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Citizens United & Corporate & Human Crime

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In *Citizens United v. Election Commission*,[1] the Supreme Court held that corporations have the same First Amendment rights as human beings. As one commentator put it, for First Amendment purposes "corporations are now 'people.'"[2] Thus, like human citizens, corporations can exercise their right to free speech by spending as much money as they like trying to influence elections.

I'm not going to attack or defend *Citizens United*. Rather, I explore below, briefly and somewhat fancifully, *Citizens United's* implications for criminal liability, corporate and otherwise. *Citizens United* could influence the fate of corporations suspected of wrongdoing in four ways, three of them doctrinal and one practical. First, it reinforces the long-accepted but still highly controversial proposition that, despite their inanimate nature, corporations can be criminally prosecuted for harm they cause. At the same time, *Citizens United* provides fodder for those who would soften current corporate liability and punishment rules. Third, the decision could bolster the case for expanding corporate criminal procedure rights. Finally,

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[1] 130 S.Ct. 876 (2010).

[2] Jim Hightower, Fighting the Subversion of Our People's Sovereignty, Feb. 26, 2010.

whatever the merit of these doctrinal predictions, as a practical matter *Citizens United* will help ensure that corporations are rarely punished to the limits of the law.

Citizens United might also have a significant impact on how the criminal justice system treats street criminals, at least if the doctrinal developments just alluded to come to pass. After all, the courts can hardly withhold from human offenders and suspects the dispositional breaks and procedural rights they have granted non-human corporations. Right?

CRIMINAL LIABILITY

The litigation that led to *Citizens United* is the latest sally in a century-long debate over whether corporations should be considered purely artificial entities or instead treated as natural persons guaranteed the same constitutional rights that individuals enjoy. Over that period, corporations have managed to acquire due process rights, equal protection rights, and a number of other entitlements.[3] Outside of a few lost skirmishes over the Fourth and Fifth Amendments (discussed further below), the natural rights folks have pretty much triumphed. *Citizens United* is just another notch in their battle axes.

But *Citizens United* does have a downside for corporations. Although corporations have for some time been subject to criminal liability on the ground that they are legal persons, the argument has persisted that only the officers and employees responsible for the crime, not the corporate entity itself, should be prosecuted. Some have contended, for instance, that just as the legal personhood of young children does not require that they be held criminally accountable, the fact that corporations are persons for most constitutional purposes is irrelevant to whether they can be charged with crime.[4] But that argument makes less sense after *Citizens United*.

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[3] Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 Hastings L.J. 577, 579 (1990).

[4] John Hasnas, Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics, 39 LOY. U. CHI. L.J. 507, 509-10 (2008).

Corporations, the Supreme Court said in that case, must be allowed to participate in the "marketplace of ideas."[5] Whatever might be the case for infants, an entity that has political will also has free will.

Once it is established that a corporation can be an autonomous actor, it follows that the criminal penalty for corporate wrongdoing should be proportionately harsher as the mens rea – perhaps aggregated over multiple actors within the corporation – progresses from negligence through reckless toleration to premeditation. And while a corporation cannot be put in prison, if a corporation is a person it can be required to do penance in ways other than paying a fine. Indeed, restorative justice processes and shaming penalties might be even more meaningful in this setting, because they are likely to receive national attention when large companies are involved. Corporations could be required to suffer sanctions victims impose, and public castigation of malfeasant businesses could occur on TV and radio. Just think what judges could do to BP in this type of regime (for starters, require that its green flower logo drip with oil).

So *Citizens United* could be the final blow against those who resist criminal liability for corporations. But it could also have a mitigating effect when the government seeks to prosecute, in two ways. First, strict liability and liability for simple negligence, currently staples of corporate criminal doctrine,[6] are usually anathema when a person is being punished, at least when the punishment involves something other than a small fine.[7] Second, as the Supreme Court suggested in its recent case striking down life-without-parole for juveniles, all criminals, except those who commit murder or are too old, are entitled to show they can be rehabilitated.[8] In the corporate context deferred prosecution and non-prosecution agreements are already popular, because they reduce corporate recidi-

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[5] 130 U.S. at 906.

[6] New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909).

[7] Wayne R. LaFave, Criminal Law 739-70 (5th ed. 2010) .

[8] Graham v. Florida, 130 S.Ct. 2011, 2030 (2010) (requiring that juveniles be given "some meaningful opportunity to obtain release based on demonstrated . . . rehabilitation").

vism and minimize damage to the wealth and jobs the corporation represents.[9] Now corporate bodies can make even stronger pleas for such "treatment."

So much for doctrine. The practical consequences of *Citizens United* for corporate criminal liability are less subtle. Given the additional political power corporations and chambers of commerce now have,[10] the probability increases substantially that the relatively lenient criminal liability and dispositional rules just described will find favor. Without contemplating any type of corruption, it can be assumed that, after *Citizens United*, public officials who do not like strict liability crimes and harsh sentences in the corporate context are more likely to be elected.

