



Case Western Reserve Law Review

Volume 62 | Issue 1

2011

The Senior Management Mens Rea: Another Stab at a Workable Integration of Organizational Culpability into Corporate Criminal Liability

George R. Skupski

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

George R. Skupski, *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 (2011)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol62/iss1/11>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

THE SENIOR MANAGEMENT MENS REA: ANOTHER STAB AT A WORKABLE INTEGRATION OF ORGANIZATIONAL CULPABILITY INTO CORPORATE CRIMINAL LIABILITY

INTRODUCTION

“It is a poor legal system indeed which is unable to differentiate between the law breaker and the innocent victim of circumstances so that it must punish both alike.”¹ This observation summarizes the pervasive flaw with the present standards of vicarious liability used to impose criminal liability on organizations. As in civil lawsuits, corporate criminal liability at the federal level and in many states is imposed using a strict respondeat superior standard: corporations are criminally liable for the wrongdoing of their agents committed within the scope of their authority for the benefit of the corporation.² The remaining jurisdictions follow some variation of the Model Penal Code standard, a narrower approach than the federal rule, finding corporate liability only where the board of directors or other high-level managers “authorized, requested, commanded, performed or recklessly tolerated” the offense.³

These liability standards, which rely on imputing mental states to individual agents, are fatally over- and underinclusive because they

¹ Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 45 (1957).

² See *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (citing cases that employ the strict respondeat superior standard); see also Christopher R. Green, *Punishing Corporations: The Food Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 200–02 (2008) (summarizing this standard, the “liberal” rule, and listing the jurisdictions applying it).

³ MODEL PENAL CODE § 2.07(1)(c) (1962); see also Green, *supra* note 2, at 204–06 (summarizing the MPC standard and listing the jurisdictions applying it).

fail, without justification, to differentiate between the nonblameworthy organizations and those which are genuinely culpable. Consider, for example, the following two circumstances:

Corporation A employs purchasing agent X, a lower-echelon agent, who personally accepts bribes from a foreign manufacturer, F, in exchange for his promise to purchase F's product. Assume a person is criminally liable for knowingly accepting bribes of this sort. A has extensive policies in place prohibiting such practices, and provides annual compliance training to all purchasing agents. A also exhibits a track record of diligently supervising and controlling its agents to ensure compliance. There is no evidence that X's superiors knew or had reason to know of X's conduct. X simply took exceptional efforts to cover up his conduct and slipped through the cracks. Assuming that the prosecution can locate X and prove his knowledge, despite X's apparently personal motivations and A's lack of genuine culpability in the offense, A would be vicariously criminally liable.

Compare Corporation B, a large, complex, highly decentralized organization employing purchasing agent Y. Y is given a lead to pursue a contract with Corporation F that has trickled down through the layers of management. After months of service on the contract, B's accounting department accepts a check from F earmarked as a refund for returned F products, which were actually used by B. Essentially, the payment is nothing short of a bribe. Some indeterminate members of senior management at B had, a year earlier, made this arrangement with an equally unidentifiable group of management at F. Due to standard communications disposal and retention procedures and management's deliberate care to obscure its conduct, there is no paper trail or credible testimony that may be used to trace the arrangement back to an agent at B. Assume that this is not an isolated incident, but that B has been convicted of similar violations in the past. Additionally, due to its lack of proper compliance programs and its notoriety for extreme bottom-line driven pressures on its purchasing agents, it appears to be simply indifferent to, or actually encourages such conduct. Nonetheless, since the prosecution cannot prove that any individual agent knowingly accepted the illegal payments, B will escape liability.

This Note contends that the disconnect between organizational blameworthiness and liability under the current individualistic liability scheme warrants overhauling the standard for holding organizations criminally liable. That organizations demonstrate culpability independent of their individual agents has long been recognized both in other areas of the law and competing academic

conceptualizations of organizational criminal liability. Accordingly, this Note builds from the existing academic models of genuine organizational culpability and suggests a standard that uses an approximation of the senior management mens rea (SMMR). This SMMR should be used as a proxy for the corporate mens rea by using both (1) subjective mental states of senior management and (2) reasonable inferences of senior management's culpability derived from organizational variables commonly recognized as contributing to organizational culpability. These variables should serve as nonsubjective circumstantial evidence of culpability. This model, which embodies the understanding of genuine organizational culpability and ensures true organizational blameworthiness, can be weaved seamlessly into the current criminal statutes in a form that courts can more consistently understand and apply than other academic proposals.

Part I of this Note explains the development and shortcomings of the present standards of corporate criminal liability. Part II discusses the theoretical underpinnings of independent organizational action and intention in organizational theory. Part II also outlines the means by which the law and legal scholars have incorporated the understanding of genuine organizational culpability into models assessing independent organizational culpability. Finally, Part II explores the shortcomings of the prevailing academic models. Specifically, it focuses on William Laufer's model of constructive corporate fault, one of the most substantively sound and practical academic models to date. Part III advocates a new liability standard, the SMMR, and specifically examines its implementation-based utility when compared to Laufer's model.

I. THE CURRENT LIABILITY SCHEME AND ITS SHORTCOMINGS

A. Development of the Current Standards of Corporate Mens Rea

An understanding of the present liability system requires an examination of the historical development of the law to bring to light the tension between the generally sound justifications for holding corporations criminally liable and the defective rationale behind the use of a respondeat superior model. Early courts struggled to manufacture a standard for imposing criminal liability on organizations from the predominantly individual-centered criminal law due to the prevailing view that the corporation was merely a legal fiction—a shell housing its individual members with no independent

identity.⁴ This view, exemplified by Chief Justice Marshall's widely-noted position in *Trustees of Dartmouth College v. Woodward*,⁵ is that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"⁶ Thus, American courts borrowed from English common law the view that a corporation is merely an aggregation of its individual members and may act only through these members in their individual capacities, a view entirely inconsistent with the imputation of criminal liability.⁷

Throughout the nineteenth century, the "corporation as a fiction" view was progressively rejected as the corporation became more dominant in American society.⁸ Potentially damaging societal effects of giant, multidivisional organizations stood in stark contrast with the idea that a corporation was incapable of committing crime.⁹ In response, the corporation transformed from an untouchable entity to a legal person, and "the criminal law became the state's response to all sorts of corporate wrongs, from the indictment of railroad companies . . . to elaborate prosecutions of conglomerate companies"¹⁰

⁴ WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS 11 (2006) (discussing the struggle of corporate criminal law to overcome the conception of personhood that was "bounded by a methodological individualism that limit[ed] the understanding of social and group phenomena").

⁵ 17 U.S. (4 Wheat.) § 518 (1819).

⁶ *Id.* at 636; see also LAUFER, *supra* note 4, at 11 ("How then may a corporation be indicted? Corporations, being incorporeal, cannot appear at the bar for trial. The state does not charter corporations to commit crimes. To punish both the corporation and the members of the body corporate seemed nothing less than double punishment. It was simply inconceivable that corporations could act in ways that contravene the justification for their creation.").

⁷ See 1 WILLIAM BLACKSTONE, COMMENTARIES 476 ("A corporation cannot commit treason, or felony, or other crime, in it's [sic] corporate capacity; though it's [sic] members may, in their distinct individual capacities.") (footnotes omitted).

⁸ See MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 23 (2006) (noting that the Industrial Revolution triggered an expansion in the scale of enterprises, such that "[b]y the latter half of the nineteenth century the major firms in almost all industries were operating as corporations"); Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 582–83 (1989) ("The fiction theory of corporate action was seen as a failed attempt by the law to deal with corporate facts without departing from individualistic premises."). But see Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367–69 (2009) (supporting many of the classic critiques of corporate criminal liability by arguing that a corporation is a mere fiction that cannot be punished, and that it is innocent shareholders who are forced to bear the direct burden of criminal sanctions).

⁹ Laufer notes that "[w]idespread discrimination against people and localities, bribing of legislators, stock manipulation, and formation of pools were engaged in with near impunity," and that the immensely powerful railroads "left many with the impression that corporations were more powerful than the very states that regulated them." LAUFER, *supra* note 4, at 14.

¹⁰ *Id.* at 12 (citing *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (S.D.N.Y. 1906); *United States v. Van Schaick*, 134 F. 592 (S.D.N.Y. 1904); *United States v. John Kelso Co.*, 86 F. 304 (N.D. Cal. 1898); *United States v. Baltimore & Ohio R.R. Co.*, 24 F. Cas. 972

Regulation of corporations grew steadily through the latter part of the nineteenth century with the growth of criminal liability and the emergence of regulatory law.¹¹ Maintaining the trend, the Supreme Court extended corporate criminal law to all crimes, including those requiring proof of mens rea, in the seminal case of *New York Central & Hudson River Railroad Company v. United States*.¹² In that case, an employee of the railroad company gave rebates to certain customers for shipments of sugar.¹³ The lower courts convicted both the employee and the corporation under a provision of the Elkins Act that imposed vicarious criminal liability on a corporation for the acts and intentions of its agents while acting within the scope of their employment.¹⁴

Defense counsel urged that this provision was unconstitutional because “punish[ing] the corporation is in reality to punish the innocent stockholders . . . depriv[ing] them of their property without opportunity to be heard, consequently without due process of law” and because the provision “deprive[s] the corporation of the presumption of innocence . . . which is a part of due process”¹⁵ In other words, the defense argued that imputation of criminal liability amounted to a punishment of the innocent corporation and its owners for the acts of a guilty agent.

The Supreme Court rejected this argument, holding that this provision was not unconstitutional. The Court emphasized the need to control corporations, which had quickly grown into enormously powerful actors¹⁶:

We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act [Further, giving corporations immunity] from all punishment because of the old and exploded doctrine that a corporation cannot

(W.D. Va. 1868)).

¹¹ See LAUFER, *supra* note 4, at 15 (noting that “[c]riminal liability, as well as the emergence of regulatory law . . . provided some needed relief from the risks associated with the rise of the modern corporation”).

¹² 212 U.S. § 481 (1909).

¹³ *Id.* § 489.

¹⁴ *Id.* § 490–92.

¹⁵ *Id.* § 492.

¹⁶ *Id.* § 495 (“[The law] cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands . . .”).

commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at It would be a distinct step backward to hold that Congress cannot control [corporations] by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.¹⁷

Through this rationale, the Court articulated the enduring policy behind criminally punishing corporations: deterring agent misconduct by allocating risk of criminal liability to the corporation to incentivize greater control of its agents.¹⁸ As one commentator summarized soon after the *New York Central* decision, “[c]orporate criminal responsibility tends to prevent crime not only by influencing the corporation’s representatives of all degrees to abstain from conducting its business in unlawful ways, but also by influencing those of higher or more remote degrees to restrain subordinates.”¹⁹ This deterrence justification is as legitimate today as it was a century ago, as “the power now wielded by corporations is both enormous and unprecedented in human history.”²⁰ The criminal law thus serves as an important mechanism to deter the damaging effects of powerful corporate actors’ misconduct, which many commentators argue causes significantly more harm to individuals and society than the acts of individuals.²¹

Federal law continues to embody the relatively unrestricted attribution of agents’ mental states to the organizations. The United States Court of Appeals for the Fourth Circuit stated the generally followed rule of organizational criminal liability under modern federal law in *United States v. Basic Construction Company*.²² In *Basic*, the court affirmed a conviction under the Sherman Antitrust

¹⁷ *Id.* § 495–96.

¹⁸ See LAUFER, *supra* note 4, at 16 (“The ingenious public policy that emerged in *New York Central & Hudson River Railroad* shared the allocation of risks to both principal and agent. Corporate liability deters crime; it moves risk of loss away from risk-averse officers and directors and toward the firm; it efficiently distributes liability risk between the firm and employees.”).

¹⁹ Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 835 (1927).

²⁰ Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1483 (2009).

²¹ See CLINARD & YEAGER, *supra* note 8, at 8 (stating that the costs of corporate crime “involve not only large financial losses but also injuries, deaths, and health hazards,” that they involve “incalculable costs of the damage done to the physical environment and the great social costs of the erosion of the moral base of society” and, finally, that they “destroy public confidence in business”); Beale, *supra* note 20, at 1482–84 (arguing that corporations are “enormously powerful actors whose conduct often causes significant harm both to individuals and to society as a whole,” and citing the wealth controlled by the corporations and the monetary losses that have resulted from large-scale corporate criminal conduct).

²² 711 F.2d 570 (4th Cir. 1983).

Act for bid-rigging in connection with state road paving contracts. At trial, the defendant argued that the bid-rigging activities were performed by low-level officials and without the knowledge or participation of higher management, and that the company had a strict policy against such practices.²³ The court ruled that “a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.”²⁴ Although the “for the benefit of the corporation” requirement appears to provide a nexus between the interests and intentions of the employee and those of the organization, courts have, over time, effectively removed this requirement from the standard entirely.²⁵

In 1962, the American Law Institute (ALI) came forward with the Model Penal Code (MPC), providing a major alternative to strict vicarious liability. The ALI ultimately settled on three bases of liability for corporate defendants. First, corporations are liable for minor regulatory offenses where a clear “legislative purpose to impose liability” is present, and the agent’s actions were “[on] behalf of the corporation” and within the scope of his authority.²⁶ This largely echoed the broad federal rule of vicarious liability except that it provides for a “due diligence” defense allowing a corporation to escape conviction if it can establish that a “high managerial agent having supervisory responsibility” used due diligence to prevent the offense.²⁷ Second, a corporation is liable where the offense is based on a failure to discharge a specific duty imposed by law.²⁸

²³ *Id.* at 572.

²⁴ *Id.* at 573.

²⁵ *See, e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 969–70 (D.C. Cir. 1998) (holding an agricultural cooperative liable where an employee authorized an expenditure from the cooperative in furtherance of a fraudulent scheme despite the fact that the employee hid the illegal scheme from others at the company because the employee may have been acting to further the interests of the cooperative); *United States v. Automated Med. Lab., Inc.*, 770 F.2d 399, 406–07 (4th Cir. 1985) (holding that an agent’s conduct, which is actually or potentially detrimental to the corporation, may be imputed to the corporation in a criminal case if motivated at least in part by intent to benefit the corporation); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004–07 (9th Cir. 1972) (holding hotel corporation liable where a purchasing agent threatened a supplier with the loss of the hotel’s business unless the supplier did not contribute to a trade association, even though this was against explicit corporate policy, both the manager and assistant manager had specifically told the purchasing agent not to threaten suppliers, and the employee testified that he violated the instructions because of personal anger toward the supplier).

²⁶ MODEL PENAL CODE § 2.07(1)(a) (1962).

²⁷ *Id.* § 2.07(5).

²⁸ *Id.* § 2.07(1)(b).

The third basis, which applies to the majority of criminal offenses, provides that corporations are liable for penal law violations (with a few exceptions) where 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.”²⁹ This standard confines the respondeat superior approach “to a narrow class of criminal acts—those concerning high managerial agents whose acts reflect the policy of the corporate body.”³⁰ This refined standard strides toward a stronger nexus between the action and intention of the agent and the corporation.³¹ Charging the conduct of a “high managerial agent,” defined by the MPC as “having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association,”³² to the organization may have a greater deterrent effect because the organization can and should be required to exercise greater control over agents in elevated roles. And from a culpability standpoint, the actions of managerial agents more directly embody corporate policy, values, and intention. Thus, the acts of higher-level agents are better “reflective of the character of the corporate body.”³³

Despite its strides toward a better normative standard, the MPC model uses the same agent-to-organization intent attribution as the strict respondeat superior scheme. Consequently, it reflects many flaws of the broad federal standard, including improperly broad liability, the difficulties in locating a culpable agent, and greater inconsistency in administration and excessive prosecutorial discretion.³⁴ Nonetheless, every jurisdiction in the United States currently follows the federal rule, the MPC standard, or some variation thereof.³⁵

²⁹ *Id.* § 2.07(1)(c).

³⁰ LAUFER, *supra* note 4, at 23.

³¹ In fact, the MPC drafters acknowledged that this rule was a partial rejection of the federal rule in favor of a more reasonable standard for imposing liability on shareholders of the corporation. See MODEL PENAL CODE § 2.07 cmt. c (1962) (summarizing the rationale for confining the liability standard to situations bearing a connection to high managerial personnel).

³² *Id.* § 2.07(4)(c).

³³ LAUFER, *supra* note 4, at 25.

³⁴ These flaws are discussed more thoroughly in Part II.B.

³⁵ Christopher Green observes that cases from fourteen jurisdictions (Federal law, California, the District of Columbia, Florida, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Wisconsin) follow the *New York Central & Hudson* federal rule for corporate crime, that statutes adopt the rule in Alaska, Indiana, Kansas, and Maine, and another eleven states (Alabama, Connecticut, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Puerto Rico, South Carolina, the Virgin Islands, and Wyoming) allow corporate criminal liability without suggesting any “high managerial agent limitation.” Green, *supra* note 2, at 202. He notes that the remaining twenty

B. Flaws of the Current Scheme

Establishing corporate criminal liability using vicarious liability was flawed from the start. The *New York Central* Court's decision abounds with defective reasoning for its adoption. Despite the Court's sound policy justification for imposing criminal liability on corporations, its use of strict respondeat superior attribution was misguided. This Part discusses those flaws in depth.

1. The Flaws of Applying Respondeat Superior in Criminal Law

At the most general level, the Court's justification is flawed because it jumped into a respondeat superior regime without considering its fit with the precepts of criminal law.³⁶ First, the "Court[] fail[ed] to appreciate the inherently different nature of civil and criminal law."³⁷ Tort suits function primarily to compensate a party for damage caused by another. Any resulting deterrence is often viewed as a byproduct of the desired compensation. But criminal suits are pursued "because of the impact a conviction will have on future conduct by the general public."³⁸ Additionally, because tort liability is commonly considered a cost of doing business, it does not carry the moral stigma that attaches to criminal convictions³⁹ and is less likely to put the firm out of business.⁴⁰ Consequently, respondeat superior

jurisdictions (including Guam) have adopted MPC-type restrictive rules. *Id.* at 205–06.

³⁶ See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1114–21 (1991) (describing the developments leading to a corporate criminal law that has no intent requirement).

³⁷ *Id.* at 1115.

