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**Corporate Criminal Liability and Punishment
in the 21st Century: Departures from Constitutional and
Criminal Norms and Anomalies in Practice**

Introduction

Over the course of the past century, the legal doctrines governing imposition of corporate criminal liability and punishment have undergone marked transformation. While criminal prosecutions of corporations are now an accepted feature of American criminal law, the development of a legal framework permitting such prosecutions is a relatively recent phenomenon. In the early 1900s, corporations were viewed as legal fictions that lacked capacity to form the requisite “evil intent” to violate the criminal law, and punishment of corporations for the misconduct of their employees was virtually non-existent.

As the corporation came to play an increasingly important role in the fabric of American commercial life, however, pressure mounted to hold corporations accountable for the wrongful conduct of their employees. The law, in turn, evolved – more an outgrowth of perceived social necessity than a product of informed legal analysis or jurisprudential principles. As one commentator has observed, the development of corporate criminal liability in the Anglo-American system is like the growth of weeds: “Nobody bred it, nobody cultivated it, nobody planted it. It just grew.”¹ This un-tended growth spawned a doctrine of vicarious corporate criminal liability that is not only untethered from many of the traditional restraints that limited the doctrine in the civil context, but also divorced from the core principle of American criminal jurisprudence that guilt requires moral culpability.

While the potential severity of the doctrine of vicarious corporate criminal liability was historically tempered by the existence of minimal corporate fines and patterns of lenient sentencing, the law governing corporate criminal punishment has itself evolved over the last several decades – on a seemingly independent though parallel track – to permit the imposition of increasingly harsh penalties on corporations for the misconduct of their employees. The ever-expanding criminalization of regulatory offenses, the passage of statutes with unprecedented high levels of fines, the adoption of organizational sanctions by the Federal Sentencing Commission, and the advent of the “corporate death penalty” in the form of exclusion and debarment remedies all have provided new incentives for prosecutors to pursue corporate criminal prosecutions.² Coupled with the developments in the law governing corporate criminal liability, these trends have ushered in the modern era of aggressive corporate criminal prosecutions and extraordinarily harsh – at times draconian – punishment of the corporate entity for misconduct by corporate employees.

While the twin doctrines of corporate criminal liability and punishment have been evolving without apparent limitation or constraint, little attention appears to have been given to the effect of the confluence of these two developments in the law on settled notions of crime and punishment and accepted standards for dispute resolution to ensure fair and just determinations of contested matters. There is a danger, in the current climate of zero tolerance for corporate wrongdoing and unprecedented harsh penalties, that important principles in our

constitutional and criminal jurisprudence will be undermined and, as a corollary, that credibility in the American system of criminal justice will be diminished.

This article traces in short compass the parallel expansion of the law governing corporate criminal liability and the legal framework for imposition of corporate punishment, and examines the impact of the interplay between these two developments on our constitutional and criminal jurisprudence. The article also examines the manner and means, in practice, by which serious disputes between corporations and the government are now resolved where allegations of criminal misconduct are in play. However strong and legitimate the interests may be in holding corporations accountable for the misconduct of their employees and in imposing stern punishment for corporate criminal misconduct, the current legal framework for determining issues of crime and punishment in the corporate sphere warrants examination to address apparent departures from constitutional norms, lack of accord with the basic goals of the criminal law, and the anomalies that have, in practice, arisen from the existing framework.

I. Evolution of the Law Governing Corporate Criminal Liability

Among the most firmly rooted principles in Anglo-American law is the maxim that no one should be punished as a criminal unless he or she acts with “*mens rea*” or an “evil-meaning mind.” It is this state-of-mind element in our jurisprudence that has distinguished throughout history between criminal misconduct worthy of condemnation and punishment and civil misconduct that warrants only compensation for injuries sustained.³ The concept of *mens rea* is, in turn, intertwined with the equally well-rooted principle of deterrence, which “addresses the threat of legal sanction to a guilty or potentially guilty mind.”⁴

When corporations first came into existence in the 17th and 18th centuries, the requirement of *mens rea* operated as a bar to the imposition of criminal liability on corporations and gave rise to early common law notions of corporate criminal immunity. Thus, Blackstone in his *Commentaries* noted that, “[a] corporation cannot commit treason, or felony, or other crime, in its corporate capacity; though its members may in their distinct individual capacities.”⁵ The corporation was viewed to be a legal fiction that “lacked physical, mental and moral capacity to engage in wrongful conduct or to suffer punishment. It could neither commit criminal acts, entertain criminal intent, nor suffer imprisonment. It had no soul, and so could not be blamed.”⁶

As corporations began to play an increasingly active role in American society, however, early notions of corporate criminal immunity began to give way to considerations of public policy and to the view that corporations should be deemed legally responsible for the actions of their employees. Thus, the American doctrine of corporate criminal liability developed from the practical notion that large organizations should not be able to profit from wrongdoing by their employees with corporate immunity from criminal sanction, and that the corporation should be held accountable for what ultimately amounts to organizational behavior.⁷ The vehicle for such expanded corporate accountability was the civil law doctrine of vicarious liability.

While originally a tort law concept designed to provide courts with a means by which to ensure compensation to innocent victims and to encourage accident prevention, the doctrine of vicarious liability was imported into the criminal law as a means of achieving enhanced corporate accountability. Thus, in *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909), the Supreme Court for the first time employed traditional respondeat superior principles in the criminal law context to hold corporations accountable for the conduct of their employees. Faced with a challenge to the Elkin's Act, premised on the ground that the statute was unconstitutional because Congress lacked authority to impute to a corporation the

commission of criminal offenses,⁸ the Court stated: “[a]pplying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.”⁹

The motivation for the *New York Central* Court’s decision to ratify liability in such instances was the growing awareness that a great majority of transactions in modern business were being conducted through corporations and that, immunized from liability, corporations would be free to conduct themselves in whatever fashion they saw fit.¹⁰ Thus, the Court observed that the law,

cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.¹¹

In upholding the Elkin’s Act, the *New York Central* Court also addressed, albeit cryptically, the thorny issue of intent. Specifically, the Court stated that “[i]t would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act”¹² While the Court limited its holding to acts of misfeasance in violation of a duty imposed by statute,¹³ the Court gave express recognition to the broader proposition that corporations could be liable criminally for the purposeful doing of a wrongful act based upon the “intent and purposes” of their agents.¹⁴

From this theory of corporate criminal liability for crimes requiring general intent, an easy transition was made to imputing the requisite specific intent of corporate agents to corporations and thereby holding corporations accountable for crimes such as contempt, conspiracy and the like.¹⁵ Courts thereafter summarily rejected the notion that a corporation could not be held criminally liable because it lacked capacity to form the requisite “evil intent,”¹⁶ and the modern doctrine of corporate criminal liability was born. The governing rule, which emerged from *New York Central* and its progeny, is that criminal liability will be imputed to the corporation for the wrongful acts of its employees, provided: (i) the employee’s conduct was within the scope of his or her employment; and (ii) the conduct was undertaken with the intent, at least in part, to benefit the corporation.¹⁷

Notwithstanding these apparent limitations, the doctrine of corporate criminal liability has evolved virtually uninhibited by either the traditional limits of tort law or the essential safeguards of the criminal law. This unchecked evolution has occurred through erosion of any meaningful restraint on either prong of the test for corporate criminal liability.

The first prong – that the agent be acting within the scope of his or his employment – is derived directly from the doctrine of respondeat superior in tort law.¹⁸ As applied in the context of corporate criminal liability, however, the doctrine has transcended its civil law roots.¹⁹ Rather than looking to principles of “actual” or “apparent” authority as in the context of traditional agency law, in the criminal sphere liability may attach to conduct “within the scope of

employment” even though the employee was not authorized to engage in the misconduct in question, even though corporate management was unaware of the employee’s conduct, and despite good faith efforts by corporate management to prevent commission of the wrongful act. Thus, as Professor Brickey has observed, “in the context of corporate criminal prosecutions, ‘within the scope of employment’ is a term of art signifying little more than that the employee’s crime must be committed in connection with his performance of some job-related activity.”²⁰ As such, the “scope of employment” prong of the test provides no meaningful limitation on the doctrine of vicarious criminal liability.

The second prong – that the employee intend to benefit the corporation – has repeatedly been held to require only that the employee have as *one* of his or her intentions that the corporation benefit. The employee need not intend that *only* the corporation benefit nor that the corporation should be the principal beneficiary; all that the employee need intend is that the corporation benefit, at least in part, by the wrongful conduct. Moreover, if the intent to benefit the corporation is present, the corporation may be held criminally liable even though the wrongful conduct conferred no actual benefit on the corporation.²¹

In short, as a result of this evolution, under the modern doctrine of corporate criminal liability, corporations may be held criminally liable: for conduct by their employees that was neither authorized nor approved nor even known to corporate management;²² for conduct that was specifically forbidden by corporate policy, even in circumstances where the corporation undertook good-faith efforts to prevent the prohibited activity;²³ and for conduct that was carried out primarily in furtherance of the employee’s own personal interests or for the benefit of independent third parties and that did not in fact confer any benefit on the corporation.²⁴ Moreover, the corporation may be held liable for the wrongful conduct of its employee whether the employee who engages in the misconduct is a senior manager or a low-level employee. The doctrine of vicarious criminal liability, as it has developed in our jurisprudence, draws no distinction.²⁵

Further, under the doctrine of “collective knowledge,” the corporation may be held criminally culpable based on the “collective knowledge” of its employees, even though no single employee possesses the requisite knowledge for commission of the criminal offense.²⁶ Similarly, although there is no doctrine of “collective intent,” and the different states of mind of different employees cannot be aggregated to support a finding of corporate criminal intent,²⁷ a corporation may nevertheless be found to have intentionally committed a criminal act even though no employee possessed the requisite intent to violate the law. Specifically, under the *Bank of New England* doctrine, even though no employee acts with the requisite intent to violate the law, the corporation may be held to have intentionally violated the law where the corporation as an organization exhibited “flagrant indifference” to its legal obligations.²⁸

As a result of these collective developments, criminal liability may attach to corporations in circumstances where the corporation cannot be said in any meaningful sense to have *knowingly* and *intentionally* engaged in misconduct or to be morally culpable in connection with the commission of the wrongful act. The modern doctrine of corporate criminal liability has thus evolved well beyond traditional civil law limitations and without the core, intent-based protections of the criminal law.

