Corporate Crime, Overcriminalization, and the Failure of American Public Morality

by Jeffrey S. Parker Draft 12/2/10

I am willing to accept the general proposition that American exceptionalism can cut both ways, and sometimes more than two. By and large, I think that American exceptionalism is a very good thing, both for America and for the world. A strongly distinctive outlier performs useful functions in the world system, not least of which is insuring the diversity of approaches that is optimal to the advance of human culture. So, I am a fan of both American exceptionalism and intra-American exceptionalism, i.e., the "social laboratory" aspect of American federalism.

Nor do I believe that legal systems differ in this regard, and, if anything, are a cardinal example of the value of diversity in general and American exceptionalism in particular. In my view, one of the worst trends in transnational and comparative law today is the drive in some quarters toward homogenization, or its euphemistic equivalent of "harmonization," across national boundaries. Particularly in some areas, such as civil procedural law, diversity is essential to efficient functioning of the transnational system, and uniformity or even substantial conformity would be a serious mistake. In that context, American exceptionalism is a truly priceless asset, made all the more so by its nearly unique combination of features found nowhere else on the planet, including the other common-law countries. I have expressed these views on civil procedure in a paper presented in Germany and published last year.[1]

Given these general views, I find myself in an unusual position with my current topic of "corporate crime." While it is a good example of American exceptionalism–or at least distinctiveness, as most common-law countries have had some form of criminal liability in the corporate entity since the 19th Century–I have considered that doctrine so mistaken and destructive that it should be abolished.[2] When I first took that position publicly in 1991, corporate criminal liability traditionally had been rejected in virtually all civil law systems. However, just at that time, the doctrine was under consideration by the EU council, and since has been adopted in a number of European states.[3] So, it would seem that we have a case here of American exceptionalism that cuts in both directions simultaneously: I will argue in this Chapter that Continental Europe had it right before 1990, and therefore America should not have been "exceptional" then; whereas now those other counties who have adopted the doctrine are wrong, and therefore America should become "exceptional."

Of course, for most legal subjects (unlike civil procedure), conformity with or divergence from other jurisdictions' systems is a matter of secondary importance. Usually, it is more important to develop the appropriate doctrines and processes for one's own jurisdiction, in light of its own local jurisprudence and conditions. Corporate crime seems to be an intermediate case, at least between common-law and European civil-law systems, as their basic principles of criminal liability are similar and founded on a common intellectual and philosophical heritage. Transnational competitive conditions themselves may cut both ways simultaneously, depending upon the structure of both liability and penalties. Thus, for example, Continental European

countries may be inherently more resistant to the negative effects of a poorly specified liability framework, simply because their sentencing systems are more sensible; this was actually the case in the U.S. corporate sentencing system prior to 1991. It is only a casual observation, but my impression is that European criminal sentencing systems sensibly give primary stress to the symbolic nature of criminal sentencing, and hardly ever carry out the enormous "hard time" sentences that are routinely implemented, without any prospect of parole or early release, in many American jurisdictions. Nor, though continental EU countries have relatively limited experience with corporate criminal sentencing, would I suppose that these countries actually would impose on their own domestic firms the types of crushing burdens regularly advocated by American federal officials against American firms. So, I think that a consideration of the interplay of sentencing with liability structures is important to a complete analysis.

Finally, I believe that considering the interaction between corporate crime and the related but distinct subject of overcriminalization in America is necessary to a full treatment of the topic. Because overcrminalization includes both over-prohibition and over-punishment, this is another topic on which America is truly exception among its cultural cousins, as it is a dramatic outlier on the magnitude of criminal punishment imposed on its own people.

Corporate Crime-Definitions and History

Though commonly used, the phrase "corporate crime" is ambiguous in its connotations, as referring to any one or more of at least three different but partially overlapping phenomena:

(1) the legal doctrine holding a corporate entity (as distinguished from its owners or agents) criminally liable for an event, which may or may not be a "crime" when committed by agents of the corporation;[4]

(2) the criminal liability of an individual agent for an actions taken (or omitted) in relation to the operations of a corporation or other business enterprise, which may or may not be a "crime" if committed outside the corporate or business context; and

(3) a synonym for "white-collar crime," which is not a legal concept but a sociological one, as referring to violations of law, either by business entities or by individuals associated with them, which violations may or may not be "crimes" by any legal definition, including the first two senses stated above.

As indicated by the definitions given, all three senses of "corporate crime" bear only a tangential relationship–if any at all–to the core definition of crime more generally, and therein lies much of the problem created by "corporate crime" in any of those senses. The acceptance of "corporate crime" into any legal system inevitably leads to a corruption of the ethical premises of criminal responsibility, and that corruption tends to spread into the body of criminal law more generally.

Entity Criminal Liability. The strictest legal sense of "corporate crime" as referring to entity criminal liability is the most obviously deviant from the general premises of criminal law. While some forms of proto-corporate and collective liability were extant in primitive to Medieval societies, these forms of liability largely disappeared from criminal law with the Enlightenment, which focused criminal responsibility on the individual's actions and intent. By the time of Blackstone's Commentaries, neither English nor American law recognized entity criminal liability, even though corporate forms were by then well established. And Blackstone also formulated the generic definition of crime into the familiar doctrines of actus reus and mens rea that remain fundamental requisits to criminal liability today, both in American and elsewhere. Because corporations, as abstract instrumentalities, could neither act in their proper person nor form a mens rea, they were not subject to criminal liability.[5]

However, beginning in the mid-19th Century, English and American courts began to recognize entity corporate liability, at first limited to "public nuisance" cases of omission and later extended to agents' acts, by analogy to the tort law doctrine of vicarious liability through respondeat superior. However, even this extension to meet actus reus deficiencies was inadequate to solve the mens rea problem. Vicarious liability is often but not inevitably associated with strict liability in the principal, and so various efforts where taken in the direction of figuratively anthropomorphizing the corporate entity so that it could have a corporate "mind" that could then been found "guilty."

