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# CORPORATE CRIMINAL LIABILITY AND THE POTENTIAL FOR REHABILITATION

Peter J. Henning\*

## INTRODUCTION

In December 2008, Siemens AG, the multinational German corporation with over 400,000 employees and annual revenues in excess of €70 billion, entered a guilty plea to violating the Foreign Corrupt Practices Act (FCPA). The company agreed to pay a \$450 million criminal fine and disgorged profits of \$350 million in a related SEC civil enforcement action. This was by far the largest FCPA fine ever paid, and marked a significant turning point in international business corruption enforcement.<sup>1</sup> Just two months later, in February 2009, UBS AG, Switzerland's largest bank, entered in to a deferred prosecution agreement with the Department of Justice that included a payment of \$780 million in fines, penalties, and interest for aiding United States citizens to avoid paying taxes on undeclared accounts at the bank. More importantly, the Swiss bank agreed to turn over information about its American clients to the IRS, apparently the first time in history the wall of secrecy surrounding Swiss banking operations had been breached on a significant scale.<sup>2</sup>

Each company undertook an extensive internal investigation to ascertain wrongdoing by corporate employees and agreed to restructure its operations to ensure future compliance with United States law. If the potential for criminal charges being filed against the companies had not been available, would either corporation have done anything to rectify the misconduct that occurred within the organization? While one can bemoan corporate criminal liability as a "weed" growing in the legal system,<sup>3</sup> it cannot be denied that the potential for criminal prosecution of an organization apart from its individual agents can serve important law enforcement purposes.

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\* Professor of Law, Wayne State University Law School. © 2009, Peter J. Henning.

1. See Press Release, U.S. Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), available at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html> (last visited Oct. 7, 2009) (noting that this level of coordination among enforcement authorities set the standard for multi-national cooperation in fighting corruption).

2. See Press Release, U.S. Dept. of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), available at <http://www.usdoj.gov/opa/pr/2009/February/09-tax-136.html> (last visited Oct. 7, 2009) (noting that the agreement is a milestone for law enforcement efforts that pulled aside the "veil of secrecy" to allow continued pursuit of tax evaders).

3. See Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 21 (1957) (describing corporate criminal liability as a "weed" and asserting that "[n]obody bred it, nobody cultivated it, nobody planted it. It just grew.").

Yet the notion of corporate criminal liability continues to be questioned as an unwarranted extension of the criminal law that gives prosecutors too much authority over companies that feel compelled to cooperate. Recently, Andrew Weissmann proposed narrowing the scope of corporate criminal liability by requiring that the “government should bear the burden of establishing as an additional criminal element that the corporation failed to have reasonable policies and procedures to prevent the employee’s conduct.”<sup>4</sup> Professor Ellen Podgor went a step further in proposing a “good faith” affirmative defense if the company made efforts to achieve compliance with the law.<sup>5</sup>

Some have even asserted that the criminal sanction should be reserved solely to individuals rather than incorporeal organizations that cannot form criminal intent or act on its own, leaving the regulation of businesses to civil enforcement programs. For example, Professor Parker asserts that “there is no legitimate function of corporate criminal liability that cannot be served equally as well, if not better, by civil enforcement.”<sup>6</sup> Mr. Lynch of the Cato Institute stated, “[p]olicymakers should excise the doctrine of corporate criminal liability from American law.”<sup>7</sup> Professor Baker argues, “[m]odern corporations are abstract, impersonal, utilitarian entities lacking emotions and a personal story, and as such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecutions.”<sup>8</sup>

So much has been made about prosecutorial unfairness in treating corporations, that some multibillion dollar enterprises have been bullied by the Department of Justice to cooperate with the government by acknowledging guilt and then turning over records and employee statements regardless of guilt or innocence. And for what crimes? According to former Attorney General Dick Thornburgh, Congress has adopted “artificial crimes” that criminalize acts which cause no cognizable harm to people or property.<sup>9</sup>

The demise of Arthur Andersen after its conviction in 2002 for obstruction of justice is often used to “prove” the purported overwhelming power of prosecutors and the trembling fear of corporations who dare not risk going to trial under any circumstances lest they face near-certain destruction.<sup>10</sup> However, there have been

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4. Andrew Weissmann, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 411 (2007).

5. Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007).

6. Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381, 393 (1996).

7. Timothy Lynch, *Introduction: First Principles of American Justice*, in *IN THE NAME OF JUSTICE*, at xvii (Timothy Lynch ed., Cato Institute 2009).

8. John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2003).

9. Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279, 1280 (2007).

10. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005). The Supreme Court overturned the conviction because of flawed jury instructions, and the Department of Justice decided not to seek a retrial. For a

no other instances of a large firm suffering the same fate since then, even though other companies that have been charged with crimes and appear to have survived the ordeal, albeit quite a bit worse for wear.<sup>11</sup> Moreover, despite the oft-repeated statement that a corporation would never dare go to trial for fear of the consequences, W.R. Grace & Co. did just that in fighting environmental charges and was found not guilty along with three of its executives.<sup>12</sup> Somehow, citing to a single example of a firm's demise after a conviction and simply asserting that corporations "never" go to trial seems to be sufficient to establish the problematic nature of corporate criminal liability and its companion claim of prosecutorial overreaching. But this is hollow. Despite the repeated criticisms of corporate criminal liability, it is a staple of the criminal law in the United States, and unlikely to leave the scene any time soon. Indeed, it is growing outside the United States as a means of policing corporate misconduct.<sup>13</sup>

In this Essay, I focus on two questions that seem relevant to the current discussion about the scope of corporate criminal liability: first, is there a justification for applying the criminal law to a corporation or other type of business organization? While there is at least the possibility of deterring an individual from undertaking criminal conduct again by imposing punishment on the person, and society can exact retribution from the law-breaker to vindicate its interests and

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discussion of Arthur Andersen's culture that may have contributed to the firm's choices regarding the destruction of the Enron audit documents that led to the obstruction of justice charges, see Jeffrey S. Kinsler, *Arthur Andersen and the Temple of Doom*, 37 Sw. U. L. REV. 97, 98 (2008).