II. The Rise of Corporate Criminal Punishment

In the early 1900s, when the doctrine of corporate criminal liability was still in its infancy, punishment of corporations for misconduct engaged in by their employees was virtually non-

existent. Even as the law governing corporate criminal liability began to expand, however, the framework for imposition of corporate criminal punishment remained essentially unchanged. Minimal fines and patterns of lenient sentencing in turn provided little prosecutorial incentive to bring complex criminal prosecutions. As a result, throughout the early 1900s and up through the mid-1980s, corporate criminal prosecutions were exceptionally rare.²⁹

Historically, criminal statutes typically provided for substantial terms of imprisonment for individuals, but only modest fines. For example, in the period prior to the mid-1980s, the principal federal criminal fraud statutes – mail fraud, wire fraud, securities fraud and bank fraud – carried jail terms of up to five years per count but fines of only \$1,000 per count (for mail and wire fraud) or \$10,000 per count (for securities fraud and bank fraud).³⁰ Thus, notwithstanding the emergent, sweeping theory of vicarious corporate liability available to prosecutors to employ in the pursuit of corporations for the criminal misconduct of their employees, the penalty framework – focused as it was on individual wrongdoers – discouraged corporate criminal prosecutions.³¹

More recently, however, the legal framework for imposition of corporate criminal punishment has changed dramatically, and has all but overtaken, in terms of expansiveness, the parallel development in the law governing corporate criminal liability. In the mid-1980s, Congress began to enact legislation that increased substantially the fines that could be imposed on corporations found guilty of a wide range of criminal offenses.³² The fines increased to as much as \$1 million per offense and, for certain specific offenses, to even higher levels.³³ The penalty framework also expanded beyond traditional fines through a proliferation of federal corporate criminal statutes that included enhanced penalty provisions.³⁴ These statutes included: provisions for alternative fines based on gain or loss caused by the criminal conduct; criminal and civil forfeiture; injunctions against fraud; restitution; and organizational probation.³⁵

These developments in turn set the stage for the adoption in 1991 of the Federal Sentencing Commission's Organizational Sanctions (the "Organizational Guidelines").³⁶ Upon adoption, the Organizational Guidelines applied to the sentencing of all organizations for all federal felony and Class A misdemeanor offenses,³⁷ and they increased substantially the available penalties for corporate criminal misconduct. In particular, the Organizational Guidelines called for awards of restitution, imposition of enhanced fines, application of various "multipliers," and expanded use of the corporate probation sanction.³⁸

For virtually all types of corporate criminal misconduct, the application of the Organizational Guidelines has resulted to date in fines and related penalties substantially greater than those that would have been imposed under the pre-Guidelines regime. Specifically, pursuant to the Organizational Guidelines, an award of restitution is contemplated as an initial matter and thus, even before consideration of the criminal fine, the corporation must fully redress the harm caused by the wrongful conduct through payment of what amounts to compensatory damages.³⁹ The base fine is then separately computed based upon the greater of the pecuniary gain or the pecuniary loss caused by the criminal offense.⁴⁰ Accordingly, prior to application of any of the multipliers, the Organizational Guidelines contemplate that the corporation will pay, at a minimum, "two times" the loss caused by the wrongful conduct of its employees. Upon application of the multipliers set forth in the Organizational Guidelines, the fine level may be increased by up to four times the base fine in order to determine the appropriate "guideline fine range" for the corporation.⁴¹

In addition to restitution and punitive fines, the Organizational Guidelines provide for the imposition of "organizational probation."⁴² The conditions of probation to which a corporation

may be subject are intrusive, onerous and expensive. By way of example, the probation order entered by the court may be for a term of up to five years and may require, among other things, periodic submissions to the court, unannounced examinations of the corporation's books and records, the development of a comprehensive corporate compliance program to prevent and detect violations of the law, including elaborate training programs for corporate employees, and extensive monitoring and auditing by independent firms, with the full cost of retaining such outside auditors, accountants, and other monitoring experts to be borne by the organization.⁴³

With these provisions for awards of restitution, punitive fines capable of reaching hundreds of millions of dollars, and intrusive corporate probation, it is not uncommon for the sentence meted out in accordance with the Organizational Guidelines to rise to a level that threatens the corporation's continued viability as a business entity. As has been observed, "there can be little doubt that the Organizational Guidelines taken as a whole greatly increase the potential sanctions for corporate misconduct . . . [and] that the overall package provides a substantially increased incentive to federal authorities to prosecute organizations for the crimes of their employees."⁴⁴

Meanwhile, on a separate track but also during the latter half of the 20th century, the current system of administrative suspension, debarment and exclusion began to emerge as perhaps the most potent weapon in the government's arsenal for pursuing corporations for the criminal misconduct of their employees.⁴⁵ For corporations in highly regulated industries – such as government contractors or health care providers – these remedies, although putatively "administrative" in nature,⁴⁶ can operate to exclude the corporation from continued participation in federal programs or contracts and thereby effectively not only "penalize," but also sound the "death knell" for the company.⁴⁷ Due to the power of these administrative remedies to "kill" the company, they have been recognized to be highly punitive in nature and, indeed, have often been referred to as the "corporate death penalty."⁴⁸

By way of example, a government contractor may be suspended upon "adequate evidence" that the entity has engaged in criminal misconduct "indicating a lack of business integrity or honesty," including fraud, embezzlement, unfair trade or various other offenses.⁴⁹ A suspended contractor is immediately excluded from receiving government contracts, and government agencies cannot solicit offers from, award contracts to, or consent to subcontracts with suspended entities.⁵⁰ State and local governments may independently act to suspend or debar a contractor subject to federal suspension, and so-called "flow-down" provisions limit the ability of other federal contractors to do business with a suspended contractor.⁵¹

For a corporation whose business is predominantly in the arena of government contracting, the effect of imposition of this "remedy" can be fatal.⁵² The draconian nature of the punishment thereby imposed on the corporation is all the more striking given that no criminal conviction is required. The mere charging of an organization in an indictment with criminal misconduct that, if proved, would establish "a lack of business integrity or honesty" may constitute immediate grounds for suspension and thereby trigger all of the direct and indirect consequences noted above.⁵³

Similarly, and also by way of example, under the current regime, a health care provider must be excluded from participation in all federal and state health care programs if the provider is convicted of certain offenses, and may be excluded at the discretion of HHS under other circumstances, including if the Office of Inspector General of the Department of Health and Human Services ("HHS-OIG")⁵⁴ determines that the provider has engaged in certain prohibited conduct.⁵⁵ Upon exclusion, no federal or state program payment may be made for any item or

service that is furnished by the excluded entity and monetary penalties are imposed upon the excluded entity should it request payment from a federal or state health care program following exclusion and prior to any reinstatement.⁵⁶ Further, upon exclusion, the health care provider automatically will be debarred from participation in any federal grant programs or other procurement or non-procurement contracting with the federal government.⁵⁷ Exclusion may also trigger “termination for cause” provisions in the excluded entity’s contracts with major private insurers,⁵⁸ and impair its ability to contract with other private parties.⁵⁹

For a health care provider (whether a hospital, laboratory or medical device manufacturer) that delivers, as a substantial part of its business, items or services reimbursable by one or more of the federal or state health care programs – a condition that describes virtually all such providers – the effect of imposition of this remedy would be debilitating at a minimum and, in many instances, fatal to the provider’s ability to remain in business. Moreover, as with the suspension remedy for government contractors, the draconian nature of the exclusion remedy for health care providers is particularly notable given that, for the remedy to attach, no criminal conviction is required.⁶⁰ To the contrary, for certain conduct, exclusion may be triggered based upon the strength of the allegations set forth in a criminal indictment alone.⁶¹ Upon conviction for certain offenses, imposition of the exclusion remedy is mandatory.⁶²

Arthur Andersen is perhaps the paradigmatic, modern-day example of the collateral consequences of charging a business organization. The day after its indictment on obstruction of justice charges, the accounting firm was suspended by the General Services Administration (the “GSA”) from further government contracts. In a press release issued by the GSA, the government announced that Andersen’s suspension was based solely upon the strength of the allegations set forth in the indictment. Specifically, the GSA stated: “Under federal law, an indictment for such a criminal offense is adequate evidence of misconduct to support suspension of a government contract.”⁶³ The Department of Justice, moreover, certainly knew of the fatal implications for Andersen when it obtained an indictment against the partnership for obstruction of justice,⁶⁴ and the indictment was widely recognized to presage the downfall of the once-preeminent firm.⁶⁵ As anticipated, and notwithstanding that over 95% of the firm’s employees had no involvement in the conduct that led to the firm’s indictment,⁶⁶ Andersen in fact dissolved in the wake of the criminal charges.⁶⁷

As this overview of the evolution of corporate criminal punishment demonstrates, the range of penalties that may be imposed upon a corporation for the misconduct of its employees has increased dramatically in scope and severity over the course of the past century. There can be little doubt, moreover, that the range of potential sanctions available today creates substantially increased incentives for federal law enforcement authorities to prosecute organizations for the criminal misconduct of their employees. Gone are the days when prosecutors more or less neutrally weighed the interests of criminal justice, and served as “umpires” of sorts between law enforcement agents, on the one hand, and defendants and their counsel on the other. With the potential for recoveries from corporate criminal prosecutions now often in the tens or even hundreds of millions of dollars, the pursuit of criminal justice has become – as never before – a highly remunerative endeavor. As a result, and for better or for worse, prosecutors and other law enforcement officials now have significant financial incentives aggressively to pursue corporate criminal prosecutions. In addition, in this climate, prosecutors typically conduct the investigation and personally invest substantial time and resources in the investigative process; they thus often have personal and professional, as well as financial, incentives to ensure a substantial “victory” for the government – a victory that is typically registered in terms of the size of the monetary penalty and the severity of the terms of probation.

In short, the legal framework for imposition of punishment on corporations in the American legal system has experienced a sea change over the past one hundred years. From a period of virtually no corporate criminal punishment as late as the early 1900s, there emerged a period of modest fines and lenient sentencing, followed in the late 1900s by the rise of punitive fines, intrusive probationary conditions and the ultimate penalty – the “corporate death penalty” – of suspension, debarment and exclusion of the corporate entity for misconduct engaged in by one or more of its corporate employees. Together with the parallel expansion in the law governing corporate criminal liability, these developments ushered in the modern era of aggressive corporate criminal prosecutions.