³⁸ *Id.* Another justification for the use of criminal sanctions is the retributive function, which focuses on punishing the actor for engaging in blameworthy conduct. See *infra* notes 77–82 and accompanying text.

³⁹ See Bucy, *supra* note 36, at 1115–16 (comparing goals and effects of tort lawsuits and criminal actions); see also Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 73 (2007) ("[C]orporate defendants, subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing."); Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 352 (1993) ("In some instances adverse publicity alone can cause corporate devastation . . ."). This stigma has actually been suggested as a form of punishment. Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 755–56 (1992) (noting that several commentators have "suggested the use of court-ordered adverse publicity as a criminal sanction against corporate offenders").

⁴⁰ See Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008) ("A conviction could have fatal consequences for business entities even when the criminal trial ends with a modest penalty . . . [because] a variety of laws and regulations can effectively put out of business firms convicted of a crime."). For example, Arthur Andersen was given a modest criminal sanction but was prohibited from serving as an auditor for publicly traded companies as a convicted felon under SEC rules, pushing the firm

fits well into tort law, serving to compensate the victim by providing access to the corporation's deep pockets, but is "anathema to the criminal law, which . . . should focus on personal intent," and discouraging criminal intentions by corporate actors.⁴¹

But, the most troubling flaw in the Court's rationale is "its failure to consider the conceptual alternatives to broad respondeat superior as the standard for corporate criminal liability."⁴² Pamela Bucy observes that the Court undertook an all-or-nothing analysis, choosing to either impose criminal liability via respondeat superior, or to forgo criminal liability entirely.⁴³ The Court's failure to explore alternatives is understandable given the limited scope of the issue before the Court and that the case was heard at a time when corporate criminal law was in its infancy and its merits were still a matter of serious debate.⁴⁴ But the present ignorance of the substantive criminal law to the "subtleties of organizational behavior that courts are now better able to identify and appreciate"⁴⁵ is not justified, either by pragmatic or normative concerns. Due to the progressive understanding of organizational behavior and culpability, prosecutors, judges, and juries are sufficiently equipped to identify and appreciate genuine organizational culpability.⁴⁶

2. *The Failure of the Current Scheme to Deter Misconduct*

The respondeat superior standard also fails to deter corporate wrongdoing adequately. It is true that the deterrent function cited as a basis for vicarious liability may take hold in a perfect world and under optimal organizational conditions:

Vicarious liability should align organizational incentives (e.g., increases in payroll compensation, significant bonuses, and promotion to higher positions in the corporation) with

out of business. *Id.* at 279.

⁴¹ Bucy, *supra* note 36, at 1116.

⁴² *Id.* at 1120.

⁴³ *Id.*

⁴⁴ See, e.g., Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 413 (1982) (noting that only certain classes of crimes could be committed by corporations); Edgerton, *supra* note 19, at 827 ("[I]t is not yet clear that corporations can commit all crimes; on the contrary, it is constantly assumed that they cannot; and it is not at all clear what human action is necessary to the commission of corporate crime.").

⁴⁵ Bucy, *supra* note 36, at 1120.

⁴⁶ See *infra* Part II.A–C (discussing the understanding of independent organizational action, intention, and culpability in organizational theory, in legal doctrine and criminal practice, and as used in proposals for liability standards embracing genuine organizational culpability).

corporate policies, codes, standards, and procedures that maximize law abidance. Top management is put on notice that the failure to align such incentives with implicit messages to deviate from the law risks entity liability. Successful managers must institutionalize an adequate control system to identify deviance, exercise great care in the delegation of significant corporate responsibility, and clearly communicate the importance and relevance of policies, code provisions, standards, and procedures, while defining those acts that are within the scope of the agent's authority.⁴⁷

As desirable as this objective appears on its face, in practice, respondeat-superior-based liability likely creates contrary control incentives due to its creation of constructive strict liability.⁴⁸ This effect is best exemplified in cases where a rogue agent acts contrary to corporate policies and well-intentioned efforts to control the subordinate's conduct. *United States v. Hilton Hotels Corporation*⁴⁹ provides an example. The purchasing agent at a Hilton hotel threatened a supplier with the loss of the hotel's business if the supplier did not contribute to an association formed to attract conventions to the region housing the hotel.⁵⁰ Although the hotel attempted to prevent this misconduct, the district court convicted it of a violation of the Sherman Act under the federal rule.⁵¹ The corporation's president testified that the purchasing agent's actions were contrary to the corporation's policy, and two managers of the hotel testified that they specifically told the agent not to threaten suppliers.⁵² Even though the corporation took reasonable measures to control its agent's misconduct, the corporation would still have been liable under the respondeat superior standard. From the perspective of a well-intentioned, diligent corporation, this is clearly an unfair standard.

This unfairness not only creates another burden on corporations with which they must cope, but it also harms criminal enforcement as

⁴⁷ LAUFER, *supra* note 4, at 16.

⁴⁸ Commentators frequently invoke the analogy between vicarious criminal liability for organizations and strict liability to describe the lack of incentives for corporations to internally control their agents' conduct. *See, e.g.*, Bucy, *supra* note 36, at 1114 ("If mens rea is essential to a fair and just criminal justice system, how did criminal liability of corporations develop without this element? . . . [C]ourts borrowed the respondeat superior principle from tort law and applied it to criminal law.")

⁴⁹ 467 F.2d 1000 (9th Cir. 1972).

⁵⁰ *Id.* at 1002.

⁵¹ *Id.* at 1004-06.

⁵² *Id.* at 1004.

a whole because it “erodes the power of the criminal law.”⁵³ H.L.A. Hart posits that a majority of citizens must comply with laws if they are to achieve their ultimate intended purpose of encouraging social stability.⁵⁴ “Voluntary compliance will wane, however, if people view laws as unjust, unfair, or arbitrary.”⁵⁵ Laws punishing a corporation despite its thorough efforts to prevent misconduct have this precise effect. Unsurprisingly, this creates an incentive for corporations to either forgo preventative efforts or to obscure misconduct.⁵⁶ Corporations may forgo preventative efforts, for example, by “hid[ing] the evidence, or [colluding] with the agent, to avoid their joint and several liability.”⁵⁷ This incentive is equally present under the MPC standard, which encourages higher-level employees to avoid any connection with known misconduct by artificially insulating themselves from that knowledge.⁵⁸

It can be argued that the appeal of concealing misconduct is more theoretical than real because of the higher risk of prosecution and increased fines under the Federal Sentencing Guidelines.⁵⁹ One need

⁵³ Bucy, *supra* note 36, at 1100.

⁵⁴ See H.L.A. HART, *THE CONCEPT OF LAW* 116 (2d ed. 1994) (arguing that one of “two minimum conditions necessary and sufficient for the existence of a legal system” is that “its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials”).

⁵⁵ Bucy, *supra* note 36, at 1108.

⁵⁶ See LAUFER, *supra* note 4, at 16–17 (discussing the incentive to obscure and the awareness of the problem immediately after *New York Central*, as corporations explored the trade-off between compliance costs and criminal enforcement costs); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994):

On the one hand, increased enforcement expenditures reduce the number of agents who commit crimes by increasing the probability of detection. . . . On the other hand, these expenditures also increase the probability that the government will detect those crimes that are committed, thereby increasing the corporation’s expected criminal liability for those crimes. . . . [This may incentivize] a corporation subject to vicarious liability [to] spend less on enforcement than it would absent vicarious liability.

See also David A. Dana, *The Perverse Incentives of Environmental Audit Immunity*, 81 IOWA L. REV. 969, 970 (1996) (“[C]ommentators stress that corporations may forego [sic] internal audits if they fear that they will be held liable for, and hence punished for, any violations that they might uncover.”).

⁵⁷ C.Y. Cyrus Chu & Yingyi Qian, *Vicarious Liability Under a Negligence Rule*, 15 INT’L REV. L. & ECON. 305, 306 (1995).

⁵⁸ See Bucy, *supra* note 36, at 1105 (“The MPC standard encourages higher echelon officials to insulate themselves from knowledge of corporate employee activity.”); see also *infra* note 244–45 and accompanying text (discussing the recognized tendency for senior management to, either deliberately or inadvertently, avoid positive knowledge of deviance within the lower ranks of the organization).

⁵⁹ See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(e)–(g) (2010) (in assessing the culpability of and prescribing a fine to an organizational defendant, among other factors, the

only look to the infamous Enron accounting scandal,⁶⁰ however, to see that this argument is naïve. Prior to the scandal, Enron “demonstrated a leading-edge commitment to corporate ethics and social responsibility.”⁶¹ In 2000, shortly before the scandal surfaced, Enron instituted a number of ethics and compliance measures, including a corporate responsibility task force staffed by upper management to analyze the company’s social and environmental record, and implemented a number of programs and policies to educate and encourage employee participation in a more responsible and ethical practice.⁶² “[Enron] did more than merely produce an ethics code and distribute it among employees. . . [and] devise ethics training programs, produce glossy ethics material, and give impressive multimedia presentations. It led many Fortune 500 companies with a wide variety of social and environmental initiatives around the world.”⁶³

The Enron scandal demonstrates that corporations have the capability, as Laufer describes it, to play “compliance games” where the firm essentially puts on an artificial front of good corporate citizenship and compliance to ward off regulatory scrutiny and minimize the risk of liability.⁶⁴ This phenomenon can be analogized to a moral hazard present in insurance: compliance programs, like insurance policies do not necessarily modify the poor moral character of the corporation (the insured), but may instead merely permit that corporation to engage in misconduct with less risk of investigation.⁶⁵

court is advised to consider whether the organization obstructed justice; the degree to which it accepted responsibility, reported the misconduct, and cooperated with the investigation; and whether the organization had in place an effective compliance program at the time of the offense); *see also* U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9–28.300: PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2008) [hereinafter PRINCIPLES], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrim.htm#9-28.300 (advising federal prosecutors to consider in prosecuting organizations, among other factors, the organization’s “timely and voluntary disclosure of wrongdoing and its willingness to cooperate,” and the existence and adequacy of compliance programs).

⁶⁰ *See Enron Scandal At-A-Glance*, BBC NEWS (Aug. 22, 2002, 16:59 GMT), <http://news.bbc.co.uk/2/hi/business/1780075.stm> (summarizing the progression of the Enron accounting scandal).

⁶¹ LAUFER, *supra* note 4, at 99.

⁶² *See id.* (summarizing the corporate responsibility and ethics efforts launched by Enron shortly before the scandal).

⁶³ *Id.* at 100.

⁶⁴ *Id.* at 103 (describing the general compliance games employed by organizations).

⁶⁵ *See id.* at 122–24 (analogizing the moral hazard possible through the use of corporate compliance programs to that presented through the purchase of insurance contract). Regarding corporations’ tendency to create compliance programs as a form of insurance, *see id.* at 121 (noting that “[w]ith some corporations—Enron and Andersen may be good examples—once compliance and governance expenditures are made, care levels may be expected to decrease if

And the increased odds of prosecution and the threat of a larger sentence apparently did not stop Enron's accounting firm, Arthur Andersen, from shredding documents to conceal the accounting fraud.⁶⁶ These instances illustrate that the deterrent function is far from optimal under a standard of strict vicarious criminal liability.

3. *Flaws of Applying Strict Liability to Corporate Misconduct*

Some commentators may argue that the constructive strict-liability treatment of corporate offenses is in line with the growth of strict liability and a potential shift away from the link between culpability and criminal punishment.⁶⁷ However, strict liability is generally reserved for "public welfare offenses": offenses of a regulatory nature which carry relatively light monetary fines, and for which proof of mens rea would be difficult to establish, or would impose so high a burden on the prosecution, as to prevent adequate enforcement due to their broad coverage.⁶⁸ The United States Supreme Court has stated that the omission of mens rea from an offense is properly upheld where the statute "render[s] criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."⁶⁹

Based on this understanding of strict liability, the suggestion of such a broad-based shift to constructive strict liability for all penal offenses of corporations is unpersuasive. All corporate crimes simply do not fit the mold of traditional strict liability crimes such as environmental offenses.⁷⁰ Further, under strict vicarious liability, liability may be imposed without any primary action by the

the consensus view emerges in the firm that those expenditures wholly protect against liability").

⁶⁶ See Indictment at 7–8, *United States v. Arthur Andersen, LLP*, Cr. No. CRH-02-121 (S.D. Tex. March 7, 2002), 2002 WL 33949318, for a description of the obstruction of justice charge..

⁶⁷ See, e.g., Moore, *supra* note 39, at 747 (noting that "some commentators see the growth of strict liability as a repudiation of the traditional link between culpability and punishment"); see also John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 213 (1991) (arguing that "a theory may be on the verge of judicial acceptance that effectively severs [the traditional] linkage between blameworthiness and criminal punishment").

⁶⁸ See Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72–73 (1933) (discussing what crimes are punishable without mens rea).

⁶⁹ *Liparota v. United States*, 471 U.S. 419, 433 (1985).

⁷⁰ See, e.g., C. Boyden Gray et al., "Attempted" *Environmental Crimes: A Flawed Concept*, 14 J.L. & POL. 363, 370 (1998) ("Although it is debatable whether environmental crimes that do not threaten human health should be considered 'public welfare offenses,' most environmental crimes are categorized as such.").

corporation, as liability is based exclusively on the secondary actions of its agents. Given the “generally disfavored status”⁷¹ of strict liability statutes, that present corporate liability standards impose strict liability is unjustified.

More troubling is that the strict liability effect respondeat superior standard causes a failure to inquire into the genuine culpability of the organization.⁷² Our system of criminal law has traditionally used the accused’s culpability to separate blameworthy from nonblameworthy conduct to focus prosecutorial efforts on conduct that is most harmful to society.⁷³ This culpability analysis is required to promote the respect in the criminal law required for effective deterrence.⁷⁴ But by using respondeat superior to assign criminal blame to corporations, the law arbitrarily punishes corporations without any true indication that the corporation itself was culpable for the misconduct.

This problem is best illustrated where a corporate employee acts in a manner contrary to express corporate policy and for his own benefit out of personal motives. For example, in *Hilton Hotels*, the corporation was convicted for its purchasing agent’s threats to a supplier despite the fact that his actions contravened corporate policy, he was warned on two occasions against engaging in the misconduct,

⁷¹ See *Liparota*, 471 U.S. at 426 (noting that criminal offenses requiring no mens rea have a “generally disfavored status”) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978)).

⁷² See Bucy, *supra* note 36, at 1103 (“The critical weakness in both the traditional respondeat superior and MPC standards of liability is that they fail to sufficiently analyze corporate intent.”); Moore, *supra* note 39, at 761 (“Ultimately, the respondeat superior theory is overinclusive because it is a theory of imputed culpability. Under a theory of imputed culpability, what makes a corporation ‘culpable’ is not (primarily) any feature of the corporation as such, but the mere fact that an agent committed a crime.”).

⁷³ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 114 (1968) (“All civilized penal systems make liability to punishment for . . . serious crime depend[] not merely on the fact that the person to be punished has done the outward act of the crime, but on his having done it in a certain state of . . . mind or will.”); Bucy, *supra* note 36, at 1106 (“The notion of mens rea thus developed as a way of distinguishing those who should be criminally liable from those who should not.”) (citing Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 989–90, 993, 1017 (1932)); Bucy, *supra* note 36, at 1106–07 (“Today, the objectives of our modern criminal justice system focus less on ‘awarding adequate punishment for moral wrongdoing’ than on ‘protecting social and public interests.’” (quoting Sayre, *supra* note 73, at 1017)).

⁷⁴ See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 69 (1968):

If it is not thought enough of a justification that the law *be* fair, the argument may seem appealing that a criminal law system cannot attract and retain the respect of its most important constituents—the habitually law-abiding—unless it *is seen to be* fair. And . . . [the] simplest . . . meaning [of fairness] is that no one should be subjected to punishment without having an opportunity to litigate the issue of his culpability. (emphasis in original).

see also Moore, *supra* note 39, at 749 (“A system that routinely punished the non-culpable would create an intolerably high level of anxiety and apprehension, because citizens could no longer rely on their own, voluntary efforts to avoid confrontations with the criminal law.”).

and the agent admitted that he violated the instructions because of “anger and personal pique toward the individual representing the supplier.”⁷⁵ Whether the corporation could reasonably have done anything to control the rogue agent’s conduct, aside from termination, is unclear, which argues against the organization’s culpability. The agent’s admission that his conduct was not undertaken with intent to benefit the corporation removes any indication that the organization influenced his decision in any way. Holding a corporation liable for this conduct is reflective of the trend, noted by one court, of cases “in which the corporation is criminally liable even though no benefit [to the corporation] has been received in fact.”⁷⁶ Not only is this unfair to the corporation, but it may breed disrespect for the system, which further erodes the deterrence function.

4. *The Current Scheme’s Lack of Retributive Function*

The current respondeat superior scheme also fails to serve any real retributive function. In criminal law, retributive punishment “appeals to notions of moral culpability or just deserts” by imposing criminal sanctions “because it is morally proper to punish that person.”⁷⁷ A number of commentators push the retributive function aside in the context of entity criminal liability, arguing that the overriding deterrent purpose overshadows the need to consider retribution as a justification.⁷⁸ But retribution certainly has a place. The lack of any retributive underpinning in the current standards of liability fails to reflect the criminal law’s expressive function, which provides that laws should “express the community’s condemnation of the wrongdoer’s conduct by emphasizing the standards for appropriate behavior”⁷⁹ As demonstrated in the discussion above, principles of respondeat superior fail to inquire into the true culpability of organizations and, consequently, whether the organization itself did

⁷⁵ *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

⁷⁶ *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962).

⁷⁷ *Developments in the Law – Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1232 (1979) [hereinafter *Developments*]. The retributive justification is traced to Immanuel Kant’s theory that criminal punishment must be invoked exclusively because the individual has violated the law, regardless of the deterrent consequences that may flow from the punishment. See IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., 2d ed. 1999) (developing this theory).

⁷⁸ See, e.g., *Developments*, *supra* note 77, at 1235–37 (discussing the arguments against the inclusion of retribution as a consideration in entity criminal liability).

