

REGULATION BY PROSECUTION: The Problems with Treating Corporations as Criminals

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The criminal prosecution of corporations has been on the rise. In the 1990s major corporations were prosecuted in abundance for antitrust and environmental crimes as well as various alleged frauds. In the last decade there has been an explosion in “non-prosecution agreements” and “deferred prosecution agreements,” in which federal or state prosecutors decline to press charges in exchange for corporate concessions, which might include substantive changes in business practice, the firing of key executives, and the appointment of “business monitors” selected by the prosecutor. Federal prosecutors have entered into more than 140 of these agreements, and the corporations subject to them are a Who’s Who of international business, particularly in finance and health care.

The power to prosecute corporations as entities distinct from their employees has a long history in American law. Prior to the rise of the modern regulatory state, such prosecutions were an important means of regulating corporate behavior. Today, however, prosecutorial power rests alongside extensive civil and regulatory authority at both the state and federal level. And under both state and federal law, the government can prosecute corporations vicariously—that is, on the basis of an employee’s actions—even when the offenses are petty, the actor occupies a lower-level position, or the employee acted contrary to corporate policy.

The aggressive application of this doctrine is inconsistent with:

- *Foreign law*: It is much easier to prosecute corporations in the United States than it is in the rest of the Western world. Corporations cannot be prosecuted criminally at all in some countries, such as Germany. Other Western nations, such as France, have recently adopted corporate criminal liability, but more limited versions of it than our own.
- *The Model Penal Code*: The pertinent sections of the Code, which was developed by the American Law Institute in 1962, establish hierarchies of corporate crimes, single out the actions of employees with management authority, and allow corporations to defend themselves by pointing to their good-faith efforts to promote compliance with the law. The legislatures of nineteen American states have adopted at least some of the Code’s principles, as have the courts of several others.
- *Civil law protections*: In two recent cases involving charges of sexual harassment, the U.S. Supreme Court opined that employers could not be held liable for actions of lower-level employees that violated corporate policy.

The sweeping scope of corporate criminal liability in America gives prosecutors exceptional and troubling power over companies—as exemplified by the federal prosecution and conviction of Arthur Andersen, the accounting firm. Although Andersen’s conviction on a single count was reversed on appeal, it was too late to save the firm or the livelihoods of its 85,000 employees. As a certified public accountant in the business of attesting in government filings to the reliability of public companies’ financial statements, Andersen was particularly vulnerable to prosecution. But other kinds of businesses face problems of their own: debarment from government work following indictment; damage to reputation; difficulty in obtaining credit; and diversion of management’s attention from the firm’s essential business. The costs and risks of prosecution induce many companies, even those that believe themselves to have done nothing wrong, either to plead guilty or to enter into deferred prosecution agreements.

Prosecutors’ campaign against corporations has the following defects:

- It has thoughtlessly imposed policies and practices on corporations that interfere with vital commercial operations.
- It has pressured companies to abandon their employees by offering rewards for terminating them, for releasing material damaging to their interests, and for refusing to participate in their defense.
- It has been carried out with little legislative authorization or judicial oversight.

To address such excesses, it is not necessary to abolish corporate criminal liability. But its imposition will be unfair and even ineffective unless:

- The law allegedly broken expressly calls for criminal penalties against corporations.
- The crime allegedly committed is a serious one.
- The crime was allegedly committed or authorized by high-level executives.

If, having met these criteria, a prosecution is instituted,

- Corporations should be allowed to point to their good-faith efforts to promote compliance with the law.
- The law should not inflict any collateral consequences on the corporation unless and until it has been convicted.

Such measures should put a stop to what may reasonably be called regulation by prosecution.

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REGULATION BY PROSECUTION: THE PROBLEMS WITH TREATING CORPORATIONS AS CRIMINALS

James R. Copland

It would be a mistake to infer from recent business and financial crises—and the frauds that accompanied them—that a dearth of adequate criminal sanctions was the reason corporate America acted so recklessly. Quite the opposite: prosecuting corporations for their employees' misconduct is an American specialty.¹ American law has long permitted the prosecution of corporations.² But the arrival of a sprawling regulatory apparatus, first in the Progressive Era and then with the coming of the New Deal, makes the criminal prosecution of businesses redundant if not completely unnecessary. Nevertheless, federal courts have expanded prosecutorial power over business by allowing prosecutors to impute criminal liability to corporations for the actions of lower-level employees,³ even when they are violating company policy.⁴

Moreover, prosecutors have made use of their almost untrammelled power to act as frontline corporate regulators by extracting serious concessions from management and corporate directors. Their preferred vehicle in recent times has been “deferred prosecution agreements” (DPAs) and “non-prosecution agreements” (NPAs),⁵ through which corporations avoid criminal charges by agreeing to comply with prosecutors' demands. A decade ago, such arrangements were essentially unknown, but in the past seven and a half years, 136 companies have entered into DPAs and NPAs with the federal government alone.⁶

As corporate prosecutions have grown more commonplace, academic commentators have become increasingly critical of the practice.⁷

This paper discusses these critiques and builds upon them by suggesting policy changes that offer some hope of constraining prosecution under the corporate criminal-liability doctrine and of better aligning the prosecutorial enforcement of laws governing corporate entities with the broader legal and regulatory system. Part I of the paper analyzes American corporate criminal-liability doctrine in a historical and comparative context. Part II assesses the current, dubious practice of regulation through prosecution. Part III offers a short list of policy recommendations.

I. AMERICAN CORPORATE CRIMINAL LIABILITY IN CONTEXT

Before analyzing the American practice of holding corporations liable for their employees' criminal violations, it may be useful to put the practice in context. This section of the paper (1) summarizes the evolution of corporate criminal liability in American law before and after the seminal 1909 case *New York Central & Hudson River Railroad v. United States*;⁸ (2) explores how the civil and the criminal approaches to holding corporations vicariously liable for employees' actions differ in this country; and (3) briefly examines how American corporate criminal-law doctrine compares with its counterparts in other countries and how state and federal practices vary.

I. The Doctrine's Evolution in America

Although the American phenomenon of regulation by prosecution is a relatively recent trend, holding corporations themselves criminally liable in at least some circumstances is deeply rooted in Anglo-American law.⁹ However, the practice was sharply circumscribed until the last century.

At the time of the American Revolution, the general position of British law was that corporations could not be held criminally liable, even though individuals acting in a corporate capacity could. In a 1701 case, Lord Holt noted that a "corporation is not indictable but the particular members of it are,"¹⁰ and William Blackstone wrote in his *Commentaries*, compiled in

the 1760s, that a corporation "cannot commit . . . crime in its corporate capacity, though its members may in their distinct individual capacities."¹¹ The general doctrine proscribed criminal liability for corporations because they were not, as collective entities, morally responsible in the sense that individuals are supposed to be under the criminal law.¹²

Notwithstanding this general rule, English courts started holding corporations criminally responsible as long ago as 1635 when they were found to be causing a "public nuisance."¹³ The early cases tended to concern quasi-public corporations such as municipalities;¹⁴ the paradigmatic criminal public-nuisance case against a "corporate" entity targeted a municipality that had let its roads fall into disrepair. In an early American example, in 1834 the City of Albany—at the time a chartered corporation—was indicted for allowing the stretch of Hudson River opposite to become "foul, filled and choked up with mud, rubbish, and dead carcasses of animals."¹⁵ This sort of example is best understood as a method of prompting quasi-state action at a time when government was rather rudimentary.

