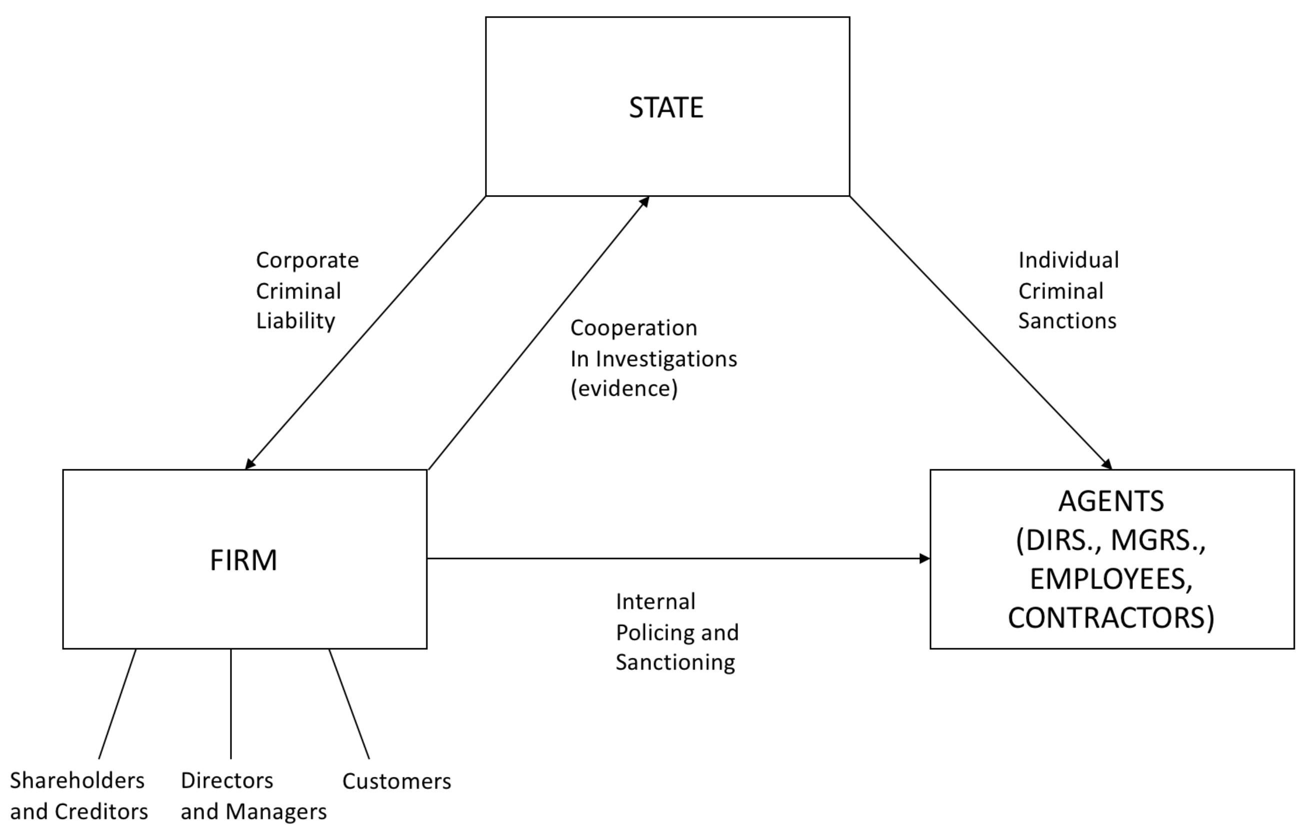
1. CRIMINAL LIABILITY OF BUSINESS FIRMS

A. Introduction

The central difference between corporate crime and what the rest of the American criminal justice system addresses is, of course, the corporation. Thus, an introduction to this field begins with understanding (1) the nature of the firm and (2) the rules and practices for imposing criminal liability on firms. (A basic course in Business Associations is essential for any prospective lawyer in this field.)

Ordinary criminal law and procedure are concerned with the relationship between the individual and the state. The presence of the firm introduces a third actor. This creates a triangle of relationships that must be considered in analyzing any problem of substantive law or procedure in this field. The firm is an especially interesting addition to the analysis of criminal law and justice because it can function like the individual—as the subject of criminal sanctions and threat of liability—and also function like the state—as an institutional mechanism for generating deterrence and investigating crime.

The relationship looks like this:



The state uses the instrument of corporate criminal liability to induce the firm to do two things: (1) cooperate in criminal investigations, meaning to provide the state with evidence of individual crimes; and (2) monitor and police its own employees and other agents to prevent the commission of crime in the first instance.

Because the firm itself does not have the capacity to reason, in reality this pressure is exerted on the persons who control the firm, primarily the board of directors, senior managers, major investors, and counter-parties in the markets in which the firm operates. To the extent that the potential imposition of criminal liability on the firm raises the specter of undesirable costs for such persons, they will be induced to take action to forestall, or reduce the impact of, such liability, typically through cooperation with the state.

The state also uses its control over criminal liability to deter crime in the ordinary manner, by threatening persons in the corporate sector with individual criminal punishment. Notice, therefore, how the theory of corporate criminal enforcement anticipates pressure on the individual from two directions: from the state, with its power to levy legal sanctions, *and* from the firm, with its power and incentive to levy private sanctions in order to avoid legal sanctions on the firm.

A helpful organizing principle is the distinction between *de jure* corporate criminal liability and *de facto* corporate criminal liability.[1] *De jure*, the law of corporate criminal liability in the United States is broad and relatively absolute. Doctrine gives business firms little basis to resist the imposition of criminal liability if an employee has committed a crime in the course of her job. *De facto*, the contemporary practice of corporate criminal liability involves bargaining away (or bargaining down) that severe form of liability in exchange for helping the government overcome the special problem it faces in policing corporate crime: the difficulty of detecting and proving crimes that are committed within the complex and opaque setting of the large modern business firm.

The reality of the American approach to corporate crime enforcement is that it is overwhelmingly concerned with the instrumental project of crime reduction, primarily through mechanisms of deterrence. While some argue that the ancient and persistent idea of retribution in criminal punishment also explains corporate criminal liability, there is cause for skepticism of that claim, at least with respect to arguments for retribution that do not turn out, in the end, to rest on instrumentalist claims about how pursuing corporate retribution is an avenue for reducing corporate crime.[2] Because retributive theory plays a small role in the current practice of corporate criminal law, this text will address these arguments only briefly.[3]

The focus throughout this text will be primarily on *criminal* liability, both corporate and individual.[4] But it is important to understand that most cases of serious corporate wrongdoing lead to the potential for four types of liability, all of which must be considered by the practitioner in this field:

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[1] Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence* in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (A. Harel & K. Hylton eds. 2012).

[2] *See* Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS. (forthcoming 2021).

[3] For those interested in the idea of retribution for corporations, a continuing theoretical debate in the academic literature is easily accessible.

[4] An essential institutional point, that often confuses even practicing lawyers not immersed in this field, is that *only* prosecutors can bring criminal charges in the United States. This means that in the federal system only the Department of Justice and its subdivisions can charge corporations and individuals with crimes and seek the sanction of imprisonment. Other government enforcement agencies, such as the Securities and Exchange Commission (SEC), have no legal authority over criminal violations—even though parallel statutes often allow civil proceedings to be brought for the same or similar conduct and such enforcers sometimes say (incorrectly) that they have chosen to "prosecute" a case.

(1) Criminal sanctions against the firm.

(2) Criminal sanctions against individuals.

(3) Civil sanctions against the firm, through private lawsuits and/or regulatory proceedings.

(4) Civil sanctions against the individual, through private lawsuits and/or regulatory proceedings.

The remainder of this chapter is organized as follows. First, this introductory part consists of a book excerpt that frames corporate crime as a public policy problem and summarizes the state of the discussion about corporate criminal liability in the United States legal system. Part B will cover the law that constitutes the *de jure* regime of corporate criminal liability. Part C will touch upon the broader theoretical and academic debate about corporate criminal liability. Part D will cover the *de facto* system of corporate criminal enforcement as it presently exists. Finally, Part E will discuss the role of the judiciary, if any, in the current *de facto* regime.

THE WHITE COLLAR BEAT

(from SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016))[5]

Even though it uses the same law enforcement apparatus and is controlled by the same principles of law, investigation and prosecution of corporate crime bears almost no resemblance to policing street crime. Ordinary law enforcement takes place in the binary relationship—one defined by powers and rights—between the state and the individual: search warrants for evidence, interrogations and confessions, crime scene forensics, traffic stops, surveillance, and the other games played in stories like *Law & Order*, *Breaking Bad*, and *The Wire*.

Corporate law enforcement operates along a strange triangle connecting the state, the individual, and the business firm. A variety of powers and rights are spread among all three legs of this triangle. The firm sits in the oddest position, as both cop and criminal. In some instances, a firm practically pays its workers to break the law and then hides evidence of the crime. Other times, the corporation is the one that digs up the smoking gun document and elicits the confession from its miscreant employee. Sometimes a firm does both things in the same corporate scandal (sequentially, of course).

This might sound strange, perhaps even untenable. But it shouldn't be surprising. Even in punishing corporate crime, and striving to prevent it, the American legal system cannot help but rely on the powers and structure of the corporation itself. . . .

This process has real upsides, including for corporations. Companies can use their powers to gather evidence—their capacity to see into themselves in spite of their opacity to outsiders—in trades to avoid

[5] © Samuel W. Buell 2016.

criminal charges. Corporations also get to monitor the progress of a government investigation, so they're not blindsided as they might be in a system of search warrants, wiretaps, and taciturn FBI agents serving grand jury subpoenas. Routinizing this system also ought to have generated better deterrence of crime because corporate employees now know that if they commit a crime on the job, their powerful employer is likely to team up with the awesome forces of the federal government to make sure they're caught and prosecuted.

What's not to like about this clever program for uncovering and prosecuting crime in corporations? Quite a lot. The system's critics are legion.

Let's start with the objections of corporations and their lawyers. The argument starts with a complaint about the law. The *de jure* (on the books) rule for when corporations can be criminally prosecuted in federal court is said to be far too harsh. Federal law makes a corporation eligible for prosecution anytime any employee violates the law in the course of doing her job and does so, even in part, for the company's benefit. The rule, which is ancient and used in many other areas of law, is called *respondeat superior*, or master-servant liability.

The law doesn't care if the employee's violation is minor, the violator holds a low-level job in the company, if the company's managers are in no way involved, the firm's policies prohibit the conduct, or the employee acted mostly to enrich herself. The idea is to give the "master" lots of good reasons to police his "servant" carefully. . . .

This rule for criminal liability of corporations is overbroad, the argument goes, because it sweeps onto the company's legal ledger every conceivable case of crime on the job. The powerful rule becomes a weapon of prosecutorial mass destruction when combined with two other overbearing features of federal law. First, federal criminal law is stuffed with thousands of overlapping criminal offenses, particularly in areas of business subject to heavy regulation like health care products and securities dealing. Second . . . federal regulatory regimes are replete with rules that can bar companies from doing business in markets or industries if they're convicted of crimes.

The collective force of these rules[, the argument goes,] leaves corporations without practical ability to contest criminal cases. If a prosecutor comes along with even the notion of a criminal charge, a company has no alternative but to roll over. If the *de jure* rule makes corporations almost always guilty, then the *de facto* rule becomes that corporations must always settle with the Justice Department.

Corporations, the argument continues, also do not have the means that individuals enjoy to keep information out of the government's hands. Ordinary regulatory requirements mandate lots of ongoing, routine disclosure that is not required of private citizens. And the threat of corporate criminal liability makes it impossible for corporations to resist prosecutors' demands for further evidence. Under constitutional law, corporations have no Fifth Amendment right against self-incrimination. Fourth Amendment search-and-seizure protections are of little value to corporations because those constitutional constraints don't limit duly issued subpoenas, which are the primary tool for gathering evidence in investigations of white collar crime. . . .

This suite of laws has, in the eyes of its detractors, produced a cadre of corporate crime prosecutors who do not act in the greater public interest. Over the last two decades, the Justice Department has developed guidelines on when to charge a corporation. These purport to limit the use of corporate criminal liability to cases in which harms are widespread and serious, management bears responsibility for the wrongdoing, or companies don't behave like good citizens by having effective compliance programs and helping discover and root out crime. But individual prosecutors don't have to follow these guidelines and there's no way for a company's managers and lawyers to predict how the Justice Department will apply them.

Therefore, corporate managers and their legal advisers say, even the mention by prosecutors of a potential charge against the corporation has to be treated as if it were a death threat. Any prospect of contesting matters through litigation vanishes. Prosecutors know this, which makes them complacent, even lazy. They can get corporations to do their work for them and they lose motivation to examine cases closely and make careful distinctions among them. It's irresistibly easy to make every corporation jump through the same evidence-collection hoops, reach the same kind of settlement, and write the same sort of check to the government in the end. Some evidence for this alleged lassitude can be found in cases in which the Justice Department settles with a corporation but never prosecutes individuals—a result that, as several critics have pointed out, seems to defy legal logic. Criminal liability can attach to a corporation *only* through the imputation of an individual employee's provable crime.

The corporations' argument sounds like a variant on one we hear about other parts of the American criminal justice system. On this account, if there's such a thing as an innocent corporation, we'll never know because the government has the power to make everyone roll over. Cases are never tested at trial. (Never is an overstatement; it's more like rarely.) Prosecutors, who don't hear the views of judges and jurors about their cases, lose the ability to tell a weak case from a strong one or an important one from a minor one. Even corporate defense lawyers—who complain that they have been turned into nothing more than "deputy prosecutors" whose job is to investigate their own clients—lose the ability and desire to poke, prod, or try criminal accusations.

This line of argument extends further, beyond investigation of crime and settlement of cases. The government, viewing the problem of corporate crime as part of the general project of corporate regulation, now routinely uses criminal settlements as an entree to prevent future law violations and reform companies. A common feature of a settlement agreement is to require the corporation to change its operations in various ways—to rehabilitate itself—to reduce the chances of future similar violations of law. Part of this process typically involves the forced hiring of an expensive outside "monitor" for several years—a reputable, independent individual with an office and staff inside the company and the power to inspect, ask questions, receive complaints, report to prosecutors, and generally make sure the company is fixing itself.

The problem with this practice, it is said, is that prosecutors—English majors with law degrees, in the phrase of one critic—don't know how to run corporations. Just as companies shouldn't be distracted from their business mission by working as beat cops in the fight against crime, prosecutors shouldn't be playing amateur corporate manager when their training is to litigate in criminal courts. . . .

Sometimes I wonder what those who voice these complaints would prefer. Surely they would not want maximum enforcement of the law, an end to settlements, trial as a matter of routine, and much greater involvement of judges and juries in policing and punishing corporations. It’s the allegedly intolerable consequences of full criminal enforcement that corporations finger as disabling them from challenging even the barest allegations of criminal wrongdoing. Business objectives take precedence over principled vindication of legal rights. Corporations, by their own accounts, exist not to realize their own liberties (whatever that could even mean) but to make money.

