A CONTEXT FOR EVALUATING DEPARTMENT OF JUSTICE POLICY ON THE PROSECUTION OF BUSINESS ORGANIZATIONS: IS THE DEPARTMENT OF JUSTICE PLAYING IN THE RIGHT BALLPARK?

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I. INTRODUCTION

Federal criminal law permits the prosecution of business organizations for crimes committed by their employees acting within the scope of their employment with the intent to benefit the organization. This means that United States Attorneys must decide when to bring charges against business organizations as collective entities. They do so on the basis of guidance provided by The Principles of Federal Prosecution of Business Organizations, which, in its current incarnation, is known as the Filip Memorandum.

How good is this guidance? Does this document correctly identify the conditions that justify the prosecution of an organization in addition to or instead of its individual employees? What are the goals of prosecuting business organizations? Is current Department of Justice (“DOJ”) policy well-designed to realize them? Can it be reformed to do so more effectively?

The purpose of this symposium is to answer these questions. Doing so requires both an understanding of the normative purposes of the criminal law and a high level of empirical expertise in the science of human behavior. Although I can lay claim to the requisite normative understanding, I do not possess the equally necessary empirical expertise. Fortunately, that expertise is being supplied by my fellow symposiasts. This situation suggests that my most valuable contribution to the symposium would be to provide a normative context for the empirical information supplied by my fellow contributors. I attempt to do that in what follows.

To evaluate the merits of any policy, one must know what purpose it serves—what goals the policy is designed to help its adherents achieve. Hence, in Part II, I begin my analysis by identifying the purpose of imposing criminal liability on business organizations. With this knowledge in hand, in Part III, I explore the

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situations in which threatening to impose criminal liability on business organizations can advance this purpose. In Part IV, I draw two substantive implications that follow from this analysis of the proper range of application of DOJ policy. Finally, in Part V, I conclude.

II. PURPOSE

One evaluates a policy by asking whether it is well adapted to its purpose. Such a question implies, of course, that one knows what purpose the policy is designed to serve. Thus, to evaluate the DOJ’s policy on the prosecution of corporations, we must first know what purpose is served by prosecuting corporations.

Unfortunately, the purpose served by imposing criminal punishment on corporations is rather obscure. To begin with, the traditional purposes of the criminal sanction that justify the punishment of individuals—retribution, rehabilitation, and deterrence—do not apply to corporate entities. To see why, it is important to keep in mind precisely what corporate criminal liability is. Corporate criminal liability does not supplant the personal criminal liability of the individual or individuals who commit crimes; it supplements it with an additional form of strict, vicarious liability.

Corporations have no bodies or minds of their own. They can act only through their human agents. For purposes of criminal liability, the actions of a corporation’s agents are attributed to the corporation under a respondeat superior theory of liability. Corporate criminal liability is strict liability in the sense that there is no need to find any fault on the part of any supervisory official for the corporation to be guilty of its employees’ crimes. If an employee commits a crime within the scope of his or her employment, the corporation is instantly and simultaneously guilty of that crime.

It is clear that neither retribution nor rehabilitation can be the purpose of such a form of criminal liability. Retribution—the process of requiting evil with evil—may be warranted against an individual employee who commits a crime because he or she has engaged in personal wrongdoing. But it cannot be the objective of corporate criminal liability, in which there is liability without fault. Without fault, there is no separate corporate evil to requite. Similarly, rehabilitation consists of the effort to improve the character of one who has manifested his or her dangerous or anti-social nature through his or her criminal activity. While rehabilitation may be appropriate for the employee who commits a crime, it cannot be the purpose of imposing liability without fault. Without fault, there is nothing to rehabilitate.

1. For purposes of convenience, I will employ the term “corporation” generically to refer not merely to businesses that have gone through the formal process of incorporation, but to all business organizations, regardless of their legal form. Corporate criminal liability, of course, applies to partnerships and other unincorporated business organizations as well as corporations.

Deterrence also cannot be the purpose of corporate criminal liability, at least as
deterrence is traditionally understood within the context of a liberal legal system.
In a liberal society, the deterrence that can justify criminal punishment refers to
the imposition of punishment on a wrongdoer to discourage both the wrongdoer
and others from committing similar offenses in the future. It does not refer to the
imposition of punishment on those without fault whenever doing so may reduce
the overall level of criminal activity. Correctly understood, deterrence can be the
purpose of punishing the individual employee who violated the law because he
or she has engaged in wrongdoing. But, in a liberal society, it cannot be the purpose
of punishing a party who has not engaged in criminal activity for the actions of
another who has.

In short, the traditional purposes of imposing criminal punishment on those who
engage in personal wrongdoing cannot be the purpose of imposing an additional
layer of criminal liability upon the wrongdoer’s employer when the employer is
without fault.\footnote{For a more detailed argument of this conclusion, see John Hasnas, The Centenary of a Mistake: One
Hundred Years of Corporate Criminal Liability, 46 AM. CRIM. L. REV. 1329, 1338–41 (2009).}

It is sometimes asserted that the purpose of imposing punishment on corporations is to ensure that serious crimes do not go unpunished. For instance, in \textit{New
York Central & Hudson River Railroad Co. v. United States},\footnote{212 U.S. 481 (1909).}—the case that
created corporate criminal liability—the court stated:

\begin{quote}
[W]e see no good reason why corporations may not be held responsible for and
charged with the knowledge and purposes of their agents, acting within the
authority conferred upon them . . . . If it were not so, many offenses might go
unpunished and acts be committed in violation of law, where, as in the present
case, the statute requires all persons, corporate or private, to refrain from
certain practices forbidden in the interest of public policy.\footnote{Id. at 494–95.}
\end{quote}

Indeed, in \textit{United States v. Hilton Hotels Corp.},\footnote{467 F.2d 1000 (9th Cir. 1972).} the court suggested that corporate
criminal liability is necessary because of the difficulty of obtaining convictions of
the individuals who commit crimes within corporations.