The culmination of these developments at the federal level came with the 1909 decision of the U.S. Supreme Court in New York Central and Hudson River Railroad Company v. United States,[6] which upheld the validity of a specific federal statute expressly providing for entity criminal liability. While actually limited by its specific statutory context in the unsual Elkins Act,[7] the New York Central decision subsequently has been taken–quite inaccurately, in many commentators' opinions–as representing the "federal" rule of vicarious entity criminal liability for the conduct of corporate agents. Moreover, as New York Central brushed aside concerns about the lack of mens rea at the corporate level, it also has been taken as establishing a federal norm of both vicarious and "strict" or "absolute" liability, i.e., that entity liability requires no showing of mens rea or fault of any kind–including negligence–in the entity.

Thus, the development of the federal entity criminal liability standard directly violates two of the fundamental premises of criminal law doctrine, which are the negative correlatives of the actus reus and mens rea doctrines, respectively: (1) the general disapproval of vicarious liability for criminal (as opposed to civil) liability; and (2) the general disapproval of criminal liability in the absence of personal fault of a sufficient degree to produce moral condemnation of the offender who is being held liable.[8] One later development adds a third significant deviation in the form of the still-controversial "collective knowledge" doctrine, which imposes entity criminal liability where no individual actually is guilty of a crime, by the imaginary conflation of knowledge separately held by several different corporate agents, but never communicated to each other or to corporate management.[9] This is a case of purely imaginary crime.

Developments of entity criminal liability in American state law generally have been less expansive, though still deviant from the basis principles of actus reus and mens rea. The ALI's Model Penal Code proposes to limit strict criminal entity liability to minor offenses, and recognizes an affirmative defense of entity "due diligence" even in such cases, while more serious offenses are governed by a further development of the anthropomorphic approach to create a structure akin to the English "alter ego" rule, which substitutes for mens rea by requiring that either the entity's board of directors or "high managerial agent" performed, directed, or "recklessly tolerated" the commission of the underlying offense.[10] As usual, there is a wide degree of variation among individual states' laws, with some states more closely approaching the federal model. In any event, there appear to be very few criminal prosecutions of corporations in the states.

The American developments, while similar to those in the other English-speaking legal systems, were not in any way paralleled in Continental European law, which continued to reject criminal entity liability on principle until quite recently, and still does in some important European systems, such as Germany. There is no generally accepted explanation for this differential development. One explanation that I previously have proposed, and that fits the historical facts, is that both England and America came under an extraordinary pace of industrial development largely conducted through private corporations at a time when their legal systems were far less bureaucratic than those of Continental Europe.[11] Given this confluence of conditions, at a time when there was a felt need for public law enforcement, the only existing institution geared toward public law enforcement was the criminal law. This rationale is explicit in some of the earliest state cases,[12] and may well have been implicit in some of the early federal forays into criminalization of corporate behavior, such as the Sherman Act and perhaps the Food and Drug Act of 1906. However, the rise of the administrative state in the 20th Century removed this rationale. This appears to have produced a relative disuse of the criminal sanction against corporations until relatively late in the 20th Century, but it did not produce the doctrine's demise.

Corporate Agent Criminal Liability. At first blush, the practice of holding individual corporate agents liable for crimes committed in the course of their agency seems less deviant from criminal law principles than entity criminal liability, though the dual agent-principal liability system itself creates significant problems in enforcement (discussed below). However, once one examines the instances of liability in more detail, it becomes obvious that some similar forces are in play, to produce a regime of individual liability that is much more vicarious and strict than the norm of criminal law.

The main historical development here is the rise of a new sort of criminal offense ultimately dubbed the "public welfare offense" by Sayre.[13] This category refers to the use of criminal prohibitions to enforce what we would today call "regulatory" standards on commercial or industrial activities, usually in the name of "public health or safety," and hence the term "public welfare." Interestingly, public welfare offenses began to appear in significant numbers in that same mid-19th Century period that witnessed recognition of criminal entity liability in Anglo-American systems, and may have been cognate in terms of motivation.[14] They certainly

shared one important characteristic, as "public welfare" offenses tended to reduce or entirely dispense with a mens rea requirement, i.e., they were "strict liability" offenses.

As ultimately developed into the mid-20th Century, the "public welfare" offense also partook of vicarious liability, as these offenses applied to proprietors or managers of the regulated business. The paradigmatic example is sometimes known as the Dotterweich-Park doctrine after the names of the leading U.S. Supreme Court cases,[15] or as the "responsible corporate officer" doctrine after the use the terminology of "responsible relation" in the cases. The essence of the doctrine is that a corporate officer (or other manager or proprietor) may be held individually criminally responsible for action or inaction by the firm, not only without a showing of intent but also without any showing of actus reus, merely by virtue of the individual's position within the management structure of the firm. Thus, the "responsible officer" doctrine introduces yet another type of vicarious criminal liability, which in this instance could be called respondeat inferior, or "reverse" vicarious liability, as it imposes on the agent vicarious liability for the action of the firm.

