Cleveland State Law Review

Volume 70 | Issue 1 Note

11-29-2021

Reexamining the Vicarious Criminal Liability of Corporations for the Willful Crimes of Their Employees

Evan Tuttle
Cleveland-Marshall College of Law

REEXAMINING THE VICARIOUS CRIMINAL LIABILITY OF CORPORATIONS FOR THE WILLFUL CRIMES OF THEIR EMPLOYEES

EVAN TUTTLE*

ABSTRACT

Corporate compliance programs in the United States have evolved substantially in the past several decades, expanding exponentially in both number and scope. Yet, our legal standard of corporate criminal liability for the acts of employees has remained largely unchanged for the past fifty years. *United States v. Hilton Hotels* established that a corporation can be held liable for the acts of its employee, even though the employee's conduct may be contrary to their actual instructions or contrary to the employer's stated policies. That holding, cited with favor by the Supreme Court, was based on a deeply flawed interpretation of precedent, yet has stood as good law for nearly five decades.

Corporations are innately unsympathetic "victims" to this injustice, but the potential harm spreads far beyond the Fortune 500. Prosecutorial discretion is the sole bulwark protecting corporations of all sizes from the potential of liability under *Hilton Hotels*. There is not a clear method of eschewing vicarious liability in criminal cases. Under the current regime, a corporation could pour a nearly endless amount of money towards a compliance function that has no guarantee of protecting the company from the criminal inclinations of a single rogue employee. This Note suggests that an affirmative defense to the common law doctrine of respondeat superior would be in the best interests of justice.

* J.D., May 2022, Cleveland-Marshall College of Law. I'd like to thank my Dad and Bennett Kuhar for going the extra mile to edit this Note, and the *Cleveland State Law Review* editors and associates for working so hard. I would also like to thank Sydney Victor, who was a tremendous mentor to me while I was writing this Note.

CONTENTS

I. INTRODUCTION

Under the doctrine of respondeat superior, a corporation is liable for the actions of its employee, so long as those actions were within the scope of the employee's duties and were intended, at least in part, to benefit the corporation.[1] The doctrine has been in use since the mid-nineteenth century, but continually grew alongside the shifting corporate environment of the twentieth century.[2] As corporations became bigger, a comprehensive regulatory system to prevent fraud and anticompetitive practices became increasingly important.[3] When employees would violate these regulations as individuals, the doctrine of respondeat superior was invoked to hold their employers liable as well.[4] Holding corporations liable for the acts of their agents is a practice supported by compelling public policy logic.[5] Corporations are often in a better position to monitor and control employees than the government. Further, allowing corporations to disavow the unlawful acts of employees would open the door to unjust

---

[1] *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909); U.S. Dep't of Just., Just. Manual §9-28.210(b) (2018).

[2] 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 1:03 (Clark Boardman Callaghan 2d ed. 1992).

[3] *Id.*

[4] *Id.*

[5] Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605, 617 (1995).

scapegoating and permit corporations to benefit from unlawful acts without fear of reprisal.

But employers should be allowed to shed liabilities that are created by truly rogue actors. When an employee acts in a manner that any reasonable person would consider to be against the objective intent of corporation, the corporation should not be punished.[6] This Note looks at a specific example of such extraordinary behavior: violating direct orders from a superior to further a personal grudge. Holding corporations responsible for the actions of employees, who defy explicit orders from superiors for personal reasons, is unreasonable and impractical, and creates a compliance environment that is contrary to public policy.

This Note proposes that the best solution to this inequity is an affirmative defense to the doctrine of respondeat superior. If an employer can prove that the employee had a personal grudge or intended malice when the unlawful action was taken, the employer will have shown that the employee was acting outside of the scope of his employment, regardless of whether the unlawful action benefitted the employer in some way. The employer could still be required to return ill-gotten gains, as a lack of liability would not somehow clean the tainted proceeds. But the employer could avoid the punitive aspects of criminal liability in a manner that is just and supported by public policy.

Part II of this Note examines the history of the doctrine of respondeat superior, and how it has shaped the current law of corporate criminal liability. Next will be an examination of compliance programs and their role in determining liability. This will transition into discussion of *Hilton Hotels*,[7] the preeminent case regarding a corporation's liability for its employee's actions. Part III contrasts *Hilton Hotels* to *Klor's v. Broadway-Hale Stores*, a case decided by the Supreme Court that the Circuit Court in *Hilton Hotels* incorrectly relied on to justify its ruling.[8] Part IV of this Note examines the impracticality of a corporation creating a compliance program for its employee's personal whims and the inconsistency of this rule with various other related areas of law. Part V identifies and analyzes a range of solutions to the problem, including the aforementioned common law defense, a statutory provision, an expansion of the Justice Department's guidelines for prosecution, or a reform of the Federal Sentencing Guidelines.

II. THE HISTORY OF CORPORATE CRIMINAL LIABILITY: RESPONDEAT SUPERIOR TO MODERN VICARIOUS LIABILITY

Although the doctrine of respondeat superior existed in English common law as far back as 1698,[9] the first major usage in the United States was not until 1838.[10] At

---

6 *See N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. at 495–96.

7 United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

8 Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959).

9 Jones v. Hart [1698] 91 Eng. Rep. 382 (K.B.).

10 Wright v. Wilcox, 19 Wend. 343 (N.Y. Sup. Ct. 1838).

that time, respondeat superior was only applied to find vicarious liability in tort law.[11] Principals could avoid liability if they could prove that their agent had acted "willfully" to commit the tortious action.[12] This defense came under criticism for a variety of reasons[13] and courts grew more inclined to find liability with principals whose agents had committed willful acts.[14] Courts began to apply a "scope of employment" analysis to determine what authority the principal had granted to its agent.[15] The test for determining whether an agent's action was within their "scope of employment" was based around the factors of timing, location, and purpose.[16] These factors have each spawned a number of legal sub-doctrines in their own right,[17] but most pressing to this Note is the notion of purpose: whether or not the agent was acting in performance of the role for which they were hired.[18] In 1893, the Supreme Court ruling in *Lakeshore & Southern Michigan Railway Co. v. Prentice* laid the foundation of our modern understanding of transferred intent in respondeat superior cases.[19] The Court in *Prentice* held that, whatever wicked intent mens rea element is at issue in a case, "if proved in the agent, may be imputed to the corporation"[20] in order to prove the corporation's culpability in a crime.

The doctrine continued to develop in response to the growth of corporations.[21] Corporations became the predominant business entity over the course of the nineteenth century, and courts began to find corporations criminally liable to curb their darker

---

11 *See* Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411, 419 (2007).

12 *Id.*

13 Besides the obvious interests to plaintiffs in having the ability to sue principals, there was also discussion that precedent had been poorly interpreted. See Justice Holmes' critique in *Dempsey v. Chambers*, 28 N.E. 279 (Mass. 1891).

