THE SUBSTANTIVE LAW CASE FOR PENALIZING CORPORATE CRIMES CIVILLY

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Last summer, the Department of Justice issued new policies meant to emphasize the investigation and prosecution of individuals in cases of corporate malfeasance. The move was an understandable reaction to the practice of confronting corporate wrongdoing with mere entity-level liability, unaccompanied by actions against the real persons responsible. The new policies have generated significant discussion. What has remained largely ignored, however, is the policies’ emphasis on civil actions against individuals. This brief comment suggests that civil actions represent, in many cases, the best fit for penalizing individuals involved in corporate misconduct.

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Criminal law is inherently moral and expressive. In the corporate context, criminal law is “our most powerful tool for expressing what conduct is outside the bounds of acceptable corporate behavior.” However, the expressive component of criminal law is lost where the substantive law is unclear.

2 The Yates Memo directs criminal and civil attorneys to maintain routine communication and to work together on corporate investigations. See id. at 4. It specifically provides that “if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance.” Id.
3 See Peter J. Henning, Corporate Criminal Liability and the Potential for Rehabilitation, 46 Am. Crim. L. Rev. 1417, 1420 (2009)(“[D]esignating conduct as criminal is important apart from any sanction imposed and that the application of the criminal law to an actor in society is a means to express a moral judgment about that actor's conduct.”); see also Joel Feinberg, The Expressive Function of Punishment, 49 The Monist 397, 400 (1965)(distinguishing punishment by reference to the necessary accompanying “expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation”).
The substantive law sets forth a code, and violations of that code are condemned. Some parts of the code are so fundamental as to be entirely uncontroversial among sane adults who made it through kindergarten: don’t murder; don’t hit; don’t take other people’s stuff. Other parts are less evident: you may not sell certain firearms to persons under twenty-one years old in Massachusetts; you can’t trade securities based on material non-public information; don’t try to secure a business advantage by providing a thing of value to a foreign government official. Absent a clear code to the contrary, these latter offenses would be difficult to condemn.\(^5\)

Unluckily, the criminal law that is generally applied in the corporate context is not at all clear. Substantive corporate law – that is, the set of rules governing conduct in the corporate setting – is broad and in a near constant state of flux. Ellen Podgor wrote in 1994 that “white collar crime is changing so rapidly that it is difficult to provide a firm or constant setting for its understanding.”\(^6\) Nearly a decade and a half earlier, Jed Rakoff wrote of possibility that “the scope of the mail fraud statute is too great, either in requiring only a very minimal amount of reprehensible conduct to trigger its application or in extending its application to an immensely broad and as yet ill-defined spectrum of intentions and activities….”\(^7\) Indeed, the early years of the Securities and Exchange Commission posed a significant hurdle to the rule of law while laying the foundation for modern administrative law.\(^8\) The root of the problem: wildly overbroad substantive laws upheld only by being interpreted as lawful delegations of authority.\(^9\) These early efforts to govern corporations lay the groundwork for the vague standards and imprecise language that characterize much of the substantive corporate criminal law today.

Questions about the scope of prohibited conduct under RICO are seemingly limitless.\(^10\) John Anderson and Joan Heminway have mounted a

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5 Two quick points for this very short comment: Yes, this is the much-maligned *malum in se, malum prohibitum* distinction; it’s still useful. And, yes, it is true that the listed *malum in se* offenses also require a clear code in order to condemn; but, there is widely-shared normative clarity that requires no reference to substantive law regarding these offenses, and the same cannot be said of the *malum prohibitum* offenses.


7 See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 821 (1980)(advocating a jurisdictional approach to the use of mails element, while recognizing the possibility that this would cause the mail fraud statute to become unmanageably broad).

8 See & Exch. Comm’n v. Chenery Corp., 332 U.S. 194 (1947)(permitting the “informed discretion” of an administrative agency to apply with retroactive effect).

9 The controlling statute in *Chenery* was the Public Utility Holding Company Act of 1935, which empowered the SEC to limit the issuance or sale of securities where it found such action would result in “an unfair or inequitable distribution of voting power.”

sustained attack on lack of clarity to insider trading law. Heminway has concentrated on the failure of both Congress and the SEC to define materiality. Anderson extends this critique to include a lack of clarity as to what information is “nonpublic” and when one trades “on the basis” of information. Honest services fraud has been subject to continued attack as impermissibly vague. The list goes on.