Complex business structures, characterized by decentralization and delega-
tion of authority, commonly adopted by corporations for business purposes,
make it difficult to identify the particular corporate agents responsible for
Sherman Act violations.

\ldots In sum, identification of the particular agents responsible for a Sherman
Act violation is especially difficult, and their conviction and punishment is
peculiarly ineffective as a deterrent. At the same time, conviction and punish-
ment of the business entity itself is likely to be both appropriate and effective.\footnote{7}

A moment’s reflection, however, should convince one that ensuring that crime
does not go unpunished cannot be the purpose of imposing criminal liability on
corporations. This is because precisely the same evidence that is required to
convict the individual is required to convict the corporation. The offense of the
corporation is entirely coincident with the offense of the employee. To be able to
convict the corporation, a prosecutor must already have sufficient evidence to
convict the individual. Contrary to what is suggested by \textit{Hilton Hotels}, unless a
prosecutor can identify an individual employee who committed an offense within
the scope of his or her employment with the intent to benefit the corporation, the
prosecutor cannot convict the corporation.\footnote{8} Purely as a logical matter, the exis-
tence of corporate criminal liability cannot result in punishment for any offense for
which an individual conviction cannot already be obtained.\footnote{9}

What, then, \textit{are} the purposes served by allowing the punishment of corporations
for the offenses committed by their employees? I submit that there is only one:
reducing criminal wrongdoing by corporate employees by coercing corporations
into undertaking a policing function.\footnote{10} The purpose of imposing strict criminal
liability on one party for the criminal actions of another can only be to motivate the
first party to suppress the criminal activity of the second. The only reason for
threatening an entire business organization with punishment for the crimes of any
of its employees is to cause the organization to actively discourage criminal
wrongdoing by its employees.\footnote{11}

The problem with this is that using the criminal sanction for such a purpose is

\footnote{7} Id. at 1006.
\footnote{8} As a matter of fact, in \textit{Hilton Hotels}, there was no question about which employee violated the Sherman Act,
and the employee who committed the offense testified at trial as to his conduct. \textit{Id.} at 1004.
\footnote{9} For reasons explained below, see \textit{infra} note 11. I am ignoring the collective knowledge doctrine under which
“‘the corporation is considered to have acquired the collective knowledge of its employees.’” \textit{United States v.
Supp. 730, 738 (W.D. Va. 1974)).
\footnote{10} The courts have recognized that this is the purpose of corporate criminal liability. \textit{See United States v.
Sun-Diamond Growers of California}, 138 F.3d 961, 971 (D.C. Cir. 1998) (identifying the justification for
“holding corporate principals liable for the illegal acts of their agents” as “to increase incentives for corporations
to monitor and prevent illegal employee conduct”).
\footnote{11} \textit{See John Hasnas, Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics},
39 \textit{LOY. U. CHI. L.J.} 507, 512–16 (2008). This article does not discuss the collective knowledge doctrine, which
deems the corporation to possess the collective knowledge of all of its employees. The reason for this is, in part,
because the doctrine is so rarely applied, but, more significantly, because the collective knowledge doctrine serves
precisely the same function as the respondeat superior liability being discussed. The only way corporations can
protect themselves from criminal liability under the collective knowledge doctrine is to continually review all
corporate activities to ensure that no laws are unintentionally violated as a result of the ill-informed or
poorly-coordinated actions of the companies’ various employees. Hence, the only purpose served by the
collective knowledge doctrine is, like the respondeat superior standard of liability, to coerce corporations into
performing a police function.
utterly inconsistent with the moral values inherent in a liberal legal system. Liberal societies eschew vicarious criminal liability. We could undoubtedly greatly reduce crime if we threatened to punish the family, friends, or fellow community members of those who commit crimes. We do not because it would violate the respect for individual autonomy that lies at the heart of a liberal society, and because it reminds us too much of the policies of collective punishment associated with fascist regimes. Yet, threatening to punish the members of a corporation who are without fault for the crimes of their colleagues is, in principle, indistinguishable from such schemes.\footnote{See John Hasnas, Where Is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations, 19 BROOK. J.L. & POL’Y 55, 77–79 (2010).}

Further, use of corporate criminal liability to compel corporations to undertake a policing function is tantamount to a violation of the principle of legality (\textit{nulla poena sine lege})—the fundamental liberal principle that forbids punishment without violation of law.\footnote{United States v. Bodiford, 753 F.2d 380, 382 (5th Cir. 1985) (stating that \textit{nulla poena sine lege} is a requirement of due process); see Jerome Hall, \textit{Nulla Poena Sine Lege}, 47 YALE L.J. 165 (1937) (discussing the doctrine’s history and various interpretations).} The state or federal legislatures could pass criminal statutes requiring corporations to undertake efforts to suppress criminal activity by their employees. They have not. Hence, threatening corporations with criminal punishment for failing to undertake such efforts is threatening punishment for what is not a violation of law.

The fact that the only purpose served by subjecting corporations to criminal punishment is a fundamentally illiberal one explains why advocates of corporate criminal liability rarely, if ever, explicitly acknowledge that purpose. Instead, the purpose is submerged in a sea of verbiage regarding the traditional purposes of punishment and the importance of protecting the public from crime. The Filip Memorandum (“Memo”) supplies an excellent example of such obscurantism.

The Memo begins with a classic non sequitur by stating:

\begin{quote}
The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, to take just a few examples: (1) protecting the integrity of our free economic and capital markets; (2) protecting consumers, investors, and business entities that compete only through lawful means; and (3) protecting the American people from misconduct that would violate criminal laws safeguarding the environment.\footnote{Filip Memorandum, \textit{supra} note 2, at 1.}
\end{quote}

These may all be laudatory goals, but the paragraph says nothing about why prosecuting corporations as collective entities is necessary or even helpful to achieving them. There is nothing objectionable about the DOJ making the prosecution of corporate crime a high priority and I am glad that it intends to bring
charges only where appropriate. I am also glad that the DOJ wants to protect the integrity of our markets, everyone who competes by lawful means, and the environment. These are good reasons to prosecute those whose actions undermine our markets, compete by unlawful means, and violate environmental law. But they are completely irrelevant to the question of whether the DOJ should also prosecute the corporations whose employees fall into one of these categories, regardless of the corporations’ fault.