11. The law firm Milberg, Weiss, Bershad & Schulman was charged with RICO and other violations in May 2006 related to improper payments to class action representatives and expert witnesses. The firm survived the indictment, and ultimately entered into a "Case Disposition Agreement" that required it to pay a \$75 million fine. After resolving the criminal prosecution, the firm reconstituted itself as Milberg LLP and remains a viable entity, although it is not the litigation powerhouse it once was. See Lisa L. Casey, *Class Action Criminality*, 34 J. CORP. L. 153, 235 (2008). Casey explains,

While the indictment did not cause Milberg Weiss to collapse, as some pundits had predicted, the firm did have to shutter some offices, including its Florida branch that had employed 120 lawyers in 2005. . . . Under its nonprosecution agreement with the government, Milberg LLP has five years to satisfy the \$75 million penalty assessed. However, even if the firm recovers some of the penalty amounts from its four former partners who pleaded guilty to wrongdoing, the firm's survival still depends upon its ability to attract clients and litigate cases successfully despite the reputational harm caused by the indictment.

*Id.* In 2009, the W.R. Grace & Co. went on trial on environmental charges related to a vermiculite mine it operated in Libby, Montana from 1963 to 1990. Kirk Johnson, *Chemical Company is Acquitted in Asbestos Case*, N.Y. TIMES, May 9, 2009, at A10. The company remains in business.

12. W.R. Grace & Co. went on trial in 2009 on environmental charges related to a vermiculite mine it operated in Libby, Montana from 1963 to 1990. Johnson, *supra* note 11, at A10. The company remained in business throughout the period from its indictment in 2005 through the jury's verdict.

13. See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1503 (2009) ("[I]n other countries, the focus in the past several decades has been on the creation of corporate criminal liability in jurisdictions in which it did not exist, and where such liability already existed the modern reforms included modifications intended to make it easier, rather than harder, to prosecute corporations criminally. In particular, there have been notable changes in both English and Canadian law in the last decade aimed at making it easier to prosecute corporations for homicide and for workplace injuries.").

those of the victim, these rationales for punishment do not work well for organizations that do not act through the same individuals and will continue to exist even if individual miscreants are removed. My position is that designating conduct as criminal is important apart from any sanction imposed and that the application of the criminal law to an actor in society is a means to express a moral judgment about that actor's conduct. Corporations are as much a part of modern society as individuals, and so this expressive function of the criminal law is particularly worthwhile when applied to organizations that play such a significant role in the economy and indeed throughout society.

Second, if specific deterrence<sup>14</sup> and retribution are, at best, weak justifications for punishing corporations, is there a workable rationale for using criminal laws rather than civil regulatory actions against organizations? I argue in this Essay that the current trend toward using deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to resolve criminal investigations of corporations highlight the proper focus on rehabilitation of the organization as the proper goal of the application of the criminal law to corporations. Not every transgression by a corporate agent can – or should – result in the prosecution of the organization, and, in fact, the number of criminal prosecutions involving corporations – which does not include cases resolved short of indictment by a DPA or NPA – is quite small, fewer than 200 per year at the federal level.<sup>15</sup> When the focus is on publicly-traded corporations and not closely-held businesses in which an owner or senior manager is also charged, that number shrinks dramatically.

If criminal law can be legitimately applied to corporations, then DPAs and NPAs are a worthwhile means to resolve investigations short of a full-blown indictment and guilty plea by the organization because the goal of these agreements is to take steps to prevent future violations. Rehabilitation focuses on the future, through which a defendant resumes being a law-abiding member of society. In a complex organization, it is a worthwhile use of the criminal law to create a means to ensure compliance with the requirements of a DPA or NPA while retaining the threat of a future, and perhaps highly destructive, criminal prosecution if a corporation persists in wrongdoing.

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14. I distinguish specific deterrence, which is focused on the particular defendant, from general deterrence, under which a criminal punishment can discourage others from committing future crimes. General deterrence has some measure of utility in corporate criminal liability because businesses do pay attention to what is happening in their industry and even in the wider commercial community, so the impact of a criminal conviction may have an effect on the organization. See Weissmann, *supra* note 4, at 428 (“General deterrence is particularly apt with respect to corporate criminal conduct, which tends to be the antithesis of crimes of passion. Corporations – through boards, inside and outside counsel, and formal deliberative processes – generally pay particular attention to precedent in determining the risks and rewards of contemplated action.”). Of course, it is not clear how much impact a criminal sanction imposed on one company affects the conduct of others because the individuals in an organization may assign different weights to the conviction of another company, and whether they view themselves as similarly situated.

15. See U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2008, tbl. 51, available at <http://www.ussc.gov/ANNRPT/2008/Table51.pdf>.

## I. APPLYING THE CRIMINAL LAW TO ORGANIZATIONS

The concept of corporate criminal liability has been assailed on a number of fronts. The common law of crimes developed around the concept that an individual can only be punished if there is a concurrence of a guilty mind – the *mens rea* element – coupled with culpable acts.<sup>16</sup> Because a corporation has no mind, and only acts through its agents, it has been posited that applying the criminal law to it was an unwarranted – or at least unreflective – extension beyond what society should otherwise permit. Professor Mueller noted that while the law of corporate criminal liability is easily understood, “[i]t is safe to say that, for the most part, the law has proceeded without rationale whatsoever. . . .”<sup>17</sup>

The presumption of critics of corporate criminal liability seems to be that those who are capable of being prosecuted for traditional common law offenses that required proof of a criminal intent, like murder, rape, or larceny, are the only ones properly within the purview of the criminal law. A late arrival to the social scene, the corporation and its more recent descendants, like the limited liability company, do not fit comfortably within the traditional requirements for liability for a crime except through purportedly unacceptable legal fictions like “collective knowledge” or vicarious liability. Thus, so the critique goes, corporate criminal liability is an interloper in the criminal law.

### A. *Mens Rea is not Always Required*

In conjunction with the critique of corporate criminal liability as falling well outside the requirements of the criminal law is the supposition that its recognition by the Supreme Court represented a radical – and unwarranted – break with the past. In *New York Central & Hudson River Railroad Co. v. United States*,<sup>18</sup> the Supreme Court adopted the *respondeat superior* theory of corporate criminal liability that allowed the criminal prosecution of an organization “by imputing [the agent’s] act to his employer and imposing penalties upon the corporation for which he is acting in the premises.”<sup>19</sup> The Court relied on the tort theory of principal liability for an agent’s misdeeds, stating that it was only going “a step further” in applying the theory of civil liability to a criminal case.