It also seems unlikely that corporations would welcome a system, even if one were feasible, that policed business crime like street crime. That would interfere far more than current practices with companies’ ability to conduct business. And it would give corporations far less control and transparency than they enjoy over the government’s gathering of information from corporate records and employees. As things stand, almost every document that goes to a prosecutor in a corporate investigation travels through a company lawyer and almost every employee who speaks to a prosecutor has already spoken to corporate counsel. Corporate violators manage criminal investigations in real time; street criminals either preempt arrest with violence and threats—or flight—or they wait and hope.

Businesses would, of course, like there to be less criminal law, at least when it comes to the kinds of things businesses do. The Chamber of Commerce has teamed up with conservative and libertarian think tanks like Cato and Heritage to decry the oppressive reach and weight of federal criminal law. But these arguments are almost always pitched on behalf of the imagined citizen who must go about her life under the shadow of a bloated and intrusive state, in perpetual fear of federal arrest. Corporations hardly want to be seen as launching a vocal lobbying campaign on behalf of white collar decriminalization. . . .

Prosecutors have a fundamentally different view than corporate managers of the place of the corporation in the world and, therefore, the law. (It’s amazing how far that view can evolve in the mind of a lawyer who spends just a year or two on the private sector side of the revolving door.) Though they won’t say it, prosecutors don’t think corporations have especially convincing arguments about rights. Corporations are not people. They are particular projects chartered by the law and the state, which can produce social benefits for, but also impose costs on, the public—whom prosecutors understand themselves to represent. So, they think, there should be no objection to harnessing the corporation, when it makes sense to do so, in service of an important endeavor like the prevention and policing of crime.

Why fret about corporations’ vanishing opportunities to try criminal cases, or the intrusiveness of reforms imposed by settlement agreements, when firms are simply a vehicle—one neither virtuous nor corrupt—for dealing with the problem of human beings and their tendencies to do ill? This line of thinking has affected the way prosecutors have approached issues with corporations that lawyers, even prosecutors, see very differently when it comes to individual criminal cases. . . .

Prosecutors would like to see a corporate sector that is enthusiastically and unreservedly on board a joint program of fighting white collar crime. Companies should want to be “responsible corporate citizens” and should seek out and enjoy the fruits of marketing themselves as such. That’s the corporation that works best for its shareholders, for its employees, and for the American public. We’re all against crime here, as we’re all against terrorism and for apple pie. Right?

This attitude does not match the view of those who work in the executive suites and their lawyers. To them the Justice Department is an adversary, albeit their most powerful one, among many litigants and lawyers who benefit from suing corporations or threatening to do so. The Department's activities, and the laws it is chartered to enforce, are one part of a vast legal apparatus that hampers, makes more costly, and threatens to cripple growth and profits. This machinery is to be managed, priced, and accounted for like other business "risks," albeit as a grave one. . . .

The most vocal line of complaint about this system of policing is also the most widespread. More and more Americans are convinced that our criminal justice system—the product of a forty-year War on Crime that has included a thirty-year War on Drugs—is an embarrassment. A good measure of that feeling has to do with matters of process: police shootings, stop-and-frisk programs, "broken windows" policing, weak constitutional rights against intrusive searches, lack of privacy in information technology, and abuses of asset forfeiture laws. But most of the feeling—especially in its strongest and bipartisan forms—has to do with outcomes, mainly the state of America's prison system. Liberals and libertarians agree: locking up vast numbers of people is un-American.

Our "incarceration nation" (or "carceral state," in the academic language) has the world's largest prison population and, more to the point, by far the highest rate of imprisonment per person. China and Russia, controlled by famously illiberal governments and legal systems, are America's only serious challengers among large nations.

The brunt of mass imprisonment has fallen on poor and minority populations, which are vastly overrepresented in institutions of confinement. Most infamously, a man in the United States who is African-American is over six times more likely to be imprisoned than his white counterpart. At present rates, he stands a one-in-three chance of being in the custody of the state at some point in his lifetime. These facts constitute both a failure and a disgrace for the American legal system. . . .

In this accounting of American justice, white collar crime is a rounding error. Of the over 1.3 million state prisoners in 2009, about 33,000 were locked up for fraud; of the nearly 200,000 federal prisoners in 2010, about 8,000 were in custody for white collar crimes.

Still, America's prisons and their inhabitants glower in the background of any examination of how the legal system treats business crime. It's salt in this wound of injustice when businesspersons, who generally have financial resources, have access to a concierge level in the criminal justice system, which is what the enforcement system for corporate crime can look like. When skirmishing over corporate investigations, prosecutors and defense lawyers can appear to be playing a polite game of cricket while cops and street criminals are engaged in a grim blood sport.

This contrast is especially stark for corporations themselves, which, as we've seen, are given the option (indeed are encouraged) to "partner" with the government in the fight against crime and to avoid criminal prosecution altogether by undertaking elaborate programs of rehabilitation. Nothing could make a less attractive comparison to a single poor citizen destroyed by the state because of one bad decision and the color of his skin than a nonhuman machine for spewing profits that has run an oil tanker aground, filled pharmacies with a drug that hurts people, or scammed the Pentagon by selling it defective equipment for America's soldiers. That's putting the point clinically. Full-throated expressions of this point have gone much farther.

Those who voice this line of complaint rarely specify what an alternative system of corporate policing might look like. They have no obligation to do so, especially if they are aiming at the problem of mass imprisonment, using the treatment of business crime as a foil or aggravating fact in a case for decriminalization and "decarceration."

But to think critically about corporate crime in America . . . we must carry out the thought experiment. What might a legal system look like that did not treat corporate crime differently—not as a special problem of crime in corporations but as a problem of crime like any other? As the argument so often goes, "Treat 'em like common criminals, I say."

Let's imagine that we could afford the cost of saturating large corporations in major industries like banking, energy, pharma, and auto manufacturing with cops. Perhaps we could figure out, whether by legislation or even constitutional amendment, a workaround for legal rules that do not permit police to walk corporate hallways and drive corporate campuses the way they do the streets of America's cities.

What would these cops look for? Accounting fraud, insider trading, disregard of health and safety regulations, failure to report defects in industrial processes, and the like are not easily observable crimes. There is no office-level equivalent to the street crimes that give law enforcement an entry point into problems of group crime like mob rackets, international trafficking in humans and narcotics, or sex crime enterprises. Some have suggested, in part for the point's rhetorical value, that locking up loads of bankers for consumption of drugs and prostitution services might crack open some fraud cases. The occasional investigation might get a break this way, but I'm skeptical of it as a sustained strategy.

Many successful corporate prosecutions have relied on the up-the-ladder strategy of charging key players with crimes and using that leverage to turn them into prosecution witnesses against more senior executives. The Enron prosecution succeeded, in part, by securing the testimony of CFO Andrew Fastow. The case against Fastow was developed from cases against members of his own staff, and even his wife. But all of those cases were made possible because Fastow and others had looted Enron in a series of flagrant self-dealing transactions. These transactions were provable through corporate records the government obtained mainly from Enron and several banks.

Without the extra greed of Fastow's embezzlement from the company, and the post-bankruptcy cooperation of Enron in investigating itself and surfacing the key records, the government's already steep path to the end point of the Enron prosecutions would have been longer and harder. Critics often say that to get at top corporate executives, prosecutors need to work their way up the ladder. Unfortunately, the first rung of that ladder is often out of reach.

The greater reason that a vision of blanket corporate policing is unrealistic is the prospect of massive law enforcement intrusion into daily business activity. Entrepreneurs, professionals, and business institutions that depend on confidentiality and teamwork would struggle to function under omnipresent and overbearing human surveillance. Imagine the lawyers who would be needed to shadow employees and police officers in the workplace and mediate their constant interactions.

The rejoinder here is obvious: The constant and intrusive presence of policing in poor, urban neighborhoods in America is a real nightmare, not a thought experiment, and it can crush the efforts of those communities and their inhabitants to generate economic value and better their own lot. However, short of envisioning a different society altogether—a social order not simply more just but unrecognizably novel—this kind of goose-gander logic is not helpful. The maladies of the urban policing-poverty axis must be treated. Radically enhancing corporate policing won't do anything to advance that urgent project of reform.

Detecting and punishing law violations in corporations are very different projects than policing street crime because the two types of crime are different. *That* fact could itself be changed. But only if we decide to rethink the basic moral architecture of criminal law—what sends one to prison and what does not—by, for example, legalizing drugs and criminalizing the sale of securities.

Short of wholesale adjustment, we have to deal with the fact that corporate crime . . . requires line drawing that criminalization of entire markets or social practices does not. Corporate crime is embedded within activities that can be dangerous and harmful but are for the most part entirely acceptable. It cannot be policed, even remotely, the way governments have attempted to manage (with mixed success, to say the least) drug trafficking or immigration offenses.

In the corporate sector there is a vast apparatus for enforcing law that has no equivalent in the realm of street crime: the regulatory state. Almost every important industry in the United States *does* have a kind of constant police presence, in the form of Washington's alphabet soup: the EPA, SEC, FCC, CPSC, FDA, FAA, DOD, FDIC, DHS, HHS, and on and on. Law and legal institutions do not intervene in the problem of corporate crime only when prosecutors and FBI agents get involved. In theory, the regulatory system addresses these problems before matters escalate to criminal prosecution. This system has many mechanisms of surveillance, evidence gathering, and sanctions short of criminal punishment. Many agencies have sharp teeth, including the power to banish companies from industries and hobble them with large financial penalties.

Critics charge, often rightly, that American industrial regulations and regulators are too soft. The laws aren't tough enough, regulators don't enforce them vigorously enough, and officials are captive to industry. Fair enough. But these systems exist and they take a different form from police departments. Their charter is not to eliminate the scourge of factories, oil rigs, prescription drugs, and investment products. It's to make those things safe enough to buy, use, and live around.

Americans could certainly enjoy a better system of corporate regulation, as well as a more robust apparatus for enforcing laws against white collar crimes. So too, the inhabitants of America's regions of poverty should experience more tolerable policing—policing that involves fewer guns and handcuffs and looks more like the regulatory systems that govern American business. But these objectives cannot be achieved through a brute trade that transplants street policing into the corporate sector.

So we have the current situation, arrived at over twenty years or so, in a kind of ad hoc development of practices by prosecutors, corporate defense lawyers, and companies. The law treats the corporation as both criminal and cop, and uses the corporation as a vehicle for detecting, proving, and punishing business crime.

B. *De Jure* Corporate Criminal Liability

1. Statutes

There is no general statute on corporate criminal liability in the United State Code, even though people commonly talk about criminal liability of corporations as if it were a matter of blanket federal law. This statute is the closest thing to a general statute on the subject. Do you see how this statute is relevant? What important questions about the federal law of corporate criminal liability does it leave unanswered?

> **1 U.S.C. § 1 - Words denoting number, gender, and so forth ("The Dictionary Act")**
>
> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> . . . the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; . . .

2. Respondeat Superior Liability

"Respondeat superior" liability is an ancient legal principle by which the master is held liable for his servant's violation of the law. Imported from the law of torts into corporate criminal law, respondeat superior liability can have the effect of imposing almost strict liability on corporate employers. I say "almost" because the imposition of liability is not entirely automatic. There are some qualifications of the doctrine, though, as we will see, how much limiting work these qualifications do is subject to skepticism.

The following case is the seminal one on criminal liability of firms in federal court based on respondeat superior principles. This case was brought under the Elkins Act, which, *inter alia*, prohibited shippers and railroad companies from engaging in the anticompetitive behavior of paying and accepting rebates off of shipping rates set by federal regulation. It should not be surprising that the law of corporate criminal liability that prevails today originated in the era when American lawmakers and courts first embarked on comprehensive programs of legal control of the large corporation. Pay close attention to the holding and rationale(s). What did the Supreme Court really say here? Why might this case have become so routinely cited as establishing our modern de jure system of corporate criminal liability?

NEW YORK CENT. & HUDSON RIVER R.R. CO. V. UNITED STATES, 212 U.S. 481 (1909)

MR. JUSTICE DAY delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the southern district of New York, sued out by the New York Central & Hudson River Railroad Company, plaintiff in error. In the circuit court the railroad company and Fred L. Pomeroy, its assistant traffic manager, were convicted for the payment of rebates to the American Sugar Refining Company and others, upon shipments of sugar from the city of New York to the city of Detroit, Michigan. The indictment was upon seven counts and was returned against the company, its general traffic manager, and its assistant traffic manager. The first count, covering the offering of a rebate, was withdrawn from the jury by the district attorney, and it is unnecessary to consider it. The second count charges the making and publishing of a through tariff rate upon sugar by certain railroad companies, including the plaintiff in error, fixing the rate at 23 cents per 100 pounds from New York city to Detroit, and charges the railroad company's general traffic manager and assistant traffic manager with entering into an unlawful agreement and arrangement with the shippers, the American Sugar Refining Company of New York and the American Sugar Refining Company of New Jersey, and the consignees of the sugar, W. H. Edgar & Son, of Detroit, whereby it was agreed that, for sugar shipped over the line, the full tariff rate being paid thereon, the railroad company should give a rebate of 5 cents for each 100 pounds. This count charges that during the months of April and May, 1904, shipments were made under this agreement, and the regular tariff rates paid thereon. On July 14 of that year a claim for a rebate in the sum of $1,524.99 was presented by the agents of the shipper and consignees, and paid on the 31st day of August to Lowell M. Palmer, agent of the sugar company, for the benefit of the shippers and consignees. In each of the counts, except the sixth, the lawful rate is charged to have been 23 cents per 100 pounds. During the month of June, 1904, the same was reduced to 21 cents per 100 pounds, and the rebate agreed to and paid being 3 cents per 100 pounds. The second count covers the shipments of April and May, 1904; the third count the shipments for July and August, 1904; the fourth for September, 1904; the fifth for October, 1904; the sixth for June, 1904, and the seventh for April and May, 1904. In each of these counts there is an allegation of the payment of the published rate, the presentation of the claim for the rebate, and the statement of a specific sum allowed and paid on account thereof.

Upon the trial there was a conviction upon all of the six counts, two to seven inclusive. The assistant traffic manager was sentenced to pay a fine of $1,000 upon each of the counts; the present plaintiff in error to pay a fine of $18,000 on each count, making a fine of $108,000 in all.

The facts are practically undisputed. They are mainly established by stipulation, or by letters passing between the traffic managers and the agent of the sugar refining companies. It was shown that the established, filed, and published rate between New York and Detroit was 23 cents per 100 pounds on sugar, except during the month of June, 1904, when it was 21 cents per 100 pounds.

The sugar refining companies were engaged in selling and shipping their products in Brooklyn and Jersey City, and W. H. Edgar & Son were engaged in business in Detroit, Michigan, where they were dealers in sugar. By letters between Palmer, in charge of the traffic of the sugar refining companies and of procuring rates for the shipment of sugar, and the general and assistant traffic managers of the railroad company, it was agreed that Edgar & Son should receive a rate of 18 cents per 100 pounds from New York to Detroit. It is unnecessary to quote from these letters, from which it is abundantly established that this concession was given to Edgar & Son to prevent them from resorting to transportation by the water route between New York and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers. The shipments were made accordingly and claims of rebate made on the basis of a reduction of 5 cents a hundred pounds from the published rates. These claims were sent to the assistant freight traffic manager of the railroad company by Palmer, the agent of the sugar companies, and then sent to one Wilson, the general manager of the New York Central and Fast Freight Lines at Buffalo, New York. Wilson returned to the assistant traffic manager of the railroad company a cashier's draft for the amount of the claim. This draft was then sent to the agent of the sugar companies, and his receipt taken. It was stipulated that these drafts were ultimately paid from the funds of the railroad company.