The interpretive cases make reference to "circumstances of modern industrialism" as supposedly justifying the admitted injustice of conviction without proof of fault, and claim that, in the "public welfare" category, "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation."[16] However, some of the early cases plainly do not meet that description. The 1922 case of United States v. Balint[17]–routinely cited by the Court as an early example–involved a felony prosecution under the Harrison Narcotic Act of 1914, carrying a penalty of five years' imprisonment, in which the Court held that ignorance that the drugs in question were of the prohibited type was not a defense. While some subsequent Supreme Court cases have sought to cabin in the scope of permissible strict liability offenses,[18] the application of strict liability to some or all of a federal criminal offense has become commonplace, both within the corporate context and elsewhere.[19]

"White Collar" Crime. The final sense of "corporate crime" is not legal but sociological, as the term "white collar" crime itself was coined by the sociologist Edwin Sutherland.[20] To some extent, the invention of "white collar" crime was a continuation and expansion of the critique of industrialization, and its corporate practitioners, that had begun with in the mid-19th Century and extended through the Populist and Progressive eras of the late 19th and early 20th Century. The critique reached a climax in the immediate post-Depression era, and is very much associated with Sutherland himself, and in particular his book White Collar Crime, which first appeared in 1949. Sutherland's emphasis was on what he believed was the corrupting and criminogenic influence of corporate business structures, and his empirical work focused entirely on enforcement actions against large corporations. While the work of Sutherland and other sociologists did not give close attention to the criminal law doctrines of mens reus and actus reus, he did focus on pushing the envelope on what was called "crime." To some extent, this was a necessity given his empirical findings, which was that the vast majority–84%– of the cases he studied actually were instances of civil and not criminal law enforcement. He devoted an entire chapter in his book to arguing that these civil cases, either because they involved public

enforcement or laws that could be enforced publicly, should be considered "crime," as they were wrongs against the state or the public. A similar pattern is found in later sociological studies by followers of Sutherland, into the late 1970s and early 1980s.[21]

Thus, the sociologists' construct of corporate crime shares the common feature of attacking the legal distinction of crime from non-crime, and thus blurring the civil-criminal distinction.

Recent Developments Regarding Corporate Crime and its Enforcement

As late as 1990, the American doctrine of entity criminal liability remained a curious anomaly even within the English-speaking world, and had been rejected elsewhere. Even within the United States, which was the foremost practitioner of entity criminal liability, actual criminal prosecutions against corporations remained relatively infrequent, and penalties imposed on corporations were modest, and almost exclusively consisted of monetary fines.[22]

Over the ensuing 20 years, these conditions have changed dramatically. With the EU's apparent blessing, some of its member states recently have decided to embrace American-style entity criminal liability. In the United States, entity criminal liability has been transformed from a minor anomaly into a serious threat to our economic well-being. Ironically, this transformation has come during a period in which there has been a growing scholarly opinion in America that the entire "corporate crime" exercise is bad law enforcement policy, and economically destructive.

The seemingly unlikely catalyst for the American developments was the enactment of the federal Sentencing Reform Act of 1984,[23] which authorized the creation of a regime of mandatory criminal sentencing guidelines for the federal courts. As it pertains to corporate crime, the significant changes wrought by that Act were: (1) raising and restructuring statutory maximum penalty levels; and (2) authorizing the imposition of an independent non-monetary sanction of corporate "probation," which could be used, and ultimately was used, to force corporations to adopt a governmentally-specified "compliance" regime to "prevent and detect violations of law," with no legally-specified limit to the magnitude or type of "compliance" procedures that could be imposed. [24] When the final federal corporate guidelines appeared in late 1991, they took the "compliance" model to an extreme, essentially mandating that a government-style compliance bureaucracy be created within corporations, and, through the fining structure, punishing firms more severely for having failed to implement the specified compliance programs ex ante.[25]

In the meantime, the advent of the Sentencing Reform Act had focused scholarly attention on the problem, especially in the economics and law-and-economics literature. In addition to my own prior publications, this included important papers by Fischel and Sykes,[26] and by Khanna,[27] showing the entity criminal liability had no benefit to enforcement, and potential costs to both enforcement and business efficiency. The basic logic of the economic critique is straightforward:

while a good case could be made for the efficiency of entity-level monetary penalties of appropriate magnitude, based upon vicarious and strict liability, nothing about that case required or even recommended the use of criminal as opposed to civil penalties.

A secondary debate on the tradeoff between monetary penalties based on strict ex post liability and specified ex ante "care" regimes essentially paralleled the traditional literature on the tradeoff between strict liability and negligence in tort.[28] Putting aside the recognized problem that a negligence or care regime does not operate on the "activity level" problem (i.e, it does not provide the firm with optimal incentive to change the scale of operations as a compliance mechanism), the tradeoff is the familiar one that selection depends upon whether the policy instrument has better information about the magnitude of external harm (and probability of enforcement) or better information about socially optimal care.[29] But here again, this debate does not influence the choice of criminal versus civil sanctions under current institutional arrangements: civil sanctions could do as well, and probably better, depending upon the governmental procedures and expertise applied.

