CARING ABOUT CORPORATE "DUE CARE": WHY CRIMINAL *RESPONDEAT SUPERIOR* LIABILITY OUTREACHES ITS JUSTIFICATION

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Introduction

Respondeat superior liability permits the criminal prosecution of a corporation for the crimes of its employees absent proof of corporate ratification or involvement of corporate officers.[1] As the doctrine currently stands, a corporation may be held criminally responsible for conduct that it specifically prohibited and that its employee went to great lengths to conceal. Evidence that a corporation took all reasonable steps to prevent the misconduct through a robust compliance program, for example, is simply irrelevant to the question of liability.

Courts have justified criminal respondeat superior on the grounds that it "increase[s] incentives for corporations to monitor and prevent illegal employee conduct."[2] This reasoning assumes that imposing broad liability and dire sanctions on corporations for their agents' actions will prompt them to take steps to prevent the illegal conduct in the first instance, thus reducing the risk that employees will offend.

Although this justification is compelling, it leaves important practical questions unaddressed. For example, is there any evidence that criminal burden-shifting will result in an economically efficient investment in compliance? What is the likelihood that the risk of being terminated will deter an employee who is prepared to run the risk of criminal prosecution? While these questions have gained increased attention in recent years, the statistical data is simply lacking.[3] We propose instead to examine the doctrine of respondeat superior and the limits on liability that necessarily flow from it. That review leads inexorably to the conclusion that we have

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1. *See* RESTATEMENT (SECOND) OF AGENCY §§ 217, 219(1) (AM. LAW INST. 1958).

2. United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

3. To be sure, data regarding the practical, empirical effect of criminal respondeat superior liability on corporate compliance efforts and effectiveness remains inconclusive. For a discussion of various impediments to robust empirical measurements of corporate compliance efforts and effectiveness, see Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 114 (2002); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U J. L. & BUS. 965, 970, 974 (2018).

embraced the rule's application in the criminal law while forgetting the logic of its deterrence-based rationale. Put simply, holding corporations strictly liable for employee wrongdoing in circumstances in which the corporation has taken all reasonable precautions to deter it—thus demonstrably satisfying the doctrine's *raison d'etre*—shifts liability on "risk spreading" or "deep pocket" principles.

Indeed, risk-spreading principles are often advanced as justifications for respondeat superior liability. But whereas the compensatory goals served by risk-spreading principles of liability constitute the bedrock of civil tort law,[4] they are ill-suited to the criminal law, where liability is, at its heart, based on culpability.[5] Thus, if we assume the only appropriate justification for criminal respondeat superior liability is to ensure that corporations exercise an appreciable level of "due care" in monitoring their employees, then, *a fortiori*, corporations that *can* demonstrate having taken such preventative measures should not be held vicariously liable.

Having gone to great lengths solidifying and expanding the scope of corporate criminal liability, the Supreme Court would appear to be an unlikely critic of criminal respondeat superior.[6] And yet, despite the doctrine's almost sacrosanct status in the civil law, the Court's decisions in a series of Title VII cases suggests a growing readiness to question the appropriate scope of respondeat superior where the underlying law seeks to deter certain conduct.[7] Reasoning that Title VII's primary purpose is not to provide victim compensation, but rather to encourage employer efforts to deter discrimination and harassment, the Court has consistently rejected the usual rule of respondeat superior in this context. Instead, it limited the scope of the doctrine to allow for consideration of an employer's efforts to prevent these civil harms.[8] Moreover, the Court later confirmed the propriety of limiting respondeat superior liability to bring it in line with Title VII's deterrence rationale where punitive damages are at stake.[9]

Congress's creation of control person liability in the federal securities laws also evinces a certain degree of discomfort with respondeat superior's purported

4. RESTATEMENT (SECOND) OF TORTS § 901 (AM. LAW INST. 1979) ("[T]he purpose[] for which actions of tort are maintainable . . . are . . . to give compensation, indemnity[,] or restitution for harms."); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 20 (5th ed. 1984); WALTER H. BECKHAM JR. ET AL., ABA SPECIAL COMM. ON TORT LIABILITY SYS., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4–29 (1984) (denoting compensation as "one of the main announced goals of tort law").

5. *See* John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1330 (2009).

6. *Sun-Diamond Growers of Cal.*, 138 F.3d at 970, *aff'd*, 526 U.S. 398 (1999) (holding requirement that employee act for the corporation's benefit satisfied so long as some potential benefit can be inferred, even if the conduct causes substantial harm to the corporation); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004–07 (9th Cir. 1972) (upholding imposition of strict vicarious liability where employees act contrary to express corporate policy).

7. Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).

8. *Faragher*, 524 U.S. at 780; *Burlington*, 524 U.S. at 765.

9. *Kolstad*, 527 U.S. at 545.

deterrence justification. Under the control person theory of liability, covered individuals and institutional actors are exempted from vicarious liability so long as they did not induce the securities violation and can prove having acted in "good faith" with respect to the misconduct.[10] "Good faith" in this context constitutes precautionary measures to prevent the agent's violation according to a majority of courts,[11] with the minority view requiring only absence of culpable participation in the misconduct.[12] Indeed, Congress refrained from explicitly supplanting the common law doctrine where control person liability applies. But Congress's desire to incentivize greater supervisory control over employees through a theory of vicarious liability antithetical to respondeat superior is nevertheless pertinent to respondent superior's continued relevance and utility.

As in the Title VII and securities regulation contexts, a corporation-employer's reasonable, good faith efforts to deter employee misconduct need also be made available as a defense to otherwise unlimited, vicarious criminal liability. This is important to rectify the mismatch between respondeat superior's scope of liability and justification in the criminal law. This Article's thesis is simple and does not depend upon proof that limiting the doctrine of respondeat superior is sound policy. Rather, a "due care" defense follows directly from the core justification for the doctrine. It is compelled irrespective of whether criminal respondeat superior actually does lead to perverse or misaligned deterrence incentives.

Part I.A of this Article traces the origin and development of the respondeat superior doctrine in the United States. Central to this discussion is the Supreme Court's decision in *New York Central & Hudson River R.R. Co. v. United States*.[13] Here, the Court stretched the doctrine of respondeat superior beyond its common law roots by extending, for the first time, the concept of strict vicarious liability into the criminal law.

Part I.B examines historical and modern justifications advanced in support of respondeat superior, with particular attention paid to the deterrence-incentivizing and risk-spreading rationales. This Part also discusses each rationale as it relates to the doctrine's application in the civil and criminal laws, respectively.

Part II.A outlines the current parameters of vicarious criminal liability and the extent to which employers may be held liable for an employee's misconduct. This Part also discusses the impact, if any, that lack of "fault" on the part of the corporation has on its broad vicarious liability exposure. Relatedly, Part II.B highlights some practical consequences of a criminal respondeat superior regime given the realities of our modern corporate prosecutorial system. It is, however, cognizant of the speculative nature of these observations absent robust empirical research.

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10. *See* 15 U.S.C. § 78t(a) (2011); 15 U.S.C. § 77o(a) (2010).

11. *See, e.g.*, G.A. Thompson & Co., Inc. v. Partridge, 636 F.2d 945, 959 (5th Cir. 1981).

12. The Second, Third, and Fourth Circuits hold this view. *See, e.g.*, SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1472–73 (2d Cir. 1996); Sharp v. Coopers & Lybrand, 649 F.2d 175, 185 (3d Cir. 1981); Carpenter v. Harris, Upham & Co., 594 F.2d 388, 394 (4th Cir. 1979).

13. 212 U.S. 481, 495–96 (1909).

Part III comprises this Article's central argument: criminal respondeat superior liability outreaches its justification. Part III.A asserts that the deterrence policies espoused as justification for criminal respondeat superior liability necessarily define the limit of liability at proof of the corporation's due care efforts to prevent employee misconduct. Part III.B goes on to demonstrate how alternate justifications for respondeat superior—namely, risk-spreading or "deep pocket" rationales—also fail to justify the doctrine's application in the criminal law. More specifically, this Part contends that just as liability shifting serves compensatory goals well-suited to the civil law (especially tort law), the lack of any accompanying fault determination renders these justifications equally incompatible with the criminal law and the moral culpability that underlies all criminal responsibility.

Finally, Part IV argues that consideration of a corporation's "due care" efforts to prevent employee misconduct is needed to align the scope of criminal respondeat superior liability with its deterrence-incentivizing justification. As support for this proposition, this Article examines the incorporation of fault determinations into the vicarious liability regimes embraced in the Title VII and securities regulation contexts, as laid out in Part IV.A and B, respectively.

I. PRINCIPLES OF RESPONDEAT SUPERIOR LIABILITY

Under federal law and the law of many states, civil and criminal corporate liability is governed by the doctrine of respondeat superior. Rather than imposing liability on the principal corporation under a duty-based standard such as negligence, or requiring proof that the misconduct was engaged in or approved by a "controlling mind,"[14] a corporation is strictly liable for the acts of its agents committed within the scope of their authority.[15] Respondeat superior incorporates a form of secondary liability for another's actions broadly referred to as "vicarious liability."[16]

A. *Origin and Development of Respondeat Superior in Civil and Criminal Law*

Alternatively titled the "master-servant rule," the roots of respondeat superior extend as far back as ancient Rome.[17] Back then, masters were held responsible for any and all harm caused by their animals, slaves, and even family members.[18] Early English courts embraced a more limited form of the doctrine: principal-employers faced strict liability only for intentional or unintentional acts of

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14. *See Corporate Prosecutions: Legal Guidance*, CROWN PROSECUTION SERVICE, https://www.cps.gov.uk/legal-guidance/corporate-prosecutions ("In offences requiring mens rea, the directing mind must be clearly identified and their status and functions established. The required mens rea of at least one directing mind of the company must also be established.").