Numerous objections and exceptions were taken at every stage of the trial to the validity of the indictment and the proceedings thereunder. The principal attack in this court is upon the constitutional validity of certain features of the Elkins act. 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880. That act, among other things, provides:

(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed. . . .

'In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.'

It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence,-a presumption which is part of due process in criminal prosecutions. It is urged that, as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as, indeed, the stockholders could not do so, the arguments come to this: that, owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case.

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) that 'a corporation is not indictable, although the particular members of it are.' In Blackstone's Commentaries, chapter 18, § 12, we find it stated: 'A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities.' The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: 'Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.' Without citing the state cases holding the same view, we may note *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445, in which it was held that a corporation was subject to punishment for criminal contempt; and the court, speaking by Mr. Chief Justice Field, said: 'We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong.' It is held in England that corporations may be criminally prosecuted for acts of misfeasance as well as nonfeasance. *R. v. Great North of England R. Co.*, 9 Q. B. 315.

It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 109, 111, 37 L. Ed. 97, 102, 103, 13 Sup. Ct. Rep. 261.

And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct. *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528.

A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 544, 43 L. Ed. 543, 547, 19 Sup. Ct. Rep. 296.

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted by the defendant at the trial that, at the time mentioned in the indictment, the general freight traffic manager and the assistant freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central & Hudson River Company, and were authorized to unite with other companies in the establishing, filing, and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus, the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying 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.

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz, Priv. Corp. § 733; Green's Brice, Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins law, making corporations criminally liable.

This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate transportation, and one legal rate, to be published and posted and accessible to all alike. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 399, 50 L. Ed. 524, 26 Sup. Ct. Rep. 272; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. Rep. 428.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it 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.

There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism, and to secure equal rights to all engaged in interstate trade. It 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 in the premises.

It is contended that the Elkins law is unconstitutional, in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and of the presumption of innocence which the law raises in his favor. This contention rests upon the last paragraph of § 1 of the Elkins act, which is as follows:

> 'In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier as well as that of the person.'

We think the answer to this proposition is obvious; the plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section. There is no individual in this case complaining of the unconstitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions. *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141. It may be doubted whether there are any individual carriers engaged in interstate commerce, and every act is to be construed so as to maintain its constitutionality if possible. There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations. *Berea College v. Kentucky*, 211 U. S. 45, 55, 53 L. Ed. 81, 29 Sup. Ct. Rep. 33. . . .

Notice that in *New York Central*, the Court did not actually hold that corporate respondeat superior liability is applicable to all federal crimes. Rather, the Court observed that corporate respondeat superior liability was contained in the Elkins Act and held that such statutory liability was not unconstitutional. However, federal courts have frequently cited *New York Central* as support for a broad rule of respondeat superior liability in cases of corporate crime.

Problem 1-1
Describe four potential rules for corporate criminal liability that you might design instead of the current federal rule of respondeat superior liability. (For an idea to get started, you might look at the Model Penal Code's approach.)

On a personal note . . .

After teaching *New York Central* for many years, I recently discovered a connection to the case. My great great grandfather (and my father's namesake) George C. Buell owned and operated a grocery store in Rochester, New York in the nineteenth century. At some point, he seems to have become a bit of a city father. He was appointed to chair the Rochester Elevated Tracks Committee, which was instrumental in the routing of the New York Central Railroad (Cornelius Vanderbilt's railroad, which has been described as "one of the first giant corporations in United States history") through the city.

On April 26, 1880, Buell resigned from the chair in the following letter: "Dear Sir, Having been elected a Director of the New York Central & Hudson River Railroad Company, I hereby tender my resignation as Elevated Tracks Commissioner." I have no knowledge of what led to this appointment (or of the Directors' awareness of any later Elkins Act violations). I can only say that, if there was any Vanderbilt money involved, it is long gone.

3. The "Intent to Benefit the Firm" Element

On the terms of the doctrine, not all agent crimes will trigger corporate criminal liability: the agent must have acted not only within the scope of employment but also, at least in part, "with intent to benefit the firm." How, if at all, does this element of corporate criminal liability limit application of the doctrine? Read the following case and then try to imagine a case of crime by an employee that would *not* satisfy this element of corporate criminal liability. (It should be noted, of course, that the law governing federal campaign contributions was more restrictive at the time of this prosecution than it is at present.)

UNITED STATES v. SUN-DIAMOND GROWERS OF CALIFORNIA, 138 F.3d 961 (D.C. Cir. 1998)

STEPHEN F. WILLIAMS, Circuit Judge:

Sun-Diamond is a large agricultural cooperative owned by individual member cooperatives including Diamond Walnut Growers, Sun–Maid Growers of California, Sunsweet Growers, Valley Fig Growers, and Hazelnut Growers of Oregon. It came within the sights of an independent counsel, Donald C. Smaltz, who was responsible for investigating allegations of unlawful activity by former Secretary of Agriculture Mike Espy. The independent counsel charged Sun-Diamond with making illegal gifts to Espy, committing wire fraud, and making illegal campaign contributions.

Linking Sun-Diamond and Espy was the figure of Richard Douglas. As Sun–Diamond's vice president for corporate affairs, Douglas was responsible for (among other things) representing the interests of the corporation and its member cooperatives in Washington. Given Sun–Diamond's business, the Department of Agriculture ("USDA") was naturally part of his bailiwick. According to performance evaluations signed by Sun–Diamond's president, Douglas was a diligent and able representative. He once described his approach to lobbying by paraphrasing Lord Palmerston: "We have no permanent friends or permanent enemies, only a permanent interest in Sun-Diamond Growers of California." Permanent friends aside, he had a long-time friend in Mike Espy—the two had gone to college together at Howard University and had stayed close in the years since.

The crimes charged to Sun-Diamond grow out of two largely independent stories. One involves illegal gratuities given to Espy while he was Secretary of Agriculture, the other wire fraud and illegal contributions to the congressional campaign of the Secretary's brother, Henry Espy. We save the recitation of facts for the discussion of the distinct legal issues raised by each story. . . .

Sun-Diamond was found guilty on Counts III and IV of committing wire fraud in violation of 18 U.S.C. §§ 1343 & 1346, and on Counts V through IX of violating the Federal Election Campaign Act, 2 U.S.C. §§

441b(a) & 441f ("FECA"). Both sets of convictions flow from a scheme of Richard Douglas and James H. Lake to help repay the debts of the failed congressional campaign of Mike Espy's brother Henry. The following facts about the scheme come from the testimony of Lake, who was granted immunity by prosecutors in exchange for his cooperation.

Lake was one of the founding partners of a Washington based firm, Robinson Lake Sawyer & Miller ("RLSM"), which handled communications and public relations matters for Sun–Diamond. Sun-Diamond retained RLSM for a fee of $20,000 a month; Douglas oversaw Sun–Diamond's dealings with RLSM and maintained his own office there. RLSM was a wholly-owned subsidiary of Bozell Worldwide, Inc. ("Bozell").

After Mike Espy became Secretary of Agriculture, Henry Espy unsuccessfully pursued election to his brother's vacant seat in Congress, building up a sizable campaign debt in the process. In February 1994 Douglas left a telephone message at Lake's office—a crucial act for jurisdiction over one of the wire fraud counts. When Lake contacted Douglas, he learned that Secretary Espy had asked Douglas for help in retiring his brother's campaign debt. Lake immediately offered to donate $1,000, the maximum permissible individual contribution. Douglas replied that he had to raise at least $5,000 fast, and that he needed Lake's help. He then proposed a way around the campaign finance restrictions. If Lake would get five RLSM employees (including Lake himself) to write a check for $1,000 each, Douglas would find a way for Sun-Diamond to reimburse them all. Lake knew the scheme was illegal—corporations are forbidden to make contributions "in connection with any election" for Congress, 2 U.S.C. § 441b(a), and no one may make a campaign contribution in the name of another person, 2 U.S.C. § 441f—but agreed to participate anyway. Lake testified that no one else at RLSM or Bozell knew about the plan.

Lake wrote a $1,000 check in his own name and then approached the four RLSM employees identified by Douglas. Three of them agreed to pay up. (A fourth—presumably suspicious about the notion of a reimbursable campaign contribution—declined.) Lake then passed the checks worth $4,000 to Douglas, who deposited them in a "Henry Espy for Congress" account he had opened.

As the vehicle for reimbursement, Douglas settled on the Joint Center Dinner, an annual benefit for which RLSM and Lake had in the past routinely bought tickets on Sun–Diamond's behalf. Lake's staff prepared an internal RLSM document authorizing reimbursement to Lake for his supposed purchase of tickets to the dinner in the amount of $5,000 (even though he had raised only $4,000 for Henry Espy). The same document became part of the monthly invoice sent to Sun–Diamond, billing the client $5,000 for the fictitious dinner attendance on top of its $20,000 monthly retainer and other expenses. Lake received a $5,000 reimbursement check from Bozell, which he cashed and used to pay back the three other individual contributors (apparently pocketing the extra $1,000 for himself). Douglas, as part of his normal duties at Sun-Diamond, approved the payment to RLSM, which eventually went through. The net result: a $5,000 expenditure by Sun-Diamond, $4,000 of which went into Henry Espy's campaign coffers and $1,000 into James H. Lake's pocket. The independent counsel charged that the scheme worked a fraud on Bozell and RLSM, depriving the former (albeit temporarily) of $5,000, and depriving the latter of the "honest services" of its agent Lake under 18 U.S.C. § 1346. The jury convicted, evidently convinced that at least one such deprivation occurred. The jury also found Sun-Diamond guilty of making illegal campaign contributions in violation of FECA, 2 U.S.C. §§ 441b(a) & 441f.

As a threshold matter, Sun-Diamond raises a challenge which it says goes equally to the wire fraud and FECA counts. Richard Douglas's campaign contribution scheme cannot be attributed to it, Sun-Diamond argues, because Douglas was not acting with an intent to benefit the corporation. It is true, as the district court instructed the jury in this case, that an agent's acts will not be imputed to the principal in a criminal case unless the agent acts with the intent to benefit the principal. Here, Sun-Diamond says, Douglas's scheme was designed to—and did in fact—*defraud* his employer, not benefit it. In this circumstance, it strenuously argues, there can be no imputation: "[T]o establish precedent holding a principal *criminally* liable for the acts of an agent who defrauds and deceives the principal while pursuing matters within his self-interest merely because the agent's conduct *may* provide some incidental benefit to the principal serves to punish innocent principals with no countervailing policy justifications."

This argument has considerable intuitive appeal—Sun-Diamond does look more like a victim than a perpetrator, at least on the fraud charges. The facts in the record, however—that Douglas hid the illegal contribution scheme from others at the company and used company funds to accomplish it—do not preclude a valid finding that he undertook the scheme to benefit Sun-Diamond. Part of Douglas's job was to cultivate his, and Sun-Diamond's, relationship with Secretary Espy. By responding to the Secretary's request to help his brother, Douglas may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit. *See, e.g.*, *United States v. Automated Medical Laboratories, Inc.,* 770 F.2d 399, 406–07 (4th Cir. 1985) (agent's conduct which is actually or potentially detrimental to corporation may nonetheless be imputed to corporation in criminal case if motivated at least in part by intent to benefit it); *cf. Local 1814, International Longshoremen's Association, AFL–CIO v. NLRB,* 735 F.2d 1384, 1395 (D.C. Cir. 1984) ("[T]he acts of an agent motivated partly by self-interest—even where self-interest is the predominant motive—lie within the scope of employment so long as the agent is actuated by the principal's business purposes 'to any appreciable extent.'") (quoting *Restatement (Second) of Agency* § 236 & comment b (1957)). Where there is adequate evidence for imputation (as here), the only thing that keeps deceived corporations from being indicted for the acts of their employee-deceivers is not some fixed rule of law or logic but simply the sound exercise of prosecutorial discretion.

And the answer to Sun-Diamond's claim of the absence of any "countervailing policy justification" is simply the justification usually offered in support of holding corporate principals liable for the illegal acts of their agents: to increase incentives for corporations to monitor and prevent illegal employee conduct. One might well question this justification—and scholars have. Moreover, the justification may be at its weakest in cases like this one, where the offending employee breaches a duty of honesty to the very corporation whose goals he aims to advance. In any event, Sun-Diamond's argument here, whatever its merit as an issue of policy, has no real grounding in the relevant statutes. And Sun-Diamond does not invoke the Constitution, which in any event would require either an overruling of the Supreme Court's rejection of a due process attack on corporate liability, *New York Cent. & Hudson River R.R. Co. v. United States,* 212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613 (1909), or the development of some new theory.

Sun-Diamond also raises a narrower objection concerning imputation, one which goes only to the fraud counts. To the extent Douglas's conduct is to be imputed to his employer, argues Sun-Diamond, then so must Lake's be imputed to his employers (RLSM and Bozell). Both men occupied high-level management positions in their respective firms, and both men's firms sought to establish and maintain good relations with Secretary Espy. If Douglas's knowledge can be imputed to Sun-Diamond to hold it responsible for Douglas's acts, then Lake's must be imputed to his employers, RLSM and Bozell, and they cannot be victims.

Even assuming the evidence showed the balance of private and corporate purpose in Douglas's and Lake's motivation to be identical, Sun-Diamond's argument rests on a faulty assumption—that the imputation rules must be the same on both the perpetrator and victim sides. They need not be, and indeed are not. Imputation is a legal fiction designed to assist in the allocation of liability, not a literal description of the state of a principal's knowledge. The law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims. A rule that makes victim wariness a condition of criminally punishing the perpetrator—unlike, say, a rule of contributory negligence in tort—might not inspire much extra precaution in potential victims. However much they may benefit from the criminalization of fraud generally, potential victims (who have many incentives to avoid being gulled, independent of the criminal law) seem unlikely to step up their precautions just to increase the *ex ante* chances that their deceivers will face criminal sanctions—or so Congress could reasonably conclude. Thus, when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even "gullible." Indeed, Congress's adoption of 18 U.S.C. § 1346, specifying that the term "scheme or artifice to defraud," as used in various federal criminal fraud statutes, should include schemes to deprive a principal "of the intangible right of honest services," is hard to square with an imputation rule on the victim side as broad as the one governing corporate criminal responsibility. . . .

4. Corporate Compliance Policies

Under federal law, it is no defense to corporate criminal liability that the corporation had a policy against criminal conduct by its employees, or even that it had a particularly good or effective such policy. The following case illustrates the rule. Is this well-considered law? *Should* something like this be a defense? (Notice that this case, like *New York Central*, involves anti-competitive behavior.)

UNITED STATES v. HILTON HOTELS CORP., 467 F.2d 1000 (9th Cir. 1972)

BROWNING, Circuit Judge:

This is an appeal from a conviction under an indictment charging a violation of section 1 of the Sherman Act, 15 U.S.C. § 1.

Operators of hotels, restaurants, hotel and restaurant supply companies, and other businesses in Portland, Oregon, organized an association to attract conventions to their city. To finance the association, members were asked to make contributions in predetermined amounts. Companies selling supplies to hotels were asked to contribute an amount equal to one per cent of their sales to hotel members. To aid collections, hotel members, including appellant, agreed to give preferential treatment to suppliers who paid their assessments, and to curtail purchases from those who did not.

