

COMMENT ON LYNCH

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I am probably the least appropriate person to be commenting on the topic of policing corporate misconduct. My job as a district court judge is only to take what Professor Lynch's former colleagues in the prosecutor's office bring me, provide an arena for the dispute, bury the bodies when it is over, and clean up the arena for the next set of combatants. Therefore, I should not have a view on the more general topic, but I do. So, for what it is worth, I will share it with you.

First, despite the blurring of lines that Professor Lynch's article¹ points out at the extremes and at the edges, the issue is still pretty clear. There is a bright line distinction between civil and criminal cases and the distinction is one word, with four letters: JAIL.

I can recall being involved in a representation of people in a price-fixing investigation in the wiring device business. The investigation plodded along as antitrust investigations will do, but when there was a perceived shift from a civil to a criminal investigation, there was a palpable difference in the atmosphere. The prospect of paying fines, even of personal liability, was one thing. The prospect of spending time in jail was something quite different. And, as could be expected, once jail was a possibility, all the schoolyard rationalizations came out in a great tumble: "What did we do? We didn't kill anybody; we didn't rape anybody; people do much worse; and everybody else is doing it." All the things we have heard for ages and generations came tumbling out in a rush. There was a very strong and obvious distinction.

Distinguishing between the kinds of behavior that are prosecuted criminally and those that are not is a long-standing problem. Criminal statutes have never been enforced with equal vigor. There are always campaigns of one kind or another to crack down on different misbehaviors. By and large, this system of enforcement has worked tolerably well, probably due to an important point I hope does not get lost: Most people do not need the criminal law to tell them what to do and what not to do. People who do need it are, if nothing else, put on edge because of the randomness of the possibility that they might at some point engage the attention of the authorities.

In my own court some years ago, a prosecutor decided it would be helpful to have routine narcotics cases enforced in federal court. So one day a week (no one knew in advance which day it was) was "federal day," and all the drug

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

dealers and street corner dealers were picked up and taken to the federal court where they got a horse doctor's dose of reality.

Although this practice of selective prosecution and selective federalization of some misbehaviors has been with us a long time, and seems to be working fairly well, I do think we need to be careful about who makes these types of prosecutorial decisions. I am not suggesting that the decisionmaking authority should reside anywhere other than the prosecutor's office, but I am suggesting that even prosecutors' offices should employ some type of *Archer Daniels Midland* style of control.² That is, to assure that experienced people, who have been "out there" for a while, and who have had to say "please" and "thank you" get to make the decisions, not simply people who are two or three years out of law school. When it comes to making human decisions, these inexperienced attorneys lack a certain level of experience and judgment possessed by people who have been around a while longer.

The extent I detect any suggestion that we ought to have objective standards, I am experiencing a very haunting and uncomfortable feeling. I feel that we have returned to a time about a dozen or fifteen years ago, when there was a discussion about the randomness of the results in the criminal law and how there was perceived unfairness and how apparently similar cases were being treated differently. As a result of that discussion, we were given the United States Sentencing Guidelines, which are now celebrating, if that is the right word, their tenth year. There are two notable things about the celebration: First, as far as I know, the celebration is occurring only at the United States Sentencing Commission, and, second, as parties go, it is mighty quiet.

It is a nice academic aim to create a rigorous set of standards to control decisions about human behavior, and I am in favor of conferences to discuss such topics in warm places during cold weather and cold places during warm weather. But, let us not have any illusions; ultimately it comes down to intelligent, experienced people making intelligent decisions. The transparency comes in the cases themselves. If the wrong kinds of cases are being brought, or if cases are being brought that the public cannot tolerate or cases are not being brought that the public demands, the press and political campaigns can take care of such problems. What nobody can take care of is a legislative system that gets completely out of hand with a set of "objective standards." Although repeal of the sentencing guidelines is a dream that may be in the minds of some guerrillas up in the mountains, it ain't going to happen. Before we have a set of prosecutorial guidelines, then, I would urge everybody to be very, very careful.

2. See Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 166 & n.195 (Summer 1997); John M. Conley & William M. O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 5, 12-15, 20 (Summer 1997); Keith L. Johnson, *Deterrence of Corporate Fraud Through Securities Litigation: The Role of Institutional Investors*, 60 LAW & CONTEMP. PROBS. 155, 160-61 (Autumn 1997).