15. RESTATEMENT (SECOND) OF AGENCY § 219(1) (AM. LAW INST. 1958).

16. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 (AM. LAW INST. 2000).

17. Ralph L. Brill, *The Liability of an Employer for the Wilful Torts of his Servants*, 45 CHI.-KENT. L. REV. 1 (1968) (describing literal meaning of respondeat superior as "let the master respond"); *Master Servant Rule*, BLACK'S LAW DICTIONARY ONLINE, https://thelawdictionary.org/master-servant-rule/.

18. Brill, *supra* note 17, at 1.

omission, or "nonfeasance," occurring within an agent's scope of authority.[19] In other words, an employee's affirmative misconduct (or "misfeasance"), whether characterized as a violation of civil or criminal law, could not be imputed to the corporation.[20] This practice was consistent with the related notion that corporations were not capable of committing crimes with an accompanying mens rea.[21] Even when respondeat superior was confined to acts of nonfeasance, English courts still appeared uneasy about the strict liability aspect of the doctrine where punitive punishment for such misconduct was at stake: rarely were punitive civil damages for malicious, wanton, or outrageous conduct awarded absent a showing of authorization, ratification, or recklessness on the part of the employer.[22]

Courts in the United States initially followed the practice of English courts by embracing respondeat superior liability for civil torts committed within an agent's scope of employment.[23] By the end of the nineteenth century, however, the doctrine of respondeat superior expanded to include affirmative agent actions committed against the express orders of the principal, effectively doing away with the English distinction between acts of misfeasance and nonfeasance.[24] And, while continuing to shape the doctrine's application in the civil law, American courts began increasingly to disapprove of the English notion that corporations could not be held criminally liable for crimes with an accompanying mens rea.[25] Still, criminal corporate liability remained unclear throughout the nineteenth century, as there were no criminal statutes a corporation could violate.[26]

The rise of the Progressive movement at the turn of the twentieth century brought an end to corporate criminal immunity, as Congress sought to burnish the rough edges of capitalism, initially through efforts to curb monopolistic corporate

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19. *See generally* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. REV. 393, 401–21 (1982) (discussing the development of the law of corporate criminal liability in both England and America).

20. *Id.*

21. *Id.* at 401 ("[The corporation] had no mind and so it could not form criminal intent.").

22. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1566 (1990); *Brickey*, *supra* note 19, at 417 ("[*R*]*espondeat superior* was rejected during the eighteenth century. . . . Rather, the liability of each [actor was] determined by the degree of his participation.").

23. *See, e.g.*, State v. Great Works Milling & Mfg. Co., 20 Me. 41, 43 (Me. 1841) (describing how corporate criminal liability does not extend to acts of misfeasance because a corporation "can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so").

24. *See* Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411 (2007) (citing Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. 339 (1854) and State v. Morris & Essex R.R., 23 N.J.L. 360 (1852)).

25. *Id.*

26. *See* Roni A. Elias, *The Virtues of the Due Diligence Defense for Corporations in Criminal Cases: Solving the Problems of a Corporation's Vicarious Liability for the Crimes of Its Agents and Employees*, 13 GEO. J.L. & PUB. POL'Y 423, 429 (2015); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1361–63 (1999).

behavior.[27] Although legislation such as the Sherman Act created individual criminal liability for proscribed conduct typically occurring in the corporate setting,[28] Congress later considered these measures inadequate to curb corporate policy and decision-making. Accordingly, piecemeal legislation expressly imputing to corporations criminal liability for an employee's crimes were enacted to supplement existing anti-monopoly statutes.[29] One such statute was the Elkins Act of 1903, which provides that "the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall *in every case* be also deemed to be the act, omission, or failure of such carrier."[30]

Criminal respondeat superior liability as we know it today first emerged as the prevailing standard when the Supreme Court upheld the constitutionality of the Elkins Act in *New York Central & Hudson River R.R. Co. v. United States*.[31] The case involved the criminal prosecution of a railroad company for the illegal actions of its assistant traffic manager.[32] As a threshold matter, the Court found that Congress's Commerce Clause power allowed it to regulate the entities controlling interstate commerce, such as railroad companies.[33] From there, the Court extended respondeat superior into the criminal law, embracing for the first time a rule allowing the imputation of liability where employees act against the express orders of the principal.[34] In doing so, the Court eschewed without comment the English common law limitation against imputing liability for punitive damages absent proof of a corporation's authorization, ratification, or recklessness.[35] According to the Court, the principle of strict vicarious criminal liability went "only a step farther" than existing principles of civil vicarious liability.[36]

Although the *New York Central* Court recognized Congress's power to employ vicarious criminal liability as a means of regulating corporations, it was notably silent as to whether federal common law *required* this result so as to render the doctrine available even absent an express statutory directive to that effect. Over time, however, lower courts interpreted the decision as essentially mandating a strict respondeat superior rule in all corporate cases (civil or criminal), even absent

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27. Laufer, *supra* note 26, at 1361–62 (discussing early legislation aimed at preventing anti-competitive behavior).

28. *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972) ("In enacting the Sherman Act . . . it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.").

29. Laufer, *supra* note 26, at 1361–62.

30. New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 496 (1909) (emphasis added).

31. *Id.* at 481, 495.

32. *Id.* at 490–91.

33. *Id.* at 496.

34. Id. at 493.

35. *Id.* at 493–95.

36. *Id.* at 494.

statutory incorporation.[37] Unsurprisingly, this interpretation of *New York Central* continues to receive heavy criticism from defendant-corporations and legal scholars alike.[38] Still, it remains the status quo.

B. *Justifications for Respondeat Superior*

Despite universal adoption of respondeat superior as a foundation of civil and criminal entity liability, scholars have always struggled to identify and defend its precise rationale. One early theory in support of the doctrine reasoned that because the master can "control" its servants to engage in actions that "benefit" it, the employer should therefore be held responsible for the consequences of exercising control and reaping the benefits.[39] Another early theory, premised on "identifying" the employee and employer as one, rationalized employer liability "as an incentive to making [the employer] more careful in selecting competent and careful servants."[40] An alternative theory justified imposing liability on the principal as the party who placed in the employee's hands the means to commit the resulting wrong.[41]

Today, arguably more prevalent than control-benefit or deterrence-incentivizing theories are "risk-spreading" or "deep-pocket" justifications for respondeat superior, which rest on a base of broad economic and social policy.[42] These theories prioritize victim compensation and hold employers, rather than employees, responsible for compensating tort victims because they are better able to absorb and distribute the burden of victim compensation.[43] For example, corporations and employers often shift victim compensation burdens onto society through insurance, with premiums passed on to the public through slightly higher charges for the employer's product or services.[44]

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37. *See* Brief for the Association of Corporate Counsel et al. as Amici Curiae in Support of Appellant Urging Reversal, United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009) (No. 07-5801), 2008 WL 8626038, at *15–18 [hereinafter Ionia Mgmt. Brief]; *see also* United States v. Blood, 435 F.3d 612, 621 (6th Cir. 2006); United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963); Continental Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960).

38. *See* Ionia Mgmt. Brief, *supra* note 37, at *15–17 ("Lower courts have mistakenly relied on [*New York Central*] as if it instructed the trial courts that they *must* apply the least demanding respondeat superior rule in the criminal context."); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996) ("The doctrine of corporate criminal liability has developed . . . without any theoretical justification.").

39. *See* Brill, *supra* note 17, at 2.

40. *Id.* at 2 (citing 2 FREDERICK POLLACK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 530 (1898)).

41. *See* Warren A. Seavey, *Speculations as to "Respondeat Superior"*, *in* HARVARD LEGAL ESSAYS 433, 435 (1934).

42. *See* WILLIAM L. PROSSER, HANDBOOK FOR THE LAW OF TORTS 459 (West, 4th Ed. 1971); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1236 (1984); William O. Douglas, *Vicarious Liability and Administration of Risk II*, 38 YALE L.J. 720, 722 (1929); Seavey, *supra* note 41, at 450.

43. *See* Sykes, *supra* note 42, at 1236.

44. *See* 2 FOWLER HARPER & FLEMING JAMES, THE LAW OF TORTS 1363–64 (1956) ("The whole structure of our economic and business practices and institutions puts the employer in a better position than the employee to absorb and distribute these costs.").

In the modern civil tort context, respondeat superior liability is closely associated with both compensatory "risk-spreading" and deterrence-incentivizing goals, as these are the primary and secondary goals of tort law, respectively.[45] Deterrence rationales are, however, more naturally and frequently associated with negligence-based systems of liability, given the focus on incentivizing socially optimal conduct through proof of due care.[46] The opposite is true of strict liability regimes in tort law, which tend to focus on defendants' ability to bear and spread losses for victim injury.[47]

Conversely, federal courts have relied exclusively on deterrence-incentivizing theories to justify the use of respondeat superior liability in the criminal law.[48] The Supreme Court's decision in *New York Central* represented the first articulation of deterrence justifications for criminal respondeat superior liability.[49] More specifically, the Court found that rejection of such liability "would virtually take away the only means of *effectually* controlling the subject-matter and correcting the abuses" such that "many offenses might go unpunished and acts be committed in violation of law[.]"[50] Thus, according to the *New York Central* Court, importing strict vicarious liability into the criminal law was justified because it was more

45. *See, e.g.*, Stephen Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 450 (2011) ("The main purpose of tort law is to make the plaintiff whole. . . . A secondary purpose of tort law is to deter wrongful, potentially harmful conduct."); DAN B. DOBBS, THE LAW OF TORTS 19 (2000) ("Courts and writers almost always recognize that another aim of tort law [other than victim compensation] is to deter certain kinds of conduct by imposing liability when that conduct causes harm.").