This introductory non sequitur is immediately followed by a bit of foreshadowing. In the next paragraph, the Memo states:

In this regard, federal prosecutors and corporate leaders typically share common goals. For example, directors and officers owe a fiduciary duty to a corporation’s shareholders, the corporation’s true owners, and they owe duties of honest dealing to the investing public in connection with the corporation’s regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal cases are designed to serve.15

This is all true. Corporate leaders do share the goals identified above, do owe fiduciary duties to shareholders, and, by faithfully executing these duties, do serve the same values that criminal prosecutions serve. But the purpose of including this paragraph in a memo designed to provide guidance as to when to prosecute a corporation can only be to suggest that it would be a good idea for corporate leaders to help the DOJ police the corporate environment. Such a suggestion is designed to seductively set the stage for the as yet unstated claim that the DOJ intends to use the threat of corporate criminal indictment to coerce corporate leaders into doing precisely that.

The Memo comes its closest to explicitly recognizing that this is the purpose of corporate criminal liability in the next section entitled, General Considerations of Corporate Liability. This section provides the following general principle:

General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.16

After instructing prosecutors that corporations should be treated neither more leniently nor more harshly than anyone else—what could be more fair?—the Memo asserts that indicting corporations provides the “great benefits” of enabling

15. Id.
16. Id. at 1–2.
“the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.”

Now, consider what it can mean for the government to be a force for positive change of “corporate culture.” Criminal punishment is designed to alter human behavior, not “culture.” To the extent that the term “corporate culture” is relevant in this context, it must be an oblique way of referring to the behavior of corporate policy makers. If corporate policy makers are themselves engaging in intentional wrongdoing, I would think that the DOJ would be interested in locking them up, not improving their “culture.” But assuming they are not engaging in wrongdoing themselves, how can the threat of corporate indictment change their behavior? All that they can do to avoid corporate indictment is take active steps to suppress the possibility of criminal wrongdoing by employees. Hence, the only thing the DOJ can mean by saying that “indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture” is that the threat of indictment can be used to coerce corporations into performing a police function.

The same is obviously true with regard to the assertion that the government can be “a force to prevent, discover, and punish serious crimes.” Actually punishing a corporation for a crime committed by an employee does not prevent or discover any crimes, and it does not punish any crime that is not already punishable by convicting the individual criminal. The only way threatening a corporation with criminal prosecution can prevent or discover serious crimes is by coercing the corporation into policing its workforce for the government.

The Memo continues to obliquely extol the benefits of drafting corporations as deputy law enforcement agents in its Comment on this section, where it states:

> [P]rosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees.17

Although clothed in the language of deterrence, what is being described in this

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17. Id. at 2. The Comment includes a third item on its list of the benefits of corporate indictment by stating “Finally, certain crimes that carry with them a substantial risk of great public harm—e.g., environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.” Id. However, this statement is perfectly circular and says nothing. Whether a crime carries with it a substantial risk of great public harm or not, it may be committed by a business entity only if human beings who work for that entity violate the law. Whether there is a good reason to indict the corporate entity in addition to the individual criminal is what the Memo is supposed to tell us. Simply asserting that there is a substantial federal interest in indicting the corporation under such circumstances is avoiding rather than answering the question. The only government interest of any kind that I can find for indicting the corporation is to cause the corporation to actively attempt to suppress criminal behavior by its employees.
Comment is something quite different. Punishing a corporation for the offenses of its employees in addition to punishing the employees adds no deterrent effect. Future potential criminals will be deterred by the threat of punishment to them personally, and will not care about collateral punishment to a corporate entity. And punishing a corporation for the offenses of its employees instead of the employees will actually encourage potential criminals to commit crimes, since they will perceive that someone else will suffer the penalty for their actions. Indicting a corporation can “deter” crime only indirectly by motivating the corporation to police its workforce for the government.\footnote{18}

Shorn of its obfuscating verbiage, what the Memo is saying is that the purpose of imposing a strict, vicarious, criminal liability on corporations for the offenses of their employees is to conscript private corporations into performing a law enforcement function that is not otherwise required by law. And indeed, this is the only useful purpose that is served by corporate criminal liability. As useful as it may be, however, it is entirely illegitimate. It may well be a good idea for corporations to police their workforces to ensure that employees do not violate the criminal law. Such efforts may even be emblematic of good corporate citizenship. But in a liberal society, criminal punishment is imposed only upon those who violate the criminal law. It is not a tool for improving the character of those who have not committed an offense. Liberal societies do not invest law enforcement agents with the power to punish those who fail to conform to the enforcement authority’s ideas of what constitutes praiseworthy behavior. Yet, the only purpose served by the prosecution of corporations as collective entities is to invest prosecutors with precisely that authority.

\footnote{18. The Memo contains additional camouflaging language in the Comment to Chapter 9-28.300, entitled Factors to Be Considered, where it instructs United States Attorneys to consider the traditional purposes of punishment in deciding whether to indict a corporation.

In making a decision to charge a corporation, . . . prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate “person.”

