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PETER HENNING*

CRIMINALIZATION OF CORPORATE LAW
The Impact of Criminal Sanctions on Corporate Misconduct

I WANT TO BEGIN BY CONSIDERING A POINT MADE BY Joan Heminway and Dean Rothenberg's statement about her losses on WorldCom stock. When Dean Rothenberg talked about her investment in WorldCom, I suspect if you asked her how she felt about losing all that money she would say that she was robbed. For those of you who teach criminal law, you know she was not robbed, she was perhaps a victim of a larceny, but robbery requires use of force.[1] Criminal law uses a different terminology than corporate law, and we need to be careful about mixing the terms together.

When I looked through the list of what the participants in this Conference teach, I noticed one unique thing about me, which is I think I am the only one here who teaches corporate law and criminal law at the same time; of course, corporate law to the Marxist is criminal law. I wonder whether a better title for this Conference, at least from my perspective, is "The Corporatization of Criminal Law" rather that "The Criminalization of Corporate Law."

It was interesting listening to Joan ask how the criminal law serves the purposes of Section 10(b)[2] and Rule 10b-5,[3] the primary anti-fraud provisions of the federal securities laws. I confess that I have never heard it phrased quite that way, and it raises an interesting point, whether criminal law should be viewed as serving the purposes of the securities law and corporate law in general.

I want to raise a couple of issues here. Should corporate (or securities) law be driving the criminal law analysis, and how much should corporate law issues, or more broadly the corporate law agenda, be injected into criminal law? The two areas of the law not only have a different vocabulary, but also very different goals for the application of the law in specific cases. For example, retribution is one of the theories for why certain conduct is punished as criminal,[4] but that rationale is foreign to corporate law. I am not aware of any discussion in corporate law about a retributivist theory of corporate governance, except perhaps for closely-held corpo-

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1. *See* 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 20.3 (2d ed. 2003).
2. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2000).
3. 17 C.F.R. § 240.10b-5 (2006).
4. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a)(6) (2d ed. 2003).

rations in which a controlling shareholder might be punished for squeezing out a minority shareholder, even in that context the language of punishment is quite different from the criminal law analysis.

Another concept widely discussed in the corporate arena, but largely foreign to criminal law, is the idea of agency costs. I have read discussions on blogs, such as the ones written by Christine Hurt[5] and Larry Ribstein,[6] talking about the so-called "criminalization of agency costs" in prosecutions of corporate executives such as Ken Lay, Jeff Skilling, and Bernie Ebbers. I am not sure exactly what this concept means, but if the point is that corporations involve certain risk-taking by their managers that may result in them acting inappropriately or even illegally, and those risks should not be subject to criminal prosecution, then I do not know if that is a legitimate basis to criticize the prosecutions of corporate officers from a criminal law perspective.

The idea of criminalizing agency costs brings to mind whether there are other examples of what might also be viewed as a criminalization of agency costs that are clearly crimes and would not be subject to the same criticism. For example, what if a congressman accepted a bag of cash and said, "Thank you, I planned to vote for this measure anyway, but to make this look acceptable let's call it a campaign contribution." The congressman then puts the bag of cash into a safe, or perhaps a freezer, and votes on the measure. If the congressman and the payer were prosecuted for the payment of the bribe, or perhaps an unlawful gratuity, would that simply be criminalizing the agency cost that our elected officials might take money for doing their jobs? I do not think any of us are willing to see congressmen accept bags of cash, and the recent sentencing of former Congressman Randy "Duke" Cunningham to eight years in jail for taking secret kickbacks from contractors seeking favors is a good example of how unacceptable such conduct is.[7] Why is it that if a corporate executive manipulates the books of a company to make its numbers appear better, that is an impermissible criminalizing of agency costs?

Criminal law is about the moral condemnation of the community,[8] and that is certainly a very different rationale from corporate law.[9] I think we can see that each area of the law has a different set of goals. Criminal law is not designed for efficient corporate governance; it is designed to deter criminal conduct and to exact retribution from those who violate moral norms.

The criminal law involves certain moral concepts. While that is also true to a degree in securities regulation, which tries to eliminate deception and encourage

5. *See* Posting of Christine Hurt to The Conglomerate, http://www.theconglomerate.org/2007/03/the_undercivili.html (Mar. 2, 2007).

6. *See* Posting of Larry Ribstein to Ideoblog, http://busmovie.typepad.com/ideoblog/corporate_crime/index.html (Jan. 4, 2006, 05:27 CST).

7. *See* Information, United States v. Cummingham, No. 05er2137-LAB (S.D. Cal. Nov. 28, 2005).

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

9. *See* Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1552 (1989).

full disclosure, I do not know whether corporate or securities law should be conflated with criminal law. In corporate law, you hear about and want to encourage the efficient allocation of capital. That is not a concept that is important in criminal law, whereas moral condemnation of a person's conduct is the core issue. Allocating capital in a private enterprise is often amoral, or at least does not revolve around determining what communal standards should govern how individuals act.

So when Joan Heminway mentioned the need for a swift and sure result in criminal prosecutions, from my criminal law background I am not sure if that is a proper goal. Certainly the rules of criminal procedure, which are almost wholly inapplicable to corporate law, do not make a "swift and sure result" a central goal of the criminal justice system. Indeed, sometimes defense lawyers do not want a swift and sure resolution of the case, especially after a conviction and before sentencing when a client might be enjoying the last days of freedom before a long stint in prison. White collar crime cases are not the only ones in which justice may not be particularly swift. Some murder cases can take months, even years, to come to trial, and I do not think that efficiency is really going to be the primary goal in the criminal process in those instances. A much more important goal in the criminal justice system is certainty, not haste. This is shown, in particular, by the allocation of the burden of proof in a criminal prosecution on the government to establish guilt beyond a reasonable doubt. Accuracy is the greatest concern.

In closing, I would like to throw out another thought, and then I will pass the floor to others who are much more qualified in this area. As we look at prosecutions of corporations and their officers, are we really asking: do we want the corporation to operate better? Or is the goal here more to protect society? And can we put the two together? Prosecutions of corporations are inefficient, and clearly not a good way to regulate corporations. At the same time, however, I do not know if the civil litigation system is working all that well in regulating corporations as some might think. I have not seen a swift and sure securities class action case, unless you get the Private Securities Litigation Reform Act's dismissal provision in there, which can knock out a case rather quickly.[10] I do not know if there is an engine for determining how corporations should be regulated efficiently.

Perhaps the simple reality is to ask whether corporations are going to be prosecuted in the future. The answer, I believe, is "Yes." We have had corporate criminal liability in this country since 1909,[11] and it is firmly entrenched in the American criminal justice system. As David Anders noted, it is not going away.[12] Does it get overused? That may be an interesting point about this era: Is the criminal law being overused in prosecuting corporations and should we pull back? Regardless of the

10. Private Securities Litigation Reform Act of 1995 § 101(b), 15 U.S.C. § 78u-4(b)(3)(A) (2006).

11. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909) (holding that corporations may be held criminally liable for the acts of an authorized agent).

12. David Anders, *Criminalization of Corporate Law*, 2 J. BUS. & TECH. L. __ (2007).

answer to that question, the criminal prosecution of corporations and their executives is not ending any time soon, and I do not think that is a bad thing.