46. *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523–26 (1984) (arguing that negligence liability deters by providing sanction for failure to take due care, and that damages are optimal if they equal or exceed amount sufficient to induce injurers to conform to legal standard); *see also* Bryan A. Liang, *Medical Malpractice: Do Physicians Have Knowledge of Legal Standards and Assess Cases as Juries Do?*, 3 U. CHI. L. SCH. ROUNDTABLE 59, 60 (1996) ("From a law and economics perspective, if the due care level chosen by the courts is socially optimal, then theoretically physicians will be induced to provide socially optimal due care, resulting in a system in which the provision of medical care is socially optimal.").

47. *See* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703 (1980) (acknowledging that compensation theory was "embraced enthusiastically by courts and commentators seeking to justify the development of strict products liability"); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500–01 (1961) (examining the justification for enterprise liability, the idea that an enterprise should pay for the injuries it causes); *see also* Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 156–58 (1976) (discussing the theory of enterprise liability and imposing costs on who has the "deepest pocket" or who can best distribute a loss across members of the community).

48. *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972) ("In enacting the Sherman Act . . . it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.").

49. New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909).

50. *Id.* at 495–96 (emphasis added).

efficient from an economic and law enforcement perspective to shift the burden of promoting employee-deterrence from the government to the employer.[51]

Since *New York Central*, federal courts have embraced deterrence justifications for respondeat superior in more explicit terms by arguing, for example, that such liability "increase[s] incentives for corporations to monitor and prevent illegal employee conduct."[52] Realities of our system of corporate prosecution aside, these courts embrace the theory that imposing high sanctions on corporations through liability for their agents' actions will prompt corporations to take steps to prevent the illegal conduct in the first instance, thus reducing the risk that employees will offend.[53]

Widespread adoption of these deterrence justifications for criminal respondeat superior liability is evident in our current system of corporate criminal prosecution. As Professor John Hasnas puts it, "[t]oday, it is corporate indictment that is the punishment and lack of cooperation that is the offense."[54] As support for this claim, Hasnas points to the constantly decreasing number of criminal investigations ending in indictments and convictions,[55] in comparison to the relatively high number of Non-Prosecution and Deferred Prosecution Agreements requiring cooperation with government investigations, implementation of robust compliance programs, and funding of independent monitors who keep the government apprised of the corporation's compliance with the law for a given number of years.[56] Patent in this practice is the *New York Central* Court's goal of promoting more efficient law enforcement through self-regulation, along with the Court's assumption that corporations and employers have a greater ability to monitor or otherwise control agent risk-taking than the government. What is less clear, however, is whether this practice seeks to achieve corporate self-regulation through a system of incentives—as the courts claim—or, rather, through coercion.

II. SCOPE AND IMPLICATIONS OF CRIMINAL RESPONDEAT SUPERIOR LIABILITY

Following the Supreme Court's initial extension of respondeat superior liability into the criminal law, subsequent cases both refined and solidified the *New York*

51. Hasnas, *supra* note 5, at 1349 ("This is a fairly explicit statement [by the *New York Central* Court] that the public policy interest that is being served by respondeat superior criminal liability is more effective law enforcement.").

52. *Sun-Diamond Growers of Cal.*, 138 F.3d at 971.

53. *Id.*; *see, e.g.*, *Hilton Hotels Corp.*, 467 F.2d at 1006 ("[T]he strenuous efforts of corporate defendants to avoid conviction, particularly under the Sherman Act, strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees.").

54. Hasnas, *supra* note 5, at 1354 (citing Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 OHIO ST. J. CRIM. L. 487, 496 n.30 (2004)).

55. *Id.*

56. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (Dec. 2009); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013).

Central standard. Part A discusses the current scope of vicarious criminal liability, including the impact, if any, that lack of employer "fault" has on a principal's liability exposure. Part B follows with a speculative discussion of the consequences of this liability regime given the realities of our modern corporate prosecutorial system.

A. *Scope of Criminal Respondeat Superior Liability*

The *New York Central* decision, while arguably limited to the antitrust context, spurred the development and widespread application of the respondeat superior doctrine in the criminal law. Subsequent courts rendered *New York Central's* holding a general rule: an employee's actions and mental state may be attributed to the corporation despite being in violation of contrary corporate policy.[57] They further expanded the doctrine by holding that employees need only act within the apparent scope of their authority to act on behalf of the corporation.[58] And although an additional requirement that the employee must act, at least in part, for the purpose of benefitting the corporation seemingly limited the doctrine,[59] expansive interpretation of this requirement rendered it of little use as a meaningful limitation on corporate liability. As it stands, the benefit requirement is satisfied even if the conduct causes substantial harm to the corporation, so long as a jury can infer some potential benefit.[60]

While the doctrine thus falls slightly short of strict liability, it is unequivocally a rule that does not require proof of any "fault" on the part of the corporation or, alternatively, proof that the misconduct was authorized or ratified by the corporation. Thus, even when an employee acted "against the express orders of the principal,"[61] a corporation's proof of taking all reasonable steps to prevent the misconduct in the first instance—for example, through a robust compliance program—has no bearing on its liability, either as direct or affirmative defense. In fact, the Second Circuit recently reaffirmed the limited, indirect impact of compliance efforts on a corporation's liability in holding that "a corporate compliance

57. *See, e.g.*, United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (holding that a corporate compliance program—however extensive—will not shield the company from criminal liability for its employees' actions (citing *Hilton Hotels Corp.*, 467 F.2d at 1004–07)). It is worth noting that the Ninth Circuit's decision in *Hilton Hotels*, which other circuits subsequently adopted, justified imposition of liability where employees acted contrary to corporate policy on the "the nature of Sherman Act offenses and the context in which they normally occur," specifically citing employer motivation to enhance profits and the fact that "if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized the profits from the illegal activity." JULIE R. O' SULLIVAN, FEDERAL WHITE COLLAR CRIME 167 (West, 7th ed. 2019). In discussing the justification for this expansive rule, some scholars have questioned the persuasiveness of the *Hilton Hotel* court's "supposition about what Congress would have done had it considered this issue[.]" *Id.*

58. *Hilton Hotels Corp.*, 467 F.2d at 1004 ("[L]iability may attach without proof that the conduct was within the agent's actual authority[.]").

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

60. United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd* 526 U.S. 398 (1999).

61. New York Cent. & Hudson R.R. Co. v. United States, 212 U.S. 481, 493 (1909).

program may be relevant to whether an employee was acting within the scope of his employment, but it is not a separate element."[62] In rendering its decision, the *Ionia* court side-stepped persuasive arguments urging rejection of respondeat superior liability in the face of robust compliance programs, relying primarily on the assertion that such an outcome would be "contrary to the precedent of our Circuit on this issue."[63]

That is not to say, however, that compliance programs are of no import to corporations facing broad vicarious liability exposure. Rather, the United States Sentencing Guidelines ("Sentencing Guidelines") introduced explicit provisions regarding fine and sentencing mitigation for corporations that have "effective" monitoring programs and that report violations promptly to the government.[64] Additionally, in 2008 the Filip Memorandum added to the Justice Manual, previously known as the United States Attorneys' Manual (federal prosecution policies and guidelines),[65] a list of important considerations in deciding whether to criminally charge a corporation in the first instance.[66] The additional sections to the Justice Manual provide that corporate compliance programs may, but do not necessarily, factor into the government's discretionary decision of whether to charge a company, especially when the corporation asserts that the wrongdoer-employee was a rogue.[67] The Justice Manual advises that the factors listed in § 9-28.1500 of the Manual "provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter[.]"[68] Incorporating weight for compliance into the Justice Manual and Sentencing Guidelines works to limit the consequences of a corporation's respondeat superior liability; nonetheless, these considerations stop short of requiring proof of corporate negligence or any other independent basis of what we would broadly regard as "fault."

The American approach to vicarious corporate liability is unique, and few foreign jurisdictions authorize such a broad scope of liability. English companies, for example, are held liable only for crimes carrying the requisite mens rea when the crime is committed by a person representing the "controlling mind" of the

62. United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009).

63. *Id.*

64. U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(f)(1), (2) (U.S. SENTENCING COMM'N 2018) [hereinafter U.S.S.G.].

65. Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, on Principles of Federal Prosecution of Business Organizations to Heads of Dep't Components and U.S. Attorneys (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf [hereinafter Filip Memorandum].

66. Michael Volkov, *DOJ's "Filip" Factors and Corporate Prosecutions*, CORRUPTION, CRIME & COMPLIANCE BLOG (July 9, 2017), https://blog.volkovlaw.com/2017/07/dojs-filip-factors-corporate-prosecutions/.

67. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL §§ 9-28.300, 9-28.500 (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [hereinafter JUSTICE MANUAL].

68. *Id.* § 9-28.1500.

company.[69] The English rule[70] stands in stark contrast to the American practice, which requires no mental state to hold companies liable for agent misconduct. Moreover, a number of countries, including England, Italy, Austria, and Japan, allow corporations to escape vicarious criminal liability through affirmative defenses, requiring proof of effective compliance programs, other efforts to deter employee misconduct, or both.[71] It should come as no surprise that a theory of liability as unlimited as respondeat superior creates expansive consequences for corporations, the government, and the public.