⁷⁹ Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 843 (2000); see also Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 526 (2006) (stating that the respondeat superior doctrine should more fully exploit criminal law’s expressive capital by selecting cases based on entity blameworthiness).

something wrong and deserving of punishment.⁸⁰ The appropriate limits on our criminal law invoked by retributive principles should not be disregarded in light of the predominant deterrent justification.⁸¹ Although “[r]etribution has not been a traditional aim of corporate criminal law, . . . once the sense in which corporations are culpable has been more clearly identified, there is no reason why it should not become one.”⁸²

5. *The Current Scheme’s Failure to Promote Consistent Enforcement of the Law*

Bucy points to another damaging function of the failure to assess genuine organizational culpability: its shortcomings in promoting consistent enforcement of the law.⁸³ The effective strict-liability standards offer little guidance to prosecutors in determining which corporations to prosecute. The lack of prosecutorial resources requires the prosecutor to pick and choose which corporations to prosecute, at least in theory, based upon an assessment of the organization’s genuine culpability.⁸⁴ For example, the Principles of Federal Prosecution of Business Organizations cautions prosecutors about using strict vicarious liability, suggesting prosecutors instead examine the pervasiveness of the wrongdoing in the firm, because “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.”⁸⁵

⁸⁰ See Buell, *supra* note 79, at 526 (“[R]espondeat superior is grossly overbroad since it has almost nothing to do with the social practice of institutional blame.”).

⁸¹ See *Developments*, *supra* note 77, at 1241 (“[W]hile the primary aim of corporate criminal sanctions is deterrence, there may be some retributive limitations on the pursuit of this goal . . .”).

⁸² Moore, *supra* note 39, at 756; see also *Developments*, *supra* note 77, at 1231–42 (1979) (arguing that statutes already indicate a preference for some retributive element in corporate crimes). One commentator, while recognizing that the current federal approach of strict vicarious liability imposes criminal liability where there is no corporate blameworthiness, notes that this failure to adequately consider moral blameworthiness “is endemic to the definition of crimes and defenses.” Beale, *supra* note 20, at 1488–89 (citing the flaws in assessing culpability through the restriction or elimination of intent in the insanity defense, in accomplice liability, and in many weapons and immigration offenses). But the fact that this problem is present in other areas of the criminal law does not justify the continued use of a flawed system, nor does it negate the desirability of reform. As the time-honored proverb goes, two wrongs do not make a right.

⁸³ Bucy, *supra* note 36, at 1108 (“Requiring proof of intent before imposing criminal liability also serves a second function: it enhances consistent enforcement of the law.”).

⁸⁴ See *id.* at 1108–09. (“Because resources are not available to prosecute every offending corporation that meets [the broad respondeat superior standards of liability], prosecutors must pick and choose which corporations to prosecute.”).

⁸⁵ PRINCIPLES, *supra* note 59, § 9–28.500.

While this looks great on paper, it would be naïve to think that all prosecutors decide when to act by assessing the true fairness of prosecuting a corporation in light of its independent culpability.⁸⁶ Among other improper reasons, the decision may instead be based on the ease with which a prosecutor may locate a culpable agent and obtain a conviction. Thus, the prosecutorial guidelines clearly “fail as an adequate substitute”⁸⁷ for consideration of genuine organizational culpability in the substantive law. Giving the prosecution the nearly unfettered discretion to exercise their personal, variable views over whether to indict a corporation, without any required adherence to legal standards analyzing genuine corporate culpability, opens the door to arbitrariness.

The current liability model essentially grants the prosecutor power to act as prosecutor, judge, and jury, which is inherently unfair to corporate defendants.⁸⁸ One commentator effectively analogized this to shooting fish in a barrel:

The simplicity of using vicarious liability to obtain a conviction bespeaks a certain unfairness; shooting fish in a barrel does not seem fair to the fish—nor to a business entity. . . . Unfairness to the fish results because, under the vicarious liability standard, accused firms cannot defend themselves on the basis of either conduct or culpability.⁸⁹

Prosecutors use this power to “negotiate deferred prosecution and nonprosecution agreements, essentially private settlements that impose large fines and burdensome supervision on corporations.”⁹⁰ Paving the way for abuse, prosecutors undertake these negotiations without the restraints of judicial oversight or grand jury indictments

⁸⁶ LAUFER, *supra* note 4, at 24–25:

Although most prosecutors consider the diligent efforts of corporations in deciding whether to investigate, charge, and pursue an aggressive prosecution, those who do not raise reasonable concerns. . . . For some state and federal prosecutors, no evidence of diligence on the part of a company can shield the principal from the acts of the wayward agent. Here liability is absolute; the miscreant agent simply acts and speaks for the principal in the commission of a crime.

⁸⁷ *Id.* at 63.

⁸⁸ See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, LAW & CONTEMP. PROBS., Summer 1997, at 23, 59 (arguing that corporate defendants are “increasingly relegated to making their most significant moral and factual arguments to prosecutors, as a matter of ‘policy’ or ‘prosecutorial discretion,’ rather than making them to judges, as a matter of law, or to juries, as a matter of factual guilt or innocence”).

⁸⁹ Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1460 (2009).

⁹⁰ *Id.*

and trials.⁹¹ And the agreements are reached “with no guarantee that the axe will drop if the prosecutor believes the corporation is not living up to the agreement.”⁹² This lack of prosecutorial discretion can lead to problems of overinclusiveness, as discussed in the next section.

6. *Overinclusiveness and Underinclusiveness in the Current Scheme*

When facing a criminal investigation, the corporation is stuck in a vulnerable position: either forfeit privileges, fully cooperate, and accept responsibility in the hopes of prosecutorial and sentencing leniency, or take its chances with an aggressive defense by refusing to trade favors.⁹³ This vulnerability is underscored by the absence of a liability standard requiring genuine corporate culpability against which the organization can buttress a defense. Instead, if a corporation chooses to roll the dice and defend itself against a prosecution, it is left to hope that the prosecution will be unable to prove the culpability of an individual agent. This is particularly absurd because the agent may have acted contrary to the corporate policies and instructions, and his or her individual interests may clash with those of the corporation. As one commentator stresses, “prosecutorial self-restraint does not provide the inherent or legal protection against the problem of overinclusiveness that a genuine theory of corporate culpability would provide.”⁹⁴

The bulk of the criticisms to this point can be lumped into the general proposition that the present standards for establishing corporate criminal liability are overinclusive. Vicarious liability, however, is also underinclusive. This is because the vicarious-liability standard fails to impose liability where it may be due. This underinclusiveness surfaces in cases where blameworthy activity persisted but the prosecution is unable to locate an individual agent with the required mens rea.

This problem is exemplified in a recent Massachusetts case, *Commonwealth v. Life Care Centers of America, Inc.*⁹⁵ In that case,

⁹¹ *Id.*

⁹² Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 251 (2009).

⁹³ See LAUFER, *supra* note 4, at 37 (“In fact, corporations have little choice but to trade favors with authorities with the threat of significant sentencing guidelines—prescribed fines.”); Ball & Bolia, *supra* note 92, at 246 (noting that the increased emphasis on corporate efforts to impede investigations in the prosecutorial guidelines has raised concern that corporations “would no longer be able to do anything other than raise a white flag—voluntarily self-report evidence and fully cooperate”).

⁹⁴ Moore, *supra* note 39, at 761.

⁹⁵ 926 N.E.2d 206 (Mass. 2010).

the corporate operator of a nursing home was charged with involuntary manslaughter of a resident at its long-term care facility. A resident died from injuries sustained when she fell down the front stairs of the facility while attempting to leave in her wheelchair. Due to the known risk that the patient would attempt to leave the home, a physician ordered that she wear a bracelet that activates an alarm and locks the exterior doors if she approached an exit. However, an administrative employee misinterpreted the director of nursing's instruction to "clean up" all resident treatment sheets and removed numerous physicians' orders, including orders to wear the bracelets. The prosecution presented evidence that the omission from the treatment sheet was noted by the patient's regular nurses and reported to a nursing supervisor.⁹⁶ But on the night of the accident, a nurse from a substitute unit supervised the patient and did not check for the bracelet due to the omission of the bracelet order from the treatment report. The prosecution attempted to establish the culpability of the organization by pointing to the conduct of the various employees whose actions contributed to the accident, including:

[T]he removal of the [bracelet] order from [the patient's] chart; the knowledge of her regular nurses that she was supposed to wear the [bracelet]; the knowledge of various employees that [the patient] had a tendency to attempt to leave the nursing home; the knowledge of the nursing supervisor that the [bracelet] order had been removed from the chart together with her failure to have the treatment order re-entered; and the failure of the substitute nurse to check that [the patient] was wearing her [bracelet].⁹⁷

However, the court adhered to the traditional respondeat superior theory requiring the prosecution to establish the requisite mental state in at least one individual agent, and refused to aggregate the various employees' acts under the collective knowledge doctrine to attain the level of culpability required for conviction.⁹⁸

Although *Life Care Centers* falls well short of demonstrating the most egregious misconduct, a set of circumstances with more aggravating factors can be envisioned—one in which criminal punishment is warranted on the basis of organizational culpability. What if the nursing home had a history of similar administrative

⁹⁶ *Id.* at 209–10 n.6.

⁹⁷ *Id.* at 211.

⁹⁸ *Id.* at 211; see *infra* Part II.B.1 for a discussion of the collective knowledge doctrine employed by some courts to aggregate the mental states of multiple employees to reach the required mens rea.

errors, compromising the safety of the patients, but failed to implement adequate procedural requirements to control the errors? What if the individual to whom the chart reorganization was delegated had never performed that task and received inadequate instruction on doing so? What if higher-level nurse management throughout the corporation had tolerated lax charting and patient-need communication by the nurses? What if the board of directors ordered management to cut costs, which led to short staffing, a lack of preparation by and communication between nurses, and ultimately, to the patient's death? These factors would clearly aggravate the organization's culpability in the death, but would likely continue to leave the prosecution unable to single out an agent with the requisite mental state.

The process through which corporate decisions are made and actions are taken within the complex organizational structure creates this dilemma in many circumstances. Marshall Clinard and Peter Yeager summarize this phenomenon as a product of the fact that "[o]rganizational machinery in a corporation may be set in motion, and each subgroup contributes a small impetus perhaps without any awareness of the illegal and potentially dangerous final result."⁹⁹ This problem transcends various organizational processes and industries.¹⁰⁰ The recent BP Deepwater Horizon oil spill presents a timely example of this inherent blame diffusion. During the Department of Justice investigation, former BP CEO Tony Hayward stated that the Gulf disaster "was the result of multiple equipment errors and human error involving many companies."¹⁰¹ Although this is an instance of

⁹⁹ CLINARD & YEAGER, *supra* note 8, at 45.

¹⁰⁰ Clinard and Yeager discuss the problem in the case of a drug company: "A drug corporation . . . has doubts about the safety of a new drug but does not pass on these doubts to the salesman. The salesman, in turn, assures a doctor that the drug is quite safe; the doctor prescribes the drug; and the patient dies . . ." *Id.* at 45–46. Christopher Stone describes the issue in the context of an explosion at a nuclear power plant:

We can readily imagine that there might be knowledge of physics, evidence of radiation leakage, information regarding temperature variations, data related to previous operation runs in this and other plants, which, *if gathered in the mind of one single person*, would make his continued operation of that plant, without a shutdown, wanton and reckless But let us suppose what is more likely to be the case in modern corporate America: . . . [t]he nuclear engineer can be charged with a bit of information, *a*, the architect knows *b*, the night watchman knows *c*, the research scientist task force knows *d*. Conceivably there will not be any single individual who has, in and of himself, such knowledge and intent as will support a charge against him individually.

CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 52 (Waveland Press, Inc., 1991) (emphasis in original).

¹⁰¹ *BP Report Spreads Blame Across Gulf Spill Actors*, CNN U.S. (Sept. 8, 2010, 2:57 PM), <http://www.cnn.com/2010/US/09/08/us.gulf.oil.disaster/index.html?hpt=T1>.

shifting blame outside the organization, it is also an example of the potential difficulties of locating an individually culpable actor within a corporation. The natural vertical and horizontal integration of smaller firms by large corporations does not modify the probability or severity of the misconduct, but the legal standard for holding corporations criminally liable fails to effectively account for the contours of organizational action.

Armed with knowledge of this flaw, the corporate defense bar may exploit this gap in the law during trial to prevent a finding of liability despite overwhelming evidence of organizational misconduct. In Arthur Andersen's obstruction of justice trial resulting from its document destruction in the wake of its accounting fraud in the Enron scandal, the defense focused the jury's attention on a careful examination of individual employees' subjective intentions to "corruptly persuade[]." ¹⁰² Referring to the government's failure to actually name those people before trial, the defense cleverly compared the prosecutor's case to the children's book, *Where's Waldo?*, in which readers work to spot Waldo amongst massive crowds of similarly-drawn figures. ¹⁰³ Leveraging that theme, defense attorney Rusty Hardin frequently began his cross-examinations of government witnesses by asking, "Are you Waldo?" ¹⁰⁴ This comical tactic actually proved meaningful: during deliberations the jurors asked the court an unprecedented question: "If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it [necessary] for all of us to believe it was the same agent? Can one believe it was Agent A, another believe it was Agent B, and another believe it was Agent C?" ¹⁰⁵ As the defense hoped, the jury observed misconduct on behalf of a number of agents, but struggled to pin

¹⁰² REBECCA SMITH & JOHN R. EMSWILLER, 24 DAYS: HOW TWO WALL STREET JOURNAL REPORTERS UNCOVERED THE LIES THAT DESTROYED FAITH IN CORPORATE AMERICA 357 (2003). Andersen was indicted pursuant to Title 18 of the United States Code, which provides:

(b) Whoever knowingly uses intimidation, threatens, or *corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . .

(2) cause or induce any person to . . .

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . .

shall be fined under this title or imprisoned

18 U.S.C. § 1512(b)(2)(B) (2006) (emphasis added); Indictment at 7–8, *United States v. Arthur Andersen, LLP*, Cr. No. CRH-02–121 (S.D. Tex. March 7, 2002), 2002 WL 33949318.

¹⁰³ SMITH & EMSWILLER, *supra* note 102, at 357.

¹⁰⁴ *Id.*

¹⁰⁵ Jonathan Weil et al., *Dramatic Question from Jury Could Shape Andersen's Fate*, WALL ST. J., June 14, 2002, at A1.

down the culpability of one agent as is generally required under the present liability standards. Although Andersen was ultimately convicted at trial, the conviction was reversed by the Supreme Court, which held that the jury instructions were misleading because they did not adequately convey the proper intent requirement of 18 U.S.C. § 1512(b).¹⁰⁶ The ultimate disposition of this case aside, the substantive law simply should not permit the dilemma faced by the jurors in this case in light of the alternatives for assessing genuine organizational culpability.

Despite the well-documented shortcomings of vicarious liability in the corporate criminal law, the present scheme remains rooted in the flawed rationale of the century-old precedent of *New York Central*. That rationale was not only flawed when written, but has been further undercut over the years with the emerging understanding of true organizational behavior and misconduct. The maintenance of these inadequate standards is no longer justified by the argument that there simply is no better formula for criminally punishing organizations.¹⁰⁷ In fact, a number of theories of liability have emerged that incorporate genuine organizational culpability and avoid many of the pitfalls of vicarious liability. With further refinement, these theories may be worked into a practical, consistent conceptualization of corporate criminal liability more effectively and more fairly serving the underlying purposes of corporate criminal liability. Thus, the survival of vicarious liability standards is simply not borne by necessity,¹⁰⁸ but by inertia.

II. MOLDING CORPORATE PERSONHOOD INTO GENUINE CULPABILITY

A. *Organizational Theory and Genuine Corporate Culpability*

The legal treatment of corporations has shifted from a flat refusal to recognize the corporation as anything but a legal fiction—incapable of any action or intention other than that directly derived from individual agents—to a view of the corporation as a legal person—an entity existing independently of its individual

¹⁰⁶ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (“[T]he jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.”).

¹⁰⁷ See William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 654 (1994) (“Absent a competing conceptualization of corporate liability and culpability, the only way in which to satisfy the requirements of the criminal law is to focus almost exclusively on a determination of the agent’s culpability.”).

¹⁰⁸ See *id.* (“Vicarious liability has survived as a matter of necessity . . .”).

members.¹⁰⁹ The recognition of corporate personhood has shaped a number of generally accepted corporate characteristics and capabilities:

[A corporation] acquires a common will and has a continual life. It is more than merely the sum of its members. The independence of the entity from its members render[s] the exact membership of the entity immaterial: allow[s] for ownership of property and the assumption of debts; limited liability for owners; and permit[s] the delegation of responsibilities down the corporate ladder.¹¹⁰

And, as needed by the tremendous growth of corporate prominence during the nineteenth century, the law acknowledged corporate personhood and brought the corporation within the sphere of regulatory and criminal law.¹¹¹

However, the effort to fit the corporation into the law through the fictional person approach was eventually criticized for its inherent flaw: it was an attempt to fit a square peg into a round hole. The law abruptly squeezed corporations into the existing criminal law without adequate consideration of the distinctions between organizational and individual behavior. The fictional person theory was “a failed attempt by the law to deal with corporate facts without departing from individualistic premises. Corporations were deemed merely ‘fictional’ entities because the law’s individualistic premises would allow only isolated natural persons to be viewed as real legal entities.”¹¹² But the flaws inherent in the fictional person theory of the corporation live on in the limited recognition of corporate personhood in the criminal law. In the eyes of the substantive law, a corporation is a “person” only to the extent necessary to work it into a criminal statute and attribute to it the blame of an individual agent. This unjustifiably rigid view of personhood fails to incorporate the dynamics of true organizational action and culpability.

¹⁰⁹ Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 568 (1987) (“The person theory . . . conceived of the corporation as a real entity that existed independently of its members.”).

¹¹⁰ LAUFER, *supra* note 4, at 50.

¹¹¹ *Id.* at 47 (arguing that the in order “[t]o indict, prosecute, and convict . . . corporations and partnerships” that the law “grant[s] [them] the status of a legal person separate and apart from their many employees and employers scattered in regional headquarters and field offices around the world”).

¹¹² Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 583 (1989).

