

## On the Prospects of Deterring Corporate Crime

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## On the Prospects of Deterring Corporate Crime

### INTRODUCTION

CRIMINAL LAW AND CORPORATE LAW HAVE TRADITIONALLY occupied different legal spheres. Although important exceptions exist (public welfare offenses and regulatory crimes come to mind), the two fields historically developed along separate tracks. The recent surge in corporate misconduct by executives has changed all that, and it is no longer uncommon for the two tracks to intersect and even to overlap. The disciplines now share common interests: The need to deter criminal misconduct and to encourage law-abiding conduct at business firms.

Congress seems to have recognized this new overlap of corporate and criminal law in drafting the Sarbanes-Oxley Act, which includes provisions regarding both corporate governance and criminal law.<sup>1</sup> Congress strengthened the regulatory approach and also provided the Securities and Exchange Commission (SEC) with increased funding. Independently of Congress, the executive branch mounted an unprecedented criminal enforcement effort that added personnel, created task forces, and generally devoted significant resources to identifying and prosecuting white collar crimes.<sup>2</sup> Those combined efforts have resulted in, as of December 2005, indictments of 314 individuals from fifty-two different corporations and convictions of 161 individuals.<sup>3</sup>

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\* Alumnae Law Center Professor at the University of Houston Law Center. I would like to thank all the presenters at the Roundtable and participants in the faculty colloquium at the University of Alabama School of Law for their comments. I also thank Kathy Brickey for sharing her research data and Pamela Bucy for our conversations on this topic. Patrick Byrd provided excellent research assistance, for which I am grateful. I am also grateful to Dean Ray Nimmer and the University of Houston Law Center Foundation for generous support of my research.

1. See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). For a comprehensive summary of legislative and regulatory initiatives, see Pamela H. Bucy, "Carrots and Sticks": *Post-Enron Regulatory Initiatives*, 8 BUFF. CRIM. L. REV. 277, 281-306 (2004).

2. See John R. Wilke, *President Praises Work of Task Force on Business Crime*, WALL ST. J., Sept. 27, 2002, at A4 (reporting administration initiatives).

3. See Kathleen F. Brickey, *Major Corporate Fraud Prosecutions, March 2002-December 2005* [hereinafter Brickey, *Major Corporate Fraud Prosecutions*] (unpublished manuscript on file with the author). A few individuals were indicted more than once, for instance when state and federal prosecutors brought charges. *Id.* The number of convictions includes guilty pleas and convictions after trial. *Id.* Professor Brickey has analyzed the numbers from several perspectives and helpfully provides data in appendices to her articles. See, e.g., Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006) [hereinaf-

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The emphasis on criminal law by Congress and the executive branch is not inappropriate. Crimes were committed and serious offenses harmed investors, employees, and public confidence in the financial system. Yet it would be remiss to forget that the crimes occurred in corporate settings, went undetected by gatekeepers and by regulators charged with monitoring corporate finance, and involved the acquiescence, if not the complicity, of corporate boards. This essay considers the deterrent force of the substantive white collar criminal statutes, their penalty schemes, and current efforts to enforce those laws in the context of the formal and informal complexities of an institutional setting.

### 1. "CORPORATE CRIME"

The term, "corporate crime," has two meanings, and to which meaning courts and commentators refer is not always clear. "Corporate crime" may refer to the criminal liability of the corporate entity. The term may also refer to the criminal conduct and liability of an agent of the firm. Although the two meanings are related, it is important to distinguish misconduct *at* the corporation from misconduct *by* the corporation. Indeed, the firm is not always a perpetrator. A business firm may be a victim of an agent's misconduct, and in some cases, may be both a victim and a perpetrator.

The concept of corporate crime as committed by the entity does not occupy a comfortable berth in corporate governance law. Nor does it occupy a natural place in criminal law, reflecting as it does an inherent tension in criminal law theory. Criminal theory teaches that punishment is justified only when one has chosen to disobey the law. Despite exceptions like conspiracy, the general rule is that individuals are responsible only for their own actions. Criminal liability is a function of immorality of conduct and culpability of the actor, which includes an individual's decision to flaunt community norms and disobey the law.

In contrast to a human being, a corporation—an unnatural, artificial person—can act only through others. To paraphrase Gertrude Stein, there is no person there. Thus, the justification for punishing a corporation does not rest on personal choice. Instead, federal corporate criminal liability rests squarely on the concept of vicarious liability.<sup>4</sup> Indeed, the 1909 Supreme Court decision that established corporate criminal liability was based on a beneficial consequence of punishing the corporation—enhancing the government's ability to control and regulate corporations. The Court noted that punishing individuals was often ineffective in securing

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ter *In Enron's Wake*]; Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003) [hereinafter *From Enron to WorldCom*].

4. State criminal laws may limit corporate criminal liability to acts that were authorized or tolerated by the board or high managerial agents. See MODEL PENAL CODE § 2.07(1)(c). This essay considers only the federal approach to white collar and corporate crime.

compliance with the law,<sup>5</sup> and reasoned that absolving corporations of guilt “would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.”<sup>6</sup> Although the court’s reasoning is less than persuasive in our age of regulatory enforcement, for better or worse the federal standard for corporate criminal liability is the familiar respondeat superior of tort law.

The pragmatic basis for assigning guilt to a corporate entity is reflected in the standard for determining when a business may be guilty of a crime. In the federal system, a corporation bears responsibility for the crime of an agent when the agent acted within the scope of his or her real or apparent authority, intending to benefit the firm. The prospect of criminal liability gives firms an incentive to prevent criminal conduct in the first place, and that incentive is quite strong because corporate criminal responsibility in the federal system derives almost automatically from an agent’s conduct. The standards for determining when agents acted within the scope of their authority and in the interest of the firm are not difficult to establish.<sup>7</sup>

In sum, a finding of corporate guilt derives from the crime of a natural person. Corporate crime is a function of individual misconduct, and the ultimate target of deterrence is the individual with the means and power to injure the public. It is thus appropriate to consider the prospects for deterring agents who commit corporate crimes.

