

PROSECUTING CORPORATIONS
FOR VIOLATIONS OF INT'L LAW:
JURISDICTIONAL ISSUES

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US CORPORATE CRIMINAL LIABILITY

- The standard for corporate criminal liability in the U.S. federal system is “respondeat superior.”
- The federal courts have defined respondeat superior very broadly.

US CORPORATE CRIMINAL LIABILITY

- A corporation is liable for offenses committed by its officers, employees, or agents:
 - within the scope of their employment;
and
 - in part for the benefit of the corporation.

US CORPORATE CRIMINAL LIABILITY

If a corporate employee or agent is performing actions within his or her responsibilities, there is no need to prove approval or direction by the board or senior management.

US CORPORATE CRIMINAL LIABILITY

- The act need only “in part” benefit the corporation.
- A corporation may benefit, and therefore be liable, even from a violation of its written policies.

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

Beginning N.Y. Central Railroad v. United States, most judicial decisions have used language reflecting reliance on the utilitarian functions of criminal law, especially deterrence.

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

A corporation is in the best position to prevent misconduct by its officers and employees through careful selection, supervision, and monitoring of its officers, employees, and agents.

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

- Civil sanctions might be insufficient.
- Criminal liability is not the first option, but the potential for criminal liability provides a strong incentive to allocate sufficient resources to carefully select, supervise, and monitor employees and agents.

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

- Corporations wield enormous power
- Corporations benefit from wrongdoing (crime pays)
- Misconduct is widespread & has significant consequences for health, safety, and the economy

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

- Legal scholars have also emphasized the **expressive function of criminal law**.
- Under this view, criminal law both reflects and reinforces key social values.

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

Legal scholars have also emphasized the expressive value of blaming a corporation for criminal conduct by its officers, agents, and employees.

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

Blaming a corporation accords with the sociological fact that individuals regard corporations as proper entities to be blamed (or praised).

Gregory Gilchrist

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

Blaming a corporation may have a spillover effect, bringing about corporate reform by changing individual as well as entity preferences.

Samuel Buell

THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

Prosecution can also force internal corporate reforms by:

- Corporate probation, and/or
- Requiring adoption of a compliance program

JUSTICE DEPARTMENT GUIDELINES

Both the DOJ guidelines and the Sentencing Guidelines use a carrot (incentives) and stick (sanctions) approach to reform corporate behavior.

JUSTICE DEPARTMENT GUIDELINES

Prosecutors often rely on the potential for corporate criminal liability as leverage to induce corporations to cooperate at the investigative stage, helping prosecutors identify and build a case against any culpable individuals.

JUSTICE DEPARTMENT GUIDELINES

- Coerced (or incentivized) cooperation is the strategy of the modern Justice Department.
- (Note that this applies not only in corporate cases, but also in individual prosecutions.)

DPA'S AND NPA'S – A MIDDLE GROUND

The DOJ guidelines state “[i]n certain instances, it may be appropriate . . . to resolve a corporate criminal case by means other than indictment. **Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation.**”

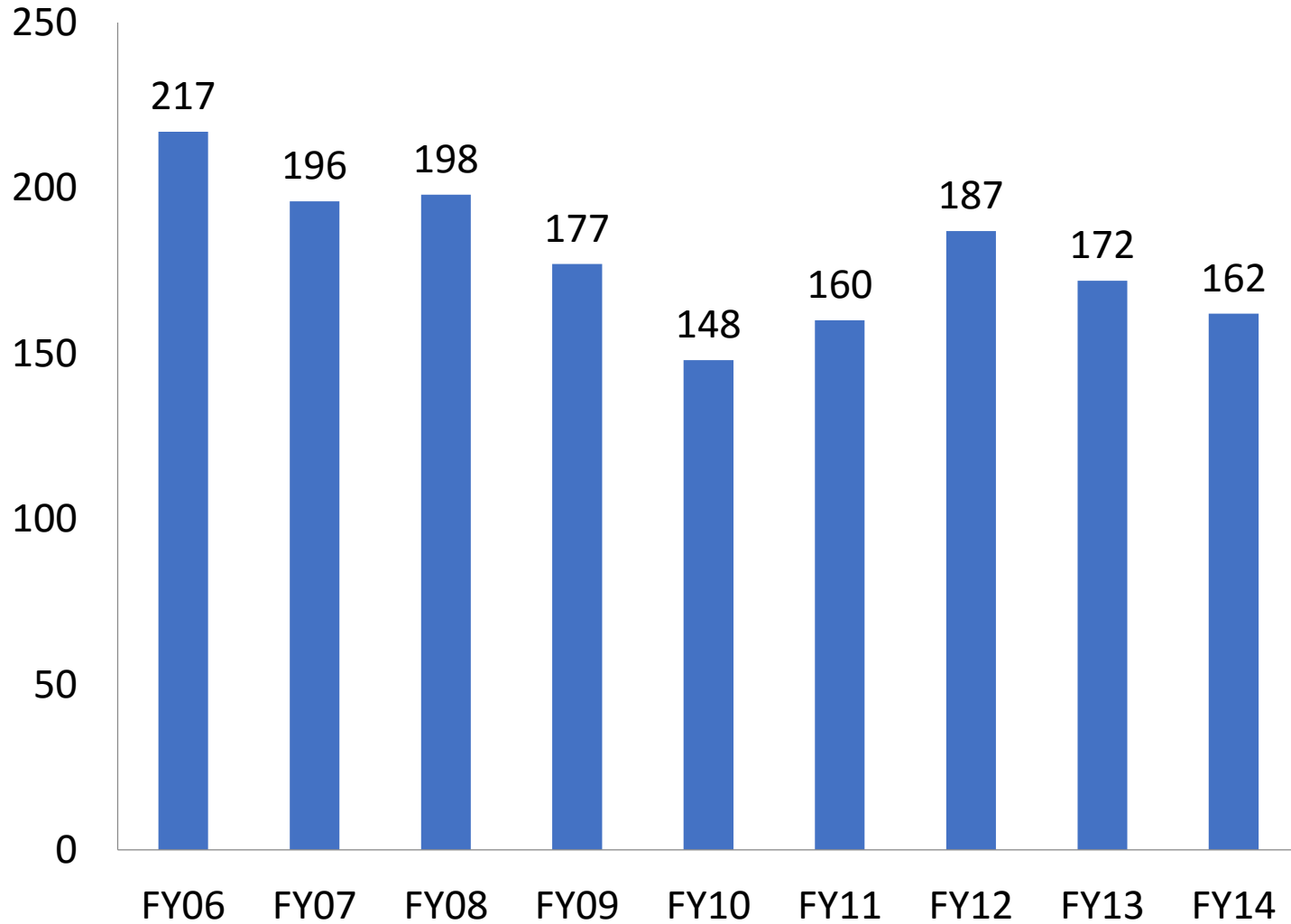
HOW DOES THE SYSTEM WORK IN PRACTICE?