Notably, these early criminal prosecutions against corporations did not punish acts of commission ("intentional acts") but rather acts of omission—i.e., the doctrine was limited to crimes of nonfeasance rather than malfeasance.¹⁶ By the mid-nineteenth century, however, courts were not only extending the application of the concept of public nuisance to commercial corporations but also permitting prosecutions under the doctrine to be directed against corporations' active creation of public nuisances.¹⁷ Still, these cases generally came under the common law of nuisance, for which intent was not a prerequisite because it was still the general rule that a corporation could not "be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient."¹⁸

Of course, these early cases finding corporations criminally liable under a public-nuisance theory involved state courts interpreting common-law crimes.¹⁹ The major expansion of corporate criminal liability would happen with the emergence of large corporations' dealings in interstate commerce, to which Congress responded by laying the groundwork of the federal

regulatory state—most notably, through the Interstate Commerce Act of 1887²⁰ and the Sherman Antitrust Act of 1890.²¹ Although the original Interstate Commerce Act lacked criminal penalties, a successor statute, the Elkins Act of 1903,²² established them for violations of price regulations.

The sweep of the Elkins Act was plain enough: “[T]he act, omission, or failure to act of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.”²³ In 1909, a constitutional challenge to the relevant portion of the Elkins Act by the New York Central and Hudson Railroad Company would reach the U.S. Supreme Court in a case that would lay the foundation for the subsequent growth of corporate criminal liability.²⁴

The *New York Central* Court noted that in tort law, the doctrine of *respondeat superior*—which holds that “the corporation may be held responsible for damages for the acts of its agent within the scope of his employment”—was well established.²⁵ Though it noted that there did exist “some crimes which, in their nature, cannot be committed by corporations,” the Court determined that regulatory offenses such as those covered under the statute at hand, the Interstate Commerce Act, were not among them:

[T]here is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.²⁶

The Court’s holding in *New York Central* is hardly shocking. The decision merely held it to be *constitu-*

tionally permissible for Congress to ascribe criminal liability to a corporation on the basis of the actions of its employees or agents. Just five years before its decision in *New York Central*, the Court had upheld the federal government’s authority to regulate state-incorporated corporations, notwithstanding contrary authority in the corporate charter, against a Tenth Amendment challenge.²⁷ Corporations clearly enjoy constitutional protections,²⁸ but a blanket prohibition of criminal prosecution is not among them.

Although *New York Central* did no more than permit Congress to hold corporations responsible for regulatory crimes, courts have subsequently borrowed from the Court’s rationale in the case and relied on the tort-based *respondeat superior* principle to find corporations criminally liable, even when the laws under examination fail to make explicit their applicability to corporations.²⁹ It is now the standard federal rule that corporations are vicariously liable under criminal law for the crimes of corporate employees—even for offenses of low-level employees³⁰ that are contrary to corporate policy,³¹ and even if the individual employees in question lacked the level of knowledge that is necessary to confer personal criminal liability.³²

2. Civil Law Trends

Although the Supreme Court founded federal vicarious corporate criminal liability on the *respondent superior* doctrine, an aspect of tort law, there is some tension between the courts’ modern handling of vicarious liability in the civil and criminal contexts.³³ If, in the decades after *New York Central*, the distinction between the civil and criminal law became increasingly obscured,³⁴ today corporations are better insulated against liability for their employees’ actions in at least some civil law contexts than they are under the criminal law.

In 1998, in *Faragher v. City of Boca Raton*³⁵ and *Burlington Industries, Inc. v. Ellerth*,³⁶ the U.S. Supreme Court narrowed the scope of vicarious liability for sexual harassment charged under Title VII, which assigns civil penalties for discrimination in the workplace.³⁷ In both these companion cases, the Court held that only the actions of supervisors could confer

liability on employers, and then only in the absence of corporate policies designed to prevent the conduct in question.³⁸ The Court's decision was a remarkable shift in civil vicarious-liability doctrine, considering Congress's invocation of broad common-law principles of liability and its express definition of "employer" to include (all of) its "agents."³⁹

One year after deciding *Faragher and Ellerth*, the Supreme Court, in *Kolstad v. American Dental Association*, held that in Title VII discrimination lawsuits, punitive damages could not be levied on "employers who make good-faith efforts to prevent discrimination in the workplace."⁴⁰ The Court reasoned that assessing punitive damages in such a case "would reduce the incentive for employers to implement antidiscrimination programs" and might, perversely, deter them from taking remedial actions in cases of discrimination, since such actions would provide no defense but might themselves expose an employer to some degree of liability.⁴¹

Ironically, then, American corporations today suffer greater exposure under the criminal law as the result of employees' misconduct than they do under civil law, at least in the Title VII context. Vicarious corporate criminal liability generally attaches for offenses by low-level employees, even when companies prohibit the employees' conduct and have well-developed compliance programs for schooling employees in the law. But corporations cannot be sued civilly under Title VII for low-level employees' actions or if they have adopted good-faith compliance programs.

To be sure, the *Kolstad*, *Faragher*, and *Ellerth* decisions are specific interpretations of a specific statute, Title VII; no broad doctrine limiting vicarious liability in all civil law contexts has been embraced by the federal courts. Nevertheless, the disjunction between the Supreme Court's narrowing of vicarious corporate civil liability under Title VII and the federal courts' broad imputation of vicarious corporate criminal liability is striking.

Although Title VII, unlike most federal criminal statutes, explicitly extends liability to corporations, the Court has recognized that failing to give credit to cor-

porations for their good-faith compliance efforts can weaken the incentive to make such efforts. In view of the difficulty and expense of broadly policing corporate behavior, the Court apparently concluded that a legal standard that generates incentives for corporate self-policing is an effective way of meeting Title VII's objectives. Is there any reason that the same logic should not operate in a criminal-law context?

3. Comparative Analysis

Not only does the federal vicarious corporate criminal-liability standard exist in some tension with recent Supreme Court jurisprudence in the civil context; it markedly departs from the norms of other Western countries. The federal standard is also generally more aggressive than those in several states, particularly those adopting relevant portions of the Model Penal Code.

