

TWO DECADES OF CORPORATE CRIMINAL ENFORCEMENT

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Twenty years after the United States Department of Justice (DOJ) first published guidelines for the criminal prosecution of corporations, in the fall of 2019, we solicited the articles that follow in this Issue. Though American law on corporate criminal liability dates back to the nineteenth century, it was not until the end of the twentieth century that investigating and prosecuting corporations and their employees became a major and institutionalized feature of criminal justice in the United States, chiefly at the federal level. With that still relatively young practice concluding its second decade, and having produced a now vibrant and growing field of scholarship, a broader assessment is in order.

What have we learned after two decades of organizational prosecutions in the United States, since the first publication of the Justice Department guidelines in a memo by then-Deputy Attorney General Eric Holder?¹ We have seen a string of updated prosecution guidelines, as each presidential Administration puts its stamp on an evolving approach towards prosecuting corporations, by adding to a now quite lengthy set of principles in the Justice Manual.² We will no doubt see further revisions to those organizational prosecution guidelines in the years ahead. The government, the private bar, the bench, the academy, and the press continue to debate and refine the particulars of how to punish and deter crime within the large modern corporation.

Meanwhile, we have seen no end to the cycles of severe corporate malfeasance. The breadth of corporate crimes and the scale of the offenses—from small ten thousand-dollar schemes to defraud the federal government, to

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1. See Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., to All Component Heads and U.S. Att’ys on Bringing Criminal Charges Against Corporations (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/J6RH-QVD3>].

2. See *Resources*, CORP. PROSECUTION REGISTRY, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/resources.html> [<https://perma.cc/KH3H-3MAD>] (featuring links to DOJ documents related to federal corporate prosecution guidelines). Prior to 2018, the Justice Manual was known as the United States Attorney’s Manual. See *Justice Manual*, U.S. Dep’t of Just., <https://www.justice.gov/jm/justice-manual> [<https://perma.cc/3EUW-BS72>]. Some articles in this issue, as well as cited sources, may refer to the United States Attorney’s Manual when speaking historically about this guidance.

multi-billion-dollar frauds that endanger entire economies—are a matter of major legal and political importance. The crimes in question range from bread-and-butter wire fraud, to antitrust, to environmental crimes, to financial crimes, to kickbacks in pharmaceutical and other product manufacturing, to money laundering, and to foreign bribery. In short, we have seen “recurring corporate misconduct, from the accounting frauds at Enron and WorldCom, to the BP oil spill, to the Volkswagen emissions scandal,” as James Nelson writes in this Issue.³

This Issue, which we were honored to convene and contribute to, and for which we thank the *Law and Contemporary Problems* editors for their tireless editorial work in bringing to publication, addresses this new landscape twenty years on from the so-called Holder Memo. The articles that follow identify a number of questions that have arisen in the realm corporate criminal liability, present potential answers to those and other questions, and propose new areas for consideration over the next twenty years and beyond.

One set of questions relates to the now mature American system of prosecuting corporations—and, most often, settling with them—as a means to reducing the prevalence of crime by employees. In *Three Conceptions of Corporate Crime (and One Avenue for Reform)*,⁴ Miriam Baer assesses the growth of informal and out-of-court settlements in corporate cases. Baer focuses on the deferred prosecution agreement (DPA), calling it “neither fish nor fowl.”⁵ Such agreements are filed in court, so are not purely private settlements, but judicial review is highly deferential. The agreements include fines, but also compliance provisions, and some focus on cooperation in investigations of individuals. Baer notes: “Both the DPA itself and its underlying procedural framework have attracted pervasive criticism from commentators—for being too weak (mostly), too strong (sometimes), too arbitrarily applied, and far too lacking in transparency and follow-up. Despite these criticisms, this settlement format has flourished for roughly two or more decades.”⁶ The flexibility in these settlements and the compromises they represent, may explain their staying power. Baer argues, however, that “[t]here is at least one additional reason that DPAs and their close cousins have been able to outlast their critics, which is society’s collective inability to decide what corporate crime prosecution is supposed to accomplish.”⁷ Baer calls for legislation to reduce reliance on these largely extra-judicial compromises and to improve regulatory and judicial oversight.

If there is ambivalence about the goals of corporate prosecutions, perhaps scholars can assist by further focus on underlying theory. One purpose of

3. James D. Nelson, *Some Realism About Corporate Crime*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 113, 113.

4. Miriam H. Baer, *Three Conceptions of Corporate Crime (and One Avenue for Reform)*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 1.

5. *Id.*

6. *Id.* at 2–3.

7. *Id.* at 4.

corporate prosecutions could be to *punish* corporations, rather than use them as an instrument for crime control, as through compliance-type reforms. In *Retiring Corporate Retribution*,⁸ Samuel Buell takes one theory off the list of candidates: Buell explains how “corporations cannot be punished *retributively*,” and how discussion of corporate retribution still has not fully acknowledged the structural limitations to applying principles of individual criminal responsibility to business firms.⁹ As a result, “[t]here will always be a gap between what corporations deserve and what they receive.”¹⁰ This gap cannot be filled with a “punishment” directed at the firm itself. Thus, there are not only practical but also theoretical reasons to focus corporate prosecutions on how to effectively produce accountability in organizational settings.

If the proper focus is on instrumental goals, though, there is much that the current settlement-oriented compliance approach neglects. In *Testing Compliance*,¹¹ Brandon Garrett and Greg Mitchell describe how one key focus could be on cementing robust compliance, to ensure that corporations do not engage in repeat misconduct and are successfully reformed and rehabilitated. However, despite the stated goal of rewarding and requiring, at times, “effective” compliance by corporations, the effectiveness of such compliance efforts is not empirically validated. Indeed, enforcement approaches often discourage validation of compliance, which could result in self-critical information leading to further liability. Garrett and Mitchell conclude by explaining how an improved instrumental legal regime for corporate crime could incentivize testing of compliance and promulgate validated compliance methods.