14 *See, e.g.*, Ploof v. Putnam, 75 A. 277 (Vt. 1910).

15 Ralph L. Brill, *The Liability of an Employer for the Wilful Torts of His Servants*, 45 CHI.-KENT L. REV. 1, 5 (1968).

16 The Second Restatement of Agency uses the terminology time, place, and purpose. RESTATEMENT (SECOND) OF AGENCY § 229 (AM. L. INST. 1958).

17 These revolve around the definitions of each term within the respondeat superior doctrine. For instance, "master and servant" law, which has now blended with other areas to become the more holistic "agency" law, examines the relationship between the employer and employee. It is remarkable how deeply rooted some of these agency and vicarious liability concepts are in the common law, and that they are still seen as good law today. *See, e.g.*, Fred Moore Whitney, *Respondeat Superior*, *in* CORNELL HIST. THESES AND DISSERTATIONS COLLECT. (1891).

18 Brill, *supra* note 15, at 6.

19 Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 114 (1893).

20 *Id.* at 110.

21 1 BRICKEY, *supra* note 2, § 2:02.

impulses.[22] Congress responded to this corporate growth by prohibiting anticompetitive conduct[23] and creating labor standards.[24] A corporation held property separate from the property of its owners, and liability could only be imposed on a corporation for the actions of its agents, directors and officers. As such, the doctrine of *respondeat superior* was always going to be required for a finding of corporate criminal liability.[25]

As the century turned, courts continued to expand the notion of what a corporation might be criminally liable for.[26] All of these decisions culminated in the 1909 Supreme Court case *New York Central & Hudson River Railroad Co. v. United*

---

[22] *Id.* § 1:03.

[23] The Sherman Antitrust Act was created during the American Industrial Revolution as Congress became increasingly aware of the rapid consolidation of business resources across the country. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7).

[24] The Clayton Act followed and added new behaviors that were considered anticompetitive. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27 & 29 U.S.C. §§ 52–53).

[25] Corporations can now also be held criminally liable under strict liability statutes. These so-called "regulatory offenses" are distinct from the corporate criminal liability discussed in the rest of this Note. Regulatory offenses are most often misdemeanors punished by fine, in conformance with conventional understanding of the Eighth Amendment. Early in United States history, "corporations were predominantly established to serve public or quasi-public ends." *See* Weissmann & Newman, *supra* note 11, at 419–20. Regulation was more of front-end matter, with corporate charters being hard to come by. But the public purpose component mitigated the need for a large regulatory system.

[26] This expansion was virtually a direct response to increasingly creative forms of corporate skullduggery. Some examples of this will be explored in more detail later in this Note, but it is important to understand that there was a more flagrant tone and scale to corporate malfeasance at the turn of the century than would ever be possible today. Consider the infamous activities of J.D. Rockefeller's Standard Oil Company that were revealed by Ida Tarbell in her 1904 exposé. *See* IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904). Standard Oil had the lion's share of the U.S. oil refining industry as far back as the 1870s, but it somehow was never enough. Tarbell uncovered some truly predatory practices that Rockefeller used against competitors, as well as retailers who refused to sell his products. As far as illegal activity goes, Tarbell was able to prove that Standard Oil was illegally collaborating with railroad companies to help force competitors out of business. Eventually, in what was perhaps the crowning achievement of the Sherman Act, Standard Oil was found to be an illegal trust and split into 34 smaller companies. That was certainly a win for the antitrust crowd but was by no means the extent of Standard Oil's crimes. For reasons that are not particularly clear, Standard Oil was not pressed on some of the crimes which were revealed during its antitrust trial including, but not limited to, corporate espionage and outright bribing of public officials. *See id.*; *see also BRIA 16 2 b Rockefeller and the Standard Oil Monopoly*, CONST'L RIGHTS FOUND. https://www.crf-usa.org/bill-of-rights-in-action/bria-16-2-b-rockefeller-and-the-standard-oil-monopoly.html (last visited Sept.10, 2021). Regardless, our modern understanding of vicarious corporate liability was required to for the illegal trust finding in *United States v. Standard Oil*, as the price fixing and illegal railroad activity was largely done by corporate agents.

States.[27] In perhaps the most foundational decision in modern agency law, the Supreme Court found no problem imposing liability on a corporation for the acts of its agents.[28] The Court laid out a clear test for when corporations may properly be held liable for the criminal acts of their agents:

> In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct.[29]

This test pulls the two distinct elements from vicarious civil liability and ingrains them as requirements for a finding of vicarious criminal liability. First, the agent must be acting within the scope of their employment. Second, the agent must be acting for the benefit of the principal.

The Court in *New York Central & Hudson River Railroad Co.* summarized its reasoning by stating:

> Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . ., may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.[30]

This public policy can generally be described as preventing corporate malfeasance, though there are numerous (if not infinite) ways in which corporations might abuse the public.[31] Punishing corporations for the acts of their agents is meant to encourage corporations to take affirmative steps towards preventing their agents' misdeeds.

A. Corporate Compliance

Corporate compliance programs have public policy benefits beyond crime prevention. Compliance programs, and a corresponding system of reporting, make it much easier for investigators to uncover criminal activity.[32] Compliance programs

---

[27] N.Y. Cent. & Hudson River R. R. Co. v. United States, 212 U.S. 481 (1909). Agent of defendant railroad corporation provided illegal rebates in order to attract specific customers away from water transportation options. Agent and defendant corporation were convicted under the Elkins Act, 32 Stat. 847. The Circuit Court of the S.D.N.Y. affirmed and the Supreme Court granted certiorari, seemingly to clarify this issue of corporate criminal liability.

[28] *Id.* at 494–95.

[29] *Id.* at 493.

[30] *Id.* at 494.

[31] *See id.*

[32] Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 511 (2005).

make the prosecution of corporate crime easier and more affordable.[33] Compliance creates clear benefits for the Government, but what legal benefit is conferred to corporations in exchange for implementing these programs?

Compliance programs create two distinct legal benefits for corporations, but neither benefit, taken separately or together, provides a path to shed liability entirely. First, compliance programs can serve as evidence of conforming to a duty of care in litigation,[34] but whether a defendant's conduct conformed to the standard of care is a matter for a jury.[35] Whether or not a corporation has a right to a trial by a jury of its peers, and who those peers might be, is a complex matter that could fill this entire Note.[36] For the purposes of this Note, it is sufficient to point out that juries are no friends to corporations.[37] Further, juries are generally posed with the simple question of whether the corporation breached its duty to supervise its employees.[38] While certainly more palatable to the average juror, this terminology runs close to the res ipsa loquitor theory of negligence. This would not pose any issue if the same defenses available to the average tort defendant were available to corporate respondeat superior defendants.[39] In any case, if these issues of juries and duties seem to be unfair to corporate defendants, they are consistent with the public policy considerations explored above. Attempting to alter them without violating public policy would be a difficult task, a notion which will be explored more in the analysis portion of this Note.

