

Written Testimony of

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before the

The Senate Judiciary Committee

on

“The Adequacy of Criminal Intent Standards in Federal Prosecutions”

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Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today. I am Robert Weissman, president of Public Citizen. Public Citizen is a national consumer advocacy and public interest organization with more than 400,000 members and supporters. For 45 years, we have advocated with some considerable success for stronger health, safety and consumer protection measures, as well as curbs on corporate wrongdoing.

Public Citizen co-chairs the Coalition for Sensible Safeguards (CSS), an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations united to protect health, safety, consumer and environmental standards. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Today's hearing on the adequacy of criminal intent standards takes place against the backdrop of a long overdue effort to address the urgent problem of overincarceration. The lives and well-being of too many young men and women of color, too many families and too many communities have been devastated by a wrongheaded experiment in throwing massive numbers of people in jail for long sentences for low-level crimes, especially nonviolent and victimless ones. It's past time to remedy this injustice, and it's genuinely inspiring to see bipartisan commitment to doing so.

It would be a serious mistake, however, to include default measures related to criminal intent in or along with bipartisan criminal justice reform measures addressing overincarceration, nor should a so-called default mens rea (state of mind) provision move forward on its own.

Various proposals to establish a default mens rea requirement have been introduced in the House and Senate. In this testimony, I do not focus on the particulars of these proposals – although the details are extremely important in determining scope, complexity, uncertainty and overall impact. Rather, my focus is on the core idea of these proposals, which is to establish “willfulness” – an intent to violate the law – as the blanket standard for criminal prosecution, unless a statute and regulation specifically establishes an alternative.

It may well be that de fault mens rea proposals would have far-reaching, presumably unintended effects on street crime prosecution. Federal statutory crimes with no mens rea standard include murder by a federal prisoner (18 USC 1118), obstruction of sex trafficking investigation (18 U.S.C. 1591(d)), bank robbery (18 USC 2113), and use of weapons of mass destruction (18 U.S.C. 2332(a)).

However, the clear target of default mens rea proposals are public health and public welfare regulatory crimes, primarily crimes committed by businesses and corporate officials, and these are the focus of my testimony.

As I discuss in some detail, corporate crime is categorically different than street crime. Corporate wrongdoing has the potential to inflict enormous harm on society, and there is sound rationale for imposing an affirmative duty on corporations and executives to know the law and ensure compliance.

A blanket willfulness standard would have predictably damaging and far-reaching effects on corporate criminal prosecution, at a time when we should be searching for more aggressive measures to curb corporate wrongdoing and hold wrongdoers to account. As I discuss in more detail, it would make it far harder for prosecutors to bring cases against corporate wrongdoers, though there are already too few such cases. It would create very substantial problems of proof. It would incentivize corporations and corporate officials to pursue strategic ignorance of the law and company actions, in order to avoid criminal liability. And it risks giving corporations freedom to escape prosecution for reckless and life-threatening acts.

In short, such a blanket measure would make it much harder for prosecutors to criminally prosecute companies and individual executives responsible for the manufacture of dangerous drugs and food that kill or sicken consumers, or who act otherwise to imperil consumers, swindle the public, endanger their workers, or poison the environment. It would insulate reckless and willfully blind behavior from prosecution and violate the basic precept that “ignorance of the law is no defense.”

The first section of this testimony highlights differences in corporate and street crime prosecution, and highlights the far-reaching harms caused by corporate wrongdoing. The second section provides an overview of standard practices in corporate crime prosecution (and non-prosecution) and offers three mini case studies. The third section critically analyzes how a default willfulness standard would negatively impact corporate crime prosecution. The final section offers affirmative recommendations for corporate criminal prosecution reform, including a call for an investigation into why there are so few individual prosecutions in high-profile corporate crime cases. One theory in this regard is that prosecutors are already deterred from action by real or perceived existing difficulties in establishing mens rea. The testimony concludes by noting the stakes in corporate crime prosecution. It urges rejection of a blanket willfulness standard, fearing that it will remove an important deterrent to corporate wrongdoing, at great cost to the welfare of the American people.

I. Corporate Crime is Different

Corporate criminal prosecution is materially different than street crime prosecution – 180 degrees different – in ways that make the blanket willfulness concept especially dangerous.

First, there are far too few, not too many, corporate criminal prosecutions. Only 237 corporations were prosecuted in 2014, according to data compiled by the Transactional Records Access Clearinghouse, a 29 percent drop from 2004, when an already low 335 prosecutions occurred.¹ More generally, regulatory crimes make up only a tiny portion of the federal criminal caseload. There were only 2,171 regulatory crime prosecutions in 2011, 2 percent of the federal total – as compared to 2,925 such prosecutions in 1980, when they made up 7 percent of the federal total.²

¹Transactional Records Access Clearinghouse, “Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations,” October 13, 2015, available at: <<http://trac.syr.edu/tracreports/crim/406>>.

² Susan Klein and Ingrid Grobey, “Debunking Claims of Over-Federalization of Criminal Law,” Emory Law Journal, Vol. 62, Issue 1 (2012-2013), available at: <http://law.emory.edu/elj/content/volume-62/issue-1/articles/debunking-claims-over-federalization.html>.