The notion of vicarious liability for individuals based on the conduct of another is not unknown in the criminal law. As Professor Beale pointed out, “The persistence of the felony murder rule and certain rules of accomplice liability (such as the natural and probable consequences doctrine) demonstrates that many

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16. See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.1(a), at 239 (2d ed. 2003) (“The basic premise that for criminal liability some *mens rea* is required is expressed by the Latin maxim *actus non facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).”).

17. Mueller, *supra* note 3, at 23.

18. 212 U.S. 481 (1909).

19. *Id.* at 494.

jurisdictions continue to impose very serious sanctions without a finding of fault based upon *mens rea*.<sup>20</sup> Similarly, under the *Pinkerton* doctrine, a coconspirator is liable for the crimes of another conspirator that were committed during the course of the conspiracy, and were reasonably foreseeable acts in furtherance of it.<sup>21</sup> The *respondeat superior* theory for corporate criminal liability is not such a great leap because assessing the organization's particular *mens rea* is difficult and using the criminal law to proscribe certain forms of conduct is more easily accommodated by vicarious liability in much the same way it is done in other areas of the criminal law.

*New York Central* should not be viewed as an isolated decision or somehow aberrational in the development of federal criminal law. Three years before the Court upheld corporate criminal liability, it held in *Hale v. Henkel* that corporations cannot assert the Fifth Amendment privilege against self-incrimination because the right is available only to natural persons and not organizations, while finding at the same time that a corporation was protected by the Fourth Amendment's protection against unreasonable searches.<sup>22</sup> Both *New York Central* and *Hale* involved two of the leading pieces of federal economic regulation in this era, the Sherman Act<sup>23</sup> and the Elkins Act.<sup>24</sup> Each law reached not only individuals but also corporations, and reflected the desire to exert some measure of federal control over large business combinations through the application of the criminal law.

The rejection of the railroad's claim in *New York Central* that due process should prevent it from being convicted of a crime because it could not form the requisite

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20. Sara Sun Beale, *Solutions: Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1514 (2007). Professor Beale notes that "[c]ompared to liability for homicide, corporate criminal liability for white collar offenses does not seem like such a big deal." *Id.* at 1515.

21. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946) ("And so long as the partnership in crime continues, the partners act for each other in carrying it forward). The Supreme Court went on to explain:

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

*Id.* at 647-48. A number of states have rejected *Pinkerton* liability for coconspirators who do not directly engage in the criminal acts. *See, e.g.*, *Bolden v. State*, 124 P.3d 191, 200 (Nev. 2005), *overruled on other grounds by Cortinas v. State*, 195 P.3d 315 (Nev. 2009); *State v. Stein*, 27 P.3d 184, 185 (Wash. 2001); *State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1993); *State v. Lind*, 322 N.W.2d 826, 841-42 (N.D. 1982); *State v. Nevarez*, 130 P.3d 1154, 1159 (Idaho Ct. App. 2006).

22. *Hale v. Henkel*, 201 U.S. 43, 75, 76 (1906) *overruled in part on other grounds by* *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 84 (1906).

23. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).

24. The first federal statute extensively regulating shipping was the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). It was later amended by the Elkins Act, ch. 708, 32 Stat. 847 (1903), and the Hepburn Act, ch. 3591, 34 Stat. 584 (1906). The original Interstate Commerce Act did not have criminal provisions; these were added in the later acts. *E.g.*, Elkins Act, ch. 708, 32 Stat. 847, 847 (1903) (codified as amended at 49 U.S.C. § 41(1) (1964) (repealed 1978)) (soliciting, accepting or receiving a "rebate, concession, or discrimination" at less than a published rate constitutes a misdemeanor).

*mens rea* for an offense was hardly surprising given the emphasis at the time on reining in large-scale businesses that were changing the economic landscape so significantly. The Court's conclusory explanation for using the tort theory of liability to determine the criminal liability of a corporation does not somehow signal that it was acting outside the usual realm of the criminal law, nor that its holding was unsupportable. The federal law was developing stronger tools to regulate organizations that had achieved such pervasive influence over the economy by enhancing economic regulation at the national level. The Court's holding that Congress could enact a statute which subjects a corporation to criminal prosecution was not a radical change or even an improper extension of federal authority over businesses when viewed in that context.

It has been argued by Professors Fischel and Sykes that "*New York Central* seemed to signal a complete repudiation of the common-law rule that corporations could not commit crimes."<sup>25</sup> This common law rule is traceable to two statements: one by the Lord High Justice in 1701 in an otherwise unknown decision that a "corporation is not indictable but the particular members of it are,"<sup>26</sup> and the other by Lord Blackstone in his *Commentaries* published in the 1760s that "a corporation cannot commit treason, or felony, or other crime, in it's [sic] corporate capacity. . . ."<sup>27</sup> Of course, the common law did not adopt fixed rules like modern statutes, but instead reflected the development of the law by the judiciary in response to new – and changing – circumstances in which prior caselaw provide important, but not suffocating, guidance.<sup>28</sup> Federal criminal law, which was at issue in *New York Central*, is purportedly a creature solely of statute because – in the oft-repeated mantra – there is no federal common law of crimes.<sup>29</sup> While one

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25. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 335 (1996).

26. Anonymous Case (No. 935), 88 Eng. Rep. 1518, 1518 (K.B. 1701) (Holt, C.J.).

27. 1 WILLIAM BLACKSTONE, COMMENTARIES \*476 (Birch 1803).

