

## The Role of Business in Combatting Corrupt Criminal Conduct

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*“Ask Not What Your Country Can Do for You—Ask What You Can Do for Your Country”*<sup>1</sup>

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### I. INTRODUCTION

What is the role of businesses in the insurrection at the Capitol on January 6, 2021? What is the role of businesses in the current Russian aggression against Ukraine? Can businesses play an important role in exacerbating or combatting corrupt criminal conduct? This Essay considers these issues.

The Department of Justice has charged approximately 850 individuals with crimes for their role in the insurrection at the Capitol on January 6, 2021.<sup>2</sup> Many charged were small business owners.<sup>3</sup> It has also been reported that some of the individuals at the insurrection were funded by outside individuals or businesses.<sup>4</sup> Following the insurrection at the Capitol, some businesses, in

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<sup>1</sup> *John F. Kennedy’s Inaugural Address, Jan. 20, 1961*, UShistory.org, <https://www.ushistory.org/documents/ask-not.htm?msclkid=1fdee0b2a7e711eca9fb366052ddec13> [https://perma.cc/X49F-L3G4].

<sup>2</sup> See *Capitol Breach Cases*, U.S. ATT’Y’S OFF., D.C., <https://www.justice.gov/usao-dc/capitol-breach-cases> [https://perma.cc/9L95-4E8Z].

<sup>3</sup> See *Why Did So Many Small-Business Owners Storm the Capitol? Here’s What One of the Most Outspoken Had to Say*, INC.MAG (Jan. 6, 2022), <https://www.inc.com/inc-staff/capitol-insurrection-business-owners.html> [https://perma.cc/55FV-S5WV].

<sup>4</sup> See Angeli Li & Areeba Shah, *How Companies Have Broken Promises and Funded Seditionists*, CREW (Jan. 3, 2022), <https://www.citizensforethics.org/reports->

addition to condemning the attack, ceased contributing to lawmakers who objected to certifying the presidential election.<sup>5</sup> Others gave even more money following the events of January 6th.<sup>6</sup> To date, no businesses have been charged with crimes as part of the events at the Capitol that day, although it has been reported that some are currently under investigation.<sup>7</sup> The charges to date are limited to individuals, although some are individuals who hold leadership roles in organizations that have been implicated in the insurrection.<sup>8</sup>

Since Russia's invasion of Ukraine on February 24th, private businesses have rallied to support the Ukrainians by issuing statements that they would be pulling their business interests out of Russia.<sup>9</sup> Although a dwindling number of

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investigations/crew-reports/the-corporate-insurrection-how-companies-have-broken-promises-and-funded-seditionists/?msclid=2f8fb346a88b11eca8f7fb961ddec6d0 [https://perma.cc/YQT9-P7U2] (noting that “[s]ince the insurrection, 717 corporations and industry groups have funneled over \$18 million to the re-election of members of Congress who objected to the 2020 presidential election results and the party committees supporting them.”); see also Gloria Oladipo, *Publix Heiress Faces Criticism for Helping Finance 6 January Rally*, GUARDIAN (Dec. 9, 2021), <https://www.theguardian.com/us-news/2021/dec/09/publix-heiress-julie-fancelli-6-january-rally-financing?msclid=eba424f2a88911ecadaf5d7fa9314355> [https://perma.cc/T7YW-TNSF].

<sup>5</sup> Melinda Fakuade, *A Running List of Corporate Responses to the Capitol Riot*, VOX, <https://www.vox.com/the-goods/22227717/brands-corporate-response-capitol-riot-insurrection-mob-pac-donations> [https://perma.cc/6QKH-ZH85] (Jan. 14, 2021); Bill Allison, *Corporations Resume Political Contributions After Jan. 6 Pause*, BLOOMBERG (Jan. 4, 2022), <https://www.bnnbloomberg.ca/corporations-resume-political-contributions-after-jan-6-pause-1.1703035?msclid=c71c6720a88c11ec98ab02f2f9da7cba> [https://perma.cc/H3WX-3AJR].

<sup>6</sup> *In Bad Company*, ACCOUNTABLE U.S., <https://accountable.us/projects/in-bad-company/> [https://perma.cc/AAY9-6Z33]; Brian Schwartz, *Corporations, Trade Groups Gave Over \$8 Million to GOP Election Objectors Following Jan. 6 Riot, New Study Shows*, CNBC, <https://www.cnbc.com/2022/01/03/corporations-groups-gave-over-8-million-to-gop-election-objectors-after-jan-6-riot-study.html?msclid=673cee7ea88d11eca2c7df7edf3ea63c> [https://perma.cc/3KPZ-EM6C] (Jan. 3, 2022).