The most dramatic evidence of the paucity of corporate criminal prosecution is the utter failure to prosecute anyone on Wall Street, or any of the financial giants, for the wrongdoing that led to the 2008 crash and ensuing Great Recession.³ Indeed, widespread illegality by Big Banks and Wall Street firms is probably far worse than we know, with Wall Street professionals themselves saying that criminal behavior is rampant in the industry.⁴

To a considerable extent, deferred prosecutions – in which the Justice Department agrees not to prosecute in exchange for a promise by corporate defendants not to violate the law in the future – have replaced actual prosecutions of corporations, undermining any kind of deterrent effect. GM is only the latest, egregious such example,⁵ with dozens of such deals entered into every year. Successive deferred prosecution deals for repeat offenders – i.e., even for corporations that violated their previous promise not to violate the law again – are routine.⁶ Notorious recent deferred prosecution deals include GM, Pfizer, Bristol-Myers-Squibb and Prudential, among many others.⁷

Second, where nonviolent and victimless crimes don't directly hurt anyone other than the perpetrator, corporate crime exacts a massive, often violent, toll in lives lost, injuries inflicted, destruction of the environment, consumers ripped off and much more. Consider just this sampling:

- Wall Street wrongdoing spurred the Great Recession, costing the economy more than \$20 trillion, and imposing devastating pain on families, communities and national well-being.⁸
- The New England Compounding Center's contaminated steroid injections killed at least 64 individuals, sickening hundreds more.⁹
- General Motors' ignition switch defect is responsible for the deaths of an acknowledged 174 people, and likely many more.
- Health care fraud costs the U.S. government an estimated \$100 billion annually.¹⁰

³ There have been a series of highly touted civil settlements with Wall Street firms in connection with pervasive mortgage abuses, but the Wall Street giants have escaped criminal prosecution for abuses that led to the worst economic downturn since the Great Depression. See Matthew Goldstein, "Goldman to Pay Up to \$5 Billion to Settle Claims of Faulty Mortgages," New York Times, January 14, 2016, available at: http://www.nytimes.com/2016/01/15/business/dealbook/goldman-to-pay-5-billion-to-settle-claims-of-faulty-mortgages.html?_r=0.

⁴ University of Notre Dame and Labaton Sucharow LLP, *The Street, the Bull and the Crisis*, May 2015, Available from: www.secwhistlebloweradvocate.com/LiteratureRetrieve.aspx?ID=224757.

⁵ General Motors Company – Deferred Prosecution Agreement, September 16, 2015, available at: <http://www.justice.gov/usao-sdny/file/772261/download>.

⁶ Elizabeth Ben-Ishai and Robert Weissman, *Justice Deferred -- and Denied*. Public Citizen, 2016. The most detailed account and analysis of deferred prosecution agreements is contained in

⁷ The most detailed account and analysis of deferred prosecution agreements is contained in Brandon Garrett, *Too Big To Jail: How Prosecutors Compromise with Corporations*, Cambridge, MA: Harvard University Press, 2014. Professor Garrett maintains a database of such deals, available at: http://lib.law.virginia.edu/Garrett/prosecution_agreements/DP.

⁸ U.S. Government Accountability Office, *Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act*, January 2013, p. 12. Available at: <http://www.gao.gov/products/GAO-13-180>.

⁹ Department of Justice, "14 Indicted in Connection with New England Compounding Center and Nationwide Fungal Meningitis Outbreak," December 17, 2014, available at: <http://www.justice.gov/opa/pr/14-indicted-connection-new-england-compounding-center-and-nationwide-fungal-meningitis>.

- Military contractor fraud is pervasive, with wartime fraud in Iraq and Afghanistan estimated to have cost taxpayers as much as \$60 billion.¹¹
- Jensen Farms' shipment of Listeria-contaminated cantaloupe resulted in at least 33 deaths.¹²
- Peanut Corporation of America's 2008 shipment of peanut paste contaminated with salmonella resulted in poisoning of more than 700 people and the deaths of nine.¹³
- Quality Eggs' sale of salmonella-contaminated eggs sent almost 2,000 people to the hospital.¹⁴
- Freedom Industries' poisoning of the Elk River in West Virginia contaminated the drinking water for 300,000 people.¹⁵
- Roughly 50,000 people die annually from occupational disease, an unknown portion of which are due to violation of existing workplace health standards.¹⁶
- The explosion of BP's Deepwater Horizon killed 11 workers and the ensuing oil gusher created what is arguably the worst environmental disaster in U.S. history.¹⁷
- Volkswagen rigged its diesel cars to cheat on emissions tests, resulting in the spewing into the air of nitrogen oxide at rates 40 times higher than permitted;¹⁸ one study found the resulting excess emissions to be responsible for 60 deaths.¹⁹

Third, unlike street criminals, corporate criminal defendants are powerful and well-resourced. Indeed, the criminal justice system they inhabit is entirely separate from the system that churns hundreds of thousands of non-violent offenders from the courts into prison each year. Prosecutors identify with white-collar criminals and generally are reluctant, not over-eager, to

¹⁰ See Department of Justice, <http://www.justice.gov/criminal-fraud/health-care-fraud-unit>.

¹¹ Commission on Wartime Contracting in Iraq and Afghanistan, "Transforming Wartime Contracting," August 2011, available at:

<http://cybercemetery.unt.edu/archive/cwc/20110929213820/http://www.wartimecontracting.gov/docs/CWC_Final_Report-lowres.pdf>.

¹² Department of Justice, "Eric And Ryan Jensen Plead Guilty To All Counts Of Introducing Tainted Cantaloupe Into Interstate Commerce," October 22, 2013, available at: <<http://www.justice.gov/usao-co/pr/eric-and-ryan-jensen-plead-guilty-all-counts-introducing-tainted-cantaloupe-interstate>>.