28. Professors Fischel and Sykes note that "by the mid-nineteenth century, cracks began appearing in the common-law rule. But the cracks were minor." Fischel & Sykes, *supra* note 25, at 333. It is not clear how one comes to the conclusion that the cracks were minor when there were two federal statutes specifically imposing criminal liability on corporations and decisions by federal and state courts finding that corporations could be held liable criminally for the acts of their agents. See 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, 808-812 (1996) (reviewing the development of corporate criminal liability and the adoption of corporate criminal liability in the Sherman Antitrust Act and the Interstate Commerce Act). One can hardly say that the common law rule was pervasive when so many "cracks" had appeared, and *New York Central* laid to rest the common law notion that a corporation could *never* be held liable. One basis for the criticism of *New York Central* is the backwards economic logic of the Elkins Act, which Professors Fischel and Sykes rightly criticize. They state, "[w]ithout the Elkins Act, the railroads would have had difficulty in enforcing their price-fixing cartel. By upholding the statute, the Court gave the 'powerful' railroads a potent weapon to punish those who cheated on the cartel." *Id.* at 335. That the underlying statute is economically indefensible is not a basis for finding that Congress is without power to make corporations criminally liable for a violation of it.

29. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); see also *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."). Of course, the common law remains important in interpreting the terms of federal criminal statutes. See *Taylor v. United States*, 495 U.S. 575,



can criticize the Congressional decision to impose criminal liability on corporations on the ground that it is ineffectual or unreflective, it is clearly within the legislative branch's *power* to enact legislation authorizing the criminal prosecution of an organization, unconstrained by any notion that the common law somehow precluded the application of the criminal law to a corporation.

### B. *Why Use Criminal Law at all?*

One criticism of the analysis in *New York Central*, and indeed the creation of corporate criminal liability by Congress in the Elkins Act, was the Court's failure to consider the efficacy of the criminal sanction as a means of regulating the conduct of corporations. *New York Central* did not pause to consider how imposing criminal liability fulfilled the usual goals of deterrence or retribution for punishment. But then, that is not the Court's job, which is limited to deciding whether Congress can enact a statute subjecting a corporation to criminal prosecution for a violation of the Elkins Act. Once it answered the question "yes," that ended the matter – the Court does not usually decide the wisdom of a legislative enactment.<sup>30</sup>

In recent years, the notion of corporate criminal liability has been the subject of strong criticism on the ground that the punishment to be imposed on an organization, in the form of fines, does not justify the social costs of the proceeding. Under the Elkins Act, for example, a shipper could be fined no less than \$1,000 nor more than \$20,000 for a violation.<sup>31</sup> Whether such a fine would engender compliance with posted shipping rates under the Elkins Act – leaving aside whether enactment of a price-fixing regime is a good idea – was never considered by the Court. *New York Central* took it as a given that the criminal punishment authorized by Congress was appropriate, which is what the courts do unless a defendant claims that it violates the Eighth Amendment's proscription on cruel and unusual punishments.

In any case, though, a corporation or any other type of business organization cannot be sentenced to prison. A federal district judge claimed that courts have the

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592 (1990) (“[A] statutory term is generally presumed to have its common-law meaning.”). As the Court noted in *Taylor* in considering whether burglary should be interpreted according to its common law meaning, “Whatever else the Members of Congress might have been thinking of, they presumably had in mind at least the “classic” common-law definition when they considered the inclusion of burglary as a predicate offense.” *Id.* Relying on the common law, however, is quite different from being required to follow its dictates, assuming they can be discerned.

30. See *Beauharnais v. Illinois*, 343 U.S. 250, 266-67 (1952).

But it bears repeating – although it should not – that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.

*Id.*; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (“Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.”).

31. See *Armour Packing Co. v. United States*, 209 U.S. 56, 70-71 (1908) (quoting the Elkins Act).

authority to sentence a company to a term of imprisonment, but only imposed probation that required corporate officials to perform community service on the entity's behalf and prohibited it from disposing of certain assets.<sup>32</sup> The Fourth Circuit, perhaps unfortunately, blocked the probationary sentence, calling it a "nullity," thus reinforcing the view that the only viable punishment available to a court in sentencing a corporation is a criminal fine.<sup>33</sup>

In looking at whether it makes sense from an economic point of view to impose fines in a criminal proceeding to deter future misconduct by the organization, the nearly unanimous judgment of scholars has been a resounding "no." For example, Professor Khanna argues in favor of a civil liability regime because "pursuing corporate criminal liability results in society bearing the higher sanctioning costs of stigma penalties and the increased costs of deterring corporate misbehavior created by the procedural protections of criminal law."<sup>34</sup> Professors Fischel and Sykes assert that while "there are cases where government fines and penalties make sense, the civil liability system is better suited to calculate appropriate fines and penalties for organizational defendants" because criminal liability is usually imposed in addition to civil liability, so that there is "overdeterrence *ex ante*, and an excessive investment of resources in litigation *ex post*."<sup>35</sup> Professors Hamdani and Klement argue that the threat of criminal liability that may cause the demise of the firm could lessen deterrence, so that "civil penalties or the pervasiveness

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32. *United States v. Allegheny Bottling Co.*, 695 F.Supp. 856, 858-59 (E.D. Va. 1988), *reversed in part* by *U.S. v. Allegheny Bottling Co.*, 870 F.2d 655 (4th Cir. 1989). The district judge explained his analysis of a potential corporate imprisonment:

Corporate imprisonment requires only that the Court restrain or immobilize the corporation. Such restraint of individuals is accomplished by, for example, placing them in the custody of the United States Marshal. Likewise, corporate imprisonment can be accomplished by simply placing the corporation in the custody of the United States Marshal. The United States Marshal would restrain the corporation by seizing the corporation's physical assets or part of the assets or restricting its actions or liberty in a particular manner. When this sentence was contemplated, the United States Marshal for the Eastern District of Virginia, Roger Ray, was contacted. When asked if he could imprison Allegheny Pepsi, he stated that he could. He stated that he restrained corporations regularly for bankruptcy court. He stated that he could close the physical plant itself and guard it. He further stated that he could allow employees to come and go and limit certain actions or sales if that is what the Court imposes.

*Id.* at 861. The court rejected the claim that a corporation could not be incarcerated, noting that

[c]onsiderable confusion regarding the ability of courts to order a corporation imprisoned has been caused by courts mistakenly thinking that imprisonment necessarily involves incarceration in jail. But since imprisonment of a corporation does not necessarily involve incarceration, there is no reason to continue the assumption, which has lingered in the legal system unexamined and without support, that a corporation cannot be imprisoned.