\textit{Id.} at 4–5. This is probably best understood as boilerplate language equivalent to an instruction to do all things good. None of it applies to corporate criminal liability. The exhortation to ensure “warranted punishment,” which applies to individual criminal conduct, is a non sequitur in the context of punishment without fault, and, because the purpose of the Memo is to provide guidance as to when the punishment of corporations is warranted, is question-begging besides. The same applies to the injunction to ensure the “rehabilitation of offenders.” This may apply to individual offenders, but is irrelevant in the context of corporate criminal liability in which liability arises entirely out of the actions of the individual offender, and for which there is no independent corporate offense. Restitution is clearly irrelevant since it is not a form of punishment and is the purpose of civil, rather than criminal, liability. Finally, the reference to deterrence and protection of the public has already been addressed. The only way threatening to punish corporations for the crimes of their employees can provide any additional protection to the public is by coercing the corporation into performing a law enforcement function. However, in a liberal legal system, conscripting private parties as deputy prosecutors is not among the recognized “general purposes of the criminal law.”}
The objective of this part of the article is to identify the purpose served by the prosecution of corporations in order to facilitate the evaluation of DOJ policy governing such prosecution. That objective has now been realized. The purpose of prosecuting corporations is to cause corporate policy makers to take actions designed to reduce criminal conduct by their corporations’ employees. In the process of identifying this purpose, we have noted that efforts to achieve it by imposing criminal punishment on corporations as collective entities are morally illegitimate and inconsistent with the values of a liberal legal system. But morally legitimate or not, the DOJ is invested with the power to prosecute corporations as collective entities. Hence, the question now becomes whether current DOJ policy is well-designed to cause corporate policy makers to take the desired actions.

III. POLICY

Given that the purpose of prosecuting corporations is to induce corporate policy makers to take actions designed to reduce criminal conduct by their corporations’ employees, the question becomes: Is current DOJ policy governing the prosecution of corporations well-designed to realize this purpose?

This is an empirical question. Determining whether the DOJ’s favored crime-reduction measures are the most effective means of reducing criminal wrongdoing by corporate employees requires expertise in human psychology. How corporate employees are likely to react to corporate compliance measures and whether these measures are well tailored to their goal of reducing employee wrongdoing are questions that can only be answered by organizational behavior scholars. Because as a normative scholar I do not possess the requisite expertise, the best I can do is to refer you to the subsequent articles of Professors Bies, Tyler, Reynolds, and Weaver.19

Nevertheless, there is an underlying matter on which a criminal law theorist is qualified to comment. As a criminal law enforcement agency, the DOJ has only one tool to influence the behavior of corporate policy makers: the threat of imposing criminal punishment on the corporation. Logically, the DOJ should employ this tool only when doing so would be an effective strategy for motivating corporate policy makers to undertake the desired police functions. By identifying such circumstances, the criminal law theorist can inform the DOJ where to direct its efforts, even if he or she is not qualified to comment on the nature of those efforts.

Accordingly, my goal in this part of the article is to provide a context for the

empirical evaluations of my co-contributors to this symposium. Speaking analogi-
cally, I will attempt to specify the ballpark in which the DOJ should be playing, 
and leave it to my colleagues to determine how well the DOJ is playing the game. 

A. Intentional Refusal

I begin by considering the class of cases in which corporate policy makers 
intentionally refrain from undertaking the desired police function. This class 
should be the one to which the DOJ’s threat of corporate prosecution can be most 
fruitfully applied. Since the purpose of threatening others with punishment is to 
alter their behavior by alerting them to the potential adverse consequences of 
defiance, the criminal sanction is always most effective when directed toward 
tentional conduct.

Corporate policy makers may have many reasons for deciding not to undertake 
the desired crime reduction measures. The most obvious may be a concern over 
the financial cost of such measures. Effective compliance programs can impose 
significant administrative costs on a company. Although these costs may be easily 
absorbed by large, highly capitalized corporations, they can pose a major problem 
for small corporations working on thin profit margins. If corporate policy makers 
judge that a compliance program will not enhance the firm’s profitability, they 
may decide to forgo implementing it on economic grounds.

Corporate policy makers may also decide not to adopt compliance programs 
on ideological grounds. They may believe that Congress should not be enacting 
criminal legislation that is too broad for the government to enforce with its own 
resources; or that law enforcement is inherently a governmental function whose 
cost should not be shifted onto private business; or that the government of a free 
society should not be incentivizing private businesses to spy on their employees 
and report their observations to law enforcement agencies because doing so is too 
reminiscent of the informer mentality engendered by fascist regimes. Corporate 
policy makers that hold such beliefs would naturally be opposed to undertaking the 
desired police function.

In addition, some corporate policy makers may decide not to adopt the DOJ-
favored compliance programs because they want to maintain an informal or 
family-like corporate culture that engenders a high level of trust between man-
agement and employee. The compliance programs that the DOJ deems effective 
require a great deal of “monitoring and auditing” of employee behavior and

20. Compliance programs are not necessarily money losers. Such programs are often cost justified. In most 
cases in which corporate employees engage in criminal activity, it is the corporation itself that is the victim. The 
most frequent forms of employee wrongdoing involve stealing from or defrauding the corporation. Therefore, 
compliance programs are often an effective way for companies to avoid the financial losses associated with 
employee theft and can, in essence, pay for themselves.

21. The DOJ usually follows the definition of an effective compliance program given in the Organizational 
Sentencing Guidelines Manual. See U.S. SENTENCING COMM’N, UNITED STATES SENTENCING COMMISSION
frequently involve significant invasions of employee privacy.\textsuperscript{22} Further, such programs usually must contain “appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.”\textsuperscript{23} These features place management and labor in a formal and adversarial relationship that can significantly reduce the level of trust between employees and corporate management.\textsuperscript{24} Hence, some corporate policy makers may want to refrain from implementing formal compliance programs in order to maintain a more flexible, trust-based relationship with their work force.

Finally, corporate policy makers may decide not to adopt measures designed to reduce criminal wrongdoing within their organization because they themselves are corrupt. Policy makers who are engaging in criminal activity and want to encourage their employees to do so as well would obviously have no interest in implementing any legal compliance measures.