B. *Implications of Criminal Respondeat Superior Liability*

The current regime of respondeat superior liability permits the criminal prosecution of a corporation when one of its employees commits a crime within the scope of employment, but (a) in violation of every rule in the employee handbook, (b) in the face of a robust and well-functioning compliance program, and (c) only through systematic efforts by the employee to conceal the misconduct and defeat the corporation's internal controls.[72] And because firms cannot possibly eliminate *all* wrongdoing,[73] a corporation may face extinction for misconduct that occurs despite its best monitoring efforts.[74] The breadth of the respondeat superior rule potentially harms a range of innocent stakeholders, including shareholders,

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69. *See* Iwona Sepioło-Jankowska, *Corporate Criminal Liability in English Law*, 6 ADAM MICKIEWICZ UNIV. L. REV. 135, 141 (2016); *see also Corporate Prosecution: Legal Guidance*, CROWN PROSECUTION SERV., https://www.cps.gov.uk/legal-guidance/corporate-prosecutions (last updated 2017).

70. *See* Sepiolo-Jankowska, *supra* note 69, at 140–41 (explaining that England limits corporate liability to crimes that either have no attendant mental state or are committed by controlling directors and managers who "represent the directing mind" of the company).

71. *See e.g.*, Bribery Act 2010, c.23 § 7 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf; Angelo Castaldo & Giorgio Nizi, *Entity Liability and Deterrence: Recent Reforms in Italy*, 3 ERASMUS L. & ECON. REV. 1, 7–9 (2007); Gudrun Stangl, *Austria: Corporate Criminal Liability*, 24 INT'L. FIN. L. REV. 75 (2005) (discussing means to minimize the board's exposure to criminal responsibility, such as appointing representatives for security or trade, or appointing project managers to oversee "technical, organizational, and personnel measures to prevent criminal offences within the company"). *See generally* Markus Wagner, *Corporate Criminal Liability: National and International Responses*, 25 COMMONW. L. BULL. 600 (1999) (providing a general history of development of corporate criminal liability in different countries).

72. *See, e.g.*, United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (holding that a corporate compliance program—however extensive—will not shield the company from criminal liability for its employees' actions (citing United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004–07 (9th Cir. 1972)); *Hilton Hotels Corp.*, 467 F.2d at 1004 ("[L]iability may attach without proof that the conduct was within the agent's actual authority[.]"); Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 128 (5th Cir. 1962). *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (Dec. 2009); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013). See *supra* note 57 for related discussion.

73. *See* John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 DRAKE J. AGRIC. L. 305, 334 (2000) (describing statistical probability of stopping all lawbreaking within an organization).

74. *See* James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509, 521–23 (2006) (describing the fall of Arthur Andersen LLP due to the criminal indictment).

employees, and customers.[75] Moreover, a standard of liability that does not take account of corporate efforts to deter employee misconduct risks misaligned, even perverse, compliance incentives.

Although empirical data regarding the doctrine's precise effect is scant, the current rule likely encourages either under- or over-investment in compliance, if not both. On the one hand, for example, the current rule may deter investment in robust compliance programs. Increased enforcement expenditures work to reduce the number of agents who commit crimes by increasing the probability of detection and thus each agent's expected cost of crime. But, as Jennifer Arlen first observed, such 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.[76] Despite this reality, corporations are likely to remain engaged in meaningful self-regulation *if* subject to a standard that rewards efforts to prevent and detect employee wrongdoing with decreased criminal liability exposure.

Under the current system, however, a company's compliance efforts have little to no impact on its liability exposure at the outset,[77] but only reduce the consequences of liability through reduction of penalties.[78] Whereas these back-end reductions should still theoretically promote compliance expenditures, their incentivizing impact is distorted when collateral consequences of criminal prosecution are taken into consideration. Mere indictment spurs profound effects that adversely impact the corporation (e.g., stock value, reputation, employee-retention, etc.), regardless of the size of any resulting monetary penalties.[79] Companies, therefore, may have little incentive to invest in and maintain robust compliance programs, including those that minimally satisfy the Justice Manual and Sentencing Guidelines. This is largely because costs associated with implementation and increased likelihood of government detection often exceed the value of any anticipated fine or sentencing reductions, as such measures do little to curb the disastrous collateral effects of criminal indictment and sanction.[80]

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75. *See* Cheryl L. Evans, *The Case for More Rational Corporate Criminal Liability: Where Do We Go from Here?*, 41 STETSON L. REV. 21, 23 (2011).

76. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 837 (1994).

77. Although the Justice Manual allows for consideration of corporate compliance efforts in deciding whether to charge a corporation at the outset, *see* JUSTICE MANUAL § 9-28.300, such consideration is entirely discretionary and "may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter[.]" JUSTICE MANUAL § 9-28.1500.

78. U.S.S.G. § 8C2.5(f)(1).

79. *See, e.g.*, Kelly, *supra* note 74, at 522–23 (describing how following Andersen's indictment, the company could not actively recruit new clients as existing clients "left in droves"); Alex B. Heller, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 769 (2015) (describing how following Andersen's indictment for obstruction of justice, most of the firm's clients moved their business to other accounting firms).

80. *See* Arlen, *supra* note 76, at 836; Langevoort, *supra* note 3, at 80; Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 655 (2012).

Moreover, if we assume that companies are sometimes able to receive the maximum sentencing reductions for compliance programs that only *appear* to comply with the Sentencing Guidelines—but that do not actually detect or deter wrongful conduct[81]—companies are incentivized to implement compliance programs as mere "window dressing."[82] This compliance behavior has the dual benefits of (1) reducing the actual detection of illegal activity that, were it discovered, would obligate "voluntary" disclosure to the government;[83] and (2) limiting the impact of liability (e.g. sentencing credit) should the government nevertheless become aware of misconduct.[84] Thus, even those companies for whom the benefit of reduced fines or sentencing for compliance efforts exceeds the accompanying detection costs, are unlikely to proceed with truly robust compliance efforts in lieu of mere paper programs. And a lack of mechanisms for meaningfully assessing a compliance program's actual effectiveness[85]—a circumstance of which companies are acutely aware—makes paper programs not only attractive, but also low-risk.

Conversely, imposing liability absent consideration of corporate due care can also promote socially inefficient monitoring by promoting over-investment in compliance in a misplaced effort to avoid liability.[86] Excessive corporate monitoring is made possible by opportunities to utilize additional auditors, independent directors, consultants, and the like to limit attendant liability.[87] Theoretically speaking, such monitoring is "excessive" because private gains from monitoring exceed the social gains.[88] Excessive monitoring is also undesirable because of its practical consequences. For example, because the costs of excessive monitoring must be recovered through prices, the price of goods or services produced by corporations end up exceeding their social costs.[89]

Absent further development of robust, empirical measures of corporate compliance efforts,[90] the practical consequences of the respondeat superior rule are a matter of plausible speculation. As Part III discusses, however, the rule simply

81. *See, e.g.*, Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 542 (2003); Richard S. Gruner, *Compliance Programs and Corporate Liability: A Look Into the Future*, *in* CORPORATE COMPLIANCE: *CAREMARK* AND THE GLOBALIZATION OF GOOD CORPORATE CONDUCT 199, 205 (1998) (suggesting that a "sham" compliance program "tends to cause employees to pay less attention to legal requirements and to be more willing to commit offenses").

82. Krawiec, *supra* note 81, at 542; Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS 367, 380 (2002).

83. *See* Arlen, *supra* note 76, at 836 ("On the one hand, increased enforcement expenditures reduce the number of agents who commit crimes by increasing the probability of detection and thus each agent's expected cost of crime. 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.").

84. *See supra* notes 61–66 and accompanying text.

85. *See, e.g.*, Soltes, *supra* note 3, at 971.

86. Fischel & Sykes, *supra* note 38, at 324.

87. *Id.* at 325.

88. *Id.* at 324.

89. *Id.*

90. *See* Soltes, *supra* note 3, at 992.

outstrips its legal justification. The appropriate limits for respondeat superior are found not in its perverse or unfair consequences—whatever those may be—but rather in the simple failure of the rationale to support the rule.

III. Criminal Respondeat Superior Liability Outreaches its Justification

The deterrence rationale upon which respondeat superior has long been justified fails to support the doctrine's application in criminal law. Two maxims, while rudimentary, are helpful to understanding this assertion and the flawed logic underlying existing justifications for criminal respondeat superior. First, the limits of a doctrine's justification necessarily define the scope of its application. Second, even where a doctrine's scope of liability is properly aligned with its justification, it must also be compatible with the system of laws sought to be applied. In applying these two principles to the doctrine of respondeat superior, it becomes apparent that the deterrence policies underlying imputation of liability from agent to principal also define the limit of respondeat superior liability at proof of due care. Furthermore, whereas other theories advanced to justify respondeat superior—such as "risk shifting" or "deep pocket" principles—are well-suited to civil tort law, only the deterrence rationale is consistent with the goals of criminal law. Accordingly, the universe of justifiable applications of respondeat superior is exceedingly smaller than the application the courts currently support.

A. *Deterrence Policies Define the Limit of Respondeat Superior Liability at Proof of Due Care*

The prevailing justification for criminal respondeat superior liability is that it "increase[s] incentives for corporations to monitor and prevent illegal employee conduct."[91] If we indulge this justification of criminal respondeat superior liability, then we assume the object of such liability is to encourage officers of a corporation to take reasonable precautions to deter employee wrongdoing (e.g., exercise "due care"), thus reducing the risk that employees will offend.