The jury was instructed that such an agreement by the hotel members, if proven, would be a per se violation of the Sherman Act. Appellant argues that this was error.

We need not explore the outer limits of the doctrine that joint refusals to deal constitute per se violations of the Act, for the conduct involved here was of the kind long held to be forbidden without more. “Throughout the history of the Sherman Act, the courts have had little difficulty in finding unreasonable restraints of trade in agreements among competitors, at any level of distribution, designed to coerce those subject to a boycott to accede to the action or inaction desired by the group or to exclude them from competition.” Barber, *Refusals to Deal under the Federal Anti-trust Laws*, 103 U. Pa. L. Rev. 847, 872–73 (1955).

Appellant argues that in cases in which the per se rule has been applied to refusals to deal, the defendants intended “to destroy a competitor or a line of competition,” while the purpose of the defendants in the present case “was solely to bring convention dollars into Portland.” But the necessary and direct consequence of defendants' scheme was to deprive uncooperative suppliers of the opportunity to sell to defendant hotels in free and open competition with other suppliers, and to deprive defendant hotels of the opportunity to buy supplies from such suppliers in accordance with the individual judgment of each hotel, at prices and on terms and conditions of sale determined by free competition. Defendants therefore “intended” to impose these restraints upon competition in the only sense relevant here. The ultimate objective defendants sought to achieve is immaterial. . . .

This is not a case in which joint activity having a primary purpose and direct effect of accomplishing a legitimate business objective is also alleged to have had an incidental and indirect adverse effect upon the business of some competitors. The primary purpose and direct effect of defendants' agreement was to bring the combined economic power of the hotels to bear upon those suppliers who failed to pay. The exclusion of uncooperative suppliers from the portion of the market represented by the supply requirements of the defendant hotels was the object of the agreement, not merely its incidental consequence. . . .

Appellant's president testified that it would be contrary to the policy of the corporation for the manager of one of its hotels to condition purchases upon payment of a contribution to a local association by the supplier. The manager of appellant's Portland hotel and his assistant testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality, and service. They also testified that on two occasions they told the hotel's purchasing agent that he was to take no part in the boycott. The purchasing agent confirmed the receipt of these instructions, but admitted that, despite them, he had threatened a supplier with loss of the hotel's business unless the supplier paid the association assessment. He testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier.

Based upon this testimony, appellant requested certain instructions bearing upon the criminal liability of a corporation for the unauthorized acts of its agents. These requests were rejected by the trial court. The court instructed the jury that a corporation is liable for the acts and statements of its agents “within the scope of their employment,” defined to mean “in the corporation's behalf in performance of the agent's general line of work," including "not only that which has been authorized by the corporation, but also that which outsiders could reasonably assume the agent would have authority to do." The court added:

"A corporation is responsible for acts and statements of its agents, done or made within the scope of their employment, even though their conduct may be contrary to their actual instructions or contrary to the corporation's stated policies."

Appellant objects only to the court's concluding statement.

Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment. *United States v. A & P Trucking Co.*, 358 U.S. 121, 125-126, 79 S. Ct. 203, 3 L. Ed. 2d 165 (1958); *New York Central & Hudson R. R. Co. v. United States*, 212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613 (1909); *cf. United States v. Illinois Central R. R. Co.*, 303 U.S. 239, 58 S. Ct. 533, 82 L. Ed. 773 (1938). Such liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been contrary to express instructions. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204–05 (3d Cir. 1970). *See also New York Central & Hudson R. R. Co. v. United States*, *supra*, 212 U.S. at 493, 29 S. Ct. 304; *Standard Oil Co. v. United States*, 307 F.2d 120, 127–28 (5th Cir. 1962); *United States v. Armour & Co.*, 168 F.2d 342, 343–44 (3d Cir. 1947); *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943); 10 Fletcher, Cyclopedia of the Law of Private Corporations 492 (M. Wolf ed. 1970).

The intention to impose such liability is sometimes express, *New York Central & Hudson R. R. Co. v. United States*, *supra*, 212 U.S. 481, 29 S. Ct. 304, 53 L. Ed. 613, but it may also be implied. The text of the Sherman Act does not expressly resolve the issue. For the reasons that follow, however, we think the construction of the Act that best achieves its purpose is that a corporation is liable for acts of its agents within the scope of their authority even when done against company orders.

It is obvious from the Sherman Act's language and subject matter that the Act is primarily concerned with the activities of business entities. The statute is directed against "restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 60 S. Ct. 982, 993, 84 L. Ed. 1311 (1940). In 1890, as now, the most significant commercial activity was conducted by corporate enterprises. *See New York Central & Hudson R. R. Co. v. United States*, *supra*, 212 U.S. at 495, 29 S. Ct. 304; *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N.E.2d 210, 219 (Ill. 1944).

Despite the fact that "the doctrine of corporate criminal responsibility for the acts of the officers was not well established in 1890", *United States v. Wise*, 370 U.S. 405, 408, 82 S. Ct. 1354, 1357, 8 L. Ed. 2d 590 (1962), the Act expressly applies to corporate entities. 15 U.S.C. § 7. The preoccupation of Congress with corporate liability was only emphasized by the adoption in 1914 of section 14 of the Clayton Act to reaffirm and emphasize that such liability was not exclusive, and that corporate agents also were subject to punishment if they authorized, ordered, or participated in the acts constituting the violation.

Criminal liability for the acts of agents is more readily imposed under a statute directed at the prohibited act itself, one that does not make specific intent an element of the offense. The Sherman Act is aimed at consequences. Specific intent is not an element of any offense under the Act except attempt to monopolize under section 2, and conscious wrongdoing is not an element of that offense. The Sherman Act is violated if “a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.” *United States v. Griffith*, *supra*, 334 U.S. 100, 105, 68 S. Ct. 941, 944, 92 L. Ed. 1236 (1948).

The breadth and critical character of the public interests protected by the Sherman Act, and the gravity of the threat to those interests that led to the enactment of the statute, support a construction holding business organizations accountable, as a general rule, for violations of the Act by their employees in the course of their businesses. In enacting the Sherman Act, “Congress was passing drastic legislation to remedy a threatening danger to the public welfare. . . .” *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 392, 42 S. Ct. 570, 576, 66 L. Ed. 975 (1922). The statute “was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.” *Northern Pacific Ry. v. United States*, *supra*, 356 U.S. at 4, 78 S. Ct. at 517.

With such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.

Legal commentators have argued forcefully that it is inappropriate and ineffective to impose criminal liability upon a corporation, as distinguished from the human agents who actually perform the unlawful acts (*see* Francis, *Criminal Responsibility of the Corporation*, 18 Ill. L. Rev. 305 (1924); Canfield, *Corporate Responsibility for Crime*, 14 Colum. L. Rev. 469 (1914)), particularly if the acts of the agents are unauthorized. *See* Mueller, *Mens Rea and the Corporation*, 19 U. Pitt. L. Rev. 21, 45 (1957). But it is the legislative judgment that controls, and “the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy.” ALI Model Penal Code, Comment on § 2.07, Tentative Draft No. 4, p. 149 (1956). Moreover, the strenuous efforts of corporate defendants to avoid conviction, particularly under the Sherman Act, strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees.

Because of the nature of Sherman Act offenses and the context in which they normally occur, the factors that militate against allowing a corporation to disown the criminal acts of its agents apply with special force to Sherman Act violations. . . .

Thus the general policy statements of appellant's president were no defense. Nor was it enough that appellant's manager told the purchasing agent that he was not to participate in the boycott. The purchasing agent was authorized to buy all of appellant's supplies. Purchases were made on the basis of specifications, but the purchasing agent exercised complete authority as to source. He was in a unique position to add the corporation's buying power to the force of the boycott. Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks. . . .

Problem 1-2
Should the law of corporate criminal liability incorporate an affirmative defense that would bar liability if the defendant firm had an effective legal compliance program? If so, what should be the specific scope and contours of that affirmative defense? In other words, how would you draft the jury instructions for such a defense? Should the law go farther by requiring the prosecutor to prove the absence of such an effective program as an element of corporate criminal liability?

5. Corporate Mens Rea

Mental state is the keystone in most forms of criminal liability. So how should mens rea analysis work when the defendant is a firm and therefore has no brain? The general answer under current law is that respondeat superior liability means there is no need to inquire into "corporate mens rea." Provided other requirements are satisfied, if the firm is liable so long as an employee is liable, then the only question about mental state is whether the employee had whatever mens rea, if any, is required for the applicable offense.

But notice how the court in the following case deals with the issue of corporate mens rea. Does the court's analysis make sense? This case is much discussed but also controversial. There is debate about how far this concept of "collective mens rea" goes, or even whether other courts could be expected to follow the concept, which has not been sufficiently tested in the federal courts. Think about how the court's analysis might work, or not, with other kinds of criminal statutes.

The legal framework applicable in this case is federal money laundering laws. Part of that regime requires individuals and banks to file a form with the IRS for any cash transaction of $10,000 or more—the purpose being to make it easier for the government to identify and further investigate potentially suspicious transactions that might involve criminal proceeds. To make this rule more effective, federal law also prohibits "structuring" of cash transactions, that is, treating one large transaction as a series of smaller ones to avoid filing of the required report.

UNITED STATES v. BANK OF NEW ENGLAND, NA, 821 F.2d 844 (1st Cir. 1987)

BOWNES, Circuit Judge.

The Bank of New England appeals a jury verdict convicting it of thirty-one violations of the Currency Transaction Reporting Act (the Act). 31 U.S.C. §§ 5311-22 (1982). Department of Treasury regulations promulgated under the Act require banks to file Currency Transaction Reports (CTRs) within fifteen days of customer currency transactions exceeding $10,000. 31 C.F.R. § 103.22 (1986). The Act imposes felony liability when a bank willfully fails to file such reports "as part of a pattern of illegal activity involving transactions of more than $100,000 in a twelve-month period. . . ." 31 U.S.C. § 5322(b). . . .

The Bank was found guilty of having failed to file CTRs on cash withdrawals made by James McDonough. It is undisputed that on thirty-one separate occasions between May 1983 and July 1984, McDonough withdrew from the Prudential Branch of the Bank more than $10,000 in cash by using multiple checks-each one individually under $10,000-presented simultaneously to a single bank teller. . . .

Criminal liability under 31 U.S.C. § 5322 only attaches when a financial institution "willfully" violates the CTR filing requirement. A finding of willfulness under the Reporting Act must be supported by "proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime." Willfulness can rarely be proven by direct evidence, since it is a state of mind; it is usually established by drawing reasonable inferences from the available facts.

The Bank contends that the trial court's instructions on knowledge and specific intent effectively relieved the government of its responsibility to prove that the Bank acted willfully. The trial judge began her instructions on this element by outlining generally the concepts of knowledge and willfulness:

> Knowingly simply means voluntarily and intentionally. It's designed to exclude a failure that is done by mistake or accident, or for some other innocent reason. Willfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law.

The trial judge properly instructed the jury that it could infer knowledge if a defendant consciously avoided learning about the reporting requirements. The court then focused on the kind of proof that would establish the Bank's knowledge of its filing obligations. The judge instructed that the knowledge of individual employees acting within the scope of their employment is imputed to the Bank. She told the jury that "if any employee knew that multiple checks would require the filing of reports, the bank knew it, provided the employee knew it within the scope of his employment, . . ."

The trial judge then focused on the issue of "collective knowledge":

> In addition, however, you have to look at the bank as an institution. As such, its knowledge is the sum of the knowledge of all of the employees. That is, the bank's knowledge is the totality of what all of the employees know within the scope of their employment. So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all. So if you find that an employee within the scope of his employment knew that CTRs had to be filed, even if multiple checks are used, the bank is deemed to know it. The bank is also deemed to know it if each of several employees knew a part of that requirement and the sum of what the separate employees knew amounted to knowledge that such a requirement existed.

After discussing the two modes of establishing knowledge-via either knowledge of one of its individual employees or the aggregate knowledge of all its employees-the trial judge turned to the issue of specific intent:

> There is a similar double business with respect to the concept of willfulness with respect to the bank. In deciding whether the bank acted willfully, again you have to look first at the conduct of all employees and officers, and, second, at what the bank did or did not do as an institution. The bank is deemed to have acted willfully if one of its employees in the scope of his employment acted willfully. So, if you find that an employee willfully failed to do what was necessary to file these reports, then that is deemed to be the act of the bank, and the bank is deemed to have willfully failed to file. . . .
>
> Alternatively, the bank as an institution has certain responsibilities; as an organization, it has certain responsibilities. And you will have to determine whether the bank as an organization consciously avoided learning about and observing CTR requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant organizational indifference. In this connection, you should look at the evidence as to the bank's effort, if any, to inform its employees of the law; its effort to check on their compliance; its response to various bits of information that it got in August and September of '84 and February of '85; its policies, and how it carried out its stated policies. . . .
>
> If you find that the Government has proven with respect to any transaction either that an employee within the scope of his employment willfully failed to file a required report or that the bank was flagrantly indifferent to its obligations, then you may find that the bank has willfully failed to file the required reports.

The Bank contends that the trial court's instructions regarding knowledge were defective because they eliminated the requirement that it be proven that the Bank violated a known legal duty. It avers that the knowledge instruction invited the jury to convict the Bank for negligently maintaining a poor communications network that prevented the consolidation of the information held by its various employees. The Bank argues that it is error to find that a corporation possesses a particular item of knowledge if one part of the corporation has half the information making up the item, and another part of the entity has the other half.

A collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. *Riss & Company v. United States,* 262 F.2d 245, 250 (8th Cir. 1958); *Inland Freight Lines v. United States,* 191 F.2d 313, 315 (10th Cir. 1951); *Camacho v. Bowling,* 562 F. Supp. 1012, 1025 (N.D. Ill. 1983); *United States v. T.I.M.E.-D.C., Inc.,* 381 F. Supp. 730, 738–39 (W.D. W. Va. 1974); *United States v. Sawyer Transport, Inc.,* 337 F. Supp. 29 (D. Minn. 1971), *aff'd,* 463 F.2d 175 (8th Cir. 1972). The acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment. The law on corporate criminal liability reflects this. *See, e.g., United States v. Cincotta,* 689 F.2d 238, 241, 242 (1st Cir.), *cert. denied,* 459 U.S. 991, 103 S. Ct. 347, 74 L. Ed. 2d 387 (1982); *United States v. Richmond,* 700 F.2d 1183, 1195 n.7 (8th Cir. 1983). Similarly, the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation. *Steere Tank Lines, Inc. v. United States,* 330 F.2d 719, 722 (5th Cir. 1963). Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation:

> [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.

United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. at 738. Since the Bank had the compartmentalized structure common to all large corporations, the court's collective knowledge instruction was not only proper but necessary.

