Deterrence Theory and the Corporate Criminal Actor: Professor Utset’s Fresh Take on an Old Problem

Daniel S. Medwed

Table of Contents

Introduction ....................................................................................................................................................... 1
I. Internal Review Committees ...................................................................................................................... 2
II. Ethical Institutional Culture ..................................................................................................................... 4
Conclusion ....................................................................................................................................................... 4

Introduction

Deterrence is a core theory underlying much of American criminal law. It is based on the assumption that potential criminal transgressors are rational—that they act to maximize benefits and minimize costs in utilitarian terms. Traditional deterrence theory holds that setting criminal sanctions at sufficient levels will dissuade many aspiring violators from following through. But, as Professor Utset and others have noted, people are not entirely rational actors; human behavior is affected by a range of cognitive biases and psychological impediments that can produce less than optimal decision-making.

Professor Utset trains his keen scholarly eye on one such impediment to rational behavior by potential criminal actors in the corporate setting: time-inconsistent preferences. His thesis is that corporate actors may “overconsume” criminal misconduct in the short-term given the temporal gap between crime and punishment. Professor Utset seeks to bridge this gap by directly targeting short-term preferences with a goal of “reducing the immediate costs of compliance or of gatekeeper monitoring and reducing the immediate rewards from violating

the law.”¹ Professor Utset’s paper is an important contribution, adding a rich layer to our understanding of how and why humans far too often fail to act in their long-term interests.

Professor Utset’s paper also indirectly taps into the literature on the merits of external regulation in deterring misconduct. For instance, he lauds the Sarbanes-Oxley Act for requiring companies to use a “wholly independent audit committee, which has the effect of reducing the ability of managers to increase the immediate costs to board members of challenging financial statements prepared by managers.”² Professor Utset also praises this legislation’s imposition of enhanced disclosure requirements on corporate lawyers, as well as the Dodd-Frank Act’s creation of a Financial Stability Oversight Council.³ On the whole, these efforts reflect the advantages of external regulatory tools, at least in theory, to guard against corporate malfeasance.

One fascinating implication of Professor Utset’s paper is whether internal regulation can also be used to protect against the potential overconsumption of criminal activity that derives from time-inconsistent preferences. Let’s assume, for a moment, that boards of directors, CEOs and other corporate officers have a long-term interest against their employees engaging in criminal misconduct—even if it boosts short-term profits—not only because of the severity of the potential sanctions, but also because of reputational costs and the subsequent effect on share prices. See Exhibit A, Carnival Cruise Lines. How, then, could corporate leaders implement internal regulatory devices designed to serve long-range institutional goals at the expense of short-term preferences? Here are two thoughts.

I. INTERNAL REVIEW COMMITTEES

Creating a series of review processes within a corporation might be helpful. Scholars have recently explored how many decision-makers suffer from confirmation bias, a form of tunnel vision that explains how after a person has made a decision she may view all subsequent information

---

² Id. at 48.
³ Id. at 48–51.
through the lens of that outcome, overvaluing information that supports
the decision and discounting evidence that undercuts it.\footnote{See Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 307–08.} To guard against
confirmation bias, several commentators have pressed for the
mere process of forcing a decision-maker to articulate the reasons for her
choice would go a long way toward promoting introspection and thwarting
the pernicious effects of tunnel vision.\footnote{See, e.g., Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959, 1006 (2009).} Even more, the review committee
should be comprised of people who did not play a role in reaching the
initial decision—a means of ensuring that the review committee itself is
not plagued by confirmation bias.\footnote{For a discussion of whether “outsiders” should participate in the review process, see Burke, supra note 5, at 1621–24.}

In the corporate setting, key decision-makers from each
department within the corporation could be forced to report periodically to
someone or a committee from another department. Major decisions, in
effect, could only be implemented with the blessing of the other
department head or committee. These reviews should feature some level
of transparency; the sessions could be recorded or, at a minimum, the
outcome of the review could be reduced to writing.

To be sure, this review process is imperfect. It is hard to ensure
that any internal review is not a ceremonial rubber-stamping of the
previous decision. People often act in ways that reinforce the decisions of
their peers because of the power of “conformity effects,” a desire to act in
line with one’s colleagues.\footnote{See Daniel S. Medwed, The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit, 84 Wash. L. Rev. 35, 53 (2009).} This phenomenon is especially pronounced
where the original decision-maker had access to greater information than
the subsequent reviewer.\footnote{Id.} That said, the trappings of transparency would
add legitimacy to the review. And the existence of this process would
prompt at least some decision-makers to reflect upon their choices and, as

\footnote{\textit{\textsuperscript{7}} For a discussion of whether “outsiders” should participate in the review process, see Burke, supra note 5, at 1621–24.}
\footnote{\textit{\textsuperscript{8}} See Daniel S. Medwed, \textit{The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit}, 84 Wash. L. Rev. 35, 53 (2009).}
\footnote{\textit{\textsuperscript{9}} Id.}
a result, cause some to reconsider and turn away from potentially criminal activity. At bottom, the formation of internal review committees to evaluate major corporate decisions—where the temptation to overstep criminal bounds may be strong—is a reform worthy of serious consideration.

II. Ethical Institutional Culture

As a complement to internal review committees, corporate leaders should think long and hard about the overall message they wish to communicate to underlings. The scholarship on management theory indicates that office culture is shaped by those in charge. Corporate officers can shift the organizational focus away from an emphasis on taking shortcuts to enhance profits at all costs (including costs in the form of possible criminal violations). Specifically, leaders can champion corporate social responsibility, honor whistleblowers, award promotions to those who make ethically sound, if economically neutral, decisions, and give high status to compliance officers. Junior staffers take their cues from above. Hiring new employees who fit within this culture and training them to embrace it are crucial to preserving an ethical culture. Not incidentally, a reputation for corporate social responsibility, ethical conduct, and disdain for potentially criminal shortcuts could add luster to a corporation’s reputation—and, over time, value to its share prices.

Conclusion

Professor Utset’s paper is a wonderful addition to the scholarship on corporate crime and behavioral law and economics. It also represents a nice launching pad to further explore the relative merits of external versus internal regulation on corporate actors. Although external regulation has garnered the most attention in the years since the recent economic meltdown, internal regulation should be part of the conversation, too, and likely part of the solution.

10 Bibas, supra note 6, at 1007-09.
11 See id. (making similar suggestions in the context of prosecutors’ offices).