International comparative perspective. The American doctrine of vicarious corporate criminal liability is an outlier among Western nations. One academic commentator has noted: "Few other Western countries impose entity liability, and those that do impose it comparatively infrequently and under the threat of far less serious punitive consequences."⁴²

The United Kingdom, which shares a common-law heritage with this country, adopted a form of corporate criminal liability in the 1950s—relying, as here, on *respondeat superior* doctrine.⁴³ However, British entity liability generally takes "a more limited form" than its American counterpart,⁴⁴ and "corporations today routinely take refuge from the harsh American regulatory system by listing themselves, not in a Continental law market, but on the London Stock Exchange."⁴⁵

Based on the maxim *societas delinquere non potest* ("the company may not engage in criminal activity"), continental European democracies such as Germany and France "fundamentally resisted the imposition of criminal liability on legal entities throughout most of the last century."⁴⁶ To this day, Germany has "held fast in refusing to punish criminally corporations for the acts of their individual directors or employees."⁴⁷

France, which had rejected the notion of corporate entity liability since the enactment of the Napoleonic Code in 1810, reversed course in 1992. However, the French statute enabling such liability is more tightly cabined than its American counterpart: the legislature must have expressly authorized corporate criminal liability by statute for a given offense; liability can attach only on the basis of the actions of a corporation's "representatives" or "organs" (generally thought to exclude lower-level employees, though the requisite level of managerial involvement is undefined in the statute); and the employee-representative's actions have to have been committed primarily for the corporation's benefit.⁴⁸

Some other Western European countries have also adopted various forms of corporate criminal liability. Denmark was the earliest to enact entity liability for corporations, in its 1926 Butter Act, and today has embraced one of the more far-reaching applications of corporate criminal liability, though it will not be imposed unless an individual acted willfully or the corporation itself "could and should have avoided the crime in question."⁴⁹ The Netherlands adopted broad corporate criminal liability in 1976, though it, too, refuses to hold corporate entities strictly accountable for employees' actions.⁵⁰ Finland adopted corporate criminal liability in 1995 and Switzerland in 2003, though again, both countries' version of it is narrower than what is found in U.S. federal law.⁵¹

Efforts to adopt corporate criminal liability all across Europe reflecting various proposals of the Council of Europe have generally foundered.⁵² One notable exception is the Criminal Law Convention on Corruption, which relates to the bribery of domestic and foreign public officials. Promulgated by the Council of Europe in 1999,⁵³ it has been ratified by forty-three countries—though not, notably, by Germany, Italy, or Austria.⁵⁴ Earlier this year, the United Kingdom enacted an even more far-reaching law, the Bribery Act,⁵⁵ which is generally viewed as even more expansive than the United States' own Foreign Corrupt Practices Act,⁵⁶ itself the locus of substantial recent prosecutorial activity against corporations.⁵⁷ Overall, however, this country goes furthest in prosecuting corporations.

Comparison of federal corporate criminality and the Model Penal Code. Federal authorities are not the only ones putting vicarious corporate criminal liability to use. Even before *New York Central*, prosecutors in various states had begun "indicting corporations not just for common law crimes but also for statutory offenses, even when the statute made no specific mention of entity liability."⁵⁸ After *New York Central*, "with the Court's stamp of approval, prosecutors continued to aggressively pursue the type of 'creative lawyering' they had before, applying both the common law and statutory offenses to corporate conduct."⁵⁹

Unlike the federal government, however, various states in recent years have acted to cabin corporate criminal liability, particularly those adopting relevant provisions of the Model Penal Code.⁶⁰ Developed in 1962 by the American Law Institute, under the primary direction of professor Herbert Wechsler, the Model Penal Code was designed to embody the sponsors' "best principles" and help standardize American criminal law. No state has adopted the Model Penal Code in its entirety, but nineteen states have enacted some or all of the Code's Section 2.07,⁶¹ which pertains to corporate criminal liability, and the courts of several others have adopted its principles.⁶²

The Model Penal Code itself is not without its faults. For one thing, Section 2.07 of the Code permits corporations to be prosecuted for petty offenses for which there is no proof of criminal intent. But these must be "strict liability" offenses—that is, ones that some legislature has deemed indefensible.⁶³ Otherwise, statutes must contain a clear "legislative purpose to impose liability on corporations," unless "the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law" or "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."⁶⁴ Moreover, in the broad run of cases, the Model Penal Code allows defendant corporations to assert a good-faith "due diligence" defense "that the high managerial agent having su-

pervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.”⁶⁵

Unlike federal doctrine, then, the Model Penal Code embraces the following principles limiting vicarious corporate criminal liability:

- A clear legislative intention to impose liability on corporations must be apparent in laws aimed at all but the least serious crimes.
- Only actions performed by or committed under the authority of officers or other “high managerial agents,” not low-level employees or even supervisors, can create criminal liability.
- Showing due diligence in enforcing compliance is a defense against all but the most serious misdemeanor and felony charges.

The Code stands in stark contrast to federal law, which generally assumes vicarious liability even in the absence of a statement of legislative purpose; conflates major and minor crimes; and ascribes criminal liability to corporations for the actions of lower-level employees, even if companies had in good faith designed and implemented programs to ensure compliance with the law.

II. ASSESSING REGULATION THROUGH PROSECUTION

In recent years, there has been a steady stream of academic commentary assessing vicarious corporate criminal liability. Some articles have attacked the very concept.⁶⁶ Others have accepted it but argued against its broad or abusive application.⁶⁷

Whether or not criminal liability for corporations is ever necessary or desirable,⁶⁸ it is undoubtedly a blunt instrument. Even an indictment can sharply limit a corporation’s ability to fight a prospective criminal prosecution or begin its irrevocable unraveling. And a criminal conviction can be a death sentence in certain industries.

The destruction of Arthur Andersen, which was one of the United States’ “Big Five” accounting firms, is a case in point. With 28,000 domestic employees and 85,000 employees worldwide, Andersen served as the auditor of Enron, an energy-trading company that collapsed under a cloud of financial misstatements in 2001.⁶⁹ Andersen was indicted on March 7, 2002, trial commenced two months later, and a guilty verdict was returned on June 15 of that same year.⁷⁰ Although Andersen’s punishment was mild—a \$500,000 fine and five years’ probation⁷¹—its felony conviction was essentially the firm’s death knell, as Securities and Exchange Commission regulations prohibit convicted felons from representing publicly traded companies.⁷² By the end of 2002, Andersen had only 3,000 employees;⁷³ today, it has only 200, who remain to wind down its affairs.

Significantly, Andersen was indicted not for having countenanced material misstatements of fact in Enron’s public disclosures but for “a single count of corruptly persuading one or more Andersen personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding,” in violation of 18 U.S.C. § 1512 (b)(2).⁷⁴ On October 8, one of Andersen’s in-house counsel, Nancy Temple, in a meeting with outside counsel, was advised that an SEC investigation of Enron was “highly probable” and that there was a “reasonable possibility” that Enron would have to restate earnings.⁷⁵ Two days later, Andersen partner Michael Odom reminded a general training session of eighty-nine employees, ten of whom worked on the Enron account, of the firm’s “document retention” policy and urged them to comply with it: “[I]f it’s destroyed in the course of normal policy and litigation is filed the next day, that’s great.... [W]e’ve followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable.”⁷⁶ Andersen employees subsequently began shredding documents, even after the firm received a letter, on October 19, from the SEC announcing the opening of an investigation into Enron’s accounting.⁷⁷

Such conduct is perhaps deserving of sanction, but it hardly seems to merit the complete destruction of a

long-standing accounting firm with tens of thousands of employees. In perhaps the greatest irony, Arthur Andersen ultimately prevailed on appeal, when a unanimous U.S. Supreme Court, in 2005, overturned the firm's conviction on the basis of a jury instruction that "failed to convey the requisite consciousness of wrongdoing." The Court wrote: "We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'"⁷⁸ Of course, by the time the Supreme Court decided the case, the accounting firm was long since defunct. Andersen's indictment was dismissed, and the sole individual Andersen employee to have been convicted of wrongdoing, partner David Duncan, withdrew his guilty plea and settled with the SEC without admitting any wrongdoing.⁷⁹