Nor do we find any defects in the trial court's instructions on specific intent. The court told the jury that the concept of willfulness entails a voluntary, intentional, and bad purpose to disobey the law. Her instructions on this element, when viewed as a whole, directed the jury not to convict for accidental, mistaken or inadvertent acts or omissions. It is urged that the court erroneously charged that willfulness could be found via flagrant indifference by the Bank toward its reporting obligations. With respect to federal regulatory statutes, the Supreme Court has endorsed defining willfulness, in both civil and criminal contexts, as "a disregard for the governing statute and an indifference to its requirements." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 & n.20, 105 S. Ct. 613, 625 & n.20, 83 L. Ed. 2d 523 (1985). Accordingly, we find no error in the court's instruction on willfulness.

The Bank asserts that the evidence did not suffice to show that it had willfully failed to comply with the Act's reporting requirements. We review the evidence in the light most favorable to the government. *United States v. Medina,* 761 F.2d 12, 16 n.3 (1st Cir. 1985).

As already discussed, the language of the Treasury regulations itself gave notice that cash withdrawals over $10,000 were reportable, regardless of the number of checks used. Primary responsibility for CTR compliance in the Bank's branch offices was assigned to head tellers and branch managers. Head tellers Orlandella and Murphy, who knew of the nature of McDonough's transactions, also knew of the CTR filing obligations imposed by the Bank. The jury heard testimony from former bank teller Simona Wong, who stated that she knew McDonough's transactions were reportable, and that the source of her knowledge was head teller Murphy.

Even if some Bank personnel mistakenly regarded McDonough as engaging in multiple transactions, there was convincing evidence that the Bank knew that his withdrawals were reportable. An internal memo sent in May 1983 by project coordinator Jayne Brady to all branch managers and head tellers stated that "'[r]eportable transactions are expanded to include multiple transactions which aggregate more than $10,000 in any *one day.*' This includes deposits or withdrawals by a customer to or from more than one account." (Emphasis in original.) The Prudential Branch Manual instructed that if Bank personnel know that a customer has engaged in multiple transactions totalling $10,000 or more, then such transactions should be regarded as a single transaction. In addition, since 1980, the instructions on the back of CTR forms have directed that reports be filed on multiple transactions which aggregate to over $10,000. Finally, a Bank auditor discussed with

Orlandella and Murphy, the Bank's obligation to report a customer's multiple transactions in a single day which amount to more than $10,000. We do not suggest that these evidentiary items in themselves legally bound the Bank to report McDonough's transactions; it is the language of the regulations that impose such a duty. This evidence, however, proved that the Bank had ample knowledge that transactions like McDonough's came within the purview of the Act.

Regarding the Bank's specific intent to violate the reporting obligation, Simona Wong testified that head teller Patricia Murphy knew that McDonough's transactions were reportable, but, on one occasion, deliberately chose not to file a CTR on him because he was "a good customer." In addition, the jury heard testimony that bank employees regarded McDonough's transactions as unusual, speculated that he was a bookie, and suspected that he was structuring his transactions to avoid the Act's reporting requirements. An internal Bank memo, written after an investigation of the McDonough transactions, concluded that a "person managing the branch would have to have known that something strange was going on." Given the suspicions aroused by McDonough's banking practices and the abundance of information indicating that his transactions were reportable, the jury could have concluded that the failure by Bank personnel to, at least, inquire about the reportability of McDonough's transactions constituted flagrant indifference to the obligations imposed by the Act.

We hold that the evidence was sufficient for a finding of willfulness. . . .

A More Recent Example

On September 9, 2010, a natural gas line in San Bruno, California owned by the PG&E corporation exploded, causing a fire in which eight people died and fifty-eight were injured. Federal prosecutors charged the corporation with violations of the federal Pipeline Safety Act (PSA). PG&E chose to contest the case at trial and a jury convicted the company on numerous counts.

In explaining corporate criminal liability in the case, the judge told the jurors that to convict on the PSA charges they needed to find, beyond a reasonable doubt, that a PG&E employee acting within the scope of employment and in part to benefit the company violated the PSA. When explaining the PSA to the jury, the judge said that a criminal violation of the statute occurs only when a defendant acts "willfully." The judge then stated to the jury that corporate "willfulness" exists when an employee acts willfully on behalf of the corporation and that "a corporation is considered . . . to have acquired the collective knowledge of its employees. The corporation's 'knowledge' is therefore the totality of what the employees know within the scope of their employment."

Was there any problem in the trial court's instruction? (Unfortunately for interested observers, PG&E and the government settled the matter after trial and no appellate decision resulted from the prosecution.)

C. Corporate Criminal Liability: Theory

TWO WAYS TO THINK ABOUT THE PUNISHMENT OF CORPORATIONS

Albert W. Alschuler, 46 AM. CRIM. L. REV. 1359 (2009)

This article compares the criminal punishment of corporations in the twenty-first century with two ancient legal practices—deodand (the punishment of animals and objects that have produced harm) and frankpledge (the punishment of all members of a group when one member of the group has avoided apprehension for a crime). It argues that corporate criminal punishment is a mistake but that viewing it as frankpledge is less ridiculous than viewing it as deodand. The article considers the implications of the choice between these concepts for standards of corporate guilt and for the sentencing of corporate offenders. . . .

The term deodand refers to the punishment of an animal or inanimate object that has killed a person. The Book of Exodus endorsed the practice: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten . . . ." A standard reference is *Criminal Prosecution and Capital Punishment of Animals* by E. P. Evans, published in 1906. As one alphabetically minded reader of this work noted, it chronicled 191 actions against "asses, beetles, bloodsuckers, bulls, caterpillars, cockchafers, cocks, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, locusts, mice, moles, rats, serpents, sheep, slugs, snails, swine, termites, turtledoves, weevils, wolves, [and] worms . . . ."

Under English law, any chattel found by a jury to have caused death was forfeit to the Crown. In the *Case of the Lord of the Manor of Hampstead*, "[a] cart met a wagon loaded upon the road, and the cart endeavouring to pass by . . . overturned, and threw the person that was in the cart just before the wheels of the waggon." The jury found that the cart, wagon, loadings, and horses were all deodands because they had "moved [unto death]."

Oliver Wendell Holmes devoted the first chapter of his legal classic *The Common Law* to deodands. Among his many illustrations: When someone was killed by a fall from a tree, "the rude Kukis of Southern Asia" required this person's relatives to cut down the tree and scatter it in chips. Holmes argued that primitive people attributed intentionality and blame to inanimate objects. Noting that proceedings in admiralty were still brought against vessels and that everyone called vessels "she," he observed, "If [following a ship accident] we should say to an uneducated man to-day, 'She did it and she ought to pay for it,' it may be doubted whether he would see the fallacy, or be ready to explain that the ship was only property." In light of Holmes's view of the common man, it is easy to see why someone called him the Yankee from Olympus. And it is easy to see why he declared in this chapter that "[t]he life of the law has not been logic."

Frankpledge was an English institution in which ten men were bound together and held responsible for delivering anyone in any of their ten households who had committed a crime. If the criminal escaped, all ten members of the tithing were fined. A precursor of this practice was in existence at least by the time of King Edgar the Peaceful, who died in 975 and whose mistress was named Wulfthryth. A law of Edgar's reign required every man to have a *borh* (or surety), and it said, "[I]f any one then do wrong and run away, let the borh bear that which he ought to bear." The Normans translated the Anglo-Saxon word *frithborh* as frankpledge and used the institution effectively. There were no professional police forces, but frankpledge gave everyone the job of capturing wrongdoers. When the members of a tithing allowed a criminal to escape, they were punished collectively for this default. F. W. Maitland speculated that frankpledge led to the jury of presentment or grand jury. Even after the members of a community were freed of the obligation to capture wrongdoers, they were required to tell the sheriffs and justices what they knew. . . .

Neither the "deodand" view of corporate criminal liability nor the "frankpledge" view justifies the *respondeat superior* standard now employed in the federal courts to determine a corporation's criminal guilt.

A corporation's "ethos" or "persona"—the essence alleged to justify its punishment for "expressive retributive" reasons—is not established by the wrongful act of a single employee, and the isolated wrongful act of a "high managerial agent" may not manifest a corporation's "personality" either. Even the "rude Kukis of Southern Asia," who allegedly punished trees for fatal falls, might have had difficulty hating an otherwise virtuous corporation with tens of thousands of employees whenever one employee did something wrong.

Blaming an entity apparently demands an atmospheric assessment of the entity's *spirit*, and Pamela Bucy has proposed that juries make this assessment. She advocates what she calls "the corporate ethos standard" and says that this standard "directs criminal liability toward only those corporations which are 'deserving' of prosecution as demonstrated by their lawless ethos." . . .

A medieval academic similarly might have opposed the indiscriminate punishment of objects that killed people and might have proposed a more careful assessment of each object's ethos. Was an accused wheel well designed? Was it made of the best material? Was it inspected and repaired on a regular basis? Had it previously provided useful service? Had it been involved in prior accidents?

Bucy's proposal provides few standards, invites prosecutors to appeal to the anti-corporate sentiments of some jurors, and probably would yield outcomes based mostly on the jurors' proclivities, the trial lawyers' rhetoric, and how much harm the defendant's agents had caused. The impossibility of translating deodand sentiments into an operational standard of liability reflects the "let's pretend" character of the group-blame concept, and the difficulty of formulating anything other than knee-jerk standards of culpability suggests placing the punishment of organizations on a different basis. The goal of corporate criminal punishment should be instrumental. It should be to induce an appropriate level of monitoring within an organization and nothing else.

If the goal of group liability is to encourage appropriate monitoring, the issue should be whether the group has monitored appropriately. The Norman inventors of frankpledge, however, did not address this question directly. Instead, they applied a standard of strict liability, presuming a failure to monitor whenever one member of a tithing escaped punishment for a serious crime.

The modern law of corporate criminality similarly employs a strict liability standard, but the modern standard is worse. For one thing, even if the criminal has not escaped, this standard presumes a failure to monitor whenever a member of the group has committed a crime. The group's delivery of the wrongdoer to the authorities may prompt forbearance or leniency, but it does not eradicate the group's responsibility. Moreover, the modern law treats any criminal act by any member of a 10,000-person group as proof of the other members' failure. That position is roughly 1000 times more misguided than treating the wrongful act of any member of a ten-person group as conclusive proof of the other members' default. A teacher who cannot determine which of his students misbehaved may keep an entire class after school, but even the most tyrannical teacher does not detain every student in the school system.

The rule of strict liability arose because people believed that the acts of an agent could be attributed to the agent's principal, and that was that. The rule had no articulated purpose. Courts and legislatures had decided to punish corporations, and they saw no other way to do it. The rule of *respondeat superior* never had a reason, and there is no reason to retain it.

When one rejects deodand mythology and recognizes that the goal of corporate punishment is to ensure an appropriate level of internal policing, the appropriate principle of liability becomes clear. Whether a criminal case against a corporation can be triggered by the criminal act of any employee or only by an act approved or tolerated by a high managerial agent, the defendant should at a minimum be permitted to show as an affirmative defense that it had an appropriate compliance program in place prior to this act. When a corporation implements a suitable compliance program, it does what the authors of the law of corporate criminal liability (at least the non-superstitious authors) meant it to do. The government should ask for no more.

Strict *respondeat superior* liability gives managers an incentive to establish effective compliance programs, but an affirmative defense of due care or appropriate monitoring would give them a stronger incentive. The expected benefits of compliance programs are greater when they can lead to a defense than when they cannot. Contrary to common intuition, strict liability probably weakens rather than strengthens the deterrent force of the criminal law. The Supreme Court has in fact limited the *respondeat superior* principle in sexual harassment cases for precisely this reason. Giving "credit . . . to employers who make reasonable efforts to discharge their duty" encourages them to establish programs to stop harassment. It does so more effectively than holding them strictly liable for whatever harassment occurs.

Rewarding firms for establishing compliance programs encourages them to establish compliance programs. In addition, the proposed affirmative defense removes the incentive *not* to monitor that strict *respondeat superior* liability sometimes creates. A firm need not fear that an appropriate compliance program would produce incriminating information that the government could use to destroy it. . . .

Although the current standard of corporate liability makes no sense from either the "deodand" or the "frankpledge" perspective, a recent *New York Times* column by former Attorney General John Ashcroft revealed why this standard has endured for 100 years and may last 100 more.

Ashcroft's column praised federal deferred prosecution agreements:

> These court-authorized agreements . . . under certain circumstances offer[] more appropriate methods of providing justice in the best interests of the public as well as a company's employees and shareholders. They avoid the destructiveness of indictments and allow

> companies to remain in business while operating under the increased scrutiny of federally appointed monitors.

Ashcroft's column did not directly answer the question, "compared to what?," but its answer was clear: compared to full enforcement of the law.

DPAs and NPAs do look great when compared to full enforcement of the law, but full enforcement of the law is unthinkable. Every Fortune 500 company presumably has had at least one employee who violated a federal criminal law while carrying out his duties. The law of corporate crime thus makes every Fortune 500 company subject to prosecution, conviction, and punishment. In addition to the reputational damage a criminal conviction is likely to bring, conviction may bar a company from obtaining needed business licenses, holding a national bank franchise, receiving Medicaid and Medicare payments, auditing the accounts of publicly traded corporations, and contracting with the government. The *respondeat superior* standard apparently empowers the Justice Department to put most American companies out of business and to bring the economy to a standstill--and to do so just as other federal agencies are bolstering failing companies to keep the economy from coming to a standstill.

Ashcroft provided an example:

> In September 2007, . . . the Justice Department and the nation's five largest manufacturers of prosthetic hips and knees reached agreements over allegations that they gave kickbacks to orthopedic surgeons who used a particular company's artificial hip and knee reconstruction replacement products. The allegations meant that the companies faced indictment, prosecution and a potential end to their business.
>
> Think of the effect on the community if these companies had been shuttered: employees would have lost their jobs, shareholders and pensioners would have lost their savings and countless people in need of hip and knee replacement would have been out of luck, as these five companies accounted for 95 percent of the market. The Justice Department could have wiped out an entire industry that has a vital role in American health care.
>
> Instead, the companies paid settlements to the government totaling $311 million. They agreed to be monitored by private sector individuals and firms with reputations for integrity and public service . . . . The monitoring costs were borne exclusively by the companies, saving taxpayers tens of millions of dollars that could be then used for other investigations . . . . In these types of circumstances, a deferred prosecution agreement is clearly better for everyone.

Of course the nation need not fear a prosecutor-prompted economic collapse. No prosecutor wants to put a corporation out of business simply because one rogue employee committed a crime. Federal prosecutors merely want the *power* to put every corporation out of business whenever a low-level employee has committed a crime. This power enables prosecutors to impose whatever sanctions they like for whatever conduct they do wish to punish. The power to do the unthinkable lets prosecutors do the thinkable without much sweat. When prosecutors exercise their sweeping powers responsibly (as nearly all of them believe that they do), they may save the jobs of thousands of people and enable companies to stay in business--all as measured from the fantasy baseline of full-enforcement. Like John Ashcroft, the prosecutors may then congratulate themselves on their restraint. . . .

Problem 1-3
To fill the theoretical gaps left by the materials to this point: (a) Identify economic (that is, deterrence-based) arguments *against* the doctrine and practice of imposing criminal liability on corporations and other firms. (b) Identify non-economic (that is, non-deterrence-based) arguments *in favor of* the doctrine and practice of imposing criminal liability on corporations and other firms.