Simply stated, “the rhetoric of corporate personhood has been far less profound than convenient.”¹¹³ The constraints imposed by the continued adherence to principles of individual culpability have confined the substantive corporate criminal law to a scheme that is unfair, at times ineffective, and inconsistent with widely-accepted standards of organizational behavior:

Legislators and courts that seem to struggle with extending the idea of personhood to matters of liability and blame nevertheless watch as it is incorporated without reflection in both prosecutorial and sentencing guidelines. This dichotomy makes the substantive criminal law look both strange and weak: strange because prosecutors and judges sidestep the substantive law, still grounded in principles of vicarious liability, in favor of ad hoc standards of corporate citizenship, corporate due diligence, and good corporate governance—much of it cast in terms of postoffense behavior; weak because the substantive law, in the context of sentencing law, is seemingly unable to conceive of an organization in organizational terms.¹¹⁴

Given the flaws of the current scheme, the law’s failure to parlay the organizational independence embodied in the personhood metaphor into principles of independent corporate action and intention is puzzling.¹¹⁵ This recognition is the first logical step toward understanding the relationship between individual and organizational action and intention, and in turn, how this relationship influences genuine organizational culpability. Corporate behavior cannot be fully understood within the bounds of an analogy to individual criminality. In order to develop an effective system for identifying genuine corporate conduct and culpability, it is necessary to “drop the analogy of the corporation as a person and analyze the behavior of the corporation in terms of what it really is: a complex organization.”¹¹⁶

The present liability standards fail to consider the range of variables critical to understanding the manner in which an organization acts, behaves, and exhibits culpability for criminal

¹¹³ LAUFER, *supra* note 4, at 48.

¹¹⁴ *Id.*

¹¹⁵ Laufer notes that “[t]here is a wide range of reactions to the ascription of human characteristics to corporate entities, from a vocal minority who attribute the evils of globalization to corporate personhood to a majority who do not know what to make of it; reject it as anthropomorphic, irrelevant; think it inefficient; or are simply ambivalent.” *Id.* at 47.

¹¹⁶ CLINARD & YEAGER, *supra* note 8, at 43.

activity independent of its agents. Organizational theory provides insight into how the structure and operation of a complex organization may be translated into illegal corporate behavior.¹¹⁷ Factors such as the size of the organization, the diffusion of responsibility, the hierarchical structure, and corporate goals and policies may shed light on how a climate conducive to criminal misconduct, or one which even encourages illegal behavior by corporate agents, may be produced.¹¹⁸ After rejecting the currently-inadequate understanding of corporate personhood in the law, the next necessary step toward the development of superior standards of corporate criminal liability demands an understanding of the factors that contribute to genuine organizational culpability.

Bucy's discussion of a "corporate ethos" as a proxy for assigning fault soundly exemplifies the distinct natures of individual and organizational action and intention.¹¹⁹ Bucy's ethos theory assumes that each corporation has a distinctive "characteristic spirit' [reflected by] . . . [s]uperficial things such as the manner of dress and the camaraderie of the employees as well as formal, written goals and policies."¹²⁰ Emphasizing corporate independence, Bucy argues that that this "characteristic spirit' . . . may transcend individuals and even generations."¹²¹ Supporting this view, Christopher Stone observes that "[i]n [the corporate] setting each man's own wants, ideas—even his perceptions and emotions—are swayed and directed by an institutional structure so pervasive that it might be construed as having a set of goals and constraints (if not mind and purpose) of *its* own."¹²² The distinctive cultures reflected from organization to organization have been readily observed by organizational theorists.¹²³ In addition to establishing the organization's reputation

¹¹⁷ See *id.* ("[O]rganizational theory can provide some insights into how the corporations' unique nature as large-scale organizations relates to their illegal behavior.").

¹¹⁸ *Id.*; see also Moore, *supra* note 39, at 753:

Although corporations always act through individual agents, and it is always an individual agent or group of agents who breaks the law, it is fair to say that corporations frequently *cause* their agents to violate the law. The behavior of individuals in corporations is not merely the product of individual choice; it is stimulated and shaped by goals, rules, policies, and procedures that are features of the corporation as an entity.

¹¹⁹ Bucy, *supra* note 36, at 1121.

¹²⁰ *Id.* at 1123.

¹²¹ *Id.*

¹²² STONE, *supra* note 100, at 7 (emphasis in original).

¹²³ See WALLY OLINS, *THE CORPORATE PERSONALITY: AN INQUIRY INTO THE NATURE OF CORPORATE IDENTITY* 82 (1978) ("It is not true that all big companies are the same—they aren't. . . . [O]rganisations manage to develop an ethos, . . . a personality which is so ingrained, so much a part of them, that the corporate identity expresses itself in their every action."); Bucy,

and an understanding of its values and operational policies, the culture bears on the tendencies of corporate agents to engage in unethical or illegal conduct. For example, Clinard and Yeager found in an examination of the largest U.S. manufacturing firms that some firms were charged with a number of violations for illegal political contributions or foreign payments, indicating a culture conducive to or encouraging unethical behavior.¹²⁴

Scholars have recognized a number of characteristics that can support criminal behavior by corporate agents and, as a result, demonstrate a connection between agent misconduct and corporate culpability sufficient to impose criminal blame on the corporation. Admittedly, it is intimidating, at first glance, to weigh the expanse of organizational characteristics that may contribute to corporate action and intention in order to make a culpability determination. These characteristics, however, may be manageably distilled and organized into aggravating and mitigating factors and analyzed as pieces of circumstantial evidence to reach an estimation of organizational culpability.

Bucy's summary of evidence contributing to a "corporate ethos" that encourages misconduct sketches many of the key factors that contribute to organizational culpability. First is the corporate hierarchy, which involves an examination of the roles of the board of directors and high management, and how the individuals filling these positions, coupled with the structure of authority, contribute to the control of misconduct, or on the other hand, how they encourage misconduct.¹²⁵ Next, Bucy recommends examination of corporate goals to determine "whether the goals set by the corporation . . . promote lawful behavior or are so unrealistic that they encourage illegal behavior."¹²⁶ This inquiry targets latent culpable corporate action resulting from an organization's setting virtually unattainable goals and turning a blind eye to the means by which the goals are met.¹²⁷ Next, she suggests an inquiry into the corporation's compliance efforts. A corporation's efforts to educate employees about the legal requirements that correspond to their responsibilities

supra note 36, at 1123–26 (summarizing organizational research focusing on the variation between organizational cultures).

¹²⁴ CLINARD & YEAGER, *supra* note 8, at 58 (finding that "some corporations have been charged with numerous violations of various types").

¹²⁵ See Bucy, *supra* note 36, at 1129–33 (discussing the relationship between corporate hierarchy and criminal conduct).

¹²⁶ *Id.* at 1133.

¹²⁷ See *id.* (noting that economic pressures within a corporation may tempt employees to engage in risky behavior for personal gain).

play into the ethos inquiry, specifically employees in autonomous positions because those positions provide ample opportunity for deviance.¹²⁸ Similarly, the corporation's efforts to monitor and enforce employee compliance with the law are relevant to determine the corporation's prevention of, or indifference to, criminal conduct by employees.¹²⁹ Bucy also advocates an examination of the corporation's efforts to investigate the offense, focusing specifically on the degree to which higher echelon officials contributed to or "recklessly tolerated" the misconduct.¹³⁰ Finally, Bucy argues that courts should examine the degree to which the compensation scheme and indemnification policies award or condone unlawful behavior.¹³¹

This understanding of independent organizational personality clearly lays the groundwork for the incorporation of genuine organizational culpability into more substantively sound criminal liability standards. But with the federal law and all states following some variation of the two traditional liability standards, the law is still in need of a stronger model. While most of the work toward a better standard has, to this point, come from scholars, both law and academia have awkwardly struggled to develop both a substantively and practically adequate model making use of genuine organizational culpability.

B. The Law's Attempts to Incorporate Genuine Culpability

1. The Collective Knowledge Doctrine

Although the present organizational liability standards continue to adhere to some variation of the respondeat superior or MPC approaches, the law has made efforts to recognize independent organizational personality and culpability. One instance appears in the judicial doctrine of collective knowledge. This doctrine serves as a patch for the underinclusiveness produced by the current standards in circumstances where no individually culpable agent is located but the organization appears justly to blame for the offense.¹³² To do so, "[i]t permits a finding of corporate mens rea to be derived from the *collective* knowledge of the corporation's members."¹³³

¹²⁸ *Id.* at 1134–35.

¹²⁹ *Id.* at 1136–38.

¹³⁰ *Id.* at 1138.

¹³¹ *Id.* at 1139–46.

¹³² See Moore, *supra* note 39, at 763 (“[Collective knowledge] enables courts to find liability in cases in which the corporation seems ‘justly to blame’ for the crime, but no single individual has the required mens rea.”).

¹³³ *Id.*

The seminal case invoking the collective knowledge doctrine is *United States v. Bank of New England*.¹³⁴ In this case, a bank was charged with and convicted of willfully violating the Currency Transaction Reporting Act for its failure to report cash deposits in excess of \$10,000, but argued that no single agent exhibited the required willfulness.¹³⁵ A customer made two to four cash deposits in multiple transactions, each deposit under \$10,000, but with each transaction aggregating to more than \$10,000.¹³⁶ The teller dealing with the customer engaging in the transaction at issue may have been unaware of the Act.¹³⁷ The teller's supervisor was aware of the Act but did not instruct the teller to record the transaction. The bank's project coordinator, working in the bank's main office, knew of the aggregation requirement, but had no knowledge that the transaction had occurred.¹³⁸ The United States Court of Appeals for the First Circuit upheld an instruction to the jury permitting it to aggregate these pieces of knowledge to reach the required willfulness, reasoning that:

A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. . . . Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of these components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation¹³⁹

The court's justification articulates the progressive recognition of the collective knowledge doctrine: that corporate intentionality may exist independent of that of the corporation's individual agents.¹⁴⁰ But collective knowledge is simply an inadequate patch over a gaping hole in the respondeat superior standard. One commentator correctly observes that it is "a mechanical concept of mental state that fails to

¹³⁴ 821 F.2d 844 (1st Cir. 1987).

¹³⁵ *Id.* at 846–47; *see also* Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311–5322 (2006) (providing reporting requirements and penalties for failure to comply for financial institutions involved in monetary transactions).

¹³⁶ *Bank of New England*, 821 F.2d at 848.

¹³⁷ *Id.* at 857.

¹³⁸ *Id.*

¹³⁹ *Id.* at 856.

¹⁴⁰ On this point, Jennifer Moore recognizes that the doctrine "only makes sense if employees are viewed as aspects of a corporate entity which is distinct from each of them, and the crime is understood not as the act of an individual, but as the act of the corporate entity . . ." Moore, *supra* note 39, at 764.

reflect true corporate fault”¹⁴¹ Instead, it is a misguided extension of respondeat superior that merely pieces together remnants of individual knowledge reflecting individual culpability.¹⁴² Although unarguably a factor contributing to organizational culpability in some circumstances, individual culpability is simply not analogous with corporate culpability. For example, the aggregated culpability of four rogue, low-level agents may totally contradict that of a well-intentioned organization. Thus, while collective knowledge is a conceptual step in the right direction, it is far from an adequate standard of genuine corporate culpability.

2. *Municipal Liability Under Section 1983*

Another instance of independent organizational fault is found in the tort doctrine of municipal liability under 42 U.S.C. § 1983, which creates a cause of action for deprivation of civil rights under color of state law.¹⁴³ Overturning a previous holding that municipalities were immune from section 1983 liability, the Supreme Court in *Monell v. Department of Social Services*¹⁴⁴ rejected respondeat superior theory and held that a municipality is liable only where a policy or custom of the municipality was the official policy or the “moving force” behind the deprivation.¹⁴⁵ The Court explained that municipalities may incur liability in two ways: (1) where a policy that has been officially adopted or promulgated by a local governing body triggers an unconstitutional act;¹⁴⁶ and (2) for “constitutional deprivations visited pursuant to a governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decision-making channels.”¹⁴⁷ The latter means of incurring liability sheds light on how courts may interpret informal organizational customs as reflecting culpable organizational action.

The post-*Monell* courts found municipal custom in two circumstances. First, municipalities were held liable for “unconstitutional acts by policy-making officials, even where such acts were one-time events, not intended to establish city-wide

¹⁴¹ Brent Fisse, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. CAL. L. REV. 1141, 1189–90 (1983).

¹⁴² See Bucy, *supra* note 36, at 1157 (“The fiction of collective intent, although perhaps needed, is simply a desperate, but disingenuous, application of the respondeat superior or MPC standards.”).

¹⁴³ 42 U.S.C. § 1983 (2006).

¹⁴⁴ 436 U.S. 658 (1978).

¹⁴⁵ *Id.* at 694.

¹⁴⁶ *Id.* at 690.

¹⁴⁷ *Id.* at 690–91.

routines.”¹⁴⁸ This approach is akin to the MPC standard for corporate criminal liability and adheres to the principle that actions by high-level decision makers more closely reflect organizational action than do acts by lower-level agents.¹⁴⁹ However, the Court in *Pembaur v. City of Cincinnati*¹⁵⁰ narrowed the definition of “policy-making official” to mean an official who is granted “final authority to establish municipal policy with respect to the action ordered,” limiting this line of liability.¹⁵¹ Additionally, municipalities were liable for unconstitutional acts resulting from indirect or informal policies or customs, which surfaced in a series of police brutality cases where courts held municipalities liable for civil rights violations “committed by police officers where the municipality had a policy or custom of failing properly to train, supervise, or discipline members of the police force.”¹⁵² However, over time “the Court has nearly eliminated . . . municipal[] liability on the basis of an informal, de facto policy . . . and has moved progressively toward the view that a municipal policy cannot exist in the absence of intentional choice by policy-making officials.”¹⁵³

Despite the subsequent limitation of its liability standards, Section 1983 jurisprudence demonstrates the court’s willingness and ability to differentiate organizational from individual action and culpability.

¹⁴⁸ Moore, *supra* note 39, at 773 (citing *Williams v. Butler*, 746 F.2d 431, 436 (8th Cir. 1984) (citing cases in which one-time events were sufficient to constitute an unconstitutional act on the part of a municipality)).

¹⁴⁹ Justice Stevens articulated this nexus from an organizational theory perspective in *City of St. Louis v. Praprotnik*:

Every act of a high official constitutes a kind of ‘statement’ about how similar decisions will be carried out; the assumption is that the same decision would have been made, and would again be made, across a class of cases. Lower officials do not control others in the same way. Since their actions do not dictate the responses of various subordinates, those actions lack the potential of controlling governmental decision-making; they are not perceived as the actions of the city itself.

485 U.S. 112, 171 (1988) (Stevens, J., dissenting).

¹⁵⁰ 475 U.S. 469 (1986) (plurality opinion).

¹⁵¹ *Id.* at 481.

¹⁵² Moore, *supra* note 39, at 774; *see also* Spell v. McDaniel, 824 F.2d 1380, 1392–95 (4th Cir. 1987) (holding that a city could be liable for police misconduct where it failed to institute policies to ensure the safety of people in custody, failed to investigate claims of misconduct and discipline officers who were known to have committed abuse, and establish quota systems for arrests and citations that encouraged the use of force).

¹⁵³ *Id.* at 775; *see also* *City of Canton v. Harris*, 489 U.S. 378, 389–90 (1989) (explaining that although the finding of an informal policy is not absolutely precluded where misconduct results from the lack of an adequate training program, it will be extremely rare); *Pembaur*, 475 U.S. at 483–84 (holding that “municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives” by city policy-makers); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (holding that municipal liability can never be based on a single incident, instead requiring a pattern of conduct).

The courts applying the doctrine expressly rejected respondeat superior theory in favor of a doctrine of organizational fault and correctly recognize that organizational fault is at least in part located in the acts of high-echelon agents and in organizational customs and policies. Scholars use these same basic principles in deriving the corporate character or corporate ethos liability standards,¹⁵⁴ establishing the value of the guidance provided by the municipal liability doctrine in understanding a standard of genuine corporate culpability.

3. Federal Prosecutorial and Sentencing Guidelines

Prosecutors and judges, at least on paper, are guided by principles of true organizational fault at both the pre-indictment and post-conviction stages in the federal prosecutorial and United States Sentencing Guidelines. The Principles of Federal Prosecution of Business Organizations provide prosecutors “guidelines and strategies that allow for the diversion from the criminal process corporations undeserving of criminal prosecution”¹⁵⁵ in the absence of a legal standard that sufficiently fills this role. Nonetheless, the prosecutorial guidelines explicitly renounce strict vicarious liability for purposes of making the indictment decision¹⁵⁶ in favor of a model for limiting prosecution to circumstances where the acts of the corporation’s agents are “fairly attributable to it.”¹⁵⁷

The Principles provide a list of factors to guide prosecutors in making the charging decision:

1. The nature and seriousness of the offense . . . ;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management . . . ;
3. The corporation’s history of similar misconduct . . . ;
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents . . . ;

¹⁵⁴ See *infra* Part II.C for a discussion of the corporate ethos or corporate character standards of organizational criminal liability.

¹⁵⁵ LAUFER, *supra* note 4, at 61.

¹⁵⁶ See PRINCIPLES, *supra* note 59, § 9–28.500 (“[I]t 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.”).

¹⁵⁷ *Id.*

5. The existence and effectiveness of the corporation's pre-existing compliance program . . . ;
6. The corporation's remedial actions . . . ;
7. Collateral consequences . . . to shareholders . . . ;
- 8 the adequacy of the prosecution of the individuals responsible for the corporation's malfeasance; and
9. The adequacy of remedies such as civil or regulatory enforcement actions¹⁵⁸

These guidelines clearly recognize principles of organizational behavior, corporate personhood, and independent culpability. For example, the Principles acknowledge that a corporation is more culpable where the misconduct was pervasive, rather than isolated, such as where it is “undertaken by a large number of employees” or “condoned by upper management.”¹⁵⁹ Additionally, in considering the corporation's history, prosecutors are directed that “[a] corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs.”¹⁶⁰ Further, the Principles acknowledge the mitigating effect on organizational culpability resulting from a properly enforced compliance program¹⁶¹ and the possible sufficiency of prosecution of the individual wrongdoers in place of the corporation.¹⁶²

“Even a casual reading of [the Principles] leads to the conclusion that prosecutors used their vast discretion to craft a new set of liability rules, without legislative assistance, that largely abandon principles of vicarious liability and attempt to replace the substantive law with permissive guidance recognizing corporate personhood.”¹⁶³ But this attempt fails as an adequate solution—the guidelines are merely, as they purport to be, guidelines. The Principles recognize that “[i]n making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute”¹⁶⁴ Prosecutorial discretion remains unduly

¹⁵⁸ *Id.* § 9–28.300 (citations omitted).