In *The Government’s Prioritization of Information over Sanction: Implications for Compliance*,¹² Veronica Root Martinez describes the central importance of information sharing: the interest in promoting reporting and disclosure, rather than punishment or compliance. Martinez describes how a range of federal enforcers have adopted a model of enforcement that “prioritizes gathering information from firms over levying significant sanctions against them.”¹³ In corporate prosecution cases, the government: “(i) exerts pressure to incentivize firms to share information with the government, (ii) eschews sanctions in favor of oversight, and (iii) often sides with corporations in limiting the transparency of investigations into wrongdoing.”¹⁴ Martinez argues that if information gathering is the central goal of corporate liability, then enforcers should more clearly use sanctions to reward sound compliance and sharing of

8. Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 25.

9. *Id.* at 26.

10. *Id.* at 44.

11. Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 47.

12. Veronica Root Martinez, *The Government’s Prioritization of Information over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 85.

13. *Id.* at 99.

14. *Id.* at 88.

information concerning compliance failures. The purposeful system of rewards that Martinez describes might be complimented by the approach towards prioritizing empirically validated reporting and testing of compliance as proposed by Garrett and Mitchell.

In *Some Realism About Corporate Crime*,¹⁵ James Nelson addresses the problem of corporate crime at the broader level of whether the corporate form itself requires rethinking and redesign. He describes how realists about corporate rights have urged a pragmatic or legal realist approach that focuses on the “concrete facts and relations” that should guide the law’s treatment of corporations.¹⁶ Nelson sets out how “we ought to have a practical accounting of likely costs and benefits before we abandon core features of the corporate form.”¹⁷ Nelson concludes that we do not necessarily need to discard or reform the current corporate form, but rather should take advantage of its benefits for accountability. Nelson’s approach is consistent with each of those just described: a focus on the utilitarian case for corporate accountability, and a concrete focus on the empirical needs of an effective program of accountability.

Mihailis Diamantis, in *The Body Corporate*,¹⁸ begins with the longstanding problem in corporate criminal liability of whether and how corporations can fulfill the mens rea elements of crimes. Diamantis then turns that discussion to the question of the physical actor in criminal theory. If we treat corporations, at least as a legal matter, as being capable of having mental culpability, we should also ask what their bodies are for the purpose of the actus reus dimension of criminality. Diamantis argues for the promise of a novel perspective on what parts and functions of the corporation might comprise the corporation’s “body,” that is, a theory allowing for the potential of imposing liability for the harmful results of a wider variety of corporate functions and processes. Diamantis observes that this discussion has been missing from the theory of corporate criminality: “Just as the law needs an account of how corporations think if they are to be held to account for crimes and torts, it also needs an account of how corporations can act.”¹⁹

The literature on corporate crime is pervaded by efforts to apply and analogize individual criminal processes to the corporation. In *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*,²⁰ Rachel Barkow turns that perspective around, considering how treatment of corporations might apply to individuals. Barkow asks why corporations benefit from the individualized approach of negotiated enforcement and settlement, usually with attention to the details of a firm’s

15. Nelson, *supra* note 3.

16. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926).

17. Nelson, *supra* note 3, at 115.

18. Mihailis E. Diamantis, *The Body Corporate*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 133.

19. *Id.* at 134.

20. Rachel E. Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 159.

business and its processes, while individuals are sentenced in federal court under a rigid grid-like structure. Both the DOJ and Sentencing Commission have taken a view that the most severe sentences should be imposed in individual cases, but in contrast, “they have recognized the costs of severity in the corporate realm.”²¹ Indeed, beginning with the Holder Memo, the DOJ has developed detailed leniency-preferring guidelines for corporate cases. As Barkow observes, no such rules exist for individual charging decisions for the most part, and instead, the DOJ has often issued brief guidance that the most severe provable charges should be pursued against individuals. Sentencing guidelines, similarly, have often not taken into account potential rehabilitation or the relevance of a range of other individual characteristics. Thus, Barkow notes: “There is no reason to maintain a policy that sees the value in saving and recognizing the worth of companies, but ignores the value in saving and recognizing the worth of individuals.”²²

What might the next two decades bring for the field of corporate prosecutions? One common theme among these wonderful contributions is that the practice of corporate prosecutions needs a theory, and to some extent already has one. It should more consciously focus on the instrumental goals of detecting and preventing corporate misconduct, while clearing away many of the distracting old conversations about individual criminal law theory in the corporate context.

In an even more developed and mature field of instrumental corporate enforcement, prosecutors would validate information-seeking and compliance approaches more rigorously and the field would be subject to more sophisticated assessment by academics for its broad social value in light of the still growing problem of corporate crime. In a future administration, DOJ might: consider relaxing its longstanding opposition to more judicial and other institutional supervision of, and involvement in, its administration of corporate settlements; pursue corporate investigations and prosecutions in a manner that makes data collection and analysis far more accessible; and continue to refine, based on available evidence, how monetary and other sanctions can be further calibrated and specified to produce optimal incentives for self-reporting, cooperation, and remediation.

Meanwhile, it is time to apply lessons from the decades of modern corporate prosecution to the individual criminal setting, both within corporations and outside them. It is fair to expect that twenty years from now, the problem of corporate crime might be as settled as a matter of theory as the nature of basic individual criminality is now. Perhaps then there can be a full turn from theoretical first principles so that questions about how best to manage corporate prosecution and punishment become—as they have in recent years with prosecution of individuals for all types of crime—predominantly a matter of debating procedural justice and costs and benefits on the ground.

21. *Id.* at 161.

22. *Id.*