The second legal benefit that compliance programs confer on corporations relates to sentencing. Corporations that install comprehensive compliance programs can also receive favorable sentencing considerations in respondeat superior cases.[40] Federal judges are required to consider the guidelines provided by the United States

---

33 *Id.* at 504.

34 *See, e.g.*, Richard S. Gruner, *Risk and Response: Organizational Due Care to Prevent Misconduct*, 39 WAKE FOREST L. REV. 613, 636 (2004); Walsh & Pyrich, *supra* note 5, at 677. ("Allowing a corporation to escape liability if it can demonstrate an adequate, effectively operating compliance program is consistent with the traditional notions of allocating criminal responsibility.").

35 *See* RESTATEMENT (SECOND) OF TORTS, § 328C (AM. L. INST. 1965).

36 Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 862–64 (1996).

37 Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 140–41 (1996). This study separates the notion of jury bias towards defendants with money from jury bias towards corporate or commercial activity, and finds that jurors have a bias against corporations, regardless of money.

38 1 BRICKEY, s*upra* note 2, at § 3.

39 *Res Ipsa Loquitor*, BLACK'S LAW DICTIONARY (11th ed. 2019). Tort defendants have the opportunity to proffer some evidence that demonstrates that a non-negligent scenario could have still resulted in the plaintiff's injury. If successful, this takes the case out of the realm of res ipsa loquitor and forces the plaintiff to prove all of the elements of negligence individually.

40 Wellner, *supra* note 32, at 507.

Sentencing Commission before ruling on a sentence.[41] The guidelines for sentencing corporations are numerous, complex, and filled with ambiguity.[42] For a compliance program to be factored into sentencing, it must comply with the requirements of § 8B2.1.[43] First, it is important to note that compliance programs must satisfy all of the requirements in order to be of any value under these guidelines. There is no mention of a good faith effort creating any benefit. This is all or nothing and is eerily similar to strict liability. Next, the exercise of "due diligence" is at the forefront of the requirements. That mirrors the duty of care mentioned above. It seems something of a foregone conclusion that if a jury finds a defendant corporation breached its duty, the defendant could not have simultaneously exercised due diligence.[44] As such, the benefit that compliance programs confer during sentencing could be negated unless the judge disagrees with the jury on this issue.

Even though these legal benefits may be somewhat lacking, corporate decision makers have additional incentives to form compliance functions. There are ethical and moral obligations to encourage a lawful society, and significant public relations benefits that come from being seen as a well-meaning corporation. Given the totality of these benefits, it can be concluded that any corporate decision maker would want there to be at least *some* form of compliance program put in place within their company. There are of course instances of insufficient compliance activity or even outright compliance disregard.[45] However, the size of the global compliance industry supports what common sense suggests—most companies truly are trying to encourage their employees towards proper conduct.[46] While much of the compliance industry's

---

41 *See* U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2018).

42 *Id*. § 8C2.5. Problems within Chapter Eight could serve as a note topic in its own right. The guidelines purport to provide a formulaic approach to sentencing but are riddled with ill-defined terms and arbitrary thresholds. For example, the number of "employees" a corporation has is a significant factor in determining culpability in the Guidelines' Culpability Score portion. Organizations are found to be more culpable the larger they are. As explained in § 8C2.5's Background portion: "Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement." The levels are set at 10, 50, 200, 1000 and 5000 or more employees, with each level corresponding to an additional "point" of culpability. Consider then that an increase of even a single culpability point could raise the sentenced fine by 20-40%.

43 *Id*. § 8B2.1.

44 One justification for this procedure lies in the Introductory Commentary section of Chapter 8. "First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused." *Id*. § 8. The authors intended to shift losses away from victims and onto defendant corporations.

45 *See infra* notes 102–111 (discussion on Enron and other bad actors).

46 The enterprise governance, risk and compliance ("eGRC") market, has grown at an astounding pace. The global market has shot up from 22 billion USD in 2017 to 32.6 billion in 2020. *See eGRC Market by Component (Software and Services), Software (Usage and Type), Type (Policy Management, Compliance Management, Audit Management, Incident Management, and Risk Management), Business Function, Vertical, and Region - Global*

growth can be attributed to corporations restructuring away from the conventional "in house" model of compliance towards a more technologically advanced one, the tremendous projections of future industry growth outpace this shift.[47] Whether it be for good or simply to protect their bottom line, corporations are continually increasing their compliance efforts.

But even as corporations take compliance more seriously with each passing year, there are old relics of a less regulated era that still float adrift in the law. Some would argue that the entire notion of corporate criminal liability is one such outdated remnant.[48] That is a more philosophical issue than this Note deigns to address. Corporate leaders are aware that their companies can be held criminally liable for the actions of their employees, and that notice alone can be seen as enough to mitigate the unfairness of the very concept of corporate criminal liability. Rather, what is concerning is the gray area that exists between legitimate, good faith compliance efforts and the vicarious liability that those efforts should eliminate.

III. THE CONFOUNDING RELATIONSHIP BETWEEN HILTON HOTELS AND KLOR'S

Vicarious liability has been attached to employers even when they take steps to discourage the illegal activities of employees. *Hilton Hotels* is the seminal case in this area of the law.[49] That decision vaguely defined a broader view of an employer's liability for an employee's action that has left a void of uncertainty around corporate compliance.[50] Beyond being simply nebulous, the decision in *Hilton Hotels* was incorrect, based on a misinterpretation of a Supreme Court ruling and a dubious understanding of the history of vicarious liability.

In *United States v. Hilton Hotels*, defendant corporation Hilton Hotels appealed its Sherman Act conviction to the Ninth Circuit Court of Appeals.[51] At the time of the indictment, the Portland branch of Hilton Hotels was involved in an organization of hotels, restaurants, and their suppliers.[52] The organization's purpose was to attract

---

Forecast to 202, MARKETS AND MARKETS (June 2020), https://www.marketsandmarkets.com/Market-Reports/enterprise-governance-risk-compliance-market-1310.html.

47 Some suggest a compound annual growth rate of 13.3%. *Id.*; *see also* Fortune Bus. Insights, *Enterprise Governance, Risk, and Compliance Market to Hit $64.55 Bn by 2027; Rising Demand for Effective Risk Management Tools from Businesses to Fuel Growth*, GLOBENEWSWIRE (Oct. 16, 2020, 07:12 ET), https://www.globenewswire.com/news-release/2020/10/16/2109787/0/en/Enterprise-Governance-Risk-and-Compliance-Market-to-Hit-64-55-Bn-by-2027-Rising-Demand-for-Effective-Risk-Management-Tools-from-Businesses-to-Fuel-Growth-Fortune-Business-Insights.html (projecting a CAGR of 13.3%).

