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Abstract

Perhaps the least sympathetic party in a corporate criminal matter is a corporate entity that has engaged in criminal conduct. If the corporation is large, subject to third party civil actions, and especially in an industry dependent upon a public perception of ethical behavior, a criminal indictment can destroy the entity, and few in society are likely to be concerned. To ameliorate the collateral consequences of an indictment, corporations are quick to cooperate with the government by signing onto non-prosecution, deferred prosecution, or plea agreements. The government secures a hefty fine and obtains from the entity the names and evidence against individuals who allegedly engaged in the corporate misconduct.

But what if companies refused to cooperate? What if corporations demanded speedy trials? What if the power and resources of the entity were used to protect innocent or naïve corporate constituents? What if the corporate fines were directed to third parties who could assist in correcting any wrongdoing?

Proposed here is the idea that corporations need to reevaluate folding to the government and instead present a united front against government attempts to extort money and evidence from them to the detriment of their corporate constituents.

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I. INTRODUCTION

Perhaps the least sympathetic party in a corporate criminal matter is a corporate entity that has engaged in criminal conduct. If the corporation is large, subject to third-party civil actions, and in an industry especially dependent upon public perception of ethical behavior, a criminal indictment can destroy the entity, and few are likely to be concerned. Corporations are quick to cooperate with the government by signing onto non-prosecution, deferred prosecution, or plea agreements to ameliorate the collateral consequences of an indictment.[1] The government secures a hefty fine and obtains from the entity the names of and evidence against individuals who allegedly engaged in the corporate misconduct.[2] Cooperation becomes necessary for corporations that cannot suffer the collateral consequences of a conviction.[3]

But what if companies refused to cooperate? What if corporations demanded speedy trials? What if the power and resources of the entity were used to protect innocent or naïve corporate constituents? What if the corporate fines were directed to third parties who could assist in correcting any wrongdoing? These are the questions examined in this Article.

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1. *See* Brandon L. Garrett & Jon Ashley, CORPORATE PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html (last visited Jan. 3, 2018) (providing a long list of companies that have entered into different settlement options with the government).

2. A key component for a corporation receiving credit for its cooperation is assisting the government in the prosecution of individuals within the entity who may have engaged in improper conduct. The U.S. Attorneys' Manual states:

> A. General Principle: In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this section.

U.S. DEP'T JUST., U.S. ATTORNEYS' MANUAL § 9-28.700–VALUE OF COOPERATION (2015), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations. *See also* Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places*, 102 IOWA L. REV. 1897 (2017) (discussing the problems with having corporations do their own investigations for them to find executive misconduct); Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23 (2010) (discussing how corporations act as government agents in assisting prosecutors in their investigations).

3. *See* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 78–81 (2010) (discussing how Arthur Andersen, LLP, went to trial and KPMG entered into a Deferred Prosecution Agreement).

This Article begins in Part II with an overview of the current corporate criminal landscape, highlighting that few cases go to trial in the current system. Part III examines two cases that in fact went to trial, *United States v. Aguilar*[4] (*Lindsey Manufacturing Co.*) and *United States v. FedEx Corp.*,[5] both resolved favorably for the company.[6] Part IV looks at the lessons learned from these two prosecutions, demonstrating how when a corporation takes on the government, commonplace issues in the criminal justice process can come to light. These two cases provide examples of discovery violations and a failure to properly investigate prior to indictment.

Proposed here is that corporations need to reevaluate folding to the government and instead present a united front against government attempts to extort money and evidence from corporations to the detriment of their corporate constituents. Advocated here is that restoring an appropriate balance between corporate and individual criminal liability might benefit society in reducing corporate misconduct. More importantly, corporations have the resources to expose government pretrial and trial misconduct. The legal landscape could change if corporations were to expose government extortion, discovery violations, and improper cooperation agreements at trial, benefitting those exposed to the criminal justice system who have less power and resources. The disruptive innovation offered here is that corporations should not be so quick to enter pleas or government resolutions, but rather, should go to trial to expose government deficiencies.