¹⁵⁹ *Id.* § 9–28.500.

¹⁶⁰ *Id.* § 9–28.600 cmt.

¹⁶¹ *Id.* § 9–28.800.

¹⁶² *Id.* § 9–28.300.

¹⁶³ LAUFER, *supra* note 4, at 63.

¹⁶⁴ PRINCIPLES, *supra* note 59, § 9–28.300 cmt.

broad,¹⁶⁵ and these guidelines provide neither the predictable guidance nor the protection to the accused of a binding liability standard.

Post-trial, the Federal Sentencing Guidelines for Organizations employ a culpability grading scheme utilizing aggravating and mitigating factors indicative of genuine organizational culpability to determine the fine upon conviction.¹⁶⁶ Aggravating factors include: (1) involvement in or tolerance of the offense by high-level personnel or pervasive tolerance by substantial authority personnel; (2) prior criminal history; (3) violation of a judicial order or injunction; and (4) obstruction of justice.¹⁶⁷ The mitigating factors include: (1) organizational self-reporting, cooperation, and acceptance of responsibility and (2) the presence of an effective compliance and ethics program.¹⁶⁸ Again, the consideration of these factors, indicative of genuine organizational culpability, is a step in the right direction, but this consideration is not mandatory¹⁶⁹ and simply takes place too late in the game, when criminal liability has already been imposed without a guaranteed analysis of organizational culpability.¹⁷⁰

The prosecutorial and sentencing guidelines demonstrate the system's willingness and ability to consider genuine organizational intention and culpability, but do not provide adequate substitutes for a liability standard doing the same. The disconnect between the guidelines and liability standards is unjustified and "remains a critical problem of law reform"¹⁷¹ The system remains in need of liability standards considering genuine organizational culpability.

C. Proposed Models of Genuine Corporate Culpability

In response to the well-documented flaws of vicarious liability standards for imposing criminal liability on organizations, a number of theories have emerged that incorporate genuine corporate fault into

¹⁶⁵ See *supra* notes 83–94 and accompanying text for a discussion of the problems with prosecutorial discretion in corporate crime.

¹⁶⁶ See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2010).

¹⁶⁷ *Id.* §§ (b)–(e).

¹⁶⁸ *Id.* §§ (f)–(g).

¹⁶⁹ See *United States v. Booker*, 543 U.S. 220, 243–44 (2005) (holding that treating the federal sentencing guidelines as mandatory violated the Sixth Amendment).

¹⁷⁰ See Bucy, *supra* note 36, at 1160 ("Under current standards of corporate liability, by the time the Sentencing Commission's guidelines impact on a corporation, the factfinders have already convicted the corporation without adequate evidence of corporate intent."); see also V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1276 (2000) (observing that the organizational sentencing guidelines blur the line between the liability and sentencing stages as they incorporate "many of the factors and issues that we more commonly associate with the liability stage").

¹⁷¹ LAUFER, *supra* note 4, at 65.

the liability standards. One theory, proactive corporate fault, imposes liability where a corporation fails to make reasonable efforts to implement internal controls to prevent the commission of a crime.¹⁷² Evidence of reasonable efforts to prevent organizational crime is gleaned from “(1) the development and implementation of safeguards to prevent crime commission and (2) the delivery of clear and convincing prohibitions of criminal behavior in the form of business conduct codes, ethics codes, and compliance training programs.”¹⁷³ This theory is a variation of the due diligence defense available under the MPC.¹⁷⁴ The principal argument for this defense is deterrence-based—it provides a proper incentive for the corporation to make efforts to encourage statutory compliance knowing that it will avoid criminal liability.¹⁷⁵

Although this standard incorporates the organization’s efforts to secure compliance, which is a key component of genuine organizational culpability, this component is merely one of many factors that contribute to organizational culpability. The treatment of due diligence as an end-all to the culpability analysis would compromise an arguably appropriate conviction where a number of aggravating culpability factors are present but the organization shows that it implemented an otherwise strong compliance program. The defense also opens the door for organizations to point to ostensibly air-tight compliance programs that, in substance, are mere shams to shield the organization from a conviction.¹⁷⁶

On the opposite end of the spectrum lies reactive corporate fault theory, which focuses on the organization’s reaction to the misconduct.¹⁷⁷ Under this theory, the basis of the organization’s liability is the reasonableness of the organization’s reaction after it

¹⁷² *Id.* at 57.

¹⁷³ *Id.* The Federal Sentencing Guidelines for Organizations incorporate a detailed definition of an effective compliance and ethics program for use in ascertaining the organization’s culpability score at the sentencing stage which could be used to guide the inquiry analysis at the liability stage. See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2010) (stating the elements of an effective compliance and ethics program).

¹⁷⁴ See MODEL PENAL CODE § 2.07(5) (1962) (“[I]t shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.”).

¹⁷⁵ See James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 119 (1976) (“[T]he purpose for imposing liability is to encourage the corporation’s efforts to secure statutory compliance by its employees. That purpose is not served . . . where the corporation has in fact diligently supervised its employees and they violate the statute contrary to express instructions.”) (footnote omitted).

¹⁷⁶ See *supra* notes 59–66 and accompanying text for a discussion of organizational compliance games used to superficially avoid liability.

¹⁷⁷ See LAUFER, *supra* note 4, at 58 (defining reactive corporate fault).

discovers that one of its agents has committed a crime, and culpability and liability will be imposed for a “[f]ailure to undertake corrective measures in reaction to the discovery of an offense”¹⁷⁸ Although it was initially suggested that reactive fault theory be reserved “only for less-serious offenses,”¹⁷⁹ scholars subsequently advocated its use for all criminal offenses.¹⁸⁰ The obvious flaw of reactive fault theory is that it “fails to capture a genuine corporate culpability to the extent that [it] reflects an entity’s response to the discovery of an illegal act rather than the commission of the act itself.”¹⁸¹ In other words, the ex post perspective of reactive fault diverges from the principle that the criminal act must coincide with a culpable mens rea.¹⁸² And similar to proactive fault, the narrow analysis of reactive fault falls well short of a full analysis of the factors contributing to organizational fault required to make a complete culpability assessment.

Corporate ethos or corporate culture theory addresses the glaring limitations of proactive and reactive fault theories by attributing fault to an organizational culture or personality that encourages criminal conduct by agents of the corporation.¹⁸³ Evidence of such an ethos or culture may be demonstrated by a number of factors, including the corporate hierarchy, corporate goals and policies, efforts to ensure compliance with ethics codes and legal regulations, the indemnification of employees, the oversight role of the board of

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *id.* at 58 (citing Brent Fisse, *Corporate Criminal Responsibility*, 15 CRIM. L.J. 166, 173–74 (1991) (suggesting that Australia adopt a standard of corporate criminal liability under which a corporation is liable where (1) the offense was committed by an agent; and (2) the corporation was at fault in at least one way, including, among other means based on proactive fault and corporate policy “by having a policy of failing to comply with a reactive duty to take preventative measures in response to having committed the external elements of the offence; or . . . by failing to take reasonable precautions or to exercise due diligence to comply with a reactive duty to take preventative measures in response to having committed the external elements of the offence.”)).

¹⁸¹ LAUFER, *supra* note 4, at 60.

¹⁸² See *Morissette v. United States*, 342 U.S. 246, 274 (1952) (quoting *People v. Flack*, 26 N.E. 267, 270 (N.Y. 1891) (“[T]o constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system . . . both must be found by the jury to justify a conviction for crime.”)).

¹⁸³ See Bucy, *supra* note 36, at 1121 (discussing the definition of the corporate ethos standard); see also the Australian Criminal Code, which allows corporate criminal liability based on a “corporate culture . . . within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision,” or the lack of “a corporate culture that required compliance. . . .” *Criminal Code Act 1995* (Cth) pt 2.5 s 12.3(2)(c)–(d), available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/EA8F2A398EBE535C-CA2570B20015CC28/\\$file/CriminalCode1995_WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/EA8F2A398EBE535C-CA2570B20015CC28/$file/CriminalCode1995_WD02.pdf). The Australian Criminal Code defines “corporate culture” as “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes [sic] place.” *Id.* at s 12.3(6).

directors and how the corporation has reacted to past violations.¹⁸⁴ As Bucy argues, a corporate ethos standard would clean up much of the over- and underinclusiveness of the respondeat superior standards by utilizing this range of organizational culpability factors to guide the inquiry.¹⁸⁵ Testing this hypothesis, Bucy applies the model to five recurring circumstances in which corporate criminal matters arise:

- (1) cases where the corporation is closely held; (2) cases where higher echelon corporate agents commit the criminal act; (3) cases where lower echelon corporate agents commit the criminal act; (4) cases where corporate agents commit the criminal act in contravention of corporate policy or express instructions; and (5) cases where the court cannot identify the corporate agent who commits the criminal act.¹⁸⁶

Bucy generally hypothesizes that liability is probable in the first two circumstances primarily due to the close nexus between individual and organizational action.¹⁸⁷ The corporate ethos standard generally avoids the counterintuitive imposition of liability in the fourth circumstance due to the lack of an ethos encouraging the rogue agent's deviance.¹⁸⁸ Liability in cases where a low-ranked agent commits the act and where the prosecution cannot locate a responsible agent hinges on a far less simplistic weighing of the universe of factors indicative of the organization's culpability to determine whether they add up to an ethos that encouraged the misconduct.¹⁸⁹ Using fact patterns falling under these two circumstances, Bucy weighs the organizational factors probative of an encouraging ethos, draws the liability line, and summarizes that

¹⁸⁴ See *supra* notes 125–31 and accompanying text (summarizing the factors contributing to a corporate ethos); see also Bucy, *supra* note 36, at 1129–47 (detailing the required inquiry into a corporate ethos that encourages criminal conduct).

¹⁸⁵ See Bucy, *supra* note 36, at 1150 (“The corporate ethos standard . . . does not . . . simply transfer [the intent of individual agents] to an entity; rather, the corporate ethos standard looks beyond the corporate agent’s intent to all aspects of the corporation that could have encouraged the criminal act. This corporate ethos analysis will result in both more, and less, convictions than the current standards . . .”).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* at 1151 (arguing that the corporate ethos standard will almost certainly yield a conviction where the corporation is closely held because “[w]hen the corporation is synonymous with one or a few individuals, its ethos is also synonymous with the criminal intent of those individuals”); *id.* at 1152 (“[C]ourts are also likely to convict corporations whose higher echelon corporate agents commit the criminal conduct.”).

¹⁸⁸ *Id.* at 1154 (“[U]nder the corporate ethos test, liability almost certainly would not attach to the corporation in this category of cases.”).

¹⁸⁹ See *id.* at 1152–54 (applying the standard to cases where lower-echelon agents committed the misconduct); *id.* at 1156–57 (applying the standard to cases where a responsible agent cannot be located).

liability will result upon a finding of “corporate actions that make corporate liability appropriate.”¹⁹⁰

But just when is liability appropriate? Although the imposition of liability under the corporate ethos test more closely reflects true organizational culpability, the ambiguity of the result under this last circumstance demonstrates some clear shortcomings. Specifically, it fails to provide sufficiently concrete and predictable guidance as to how the variables contributing to an ethos are weighed in making the liability determination. More importantly, it fails to clarify the appropriate threshold beyond which it may be said that those variables actually encourage specific criminal violations requiring various mens rea for conviction, and how this threshold correlates with the mens rea in the statute at issue. It is merely a smell test. Consider the following questions: What evidence would prove a corporate ethos that encouraged a negligent crime? How does that requirement contrast with the ethos required to encourage willful or purposeful crime? How does the analysis resolve the liability of an organization showing characteristics reflecting both an ethos discouraging and encouraging the conduct at issue? When merely presented the body of variables that may contribute to a corporate ethos encouraging misconduct, absent more finite elements and clearer principles of application, the answers to these questions lack the predictability required of a sufficient liability standard.

A fundamental flaw of the corporate-ethos standard, as with proactive and reactive fault, is it was “drafted with little concern for the basic requirements of criminal law.”¹⁹¹ These standards “all but abandon the requirement for finding a mens rea, or a mental state associated with corporate acts.”¹⁹² In litigating crimes committed by individuals, the prosecution presents direct and circumstantial evidence with reference to the specific mens rea required for conviction. The required mens rea provides guidance as to what evidence is relevant to the grade of culpability required for conviction.¹⁹³ In contrast, these models of genuine organizational culpability do not require proof of an organizational mental state corresponding to the mental state required to establish each element

¹⁹⁰ *Id.* at 1157.

¹⁹¹ LAUFER, *supra* note 4, at 59.

¹⁹² *Id.*

¹⁹³ For example, the prosecution seeking a murder conviction under the Model Penal Code, generally requiring that the defendant act with purpose or knowledge as to the death, must present evidence demonstrating the individual's purpose or knowledge. See MODEL PENAL CODE § 210.2(1)(a) (1962) (“[C]riminal homicide constitutes murder when . . . it is committed purposely or knowingly.”). This evidence could include, for example, testimony and forensic evidence probative of motive and deliberate action.

of the offense. In the Arthur Andersen case, for example, the prosecution bore the burden of proving an agent's knowingly corrupt persuasion of another to obstruct justice.¹⁹⁴ Under the corporate-ethos standard, the prosecution would apparently have had to disregard the knowledge requirement written into the statute, and instead present evidence that an ethos existed at Andersen that generally encouraged the misconduct. This essentially reduces the mens rea to negligence for all offenses,¹⁹⁵ setting aside the traditional limiting function of mental state requirements.¹⁹⁶

Although these “[e]fforts to move beyond elementary imputations of intention and action are a positive step in the development of a conceptually sound body of law,”¹⁹⁷ they are in need of further modification. Because they entirely lack synergy with the present criminal statutes, “these models fail for reasons of implementation.”¹⁹⁸ Laufer summarizes this shortcoming by observing that the models of genuine corporate culpability “are models of organizational liability rather than culpability”¹⁹⁹ In other words, they are proposals for entirely new liability standards which necessarily disregard the liability standards set forth in the present criminal statutes. They simply “cannot be incorporated wholesale into the thousands of federal statutory provisions that allow for corporate criminal liability.”²⁰⁰

In response to the observed limitations of these models, Laufer proposes a “constructive model of corporate fault” incorporating the principles of organizational culpability into a standard that, he argues, “make[s] use of existing standards . . . of culpability [and which is] capable of implementation without recodification of the federal criminal law or significant alteration of state law.”²⁰¹ To accomplish this end, “constructive corporate fault” uses objective analysis in

¹⁹⁴ See Indictment at 7, *United States v. Arthur Andersen, LLP*, Cr. No. CRH-02-121 (S.D. Tex. March 7, 2002), 2002 WL 33949318 (indicting Arthur Andersen for “knowingly, intentionally and corruptly” persuading others to withhold, destroy, and alter documents). For the statutory basis of Andersen’s conviction, see *supra* note 102.

¹⁹⁵ See V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 375 (1999) (casting many of the proposed models of genuine corporate culpability, including corporate ethos, proactive fault, and reactive fault as forms of negligence, “impos[ing] liability when the corporation’s internal procedures and policies are negligent in some way.”).

¹⁹⁶ See LAUFER, *supra* note 4, at 59 (“[M]ental state requirements limit the reach of the criminal law to those individuals and organizations that demonstrate a certain willfulness, recklessness, intention, purpose, or knowledge in committing a prohibited act.”).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 60.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

addition to the traditional subjective inquiry into the accused's mental state.²⁰² The objective is used in determining the reasonableness of imputing the agent's actions to the corporation and whether it is fair or reasonable to assign a specific level of culpability.²⁰³ Laufer emphasizes the constructive perspective of the standard, which he summarizes as "constructive in the sense of construing facts, circumstances, conduct, and intentionality of the organization, prompting a fair or reasonable attribution of liability."²⁰⁴ Necessitated by the fact that corporate action and intention are "almost always . . . derivative of individual or group action,"²⁰⁵ Laufer's theory of constructive fault "permits fact finders to move beyond the strictures of subjective evidence of culpability in order to find corporate states of mind that may be more reasonably deduced or inferred—with or without the assistance of subjective evidence of the defendant."²⁰⁶ This model is a significant step toward a substantively and practically sound model through its maintenance of the centrality of mental states in criminal liability standards while recognizing the distinctions between individual and corporate mental states. Using the federal prosecutorial and sentencing guidelines as an inspiration,²⁰⁷ Laufer seeks to place a liability standard more synergistic with the pre- and post-liability culpability inquiries.²⁰⁸

The first step in the inquiry is to determine whether there was true corporate action for which to hold the corporation liable. Laufer suggests that:

[c]ulpable organizational action may be identified through an objective test where it is determined that given the size, complexity, formality, functionality, decision-making process, and structure of the corporate organization, it is reasonable to conclude that the agents' acts are those of the corporation. This reasonableness test is a threshold

²⁰² See *id.* at 70–86 (describing Laufer's suggested subjective-objective analysis for deriving corporate action and corporate intention).

²⁰³ *Id.* at 71 ("Courts should rely on evidence of action and intention that . . . "prompt[s] a fair or reasonable attribution of liability."). Laufer packages this standard as "hybrid fault" due to the synergies of the subjective and objective. *Id.* at 87–91.

²⁰⁴ *Id.* at 71.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 72.

²⁰⁷ *Id.* at 61.