48 *See* Bruce Coleman, Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 SMU L. REV. 908 (1975).

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

50 *Id.* at 1007.

51 *Id.* at 1002.

52 *Id.*

conventions to Portland for the benefit of its members.[53] The organization asked members to make voluntary contributions to fund it.[54] However, the members of the organization who represented hotels sought to force the members who represented suppliers to contribute to the endeavor.[55] These hotel members agreed amongst themselves to give preferential purchasing treatment to the supplier members who contributed funds to the organization, in a form of boycott.[56] At trial, involvement with the boycott was deemed to be a per se violation of the Sherman Act.[57]

The Hilton employee who engaged in the boycott, the purchasing agent in charge of buying supplies, was explicitly instructed by his supervisor to not participate in the boycott on two occasions.[58] It was further revealed at trial that the purchasing agent had engaged in the boycott due to a "personal pique" he had against an agent of one of the boycotted suppliers.[59] The trial court ignored the role of personal grudges in the matter and held that Hilton was liable for the Sherman Act violation, holding: "A corporation is responsible for acts of its agents . . . even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."[60]

On appeal, the Ninth Circuit affirmed the District Court's ruling, stating that "as a general rule, a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent."[61] The defendant raised the matter of the purchasing agent's personal grudge in their appeal.[62] The Ninth Circuit swept this argument aside as having been decided by the Supreme Court in *Klor's v. Broadway-Hale Stores*.[63]

---

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* Defendant argued on appeal that there was no per se violation of the Sherman Act because the boycott's purpose "was solely to bring convention dollars into Portland", and not to destroy competitors. The Court did not find this compelling, finding that the intent to restrain competition was what constituted the violation, and that defendant's ultimate objective was "immaterial."

58 *Id.* at 1004.

59 *Id.*

60 *Id.*

61 *Id.* at 1007.

62 *Id.* at 1008.

63 *Id.* at 12 n.1.

In *Klor's*, the plaintiff sought treble damages under the Clayton Act[64] for the defendant's alleged violations of the Sherman Act.[65] The plaintiff was a small store competing with its more sizeable neighbor, the defendant.[66] The defendant conspired with its network of manufacturers and distributors to harm plaintiff.[67] This network would either refuse to sell big-name appliances to the plaintiff or do so at discriminatory prices.[68] This ensured that the plaintiff could not effectively compete in the market.[69]

The defendant had moved for dismissal for failure to state a cause of action.[70] The defense argued, and the District Court agreed, that the controversy was a "purely a private quarrel" between plaintiff and defendant, with no effect on the public.[71] The District Court granted the motion to dismiss,[72] which was subsequently affirmed by the Ninth Circuit on appeal, before being granted certiorari.[73] The issue posed to the Supreme Court was whether the Sherman Act was violated when a group of more powerful businessmen act in concert to deprive a single merchant of the goods it needs to compete.[74] The Court was not moved by the defendant's claim that this was a "purely private quarrel,"[75] finding that a monopoly is forbidden, even if it only hurts one merchant at a time. The Court explained, "Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups."[76] The Court accordingly reversed the decision and remanded the case for trial.[77]

---

64 15 U.S.C. § 15(a). Under the Clayton Act, a plaintiff is entitled to recover three times the amount suffered by the prohibited conduct, in addition to reasonable attorney's fees.

65 Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 208 (1959).

66 *Id.* at 208, 213.

67 *Id.* at 208–09.

68 *Id.* at 209.

69 *Id.* Defendant did not dispute the allegations, acknowledging that its actions had harmed the plaintiff.

70 *Id.*

71 Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214, 221 (9th Cir. 1958).

72 *Id.*

73 *Id.* at 235.

74 *Klor's*, 359 U.S. at 210.

75 *Id.*

76 *Id.* at 213.

77 *Id.* at 214. The concurrence, written and supported solely by Justice Harlan, seemed to make no opinion on the case as a matter of law. Rather, Justice Harlan thought that regardless of the majority's opinion, there were sufficient allegations in the complaint that entitled the plaintiff to reach trial.

When the Ninth Circuit relied on *Klor's* to decide *Hilton Hotels*, it erroneously created an equivalency between an employee's personal grudge and a corporation eliminating its competitors one at a time. The decision pulled a Supreme Court holding about the Sherman Act and applied it to a respondeat superior case, which only incidentally involved the Sherman Act. By doing so, the Ninth Circuit incorrectly decided the *Hilton Hotels* case, and created a fallacious precedent that has still not been overturned.[78]

IV. ANALYSIS OF THE PROBLEM CREATED BY HILTON HOTELS

The decision in *Hilton Hotels* established that an employee's personal objectives, malicious as they might be, have no bearing on the employee's scope of employment. The Ninth Circuit was quick to harken back to the old truism that respondeat superior can still be satisfied so long as the employer benefits in some way from the employee's conduct. The Ninth Circuit failed to understand that the defense's argument in *Hilton Hotels* did not target the benefit to the employer element but in fact targeted the scope of employment element. The defense in *Hilton Hotels* must have known that they would never prevail on an "employer benefit" argument because the case law had become well established by that point.[79] It is difficult to know whether the defense failed to make that obvious or if the Ninth Circuit is to blame. Regardless, the real question of *Hilton Hotels* should have been this: Can an employee who commits an unlawful act for personal, nonbusiness reasons, against the direct and explicit instructions of his supervisor, be considered to be acting within the scope of their employment? The answer to that question should be an emphatic "no."

The doctrine of respondeat superior as a whole is grounded in the principles of negligence; that a corporation must monitor its employees with a reasonable degree of care. However, the second element, benefit to the employer, is only included by some

---

[78] The Supreme Court subsequently denied certiorari. W. Int'l Hotels Co. v. United States, 409 U.S. 1125 (1973). It is unclear whether this was because the highest Court concurred with the case's outcome, or if there was some other consideration in play. However, the Court explicitly addressed the *Hilton Hotels* ruling in 1982. Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 582 n.6 (1982). The Court honed in on *Hilton Hotels*' commonly used "even when done against company orders" language, but made no mention of the concerns raised in this Note. In fact, the Court went on to highlight the Ninth Circuit's observation that antitrust violations "are usually motivated by a desire to enhance profits, involve basic policy decisions, and must be implemented over an extended period of time." *Id.* It is startling to see the Court generalize the nature of a crime instead of recognizing the facts specific to *Hilton Hotels*. While those observations are certainly true of *most* antitrust offenses, the U.S. does not convict based on what happens in *most* cases. This also adds to the notion that offenses like those described under the Sherman Act have been applied as strict liability, even when Congress has made no assertion of strict liability.