II. CURRENT CORPORATE CRIMINAL LANDSCAPE

Corporate criminal liability is an accepted and common doctrine today. Historically, this was not the case as corporations have no body (so no *actus reus*), no mind (so no *mens rea*), and as an entity, could not be imprisoned.[7] Corporate criminal liability developed over time, first allowing criminality when the corporation violated an omission statute and then allowing it for all regulatory strict liability offenses. Eventually,

4. 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

5. No. C14-00380 CRV, 2016 U.S. Dist. LEXIS 6155 (N.D. Cal. Jan. 19, 2016).

6. *See* Ellen S. Podgor, *Government Dismisses Lindsey Manufacturing Case Appeal*, WHITE COLLAR CRIME PROF BLOG (May 25, 2012), http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/05/government-dismisses-lindsey-manufacturing-case-appeal.html; Eugene Volokh, *The Justice Department's Dropping of the Charges Against FedEx*, WASH. POST (June 22, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/22/the-justice-departments-dropping-of-the-charges-against-fedex/?utm_term=.03aab362a951.

7. ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, WHITE COLLAR CRIME 23 (2013) (discussing the history of corporate criminal liability).

in *New York Central & Hudson River Railroad Co. v. United States*,[8] the Supreme Court of the United States extended corporate liability for crimes requiring *mens rea*, like the violation of the Elkins Act[9] seen in this case.[10] Using *respondeat superior*, courts allowed corporations to be criminally liable when its agents committed violations within the scope of the agent's employment[11] and when the acts were for the benefit of the entity.[12]

The acceptance of the "collective knowledge" doctrine by the courts has facilitated the government's ability to prove the *mens rea* of a crime. Collective knowledge allows the government to aggregate the knowledge of individuals within the company so that knowledge can be demonstrated using the "sum of the knowledge of all the employees."[13] It is "irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."[14]

The ease of proving corporate criminal liability is a factor in corporations reaching agreements with the government to avoid the possible severe ramifications of an indictment or conviction.[15] Professor Brandon Garrett and Jon Ashley provide an exhaustive list of corporations that enter into Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs).[16] The key differences between the two resolutions are whether there is a formal charge against the entity and whether the agreement requires court approval. The use of an NPA does not require a formal indictment against the entity. Rather, the government and the corporation exchange a letter agreeing to required terms.[17] The government has the option to bring criminal charges against

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8. 212 U.S. 481 (1909).

9. Elkins Act, 32 Stat. 847, ch. 708 (1903).

10. 212 U.S. at 494–95.

11. *Id.* at 496. The Model Penal Code, however, does not adopt this standard for corporate criminal liability, instead imposing liability when the actor is a "high managerial agent." MODEL PENAL CODE § 2.07 (AM. L. INST. 1962).

12. *See* Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962) (reversing convictions where the acts were not for the benefit of the corporation).

13. United States v. Bank of New England, 821 F.2d 844, 855 (1st Cir. 1987). "Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components." *Id.* at 856.

14. *Id.*

15. Under federal law, corporations are "persons." *See* 1 U.S.C. § 1 (2012) ("[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

16. *See* Garrett & Ashley, *supra* note 1.

17. PODGOR ET AL., *supra* note 7, at 39. Typically, one finds terms such as requiring the company to have a proper "effective" (compliance) program, appointing a monitor to assure

the company if the company fails to abide by these mandates.[18] Because NPAs are entered into directly between the government and the entity, the number and existence of these agreements can be difficult to ascertain.