²⁰⁸ See *id.* at 71 (noting that this theory requires evidence that "reflect[s] the connectedness between an agent's acts or intents and that of the organization," as well as evidence that "captures an action or intention that is not attributable to any single agent or group but comes from the organization"); see also *id.* (arguing that this theory of constructive fault "lay[s] the groundwork for a substantive corporate criminal law . . . on par with that crafted by the Sentencing Guidelines for Organizations").

assessment that separates cases in which corporate acts have occurred from individual noncorporate acts or secondary acts.²⁰⁹

To make this reasonableness assessment, he defers to courts and juries to “develop a calculus, considering evidence relating to delegation, authorization, and reckless toleration, as well as the status of the agent who has acted”²¹⁰ The strength of the agent-entity relationship, or the degree of organizational “authorship,” is central to ascertaining corporate action.²¹¹ Laufer recognizes that the strength of the relationship will preliminarily hinge on the status of the agent in the corporate hierarchy, but will be “far less mechanical” where the agent-entity relationship is more remote.²¹² In general terms, a finding of constructive corporate action is more probable where high level agents are involved in the violation, while less likely when the act involves lower level personnel whose connections to the corporation are more tenuous.

Although this step takes care of the rogue agent problem, it risks completely unpredictable application and premature disposition of the liability analysis where an under-guided factfinder fails to find corporate action without assessing the remaining factors contributing to genuine organizational culpability, which is the integral stage of the analysis. The suggestion that courts and juries will “develop a calculus” with which to evaluate the expanse of organizational variables to determine whether a finding of corporate action is “reasonable” is oversimplified. This test is extremely malleable, in that it merely sets the table for unpredictable application because a jury has no familiar benchmark against which to make the suggested reasonableness judgment. This clumsiness may unduly compromise a full assessment of culpability by permitting the factfinder to drop a large portion of the culpability analysis in cases where it misguidedly resolves liability at the corporate action inquiry. In this respect, Laufer’s standard blurs the line between organizational action and culpability. A more effective inquiry should consider all variables that contribute to organizational action and intention before making the ultimate liability determination. Accordingly, it is more appropriate to consider the agent-entity relationship as a factor indicative of organizational culpability, not organizational action. If an agent acted

²⁰⁹ *Id.* at 72 (emphasis omitted).

²¹⁰ *Id.* at 72–73.

²¹¹ *See id.* at 73 (“The stronger the agent-entity relationship, the more reasonable it is to consider an agent’s action to be a construction of the corporation’s.”).

²¹² *Id.*

in some capacity connected to the organization, the action should be treated as organizational action and the analysis should proceed to the culpability assessment.

Despite the room for improvement in Laufer's standard for ascertaining organizational action, his model for assessing culpability effectively incorporates genuine organizational culpability while preserving grades of culpability used in the present criminal statutes. As a framework, he uses the Model Penal Code hierarchy of mental states—purpose, knowledge, recklessness, and negligence—and identifies an array of organizational variables and necessary evidence that may be used to fit organizational conduct into those grades of culpability.²¹³ While the federal law uses hundreds of mental states, those mental states may effectively be boiled down into the four MPC classifications commonly used in state criminal law.²¹⁴

The highest form of MPC culpability is purposive action, which occurs when it is one's conscious object, or desire, to engage in an act or cause a particular result.²¹⁵ Laufer summarizes purposive corporate action as existing in circumstances where "the corporation has . . . engaged in acts with a desire to bring about a certain, foreseeable result," and where the offense entails attendant circumstances, where the corporation "at [a] minimum know[s] or believe[s] that these requisite circumstances exist."²¹⁶ Corporate purpose will appear as "(1) policies and practices that explicitly, implicitly, or through operation promote and encourage illegality, (2) efforts to ratify or endorse the violation of law, and (3) express or tacit authorization, approval, consent, or support of the illegality."²¹⁷ However, Laufer clouds the inquiry by suggesting that "[c]onstructive corporate culpability considers this evidence by asking whether the average corporation of like size, complexity, functionality, and structure, given the circumstances presented, purposely engaged in the illegal act."²¹⁸ It is unclear just how this added context aids the inquiry. In fact, this addition makes the analysis more abstract than necessary, exhibiting another flaw with the standard. This flaw aside, however,

²¹³ See *id.* at 78–85. For a summary of these mental states and the organizational variables and evidence indicative of action falling within those variables see *id.* at 84–85.

²¹⁴ See *id.* at 78 ("With over one hundred different mental states . . . in Title 18 alone, it is not unreasonable to reexamine the integrity of the United States Code . . . [but] it does not defy classification. The . . . Model Penal Code provide[s] a hierarchy of culpable mental states for state law that captures many of the mental state distinctions found in the federal criminal law as well.").

²¹⁵ MODEL PENAL CODE § 2.02(2)(a)(i) (1962).

²¹⁶ LAUFER, *supra* note 4, at 78.

²¹⁷ *Id.*

²¹⁸ *Id.*

Laufer effectively sets forth the key evidence probative of corporate purpose.

Laufer notes that most corporate crime cases exhibiting purposeful action will likely involve “small firms existing solely for the purpose of committing fraud.”²¹⁹ While these would be the easiest cases because of the close nexus between high management and intentional misconduct, corporate purpose would also likely be present in larger firms exhibiting evidence of deliberate misconduct amongst high ranking corporate officers.

Conduct undertaken with knowledge, the next-lowest level of culpability under the MPC, requires only that the actor is “practically certain that his conduct will cause such a result” if the element involves a result of the actor’s conduct, and “if the element involves the nature of [the actor’s] conduct or attendant circumstances,” an awareness that his conduct is of a certain nature or that certain circumstances exist.²²⁰ Courts generally have taken the definition further in interpreting positive knowledge to include willful ignorance, or deliberate avoidance of knowledge.²²¹ Constructive corporate knowledge is determined by asking whether “[g]iven any evidence of actual awareness, permission, toleration, or willingness [with respect to the illegality at issue], would an average corporation of like size and structure have been aware of the nature of its conduct?”²²² Laufer posits that corporate knowledge will encompass a significant portion of corporate crime cases, “especially cases where the most senior of management knows, condones, or tacitly approves of illegal acts.”²²³

Next on the culpability hierarchy is recklessness, which requires that the actor “consciously disregards a substantial and unjustifiable risk” of harm which involves “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”²²⁴ Laufer presents the corporate recklessness inquiry as: “[c]onsidering the circumstances known, and the nature of the conduct committed, was the entity’s disregard of risks substantial and

²¹⁹ *Id.* at 79.

²²⁰ MODEL PENAL CODE § 2.02(2)(b).

²²¹ See LAUFER, *supra* note 4, at 80 (noting that “[c]ourts have considered willful ignorance, or deliberately abstaining from knowledge, as actual or positive knowledge”). See also, e.g., *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (“To act ‘knowingly,’ therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question.”).

²²² See LAUFER, *supra* note 4, at 80.

²²³ *Id.*

²²⁴ MODEL PENAL CODE § 2.02(2)(c).

unjustifiable?”²²⁵ Laufer takes an objective position on corporate recklessness, attributing the mental state where a corporation engages in “unreasonably risk-laden behavior without actual, positive knowledge of the illegality,”²²⁶ using as a reference the “risks that an average, comparable corporation would have known or been aware of in like circumstances.”²²⁷ Similar to his analysis of constructive corporate knowledge, Laufer focuses on senior management, finding recklessness where senior management must have known of its corporation’s unreasonably risk-laden behavior.²²⁸ The corporate-recklessness standard also catches many of the cases of deliberate indifference in which executives arrange reporting patterns that insulate them from positive knowledge of information respecting potentially criminal conduct.²²⁹

The lowest level of culpability, corporate negligence, is present “where an entity inadvertently creates a substantial and unjustifiable risk of which it ought to have been aware.”²³⁰ Negligence is an entirely objective standard under the MPC, providing for the best fit among the mental states with the objectively-driven constructive fault model.²³¹ Laufer observes that corporate negligence catches, for example, cases where management is unaware, but should have known of fraud perpetrated by low- or mid-level employees.²³²

²²⁵ LAUFER, *supra* note 4, at 81.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ For example, Laufer cites the case against Emery Worldwide Airlines, an air cargo carrier that pled guilty to twelve violations of the Hazardous Materials Transportation Act in 2003 for the placement by its employees of hazardous materials on its aircraft without properly notifying its pilots. *Id.* at 81–82. Laufer implies that a finding of corporate recklessness may be appropriate even though senior Emery executives lacked positive knowledge of the failures to notify because there were “credible allegations that management must have been aware of the problems with hazmat shipments and, at the very least, disregarded positive knowledge.” *Id.* at 82.

²²⁹ See *id.* (citing recent cases against a number of infamous executives as alleging, implicitly or explicitly, recklessness against the executives for their failures to “engage in the kind of diligent actions expected of a person in the position of a chief executive”); STONE, *supra* note 100, at 53:

Directors and high-up officers of corporations . . . could not know of everything their organization was doing even if they tried—and often, preferring not to know, they arrange patterns of reporting so they cannot find out (or, at least, if they do find out, they find out only in such a way that it can never be proved).

²³⁰ LAUFER, *supra* note 4, at 82.

²³¹ Under the Model Penal Code, an individual acts negligently where he “should be aware of a substantial and unjustifiable risk . . . of such a nature and degree that the actor’s failure to perceive it . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” MODEL PENAL CODE § 2.02(2)(d) (1962).

²³² LAUFER, *supra* note 4, at 82. Implying corporate negligence, Laufer cites a 2003 case against AstraZeneca Pharmaceuticals LP in which it settled fraud charges alleging that its employees gave thousands of free samples of a prostate cancer drug to doctors, knowing that

Constructive corporate fault is the most conceptually sound of the outstanding academic models for incorporating genuine organizational culpability into the corporate criminal law. It represents a significant stride toward an effective marriage of the understanding of independent organizational action and intention and the practical and normative necessity of maintaining the graded mens rea requirements in the existing criminal law. Laufer's disposal of the exclusively subjective mens rea is a significant step in moving from the limits of vicarious liability, and in lessening the burden on factfinders to distill evidence down to an organizational mental state. Thus, insofar as the objective element permits the use of reasonable objective inferences in the analysis, it is undeniably useful.

However, this model requires further refinement to ensure accurate and predictable application. Although it fits practically into the existing criminal law, it fails to give due consideration to the judges and juries who will be charged with its implementation. The general weakness lies in the standard's idealistic use of an objective standard, making the already complex task of determining a corporate mental state more complex than necessary. This unnecessary complexity comes from two sources: (1) the reasonableness test required in determining whether the action at issue was corporate action; and (2) the mental state inquiries requiring the factfinder to determine the mens rea of a corporation by asking whether, considering the circumstances, a similar corporation engaged in the conduct at issue possessed the required mental state. The former merely adds an unnecessary inquiry which may be more easily and properly absorbed into the mental state analysis.²³³ Similarly, the reasonableness judgments required in the mental state analysis confuse the inquiry by asking jurors to consider whether an "average corporation"²³⁴ would possess the required mental state. This benchmark adds unnecessary and unhelpful perspective to the already complex and abstract concept of corporate mental states.

This complexity stems from traditional methods of making assessments of culpability in tort and criminal law, in which the jury is commonly asked to jump in to the mind of the accused or to make

Medicare and Medicaid would be billed for the samples, and offered other illegal inducements pursuant to its aggressive marketing plan. *Id.* at 82–83. The company acknowledged the fraud but pointed out that it was unknown to senior management, and the prosecution did not single out individually culpable employees. *Id.* at 83.

²³³ For a more in-depth discussion of Laufer's standard of constructive action, see *supra* notes 201–10.

²³⁴ LAUFER, *supra* note 4, at 78.

judgments from the perspective of a reasonable person.²³⁵ This task, while demanding, is feasible because the jurors are human beings. Armed with their own experiences, their understandings of human thought, decision making, and reaction, and their abilities to consider different perspectives and circumstances, jurors can be reasonably expected to develop benchmarks against which they may estimate another individual's mental state. However, for jurors to step into the shoes of an "average corporation" to make corporate mental state determinations is much less straight-forward. For example, it is not unrealistic to assume that a jury may simply fail to grasp how a corporation, an intangible entity, can possess knowledge, a traditionally individualistic concept, creating an understanding barrier that would trigger improper application. A jury in this situation would likely be incapable of understanding how the differences in "size, complexity, formality, functionality, decision making process and structure"²³⁶ between corporations affect the threshold for a corporation's formation of knowledge.²³⁷ Constructive corporate fault asks too much of the factfinder if it expects any consistency in application, which compromises its substantive strength. But with further refinement, Laufer's conceptualization may be parlayed into a more user-friendly standard retaining its overall substantive strength.

III. IMPLEMENTING A MORE WORKABLE STANDARD: THE SENIOR MANAGEMENT MENS REA

A. *The Senior Management Perspective*

Among the models of genuine corporate culpability, constructive culpability strikes the best balance between a full consideration of genuine organizational culpability and the practical and normative necessity of maintaining the grades of culpability used in the existing criminal statutes. But while constructive culpability is suitable in theory, its potential efficacy is compromised for reasons of implementation. As Bucy recognizes, any new standard of corporate culpability will naturally present difficulties in administration compared to the present liability standards.²³⁸ Laufer's model,

²³⁵ See, e.g., MODEL PENAL CODE § 2.02(2)(d) (using the reasonable person benchmark in the standard for criminal negligence).

²³⁶ LAUFER, *supra* note 4, at 72 (emphasis removed).

²³⁷ This incapability is understandable in the abstract task of attributing traditionally human mental states to an organization with potentially thousands of constituents and various sources of behavior, culture, policy and culpability.

²³⁸ Bucy, *supra* note 36, at 1180 (countering the likely criticism that courts will find the corporate ethos standard more difficult to administer, stating that "[i]n part, the difficulty will stem from unfamiliarity with a new standard of liability . . . [and] from the fact that the

however, presents unnecessary implementation difficulties by requiring the factfinder to make culpability judgments using the perspective of the average corporation, a daunting task for an organizational theorist, let alone a group of lay jurors. However, it is possible to use the groundwork of constructive fault to shift perspective in a way that will add clarity while maintaining due consideration of genuine organizational culpability and graded mental states.

Instead of adopting the unduly abstract perspective of a comparable corporation, this Note proposes a model requiring the factfinder to adopt the perspective of senior management, as a group, to determine corporate action and mens rea. This shift provides increased workability compared to constructive fault, most generally, by relieving the courts of much of the burden of analyzing evidence of actual knowledge of corporate agents and other evidence of genuine culpability and using that evidence to determine mental states of a complex, abstract, and intangible entity. Specifically, the senior management mens rea (SMMR) first simplifies Laufer's suggested model for deriving corporate action by eliminating the factfinder's task of evaluating an organization's structure to determine whether a reasonable factfinder may determine that the agents' acts are those of the organization. Instead, this model presumes corporate action through senior management's encouraged corporate culture; its development and implementation of organizational goals, strategy, policy, and procedures; and its general roles of delegation, management, and oversight. Second, the model guides the factfinder to consider evidence of culpability, using reasonable, nonsubjective inferences to determine culpability from a more concrete, familiar perspective than an "average [comparable] corporation"²³⁹ by instead looking to the body of individuals representing senior management. This approach effectively balances the benefits of: (1) the court's familiarity with determining the mental states of individuals, (2) the jury's likely ability to better understand and consistently apply corporate culpability from the perspective of a body of individuals using Laufer's suggested nonsubjective culpability inferences, (3) the consideration of evidence reflecting genuine organizational culpability, and (4) the integration of organizational culpability into the standing criminal statutes employing grades of culpability.

corporate ethos standard is more fact-sensitive than are the current standards of liability").

²³⁹ LAUFER, *supra* note 4, at 78.

The use of senior management action and intention as a proxy for corporate action and intention is well-supported by the understanding of management's role in corporate deviance. In order to ensure that this model does not embody the disconnect between individual and corporate action and culpability inherent to vicarious liability, it is crucial that it require a strong connection between the action and intention of management and the organization, or what Laufer refers to as organizational "authorship."²⁴⁰ The inherently tight relationship between the actions of senior management and organizational misbehavior reveals that adoption of the perspective of senior managers, particularly top executives, provides for this authorship. Top executives have long been viewed as the central force behind corporate wrongdoing. In fact, one group of scholars points exclusively to senior management as the impetus of corporate deviance, defining corporate violence as "behavior producing an unreasonable risk of physical harm to consumers, employees, or other persons *as a result of deliberate decision-making by corporate executives or culpable negligence on their part.*"²⁴¹ Although it may be unrealistic to lay the entire blame for corporate deviance on top management, the recurring understanding is that management plays the leading role in unethical and illegal corporate behavior.²⁴² Thus, the consensus view emerging in academia is that "corporate wrongdoing is more often the result of actions or inactions, deliberate or inadvertent, by the top managers of the organization."²⁴³

At the same time, an effective standard must account for the fact that the influence of those in top management often trickles down from the highest ranks into the ranks of lower-senior and middle management, either deliberately or inadvertently, in the form of expectations and objectives driven at profit maximization,²⁴⁴

²⁴⁰ *Id.* at 73 ("The strength of authorship determines the reasonableness of [imputing the actions of agents to the corporation].").

²⁴¹ CLINARD & YEAGER, *supra* note 8, at 9 (emphasis added) (alteration in original) (quoting John Monahan et al., *Corporate Violence: Research Strategies for Community Psychology*, in CHALLENGES TO THE CRIMINAL JUSTICE SYSTEM 117 (Daniel Adelson & Theodore Sarbin eds., 1979)).

²⁴² See CLINARD & YEAGER, *supra* note 8, at 59 (observing that "superiors [are consistently] ranked as the primary influence in unethical decisionmaking"); *id.* at 60 (citing confidential interviews conducted with a number of board chairmen and senior executives and observing a consensus that "the top management, particularly the chief executive officer, sets [the] ethical tone"); LAUFER, *supra* note 4, at 125 (arguing that "[o]f all internal factors accounting for corporate crime, not one comes close in importance to the role of top management in tolerating if not shaping a corporate culture that allows for deviance").

²⁴³ Anthony J. Daboub et al., *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. MGMT. REV. 138, 138-39 (1995).

²⁴⁴ See, e.g., CLINARD & YEAGER, *supra* note 8, at 47 ("Nonetheless, the desire to increase or maintain current profits is the critical factor in a wide range of corporate deviance . . .");

permitting management to avoid positive knowledge of the deviance below.²⁴⁵ An understanding of this flow-through phenomenon is crucial to ensuring consideration of the full range of evidence probative of the SMMR. The SMMR accounts for this phenomenon by using Laufer's approach in considering the two critical sources of organizational culpability: (1) the subjective knowledge of senior management sufficiently connected to the organization, which reflects organizational culpability; and (2) circumstantial evidence, in the form of the factors contributing to genuine organizational culpability, which provides for reasonable inferences of culpability amongst senior management.²⁴⁶ This approach effectively considers individual managers' subjective culpability while restricting their ability to avoid liability by avoiding actual knowledge of deviance.

