



P E R S P E C T I V E

Time to Rethink Corporate Criminal Liability

BY GREGORY L. DISKANT

Corporations may be among the mightiest institutions in the land, but no matter how powerful, they are essentially powerless to defend against criminal charges when one of their employees commits a crime. At the same time, a criminal conviction is a draconian event for a corporation, sometimes amounting to a corporate “death knell.” The result is that corporations are at the mercy of prosecutors, whose demands—reasonable or overzealous—must largely be obeyed. That creates an unhealthy imbalance in our system.

While some have advocated tinkering with what are ultimately peripheral issues of prosecutorial power, the root cause of the imbalance is the ease with which the law imputes guilt to a corporation, stripping the corporation of many otherwise reasonable defenses. This is the hoary doctrine of respondeat superior, the law in every circuit. It is respondeat superior that makes a company guilty if a crime was committed by any employee acting in the scope of employment with at least a partial motive to benefit the corporation. In civil cases, the rule makes sense. But should the same analysis establish criminal liability? As the chair of any public company will ruefully attest, there will always be occasions in which some company employee will commit a crime and a company can do only so much

to prevent that. Why should a company be held liable for a crime when its senior management did not authorize or ratify the offense? Why should a company be held liable for a crime when it had a clearly stated and vigorously enforced policy against such misconduct?

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Thinking about these questions begins by stripping away a false premise. Many lawyers believe that the U.S. Supreme Court held long ago, in *New York Central Railroad v. United States*, 212 U.S. 481 (1909), that corporate criminal liability was governed by respondeat superior. But, in fact, that decision stands for a far narrower proposition. In *New York Central*, the Court evaluated a specific statute, the

Elkins Act, and found that Congress could enact a corporate criminal statute based on the rule of respondeat superior, that Congress has the power to enact a statute utilizing civil rules to determine corporate criminal liability.

But in the century that followed, Congress has not generally exercised this power. It has enacted criminal laws that penalize acts by any “person” or “whoever” without elaboration. Congress intended those terms to include corporations, 1 U.S.C. §1, but it provided no guidance on how to determine which acts of which natural persons should be imputed to the artificial “person” of the corporation for purposes of determining corporate guilt. Instead, Congress left that issue to the courts.

In decisions mostly handed down over half a century ago, the circuit courts have uniformly embraced the civil rule of respondeat superior in the absence of Congressional direction. But the U.S. Supreme Court has never considered whether that is the correct standard to define a “person” in the context of corporate criminal liability, not in *New York Central*, not ever. The general federal standard for determining criminal liability by a corporation is thus an open question, one that is fair game for thoughtful advocacy and reconsideration by circuit courts that have long ignored the issue.

Model Penal Code

More recent thinking strongly supports narrowing the rule. The Model Penal Code, drafted in 1962 and adopted in 37 states, imposes two important limitations on respondeat superior. First, the Code limits those agents of the company whose acts can create criminal liability. Unless the legislature has plainly directed the particular statute at corporate crimes, the crime must be authorized, performed or “recklessly tolerated” by a “high managerial agent,” a person whose responsibilities are so high that his or her acts may fairly be assumed to represent company policy. Proposed Official Draft of the Code § 2.07(1) (1962).

Second, even if the statute is directed specifically at a corporation, an act is not deemed to be within the scope of employment if the company exercised due diligence to prevent its commission. *Id.* at § 2.07(5).

In recent years, the U.S. Supreme Court has often looked to the Model Penal Code to support its interpretation of federal criminal statutes. E.g., *Salinas v. United States*, 522 U.S. 52, 64-65 (1997). Moreover, in somewhat similar contexts, the Court has recognized the soundness of the particular limitations contained in the Code.

Consider, for example, the limitations the Court has placed on punitive damages, which are “quasi criminal” in nature. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). The Supreme Court long ago held that “[a] principal . . . cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.” *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101, 107 (1893). Rather, for a corporation to be punished for the acts of its agent, “the criminal intent, necessary to warrant the imposition of such damages, [must be] brought home to the corporation.” *Id.* at 111. That requires evidence of wrongful intent by a person, like

the president or vice president, who is “so far representing the corporation and identified with it” that his or her wrongful intent “may be treated as the intent of the corporation itself.” *Id.* at 114. This analysis is much like the Model Penal Code’s focus on the acts of a “high managerial agent,” and it makes even more sense applied to criminal liability than to punitive damages.

Compliance Efforts

Likewise, the U.S. Supreme Court has recognized the importance of considering a corporation’s compliance efforts in assessing whether an employee’s act is within the scope of employment. In a series of Title VII cases, the Court focused on whether to hold a corporation liable for employee conduct that is contrary to a clearly stated and rigorously enforced company policy. The Court noted that the “primary objective” of Title VII, “like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). “It would therefore implement clear statutory policy and complement the Government’s Title VII enforcement efforts . . . to give credit here to employers who make reasonable efforts to discharge their duty.” Based on this reasoning, the Court created an affirmative defense in certain Title VII actions, much like the Model Penal Code “due diligence” defense, allowing employers to prove that they exercised “reasonable care” to prevent and correct offenses. *Id.* at 807.

Statutory Policy

Recent statutory developments support reading the federal criminal code to imply such a defense. There is “clear statutory policy,” in the Sarbanes Oxley Act, the Sentencing Guidelines and elsewhere, that public corporations should have active compliance programs and, more importantly, that compliant corporations should be spared some or all criminal

liability. It would implement that policy, and complement law enforcement to provide corporations charged with crimes a due diligence defense based upon an effective compliance program.

If these principles were adopted as the federal standard for corporate criminal liability, individual employees could still be prosecuted when they commit crimes. Corporations would still be liable for civil damages arising from the misconduct of their employees committed in the scope of employment. But a criminal conviction would be reserved for true corporate malefactors—those where top executives authorized or approved the crime, or where there was no adequate program in place to prevent or correct it. There would be greater balance in relative power of prosecutors versus corporations. And the public would benefit from greater emphasis on corporate compliance programs, potentially preventing more crimes than any government prosecutions.

Gregory L. Diskant is a partner at *Patterson Belknap Webb & Tyler LLP* and a former federal prosecutor. *Geoffrey Brounell*, a student at Harvard Law School, provided research for this article. The ideas discussed here were presented as part of a panel discussion in Chicago on July 17, 2007 before the Civil Justice Reform Group.