FAIRNESS OBJECTIONS

A common objection to corporate criminal liability, even a soft version of it, is that it unfairly penalizes shareholders and employees who had nothing to do with the criminal action. One could argue that this objection has particular purchase when the case for corporate criminal liability is based on *Citizens United*. After all, corporate speech is presumably designed to further the goals of all of those who have an interest in the corporation and thus likely to be supported by owners and workers alike. In contrast, corporate crime is almost always committed by only a few actors; virtually everyone else connected with the company can be assumed to condemn their malevolent deeds. So, it can be argued, a case about whether collectives have free speech rights has nothing to say about whether collectives can commit criminal actions.

Let us assume that the shareholders and most employees of a wrongdoing corporation are not complicit in any way with the

[9] See Peter Henning, Corporate Liability and the Potential for Rehabilitation, 46 Am. Crim. L. Rev. 1417 (2009).

[10] See Jim Hightower, Corporate America Speaking Out, TruthOut, Aug. 18, 2010, available at www.truth-out.org/jim-hightower-corporate-america-speaking-out (noting that, during the 2010 election campaign, the U.S. Chamber of Commerce planned to spend more than double what it spent in 2008, a presidential election year, with most of the money going to Republicans).

harmful corporate action and assume further that any criminal penalties imposed on the company would impose a loss on them disproportionate to any gain from the wrongdoing. This type of "unfair" collateral damage is unfortunate. But it infects all of criminal justice. When human offenders are sent away to prison, their families, complicit or not, are often left without a breadwinner and lose whatever emotional and other intangible sustenance their loved ones provide. In some cities, the criminal justice system deprives whole communities of a large percentage of their young males, in ways that can seriously damage the social structure.[11] A rehabilitative approach would significantly mitigate these types of harms in both the corporate and individual contexts, but if the system insists on retributive punishment, harm to innocents is inevitable.

[11] Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 Cal. L. Rev. 323, 345-47 (2004) (discussing collateral consequences of conviction on offenders, their communities, and their families).

At the same time, the collateral damage produced by criminal prosecution, independent of the stigma already caused by the fact that grave harm has occurred, has often been exaggerated in the corporate context. Those who oppose criminal liability for corporations often trot out the case of Arthur Andersen as an illustrative horror story. But even had there been no criminal charges Arthur Andersen would have suffered immensely. What is left of the company today is targeted with hundreds of civil lawsuits.[12] And the firm that gave a passing grade to the financial shenanigans of Enron – probably the most hated company in the United States – as well as the books of WorldCom – which suffered the biggest bankruptcy in history – would have been the bad boy of the accounting world regardless of whether it, or anyone in it, had ever been criminally prosecuted.

PROCEDURAL RIGHTS

While *Citizens United* reinforces the case in favor of corporate criminal liability, it also provides a basis for enhancing the procedural rights of corporations suspected of crime. The Court's First Amendment rationale could well foster more robust Fourth Amendment protections for corporations. And the decision might even support the case for a corporate privilege against self-incrimination, a right that, to date, courts have been unwilling to grant.

To see how the analysis might work, consider in more detail the Court's reasoning in *Citizens United*. The majority stated, "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[13] Since corporations are citizens too, the Court went on to hold, they too have a fundamental right to hold officials accountable and to speak and use information.

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[12] See Kathleen F. Brickey, Andersen's Fall from Grace, 81 Wash. U. L.Q. 917, 950-51 (2003).

[13] 130 S.Ct. at 898.

The privacy, property and autonomy interests protected by the Fourth Amendment are also "essential" to democracy. As Monrad Paulsen stated years ago, "All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained."[14] Further, as Neil Richards has demonstrated, the Fourth and First Amendments are intimately connected. In his article *Intellectual Privacy*, Richards explains why government efforts to obtain certain types of information or invade certain types of spaces infringe not only the expectations of privacy normally associated with the Fourth Amendment but also affect entitlements under the First Amendment. He makes a strong case for the proposition that this protection extends to any activities associated with freedom of thought and freedom to explore ideas – including communications, websites visited, books owned, and every term entered into a search engine.[15]

If corporations are entitled to freedom of speech, and protection from unregulated government intrusion is necessary to ensure that speech is freely exercised, the Fourth Amendment's application to corporations may need to be revisited. Right now, corporations have virtually no Fourth Amendment rights where it really counts.[16] The Court has held that a subpoena for corporate records is valid even if the government only seeks to satisfy "official curiosity," so long as "the inquiry is within the authority of the agency" and "the demand is not too indefinite."[17] Yet subpoenas can be used to obtain all sorts of information relevant to corporate speech, ranging from phone and computer logs to email messages and accounting records. One might object that corporations cannot have "intellectual

[14] Monrad G. Paulsen, The Exclusionary Rule and Misconduct by the Police, in Police Power and Individual Freedom 87, 97 (Claude R. Sowle ed., 1962).

