

TOWARD IMPROVING THE LAW AND POLICY OF CORPORATE CRIMINAL LIABILITY AND SANCTIONS

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I. INTRODUCTION

Prosecutorial discretion is a hallmark of the American criminal justice process. Prosecutors have “broad . . . [but] not completely unbridled”¹ discretion in choosing whom to prosecute, for what offenses, and to what extent. Guiding the exercise of that discretion is critical to public confidence in the criminal justice process. The Department of Justice (“DOJ”)’s efforts have served as a focal point for discussion of public policy. At times its policy statements have provoked debate, and the debate led to policy changes. Other changes in policy or substantive law continue to be discussed and should be addressed in hopes of improving our process and assuring that appropriate goals are set and met in the administration of criminal justice.

In this paper, I comment on the DOJ’s policies from my perspective as a white-collar defense lawyer. I have focused particularly on the policies as they relate to a corporation (and other organizations which I refer to collectively as corporations) that faces potential prosecution for an employee’s acts that were unknown to it, contrary to its policies, and contrary to its interests. I address the law of corporate criminal liability (Part II), the overbreadth of respondeat superior criminal liability (Part III), the origins and development of the DOJ’s policies (Parts IV and V), and areas in which I believe change would benefit the criminal justice process (Part VI), including:

1. Establishing an affirmative defense to respondeat superior criminal liability, based on a corporation’s compliance efforts.
2. Modifying current DOJ policy to exclude a corporation’s post-offense cooperation and remediation from factors to evaluate in determining whether it should be prosecuted.
3. Modifying current DOJ policy on offenses committed by “rogue employees.” Current policy is that prosecution of a corporation “may not”² be appropriate in such circumstances. I suggest the more emphatic policy that prosecution “is not” appropriate.

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1. *United States v. Armstrong*, 517 U.S. 456, 476 (1996) (Stevens, J., dissenting).

2. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-2.500(A) (2008) [hereinafter USAM], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

4. Adding guidance on when financial penalties should be sought against a corporation, and if so, how to determine an appropriate amount. In 2009, the DOJ committed to writing policy in this area but has not done so to date.