Thus, there is essentially no argument within the economics or law-and-economics literature that criminal (as opposed to public civil) enforcement has any benefit. In the literature more generally, the main debates have been over reputational effects–which appear also to be either neutral or negative toward criminal as opposed to civil enforcement[30]–and something called "expressive retribution,"[31] which may or may not be the same thing. Traditional notions of retribution are inapplicable, or worse, as applied to criminal entity sanctions, which actually are doubly vicarious, in absence of fault: even the corporate entity is not at "fault" in any coherent sense, but the final effects of corporate sanctions come to rest on those whom everyone would agree are innocents–shareholders, customers, suppliers, and employees who had nothing to do with the law violation. "Expressive" retribution tries to get around this problem by claiming that there is a social value in blaming the blameless, but it is not clear what that is supposed to accomplish, either instrumentally or symbolically, as it would seem to undermine whatever moral authority there might be in a criminal conviction, and would disable a productive technology without purpose. [32]

The remaining defenders of retaining entity criminal liability in the legal literature argue only for a modified form: either as a sanction of last resort, not to be used routinely, or modified to permit an affirmative defense of "due diligence" by the firm. This last proposal actually is a variation of the structure chosen by the Sentencing Commission for its 1991 guidelines, and questionable for similar reasons, though perhaps preferable if the "due diligence" is to be litigated in a manner similar to civil negligence.

The basic problem with the Sentencing Commission's guidelines is that it chooses neither a ex post strict liability structure with optimal fines, nor an ex ante care specification, but rather a hybrid, which possesses all of the vices and none of the virtues of the alternatives. There is no evidence that the Sentencing Commission made any effort to determine either optimal monetary penalty levels or socially optimal care, and little reason to believe that even a well-motivated

Sentencing Commission–or any other government agency could do so. Instead, what the guidelines do is to set the threatened penalty levels many times higher than prior law (and the manipulability of charging decisions allows in most cases what amounts to an unlimited threat point in the enforcer), so as to force corporations to adopt a "compliance" plan that will be deemed acceptable. In other words, it sets up a governmentally-specified compliance management regime.[33]

Even in gross terms, it would be pure dumb luck if the Commission's compliance management guidelines were optimal for even one or a few firms, and virtually impossible for such a structure to be economic for all or even many firms among the millions of diverse firms operating in the United States. At our recent LEC conference on overcriminalization, former Deputy U.S. Attorney General Larry Thompson gave a good numerical example making this point: assume that you have 100 firms, of whom one may violate the law in some minor way, but you do not know in advance which one, and of course the firms also do not know; how does the policymaker know whether it is cost-justified to force all 100 firms to implement specified compliance programs, or simply a huge waste of productive resources that dwarfs the harm that could be caused by the one violation? We may not know for certain, but we have a fairly high degree of confidence that this is social waste.

But actually, this example, good as it is, does not go far enough. At a previous LEC conference on corporate crime, held 20 years ago in 1990, Michael Block, who was a member of the Commission, presented a paper showing that even a relative small mis-specification of either optimal ex post penalties, or ex ante care, or some combination of the two, can cause profound losses in economic efficiency, and thus reduce the welfare the firms and their stakeholders.[34] This was one year before the Commission implemented its guidelines, over Block's objections. Furthermore, the more competitive the market, the more dramatic the effects can be. Block's analysis was limited by the assumption that the mis-specified standards applied across an entire industry, and even then could cause significant efficiency losses, as, for example, by making the industry inefficiently small or large. However, in this era of increasing global competition, even a minor mis-specification could cause an entire domestic industry to disappear. In highly competitive markets, the persistent failure to operate at an optimal scale eventually will destroy the viability of the firm, and if there are competing foreign firms not subject to the same regime, could cause all American firms to exit.

Thus, while there is not yet consensus on the magnitude of welfare losses to the American economy from the Commission's corporate compliance guidelines, there are good reasons in theory to be concerned about significant welfare losses.

Moreover, we now have nearly 20 years of experience with these guidelines, and our experience in practice deepens this concern. Shortly after the guidelines were implemented, the federal Department of Justice embraced their "compliance" philosophy, and in fact extended it to a "compliance and cooperation" policy to guide enforcement actions. Under a series of policy memos issued from the 1990's and bearing the names of successive Deputy Attorneys General,[35]

the Department adopted an approach that encouraged prosecutors to base their prosecutorial decisions on the degree to which the target firm embraced the "compliance" philosophy, and "cooperated" with the Department's investigation, including assistance to the Department in obtaining convictions of the firm's own agents, through such means as extracting a waiver of the firm's attorney-client privilege or work product protection, conduct an internal investigation on behalf of the Department, or to abdicate its duty to indemnify agents for their defense costs.

The controversy created by these policies came to a head in United States v. Stein,[36] where the Second Circuit affirmed a district court's dismissal of prosecutions against employees of the accounting firm KPMG, based upon unwarranted pressure brought to bear on the firm itself, which had not been charged. In the wake of this episode, the Department issued a revised policy statement, withdrawing the most offending parts, but it did not back off of its basic compliance-and-cooperation model, including such things as external "monitors" and the like.[37] Thus, the Department appears to have fallen into a policy of using criminal prosecutions against firms as a way of "managing" the firm's management, or, as Brandon Garrett terms the practice, "structural reform prosecutions." [38] As illustrated by the Stein case itself, and many others, this approach often involves "non-prosecution" or "deferred prosecution" agreements, thus placing the practice outside direct monitoring by the courts. It also may be the reason why actual indictments against corporations have continued to fall in recent years, below their levels of the 1980s. This does not mean that there is less use of the threat of criminal prosecutions against firms, and may mean that there is more.

