

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

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This issue of *Law and Contemporary Problems* is the end product of the highly successful conference entitled “Deterring Corporate Misconduct” held in Naples, Florida, in November of 1997. The conference brought together a diverse group of academics, practitioners, jurists, and government policy makers who debated the causes and cures for corporate misbehavior.<sup>1</sup> In our approach to these questions, we first sought insights from the social sciences for cultural explanations of the reasons why corporate personnel misbehave. Professors Conley and O’Barr examine three case studies of corporate misconduct—discrimination by car dealers, price fixing, and wrongful concealment of documents from an adversary during discovery—to ferret out the common cultural phenomena within each business organization that gives rise to misconduct. Next, Professor Lynch inquires whether we can any longer identify the distinctive features and purposes of enforcement within the criminal justice system, when civil sanctions are so frequently indistinguishable from criminal sanctions. Here, the commentaries of Mr. Bialkin and Judge Mukasey provide additional perspective on the role of the prosecutor in considering whether to address misconduct within the criminal justice system.

Several articles examine how the deterrent effect of civil actions can be increased without producing the harmful side effect of discouraging legitimate business behavior. The symposium’s first step toward addressing the question whether the cure for misconduct is in “pricing” the misconduct is Professor Cooter’s article. Professor Cooter examines both the limitations of the jury in imposing punitive damages and the expressive effects of their judgments. Pro-

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1. A complete list of the conference speakers, moderators, and presenters appears on the page following this Foreword.

fessor Blakey prefers multiple to punitive damages as a means of overcoming many of the problems raised by Professor Cooter. In his comment, Mr. Melamed addresses the implications of enforcement errors related to significant damage awards from an antitrust perspective, as well as whether some portion of a private party's judgment should be paid to the government. Professor Calkins studies, in the context of Federal Trade Commission enforcement actions, the relative deterrent effects of a sanction addressed to corporate personnel versus their employing entity.

In recent years, the cry for uniform standards for judging behavior has occasionally prompted Congress to preempt state law in areas that historically were jointly regulated by the states and the federal government. Professor Warren argues that the Commerce Clause continues to limit Congress's power to preempt historical state powers. On the question of how state law can exist in the long shadow of Congress's preemptive power, Professor Dwyer offers important lessons drawn from the tensions that exist between state and federal environmental laws. Mr. Sommer's commentary argues in favor of uniform standards for securities litigation involving nationally trading companies. He identifies, however, several possible unintended and undesirable consequences of preempting state fraud standards. Mr. Walker reviews the Security Exchange Commission's most recent data on securities class actions in his analysis of the merits of federal preemption of state securities fraud actions.

The symposium next examines how powerful a disincentive civil liability is in discouraging misbehavior. Professor Scholz provides an insightful review of civil liability's impact on deterrence in light of bounded rationality, ambiguity of rules, collective action problems, prosecutorial discretion, and the accountability of enforcement agencies. Next, my article examines the impact of both strict entity liability and the availability of director and officer ("D&O") insurance on deterring corporate misconduct. Professor DeMott argues in favor of the principles of agency law as fulfilling important disciplinary functions for employers to take steps to curb the misdeeds of their employees. She further suggests modifying the business judgment rule's presumption of good faith when there is a substantial likelihood of senior management's complicity in criminal misconduct. Professor Allen, in addition to providing insightful commentary on Professor DeMott's and my articles, closely reasons that greater deterrence occurs not through larger sanctions but through greater specification of the damages to be imposed when a violation occurs. The comments of Mr. Elsen and Judge Sporkin provide important perspectives on the role and limits of liability in deterring misconduct.

The symposium's final focus is on whether class actions provide sufficient incentives for the plaintiffs and their attorneys so that the class action is an important component in the overall societal effort to deter misconduct. Professor Fisch suggests that we consider suits from the enforcement-oriented perspective that currently underlies the classic *qui tam* action; from this perspective, she provides a close analysis of the practical and constitutional issues of greatly expanding the *qui tam* action to include many forms of misbehavior now ad-

dressed in the class action setting. Professor Miller and Ms. Lori Singer undertake a theoretical and empirical study of nonpecuniary class action settlements. They conclude that nonpecuniary settlements provide greater benefits to the class with improved efficiency to the litigation process than has previously been recognized. Finally, Mr. Johnson discusses how financial institutions have improved the compensation and deterrence objectives of securities class action suits by assuming a more active role in such suits.

Those who study this symposium will be duly impressed with the fresh perspective each adds to the important question of how corporate misconduct can be more effectively deterred. The conference and the symposium publication was a journey that was many months in the planning. The end product speaks for itself. I would like to extend special thanks to the many members of the steering committee who planned the conference and recruited an outstanding roster of presenters, commentators, and moderators. Equally important to this symposium was the even-handedness and balance that the steering committee sought in identifying the participants. A perusal of the list of participants and a close reading of this publication reveals a wide variety of political perspectives. None of this would have been possible without the financial support of the Institute for Law and Economic Policy.

Finally, I would like to express my deep sense of gratitude and admiration for Mr. Edward Labaton, Mrs. Sandra Stein, and Ms. Laura Stein for their guidance and tireless efforts throughout this project, as well as the excellent assistance of Mr. Bradley Bodager of the Duke University School of Law for his assistance in arranging the conference.

## The Conferees

Professor William T. Allen	Edward Labaton, Esq.
Daniel Berger, Esq.	Professor Gerard E. Lynch
Kenneth J. Bialkin, Esq.	William R. McLucas, Esq.
Allen D. Black, Esq.	The Honorable A. Douglas Melamed
Professor Robert G. Blakey	Professor Geoffrey P. Miller
Professor Steven Calkins	H. Laddie Montague, Jr., Esq.
Professor John C. Coffee, Jr.	The Honorable Michael B. Mukasey
Professor John M. Conley	Professor William M. O'Barr
Professor Robert Cooter	The Honorable Robert Pitofsky
Professor James D. Cox	Professor John T. Scholz
Professor Deborah A. DeMott	Dean Joel Seligman
Professor John P. Dwyer	Marc M. Seltzer, Esq.
Sheldon H. Elsen, Esq.	A.A. Sommer, Jr., Esq.
Professor Jill E. Fisch	The Honorable Arlen Specter
Melvin R. Goldman, Esq.	The Honorable Stanley Sporkin
Professor Harvey J. Goldschmid	Sandra Stein, Esq.
Dr. Deborah Hensler	Dean Kent D. Syverud
Keith Johnson, Esq.	Richard H. Walker, Esq.
Professor Leo Katz	Professor Manning G. Warren III
Nicholas de B. Katzenbach, Esq.	