The solution, such as it is, has been for courts to offer clarity, bit by bit. As Dan Kahan describes, a “system of federal common law crimes” not only exists; it does so “(in part) because it works so much better than the imaginary regime of legislative crimes ever would.” “[T]he proposition that federal crimes are solely creatures of statute is a truth so partial that it is nearly a lie.” Federal criminal laws are more often open-ended, vague, and unclear, than not. This is particularly true in the corporate context.

So it turns out that common law crimes do exist; they proliferate among the set of under-defined rules governing conduct in corporate settings; yet, they are tremendously problematic. Kahan’s pragmatism about definitional capacity offers little comfort to those “languishing in prison [where no] lawmaker has clearly said they should.” The imposition of criminal punishment ought to be different in kind than the imposition of civil liability. Even assuming identical penalties – e.g. deprivation of property – there remains a difference between conviction of a crime and a finding of liability. Criminal law condemns, and the condemnation rings hollow where it is based on a post hoc definition of a rule grounded only in positive law.

True, criminal law remains our best tool for designating certain conduct beyond the pale in terms of acceptable corporate behavior. But much of that designated as criminal is by no means beyond the pale – it is too broad, too ill-defined, too widely-practiced. In these cases, civil actions


12 See id.

13 See Anderson, Solving the Paradox, 88 Temple L. Rev. at 279-287.


15 See Kahan, Chevron, at 470.


18 See Ulhmann, Pendulum, at 1263.

would succeed where criminal law has failed. Civil penalties imposed in a common law manner simply do not raise the same rule of law concerns as criminal common law.

When we punish those who could not have known they were violating the law, it is sometimes rationalized by reference to assumption of risk. As a British Lord famously put it: “Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot they fall in.”20 But, as this colorful quote illustrates, assumption of risk fails to capture the expressive component of criminal punishment: perhaps the person who skated too close to thin ice cannot complain for getting wet, but we might not condemn him. This is particularly true in the corporate setting where entire industries exist for the purpose of helping people and corporations profitably operate near poorly defined legal limits. Forget the lone daredevil; consider instead a cautious village that thrives when they send fishermen near the edge of the ice.

As it stands, corporate law enforcement faces three options.

1. Continue to impose entity-level criminal penalties for corporate malfeasance, unaccompanied by individual sanctions. This course undermines the expressive and deterrent impact of law by failing to align sanctions with authority.

2. Enhance resources and incentives for targeting individuals in instances of corporate wrongdoing. This course risks either systemic failure through the rule of lenity or, avoiding that, expressive failure by convicting and condemning persons for conduct not clearly defined as criminal.

3. Enhance resources and incentives for bringing civil actions against individuals in cases of corporate misconduct. This allows the expressive function of condemnation to operate through the entity, and the deterrent function of cost to operate through the actual persons making decisions.

This last course is not perfect. It suffers (at least) from the negative expressive function of signaling elite corporate wrongs are handled civilly while street crimes are condemned criminally. However, among the three options, it is the least damaging and best functions both expressively and as a deterrent.

The practical problem with favoring civil actions against responsible individuals remains implementation. U.S. Attorneys and criminal prosecutors have proven themselves perhaps uniquely able (or willing?) to

20 See Knuller v. Director of Public Prosecutions, 2 All E.R. 898, 910 (1973)(Lord Morris); see also Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952)(it is not “unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line”).
proceed against powerful corporate interests. Civil agencies have proven themselves considerably less able (or willing?) to do so.\textsuperscript{21} If the potential for more civil remedies embedded in the Yates’ Memo is to be realized, the course forward likely involves either emphasizing the civil function of USAOs, or putting pressure on regulatory agencies to be more aggressive.

\textsuperscript{21} For one particularly compelling example of lax regulatory oversight, see U.S. Senate, Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Gov’t Affairs, \textit{U.S. Vulnerabilities to Money Laundering, Drugs and Terrorist Financing: HSBC Case History} (July 17, 2012).