## II. DETERRENCE FROM SUBSTANTIVE WHITE COLLAR CRIMINAL LAW

Recent events induce skepticism about the effectiveness of criminal law in controlling criminal conduct within corporations. The criminal laws that were “on the books” failed to deter recent frauds in Enron and other firms, a puzzling circumstance that merits discussion.<sup>8</sup> The federal white collar statutes have long proscribed a broad range of deceptive conduct, and courts treat prosecutorial interpretations of these statutes with deference. Following a triggering event, like issuing an earnings restatement, Department of Justice (DOJ) investigators could rely on criminal statutes like obstructing justice and false statement to facilitate investigation. In addition, a wide range of questionable business conduct could be investigated by the SEC, which is dedicated to protecting investors, and referred to the DOJ for further investigation and prosecution. Although criminal and civil enforcement efforts were certainly less intense in earlier days than they now are, business pages routinely reported news of criminal convictions and corporate

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5. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909) (stating that the law “could not be effectually enforced so long as individuals only were subject to punishment” for violations).

6. *Id.* at 496.

7. See, e.g., United States v. Sun-Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998), *aff’d on other grounds*, 526 U.S. 398 (1999); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

8. I have discussed this and related points in an analysis of the government’s response to the Enron matter. See Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 956–64 (2003) [hereinafter *An Enron Lesson*].

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settlements. Nor were criminal penalties insignificant. The Federal Sentencing Guidelines have steadily increased the sentences of white collar offenders,<sup>9</sup> and prosecutors could enhance penalties by adding charges of money laundering and racketeering.

The failure of substantive criminal law to deter the recent frauds is even more striking when one takes into account the planning required for fraudulent schemes, especially those involving accounting practices. Those contemplating questionable conduct at Enron and other firms had time and means to consider the costs and benefits of their actions. Moreover, white collar actors are positioned to care about social status and are motivated to avoid the disgrace of involvement with the criminal justice system, much less the disgrace that accompanies investigation, indictment, and conviction. Nevertheless, fraudulent conduct seems to have been endemic at certain companies. Corporate law scholars have pointed to gaps in corporate governance standards, auditors' conflicts of interest, and the creation of perverse incentives as explanations. Even so, why were criminal laws so ineffective?

### A. *The Nature of White Collar Criminal Laws*

One explanation for the failure of criminal laws to deter misconduct at Enron and other firms rests on the nature of substantive white collar crimes. The most relevant white collar criminal laws, such as fraud offenses, articulate standards rather than rules, and are aspirational in tone. They are written in open-ended language that does not define crucial terms such as the elements of an offense.<sup>10</sup> Broadly-written crimes like fraud and obstruction give prosecutors great flexibility because the statutes can be applied to a wide range of conduct.

There is, nonetheless, a significant disadvantage to such breadth when the enunciated standards of conduct and culpability are inherently unclear and/or ambiguous.<sup>11</sup> Broad, ambiguous terms do not clearly announce the conduct that is

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9. See *Mistretta v. United States*, 488 U.S. 361, 413–15 (1989) (Scalia, J., dissenting) (summarizing white collar punishment schemes under the Guidelines); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1(a)(4)(d) (2005) (explaining use of unique basis that increased sentences for white collar offenses); *Id.* § 2B1.1 (providing new methods of calculating financial loss for several white collar crimes). The changes, which provided a more comprehensive definition of monetary loss, were made in 2001, before either the scandals came to light or the Sarbanes-Oxley Act was passed. See *id.* § 2B1.1, app. C Amend. 617. The Guidelines were again amended after passage of Sarbanes-Oxley to reflect the increased maximum prison terms of existing crimes and the new offenses. *Id.*

10. See 18 U.S.C. §§ 1341, 1343, 1346 (2007) (mail and wire fraud prohibiting “a scheme to defraud”); see also 15 U.S.C. §§ 78j, 77ff (securities fraud prohibiting “willful” employment of “any manipulative or deceptive device”); 18 U.S.C. § 1503 (obstruction of justice prohibiting an “endeavor[ ] to influence, obstruct, or impede, the due administration of justice”).

11. The breadth and vagueness of federal offenses became apparent when prosecutors began to use the mail and wire fraud statutes to pursue state and local corruption following Watergate. See Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 655 GEO. L.J. 1171 (1977). Expansive decisions sparked more criticism of the statute. See John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the “Evolution” of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983); see also John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinc-*

prohibited. They fail to provide notice to the public and enforcement standards to prosecutors, judges, and juries, as required by constitutional due process through the void for vagueness doctrine.<sup>12</sup> The practical effects are that potential offenders may not identify proposed conduct as giving rise to criminal liability, and juries do not have an adequate standard against which to measure the defendant's conduct.

The culpability or mens rea elements of federal statutes is similarly problematic. The federal code uses terms from the common law, rather than the concisely defined culpability elements of the Model Penal Code. Terms like "corruptly" and "willfully," do not have settled meanings, allowing courts to adapt the element to the circumstances of the case at hand, instead of measuring the defendant's state of mind against a clear standard. The consequences can be disastrous for defendants and prosecutors, as the Arthur Andersen case illustrates. The firm was convicted of "corruptly" obstructing justice as it was expansively defined (at prosecutors' urging) in the trial court's instruction to the jury. After the demise of the firm, its trial, and appeal to the Fifth Circuit, the Supreme Court rejected the trial court's definition, reversing Andersen's conviction.<sup>13</sup>

Ambiguous statutory language allows courts to define the substantive law as including the conduct at issue—after the conduct took place. Judicial decisions finding that a particular scheme violated the federal fraud provisions provide formal notice to those contemplating similar conduct in the future.<sup>14</sup> But formal notice recorded in judicial decisions and collected in reporters does nothing to prevent the initial fraud and little to prevent subsequent frauds. Even upon a close reading, many appellate decisions fail to provide adequate notice, as when an interpretation of the statutory language is specifically geared to the facts at issue. A potential offender must still determine what the circuit court might hold in the case at hand.