III. Interplay Between the Doctrine of Corporate Criminal Liability and the Legal Framework Governing Corporate Criminal Punishment

While the twin doctrines of corporate criminal liability and punishment have been evolving over the years, little attention appears to have been given to the interplay between these two developments in the law. It is apparent that in our criminal jurisprudence as applied to corporations we have traversed the full theoretical spectrum for imposition of corporate criminal liability over the past 100 years: from early common law notions of corporate criminal immunity based upon the corporate entity’s inability to form the requisite “evil” intent to violate the criminal law all the way over to the modern, expansive concept of corporate criminal liability based upon the doctrines of vicarious liability and respondeat superior – doctrines engrafted from the civil law and divorced from the core criminal law principle of guilt predicated upon *mens rea* and moral culpability. It is also apparent that the legal framework for imposition of corporate criminal punishment has traversed a similarly broad spectrum, from non-existent punishment in the early 20th century to a modern-day multiplicity of vehicles for the imposition of increasingly harsh, often-mandatory, and at times draconian punishment on the corporation as a corporate entity separate and apart from its employees.

While these historical trends are of substantial interest in their own right, it is the interplay between these two parallel developments in the law that presents the most compelling issues for American corporate criminal jurisprudence in the 21st century. While it has long been settled that corporations should be held accountable for the misconduct of their employees – and the general proposition is one to which few would take exception – there is a present uneasiness, arising from the confluence of these two developments, with the manner and means by which we now hold corporations accountable for the misconduct of their employees.

The sources of this uneasiness warrant examination, and the inquiry begins with a look at the “interplay” itself. As the doctrine of corporate criminal liability has expanded to allow corporations to be held criminally culpable for conduct without regard to considerations of intentional corporate action or moral blameworthiness, and as the penalties for corporate criminal misconduct have multiplied in scope and severity, the result is a distinct disconnect between corporate “crime” and “punishment.” Thus, the interplay between the twin developments in the law governing corporate criminal liability and punishment has given birth to a legal structure in which a corporation may be subject to harshly punitive fines, invasive corporate probation, and even the ultimate penalty of disqualification from doing business – or corporate “death” – based upon misconduct that is *de minimis* in the overall corporate context. Thus, the confluence of these two developments today allows for the isolated act of a single low-level employee – acting contrary to company policy, without knowledge or participation by senior management, and in the face of diligent efforts by corporate management to prevent commission of the conduct in issue – to subject the entire company to the threat of

extraordinarily punitive sanctions. Indeed, because of the mandatory nature of certain exclusion provisions, absent prosecutorial intervention to avoid the preordained result, the entire company *must* be excluded based upon the conduct on a single occasion by a single, low-level employee in violation of a single statute.

This interplay between the twin developments in the law has given rise, in the corporate sphere, to several notable departures from established norms in our constitutional and criminal jurisprudence. First, as described above, there is in the current model the potential – indeed the reality absent prosecutorial intervention – for overwhelming disproportionality between the crime alleged and the punishment imposed. By way of example, and in accordance with the legal framework that is currently operative for health care providers, harsh criminal fines are contemplated and exclusion from participation in any and all federal and state health care programs – as sure a corporate death penalty as one could devise for a significant provider of health care services – is *mandatory* upon the conviction of a corporation for an offense committed by an employee related to the delivery of an item or service under Medicare, Medicaid or any state health care program.⁶⁸ This punishment is mandatory under the existing framework without regard to considerations of corporate “intent” or moral blameworthiness. Thus, both the thoroughly corrupt corporation and the model corporation with strong corporate policies, an effective compliance program and a demonstrated track record of good corporate citizenship, are equally subject to the threat of severe sanction, and even extinction, based upon the criminal misconduct of one or more of their employees.⁶⁹ It is, moreover, irrelevant under the existing legal framework – again, absent prosecutorial intervention – whether the employee who engaged in the misconduct is the chief executive officer of the company or a recently-hired sales representative, whether the employee is one of a small number of employees or one of a hundred thousand employees, or whether the employee was following corporate policy or acting in direct contravention thereof. Such mandatory draconian punishment of a corporation – with all of the attendant adverse consequences for innocent shareholders and employees – based upon what may be *de minimis* conduct in the overall corporate context represents a striking departure from settled principles in our constitutional and criminal jurisprudence that criminal misconduct requires moral blameworthiness and that the punishment imposed be proportionate to the crime committed.⁷⁰

While prosecutors of course may exercise the broad discretion reposed in them not to charge certain offenses (and thereby avoid the exclusion remedy and the imposition of other harsh penalties) or may be willing in practice to participate in elaborate constructs to avoid imposition on the corporation of the full weight of the exclusion remedy – for example, by permitting the company to plead to a non-excludable offense rather than one for which exclusion would be mandatory,⁷¹ or by allowing a predecessor company or largely defunct subsidiary of the company to take the criminal plea and “suffer” the exclusion⁷² – the judgment and actions of individual prosecutors are subject to too much variability and unpredictability to ensure fair and just results.⁷³ Moreover, as will be discussed more fully below, the very potential for the imposition of such severe punishment itself affects the process by which disputes involving alleged criminal misconduct are resolved between corporations and the government.

A second departure that results from the interplay between the corporate criminal liability doctrine and the legal framework for imposition of corporate punishment is the potential for the harshest of criminal penalties to be imposed on a corporation without a finding of guilt in the traditional manner. Specifically, the breadth of the corporate criminal liability doctrine and the dramatically increased penalties available upon conviction have created powerful incentives for prosecutors to pursue corporations aggressively and, coupled with the coercive threat of harsh

penalties and potential exclusion or debarment, have created an environment in which rational corporations routinely conclude that they must resolve their criminal disputes with the government short of a criminal charge. Indeed, because the ultimate penalties of suspension and exclusion may be triggered by the return of a criminal indictment alone, such punishment may effectively be imposed based upon “adequate evidence”⁷⁴ or a “preponderance of evidence”⁷⁵ of criminal misconduct and without benefit of the traditional criminal law standard of “proof beyond a reasonable doubt.”⁷⁶ The ability to impose what may amount to draconian punishment based upon a criminal charge alone without any “proof beyond a reasonable doubt” further separates corporate criminal prosecutions from all others and from established norms in our constitutional and criminal jurisprudence.

A third, and related, departure that results from the interplay between these two developments in the law is the corporation’s lack of a meaningful right to a trial by jury. While the Supreme Court has not directly addressed the issue, numerous courts have held that a corporation, like any other “accused,” is protected by the Sixth Amendment and has a constitutional right to a trial by jury where the offense alleged is “serious,” and not “petty.”⁷⁷ The right to a trial by jury in criminal cases is recognized in both Article III of the Constitution and the Sixth Amendment. Article III provides: “The trial of all crimes . . . shall be by jury.”⁷⁸ The Sixth Amendment provides: “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”⁷⁹ While the commands of both provisions are unequivocal, the scope and nature of the federal constitutional right to a jury trial in criminal cases has proved elusive. Nevertheless, while courts and commentators have explored the boundaries of the constitutional right,⁸⁰ corporations in practice have been afforded a jury trial in serious criminal cases and those courts that have squarely addressed the legal question have concluded that corporations, like individuals, enjoy a constitutional right to a trial by jury in all criminal cases in which the crime charged is “serious.”⁸¹

Assuming a criminal offense committed by a corporate employee where the potential punishment includes large monetary fines, corporate probation and mandatory exclusion or debarment – in other words, an offense for which the corporation likely would be found to have a constitutional right to a trial by jury – the reality in practice is that the corporation cannot afford to exercise its right to a jury trial and therefore has no meaningful right to a trial by jury. This practical inability to claim the constitutional right holds no matter how serious the offense or how devastating the potential consequences to the corporation and to its officers, directors, employees and shareholders. The lack of a meaningful corporate jury trial right is a direct product of the interplay between the corporate criminal liability doctrine and the existing legal framework for imposition of corporate punishment. Specifically, because of the developments in the law governing corporate criminal liability and punishment over the last several decades, corporations for the first time in the history of their existence face the specter of severe punishment upon conviction for the imputed misconduct of one or more of their employees – and perhaps even disqualification from doing business based upon the *initiation* of a criminal proceeding. In this environment, virtually all rational corporations conclude, as a business matter, that the risks associated with incurring an indictment and going to trial – risks arising from the threat not only of disqualification, but also of fines and terms of probation so potentially punitive as to render the corporation unable to continue as a viable entity – are simply too high. The result is that corporations settle their criminal disputes with the government, almost no matter the cost, short of indictment.

The *in terrorem* effect of potentially draconian sanctions is real. Because the corporation cannot afford to be indicted or convicted for the imputed misconduct of one or more of its

employees, it cannot afford to test the government's proof or to hold the government accountable through the traditional safeguards and protections of a criminal trial.

IV. Resulting Anomalies in Practice

The modern structure for imposition of corporate criminal liability and punishment, with its departures from traditional constitutional and criminal law principles, has produced some notably anomalous results. Whether these departures from our traditional jurisprudence are theoretically sound or not as a means for ensuring corporate accountability, the results in practice suggest that a re-examination is warranted if we are to maintain confidence in the criminal justice system, as applied to corporations, and in the fairness and credibility of the results it achieves.

The recent criminal prosecution of TAP Pharmaceutical Corporation (the "Company" or "TAP") and a number of its employees by the United States Attorney's Office for the District of Massachusetts provides a particularly stark example of the potential for disconcerting results in the current model of corporate criminal liability and punishment. Specifically, and as described more fully below, the Company was criminally convicted and harshly punished – through punitive monetary fines and intrusive corporate probation – while the individual employees upon whose conduct the corporation's conviction and punishment were premised were all acquitted of any criminal wrongdoing following a jury trial.

TAP is a joint venture between Abbott Laboratories of the United States and Takeda Chemical Industries of Japan. The government's investigation of TAP was launched in 1996 after two separate whistleblowers reported to government authorities what they considered to be illegal conduct. The investigation focused on an alleged criminal conspiracy in violation of 18 U.S.C. § 371 and various related substantive offenses.