*Id.*

33. *United States v. Harford*, No. 88-5139, 1989 WL 21563 (4th Cir. Jan. 11, 1989).

34. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1533 (1996).

35. Fischel & Sykes, *supra* note 25, at 321 (emphasis added).

standard could discourage wrongdoing more effectively than the threat of going out of business under the existing regime of entity liability.”<sup>36</sup> Then-Professor Posner even went so far as to argue that financial penalties for individual white collar defendants would have a greater deterrent effect than prison, so that “fining the affluent offender is preferable to imprisoning him from society’s standpoint because it is less costly and no less efficacious.”

If the application of the criminal law to conduct were based solely – or perhaps even predominantly – on whether it would deter future misconduct as a matter of both specific and general deterrence, then the argument against corporate criminal liability would be quite persuasive. The critique relies on the assumption that a system of civil enforcement that would result in the assessment of a monetary penalty could be created and would have roughly the same deterrent effect as a criminal prosecution and its resultant fine. Leaving aside the issue of regulatory capture<sup>37</sup> in which regulated businesses take control of the agency charged with overseeing them, simply relying on civil enforcement mechanisms entails viewing the civil penalty as interchangeable with the criminal punishment, without regard to the underlying nature of the legal violation. In other words, it’s all just money to a corporation—so who cares what label is attached to it when you pay the same amount regardless of who collects it?

### C. Moral Judgment

If the criminal law was just about punishment, then simple fines might be an acceptable approach to organizational wrongdoing. But the criminal law is more than simply the punishment that is authorized when a person or entity is found to have engaged in proscribed conduct. The label “criminal” has social significance aside from the particular punishment imposed on the offender. In the context of corporate criminal liability, Professor Kahan put the issue quite well when he wrote, “[j]ust as fines fail to express condemnation relative to imprisonment of natural persons, so civil damages fail to express it relative to criminal liability for corporations. Indeed, like fines, civil damages seem to connote that society is

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36. Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 289 (2008).

37. Professors Shapiro and Steinzor explain:

Ralph Nader and other sixties activists shared with their Progressive Era and New Deal predecessors the faith that effective government was necessary to regulate corporate behavior that threatened people and the environment, but they were not prepared to trust the regulators. They were particularly worried that regulated industries would blunt reforms by “capturing” the bureaucracy. This concern was based in part on a series of reports published at the time by Nader and teams of young investigators (“Nader’s Raiders”) documenting the overly cozy relationships between regulators and the regulated as the primary reason for the faltering performance of older regulatory agencies, such as the Federal Trade Commission.

Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 TEX. L. REV. 1741, 1745 (2008) (footnotes omitted).

'pricing' corporate crime."<sup>38</sup>

Professor Hart explained that what distinguishes a crime from a civil tort is that a crime entails "a pronouncement of the moral condemnation of the community."<sup>39</sup> In applying the criminal law to certain conduct, there is more to it than just the punishment of the criminal, which can only occur when the procedures required for a conviction have been adhered to. There is a communal aspect to the determination, that society expresses its view on the propriety of the defendant's actions.

Professor Buell argued that "[c]riminal liability is distinguished by its communicative force."<sup>40</sup> He argues for corporate criminal liability as meeting needs that cannot be fulfilled only by prosecuting individual organizational actors because "the serious attention that an entity criminal prosecution garners among institutional managers, and their deep worry about reputation, evidence that the social meaning of a legal judgment of institutional *wrongdoing* exceeds the social meaning of just an institutional *wrong*."<sup>41</sup> Focusing on the societal impact of criminal prosecutions, Professor Kahan has described the expressive character of the criminal law to mean that "[w]hen the law effectively expresses condemnation of wrongdoers . . . it reassures citizens that society does indeed stand behind the values that the law embodies."<sup>42</sup>

The criticism of corporate criminal fines does not necessarily mean that the application of the criminal law is improper or, perhaps worse, so wasteful that it should be jettisoned. That question whether there should be limits on how a corporation should be sanctioned is distinct from the issue of *whether* a corporation should be subject to the criminal law. As an expression of the community's moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents, apart from any instrumental benefits from having a coercive means available to deter certain conduct.

## II. REHABILITATING ORGANIZATIONS THROUGH THE CRIMINAL LAW

The rationale for criminal punishment as a vehicle for rehabilitating a defendant fell out of favor many years ago. The notion that the criminal justice system should operate as an instrument to "cure" an offender by reorienting his or her life to one of acting as a law-abiding citizen had a visceral appeal for a society undergoing significant change in the post-war era, particularly with the development of drugs that could be used to treat psychological maladies. But the goal was hardly attainable because there is not much evidence that most crimes are a result of a chemical or mental imbalance, and a system devoted to rehabilitating offenders

38. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998).

39. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

40. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 501 (2006).

41. *Id.* at 498-499 (emphasis in original).

42. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 604 (1996).

involves significant resources that the states were unwilling to commit.<sup>43</sup> Moreover, it was often the case that defendants sentenced under a rehabilitative regime received indeterminate prison terms until they could demonstrate their recovery, an assessment often left to a small group of people who had the power to extend a prison term if the person did not meet the criteria for reform. Indeterminate prison terms for some, while others might have a sentence reduced because they knew how to manipulate the system by feigning rehabilitation, led to its demise.<sup>44</sup>

While rehabilitation lost virtually all of its luster by the 1970s, it has reappeared more recently in the context of drug treatment courts, where those addicted to narcotics can be sentenced to treatment programs rather than being placed in penitentiaries. The idea of reforming the individual who is addicted to drugs is now viewed as a more effective approach that can address the problem, while avoiding further growth in the prison population that is draining resources from the states.<sup>45</sup>

#### A. *The Problems of Rehabilitation do not Apply to Corporations*

Like the addict, a corporation may be a good candidate for reform rather than retributive punishment through high fines. When a corporation is prosecuted, the issue of indeterminate sentences that plagued the rehabilitative model is not a concern. Moreover, the problem with individuals feigning rehabilitation to obtain release from prison is not as much of a consideration because the steps an organization takes to implement reforms will be much more transparent and verifiable.