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tion in American Law, 71 B.U. L. REV. 193 (1991); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153 (1994); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223 (1992).

Trenchant critiques of other criminal statutes that are frequently used in white collar cases are also longstanding. See, e.g., Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959) (conspiracy); Donald C. Langevoort, *Rule 10b-5 As an Adaptive Organism*, 61 FORDHAM L. REV. S-7 (1993) (insider trading).

Commentators continue to critique the statutes. See, e.g., Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes As a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 660–65 (2006); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

12. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (emphasizing importance of minimal guidelines to govern law enforcement); *Connolly v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating statute violates due process if "men of common intelligence must necessarily guess at its meaning and differ as to its application").

13. See *United States v. Arthur Andersen LLP*, 544 U.S. 696, 706–07 (2005) (interpreting section 1512(b)(2)(B) to require proof that defendant was conscious of wrongdoing); see also Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. LEGIS. 129, 141–66 (2004).

14. See *United States v. Lanier*, 520 U.S. 259, 271 (1997) (stating that general statements of the law are capable of giving fair and clear warning of criminality).

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Courts have little choice about interpreting undefined statutory terms, and they inevitably arrive at different definitions. The result is that whether certain conduct is a crime often depends on the circuit in which the case is tried. The paucity of notice provided by the federal statutes is reflected in the general understanding that the main issue in many white collar cases is whether the crime charged encompasses the defendant's conduct. Recent cases show that reasonable minds can differ about the applicability of federal fraud statutes and illustrate some confusion of prosecutors and judges about their scope.<sup>15</sup> In sum, white collar criminal statutes do not play a substantive role in deterring business executives from engaging in prohibited conduct. In prohibiting everything, vague and broad criminal laws prohibit nothing.

Community values, which the criminal law is expected to reflect, often provide notice that proposed conduct is illegal. Do such values not help to provide notice in corporate settings? One may also wonder why pre-Enron enforcement actions and news reports did not deter criminal frauds. Answers may lie in a hallmark characteristic of corporate crimes: they occur within institutional entities.

### B. *The Institutional Setting*

In hindsight, it seems clear that personality characteristics and workplace values may have obscured the limited notice provided by the substantive criminal law and even consideration of harsh penalties for violating the law.<sup>16</sup> This observation does not excuse or justify executive criminality, but may explain the failure of the law to deter corporate agents from engaging in criminal conduct.

Research by psychologists and behavioral economists offers insights into the ramifications of an institutional setting.<sup>17</sup> For instance, firms that value decisive and aggressive managers may attract optimistic, over-confident, and risk-taking individuals with excessive self esteem. These characteristics can impair their capacity to appreciate the possibility that a business decision may cross the line into illegality.<sup>18</sup>

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15. See *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006); *United States v. Handakas*, 286 F.3d 91, 112 (2d Cir. 2002), *rev'd* 354 F.2d 124, 144 (2d Cir. 2003); *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2003), *aff'd on reh'g en banc*, 354 F.3d 124 (2d Cir. 2003); *United States v. Frost*, 125 F.3d 356 (6th Cir. 1997).

16. I have also considered the effect of the workplace setting on executives and employees in another article. See Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Criminal Liability for Complicit Corporations*, 45 AM. CRIM. L. REV. \_\_\_\_ (forthcoming 2007).

17. Scholars who studied actual, rather than assumed, behavior provided the initial insights. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); Colin Camerer & Dan Lovallo, *Overconfidence and Excess Entry: An Experimental Approach*, 89 AM. ECON. REV. 306 (1999); Craig R. Fox & Amos Tversky, *Ambiguity Aversion and Comparative Ignorance*, 110 Q. J. ECON. 585 (1995); see also MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME (1983).

18. See, e.g., Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1 (2002).

Another related explanation rests on the phenomenon of "group think." The corporate setting may create dynamics that impede independent assessments as individuals become inclined to support or at least not to question decisions of the group.

The duty of all employees to provide loyal services to an employer may also be a factor. Employee loyalty is a legal obligation memorialized in common law decisions that condemn disloyal conduct.<sup>19</sup> The obligation of loyalty, based on cultural values, firm expectations, and legal doctrine, can lead an individual to place the interests of the firm over those of investors. Finally, loyalty and a firm's ethos, or character, might encourage managers to engage in questionable or criminal conduct.<sup>20</sup> For instance, the competitive environment at Enron is said to have contributed to an unquestioning and aggressive workforce.<sup>21</sup>

Other psychological tendencies also resonate in a firm setting. John Darley has identified an inclination to interpret complex rules so they favor the interpreter.<sup>22</sup> When interpretive judgments are necessary, the tendency toward sympathetic interpretation can lead to an "unnoticed transition into crime." As indicated by the term, "transition," the tendency has long term effects, as the following example illustrates. Executives acting on impulse or in response to a particular situation sympathetically interpret an accounting convention, such as whether a transaction is sufficiently complete to be counted as revenue in a particular quarter. A sympathetic interpretation benefits the firm, allowing it to declare greater revenue and meet analysts' expectations. Although this initial act, involving a bona-fide interpretation made without an intent to defraud, is probably not in itself criminal, it establishes a pattern of bending the rules that can lead to similar subsequent decisions that grow more serious. The initial judgment begins a chain of similar interpretations that may eventually cross the line into criminality.

Another explanation of crime within business settings has to do with the self-conception of otherwise law-abiding executives, who view themselves as inherently ethical. That self-conception is a barrier that prevents individuals from even perceiving that a given situation may raise ethical considerations, that a decision has

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19. Employee loyalty underpins an employee's duty of confidentiality, is crucial to trade secret doctrine, and justifies the common-law duty not to compete. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2005) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); see also Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321 (1999); Michelle Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM. URB. L.J. 843 (2006).

20. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123–27 (1991) (discussing existence of a corporation's "characteristic spirit").