Threatening corporations with prosecution can be an effective way of overcoming corporate policy makers’ resistance to adopting programs designed to reduce employee wrongdoing, at least where the resistance is based on cost concerns, ideology, or the desire to maintain an informal corporate culture. For policy makers whose resistance is based on cost concerns, the specter of corporate prosecution radically alters the economic calculation. The costs associated with a corporate indictment arising from employee wrongdoing—which include not only the legal costs of defending the case and the potential financial penalties if convicted, but more significantly, the damage to the firm’s reputation and resulting loss of business that results from criminal indictment—will almost always dwarf the expense associated with adopting a crime reduction program. Further, even when the costs of indictment do not threaten the continued existence of the corporation as they did in the Arthur Andersen case,\textsuperscript{25} they are virtually always large enough to overcome policy makers’ objections arising from either purely ideological considerations or the desire to maintain a friendly or family-like work environment.

Note, however, that although threatening corporations with prosecution can effectively induce corporate policy makers to adopt the type of formal compliance programs the DOJ favors, this does not imply that the DOJ serves its crime

\textsuperscript{22} For a more detailed account of how DOJ standards for an effective compliance program can result in invasions of employee privacy, see Hasnas, supra note 11, Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics, at 518–20 and John Hasnas, Ethics and the Problem of White Collar Crime, 54 Am. U. L. REV. 579, 637–40 (2005).

\textsuperscript{23} USSC GUIDELINES MANUAL, supra note 21, § 8B2.1(b)(6).

\textsuperscript{24} For a fuller discussion of the way in which compliance programs can undermine trust in the workplace, see Hasnas, Ethics and the Problem of White Collar Crime, supra note 22, at 646–51.

\textsuperscript{25} Arthur Andersen was destroyed as going concern by its indictment for obstruction of justice and was essentially defunct long before its trial and conviction. See Elizabeth K. Ainslie, Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution, 43 AM. CRIM. L. REV. 107, 109 (2006).
reduction purpose well by doing so. This would be the case only if the formal, “command and control” style compliance programs the DOJ favors actually reduce employee wrongdoing more effectively than other, less formal approaches that are incompatible with, and hence displaced by, the formal programs. However, if creating a corporate culture that aligns employees’ values with those of corporate management is, in fact, the best way to reduce employee wrongdoing—as has been suggested by many organizational behavior theorists—then the DOJ does not advance its crime reduction goals by inducing corporations to adopt formal, command and control style compliance programs. Because such command and control programs undermine the trust necessary to the culture-based approach, pressuring corporations to adopt them could actually retard the DOJ’s efforts to reduce criminal conduct by employees. Whether the formal command and control approach is more effective than the flexible, culture-based approach is precisely the type of question that my empirically-oriented fellow symposiasts will subsequently explore. For now, I merely note that regardless of the relative merits of the formal command and control approach, threatening corporations with criminal punishment if they do not adopt such an approach will be an effective way of overcoming corporate policy makers’ desire to maintain an incompatibly informal corporate culture.

Interestingly, and somewhat ironically, threatening to prosecute a thoroughly corrupt corporation does not serve any useful purpose. If a corporation’s high executives and policy makers are themselves engaging in intentional wrongdoing, threatening to punish the corporation cannot motivate them to adopt legal compliance programs. The prospect of fines being imposed on the corporate treasury cannot induce corporate executives to adopt measures likely to send them to jail.

Consider Enron. The government alleged that Enron’s top executives were engaging in criminal fraud. The DOJ brought charges and obtained convictions of Ken Lay, Enron’s Chairman and CEO, Jeffrey Skilling, Enron’s CEO during 2000, and Andrew Fastow, Enron’s Chief Financial Officer. Yet, the DOJ never

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29. Id.

30. Id.
brought charges against Enron as a corporate entity. This was clearly the correct decision because doing so would have served no purpose. Convicting Enron and imposing a fine on the corporation would not have affected the executives who were guilty of fraud, and would only have increased the financial losses suffered by Enron’s employees and shareholders, the principal victims of the executives’ fraud.

When corporate policy makers are themselves the criminals, the DOJ has no choice other than to prosecute them as individuals. Prosecuting the corporation imposes losses on otherwise innocent employees and shareholders with no corresponding benefit in the form of greater compliance efforts. When the criminals are the corporation’s management, prosecuting the corporation, either in place of or in addition to the individuals, is always bad policy.

In sum, when corporate policy makers intentionally refrain from instituting programs designed to reduce criminal conduct by employees, threatening to prosecute the corporation can overcome refusals based on cost considerations, ideology, and concerns over corporate culture. Whether this is good policy when policy makers’ refusal is based on the desire to maintain employees’ trust in corporate management depends on whether informal, trust-based compliance programs reduce employee wrongdoing more effectively than formal, command and control compliance programs—something that will be explored in subsequent empirically-oriented articles in this symposium. In contrast, when corporate policy makers refuse to undertake efforts to reduce criminal conduct because they themselves are the criminals, threatening to prosecute the corporation can neither overcome the refusal nor serve any other useful purpose. The ironic conclusion is that DOJ policy should be to refrain from bringing criminal indictments against thoroughly corrupt corporations.

B. Lack of Awareness

Some corporations fail to adopt employee crime reduction measures not as a result of an intentional decision, but simply because their policy makers have not considered the matter. Especially in the case of small to mid-sized corporations or start-ups whose management is focused on generating a profit, the question of whether to undertake efforts to reduce criminal wrongdoing by employees may simply not be on management’s radar screen. Assuming that such a corporation’s policy makers are not engaged in criminal activity themselves and otherwise have no objections to implementing a compliance program, the DOJ’s threat to prosecute the corporation for the crimes of its employees can be an effective way to motivate that corporation’s policy makers to adopt employee crime reduction

measures. The prospect of corporate indictment with its potentially disastrous consequences can focus the minds of corporate policy makers on this otherwise neglected matter. In instances in which corporations lack crime reduction programs due to lack of attention, the DOJ’s policy can effectively serve its purpose of motivating corporate policy makers to adopt such measures.

