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Roundtable - The Criminalization of Corporate Law - Foreword

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The Criminalization of Corporate Law

FOREWORD

AFTER THE ACCOUNTING AND CORPORATE GOVERNANCE SCANDALS of 2002,¹ many people from legislators to business leaders began demanding that the law ensure greater accountability from corporate officers and directors.² One response to these demands was an increase in the criminal prosecution of corporate executives, particularly high-level executives. Thus, since 2002, there has been a dramatic rise not only in the number of criminal prosecutions of corporate officials, but also in the rate of convictions.³ As a result, many former executives have been convicted for their misconduct.⁴ This includes people who have become household names such as Kenneth Lay, Martha Stewart, and Bernie Ebbers, as well as lesser-known executives who entered into plea agreements to avoid lengthy trials and sentences. The prosecution of these individuals appears to satisfy the public demand for greater corporate accountability.⁵ However, these prosecutions have sparked intense debate regarding the validity of the tactics used in criminal prosecutions as well as the propriety of relying on the criminal justice system to regulate corporate conduct.⁶

In April of 2006, the University of Maryland School of Law's Business Law Program held a series of Roundtable discussions entitled the *Criminalization of Corporate Law* aimed at shedding light on this debate. This issue of the *Journal of Business and Technology Law* includes articles and essays written in connection with those Roundtable discussions. The Roundtable began with a keynote address by David

* Professor of Law and Director of the Business Law Program, University of Maryland School of Law. Special thanks to the editors and staff members of the *Journal of Business and Technology Law* for their efforts in ensuring the success and integrity of this Issue.

1. See, e.g., Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability under the Sarbanes-Oxley Act*, 55 *RUTGERS L. REV.* 1, 6 (2002); Robert Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40 *HOUS. L. REV.* 1, 19–33 (2003); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *YALE L.J.* 1521, 1559 (2005).

2. Indeed, President George Bush noted that there needed to be a “new ethic of responsibility in the business community.” See George W. Bush, President of the United States, July 9, 2002, available at http://www.pbs.org/newshour/bb/business/july-dec02/bush_7-9.html; see also Hamilton, *supra* note 1, at 33 (noting the public's desire for corporate executives to receive “jail time”).

3. See Kathleen F. Brickey, *From Enron to WorldCom & Beyond: Life and Crime after Sarbanes-Oxley*, 81 *WASH. U. L.Q.* 357, 357–59 (2003).

4. See *id.* at 358 n.4.

5. See Hamilton, *supra* note 1, at 33.

6. See Brickey, *supra* note 3, at 359 nn.6–8.

THE CRIMINALIZATION OF CORPORATE LAW

Anders, former Assistant United States Attorney for the Southern District of New York, who was responsible for the prosecution of former WorldCom Chief Executive Officer Bernie Ebbers. Mr. Anders described his experiences prosecuting one of the highest profile corporate scandals in this era, a prosecution that led to Ebbers' conviction and a twenty-five year sentence—the longest prison term imposed on a top corporate executive.⁷ Mr. Anders also highlighted some of the tactics employed by the Department of Justice as well as the rationales for, and impact of, those tactics.

A series of discussions followed the keynote address. The Roundtable brought together academics and practitioners in the field of corporate law, with academics and practitioners within the field of criminal law, to provide insights on the impact of applying criminal law in the corporate context. In particular, participants in the Roundtable discussed the impact of enhanced criminal prosecutions on corporate culture, director and officer conduct, shareholder value, and non-shareholder constituents.

While the political and corporate landscape has shifted considerably since April 2006, the collection of articles and essays in this Issue reflects some critical initial impressions of the impact and propriety of criminal prosecutions in the corporate context. The Business Law Program is pleased to join with the *Journal of Business and Technology Law* to present these articles that make a significant contribution to the scholarly canon on the criminalization of corporate law.

7. See, e.g., Steve Rosenbush, *The Message in Ebbers' Sentence: The Ex-WorldCom CEO's 25-year Stretch Puts Corporate Crooks on Notice*, Bus. Wk., July 14, 2005, available at http://www.businessweek.com/technology/content/jul2005/tc20050714_0826_tc062.htm.