

# COMMENT ON LYNCH

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Professor Lynch's paper on the role of criminal law in policing corporate misconduct is an excellent summary of a very difficult problem.<sup>1</sup> After reviewing the role of criminal prosecution in the area of white collar crime, and contrasting the effects of civil and criminal prosecution, Lynch concludes that there is a role for criminal enforcement in these cases. However, he also notes that prosecutors do and must continue to exercise considerable discretion when deciding whether to prosecute a particular case or to let the civil justice system exact the appropriate remedy. Lynch advises that our system must overtly recognize the existence of, and the need for, prosecutorial discretion and develop standards for the exercise of this discretion in order to promote the values that our criminal law seeks to reinforce in society.

Lynch's recognition of the need for discretion is crucial. While there may be an opportunity for criminal prosecution in much of what goes on in business and corporate life, it would not be practical to employ criminal prosecution on each occasion—to do so would cause a fundamental breakdown in the economy. Part of the price we pay for freedom in our economy, and the opportunity to compete, is the reality that competition occasionally results in conduct that goes too far or, as Professor Lynch says, goes beyond the pale. In a society with almost 300 million people, each of whom has a differing role in the economy, there is inevitably going to be conduct that falls out at the edges. The problem is how to deal with those edges, the excesses of conduct, without destroying the system that has produced the benefits that we, as a society, all enjoy.

There cannot be a double-entry bookkeeping system where every wrong is righted and every person wronged has a remedy. While, theoretically, that would produce a perfect society, one must recognize that with the litigation explosion, every payment to a "wronged" plaintiff is ultimately paid by society. Specifically, if a company has to pay a judgment, that loss ultimately flows back to society in the form of increased prices for services and/or insurance premiums. The remedy granted every person wronged in society ultimately comes out of society in bits and pieces, as the pricing of goods and services reflects all costs. This is not to say that people ought not to be provided with remedies to the wrongs that are visited upon them, but these are factors that must be bal-

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1. See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *LAW & CONTEMP. PROBS.* 23 (Summer 1997).

anced with the corresponding costs to society. It is this balancing act that is the difficult problem.

Securities lawyers have clients who occasionally get into trouble with the Securities Exchange Commission ("SEC"). Trouble with the SEC often attracts the Justice Department. In a classic type of case, where there are allegations of misconduct in a brokerage firm, the same set of events can be the subject of an investigation by the SEC, the New York Stock Exchange and other stock exchanges (such as the National Association of Securities Dealers, the "NASD"), the Justice Department, and the civil plaintiffs bar. This makes the job extremely interesting, for all of these issues must be handled simultaneously, while maintaining the enterprise as a going concern. Transactional securities lawyers are often faced with the task of keeping the enterprise going while engaging in negotiations with four or five agencies at the same time. The term "negotiation" is appropriate for these meetings because the lawyer in these types of cases is faced with the task of finding a resolution to the problem, trying to reason with the administrative or regulatory agency or the Department of Justice, and trying to point out that in a particular situation, a criminal prosecution may not be the right solution, even though it may be possible for one to ensue.

A particularly vexing complication often arises because the criminal conviction of a business may produce draconian collateral consequences, not only to individuals—the executives whose careers and lives may be ruined—but also to the business entity itself. In the financial services world, for example, if a corporation is convicted, or pleads guilty to a conviction under such statutes as the Investment Company Act or the Securities Exchange Act of 1934, it may result in serious damage to the business's affairs. For example, the conviction may automatically disqualify that firm from continuing to engage in certain lines of business, most particularly in the management of investment companies and mutual funds; huge enterprises would be forced to close immediately by reason of conviction. The conviction may also provide a basis for shutting down the company, not automatically, but at the insistence of the SEC. The consequences of this shut-down affect not only the public shareholders of the company, but also the employees, which may number in the thousands. Thus, it is a very complicated decision with substantial implications for a regulator or enforcer to proceed to a criminal resolution when another type of solution is available.

To date, the system has worked because prosecutors and other enforcers have exercised appropriate discretion. In most cases, negotiation and compromise produce the right result. What that result is differs with each case: Sometimes the right result is for the enforcer or the Justice Department to do nothing, sometimes it is a civil penalty, and sometimes it is a criminal penalty. In the cases in which criminal prosecution and sanction is the right solution, the proper action for the lawyer is to recognize the issue swiftly and take the necessary actions to protect the institution against further harm.

While securities lawyers must recognize that sometimes their clients should not go unpunished, those on the other side, especially young prosecutors in the government agencies, must accept that not every case warrants criminal prosecution. Unfortunately, when a lawyer argues that his client has not committed a crime, or that the circumstances do not justify a criminal prosecution, he or she is sometimes met with a "prove it" attitude. In other words, the prosecutor often states "if your client is innocent, he will have an opportunity to prove himself so before the jury, and all will be well." What the prosecutor does not recognize, however, is that at that point, the client has already lost. In a business setting, few enterprises can withstand the burdens and strains of criminal prosecution, and the consequences to the individuals in those cases are personally harmful, and can be career-threatening or otherwise disastrous.