[79] Standard Oil Co. v. United States, 307 F.2d 120, 128 (5th Cir. 1962). The *Hilton Hotels* court cites to *Standard Oil v. United States* in evaluating the "employer benefit" element, stating that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment". United States v. Hilton Hotels Corp., 467 F.2d 1000, 1008 n.4 (9th Cir. 1972). While this interpretation looks at the "employer benefit" element as a prerequisite step to scope of employment, the difference between this view and a "two element test" view is negligible for the purposes of this Note.

courts,[80] and only in cases where the agent's conduct is actually or potentially detrimental to the corporation.[81] In fact, the employer benefit element has all but vanished from judicial explanation of the doctrine, with modern courts favoring a broad social policy approach colloquially referred to as the "deep-pocket" theory.[82] Developed throughout the early 20th century, the "deep-pocket" or "entrepreneur" theory finds that employers are in a better position to pay victims than employees, and that employers can spread out their potential liability cost through insurance.[83] The employer is thus the person best suited to bear the cost of the harm.[84] This notion has spread from tort-based vicarious liability to vicarious liability for criminal acts.[85] As a result, both the Restatement (Third) of Agency[86] and the Model Penal Code[87] do away with the employer benefit element entirely, and attach liability to the employer based solely on whether the employee was acting within the scope of their employment.

The legislative intent of the Sherman Act does seem to support this,[88] but the courts have readily applied it as such in all sorts of regulatory matters. The multitude of cases in this area largely center on a few archetypal employee motivations that the corporation is, quite reasonably, expected to anticipate. These include a desire to earn approval or promotion within the company, a desire to make money or reach a bonus threshold, a desire to see competitors fail,[89] and most of the other desires one might

---

80 *See, e.g.*, United States v. Automated Med. Lab'ys, Inc., 770 F.2d 399, 406–07 (4th Cir. 1985).

81 MIRIAM F. WEISMANN, CORPORATE CRIME & FINANCIAL FRAUD: LEGAL AND FINANCIAL IMPLICATIONS OF CORPORATE MISCONDUCT 13 (2012).

82 Brill, *supra* note 15, at 2.

83 *Id.* at 2–3.

84 *Id.*

85 *See supra* notes 10–13.

86 RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006).

87 MODEL PENAL CODE § 2.07 (AM. L. INST. 2009).

88 United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006 (9th Cir. 1972).

89 *See, e.g.*, United States v. Automated Med. Lab'ys, Inc., 770 F.2d 399 (4th Cir. 1985). Defendant Automated Medical Laboratories, Inc. ("AML"), its wholly owned subsidiary Richmond Plasma Corporation, and three employees were charged for engaging in a conspiracy to conceal records from the Food and Drug Administration. The Fourth Circuit affirmed the defendant corporation AML's conviction even though its subsidiary's employee was acting according to his "ambitious nature and his desire to ascend the corporate ladder." The court reasoned that "Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." *Id.* at 407.

expect of a corporate employee.[90] All of these could be considered "business reasons," which is the term this Note is using to encompass this group of activities. A "nonbusiness reason" could thus be defined as a motivation which does not aim to provide benefit to the employer *and* does not flow from an employee's desire to succeed in business.[91]

The first element of the doctrine (scope of employment) has remained dreadfully ambiguous since its inception. It can contain not only what is in an employee's job description, but also what an employee has been authorized, either actually or apparently, to do during their course of employment.[92] And, according to the holding in *Hilton Hotels*, it can even contain activities that are against the express instructions of superiors.[93]

That portion of the *Hilton Hotels* ruling is particularly tortured when compared to agency law. Under the law of agency, a principal may be liable for the acts that an agent had the actual or apparent authority to do.[94] The principal's explicit instruction not to commit an act would serve to fully revoke any actual authority.[95] So under agency law, one would say that the purchasing agent in *Hilton Hotels* had no actual authority. Apparent authority depends on a third party's perception of the agent's authority. If the third party has a reasonable belief that the agent has the authority to commit the act, then the principal may be liable for the act. Normally, the difference between actual and apparent authority only matters to the agent and the principal, as the distinction only serves to determine whether the principal has a cause of action against the agent.[96] However, the comparison serves to show that scope of employment in criminal law has greatly exceeded the bounds of authority in the law of agency.[97]

---

90 Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 BOS. U. L. REV. 315, 319 (1991).

91 This could be fleshed out further in a note all its own, but for the purpose of this discussion, simply sharing a definition of the phrase will suffice here.

92 *Automated Med. Lab'ys.*, 770 F.2d at 406.

93 *Hilton Hotels*, 467 F.2d at 1007.

94 *Agency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

95 *Actual Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96 *Apparent Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019).

97 Another disconnect between agency theory liability and corporate criminal liability was raised in *United States v. Sun-Diamond Growers*. United States v. Sun-Diamond Growers, 138 F.3d 961, 975–77 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999). Corporate criminal liability matters often place increased culpability on corporations when the employee at issue held a "high-level decision-making or sensitive position." *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 2C1.2 (U.S. SENT'G COMM'N 2018). Traditional agency law only focuses on the scope of employment of the employee and does not place an additional degree of importance on the agent's role within the corporation. One would expect that the authority of an employee would be different depending on their rank in the corporation under both sources of law. But a high-level employee's conduct does not become somehow more damning against its employer under agency law. The appellate court in *Sun-Diamond Growers* (later affirmed by the Supreme

The expansive definition of "scope of employment" does have public policy justifications. Primarily, it serves to spur corporations towards comprehensively monitoring their employees. After all, corporations are in a better position than outside regulators to prevent, observe, and report misconduct. Additionally, corporations are often more attractive defendants. There is greater glory to be found in bringing a corporation to heel. Punitive damages and fines against individuals pale in comparison to those levied against their corporate employers.[98]

A. Impracticable Compliance Expectation

However, this approach creates injustices and impracticalities that outweigh the perceived benefits. First and foremost, corporations cannot be reasonably expected to prevent their employees from acting for personal, nonbusiness reasons. Compliance programs are the bedrock of corporate regulations, seen by Congress, federal agencies, and the courts as the mechanism by which corporations can limit employee behavior and accordingly limit their liability as principals. Thus, the fundamental question that must be asked for any corporate liability matter is whether the conduct could have been prevented if a reasonable compliance program had been in place.

It is unreasonable to suggest that employers can effectively address employee activities that are driven by personal, nonbusiness motives. There are numerous problems in monitoring motivations. Personal desires are very difficult for an observer to gauge. An employer can only be so intrusive into the minds of its employees before it faces serious matters of privacy law. Moreover, in today's competition for human capital, a company risks losing a recruiting edge when it engages in investigative practices against its own employees. Even if a corporation came right out and asked employees to name their "enemies," how many employees would be honest? Would the purchasing agent in *Hilton Hotels* have admitted to his supervisor that he had developed a contentious relationship with a supplier? Such an admission might very well have put his job in jeopardy. Asking employees to report themselves is not likely to accomplish much at all.