Of course, the SMMR requires a body of senior management against which to present and consider evidence. Given the broad range of corporate managerial structures, from closely held organizations utilizing only a handful of senior managerial positions to the decentralized multinational corporation operating numerous

Bucy, *supra* note 36, at 1134 (“[I]nstitutional goals can encourage, or discourage, illegal activity by corporate employees.”).

²⁴⁵ The line between advertence and inadvertence of this trickle-down effect may be blurry, as some argue that “it is not uncommon for top management to lose control and direct supervision over subunits as well as subordinate employees once an organization reaches a certain size, level of complexity, and specialization.” LAUFER, *supra* note 4, at 125. Clinard and Yeager observe that the size of many large corporations:

[R]equires that corporations delegate decisionmaking and disperse their operating procedures in order to produce efficiently. This process is accompanied by the establishment of elaborate hierarchies based on authority position and functional duties. In addition, over time the number of job categories requiring specialists or professionals has expanded greatly as corporations have grown and technology has developed. These factors—size, delegation, and specialization—combine to produce an organizational climate that allows the abdication of a degree of personal responsibility for almost every type of decision, from the most inconsequential to one that may have a great impact on the lives of thousands.

CLINARD & YEAGER, *supra* note 8, at 44.

On the other hand, armed with this defense of organizational complexity, management has become adept at avoiding actual exposure to deviance of their subordinates, at least in terms of its subjective knowledge of wrongdoing. *See, e.g.*, CLINARD & YEAGER, *supra* note 8, at 44 (“Executives at the higher levels can absolve themselves of responsibility by the rationalization that illegal means of attaining their broadly stated goals had been devised without their knowledge”); LAUFER, *supra* note 4, at 125 (“[T]op management can be quite successful in demonstrating its ignorance of middle management or subordinate employee deviance.”).

²⁴⁶ Laufer emphasizes the utility of reasonable inferences of culpability, although he frames the use of these inferences in terms of directly establishing a corporate mental state under his theory of constructive corporate fault. *See* LAUFER, *supra* note 4, at 72 (“Constructive fault permits fact finders to move beyond the strictures of subjective evidence of culpability in order to find corporate states of mind that may be more reasonably deduced or inferred—with or without the assistance of subjective evidence of the defendant.”).

autonomous divisions, all of which may have multiple subdivisions and tiers of high-level management,²⁴⁷ a bright-line standard drawing the line around an appropriate senior management group is virtually impossible. In consideration of this difficulty, as an overriding principle, the prosecution should be provided flexibility in selecting the group about whose conduct and mens rea it will present evidence. Although limits must be set in order to prevent the prosecution from focusing on too low a level of management, or improperly focusing too closely on the individual culpability of a small number of managers,²⁴⁸ the prosecution should be permitted to target its presentation of evidence at a more manageable representative group of management. Most importantly, this narrowing function will permit the prosecution to direct the jury's attention to the most relevant group of management according to the locus of the deviance and evidence of culpability. Absent this ability, it would likely be easier for the defense to divert attention to an unduly broad representative group or to a group substantially irrelevant to the culpability determination.

As a lower limit, culpability may be considered *from the perspective of the level of senior management no lower than the level that significantly participates in the development and implementation of the strategic or operational policies and procedures of the organization, or for the division or department of the organization in which the level of management engages in its functions*. Again, this lower limit ensures that the culpability determination is only made with reference to a body of management sufficiently representative of the actions and intentions of the organization. The highest management bracket, of course, consists of the highest executives and the board of directors. But it bears emphasis that the prosecution should be permitted to focus on the levels or divisions of management most closely tied to the deviance.²⁴⁹ The understanding underlying

²⁴⁷ See CLINARD & YEAGER, *supra* note 8, at 24 (describing the structural features of the modern large corporation as pointed out by Drucker as being originated by General Motors, which include "decentralization into autonomous divisions, each a business of its own; [and] full responsibility of the divisional manager for the performance of his division . . .").

²⁴⁸ It may be appropriate for the prosecution to emphasize the individual culpability of a small number of high-level managers, or even a single individual.

²⁴⁹ Presumably, the ability to trim the representative group on the high end will prove most useful in prosecutions of complex, multi-divisional organizations where the deviance is focused in one of the divisions. As a simple example, suppose Corporation X has two autonomous divisions, A and B, each of which is run by a body of high-level executives. X is prosecuted for fraud perpetrated within division B. The prosecution would, of course, present evidence probative of culpability within division B, and absent any probative evidence of culpability attributable to the higher ranks of X, would likely prefer to target the senior management of division B. Without this ability, the defense would likely attempt to re-orient the jury by presenting mitigating evidence based on the general policies of X, a lack of knowledge of the

this ability to focus the analysis is that it is not necessary to prove that the entire body of senior management is culpable as long as culpability exists in a sufficiently representative management group.

Narrowing the representative group of senior management will not compromise a proper assessment of genuine organizational culpability. At first glance, it may appear as though this practice risks taking a step back toward principles of vicarious liability by focusing too closely on the culpability of a small group, or even on a single individual. This is simply not the case. First, the determination of the SMMR is not limited to individual knowledge, but will also consider as circumstantial evidence the universe of organizational variables understood to aggravate or mitigate organizational culpability, in order to reach reasonable inferences of mens rea.²⁵⁰ And even where an act is committed by a limited group of management, or even a single senior manager, and the prosecution hinges heavily on individual subjective culpability, the threshold classification as a sufficiently senior manager ensures a close nexus between individual and organization such that the organization is appropriately held responsible for the act. This nexus is still present in cases where the focus is shifted to lower-level managers because higher levels of management, and ultimately, the organization, are impliedly culpable for delegating managerial power and responsibilities. And presuming that these lower levels of management are behaving in response to pressures from above, not on exclusively individual motives, is fair.²⁵¹ Consequently, due to this organization-agent connection, the organization is itself blameworthy and appropriately held criminally liable where the culpability for the deviance is focused among lower-ranking senior management.

Inevitably, there will be an argument on both sides as to whether or not a specific level of management or an individual is truly “senior management.” But drawing this line is not central to the ultimate liability determination. This exhibits an important implementation advantage of this model. This model does not rely upon the murky, yet make-or-break line-drawing between whether the acts and intentions of an agent, or group of agents demonstrate an adequate nexus to the organization or not, as is the case under the MPC

highest management of X, and other “mitigating” factors that fail in reality to mitigate the culpability of the senior management of division B. This would only muddle and draw out an already complex and long trial.

²⁵⁰ See *infra* Part III.C for a full discussion of the SMMR.

²⁵¹ See *supra* notes 238–40 and accompanying text (discussing the understanding that deviance is commonly filtered down through the ranks from the most senior management).

approach and Laufer's standard of constructive fault.²⁵² Under the SMMR model, the means of establishing this nexus is simplified, yet is equally, if not more effective. Even if misconduct is focused among a group of lower-ranked agents, or committed by an individual in a position toeing the line of senior management, instead of engaging in the unnecessarily painstaking task of drawing this line to attribute an agent's mental state (under the MPC) or move to the corporate mens rea analysis (under Laufer's constructive fault), the senior management group can always be modified to provide some body of individuals that can be examined for the requisite culpability. It will be undeniably advantageous to the prosecution if an individual heavily involved in the misconduct qualifies as a member of senior management. But under the SMMR, this hair-splitting qualification will never take precedence over the ultimately dispositive analysis of organizational culpability. Avoiding this unnecessarily convoluted line-drawing exemplifies one of the core utilities of this standard.

B. Senior Management Action

Requiring the factfinder to draw the arbitrary distinction as to whether or not specific conduct is reasonably attributed to the organization is neither practical nor necessary. Laufer's analysis in making this determination focuses on the strength of the agent-entity relationship.²⁵³ The reliance on this relationship makes sense: the stronger the relationship between the agent and the entity, the more the agent's actions reflect the culture, policies, and procedures of the organization and, in turn, the more just it is to hold the organization liable for the agent's conduct. This principle has long been embodied in the MPC's high managerial agent standard,²⁵⁴ and should maintain its place in the liability determination. The jury, however, should not have to wade through the universe of organizational variables contributing to an organization's "authorship" of its agents' actions. A more workable standard for deriving organizational action is reached, somewhat ironically, with inspiration from the respondeat superior standard in its broad, seemingly catch-all state.²⁵⁵ Under the

²⁵² See MODEL PENAL CODE § 2.07(1)(c) (1962) (requiring that the offense be "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"); *supra* Part II.C (describing Laufer's standard requiring a finding of corporate action, which must be derived from the balancing of a number of organizational factors to determine the relationship between the agent and the entity).

²⁵³ See LAUFER, *supra* note 4, at 73 ("The reasonableness test looks to the relationship of the agent to the entity to determine [attribution].").

²⁵⁴ See *supra* Part I.A for a discussion of the MPC standard.

²⁵⁵ Due to progressive expansion of the reach of respondeat superior, it essentially catches

suggested standard, *a corporation is presumed to have acted through its senior management where any agent, or any group of agents, performs the illegal activity while carrying out a job-related activity, except where the agent or agents engage in illegal acts in which the corporation is an intended victim of the activity for an exclusively personal benefit.* While inspired by respondeat superior, this broad standard mends some of its flaws. It first removes the unnecessary, hair-splitting distinction between what is and is not within an agent's scope of employment. In determining whether an agent was acting within his authority while perpetrating the illegal act, both sides will present evidence as to the company's express and implied policies, coupled with evidence of toleration, ratification, or encouragement of the activity to prove that the agent was or was not acting within the scope of his authority. This is precisely the type of evidence that will be presented to prove the SMMR. So principles of authority are implicitly embodied in the senior management culpability analysis.²⁵⁶ As long as the corporation meets the required mental state through an analysis of its genuine organizational culpability, it is appropriately held liable for the actions of its agents, so a strict analysis of the agent's authority is superfluous. Additionally, this standard disposes of the problematic "for the benefit of the corporation" with which courts have consistently struggled.²⁵⁷ And similar to the "scope of employment" element, a corporate benefit will be impliedly considered in determining the SMMR in certain circumstances; specifically, it will be considered where senior management pressures influence agents' deviance. However, the corporate victimization

all acts committed while carrying out a job-related activity regardless of any real benefit to the corporation. *See Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962) ("There have been many cases . . . in which the corporation is criminally liable even though no benefit [to the corporation] has been received in fact."); *Developments, supra* note 77, at 1250 (arguing that the scope of employment requirement has evolved to mean "little more than that the act occurred while the offending employee was carrying out a job-related activity").

²⁵⁶ In response to critics' claims that a liberal interpretation of the "scope of employment" element is required to prevent corporations from avoiding liability through an express prohibition on all illegal activity by the board of directors, Bucy asserts that the corporate ethos standard does not disregard the "scope of employment" requirement, but instead, "is a rigorous application of this requirement. If the ethos of the corporation encouraged the agent to commit the illegal conduct, the agent's acts are within her de facto authority. If the corporate ethos did not encourage her acts, they are outside her authority." Bucy, *supra* note 36, at 1148-49.

²⁵⁷ *See id.* at 1149 ("Even if courts wanted to stringently impose this requirement, it is unclear how they could. It seems impossible to apply literally. For example, if an employee takes bribes for favors to corporate customers, has the corporation benefited? If so, how do the courts measure the benefit? Do the disadvantages, such as poor relationships with other customers, a criminal conviction, detrimental publicity, internal dissension, and poor morale, outweigh the benefit?").

limitation quickly disposes of cases in which the agent targets the corporation exclusively for his personal benefit.²⁵⁸

Finally, this standard for determining corporate action is an improvement over Laufer's objective reasonableness analysis. Like Laufer's standard, the presumption of senior management action involves the finding of a "constructive corporate act"²⁵⁹ because it derives corporate action from senior management's development and implementation of organizational policies, procedures, and strategy, its delegation of authority, and its general management and oversight of corporate operations. But this standard removes the risk that judges and juries will stumble over the development and implementation of a flexible (and likely bendable and breakable) factor-driven reasonableness test to derive corporate action. Instead of requiring the factfinder to undertake an entirely unfamiliar inquiry into the "size, complexity, formality, functionality, decision-making process, and structure of the corporate organization"²⁶⁰ to determine whether it is reasonable to derive corporate action, their efforts should focus on determining whether the agent's actions and the surrounding circumstances demonstrate the required level of culpability. At the end of the day, the organization only acts through its agents,²⁶¹ so these acts should be treated as those of the corporation until it proves that it is not culpable for them. Without compromising the substantive merits of the consideration of the organizational variables contributing to genuine corporate culpability, which will be considered by a jury armed with a more concrete senior management perspective, this model of corporate action provides a more workable approach assuring that liability will not be dismissed without due consideration of culpability as a result of an unduly complex standard for determining corporate action.

C. *The Senior Management Mens Rea*

Under the SMMR, if the presumption of senior management action is established, the factfinder must then determine the existence or nonexistence of a concurrent mental state. The SMMR model builds

²⁵⁸ Clinard and Yeager refer to these such cases, where "a corporate official . . . gains a personal benefit in the commission of a crime against the corporation . . ." as occupational crime, not corporate crime. CLINARD & YEAGER, *supra* note 8, at 18.

²⁵⁹ Laufer refers to action and intention under his model of constructive corporate fault as "constructive corporate action" and "constructive culpability." LAUFER, *supra* note 4, at 77.

²⁶⁰ *Id.* at 72.

²⁶¹ See 1 WILLIAM MEAD FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5 (2006 & Supp. 2011) (noting that one of the "distinguishing characteristics of a corporation" is that it "is capable of acting through . . . its agents . . .").

from the proposed schemes of genuine organizational culpability, drawing its primary inspiration from Laufer's incorporation of these principles into the Model Penal Code mental states.²⁶² The SMMR liability determination is made by considering *whether senior management, considering individual subjective knowledge and reasonable inferences of culpability using circumstantial evidence derived from facts and circumstances manifesting independent organizational culpability, acted with purpose, knowledge, recklessness or negligence with respect to the corresponding acts and attendant circumstances required for conviction in the relevant statute.*²⁶³ Using the understanding of independent organizational culpability and the implementation-based necessity of the incorporation of graded mental states, this standard adds an additional implementation advantage through its focus on a tangible body of individuals against which to consider evidence.

The model borrows, in large part, Laufer's marriage of the corporate agents' subjective knowledge and objective manifestations and reasonable inferences of organizational culpability.²⁶⁴ The underlying goal of this standard mirrors that of constructive corporate fault—"[to] search . . . for the best possible estimation of a corporate mental state through actual knowledge, as well as through reasonable inferences."²⁶⁵ But it does so in a more practical manner by shifting away from Laufer's idealistic assumption that judges and juries can wade through the complexities of the corporate form to make consistent, well-reasoned objective determinations as to the mental state of the abstract corporate "person." Under SMMR, the estimation of the corporate mental state is reached through an examination of the actual knowledge of senior managers and the use of factors contributing to organizational culpability as circumstantial evidence of their culpability. The SMMR analysis will use, in large part, the general organizational variables and examples of evidence probative of the respective levels of corporate culpability in the existing conceptualizations of genuine organizational culpability.²⁶⁶

²⁶² See *supra* Part II.C for a discussion of current proposed models of genuine organizational culpability.

²⁶³ The respective grades of culpability maintain the MPC definitions of the respective grades of culpability. See *supra* notes 215–19 and accompanying text (purpose); notes 220–23 and accompanying text (knowledge); note 224–29 and accompanying text (recklessness); note 230–32 (negligence).

²⁶⁴ See LAUFER, *supra* note 4, at 72 (describing the use of subjective and objective inquiries into corporate culpability under Laufer's model of constructive corporate fault).

²⁶⁵ *Id.*

²⁶⁶ See *id.* at 84–85 (summarizing the organizational variables and examples of evidence proving the respective constructive mental states under Laufer's model of constructive corporate fault). Other examples of aggravating and mitigating evidence of culpability are summarized in

The strong underpinnings of the use of objective, reasonable inferences and approximations under this model bear further emphasis. An exclusive reliance on the individual, subjective culpability of senior managers, aside from being nearly factually impossible, would compromise the merits of the standard. Laufer defends the use of objective approximations of intent on the basis that it is difficult, if not impossible, to derive a mental state by focusing on individuals' subjective thought processes using direct evidence.²⁶⁷ But this difficulty is commonly overcome in the context of criminal law through the use of reasonable inferences:

We are accustomed to this burden, however, and so do not easily realize that, truly, direct proof of intent is impossible and *we have simply become comfortable with approximations* that do not overcome the impossibility of our task. . . . However, our inability to directly prove intent does not cause us to reject the entire concept, or given sufficient circumstantial evidence, to question whether the factfinders have accurately deduced a person's intent.²⁶⁸

When framed against the criminal law's attempts at the factually impossible, it is evident that the suggested use of approximations to ascertain the "mental state" of a group of management is not a departure from principles of individual subjective determinations of mens rea, but instead, a continuation of the practical necessity of balancing aggravating and mitigating circumstantial evidence to reach a comfortable estimation. Accordingly, the SMMR model gives the factfinder the flexibility to consider senior management's mental state with reference to circumstantial evidence using the body of factors contributing to organizational culpability. This, in turn, enables a reasonable approximation as to whether senior management acted purposefully, knowingly, recklessly, or negligently. Thus, the use of objective inferences to deduce a SMMR gives full effect to the consideration of the organizational variables contributing to independent organizational culpability.

the discussion of Bucy's corporate ethos standard, *supra* text accompanying notes 125–30, and in the summary of the factors which prosecutors are urged to consider before seeking an indictment of an organization. See *supra* note 154 and accompanying text.

²⁶⁷ LAUFER, *supra* note 4, at 87 (“[O]ne primary rationale for resorting to reasonableness judgments in determining culpability . . . is the difficulty, and sometimes impossibility, of establishing subjective mental processes by direct evidence.”).