A corporation can – and often does – terminate the employees involved in the wrongdoing, so a retrospective punishment to exact retribution is hardly worthwhile. While an organization can be deterred from future violations, the economic argument in favor of using administrative procedures to impose such penalties is fairly persuasive, so that the goal of the criminal prosecution should not be focused primarily on specific deterrence of the corporation to prevent it from violating the law in the future. Instead, the use of the criminal law should be directed primarily toward enabling the corporation to reform itself.

The issue of what is an appropriate punishment for a corporation ought to focus

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43. See Richard S. Gebelein, *Delaware Leads the Nation: Rehabilitation in a Law and Order Society; a System Responds to Punitive Rhetoric*, 7 DEL. L. REV. 1, 3 (2004) (“[T]he dramatically increasing numbers of prisoners coming into correctional systems overwhelmed the financial ability and/or commitment of most jurisdictions to provide quality rehabilitative programs to assist all prisoners.”); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1018 (1991) (“Probably because of limited resources and doubt about the validity of coerced therapy, we never fully implemented treatment programs in prison. Even in the era that demonstrated great public interest and confidence in rehabilitation, actual resources remained minimal.”) (footnote omitted).

44. For an overview of the criticisms of the rehabilitative approach to sentencing, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1224-29 (1998).

45. See Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 FED. PROBATION 13, 13 (2008) (“In their various forms, drug courts have been distinguished by several features, such as expedited case processing, outpatient treatment, and support services (e.g., job placement and housing).”).

on imposing a penalty that will allow the organization to redress its wrongdoing while taking steps to ensure that the misconduct is less likely to recur. The argument for calibrating criminal fines to ensure they are commensurate with the harm caused while providing a reasonable incentive to minimize the likelihood of recidivism becomes paramount, and it may be that a court should not impose any criminal fine on the organization in much the same way that the addict is not sentenced to prison. The goal instead should be on molding punishment to the remediation of any harm and reforming the corporation, so that retribution would play no role in determining the appropriate criminal sanction.

Unlike most street crimes, corporate wrongdoing usually involves economic harm, and the effects of the violation should be redressed through some form of remediation. The pure criminal fine does not seem to be an efficient means to remedy harm, which should be the first goal of the criminal prosecution of an organization. Instead, restitution will be the key to correcting the harmful effects of corporate crimes. The Supreme Court recognized the importance of restitution as a means of rehabilitating an offender in *Kelly v. Robinson*,<sup>46</sup> when it stated:

Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.<sup>47</sup>

Under the Mandatory Victims Restitution Act, restitution is mandatory for any offense “in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.”<sup>48</sup> The application of the criminal law to corporate wrongdoing thus accomplishes one goal that a civil enforcement proceeding might not be able to by ensuring that an order of restitution will be imposed on the organization.<sup>49</sup>

### *B. Violations in Spite of Compliance Programs*

Once the harm caused by a violation is addressed by the corporation, then the issue should be what steps should the organization take to reform itself to limit the possibility that the wrongdoing will occur in the future. Virtually every publicly-

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46. *Kelly v. Robinson*, 479 U.S. 36 (1986).

47. *Id.* at 49 n.10 (1986) (citation omitted).

48. 18 U.S.C. § 3663A (2006). The Federal Sentencing Guidelines similarly require a court to order restitution when sentencing a corporation. U.S. Sentencing Guidelines Manual § 8B1.1(a) (2008).

49. See Joan H. Krause, *Healthcare Fraud and Quality of Care: A Patient-Centered Approach*, 37 J. HEALTH L. 161, 178 (2004) (“Unfortunately, the majority of healthcare fraud cases involve civil and administrative causes of action that do not independently provide for restitution.”); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1324 n.17 (2007) (“Restitution, of course, is a goal of sentencing only if there is a criminal violation.”).

traded corporation has in place some form of compliance program, and I have argued elsewhere that “there is certainly plenty of law telling corporations how to set up programs to ensure compliance with the vast array of legal and regulatory rules under which all public companies must operate.”<sup>50</sup> The Sentencing Guidelines require the directors and senior management of a company seeking a reduced sentence to “be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.”<sup>51</sup> Directors of Delaware public corporations are required to fulfill their so-called *Caremark* duty, that:

[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non compliance with applicable legal standards.<sup>52</sup>

The problem is not a lack of compliance programs so much as when the compliance program does not work because agents of the company engage in wrongdoing despite the process in place to prevent such conduct. No compliance program is perfect, and a corporation should not be prosecuted solely because an employee found a way around internal controls, or the agents simply ignored directives not to engage in certain types of conduct. The real issue is when there is a breakdown in the company’s compliance effort traceable to a corporate culture that pressures employees to engage in risky conduct, despite the presence of systems designed to prevent violations.

Companies that have in place compliance programs sometimes continue to engage in wrongdoing, occasionally in the face of warnings to act otherwise. For example, the directors of Chiquita Brands International, Inc., continued to allow the company to make protection payments to a Columbian terrorist organization to ensure the safety of its workers despite strong recommendations from corporate counsel that the payments cease. The payments continued even after the company revealed the potential violation to the Department of Justice, on the ground that simply stopping the payments would endanger the workers. Chiquita entered a guilty plea to making payments to a terrorist organization and paid a \$25 million fine.<sup>53</sup>

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50. Peter J. Henning, *Board Dysfunction: Dealing with the Threat of Corporate Criminal Liability*, 77 U. CIN. L. REV. 585, 604 (2008).

51. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(A) (2009).

52. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996). The Delaware Supreme Court affirmed the directors’ obligation to institute effective monitoring systems in a company in *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

53. See Henning, *supra* note 50, at 593-595 (explaining that Chiquita pled guilty to engaging in transactions with a specially designated global terrorist, in violation of 50 U.S.C. § 1705 (2006)).

The implementation of compliance procedures, even ones that meet the requirements for an “effective” program set forth in the Sentencing Guidelines, neither guarantees a corporation’s employees will not violate the law in the future, nor does it mean that the company should not be held accountable in a criminal prosecution for the acts of its employees. If significant or systematic violations occur despite the presence of a compliance program, then a criminal prosecution can be an effective means to impel a corporation to institute the type of structural reform necessary to minimize the likelihood of similar violations in the future.