Even if a compliance program could be effective, the cost of doing so may lead companies towards simply accepting the potential for liability. Cost benefit analyses are common corporate decision-making tools.[99] If the perceived liability is lower than

---

Court) seemed to suggest that position within the company has some further effect on scope of employment. As noted by Weismann: "The opinion does not elaborate. Presumably, a lower lower-level employee may be deemed to be a renegade employee as opposed to the case of a higher-level employee responsible for formulating company policy." WEISMANN, *supra* note 81, at 69–70. It seems the opinion may have been hinting at some small portion of the solution proposed in this Note by aiming at renegade employees.

98 *See, e.g.*, U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF SENTENCING STATISTICS (2020). While this year serves as a fine example, a comparison of "Table 17" to "Table O-2" from any given report year shows a stark contrast.

99 Tim Stobierski, *How To Do A Cost-Benefit Analysis & Why It's Important*, HARVARD BUSINESS SCHOOL ONLINE (Sept. 5, 2019), https://online.hbs.edu/blog/post/cost-benefit-analysis.

the perceived cost of avoiding that liability, the corporation will always choose to take the risk.[100]

The effectiveness and costs of a hypothetical compliance initiative are difficult to measure because courts and regulatory bodies have failed to fully define what an ideal compliance program looks like. The most likely method of compliance, hinted at by the court in *Hilton Hotels*, would involve supervisors following up on their instructions to employees.[101] Using that as a starting point, consider that there is no defined number of follow ups, nor a defined time at which to follow up. The court in *Hilton Hotels* implied that there is some theoretical level at which a corporation will have relieved itself of liability. However, without a better sense of where that threshold is, the corporation would be spending money on compliance in shear hope that it hit the mark. Reasonable persons, let alone reasonable corporations, do not spend so loosely.

Even if an ideal compliance program was a realistic option, there are still fundamental tenets of justice that weigh against a finding of corporate liability. The doctrine of respondeat superior is based in negligence, as opposed to the almost strict liability regime we see here. Torts of negligence require the existence of a duty. A corporation can be said to have duties to its customers, its employees, its business community, and even society in a broad sense. However, to suggest that a corporation has a special duty to the personal enemies of its employees requires a substantial logical leap.

B. Potential for Abuse by Employees

Without a substantial change, employees can wield their corporations as shields while they do great harm to their foes and bystanders alike. Termination, the main threat a corporation has over its employee, is simply not a great enough deterrent to an employee misusing a corporation's power. If termination alone were a strong enough deterrent, the government would not need to insist that corporations build compliance programs that prevent criminal acts.[102]

Consider a hypothetical situation with a fact pattern similar to that in *Hilton Hotels*. Federal prosecutors are highly motivated to convict corporate defendants. In 2019, the average fine for individual antitrust defendants was under $46,000,[103] while organizational antitrust defendants were fined over $33,000,000 on average.[104] If an ambitious prosecutor was assigned a case like *Hilton*, is there not a significant incentive to offer the individual defendant a deal in exchange for cooperating against the corporation? In fact, in 2019, twenty percent of eligible defendants cut deals just

---

100 *See generally* Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291 (1992).

101 United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972).

102 U.S. SENT'G GUIDELINES MANUAL § 8.

103 U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF SENTENCING STATISTICS 66 (2020).

104 *Id.* at 170.

like that.[105] Even those who did go to jail were only sentenced to an average of six months.[106] If an employee is so determined to harm another that they are willing to commit a felony, these penalties are arguably not enough to make them think twice. Moreover, it makes the employer corporation an attractive tool to commit harm on your enemies. After all, if you used a lock pick to break into your enemy's business and cause damage, you would likely receive an extra sentence for using criminal tools. But, if you simply use your employer to accomplish the same thing, you might get no jail time at all!

C. The Supreme Court after Hilton Hotels

While the Supreme Court denied certiorari in *Hilton Hotels*, it has addressed issues related to that decision more recently. The Court has reiterated in the years since *Hilton Hotels* that any intended benefit to the employer satisfies the second element of respondeat superior.[107] While providing a certain amount of clarity through redundancy, these reiterations of the law have also raised new issues.

The Supreme Court has also addressed the matter of "personal pique" in Sherman Act antitrust cases. In *Nynex v. Discon*, the Court considered another case in which a per se Sherman Act boycott violation was alleged.[108] While *Nynex* was a civil case[109] which the Court connected to *Klor's*,[110] the Court included a comment on "personal pique" in a nod to *Hilton Hotels*.[111] The Court declined to impose the per se rule in *Nynex*:

> To apply the per se rule here — where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud — would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or *personal pique*, into treble-damages antitrust cases. And that per se rule would discourage firms from

---

105 *Id.* at 68.

106 *Id.* at 64.

107 *See, e.g.*, United States v. Sun-Diamond Growers, 526 U.S. 398, 404–10 (1999), *aff'g* 138 F.3d 961 (D.C. Cir. 1998); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 573–74 (1982).

108 Nynex Corp. v. Discon, 525 U.S. 128, 130–33 (1998).

109 *Id.* Discon, Inc., a telecommunications contractor, sued under the civil recovery provisions of the Sherman Act. The defendant Nynex Corp. had previously been associated with a monopoly (AT&T) which had been broken up by the federal government. Discon alleged that Nynex discriminated against their apparently better offer in favor of a fraudulent offer involving AT&T subsidiaries.

110 *Id.* at 135–36.

111 The court never explicitly mentions *Hilton Hotels* in its *Nynex* decision, but there are two pieces of evidence that strongly support the notion that this mention of "personal pique" was connected to *Hilton Hotels*. First, this is the only Supreme Court opinion that uses the words "personal pique". Second, the issue of *Hilton Hotels* and *Nynex* are closely connected. Both cases involved liability (though of different forms) attaching based on a per se boycott violation under the Sherman Act.

> changing suppliers — even where the competitive process itself does not suffer harm.[112]

This makes it clear that the Supreme Court finds that violations caused by personal pique are unworthy of treble damages under the Sherman Act. While this is not a reversal of the *Hilton Hotels* decision,[113] it does bring it into question. The *Nynex* decision suggests that the plaintiff in *Klor's* would not be entitled to treble damages if the defendant Broadway-Hale had been able to prove that its boycott was motivated by a "personal pique" of an employee. The Court applied the holdings of *Klor's* in *Nynex*, thus reaffirming the holding that the plaintiff is entitled to treble damages if a boycott was motivated by a business' grudge with another business. [114] This difference definitively disproves the equivalency between "personal pique" and business-to-business "grudges" that the Ninth Circuit pulled out of *Klor's* in its *Hilton Hotels* decision.