Specifically, the conspiracy was centered around two separate TAP products, both of which were reimbursable by federal and state health care programs: Lupron, a prostrate cancer drug, and Prevacid, an oral prescription drug for heartburn. The conspiracy was alleged to have had three separate prongs: first, that the defendants had conspired to defraud the United States; second, that they had conspired to violate the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b); and third, that they had conspired to violate the Prescription Drug Marketing Act, 21 U.S.C. § 331(t) ("PDMA"). In addition, the conduct under investigation included alleged substantive violations of the Anti-Kickback Statute and the PDMA.⁸²

Because certain of the alleged offenses related to the delivery of products reimbursable by Medicare, Medicaid or a state health care program, a conviction on any one of these offenses would have triggered mandatory exclusion for TAP from participation in any and all federal and state health care programs.⁸³ An indictment of the corporate entity for such an alleged offense alone could have established adequate grounds for HHS-OIG to exclude the Company on a permissive basis.⁸⁴ Faced with the prospect of potential exclusion – a punishment that would have sounded the death knell for TAP as a viable corporation – the Company did what any rational company would have done in like circumstances. It settled its dispute with the government.

Thus, without any opportunity to contest in a courtroom the government's legal charges – a number of which were novel and amenable to strong defense – or to test the strength of the government's proof in a criminal trial before a jury, TAP in 2001 pleaded guilty to one count of conspiracy to violate the PDMA, paid \$875 million in criminal and civil penalties, and entered

into an onerous and “sweeping” corporate integrity agreement that subjects the organization – for a period of seven years – to elaborate outside monitoring and control provisions.⁸⁵ In addition, in order to avoid imposition of the exclusion remedy that motivated the plea, the government agreed not to require TAP to plead to an Anti-Kickback Act violation or other offense that would trigger mandatory exclusion; rather, the government, in its discretion, permitted TAP to enter a plea to a one-count Criminal Information alleging conspiracy to violate the PDMA – an offense for which exclusion was not required.⁸⁶

The government thereafter indicted thirteen individual TAP employees for the same allegedly illegal marketing activities to which the Company had pleaded guilty. Trial commenced in Boston in the United States District Court for the District of Massachusetts before the Honorable Douglas Woodlock on April 20, 2004. Forty-one witnesses, 567 exhibits and three and one-half months later, the trial ended without a single conviction. Five of the original thirteen defendants had been dismissed, acquitted or otherwise dropped from the case along the way; all eight defendants remaining at the end of the case were found by the jury to be Not Guilty of any of the charges against them. Moreover, following the acquittal of all of the individual TAP employees, the federal district court judge *sua sponte* permitted the one TAP employee who had pleaded guilty prior to trial to withdraw her plea of guilty.⁸⁷

Notwithstanding the absence of any predicate for the imposition of vicarious criminal liability on the corporation, TAP remains convicted and the punishment meted out by the government stands. This result is “logically troublesome” at a minimum;⁸⁸ on a more fundamental level, the discrepant result engenders disquietude regarding the current state of affairs in corporate criminal prosecutions.

Beyond TAP, a further illustrative example may be found in the following hypothetical. The government initiates a federal grand jury investigation of a corporation in the health care industry and the investigation focuses on a number of different business activities and transactions. In connection with the investigation, the government pursues various legal theories, some of which are established and others of which are novel and untested.

There is certain isolated conduct – say, a kickback – engaged in by an individual employee where the evidence of criminal wrongdoing is strong and the validity of the legal theory is not open to question. The employee paid the kickback in violation of the Anti-Kickback Act in order to enhance his own compensation and also to boost corporate sales. A corporate conviction for this isolated kickback will subject the company to mandatory exclusion; an indictment for this offense may trigger permissive exclusion. The individual employee who engaged in the illegal activity is confronted by the government; he confesses to the crime and subsequently enters a criminal plea to a single count violation of the Anti-Kickback Act.

Meanwhile, the government continues its investigation of the corporation, not only for the kickback activity, but also for unrelated conduct engaged in by other employees. This “other” conduct is conduct that the prosecutor believes to be criminal. No court has ever so held, however, and the statutory framework for imposition of liability is complex and riddled with ambiguity. There are, moreover, significant constitutional issues that would be implicated by a government effort to criminalize and punish the conduct in issue. Finally, while the monetary fine that would be imposed on the corporation for the imputed kickback activity is easily quantified and would be relatively modest, the criminal fine that would flow from a corporate criminal conviction on the “other” conduct – although difficult to quantify with any reasonable certainty – could rise to the level of hundreds of millions of dollars.

In these not altogether uncommon circumstances, as a theoretical matter – with the employee having pleaded guilty to a violation of the Anti-Kickback Act – the corporation faces certain exclusion if the government seeks, by way of an indictment and criminal conviction, to impute to the corporate entity the admitted misconduct of its employee. Neither the “scope of employment” nor the “intent to benefit” prong of the test for corporate criminal liability would interpose an obstacle and, as easily as one-plus-one-equals-two, based upon the employee’s admitted guilt, the corporation would stand convicted. Upon conviction, the corporation would be subject to mandatory exclusion from further participation in any and all federal and state health care programs.

Faced with such a concrete and immediate threat of extinction, the corporation seeks to resolve its dispute with the government. The government, however, is unwilling to conclude its investigation and forego a corporate criminal conviction for the kickback activity absent a plea to the “other” conduct which the government believes also to be criminal. The government further insists, as a condition of its agreement not to pursue the corporation for the kickback activity, that the corporation pay several hundreds of millions of dollars in criminal fines and civil penalties in connection with the “other” conduct.

The corporation in this hypothetical accedes to the government’s demands in order to ensure its continued survival, enters a plea of guilty to the “other” conduct even though it believes such conduct not only to have been legal, but also constitutionally protected, and further agrees to pay several hundred million dollars to the government – even though such amount has not been quantified or established in accordance with traditional standards of proof or accepted methods for ascertaining loss or gain or for calculating damages – in “settlement” of the government’s potential allegations.

Although perhaps not “logically troublesome” in the same manner as the TAP conviction,⁸⁹ the result illustrated by this hypothetical further elucidates the source of much of the disquietude that currently exists regarding corporate criminal prosecutions: namely, that corporations are subject to the harshest of penalties – penalties that cause substantial harm not only to the corporation as such but also to the corporation’s innocent directors, officers, employees and shareholders – without *any* of the traditional safeguards for protecting against government abuse or, more generally, for ensuring fair and just results in accordance with the rule of law. Because the rational corporation cannot afford to exercise its right to a jury trial in the circumstances described, it must resolve its dispute with the government in a conference room, without benefit of a judge, jury, arbitrator or other neutral third party decision-maker. Should the corporation believe the government prosecutor to be overreaching with respect to certain factual determinations or legal theories or to be seeking fines or damages well beyond those that would be imposed following an objective review of the evidence, the corporation’s only recourse as a practical matter is to speak with more government lawyers by seeking review “up the chain” within the Department of Justice. While reasonable results may from time to time be achieved through this mechanism, there is plainly in this model too much latitude for abuse of government power and too little assurance of fair and just results in accordance with the rule of law.

V. Harmonizing the Goals of Corporate Criminal Liability and Punishment with the Interests of Principled Corporate Criminal Dispute Resolution

Based upon the rash of recent high-profile corporate scandals and the prevalent accounts of white collar crime in the executive suite, there is little sympathy today for the corporation whose officers, directors or employees are alleged to have engaged in criminal misconduct. Indeed, in the current climate of perceived pervasive corporate criminal wrongdoing, there

appears to be a competition of sorts among government officials each to best the other and win favor in the public eye through aggressive corporate criminal prosecutions and imposition of harsh punishment.⁹⁰ In this rush to prosecute and punish – made so easy by the twin expansions in the law governing corporate criminal liability and punishment – there has been a tendency to overlook the means by which the ends have been achieved and to ignore the effect of the interplay between these two developments in the law on the manner in which serious disputes between corporations and the government are now resolved where allegations of criminal misconduct are in play.

However unpopular corporations may be in the current climate of white collar crime and executive scandal, and however strong the interests may be in holding corporations accountable for the wrongful conduct of their employees and in imposing stern punishment for corporate misconduct, these considerations should not be allowed to undermine the fundamental constitutional interests that exist in ensuring that serious criminal disputes with the government, whether involving individuals or corporations, be resolved in accordance with the rule of law and minimum standards of due process.⁹¹ Indeed, the primary source of uneasiness with corporate criminal prosecutions in the modern era arises from the suppression of these latter interests; for the current framework encourages – arguably even compels in certain cases – a process for resolution of serious criminal disputes between corporations and the government that lacks any of the fundamental attributes upon which the American legal system has come to rely for the achievement of fair, just and credible results.

In this “conference room” mode of dispute resolution, while there may be discussions of evidence and presentations of legal argument, there is no adjudicative process, formal or informal, and there is no decision-making by an independent third party. There is no judge or jury making factual findings and deciding the case based upon applicable rules of substantive law, with a right of appeal to correct unfounded factual findings or legal errors. There is no arbitrator or even mediator and there is no relative equality in bargaining power to help ensure a fair and just result. To the contrary, there is a corporation facing the threat of potential extinction that has little practical choice but to accede to the government’s demands – however onerous or disproportionate in the corporation’s view, if short of corporate “death” – in order to ensure the organization’s continued survival.⁹²

In this model, the risk of abuse of government power and arbitrary results is unacceptably high. If the goals of corporate criminal accountability and stern punishment for corporate misconduct are to be achieved without compromising accepted standards for principled dispute resolution, consideration must be given to restoring to the American corporation a meaningful form of adjudicative process pursuant to which the company, where appropriate and necessary, can test the government’s proof and legal theories and hold the government accountable pursuant to traditional judicial standards.

One approach to the goal of harmonizing the interests of corporate criminal accountability with those of principled dispute resolution – although only a partial solution – focuses on the doctrine of corporate criminal liability and the types of conduct for which the corporation as an entity should be held criminally responsible. This approach begins with a return to the basic questions of whose actions and intent – those of which officers, directors and employees – should provide a sufficient predicate for imposition of criminal liability on the corporation, and whether a showing of good faith compliance efforts by the corporation should absolve the corporate entity of criminal liability for the wrongful acts of its employees in contravention of corporate policy.