On its face, this theory is plausible. Faced with the risk of imputed liability, corporations will, in all likelihood, take steps to prevent their employees from offending through careful hiring, rigorous controls, and robust compliance.[92] But where employers *have* taken all reasonable precautions to deter employee wrongdoing, there is nothing left to deter, generally or specifically. At this point, the deterrence rationale and the limits on liability that flow from it are simply left in the dust.[93]

91. United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd*, 526 U.S. 396 (1999).

92. *But see supra* Part III.B. (discussing practical implications of criminal respondeat superior liability).

93. Deterrence traditionally is broken down into two components, specific and general. Specific deterrence refers generally to punishing or even incapacitating the criminal to prevent or dissuade future conduct in that individual. General deterrence, on the other hand, refers to the effect punishment of a specific defendant will have on other members of society who might be tempted to engage in similar conduct. *See* Weissmann & Newman, *supra* note 24, at 428.

Thus, if the goal of the doctrine is to ensure that corporations exercise a certain degree of due care to prevent employee misconduct, then corporations able to demonstrate that they have taken such reasonable precautions should not be vicariously liable.

1. Negligence-Based or "Due Care" Standards of Liability Seek to Deter Reasonably Preventable Harm

The principle that liability is no longer justified on deterrence grounds in the face of defendants' reasonable efforts to avoid the resulting harm is far from a nuanced concept. In fact, this principle serves as the basis for an overwhelming majority negligence-based tort duties.[94] Rather than hold doctors, lawyers, and a wealth of other professionals strictly and vicariously liable for any and all harm that results from their conduct, we only hold them liable up to the point at which they can establish compliance with standards of care indicative of what we consider socially optimal conduct.[95]

Although victim compensation underlies all of tort law, the distinguishing reason that we hold the vast majority of professionals to negligence, rather than strict, standards of liability is to encourage socially optimal conduct by deterring negligent conduct. More specifically, courts hold professionals liable for failing to conform their conduct to requisite standards of care in the hope that they will—at the risk of crushing financial consequences—be induced to prevent the occurrence of harm by engaging in such socially optimal conduct.[96] From a law and economics perspective, it is assumed that potential defendants will be so incentivized as long as anticipated malpractice judgments for failure to conform exceed the benefits, if any, of engaging in negligent conduct.[97]

In negligence regimes, fear of financial consequences acts as a floor for the deterrence incentive. Conversely, recognizing that liability is illogical in situations

94. *See* RESTATEMENT (FIRST) OF TORTS § 282 cmt. e (AM. LAW INST. 1934) ("The fact that negligence as here defined is conduct which falls below the standard of behaviour established by law for the protection of others carries with it the idea of social fault. Therefore it does not include acts which, although done with every precaution which it is practicable to demand, involve an irreducible minimum of danger to others, but which are so far justified by their utility or by traditional usage that even the most perfect system of preventive law would not forbid them.").

95. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 4 reporter's note a (AM. LAW. INST. 2012) ("However a plaintiff labels a suit for professional negligence, the fundamental basis for it—the defendant's lack of due care—is the same."); *see e.g.*, KEETON ET AL., *supra* note 4, § 32, at 187 (explaining that to determine negligence for doctors, a jury assesses whether a doctor has and uses "the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing").

96. *See* KEETON ET AL., *supra* note 4, § 31, at 169–73 (5th ed. 1984) (discussing the balance between the probability and gravity of a risk with the utility of the type of conduct in question).

97. In *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), Judge Learned Hand articulated a simple cost/benefit analysis for the determination of whether an injurer should take a certain level of care: if the injurer can spend some amount (B) that is less than the expected harm to the victim (as calculated through multiplying the probability of harm (P) times the loss suffered (L) when injury does occur), then the injurer should take care (in other words, when $B < P^*L$).

where the "wrongdoer" or "injurer" cannot prevent all possible harm provides the ceiling.[98] Liability flows from harm that reasonable measures could have prevented—this "lack of control" principle allows defendants who have taken these measures to escape liability for injuries occurring despite these efforts.[99] Indeed, this limitation ensures that only those truly at fault are held liable. But the "lack of control" principle can also be viewed as inherently bolstering the deterrence objective. Were it otherwise, the rationale would be necessarily outstripped in those situations where there is nothing left to deter. At the very least, deterrence is inextricably intertwined with the concept of control.

Withholding liability in situations where defendants cannot take any measures to completely avoid resulting harm is most characteristic of negligence regimes, but it is also incorporated into certain standards of strict liability.[100] For example, in products liability, producers of defectively-*manufactured* products are exposed to true strict liability: They are liable for harm caused by their products "although . . . the [manufacturer] has exercised all possible care in the preparation and sale of his product[.]"[101] The law governing *design*-defects in products, however, allows for manufacturers to escape liability by proving lack of any reasonable alternative design[102]—a risk-utility standard that often approximates negligence.[103]

What accounts for this difference? The liability standards governing defective products appear to reflect the levels of control manufacturers are capable of exercising throughout the design and production process, respectively. Manufacturers

98. *See* RESTATEMENT (SECOND) OF TORTS § 281 cmt. f (AM. LAW INST. 1965) ("Where the harm which in fact results is caused by the intervention of factors or forces which form no part of the recognizable risk involved in the actor's conduct, the actor is ordinarily not liable."); Barry R. Furrow, *Enterprise Liability for Bad Outcomes from Drug Therapy: The Doctor, the Hospital, the Pharmacy, and the Drug Firm*, 44 DRAKE L. REV. 377, 395 (1996) (explaining that courts have been reluctant to expand the liability of health care providers, considering "(1) the experimental nature of much medical treatment, (2) factors beyond the control of the physician, and (3) lack of certainty of successful results" (citing Hoven v. Kelble, 256 N.W.2d 379, 387 (Wis. 1977))).

99. *See generally* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 127–29 (5th ed. 1990) (explaining duty of plaintiff to prevent unreasonable risk of harm to others); KEETON ET AL., *supra* note 4, §§ 30, 31, at 162, 164–65 (stating that an unavoidable accident is "an occurrence which was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions").

100. *See* RESTATEMENT (SECOND) OF TORTS § 282 cmt. f (AM. LAW INST. 1965) ("[Negligence] does not include acts which, although done with every precaution which it is practicable to demand, involve an irreducible minimum of danger to others, but which are so far justified by their utility or by traditional usage that even the most perfect system of preventive law would not forbid them. These may for convenience be termed 'acts which create a strict liability[.]'").

101. RESTATEMENT (SECOND) OF TORTS § 402A(2) (AM. LAW INST. 1965).

102. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (AM. LAW INST. 1998) ("[A product] is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.").

103. RESTATEMENT (THIRD) OF TORTS § 1 cmt. a (AM. LAW INST. 1998) ("[Design defect actions] rely on a reasonableness test traditionally used in determining whether an actor has been negligent. . . . Nevertheless, many courts insist on speaking of liability based on the standards [] as being 'strict.'").

have a high measure of control over the production process and whether a given product is thrust into the stream of commerce and, accordingly, consumed. But they are often unable to ensure with comparable certainty that a given design will produce the safest product. Accordingly, whereas tort law's goal of victim compensation justifies holding manufacturers liable for *manufacturing* defects even where they exercise all possible care (discussed *infra* Part III.A.ii.),[104] the deterrence objective takes precedence with regard to liability for *design* defects. Withholding liability where manufacturers take all possible precautions in choosing a design that nevertheless causes injury, but where no reasonable alternatives exist, reflects the very same deterrence-incentivizing/lack of control dichotomy fundamental to negligence regimes.

2. Liability in Excess of Proof of Due Care (Strict Liability) Serves Compensatory Rather Than Deterrence Goals

Standing in stark contrast to the negligence principles discussed above are standards of liability that hold defendants liable irrespective of the measures they take to prevent the resulting harm, otherwise known as "strict liability."[105] Liability under these circumstances does not principally aim to deter undesirable conduct, as there is often nothing further to deter.[106] Instead, it simply shifts liability for the harm from the injured to the injurer. This is perhaps why justifications for strict liability in civil law rely so heavily on "risk-spreading" or "deep pocket" rationales, despite often also referencing deterrence goals.[107] As discussed, manufacturers are strictly liable for injuries caused by their products with manufacturing defects or *unreasonably* dangerous designs, even if the product was manufactured and distributed with all possible care,[108] because of the belief that consumers are vulnerable, and manufacturers can better bear and spread the resulting losses.[109]

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104. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

105. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 1965) (discussing strict liability for abnormally dangerous activities); RESTATEMENT (THIRD) OF TORTS § 1 (AM. LAW INST. 1998) (discussing strict liability for defective products).

106. *See* RESTATEMENT (FIRST) OF TORTS § 282 cmt. e (AM. LAW INST. 1934) ("[Negligence] does not include acts which, although done with every precaution which it is practicable to demand, involve an irreducible minimum of danger to others, but which are so far justified by their utility or by traditional usage that even the most perfect system of preventive law would not forbid them.").

107. *See, e.g.*, Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259, 259–62 (1976) (noting that a compensatory rationale supports compensating fault-free victims for what are "undeserved or otherwise unjustifiable losses").

108. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965); *see also* KEETON ET AL., *supra* note 4, §§ 30, 31, at 164–65, 169 (discussing unreasonable risk in negligence claims); CLARENCE MORRIS, TORTS 240–45 (2d ed. 1980) (explaining case law related to strict liability for enterprises that involve great risk).

