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Recommended Citation

Alan Palmiter, *The Impact of Criminal Sanctions on Corporate Misconduct*, 2 J. Bus. & Tech. L. 115 (2007)

Available at: <http://digitalcommons.law.umaryland.edu/jbtl/vol2/iss1/16>

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CRIMINALIZATION OF CORPORATE LAW

The Impact of Criminal Sanctions on Corporate Misconduct

IN LISTENING TO THIS DISCUSSION, IT'S CLEAR THAT I COME from only one side of the island. I do not know the difference between larceny and robbery. I thought those of us in the stock markets had been robbed, but it's good to know that it was only a case of larceny.

I think about this question of “the corporation as criminal” at the point of departure. David Anders says that we are not going to be able to go back to the question of whether the corporation should be treated as criminal,¹ but I wonder whether we should not. On preliminary reflection, corporate criminality diverts our attention from the real misbehaving human actors and mires us in the imponderables of how to make incentives work through the prism of our corporate governance.

The people who write in this area describe the “paradox” of imposing liability on a legal fiction,² the “quixotic” nature of corporate criminality,³ and “the naïve faith” that corporate criminality can achieve desirable results.⁴ Some simply say it's “bizarre.”⁵ To me, it is strange that we would seek to punish a legal construct, and it leads me to wonder what is the political economy behind this approach? Why in 1956 did the American Law Institute, home to the best corporate lawyers, go along

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1. David Anders, *Criminalization of Corporate Law*, 2 J. BUS. & TECH. L. ___ (2007). The question has a long history. See Joseph F.C. DiMento et al., *Corporate Criminal Liability: A Bibliography*, 28 W. ST. U. L. REV. 1 (2000–01).

2. Kathleen F. Brickey, *Rethinking Corporate Liability under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988) (“Corporate criminal liability is a paradox [that] suggest art imitating life [or] life miming art Through this anthropomorphic sleight of hand, the common law subtly transformed the inanimate ‘corporation’ into a ‘person’ capable of committing criminal delicts and harboring criminal intent.”).

3. Gilbert Geis & Joseph F. C. Dimento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 19 AM. J. CRIM. L. 341, 353 (2002).

4. Frederick P. Lee, *Corporate Criminal Liability*, 28 U. COL. L. REV. 1, 25 (1928).

5. Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 791 (“Extreme anthropomorphizing of the corporate person can produce bizarre results.”).

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with a Model Penal Code that makes the corporation a criminal?⁶ Why was Delaware, home to the biggest corporations, the first state to create a comprehensive scheme for criminal law liability?⁷ Why with every business scandal does Congress, home to the world's flushest business lobbyists, increase the corporate criminal penalties?⁸ Why is corporate criminality so embedded in our legal landscape that we say we cannot revisit the question?

It must be—at least it is my suspicion—that a fix is on.⁹ Corporate criminality satisfies important needs of the people at the helm of our political economy.¹⁰ Perhaps it deflects attention. Perhaps it is an inexpensive way of gaining public confidence in the business/corporate system. Perhaps it creates the illusion of the rule of law.

David Anders' talk this morning about the nobility of the cause of corporate criminality, from my perspective, only confirms these troubling concerns. Making the corporation a criminal gives us the sense that we are accomplishing justice, but we miss those real persons (individuals, we call them) who ultimately are responsible for business actions. We miss those who we are most able to deter, punish and sometimes even compel to compensate.

The corporation is just a figment of our legal imagination. It is perhaps a nexus of voluntary arrangements—a contract. But it would be the strangest thing to say to a contract, “you awful paper, I am going to make you unconscionable.” The attention should be on the contracting parties. Or if you think of the corporation as a creature of law, like a marriage, it would be strange to say, “divorce to you for the husband's DWI.” Again, focus on the spouses. Or if you think of the corporation as a collection of persons or “natural entity,” like a family, it would be odd to “visit the sins of the children on the parent.” We are correctly leery of vicarious liability, unless it accomplishes deterrence, compensation, or symbolic goals.