21. See Moohr, *An Enron Lesson*, *supra* note 8, at 965–66. In the words of Professor Ribstein, the Enron culture created business executives who were "Machiavellian, narcissistic, prevaricating, pathologically optimistic, free from self-doubt and moral distractions." Ribstein, *supra* note 18, at 9. For a discussion of the aggressive firm culture that led to abusive tax shelters at KPMG, see Evan Hoffman, Note, *IRS Circular 230 and Professional Discipline for Firms*, 43 Hous. L. Rev. 1241, 1241–52 (2006).

22. John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, J.L. & POL'Y 189, 199–200 (2005).



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an ethical component. In the words of researchers, the ethics fade from the decision or dilemma.<sup>23</sup> Fading may explain why an executive does not perceive a decision or course of conduct to be criminal. For instance, an executive who discovers that subordinates have altered financial statements may conceal the fraud in an effort to avoid negative effects of disclosure and to gain time in which to correct inaccurate statements. Failing to disclose the fraud was not intended to inflate earnings and the executive may have acted to benefit investors because immediate disclosure would lower the value of their investment.<sup>24</sup> The ethical aspect of the decision, a deception, has faded away from the total circumstances taken into consideration before acting.

Over-confidence, biased judgment, group think, loyalty, unnoticed transitions, and fading all explain, to one degree or another, why it is difficult to deter crime in a business setting. Business employees may consider their actions to be lawful and, at the least, are unlikely to consider that their actions are criminal. The business setting, coupled with white collar statutes that fail to provide notice of what conduct is criminal, indicates why achieving deterrence and law-abiding business conduct in institutional settings is more difficult than anticipated. These considerations also mitigate the deterrent effect of greater penalties for corporate crime.

### III. DETERRENCE FROM PENALTIES

Congress' first reaction to the emerging scandals of 2002 was to increase drastically the penalties for common white collar crimes.<sup>25</sup> The new obstruction statutes, which are substantially similar to existing provisions, authorize maximum sentences of ten and twenty year terms, a 200% increase over previous maximum penalties.<sup>26</sup> The maximum sentence for mail and wire fraud, often implicated in business crimes, was increased from five to twenty years, a 400% increase.<sup>27</sup> The new insider trading statute authorizes a maximum term of twenty-five years, a 250% increase over maximum punishment for violating the existing statutes.<sup>28</sup>

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23. See *id.* at 200 (citing Ann E. Tenbrunsel & David M. Messick, *Ethical Fading and the Role of Self-Deception in Unethical Behavior*, 17 Soc. JUST. RES. 223 (2004)).

24. The scenario is adapted from *United States v. Adelson*, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006). Judge Rakoff suggested that, under the common law, the executive was an accessory after the fact and would be less deserving of punishment than the instigator of the fraud. *Id.* at 513.

25. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); Moohr, *An Enron Lesson*, *supra* note 8, at 952-55 (evaluating criminal provisions). Congress' reaction reflects a twenty-five year legislative trend to increase prison terms. See Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 855 (2005) (stating that lawmakers employ the principle of "What do I need to get re-elected?").

26. Compare 18 U.S.C. § 1519 (2005) with 18 U.S.C. § 1512(b) (2001).

27. Compare 18 U.S.C. §§ 1341, 1343, 1346 (2003) with the same provisions in the 2000 version of the code, 18 U.S.C. §§ 1341, 1343, 1346 (2000).

28. Compare 18 U.S.C. § 1348 (2002) with 15 U.S.C. § 78ff (1998).

Statutory maximum penalties tell only one part of the sentencing story in the federal system; actual penalties have been determined according to the Sentencing Guidelines. Under the Guidelines, the most significant determinant of sentences for financial crimes like fraud is the amount of money lost by victims, which is calibrated in the Guidelines' loss table.<sup>29</sup> Put simply, the prison sentence varies with the financial losses of the victims. In addition, the Guidelines authorize additional prison time if the crime required the use of sophisticated means or special skill,<sup>30</sup> if there was a large number of victims,<sup>31</sup> or if the defendant played a leadership role in the crime.<sup>32</sup> When a publicly-traded company was involved, additional time is added if the defendant was an officer or if the crime endangered the company's financial security.<sup>33</sup> These factors are almost invariably present in corporate offenses, and the combination of these factors, high maximum sentences, and the Guidelines' loss table makes penalties for corporate offenses substantial.<sup>34</sup>

Notwithstanding Congress' impulse to increase sentences for white collar offenses, research indicates that increasing penalties may not increase deterrence and may be unnecessary.<sup>35</sup> A review of several studies indicates that, in general, increasing the duration of a prison sentence for a type of crime will not result in a decrease in the rate of that crime.<sup>36</sup> The studies, based on naturally occurring experiments that compare outcomes when one state increases the penalty of an offense and another state does not, indicate that "there are no general demonstrations of crime rate reductions achieved by alterations in sentence severity."<sup>37</sup> Finally, the propensity of human beings to discount future rewards or punishments

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29. U.S. Sentencing Guidelines Manual § 2B1.1 (2005).

30. *Id.* §§ 2B1.1(b)(8)(c), 3B1.3.

31. *Id.* § 2B1.1(b)(2).

32. *Id.* § 3B1.1(a).

33. *Id.* §§ 2B1.1(b)(15)(A)(i), 2B1.1(b)(13)(B)(ii).

34. Following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), courts have more discretion to deviate from a Guideline sentence. Nevertheless, prosecutors may still press for harsh sentences on the ground that the high maximum penalties for corporate crimes indicate that Congress considered fraudulent conduct within business firms to be very serious.

35. Research results reported by Paul Robinson, John Darley, Tom Tyler and their associates are particularly apt. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY AND BLAME* 492 (1995); TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) [hereinafter *The Role of Deterrence*]; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

36. See Darley, *supra* note 22, at 194–95 (citing Anthony Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in 30 CRIME AND JUSTICE: A REVIEW OF RESEARCH 143, 143–95 (Michael Tonry ed., 2003)).

