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Peter J. Henning

SHOULD THE PERCEPTION OF CORPORATE PUNISHMENT MATTER?

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"Whoever conceals his transgressions will not prosper, but he who confesses and forsakes them will obtain mercy."
Proverbs 28:13

When corporations engage in criminal conduct, they generally do so in a big way. Save perhaps for Bernie Madoff's massive Ponzi scheme, the types of harm inflicted by a corporation are far beyond what any individual could produce, both in terms of the dollars involved and the impact of the misconduct on broad portions of society. For example, as part of its guilty plea to violating the Foreign Corrupt Practices Act ("FCPA"), German conglomerate Siemens A.G. admitted to paying approximately $1.4 billion in bribes, over a six-year period, through subsidiaries in France, Turkey, and the Middle East to obtain contracts.[1] Similarly, pharmaceutical giant Pfizer paid $2.3 billion, including a criminal fine of $1.195 billion, to settle civil and criminal investigations for promoting "off-label" uses of its drugs.[2] From environmental damage to price fixing, large corporations can affect the lives of thousands—perhaps even millions—of people.

The perception that corporations are persons like any other

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[1] *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines*, U.S. DEP'T OF JUSTICE (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html [hereinafter *Siemens AG*].

[2] *Justice Department Announces Largest Health Care Fraud Settlement in its History*, U.S. DEP'T OF JUSTICE (Sept. 2, 2009), http://www.justice.gov/usao/ma/Press Office – Press Release Files/Pfizer/Pfizer – PR (Final).pdf.

individual has been furthered by the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, which stated, "The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[3] Corporations are a part of the community and accorded a range of rights similar—although certainly not identical—to those enjoyed by individual members, and so it is natural that they are understood as being bound by the same laws and social norms as any other individual.

Professors Sherman and Percy find that blaming a group for the acts of its members is a rational conclusion when the group has a high level of entativity, defined as "the perception that a group is a unified and coherent whole in which the members are tightly bound together."[4] They argue that "[i]f members are indeed perceived as interchangeable parts, the bad acts of any members will be seen as applying to all members. Thus, it is the group as a whole that is seen as blameworthy rather than (or at least in addition to) the specific individuals who behaved badly."[5] Finding an optimal punishment for an organization is a different question, however, because a group cannot be punished in the same way as an individual can, despite the desire to do so.

The problems encountered in applying criminal sanctions to corporations reflect what some scholars argue is the inappropriateness of holding a corporation liable for a penal violation when it can only operate through its individual agents. Professor Albert W. Alschuler has argued that "corporate criminal punishment is a mistake," and that it would be better to return to an eighteenth century understanding of the criminal law that limited its application to only individuals.[6] Similarly, Professor John S.

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[3] Citizens United v. Fed. Election Comm'n, 2010 U.S. LEXIS 766, at *900 (U.S. Jan. 21, 2010).

[4] Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities are Likely to be Held Responsible for the Misdeeds of Individual Members*, 19 J.L. & POL'Y (forthcoming Fall 2010).

[5] *Id.*

[6] Albert W. Alschuler, *Two Ways of Thinking About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009). Professor Alschuler

Baker, Jr., has argued that "[m]odern corporations are abstract, impersonal, utilitarian entities lacking emotions and a personal story, and as such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecution."[7] Likewise, Professor John Hasnas has argued that a corporation is not the type of "thing" that can bear moral responsibility, so application of the criminal law to its operations is improper.[8]

Some assert that the public perception of a corporation as a type of "person" to be treated the same as any individual is misguided. For example, Professor Alschuler has stated that when employees of a corporation engage in wrongdoing the public "may truly personify and hate the corporation," but compares that to berating his computer for not responding or being the vehicle that delivers bad news.[9] Professor Hasnas has argued that "the assignment of criminal responsibility to corporate entities is a direct violation of the theoretical structure of Anglo-American criminal law that has had extraordinarily pernicious effects in practice."[10] If corporations are only legal fictions, and do not exist

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lamented, "Much to my regret, we cannot return to the eighteenth century." *Id*. at 1372.

[7] John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2003).

[8] John Hasnas, *Where Is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations*, 19 J.L. & POL'Y (forthcoming Fall 2010). Professor Hasnas asserts that "attributing moral responsibility to corporations as collective entities is either without practical significance or ethically pernicious." *Id*. Professor Smiley, on the other hand, takes the position that "collective moral responsibility is not defeated by the inability of groups to intend and to act. For, the ability to act and to intend is not a condition of moral responsibility *per se*." Marion Smiley, *From Moral Agency to Collective Wrongs: Re-thinking Collective Moral Responsibility*, 19 J.L. & POL'Y (forthcoming Fall 2010).