In addressing these questions, the Model Penal Code, adopted by the American Law Institute in 1956, provides a logical point of departure. Under the Model Penal Code, the criminal liability of a corporation for the conduct of its agents is limited to circumstances where the conduct was “authorized, requested, commanded . . . or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”⁹³ In adopting this provision, the drafters sought to limit vicarious corporate criminal liability to situations in which the criminal conduct was performed or participated in by agents sufficiently high in the corporate hierarchy to “make it reasonable to assume that their acts [were] in some substantial sense reflective of corporate policy.”⁹⁴

This more circumscribed approach to corporate criminal liability has met with approval from a number of commentators.⁹⁵ These authors argue that the Model Penal Code approach better accords with traditional notions of criminal responsibility; in this model, the corporation may not be found to have acted with moral culpability and may not be held criminally responsible unless it can be shown that the corporation – through the actions and intent of high-level agents deemed to be capable of “thinking” for the corporation – acted with a “guilty mind.”⁹⁶ Other commentators have focused on the deterrent purposes of the criminal law and the importance of compliance programs and the trend toward voluntary corporate self-policing and governance.⁹⁷ These commentators observe that if, as in the current framework, the isolated act of a single, low-level employee can subject the corporation to criminal liability without regard to the soundness of the company’s policies and procedures or the extent of its compliance program, there exists a fundamental disconnect between, on the one hand, corporate action and intent and, on the other, corporate criminal responsibility. This disconnect, in turn, undermines the elemental deterrent goals of the criminal law. As one commentator has observed,

doctrines that divorce intentional corporate action (i.e., those actions that are taken at the direction or with the assent of management) and corporate criminal responsibility are contrary to the goal of deterring criminality. Indeed, the currently prevailing view in this regard is that a corporation’s efforts at legal compliance are legally irrelevant to the issue of corporate guilt, and instead, that the corporation is criminally responsible for the acts of its employees – even those that directly contravene corporate policy or management directives. Such a “damned if you do, damned if you don’t” system of punishment without countervailing incentives simply fails to accomplish any purpose other than imposing what is in essence strict liability for crimes committed by corporate employees.⁹⁸

This approach – effectively retreating from the outer boundaries of the existing model of corporate criminal liability and permitting good faith compliance efforts to shield a corporation from vicarious criminal liability – arguably would not only better accord with the basic principles and goals of the criminal law, but also help to restore some balance to corporate criminal prosecutions and dispute resolution. No longer would an otherwise compliance-conscious corporation be subject to liability and potentially severe punishment based upon the isolated misconduct of a single employee; the wrongful conduct of such an employee would thereby lose the extraordinary power it possesses in the current structure to force disproportionate and unfair corporate criminal resolutions.

A second approach to harmonizing the interests of corporate criminal accountability with those of principled dispute resolution looks to the existing legal framework for imposition of

corporate criminal punishment. Because the concern to be addressed arises so substantially from the government's present ability to impose draconian punishment – including the ultimate penalty of corporate disqualification from continued business operations – based upon what may be *de minimus* conduct in the overall corporate context, this approach focuses on reining in the more extreme features of the penalty framework, including in particular the exclusion, suspension and debarment “remedies.”

While these remedies may serve an important interest in protecting the government from contractors and providers that do not have a satisfactory record of business ethics and integrity,⁹⁹ they ultimately reach too far. Where a proposed exclusion or suspension is predicated upon alleged criminal wrongdoing by one or more corporate employees, the government should be required to establish that the criminal misconduct in fact occurred – through a conviction and not simply an allegation – and that the conduct was sufficiently harmful and pervasive (horizontally or vertically) to warrant imposition of the severe remedy of disqualification from business. Otherwise stated, it is not necessary, in order to protect the government's legitimate interests in not doing business with contractors or providers that lack business ethics and integrity, to mandate (or even permit) exclusion based upon the isolated act of a single employee who may have been one among thousands and who may have been acting primarily for personal purposes and contrary to corporate policy. No rational government official would take the position that the corporation should be suspended, debarred or excluded in such circumstances, or that such action – as distinct from termination of the employee who committed the wrongful act – would be necessary in order to protect the government's interests. A legal framework that not only permits, but also purports to require, such a result is fundamentally unsound. As a general rule, remedies should be tailored to address identified harms, and not more. This principle holds especially true here, where the failure properly to tailor the remedy has a clear, adverse impact on the manner and means by which corporate disputes with the government are resolved where allegations of excludable criminal offenses are in play.¹⁰⁰

While neither of these two approaches offers a clear pathway to a sustainable jurisprudence of corporate criminal prosecutions, together they illuminate the sources of disquietude and draw into focus the central issues that warrant attention. As a review of the evolution of the law governing corporate criminal liability and punishment demonstrates, the answer lies not in tinkering with or modifying the mode of dispute resolution – for the criminal trial, with all of its attendant safeguards, affords maximum assurance that a fair and just result will in fact be achieved – but rather in ensuring its availability, where appropriate and necessary, to test the government's proof and legal theories and to uphold the constitutional promise of government accountability pursuant to the rule of law.

Conclusion

As a result of the confluence between the twin expansions in the law governing corporate criminal liability and punishment, the modern corporation has seen its access to an effective mode of criminal dispute resolution all but disappear as a practical matter over the last several decades. With the corresponding rise in prosecutorial incentives to pursue corporate criminal prosecutions and to impose harsh corporate criminal punishment, there is a fundamental danger – indeed the reality in many cases – that serious corporate criminal disputes are now being resolved pursuant to a process that is devoid of any of the attributes upon which the American legal system, and we as a society, have come to rely for the achievement of fair, just and credible results.

The goal of restoring to the American corporation a meaningful form of adjudicative process for the resolution of its criminal disputes with the government will require nothing less than a wholesale re-examination of the corporate criminal liability doctrine and the legal framework for imposition of corporate criminal punishment. At a minimum, this process, if it is to achieve the goal of restoring principled corporate criminal dispute resolution, will require, consistent with the basic principles and goals of the criminal law, a retreat from the extreme outer boundaries of the law governing corporate criminal liability and punishment, as those doctrines have developed – un-tended and unrestrained – over the course of the past century.

¹ Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 21 (1957).

² See Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 502 (1980) (“In the last half-century, Congress has enacted a vast array of penal economic regulatory statutes directed at the corporate enterprise which has resulted in ‘hundreds of thousands of legal commands and prohibitions, violation of which may include criminal liability.’ These regulatory statutes, which have traditionally been denominated as ‘mala prohibita,’ have been described as a ‘vast and disorganized set of proscriptions that are used for the job of regulating the mode in which business enterprise . . . is carried on.’”) (quoting 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAW 403 (1970) & H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 364 (1968)); see also *infra*, Sect. II.

³ See, e.g., 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 21 (1769) (noting that no one may be punished as a criminal unless he has a “vicious will” and commits an unlawful act); 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 95 (1883) (noting that all or nearly all crimes contain a mens rea requirement); FRANCIS BOWES SAYRE, *THE PRESENT SIGNIFICATION OF MENS REA IN THE CRIMINAL LAW IN HARVARD LEGAL ESSAYS* 399 (1934) (“Since the twelfth century an unbroken line of judges and text writers has authoritatively laid it down as undisputed law that a criminal intent lies at the very foundation of criminality.”); Jed S. Rakoff, *‘Willful’ Intent in Criminal Securities Cases*, 213 N.Y. L.J. 3 (May 11, 1995) (“This emphasis on knowledge and intent reflects the fact that the criminal law, whatever other purposes it may seek to serve, speaks with the voice of morality.”); see also HALL, *PRINCIPLES OF CRIMINAL LAW* 203 (1947) (“[M]oral culpability is of secondary importance in tort law – immoral conduct is simply one of various ways by which individuals suffer economic damage. But in penal law . . . the immorality of the actor’s conduct is essential – whereas pecuniary damage is entirely irrelevant.”).

⁴ Mueller, *supra* note 1, at 48.

⁵ 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 476 (1765).

⁶ KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* § 2:01, at 64 (1992).

⁷ See Leonard Orland, *Beyond Organizational Guidelines: Toward a Modern Federal Corporate Criminal Code*, 71 WASH. U. L.Q. 357, 360 (1993).

⁸ The Elkin’s Act by its terms imputed to the corporation the criminal acts of its employees in connection with the payment of rebates. See *New York Cent.*, 212 U.S. at 491-92.

⁹ *Id.* at 494.

¹⁰ See Note, *Corporate Criminal Liability*, 68 NW. U. L. REV. 870, 871-72 (1973).

¹¹ *New York Cent.*, 212 U.S. at 495-96.

¹² *Id.*

¹³ See *id.* at 494-95.

¹⁴ See *id.* at 496.

¹⁵ See BRICKEY, *supra* note 6, § 2:09, at 81-87; see also Samuel R. Miller, *Corporate Criminal Liability: A Principle Extended to its Limits*, 38 FED. BAR J. 49, 50-53 (1979) (discussing corporations' subjection to criminal prosecution); Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1246 (1979).

¹⁶ See BRICKEY, *supra* note 6, § 2:09, at 86; Miller, *supra* note 15, at 54.

¹⁷ See *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (holding that for a corporation to be held criminally liable, the government must demonstrate that the corporation's agent/employee "perform[ed] acts of the kind which he is authorized to perform, and [that] those acts [were] motivated – at least in part – by an intent to benefit the corporation"); see also *United States v. Peters*, 732 F.2d 1004 (1st Cir. 1984) (finding that a corporation is criminally liable for authorized acts of its agents that were performed with an intent to benefit the corporation); *United States v. Carter*, 311 F.2d 934 (6th Cir. 1963) (holding that a corporation is liable for willful violation where corporate president acted in course of employment and in furtherance of corporation's business interests); 1 OTTO G. OBERMAIER & ROBERT G. MORVILLO, *WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENCES* § 5.03, at 5-10 (Law Journal Press 1990 & Supp. 2002); BRICKEY, *supra* note 6, § 3:01, at 90; see also DAN K. WEBB ET AL., *CORPORATE INTERNAL INVESTIGATIONS* §§ 1.01-1.14 (Law Journal Press 1993 & Supp. 2002).

¹⁸ See SAMUEL J. BUFFONE, ET AL., *THE NEW FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS* 84, 86 (1992).

¹⁹ Under traditional agency law principles, a corporation could be held civilly liable for its employee's intentional torts only under limited circumstances. See Daniel M. Combs, *Costos v. Coconut Island Corp.: Creating a Vicarious Liability Catchall Under the Aided-by-Agency Relation Theory*, 73 U. COLO. L. REV. 1099, 1102 (2002). Courts would impose vicarious liability on an employer when its agent committed an intentional tort within the scope of employment or when an agent misused his or her apparent authority. See *id.*; RESTATEMENT (SECOND) OF AGENCY § 219 (1957). An employee's conduct would "not [be] within the scope of employment if it [was] different in kind from that authorized [by the employer], far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

²⁰ BRICKEY, *supra* note 6, § 3:01, at 90; see also *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 406-07 (4th Cir. 1985) ("The term 'scope of employment' has been broadly

defined to include acts on a corporation's behalf in performance of the agent's general line of work.”).

