

INTRODUCTION: CORPORATE CRIMINAL LIABILITY 2.0

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On February 19, 2016, law professors and attorneys came together to speak about corporate criminal liability in a symposium held on the campus of Stetson University College of Law.¹ On one level, this Symposium brought together the work of eight scholars, all well-versed in the corporate criminal liability area. While another level of this Symposium had practitioners reacting to the presentation of these eight individuals, allowing each of these scholars to reconsider his or her Article in light of the discussion.

Some of the presenters came to the discussion as corporate professors, while others had a scholarly focus related to criminal law and procedure. Two professors, Eli Lederman and Dmitriy Kamensky, offered an international perspective to the discussion. Each of the scholars in this Symposium discussed his or her draft paper, which now forms this law review issue.

This program is a follow-up to a *Stetson Law Review* Symposium on Corporate Criminal Liability published in a fall 2011 issue.² The papers emanating from that issue focused on merits and disadvantages of having a status of corporate criminal liability. It included some articles advocating for corporate criminal liability,³ and others that expressed concerns, such as the civil liberties implications of corporate

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1. In addition to Stetson University College of Law, sponsors for this event were Carlton Fields Jordan Burt, P.A.; Lauro Law Firm; Shutts & Bowen, LLP; Trombley & Hanes, P.A.; and Zuckerman Spaeder, LLP.

2. See Ellen S. Podgor, *Corporate Criminal Liability*, 41 STETSON L. REV. 1 (2011) (providing background information on the symposium, which took place in the summer of 2010).

3. See generally, e.g., Lisa M. Fairfax, *On the Sufficiency of Corporate Regulation as an Alternative to Corporate Criminal Liability*, 41 STETSON L. REV. 117 (2011) (noting the need for corporate criminal liability in places not covered by individual criminal liability); Charles R.P. Pouncy, *Reevaluating Corporate Criminal Responsibility: It's All About Power*, 41 STETSON L. REV. 97 (2011) (discussing the role of corporate power); Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73 (2011) (noting the enormous benefits that corporations receive in society and therefore being answerable for misconduct).

criminal liability.⁴ The initial Corporate Criminal Liability Symposium also examined the concept in light of the then-recent decision *Citizens United v. Federal Election Commission*⁵ and the implications of this case on the Fourth and Fifth Amendments to the U.S. Constitution.⁶

The uniqueness of this 2016 program was that the academics set the groundwork for the discussion with their papers, that then allowed for the reactions of white-collar practitioners, who offered the practical perspective coming from their regularly dealing with clients on issues tied in some way to alleged corporate criminal liability. Mixing the theoretical with the practical provides an important bedrock for understanding the current state of corporate criminal liability and the considerations that are needed for effective legal reform.

Corporate criminal liability has not been static since the first symposium issue. Issues continue to arise as to the viability of treating corporations as persons. There are also discussions about how best to combat corporate criminal liability and who best to prosecute this misconduct.⁷ Should the misconduct be regulated through civil action or also be subject to criminal prosecution? Likewise, it is a topic of continual public concern and political debate.⁸

The first panel in Corporate Criminal Liability 2.0 was labeled, "*Corporate Criminal Liability: On the Ground and Abroad.*" Speakers Paul J. Larkin, Sara Sun Beale, Eli Lederman, and Dmitriy Kamensky presented as a part of this panel.

Paul J. Larkin, authoring his Article with John-Michael Seibler,⁹ focused on Deputy Attorney General Sally Yates' 2015 memorandum entitled, *Individual Accountability for Corporate Wrongdoing* (Yates Memo).¹⁰ In their Article, *All Stick and No Carrot: The Yates*

4. See Jon May, *Corporate Criminal Liability and the Threat to Civil Liberty*, 41 STETSON L. REV. 63 (2011) (discussing civil liberties implications from corporate criminal liability).

5. 558 U.S. 310 (2010). See also Joan MacLeod Heminway, *Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability*, 41 STETSON L. REV. 137 (2011) (providing a general explanation of corporate criminal liability and its relation to *Citizens United*).

6. See, e.g., Christopher Slobogin, *Citizens United and Corporate Human Crime*, 41 STETSON L. REV. 127 (2011) (explaining how *Citizens United* can expand procedural rights for corporations through Fourth and Fifth amendment protections).

7. E.g., ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, HORNBOOK ON WHITE COLLAR CRIME, §2.1 (D), (E) (2013).

8. See, e.g., Sen. Elizabeth Warren, *Rigged Justice: 2016 How Weak Enforcement Lets Corporate Offenders Off Easy* (Jan. 2016), available at https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf (discussing enforcement failures in the past year).

9. Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7 (2016).

10. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), available at <https://www.justice.gov/dag/file/769036/download>.

Memorandum and Corporate Criminal Liability, Larkin and Seibler provide a detailed history of corporate criminal liability. They note how the government now shifts the onus to a corporation for the investigation and prosecution of corporate misconduct.¹¹ They conclude by noting the ramifications of the Yates Memo, particularly its unintended consequences by pitting employees and corporations against each other.¹² They also discuss consequences such as eroding the attorney-client relationship and creating perverse incentives to destroy and shield information.¹³

Professor Sara Sun Beale also looks at the Yates Memo in her article titled, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*.¹⁴ She provides a historical review of corporate criminal law, including examining the 1909 cornerstone case of *New York Central & Hudson River Railroad Co. v. United States*.¹⁵ She notes how Department of Justice policy and the Sentencing Commission “set the stage for the Yates Memo.”¹⁶ But she also asks the question of “how much weight should the public’s views be given?”¹⁷

The final two articles present an international perspective to this issue. In his Article, Professor Eli Lederman from Israel remarks on U.S. corporate criminal liability, and then tells about the U.K. Bribery Act and how it serves as a model for the Israel Minister of Justice.¹⁸ Professor Dmitriy Kamensky discusses the recent amendment of quasi-criminal liability in the Criminal Code of Ukraine (CCU) and the importance of research of comparative criminal law.¹⁹

The luncheon panel was composed of leading white-collar attorneys, namely, John Lauro, Gary Trombley, Morris “Sandy” Weinberg, and Kevin Napper. They added the practitioner perspective to the discussion. Many of the observations at the end of this Introduction arise from this discussion.

