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# Corporations, Criminal Law and the Color of Money

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# CORPORATIONS

## Criminal Law

### AND THE COLOR OF MONEY

*This part of From Newton's Sleep, published by Princeton University Press in 1995 and in a paperback edition in early 1997, is reprinted by permission of the publisher. From Newton's Sleep is a book on the legal form of thought and its meaning for science and religion. It consists of some two hundred and fifty self-contained pieces arranged in eight sections. In its form, the book is much like and is meant to be much like the material with which lawyers routinely deal. Here, Law Quadrangle Notes excerpts a piece that touches on a subject of lively debate today, among practitioners and legal scholars both — the nature of criminal law and in particular its application to economic organizations. This excerpt, "Corporate Crime," is from Section VII of the book, "The Expression of Responsibility: On the Organizational in Legal Thought."*

The application of the criminal law to business corporations has one overriding function. It counters, as can nothing else, the temptation to define the purpose of the corporate entity as the maximization of money profit.

Purpose pervades all aspects of the legal analysis of entities. It governs legal decisions on the capacities of individuals, whether when they act they act for the entity. It governs individuals' decisions whether to act when acting for the entity. As a purpose, profit maximization externalizes all value and translates all decision into calculation of advantage, introducing the implacable into an already competitive world and rendering law itself, law that conceives the entity and continues to make it conceivable, an object not just of some manipulation but total manipulation.

Always in the air of thought, a playful postulate of political, economic, and biological theory alike, profit maximization is only of real moment in law in analysis of business corporations, which are not, analytically or as a matter of fact, themselves agents of decision-making individuals. The temptation to profit maximization is handled routinely in the human breast; it appears so rarely in pure form in individuals that its appearance is marked as a sign of disintegration and insanity. The cycle of life and the looming of death are alone usually sufficient to dissolve it. But it can be abstracted out and given to a corporate entity, and the life of

the corporate entity can be insulated from the natural cycle of the life of an individual. Thus entry of criminal law; and of a criminal law, moreover, unstained by the bloody rope or the twisted flesh of the prison.

Criminal law is the internalization of value. There is no crime in any set of facts, no matter how much hurt there is in them, unless there is a criminal state of mind. Causing death is common, murder is not; what distinguishes death from murder is mind. The criminal state of mind, raised as a possibility by the applicability of the criminal law, is precisely the externalization of value defined and protected by the criminal law, calculation as to value, manipulation of it, coldness toward it — precisely the state of mind contemplated for the profit-maximizing decision maker.

Prescription drug safety or worker safety are not achieved by simple prohibitions but by ingenious devices and institutional design. The criminal penalties that appear in connection with prescription drugs or worker safety have another function, which is to speak to the agent of the entity who is asking, "What is my duty, how am I to think about actions I may take on behalf of the entity?" and to speak to the lawyer for the entity, advising agents of the entity in the large and in the particular. What is spoken and said is that



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for the business corporation and agents thereof, as for individuals in other situations in social life, substantive values are ultimately to figure in decision as such and in and for themselves, and are not, ultimately, matters of indifference to be left entirely to the concern of others.

That this needs particularly to be declared in corporate law gives reason for applying the criminal law more broadly to corporations than to individuals. And the reasons for real hesitation in invoking the criminal law — the awful pain of its penalties against the body, the petty tyranny of its application to the weak and poor, the depressive effect of its threats in the psychology of everyday life, which is often named an interference with liberty or with the sense of freedom — have not the same force when the potential defendant is a corporate entity. The vagueness endemic to the criminal law in the specification of what is or is not to be done becomes less a defect, more a protection of its efficacy against a calculating mentality, including that of the litigating lawyer.

Next to this, this declarative and structuring function, the penalties and sanctions criminal law brings to bear are of secondary importance. Criminal law is internal to corporate law, part of the defining and enabling that corporate law and lawyers are engaged in — the instituting of the modern economy, its very peopling. Criminal law does not swoop in from the outside to affect what has already been set in motion. Certainly there is deterrence in some sanctions; but in the absence of pain, and with fines set as for individuals, or set with attention to their effect on individuals who are dependent on the corporation, the consequences of criminal conviction have historically been scoffed at and bundled into cost-benefit formulas. Recent developments, attaching civil liability to criminal conviction and multiplying civil damages by some punitive factor, introducing supervision (as in probation or other semi-incarcerative measures for individuals), and, above all, conditioning corporate continuation in licensed activities on “fitness” and

“character” (to which criminal conviction has always been thought to speak where individuals are involved), have made the actual outcomes of actual criminal prosecutions factors to be reckoned with by corporate decision makers. And the criminal law can work, in this sense. Decisions about its scope, appropriateness, and application are not troubled by any real fear of its impotence where corporations are involved.

But each development in the effectiveness of the sanctions that are directed at corporate entities meets the web of dependencies that surround the corporate entity and with which the entity itself may be identified. These filaments of connection are usually of such extent that they cannot be ignored, as the family of the individual convict is ignored; and increasing sensitivity to systemic effects generally, economic or ecological, has made the unintended and undesirable side effects of corporate sanctions factors to be reckoned with by public decision makers. It is thus in another sense that the criminal law works, where corporations are involved: before sanctions, addressing the very nature of decision making on behalf of corporations, speaking to what factors are to be taken into account and with what weight and what factors are not to be taken into account, what good faith consists of, what is authorized and what is not, and touching moreover all those further organizational and institutional decisions that determine whether a substantive determination will be implemented — what is to be taken to another level in decision-making structures, or what is cause for dissociation, or what is disclosable and what not, or what is defensible in preventive, protective, and self-protective activity.

Analytically there are other ways to address these questions, and they are addressed at other places in corporate law. If the interests of those holding securities entitling them to participate in some way in the equity left on liquidation (at the end of the corporation's activities) are to be focused upon with special prominence in corporate decision making during corporate life, then there can be exploration in legal argument of what

those interests are and how, when they conflict, they are to be weighed or sought. If the universe of such interests is not the sole focus, there can be exploration of what other groups, from employees to customers, are to be admitted into the category of those whose claims are not costs to be minimized, and exploration of how their interests and claims are to be defined. Analytically these interests, groups, or claims are often surrogates for values protected by the criminal law, and might enter the thinking of corporate agents with much the same life and sense of right. But such democratic or communitarian capitalism is yet inchoate and may remain so for as many centuries as the problems of organizational law have so far persisted.

From the earliest time corporations have arguably been subject to the criminal law; certainly through this century they have. In the broadest frame of reference, what is irrational and a stumbling block to those who are sure they know what the corporate entity is, may, for the empirical, be critical evidence of the place of entity in the mind and, indeed, the nature of the person created by each individual.

**Harry Burns Hutchins Professor of Law Joseph Vining** has taught at the Law School since 1969. A graduate of Yale University and Harvard Law School, he has a degree in history from Cambridge University, practiced law in Washington, D.C., and served with the Department of Justice and the President's Commission on Law Enforcement and the Administration of Justice. In 1982-83 he was a senior fellow of the National Endowment for the Humanities. He lectures and writes on legal philosophy, crime, administrative law, and corporate law. In addition to *From Newton's Sleep*, he is the author of *The Authoritative and the Authoritarian* (1986) and *Legal Identity* (1978). Last year he was elected a Fellow of the American Academy of Arts and Sciences.