Unsurprisingly, in the aftermath of the Arthur Andersen case, another large accounting firm, KPMG, decided to "cooperate" with prosecutors when facing the prospect of its own criminal indictment. In August 2005, the firm entered into a delayed-prosecution agreement with the U.S. Department of Justice, which had accused it of a criminal conspiracy in marketing certain tax shelters that cost the government some \$2.5 billion in avoided taxes.⁸⁰ In addition to paying a fine of \$456 million, KPMG agreed to "special oversight" conditions, which have become commonplace in the structuring of DPAs.⁸¹

While the fate of the accounting firms Arthur Andersen and KPMG might seem peculiar to themselves, since SEC rules forbid auditors to advise public companies if they have been convicted of a felony, accounting firms are hardly the only corporate species that operate under special legal burdens. Once a conviction—or, in many cases, even an *indictment*—has attached, specially tailored legal rules prevent broker-dealers and underwriters from participating on a securities exchange, disqualify medical companies from being reimbursed by Medicare or Medicaid, and prevent defense and other contractors from doing business with the government.⁸²

But any sort of corporation can be immobilized by the actions of law enforcement authorities. Law professor Pamela Bucy explains:

[T]here is no question that criminal prosecution of a corporation has a tremendous impact on the corporation and its community, employees, customers and lenders. For starters, the tangible and intangible costs of responding to any corporate criminal investigation are significant. Company employees must gather thousands of documents in response to subpoenas. Prior to supplying subpoenaed documents, legal counsel must review each document to verify compliance and to ensure that privileged information is not being released. This process is time consuming and expensive. In addition, any company under investigation should undertake its own internal investigation. If outside counsel is hired to do this investigation, the legal fees are large. If in-house counsel undertakes the investigation, counsel is diverted from other corporate projects and tasks and this diversion hurts a company in small and large ways. Also, once the existence of an investigation becomes public, stock prices of publicly traded companies often drop, sometimes precariously....

Additionally, lenders may raise short term interest rates, terminate lines of credit, or call in loans. Moreover, business is often disrupted by an investigation. Deals and plans are put on hold because of the uncertainty surrounding the targeted company. Employee morale plummets. Competing businesses swoop in and lure away star employees who are reluctant to remain with a business under investigation. Customers leave for competitors.

In short, a company may not survive the distractions, costs, and damage to its reputation and business that a corporate criminal investigation brings.⁸³

Facing this reality, more and more companies have been "cooperating" with prosecutors to avoid actual prosecution. In 2003, the year following Andersen's conviction, federal prosecutors entered into six DPAs with corporations, and that number grew to ten in 2004, thirteen in 2005, twenty-one in 2006, and thirty-

nine in 2007,⁸⁴ which appears to have been the peak year of the trend. Although the number of new DPAs since then seems to have leveled off at about twenty per year, they remain a powerful instrument in the hands of prosecutors for regulating business conduct. The companies entering into DPAs with the federal government in recent years, including ABN Amro, Bristol-Myers Squibb, Credit Suisse, Daimler, General Re, Halliburton, Lloyds, MetLife, Pharmacia & Upjohn, Quest Diagnostics, Schering-Plough, UBS, and Wachovia,⁸⁵ read like a Who's Who of international business, particularly in the financial and health-care fields.

Under DPAs, prosecutors have mandated major changes in a corporation's governance—including the hiring of “business monitors” selected by the prosecutor, the firing of chief executives and general counsel, and the appointment of individuals to the board of directors who are also of the prosecutor's choosing.⁸⁶ In one case, a U.S. attorney instructed the targeted company to endow a faculty chair at the U.S. attorney's alma mater.⁸⁷ Such heavy-handedness is troubling for several reasons.

First, regulation through prosecution as embodied in federal DPAs and similar state-level arrangements, such as those developed by New York attorney general Eliot Spitzer, amount to an end run around the normal legislative, regulatory, and judicial process. Prosecutors' substantial leverage over companies in the formation of DPAs and in the monitoring of their enforcement leaves the actions of the executive branch in restructuring businesses largely free from meaningful review by the judiciary, or even, in the case of many federal investigations, Justice Department headquarters.⁸⁸ Yet these deferred-prosecution agreements are able to “reshape the governance of leading corporations, public entities, and ultimately entire industries.”⁸⁹

In imposing DPAs, prosecutors are fashioning ad hoc remedies for what may or may not be crimes, rather than following established rules that clearly state the legal basis for a government's intervention in private affairs. And, thanks to these agreements, the legitimacy of prosecutors' notions is never tested at trial.

Writing in *The Wall Street Journal* about the Spitzer investigations, Henry Manne, a founder of the law and economics movement, opined: “Mr. Spitzer has introduced the world to yet a new form of regulation, the use of the criminal law as an in terrorem weapon to force acceptance of industry-wide regulations. These rules are not vetted through normal authoritative channels, are not reviewable by any administrative process, and are not subject to even the minimal due-process requirements our courts require for normal administrative rule making. The whole process bears no resemblance to a rule of law; it is a reign of force.”⁹⁰ The same may be said about DPAs extracted by other state attorneys general and their federal counterparts.

Second, there is no reason to believe that prosecutors have sufficient business judgment to fashion policies and practices that both improve legal compliance and manage to avoid interfering with vital commercial operations. While specialized regulatory agencies such as the SEC, Environmental Protection Agency, and National Highway Transportation and Safety Administration are themselves prone to error,⁹¹ there is every reason to suspect a significantly higher error rate for prosecutors, who are subject to the influence of perverse public-choice incentives, such as the opportunity to advance politically that grandstanding against corporate abuse sometimes affords.⁹²

For example, as attorney general, Spitzer's assumption of extraordinary powers, which drew on the criminal provisions of the state's almost forgotten Martin Act, helped propel him into the state's governorship. The act criminalizes misstatements even when no individual has been defrauded, or indeed when no security has been sold.⁹³ Under it, Spitzer assumed powers to tax and to regulate financial and commercial activity extending well beyond his state's borders.⁹⁴

Spitzer's aggressive actions, which earned him the moniker “the sheriff of Wall Street,” caused all the companies in his crosshairs to capitulate, leaving him free to reshape the manner in which investment banks conduct their research and trading operations and in which insurance brokerages compensate their

employees. There is good reason to believe that at least some of Spitzer's reforms reflected a misunderstanding of the market that he was regulating and hurt not only the businesses targeted⁹⁵ but also the consumers he was purportedly trying to protect.⁹⁶

Finally, the availability of separate categories of corporate and individual criminal liability, with different constitutional standards of protection, gives prosecutors a powerful incentive to turn employers against employees. In recent practice, such tactics have been not only commonplace but very much to the detriment of employees' rights. Subsequent litigation in the KPMG affair laid bare just how heavy-handed the government's tactics can be. In *United States v. Stein*,⁹⁷ a tax-shelter case, federal judge Lewis Kaplan dismissed indictments against thirteen former partners and employees of KPMG because the government had violated the individuals' Sixth Amendment right to counsel by pressuring the firm not to pay their legal expenses.