²¹ See *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir. 1978) (holding that although the illicit conduct “did not in fact bring monetary gain” to the defendant, the court could still find that the acts “were taken for the purpose of benefiting the corporation”); *Federal Sav. & Loan Ins. v. Shearson-American Express*, 658 F. Supp. 1331, 1338-39 (D.P.R. 1987) (“If the intent to benefit the principal is present, then actual benefit is largely irrelevant.”); see also *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962) (“[T]he purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation.”).

²² See, e.g., *Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939) (holding that the shipping company can be held criminally liable for a deck hand's dumping of garbage while the ship was in the harbor, notwithstanding that the ship's officers had no knowledge of the dumping of refuse or that instructions and specific written warnings had been given against the discharge of refuse in harbors).

²³ See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000,1007 (9th Cir. 1972) (“[A]s a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.”), *cert. denied*, 409 U.S. 1125 (1973); see also, *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989) (noting that a corporation's “compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law”), *cert. denied*, 493 U.S. 1021 (1990); *Standard Oil Co.*, 307 F.2d at 127 (“[N]o contention is, or can at this late date, be made that mere violation of instructions would shield the corporation from criminal responsibility for actions which its agents have taken for it.”); *but see*, *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (stating that the jury may consider corporation's antitrust compliance policy in determining whether relatively minor officials were acting for benefit of corporation); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) (“[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”).

²⁴ See *supra* note 21; *Adams v. Hyannis Harborview, Inc.*, 838 F. Supp. 676, 691 (D. Mass. 1993) (“[T]he servant need not be acting for the “exclusive benefit” of the principal, it is enough that the agent intended his acts to produce some benefit to himself and to the principal second.”)(quotations omitted); see also *Automated Med. Labs.*, 770 F.2d at 407 (“It would seem entirely possible . . . for an agent to have acted for his own benefit while also acting for the benefit of the corporation.”); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984) (holding that a corporation is criminally liable for Medicare fraud based on acts or omissions of agent performed within scope of employment even if agent intended to benefit himself first and corporation second); *United States v. Bernstein*, 533 F.2d 775 (2d Cir. 1976) (noting that it is not required that the agent act solely for the benefit of the corporation); *Carter*, 311 F.2d at 942 (corporation liable where president acted in furtherance of business interests despite lack of actual benefit); Sean Bajkowski & Kimberly R. Thompson, *Corporate Criminal Liability*, 34 AM. CRIM. L. REV. 445, 448 (1997) (noting that the “intent to benefit” requirement may also be satisfied by a strong showing that the corporate agent or employee originally acted in the corporation's interest, even where the corporation did not actually receive a benefit).

²⁵ See *Basic Constr. Co.*, 711 F.2d at 572 (rejecting the argument that no liability can attach where illegal activity was committed by two relatively low-level officials and without knowledge of high-level corporate officers); *Standard Oil Co.*, 307 F.2d at 127 (“[T]he corporation may be criminally bound by the acts of subordinate, even menial, employees.”).

²⁶ See *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (“[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.”).

²⁷ See *United States v. LBS Bank--New York, Inc.*, 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) (“Although knowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees, . . . specific intent cannot be aggregated similarly.”)(citations omitted); *First Equity Corp. v. Standard & Poor’s Corp.*, 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988) (“While it is not disputed that a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual.”); *La. Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 803 (E.D. La. 1986) (stating that for a corporation to be liable for mail fraud, one of its employees must have the specific intent required by statute); see also Bajkowski, *supra* note 24, at 454; BRICKEY, *supra* note 6, § 4:05, at 145.

²⁸ See *Bank of New England*, 821 F.2d at 855-56 (holding that where a corporation is aware of the law’s requirements, yet makes little or no effort to ensure that its employees comply with the law, the jury may find that the corporation possessed the specific intent to violate the law).

²⁹ See HON. JED S. RAKOFF, ET AL., CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION § 1.02 (2003); see also Arthur F. Matthews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT’L L. & BUS. 303, 417 (1998) (“Prior to the 1970s, apart from major anti-trust prosecutions, few major corporations were the subjects of white-collar criminal prosecutions. When corporate guilty pleas were entered, it was usually in cases where the corporation ‘took the rap’ in instances where the federal prosecutor wanted to exercise favorable prosecutorial discretion regarding the corporate individuals involved in the matter. At least since . . . the 1970s, national federal prosecutorial policy has changed.”); Mark A. Cohen, *Empirical Trends in Corporate Crime and Punishment*, 3 FED. SENT. R. 121, 121 (1990) (noting that in 1984 and prior thereto, corporate convictions accounted for “less than 1% of all federal convictions”).

³⁰ See RAKOFF, ET AL., *supra* note 29, § 1.02[3].

³¹ See RAKOFF, ET AL., *supra* note 29, § 1.02[3] (“Federal law provides a sweeping basis for prosecuting corporations for the sins of [their] employees. Yet, until comparatively recently, federal prosecutors rarely made use of this weapon. . . . Prior to the mid-1980s, Congress, in drafting criminal statutes, typically focused on the punishment of individuals”); Matthews, *supra* note 29, at 417 (“Twenty years ago . . . [t]here was not much of an effort by prosecutors to go after corporations. . . . Today a sea change has occurred.”) (citations omitted).

³² See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 101, 98 Stat. 1837 (1984); see also Leonard Orland, *The Proliferation of Corporate Crime Legislation*, 1 Corp. CRIM. L. RPTR. 29 (1987); Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. Rev. 247, 254-263 (1991) (compiling and comparing corporate monetary sanctions between 1984 and 1990, and tracking changes reflecting legislative increases in corporate fines).

³³ See RAKOFF, ET AL., *supra* note 29, § 1.02[3].

³⁴ See *id.* at § 1.02; Orland, *supra* note 32, at 29-30.

³⁵ Orland, *supra* note 32, at 29-30; see also Cohen, *supra* note 32, at 264-67 (1991) (identifying additional sanctions levied against corporations in the late 1980s, including nonmonetary criminal sanctions and marketplace penalties).

³⁶ The United States Supreme Court has recently struck down the provisions of the federal sentencing statute that made the Guidelines mandatory and has held that the Guidelines, going forward, are advisory. See *United States v. Booker*, ___ S. Ct. ___, Nos. 04-104 and 04-105, 2005 WL 50108 (Jan. 12, 2005). The impact of this ruling on sentences for corporate criminal misconduct has not yet been addressed and will likely only emerge as courts undertake sentencing under the new regime.

³⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1992).

³⁸ See *id.*; Leonard Orland, *Corporate Punishment by the U.S. Sentencing Commission*, 4 FED. SENT. R. 50, 50 (July/August 1991).

³⁹ U.S. SENTENCING GUIDELINES MANUAL § 8B1.1.

⁴⁰ See *id.* at § 8C2.4 (providing that the amount of the pecuniary loss is limited to that portion of the loss that was caused “intentionally, knowingly or recklessly”).

⁴¹ See *id.* at §§ 8C2.6 & .7.

⁴² See *id.* at § 8D1.1.

⁴³ See *id.* at § 8D1.4.

⁴⁴ RAKOFF, ET AL., *supra* note 29, § 1.04.

⁴⁵ Administrative debarment and suspension remedies for government contractors have been theoretically available since as early as 1928. See Joseph A. Calamari, *The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors*, 17 NEW ENG. L. J. 1137, 1140 (1982). The provisions governing suspension and debarment lacked teeth, however, prior to a major contracting fraud scandal that erupted in the 1980s. The ensuing investigation, called “Operation Ill Wind,” focused on defense contractor fraud, bribery, and improper disclosure of competitive information, and culminated in the indictment of numerous executives, as well as a senior procurement official – the Assistant Secretary of the Navy. See JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 498-99

(2d ed. 2002). In the wake of the scandal, Congress mobilized in unprecedented ways to manage the procurement process and to criminalize corporate misconduct. Mirroring general patterns of corporate criminalization, fraud in government contracting was attacked on several fronts. First, as Americans demonstrated substantial support for imposing serious penalties on contractors to reduce waste and fraud, aggressive prosecution efforts arose for procurement misconduct. Second, Congress supported such efforts with increased statutory weapons to enable prosecutors to pursue a broader range of conduct as criminal misconduct and to impose enhanced punishment upon conviction. Between 1984 and 1989, twenty-two major procurement statutes were enacted, including the Office of Federal Procurement Policy Act Amendments, the Competition in Contracting Act, and the Packard Commission and Procurement Integrity Act. See *id.* at 500-01. These provisions established substantial criminal, civil, administrative and contractual remedies against fraudulent contractors, and gave full force to existing suspension and debarment remedies. See *id.* at 496-504.

Similarly, the exclusion provisions of the Social Security Act were originally enacted in 1935, but lay largely dormant until the late 1970s. See 42 U.S.C. § 1320a-7 (2004) (originally enacted in 1935); Pamela H. Bucy, *Civil Prosecution of Health Care Fraud*, 30 WAKE FOREST L. REV. 693, 720-22 (1995) (tracking developments between 1977 and 1987 that expanded the government's power to exclude providers who failed to comply with the law). Remedies significantly increased in later revisions (1983 and 1987), which tasked the HHS Inspector General with detecting, prosecuting, and punishing fraudulent acts, suspending and excluding providers, and imposing civil monetary penalties; the revisions further mandated exclusion for certain acts. See *id.* at 722.

⁴⁶ See, e.g., Federal Acquisition Regulation ("FAR") § 9.402(b); 48 C.F.R. § 9.402(b) (2003) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.").