11. Larkin, Jr. & Seibler, *supra* note 9, at 8.

12. *Id.* at 38–39.

13. *Id.* at 31–33.

14. Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 (2016).

15. 212 U.S. 481 (1909); Beale, *supra* note 14, at 43–49.

16. Beale, *supra* note 14, at 62.

17. *Id.* at 68.

18. Eli Lederman, *Corporate Criminal Liability: The Second Generation*, 46 STETSON L. REV. 71 (2016).

19. Dmitriy Kamensky, *Introducing Corporate Criminal Liability in Ukraine: Terra Incognita*, 46 STETSON L. REV. 89 (2016).

The final panel was titled “*Corporate Criminal Liability: Morality and Culpability*.” It included speakers Lucian Dervan, Joan Macleod Heminway, John P. Anderson, and Ciara Torres-Spelliscy. Professor Lucian Dervan continued the conversation from the first panel in discussing the U.K. Bribery Act. He advocated for amending the Department of Justice’s *Principles of Prosecution*.²⁰

Professors Joan Macleod Heminway and John P. Anderson, both business law professors, focused on insider trading, including a discussion of insider trading by employees of a corporation.²¹ Finally, the last speaker, Professor Ciara Torres-Spelliscy, examined corporate use of slave labor.²²

An outgrowth of this program is the constellation of eleven observations regarding current corporate criminal liability policy. These observations try to capture the challenges expressed in the current practice with regard to this area of the law. They are not reflective of an agreement of all the speakers, nor do they capture all the comments made throughout the program. Rather they offer a moderator’s synthesis of eleven reflections that mark the current state of corporate criminal prosecution in the federal system. They are called the Eleven Observations here, not because they are favorable or dispositive in nature, rather, they bring together some of the thoughts expressed during the Symposium that need correction, reflection, or at least some additional study regarding corporate criminal liability.

ELEVEN OBSERVATIONS OF CORPORATE CRIMINAL LIABILITY 2.0

1. Overcriminalization, with its countless statutory and regulatory provisions, including state, federal, and international mandates, has a detrimental effect on eradicating corporate criminal liability as it makes it more difficult for corporations to comply with the law.

20. Lucian E. Dervan, *Corporate Criminal Liability, Moral Culpability, and the Yates Memo*, 46 STETSON L. REV. 111 (2016).

21. John P. Anderson, *When Does Corporate Criminal Liability for Insider Trading Make Sense?*, 46 STETSON L. REV. 147 (2016); Joan MacLeod Heminway, *(Not) Holding Firms Criminally Responsible for the Reckless Insider Trading of Their Employees*, 46 STETSON L. REV. 127 (2016). This issue also contains Maria Babajanian’s Comment that considers the Second Circuit’s decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), analyzing tippee liability for alleged insider trading. This analysis is particularly important as the Supreme Court decides *Salman v. United States*, 136 S. Ct. 899 (2016). Maria Babajanian, Comment, *Rewarded for Being Remote: How United States v. Newman Improperly Narrows Liability for Tippees*, 46 STETSON L. REV. 199 (2016).

22. Ciara Torres-Spelliscy, *Slaves to the Bottom Line: The Corporate Role in Slavery from Nuremberg to Now*, 46 STETSON L. REV. 167 (2016).

2. The erosion of criminal intent within statutes has a detrimental effect on eradicating corporate criminal liability, as it allows business decisions to be considered criminal without notice being given to individuals so that they can comply with the law. It also allows prosecution of business decisions despite there being insufficient moral culpability.

3. Some countries beyond the United States have not approached corporate criminal prosecutions as harshly as the United States federal government.

4. The enormous financial cost of defending a white-collar case places individuals at a disadvantage in maintaining their constitutional rights while presenting a case against the government.

5. The failure to provide sufficient resources to the government in administrative matters and the inadequacy of civil liability remedies detrimentally effects eradicating white-collar criminality.

6. An increased prosecutorial power, including the use of legalized extortion to obtain pleas, deferred prosecutions, non-prosecutions, and civil settlements in civil False Claims Act cases, allows companies to buy their way out of being subject to exclusion, debarment, catastrophic monetary fines, and other forfeitures. An individual's due process rights may be seriously infringed when the government deputizes companies to work against its corporate constituents.

7. Corporations are obtaining increased power with less oversight and responsibilities, allowing for actions that have far-reaching effects such as human rights violations.

8. The failure to permit corporations a "good faith" defense serves as a roadblock for corporations that attempt to comply with the law but have a rogue employee who deviates from corporate policy.

9. The government currently pits the entity and individuals against each other, which serves as a detriment to them working together to eradicate corporate criminal liability.

10. Corporate criminal liability in the context of insider trading needs serious reexamination.

11. There is a growing distinction in corporate criminal liability between prosecutions against large companies and prosecutions against smaller companies, the latter having less resources to withstand government scrutiny, which may include lengthy and costly government investigations.

Although many may disagree with some of the thoughts expressed here, it is noted that these concerns came from at least one of the individuals who participated in this program. These Eleven Observations provide a strong base for future study and hopefully correction within the legal system. With corporations clearly subject to criminal prosecutions, it is important to continue to study entity liability to determine how best to achieve better corporate compliance, legal enforcement, and most importantly, a decrease of corporate criminal conduct.