109. *See* Calabresi, *supra* note 47, at 500–01 (examining enterprise liability based on the "allocation of resources" justification); *see generally* Klemme, *supra* note 47, at 156–58 (explaining broad theory underlying enterprise liability: "[L]osses to society created or caused by an enterprise or, more simply, by an activity, ought to be borne by that enterprise or activity.").

B. *Respondeat Superior Liability Serves Compensatory Goals Ill-Suited to Criminal Law*

1. Respondeat Superior Liability Serves Compensatory Rather Than Deterrence Goals

Persons and entities subject to primary strict liability in civil tort law are held liable not because of any fault determination or accompanying deterrence objective, but rather to maximize victim compensation.[110] The same is true of respondeat superior liability. In fact, Justice Stevens recognized this precise point in his dissenting opinion in *Bennis v. Michigan*.[111] Analyzing strict vicarious liability in a civil forfeiture context, Justice Stevens took issue with the state's denial of proceeds from a forfeited car to the petitioner, [112] a joint owner of the car, even though "it [was] conceded that [she] was in no way negligent in her use or entrustment of the family car."[113] The majority upheld the state's reliance on strict vicarious liability principles to bar the wife from recovery[114] on grounds that denial of funds is more akin to a civil than "punitive" action.[115] Disagreeing with the majority's assessment of the action as non-punitive,[116] Justice Stevens rejected the application of strict vicarious liability against the joint owner wife in this circumstance, asserting that "truly blameless individuals" are excepted from the usual rule of strict liability because the "goal [of deterrence] is not fairly served in the case of a person who has taken all reasonable steps to prevent an illegal act."[117] And since no compensatory damages were claimed, Justice Stevens criticized holding the wife vicariously liable for purely punitive reasons absent a coinciding deterrence or fault-based rationale.[118]

Inherent in Justice Stevens' dissent are two distinct conclusions. First, imposing liability upon a person who took all reasonable steps to prevent the resulting misconduct serves no deterrence goal because there was nothing left to deter, generally or specifically.[119] Second, holding a person liable in the absence of fault is

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110. Coleman, *supra* note 107, at 262.

111. 516 U.S. 442, 469 (1996) (Stevens, J., dissenting).

112. The car in question was deemed a public nuisance in connection with the petitioner's husband's sexual activity with a prostitute in the car. *Id.* at 442.

113. *Id.* at 466 (Stevens, J., dissenting).

114. The majority considered the petitioner-wife strictly liable for the wrongful use of the car as a joint-owner of the property. *Id.* at 445–46.

115. *Id.* at 464 (Stevens, J., dissenting).

116. *Id.*

117. *Id.* at 466, 469.

118. *Id.* at 470 ("The absence of any deterrent value reinforces the punitive nature of this forfeiture law. But petitioner has done nothing that warrants punishment.").

119. "But the law of agency recognizes limits on the imposition of vicarious liability in situations where no deterrent function is likely to be served; for example, it exonerates the employer when the agent strays from his intended mission and embarks on a 'frolic of his own.'" *Id.* at 469–70 (citing United States v. Park, 421 U.S. 658, 673 (1975) finding that corporate officers who are "'powerless' to prevent or correct the violation" cannot be held vicariously liable)). Even the *Sun-Diamond* court recognized that "the [deterrence] justification may be at its

inappropriate where punitive damages or other punishment is at stake, since such liability serves no deterrence goals.[120]

2. Respondeat Superior's Compensatory Goals are Ill-Suited to the Criminal Law

As explained above, imposing strict liability on corporations that have taken all reasonable steps to detect and deter the criminal conduct of its employees does not deter misconduct,[121] it simply shifts liability on "risk spreading" or "deep pocket" principles. The goal of compensatory maximization served by this liability shifting is often cited as justification for application of respondeat superior liability in civil law, which is primarily concerned with distributing a loss to those parties best able to bear it.[122]

Whereas compensatory goals appropriately justify the use of respondeat superior liability in the civil law, these risk-spreading theories of liability do not find an equivalent fit in the criminal law. Our criminal laws are not primarily concerned with compensating victims, but rather with both deterring and punishing conduct society deems repugnant and deviant.[123] Indeed, our criminal justice system often seeks to provide victim restitution. But, absent an accompanying fault determination, deep pocket justifications for punishment undermine the concept of moral culpability underlying all criminal responsibility.[124] Thus, there is a fundamental mismatch in importing the equivalent of a deep-pocket justification into criminal law, where at its heart, liability is based on culpability and is a moral, not financial sanction.

IV. AS WAS DONE IN THE TITLE VII AND SECURITIES REGULATION CONTEXTS, CRIMINAL RESPONDEAT SUPERIOR LIABILITY MUST ALSO BE LIMITED TO ALIGN WITH ITS JUSTIFICATION

The logic of a deterrence rationale necessarily limits liability to situations in which defendants cannot prove that they acted in accordance with a desired

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weakest in cases like this one, where the offending employee breaches a duty of honesty to the very corporation whose goals he aims to advance." United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

120. *Bennis*, 516 U.S. at 470 (Stevens, J., dissenting).

121. *Id*. at 469.

122. *See* Sykes, *supra* note 42, at 1236.

123. *See* Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1335 (2007); Ionia Mgmt. Brief, *supra* note 37, at *14–15.

124. *See* Hasnas, *supra* note 5, at 1334–35. As Professor Hasnas notes, the same is true of criminal punishment imposed for purely deterrence purposes, absent an accompanying fault determination. Indeed, the goal of deterrence often operates as a *purpose* of punishment, but because criminal law's punishment goal implies *just* punishment (punishment based on fault), our criminal justice system does not embrace achieving deterrence through punishment by any means, such as through punishing the innocent. *Id*. Thus, even if we assume that deterrence justifications for respondeat superior are logically sound, which we assert they are not, a system of liability that imposes punishment irrespective of the defendant-*corporation's* guilt or fault—as does the doctrine of respondeat superior—is nevertheless fundamentally inconsistent with the concept of just punishment.

standard of conduct, typically "due care."[125] Deterrence-fueled liability schemes that allow for liability *in excess* of proof of due care or its equivalent should, accordingly, be limited to align the rule with its justification.

Where deterrence is the primary goal of the underlying law, both the Supreme Court and Congress support limiting strict vicarious liability to allow for consideration of a defendant's good faith efforts to prevent resulting harm. In fact, the Supreme Court applied this logic when it called for the rejection of respondeat superior liability in situations where Title VII employer-defendants can prove having taken reasonable care "to prevent and correct" sexual harassment within the workplace.[126] The Court defined this limit on vicarious liability to align with Title VII's primary purpose of incentivizing deterrence rather than compensating victims.[127]

Congress's addition of the control person liability provisions to the federal securities laws also suggests recognition that vicarious liability absent fault consideration places illogical limitations on deterrence objectives.[128] Seeking to prevent controlled-agent violations through enhanced supervisory control, Congress created "control person liability" applicable not only to "persons," but also corporations already subject to broad respondeat superior liability.[129] What is more, control person liability represents the exact converse of respondeat superior, as it is specifically limited to the point where controlling-person-defendants can prove that they took all reasonable efforts to prevent the controlled-agent's violation.[130]

As was done in Title VII and securities contexts, corporate efforts to deter employee misconduct need to be similarly considered in determining vicarious criminal liability, as deterrence is not only the primary justification for respondeat superior liability in the criminal law, it is the *only* appropriate justification. Absent some consideration of corporate "fault," or alternatively an affirmative "good faith" defense modeled off the control person provisions, the doctrine's use in the criminal law is simply unjustified.

A. *The Supreme Court Limited Respondeat Superior Liability Through Due Care Consideration to Promote Title VII's Deterrence Goals*

In a series of Title VII cases, the Supreme Court rejected the usual rule of respondeat superior and instead limited the scope of the doctrine to allow for

125. *See* RESTATEMENT (FIRST) OF TORTS § 918 cmt. c (AM. LAW INST. 1939) ("The factors determining whether an injured person has used care to avert the consequences of a tort are in general the same as those which determine whether a person has been guilty of negligent conduct[.]").

126. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

127. *See, e.g.*, *Burlington*, 524 U.S. at 764–65.

128. *See* 15 U.S.C. § 77o (2010); 15 U.S.C. § 78t (2011).

129. *See, e.g.*, 15 U.S.C. § 78c(a)(9) (2012) (defining "person" in § 78t(a) and § 77o as "a natural person, company, government, or political subdivision, agency, or instrumentality of a government").