¹³ Department of Justice, "Former Peanut Company President Receives Largest Criminal Sentence in Food Safety Case; Two Others also Sentenced for Their Roles in Salmonella-Tainted Peanut Product Outbreak," September 21, 2015, available at: <<http://www.justice.gov/opa/pr/former-peanut-company-president-receives-largest-criminal-sentence-food-safety-case-two>>.

¹⁴ Department of Justice, "Quality Egg, Company Owner and Top Executive Sentenced in Connection with Distribution of Adulterated Eggs," April 13, 2015, <<http://www.justice.gov/opa/pr/quality-egg-company-owner-and-top-executive-sentenced-connection-distribution-adulterated>>.

¹⁵ Department of Justice, "Freedom Industries Officials Indicted in January Chemical Spill," December 17, 2014, available at: <<http://www.justice.gov/opa/pr/freedom-industries-officials-indicted-january-chemical-spill>>.

¹⁶ K. Steenland, C. Burnett, N. Lalich, E. Ward and J. Hurrell, "Dying for work: the magnitude of US mortality from selected causes of death associated with occupation," *Am. J. Ind. Med.* 2003 May; 43(5):461-482.

¹⁷ Department of Justice, "BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident," November 15, 2012, available at: <http://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental>.

¹⁸ Coral Davenport and Jack Ewing, "Volkswagen Is Said to Cheat on Diesel Emissions; U.S. to Order Big Recall," *New York Times*, September 18, 2015, available at: <http://www.nytimes.com/2015/09/19/business/volkswagen-is-ordered-to-recall-nearly-500000-vehicles-over-emissions-software.html>.

¹⁹ Jennifer Chu, "Study: Volkswagen's emissions cheat to cause 60 premature deaths in U.S.," *MIT News*, October 28, 2015, available at: <http://news.mit.edu/2015/volkswagen-emissions-cheat-cause-60-premature-deaths-1029>.

prosecute. They fear the collateral consequences of prosecution, such as the impact on jobs and the economy. By contrast, impacts on family and loved ones are rarely a factor in consideration of street crime prosecution. Corporate criminal defendants are typically very able to defend themselves with the best legal counsel that meet or exceed resources available to prosecutors. And in sharpest contrast to street criminals, corporate criminals are able to shape the criminal law itself, through lobbying, campaign contributions and other activities that influence the establishment of criminal regulatory standards.

Lastly, corporate criminals are the utmost rational actors. Weak enforcement and lax standards, as we have seen over and over, will invite more corporate crime and wrongdoing. Tougher standards with meaningful enforcement will deter corporate criminals. It's that simple.

II. Corporate Criminal Prosecution in Practice

A. General Mens Rea Requirements

The story that makes the case for a blanket willfulness standard is that many defendants are finding themselves criminally charged, and facing the threat of jail time, for innocent or accidental activities that they did not and should not reasonably have known were criminal. According to this account, strict liability crimes – those not requiring a showing of intent – are pervasive and increasing, with resultant prosecutions transgressing basic norms of fairness. Yet while there may well be anecdotes that buttress this story, there is no evidence that it is more than an occasional happenstance, if that.

As noted, there are only a couple thousand federal regulatory prosecutions a year, and the number is substantially lower than it was three decades ago. For the reasons identified, prosecutors are generally reluctant to prosecute; when they do bring cases, they typically do so with a care and consideration for familial and perceived economic impacts not generally present in street crime cases. In short, prosecutors typically proceed mindfully in regulatory crime cases.

There are a number of criminal misdemeanors that do not require a mens rea showing. However, it is generally Justice Department practice not to prosecute these cases unless the defendant at least was negligent.

Federal felony statutes generally require at least a showing that the defendant acted “knowingly” – with intentionality. Many also require showing that the defendant acted “willfully” – with awareness of the illegality of his or her actions. Some felony statutes, including those noted below, do not include a mens rea element. However, it is generally Justice Department practice not to prosecute those cases unless the defendant at least acted knowingly.

In sum, in law and practice, defendants are rarely prosecuted without a showing of intent, or at minimum a showing of negligence in misdemeanor cases.

B. Case Studies

Before proceeding to analyze how a willfulness standard might affect corporate and regulatory criminal prosecution, it is worth considering examples of some recent corporate crime prosecutions (and non-prosecutions). Below follow three very brief summaries of recent cases,

intended to provide a real-world context for the kinds of wrongdoing that would actually be affected by a blanket willfulness intent standard.

GM Ignition Switch: Starting in 2002, GM sold a host of cars containing a faulty ignition switch that would suddenly shut off the engine during driving, and prevent airbags from deploying in the event of a crash. GM has acknowledged that 174 people have died as a result of ignition switch failures, and the actual number may be much higher.

The problems with the General Motors ignition switch began more than a decade before defective cars were finally recalled. “During the time between GM’s approval of the low-torque ignition switch in 2002 and its 2014 recall of 2.6 million vehicles affected by the ignition switch defect, key facts were withheld by, or unrecognized within, GM, making detection of the connection between the faulty ignition switch and non-deployments of air bags difficult for both GM and NHTSA, and leading to a tragic delay in instituting a recall,” a National Highway Transportation and Safety Administration (NHTSA) review found. “From 2007 to 2013, GM faced litigation on several more air bag non-deployment fatalities and was repeatedly warned by outside counsel that a defect existed. However, GM failed to make a defect determination and did not provide the required notification to NHTSA.”²⁰ By spring 2012, the Department of Justice concluded and GM has agreed not to contest, the company definitively knew about the ignition switch failure and its consequences. Yet, it did not disclose the defect for an additional 20 months. “GM’s delay in disclosing the defect at issue was the product of actions by certain personnel responsible for shepherding safety defects through GM’s internal recall process, who delayed the recall until GM could fully package, present, explain, and handle the deadly problem,” according to the Department of Justice.²¹

In September 2015, GM entered into a deferred prosecution agreement with the Justice Department. Simultaneous with the filing of the deferred prosecution agreement, prosecutors filed a criminal information against the company, alleging it had illegally concealed information from NHTSA (under 18 U.S.C. 1001) and engaged in wire fraud by misleading consumers as to the truth about the ignition switch.²² GM agreed to pay \$900 million in penalties as part of the deal. No individuals have been charged in connection with the case, and it is not expected that any will be.