Whatever the Department is actually doing in detail, we know that its basic approach is, in essence, bureaucratic management of the firm's own management, backed up by the threat of large (possibly terminal) consequences for the targeted firm, whether or not it is ever indicted. Of course, this adds to the concerns noted above. Even if we were to suppose that any government agents would be qualified to manage a firm's management, it seems unlikely that we would choose criminal prosecutors to implement that task, as there competencies and incentives simply do not match the task. Indeed, it is doubtful that any government agents would be sufficiently suited. If they were, then in a competitive labor market, they would be managing firms rather than working for the government. Even more fundamentally, if any government agents had any competency to manage the firm's management, this would call into question the entire rationale for entity liability of any sort–either civil or criminal–because the entire point of firm liability in public enforcement is that the firm's own managers are better able to manage that firm, including its legal compliance.

Overcriminalization

While the problems of "corporate crime" in themselves are sufficient to constitute a major social problem worthy of discussion, I believe that corporate crime forms only one part of the much larger problem of overcriminalization that has received extensive attention in scholarly and public debate over the last few years. Moreover, I think it is an important part of the current overcriminalization phenomenon, in that the recognition of corporate crime doctrines has

functioned as an enabler of overcriminalization in a profound way. This way is suggested by keynote remarks delivered at a 2007 corporate crime conference by former Attorney General Richard Thornburgh, who spoke of "artificial entities and artificial crimes," in which he included not only corporate entity liability, but also a broader set of problems, including the proliferation of federal crimes, especially strict-liability regulatory crimes. [39] By examining the overcriminalization debates more closely, we can identify parallels with the evolution of corporate crime, beyond the obvious fact that corporate crime–at least in the sense of criminal entity liability–is by definition a species of overcriminalization.

Somewhat like corporate crime, definitions of "overcriminalization" are a bit fuzzy and debatable. Literally, the term means over-use of the criminal sanction. But by what standard of optimality? Eric Luna has proposed the useful definition of "abuse of the supreme force of a criminal justice system - the implementation of crimes or imposition of sentences without justification."[40] But again, it fails to specify the standards and processes by which justification is assessed.

Of course, complaints of overcriminalization–by any definition–are neither new nor uniquely American. Overcriminalization critiques seem to come in waves to any developed legal system, and their foci may vary with the social conditions of the times, including actual or perceived crime rates and the like. In America, the critique of alcohol Prohibition was one thing, while the overcriminalization debates of the 1960s were quite another.[41] The contemporary debate seems to be more broadly based than either of those episodes, and embraces at least five different factors that are claimed to create overcriminalization:

(1) the sheer proliferation of criminal prohibitions, especially at the federal level;

(2) the vague, arcane, or trivial nature of such prohibitions, as undermining citizens' ability to conform, and debasing the moral moment of the criminal sanction;

(3) the lack of adequate mens rea standards in criminal prohibitions;

(4) as one major driver of the first three problems, the politicization of crime, especially at the federal level, which produces a "one-way-ratchet" always leading to more criminalization, because elected politicians all want to be "tough on crime" for the benefit of their constituents, and federal prosecutors want to become elected officials; and

(5) over-punishment, which has at least two aspects, one of which is excessive sentences (also driven in part by the "one-way ratchet"), and another is the proliferation of forfeiture provisions, both civil and criminal, which in turn leads to "policing for profit."

At least the first four, and perhaps all five factors have much in common with the rise of "corporate crime." The key to their common foundation can be formed by combining the quotes from Thornburgh and Luna: our system has permitted too much "artificial" crime to enter the

system, with too much leeway for both legislators and enforcers, which is an unjustified abuse of the extraordinary power of the criminal sanction. Or, more concisely, power corrupts.

Just as remarkable as the breadth of the contemporary critique is the breadth of the critics. Close partners in the critique are the Heritage Foundation and the National Association of Criminal Defense Lawyers, who co-sponsored the 2005 American University conference on "Overcriminalization: The Politics of Crime,"[42] and several subsequent conferences. In 2010, those same two organizations jointly published a sweeping critique of Congress's legislative output during the 109th Congress.[43] And there are further members of the coalition of criticism; even the general media has taken notice,[44] as have members of Congress, on both sides of the aisle. Over the last several years, a variety of excellent books from an array of viewpoints have appeared, addressing one or another aspect of the problem. [45]

It may be that the contemporary critique will fail to produce any meaningful reforms. Certainly, the scope of criminalization will go on a long list of dissatisfactions with the federal Congress–and the federal government in general– and may never produce enough political traction. But why is such a wide range of interests so upset at the scope of criminalization today?

One gross indicator may be the portion of the American population that is now incarcerated (over 2 million) or otherwise subject to deprivations of physical liberty under what is euphemistically termed "criminal justice supervision," i.e, probation, parole, or supervised release (another 5 million). America has long been something of an outlier among its peer group in terms of incarceration rates. However, we are now in unprecedented territory. As a result of an enormous run-up over the past 25 years, our current incarceration rates per capita are now three to four times higher than the traditional U.S. average, which had been stable for several decades before.

Moreover, this growth in per capita U.S. incarcerations began after U.S. crime rates began to decline, which in most categories has now been continuing for over 30 years, when measured by reference to underlying rates as estimated through by the National Crime Victimization Survey, as opposed to the separate series of "Crimes Reported to the Police," which lags the underlying rates because of changes over time in reporting rates. The cumulative decline in U.S. crime rates is quite dramatic: homicide rates have declined by nearly 50%, rape by 85%, and burglary by 73%, and these rates began dropping in the 1974-81 time period.[46] For some offenses, such as burglary, U.S. rates are among the lowest in the world, and much lower than most European countries. Nevertheless, our incarceration rates and sentence length remain much higher. This mismatch between incarceration rates and the rates of 'traditional" or "index" crime supports part of the overcriminalization critique.