[9] Alschuler, *supra* note 6, at 1372–73. Professor Alschuler notes that "[e]xpressing one's values by smashing a computer can be therapeutic, but it is not recommended for children or for grownups." *Id*. at 1373. Of course, a computer is no more a corporation than the Washington Monument is the federal government, so equating criminal punishment with physically abusing an object seems to be a bit misdirected.

[10] John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009).

apart from their assets and agents, then why should the organization be held liable under the criminal law rather than simply holding the agents responsible and, when necessary, extracting compensation through the seizure of assets?

Perhaps the most cogent criticism of corporate criminal liability is that the only real punishment available against a corporation is a fine, which can be much more easily calibrated to redress any harm through a civil proceeding that does not require all the protections usually afforded in a criminal prosecution. When the only issue is monetary, the criminal courts are no better equipped to impose sanctions that will deter future misconduct and extract a measure of retribution than an administrative agency could through a civil suit or even an in-house adjudicative procedure.[11] If civil proceedings are just as good as criminal prosecutions, then there seems to be a significant mismatch between the societal desire to punish corporations through the application of the criminal law, rather than just by way of civil sanctions, and the ability of the criminal law to be applied in a meaningful way.[12]

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[11] *See* Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426 (2009).

> If the application of the criminal law to conduct were based solely—or perhaps even predominantly—on whether it would deter future misconduct as a matter of both specific and general deterrence, then the argument against corporate criminal liability would be quite persuasive. The critique relies on the assumption that a system of civil enforcement that would result in the assessment of a monetary penalty could be created and would have roughly the same deterrent effect as a criminal prosecution and its resultant fine. Leaving aside the issue of regulatory capture in which regulated businesses take control of the agency charged with overseeing them, simply relying on civil enforcement mechanisms entails viewing the civil penalty as interchangeable with the criminal punishment, without regard to the underlying nature of the legal violation. In other words, it's all just money to a corporation—so who cares what label is attached to it when you pay the same amount regardless of who collects it?

Id.

[12] The amount of a criminal fine does not necessarily connote that a meaningful punishment has been imposed when taking into account the size of the organization and the impact of the payment on the organization. For example, Siemens paid a criminal fine of $450 million to settle the

If the only result of corporate criminal prosecutions were monetary penalties, then prosecuting corporations just so everyone feels better would debase the criminal law. Criminal sanctions are appropriate for a corporation, even if it has a compliance program in place, when the goal of the criminal prosecution is rehabilitation of the organization to change its corporate culture so that it can more effectively prevent future violations.[13] While begrudging corporate criminal liability, Professor Alschuler noted that it does serve one purpose: "Because corporate criminal punishment is not really criminal punishment as people customarily understand it, harsh exemplary penalties are inappropriate. The goal should be to induce an appropriate level of monitoring within the organization."[14] Compliance programs in corporations are now commonplace, and no large organization can risk operating without a structure in place ostensibly designed to detect and prevent misconduct.

Finding the proper balance in sanctioning a corporation can be frustrating because the typical tool for punishing a defendant, a term of incarceration, is not available, and the alternative of a fine is often perceived as simply a means by which a corporation buys its way out of a problem. Two recent cases involving corporate

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government's FCPA investigation, which seems like a significant amount, except that the company reported net income of 2.5 billion euros in 2009. U.S. *supra* note 1; Peter Löscher, Chief Executive Officer of Siemens AG, *Letter to our Shareholders*, SIEMENS, http://www.siemens.com/annual/09/en/letter_to_our_shareholders/index.htm (last visited Oct. 18, 2010).

Of course, a corporation does not have its "own" money in the same sense that an individual does because it is owned by its shareholders, so a fine does not come out of the company's wallet but rather that of the shareholders. As Professor Kolber points out, "The act of handing over *somebody else's* check is not severe at all. Fines are comparative in nature because only when fines are understood as a reduction in people's assets (or a change in their level of happiness) can we make sense of their severity." Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1577 (2009) (emphasis added).

[13] Henning, *supra* note 11, at 1431 ("When criminal prosecution and a resultant punishment is viewed as advancing the rehabilitation of the corporation, then the notion of reform rather than retrospective sanctions becomes the means to assess whether the criminal law should be used against the organization.").

[14] Alschuler, *supra* note 6, at 1389–90.

misconduct show the frustration federal judges have in trying to impose appropriate sanctions on a corporation, and illustrate the need to use the criminal law as a tool for corporate reform and not merely as a means of exacting a form of meaningless retribution.