Such tactics are not unique to the *Stein* case but are standard under the Federal Sentencing Guidelines for organizations, which explicitly encourage corporate defendants to "cooperate" with prosecutors in exchange for leniency. In 1999, Eric Holder, the deputy attorney general at the time, issued the first of several memoranda sketching out guidelines for seeking sanctions against corporate defendants that agree to cooperate with prosecutors. Examples of credited cooperation are waiving work-product and attorney-client privileges, disciplining or terminating allegedly culpable employees, and refusing to indemnify individual defendants or participate in joint-defense agreements with them.⁹⁸ In October 2001, the Securities and Exchange Commission embraced similar rules in its Seaboard Report.⁹⁹

The Holder Memo, a subsequent variation issued under the name of Holder's successor, Larry Thompson, and the Seaboard Report prompted a flurry of criticism across the political spectrum, from the American Civil Liberties Union to the American Bar Association and the U.S. Chamber of Commerce.¹⁰⁰ In December 2006, U.S. Senator Arlen Specter (R-Pa.) introduced the Attorney-Client Privilege Protection Act of 2006,¹⁰¹

which, had it passed, would have effectively rewritten the Justice Department's prosecutorial playbook by denying corporations cooperation credit under the Sentencing Guidelines for waiving privilege, declining to indemnify or jointly defend employees, or disciplining or terminating them.

In response to this wave of criticism and the legislation that followed, the Justice Department has twice more, under Thompson's successors, Paul McNulty and Mark Filip, issued memoranda attempting to clarify its position. The more recent of the two iterations, the Filip Memo, does go some distance in limiting the government's ability to pit employers against employees, namely by protecting materials protected by "core" attorney-client and work-product privileges and by prohibiting prosecutors from considering a corporation's decision to indemnify accused employees.¹⁰² However, under the Filip Memo, prosecutors may still give credit for corporations' decision to sanction or terminate employees.¹⁰³ The Filip Memo also leaves broad aspects of attorney-client relations and work-product vulnerable and permits the conditioning of cooperation credit on whether joint-defense agreements stop companies from disclosing "relevant facts." Thus, prosecutors' ability to leverage corporate prosecutions to the detriment of individual corporate employees remains a potent weapon.¹⁰⁴

III. POLICY RECOMMENDATIONS

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, 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.

Suggestions of methods for reining in prosecutorial discretion abound. They include eliminating corporate criminal liability altogether, refining Justice Department standards, and buttressing corporations' legal protections.¹⁰⁵ As noted, particular consideration has been given—in, for example, the Attorney-Client

Privilege Protection Act—to protecting the attorney-client and work-product privileges so as to ensure adequate attorney representation.¹⁰⁶

In light of the problems with regulation by prosecution discussed in this paper, as well as its scant support both historically and beyond this country's borders, legislators would be well-advised to consider the following questions before deeming the status quo acceptable or undertaking any reforms:

- When should companies be held vicariously liable under criminal law?
- What types of conduct should trigger criminal sanctions for corporations?
- What categories of employee should trigger a corporation's liability?
- How can companies defend themselves against a criminal investigation or prosecution?
- What should be the limits, if any, on the collateral penalties that criminal prosecution visits on corporations?

Serious consideration of these questions leads to the following five principles for reform:

1. Courts should deem criminal laws applicable to corporations only when expressly commanded by the legislature. *New York Central* held merely that the Constitution's Commerce Clause gave Congress the power to make corporations criminally liable. Since then, however, federal courts and many state courts have regularly inferred *general* vicarious liability for corporations for any federal criminal offense, even those that did not explicitly extend to corporate entities. Given the excesses of regulation by prosecution, its present estrangement from its historical rationale, and the scarcity of situations in which vicarious corporate criminal liability can accomplish what other sanctions and remedies cannot, courts should demand authorizing language in the laws that prosecutors invoke to indict corporations. If, however, courts do not reverse course and continue to apply criminal laws to corporations on the basis of *respondeat superior* principles, legislatures should adopt a default rule that makes crimes applicable to corporations only when expressly authorized by statute, at least

in the case of non-petty offenses, as provided in the Model Penal Code.

2. Legislatures should limit vicarious corporate criminal liability to serious crimes. A key enabler of regulation by prosecution is the vast reach of the modern criminal law. At the federal level, Congress has continued to expand the number of crimes in the U.S. Code, which now stands at about 4,450,¹⁰⁷ while criminally actionable regulatory offenses in the Federal Register number as many as 300,000.¹⁰⁸ State legislatures have also continued to create new crimes and to give whole sections of regulation criminal force.¹⁰⁹ There is no principled reason for the vast majority of such provisions to apply to corporations as distinct entities. Corporate criminal liability, which “arose only as a nineteenth century expedient to fill a gap in public law enforcement institutions,” is too blunt an instrument for disciplining activities already under the jurisdiction of regulatory agencies created in the New Deal and Great Society eras.¹¹⁰ Ideally, what are now minor crimes would be covered by civil and administrative law.

3. Only crimes performed or authorized by corporate officers or high-managerial agents should give rise to corporate criminal liability. Both the proliferation of criminal laws and their frequent application to corporations as the result of the actions of low-level employees have dramatically expanded the scope of regulation by prosecution. Because no large corporation can possibly govern all the actions of its employees, such a standard effectively makes corporations subject to prosecutorial whim. This standard of vicarious corporate criminal liability is at odds with not only the standards of foreign nations but also those embedded in the civil law, at least in the federal Title VII context, as well as Section 2.07 of the Model Penal Code. The Code limits liability for the most serious class of crimes to the actions of directors, officers, and other high-ranking employees. If Congress and state legislatures that have not yet done so went ahead and adopted the Model Penal Code's vicarious-liability standard for felonies and other serious crimes, corporations would still be subject to strict liability for civil transgressions committed by lower-level employees, and employees whose actions did

not give rise to vicarious liability could, of course, still be prosecuted as individuals for the crimes they allegedly committed.

4. Where the facts so indicate, corporations should be able to assert an affirmative defense of having made a good-faith effort to promote compliance with the law. It is not only their ability to prosecute corporations for picayune offenses committed by low-level employees that unduly strengthens prosecutors' hands. So does a company's inability to defend itself by proving that the employees being charged had violated corporate policy, of which the company had made them aware. As the U.S. Supreme Court recently recognized in allowing a good-faith defense to charges of sexual harassment brought under Title VII, corporate compliance programs are often the most efficient and effective way of ensuring obedience to the law. Allowing corporations to defend themselves by pointing to the existence of active compliance programs, as per the Model Penal Code, would encourage the development of such programs and thus good conduct.

5. Legislatures should ensure that the statutory collateral consequences flowing from criminal prosecution attach only after conviction, not indictment. Many serious collateral consequences can flow from not only indictment but even a criminal inquiry—including client or customer abandonment, a loss of confidence by creditors, and damage to reputation, not to mention substantial expense. Such outcomes are be-

yond the government's control to mitigate or prevent. However, it can do something about the many laws and regulations that debar corporations from entering into government contracts or conducting other business activities upon indictment, not conviction. A disproportionate number of companies that are vulnerable in this way have been the subject of federal DPAs, which provide prosecutors with enormous leverage. Giving corporations their day in court before such consequences attach would enable them to shift their negotiations to the post-indictment phase. Doing so would also have the salutary effect of restoring the general constitutional presumption of innocence.

By specifying which crimes were applicable to corporations per se, legislatures would ameliorate the anti-democratic defects of regulation by prosecution and better align federal and state law with international norms and those developed in the Model Penal Code. Limiting corporate crimes to major offenses committed by major agents of the corporation would help guard against prosecutorial abuse and return criminal law to its historical role of punishing deliberate acts by intentional actors deserving of moral opprobrium. Making corporations' compliance programs legally cognizable would facilitate self-policing, while minimizing the instances in which indictment alone inflicts serious collateral damage would give companies a fighting chance to defend themselves.