In contrast, a DPA requires that a formal charge be filed against the company.[19] The parties then agree not to move forward with the case, pending the company complies with the agreed terms in the DPA.[20] If the entity complies with the terms of the agreement, the case is typically dismissed.[21]

Garrett and Ashby also track corporate prosecutions in their Corporate Prosecution Registry, such as when the company enters into a plea agreement with the government, in addition to providing information on NPAs and DPAs.[22] There were 274 companies that entered into NPAs between 1992 and 2017, 208 companies that entered into DPAs, and 2,593 companies that reached a plea agreement between the company and the government.[23] Some of these numbers represent subsidiaries or companies related to the main company.[24] The registry only lists two companies with trial convictions,[25] both resulting from an antitrust violation. Further, there are only seven companies listed in this

compliance, and providing information to the government of the wrongdoing committed by individuals within the company. Many of these terms can be considered questionable from a contracts perspective, as they may place the exclusive power within the government to decide if there has been a breach of the agreement. It is also questionable whether the parties are on equal footing in reaching these agreements and whether the government's superior bargaining power makes them unfair. *See generally* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007–08) (advocating for use of deferred prosecution agreements, but noting the problems with some of the terms used in these agreements).

18. PODGOR ET AL., *supra* note 7, at 39 (discussing the differences between a NPA and DPA).

19. *Id.*

20. *Id.*

21. *Id.* Several recent cases have struggled with whether courts can use their supervisory powers with regard to DPAs. *See, e.g.*, United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017); United States v. Fokker Servs., B.V., 818 F.3d 733 (D.C. Cir. 2016).

22. *See* Garrett & Ashley, *supra* note 1.

23. *See id.*

24. *See id.*

25. *See id.* (AU Optronics Corp. America and AU Opstronics Corp.).

database with prosecution declinations,[26] and three companies are listed with acquittals.[27]

The United States Sentencing Commission (USSC)[28] also provides information regarding sentencing under the organizational guidelines.[29] These USSC statistics report that, in 2016, 132 organizations were convicted of a federal offense.[30] Of this number only "1.1% was a publicly-traded corporation."[31] "[E]nvironmental (23.5%), fraud (23.5%), and food and drug crimes (12.9%)" were "[t]he most common offenses committed by organizations."[32] Of the fraud crimes, 48.4% fell in the mail fraud category, with the next-highest fraud offense being false statements (25.8%).[33] "97.7% of all organizational offenders pled guilty," with "[s]ixty percent (60.6%) of the organizations" being "sentenced to probation."[34] Overall, the sentencing of organizational offenders decreased by 27.1% from the prior year.[35] These numbers, however, do not reflect the government's proceeding against entities when the parties have entered into a NPA, as these would not have included an indictment or conviction,

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26. *Id.* The listed declinations were, with the exception of one, companies examined for possible Foreign Corrupt Practices Act violations. *Id.* The declination letters often state that "[i]f additional information or evidence should be made available to us in the future, we may reopen our inquiry." *See* Letter from Danial Kahn, Deputy Chief, U.S. Dep't of Justice, to Jay Holtmeier, Esquire, WilmerHale (June 21, 2016) (on file at http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/johnson_declination.pdf).

27. *See* Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, CORPORATE PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html (last visited Apr. 26, 2018). Although the government issues press releases when it indicts someone or a case results in a guilty verdict through trial or plea, one does not see the government issuing press releases for acquittals. As such, it becomes more difficult to ascertain, other than from listservs, blogs, and the media, if a case resulted in a not guilty verdict following a trial.

28. U.S. SENTENCING COMM'N, https://www.ussc.gov/ (last visited Jan. 3, 2018).

29. *See Chapter Eight—Sentencing of Organizations,* U.S. SENTENCING COMM'N, https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN (last visited Jan. 3, 2018).

30. *Quick Facts—Organizational Offenders*, U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Organizational-Offenders_FY16.pdf (last visited Jan. 3, 2018). Of the 132 organizational offenders, approximately 36.6% were sentenced under the federal sentencing guidelines. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

and therefore, these cases would not be reflected in sentencing statistics.[36]

It is apparent that few companies are risking a trial, and most resolve criminal matters with either an NPA, DPA, or plea agreement. The 3,099 companies reported in the Corporate Prosecution Registry represent resolutions from 1992–2017, and despite it being of tremendous assistance to scholars, there appear to be some omissions in that cases that proceed to trial and end with a not guilty are sometimes not reflected.[37] But this number is most likely very small.