The potential misuse of imprisonment is not the principal parallel with "corporate crime." However, reference to imprisonment calls our attention to the fact that all criminal sanctions have severe consequences to the punished, and perhaps to others. "Punishment" involves the

infliction of pain, even if only in stigmatizing effect of the criminal conviction. In most cases, it also produces collateral disabilities to the convict, including the loss of professional or occupational licenses, debarment from certain business opportunities, and potentially disproportionate forfeiture of property, in additional to fines and other monetary sanctions. Furthermore, the impact is not limited to the convicted individual alone, but could extend to family members, social and business networks, and the like. Some of these consequences are under the direct control of criminal justice procedures, but others are not. Their cumulative effect may be disproportionate to either or both the nature of the harm done–if any–and the culpability of the offender– if any. If so, then the application or even the threat of the criminal sanction does more harm than good.

Here is where the parallel to corporate crime is closest. The essence of the overcriminalization critique is similar to the critique of corporate crime. Why invoke the criminal sanction, when civil sanctions could do as well, or better? Especially in absence of a fully-specified mens rea requirement, why invoke the uniquely condemnatory power of the criminal sanction? The traditional answer seems to be something like "convenience." But to condemn without fault, however "convenient," is always wrong, and in the long run, also inefficient.

This parallel also shows why "corporate crime" has a contagious corrosive effect. If it is acceptable to condemn a corporate entity without fault because it is convenient, and if it is acceptable to condemn an individual corporate officer without fault because it is convenient, then, by a parity of reasoning, it eventually becomes acceptable to condemn an individual non-corporate officer without fault, if deemed convenient. The reasoning ultimately consumes the entire rationale for distinguishing criminal from non-criminal liability. In this way, corporate crime not only is part of the overcriminalization problem, it is a cause of the overcriminalization problem. Once the barrier to the creation of "artificial crimes" has been brought down by its application to "artificial persons," then the temptation is great to extend the same rationale to natural persons. And, as our experience of the last few decades illustrates, that temptation becomes too powerful to resist, especially when the powerful lack the incentive to resist.

Implications

Have I identified a symptom of "American Illness"? Perhaps, but probably not an exceptional one. All legal systems at all times can be tempted by expediency. Once expediency is allowed into the discussion as a decision point, it tends to dominate.

"Corporate crime" presents an unusual case of American exceptionalism, or, perhaps more precisely, English-speaking exceptionalism. Traditional legal rules recognized criminal entity liability in the English-speaking systems, but rejected it elsewhere. In this instance, I believe that the Americans were wrong, and the Continentals were right, and I am no longer in the minority, as I may have in the 1990s. But now, the Continentals are in the process of shifting

over to the American view, or something like it, on the apparent misperception that the American experience was favorable. While I see no evidence that the American experience was ever favorable, in defense of the Continentals, I should add that the American experience was not disastrous until after the anomalous doctrine was coupled with a new sentencing structure in 1991. Since then, it has become increasingly disastrous.

What is most remarkable about this more recent American experience is that it was entirely predictable, and in fact was predicted accurately, prior to the implementation of that policy. This to me is the most damning indictment of the policy process: despite decades of experience with corporate criminal liability, and good reason to doubt the efficacy of its "carrot-and-stick" approach of managing corporate managers to a public-bureaucracy style of compliance enforcement through criminal prosecutors unqualified to evaluate the relevant criteria, the Commission plunged forward, anyway. The Commission not only leaped without looking, but also failed to put in place an appropriate mechanism to evaluate the results. To quote from sociological commentators, this indicates "a careless attitude toward human welfare."[47]

Although we still do not have a full assessment of the damage done to the American economy, there are sound reasons to expect that more evidence will be forthcoming over time. We have a cottage industry of "corporate compliance" that has not been shown to accomplish anything in terms of preventing and detecting violations of law within corporations, but it certainly has been costly. If, as theory indicates, those expenditures have been largely wasted, then American industry has been harmed, and perhaps severely harmed in some industries, especially those facing foreign competition not subject to the same type of "compliance" regime. But even these costs may be small in relation to those stemming from the larger problem of overcriminalization, which is an even more careless disregard for human welfare.

The root cause of these problems is that the criminal sanction has an inherent tendency towards destructive effects on human welfare, and those effects are difficult to control even by the well-intentioned and well-informed. policy makers and functionaries. In moral terms, criminal punishment (literally, "pain") is inherently evil, and should never be deployed without recognition of that property. However, punishment, like government, may sometimes be a necessary evil, in the sense of being the lesser of two evils. That is the basic rationale for the traditional limitation of criminal punishment solely to those who are sufficiently morally blameworthy to be justly condemned by the community, which is the traditional office of the fundamental criminal law doctrines of mens rea and legality. Criminal condemnation makes the convict a social pariah of sorts, with predictably severe consequences of unpredictable magnitude. To apply that treatment to the non-blameworthy is itself immoral.

Framed in terms of Eric Luna's suggestion of a "justification" standard, the direct analogy is to the "necessity" defense in criminal law. As an inherent evil, criminal punishment is justified only when it is necessary to prevent a greater evil, and not merely as an expedient method of law enforcement. It is never justified on public "convenience" as outweighing the harm to its subject, because civil enforcement is always available as the next alternative.