<sup>7</sup> See, e.g., Alvi Sattar, *January 6 Insurrection Investigation: Major Tech Companies Subpoenaed*, IMPAKTER (Jan. 19, 2022), <https://impakter.com/january-6-insurrection-investigation-major-tech-companies-subpoenaed/> [https://perma.cc/U9TY-K9BJ]; Claudia Grisales, *New Clues Emerge About the Money That Might Have Helped Fund the Jan. 6 Insurrection*, NPR (Mar. 11, 2022), <https://www.npr.org/2022/03/11/1085783310/new-clues-emerge-about-the-money-that-might-have-helped-fund-the-jan-6-insurrect> [https://perma.cc/K2PE-NPSM].

<sup>8</sup> See Madison Hall, et al., *At Least 919 People Have Been Charged in the Capitol Insurrection So Far. This Searchable Table Shows Them All*, INSIDER, <https://www.insider.com/all-the-us-capitol-pro-trump-riot-arrests-charges-names-2021-1> [https://perma.cc/WQ9R-ZCK3] (Dec. 21, 2022).

<sup>9</sup> See Irina Ivanova & Kate Gibson, *These Are the Companies That Have Pulled Out of Russia Since its Invasion of Ukraine*, CBS NEWS, <https://www.cbsnews.com/news/russia-ukraine-corporations-pull-out-invasion/?msclid=1885dedfa7b811ec956b2aada9f1c82f> [https://perma.cc/XB3V-RBKB] (Mar. 11, 2022).

United States businesses continue to operate in Russia,<sup>10</sup> the list of those that have ceased doing business is extensive.<sup>11</sup> Significant praise has been seen in the media for businesses that have exited this market, often at a financial cost to the companies.<sup>12</sup>

The International Criminal Court prosecutor is currently investigating whether Russia has committed war crimes and crimes against humanity in Ukraine.<sup>13</sup> Although economic sanctions may influence the way businesses operate in Russia,<sup>14</sup> much of the initial efforts to recede from the Russian marketplace have been company decisions that were not initially subject to government mandates.<sup>15</sup>

In looking at the role of business in assisting the cessation of criminal conduct, whether it be violations of national law or international law, the question is whether these decisions should be left to corporations, allowing them to consider the value from a monetary and social perspective of whether to associate with possible criminality. Underlying this question is whether businesses should have sole ownership in decisions on whether to participate with individuals or countries that might be engaging in criminal activity.

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<sup>10</sup> Some companies like Subway, have not pulled out of the Russian marketplace, but are sending their profits from Russia to “humanitarian efforts.” Kate Gibson, *These Companies Continue to do Business in Russia*, CBS NEWS, <https://www.cbsnews.com/news/russia-ukraine-companies-business-koch-patreon-mcdonalds-cbs-news-explains/> [<https://perma.cc/4ARN-7AE8>] (Mar. 18, 2022).

<sup>11</sup> Companies ceasing to do business in Russia following their invasion of Ukraine include major companies such as: Adidas, Amazon, American Express, Apple, Boeing, Cadillac, Chevrolet, Coca Cola, Dell, Disney, FedEx, Ford, Google, Mastercard, McDonalds, Meta (Facebook), Microsoft, Netflix, PayPal, Pepsi, Samsung, Sony, TikTok, Toyota, UPS, and VISA. See Ivanova & Gibson, *supra* note 9; Jeffrey Sonnenfeld et al., *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. MGMT., <https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain> [<https://perma.cc/9NN8-UN75>] (Dec. 20, 2022); Ben Klayman, *GM, Other Automakers Suspend Some Business in Russia Following Invasion*, REUTERS (Feb. 28, 2022), <https://www.reuters.com/business/autos-transportation/auto-truck-makers-suspend-some-business-russia-following-invasion-2022-02-28/> [<https://perma.cc/L536-G5CJ>].

<sup>12</sup> See *Western Businesses Pull Out of Russia*, ECONOMIST (Mar. 5, 2022), <https://www.economist.com/business/western-businesses-pull-out-of-russia/21807961> [<https://perma.cc/ABG4-7XFR>].