The high number of government resolutions without trial is easily explained. NPAs and DPAs allow the company to pay huge fines while avoiding the collateral consequences that can come with an indictment or a finding of guilt. Companies are quick to resolve cases when the government reminds them of what happened to Arthur Andersen, LLP. Andersen failed to enter into a NPA or DPA that resulted in an indictment, trial, and later conviction.[38] The company was already in bankruptcy[39] by the time the Supreme Court of the United States reversed the conviction.[40] Thus, the collateral consequence of even an indictment can place a company reliant on public trust out of business, and a later exoneration will not lift the consequences suffered by the company.[41] Employees may lose their jobs despite being in a different

36. *Id.* It is equally questionable as to whether statistics of DPAs would appear in the sentencing commission statistics as there is no plea in a DPA, and the case is eventually dismissed if the company properly abides by the terms of the agreement.

37. *See* Garrett & Ashley, *supra* note 27. This statement should not in any way be interpreted as a criticism of this database, as attempting to report all declinations and non-prosecution agreements is near impossible since many of these matters are not included in court documents. The numbers reported here represent use of the database as of January 3, 2018.

38. *See* United States v. Arthur Andersen, LLP, 374 F.3d 281 (5th Cir. 2004).

39. *See* Lawrence A. Cunningham, *Too Big to Fail: Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels*, 106 COLUM. L. REV. 1698, 1710 (2006) (examining the demise of Arthur Andersen).

40. Arthur Andersen, LLP v. United States, 544 U.S. 696, 708 (2005).

41. KPMG, another accounting firm being scrutinized during a similar time period, entered into a DPA with the government. Podgor, *White Collar Innocence*, *supra* note 3, at 80. KPMG did not suffer the collateral consequences experienced by Arthur Andersen, LLP. *See id.* In fact, the DPA between the government and the accounting firm of KPMG included a clause that provided that the company could continue "to audit the Department of Justice's financial statements" and would not suffer debarment, as the agreement provided that they were a "responsible contractor." *Id.*

office from the alleged conduct and having no connection with those in the company who may be engaging in wrongdoing.[42]

Companies doing business with the government can be particularly quick to cooperate with the government as a conviction can result in government debarment, possibly putting the company out of business. Likewise, companies related to the medical industry fear losing government benefits following a conviction. Cooperating with the government and offering up corporate constituents offers quick resolution with less exposure than if the entity proceeded to trial.[43] Currently, the Department of Justice (DOJ) policy, found in the Yates Memo,[44] provides strict mandates for a company that wishes to minimize its exposure to collateral consequences.[45] The corporation must implicate the corporate constituents who they believe engaged in wrongdoing to receive cooperation credit from the government.[46] Although it is believed that the Yates Memo is currently being reconsidered,[47] modification of this policy may not necessarily alleviate the concerns expressed here. Companies may still feel pressured to settle with the government as opposed to asserting rights to trial.

In addition to fears of severe collateral consequences, companies may also be quick to resolve cases with the government as *respondeat superior*, collective knowledge, and strict liability regulatory offenses offer the government a difficult case for the defense to counter. The risk of going to trial places corporations in an unenviable position when evaluating the merits of the case against them. Paying a fine and resolving the matter brought against them offers, like most plea

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42. *See* Zierdt & Podgor, *supra* note 17, at 14–17 (discussing how the employees at Arthur Andersen, LLP, who had no connection with the alleged misconduct were without a job after the indictment of the company).

43. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013) (discussing the current discord between corporations and their constituents in contrast with cases immediately following *Upjohn v. United States*, 449 U.S. 383 (1981), when the company and its constituents were aligned against the government).