C. Voluntary Adoption

The final possibility is that corporate policy makers have both considered the matter and have decided to adopt measures designed to reduce employee wrongdoing. Does this mean that DOJ should refrain from prosecuting such corporations? Not necessarily. It obviously would be pointless to prosecute corporations that have adopted and properly implemented the desired crime reduction programs. Since the purpose of prosecuting corporations is to induce corporate policy makers to adopt such programs, there can be no reason to prosecute corporations whose policy makers comply. However, there will be cases in which corporate policy makers who decide to adopt compliance programs do so in a negligent manner—where they fail to exercise proper care either to determine what measures they should adopt or to ensure that the measures they adopt are properly implemented. The question then becomes whether the DOJ should have a policy of prosecuting corporations that adopt compliance programs, but carelessly fail to ensure that they function properly. Can the threat of corporate indictment reduce the likelihood that corporations will adopt defective compliance programs, and if so, how?

The question of how best to deal with inadvertent malfeasance is anything but a novel one. Tort and criminal law provide two basic strategies for addressing it. The first is to hold parties liable if, but only if they fail to exercise the degree of care that an ordinary, reasonable person would exercise in the relevant circumstances—that is, to employ a negligence standard. The second is to hold parties liable regardless of the amount of care that they exercise—that is, to impose strict liability. In the present circumstances, we are considering situations in which corporate policy makers inadvertently adopt ill-constructed or poorly administered legal compliance programs. So the first question the DOJ needs to answer is whether the best way to encourage corporate policy makers to exercise greater care in the construction and operation of compliance programs is to hold them strictly liable for their failures—to threaten to prosecute all corporations with defective compliance programs—or to hold them liable only for their negligence—to threaten to prosecute only those corporations that fail to exercise reasonable care in the construction or operation of their compliance programs.

In general, prosecutors tend to favor regimes of strict liability for evidentiary reasons. The application of the criminal sanction usually requires the prosecution to establish both a mens rea and an actus reus of an offense. The actus reus typically consists of a set of observable facts that can be established on the basis of
objective evidence. Mens rea, in contrast, consists of a state of mind that can be established only by inferential evidence, something that is often difficult for the prosecution to prove beyond a reasonable doubt. By dispensing with mens rea, strict liability opens a much easier path to conviction for the prosecution.

In the present context, the DOJ is not interested in actually convicting corporations. Rather, it wants to use the threat of corporate indictment to cause corporate policy makers to implement effective compliance programs. Nevertheless, strict liability holds the same attractions in this context that it does when a conviction is sought. By basing the decision whether to indict exclusively on whether the compliance program is defective or not, the DOJ avoids having to make difficult inquiries regarding the state of mind and the level of care exercised by the corporate employees responsible for the program’s construction and operation. Hence, there is a natural temptation for the DOJ to employ a strict liability standard and threaten to prosecute all corporations that have flawed compliance programs.

This is a temptation the DOJ would do well to resist. For although strict liability may be administratively convenient, it would undermine the DOJ’s efforts to realize its underlying purpose. To see why, consider the different purposes served by the negligence and strict liability standards. The negligence standard is designed to induce parties to carry on the activity in question with greater care; strict liability is designed to induce parties to do less of the activity in question.32

If we think back to our first-year Torts course, we recall that there are two ways to reduce the risk that one party’s actions impose on others. The first is to encourage the actor to be more careful in undertaking his or her activities. The second is to induce the actor to undertake the risky conduct less frequently—to reduce his or her “activity level.”33 By imposing liability only when one has been careless, the negligence standard creates the incentive for the actor to exercise greater care. Thus, “[a]ccidents that are due to a lack of care can be prevented by taking care; and . . . such accidents are adequately deterred by the threat of liability for negligence.”34 In contrast, by holding the actor liable regardless of how careful he or she has been, strict liability creates the incentive for the actor to do less of the activity in question and to seek other ways of accomplishing his or her ends. “By making the actor strictly liable[,] . . . we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident.”35

In the present context, the DOJ’s purpose is to cause corporations to be more careful in the creation and administration of their compliance programs, not to

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33. Id. at 176.
35. Id. at 1177.
discourage the activity. The last thing the DOJ wants in this situation is to reduce the activity level of corporate compliance efforts. The most effective way to achieve this result is to adopt a negligence standard for corporate prosecution—that is, to announce that the DOJ will bring corporate indictments only against corporations that fail to exercise reasonable care to ensure that their compliance programs are effective. The prospect of inoculating their corporation against criminal indictment by exercising proper care in the construction and operation of their compliance program creates the strongest possible incentive for corporate policy makers to produce an effective program.

Holding corporations strictly liable—threatening to prosecute them for having a defective compliance program regardless of how much care they exercise—cannot strengthen this incentive, but can considerably weaken it. Knowledge that one’s best efforts cannot protect one’s corporation from indictment can make corporate policy makers question the value of those efforts. Rather than stimulate greater care to ensure that their compliance programs are effective, strict liability incentivizes corporate policy makers to seek other ways to protect their firm from indictment. In the present context, such other ways could include undertaking efforts to conceal wrongdoing from the government, employing corporate counsel to provide legal cover for questionable activity, exerting political influence to shield the firm from prosecutorial scrutiny, or failing to undertake efforts to learn of employee wrongdoing in the first place.36 These are certainly not the type of corporate activities that the DOJ wants to encourage.

The underlying purpose of applying the criminal sanction to corporations is to stimulate corporate policy makers to institute effective measures to reduce criminal wrongdoing by corporate employees, not to maximize the number of enforcement actions brought against corporations as collective entities. Holding corporations strictly liable for any defects in their compliance programs serves only the latter purpose, and hence is not good policy. For corporations whose policy makers voluntarily decide to institute measures designed to reduce employee wrongdoing, the only useful purpose that the threat of corporate indictment can serve is to cause corporate agents to exercise greater care to ensure that their corporate compliance programs are effective. This implies that the DOJ should employ a negligence standard for deciding whether to indict corporations that have instituted compliance programs. Hence, proper DOJ policy would be to clearly announce that it will prosecute corporations that have adopted compliance programs only if the corporate agents responsible for constructing or implementing the program have failed to exercise reasonable care to ensure that the program is effective. The DOJ can most effectively accomplish its purpose by informing corporate policy makers that

36. There is evidence that many organizations avoid formal self-assessment—are willfully blind to employee wrongdoing in order to protect themselves from the consequences of having to disclose the results of such self-assessments to prosecutors. See David A. Nadler, Don’t Ask, Don’t Tell, WALL ST. J., Nov. 25, 2003, at B2.
they can protect their firms from corporate indictment by exercising proper care to reduce criminal wrongdoing by employees.