Prosecutors were effusive in praising GM for its cooperation after it finally disclosed the defect, and this plainly impacted the decision to treat the company so lightly. It is notable in reflecting on corporate criminal prosecution that, for a period of six years, GM had notice of the problem with the ignition switch due to litigation with accident victims, and entered into

²⁰ National Highway Traffic Safety Administration, NHTSA’s Path Forward, June 2015, available at: www.nhtsa.gov/staticfiles/communications/pdf/nhtsa-path-forward.pdf.

²¹ Department of Justice, “Manhattan U.S. Attorney Announces Criminal Charges Against General Motors And Deferred Prosecution Agreement With \$900 Million Forfeiture,” September 17, 2015, available at: <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred>.

²² United States of America v. General Motors Company, Information, September 17, 2015, available at: <http://www.justice.gov/usao-sdny/file/772301/download>.

civil settlement deals that required information about the defect be sealed;²³ yet prosecutors did not allege the company had knowledge of the defect during this period. It is notable as well that all reports indicate no individual will be held criminally responsible for any of the 174-plus deaths resulting from the defect and cover-up.

It turns out that a number of individual drivers were prosecuted for manslaughter for crashes that were in fact attributable to the ignition switch defect; the contrast with the ultimate treatment of GM could not be starker in showing the double standards applied to corporate criminal prosecutions and in underscoring the challenges in prosecuting individuals involved in such cases.²⁴

Risperdal: Risperdal (generic name: risperidone), was approved for sale as an anti-psychotic in 1992, based on short-term trials with schizophrenic patients. The drug is sold by Janssen, now a subsidiary of Johnson & Johnson. It is associated with serious side effects, including potentially fatal side effects, especially among the elderly. Its initial labeling indicated that it had been insufficiently tested on the elderly to determine efficacy in that population. In January 1999, the FDA informed Janssen that specific Risperdal advertising pieces for geriatric patients were false and misleading. In March, the agency told the company that it disagreed with the company's assertion that the FDA had approved "relatively broad indications for this particular class of drugs." In January 1999, the agency also rejected a company request to expand indications to cover behavioral disturbances in dementia. In April 2005, the agency asked Janssen to place a black box warning on the Risperdal label, highlighting the risk of increased mortality in patients with dementia-related psychosis.²⁵

Nonetheless, Risperdal was widely used for patients with dementia, a far more common condition than schizophrenia. Sales of Risperdal were substantial, hitting \$1.7 billion in 2005 alone, and constituting Johnson & Johnson's second largest selling drug in 2000.

Janssen heavily marketed Risperdal. From 1998 to 2005, according to government prosecutors, Janssen maintained an "ElderCare" sales force to market Risperdal and two other drugs to prescribers who treated elderly patients. The Justice Department charged that the company improperly marketed the drug for treatment of dementia. "Janssen's team for Risperdal, also known as the Brand Team, knew that approximately 90% of the use of Risperdal in patients aged 65 and over was by patients who were not diagnosed with schizophrenia." The indictment alleges that Janssen even provided monetary incentives to sales representatives to market Risperdal for unapproved uses.

From 1998 to 2002, the company encouraged its ElderCare sales representatives to market Risperdal for treatment of non-psychotic symptoms such as hostility, excitement, agitation, aggression, anxiety and depression, even if these arose in non-psychotic patients, including

²³ Bill Vlasic, "Inquiry by General Motors Is Said to Focus on Its Lawyers," New York Times, May 17, 2014, available at: <http://www.nytimes.com/2014/05/18/business/inquiries-at-gm-are-said-to-focus-on-its-legal-unit.html>.

²⁴ See Jeff Bennett, "Texas Woman Driving GM Recalled Car Cleared In Death of Fiancé," Wall Street Journal, November 24, 2014, available at: <http://www.wsj.com/articles/gm-confirms-texas-accident-linked-to-faulty-ignition-switch-1416842193>.

²⁵ This account is drawn from: United States of America v. Janssen Pharmaceuticals, Information, November 4, 2013, available at: <http://www.justice.gov/sites/default/files/opa/legacy/2013/11/04/janssen-info.pdf>.

patients with dementia. The company referred to this as a “symptoms-based” message. Sales aids from the companies highlighted these behaviors and intentionally did not mention schizophrenia.

The overall result was massively increased sales for Janssen, the waste of taxpayer, consumer and insurance payer money on drugs for unapproved uses, and likely the endangerment of untold numbers of patients wrongly prescribed the drug. In November 2013, Janssen Pharmaceuticals, Inc. pled guilty to one misdemeanor charge of introducing misbranded drugs into interstate commerce. It stipulated to many of the key facts in the government’s criminal charge, but disputed the period during which improper marketing occurred and the extent of the improper marketing. The company agreed to pay a \$400 million criminal fine, as part of a \$2.2 billion global settlement of civil and criminal charges related to Risperdal and two other drugs.²⁶ The case originated as a False Claims Act case, filed initially by whistleblowers who provided evidence of Janssen’s wrongdoing. No individuals were criminally charged in connection with the case.

