

**CORPORATE CRIMINAL LIABILITY:
COURSE DESCRIPTION AND SYLLABUS
Spring 2023
Professor Gregory Gilchrist**

CONTACT INFORMATION:

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STUDENT LEARNING OUTCOMES

Upon completion of this course you should:

- Exhibit a strong understanding of the basic rules of corporate criminal liability, the principles guiding the decision whether to prosecute a corporation, and the role of culture in corporate wrongdoing
- Be able to assess the costs and benefits of, and rationales for, applying criminal law to non-persons
- Demonstrate an introductory level understanding of compliance programs
- Develop a richer understanding of the function and role of criminal law generally

GRADE AND ASSESSMENT

Your grade will be based on your written paper. In the first weeks of class you will develop and get approval for your topic. Later in the semester you will turn in a draft of your paper. This draft will count as 25% of your grade. The final paper will count for 75% of your grade. In-class participation, including paper presentations, can improve a student grade, and in rare cases can cause that grade to be reduced.

ONLINE CLASS

This class will be entirely online. There will be synchronous weekly meetings over Zoom. Per University policy, attendance in 80% of these meetings is mandatory. Additionally, failure to be present and participatory could affect grades (see above).

Welcome. This seminar will explore issues surrounding criminal liability for corporations. In doing so, we will consider larger questions about the purpose and meaning of punishment.

Corporations can be held criminally liable. But what does that mean? We cannot put a corporation in prison. We don't expect a corporation itself to feel shame. What is the purpose of holding corporations criminally liable (as opposed to people who work for corporations)?

Chapter 8 of the U.S. Sentencing Guidelines sets forth the guidelines for imposing punishment on corporations convicted of crimes. The chapter begins:

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

U.S.S.G. Ch. 8, Introductory Comment, Nov. 2018.

The Comment tells us that, “[o]rganizations can act only through agents...,” and that “individual agents are responsible for their own criminal conduct.” It is true that a corporation only acts through its agents. A corporation is a legal fiction. A corporation does not act absent some natural person doing something. When a natural person acts in a criminal manner, on behalf of the corporation, that natural person can be convicted of a crime and punished. So, the question remains, why should the corporation be punished too? And, what does it mean to punish a legal fiction?

The introductory comment also states that the Guidelines aim to “provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” What does it mean to deter a corporation (as opposed to deterring the people who work for, or on behalf of, the corporation)? What incentives might work on a corporation that would not work just as well on individual persons? And most critically, what is “just punishment” for a corporation? This seminar will ask you to confront these and other questions about the purpose, nature and meaning of corporate criminal liability. More broadly, I hope this seminar will cause you to ask questions about the special role of criminal laws in a legal system.

ANTICIPATED CLASS SCHEDULE (subject to change during the semester)

Assignments in bold to be completed before class. For harder-to-find (the Corporation film and Lauren Stevens interview, and some older law review articles) I will distribute the materials before class; for most readings, students should download the materials themselves.

Week	Subject	Reading / Assignments
1	The Corporation	<p>Watch "The Corporation" (a film by Mark Achbar, Jennifer Abbott, and Joel Bakan).</p> <p>I begin this class with this documentary because it illustrates a number of issues we will confront throughout the semester, and because students generally enjoy it.</p> <p>I will add an important caveat, however: this is a documentary with a bias. The bias is not mine, it is that of the filmmaker. The bias is anti-corporate, which is perhaps unfair to the film because it does go to some lengths to acknowledge the benefits we all derive from corporations. That said, in sum I do think this film establishes an anti-corporate tone. I point this out because I do not intend this to be an anti-corporate class. To the contrary, I am pretty sure that few of us would prefer to live in an economy without corporations. That said, just like people cause harm, so do corporations. This class is largely about why and how corporations do harm, and what the law can and should do about those harms.</p>