ENDNOTES

1. See, e.g., Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure*, 118 YALE L.J. 126, 129 (2008).
2. See generally Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393 (1982).
3. See, e.g., U.S. v. Dye Construction Co., 510 F.2d 78, 82 (10th Cir. 1975).
4. See, e.g., U.S. v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972).
5. DPAs and NPAs are authorized by the 1974 Speedy Trial Act's provision allowing for prosecutorial deferrals "pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. s 3161(h)(2).
6. See Gibson Dunn, 2010 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, Aug. 5, 2010, available at <http://www.gibsondunn.com/publications/pages/2010Mid-YearUpdate-CorporateDeferredProsecutionandNon-ProsecutionAgreements.aspx> [hereinafter "Gibson Dunn 2010"]; Gibson Dunn, 2009 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, Jan. 7, 2010, available at <http://www.gibsondunn.com/publications/pages/2009YearEndUpdateCorpDeferredProsecutionAgreements.aspx> [hereinafter "Gibson Dunn 2009"].
7. See, e.g., Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007); Ellen S. Pogdor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411 (2007); Elizabeth K. Ainslie, *Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310 (2004); V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).
8. 212 U.S. 481 (1909).
9. Other scholars have offered detailed surveys of the evolution of corporate criminal liability in America. See generally Brickey, *supra* note 2. This discussion is not intended to be comprehensive but rather to frame the analysis of corporate criminal liability in historical context.
10. 88 Eng. Rep. 1518 (K.B. 1701).
11. William Blackstone, 1 Commentaries 476*.
12. More specifically, seventeenth- and eighteenth-century courts felt that corporations lacked *actus reus* and *mens rea*—the requisite "act" and "intent" necessary to attribute criminality. Eighteenth-century courts also tended to enforce the doctrine of *ultra vires*, which prevented corporations from being held for acts outside their charters, and the criminal procedure of the day required the accused to be physically present in the courtroom. See V. S. Khanna, *supra* note 7, at 1479–80.
13. Case of Langforth Bridge, 79 Eng. Rep. 919, 919 (K.B. 1635). See also The King v. Inhabitants of Clifton, 101 Eng. Rep. 280, 280–81 (K.B. 1794); Rex v. Inhabitants of Great Broughton, 98 Eng. Rep. 438, 418 (K.B. 1771).

14. See Brickey, *supra* note 2, at 401 & n. 51 (discussing cases).
15. *People v. Corporation of Albany*, 11 Wend. 539, 539 (N.Y. Sup. CL 1834) (citations omitted).
16. See *State v. Great Works Milling & Manufacturing Co.*, 20 Me. 41 (1841) (holding that a corporation “can neither commit a crime or misdemeanor, by any positive act or affirmative act, or incite others to do so”).
17. In 1852, for example, the New Jersey Supreme Court considered “whether a corporation aggregate is liable to be proceeded against by indictment for any offence committed by active means or by an affirmative act” in a case in which a railroad company had been convicted of a public nuisance for erecting a building and leaving cars on a public highway. *State v. Morris & Essex Railroad Co.*, 23 N.J.L. 360, 364 (1852). Drawing an analogy to tort law, and noting that the crime of nuisance required no showing of intent, the court determined that the railroad could be thus prosecuted.
18. See 23 N.J.L. at 370.
19. Whereas states have a general common law criminal jurisdiction, “all federal criminal law is statutory,” see Baker, *supra* note 7, at 311. Congress’s power to pass criminal-law statutes does not rest on a general police power but rather derives from its power to regulate interstate commerce.
20. 24 Stat. 379 (1887).
21. 26 Stat. 209 (1890).
22. 32 Stat. 847 (1903).
23. *Id.*
24. See *New York Central & Hudson Railroad Co. v. U.S.*, 212 U.S. 481 (1909).
25. *Id.* at 493.
26. *Id.* at 494–95.
27. See *Northern Securities Co. v. U.S.*, 193 U.S. 197, 342 (1904) (interpreting Sherman Act).
28. Public rhetoric notwithstanding, the Supreme Court’s recent, controversial holding in *Citizens United v. Federal Election Commission*, 301 S. Ct. 836 (2010), was hardly revolutionary in finding that constitutional protections apply to corporations. Even in the earliest days of the republic, the Court held that corporations are citizens under the Constitution for purposes of federal diversity jurisdiction—see *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87–88 (1809)—but not for purposes of the Article IV Privileges and Immunities Clauses, see *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586–87 (1839). The Fourteenth Amendment Privileges and Immunities Clause likewise does not apply to corporations. See *Paul v. Virginia*, 80 U.S. (8 Wall.) 168, 178 (1868). But the Equal Protection Clause of the same amendment does; see *Santa Clara Cty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886). In the criminal context, corporations are not protected by the Fifth Amendment’s right against self-incrimination. See *Hale v. Henkel*, 201 U.S. 43 (1906). But they are protected by the same amendment’s protection against double jeopardy. See *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). For a full discussion of the constitutional protections afforded corporations in the criminal context, see generally 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 (1996).

29. See ANDREW WEISSMANN ET AL., REFORMING CORPORATE CRIMINAL LIABILITY TO PROMOTE RESPONSIBLE CORPORATE BEHAVIOR 5 (U.S. Chamber Institute for Legal Reform 2008) (citing *United States v. Blood*, 435 F.3d 612 (6th Cir. 2001); *United States v. Sun-Diamond Growers*, 138 F.3d 961 (D.C. Cir. 1998)).

30. See, e.g., *U.S. v. Dye Construction Co.*, 510 F.2d 78, 82 (10th Cir. 1975).

31. An early representative case is *Dollar Steamship Co. v. U.S.*, 101 F.2d 638, 640 (9th Cir. 1939) (holding corporation criminally liable for employees' dumping refuse into waterway notwithstanding express countervailing corporate instructions). In 1972, the Ninth U.S. Circuit Court of Appeals found the Hilton Hotels Corporation criminally liable for engaging in a concerted refusal to deal with a supplier—a per se violation of the Sherman Antitrust Act—even though the company had given its employees specific instructions not to participate in the boycott, and the employee whose conduct was in question “testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier.” See *U.S. v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972).

32. In 1987, the First Circuit ruled that the Bank of New England was criminally liable for failing to report, under the Currency Transaction Reporting Act, an individual's cumulative withdrawals of more than \$10,000, even though none of them individually exceeded \$10,000 and no single employee at the bank had actual knowledge that the withdrawals had cumulatively exceeded the statutory threshold. See *U.S. v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987).

33. Much of this analysis borrows from the writings of criminal defense attorney Andrew Weissmann, see *supra* notes 7 and 29, to whom I am deeply indebted.

34. Note that even the historical difference between criminal and civil law is smaller than one might imagine. It is true that criminal law is enforced by state action, through prosecutions, whereas the civil law of tort stems from private rights of action brought by individuals. It is also true that in tort, those individuals must have been harmed, if the suit they file is to be cognizable, whereas the state may prosecute crimes, such as attempts or conspiracies, from which no individual has suffered.