37. *Id.* at 195. Other studies compare the incidence of crimes before and after a jurisdiction increased penalties. *Id.* at 194.

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makes it even less likely that long prison terms, on their own, will deter others from committing crimes.<sup>38</sup>

Despite these research results, which are not specific to white collar crimes, one could reasonably suppose that a white collar offender might consider the possibility of punishment. White collar crimes are usually not a matter of passion or rage, nor are offenders under the influence of drugs or alcohol when they engage in fraudulent conduct. Fraud and conspiracy typically require planning and some subterfuge, offering an opportunity to consider the prospect of punishment. But whether potential harsh penalties influence individuals who operate within institutional business settings is far from certain.<sup>39</sup> Institutional barriers that undermine the deterrent effect of the substantive law also undermine the deterrent effect of harsh penalties. Because of biased judgments, group think, loyalty, and psychological tendencies like unnoticed transitions and fading, individuals who work in a business firm are not likely to consider the possibility that their conduct may be regarded as criminal. If that is so, they never consider possible penalties. Finally, lengthy prison terms may be unnecessary in the white collar world: if potential wrongdoers recognize a risk of penalties, even relatively short prison sentences are likely to act as a strong deterrent.<sup>40</sup>

It appears that in order to reduce crime through increased sentences, prison terms would have to exceed the limits considered "plausible" in western societies.<sup>41</sup> Plausible limits were exceeded in a recent case that implicated both maximum sentences and the Guidelines. Richard Adelson, once the president of a firm that specialized in cancer diagnosis testing, was convicted of conspiracy, securities fraud, and three false filing counts.<sup>42</sup> Adelson discovered a fraud begun by subordinates under the former chief executive officer, but rather than expose the scheme, Adelson concealed and participated in its continuation.<sup>43</sup> Based on a calculation of \$260 million total shareholder loss and various adjustments, the recommended Guideline sentence was 85 years.<sup>44</sup> Characterizing the sentence as extraordinary and

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38. See *id.* at 200–01 (citing Marjon van der Pol & John Cairns, *A Comparison of the Discounted Utility Model and Hyperbolic Discounting Models in the Case of Social and Private Intertemporal Preferences for Health*, 49 J. ECON. BEHAV. & ORG. 79, 93 (2002)).

39. Not all white collar crimes occur within an institutional setting and the existing studies of white collar penalties do not differentiate between institutional and non-institutional crimes. These studies suggest only weak support for the position that general deterrence is furthered by criminal penalties. See Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 493–94 (1999). For that matter, there is little empirical support that harsh penalties deter conventional street crimes as compared to certainty of the sanction. *Id.* at 493.

40. See Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 80 (2005); Szockyj, *supra* note 39, at 492.

41. See Darley, *supra* note 22, at 195; see also Robinson & Darley, *The Role of Deterrence*, *supra* note 35, at 995.

42. See *United States v. Adelson*, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006).

43. *Id.*

44. *Id.* at 509–11. The government calculated that an 88% decline in share price caused the firm's shareholders to suffer a combined loss of more than \$260 million. *Id.* The Guideline loss table authorized a 55-year

"patently unreasonable,"<sup>45</sup> Judge Rakoff departed from the Guideline Sentence to impose a sentence of three and a half years, based on federal sentencing goals of retribution and general deterrence.<sup>46</sup> Even more tellingly, the prosecutors who had tried the case suggested a departure from the Guideline sentence, albeit obliquely.<sup>47</sup>

Evidence indicates that the general public shares a "plausibility limit" on sentencing. Experimental studies indicate that citizens evaluate sentences according to the immorality of the conduct and react negatively to sentences that they consider too strict.<sup>48</sup> To a lesser extent, citizens consider incapacitation, but do not entertain the notion of general deterrence.<sup>49</sup> In a word, draconian prison terms fail the "plausibility test" because they offend community values. Harsh sentences may also run afoul of deterrence doctrine in a very basic way. At some point, the undeterminable benefit of deterrence may not offset the financial costs born by the community (including lost productivity of the defendant) and others. The over-breadth and vagueness of the criminal statutes contribute to unease, especially when long sentences are given for conduct that is not adequately defined in the code. Given these considerations, the promise of deterring potential wrongdoers through enforcement is particularly alluring.

#### IV. DETERRENCE FROM ENFORCEMENT

Enforcement of criminal laws, which heightens the risk of apprehension and the possibility of punishment, promises to deter people from engaging in criminal conduct. Enforcement also reinforces community norms and the internalized moral codes of individuals. When enforcement is fair and even-handed, it expresses two community values: the condemnation of criminal acts and a preference for fair procedures. Another positive effect of increased enforcement is that it is fairer than sporadic enforcement coupled with high penalties. In the latter plan, which costs less, the convicted are given long prison terms and serve as stark examples of the consequences of unlawful acts, while equally culpable wrongdoers go free. Increased enforcement that convicts more wrongdoers and delivers shorter sentences may obtain the same deterrent effect more fairly. For all these reasons, the current enforcement initiative against corporate crime holds significant promise.

The unprecedented scope of current enforcement efforts is indicated by the number of business people that have been charged. Approximately 315 former em-

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sentence based on this loss. Additional time was added by upward enhancements for using a special skill, assuming a leadership role, and harm to a publicly traded company. *Id.* at 510-11.

45. *Id.* at 506.

46. *Id.* at 514 (utilizing 18 U.S.C. § 3553(a)).

47. *Id.* at 511 (presenting sentencing colloquy).

48. See Darley, *supra* note 22, at 206-07 (citing several studies by Carlsmith and Darley and citing public reaction to specific three strike sentences in California).