130. *See* § 77o(a); § 78t(a).

consideration of an employer's efforts to prevent and remedy work-place harassment. The Court first embraced limiting the doctrine in the companion Title VII hostile workplace cases, *Faragher v. City of Boca Raton*[131] and *Burlington Industries, Inc. v. Ellerth*.[132] Reasoning that Title VII's primary purpose was not to provide redress, but rather to prevent harm by encouraging the creation of anti-discrimination "policies and effective grievance mechanisms,"[133] the Court embraced an affirmative compliance defense of due care that, if satisfied, would shield the corporation of all liability.[134] The defense requires proof that (1) the defendant employer exercised reasonable care "to prevent and correct" any sexual harassment, and (2) the plaintiff employee unreasonably failed to take advantage of such due care.[135]

One year later, the Court again grappled with the logic of respondeat superior as a deterrence-incentivizing theory of liability, focusing this time on its application to punitive, rather than compensatory damages. Feeling similarly "compelled to modify [respondeat superior] principles to avoid undermining the objectives underlying Title VII,"[136] the Court in *Kolstad v. American Dental Association*[137] deemed punitive damages entirely unavailable in Title VII cases when the offending employee's actions were taken "contrary to the employer's good-faith efforts to comply with Title VII."[138] According to the Court, holding employers liable for punitive damages in this circumstance is in "tension with the very principles underlying common law limitations on vicarious liability for punitive damages—that it is 'improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.'"[139] And as a result, such liability absent consideration of good faith compliance efforts "would reduce the incentive for employers to implement antidiscrimination programs[] . . . [and] likely exacerbate concerns among employers that . . . [the] standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions."[140]

Two conclusions can be drawn from the Supreme Court's Title VII cases. First, *Faragher* and *Ellerth* demonstrate the Supreme Court's willingness to limit respondeat superior to allow for consideration of defendants' efforts to deter misconduct in situations where the purported purpose of respondeat superior liability is to deter misconduct. Thus, while they do not say so explicitly, *Faragher* and *Ellerth* lend credence to the argument that absent due care consideration,

131. 524 U.S. 775 (1998).
132. 524 U.S. 742 (1998).
133. *Burlington*, 524 U.S. at 764; *see also Faragher*, 524 U.S. at 806–07.
134. *Burlington*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.
135. *Burlington*, 524 U.S. at 765.
136. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).
137. *Id.*
138. *Id.* (internal quotations and citation omitted).
139. *Id.* at 544 (citing RESTATEMENT (SECOND) OF TORTS § 909 (AM. LAW INST. 1965)).
140. *Id.*

respondeat superior liability does not promote the goal of deterrence on a theoretical level, irrespective of the doctrine's empirical influence on defendant conduct.

Second, *Kolstad* asserts that the logic of *Faragher* and *Ellerth* is equally, if not more applicable where punitive punishment is at stake—a situation one step closer to criminal liability.[141] To be sure, the *Kolstad* decision ranges beyond merely applying the theoretical implications of *Faragher* and *Ellerth* to a punitive context, but rather concludes that punitive respondeat superior liability results in *perverse* deterrence incentives.[142] That assumption, while intuitive, lacks empirical support. Implicit in this assumption of perverse deterrence incentives, however, is the notion that punitive respondeat superior liability fails to incentivize deterrence on a purely theoretical level. This is evidenced by the *Kolstad* Court's concern that failure to modify respondeat superior's application to punitive damages cases would undermine both the "common law limitations on vicarious liability for punitive damages" and deterrence objectives of Title VII.[143] Thus, the Supreme Court's Title VII jurisprudence can be read as effectively addressing the concerns over unmoored vicarious liability raised by Justice Stevens' dissenting opinion in *Bennis v. Michigan*.[144]

B. *Control Person Liability Reflects Congress's Desire to Limit Vicarious Liability for Securities Violations to Proof of Good Faith Efforts to Supervise*

Congress's creation of control person liability in the federal securities laws also evinces a degree of heartburn over a rule of liability that outreaches its justification. Legislative history surrounding the provisions' enactment is admittedly vague as to whether Congress specifically intended to supplant the common-law doctrine where control person liability applies.[145] What is clear, however, is that Congress sought to incentivize more meaningful supervision of mid- and low-level employees by creating a system of liability that does precisely what respondeat superior does not: limit liability at the point where controlling-person-defendants can prove having taken all reasonable efforts to prevent the controlled-agent's violation.[146]

141. *See* Ionia Mgmt. Brief, *supra* note 37, at *13–14.

142. *Kolstad*, 527 U.S. at 544–45.

143. *Id.*

144. Bennis v. Michigan, 516 U.S. 442, 458 (1996) (Stevens, J., dissenting).

145. *See* Paul F. Newton & Co. v. Tex. Commerce Bank, 630 F.2d 1111, 1115–16 (5th Cir. 1980) ("The legislative history of s 15 does not indicate whether Congress by enacting s 15 intended to supplant common law agency principles for determining secondary liability or simply to expand the group of persons secondarily liable for violations of the Securities Act[.]").

146. *See, e.g.*, 15 U.S.C. § 78t(a) (2011) (holding "controlling persons" liable "unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action").

1. Control Person Liability under the Federal Securities Laws

Section 20(a) of the Securities Exchange Act of 1934,[147] which is patterned upon a similar provision in section 15 of the Securities Act of 1933,[148] imposes vicarious joint and several liability for securities fraud on "controlling persons" for the conduct of those they control, unless the controlling persons can prove that they (1) acted in "good faith" and (2) did not induce the controlled person's conduct.[149]

Both statutes define "person" broadly to include an individual, an organization, or a group, but lack a corresponding definition of "control."[150] Courts have construed the term broadly, finding it unnecessary for the controlling person to exercise actual control over the particular transaction giving rise to the violation.[151] Rather, "heavy consideration" is given to the potential power to influence and control the activities of the primary violator.[152] Although their status as control persons is not automatic,[153] officers and directors of corporations are almost always subject to control person liability.[154]

As a counter to the courts' liberal construction of "control," controlling persons may avoid liability by meeting the defenses provided in §§ 15 and 20(a) of the 1933 and 1934 Acts, respectively.[155] Under § 20(a), for example, controlling persons bear the burden of showing that they acted in "good faith" and did not directly or indirectly induce the acts constituting the primary violation.[156] Lacking statutory guidance as to what constitutes "good faith," the circuit courts have differed in their interpretations of the term. Under the majority view, a controlling person's

147. 15 U.S.C. § 78t (1994) [hereinafter § 20(a)].

148. 15 U.S.C. § 77o (1976) [hereinafter § 15]. Section 15 refers to "every person who [controls] . . . by or through stock ownership, agency, or otherwise," *id.*, whereas § 20(a) speaks of "[e]very person who [controls], directly or indirectly." 15 U.S.C. § 78t(a). Notwithstanding the differences in language, courts tend to interpret these sections analogously. *See* Pharo v. Smith, 621 F.2d 656, 673 (5th Cir. 1980); SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 812 (2d Cir. 1975).

149. *See* 15 U.S.C. § 78t(a).

150. *See* 15 U.S.C. § 78c(a)(9) (2012) (defining "person" in § 78t and §77o as "a natural person, company, government, or political subdivision, agency, or instrumentality of a government").

151. *See* Ralph C. Ferrara, *Derivative Liability in Securities Law: Controlling Person Liability, Respondent Superior, and Aiding and Abetting*, 40 WASH. & LEE L. REV. 1007, 1010 (1983) (citing Stern v. Am. Bankshares Corp., 429 F. Supp. 818, 823–24 (E.D. Wis. 1977)).

152. *See, e.g.*, Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 464 F. Supp. 528, 538–39 (D. Md. 1978); Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 884–85 (3d Cir. 1975), *cert. denied*, 425 U.S. 993 (1976).

153. *See, e.g.*, *In re* Tronox, Inc. Sec. Litig., 769 F. Supp. 2d 202, 207–08, 208 n.10 (S.D.N.Y. 2011).

154. *See, e.g.*, Dellastatious v. Williams, 242 F.3d 191, 195 (4th Cir. 2001); Salit v. Stanley Works, 802 F. Supp. 728, 735 (D. Conn. 1992) (holding allegation of control by status sufficient to shift burden to plaintiff to prove good faith).

155. 15 U.S.C. § 78t(a) (2011) (providing good faith defense to control person liability under § 20(a) of the Exchange Act); 15 U.S.C. § 77o(a) (2010) (providing good faith defense to control person liability under § 15 of the Securities Act).

156. 15 U.S.C. § 78t(a). The analogous § 15 defense to controlling person liability requires defendants to prove that they had no knowledge of, or reasonable ground to believe in, the existence of the facts constituting the primary violation. 15 U.S.C. § 77o.

failure to take feasible, precautionary measures to prevent the controlled person's violation constitutes lack of good faith.[157] In contrast, the Second, Third, and Fourth Circuits refrain from rendering bad faith determinations absent proof of the controlling person's culpable participation in the violation.[158] Under this view, a controlling person's inaction or silence regarding a violation triggers liability only if done deliberately and in furtherance of the fraud.[159]

2. Disputed Interplay Between Control Person Liability and Respondeat Superior

Since their addition to the federal securities laws, the control person provisions have generated intense debate over whether Congress intended to supplant respondeat superior where control person liability applies. As it stands, the federal appellate courts remain decidedly split on the issue. The majority position, which the SEC endorses, asserts that the controlling person provisions were *not* intended to preempt the doctrine.[160] Rather, the provisions supposedly reflect Congress's desire to expand the scope of liability under the securities laws to "address the specific evil of persons seeking to evade liability . . . by organizing 'dummies,' that, acting under their control, would commit the prohibited acts."[161] The Third and Fourth Circuits take the opposing view. Focusing instead on the structural placement of the liability granting provisions and good faith defenses together in single, cohesive sections of each Act, these courts consider the organizational structure of the provisions indicators of Congress's intent to hold a certain class of actors—expressly defined to include corporations[162]—vicariously liable only when the defenses provided are unsatisfied.[163]

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157. *See* Ferrara, *supra* note 151, at 1013 (citing G. A. Thompson & Co., Inc. v. Partridge, 636 F.2d 945, 959 (5th Cir. 1981)). Some courts have held that a controlling person's failure to take preventative measures need have been reckless under the circumstances. *See, e.g.*, *Partridge*, 636 F.2d at 959. Moreover, the feasibility of executing possible preventative measures often depends on the industry in which the controlling person operates. For example, courts have recognized that directors cannot be expected to exercise the kind of supervision over a corporate president that brokers must exercise over salesmen. *See, e.g.*, Moerman v. Zipco, Inc., 302 F. Supp. 439, 447 (E.D.N.Y. 1969).