<sup>13</sup> *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation.”*, INT’L CRIM. CT. (Feb. 28, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=20220228-prosecutor-statement-ukraine> [<https://perma.cc/J22F-6DGW>] (“In particular, I am satisfied that there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine in relation to the events already assessed during the preliminary examination by the Office.”).

<sup>14</sup> There have been both Treasury sanctions and export controls that have influenced commerce by U.S. businesses with Russia. See *Commercial Service Status, U.S. Sanctions and Export Controls on Russia*, INT’L TRADE ADMIN., U.S. DEP’T COM., <https://www.trade.gov/russia> [<https://perma.cc/XWB2-CSB8>].

<sup>15</sup> See Ivanova & Gibson, *supra* note 9.

Alternatively, should the government be more proactive in placing restraints on companies to avoid association with any form of possible criminal conduct no matter how peripheral the company may be to the criminal conduct?<sup>16</sup>

These questions raise a host of issues on the role of businesses in general with respect to criminal conduct, and in this regard, there are several configurations to consider. On one end of the spectrum are businesses engaged in clear-cut criminal conduct. In these cases, the *mens rea* is explicitly stated by the entity, or the conduct or omission to act is so egregious that a high level of intent can be inferred from the company's acts.<sup>17</sup> In this category are companies that are charged or implicated in criminal conduct, oftentimes with differing resolutions such as plea agreements, deferred prosecution agreements, and non-prosecution agreements.<sup>18</sup> In each of these instances, there is an explicit statute or regulation designating the criminal conduct that permits the prosecution, although the government may use its discretion to withhold that criminal prosecution from proceeding.<sup>19</sup> The actions may be resolved with judicial intervention (*e.g.* a company pleading to a crime), or an out-of-court agreement (*e.g.* a company entering into a non-prosecution agreement with the government).<sup>20</sup> Thus, companies that violate mandatory economic regulations and companies that directly instruct employees to obstruct justice by attempting to overturn an election could find themselves in this category of clear-cut criminal conduct.

In the middle group are companies that may have a tangential role with criminality, whether it be through financing activities that results in criminal liability or a rogue employee who commits acts that implicate the entity.<sup>21</sup> In this group, the business operates with good faith but fails to catch criminal conduct that is clearly prohibited by the company.<sup>22</sup> This category does not include the employee who is clearly acting with company authorization, but

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<sup>16</sup> This Essay is not examining the question of the role of economic sanctions that might be used to motivate companies from engaging in criminal conduct. Rather, this Essay is more focused on highlighting a statutory versus a non-statutory motivation of companies to assist the government in curtailing criminal conduct, that comes from a public response to the companies' activities or as a result of a company's own internal standards.

<sup>17</sup> See Ellen S. Podgor, *A New Corporate World Mandates A "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1541 (2007).

<sup>18</sup> See generally Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1 (2007) (discussing the different types of agreements that companies reach with the government).

<sup>19</sup> See *id.* at 1.

<sup>20</sup> See *Corporate Prosecution Registry*, DUKE & VA. L. LIBR., <https://corporate-prosecution-registry.com/> [<https://perma.cc/H74S-GGKP>] (providing a database of corporate agreements reached with the government; joint project between Duke University School of Law and the Legal Data Lab at the University of Virginia Arthur J. Morris Law Library).

<sup>21</sup> See Podgor, *supra* note 17, at 1537–38; see also Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 405 (1993).

<sup>22</sup> See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1368–73 (1999).

rather the company that may have a failed compliance program that resulted in the employees' activities not being properly monitored.<sup>23</sup> It can also include a company that fails to recognize the repercussions of the acts that it is supporting, such as financing what might be perceived as a protest that in fact is a demonstration intended to overthrow an election.<sup>24</sup> Prosecutors assess the activity, consider the statutory framework, and evaluate whether the conduct is prohibited by a specific statute.<sup>25</sup> Questions may also be asked about whether there is accessory or accomplice liability that can be demonstrated, or perhaps conspiracy charges that fit the circumstances.<sup>26</sup> Although the conduct may present hazier questions when determining whether the entity's actions are criminal, the assessment here includes a statutory analysis and a determination of whether the conduct meets the specific elements of that criminal statute. And if the prosecutor does find criminality, the entity's reporting the criminality and cooperating with the government may mitigate its exposure to penalties.<sup>27</sup>

The last category, at the opposite end of clearcut corporate criminality, is when companies take an initiative to proactively assist in eradicating existing criminal activity. In this instance the company is not acting with any *scienter* for a crime, but rather proactively assists the government in curbing criminal conduct.