2	Of Rats, Railroads, and Pirates: Punishing Things	<p>Read:</p> <ol style="list-style-type: none"> 1. <i>Harmony v. United States</i>, 43 US 210 (1844) 2. <i>NY Central RR v. United States</i>, 212 U.S. 481 (1909) 3. <i>United States v. Hilton Hotels Corp.</i>, 467 F.2d 1000 (9th Cir. 1972) 4. Paul Schiff Berman, <i>Note: Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecutions of Animals and Inanimate Objects</i>, 69 N.Y.U.L.Rev. 288 (1994) <p>Corporations are legal constructs. They do not think or feel, they do not "act" in the normal sense of the word, and they cannot be imprisoned. The idea of holding corporations criminally liable is little over 100 years old; however, the idea of holding things and animals accountable is far more ancient. This week we begin to explore the practice of punishing things, animals, and yes, corporations.</p> <p><i>Students should begin thinking about paper topics.</i></p>
3	No Soul to Damn, No Body to Kick	<p>Read: John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”; <i>An Unscandalized Inquiry Into the Problem of Corporate Punishment</i>, 79 Mich.L.Rev. 386 (1980).</p> <p>When we punish a corporation, who exactly suffers? Can this intentional imposition of suffering be justified, and if so, how? This week we begin to grapple with the central dilemmas of corporate criminal liability.</p> <p><i>Continue exploring paper topics.</i></p>

4	Why Criminal, not Civil?	<p>Read: Vikramaditya Khanna, <i>Corporate Criminal Liability: What Purpose Does It Serve?</i>, 109 Harv. L. Rev. 1477 (1996)</p> <p>Does using the criminal law against corporations net any benefits that could not be achieved more simply through the civil law?</p> <p><i>Students should be prepared to present preliminary thinking to the class about their potential paper topics; these are informal discussions, not formal presentations.</i></p>
5	The Importance of Culture	<p>Read:</p> <ol style="list-style-type: none"> 1. Pamela H. Bucy, <i>Corporate Ethos: A Standard for Imposing Corporate Criminal Liability</i>, 75 Minn.L.Rev. 1095 (1991) 2. Marleen A. O'Connor, <i>The Enron Board: The Perils of Groupthink</i>, 71 U.Cin.L.Rev. 1233 (2003) [Introduction, and Parts I, II, and III only] <p>What is "corporate culture," and do cultures vary between corporations? What impact might culture have on corporate malfeasance and punishment? What factors influence organizational culture and group behavior? How, if at all, can the law harness and influence these factors?</p> <p><i>Students should be prepared to present preliminary thinking to the class about their potential paper topics; these are informal discussions, not formal presentations.</i></p>
6	PAPER TOPICS	<p><i>Students meet one-on-one with me to discuss and get approval for final paper topics</i></p>

7	Principles for Prosecuting Corporations	<p>Read:</p> <ol style="list-style-type: none"> 1. A Resource Guide to the U.S. Foreign Corrupt Practices Act by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (Pages 50-68), https://www.justice.gov/criminal-fraud/file/1292051/download 2. Justice Manual 9-28.100 – 9-28.1300, Principles of Federal Prosecution of Business Organizations, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.100 3. United States Sentencing Guidelines §8B2.1, Effective Compliance and Ethics Program, https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8#NaN <p>This week we will turn to governmental guidance and rules about what constitutes an effective compliance program, and under what conditions corporations should be criminally prosecuted.</p> <p><i>Work on draft papers</i></p>
8	DRAFTS DUE	<p><i>No class – work on and turn in draft; optional one-on-one meetings</i></p> <p>Draft Due by end of day (email sent by 11:59pm Houston Time) March 10th</p>
		SPRING BREAK

9	The Failure to Prosecute Individuals	<p>Read:</p> <ol style="list-style-type: none"> 1. The Honorable Jed S. Rakoff, <i>The Financial Crisis: Why Have No High Level Executives Been Prosecuted</i> (2014) 2. Gregory M. Gilchrist, <i>Individual Accountability for Corporate Crime</i> (2017) 3. The Yates Memorandum, https://www.justice.gov/archives/dag/file/769036/download <p>In recent years, the newspapers have been filled with stories of corporations resolving criminal liability for very serious crimes for which no actual persons were ever prosecuted. Why is there a dearth of criminal prosecutions against the individual culprits within corporations, and is the failure to prosecute individuals a problem? If so, what remedies might exist?</p> <p><i>Work on draft papers</i></p>
10	Blurring the Lines	<p>Read: John C. Coffee, Jr., <i>Paradigms Lost: The Blurring of the Criminal and Civil Law Models – and What Can be Done About It</i>, 101 Yale L.J. 1875 (1992)</p> <p>This week we turn to an abstract issue that presents significant practical challenges. It used to be that criminal law was for the obvious crimes: murder, rape, theft. Civil law handled other "wrongs." This is, of course, an oversimplification, but not an unhelpful one. The modern industrial age has witnessed the rapid expansion of criminal law into many areas that traditionally were resolved civilly. This shift is significant, and it raises a number of questions about the use and function of criminal law today, particularly in the corporate context.</p> <p><i>Work on papers</i></p>