Based on the facts alleged in the criminal information, it is hard to see how the \$2.2 billion settlement – the largest ever in a False Claims Act case – disgorges from Johnson & Johnson its unjust gains. Although the FDA was clear throughout its dealings with Janssen that the drug should not be marketed beyond its relatively narrow indications, Janssen argued and sought for a period of years to justify or obtain permission for broader marketing – a set of facts that might have created difficult problems of proof if prosecutors had needed to prove willfulness.

Peanut Corporation of America: A fall 2008 salmonella outbreak, one of the largest in history, resulted in the deaths of nine people and sickened 714. About one-quarter of those made ill were hospitalized and half of the ill were young children. The outbreak was traced to peanut products produced by the Peanut Corporation of America (PCA) from its facilities in Blakely, Georgia, and Plainview, Texas. The company made peanut paste used in a wide variety of products, from cereal to desserts to pet food. Large food producers such as Kellogg’s and Nestlé had been PCA customers, as was the federal government, which bought peanut products for low-income schools, the military, and victims qualifying for disaster relief. It turned out also that PCA managers routinely shipped products accompanied by paperwork that was deliberately falsified. PCA products tested positive for salmonella 12 times in 2007 and 2008, but the company sold these lots to customers anyway after a retest produced negative results. Plant managers went so far as to use test results from previously shipped batches to accompany batches that had not been tested.²⁷

On February 21, 2013, the U.S. Attorney for the Middle District of Georgia indicted Stewart Parnell, owner and president of PCA; Michael Parnell, his brother and a food broker who

²⁶ Department of Justice, “Johnson & Johnson to Pay More Than \$2.2 Billion to Resolve Criminal and Civil Investigations,” November 4, 2013, available at: <http://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations>.

²⁷ This summary is based on the fuller account provided by Rena Steinzor, “Federal White Collar Crime: Six Case Studies Drawn from Ongoing Prosecutions to Protect Public Health, Worker and Consumer Safety, and the Environment,” Center for Progressive Reform, November 2015, available at: http://progressivereform.org/articles/Steinzor_Federal_Crimes_1507_Final.pdf.

worked on behalf of PCA; Samuel Lightsey, operations manager of PCA's Blakely, Georgia, plant; and Mary Wilkerson, quality assurance manager at Blakely. These individuals were charged with multiple counts of conspiracy, introduction of adulterated food into interstate commerce, interstate shipments fraud, wire fraud and obstruction of justice.

The indictment contained stunning internal communications. For example, in one email exchange, the defendants "planned to falsely state to FDA officials that the product had been rejected because of size issues when in fact it had been rejected because it contained metal fragments. ... Stewart Parnell instructed that the explanation to be given to the FDA be "SIZE ISSUES OF THE CUT." Stewart Parnell further stated: "I don't want to mention metal."²⁸

In another exchange, Mary Wilkerson wrote: "we have a problem with the granulation line and salmonella at least every other week if not every week, but when retested by a different lab it comes back ok."

Stewart Parnell was sentenced to 28 years in prison on September 22, 2015, the most severe sentence ever handed down in a food safety case; the other defendants received lesser terms.²⁹

The Peanut Corporation of America case stands out as an exception in the corporate crime field, with key executives criminally prosecuted and given a meaningful sentence including significant prison time. The facts of the case illustrate how pernicious is corporate wrongdoing, and how it can have very real and tragic consequences for innocent and unwitting consumers and others.

These three examples hopefully highlight a number of features of real-world corporate crime and prosecution. First, the cases often involve systematic wrongdoing that plays out over a period of months or years, not a single act; they are the result of intentional and concerted activity. Second, corporate activity is typically characterized by diffuse responsibility, decentralized action and erratic information-sharing. Third, corporate defendants are frequently able to escape criminal penalties sufficient to disgorge their ill-gotten gains, let alone to deter future bad acts. Fourth, there are few individual prosecutions in connection with the most serious cases of corporate crime and wrongdoing. The example of the Peanut Corporation of America is an exception to many of the hallmarks of corporate crime cases except for perhaps the most important: the term "regulatory crime" disguises the severity of a great deal of corporate crime, and the tragic and horrific toll on its victims.

²⁸ United States of America v. Stewart Parnell, et. al., Indictment, February 13, 2013, available at: <http://www.justice.gov/iso/opa/resources/61201322111426350488.pdf#page=36&zoom=auto,-65,792>.

²⁹ Department of Justice, "Former Peanut Company President Receives Largest Criminal Sentence in Food Safety Case; Two Others also Sentenced for Their Roles in Salmonella-Tainted Peanut Product Outbreak," September 21, 2015, available at: <http://www.justice.gov/opa/pr/former-peanut-company-president-receives-largest-criminal-sentence-food-safety-case-two>.

III. The Impact of a Willful Standard on Corporate Criminal Prosecution

Although most corporate criminal statutes include an explicit mens rea requirement, a number of the key statutes upon which prosecutors rely to hold corporations criminally liable for wrongdoing do not. These include:

- Mail and wire fraud, 18 U.S.C. 1341³⁰ and 18 U.S.C. 1343,³¹ prohibiting the use of the postal service or interstate telephone or electronic communications for any scheme to defraud.
- The adulteration or misbranding of food, drug and medical devices,³² 21 U.S.C. 331(a) and (b).
- Racketeering Influenced and Corruption Organization (RICO) Act violations, 18 U.S.C. 1961 – 1968.³³

³⁰ “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 1522)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”

³¹ “Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”

³² “The following acts and the causing thereof are prohibited: (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded. (b) The adulteration or misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce.”