The category of assisting the government in combatting criminal conduct can be subdivided by the many rationales for a business taking this approach. The less magnanimous position would be the entity that is throwing individuals “under the bus” in negotiations with the government in order to save the company,<sup>28</sup> or instances when the entity is serving as an “agent” for the government to protect itself from prosecution.<sup>29</sup> These entities may have originally been in the first grouping of those engaged in clear-cut criminal conduct. They can also be in the second group of those who hold a somewhat unclear position in whether they are actors perpetrating criminality or merely associated with the criminal activity. The more altruistic position of those entities assisting the government in combatting criminal conduct would be companies that act to assist the government out of a sheer desire to support the country or those injured by outside forces. The rationales for this posture may

<sup>23</sup> See Podgor, *supra* note 17, at 1537.

<sup>24</sup> See *id.* at 1540.

<sup>25</sup> See Laufer, *supra* note 22, at 1344.

<sup>26</sup> See, e.g., 18 U.S.C. § 371.

<sup>27</sup> See generally Zierdt & Podgor, *supra* note 18.

<sup>28</sup> See Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 74–75 (2013).

<sup>29</sup> See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 313, 336 (2007).

include a business decision that is looking at the benefits of this action to achieve long-term profits, but it also can decrease profits in the short-term.<sup>30</sup>

### Self-Serving Corporate Assistance

### Non-Self-Serving Corporate Assistance

Whatever the rationale for the business incentive to assist the government, it often is not statutorily based.<sup>31</sup> Rather, the company is acting to protect itself, acting because it is the “right thing to do,” or because of concerns of market backlash if it is not aligned with the populace. Arguably, incentives are sometimes there in the “carrot and stick” approach used by the U.S. Sentencing Guidelines in providing benefits to companies that disclose misconduct, cooperate with the government, and institute compliance measures to avoid criminality.<sup>32</sup> But all of these factors go to companies acting in their personal self-interest to avoid the sting of a government prosecution against them.<sup>33</sup> These are not instances of where the business entity is aggressively proceeding on its own initiative to assist the government in combatting criminal conduct.

The question presented here is whether there could be better tools provided to businesses to assist the government in correcting criminal conduct. Could statutes offer a greater incentive to provide entities with enhanced abilities to extend their role in correcting criminal conduct? Or does a *laissez faire* approach offer a better model?

This Essay looks at the dichotomy between public and private law in fighting corrupt conduct. It notes that some criminal statutes contain civil provisions, sometimes referred to as “hybrid statutes,” allowing private individuals and businesses the option of proceeding against criminal conduct, although using the civil structure for the process.<sup>34</sup> Unlike some countries, the United States does not endorse private prosecutions, so these matters are civil in nature but may in fact have a criminal statute as its source for bringing the action.<sup>35</sup> Professor Pamela H. Bucy has analyzed and categorized what she called “private justice” actions in advocating for the increased usage of private rights of action.<sup>36</sup>

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<sup>30</sup> See Green & Podgor, *supra* note 28, at 74.

<sup>31</sup> See *id.*

<sup>32</sup> See John C. Coffee, Jr., “Carrot and Stick” Sentencing: Structuring Incentives for Organizational Defendants, 3 FED. SENT’G. REP. 126, 126 (1990).

<sup>33</sup> There may, however, be statutes, like with environmental crimes that require reporting of events by a responsible corporate officer. See, e.g., 33 U.S.C. § 1319(c)(6) (responsible corporate officer in Clean Water Act).

<sup>34</sup> See, e.g., 18 U.S.C. § 1964(c); see also Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 17 (2002) (discussing “hybrid” private justice actions).

<sup>35</sup> See Bucy, *supra* note 34, at 13; see also *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028 (6th Cir. 1990) (quoting *Thompson v. Thompson*, 484 U.S. 174, 179 (1988)) (noting the judicial requirement for evidence that Congress intended to create a private cause of action).

<sup>36</sup> See Bucy, *supra* note 34, at 4.