- Prosecutorial discretion drastically restricts the number of prosecutions.
- DPAs and NPAs secure reforms and restitution without imposing crippling criminal sanctions.
- Global settlements often resolve criminal and civil claims without any criminal conviction and in many cases without an admission of wrongdoing.

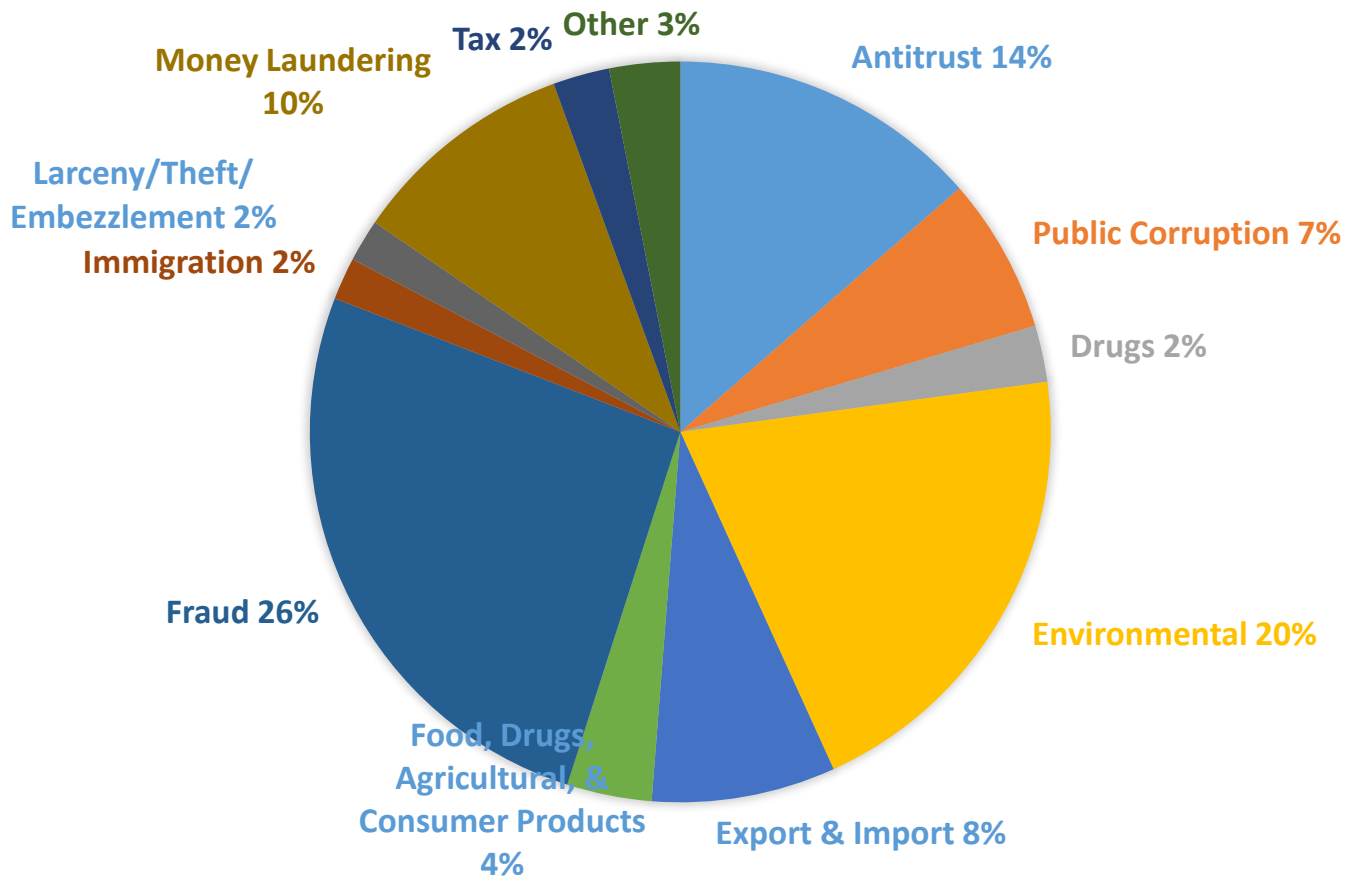
DATA AND STATISTICS

- How many corporations are prosecuted?
- What are the offenses for which corporations being convicted?

NUMBER OF ORGANIZATIONAL CONVICTIONS FY06-FY14



PRIMARY OFFENSE: CORPORATE CONVICTIONS FY 2014



WHAT ABOUT EXTRATERRITORIAL APPLICATION OF CCL?

- There are approximately 4,000 federal offenses, many broadly defined.
- Some have clear extraterritorial application, and some require only a minimal jurisdictional link to the U.S.

WHAT ABOUT EXTRATERRITORIAL APPLICATION OF CCL?

- For example, the FCPA applies to any company that lists its securities in the US, and mail/wire fraud reach an internet or mail transmission in the US.
- Allowed US prosecutors to reach FIFA and Siemens.

WHAT ABOUT EXTRATERRITORIAL APPLICATION OF CCL?

- All federal criminal offenses must be defined by statute.
- U.S. courts do not recognize core crimes unless/until Congress passes an appropriate statute.
- After the President signs a treaty, U. S. courts do not recognize treaty crimes until Congress passes the appropriate statutes.

PRESUMPTION AGAINST EXTRATERRITORIAL EFFECT

- Whether an ambiguous statute will be given extraterritorial application is a question of statutory interpretation.
- The Supreme Court has emphasized that courts interpreting federal statutes should exercise a strong presumption against extraterritorial effect.

PRESUMPTION -- JUSTIFICATIONS

- “Common sense” assumption that Congress is ordinarily focused on domestic matters.
- Judicial fear of creating international discord.
- Need to construe ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.
- “Prescriptive comity”
- Criminal law is traditionally a state law concern.

COMMON EXTRATERRITORIAL PROSECUTIONS

- US extraterritorial prosecutions have aggressively targeted terror leaders, global arms traffickers, and violent drug lords.
- These prosecutions reflect high priority US policies.

WHAT ABOUT ABUSES IN SUPPLY CHAINS?