But corporate criminality diverts our attention from the real actors, focusing us on the fictional one and thus away from the primary actors toward secondary ones. We say that in the family that is the corporation that the parents should pay (whether in money or by limiting their future action) for the misbehavior of their children. Now maybe that makes some sense, maybe our deterrence, compensation, and symbolic goals are best advanced by shifting our attention. The concept of

6. Gilbert Geis & Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 350–51 (2002).

7. 11 Del. Laws § 222 (2006).

8. VIKRAMADITYA S. KHANNA, *Corporate Crime Legislations: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004).

9. I am not the first to make this observation. Vikramaditya Khanna observes that corporate criminality comes into vogue after corporate scandals, serving as a salve for the public outrage at anti-social business behavior. *See id.* By deflecting attention away from executives to the corporation, legislation imposing greater corporate criminality under-deters misbehavior. It misses its target: the human actors. *See id.*

10. It is telling that the criminal law of continental Europe has not subjected corporations to criminal punishment. Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. Rev. 307, 311 (1991).

family (really parental) liability seems right, but only if two things are true. First, we must conclude there is some kind of family cultural problem that warrants imposing “entity” liability rather than just individual liability. Second, we believe that the parents will exercise parental authority and correct the problem if we impose criminal sanctions on the parents. It makes sense if the cultural problem is one that is appropriately handled by and within the family. After all, it was the family that created the externalities, through conduct of the children, and now the family should correct the problem internally.

But this does not make sense in the usual context of corporate misbehavior. The reason for corporate criminality is that the family—that is, the corporation—is dysfunctional.¹¹ It was not able to control its agents in their creation of external harm. Is there any reason to think that the mechanisms of corporate governance and decision-making will become functional by imposing liability on the corporation, mostly on the residual financial owners? Will the board and other structures of corporate power be able to correct and re-direct the corporate errant agents? The notion seems to be that if we impose corporate fines or otherwise sanction the business that somehow the corporate governance mechanisms will lurch into action and correct the systemic and cultural failings that originally raised concerns. But this seems naïve. The problem was that the corporate governance mechanisms were not working before to control the criminality. Why should they now?

Why then have we manufactured corporate criminality? I suspect it is a smoke screen. My sense, looking at the question of this roundtable, is that corporate criminality is a way for those people who hold the reins of corporate power to deflect attention. But lately the deflection has taken a curious and subtle turn. It is like when you are out driving in high school. It is Friday night, and the officer stops your car. Your first thought is whether you cooperate or resist. You know the officer will be sympathetic, so you cooperate completely. Why? Because you don’t want to be taken to jail. What will my parents say? It will be terrible. You tell the officer right away that there’s some booze in the back seat and that it’s Johnny’s. You point to Johnny, still in a bit of a fog.

David Anders confirms this story.¹² He describes that the current *modus operandi* of corporate criminal prosecutions is about offering up sacrificial lambs.¹³ Big corporations, and their boards and principal executives, may not be actually charged because they go along with things. Their executives are smart enough to know, “I have got to cooperate right away and hope that they go after Johnny in the back

11. The problem of corporate criminality in the public corporation, where shareholder financial ownership is separated from executive control, has been recognized, but has not been solved. See John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981).

12. See David Anders, *Criminalization of Corporate Law*, 2 J. BUS. & TECH. L. ___ (2007) (explaining that corporate entities play an important role in helping the government in the context of corporate fraud prosecutions).

13. *Id.* at ___.

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seat. I will even point out where the wrongdoing is. I will get the documents to them right away. I will collate them just the way they want.”

This is deeply troubling. It comes down to a question of political economy. Has the system been corrupted? Are we accomplishing justice? Are we producing the right incentives? Are we encouraging respect for the rule of law? Or are corporate criminality and its current corollary of offering up individual scapegoats acts of deep cynicism? If cynicism is indeed vice’s recognition of virtue, we should be asking whether corporate criminality has a tendency toward virtue or vice. That is, there is reason for us to revisit the basic question—what do we gain and what do we lose by treating the corporation as criminal?