Yet in most other respects, the conduct regulated by tort law overlaps that regulated by the criminal law. The traditional harms to body and property policed by tort—assault, battery, fraud, and the like—have analogs in the criminal law. Ancient systems of law, such as the Code of Hammurabi in Babylon, failed to distinguish between tort and criminal law. Although there was a tort/criminal distinction under the Twelve Tables of Rome, commentators often conflated the concepts, and the law remained a system principally of private enforcement. See, e.g., James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U.L. REV. 29, 38 (1996).

What we consider criminal law today evolved after the Norman conquest of Britain, in which the traditional Anglo-Saxon “pleas of the crown”—a subset of offenses deemed sufficiently important to the king's interest to warrant the state's legal action—evolved into the common-law version of criminal justice. See *generally* KENNETH PENNINGTON, *THE PRINCE AND THE LAW, 1200–1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION* (1993). The criminal law began to discriminate among offenses—treason, felony, and misdemeanor—according to their seriousness, and the law evolved to include many protections, including the right to a jury, in the more serious cases.

With the modern expansion of both tort and criminal law, commentators have struggled to delineate normatively between public and private. In 1991, one of them observed: “[T]he dominant development in substantive federal criminal law over the decade has been the disappearance of any clearly definable line between civil and criminal law.” John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 193 (1991). In Coffee’s view, “the factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance.” *Id.* at 193–94.

35. 524 U.S. 775 (1998).

36. 524 U.S. 742 (1998).

37. See Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e (2010); see also *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing sexual harassment as a violation of Title VII).

38. See 524 U.S. at 766; 524 U.S. at 804.

39. See 42 USC § 2000e (b).

40. *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 545–46 (1999).

41. See *id.* at 544–45.

42. Diskant, *supra* note 1, at 129. See also Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004).

43. See Beale & Safwat, *supra* note 42, at 105.

44. See *id.* In bribery law, however, Britain has recently embraced a more stringent approach than that of the United States. See note 55, *infra*, and accompanying text.

45. See Diskant, *supra* note 1, at 130, citing COMM. ON CAPITAL Mkts. REGULATION, INTERIM REPORT, 2–3, 29–34, 39–44 (2006) (referencing data suggesting a shift in initial public offerings from New York to London in the wake of the Sarbanes-Oxley Act); MCKINSEY & CO., SUSTAINING NEW YORK’S AND THE US GLOBAL FINANCIAL SERVICES LEADERSHIP, 10–14, 16–17 (2007) (same).

46. See Beale & Safwat, *supra* note 42, at 105.

47. *Id.*

48. See *id.* at 116–17 & nn. 125–26.

49. See *id.* at 111–12.

50. See *id.* at 110–11.

51. See *id.* at 113–14.

52. In addition to the Criminal Law Convention on Corruption, discussed *infra*, there is the Convention on the Protection of the Environment through Criminal Law, which has been signed by thirteen European states, though ratified only by Estonia. See *id.* at 128–29.
53. See European Treaty Series No. 173, Criminal Law Convention on Corruption, Jan. 27, 1999, arts. 2–12.
54. See Beale & Safwat, *supra* note 42, at 129–30.
55. See ANDREW WEISSMANN & ALEXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 5 (U.S. Chamber of Commerce Institute for Legal Reform 2010).
56. See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, (2010).
57. According to criminal defense attorneys Andrew Weissmann and Alexandra Smith, “the last five years has seen nothing short of a boom in [Foreign Corrupt Practices Act] enforcement,” and “[f]ive of the top ten [Foreign Corrupt Practices Act] settlements have occurred in 2010 alone.” Weissmann & Smith, *supra* note 55, at 2.
58. Diskant, *supra* note 1, at 136.
59. *Id.* at 137.
60. See *generally* Model Penal Code (1962).
61. Model Penal Code § 2.07, in pertinent part, follows:
 - (1) A corporation may be convicted of the commission of an offense if:
 - (a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
 - (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
 - (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.
 - (2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.
 - ...
 - (4) As used in this Section:
 - (a) “corporation” does not include an entity organized as or by a governmental agency for the execution of a governmental program;
 - (b) “agent” means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;
 - (c) “high managerial agent” means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.
 - (5) In any prosecution of a corporation or an unincorporated association for the commission of an offense

included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

...

62. See Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 NEB. L. REV. 197, 205–6 (2008).
63. See Model Penal Code § 2.07(2) & Explanatory Note (2001) (noting that “misdemeanors and felonies can be prosecuted under” subsection (1) but not subsection (2) of the Model Penal Code).
64. See Model Penal Code § 2.07(1).
65. See Model Penal Code § 2.07(5).
66. See, e.g., John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009); Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (2003); Khanna, *supra* note 7.
67. See, e.g., Bucy, *supra* note 7; Pogdor, *supra* note 7; Weissmann & Newman, *supra* note 7; Ainslie, *supra* note 7.
68. For a good discussion of the general philosophical case for and against criminal liability for corporations, see John Hasnas & Mike Seigel, *Criminalizing Corporate Conduct: How Far Is Too Far*, POINTOFLAW.COM (July 2009), http://www.pointoflaw.com/feature/criminalizing_corporate_conduct_0709.php. In this author’s view, the case for entity criminal liability is attenuated at best.

There clearly is a role for criminal law in regulating corporate behavior, since economic penalties alone cannot deter all corporate misconduct. This truth undergirds the entire body of criminal law; as Holmes noted, “the poverty of the criminal” necessitates that “punishment [take] the place of compensation.” *The Common Law*, ch. 2. Similarly, civil penalties alone are insufficient deterrents to corporate misbehavior, since the corporate form and its limited-liability privilege insulate equity investors from their full consequences.

Ultimately, however, any criminal sanctions levied against corporations—including increased stigma, curtailment of freedoms, and any collateral consequences—are essentially economic penalties that run up against the same limitations that civil penalties do in regulating corporate behavior. Only individual actors can be imprisoned, so criminal liability for individuals acting in their corporate capacity, rather than criminal liability for the corporate entity itself, would seem the necessary adjunct to civil law for appropriately regulating corporate behavior.
69. See Ainslie, *supra* note 7, at 107, 109.
70. U.S. v. Arthur Andersen, LLP, 374 F.3d 281, 284 (5th Cir. 2004), *rev’d*, 544 U.S. 696 (2005).
71. See Ainslie, *supra* note 7, at 107.
72. See 17 C.F.R. § 201.102(e)(2) (2005).
73. See Ainslie, *supra* note 69, at 109.