11	Law as Language	<p>Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U.Chi.L.Rev. 591 (1996)</p> <p>We now turn to the idea that punishment might actually be a form of expression. And, more broadly, law might be a language. If we think of punishment as expression, and law as language, a number of questions follow. Who is speaking? What is being expressed? Who is the audience? Digging into these questions a bit helps identify some of the distinctive aspects of criminal law, and may take a step closer to understanding why people want corporations to be criminally prosecuted, notwithstanding the numerous problems introduced earlier in the semester.</p> <p><i>Work on papers</i></p>
12	Lawyers in the Crosshairs	<p>Watch: Lauren Stevens Interview</p> <p>When wrongdoing occurs in a corporation, attorneys frequently have a role. Not in the original wrongful conduct, necessarily, but at some point the matter may come to the attention of corporate attorneys. How they address the matter is critical for officers and directors, shareholders, and employees. It's also critical for the lawyers themselves. Handling allegations of criminal conduct within the corporation poorly can sometimes expose the attorney herself to criminal prosecution. That is exactly what happened to Lauren Stevens in 2010. This week we will watch a remarkable interview with Ms. Stevens and consider the role of and risks for attorneys involved in corporate investigations.</p> <p><i>Work on papers</i></p>
13&14	Paper Presentations	<p><i>Students will present their papers to the class (this week and next). These presentations can be formal presentations of an argument, informal discussions of topics still being worked out, or review of near-final papers. We will discuss approaches in more detail during the semester, but students have significant choice in how they approach these presentations.</i></p> <p>FINAL PAPER DUE (email by 11:59pm): April 28th</p>

OTHER CLASS INFORMATION

Accessibility and Accommodations

UHLC is committed to ensuring that all students enjoy equal access and full participation. If you anticipate or experience barriers based on a disability (including any chronic or temporary medical or mental health condition), please feel free to reach out to me so that we may discuss options. If you require any support services, you may contact Ms. Samantha Ary, Academic Records Coordinator. Ms. Ary is located in room 44A TU-II in the Office of Student Services suite, and she can be reached at sary@central.uh.edu or (713) 743-7466. Requests for accommodation that involve graded assignments must be directed to Ms. Ary and should be made as soon as possible to allow adequate time to document and to process the request. If you observe religious or cultural holidays that will coincide with synchronous class sessions or conferences, please let me know as soon as possible, so that we may make arrangements.

Diversity and Inclusion

This is an inclusive learning space; all are welcome. If you feel like your class performance is impacted in any way by your experiences inside or outside of class, please reach out to me. I want to be a resource for you. If you feel more comfortable speaking with someone besides me, Monica Mensah, Assistant Dean for Student Affairs Student Services, is an excellent resource (contact info above). You can also bring any issues negatively impacting UHLC's openness to diversity and inclusion to the Law Center's Diversity and Inclusion Committee. You can contact the committee directly at UHLCD&I@uh.edu.

Anti-Discrimination and Sexual Misconduct Policies

UHLC and the University of Houston are committed to maintaining and strengthening an educational, working, and living environment where students, faculty, staff, and visitors are free from discrimination and sexual misconduct. If you have experienced an incident of discrimination or sexual misconduct, a confidential reporting process is available to you. For more information, please refer to the University System's Anti-Discrimination Policy, available at <https://uhsystem.edu/compliance-ethics/docs/sam/01/1d7.pdf>, and Sexual Misconduct Policy, available at <https://uhsystem.edu/compliance-ethics/docs/sam/01/1d8.pdf>.

Please be aware that under the sexual misconduct policy, faculty and other University employees are required to report to the University any information received regarding sexual misconduct as defined in the policy. Due to this

reporting requirement, faculty members and other employees are not a confidential resource. The reporting obligations under the sexual misconduct policy extends to alleged conduct by University employees and students.