V. PROPOSED SOLUTION TO THE PROBLEM CREATED BY HILTON HOTELS

The best solution for the problem created by *Hilton Hotels* would be an affirmative "personal, nonbusiness motive" defense to the common law doctrine of respondeat superior. This would achieve the result of limiting liability to only those who are responsible for the wrongdoing, while avoiding the downsides that accompany other potential solutions. Because of the complexities involved with this issue, the defense should be a bar to prosecution. A judge should rule that, as a matter of law, the employee acted outside their scope of employment, if the employer can prove, by clear and convincing evidence, that the employee committed the crime for personal, nonbusiness reasons.

It may seem as if this defense would be better applied to the second element (benefit to the principal) of respondeat superior. However, there are three considerations that make this proposed defense a better fit with "scope of employment." First, as mentioned before, there are strong public policy reasons to maintain the second element as it currently is. Second, this defense lies closest to the "purpose" subcomponent of "scope of employment." While the mens rea component of "intent" is attached to "benefit the principal," it is not a substitute for the "purpose" within "scope of employment." As noted above, this intent component has largely become an irrelevant portion of the second respondeat superior element anyway. Finally, attaching this defense to the first element of respondeat superior (scope of employment) eliminates any confusion regarding ill-gotten gains that might come from attaching it to the second element, or attaching it to respondeat superior as a whole. If the defense disproved the second element, it could lead to some unfortunate holdings which confuse the fact that an employee's "personal, nonbusiness motives" can still result in outcomes that improperly benefit an employer.

---

112 *Nynex*, 525 U.S. at 136–37 (emphasis added).

113 Given the difference in sources of liability between the two cases (criminal versus civil), and the lack of an explicit statement, it would be a reach to suggest that the Supreme Court overruled Hilton Hotels in Nynex.

114 *See Nynex*, 525 U.S. at 134–35.

A. Alternative Solutions and Their Drawbacks

There are other methods that could cure or help to limit the injustice created by rogue employees that are driven by personal vendettas. All of these must be considered with the understanding that there are compelling public policy reasons for corporate criminal liability[115] and that any changes should not be disproportional to the existing harm or create new harms. These principles serve to rule out a number of more dramatic possibilities. For instance, some scholars promote the view that corporate *civil* liability can, if properly structured, serve the same purpose as the current system of corporate criminal liability.[116] Besides the desire for better mutual outcomes, this view is also driven by concerns over the disparate rights that corporations and individuals have in criminal prosecutions.[117] But doing away with corporate criminal liability entirely would be a drastic departure from over a hundred years of precedent. Such a change would not likely come from the courts due to judicial adherence to stare decisis.[118] The change is perhaps even less likely to come from the legislature. Congress has persistently left corporate criminal liability clauses intact in legislation like the Sherman Act.[119]

A more targeted statutory change may be more realistic than the hard reset proposed by those who favor doing away with corporate criminal liability entirely. Congress has created an opening which some scholars believe could serve as a defense to corporate criminal liability in some white collar cases.[120] The "Mail fraud and other fraud offenses" chapter of the U.S. Code prohibits various forms of fraudulent activity, including a "scheme or artifice to defraud."[121] Though the chapter itself was formed

---

115 *See* public policy discussion *supra* pp. 6–8, 17.

116 *See* Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1532–34 (1996).

117 *See* Henning, *supra* note 36, at 795–802, 820–21. Perhaps the biggest point of contention centers on mens rea elements and a corporation's ability to form intent. This issue is too broad to do justice to here, but it does raise some particularly interesting questions within this Note's scope. First, what is the unconstitutionally vague method by which a corporation manifests its intent? Publicly stated corporate policy cannot form intent by itself, lest we have corporations simply put "do not break the law" in their articles of incorporation and thus escape all liability. Some additional expression from the agents of the corporation must be included when evaluating intent. But if a supervisor twice instructing his employee against an illegal action, as in *Hilton*, is not enough to consider that the corporation did not intend to commit the crime, what is? Traditionally the law says that the corporation assumes the intent of the agent if the corporation breaches its duty to supervise. But as this Note argues, that duty is ill defined.

118 *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 447 (2015). The Supreme Court respects the doctrine of stare decisis and stated that it "provides that today's Court should stand by yesterday's decisions." It further held that where "the precedent interprets a statute, stare decisis carries enhanced force, since critics are free to take their objections to Congress."

119 *See, e.g.*, the development of the Sherman Act as a result of the Clayton Act and Robinson-Patman Act of 1936. 15 U.S.C. § 13.

120 WEISMANN, *supra* note 81, at 32.

121 18 U.S.C. §§ 1341–51.

in 1948, § 1346 was added in 1988 to shed additional light on what a "scheme or artifice to defraud" encompasses. For the purposes of the chapter, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[122] But the Supreme Court interpreted § 1346 as narrowly as possible, holding that "§ 1346 covers only bribery and kickback schemes."[123] If Congress intended § 1346 to apply more broadly as the prosecution in *Skilling* suggested, Congress could amend the statute to make that clear. Under that broader understanding of § 1346, corporations could claim that they were in fact the victim of the employee's conduct, shielding the corporation from liability for the employee's actions. However, the existence of any employer benefit that satisfies the second element may still result in a finding of corporate liability.[124] Even if Congress broadened § 1346, it would still only apply to Chapter 63 fraud indictments.[125] Congress would have to apply the "dishonest services" protection to the Sherman Act, or corporate criminal liability in general, to reach cases like *Hilton Hotels*.

There are general concerns that also make statutory changes a less attractive solution. Changing statutes is a long and unlikely business. A single statute change that created an affirmative defense like the proposed solution for all instances of corporate criminal liability would be frighteningly broad. Changing each statute under which a corporation can be found criminally liable would be an enormous endeavor. In addition, lawmakers would be faced with the reality that this subject would not be particularly appealing to voters. Even pro-business voters may feel that there are better uses for their legislators' time.

The problem exhibited in *Hilton Hotels* could also be addressed by reevaluating jury instructions involving the duty to supervise. But altering that portion of the law would have undesirable consequences. Revisiting jury instructions for corporate criminal trials in general would be a noble pursuit. Jury instructions in corporate cases are already lengthy and frequently confusing. Ideal jury instructions are "brief, concise, nonrepetitive, relevant to the case's details, understandable to the average juror, and should correctly state the law without misleading the jury or inviting

---

122 *Id.* § 1346.

123 Skilling v. United States, 561 U.S. 358, 368 (2010). Skilling was a longtime executive of Enron up until the company's notorious bankruptcy. The Government sought to charge Skilling under the "honest-services" theory of wire fraud for depriving the Enron shareholders and the broader public of honest services. The Court unanimously agreed that § 1346 was not properly applied but had two distinct approaches on resolving the issue. The majority opinion believed that § 1346 was too broad and required the insertion of the "bribery and kickback schemes" language would remedy the issue while reflecting congressional intent. Scalia's concurrence found that § 1346 was unconstitutionally vague and that the Court was wrongfully inserting itself into the legislative process by inserting terms which appeared nowhere in the statute.