D. *De Facto* Corporate Criminal Liability

Now we shift to examining *de facto* corporate criminal liability. All lawyers practicing in this field know that the imposition, and degree, of any criminal sanctions imposed on a business firm in a case of employee crime—should the case, as is common, result in settlement—will depend heavily on a number of factors that prosecutors will weigh. These factors thus guide negotiation between defense lawyers and the government over corporate criminal liability and, well before that stage, the advising of corporations on how to best position themselves to obtain leniency should they face an enforcement problem.

To introduce these discretionary factors, three items follow: (1) excerpts from the longstanding provisions of the Justice Manual (until recently known as the U.S. Attorneys' Manual), setting out DOJ policy on prosecution of corporations; (2) the SEC's "Seaboard Report," which is the most explicit statement from the SEC on its policy regarding enforcement against firms; and (3) two recent judicial decisions, and a critical response, on the question of whether courts have any role in the current *de facto* enforcement process.

Notice the things the DOJ and SEC consider relevant to firm liability that are not found anywhere in American *de jure* doctrine. What is the policy motivation behind each of these factors? These documents are not law or otherwise enforceable in court. So why do the DOJ and SEC have them?

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL (Excerpts)

9-28.010. Foundational Principles of Corporate Prosecution

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, among other things: (1) protecting the integrity of our economic and capital markets by enforcing the rule of law; (2) protecting consumers, investors, and business entities against competitors who gain unfair advantage by violating the law; (3) preventing violations of environmental laws; and (4) discouraging business practices that would permit or promote unlawful conduct at the expense of the public interest.

One of the most effective ways to combat corporate misconduct is by holding accountable all individuals who engage in wrongdoing. Such accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public's confidence in our justice system.

Prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers, we accomplish multiple goals. First, we increase our ability to identify the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and the extent of any corporate misconduct. Second, a focus on individuals increases the likelihood that those with knowledge of the corporate misconduct will be identified and provide information about the individuals involved, at any level of an organization. Third, we maximize the likelihood that the final resolution will include charges against culpable individuals and not just the corporation.

9-28.100. Duties of Federal Prosecutors and Duties of Corporate Leaders

Corporate directors and officers owe a fiduciary duty to a corporation's shareholders (the corporation's true owners) and they owe duties of honest dealing to the investing public and consumers in connection with the corporation's regulatory filings and public statements. A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders who seek to promote trust and confidence. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors—including the professionalism and civility we demonstrate, our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation, and also our appreciation that corporate prosecutions can harm blameless investors, employees, and others—affects public perception of our mission. Federal prosecutors must maintain public confidence in the way in which we exercise our charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case.

9-28.200. General Considerations of Corporate Liability

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed in these guidelines. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm—*e.g.*, environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.

In certain instances, it may be appropriate to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in JM 9-28.1100 (Collateral Consequences). Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in JM 9-28.1200 (Civil or Regulatory Alternatives). When considering whether to enter into a non-prosecution or deferred prosecution agreement with the defendant, prosecutors should consider the interests of any victims and be aware that any fines collected under such agreements will *not* be deposited into the Crime Victims Fund, but will rather go to the General Fund of the Treasury. *See* JM 9-28.1400.

Prosecutors have substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. Prosecutors should ensure that the general purposes of the criminal law—appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims—are adequately met, taking into account the special nature of the corporate "person."

9-28.210. Focus on Individual Wrongdoers

A. General Principle: Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Provable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution. In other words, regardless of the ultimate corporate disposition, a separate evaluation must be made with respect to potentially liable individuals.

Absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, no corporate resolution should provide protection from criminal liability for any individuals. The United States generally should not release individuals from criminal liability based on corporate settlement releases. Any such release of individuals from criminal liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

B. Comment: It is important early in the corporate investigation to identify the responsible individuals and determine the nature and extent of their misconduct. Prosecutors should not allow delays in the corporate investigation to undermine the Department's ability to pursue potentially culpable individuals. Every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception. In situations where it is anticipated that a tolling agreement is unavoidable, all efforts should be made either to prosecute culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

If an investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and, when warranted, an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation to pursue charges or some other resolution with the corporation but not to bring criminal charges or civil claims against culpable individuals, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Agents may act for mixed reasons—both for self-aggrandizement (direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. *See United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is "whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation."). In *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985), for example, the Fourth Circuit affirmed a corporation's conviction for the actions of a subsidiary's employee despite the corporation's claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." *Id.* at 407. The court stated, "Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." *Id.*; *see also United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982) (upholding a corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name).

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

> [B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (internal citation omitted) (quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945)).

9-28.300. Factors to be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. *See* JM 9-27.220 et seq. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. *See id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (*see* JM 9-28.400);
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (*see* JM 9-28.500);
3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (*see* JM 9-28.600);
4. the corporation's willingness to cooperate, including as to potential wrongdoing by its agents (*see* JM 9-28.700);
5. the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision (*see* JM 9-28.800);
6. the corporation's timely and voluntary disclosure of wrongdoing (*see* JM 9-28.900);

7. the corporation's remedial actions, including, but not limited to, any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution (*see* JM 9-28.1000);
8. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (*see* JM 9-28.1100);
9. the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies (*see* JM 9-28.1200);
10. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance (*see* JM 9-28.1300); and
11. the interests of any victims (*see* JM 9-28.1400).

B. Comment: The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

9-28.700. The Value of Cooperation

Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

A. General Principle: In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals substantially involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the Department support a cooperation-related reduction at sentencing.

If the company is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully, the organization may still be eligible for cooperation credit. For example, there may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is legally prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.

To be clear, a company is not required to waive its attorney-client privilege or attorney work product protection to be eligible to receive cooperation credit. The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (*e.g.,* the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation).

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—*i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees, uncertainty about who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation—and ultimately shareholders, employees, and other often blameless victims—by enabling the government to focus its investigative resources in a manner that may expedite the investigation and that may be less likely to disrupt the corporation's legitimate business operations. In addition, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

The requirement that companies cooperate completely as to individuals does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process—before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize, exaggerate, or otherwise misrepresent the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. In addition, the company's continued cooperation with respect to individuals may be necessary post-resolution. If so, the corporate resolution agreement should include a provision that requires the company to provide information about all individuals substantially involved in or responsible for the misconduct, and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

9-28.720. Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. . . .

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information about individual misconduct alone does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in JM 9-28.300. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a potential mitigating factor, but it alone is not dispositive. . . .

9-28.800. Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior. See United States v. Basic Constr. Co*., 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ... such acts were against corporate policy or express instructions."). As explained in *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006), a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts, because "[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." *Id.* at 25–26. *See also United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks"); *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.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned. Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist United States Attorneys' Offices in finding the appropriate agency office(s) for such consultation.

In June 2020, the Criminal Division of the DOJ issued additional written details regarding its criteria for evaluating the quality of corporate compliance programs, which can be accessed here: https://www.justice.gov/criminal-fraud/page/file/937501/download.

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 44969 / October 23, 2001

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 1470 / October 23, 2001

Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions ("The Seaboard Report")

Today, we commence and settle a cease-and-desist proceeding against Gisela de Leon-Meredith, former controller of a public company's subsidiary. Our order finds that Meredith caused the parent company's books and records to be inaccurate and its periodic reports misstated, and then covered up those facts.

We are not taking action against the parent company, given the nature of the conduct and the company's responses. Within a week of learning about the apparent misconduct, the company's internal auditors had conducted a preliminary review and had advised company management who, in turn, advised the Board's audit committee, that Meredith had caused the company's books and records to be inaccurate and its financial reports to be misstated. The full Board was advised and authorized the company to hire an outside law firm to conduct a thorough inquiry. Four days later, Meredith was dismissed, as were two other employees who, in the company's view, had inadequately supervised Meredith; a day later, the company disclosed publicly and to us that its financial statements would be restated. The price of the company's shares did not decline after the announcement or after the restatement was published. The company pledged and gave complete cooperation to our staff. It provided the staff with all information relevant to the underlying violations. Among other things, the company produced the details of its internal investigation, including notes and transcripts of interviews of Meredith and others; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.

The company also strengthened its financial reporting processes to address Meredith's conduct— developing a detailed closing process for the subsidiary's accounting personnel, consolidating subsidiary accounting functions under a parent company CPA, hiring three new CPAs for the accounting department responsible for preparing the subsidiary's financial statements, redesigning the subsidiary's minimum annual audit requirements, and requiring the parent company's controller to interview and approve all senior accounting personnel in its subsidiaries' reporting processes.

Our willingness to credit such behavior in deciding whether and how to take enforcement action benefits investors as well as our enforcement program. When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly. In setting forth the criteria listed below, we think a few caveats are in order:

First, the paramount issue in every enforcement judgment is, and must be, what best protects investors. There is no single, or constant, answer to that question. Self-policing, self-reporting, remediation and cooperation with law enforcement authorities, among other things, are unquestionably important in promoting investors' best interests. But, so too are vigorous enforcement and the imposition of appropriate sanctions where the law has been violated. Indeed, there may be circumstances where conduct is so egregious, and harm so great, that no amount of cooperation or other mitigating conduct can justify a decision not to bring any enforcement action at all. In the end, no set of criteria can, or should, be strictly applied in every situation to which they may be applicable.

Second, we are not adopting any rule or making any commitment or promise about any specific case; nor are we in any way limiting our broad discretion to evaluate every case individually, on its own particular facts and circumstances. Conversely, we are not conferring any "rights" on any person or entity. We seek only to convey an understanding of the factors that may influence our decisions.

Third, we do not limit ourselves to the criteria we discuss below. By definition, enforcement judgments are just that—judgments. Our failure to mention a specific criterion in one context does not preclude us from relying on that criterion in another. Further, the fact that a company has satisfied all the criteria we list below will not foreclose us from bringing enforcement proceedings that we believe are necessary or appropriate, for the benefit of investors.

In brief form, we set forth below some of the criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions.

1. What is the nature of the misconduct involved? Did it result from inadvertence, honest mistake, simple negligence, reckless or deliberate indifference to indicia of wrongful conduct, willful misconduct or unadorned venality? Were the company's auditors misled?

2. How did the misconduct arise? Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company? What compliance procedures were in place to prevent the misconduct now uncovered? Why did those procedures fail to stop or inhibit the wrongful conduct?

3. Where in the organization did the misconduct occur? How high up in the chain of command was knowledge of, or participation in, the misconduct? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct? How systemic was the behavior? Is it symptomatic of the way the entity does business, or was it isolated?

4. How long did the misconduct last? Was it a one-quarter, or one-time, event, or did it last several years? In the case of a public company, did the misconduct occur before the company went public? Did it facilitate the company's ability to go public?

5. How much harm has the misconduct inflicted upon investors and other corporate constituencies? Did the share price of the company's stock drop significantly upon its discovery and disclosure?

6. How was the misconduct detected and who uncovered it?

7. How long after discovery of the misconduct did it take to implement an effective response?

8. What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are persons responsible for any misconduct still with the company? If so, are they still in the same positions? Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators? Did the company cooperate completely with appropriate regulatory and law enforcement bodies? Did the company identify what additional related misconduct is likely to have occurred? Did the company take steps to identify the extent of damage to investors and other corporate constituencies? Did the company appropriately recompense those adversely affected by the conduct?

9. What processes did the company follow to resolve many of these issues and ferret out necessary information? Were the Audit Committee and the Board of Directors fully informed? If so, when?

10. Did the company commit to learn the truth, fully and expeditiously? Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior? Did management, the Board or committees consisting solely of outside directors oversee the review? Did company employees or outside persons perform the review? If outside persons, had they done other work for the company? Where the review was conducted by outside counsel, had management previously engaged such counsel? Were scope limitations placed on the review? If so, what were they?

11. Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?

12. What assurances are there that the conduct is unlikely to recur? Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct? Did the company provide our staff with sufficient information for it to evaluate the company's measures to correct the situation and ensure that the conduct does not recur?

13. Is the company the same company in which the misconduct occurred, or has it changed through a merger or bankruptcy reorganization?

We hope that this Report of Investigation and Commission Statement will further encourage self-policing efforts and will promote more self-reporting, remediation and cooperation with the Commission staff. We welcome the constructive input of all interested persons. We urge those who have contributions to make to direct them to our Division of Enforcement. The public can be confident that all such communications will be fairly evaluated not only by our staff, but also by us. We continue to reassess our enforcement approaches with the aim of maximizing the benefits of our program to investors and the marketplace.[6]

The CFTC and Foreign Examples

The focus in this text is, of course, on criminal enforcement. The relationship between criminal and civil enforcement is very important to understand. Given the vast size and complexity of civil enforcement

[6] In addition to the Seaboard Report with regard to corporations, the SEC has issued a policy statement regarding credit individuals may receive as a result of their cooperation in SEC enforcement investigations and actions, available at https://www.sec.gov/rules/policy/2010/34-61340.pdf.

mechanisms in U.S. law, there is space here to proceed only by example. The SEC enforcement example is featured throughout this text because it is the one that most commonly overlaps with criminal enforcement. To see an example of how the DOJ's approach to *de facto* corporate liability has spread even beyond the SEC, consider the statements of factors controlling credit for cooperation issued by the Division of Enforcement of the Commodities Futures Trading Commission, available at:

(1) https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf (enforcement advisory for companies).

(2) https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryselfreporting0917.pdf (updated advisory on full credit for self-reporting and cooperation).

(3) https://www.cftc.gov/PressRoom/PressReleases/8235-20 (guidance on evaluating corporate compliance programs).

The CFTC's statements echo many of the factors stressed in the DOJ guidelines. Some of the same factors are also being stressed by the United Kingdom and EU nations, as they begin to adopt procedures for settling enforcement actions with companies. *See* Organization for Economic Cooperation and Development (OECD), Resolving Foreign Bribery Cases with Non-Trial Resolutions (2019), available at https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf. For recent UK enforcement policy statements that mirror many of the factors expressed by DOJ, SEC, and CFTC policy, see the sections on corporate cooperation, deferred prosecution agreements, and evaluating corporate compliance programs in the Operational Handbook of the Serious Fraud Office, available here: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook.

E. The Role of the Judiciary

Courts, of course, have a role in the criminal sanctioning of a corporation when a case goes to trial and conviction, or results in a guilty plea, and thus proceeds to sentencing. (Sentencing of corporations is addressed in Chapter 18.) Is there also a role for the courts in *de facto* corporate criminal liability? That is, in the process whereby the DOJ and other government agencies pursue policies designed to encourage business firms to behave in certain ways in order to obtain favorable settlements with lower sanctions? Some have argued that judicial supervision of the process would be helpful and even might be essential. Perhaps the primary difficulty is this: On what legal theory could courts police the process of settlement? The following two cases take up that question.

UNITED STATES v. FOKKER SERVICES B.V., 818 F.3d 733 (D.C. Cir. 2016)

SRINIVASAN, Circuit Judge:

The Constitution allocates primacy in criminal charging decisions to the Executive Branch. The Executive's charging authority embraces decisions about whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges once brought. It has long been settled that the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences. The courts instead take the prosecution's charging decisions largely as a given, and assume a more active role in administering adjudication of a defendant's guilt and determining the appropriate sentence.