44. *See* Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to All U.S. Attorneys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

45. *See* Paul J. Larkin & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7 (2017); *see also* Podgor, *White Collar Innocence*, *supra* note 3, at 78–81.

46. *See* Memorandum from Sally Quillian Yates, to All U.S. Attorneys, *supra* note 44, at 2–3.

47. *See* Lucian E. Dervan, *DOJ Considering Changes to Yates Memo*, WHITE COLLAR CRIME PROF BLOG (Sept. 16, 2017), http://lawprofessors.typepad.com/whitecollarcrime_blog/2017/09/doj-considering-changes-to-yates-memo.html.

agreements, finality with a defined result. Resolving the case with the government also avoids what could be a distraction to the daily business operations of the company. The government may even offer the company a voice in the language used in the press release issued to the public. Thus, there are clear advantages for the company to resolve the case with the government, especially in situations when an NPA is reached and the matter will not be part of a court document or be announced publicly.

In the past, some of the corporate resolutions have had positive results in providing victims with restitution or providing third parties with funds to work on advances to avoid similar damage.[48] For example, the BP Plea Agreement following the explosion on the Deepwater Horizon rig included funds of $2.394 billion to the National Fish and Wildlife Foundation to not only eliminate harm, but also to "reduce the risk of future harm to Gulf Coast natural resources."[49] The plea agreement also included "$350 million to the National Academy of Sciences for the purposes of Oil Spill prevention and response in the Gulf of Mexico."[50] This required the National Academy of Sciences "to use the funds to advance scientific and technical understanding to improve the safety of offshore oil drilling, production and transportation in the Gulf of Mexico."[51]

On June 5, 2017, Attorney General Jeff Sessions issued a memorandum that prohibited most payments to third parties in future agreements.[52] He stated that

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48. *See* Ellen S. Podgor, *Deferred Prosecution Agreements*, WHITE COLLAR CRIME PROF BLOG (Apr. 12, 2006), http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/04/deferred_prosec.html. Some of these payments have been criticized, such as the agreement between U.S. Attorney Chris Christie with Bristol-Myers Squibb and the University of Medicine and Dentistry of New Jersey—an agreement that included an endowment of an ethics chair to Christie's alma mater, Seton Hall Law School. *Id.*; *see also* Ellen S. Podgor, *Bristol-Myers Squibb Agrees, 2 Execs Get Indicted, and Seton Hall Gets A Chair*, WHITE COLLAR CRIME PROF BLOG (June 15, 2005), http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/06/bristol_myers_s.html; *Deferred Prosecution Agreement*, CORPORATE PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/bristol-meyers.pdf, at ¶ 20 (last visited Jan. 3, 2018).

49. *See* Sarah Vance, *Reasons for Accepting Plea Agreement*, CORPORATE PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/BP_Exploration_Production.pdf, at 14 (last visited Jan. 3, 2018).

50. *Id.*

51. *Id.*

52. *See* Ellen S. Podgor, *DOJ Ends Third Party Settlement Practice—But What is No Longer Allowed?*, WHITE COLLAR CRIME PROF BLOG (June 7, 2017), http://lawprofessors.typepad.com/whitecollarcrime_blog/2017/06/doj-ends-third-party-settlement-practice-but-what-is-no-longer-allowed.html.

> [e]ffective immediately, Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.[53]

His new policy allows for three exceptions: (1) "an otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed," (2) "payments for legal or other professional services rendered in connection with [a] case," and (3) "payments expressly authorized by statute, including restitution and forfeiture."[54]

III. TWO CORPORATE CASES CHALLENGING THE GOVERNMENT

Two cases initially unreported in the Garrett and Ashby database[55] deserve mention here: *Lindsey Manufacturing Co.* and *FedEx Corp.* Both *Lindsey Manufacturing Co.* and *FedEx Corp.* went to trial.[56] Both cases resulted in unfavorable resolutions for the government, and both can serve as teaching points to the government. Both also demonstrate how white collar and corporate prosecutions can highlight problems within the criminal justice system that are difficult to see in cases involving indigent defendants. In sum, both cases demonstrate DOJ deficiencies that need scrutiny.