49. See *id.*

employees and officers of business entities have been indicted since March 2002.<sup>50</sup> As of December 2005, prosecutors had secured 161 convictions, 140 of them through guilty pleas.<sup>51</sup> New laws and initiatives, like protecting whistle blowers from retaliation and imposing duties on inside counsel, promise to increase enforcement pressure by encouraging the reporting of questionable conduct.<sup>52</sup>

The numbers are impressive because prosecutors dealing with corporate crime face a dual problem: lack of information about questionable practices and lack of evidence of illegal conduct. It may be difficult to identify and understand a problematic business transaction or judgment, and there may be little or only indirect evidence of executive involvement in that transaction. Cooperation from witnesses can be crucial in solving both problems. Consequently, and as the figures indicate, obtaining plea bargains is a key strategy in the current enforcement effort. Prosecutors are aided in this effort by their control of whether and what to charge, as well as by their influence at sentencing.<sup>53</sup> Further, pleas are conditioned on cooperation agreements that obligate defendants to provide information and to testify for the government.<sup>54</sup> The strategy is to focus first on lower and mid-level executives who can provide information about transactions, decisions, and evidence that implicates higher-level individuals. The Enron case against Ken Lay provides a text-book example: information gathered from two mid-level executives led prosecutors to the Chief Financial Officer, Andrew Fastow, who in turn led prosecutors to the three top Enron officials, including CEO Ken Lay.<sup>55</sup>

Despite the contribution of such tactics to successful prosecutions, the practices raise significant concerns. The prospect of very long prison sentences raises the haunting possibility that an innocent person may decide, quite reasonably, to plead

50. See Brickey, *Major Corporate Fraud Prosecutions*, *supra* note 3. By another account, 1,000 individuals have been convicted of white collar offenses since 2001, including 167 officers. See Edward Iwata, *Debate Heats up on Justice's Deferred-Prosecution Deals*, USA TODAY, May 31, 2006, at 4B.

51. See Brickey, *Major Corporate Fraud Prosecutions*, *supra* note 3. The percentage of plea bargained dispositions in the current corporate crime cases is below the average of 95% in the federal criminal justice system, although the figure could increase as more cases near trial, particularly if co-defendants decide to plead. See GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003). The practice of plea bargaining is well-entrenched in federal and state systems, largely because it is seen as an efficient method of disposing of cases. Offenders exchange the right to trial and other due process rights for certainty and a lower sentence, and the government obtains a conviction at a fraction of the cost of trial.

52. But see Bucy, *supra* note 1, at 315–17 (explaining why recent reforms are unlikely to be effective); Jill E. Fisch & Ken Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

53. In addition to deciding what crimes to charge, which influences the penalty, prosecutors may recommend a downward departure from a Guideline Sentence when an offender provides substantial aid to the government. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

54. See Brickey, *In Enron's Wake*, *supra* note 3, at 373–75 (discussing significance of cooperation agreements).

55. See Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 184–85 & n.80 (2004) (recounting prosecutorial effort to secure plea of Andrew Fastow, which included charging and agreeing to a plea bargain with Lea Fastow, his wife and former Enron assistant treasurer).

guilty rather than risk a double-digit sentence.<sup>56</sup> Plea bargains also introduce undesirable variability in sentencing into a deterrent system. A plea-bargained sentence is, almost by definition, lower than a possible sentence based on the original indictment,<sup>57</sup> and may also be significantly lower than those of similarly-situated defendants who went to trial—even when the individuals were involved in the same fraudulent scheme. The *Adelson* case, mentioned earlier, illustrates the variance.

In *Adelson*, the scheme to defraud had actually begun under a former CEO.<sup>58</sup> The government accepted her plea to misappropriating company funds for personal expenses, and she received a three month term of imprisonment. This contrasts starkly with the eighty-five year sentence recommended for *Adelson*.<sup>59</sup> Similarly, Jamie Olis, a Dynegy accounting executive convicted of various offenses for an accounting fraud, was initially sentenced to twenty-four years in prison, based on a \$100 million loss calculation.<sup>60</sup> Olis' boss, who had approved and participated in the fraudulent accounting tactic, pleaded guilty, testified for the government, and received a five-year term of imprisonment.<sup>61</sup> The sentences shock twice; once because of their length and again because of their disparity. But similar disparities exist even when sentences are low. Martha Stewart, convicted of committing obstruction and false statement offenses, was sentenced to a ten month penalty, split between five months in prison and five months under house arrest.<sup>62</sup> Faneuil, the assistant broker who handled the transaction that led to the investigation, admittedly thought the trade was illegal and for six months participated in Stewart's attempt to provide lawful reasons for the transaction.<sup>63</sup> In return for his

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56. See *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) (noting that because of possible long prison terms "[e]ven the threat of indictment on wafer-thin evidence of fraud may therefore compel a plea").

57. For instance, *Fastow* was charged with 109 counts and pleaded guilty to two counts of conspiracy, agreeing to serve ten years in person. See Superseding Indictment, *United States v. Fastow*, No. H-2-02-0665 (S.D. Tex. Apr. 30, 2003). *Fastow* was ultimately sentenced to a six-year term based on his cooperation with prosecutors and civil plaintiffs. See Kate Murphy & Alexei Barrionueva, *Fastow Sentenced to Six Years*, N.Y. TIMES, Sept. 27, 2006 at C1.

58. See *United States v. Adelson*, 441 F. Supp. 2d 506, 506–07 (S.D.N.Y. 2006).

59. See *id.*; *supra* text accompanying notes 42–47.

60. *United States v. Olis*, 429 F.3d 540, 542 (5th Cir. 2005).

61. See *id.* at 542–43 (following *United States v. Booker*, 543 U.S. 220 (2005) (vacating sentence and remanding for resentencing). Another colleague who had also participated in the accounting scheme was similarly sentenced, upon a plea and cooperation agreement, to five years. *Id.* at 542. Upon resentencing, Olis received a six-year term of imprisonment. See *United States v. Olis*, No. H-03-217-02, 2006 WL 2716048, at \*13 (S.D. Tex. Sept. 22, 2006).