⁴⁷ See James J. McCullough & Abram J. Pafford, *Government Contract Suspension and Debarment — What Every Contractor Needs to Know*, 45 Government Contractor ¶465, at 1 (Nov. 19, 2003) ("The United States Government has long had the power to suspend or debar any contractor that is not considered "responsible" — an action that, for many contractors both large and small, can sound a death knell."); David Yellen & Carl J. Mayer, *Coordinating Sanctions for Corporate Misconduct: Civil or Criminal Punishment?*, 29 AM. CRIM. L. REV. 961, 972 (1992) ("[D]ebarment is often implemented with punitive intent, and . . . prosecutors often regard debarment as a substitute for criminal punishment."); see also John S. Pachter, *The New Era of Corporate Governance and Ethics: The Extreme Sport of Government Contracting*, 2004 PUB. PROCUREMENT L. REV. 247, 248 (2004) (discussing debarment and suspension's fine and often non-existent line between sanction and punishment, and noting that "[i]n fact, the line between punishment of contractors and protection of the government's interest is in serious danger of erosion, and the current trend picks up the thread of previous efforts to punish government contractors for past infractions, without regard to remedial steps the contractor may have taken"); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Agents and Employees*, 41 LOY. L. REV. 279, 279 (1995) ("The consequences of conviction are particularly harsh for corporations in regulated industries because criminal prosecutions can result not only in substantial fines but in disqualification from doing business."); cf. *United States v. Halper*, 490 U.S. 435, 447-49 (1989) (Blackmun, J.) (observing that notions of punishment cut across the division between the civil and criminal law, and that a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment).

⁴⁸ Albeit long before the advent of exclusion and debarment remedies, Blackstone in his *Commentaries* was perhaps the first to address the concept of “corporate death.” See 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 484 (1803) (referring to the dissolution of a corporation as “civil death”); see also Orland, *supra* note 2, at 502 (“a corporation cannot be incarcerated, although it can be executed”); *supra* note 47; *infra* note 64, 65 & 67.

⁴⁹ 48 C.F.R. § 9.407-2 (2004).

⁵⁰ 48 C.F.R. § 9.405(a) (2004).

⁵¹ McCullough & Pafford, *supra* note 47, ¶465, at 3.

⁵² See *id.*

⁵³ As explained in FAR § 9.407-2, the suspending official may suspend an entity from contracting with the federal government based solely upon an indictment for conduct constituting a “cause for suspension.” Such offenses include, inter alia, commission of a fraud, violation of the antitrust laws, commission of an unfair trade practice, or “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.” 48 C.F.R. § 9.407-2 (2003).

⁵⁴ The Secretary of Health and Human Services has primary responsibility and oversight to exclude individuals and entities. 42 U.S.C. § 1320a-7 (2004). As reflected in the implementing regulations, 42 C.F.R. § 1001 *et seq.*, these duties have been delegated to the Health and Human Services Office of Inspector General (HHS-OIG). See *Greene v. Sullivan*, 731 F. Supp. 835, 837 (E.D. Tenn. 1990).

⁵⁵ 42 U.S.C. § 1320a-7 (2004); 42 C.F.R. § 1001 *et seq.* This remedy may be mandatory or permissive, depending upon the cause for exclusion. The Secretary *shall* exclude individuals and entities for: conviction of crimes related to the delivery of an item or service under Medicare/Medicaid or a State health care program; conviction relating to patient abuse; felony conviction related to health care fraud; and felony conviction relating to controlled substance. 42 U.S.C. § 1320a-7(a) (2004). In contrast, there are two types of permissive exclusion: derivative, consisting of exclusions based on an action taken by a court, licensing board or other agency; and non-derivative, which require the HHS-OIG to make a determination that relevant misconduct occurred. 57 FED. REG. 3298, 3299 (Jan. 29, 1992); see Bucy, *supra* note 45, at 725-27. Examples of derivative grounds for exclusion include, *inter alia*: conviction relating to fraud; conviction relating to obstruction of an investigation; license revocation or suspension; and exclusion or suspension under federal or state health care programs. Non-derivative bases include: claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary services; fraud, kickbacks, and other prohibited activities; and failure to grant immediate access. 42 U.S.C. § 1320a-7(b) (2004); see Bucy, *supra* note 45, at 725-27; see also Howard E. O’Leary, *Regulating Health Care Costs Through Fraud Enforcement*, 62 DEF. COUNS. J. 211, 220-223 (1995) (discussing mandatory and permissive grounds for exclusion, as well as their application to case examples).

⁵⁶ 42 C.F.R. § 1001.1901(b) (2004).

⁵⁷ 45 C.F.R. § 76.230 (2004) (“Any individual or entity excluded from participation in Medicare, Medicaid and other Federal health care programs under Title XI of the Social Security Act, 42 U.S.C. 1320a-7 . . . [is] prohibited from participating in all Executive Branch procurement programs and activities.”); Executive Order No. 12689, 54 FED. REG. 34,131 (Aug. 16, 1989) (“[T]he debarment, suspension, or other exclusion of a participant in an procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have government-wide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.”).

⁵⁸ Boilerplate language in many private insurer contracts requires that health care providers maintain participation in Medicare and Medicaid programs. Failure to do so may trigger termination for cause provisions, resulting in an excluded provider also losing its contracts with those private insurers.

⁵⁹ HHS-OIG may impose civil monetary penalties where a party contracts with an excluded entity for that entity to provide items or services for which payment may be made under a federal health care program, and the party knew or should have known that the entity was excluded. 42 U.S.C. § 1320a-7a(a)(6); 42 C.F.R. §§ 1003.102(a)(2) & .104. That party risks exclusion as well. 42 C.F.R. § 1003.105(a).

⁶⁰ See *supra* note 55.

⁶¹ See *id.* Corporations in other highly regulated industries face similar threats of disqualification from doing business, typically also triggered by the return of an indictment alone. For example, health care insurers, who provide health insurance to federal employees, are subject to suspension and debarment under the Federal Employees Health Benefits Act, 5 C.F.R. § 890.1001 *et seq.* (2004). Pursuant to that Act and the related OPM regulations, an indictment may lead to a suspension of a provider’s contract based upon an alleged criminal offense “relating to fraud, corruption, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care service or supply.” 5 U.S.C. § 8902a(b)(1); 5 C.F.R. § 890.1031(a)(b)(1). A suspension under these provisions is effective immediately and does not require prior notice to the provider. 5 C.F.R. § 890.1030(b). Upon conviction, debarment is mandatory. 5 U.S.C. § 8902a(b)(1-4).

⁶² See *supra* note 55.

⁶³ GSA Press Release #9930, *GSA Suspends Enron and Arthur Andersen and Former Officials* (Mar. 15, 2002); see also *supra* note 53.

⁶⁴ Thus, in a blunt exchange that reportedly took place between Andersen Managing Partner, Joseph Bernadino, and then-DOJ Criminal Division Head, Michael Chertoff, on the eve of the return of the one-count Indictment of Andersen, Mr. Bernadino is reported to have said to Mr. Chertoff in frustration: “If you want to kill us, go kill us. . . . If you want to keep us alive, we can get through this, but we can’t take an indictment.” Richard B. Schmitt et al., *Behind Andersen’s Tug of War With Justice: How Firm’s Plan to Settle Fell Apart*, WALL ST. J., Apr. 19, 2002, at C1. Indeed, by all indications, the government weighed the likely collateral consequences before deciding to seek the indictment of Andersen. See, e.g., DOJ News Conference on March 14, 2002 (Q: [Andersen’s] lawyers are claiming that the charges amount to the death penalty for

the firm. What's your reaction to that? Do you have any sympathy for that rationale? MR. THOMPSON: As I mentioned previously, we considered a number of factors, and a number of factors are typically considered when a decision is made to charge an entity. And I am confident that the team, the task force, as well as myself, considered all the appropriate charges [sic] in making the decision to seek the indictment that we announce today.”).

⁶⁵ Floyd Norris, *Enron's Many Strands: News Analysis; Execution Before Trial for Andersen*, N.Y. TIMES, Mar. 15, 2002, at C1 (“It is customary to say that a judge and jury will decide guilt. But in this case, the punishment may well come before the verdict. . . . In reality, many in the accounting business believe, the death penalty seems virtually certain.”); David Schepp, *Analysis: Verdict Signals Andersen's End*, BBC NEWS, June 15, 2002, at <http://news.bbc.co.uk/1/hi/business/2047381.stm> (“For many the guilty verdict reached in the obstruction of justice case against Arthur Andersen signals the end to the already mortally wounded accountancy firm.”)

⁶⁶ Norris, *supra* note 65, at C1 (“Even the allegations at their worst . . . make it appear that 95 percent of the firm was not involved.”) (citations omitted).

⁶⁷ Following a criminal trial, Andersen was convicted of obstruction of justice. *United States v. Arthur Andersen, LLP*, No. 4:02-cr-00121-ACL, Jury Verdict (S.D. Tex. June 17, 2002). Even before its conviction, however, the harm from the criminal charge to Andersen's reputation for integrity was evidently catastrophic. See *Analysts: It's the End of Andersen*, HOUSTON CHRONICLE, June 15, 2002 at <http://www.chron.com> (“Arthur Andersen LLP's felony conviction for obstructing justice signals the end of the once-mighty accounting firm, industry analysts predicted today. While [Anderson] has maintained for months it can stay in business as a smaller firm, most experts think the 89-year-old company was mortally wounded even before its federal trial began. . . . Andersen has already lost millions of dollars in revenue and hundreds of publicly traded clients. . . .”); Schepp, *supra* note 65 (“The firm's demise was all but guaranteed in March when the US government indicted Andersen on charges of obstruction of justice for destroying key documents of its audit client, Enron. Chicago-based Andersen watched as its client base dwindled as company after company began looking for another auditor to sign off on their books.”).

⁶⁸ See *supra* note 55.

⁶⁹ Indeed, in accordance with an official memorandum recently issued to all federal prosecutors by Attorney General John Ashcroft, “[i]t is the policy of the Department of Justice that in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case,” except in “limited circumstances” and then only as authorized by an Assistant Attorney General, United States Attorney or designated supervisory attorney. See Memorandum from Attorney General John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (the “Ashcroft Memo”). As a corollary, “[c]harges may be declined or dismissed pursuant to a plea bargain only to the extent consistent with the [foregoing] principles.” See *id.* The Ashcroft Memo by its terms makes no exception for vicarious corporate criminal offenses.

⁷⁰ The idea of proportionality of punishment for one's bad acts – that the punishment should fit the crime – is deeply ingrained in American criminal jurisprudence. *Atkins v. Virginia*, 536 U.S.

304, 311 (2002) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense.”) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); *BMW of N. Am. v. Gore*, 517 U.S. 559, 576 n.24 (1996) (“The principle that punishment should fit the crime ‘is deeply rooted and frequently repeated in common-law jurisprudence.’”) (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)); *Solem*, 463 U.S. at 284-85 (noting that the concept that a punishment should be proportionate to the crime dates back at least as far as the Magna Carta). For a similar overview of the deeply-rooted principle that criminal misconduct requires moral culpability and a “guilty mind,” see *supra* note 3 & accompanying text.

