

Corporations Aren't Criminals

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Now that settlement talks have collapsed, the Justice Department is proceeding to trial with its criminal case against Arthur Andersen.

Auditor David Duncan has pleaded guilty to charges of obstruction of justice and agreed to testify for the government. But do his actions really indict an organization with 85,000 employees?

The Justice Department can cite precedents and statutes that justify criminal prosecutions of business entities. Indeed, federal prosecutors have been indicting corporations for decades, usually under the auspices of the 1970 Racketeer Influenced and Corrupt Organizations Act. Two justifications are most often carted out. First, the complexity of modern corporations is said to justify criminal liability due to the difficulty of proving the responsibility of a particular individual. Second, it is argued, corporations ought not to benefit from the criminal acts of their agents.

What prosecutors seem to have forgotten, however, is that individuals – not organizations -- commit crimes. Criminal indictments of groups or other entities conflict with, and cloud, the whole purpose of criminal law, which is to make judgments about individual moral responsibility. From what is known about the Andersen and Enron cases, numerous individual criminal actions probably occurred. But Justice seems to be operating on the premise that widespread wrongdoing by individuals in a company justifies a criminal indictment of the company itself.

This reflects a larger trend within the legal profession in favor of viewing criminal law and tort law as basically indistinguishable, except for the remedies available: jail vs. fines. More importantly, it ignores the moral basis on which substantive criminal law rests -- the requirement that a defendant be personally responsible for his actions. Under the common law, a corporation could not be guilty of a crime because it could not possess *mens rea*, a guilty mind. Generally speaking, the moral basis of criminal law, the requirement of personal moral fault, remained fairly firm in the U.S. until recent decades. In large part, this was due to the fact that most crimes are matters of state law, which has adhered relatively closely to the common law.

Since about 1970, however, the federal government has greatly expanded the reach of federal crimes to cover areas previously reserved for the states. Addressing this overreach, the Supreme Court has handed down two important decisions since 1995 forcefully reaffirming that the federal government does *not* possess a general police power. Nevertheless, the Justice Department continues to indict corporations for

violations of ethical standards and government regulations that do not necessarily constitute crimes.

Justice is often more interested in going after entire corporations than the individuals responsible for wrongdoing. Some of the better known examples of corporate indictments are Hughes Aircraft, for conspiring to defraud and make false statements to the federal government, and the Bank of New England, for violations of the Currency Transaction Reporting Act.

This trend reached an extreme in 1985 when the Justice Department indicted E.F. Hutton on mail- and wire-fraud charges without indicting a single individual. Justice explained that it was forced to indict Hutton because it could not prove the guilt of any individuals involved. Logically, this problem should have led one to question the proof of the corporation's guilt. Nevertheless, the federal government and the corporation entered into a plea bargain whereby Hutton pleaded guilty (and subsequently went bankrupt) without any individuals being charged.

If corporations can be convicted without proof of personal guilt, it should not be surprising if individuals are also convicted without sufficient concern for personal guilt. The Justice Department has taken the right approach by charging Mr. Duncan with the crime of obstruction of justice, but using his plea to go after the firm instead of other individuals involved in criminal activity would do a disservice to the notion of personal responsibility under the law. Thus, the reason for rejecting corporate criminal liability is not a bias in favor of corporations, but rather a concern for the dignity of individual rights reflected in the rejection of collective guilt.

The indictment of Andersen is a dangerous precedent that will be cited, along with the E.F. Hutton case and others, to justify more indictments of public companies. Executives have come to fear tort lawyers as a threat to corporate capitalism. But against suits, even class actions, corporations at least have the possibility of negotiating a settlement short of bankruptcy; after all, all the plaintiffs' lawyers want is money. As the indictment of Arthur Andersen should make clear, the business community has as much, if not more, to fear from well-meaning, but misguided, federal prosecutors.

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