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COMMENTARY

Corporate Criminal Liability and the Individual Accountability Gap

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When a corporation commits a crime, the corporation itself is held accountable. When executives make the decisions that lead to those crimes, they often are not.

Modern corporate criminal enforcement in the United States relies heavily on deferred prosecution agreements (DPAs). This allows the Department of Justice to impose monetary penalties while requiring reform without a criminal conviction.¹ While this has produced record breaking fines without intensive trials, DPAs are often criticized for not effectively deterring white collar crime because, although corporate entities bear financial punishment, few senior executives face prosecution.²

The Rise of Deferred Prosecution Agreements

Deferred prosecution agreements became the prevailing enforcement mechanism for corporate criminal liability in the early 2000s. Scholars have described DPAs as a form of “prosecutorial regulation,” in which the executive branch reshapes corporate governance from formal adjudication to negotiated settlements.³ Brandon Garrett’s empirical study of corporate prosecutions discusses how most DPAs include compliance monitors, structural reforms, and ongoing oversight obligations that resemble regulatory supervision.⁴ In exchange, prosecutors defer charges and dismiss them if the corporation satisfies the agreement’s conditions.

Judicial review of these agreements is extremely limited. In *United States v. Fokker Services B.V.*, it was held that courts have minimal authority to reject DPAs under the Speedy Trial Act.⁵ The Court emphasized separation of powers principles and prosecutorial discretion to support

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¹ Yuan Zhou, *Raising the Deterrent Effect of the U.S. Deferred Prosecution Agreement: New Perspectives on the U.S. from the U.K. and Jersey*, 10 J. Econ. Criminology 100189 (2025).

² *Id.*

³ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989 (2006).

⁴ Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007).

⁵ *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016).

their holding.⁶ The result is a system where enforcement priorities, particularly decisions about whether to charge individuals, remain almost entirely within executive control. This differs from typical criminal prosecutions where courts play a significant role.

The Yates Memo

In response to public criticism following the 2008 financial crisis, the DOJ announced a renewed commitment to individual prosecutions.⁷ In 2015, the former Deputy Attorney General Sally Yates issued a memorandum directing prosecutors to prioritize individual accountability in corporate investigations.⁸ The memo required corporations seeking cooperation credit to disclose all relevant facts about individuals involved in misconduct.

The memo reflected a foundational deterrence principle: personal liability is more effective than corporate fines alone. As scholars have noted, criminal law's expressive and deterrent force depends significantly on individual culpability.⁹ Yet empirical evidence suggests that the proportion of individual prosecutions has not dramatically increased.¹⁰ Critics argue that structural barriers such as complex hierarchies and evidentiary burdens make individual prosecutions difficult.¹¹

Deterrence and Distributional Concerns

Heavy reliance on corporate fines raises deterrence concerns. Monetary penalties are often borne internally by shareholders, employees, and sometimes consumers, all of whom may have had little involvement in the misconduct. Vikramaditya Khanna has argued that optimal enforcement requires carefully balancing corporate and individual liability to avoid over-detering firms while under-detering managers.¹²

At the same time, large financial settlements may become predictable costs of doing business. If executives do not face meaningful personal risk, any deterrence is minimized because executives making decisions that lead to crime expect the costs to be internalized. The perception that corporations pay while executives walk risks undermining public confidence in corporate criminal enforcement.

A Structural Accountability Gap

None of this suggests that DPAs should be entirely abandoned. Entity liability can promote internal compliance programs and address organizational harms that cannot easily be determined

⁶ *Id.*

⁷ U.S. Dep't of Justice, Office of the Deputy Attorney General, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), <https://www.justice.gov/archives/dag/individual-accountability>.

⁸ *Id.*

⁹ Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind. L.J. 473 (2006).

¹⁰ *Id.*

¹¹ John C. Coffee Jr., *Corporate Criminal Liability: An Introduction and Comparative Survey*, in ENCYCLOPEDIA OF CRIME AND JUSTICE (2d ed. 2002).

¹² Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477 (1996).

by a single actor. However, the system risks separating punishment from personal culpability when enforcement primarily targets corporations but relatively few senior executives that are responsible for the acts face prosecution.

If deterrence is a central aim of criminal law, corporate enforcement policy must address this accountability gap. The challenge moving forward is not whether corporations should pay, but whether current corporate criminal liability, specifically DPAs, adequately ensures that individuals who make or tolerate unlawful decisions are held personally accountable.