In certain situations, rather than choose between the opposing poles of pursuing a criminal conviction or forgoing any criminal charges altogether, the Executive may conclude that the public interest warrants the intermediate option of a deferred prosecution agreement (DPA). Under a DPA, the government formally initiates prosecution but agrees to dismiss all charges if the defendant abides by negotiated conditions over a prescribed period of time. Adherence to the conditions enables the defendant to demonstrate compliance with the law. If the defendant fails to satisfy the conditions, the government can then pursue the charges based on facts admitted in the agreement.

This case arises from the interplay between the operation of a DPA and the running of time limitations under the Speedy Trial Act. Because a DPA involves the formal initiation of criminal charges, the agreement triggers the Speedy Trial Act's time limits for the commencement of a criminal trial. In order to enable the government to assess the defendant's satisfaction of the DPA's conditions over the time period of the agreement—with an eye towards potential dismissal of the charges—the Speedy Trial Act specifically allows for a court to suspend the running of the time within which to commence a trial for any period during which the government defers prosecution under a DPA.

In this case, appellant Fokker Services voluntarily disclosed its potential violation of federal sanctions and export control laws. After extensive negotiations, the company and the government entered into an 18–month DPA, during which Fokker would continue cooperation with federal authorities and implementation of a substantial compliance program. In accordance with the DPA, the government filed criminal charges against the company, together with a joint motion to suspend the running of time under the Speedy Trial Act pending assessment of the company's adherence to the agreement's conditions. The district court denied the motion because, in the court's view, the prosecution had been too lenient in agreeing to, and structuring, the DPA. Among other objections, the court disagreed with prosecutors' decision to forgo bringing any criminal charges against individual company officers.

We vacate the district court's denial of the joint motion to exclude time under the Speedy Trial Act. We hold that the Act confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants. Congress, in providing for courts to approve the exclusion of time pursuant to a DPA, acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions. Nothing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges. . . .

The Speedy Trial Act establishes time limits for the completion of various stages of a criminal prosecution. *See* 18 U.S.C. §§ 3161–3174. For instance, the Act requires the commencement of trial within seventy days of the filing of an information or indictment by the government. *Id.* § 3161(c)(1). The Act also excludes various pretrial periods from the running of that seventy-day time clock. Of particular relevance, the Act excludes "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." *Id.* § 3161(h)(2).

That exemption exists to enable prosecutors to resolve cases through DPAs. DPAs, along with their out-of-court analogues, non-prosecution agreements (NPAs), afford a middle-ground option to the prosecution when, for example, it believes that a criminal conviction may be difficult to obtain or may result in unwanted collateral consequences for a defendant or third parties, but also believes that the defendant should not evade accountability altogether. Both DPAs and NPAs generally include an admitted statement of facts, require adherence to "conditions designed ... to promote compliance with applicable law and to prevent recidivism," and remain in effect for a period of one to three years. U.S. Attorney's Manual § 9–28.1000 (2015). During that period, if the defendant fails to abide by the terms of the agreement, the government can prosecute based on the admitted facts. While prosecutors at one time seldom relied on NPAs and DPAs, their use has grown significantly in recent years.

DPAs differ from NPAs primarily with regard to the filing of criminal charges. With an NPA, "formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court." Craig S. Morford, *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations,* at 1 n.2 (Mar. 7, 2008). A DPA, by contrast, "is typically predicated upon the filing of a formal charging document by the government." *Id.*

For that reason, a DPA's viability depends on the specific exclusion of time for such agreements set forth in the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). The filing of an information or indictment would ordinarily trigger the Act's seventy-day clock within which trial must commence. *See id.* § 3161(c)(1). But in the case of a DPA, if the defendant were to fulfill the agreement's conditions, the prosecution would move to dismiss all charges with prejudice at the end of the specified time period, ordinarily one to three years. Without the statutory exclusion of time for DPAs provided in § 3161(h)(2), the government would relinquish its ability to prosecute based on the conceded facts if the defendant were to violate the agreement after seventy days. That would largely eliminate the leverage that engenders the defendant's compliance with a DPA's conditions. The statutory exclusion of time for DPAs therefore is essential to the agreements' effective operation.

Fokker Services, a Dutch aerospace services company, provides technical and logistical support to owners of aircraft manufactured by its predecessor company. In 2010, Fokker voluntarily disclosed to the United States Departments of Treasury and Commerce that it had potentially violated federal sanctions and export control laws concerning Iran, Sudan, and Burma. At the time Fokker came forward, no government agency had initiated any investigation focused on the company.

Over the course of the next four years, Fokker cooperated in the wide-ranging investigation conducted by federal authorities. The company facilitated interviews of relevant witnesses, expedited the government's requests to Dutch authorities for documents under the Mutual Legal Assistance Treaty, and initiated its own internal investigation. Fokker's internal investigation revealed that, from 2005 to 2010, the company had participated in 1,147 illicit transactions through which it earned some $21 million in gross revenue. The company instituted remedial measures to improve its sanctions compliance program, adopting a set of procedures to track parts and bolstering its employee training requirements. It also fired its president and demoted or reassigned other employees who had been involved in the violations. The company's compliance efforts have been described by government officials as "a model to be followed by other corporations."

In light of Fokker's cooperation, remediation efforts, and other mitigating factors, federal agencies negotiated a global settlement with the company. The settlement included, as an integral component, an 18-month DPA. During the DPA's 18-month period, Fokker was to: continue full cooperation with the government, implement its new compliance policy, and pay fines and penalties totaling $21 million (a sum equaling the gross revenues gained by the company from the illicit transactions). Fokker also accepted responsibility for the acts described in the stipulated factual statement accompanying the DPA.

On June 5, 2014, pursuant to the agreement, the government filed with the district court a one-count information against Fokker, together with the DPA. The information charged Fokker with conspiracy to violate the International Emergency Economic Powers Act. *See* 18 U.S.C. § 371; 50 U.S.C. § 1705. The same day, the government and Fokker filed a joint motion for the exclusion of time under the Speedy Trial Act, in order to "allow [the company] to demonstrate its good conduct and implement certain remedial measures."

The district court then held a series of status conferences, during which it repeatedly emphasized its concerns about the absence of any criminal prosecution of individual company officers. The court requested several additional written submissions from the government. The government was asked to explain why the interests of justice supported the court's approval of the deal embodied by the DPA, and also to address whether Fokker's initial disclosures to the government had in fact been voluntary. In response, the government described why the "proposed resolution with Fokker Services is fair and is an appropriate exercise of the government's discretion," and affirmed the absence of any indication "that Fokker Services was motivated to make its disclosures out of fear about a nonexistent U.S. government investigation." The district court later expressed that it might still reject the DPA because it was "too good a deal for the defendant."

On February 5, 2015, the district court denied the joint motion for the exclusion of time. In explaining the reasons for its decision, the court criticized the government for failing to prosecute any "individuals . . . for their conduct." According to the court, approval of an agreement in which the defendant had been "prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies" would "promote disrespect for the law." The court further noted that certain employees had been permitted to remain with the company; that the DPA contained no requirement for an independent monitor; and that the amount of the fine failed to exceed the revenues Fokker gained from the illegal transactions. Based on those considerations, the court rejected the DPA as an "[in]appropriate exercise of prosecutorial discretion."

The district court's order marks the first time any federal court has denied a joint request by the parties to exclude time pursuant to a DPA. Both parties filed a timely notice of appeal. Because both parties seek to overturn the district court's denial of their joint motion to exclude time, we appointed an amicus curiae to present arguments defending the district court's action. . . .

By rejecting the DPA based primarily on concerns about the prosecution's charging choices, the district court exceeded its authority under the Speedy Trial Act. The Act excludes any period of time "during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2). While the exclusion of time is subject to "the approval of the court," there is no ground for reading that provision to confer free-ranging authority in district courts to scrutinize the prosecution's discretionary charging decisions. Rather, we read the statute against the background of settled constitutional understandings under which authority over criminal charging decisions resides fundamentally with the Executive, without the involvement of—and without oversight power in—the Judiciary. So understood, the statute's "approval of the court" requirement did not empower the district court to disapprove the DPA based on the court's view that the prosecution had been too lenient.

The Executive's primacy in criminal charging decisions is long settled. That authority stems from the Constitution's delegation of "take Care" duties, U.S. Const. art. II, § 3, and the pardon power, *id.* § 2, to the Executive Branch. Decisions to initiate charges, or to dismiss charges once brought, "lie[ ] at the core of the Executive's duty to see to the faithful execution of the laws." *Cmty. for Creative Non–Violence v. Pierce,* 786 F.2d 1199, 1201 (D.C. Cir. 1986). The Supreme Court thus has repeatedly emphasized that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder,* 442 U.S. 114, 124, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979); *see Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

Correspondingly, "judicial authority is . . . at its most limited" when reviewing the Executive's exercise of discretion over charging determinations. *Pierce,* 786 F.2d at 1201; *see ICC v. Bhd. of Locomotive Eng'rs,* 482 U.S. 270, 283, 107 S. Ct. 2360, 96 L. Ed. 2d 222 (1987). The decision whether to prosecute turns on factors such as "the strength of the case, the prosecution's general deterrence value, the [g]overnment's enforcement priorities, and the case's relationship to the [g]overnment's overall enforcement plan." *Wayte v. United States,* 470 U.S. 598, 607, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985). The Executive routinely undertakes those assessments and is well equipped to do so. By contrast, the Judiciary, as the Supreme Court has explained, generally is not "competent to undertake" that sort of inquiry. *Id.* Indeed, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." *Newman v. United States,* 382 F.2d 479, 480 (D.C. Cir. 1967). "Judicial supervision in this area" would also "entail[ ] systemic costs." *Wayte,* 470 U.S. at 608, 105 S. Ct. 1524. It could "chill law enforcement," cause delay, and "impair the performance of a core executive constitutional function." *Armstrong,* 517 U.S. at 465, 116 S. Ct. 1480 (quotation omitted). As a result, "the presumption of regularity" applies to "prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Id.* at 464, 116 S. Ct. 1480 (internal quotation marks, quotation, and alterations omitted). . . .

As an initial matter, the context of a DPA, like that of Rule 48(a), concerns the prosecution's core prerogative to dismiss criminal charges. While dismissal under a DPA follows from the defendant's adherence to agreed-upon conditions over a specified period, the decision to seek dismissal pursuant to a DPA—as under Rule 48(a)—ultimately stems from a conclusion that additional prosecution or punishment would not serve the public interest. Dismissal in either situation thereby fulfills the Executive's duty under Article II to see that the laws are faithfully executed. . . .

To be sure, the criminal charges filed as part of a DPA remain on the court's docket throughout the time of the agreement (i.e., pending assessment of whether the defendant has satisfied the agreement's conditions, upon which the prosecution seeks dismissal of the charges). But the existence of charges on the court's docket suggests no greater power on the part of the court to second-guess the underlying charging decisions than under Rule 48(a): there, too, criminal charges remain on the court's docket until dismissed. The key point is that, although charges remain pending on the court's docket under a DPA, the court plays no role in monitoring the defendant's compliance with the DPA's conditions. For instance, defendants who violate the conditions of their DPA face no court-ordered repercussions. Rather, the prosecution—and the prosecution alone—monitors a defendant's compliance with the agreement's conditions and determines whether the defendant's conduct warrants dismissal of the pending charges. Just as is the case under Rule 48(a), the prosecution, after taking stock of the circumstances, concludes that continued pursuit of a criminal conviction is unwarranted. . . .

In defending the notion that § 3161(h)(2)'s "approval of the court" language gives district courts substantial authority to second-guess the prosecution's charging decisions, amicus seeks to analogize a court's review of a DPA under § 3161(h)(2) to a court's review of a proposed plea agreement under Rule 11 of the Federal Rules of Criminal Procedure. That argument fails.

To begin with, even in the context of reviewing a proposed plea agreement under Rule 11, a district court lacks authority to reject a proposed agreement based on mere disagreement with a prosecutor's underlying charging decisions. Rule 11 states that a district court may "accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A). Although "district courts must exercise discretion in deciding whether to accept or reject a guilty plea, that discretion is not unfettered." *United States v. Maddox,* 48 F.3d 555, 556 (D.C. Cir. 1995). In particular, we have explained, "trial judges are not free to withhold approval of guilty pleas ... merely because their conception of the public interest differs from that of the prosecuting attorney." *United States v. Ammidown,* 497 F.2d 615, 622 (D.C. Cir. 1973).

In addition, a district court's authority to "accept" or "reject" a proposed plea agreement under Rule 11 is rooted in the Judiciary's traditional power over criminal *sentencing,* as the Rule itself indicates in permitting the court to "defer a decision until the court has reviewed the presentence report." Fed. R. Crim. P. 11(c)(3)(A). Plea agreements can take roughly two forms: (i) charge bargains, in which a defendant agrees to plead guilty to certain charges in exchange for the dismissal of other charges; and (ii) sentence bargains, in which the defendant agrees to plead guilty to a particular charge after the parties agree upon a sentence, which the prosecution then recommends to the sentencing court. In light of the Executive's traditional power over charging decisions and the Judiciary's traditional authority over sentencing decisions, some of our sister circuits have concluded that district courts have more limited authority to reject charge bargains than sentence bargains. Regardless, even in the case of a charge bargain, the court reviews the defendant's admitted conduct and enters a judgment of *conviction,* which in turn carries immediate sentencing implications.

The context of a DPA is markedly different. Unlike a plea agreement—and more like a dismissal under Rule 48(a)—a DPA involves no formal judicial action imposing or adopting its terms. Whereas a district court enters a judgment of conviction and then imposes a sentence in the case of a plea agreement, the court takes no such actions in the case of a DPA. Rather, the entire object of a DPA is to enable the defendant to *avoid* criminal conviction and sentence by demonstrating good conduct and compliance with the law. And a DPA's provisions are agreed to by the parties, not the court, with no occasion for the court to adopt the agreement's terms as its own. The court never exercises its coercive power by entering a judgment of conviction or imposing a sentence. It instead merely approves the prosecution's judgment that further pursuit of criminal charges is unwarranted, as it does when it approves a prosecutor's motion to dismiss charges under Rule 48(a). And as is the case when confronted with a motion to dismiss charges under Rule 48(a), a district court lacks authority to disapprove a DPA under § 3161(h)(2) on the ground that the prosecution has been too lenient in its exercise of charging discretion.

Judged by those principles, the district court in this case erred in denying the parties' motion for exclusion of time under § 3161(h)(2). There is no indication that the parties entered into the DPA to evade speedy trial limits rather than to enable Fokker to demonstrate its good conduct and compliance with law. Rather, the district court denied the exclusion of time based on its view that the prosecution should have brought different charges or sought different remedies. In doing so, the court exceeded its authority under § 3161(h)(2).

From the first status conference concerning the DPA, the district court repeatedly criticized the government for failing to bring charges against individual company officers. Noting its belief that illegal conduct had been "orchestrated at the highest levels of the company," and unpersuaded by the government's efforts to ground its charging decisions in traditional prosecutorial considerations such as the strength of the evidence and the value of pursuing of different charges, the district court questioned why no individuals would be held separately accountable. The court also faulted the government for "not requiring Fokker Services to pay as its fine a penny more than the $21 million in revenue it collected from its illegal transactions." In addition, the court thought the prosecution should have required an independent monitor as part of the DPA's terms. The district court denied the motion for the exclusion of time for those reasons.