- No federal statute proscribes crimes against humanity.
- The Supreme Court has narrowly interpreted both statutes human rights litigators had been using: the Alien Tort Statute (ATS) and the Alien Torture Victim Statute.

WHAT ABOUT ABUSES IN SUPPLY CHAINS?

- The ATS is now restricted to specific narrowly defined torts. The Supreme Court will decide whether it applies to corporations next year.
- The most promising statutory basis for human rights violations involving supply chains is the Trafficking Victims Protection Act (TVPA).

WHAT ABOUT ABUSES IN SUPPLY CHAINS?

- The TVPA was passed in 2000 & given explicit extraterritorial jurisdiction in 2008.
- The TVPA has been used to bring suits against multinational corporations for using forced labor.
- At least one conviction has been obtained against someone who purchased services from a forced laborer.



ALLEGATIONS: JOHN DOE V. NESTLE

- Malian child workers brought a civil action against Nestle in U.S. federal court.
- Nestle is a Swiss company with an Ivorian subsidiary and a wholly-owned U.S. subsidiary. All three were defendants.

ALLEGATIONS: JOHN DOE V. NESTLE

- As children, plaintiffs were trafficked from Mali into Ivory Coast to pick and process cocoa.
- They often worked 14-hour days, six days a week.
- They were beaten after failed escape attempts.

ALLEGATIONS: JOHN DOE V. NESTLE

- Human trafficking into the Ivory Coast has been a widely documented problem since at least 1996.
- Nestle regularly sent corporate employees to inspect the Ivorian cocoa operations.
- Nestle entered into exclusive agreements with individual farms and cooperatives.
- Nestle provided the farms with money, training and supplies

TVPA CIVIL

18 U.S. Code § 1595 - Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or **whoever knowingly benefits, financially** or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

TVPA CRIMINAL

- 18 U.S. Code § 1593A - Benefitting financially from . . . trafficking in persons
- Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581 (a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

TVPA CRIMINAL

18 U.S. Code § 1589 - Forced labor

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

* * * * *

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).