IV. TWO IMPLICATIONS

Having specified the situations in which the threat of corporate prosecution can successfully serve its underlying purpose, I venture to draw two substantive implications from the analysis. The first is that the DOJ should not attempt to prescribe the nature or content of corporate compliance programs. The second is that the DOJ should not incentivize corporations to cooperate with federal criminal investigations in ways that conflict with their internal efforts to reduce criminal conduct by their employees.

With regard to the first implication, please note that federal white-collar criminal law applies to all corporations that operate within the United States, whether they are large, mid-sized, or small, whether they produce goods or services, and whether they are organized as an impersonal bureaucracy or as a close-knit group of colleagues. The DOJ must enforce federal criminal law across this incredibly diverse array of business organizations. There is little reason to believe that any particular compliance model would work equally well across all corporations, large and small, that produce everything from industrial products to software to financial instruments to intangible services, and that possess widely diverse corporate cultures.

U.S. Attorneys typically have a great deal of expertise in investigating wrongdoing, analyzing and marshaling evidence in support of allegations, negotiating guilty pleas or deferred or non-prosecution agreements, trying cases, and arguing appeals. But they also typically have little expertise in the fields of human psychology and organizational behavior. In a world in which a one-size-fits-all solution is not available, U.S. Attorneys are singularly ill-equipped to prescribe what constitutes an effective compliance program for the wide variety of corporations that come within their purview.

The negligence standard is a general standard. It is designed to apply across a large range of diverse situations. It requires parties to exercise reasonable care in the relevant circumstances. For this reason, negligence is the optimal standard to employ in situations in which regulators do not have sufficient knowledge to prescribe specific duties.37

What constitutes reasonable care varies greatly by industry and company. This is true not only with regard to protecting the safety of the public, but also with

37. Perhaps the most famous example of the advantage of holding parties to the flexible, reasonable care standard rather than creating a rigidly defined duty is Oliver Wendell Holmes’ attempt to define reasonable care as requiring all drivers to stop, look, and listen at railway crossings before proceeding in 1927. See Balt. & Ohio R.R. v. Goodman, 275 U.S. 66, 69–70 (1927). This duty quickly proved unworkable and was overruled within seven years as the Court returned to the general reasonable care standard. See Pokora v. Wabash Ry., 292 U.S. 98, 106 (1934).
regard to what will most effectively reduce employee wrongdoing. Holding corporations to the standard of reasonable care rather than prescribing a specific compliance model allows each industry and each company to find the most efficient means of reducing employee wrongdoing. Such an approach is more likely to advance the DOJ’s goal of reducing wrongdoing than are efforts by the DOJ to impose specific compliance measures on all corporations.\footnote{Requiring only the exercise of reasonable care rather than conformity to a pre-established compliance template prescribed by the DOJ will also eliminate many economically wasteful and unnecessary expenses associated with compliance programs. See, for example, the account provided by Patrick J. Gnazzo, Chief Compliance Officer at CA, in a previous symposium, Patrick J. Gnazzo, Remarks on “The Challenge of Cooperation: Consideration of the Ethical and Managerial Implications of the Organizational Sentencing Guidelines, Thompson Memorandum, SOX, Etc.,” 44 AMERICAN CRIMINAL LAW REVIEW 1441 (2007). Mr. Gnazzo recounts the requirement that CA adopt the type of enterprise resources planning system designed for manufacturing companies at a cost of $700 million even though “[they] are not a manufacturing company, [they] are a software company. All [they] manufacture is the CD.” Id. at 1442.} This suggests that DOJ policy will be more effective if the DOJ does not attempt to prescribe specific compliance measures, but rather bases the decision as to whether to prosecute corporations with defective compliance programs exclusively on the question of whether the corporate agents responsible for the program exercised reasonable care.

The second implication of our analysis is that the DOJ should not incentivize corporations to cooperate with federal criminal investigations in ways that conflict with their efforts to reduce criminal conduct by their employees. One of the nine factors that the Memo instructs federal prosecutors to consider in deciding whether to indict a corporation is “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.”\footnote{Filip Memorandum, supra note 2, at 4.} This is the most important factor to corporate policy-makers because, once an investigation has begun, it is the only one over which they can exert direct control. When faced with a situation in which there may have been criminal activity by one or more of its employees, the only thing corporate management can do to avoid indictment is disclose what it knows to the government and otherwise do whatever the government regards as cooperating with its investigation.

If the purpose of the DOJ policy governing the prosecution of corporations were to maximize the number of corporate convictions, then the DOJ would be well-advised to require corporations to fully disclose all information they possess regarding employee wrongdoing and otherwise do whatever they can to aid in the prosecution of their employees. However, the purpose of the DOJ policy is not to maximize corporate convictions, but to reduce criminal wrongdoing by corporate employees. It would therefore be counter-productive for the DOJ to require disclosures or other forms of cooperation that interfere with corporations’ internal crime reduction efforts.

In recent years, there has been much controversy over whether the DOJ required
corporations to waive their attorney-client privilege to be considered cooperative. In 2008, the DOJ addressed this controversy in the Memo by declaring that “[w]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review . . . . [P]rosecutors should not ask for such waivers and are directed not to do so.” At present, the DOJ policy is that cooperation requires only the voluntary and timely “disclosure of the relevant facts concerning . . . misconduct” but that “a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.” The problem with this revised DOJ policy on disclosure and cooperation is the phrase “for whatever reason.” For if the reason why a corporation does not want to disclose information to the government is that doing so would undermine its efforts to reduce employee wrongdoing, then the DOJ is undermining its own purpose by incentivizing the disclosure.

