

ARTICLES

A CONTEXT FOR EVALUATING DEPARTMENT OF JUSTICE POLICY ON THE PROSECUTION OF BUSINESS ORGANIZATIONS: IS THE DEPARTMENT OF JUSTICE PLAYING IN THE RIGHT BALLPARK?

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I. INTRODUCTION

Federal criminal law permits the prosecution of business organizations for crimes committed by their employees acting within the scope of their employment with the intent to benefit the organization. This means that United States Attorneys must decide when to bring charges against business organizations as collective entities. They do so on the basis of guidance provided by *The Principles of Federal Prosecution of Business Organizations*, which, in its current incarnation, is known as the Filip Memorandum.

How good is this guidance? Does this document correctly identify the conditions that justify the prosecution of an organization in addition to or instead of its individual employees? What are the goals of prosecuting business organizations? Is current Department of Justice (“DOJ”) policy well-designed to realize them? Can it be reformed to do so more effectively?

The purpose of this symposium is to answer these questions. Doing so requires both an understanding of the normative purposes of the criminal law and a high level of empirical expertise in the science of human behavior. Although I can lay claim to the requisite normative understanding, I do not possess the equally necessary empirical expertise. Fortunately, that expertise is being supplied by my fellow symposiasts. This situation suggests that my most valuable contribution to the symposium would be to provide a normative context for the empirical information supplied by my fellow contributors. I attempt to do that in what follows.

To evaluate the merits of any policy, one must know what purpose it serves—what goals the policy is designed to help its adherents achieve. Hence, in Part II, I begin my analysis by identifying the purpose of imposing criminal liability on business organizations. With this knowledge in hand, in Part III, I explore the

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situations in which threatening to impose criminal liability on business organizations can advance this purpose. In Part IV, I draw two substantive implications that follow from this analysis of the proper range of application of DOJ policy. Finally, in Part V, I conclude.