²⁶⁸ Bucy, *supra* note 36, at 1178 (emphasis added).

The aim of SMMR is, of course, a close estimation of the organization's mental state—it is an approximation of senior management's culpability as a body, and thus will not reflect a perfect assessment of every senior manager's individual culpability. Accepting this imperfection is crucial to properly implementing this model. Certainly, proof of culpable mental states among those individuals in the highest ranks of an organization will weigh heavily in the culpability assessment because those individuals bear the closest nexus to the will of the organization.²⁶⁹ Similarly, the scope of the culpability analysis will be necessarily focused where deviance is focused in a division of the organization which is directly overseen by a concentrated group of senior managers or where misconduct is actually committed by such a group.²⁷⁰ But courts must be careful to avoid falling into the constraints inherent to the strict imputation of individual mental states by maintaining the central understanding of this model—culpability of individual agents, in many instances, is only a piece of the SMMR and is not a prerequisite to its finding. Accordingly, the presence of evidence aggravating the culpability of senior management, and ultimately the organization, inevitably will not speak to the subjective mental state of every involved senior manager with respect to the deviance.

For example, assume that agents in middle management commit a fraud, and the prosecution seeks to prove knowledge of the acts on the part of twenty senior managers. The central evidence of senior management's knowledge is that five senior managers responsible for the oversight of the subordinate agents appeared to turn a blind eye or failed to properly enforce controls preventing the misconduct of subordinates, and that the corporation exhibited a history of similar misconduct. Not every manager tolerated the misconduct, and it is possible that not every manager even knew that his or her colleagues tolerated the misconduct, or knew of the history of deviance. Although this is a simplified example, it would not be inappropriate for a jury to reasonably infer, considering these failures within the ranks of senior management, taken in light of management's general responsibility to be informed of and control the conduct of

²⁶⁹ See *supra* notes 30–33 and accompanying text (supporting the Model Penal Code's use of the high managerial agent standard) and Part III.A (describing the tight relationship between top management and corporate deviance). For example, it may, in many circumstances, be appropriate to convict a corporation where the Chief Executive Officer, or a similarly senior officer, alone engages in the misconduct with the required mental state because that individual is so closely connected with the organization, and is so representative of "senior management" that his actions and intentions are appropriately attributed to the organization.

²⁷⁰ See *supra* Part III.A for a discussion of the justifications for this ability to narrow the focus to the group of senior management most closely connected to the deviance.

subordinates, that senior management acted with knowledge through, among other potential factors, its toleration, lack of oversight, failure to implement proper controls, and express or implied pressures on subordinates.

The core utility of the SMMR approach over Laufer's model stems from judges' and juries' abilities to think about the corporate "mental state" of a body of individuals who are capable of forming mental processes, rather than of a corporation. To presume that the courts, and more questionably, jurors, will truly be able to accept and analyze the corporation, an intangible, abstract entity, as an independently thinking "person" amenable to the application of a mental state, is simply too far of a logical leap. Even if courts can overcome this cognitive barrier, to also assume that the factfinder can wade through the expanse of culpability evidence, considering the differences in size, complexity, and functionality of organizations, to come up with consistent determinations as to whether intangible entities acted purposefully, knowingly, recklessly, or negligently is an even further stretch. At the end of the day, it is easier to think about the thought processes of a group of individuals making decisions for the organization, and to ascribe a mental state to that group, than it is to do the same of the elusive abstraction that is the corporate person. By shifting the task to making an SMMR determination, the jury is armed with a more familiar perspective against which to approximate a mental state, a body of tangible, thinking, decision making individuals.

At the same time, this shift maintains the other substantive and implementation advantages of Laufer's model. It avoids the overinclusiveness of vicarious liability²⁷¹ by considering genuine organizational culpability. This culpability is understood by focusing on the subjective culpability of senior managers bearing a close relationship to the action and intention of the organization, and by the use of the accepted factors contributing to organizational culpability as circumstantial evidence of senior management's mens rea. On the other hand, it skirts the underinclusiveness²⁷² by avoiding reliance on individually culpable agents. Further, SMMR is an improvement over the courts' attempts at aggregating individual pieces of culpability under the collective knowledge doctrine,²⁷³ which neglects a proper consideration of the agent-entity relationship and of the expanse of

²⁷¹ See *supra* Part I.B.6 (discussing the over- and underinclusiveness of the current scheme).

²⁷² See *id.*

²⁷³ See *supra* Part II.B.1 (discussing the law's attempts to incorporate genuine culpability through the collective knowledge doctrine).

variables contributing to genuine organizational culpability. These substantive strengths are achieved in a model capable of integration into the standards of graded culpability used in the existing criminal law.

D. SMMR in Action

Because most of the utility of the standard over Laufer's constructive culpability model stems from its streamlined analysis and implementation, the liability results should closely match those hypothesized by Laufer.²⁷⁴ The Arthur Andersen obstruction of justice case provides a useful set of facts against which to test this model. Again, at issue was whether an Andersen agent "knowingly, intentionally and corruptly persuade[d] . . . [other Andersen employees] with intent to cause' them to withhold documents from, and alter documents for use in . . . 'regulatory and criminal proceedings and investigations.'"²⁷⁵

The conviction generally turned on Andersen's document retention procedures when the Enron accounting scandal came to a head in August of 2001. On August 14, a senior Enron accountant gave three warnings of the oncoming trouble: one to Enron CEO Kenneth Lay, one to David Duncan, the head partner of Andersen's Enron "engagement team" (the group of personnel responsible for Andersen's auditing and consulting services), and one to Duncan's supervisor and fellow partner, Michael Odom.²⁷⁶ Andersen had ample reason from the start to expect an SEC investigation due to its June 2001 SEC settlement in connection with its audit work for Waste Management, Inc., under which it was effectively placed on probation with the SEC.²⁷⁷ The Enron scandal publicly surfaced in the Wall Street Journal in late August, and the SEC promptly opened an informal investigation.²⁷⁸ By early September, Andersen had formed an Enron "crisis response" team, which included a number of high-level partners and Andersen in-house counsel, and on October 8, Andersen retained outside counsel to represent it in litigation resulting from its involvement with Enron.²⁷⁹ In early October, Odom held a

²⁷⁴ See *supra* Part II.C for a summary of the standards and an application of Laufer's constructive culpability. Again, the goal of the suggested modifications is to avoid undue complexity and the risk of improper and inconsistent application, which the author contends, may create an unnecessarily high probability of unintended liability results.

²⁷⁵ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005) (citation omitted).

²⁷⁶ *Id.* at 698–99.

²⁷⁷ Brief for the United States at 2–3, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04–368) 2005 WL 738080.

²⁷⁸ *Arthur Andersen*, 544 U.S. at 699.

²⁷⁹ *Id.*; see also Brief for the United States at 3, *Arthur Andersen LLP v. United States*, 544

training meeting with eighty-nine Andersen employees, including ten from the Enron engagement team, and informed all to adhere to the firm's document retention policy, which stated that "[i]n cases of threatened litigation, . . . no related information will be destroyed . . . [and] separately . . . that, if [Andersen] is advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed."²⁸⁰ However, Odom added: "[i]f it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable."²⁸¹

The high probability of an Enron-related investigation and litigation was expressly recognized by Nancy Temple, an Andersen in-house counsel working on the crisis response team, in notes taken at an October 9 meeting with other in-house counsel.²⁸² On October 20, after receiving a letter from the SEC to Enron notifying it that it had opened an informal investigation in August, Andersen's counsel emphasized in a conference call that the Enron crisis-response team follow the retention policy.²⁸³ After the call, Duncan met with other Andersen partners on the engagement team and advised them to ensure that team members were complying with the retention policy.²⁸⁴

Duncan's advice to stick to the retention policy fanned throughout the organization. Partners held smaller meetings with subordinates discussing the SEC investigation and confirming the need for compliance with the destruction policy to the extent that, as the government contended, "[m]embers of the Enron engagement team were instructed to make document destruction a priority."²⁸⁵

U.S. 696 (2005) (No.04-368) 2005 WL 738080.

²⁸⁰ *Arthur Andersen*, 544 U.S. at 700 n.4 (quotations and citations omitted).

²⁸¹ *Id.* at 700 (quotation and citation omitted).

²⁸² Her notes acknowledged that "some SEC investigation" was "highly probable," that there was a "reasonable possibility [that the accounting practices at issue] will force a restatement" of Enron's financial statements, and that there was a "probability of charge of violating [the injunction] in Waste Management." Brief for the United States at 3-4, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368) 2005 WL 738080 (internal quotation marks omitted).

²⁸³ *Arthur Andersen*, 544 U.S. at 700-01.

²⁸⁴ *Id.* at 701.

²⁸⁵ Brief for the United States at 7, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368) 2005 WL 738080 at *7. In fact, one Andersen partner instructed a manager that it was so crucial to clean up files because "we may be subpoenaed," and another employee stated in an e-mail to other employees that the order to destroy documents "came from a partner group and is considered VERY important." *Id.* (internal quotation marks omitted). Similar instructions went out to other offices handling Enron matters. *Id.* at 7-8.

Throughout this period, despite the inevitable litigation, Andersen continued substantial destruction of electronic and paper documents. On one occasion, a fellow Andersen partner warned Duncan of the impropriety of continued destruction, and on another, during a meeting with a forensics investigator concerning his document retention practices, Duncan shredded a document labeled “smoking gun” stating “we don’t need this.”²⁸⁶ At trial, the government produced an exhibit depicting the time and quantity of documents shredded at the Andersen’s main Houston office, showing that destruction remained relatively steady throughout the time during which the Enron turmoil surfaced, but spiked five-fold on October 25.²⁸⁷ Finally, on November 9, Duncan’s secretary circulated an email stating that Andersen had been served a subpoena for records, and per Duncan’s instruction, there was to be no further shredding.²⁸⁸

Under the senior management model, the required senior management action is present. Again, a corporation is presumed to have acted through senior management where any agent, or group of agents has performed an illegal activity while carrying out a job-related function except where the corporation is the intended victim of the conduct. The actions of the Andersen agents involved were clearly not undertaken with personal benefits in mind, but instead, to stick to protocol, or more likely, to cover Andersen’s tracks.

The mens rea analysis under these circumstances reflects the pragmatic advantages of the SMMR model over the strict imputation standard used at trial and in the subsequent appeals. A conviction under the current liability scheme required the government to prove that one of the agents involved knowingly and corruptly persuaded others to engage in document destruction, which under the Supreme Court’s statutory interpretation, required consciousness of the wrongdoing.²⁸⁹ Aside from the difficulties presented by this interpretive issue, the jury initially battled the dilemma as to its ability to convict based on a “patchwork verdict”—that is, a conviction reached where the jurors “agree that the accused has done something illegal,” but can reach no consensus on a single agent possessing the requisite mental state.²⁹⁰ The SMMR model avoids the difficulties

²⁸⁶ *Arthur Andersen*, 544 U.S. at 701 n.6 (internal quotation marks omitted).

²⁸⁷ *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 286 (5th Cir. 2004), *rev’d*, 544 U.S. 696 (2005).

²⁸⁸ *Arthur Andersen*, 544 U.S. at 702.

²⁸⁹ *See id.* at 705–06 (holding that because the “natural meanings” of the terms “knowingly” and “corruptly” are “normally associated with awareness, understanding, or consciousness” that “[o]nly persons conscious of wrongdoing can be said to ‘knowingly [and] corruptly persuad[e]’”).

²⁹⁰ Stacey Nuemann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the*

presented by the individualistic constraints of respondeat superior. Instead of chasing the subjective culpability of an individual agent, the jury would consider Andersen's culpability from the broader perspective of senior management, as a group, using the subjective knowledge of those senior managers tied to the misconduct, as well as evidence of other organizational variables aggravating and mitigating senior management's culpability.

The first step in the analysis is to frame the representative senior management group. Although the extent of agents involved and the precise responsibilities of each individual is not clear from the reported facts, it is likely that the presentation of evidence would focus heavily on the involvement of Duncan, Odom, and Temple, all of whom appear to satisfy the definition of senior management due to their high-level, apparently supervisory responsibilities, and who were closely involved with document retention procedures. In addition, the testimony of other senior partners and sufficiently senior agents involved with the Enron matter, up to the highest-ranked Enron executives, would be presented in attempts by the prosecution and defense to respectively aggravate and mitigate the evidence of senior management's knowledge of the corrupt persuasion. But based on the facts at hand, the actions and intent of Duncan, Odom, and Temple would be the most prominent in the SMMR determination.

The case likely presents circumstances worthy of a conclusion that senior management acted to knowingly persuade Andersen employees to obstruct justice. Because a conviction is possible absent proof of an individually culpable agent, the jury would consider the organization's urgency to continue extensive document destruction, which was unarguably triggered by senior management's awareness of the imminent investigation. Certainly, a jury would heavily weigh the actions of Duncan, Odom, and Temple due to their close nexus to the deviance. The jury could also more broadly consider the actions and intentions of senior management as the turmoil escalated to be at a level roughly approximating knowledge that an investigation and litigation was on the horizon. The jury could further assume that its instructions were rooted in corrupt motives given its knowledge that Andersen would soon be under investigatory scrutiny. The prosecution would likely attempt to aggravate the SMMR by presenting management's involvement in the recent Waste Management litigation to prove its knowledge of the importance of document retention during the early stages of investigation as a means

to demonstrate that management knew it was attempting to cover Andersen's tracks as soon as the scandal surfaced. Finally, the prosecution could point to the company's failure to have adequate controls in place to ensure document retention as further aggravating evidence. This culpability can be traced all the way up to the most senior levels of management, because executives were certainly aware of the imminence of the Enron turmoil and at least had to have raised an eyebrow at or turned a blind eye to management's relentless document shredding, and thus failed to use their authority to ensure proper retention. Accordingly, even assuming the lack of required knowledge on the part of any individual agent as determined by the Supreme Court, it would be proper for a jury to hold that senior management acted knowingly.

The model is equally applicable and effective on a smaller scale. Recall, for example, *Life Care Centers*,²⁹¹ in which a nursing home was prosecuted for involuntary manslaughter arising from a patient's falling death which occurred because an administrative employee accidentally removed a physician's order from the patient's charts which said that the patient was required to wear a security bracelet preventing her from leaving the building on her own. The employee mistakenly removed the bracelet based on a misinterpretation of the nursing home's director's instructions to "clean up" the treatment charts.²⁹² On the night of the death, the decedent's unit was short-staffed, so a replacement nurse, unfamiliar with the decedent's course of treatment, did not check for the bracelet because of the absence of the order in the patient's treatment charts and because the replacement nurse was not otherwise informed of the omission by the patient's regular nurses.²⁹³

In this instance, as will be typical under this model, corporate action is present due to the lack of victimization of the organization. Involuntary manslaughter under Massachusetts law would require a reckless SMMR as to the patient's death.²⁹⁴ It is unclear from the facts just how far down the ladder the representative senior management group would extend in this case, but it is likely that those individuals relevant to the analysis will include the nursing home director, and potentially any other senior administrators or

²⁹¹ Commonwealth v. Life Care Ctrs. of Am., Inc., 926 N.E.2d 206, 208 (Mass. 2010).

²⁹² *Id.* at 209.

²⁹³ *Id.* at 210.

²⁹⁴ See *id.* at 212 ("Conviction of involuntary manslaughter requires more than negligence or gross negligence The act causing death must be undertaken in disregard of probable harm to others in circumstances where there is a high likelihood that such harm will result.") (citations omitted).

nurses exercising policy and procedure making discretion. In this case, the prosecution would focus its proof of recklessness on senior management's failure to implement adequate policies and procedures relating to the management of patients' charts, staffing, and communication with nurses in a manner demonstrating deliberate indifference to a substantial risk of harm to the patient.²⁹⁵ The absence of policies and procedures for the management and cleanup of medical charts would be a significantly aggravating factor. This absence would further raise culpability if there had been instances of similar mishaps involving medical charts causing patient mistreatment in the past. The prosecution could bolster its argument for a reckless SMMR by focusing on the short-staffing if this decision can be traced back to senior management, especially if there is a history of similar staffing decisions. Finally, because the nursing home director was so closely tied to the medical chart misstep, the prosecution may rely heavily on his manner of delegation as a source of deliberate inattention to a substantial risk of harm due to his extremely general instructions given to an individual apparently unfamiliar with proper chart management. There is no precise recipe for the number and strength of these and other pieces of aggravating evidence required to support a conclusion of recklessness on the part of senior management. But armed with the definition of recklessness and a body of individuals against which to consider the relevant actions and omissions, a jury could weigh the substantiality of the risk taken to reach a reasoned estimation as to whether senior management acted recklessly with respect to the patient's death.

CONCLUSION

The corporate criminal law's adherence to individualistic standards of vicarious liability, imputing the mens rea of individual corporate agents, is unjustifiably defective. The current liability scheme's failure to consider the independence of individual and organizational culpability has created an unnecessarily large risk of over- and underinclusive application of the criminal liability to organizations. Distinct, genuine organizational culpability has long been acknowledged, but has only been incorporated, albeit inadequately, into the criminal law through federal prosecutorial and judicial sentencing guidelines. Under the present model, the corporation is essentially strictly liable in the eyes of the law, and only able to defend itself at the indictment and sentencing stages. At that point

²⁹⁵ Evidence of this nature was not presented in the Court's summary of facts, likely due to its irrelevance to the analysis, the prosecutions failure to raise it at trial, or its absence entirely.

prosecutorial and judicial discretion reign free, permitting the government and judges to flexibly consider the organization's actual culpability in the offense using a malleable group of factors, many of which focus on the organization's post-offense conduct. Although generally substantively sound, the foremost proposals for incorporating genuine organizational culpability into liability standards exhibit implementation-related flaws risking unintended liability results, compromising their normative merits. Building from the substantive wisdom of these proposals, the proposed SMMR approach ensures the consideration of genuine organizational culpability in a framework that can be seamlessly integrated into the graded culpability scheme of our criminal statutes, and, using the familiar humanistic perspective of "senior management" courts and juries may consistently implement, understand, and apply.

GEORGE R. SKUPSKI[†]

[†] J.D. Candidate, 2012, Case Western Reserve University School of Law.