⁷¹ See, e.g., Press Release, Department of Justice, Bayer Corporation and GlaxoSmithKline to Pay \$344 Million to Resolve Allegations of Health Care Fraud Against State Programs (Apr. 16, 2003) (following a wide-ranging investigation into health care fraud by Bayer that allegedly involved the concealment and avoidance of millions of dollars in rebates owed to the Medicaid program, and upon Bayer’s agreement to pay \$344 million and enter into a corporate integrity agreement, Bayer was permitted to plead guilty to the non-excludable offense of failing to file a regulatory report with the FDA).

⁷² See, e.g., Press Release, Department of Justice, Fresenius Medical Care North America Agrees to Pay \$486 Million to Resolve Health Care Fraud Investigation (Jan. 19, 2000) (on file with the Department of Justice) (noting that upon Fresenius Medical Care North America’s agreement to pay \$486 million and enter into an eight-year corporate integrity agreement, the government agreed to permit three predecessor companies (all NMC subsidiaries) – Lifechem, Inc., NMC Homecare, Inc. and NMC Medical Products, Inc. – to enter the guilty pleas). Fresenius was not excluded from future participation in federal or state health care programs, but the three predecessor NMC subsidiaries were. See HHS-OIG Fraud Prevention & Detection – Exclusion Program, List of Excluded Individuals/Entities (LEIE), at <http://oig.hhs.gov/fraud/exclusions.html>; Press Release, Abbott Laboratories, Ross Products Division Reaches Settlement Related to Industry-Wide Enteral Nutrition Investigation, (July 23, 2003) (following a multi-year federal criminal investigation into sales and marketing practices of Abbott Laboratory’s enteral nutrition business, Abbott agreed to pay \$622 million and the government agreed to permit CG Nutritionals, a subsidiary of Abbott, to plead to one count of obstruction of a health care offense). Abbott Laboratories was not excluded from future participation in federal or state health care programs, see *id.* (stating that the settlement “will not affect Abbott’s ongoing business with any customer, including the U.S. government”), but CG Nutritionals was subsequently so excluded. See HHS-OIG Fraud Prevention & Detection – Exclusion Program, List of Excluded Individuals/Entities (LEIE), at <http://oig.hhs.gov/fraud/exclusions.html>.

⁷³ The Department of Justice Guidelines for the Prosecution of Business Organizations warrant brief mention in this regard. In 1999, Deputy Attorney General Eric Holder issued a set of guidelines that “should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case.” See Memorandum from Deputy Attorney General Holder to All Component Heads and United States’ Attorneys (June 16, 1999), and attached Guidelines for Federal Prosecution of Corporations (hereinafter the “Holder Memo”). Recently, the DOJ issued revised “Principles of Federal Prosecution of Business Organizations.” See Memorandum from Larry D. Thompson to Heads of Department Components and United States Attorneys (Jan. 20, 2003), and attached Principles of Federal Prosecution of Business Organizations (hereinafter the “Thompson Memo” or “DOJ Principles”). While the Thompson Memo identifies various factors that should be considered by prosecutors in “conducting an investigation, determining whether to bring charges, and negotiating plea agreements” – including the nature

and seriousness of the offense, the pervasiveness of the wrongdoing and the existence of a meaningful corporate compliance program – the memo makes clear that it sets forth only “guidelines” and that proper application of the factors will depend significantly on the facts of the case. The DOJ Guidelines thus create no enforceable rights in corporate organizations facing prosecution and are subject to interpretation and implementation by individual prosecutors in individual cases with no assurance of uniform or predictable applications of the “factors.” As a result, and particularly given the financial and other incentives that now drive corporate criminal prosecutions, see *supra* Sect. II, the DOJ Guidelines, whatever their merits, do little, if anything, to remove the threat of draconian corporate punishment for the misconduct of individual employees and do not alleviate the *in terrorem* effect discussed, *infra*, or the adverse consequences thereof. See also *supra* note 69 (discussing Ashcroft Memo and Department of Justice policy that federal prosecutors “must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case”).

⁷⁴ See *supra* note 49 & accompanying text.

⁷⁵ The exclusion provisions do not specifically require the Secretary to adhere to a burden of proof in making permissive exclusion determinations. However, the standard of review for an administrative law judge reviewing the Secretary’s decision on appeal is “preponderance of evidence.” See *In re Nosratolah Yadegari*, No. C-03-128, 2003 WL 21368259 (H.H.S. May 14, 2003); *In re Jose Grau, M.D.*, No. C-02-079, 2002 WL 1804669 (H.H.S. July 15, 2002).

⁷⁶ The protections afforded by the “proof beyond a reasonable doubt” standard are grounded in the Due Process Clause of the Constitution. *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). For a comprehensive historical discussion of the reasonable doubt standard, see Thomas V. Mulrine, *Reasonable Doubt: How in the World is it Defined?* 12 AM. U. J. INT’L L. Pol’y 195, 199-210 (1997).

⁷⁷ See *Twentieth Century Fox Film Corp.*, 882 F.2d at 657-58, 662-65 (holding that the Sixth Amendment entitles corporations to a jury trial); *United States v. Troxler Hosiery Co., Inc.* 681 F.2d 934, 935-37 (4th Cir. 1982); *United States v. NYNEX Corp.*, 781 F. Supp. 19, 26-28 (D.D.C. 1991) (“[T]he corporation is entitled to a jury trial under the Sixth Amendment”); *Muniz v. Hoffman*, 422 U.S. 454, 475-77 (1975).

⁷⁸ U.S. CONST. art. III, § 2, cl. 3.

⁷⁹ U.S. CONST. amend. VI.

⁸⁰ See *supra* note 77; see also Alan L. Adelstein, *A Corporation’s Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375 (1994); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996).

⁸¹ See *supra* note 77.

⁸² See *United States v. MacKenzie*, No. 1:01 cr-10350-DPW, Indictment (D. Mass. Oct. 2, 2001).

⁸³ See *supra* note 55. While less than clear as a legal matter, the OIG has taken the position that its exclusion authority extends to “indirect” providers, such as pharmaceutical companies. In the OIG’s view, “from 1980 to present, Congress has consistently and repeatedly expressed its view that any individual or entity that furnishes items or services that are reimbursable under the programs is subject to exclusion from the programs, regardless of whether that individual or entity directly presents a bill to the program.” 63 FED. REG. 46,676, 46,678 (Sept. 2, 1998); see also 42 C.F.R. § 1001.1901(b)(1); 42 C.F.R. § 1000.10. There has been no judicial determination to date with respect to whether the OIG acted within its statutory authority when it modified its regulations expressly to provide for exclusion of indirect providers.

⁸⁴ See *supra* note 55.

⁸⁵ See Press Release, United States Attorney’s Office for the District of Massachusetts, TAP Pharmaceutical Products Inc. and Seven Others Charged with Health Care Crimes; Company Agrees to Pay \$875 Million to Settle Claims (Oct. 3, 2001); *United States v. TAP Pharm. Prods.*, No. 1:01-CR-10354-ALL, Corporate Integrity Agreement (D. Mass. Sept. 28, 2001).

⁸⁶ See *United States v. TAP Pharm. Prods.*, No. 1:01-CR-10354-ALL, Settlement Agreement and Release (D. Mass. Sept. 28, 2001).

⁸⁷ See *United States v. MacKenzie, et al*, No. 1:01 cr-10350-DPW, Order Vacating Guilty Plea as to Kimberlee Chase, No. 1:01 cr-10350-DPW-5 (D. Mass. Sept. 14, 2004).

⁸⁸ See BRICKEY, *supra* note 6, § 3:09, at 115 (“[C]orporate criminal prosecutions may provide juries with an opportunity to reach logically troublesome results, namely conviction of the corporation and acquittal of the individual agent upon whose conduct the corporation’s conviction rests.”).

⁸⁹ See *id.*

⁹⁰ See, e.g., Tim Reason, *Corporate Wrong-doers Are Finding That State Cops Have Become More Aggressive Than The Feds*, CFO MAGAZINE, Feb. 1, 2004, at <http://www.cfo.com/article.cfm/3011459?f=advancesearch> (noting environment in which state and federal regulators compete for cases and where ensuing quarrels over jurisdiction provide “great political theater”); Randall Smith & Tom Lauricella, *U.S. Attorney to Join Probe of Fund Trades*, WALL ST. J., Sept. 8, 2003, at C1 (reporting that U.S. Attorney for the Southern District of New York intends to participate in inquiry into alleged mutual-fund trading violations being investigated by New York Attorney General).

⁹¹ It has been settled for over a century that corporations are considered to be “persons” for purposes of many of the protections afforded by the Constitution. See generally 18 AM. JUR. 2D *Corporations* § 70 (2004). Thus, corporations have long been recognized to have a right to due process pursuant to the Fifth and Fourteenth Amendments. See *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893) (holding that corporations have a right to due process under the Fifth Amendment); *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26 (1889) (corporations have a right to due process under the Fourteenth Amendment).

⁹² While certain forms of plea bargaining in connection with individual prosecutions may raise similar concerns, see, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*,

101 YALE L. J. 1909 (1992), the issues that confront a corporation are qualitatively different. While individuals may feel pressure to negotiate a deal with the government for various reasons and may confront difficult choices in the plea bargaining process, the degree of “coercion” does not rise, as it does for corporations, to the level of potential imposition of the most draconian of punishments – including potential disqualification from doing business and ensuing “civil death” upon the *initiation* of a criminal proceeding – such that the prospect of a judicial resolution must be avoided at all costs. See *supra* Sects. II & III.

⁹³ See MODEL PENAL CODE § 2.07(1)(c).

⁹⁴ See Miller, *supra* note 15, at 55.

⁹⁵ See Mueller, *supra* note 1, at 38-44; Brown, *supra* note 47, at 307-29; Miller, *supra* note 15, at 56; Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L. Q. 329, 329 (1993); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).

⁹⁶ See Miller, *supra* note 15, at 55.

⁹⁷ See, e.g., Mueller, *supra* note 1; Brown, *supra* note 47, at 279.

⁹⁸ Brown, *supra* note 47, at 307-08.

⁹⁹ See *supra* note 46 & 53.

¹⁰⁰ See *supra* Sect. III.