74. U.S. v. Arthur Andersen, 374 F.3d at 284.
75. *Id.*
76. U.S. v. Arthur Andersen, 374 F.3d at 286; Arthur Andersen v. U.S., 544 U.S. at 700.
77. 374 F.3d at 286.
78. Arthur Andersen v. U.S., 544 U.S. at 703, 706 (citations omitted).
79. See Reuters, *Accountant and S.E.C. Reach Deal in Enron Case*, N.Y. TIMES, Jan. 29, 2008.
80. See Carrie Johnson, *Charge Against KPMG Dropped*, WASH. POST, Jan. 4, 2007.
81. See *id.*
82. See, e.g., The Securities Exchange Act of 1934, 15 U.S.C. § 78b; The Investment Advisors Act of 1940, 15 U.S.C. § 80b-3(e); The Commodity Exchange Act, 7 U.S.C. § 12a; The Federal Deposit Insurance Act, 12 U.S.C. § 1818(a); The Medicare and Medicaid Patients and Program Protection Act, 42 U.S.C. § 1320a-7.
83. Bucy, *supra* note 7, at 1288.
84. See Gibson Dunn 2009, *supra* note 6.
85. See *id.*; Gibson Dunn 2010, *supra* note 6.
86. See *id.* (“Consistent with the DOJ’s stated commitment to the use of monitors, four of the ten DPAs so far in 2010 contain a monitor requirement.”).
87. See, e.g., Bristol-Myers Squibb Deferred Prosecution Agreement § 20 (June 2005), available at <http://www.justice.gov/usao/nj/press/files/pdffiles/deferredpros.pdf> (“BMS shall endow a chair at Seton Hall University School of Law dedicated to the teaching of business ethics and corporate governance . . .”).
88. See Gibson Dunn 2009, *supra* note 6.
89. Brandon Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 936 (2007).
90. Henry G. Manne, *Regulation “In Terrorem,”* WALL ST. J. (Nov. 22, 2004), <http://online.wsj.com/article/0,,SB110108317665080424-email,00.html>.
91. In general, the public-choice incentive for regulatory agencies is overdeterrence; i.e., agencies typically commit “Type II errors.” See James R. Copland & Paul Howard, *In the Wake of Wyeth v. Levine: Making the Case for FDA Preemption and Administrative Compensation*, 1 MANHATTAN INSTITUTE PROJECT FDA REPORT 6 (2009) (citing Tomas Philipson et al., *How Safe Is Too Safe?*, 2 MILKEN REV. 38, 44 (2006)).
92. The gist of the business judgment rule, which prudentially restrains judges from second-guessing the business decisions of management and directors, counsels against undue prosecutorial involvement in business management, regardless of a corporation’s alleged criminal wrongdoing.

93. For a fuller discussion of the Martin Act and its evolution, see James R. Copland, *What's Wrong—and Right—with New York Criminal Law*, in *ONE NATION UNDER ARREST* (Paul Rosenzweig & Brian W. Walsh eds., 2010).
94. Initially, in the wake of the burst dot-com bubble, Spitzer targeted investment banks, whose sell-side research shops, according to some internal documents, pumped up forecasts for the banks' important investment-banking clients. Spitzer was able to realize over \$1.4 billion in settlements from New York's ten biggest investment firms, and to reshape the investment banks' analyst businesses entirely, by forcing the banks to adopt firewalls between their research shops and fee-based banking. Spitzer subsequently targeted mutual funds for allowing hedge funds to execute trades after the closing bell, and collected some \$1 billion in settlements from the mutual-fund industry, in addition to strengthening late-trading prohibitions.

In October 2004, Spitzer announced that he was investigating the rigging of prices among various players in the insurance industry, including risk and insurance broker Marsh & McLennan, large insurer AIG, and General Re, a reinsurer owned by Warren Buffett's Berkshire Hathaway. Within weeks, the chief executive officer of Marsh & McLennan, Jeffrey Greenberg, had resigned, and in March 2005, under pressure from Spitzer, AIG's board forced its CEO, Maurice "Hank" Greenberg—Jeffrey's father—to resign. It is worth noting that, as with Arthur Andersen and essentially all of Spitzer's corporate investigations, the investigation of AIG ended with a whimper. In 2008, four former employees of General Re and one former employee of AIG were convicted in a federal prosecution, but the SEC's final settlement with Greenberg, in 2009, made out no case of civil, let alone criminal, fraud against the former CEO.
95. Coping with new regulatory standards and cooperating with criminal probes can be a powerful distraction from the essential work of running a business. Indeed, in AIG's case, it may have contributed to the firm's effective demise. Hank Greenberg's successor as CEO of AIG, Martin Sullivan, admits that upon taking the company's reins, he "focused on other priorities including repairing AIG's standing with customers and regulators [and] cooperating with several government probes." Andrew G. Simpson, *Greenberg: AIG's Risky Subprime Activity 'Exploded' After He Left*, *INS. J.* (Oct. 10, 2008), <http://www.insurancejournal.com/news/national/2008/10/10/94544.htm>. The bulk of the overwhelming credit-default-swap position that forced the company to the brink of bankruptcy and into government receivership was amassed shortly after Greenberg's departure: over a nine-month period, the company wrote as many credit-default swaps as it had in the previous seven years combined. While it is certainly possible that AIG would have amassed the same large derivative position had Greenberg remained at the helm, the long-serving CEO had a proven track record of monitoring the financial products group's risk. David Havens, a credit analyst with UBS, contends: "Had Hank Greenberg still been running the company, I think it's pretty safe to say the situation wouldn't even be close to what is now." Lynnley Browning, *AIG's House of Cards*, *PORTFOLIO.COM* (Sept. 28, 2008), <http://www.portfolio.com/news-markets/top-5/2008/09/28/AIGs-Derivatives-Run-Amok?page=2#page=2>.
96. For instance, at Spitzer's insistence, insurance brokerages ceased the practice of paying their brokers contingent commissions, which tie compensation to the fees paid to the brokerage firm. Spitzer's office perceived this practice as a conflict of interest, since it seems to give agents an incentive to sell *higher-priced* policies, instead of serving their clients by seeking out and recommending lower-priced ones. Such an objection, of course, could be levied against any standard commission that is a function of price. Furthermore, non-price factors, such as coverage terms and creditworthiness, are vital to assessing a policy's value. In the law-and-economics literature, payment incentives analogous to the insurance brokerages' contingent-fee structure have been defended as proxies for non-price factors, dating to Nobel laureate Ronald Coase's seminal 1979 article defending radio

"payola." See *Payola in Radio and Television Broadcasting*, 22 J.L. & Econ. 269 (1979). Henry Manne has argued that the contingent commissions attacked by Spitzer were, in fact, economically efficient, particularly given the specifics of the insurance brokerage market, which has a sophisticated and well-informed customer base. See *supra* note 90.

97. U.S. v. Stein, 435 F.Supp.2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

98. See Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y.L.J., Sept. 11, 2008.

99. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) (the "*Seaboard Report*"), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

100. See Stein & Levine, *supra* note 98.

101. S. 30, 109th Cong. (2006).

102. See Stein & Levine, *supra* note 98.

103. Although the Filip Memo proscribes such consideration in the "cooperation" context, it permits it when considering "remediation," such that "it is unclear whether there is any significance to this change." See *id.*

104. It is also worth noting that the Filip Memo applies only to the Justice Department—it has no influence over the SEC and other regulatory bodies—and even as to Justice, it is only a nonbinding "guideline."

105. See, e.g., Hasnas, *supra* note 66; Bucy, *supra* note 7; Pogdor, *supra* note 7; Weissmann & Newman, *supra* note 7; Ainslie, *supra* note 7.

106. See, e.g., Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199 (2010); Valerie Figueredo, *Misadventures into Corporate Prosecutions after the Holder, Thompson, and McNulty Memoranda*, 33 U. DAYTON L. REV. 1 (2007); Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

107. See John Baker, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (June 16, 2008), available at <http://www.heritage.org/Research/LegalIssues/lm26.cfm>.

108. See Coffee, *supra* note 34, at 216.

109. See Copland, *supra* note 93.

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

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