[15] Neil Richards, Intellectual Privacy, 87 Texas Law Review 387 (2008).

[16] In some inspection situations, a warrant requirement exists, but individualized suspicion is not required for these warrants and exceptions to the requirement abound. See Charles Whitebread and Christopher Slobogin, Criminal Procedure: An Analysis of Cases and Concepts 319-324 (5th ed.2008).

[17] United States v. Morton Salt, 338 U.S. 532, 652 (1950).

privacy." But *Citizens United's* willingness to grant corporations the right "to inquire, to hear, to speak and to use information" puts a real crimp in that argument.

The same goes for the privilege against self-incrimination, which up to now has not applied to corporations because of the Supreme Court's 1906 decision in *Hale v. Henkel.*[18] *Hale's* apparent rationale for its conclusion – besides the obvious one that according corporations a right to remain silent could derail the regulatory state – was that, even if a corporation had a Fifth Amendment right, it could not be asserted by third parties (e.g., the corporate officers) nor by the corporation itself, given its non-human status. But if corporations can possess and exercise a right to speak (per *Citizens United*), they can possess and assert a right not to speak. It is true that, in *First Bank of Boston v. Bellotti*, the Court suggested that the Fifth Amendment self-incrimination privilege is a "purely personal" right and therefore is not meant to provide protection against coercion of a corporate entity.[19] But that statement ignored *Hale's* reluctance to decide definitively whether a corporation is a person for Fifth Amendment purposes. It also is hard to reconcile with the fact that, since *Hale*, the Court has extended to corporations the guarantees of the Double Jeopardy Clause and the Due Process Clause, both of which are also rights that the Fifth Amendment accords to "any person."[20]

These contentions about the Fourth and Fifth Amendment rights of corporations, if accepted, would require adjustments to fairly well-entrenched precedent. But the extra political power corporations now have because of *Citizens United* could help the courts see the light of day. If so, there could be other repercussions as well.[21]

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[18] 201 U.S. 43 (1906).

[19] 435 U.S. 765, 778 n.14 (1979).

[20] 201 U.S. at 70. See Mayer, supra note 3, at 618-19.

[21] One particularly startling possibility: corporations could have a "race." Long ago some courts took this idea quite seriously. See, e.g., *People's Pleasure Park Co., Inc. v. Rohleder,* 109 Va. 439, 63 S.E. 981 (1909). Although these decisions found that even all-black corporations are impersonal, colorless entities, they relied on assumptions rendered suspect by *Citizens United*, which might require extension of

BENEFITS FOR HUMANS?

Since this piece is already full of conjectures, it won't hurt to add a few more. Consider first a story from another domain. Federal Rule of Evidence 410 prohibits the trial use of statements made during the plea bargaining process unless the defendant somehow forfeits or waives the rule's protection. This rule benefits white collar and street criminals alike. But it exists solely because of the corporate bar. The history of Rule 410's genesis makes clear that, without the political clout of the latter group, the rule's proponents would never had prevailed over a very hostile Department of Justice.[22]

It would be nice to think that the same dynamic could occur if corporations began flexing their post-*Citizens United* muscle in the criminal justice system. If so, perhaps pro-defendant changes in strict liability doctrine brought on by litigation in the corporate context would lead to elimination of the *Pinkerton* and felony murder rules that permit conviction of humans for accidental and non-negligent crime.[23] If corporations are able to convince the courts that recovery rather than ostracism is the best way of reducing recidivism, perhaps sentences for human criminals would become more focused on rehabilitation than retribution. Maybe government efforts to access personal information about human suspects from banks, phone companies and other third party institutions (an investigatory practice that is currently unrestricted by the Constitution[24]) would require more justification if corporate records are accorded greater protection under the Fourth Amendment. And perhaps recognition of a corporate Fifth Amendment would not only rejuve-

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anti-discrimination laws to raced or gendered corporations.

[22] See Christopher Slobogin, The Story of Rule 410 and United States v. Mezzanatto: Using Plea Statements at Trial, in Evidence Stories 103, 105-08 (2006).

[23] For a description of the strict liability regimes established by Pinkerton v. United States, 328 U.S. 640 (1948) and the felony murder rule, see LaFave, supra note 7, at 722-723 & 790-796.

[24] See United States v. Miller, 425 U.S. 735 (1976), and Smith v. Maryland, 442 U.S. 735 (1979).

nate legal resistance to the rat-out-your-employees deals that have, in recent times, routinely been forced on corporate officers,[25] but also percolate down to the back rooms of stationhouses and reduce the coercive pre-plea bargaining that goes on between police and human street criminals.

But probably not.

[25] See Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 853 (2007).