A. Lindsey Manufacturing Company

Lindsey Manufacturing Company, a private company with approximately 100 employees, was charged in the United States District Court for the Central District of California with one count of conspiracy

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53. Memorandum from Jeff Sessions, the Attorney General of the U.S., Office of the Attorney General, to All Component Heads and U.S. Attorneys (June 5, 2017) (on file at https://www.justice.gov/opa/press-release/file/971826/download).

54. *Id.*

55. *See* Garrett & Ashley, *supra* note 27. The omission from this database is easily explained: the government does not issue press releases for acquitted conduct. Recently, the Garrett-Ashley database added FedEx Corp. and FedEx Corporate Services, Inc. *Id.*

56. *See FedEx*, 2016 U.S. Dist. LEXIS 6155, at *1; *Aguilar*, 783 F. Supp. 2d at 1108. Other cases in which an entity went to trial and was found not guilty include Suarez Corp. and W.R. Grace Corp. *See Jury Finds Suarez Corporation Industries Not Guilty on All Charges*, CRIMINAL DEFENSE BLOG (July 1, 2014), http://www.iannfriedman.com/Criminal-Defense-Blog/2014/July/Jury-Finds-Suarez-Corporation-Industries-Not-Gui.aspx; Tristan Scott, *W.R. Grace Trial Verdict: Not Guilty on All Charges*, MISSOULIAN (May 9, 2009), http://missoulian.com/news/w-r-grace-trial-verdict-not-guilty-on-all-charges/article_746a3d2c-27e5-5d25-a147-f7501dcf64d7.html.

to violate the Foreign Corrupt Practices Act (FCPA)[57] and five FCPA counts. [58] The case went to trial and the defendants were convicted, but the trial court vacated the conviction and dismissed the indictment when the government's conduct came under scrutiny.[59]

The court in *Lindsey Manufacturing* noted that "most district judges are reluctant to find that the prosecutors' actions were flagrant, willful or in bad faith."[60] Further, the court noted that "[i]n this Court's experience, almost all of the prosecutors in the Office of the United States Attorney for this district consistently display admirable professionalism, integrity and fairness."[61] But the court found that the conduct in this particular case was not of that caliber, stating:

> So it is with deep regret that this Court is compelled to find that the Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court.[62]

After a forty-one-page detailed statement of the government's misconduct in this case,[63] the court stated that

> [w]ithin the period beginning in 2008 and continuing at least through June 27, 2011, the Government team committed many wrongful acts. It should not be permitted to escape the consequences of that conduct.

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57. The Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2018). The FCPA was enacted in 1977 to curtail bribery by United States companies to foreign officials and politicians. *See* U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), https://www.justice.gov/criminal-fraud/fcpa-guidance.

58. *Lindsey Manufacturing Case Officially Over*, FCPA PROFESSOR BLOG (May 25, 2012), http://fcpaprofessor.com/lindsey-manufacturing-case-officially-over/.

59. United States v. Aguilar Noriega, 831 F. Supp. 2d 1180, 1182 (C.D. Cal. 2011).

60. *Id.*

61. *Id.*

62. *Id.*

63. The court's description of the misconduct included pretrial, trial, and other examples of improper conduct on the part of the government. For example, the court discussed the "failure to timely disclose the grand jury transcripts," which it noted "constituted a *Brady* violation." *Id.* at 1202.