³³ RICO’s prohibited acts are specified in 18 U.S.C. 1962: “(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

- Conspiracy,³⁴ 18 U.S.C. 371.
- Illegal restraint of trade,³⁵ 15 U.S.C. 1.

Although these statutes do not include an explicit mens rea standard, most of them do in practice incorporate a knowing intent element, either because it is embedded in the nature of the offense, because of Department of Justice practice of not prosecuting cases in the absence of some demonstrated defendant intent, or because of judicial ascertainment of intent standards. In the case of Sherman Act illegal restraint of trade, for example, the Supreme Court has ruled that an intent element must be present, even though the statute contains no such overt requirement.³⁶ RICO claims do not include an intent element in their own right, but do derive an intent standard from the underlying crimes that are alleged to be furthered by an illegal racketeering organization, and it is Department of Justice policy not to bring RICO criminal cases unless it can be shown that a defendant acted knowingly.³⁷ Mail and wire fraud, and other fraud statutes, commonly do not include intent standards, but some intent requirement is implicit in the broad concept of false representations, deceit and dishonesty³⁸ – fraud does not encompass good-faith mistake. Accordingly, courts have commonly found that mail and wire fraud involves some intent to deceive. For example, in *U.S. v. Hawkey*,³⁹ the Eighth Circuit noted that the scheme to defraud "need not be fraudulent on its face but must involve some sort of fraudulent

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

³⁴ "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

³⁵ "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

³⁶ *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

³⁷ Criminal RICO: A Manual for Prosecutors, Fifth Revised Version, Prepared by the Staff of the Organized Crime and Racketeering Section U.S. Department of Justice, October 2009, available at:

<http://www.justice.gov/sites/default/files/criminal/legacy/2010/04/11/2009rico-manual.pdf>. ("Every court that has considered the issue has held that RICO does not require any mens rea or scienter element beyond what the predicate offenses require. Therefore, willfulness or other 409 specific intent is not an element of a RICO offense; however, if any of the predicate offenses require proof of willfulness or specific intent then such requirement must be met regarding that predicate offense. Nevertheless, it is the policy of the Organized Crime and Racketeering Section to allege 410 and prove at least that the RICO defendant acted knowingly or intentionally to eliminate any issue that the RICO defendant did not have a requisite criminal intent." At 284.)

³⁸ See U.S. Attorneys Criminal Resource Manual 1007, available at: <http://www.justice.gov/usam/criminal-resource-manual-1007-fraud>.

³⁹ 148 F.3d 970 (8th Cir. 1998)

misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension."⁴⁰

That law and practice requires an intent standard in these core prosecution tools for addressing regulatory and corporate crime – even in the absence of an explicit statutory requirement – underscores that there is no need for a uniform, default mens rea statute.

On the other hand, it does not follow that no harms would flow from imposing a default mens rea requirement. A blanket mens rea statute will meaningfully, dangerously and misguidedly undermine corporate criminal prosecution. It will remove criminal incentives for corporations to follow the law and make it much more likely that they operate at the edges of illegality – as well as in the zone of illegality. And it will thereby leave our country less healthy and safe, more polluted, more prone to corporate fraud and rip-offs.

A number of interconnected, but discrete, factors explain why the move to a default mens rea standard of willfulness is so troubling.

First, a willful standard goes far beyond the knowing requirement that is the effective default for corporate crime. Willfulness generally requires not just intent to commit a wrongful act, but an intent to violate the law. Although willfulness is a required element in many regulatory crimes, it is a higher standard, and in many contexts a considerably more difficult one to meet.

Second, the nature of the corporation and corporate crime may pose special problems of proof in establishing willfulness. Diffuse responsibility and decentralized decision-making may make it difficult to establish who, exactly, made a decision to break the law, causing problems both for prosecution of individual executives and the corporation itself. The GM case highlights this point, where the company failed to respond to warnings from its counsel about the ignition switch defect, and where the Department of Justice did not allege effective company knowledge for a period of at least five years after the company was entering confidential settlements related to the defect.

Third, while it is a basic principle of the criminal law that “ignorance is no excuse,” a default mens rea standard threatens to create an “ignorance of the law” defense, and to encourage corporation and corporate officials to cultivate strategic ignorance of criminal law standards. This would be true both for technical, regulatory standards relating to matters such as health, safety and financial protections, and for behavioral standards such as what constitutes fraud. In the Risperdal case, the persistence of Janssen in seeking broad marketing approval and in claiming broad marketing authorization illustrates the problems of proof in showing willfulness, as the company contested what standards were supposed to apply even as it transgressed FDA instructions.

Fourth, a willfulness standard will call into question the viability of “willful blindness” as satisfying intent standards. The diffuse responsibility inherent in large corporations enables executives to be adept at willful blindness as to wrongful acts committed by the corporation, as well as to the potential criminal illegality of corporate wrongdoing. Top executives may

⁴⁰ Id. citing *U.S. v. Manzer*, 69 F3d 222 (8th Cir. 1995). See also, for example, *United States v. Profit*, 49 F.3d 404 (8th Cir. 1995) (finding an intent to defraud element in wire fraud).

intentionally avoid knowing details about company practices; corporations collectively may act so that information of wrongdoing is not disseminated to decision-makers who might correct it.