Similarly, the magnitude of a criminal punishment is justified only to the minimal extent that it is, in the words of the currently-applicable federal sentencing statute, "sufficient, but not greater than necessary" to accomplish its purpose. The federal courts have managed to evolve a doctrine to excuse themselves from strict compliance with this mandate, and largely absent themselves from the basic criminalization decision, but that is not so unusual.

The greater fault lies with the failure of legislators and prosecutors to apply the same standard of necessity to their own enactments and enforcement decisions. Congress is notoriously bad at tying its own hands, and federal prosecutors refuse to do so until ordered by the courts. So, I do not have much confidence that any provision of positive law can solve what amounts to a moral and ethical problem. For most– by no means all– of American history, legislatures were able to restrain themselves by observing the basic principles of criminal liability and by reference to an ethic of criminalization only on broad consensus. That ethic appears to have broken down, as criminalization decisions, like all others, seem to be determined by the same interest-group politics and rent-seeking behaviors that we observe in ordinary legislation. Unless the ethic of governing replaces what appears to be a managerial mentality in the Congress, or unless the courts decide to step in, I am doubtful that this particular pathology can be cured.

Notes

1. Parker, Comparative Civil Procedure and Transnational "Harmonization": A Law-and-Economics Perspective, in Bork, Eger & Schaefer, Okonomishe Analyse des Verfahrensrechts 387-421 (Mohr Siebck: 2009).

2. My first paper on the topic was presented publicly in 1991, but not published until 1996. It argued that "corporate criminal liability is a doctrine that we should destroy before it further works its destructive properties in our economy, our polity, and our shared morality." Parker, Doctrine for Destruction: The Case of Corporate Criminal Liability, 17 J. Managerial and Decision Econ. 381-98, 381 (1996) [hereinafter Parker, Doctrine]. At that time, some years ago, I may have been a minority of one on this side of the Atlantic, and my advice was ignored. Intervening history has, in my view, borne out my predictions.

3. This again was notwithstanding my advice, in joint work with Peter Lewisch of Austria, that the doctrine should be rejected as unsound in theory and policy, and was optional under the EU instruments. Lewisch & Parker, Strafbarkeit der juristischen Person? (Manz: 2001) (in German). For a recent multi-country survey of current laws in English, see Lex Mundi, Business Crimes and Compliance Liability of Companies Survey (2008), available at www.lexmundi.com (includes, inter alia, Austria, Canada, Denmark, France, Germany, Netherlands, Portugal, and Spain).

4. An example of the latter is the American federal "collective knowledge" doctrine, see note 9 and accompanying text, below.

5. These points, and those in the following paragraph, are developed more fully in Parker, Doctrine (cited at note 2, above).

6. 212 U.S. 481 (1909). In 2009, the American Criminal Law Review published a symposium commemorated the 100th anniversary of this decision, and including several papers raising contemporary issues concerning its authority. Symposium, 46 Am. Crim. L. Rev. (2009).

7. As has been pointed out by others, New York Central bears the ignominy of granting criminal enforcement of a statute intended to compel cartel pricing by shippers. New York Central was punished for giving a discount from the cartel price.

8. See 2 LaFave, Substantive Criminal Law § 13.5(b) (2d ed. 2003: West).

9. United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987). All of the points in this paragraph are further developed in Parker, Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties, 26 Am. Crim. L. Rev. 513 (1989) [hereinafter cited as Parker, Criminal Sentencing Policy].

10. Model Penal Code § 2.07. The classic critique of the Model Penal Code's approach is Meuller, Mens Rea and the Corporation, 19 U. Pitt. L. Rev. 21 (1957).

11. See Parker, Doctrine (cited at note 2, above), pages 387-88.

12. See Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass. 339 (1854).

13. Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933).

14. Jerome Hall, in his extensive and disapproving treatment of strict liability in crime, suggests that the "public welfare offense" theory can be traced back to French "positivists" of the 19th Century. Hall, General Principles of Criminal Law 333 (2d ed. 1960: Bobbs-Merrill).

15. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975).

16. Morissette v United States, 342 U.S. 250 (1952) (characterizing but distinguishing the public welfare offense).

17. 258 U.S. 250 (1922); see also United States v. Behrman, 258 U.S. 280 (1922).

18. Morissette (cited in note 16, above) distinguished "public welfare offense" from codified "common law" offenses. Staples v. United States, 511 U.S. 600 (1994), tuned back an effort to classify a prohibition on the possession of automatic weapons as a public welfare offense, based in part on the "potentially harsh" statutory maximum sentence of 10 years. See also United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

19. Partial mens rea, as to some but not all material elements of an offense, is discussed in Parker, The Economics of Mens Rea, 79 Va. L. Rev. 741 (1993).

20. Sutherland, The White Collar Criminal, 5 Am. Soc. Rev. 1 (1940).

21. One of Sutherland's followers was Marshall Clinard, who was funded by the Department of Justice to conduct a more extensive study in the 1970s, with the results initially published as Illegal Corporate Behavior (1979: US DOJ), and later re-published commercially as Clinard and Yeager, Corporate Crime (1980). In Clinard's data, 97.5% of these "corporate crime" cases were actual civil matters.

22. For a summary of these findings, see Parker, Criminal Sentencing Policy (cited at note 9, above).

23. Pub. L. 98-473, tit. II, ch. 2. For a more complete discussion of the Act's provisions affecting corporate sentencing, see Parker, Criminal Sentencing Policy (cited at note 9, above).