> By not allowing it to benefit from a "do over," the Court hopes that this ruling will have a valuable prophylactic effect.[64]

Although the government initially filed an appeal in the United States Court of Appeals for the Ninth Circuit, it later voluntarily dismissed the matter.[65] This dismissal ended the government's attempt to obtain $24 million from the company via forfeiture.[66]

B. United States v. FedEx Corp.

The government's case against FedEx is another example of government overreaching that a company challenged. FedEx was charged for allegedly shipping online prescriptions in 2014. In this case, the government indictment accused FedEx of conspiracy to distribute controlled substances,[67] distribution of controlled substances,[68] conspiracy to distribute misbranded drugs,[69] and misbranding drugs.[70] The indictment also contained allegations of forfeiture.[71] In contrast to many other companies facing a corporate indictment, including United Parcel Service (UPS), FedEx elected to proceed to trial.[72]

The government's opening statement included statements depicting FedEx as a "Drug Courier in Corporate Disguise."[73] In contrast, the defense, headed by Attorney Christina Arguedas, noted that FedEx stopped shipping to any customer the government advised them was operating illegally.[74]

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64. *Id.* at 1210. In discussing the appropriate remedy for the government misconduct, the court recognized that "dismissing an indictment is a disfavored remedy." *Id.* at 1208. It noted that Lindsey Manufacturing Co., a "small, once highly-respected enterprise has been placed in jeopardy." *Id.* at 1209.

65. *See* Podgor, *Government Dismisses Lindsey Manufacturing*, *supra* note 6.

66. *Id.*

67. *See* 21 U.S.C. § 845 (2018).

68. *See* 21 U.S.C. § 841 (2018).

69. *See* 18 U.S.C. § 371 (2018).

70. *See* 21 U.S.C. §§ 331, 333, 353 (2018).

71. *See* 18 U.S.C. § 982 (2018); 21 U.S.C. § 853 (2018); 28 U.S.C. § 2461 (2018).

72. *FedEx*, 2016 U.S. Dist. LEXIS 6155, at *3.

73. *See* Joel Rosenblatt, *FedEx Depicted by U.S. as Drug Courier in Corporate Disguise,* BLOOMBERG (June 13, 2016); *see also* Ross Todd, *Litigator of the Week: Cristina Arguedas of Arguedas, Cassman & Headley*, AM. LAWYER (June 24, 2016).

74. Volokh, *supra* note 6. In dismissing the case, Judge Breyer stated,

> To the contrary, they offered to and did cooperate with the Government during the course of its investigation. As FedEx said to the DEA from the inception of this alleged conspiracy and repeated over time, "Simply identify a particular customer who is shipping illegal substances, and we will not pick up or deliver his packages." DEA was either unwilling or incapable of providing that

Five days into the trial, on June 17, 2016, the court found the company "factually innocent,"[75] followed by the government's decision to drop this two-year-old case.[76] Judge Breyer of the United States District Court for the Northern District of California called the case a "novel" prosecution and, as reported by two journalists, questioned whether the government could show that FedEx "knew of the illegal drugs and intended them to be distributed illegally."[77] The court did praise the government's dismissal, stating, "Dismissal is an act . . . entirely consistent with the government's overarching obligation to seek justice[,] even at the expense of some embarrassment."[78] This case had a positive effect by prompting the DOJ to conduct an internal review of the prosecution.[79]

This case contrasts with the UPS prosecution for violations of the Controlled Substances Act, money laundering, and conspiracy. UPS and the U.S. Attorney's Office for the Northern District of California entered into a NPA,[80] resulting in a $40 million forfeiture by UPS, payments alleged to be from "illegal online pharmacies."[81] As with most corporate criminal matters, the company cooperated with the government, implemented a "strengthened" compliance program, and folded to the government's pressure. [82]

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information to FedEx. Rather, the Government decided to bring this novel prosecution.

Id.

75. *See* Jonathan Sack, *Recent Trials Highlight DOJ's Challenges in Prosecuting Individuals for Corporate Misconduct*, FORBES, https://www.forbes.com/sites/insider/2016/07/11/recent-trials-highlight-dojs-challenges-in-prosecuting-individuals-for-corporate-misconduct/#64dd25852e7a (last visited Jan. 3, 2018).