Most criminal statutes, however, omit civil remedies and some that have civil remedies may restrict the use of the statutes to limited circumstances.<sup>37</sup> This means that entities may find a “hybrid statute” to effectuate a civil action that is criminally based, but for the most part statutes do not offer this possible action for private businesses that seek to combat criminal activity that directly affects them.<sup>38</sup> For example, the Racketeer Influenced and Corrupt Organization (RICO) Act has a civil statute permitting private parties to bring these actions, although differentiating its usage in some circumstances.<sup>39</sup> By contrast, the Foreign Corrupt Practices Act (FCPA), through caselaw, has precluded the use of its criminal statutes by private persons.<sup>40</sup>

The reality is that government resources limit its discretion to pursue all criminal conduct.<sup>41</sup> The fact is that the government cannot do everything alone, and often needs private business to assist with its initiatives.<sup>42</sup> But the question is whether private businesses need statutes to assist the government in fighting criminal activity.

When a business provides support to the government in eradicating corruption, whether intentionally or unintentionally, more can be achieved. In the same vein, however, vigilante private actions could cause delay in the courts and impede the government’s ability to properly proceed against perpetrators of criminal conduct. As opposed to looking at citizen suits, a subject well-covered by Professor Bucy,<sup>43</sup> this Essay looks for the balance between the important role that businesses have in society and the need to encourage these specific private players to take positive action to assure that corrupt conduct is not tolerated. This can often be achieved without the necessity of additional statutes or pressure being placed upon the entity. In this regard, transparency and public reaction can offer significant rewards.<sup>44</sup>

## II. PRIVATE LAW V. PUBLIC LAW

When typically thinking about criminal conduct, the inclination is to look for remedies within public law as opposed to those that exist in the private law realm. That is, when wrongful conduct creates a social harm to society, we

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<sup>37</sup> *See id.* at 17 (noting the limited circumstances under which civil RICO remedies are available).

<sup>38</sup> *See id.*

<sup>39</sup> *See* 18 U.S.C. § 1964(c).

<sup>40</sup> *See, e.g.,* *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990); *see also* 15 U.S.C. § 78dd-1, 78dd-2, and 78ff.

<sup>41</sup> *See* Bucy, *supra* note 34, at 4 (noting how “expensive and time-intensive” investigations and prosecutions of economic wrongdoing can be for government entities).

<sup>42</sup> *See id.* at 5.

<sup>43</sup> *See generally* Bucy, *supra* note 34.

<sup>44</sup> *See* Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463, 465 (2019); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 260 (2010).

emphasize the need to punish as opposed to focusing on how the matter might be handled in tort or other civil actions. Whether it be an individual committing a homicide, theft, or rape, we punish the perpetrator to achieve deterrence, incapacitation, rehabilitation, or retribution, often dependent upon the criminal justice system in the locale of the crime. “Middleground” remedies do, however, exist.<sup>45</sup> For example, in some instances, civil remedies or modified criminal remedies, such as forfeiture, may be used to “correct” criminal related conduct.<sup>46</sup> We see this with civil false claims actions,<sup>47</sup> juvenile matters, and negotiated responses to corporate criminal activity.<sup>48</sup> But in all instances, these remedies are with prosecutors or other government officials as part of our public law.<sup>49</sup> The remedies may be part of an agency agreement, a Department of Justice resolution such as a non-prosecution agreement (NPA), and, in some instances exclusively within the executive branch of government.<sup>50</sup> Some resolutions are exposed for public review, while others may never see the light of day, leading to arguments for increased transparency.<sup>51</sup>

But there is another component to actions in which the government has no role—these can be criminal statutes that include provisions for civil parties to use in proceeding with alleged criminal related conduct.<sup>52</sup> For example, the RICO Act contains a statute allowing for civil matters to be brought by private

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<sup>45</sup> See generally Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992) (examining the growth and impact of state-invoked and privately invoked punitive civil sanctions).

<sup>46</sup> See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991); John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1875 (1992); Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1895 (1992).

<sup>47</sup> See ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, *WHITE COLLAR CRIME* § 9.8 (2d ed. 2018).

<sup>48</sup> Corporate criminality is met with limited remedies, as a corporation cannot be incarcerated. There are, however, a host of ways in which the government can resolve a case when the defendant does not go to trial. These include, deferred prosecution agreements, non-prosecution agreements, and plea agreements. These all offer fines and consequences such as requiring the corporate entity to provide the guilty perpetrators names and evidence of their crimes to the government. It may also include a requirement that the entity implement a new more enhanced corporate compliance program. In some cases an agreed resolution will include having a monitor inserted into the corporation to assure continued compliance by corporate constituents as well as the entity. See *id.* at 39.