124 *See* United States v. Sun-Diamond Growers, 138 F.3d 961, 970 (D.C. Cir. 1998). The circuit court found that the bribery and kickback scheme created by the employee was meant to benefit his employer. Thus, even if § 1346 was expanded to touch all cases of fraud, the defendant corporation would still have to show that its employee did not act intending to benefit the employer.

125 18 U.S.C. §§ 1341–51.

unnecessary speculation."[126] One need look no further than the infamous *Arthur Andersen LLP v. United States* to see just how confounding these jury instructions can be.[127] During initial deliberations, only four of the jurors in the trial court for *Arthur Andersen* committed to a guilty verdict.[128] It was not until the trial judge issued more instructions that the jury returned a guilty verdict.[129]Adding additional language about the duty to supervise in cases like *Hilton Hotels* could complicate matters in a similar fashion to *Arthur Andersen*.[130] It is better to leave the matter to the experience of a judge.[131] In spite of the tremendous benefit that jury instruction reform could have on corporate crime cases as a whole, it would likely leave cases like *Hilton Hotels* untouched. The Supreme Court, which would be a necessary participant in such reform, has shown more interest in evaluating the jury instructions regarding corporate intent than respondeat superior cases in which the corporation takes on the intent of its agent.[132]

Another potential solution could come from an adjustment to the Justice Department's guidelines for prosecution. The Department of Justice could include a "compliance program" or a "nonbusiness reason" bar to prosecution. Similar to the Federal Sentencing Commission's guidelines, the Department of Justice does not have a sufficiently detailed or tiered understanding of corporate compliance programs.[133] The "compliance" bar would certainly be more beneficial to the Department of Justice itself. The definition of the ideal compliance program could be structured in a way that

---

126 *Jury Instructions*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/jury_instructions (last updated June 2020).

127 Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005). The Supreme Court reversed the conviction of Arthur Andersen based on problematic jury instructions.

128 WEISMANN, *supra* note 81, at 8.

129 *Id.*

130 There are movements like The Plain Language Action and Information Network (a group of federal employees who can be found at www.plainlanguage.gov) who support keeping jury instructions in concise, plain language. Seeing as I have had to inject phrases like "nonbusiness reason" into my own proposed solution, it is hard to imagine a jury instruction that could adequately confer these concepts to a jury in sufficiently clear language.

131 This would also have the additional benefit of avoiding a costly trial.

132 The Enron Scandal, its direct descendants, and spiritual successors, have taken up a great deal of the focus of regulators, courts, and scholars over the past two decades.

133 Building a more detailed view of corporate compliance programs would likely be closer to the core competencies of the Justice Department then the Federal Sentencing Commission. After all, members of the Justice Department must think every day about ways that their corporate targets could have fulfilled their duty to supervise, as they proceed in building cases to show how targets breached that duty. The Justice Department also has a significant number of employees who used to work in the corporate compliance sector.

quality programs made prosecution more cooperative and generally easier.[134] While changes to the Department of Justice guidelines could be effective, they could also be ignored.[135] Furthermore, given that the guidelines were not changed in this respect during the "corporate-friendly" Trump Administration,[136] it is hard to believe that such changes are likely to occur in the foreseeable future.

Finally, the Federal Sentencing Commission could consider making substantive changes to the definition of compliance programs and their related effect on sentencing. This is perhaps the "second best" solution to the problem, as it could provide much needed clarity about what makes a satisfactory compliance program, while generating outcomes that are more just. To reach the effectiveness of the proposed common law defense, the Commission would likely need to take a tiered approach in which degrees of quality in compliance are explicitly defined. In such a scheme, a superb compliance program would bar, at the very least, all punitive damages. But make no mistake, this would be a difficult solution to implement. After acknowledging a change should be made, the Commission would have to almost completely restructure Chapter 8 of the Guidelines. The Commission would also have to reach out to compliance experts for help in developing reasonable and effective definitions and tiers. However, even if the Sentencing Guidelines were improved, there is no obligation for sentencing courts to follow them.[137]

VI. CONCLUSION

Either a circuit court or the Supreme Court should revisit the issue of corporate criminal liability, as the current system does not adequately place liability on those who are truly at fault. *Hilton Hotels* stands as an example of the problems imposed created by the poorly defined "scope of employment" term, as well as an example of a circuit court misapplying a Supreme Court ruling. The Ninth Circuit's decision in that case does not render the intended public policy benefit. Instead, it encourages employees to use their companies as tools to engage in private spats with their enemies.

The Supreme Court and appellate courts seem content with quoting the simple holding of *Hilton Hotels*[138] without fully examining the facts of the case. The details

---

134 For instance, standardized record keeping of compliance activities could help prosecutors in a manner similar to that of the standardized reporting of the Securities and Exchange Commission.

135 Additionally, both of these solutions limit the possibility of this concept spreading to other parts of the law, such as agency, tort or contract. While this Note does not focus on those fields, they similarly suffer from the nebulous "scope of employment" element.

136 Drew Desilver, *Trump's Cabinet Will Be One of the Most Business-Heavy in U.S. History*, PEW RSCH. CTR. (Jan. 19, 2017), https://www.pewresearch.org/fact-tank/2017/01/19/trumps-cabinet-will-be-one-of-most-business-heavy-in-u-s-history/.

137 Gall v. United States, 552 U.S. 38, 46 (2007); Kimbrough v. United States, 552 U.S. 85, 100–01, 111 (2007). In this pair of cases the Supreme Court asserted that the Sentencing Guidelines were advisory and established that the proper standard of review for sentences is whether or not the sentencing court abused its discretion.

138 United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972); *see also* United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989); United States v. Phelps Dodge

of *Hilton Hotels* and its faulty reasoning should not be overlooked, even if there is good law in portions of its opinion. *Hilton Hotels* was not only unfair to the corporate defendant, but also shows a disregard for legislative intent that surrounds many corporate criminal liability offenses. Strict liability should not be applied by the courts absent clear congressional intent.

A common law defense to the "scope of employment" element of respondeat superior is the best way to accomplish justice in cases like *Hilton Hotels* without dramatically altering the precedent of such an established doctrine. While changes to statutes, jury instructions, prosecutorial guidelines, and sentencing guidelines could all serve to reach fairer outcomes, a common law prosecutorial bar based on "scope of employment" would be the simplest and most effective means of resolving the issue.

Indus., Inc., 589 F. Supp 1340, 1358 (S.D.N.Y. 1984) ("A corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.").