The WorldCom matter provides another example. Bernie Ebbers was sentenced to 25 years in prison; Scott Sullivan, who admittedly participated in the fraud, pleaded and testified against Ebbers and received a five year prison term. See *United States v. Ebbers*, 458 F.3d 110, 117, 124, 129 (2d Cir. 2006). In upholding the sentence, the court noted that other defendants in the case had cooperated with prosecutors and that Ebbers, as CEO, had primary responsibility for the fraud. *Id.* at 129. This justification seems to ignore that Sullivan, as CFO, also shared significant responsibility for the fraud.

62. See *United States v. Stewart*, 433 F.3d 273, 280 (2d Cir. 2006).

63. See *United States v. Stewart*, 323 F. Supp. 2d 606, 611–12 (S.D.N.Y. 2004).

testimony against Stewart and her co-defendant, however, Faneuil was allowed to plead guilty to a misdemeanor charge and ultimately paid a \$2,000 criminal fine.<sup>64</sup>

These examples are not offered as argument for absolute parity in sentencing; it is preferable that sentencing judges take into account factors that may lead to different sentences. Traditional individualized sentencing and the Guideline policy of real offense sentencing inevitably result in some inconsistency between the sentences of similarly-situated offenders. Despite those values, inconsistent sentences because of plea and cooperation agreements merit attention. In the first instance, long and inconsistent prison terms do not easily satisfy retributive goals, especially when the financial harm that was caused by the defendant's breach of moral conduct is essentially indeterminate.<sup>65</sup> In the second instance, it is hard to square inconsistent sentences with the deterrent rationale that justifies high maximums because grossly inconsistent sentences undercut the threat of those maximums. Not only do variable sentences introduce an undesirable uncertainty, but they also make sentencing seem random instead of principled. The possibility of random, unprincipled, and low sentences makes it less likely that potential penalties will deter potential offenders. Inconsistent sentences also dull the expressive message that a conviction sends to the greater community and to the business world. Unusually low sentences that contrast with longer sentences for the same conduct communicate that the bargainer's conduct was not a serious violation of community standards.

In addition to working from the bottom up, by pressuring mid-level employees to incriminate high-level managers, prosecutors are also working from the top down by pressuring firms to incriminate managers and employees. As we learned from David Anders, a former white-collar prosecutor, firms that want to avoid criminal charges are expected to aid prosecutors in convicting their former employees.<sup>66</sup>

Firms are highly motivated to avoid indictment. The federal standard for convicting a corporation of a crime committed by an agent is, as noted earlier, not rigorous, and the Arthur Andersen prosecution makes the negative effects of indictment, trial, and conviction very real. Firms understandably seek to avoid collateral

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64. See *United States v. Faneuil*, 02-CR-1287 (S.D.N.Y. Oct. 2, 2002) (Misdemeanor Information charging a violation of 18 U.S.C. § 830 for withholding information from authorities); Brooke A. Masters, *Witness in Stewart Trial Is Spared Prison Time*, WASH. POST, July 24, 2004, at E1.

65. See *United States v. Ebberts*, 458 F.3d 110, 126–27 (2d Cir. 2006) (explaining perils of estimating investor loss); *United States v. Adelson*, 441 F. Supp. 2d 506, 509–11 (S.D.N.Y. 2006) (outlining three methods of estimating investor loss). In *Adelson*, a financial expert identified other marketplace factors that made it impossible to determine what portion of the actual loss had been caused by the fraudulent conduct. *Id.* at 509–10.

66. See Larry Ribstein, *A Former Prosecutor Shares His Secrets*, [http://busmovie.typepad.com/ideoblog/2006/04a\\_former\\_prose.html](http://busmovie.typepad.com/ideoblog/2006/04a_former_prose.html) (Apr. 21, 2006, 20:27 EST) (quoting remarks of former prosecutor David Anders).

consequences that follow indictment, such as a fall in share value and loss of clients, in addition to the penalties that accompany a conviction.

Under DOJ policies, firms may negotiate agreements under which prosecutors agree not to file charges or not to prosecute filed charges as long as the firm abides by the terms of the agreement.<sup>67</sup> To secure this outcome, firms had to cooperate with the investigation.<sup>68</sup> One way to cooperate was to dismiss those executives and employees who were involved in the alleged illegal conduct. Cooperation has also been demonstrated by voluntarily waiving attorney-client and work product privileges and disclosing the results of internal investigations, other memos, and financial documents. Such disclosure identifies and may often implicate individuals who participated in the matter, perhaps unfairly. Prosecutors also considered whether a firm intended to pay the legal expenses of former executives, an obligation that may be a matter of contract, firm policy, and even state law.<sup>69</sup> Faced with disclosure of privileged documents and without funds for legal representation, a former executive was effectively trapped between the interests of the firm and those of the prosecutor.

The practice of deferring corporate prosecutions and the terms of individual agreements were met with forceful and sustained criticism.<sup>70</sup> A federal judge held that government pressure on firms to withdraw payment of attorney's fees violated defendants' constitutional rights,<sup>71</sup> Congress threatened legislation,<sup>72</sup> the Sentencing Commission dropped Guideline language that encouraged waiver,<sup>73</sup> and former attorneys general issued a public letter that decried DOJ policy.<sup>74</sup>

67. See generally Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP., FIN. & COM. L. 45, 55–56 (2006) (describing agreements); see also Edward Iwata, *Debate Heats Up on Justice's Deferred-Prosecution Deals*, USA TODAY, May 31, 2006, at 4B (reporting prosecutors have signed a "couple dozen" agreements in the past four years, twice as many as in the previous ten years); Andy Pasztor, *Boeing to Settle Federal Probes for \$615 Million*, WALL ST. J., May 15, 2006, at A1.

68. Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), reprinted in UNITED STATES ATTORNEY'S MANUAL, tit. 9, CRIM. RESOURCE MANUAL, 161–62, available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

69. See Stephen W. Grafman & William F. Boyer, *KPMG Ruling Is Right and Wrong*, NAT'L L.J., Aug. 14, 2006 (noting obligation to pay employees' attorneys' fees).

