



Press Release:
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New Report from the Center for Legal Policy
Regulation by Prosecution

New York, NY: In the last decade there has been a dramatic increase in the number of criminal prosecutions of corporations for various antitrust and environmental crimes as well as for the petty crimes of lower-level employees. To avoid indictment, many companies have entered into “non-prosecution” and “deferred prosecution” agreements. Without the judicial or legislative input which would allow these new forms of regulation to be rightfully debated, prosecutors have forced firms to fire key executives, to restructure business policies, to appoint new board members, and, in one alarming case, to endow a faculty chair at the U.S. attorney’s alma mater.

In a new Manhattan Institute report, “Regulation by Prosecution: The Problems with Treating Corporations as Criminals,” senior fellow and director of the Center for Legal Policy James R. Copland details the exceptional and troubling power that prosecutors have used to circumvent the normal democratic legislative process and subvert the rights of individual defendants in criminal actions. In his report, Copland exposes the increasing American phenomenon of “regulation by prosecution” and provides solutions to the most egregious aspects of so-called “vicarious corporate-criminal liability.”

Major Problems with Regulation by Prosecution

- **The sprawling apparatus of the regulatory state** makes the criminal prosecution of corporations both redundant and unnecessary.
- It amounts to **an end run around the democratic legislative, regulatory, and judicial process** and provides ambitious prosecutors a stage for political grandstanding.
- It imposes policies and practices on corporations that interfere with vital commercial operations **making businesses less competitive**.
- **It creates an incentive for companies to abandon their employees** in order to obtain rewards for disciplining them, for releasing material damaging to their interests, or for refusing to participate in their defense.
- The costs and risks of prosecution induce many companies, **even those that believe they have done nothing wrong**, to either plead guilty or to enter into deferred prosecution agreements.

Copland’s Policy Recommendations to Restrain Prosecutors

- Courts should apply criminal laws **only when expressly commanded by the legislature**, through the normal democratic process.
- Legislatures should **reserve vicarious corporate criminal liability to serious crimes**.
- **Petty crimes by lower level employees should not give rise to corporate criminal liability**, only the actions of corporate officers or high-managerial agents should come under scrutiny.
- **Corporations should be able to assert an affirmative defense** if they make a good faith effort to comply with the law.
- Legislatures need to ensure that **statutory collateral consequences from criminal prosecution are attached only after conviction, not indictment**.

“Though largely an accident historically and an anomaly internationally, the American practice of holding corporations broadly liable under criminal law for the actions of their employees is burgeoning as never before, with state and federal prosecutors gaining a measure of regulatory authority that is prone to abuse and erosive of individuals’ constitutional and other legal protections.” – James R. Copland

James R. Copland is the director of the Manhattan Institute's Center for Legal Policy, which seeks to develop and communicate thoughtful ideas on how to improve the civil and criminal justice system. Copland serves as managing editor of the Institute's PointofLaw.com, a web magazine that brings together information and opinion on the U.S. litigation system; and project manager for the Institute's *Trial Lawyers, Inc.* series of publications examining the size, scope, and inner workings of America's lawsuit industry.

The report is available at http://www.manhattan-institute.org/html/cjr_13.htm. If you would like to schedule an interview with Bridget C. Carroll at 646-839-3313 or bcarroll@manhattan-institute.org.

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