In *Securities & Exchange Commission v. Bank of America*, a civil securities fraud case, United States District Court Judge Jed S. Rakoff rejected a proposed settlement because it contained only a token civil monetary penalty that would effectively penalize the very shareholders harmed by the misconduct.[15] The case arose out of the acquisition of Merrill Lynch by Bank of America during the 2008 financial crisis. As part of the merger, Bank of America solicited votes from its shareholders to approve the transaction.[16] The proxy solicitation materials did not reveal the substantial financial problems that existed with Merrill Lynch's assets, and stated that Merrill Lynch would not be permitted to pay bonuses to its executives when in fact Bank of America had already approved them.[17]

The initial proposed settlement required Bank of America to pay a $33 million penalty and the court would issue an injunction

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[15] *See* Sec. & Exch. Comm'n v. Bank of America Corp., 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) [hereinafter *Bank of America Corp.*].

[16] *Id.*

[17] The district court summarized the fraud claims as follows:

> (1) [T]he Proxy Statement that the Bank sent to its shareholders on November 3, 2008 soliciting their approval of the merger with Merrill Lynch & Co., Inc. ("Merrill") failed adequately to disclose the Bank's agreement to let Merrill pay its executives and certain other employees $5.8 billion in bonuses at a time when Merrill was suffering huge losses; and
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> (2) the Bank failed adequately to disclose to its shareholders either prior to the shareholder approval of the merger on December 5, 2008 or prior to the merger's effective date of January 1, 2009 the Bank's ever-increasing knowledge that Merrill was suffering historically great losses during the fourth quarter of 2008 (ultimately amounting to a net loss of $15.3 billion, the largest quarterly loss in the firm's history) and that Merrill had nonetheless accelerated the payment to certain executives and other employees of more than $3.6 billion in bonuses.

Sec. & Exch. Comm'n v. Bank of America Corp., Nos. 09 Civ. 6829 (JSR), 10 Civ. 0215 (JSR), 2010 WL 624581, at *1 (S.D.N.Y. Feb. 22, 2010) (line space in original) [hereinafter *Sec. & Exch. Comm'n*].

barring it from future violations of the proxy fraud provisions.[18] In rejecting the settlement, Judge Rakoff ridiculed the resolution as little more than window-dressing:

> The injunctive relief, as noted, is pointless. The fine, if looked at from the standpoint of the violation, is also inadequate, in that $33 million is a trivial penalty for a false statement that materially infected a multi-billion-dollar merger. But since the fine is imposed, not on the individuals putatively responsible, but on the shareholders, it is worse than pointless: it further victimizes the victims.[19]

Even this civil effort to police corporate misconduct fell short because it simply glossed over the harm caused and did little to prevent future violations. More than just a meaningless conclusion, Judge Rakoff found that the settlement, which seemed to be an effort to hide the truth, made any purported punishment all the more suspect.[20] He concluded:

> The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth.[21]

When the Securities & Exchange Commission ("S.E.C.") and Bank of America came back a few months later with a new settlement, they incorporated some modest measures to ensure that the corporation would not engage in similar misconduct in the future. Judge Rakoff found them to be an improvement—however modest—over the first settlement, explaining that "[n]o one can quarrel that these remedial steps are helpful, so far as they go, and may help to render less likely the kind of piecemeal and mincing approach to public disclosure that led to the Bank's problems in

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18 *Bank of America Corp.*, 653 F. Supp. 2d at 508.
19 *Id.* at 512.
20 *Id.*
21 *Id.*

the instant cases."[22] Still, the outcome hardly met the judge's view of an ideal result that should impose meaningful sanctions or lead Bank of America to implement real changes in its corporate governance to protect shareholders in the future. Judge Rakoff grudgingly approved the settlement, finding that it was "better than nothing" but still "half-baked justice at best."[23]

In *United States v. Guidant LLC*, United States District Judge Donovan W. Frank rejected a proposed plea agreement between Boston Scientific and federal prosecutors related to defective heart defibrillators manufactured and sold by Guidant Corporation.[24] After the violations at issue, Guidant Corporation was acquired by Boston Scientific, and is now a wholly-owned subsidiary.[25] It pled guilty to making a false and misleading report to the Food and Drug Administration ("FDA"), and for failing and refusing to report to the FDA a medical device correction.[26] At issue were short-circuiting problems in some of Guidant's defibrillators, which resulted in a number of deaths due to the device's failure—although the company was not charged with any crimes related to the loss of life.[27] The plea agreement required Boston Scientific, as the controlling shareholder of Guidant, to pay a fine of

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[22] *Sec. & Exch. Comm'n*, 2010 WL 624581, at *4.

[23] *Id*. at *5. The district court lamented:

> [T]he proposed settlement, while considerably improved over the vacuous proposal made last August in connection with the Undisclosed Bonuses case, is far from ideal. Its greatest virtue is that it is premised on a much better developed statement of the underlying facts and inferences drawn therefrom, which, while disputed by the Attorney General in another forum, have been carefully scrutinized by the Court here and found not to be irrational. Its greatest defect is that it advocates very modest punitive, compensatory, and remedial measures that are neither directed at the specific individuals responsible for the nondisclosures nor appear likely to have more than a very modest impact on corporate practices or victim compensation. While better than nothing, this is half-baked justice at best.