70. See JOHN HASNAS, *TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW* (2006); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA. L. REV. 643 (2002); Orland, *supra* note 67; see also Kathryn Kennealy, *The KPMG Deferred Prosecution: Warning Flags for Defense Rights*, 29 NOV. CHAMPION 44 (2005) (outlining the one-sided agreement signed by KPMG); Stephanie Martz, *Trends in Deferred Prosecution Agreements*, 19 NOV. CHAMPION 44 (2005); *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. 1–3, Dec. 28, 2005 (noting failure to indict firms).

71. See *United States v. Stein*, 435 F. Supp. 2d 330, 373 (S.D.N.Y. 2006).

72. See Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006).

73. See Amendments to the Sentencing Guidelines, 71 Fed. Reg. 28063 (May 18, 2006), available at <http://www.uscc.gov/2006guid/FinalUserFrldy.pdf>; Lynneley Browning, *Judges Press Companies That Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at C1.

74. See Griffin B. Bell, et al., Letter re Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work-Product Doctrine, (Sept. 5, 2006) (on file with author). The



## ON THE PROSPECTS OF DETERRING CORPORATE CRIME

In December 2006, the DOJ adjusted its controversial policy.<sup>75</sup> The revised policy provides procedural protection on the waiver issue, but most of the prosecutorial guidelines are unchanged, and the government is free to consider all forms of voluntary cooperation. It remains to be seen whether the adjusted policy will unwind the unwritten understanding that has developed between prosecutors and corporate counsel that the best corporate response is to implicate executives and employees. That response, although entirely rational from the corporate viewpoint, may interfere with effective deterrence of individuals and firms. Executives may fail to consult with firm counsel before undertaking innovative or risky transactions. The shift of responsibility from the entity to managers and employees, in the long run, may reduce the firm's incentive to monitor employees.<sup>76</sup>

Other prosecutorial policies, such as using cover-up offenses, lodging multiple charges based on the same course of conduct, and conditioning pleas on cooperation agreements, may also undercut effective deterrence.<sup>77</sup> As mentioned, courts are showing some unease with harsh Guideline sentences that are based on shareholder losses.<sup>78</sup> The Supreme Court rejected the government's expansive interpretation of the mens rea for obstruction, on which the conviction of Arthur Andersen was based,<sup>79</sup> and a Fifth Circuit decision has raised, once again, debate over the vagueness of the honest service provision in the mail and wire fraud statutes.<sup>80</sup> The multiple critiques indicate that the prosecutorial enforcement effort may have reached a turning point and become overly aggressive.

On the whole, the aggressive enforcement policy, which includes plea and cooperation agreements, inconsistent sentences, deferred prosecutions of firms, and other tactics, may have swung too far. In today's harshly punitive environment, it is surprising to consider that in 1992 the DOJ rejected a definition of white-collar

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letter was signed by former attorneys general Bell, Gerson, Thornburgh, former deputy attorneys general Dinkins, Gorelick, Terwilliger, and former solicitors general, Dellinger, Olson, Starr, and Waxman. *Id.*

75. See Memorandum from Deputy Attorney General Paul J. McNulty to United States Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

76. See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 534–36 (2004) (discussing the dynamic that allows corporate entities to avoid prosecution); Laufer, *supra* note 70.

77. See Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1164–65 (2004); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443 (2004); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 628–30 (2005); Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1125–28 (2005).

78. See *supra* note 42–48 and accompanying text; *supra* note 65.

79. See *Arthur Anderson LLP v. United States*, 544 U.S. 696, 708 (2005); see also *United States v. Quatrone*, 441 F.3d 153, 176, 180 (2d Cir. 2006) (relying on *Andersen* to vacate guilty verdict).

80. See *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006) (reversing wire fraud convictions of four Merrill Lynch executives implicated in the unlawful Nigerian barge transaction between Merrill Lynch and Enron).

crime that focused on the white-collar status of the offender. The DOJ explained that the offender-based definition “implicitly raises the specter of large enforcement agencies targeting whole segments of society for special enforcement emphasis.”<sup>81</sup> Today, only fourteen years after Benjamin Civiletti offered this assessment, the government has embraced a policy of targeting corporate officers and employees for special enforcement emphasis. The consequence, whether the target is the mafia, drug dealers, or corporate executives, is a tendency to demonize individuals because they are members of a group.<sup>82</sup> We know from experience that the long-term effects of such characterizations can negatively affect other social goals. In the case of corporate offenses, it is also counter-productive because we must, in the end, rely on members of the business community to encourage law-abiding conduct. Convicting those caught in this period of transition and imposing harsh sentences on some of them may not strike members of the greater community or the business world as entirely fair. It seems foolish and counter-productive to alienate the very people on whom we rely to enforce lawful business practices by exerting informal pressure on their firms and colleagues.

#### V. CONCLUSION

Relying on the criminal law to prevent corporate crimes is more complicated and less effective than legislators, regulators, and enforcers believe. The most effective use of criminal law in deterring corporate crime requires legislators to amend the substantive laws so they provide clear notice of prohibited conduct, to avoid the reflexive impulse to increase penalties, and to review DOJ enforcement policies. The likelihood of effectively deterring crime at corporate entities is greatest when the substantive law, penalties, and enforcement policies take into account the institutional setting in which corporate crime occurs.

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81. See Tony G. Poveda, *White-Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 *CRIME, L. & SOCIAL CHANGE* 235, 242 (1992) (quoted in JULIE O’SULLIVAN, *FEDERAL WHITE COLLAR CRIMES: CASES AND MATERIALS* 5 (2d ed. 2003)).

82. A recent survey of television dramas adds substance to this abstract concern. Negative plots about business executives outweighed positive plots by four to one, and victims were 21 times as likely to be kidnapped or murdered at the hands of businessman than by a member of the mob. See *On TV, There’s a Killer Corporate Image Problem*, WASH. POST, June 23, 2006, at D1.