76. *See* Dan Levine & David Ingram, *U.S. Prosecutors Launch Review of Failed FedEx Drug Case*, REUTERS, http://www.reuters.com/article/us-fedex-doj-idUSKCN0ZV0GO?feedType=RSS&feedName=topNews&utm_source=twitter&utm_medium=Social (last visited Jan. 3, 2018).

77. *Novel FedEx Drug-Shipping Case Left to Skeptical Judge at Trial*, IND. LAWYER (June 13, 2016), https://www.theindianalawyer.com/articles/40598-novel-fedex-drug-shipping-case-left-to-skeptical-judge-at-trial.

78. Rebecca Hersher, *Justice Department Drops Charge that FedEx Shipped for Illegal Pharmacies*, NPR (June 17, 2016), https://www.npr.org/sections/thetwo-way/2016/06/17/482537913/justice-department-drops-charge-that-fedex-shipped-for-illegal-pharmacies.

79. *See* Levine & Ingram, *supra* note 76.

80. *See* Letter from Melinda Haag, Assistant U.S. Attorney, U.S. Dep't of Justice, to Eugene Illovsky, Morrison Foerster LLP (Mar. 29, 2013) (on file at http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/UPS.pdf).

81. *See* Press Release, U.S. Attorney's Office for the N. Dist. of Cal., UPS Agrees to Forfeit $40 Million in Payments from Illicit Online Pharmacy for Shipping Services (Mar. 29, 2013) (on file at http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/press_release/UPS_PR.pdf).

82. *Id.*

IV. LESSONS LEARNED

The cases against Lindsey Manufacturing and FedEx demonstrate improper government conduct that is commonplace in the non-corporate sector. Discovery violations,[83] government stretching of statutes,[84] and government influence to extort pleas[85] are difficult to prove and often cost prohibitive for mainstream criminal defendants. Innocent individuals and corporations take pleas because they are unable to risk draconian sentences that might be imposed if they are convicted following a trial.[86] Quick resolutions may be necessary in the corporate sphere to minimize the collateral consequences caused by an indictment and possible conviction. Attorneys who can mount extensive defenses, as those seen in the *Lindsey Manufacturing* and *FedEx* cases, are often cost prohibitive and beyond the allowances provided in indigent defense cases.

The net result of the government proceeding against a corporate entity is a lopsided system. The company cannot risk the trial, and innocence becomes an irrelevant factor in minimizing the consequences to the entity. But imagine, as this topic requests, a disruptive innovation in criminal defense, such as corporations suddenly going to trial, as opposed to becoming government agents in their quest to obtain shortcuts with easy statistics and minimal work.[87] Imagine a world where corporations would expose government misconduct and inexcusable behavior because they had the resources to do so. Yes, imagine a world in which alleged corporate criminality could advance the causes of those less fortunate in our criminal justice system. Demanding corporate trials would bring this imagination to reality.

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83. ROB CARY, NOT GUILTY: THE UNLAWFUL PROSECUTION OF U.S. SENATOR TED STEVENS 56–57 (2014) (discussing the discovery violations coming from the prosecution of former Senator Ted Stevens); *see also* United States v. Olsen, 737 F.3d 625, 626 (2013) (Kozinski, J., dissenting from denial of rehearing en banc) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.").

84. *See* Ellen S. Podgor, *"What Kind of Mad Prosecutor" Brought Us This White Collar Case*, 41 VERMONT L. REV. 523 (2017) (discussing the stretching of statutes by federal prosecutors).

85. *See* Podgor, *White Collar Innocence*, *supra* note 3.

86. *Id.*

87. *See generally* Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952212 (discussing the government's use of shortcut offenses such as false statements, obstruction of justice, and perjury, as opposed to prosecuting for the underlying conduct).