By way of illustration, consider the much-touted Sarbanes-Oxley requirement for CEOs to certify the truthfulness of corporate financial reports, and the failure of prosecutors to bring successful prosecutions for false certifications. Only a few such cases have been filed, and they mostly, or perhaps entirely, failed. The reason, reports Reuters' Alison Frankel, is that "most large corporations put in place multiple layers of subcertification, requiring lower-level officials to attest to the accuracy of financial reports all the way up the chain to the CEO and CFO." This is a good practice, and may improve actual compliance. But it has another effect, as well: "[S]ubcertifications also insulate CEOs and CFOs from false certification charges. To prove SOX charges, prosecutors have to show that top officials signed off on financial reports they knew to be false. That's much tougher when CEOs and CFOs can point to the certifications they received from lower-rung execs. 'Whether that's foolproof, I don't know. But I've certainly argued it to prosecutors,' said [Karen] Seymour, who's now in private practice at Sullivan & Cromwell [and previously served as chief of the criminal division of the U.S. Attorney's Office in Manhattan]. 'I've said, Everything he knew, he relied on other people to tell him.'"⁴¹

Fifth, a default willfulness mens rea standard, if applied to every element of a crime, will at minimum create far-reaching legal uncertainty, as prosecutors, defense counsel and courts grapple with complicated statutory interpretation and conceptual confusion about what it means to apply willfulness to each element of a crime.

Sixth, a willfulness standard will call into question the ability of prosecutors to bring cases based on reckless activity. Recklessness is well-established in the criminal law as satisfying mens rea requirements, notably in the case of manslaughter. It characterizes the criminal intent in many industrial disasters and product defect cases, where corporations did not intend to injure or expose anyone to danger but in fact did so through reckless behavior. In the case of GM, it was ultimately charged with intentionally concealing information from regulators and the public, but its underlying act of wrongdoing was recklessly selling defective cars.

Seventh, a willfulness standard will undermine viability of the "responsible corporate officer" doctrine, which defines senior managers as a category of defendant worth of punishment when they have the responsibility for preventing a crime, but fail to take action. Because it makes individual managers with the power to ensure that companies adopt a safety culture, both with respect to workers and the public, the responsible corporate officer, first developed by the Supreme Court and now contained in such statutes as the Clean Air Act,⁴² provides clear incentives for programs that ensure compliance and prevent threats to public health and well-being. Prosecutors may be able to prove willfulness in certain cases, but the whole purpose of the responsible corporate officer doctrine is to punish managers and executives for actions *not* taken – an entirely different approach than contemplated by willfulness requirements.

⁴¹ Alison Frankel, "Sarbanes-Oxley's lost promise: Why CEOs haven't been prosecuted," Reuters, July 27, 2012, available at: <http://blogs.reuters.com/alison-frankel/2012/07/27/sarbanes-oxleys-lost-promise-why-ceos-havent-been-prosecuted>.

⁴² *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943). The doctrine was reiterated in *United States v. Park*. *United States v. Park*, 421 U.S. 658, 675 (1975). See, also, 42 U.S.C. 7413(c)(6).

Finally, regulatory and corporate criminal law aims to place a duty on the corporation to ensure compliance – or, in other words, to ensure it is not endangering consumers or the environment, ripping off people or the government. As the most powerful actors in a market economy, corporations and their officials must be incentivized to know what they are doing, know the law, and know that their actions are legally compliant. In practical terms, there is absolutely nothing a consumer can do to ensure the drug they take has not been adulterated. The affirmative duty must rest with the corporation, meaning they should be criminally liable for selling an adulterated drug, for example, irrespective of whether they intended to violate the law in doing so. A blanket willfulness rule would undercut this incentive structure and assignment of affirmative duties.

The combined effect of these impacts would be a crushing blow against the ability of prosecutors to hold criminally liable the most powerful forces in society. In many cases, prosecutors would simply decide not file criminal charges against, or even investigate, large corporations and their officials for acts of wrongdoing – dramatically exacerbating an already existing problem. They would reasonably calculate it is too difficult to bring successful cases against exceptionally well-resourced defendants when they must also meet difficult standards of proof and overcome significant legal uncertainty. To the extent they do bring cases, prosecutors are likely to move lower down the corporate hierarchy, focusing their efforts on lower-level employees directly responsible for particular corporate acts (for example, an engineering defect) rather than upper-level management with more authority but less direct involvement. This will follow from the reasonable assumption that it will be harder to meet heightened standards of proof for those who manage rather than do.

From the corporate side, the foreseeable effects are equally clear and pernicious. Companies and corporate executives will respond to the incentive to remain strategically ignorant. They will perceive, correctly, a diminished criminal deterrent, and the direct result will be more criminal activity: more reckless activity, more pushing up against the edge of legality.

IV. Strengthening Corporate Crime Prosecution

To argue against imposition of a blanket willful element for regulatory crimes is not to suggest there is no need for reform. As the examples referenced and argument made here indicate, there is a crying need for corporate criminal reform – to ensure corporations and executives are in fact punished and deterred from wrongdoing that inflicts enormous harm on the public. Here are six areas that would be fruitful for Congressional investigation and legislation.