<sup>49</sup> See Cheh, *supra* note 46, at 1326.

<sup>50</sup> See, e.g., Mike Scarcella, *DOJ Non-Prosecution Records Are Target of Law Librarian’s Suit*, REUTERS (Nov. 8, 2021), <https://www.reuters.com/legal/government/doj-non-prosecution-records-are-target-law-librarians-suit-2021-11-08/> [<https://perma.cc/JTB6-CGC9>].

<sup>51</sup> See *id.* (discussing a lawsuit filed to have the DOJ release some of the government’s non-prosecution agreements).

<sup>52</sup> See Bucy, *supra* note 34, at 4.

parties.<sup>53</sup> Likewise, there are actions, such as whistleblower qui tam suits that proceed civilly with the government sometimes proceeding with the case later, while still providing the initial whistleblower with proceeds from the purse that may come from a successful case.<sup>54</sup>

The question here is whether private law can provide a remedy specifically for businesses to pick up the government's mantle and assist in fighting corruption. Thus, this is not a discussion of civil remedies in private law that exist to assist individual—remedies that often seek damages in tort or contract for wrongs against an individual or company. But rather, can allowing private businesses to use modified criminal statutes assist the government in stopping criminal activity? And would adding civil provisions to some existing criminal statutes offer needed assistance to the government in fighting corruption?

### III. DOES CRIMINAL LAW PROVIDE A SUFFICIENT STATUTORY BASIS FOR BUSINESSES TO ASSIST IN THE FIGHT AGAINST CORRUPTION?

Two statutes are considered here to answer the question of whether using private law can assist with achieving the desired result in public law, eliminating corrupt activities.

The RICO Act, passed in 1970, created a host of statutes to fight organized crime.<sup>55</sup> Premised upon organized crime's infiltration of legitimate businesses, the statutes allowed for the prosecution of individuals or entities that were using income from a pattern of racketeering activity to acquire an interest in an enterprise,<sup>56</sup> acquiring or maintaining through a pattern of racketeering activity an interest in an enterprise,<sup>57</sup> or conducting or participating in the conduct through a pattern of racketeering activity.<sup>58</sup> A RICO conspiracy can also be a basis for prosecution,<sup>59</sup> and no overt act is necessary for a criminal conviction.<sup>60</sup> Although the activities need to affect interstate or foreign commerce, the Supreme Court has traditionally read the statute broadly.<sup>61</sup> The breadth of interpretation has allowed for actions that are well beyond those covered by organized crime.<sup>62</sup> The Court has also not limited RICO actions to the

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<sup>53</sup> See 18 U.S.C. § 1964(c).

<sup>54</sup> See Bucy, *supra* note 34, at 44.

<sup>55</sup> See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661–62 (1987).

<sup>56</sup> See 18 U.S.C. § 1962(a).

<sup>57</sup> See *id.* § 1962(b).

<sup>58</sup> See *id.* § 1962(c).

<sup>59</sup> See *id.* § 1962(d).

<sup>60</sup> See *Salinas v. United States*, 522 U.S. 52, 63 (1997) (holding that a RICO conspiracy does not require an overt act).

<sup>61</sup> See PODGOR, HENNING, ISRAEL, & KING, *supra* note 47, § 8.1[E].

<sup>62</sup> See Lynch, *supra* note 55, at 661.

infiltration of legitimate businesses, allowing proceedings where the defendant was associated with an illegitimate business.<sup>63</sup>

RICO includes predicate acts of corruption.<sup>64</sup> Within the many offenses upon which a RICO action can proceed are crimes such as bribery, extortion, mail fraud, and wire fraud.<sup>65</sup> These offenses are commonly used in corruption prosecutions.<sup>66</sup> Likewise, several different obstruction of justice statutes are listed as RICO predicate acts.<sup>67</sup> Although the RICO statutes offer a basis for corruption prosecutions, and have enormous breadth, they also have restraints that can hamper proceeding with a RICO charge.<sup>68</sup> For example, RICO requires “continuity and relationship” between the predicate acts.<sup>69</sup> It also limits prosecutions under 18 U.S.C. 1962(c) when the alleged defendant is not a part of the “operation or management” of the enterprise being used in the RICO charge.<sup>70</sup> RICO actions brought by a United States Attorneys’ Office requires prior approval from the Department of Justice’s Organized Crime and Gang Section of the Criminal Division prior to filing a RICO criminal indictment, information, or government civil complaint.<sup>71</sup> Finally, RICO’s extraterritoriality is limited to predicate acts that have a clear extraterritorial application.<sup>72</sup>