158. *See* SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1472–73 (2d Cir. 1996); Sharp v. Coopers & Lybrand, 649 F.2d 175, 185 (3d Cir. 1981); Carpenter v. Harris, Upham & Co., 594 F.2d 388, 394 (4th Cir. 1979); Rochez Bros. Inc. v. Rhoades, 527 F.2d 880, 884 (3d Cir. 1975); Gordon v. Burr, 506 F.2d 1080, 1085 (2d Cir. 1974); *see also* Ferrara, *supra* note 151, at 1014.

159. *See supra* note 154.

160. *See, e.g.*, Sharp v. Coopers & Lybrand, 649 F.2d 175, 181 n.5 (3d Cir. 1981) ("The SEC argues that '[t]he prevailing view among the federal courts' is that agency principles are applicable to impute securities law violations to employers.") (citation omitted); Paul F. Newton & Co. v. Tex. Commerce Bank, 630 F.2d 1111, 1118–19 (5th Cir. 1980).

161. *Tex. Commerce Bank*, 630 F.2d at 1118–19.

162. *See* 15 U.S.C. § 78c(a)(9) (2012) (defining "person" in § 78t(a) and §77o as "a natural person, company, government, or political subdivision, agency, or instrumentality of a government").

163. *See* Carpenter v. Harris, Upham & Co., 594 F.2d 388, 393–94 (4th Cir. 1979); Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 885, 889 (3d Cir. 1975). *See generally* William J. Fitzpatrick & Ronald T. Carman, *Respondeat Superior and the Federal Securities Laws: A Round Peg in a Square Hole*, 12 HOFSTRA L. REV. 1, 25

The Supreme Court has yet to directly weigh in on the matter, but proponents of the latter view frequently cite the Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*[164] as support for their position.[165] Indeed, the majority decision makes no explicit mention of respondeat superior, but in rendering aiding and abetting liability unavailable in private securities fraud actions, the Court expressly prompted private plaintiffs seeking secondary liability to rely instead on the Acts' control person provisions.[166] Moreover, the dissenting opinion expressed concern that respondeat superior and other agency theories of liability "appear[ed] unlikely to survive the Court's decision."[167]

Respondeat superior survived the Court's decision in *Central Bank of Denver*, but the doctrine's status in the federal securities law remains decidedly ambiguous.[168] As William Fitzpatrick and Ronald Carman first noted,[169] this ambiguity is further fueled by an apparent misunderstanding of respondeat superior underlying assertions of the liability regimes as non-exclusive.[170] Their article cites as an example of this fundamental misunderstanding an amicus curiae brief filed by the SEC in support of the non-exclusive viewpoint.[171] In its brief, the SEC simultaneously argued that (1) respondeat superior liability is consistent with the statutory good faith defense, and (2) under any other holding, "a [controlling person] could evade all responsibility . . . by demonstrating that it was merely negligent in failing to discover the wrong-doing.'"[172] This argument is problematic because it misstates the standard for satisfying the good faith defense, which in most cases, and particularly for brokerage firms, requires proof of the controlling person's "reasonable and proper system of supervision and internal control"—that is, the absence of negligence.[173] But more importantly, in treating respondeat superior liability and the good faith defenses as consistent, the Commission likens respondeat

(1983) (discussing the weakness of a nonexclusivity argument of § 20(a) because it ignores the good faith defense requirement).

164. 511 U.S. 164, 184 (1994).

165. For a discussion of these arguments, see Robert A. Prentice, *Conceiving the Inconceivable and Judicially Implementing the Preposterous: The Premature Demise of Respondeat Superior Liability Under Section 10(b)*, 58 OHIO ST. L.J. 1325, 1329 n.14 (1997) (citing scholarly articles discussing same).

166. *See Central Bank of Denver*, 511 U.S. at 184.

167. *Id.* at 201 n.12.

168. *See* Paul F. Newton & Co. v. Tex. Commerce Bank, 630 F.2d 1111, 1115–16 (5th Cir. 1980) ("The legislative history of s 15 does not indicate whether Congress by enacting s 15 intended to supplant common law agency principles for determining secondary liability or simply to expand the group of persons secondarily liable for violations of the Securities Act. . . . The inconclusive legislative history of ss 15 and 20(a) [therefore] supports neither of the positions advocated by the parties before us on this appeal.").

169. Fitzpatrick & Carman, *supra* note 163, at 24–25.

170. *Id.*

171. *Id.* at 24 n.158.

172. *Id.* at 24–25.

173. *See* Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1576 (9th Cir. 1990) ("A broker-dealer can establish the good faith defense only by proving that it 'maintained and enforced a reasonable and proper system of supervision and internal control.'") (citation omitted); *Tex. Commerce Bank*, 630 F.2d at 1120 (stating that a broker-dealer must show it "diligently enforce[d] a proper system of supervision and control").

superior to a fault-based standard of liability, which is inaccurate given the doctrine's strict liability aspect. What is more, several circuit courts have relied on the same faulty reasoning in upholding the doctrine's continued viability as an alternative to control person liability.[174]

3. Congress's Creation of Control Person Liability as a Remedy to Respondeat Superior

Notwithstanding the opposing viewpoints over Congress's intent to specifically supplant respondeat superior where control person liability applies, it is clear from both the legislative history and text of the provisions that Congress intended for the control person liability scheme to incentivize meaningful supervision of mid- and low-level employees by persons reasonably capable of doing so.[175] Congress accordingly crafted the control person provisions to exclude from their reach the precise class of defendants respondeat superior punishes: corporations that can prove having taken all reasonable efforts to prevent violations of the securities laws by agents within their influence and control.[176] Control person liability is therefore devoid of the mismatch between liability and justification plaguing respondeat superior's deterrence rationale.[177]

Even absent legislative insight regarding respondeat superior's appropriate role where control person liability governs, the doctrine's purpose and continued relevance is nevertheless called into question by Congress's incorporation of control person liability into the federal securities laws. The control person provisions present an entirely converse method of vicarious liability, applicable to parties already subject to broad respondeat superior liability. And what's more, control person liability seeks to achieve the same ends as the common law doctrine, despite the doctrine's alleged vitality and sound justification in the criminal law. Considered

174. *See, e.g.*, Sharp v. Coopers & Lybrand, 649 F.2d 175, 184 (3d Cir. 1981) (holding accounting firm to a "high duty to supervise"' and imposing liability under respondeat superior as a means to "incentivize"' the firm to supervise its employees carefully); *see also* Fitzpatrick & Carman, *supra* note 163, at 13 ("Discussion of a 'high duty of supervision' which must be satisfied is inappropriate and unnecessary since such a duty, even if fulfilled, cannot constitute a defense under a strict liability doctrine such as respondeat superior.").

175. *See Tex. Commerce Bank*, 630 F.2d at 1115–16 ("The legislative history of s 20(a) discloses that Congress deliberately patterned it after s 15, with the identical purpose of preventing persons from avoiding liability under the provisions of the Securities Exchange Act by utilizing 'dummies' to commit the prohibited acts." (citing SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 812 (2d Cir. 1975)); *Hearings on S. Res. 84 (72d Cong.) & S. Res. 56 and 97 (73d Cong.) before the S. Comm. on Banking and Currency*, 73d Cong. 6571 (1934).

176. *See Hollinger*, 914 F.2d at 1576; *Tex. Commerce Bank*, 630 F.2d at 1120.

177. Moreover, if we accept the (faulty) assumption that criminal respondeat superior is indeed justified on deterrence-incentivizing grounds, then Congress's efforts with control person liability appear particularly duplicitous given that it could have easily excluded corporations from the provisions' reach by limiting liability to "the specific evil of *persons* seeking to evade liability . . . by organizing 'dummies'. . . [to] commit the prohibited acts." *Tex. Commerce Bank*, 630 F.2d at 1118 (emphasis added). Nor do the provisions facilitate previously-unavailable means of prosecuting corporations acting on an organization-wide level to evade liability through use of "dummies," as prosecutors have long been successful in proving corporate mens rea under these circumstances through theories of "collective knowledge" or "flagrant organizational indifference." United States v. Bank of New England, 821 F.2d 844, 855–56 (1st Cir. 1987).

this way, Congress's creation of control person liability under the federal securities laws can sensibly be read as a remedy to the very flaws that emerged in respondeat superior's justification upon its extension into the criminal law. Having neither birthed nor bred the doctrine, this revelation regarding respondeat superior would have been easier for Congress to accept.

CONCLUSION

Risk-shifting or deep pocket justifications for the respondeat superior doctrine find no proper place in the criminal law, which is animated by principles of fault and is consequently justified as a moral sanction as well as legal or financial. And a justification that seeks to "increase incentives for corporations to monitor and prevent illegal employee conduct"[178] is inherently limited. Imposing liability on a corporation that has done all that the doctrine demands—that is, exercise due care in the selection and supervision of its employees—unmoors rule from reason and creates a doctrine that is, at once, irrational and unfair.

Scholars have advanced numerous alternatives to criminal respondeat superior liability, and proposals will continue to follow. While empirical efforts to determine the scope of liability likely to incentivize corporate deterrence efforts are on the rise, these inquiries remain underdeveloped. Currently comprehensible and compelling, however, is the need to consider corporate efforts to deter employee misconduct in order to align criminal respondeat superior liability with its deterrence justification.

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178. United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).