First, enforcement and prosecutorial budgets should be increased. To take one example among many, there is general agreement that the Food and Drug Administration (FDA) does not have sufficient resources to meet its statutorily mandated responsibilities to ensure the safety of drugs and medical products, including through inspection of overseas plants. "Our current examination of FDA's resources confirms that the agency's ability to protect Americans from unsafe and ineffective medical products is compromised," the GAO found in 2009. GAO explained that "[t]he structure of the agency's funding—its reliance on user fees to fund certain activities, particularly those related to the review of new products—is a driving force behind which responsibilities FDA does and does not fulfill. The approval of new products has increasingly

become the beneficiary of the agency's budget, without parallel increases in funding for activities designed to ensure the continuing safety of products, once they are on the market."⁴³

Second, the use of deferred and nonprosecution agreements for corporations should be ended. If they are not prohibited outright, at minimum a strong presumption against such deals should be established, so they are used only in rare cases upon specific showings of their necessity, and never in cases of repeat offenders. Deferred and non-prosecution agreements are a special gift to large corporations, which are enabled to escape prosecution for serious crimes in a manner rarely afforded to individuals or small business. The logic of these agreements is that they permit prosecutors to put in place special compliance mechanisms to prevent future wrongdoing. These compliance mechanisms can equally be obtained through criminal plea agreements, however, so the claim that deferred and non-prosecution agreements offer some unique benefit is incorrect. Worse, deferred prosecution agreements offer little or no deterrent effect, either for the (non-) charged corporation or for others.

Third, tougher criminal penalties should be established in many areas of corporate wrongdoing, including especially relating to food and drug adulteration and misbranding cases, and workplace endangerment. The food and drug adulteration and misbranding statutes contain a one-year maximum prison term. The willful violation of a workplace safety rule that leads to death an employee is punishable by a maximum of six months in prison (29 U.S.C. 66(e)).

Fourth, Congress should adopt a new criminal provision making it a serious crime for any corporation or corporate officer to endanger their consumers or workers and conceal information about the hazards to which they are exposed. The Hide No Harm Act of 2015, S.2140, introduced by Senator Blumenthal, would make it a crime to conceal information of hazards posing a risk of serious injury or death to workers or consumers.

Fifth, Congress should investigate and seek to legislate to remedy the “too big to jail” phenomenon, by which large corporations, especially financial corporations, are able to escape criminal prosecution because of prosecutors’ fears of collateral effects. Perhaps the worst such case involves HSBC, which in December 2012 agreed to pay more than \$1 billion in fines and entered into a deferred prosecution agreement for anti-money laundering and sanctions violations, for charges relating to money-laundering for narco-traffickers and countries the United States considered enemies. According to then-Assistant Attorney General Lanny Breuer, the government declined to prosecute HSBC despite these remarkable facts because of fears that a criminal prosecution of a giant bank like HSBC might bring down the company and threaten the global financial system's stability.⁴⁴ “In trying to reach a result that's fair and just and powerful, you also have to look at the collateral consequences,” Breuer said at the news conference announcing the deferred prosecution deal.⁴⁵ If the Justice Department declines to criminally prosecute out of concern for collateral consequences, it should be required to

⁴³ Government Accountability Office, Food and Drug Administration: FDA Faces Challenges Meeting Its Growing Medical Product Responsibilities and Should Develop Complete Estimates of Its Resource Needs, June 2009, p.34. Available at: <http://www.gao.gov/products/GAO-09-581>.

⁴⁴ James O’Toole, “HSBC: Too Big to Jail?” CNNMoney, December 12, 2012, available at:<http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering/index.html>.

⁴⁵ Aruna Viswanatha and Brett Wolf, “HSBC to pay \$1.9 billion U.S. fine in money-laundering case,” Reuters, December 12, 2012, available at: <http://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211>.

affirmatively state the basis for this determination; and, especially in the financial context, there should be follow an immediate investigation and presumption that the company will be broken up. These are companies whose size has effectively put them above the law, a condition our justice system – and society – cannot tolerate.

Last, Congress should investigate why there are so few prosecutions of individuals in major corporate crime cases, and consider what remedies may be appropriate. To its credit, the Justice Department has recently issued a memorandum urging more aggressive prosecution of individual wrongdoers, and adopted certain prosecutorial guidelines aimed at spurring more such prosecutions.⁴⁶ Yet it remains to be seen how this approach will play out; and it is certain to be insufficient on its own.

An investigation into the paucity of individual prosecutions in corporate criminal cases is likely to turn upside-down the premise of the proposal for adoption of a blanket willfulness standard. It is likely to show that while individuals take actions inside of corporations, it is very difficult to prove who did what, under whose authority and with what knowledge. It is likely to show that prosecutors are deferential to individuals in corporate criminal prosecution, and bend over backwards to ensure fair treatment, sometimes bordering on deference. And it is likely to show that it is precisely the problem of establishing mens rea – whether or not required by statute – that deters prosecutors from bringing such cases, including otherwise meritorious cases.

V. Conclusion

The stakes in these corporate criminal prosecutions are extremely high. While corporations do great service to the country in advancing innovation, providing needed goods and services and employing people, their size, organization and economic power also confers on them the ability to inflict great harm.

Corporations respond to incentives. Adoption of a blanket willfulness standard for corporate criminal prosecution will dramatically reduce the incentive to comply with the law, with foreseeable ramifications. If there are not adequate deterrents to ensure corporations abide by the law, in too many cases they will not.

We've seen the terrible consequences, again and again. We should be moving to avert those consequences, not increase their likelihood.

⁴⁶ Sally Quillian Yates, "Individual Accountability for Corporate Wrongdoing," September 9, 2015, available at: <http://www.justice.gov/dag/file/769036/download>.