24. Prior to the Reform Act, the maximum burden that could be imposed through "probation" was limited by probation's stature as an alternative to fines or imprisonment. As corporate entities were not subject to imprisonment, this structure effectively limited the potential burden of probation to the statutory maximum fines, which also were set at much lower levels prior to the Act.

25. For critiques, see Parker, The Current Corporate Sentencing Proposals: History and Critique, 3 Fed. Sent. Rep. 133 (1990), and the more fully-developed Parker, Rules Without . . .: Some Critical Reflections on the Federal Corporate Sentencing Guidelines, 71 Wash. U. L. Q. 397 (1993).

26. Fischel & Sykes, Corporate Crime, 25 J. Leg. Studies 319 (1996).

27. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477 (1996).

28. The classic treatment is Brown, Toward an Economic Theory of Liability. 2 J. Leg. Stud. 323 (1973); see also Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523 (1984).

29. However, unlike the basic analysis of Brown, the structure of either monetary or non-monetary sanctions can affect optimality, see Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Leg. Stud. 833 (1994); Arlen & Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U.L. Rev. 687 (1997).

30. Empirical research shows a large but disparate effect for different types of offenses. Karpoff & Lott, The Reputation Penalties Firms Bear from Committing Fraud, 36 J. L. & Econ. 757(1993); Karpoff, Lott & Wehrly, The Reputational Penalties for Environmental Violations:

Empirical Evidence, 48 J. L. & Econ. 653 (2005). However, a limited empirical test has failed to find any significant difference in the reputational effects of criminal versus civil sanctions againt firms. Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U.L. Rev. 395 (1991).

31. See Friedman, In Defense of Corporate Criminal Liability, 23 Harv. J.L. & Pub. Policy 833 (2000).

32. Albert Alschuler has aptly characterized this theory as a revival of the primitive practice of "deodand"–destroying an inanimate object that was an instrument of harm. Alschuler, Two Ways to Think About the Punishment of Corporations, 46 Am. Crim. L. Rev. 1359 (2009).

33. Given the functionally unlimited threat point available to the federal prosecutors, it may not be necessary even to issue an indictment. As illustrated by the famous (or infamous) prosecution of the Arthur Andersen accounting firm, the mere issuance of an indictment–even if unfounded–can impair or destroy a firm's value. Though ultimately vindicated in the Supreme Court, Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), the firm did not survive the litigation.

34. Block (cited at note 30, above).

35. The current version, now called the "Filip" memo, is now codified in the United States Attorneys's Manual ["USAM"], 9-28.

36. 541 F.3d 130 (2d Cir. 2008).

37. In May 2010, the Department issued a new document on "Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations." (Guidance 166, USAM Part 9), to supplement its previous statement (Guidance 163, id.).

38. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 853 (2007).

39. Thornburgh, The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes, 44 Am. Crim. L. Rev. 1279 (2007).

40. Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 716 (2005).

41. . Milestones of the 1960s debates, which appear to be the last major U.S. episode of overcriminalization critiques, are the works by Packer, The Limits of the Criminal Sanction (1969), and Kadish, The Crisis of Overcriminalization, 374 Annals Am. Acad. Pol. & Soc. Sci. 157 (1967). Those debates produced odd sequelae, as the longer-term effects seem to have been an increase in criminalization. The Katzenbach Crime commission seems ultimately to have produced negative milestones, such as the RICO statute and the current "war on drugs" statute. The Brown Commission, which proposed a complete recodification of federal criminal as one

means of addressing overcriminalization, produced a decade-long debate in Congress that ultimately failed to enact anything. However, portions of that proposal, as it evolved through the 1970s, ultimately appeared as part of the Sentencing Reform Act of 1984, which itself has been criticized as a species of overcriminalization.

42. As diplomatically phrased by Ellen Podger in her introduction to that Symposium, these are "two groups with very distinct missions . . . standing at different points on the philosophical spectrum." Podger, Foreword: Overcriminalization: The Politics of Crime, 54 Am. U. L. Rev. 541, 541 (2005).

43. Walsh & Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law (Heritage/NACDL: 2010), available in full text on both organizations' web sites. Heritage also maintains a separate website, www.overcriminized.com, where it tracks pending bills in Congress with proposed criminal sanctions.

44. Adam Liptak, "Right and Left Joine Forces on Criminal Justice," New York Times, November 23, 2009, page A1.

45. Among these are Davis, Arbitrary Justice: The Power of the American Prosecutor (Oxford: 2007); Husak, Overcriminalization (2008); Lynch, In the Name of Justice (Cato: 2009); Silverglate, Three Felonies A Day (2009); Rosensweig & Walsh, One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty (Heritage: 2010).

46. Here are the summary data, as of 2004, taken from the Justice Department's survey estimates:

Offense	Peak Year	Peak Rate	2004 Rate	Cumulative Decline
Total violent crime	1981	52.3	21.1	-60%
Homicide	1980	0.102	0.055	-46%
Rape	1979	2.8	0.4	-85%
Robbery	1981	7.4	2.1	-72%
Aggravated Assault	1974	12.9	4.3	-67%
Simple Assault	1994	31.5	14.2	-55%
Total property crime	1975	553.6	161.1	-71%
Burglary	1974	111.8	29.6	-73%
Theft	1975	424.1	122.8	-71%
Vehicle Theft	1991	22.2	8.8	-60%

Violent crimes are offenses per 1,000 population, property crime rates are per 1,000 households. The underlying data can be found at at www.ojp.usdoj.gov/bjs/.

47. Geis & DiMento, Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability, 29 Am. J. Crim. L. 341, 375 (2002).