To be effective, corporate compliance programs often depend on the willingness of employees to come forward with information about potential wrongdoing. One way to encourage employees to come forward is to guarantee confidentiality: to promise that the identity of employees who communicate with management will not be made public and that such employees will suffer no adverse consequences from communicating with management. Such promises of confidentiality will successfully generate the desired flow of information only if they are scrupulously honored. The level of trust required to coax employees involved in or merely aware of potential wrongdoing to confide in management is so high that even one example of a “whistle blower” being involuntarily exposed or harmed can dry up all communication with management.

By requiring corporations to disclose all relevant facts, including the names of potential witnesses, current DOJ policy can undermine corporate promises of confidentiality. The first time one who comes forward under the shield of confidentiality is interviewed by federal prosecutors who obtained his or her name from management, the word will be out that the confidentiality policy is a fraud. To the extent that the corporation’s crime reduction efforts depend on the willingness of

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41. Filip Memorandum, supra note 2, at 8–9.

42. Id. at 9.

43. Id. at 11.
its employees to communicate with management, the effectiveness of these efforts will be reduced. Thus, requiring corporations to disclose “relevant facts” that undermine the employees’ trust in management can be antithetical to the policy’s underlying purpose.

This observation can be generalized. Beyond merely the type of disclosures that are required, the DOJ should not pressure corporations to cooperate with federal investigations in ways that would undermine the corporation’s own compliance efforts. To the extent that corporations’ crime reduction efforts are based on maintaining their employees’ trust that management is protecting their interests and treating them fairly and respectfully, the DOJ should not define cooperation in a way that requires firms to violate this trust. Therefore, cooperation should not necessarily require that corporations act as deputy prosecutorial agents or otherwise place corporate management in an adversarial relationship to their employees.44

In sum, if the DOJ intends to retain cooperation with its law enforcement efforts as a factor in the decision to charge a corporation, it should be careful to define cooperation in a way that does not undermine its own purpose in charging corporations with a crime in the first place—that is, in a way that does not impede the corporation’s voluntarily undertaken crime reduction program. However, the specification of precisely what this implies about the proper definition of cooperation must await the subsequent contributions of my more empirically knowledgeable fellow symposiasts.

V. CONCLUSION

Under present federal law, corporations may be charged and convicted of criminal offenses for the actions of their employees taken within the scope of their employment with the intent to benefit the corporation. This means that the DOJ must decide when it is appropriate to bring charges against corporations in addition

44. In the past, the DOJ has defined cooperation to require corporations to use their best efforts to induce their employees to waive their Fifth Amendment right against self-incrimination and provide information and testimony to the government. See United States v. Stein, 440 F. Supp. 2d 315, 318 (S.D.N.Y. 2006) (describing the government’s threat to consider failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment); United States v. Stein, 435 F. Supp. 2d 330, 367–73 (S.D.N.Y. 2006) (noting that the government may place pressure on corporations to fire or refuse to advance the legal fees of any partner or employee who does not cooperate with federal investigations). The DOJ has also required corporations to refuse to enter into joint defense agreements with its employees or to otherwise render employees any aid in mounting a defense to criminal charges. See, e.g., Laurie P. Cohen, In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees, WALL ST. J., June 4, 2004, at A1; Leonard Post, Deferred Prosecution Deal Raises Objections, Nat’l L. J. (Feb 2, 2006), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=900005446372&Deferred_Prosecution_Deal_Raises Objections&slreturn=20130820145327; KPMG in Wonderland, WALL ST. J., Oct. 6, 2005, at A14; Deferred Prosecution Agreement (Re: KPMG) from David N. Kelley, U.S. Attorney for the S. Dist. of N.Y., to Robert S. Bennett (Aug. 26, 2005), http://www.usdoj.gov/usao/nys/Press%20Releases/August%2005/KPMG%20dp%20AGMT.pdf; Press Release, IRS, KPMG to Pay $456 Million for Criminal Violations (Aug. 29, 2005), http://www.irs.gov/newswroom/article/0,,id=1469999,00.html.
to or instead of the individual employees who commit the offenses. A careful review demonstrates that the only useful purpose that can be served by bringing such charges is to induce corporate policy makers to undertake efforts to reduce criminal activity by their employees. And this implies that the DOJ’s policy with regard to the prosecution of corporations should be to threaten to bring charges only when doing so can spur corporate compliance efforts.

Knowledge of the purpose of the DOJ’s policy delimits its range of application—it identifies the ballpark within which the DOJ should be playing. This knowledge informs us that the DOJ is acting reasonably when it threatens to bring charges against corporations that have not undertaken crime reduction efforts because corporate management wants to avoid the financial cost of such efforts, or has ideological objections to doing so, or wants to preserve an informal corporate culture, or simply has not considered the matter. But this knowledge also informs us that the DOJ has no justification for bringing charges against thoroughly corrupt corporations whose policy makers are themselves engaging in criminal activity. In addition, our knowledge of the purpose of prosecuting corporations indicates that the DOJ’s policy should be to clearly announce that it will not prosecute corporations that undertake crime reduction efforts unless they do so in a negligent manner. Further, even for such corporations, the DOJ should not create a checklist of specific features that a compliance program must have to be considered effective, but should instead base the decision to prosecute exclusively on whether the firm undertook reasonable efforts to create an effective crime reduction program. And finally, to the extent that the DOJ bases it decision to prosecute on whether corporations cooperate with its investigations, it should be careful to define cooperation in ways that do not undermine corporations’ voluntarily undertaken crime reduction efforts.

When these conditions are met, we can be assured that the DOJ is playing in the right ballpark. For an assessment of how well it is playing the crime reduction game, we must turn to the insight provided by my fellow symposiasts.