*C. Rehabilitating Corporate Criminals through DPAs and NPAs.*

Corporate management and employees may be resistant to the type and degree of change that entails a significant restructuring of the corporate culture. While civil penalties offer a measure of deterrence to future misconduct, there is a risk that civil enforcement will be viewed as only a price to be paid. I have argued that the threat of criminal prosecution can be a significant motivating factor to impel a board of directors to act independently of management in order to “consider the need to *change* the organization both to address the problems that occurred in the past and to ensure that future violations of that type do not happen again.”<sup>54</sup> When criminal prosecution and a resultant punishment is viewed as advancing the rehabilitation of the corporation, then the notion of reform rather than retrospective sanctions becomes the means to assess whether the criminal law should be used against the organization.

Using the criminal law to further the goal of rehabilitation affects whether a criminal prosecution should even be instituted, and if it is then what type of sanction should be imposed. Prosecutors have enormous discretion in deciding whether or not to file criminal charges if there is sufficient evidence for a reasonable juror to find the defendant guilty.<sup>55</sup> The Department of Justice has set forth its views on the appropriate circumstances under which it will charge a corporation with a crime in the *Principles of Federal Prosecution of Business Organizations*. The Department identifies the following as a “General Consideration” in deciding whether to charge a corporation: “Indicting corporations for wrongdoing enables the government to be *a force for positive change of corporate culture*, and a force to prevent, discover, and punish serious crimes.”<sup>56</sup> While there are a number of case-specific issues related to charging an organization with a crime, such as the nature of its cooperation and involvement of senior management, the first consideration should be the efficacy of the criminal law rather than the civil enforcement mechanism as a means to foster real change.

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54. Henning, *supra* note 50, at 610 (emphasis added).

55. See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 913 (2007) (“Federal criminal law delegates to [prosecutors] vast discretion while, at the same time, considerations of separation of powers constrain courts.”).

56. U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-28.200 (2008) (emphasis added).



Professor Garrett identifies the current approach to corporate criminal liability as “structural reform prosecution” through which the Department of Justice has “adopted a novel strategy by prosecuting large organizations far more often, but leveraging the prosecutions to secure adoption of sweeping internal reforms.”<sup>57</sup> Since the demise of Arthur Andersen in 2002, the number of DPAs and NPAs has increased substantially, and the government’s approach to these cases has developed some fairly clear lines. Messers, Spivack, and Raman call federal prosecutors “The New Regulators,” so that “[b]y focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity’s criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America.”<sup>58</sup>

The use of DPAs and NPAs has not been without its flaws, of course, with the Department of Justice encountering its fair share of stumbles in crafting and implementing these agreements. There were certainly abuses, such as the decision to allow Bristol-Myers Squibb to endow a chair at the law school alma mater of the United States Attorney who negotiated the agreement.<sup>59</sup> More ominously, the DPA with accounting firm KPMG was severely criticized for allowing the government to force employees to cooperate in its investigation on pain of losing their job and payment of attorney’s fees by the firm. In *United States v. Stein*,<sup>60</sup> the Second Circuit upheld the district court’s dismissal of the indictment of thirteen former partners and employees for the government’s violation of their Sixth Amendment right to counsel by pressuring KPMG to cut off payment of attorney’s fees as a means of garnering the DPA, contrary to the firm’s prior policy.<sup>61</sup>

The Department of Justice learned some lessons from earlier controversies, and has started to take a more uniform approach to the agreements. In March 2008, the Department issued a memorandum, “Selection and Use of Monitors in Deferred

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57. Garrett, *supra* note 55, at 856.

58. Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008).

59. See Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1055-56 (2006). Mr. Christie was the United States Attorney for the District of New Jersey who negotiated the DPA, and he defended the provision on the ground that “[t]he idea for endowing the chair originated with counsel for Bristol-Myers.” *Id.* at 1058 n.29. The source of the provision is largely irrelevant when the appearance of currying favor calls into question the fairness of the resolution of the investigation.

60. 541 F.3d 130 (2d Cir. 2008)

61. *Id.* at 153. The court stated:

Although defendants’ Sixth Amendment rights attached only upon indictment, the district court properly considered pre-indictment state action that affected defendants post-indictment. When the government acts prior to indictment so as to impair the suspect’s relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment.

*Id.*

Prosecution Agreements and Non-Prosecution Agreements with Corporations,” that provides for oversight of the selection of monitors who will oversee a corporation’s compliance with the terms of a DPA or NPA, a common feature of these agreements. Among other things, the Deputy Attorney General must approve the monitor selected, and prosecutors “should decline to accept a monitor if he or she has an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor’s impartiality.”<sup>62</sup> Yet, the availability of a DPA or NPA, and when one type of agreement is more appropriate than the other, remains largely unknown because there are no clear guidelines regarding when a pre-charge disposition of a case is appropriate or how it should be structured.<sup>63</sup> For example, Boeing entered into an NPA related to procurement fraud and the unlawful attempt to hire a senior Department of Defense official:

[I]n part because the company is fully cooperating with the government’s investigation. Boeing has agreed to accept responsibility for the conduct of its employees in these matters, continue its cooperation with federal investigators, pay a monetary penalty of \$50 million, and maintain an effective ethics and compliance program, with particular attention to the hiring of former government officials and the handling of competitor information.<sup>64</sup>

Norwegian oil company Statoil, ASA entered into a DPA for payments to Iranian officials to secure oil and gas rights in violation of the Foreign Corrupt Practices Act, and Assistant Attorney General Alice Fisher praised the company’s coopera-

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62. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, section II (Mar. 7, 2008), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00163.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm) (last visited Oct. 7, 2009).

63. As Professor Garrett explained:

Taking as a given that organizational prosecutions will continue for some time and that some kind of settlement option will remain preferable for both prosecutors and for organizations, defining the scope of those settlements and their terms is an important and under-examined project. The DOJ has not yet made policy statements regarding most structural reform aspects of the agreements.