One of the RICO statutes, 18 U.S.C. § 1964 provides for civil actions by private parties.<sup>73</sup> Unlike the criminal penalties provided in the criminal statutes within RICO, those that are brought as civil matters have remedies of damages.<sup>74</sup> Incentives for bringing these civil actions are provided in the allowance of treble damages and attorney fees to the successful litigant.<sup>75</sup>

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<sup>63</sup> See *United States v. Turkette*, 452 U.S. 576, 593 (1981).

<sup>64</sup> See 18 U.S.C. § 1962(a)–(c).

<sup>65</sup> See *id.* § 1961.

<sup>66</sup> See OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUST. PROSECUTION AND DEFENSE OF RICO (RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT) AND MAIL FRAUD CASES, at Abstract (1980), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/prosecution-and-defense-rico-racketeer-influenced-and-corrupt>.

<sup>67</sup> See 18 U.S.C. § 1961 (including predicate acts under § 1503 (relating to obstruction of justice), § 1510 (relating to obstruction of criminal investigations), § 1511 (relating to the obstruction of State or local law enforcement), § 1512 (relating to tampering with a witness, victim, or an informant), § 1513 (relating to retaliating against a witness, victim, or an informant)).

<sup>68</sup> See *id.* § 1962.

<sup>69</sup> See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 251 (1989).

<sup>70</sup> See *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993).

<sup>71</sup> U.S. DEP’T OF JUST., JUST. MANUAL §§ 9-110.101, 9-110.320 (2020). The *Justice Manual* provides, “[i]nclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate and would violate the Principles of Federal Prosecution.” *Id.* § 9-110.320.

<sup>72</sup> *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2102 (2016).

<sup>73</sup> 18 U.S.C. § 1964(c).

<sup>74</sup> The statute does provide that “[a]ny person injured in his business or property by reason of a violation of section 1962 . . . may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . . .” *Id.*

<sup>75</sup> See *id.*

RICO's civil provisions, however, are more limited than those allowed in criminal matters.<sup>76</sup> But clearly RICO does provide businesses aggrieved of wrongdoing by another, to step to the plate and proceed in pursuing this conduct.<sup>77</sup> While proceeding with a civil RICO action may be noteworthy to a business, its effect on the general public is less significant, with many garden variety cases that are far afield from the legislature's aim in combatting organized crime.<sup>78</sup>

Not all statutes provide for civil actions by individuals or businesses. One example here is the Foreign Corrupt Practices Act (FCPA), where courts have rejected a private right of action.<sup>79</sup> The FCPA, adopted in 1977 in response to Securities Exchange Commission investigations into payments that were made by United States corporations to foreign officials,<sup>80</sup> prohibits bribery and also requires publicly traded companies to adhere to specified accounting and internal controls.<sup>81</sup> The FCPA is limited in many ways, as the statute excludes foreign officials from being prosecuted.<sup>82</sup> Fear of an international dispute was a likely consideration for not allowing prosecutions against foreign officials.<sup>83</sup> Most importantly, courts have continually noted that there is no legislative intent

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<sup>76</sup> Although civil RICO actions do not require that there be a conviction of the predicate used in bringing the RICO claim, Congress amended § 1964 holding that RICO actions could not be based upon "conduct that would have been actionable as fraud in the purchase or sale of securities" unless the individual was criminally convicted of the fraud. PODGOR, HENNING, ISRAEL, & KING, *supra* note 47, § 8.8 (quoting 18 U.S.C. § 1964(c)).

<sup>77</sup> See John K. Cornwell, *RICO Run Amok*, 71 SMU L. REV. 1017, 1018–21 (2018).

<sup>78</sup> See *generally id.* (discussing the expansion of RICO beyond its purpose).

<sup>79</sup> See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990). The Sixth Circuit used a four-part test in finding that no civil action could be pursued under the FCPA. Focusing on Congressional intent, the *Cort* factors provide:

- (1) whether the plaintiffs are among "the class for whose especial benefit" the statute was enacted;
- (2) whether the legislative history suggests congressional intent to prescribe or proscribe a private cause of action;
- (3) whether "implying such a remedy for the plaintiff would be 'consistent with the underlying purposes of the legislative scheme'"; and
- (4) whether the cause of action is "'one traditionally relegated to state law, in an area basically the concern of States, so that it would be inappropriate to infer a cause of action.'"