Even if the district court's criticisms of the prosecution's exercise of charging authority were entirely meritorious—an issue we have no occasion to address—the court should not have "assume[d] the role of Attorney General," *Microsoft,* 56 F.3d at 1462. Rather, the court should have confined its inquiry to examining whether the DPA served the purpose of allowing Fokker to demonstrate its good conduct, as contemplated by § 3161(h)(2). There is no reason to question the DPA's bona fides in that regard, and the district court made no suggestion otherwise. And insofar as a court has authority to reject a DPA if it contains illegal or unethical provisions, *see United States v. Saena Tech Corp.,* —— F.Supp.3d ——, ——, 2015 WL 6406266, at *17–19 (D.D.C. Oct. 21, 2015); *United States v. HSBC Bank USA, N.A.,* 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013), the district court again made no such suggestion here. The court instead denied the exclusion of time under § 3161(h)(2) based on a belief that the prosecution had been unduly lenient in its charging decisions and in the conditions agreed to in the DPA. The court significantly overstepped its authority in doing so. . . .

UNITED STATES v. HSBC BANK USA, N.A., 863 F.3d 125 (2d Cir. 2017)

KATZMANN, CHIEF JUDGE:

We are called upon in this case to address the role of a district court in monitoring the implementation of a deferred prosecution agreement. In December 2012, plaintiff-appellant the United States entered into a five-year deferred prosecution agreement (the "DPA") with defendants-appellants HSBC Holdings plc and HSBC Bank, USA, N.A. (collectively, "HSBC"), deferring prosecution of charges under the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act. The still-pending agreement provides that if HSBC complies with its extensive obligations under the DPA, the government will seek the dismissal of those charges at the conclusion of the DPA's term. If, on the other hand, HSBC breaches the DPA, the government may seek to convict HSBC on the deferred charges. To inform that determination, the DPA provides for the appointment of an independent monitor charged with preparing periodic reports on HSBC's ongoing compliance with anti-money laundering laws and with the DPA itself.

When the government and HSBC jointly moved for a speedy trial waiver, the district court (Gleeson, J.) invoked its supervisory power both to review and "approve" the DPA on its merits and to condition its approval on the court's monitoring of the DPA's implementation. In the exercise of that asserted authority, the district court subsequently ordered the government to file a confidential report prepared by the independent monitor regarding HSBC's compliance with the DPA (the "Monitor's Report"). In November 2015, appellee Hubert Dean Moore, Jr., a member of the public, moved to unseal the Monitor's Report. The district court granted the motion, subject to redactions, finding that the Monitor's Report was a "judicial document" to which the public enjoyed a qualified First Amendment right of access. The government and HSBC appeal the district court's unsealing and redaction orders, arguing that the district court ran afoul of separation of powers principles in involving itself in the implementation of the DPA.

We agree. By sua sponte invoking its supervisory power at the outset of this case to oversee the government's entry into and implementation of the DPA, the district court impermissibly encroached on the Executive's constitutional mandate to "take Care that the Laws be faithfully executed." U.S. Const. art. II , § 3. In the absence of evidence to the contrary, the Department of Justice is entitled to a presumption of regularity—that is, a presumption that it is lawfully discharging its duties. Though that presumption can of course be rebutted in such a way that warrants judicial intervention, it cannot be preemptively discarded based on the mere theoretical possibility of misconduct. Absent unusual circumstances not present here, a district court's role vis-à-vis a DPA is limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise. Because the Monitor's Report is not now relevant to the performance of the judicial function, it is not a "judicial document" and the district court erred in ordering it unsealed. Accordingly, we reverse. . . .

For a DPA to function as intended, the parties must obtain an exemption from the Speedy Trial Act's general requirement that a criminal trial "begin within 70 days after a defendant is charged or makes an initial appearance." *Zedner v. United States*, 547 U.S. 489 , 492 , 126 S. Ct. 1976 , 164 L. Ed. 2d 749 (2006) (citing 18 U.S.C. § 3161(c)(1)). Absent such an exemption, the logic of any DPA would unravel, as the filed charges would be subject to mandatory dismissal once the 70-day period had run. *See* 18 U.S.C. § 3162(a)(2) (providing that "[i]f a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h) , the information or indictment shall be dismissed on motion of the defendant"). Congress anticipated this problem and excluded from the speedy trial clock "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." 18 U.S.C. § 3161(h)(2) .

Accordingly, when the government filed the Information and the DPA with the district court, the government and HSBC jointly requested that the district court "place th[e] matter into abeyance for a period of sixty months and exclude that time" under the Speedy Trial Act. At a subsequent hearing at which the defendants entered pleas of not guilty, the district court asked counsel "what [they] contemplated of the Court's participation, if any, in the proceedings as they go forward. The government responded that it "had not asked the Court to actively take part in overseeing the deferred prosecution agreement," but instead "simply asked the Court to accept the information for filing and [to] exclude time during the period of the deferred prosecution agreement." The district court asked the parties to put in submissions explaining why the court should accept the DPA. At the time it made this request, the district court was operating under the misconception that the DPA was "really a plea agreement in the form of an 11C1A charge bargain," and that the United States Sentencing Guidelines therefore instructed it to consider whether the "charges adequately reflect[ed] the seriousness of the actual offense behavior and [whether] accepting the agreement [would] undermine the statutory purposes of sentencing or the sentencing guidelines." In their resulting submissions, both the government and HSBC took the position that Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure did not apply and that the district court's authority at this juncture was limited to determining whether to exclude time under 18 U.S.C. § 3161(h)(2).

On July 1, 2013, the district court issued a Memorandum and Order granting the parties' request to hold the case in abeyance pursuant to the Speedy Trial Act and "approv[ing] the DPA pursuant to the Court's supervisory power." After concluding that Rule 11(c)(1)(A) did not apply because the defendants had not entered pleas of guilty or nolo contendere, the district court turned to the text of the Speedy Trial Act, noting that the statute is "silent as to the standard the court should employ when evaluating whether to grant 'approval' to a deferred prosecution agreement under 18 U.S.C. § 3161(h)(2) ." Based on its review of legislative history, however, the district court surmised that "§ 3161(h)(2) appears to instruct courts to consider whether a deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date." . . .

Beginning in September 2013, in compliance with the district court's Approval Order, the government began filing quarterly letters with the district court apprising the court of the Monitor's progress and findings. The government's April 2015 quarterly report advised the district court that the Monitor had submitted his first annual follow-up report (which, again, we refer to here as the "Monitor's Report") and described the Monitor's findings in some detail. The government noted that though the Monitor believed that HSBC was acting in good faith and making meaningful progress in developing an effective compliance program, he also believed that "in certain instances . . . [HSBC's] progress ha[d] been too slow" and that HSBC "ha[d] a substantial amount of work left to do to implement its written policies." The government also relayed the Monitor's finding that senior managers at one HSBC business line had failed to properly cooperate with internal compliance reviews, and the government outlined the steps HSBC was taking to address the situation. On April 28, 2015, the district court ordered the government to file the Monitor's Report with the court. . . .

On January 28, 2016, the district court issued a Memorandum and Order granting Moore's motion to unseal the Monitor's Report in part. In this Circuit, a document filed with the court is a judicial document subject to a presumptive right of access if it is "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 , 119 (2d Cir. 2006) (internal quotation mark omitted). The district court determined that the Monitor's Report satisfied this test for two reasons. First, the Monitor's Report was relevant to the exercise of its supervisory power, as the court could not "perform [the] task" of "ensur[ing] that the DPA remains within the bounds of lawfulness and respects the integrity of th[e] Court . . . without receiving at least some updates from the parties about HSBC's compliance with the DPA." Second, the Monitor's Report would be "be integral to the future resolution of the case." *Id*. In particular, if the government were to determine that HSBC breached the DPA and that the government would pursue the pending charges, the district court would oversee those proceedings. If, on the other hand, the government were to seek to dismiss the charges at the conclusion of the DPA's term, such a dismissal could only be effectuated under Federal Rule of Criminal Procedure 48 with leave of court. The decision whether to grant such leave, the district court reasoned, could not "properly be made without judicial review of the [Monitor's] Report."

The district court then concluded that a qualified First Amendment right of public access attached to the Monitor's Report and that the confidentiality concerns articulated by the government and HSBC could be addressed with targeted redactions and by maintaining five of the Monitor's Report's six appendices under seal. To that end, the district court invited the parties to submit proposed redactions to the Monitor's Report, which the parties did. On March 9, 2016, the district court issued an order (the "Redaction Order") describing the redactions it had made to the Monitor's Report and staying the unsealing of the Monitor's Report pending appellate review. . . .

The threshold merits question in this case is whether the Monitor's Report is a judicial document, as only judicial documents are subject to a presumptive right of public access, whether on common law or First Amendment grounds. Though we review the "ultimate decision to seal or unseal for abuse of discretion," we review the determination that the Monitor's Report is a judicial document de novo. In this Circuit, to qualify as a "judicial document" subject to a presumptive right of public access, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"). . . .

The district court ordered the filing of the Monitor's Report for its review in the exercise of its stated supervisory power to monitor the implementation of the DPA and to condition its approval of the DPA on such monitoring. If the district court's conception of its supervisory power in this context were correct, the Monitor's Report would quite obviously "be relevant to the performance of the judicial function and useful in the judicial process." *Amodeo I*, 44 F.3d at 145. Thus, even though the appellants did not attempt to appeal the district court's Approval Order announcing its supervisory power over the DPA, whether the district court was correct to assert such a power is squarely at issue on this appeal. We hold that the district court erred in sua sponte invoking its supervisory power to monitor the implementation of the DPA in the absence of a showing of impropriety. . . .

The district court justified its concededly "novel" exercise of supervisory power in this context by observing that "it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court." We agree that it is not difficult to imagine such circumstances. But the problem with this reasoning is that it runs headlong into the presumption of regularity that federal courts are obliged to ascribe to prosecutorial conduct and decisionmaking. That presumption is rooted in the principles that undergird our constitutional structure. In particular, "because the United States Attorneys are charged with taking care that the laws are faithfully executed, there is a 'presumption of regularity support[ing] their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008) (alteration in original) (quoting *United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)). In resting its exercise of supervisory authority on hypothesized scenarios of egregious misconduct, the district court turned this presumption on its head. . . .

To be sure, in its history, this nation has not been free of executive misconduct and abuse of power. And if misconduct in the implementation of a DPA came to a district court's attention (for example, through a whistleblower filing a letter with the court), the district court might very well be justified in invoking its supervisory power sua sponte to monitor the implementation of the DPA or to take other appropriate action. The point is not that the court can or should disregard governmental misconduct, but rather that a federal court has no roving commission to monitor prosecutors' out-of-court activities just in case prosecutors might be engaging in misconduct. *See Fokker Servs. B.V.*, 818 F.3d at 744 ("[A]lthough charges remain pending on the court's docket under a DPA, the court plays no role in monitoring the defendant's compliance with the DPA's conditions."); *In re U.S.*, 503 F.3d 638, 641 (7th Cir. 2007) ("[A] judicial effort to supervise [a prosecutor's] process of reaching a decision intrudes impermissibly into the activities of the Executive Branch of government."). . . .

Moore next argues that the Monitor's Report is a judicial document because it will either be relevant to deciding a motion to dismiss the Information at the conclusion of the DPA's term or, alternatively, to adjudicating any claimed breach of the DPA. These arguments fail.

Even if we assume that the Monitor's Report might be relevant to the judicial function at a later point in this case, that would not be sufficient to render the Monitor's Report a judicial document now. Critically, as we held above, the district court erred in ordering the government to file the Monitor's Report pursuant to its authority over the implementation of the DPA for the simple reason that the district court had no such authority. Thus, although the government complied with the district court's order, the Monitor's Report—for purposes of the public access doctrine—is not unlike a document exchanged by the parties in the course of litigation that has not yet been brought to the attention of the court. And we have long recognized that documents "passed between the parties in discovery[] lie entirely beyond the . . . reach" of the presumption of public access. *United States v. Amodeo*, 71 F.3d 1044 , 1050 (2d Cir. 1995) ("*Amodeo II*"); *cf. Amodeo I*, 44 F.3d at 145 ("[T]he mere filing of a paper or document with the court is insufficient to render that paper a judicial document . . . ."). If the rule were otherwise, deposition transcripts, interrogatories, and documents exchanged in discovery would become "judicial documents" to which the public could demand access before the parties had even contemplated filing such documents with the court. While "public monitoring is an essential feature of democratic control," such an approach would constitute a radical expansion of the "public access" doctrine. . . .

Whatever the precise contours of a district court's authority in resolving a Rule 48(a) motion, it is certainly not the case that the Monitor's Report will, as Moore contends, necessarily be relevant to deciding such a motion. For example, where a Rule 48(a) motion is uncontested and the parties' good faith is not in doubt, a district court is unlikely to have any occasion to demand a monitor's reports (or analogous work product) for the court's inspection before granting the Rule 48(a) motion. Nor do we accept that the Monitor's Report will necessarily be relevant to adjudicating any claimed breach of the DPA, as the claimed breach could be based, for example, on HSBC's obligation not to commit a crime under federal law or its obligation not to contradict the Statement of Facts in a public statement. Conversely, the Monitor's Report may indeed be relevant in determining whether to grant an eventual Rule 48(a) motion or in adjudicating a claimed breach of the DPA. For example, there may be circumstances that suggest that the motion is being made in bad faith, thereby raising a question as to whether dismissing the Information would be "clearly contrary to manifest public interest." *Pimentel*, 932 F.2d at 1033 n.5. The salient point is that attempting to forecast the relevance of the Monitor's Report at the conclusion of the DPA's term is inherently speculative. Such prognostication cannot support treating the Monitor's Report as a judicial document now. . . .

As the above cases demonstrate, the role of the judiciary in the *de facto* system of corporate criminal liability is limited, though just how limited is under some debate. For a critique of the D.C. Circuit's decision in *Fokker*, see Brandon L. Garrett and Alan B. Morrison, *Deferred Prosecutions Need Judicial Oversight*, LAW.COM (May 2, 2016), at https://www.law.com/nationallawjournal/almID/1202756357644/Deferred-Prosecutions-Need-Judicial-Oversight. Garrett and Morrison argue that the Speedy Trial Act and sound public policy may not support the D.C. Circuit's broad claim of absolute deference to the executive with regards to DPAs, and that judges actually should "retain some discretion to review such agreements."

Problem 1-4
You are a prosecutor. Should you pursue prosecution of the organization, or just individuals, or neither, in the following cases? Explain your reasoning, as well as what more you would want to know before making your decision. (A quick internet glance at some of the events in these cases might help prime your intuitions.) You should consider the DOJ policies excerpted above but need not view them as your exclusive criteria. (a) The Exxon Corporation for the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska, which was caused by an intoxicated ship captain. (b) The BP Corporation for the 2010 oil spill in the Gulf of Mexico and the deaths of its workers which were caused by the explosion of the Deepwater Horizon rig. (c) The Catholic Archdiocese of Boston for sexual abuse of children by members of the clergy who were allowed to continue employment after the Archdiocese had information of possible abuse by those persons. (The film *Spotlight* is a must-see if you haven't.) (d) GlaxoSmithKline for its Chinese employees' widespread bribery of Chinese physicians to prescribe its medications, in violation of express GSK anti-bribery policies.