Brandon L. Garrett, *United States v. Goliath*, 93 VA. L. REV. IN BRIEF 105, 113 (2007). In response, Mr. Warin and Mr. Boutros explain:

Guidance on the availability and appropriateness of pretrial diversion agreements is needed now, and such guidance must come from DOJ, not from the courts. Regrettably, DOJ has been unhelpfully silent on this issue. Current DOJ guidance focuses only on the threshold discretionary question of whether a business organization should be indicted at all. There has been absolutely no guidance, however, on the second discretionary question of whether a case should be resolved through the vehicle of a guilty plea, a DPA, or an NPA. There also exists a lacuna of guidance about appropriate terms to be included in DPAs.

F. Joseph Warin & Andrew S. Boutros, Response, *Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. IN BRIEF 121, 126 (2007) (footnote omitted).

64. Press Release, U.S. Dep’t of Justice, Boeing to Pay United States Record \$615 Million to Resolve Fraud Allegations (June 30, 2006), available at [http://www.usdoj.gov/opa/pr/2006/June/06\\_civ\\_412.html](http://www.usdoj.gov/opa/pr/2006/June/06_civ_412.html) (last visited Oct. 7, 2009).

tion:

The Department's willingness to resolve this particular investigation by a deferred prosecution agreement is in large part due to the exceptional assistance Statoil provided to U.S. authorities in connection with the investigation, the significant remedial efforts undertaken by the company, and the fact that the Norwegian authorities also investigated and sanctioned Statoil.<sup>65</sup>

It is difficult to comprehend why Boeing received an NPA requiring it to pay \$615 million to settle multiple investigations involving different U.S. Attorneys offices with no criminal charges ever filed, while Statoil paid \$10 million for a single violation under its DPA that entailed the filing of criminal charges which were then held in abeyance.<sup>66</sup> One company was "fully cooperating" while the other provided "exceptional assistance," so there was no perceptible distinction between them on the issue of cooperation.

Despite the flaws in the Department of Justice's approach, its focus on using criminal sanctions to reform corporations is an important development in orienting corporate criminal liability toward rehabilitating organizations whose agents violate the law. Not every case calls for a criminal prosecution even if one could be brought successfully under the *respondeat superior* theory of corporate liability. Avoiding the "Arthur Andersen effect" of a criminal prosecution that will result in significant collateral consequences is an important reason to look to prosecutions that allow a corporation to continue in existence so long as it takes step to redress any harm caused and measure to prevent recurrence of the problem.

Reforms can only go so far, of course, and it may be that the organization's agents will engage in similar conduct again in the future because the corporate culture simply cannot respond to efforts to change it. The availability of the criminal sanction as retribution against a recidivist corporation may reach a point where the government needs to seek a significant penalty against a corporation, including perhaps its demise.

#### CONCLUSION

The topic of corporate criminal liability has been the subject of significant

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65. Press release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company That Bribed Iranian Official (October 13, 2006), available at <http://www.usdoj.gov/usao/nys/pressreleases/October06/statoildeferredprosecutionagreementpr.pdf> (last visited Oct. 7, 2009).

66. One criticism leveled against DPAs and NPAs that require a company to implement new compliance and monitoring programs is that these programs impose an undue burden on a company to expend its resources. See Spivack & Raman, *supra* note 58, at 185 ("[T]he considerable costs that monitoring imposes on a company cannot and should not be ignored. One can legitimately query whether monitor-imposed corporate governance reforms actually enhance shareholder value or promote the general welfare."). If the government requires the payment of a significant fine in addition to the new programs and any restitution, then that criticism makes some sense. But it does not seem appropriate absent a heavy fine that will be paid to the government. Using corporate resources to enhance its future compliance seems like a much more worthwhile use of the organization's money than simply turning it over to the United States Treasury.

academic comment, particularly over the past few years since the demise of Arthur Andersen, and especially in light of the Supreme Court overturning the conviction that did nothing to revive the firm. The investigation and settlement of cases involving business organizations draws significant – and perhaps even inordinate – attention because, unlike an ordinary street crime, the potential impact of the misconduct and economic value of the transactions is so much larger than a petty theft or drug deal. Yet, the number of corporations sentenced under the Sentencing Guidelines in fiscal year 2008 was 199, while there were over 25,000 drug cases and over 70,000 immigration cases during the same period. Interestingly, not one of the organizations that was sentenced was found to have an effective compliance program. This indicates that most of these companies are smaller, closely-held businesses that do not have any monitoring systems in place rather than public corporations that can be expected to adhere to the precepts of state corporate law mandating an effective compliance system as a shield against liability to shareholders.

Calls for changing the *respondeat superior* theory of assessing corporate criminal liability have fallen on deaf ears so far. The recent Second Circuit decision in *United States v. Ionia Management, S.A.*<sup>67</sup> brushed off the assertion that the government should be required to prove that a corporation lacked an effective compliance program as an element of the offense, stating that the argument was “unavailing” and that “[a]dding such an element is contrary to the precedent of our Circuit on this issue.”<sup>68</sup> Altering the method of proving a corporation’s liability would require Congressional action, which would be a difficult sell politically, but it is certainly not impossible.

The criminal law is retrospective in nature, asking whether proof of the defendant’s act and mental state *at the time of the offense* are sufficient to establish guilt beyond a reasonable doubt. For corporations, however, simply assessing past conduct is not as important as determining whether the organization is in need of reform to ensure future compliance. If rehabilitation is the goal, which should be the primary focus, then the decision whether to prosecute and how to punish becomes a forward-looking enterprise that does not simply assess the nature of the organization at the time of the agent’s conduct.

Any proposal for changing the scope or application of corporate criminal liability should be assessed in light of the rehabilitative goal for applying the criminal law to organizations. Focusing on the presence or absence of an effective compliance system at the time of the offense says little about whether the company is in need of significant reform today, and may even be a distraction to assessing the need for rehabilitative measures. Even if a corporation’s compliance system was deemed effective, the violation occurred nonetheless and the more important

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67. 555 F.3d 303 (2d Cir. 2009).

68. *Id.* 310 (2d Cir. 2009).

issue is whether the organization needs to change its operations to prevent future wrongdoing. If the answer to that question is “no,” then the use of the criminal law would be ineffective, not because the compliance program was deemed sufficient but because there is no need to reform the organization. On the other hand, focusing on what might ostensibly appear to be an effective compliance program that did not prevent significant misconduct within the organization is irrelevant to determining how the organization must be changed going forward.