Id.

[24] United States v. Guidant LLC, Crim. No. 10-mj-67 (DWF), 2010 WL 1729179, at *1 (D. Minn. Apr. 27, 2010).

[25] *See id.* at *9.

[26] *See id.* at *10.

[27] *See id.* at *6.

$253,962,251 and also forfeit $42,079,675.[28]

While Judge Frank did not disagree with the financial provisions of the plea agreement, he found that the government's failure to include a term of probation that would require future reforms by Boston Scientific meant that it was "not in the best interests of justice and d[id] not serve the public's interest because they d[id] not adequately address Guidant's history and the criminal conduct at issue."[29] The government and the company defended the decision not to include any form of corporate probation because "Boston Scientific is a conglomerate" and Guidant was no longer an operating part of the company, so that imposing probationary terms "[wa]s absolutely meaningless."[30] Moreover, the parent company was already under supervision from an unrelated civil settlement, so that a means for supervising the entire corporation was already in place.[31]

Guidant involved the problem of pursuing the criminal prosecution of a corporation, for a wrongdoing that occurred years earlier, when the entity no longer existed because it had been acquired by another company that was not directly responsible for the violation. Corporations cease to exist with great regularity, particularly when there is a boom in mergers and acquisitions that creates conglomerates comprised of a number of different operating divisions, which happened in the healthcare field a few years ago.

Judge Frank was unwilling to simply abide by corporate formalities to excuse the entity in its current form from having to take any concrete steps to reform itself, finding that "[t]he interests of justice are not served by allowing a company to avoid probation [by] simply changing their corporate form."[32] The district court concluded that "a term of probation would be appropriate in this case and could be fashioned in a manner to serve the public's interest and address the accountability issues" raised by two

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[28] *Id.* at *3.

[29] *Id*. at *9.

[30] *Id.* These were the statements of one of the federal prosecutors in the case.

[31] *Id.* at *10.

[32] *Id.* at *11.

doctors whose patient died when a Guidant defibrillator short circuited.[33]

The judge noted that the Federal Sentencing Guidelines call for probation if "necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct."[34] Among the potential terms of a corporate probation that could be considered is community service "to repair the harm caused by" Guidant's offenses and to "help build the public's confidence in the FDA regulation process, the medical device manufacturers' quality control efforts, and the cardiac healthcare industry in general."[35] In addition, corporate probation could include dedicating additional resources to corporate charitable programs and to Boston Scientific's internal compliance and ethics programs.[36]

While none of these available probationary requirements would necessarily prevent future misconduct, the district court in *Guidant* was deeply concerned about the absence of *any* remedial provisions in the sentencing, which it viewed as crucial to accepting the plea bargain.[37] Paying out money, whether styled as restitution or a fine, addressed only the past but not the future. Judge Frank perceived that corporate punishment imposed without including terms designed to help the organization change the way it does business was a meaningless application of the criminal law.

The decisions in *Bank of America* and *Guidant* show that perceptions of corporate crime are not just limited to an assessment of corporate guilt, but include an understanding of the efficacy of corporate punishment that is different from prosecutions of an individual. While an organization may have various human characteristics attributed to it, a corporation is also understood as something that should be treated differently in the application of sanctions. The district judges in *Bank of America* and *Guidant* looked at these corporations in a similar way the general public does, that organizations are certainly capable of engaging in

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33 *Id*. at *12.

34 *Id*. (quoting U.S.S.G. § 8D1.1(6) (2010)).

35 *Id.*

36 *Id*.

37 *See id.* at *15.

wrongdoing apart from what any individual might have accomplished, and that just imposing fines without seeking to reform the corporation provides little real benefit to society.

The perception of corporate punishment does matter when the public views the company as a coherent entity that can be changed by the application of criminal sanctions so that it can conform to the requirements of the law. As such, society wants to see something more than a corporation paying a fine because that merely represents its ability to buy its way out of a criminal case. Rather, it wants to see criminal punishment used to rehabilitate a corporation to prevent future misconduct.

Civil sanctions are understood as a means of resolving a case without assigning blame, while criminal prosecution brings with it the demand that an organization take responsibility for its conduct, which reflects more than just the actions of individual agents. Demanding concrete changes in how an organization conducts itself is a reasonable means of responding to the psychological perception that corporations can be blameworthy. Using the criminal law as a means to rehabilitate the organization is not a misuse of penal sanctions, but a rational response to society's desire to see those responsible for misconduct punished.