*Id.* at 1028 (quoting *Chairez v. United States I.N.S.*, 790 F.2d 544, 546 (6th Cir. 1986); see also *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

<sup>80</sup> "[O]ver 400 American companies disclosed to the SEC that they had made payments to foreign government officials, politicians, and political parties to obtain contracts." PODGOR, HENNING, ISRAEL, & KING, *supra* note 47, § 7.7.

<sup>81</sup> See 15 USC §§ 78dd-1, 78dd-2, 78ff.

<sup>82</sup> See *United States v. Castle*, 925 F.2d 831, 831 (5th Cir. 1991) (rejecting the government's attempt to circumvent this statute through use of the general conspiracy statute under 18 U.S.C. § 371, charging a conspiracy to commit a FCPA violation).

<sup>83</sup> "Most likely Congress made this choice because U.S. businesses were perceived to be the aggressors, and the efforts expended in resolving the diplomatic, jurisdictional, and enforcement difficulties that would arise upon the prosecution of foreign officials was not worth the minimal deterrent value of such prosecutions." *Id.* at 835.

supporting a private right of action under the FCPA,<sup>84</sup> and amendments to the statute have also not created such a right.<sup>85</sup>

These two examples, RICO and FCPA, demonstrate how a statute may provide an avenue for civil actions by businesses for corrupt conduct in one instance and yet in another it may deliberately exclude the ability of a civil action. Although two distinct statutes, there may be symmetry in that one is mostly exclusive to conduct within the United States and the other has foreign implications.<sup>86</sup> Does proceeding with a civil action provide deterrence for eliminating present and future criminality? Is deterrence achieved when businesses proceed civilly against others for what could also be criminal wrongdoing? There is also another dimension to the question of the role of business in assisting the government in combatting criminal conduct, that being the effect of corporate expressions denouncing criminal activity.

#### IV. CONCLUSION: ACTIONS SPEAK LOUDER THAN “STATUTORY” WORDS

Corporate wealth offers businesses a superior position in assisting with eradicating criminal conduct. Relying on a statute’s private law possibility will not be as consequential as expressive conduct that vilifies the criminality. Disassociating with those involved in the possible criminality, such as ceasing campaign contributions to those corruptly attempting to obstruct a congressional proceeding offers a strong positive statement to recipients of the funds that there are consequences to participating in such conduct. Likewise, ceasing business in a country engaged in an aggressive war that is under investigation for war crimes, provides economic repercussions to that country that can prove a benefit in hopefully curtailing the alleged criminality.<sup>87</sup>

These corporate expressions can come at a huge cost to the businesses in the short term.<sup>88</sup> But they also can provide a general and specific deterrent to

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<sup>84</sup> See, e.g., *Republic of Iraq v. ABB AG*, 768 F.3d 145, 169–172 (2d Cir. 2014); *J.S. Serv. Ctr. Corp. v. Gen. Elec. Tech. Servs. Co., Inc.*, 937 F. Supp. 216, 226 (S.D.N.Y. 1996); *Citicorp Intern. Trading Co., Inc. v. W. Oil & Refin. Co. Inc.*, 771 F. Supp. 600, 607 (S.D.N.Y. 1991); *Shields ex. rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686, 688 (N.D. Ill. 1989); *Lewis v. Sporck*, 612 F. Supp. 1316, 1332–33 (N.D. Cal. 1985).

<sup>85</sup> In *Republic of Iraq v. ABB AG*, the Second Circuit stated:

[W]e note that although it has been nearly a quarter of a century since *Lamb* was decided, and although Congress has more recently amended the FCPA, see International Anti-Bribery and Fair Competition Act of 1998, Pub.L. No. 105–366, 112 Stat. 3302 (1998), Congress has not chosen to override *Lamb*. We conclude that there is no private right of action under the antibribery provisions of the FCPA and that the district court did not err in dismissing the Republic’s FCPA claims.

768 F.3d 145, 171 (2d Cir. 2014).

<sup>86</sup> See *supra* notes 72, 80, and accompanying discussion.

<sup>87</sup> See *Commercial Service Status, U.S. Sanctions and Export Controls on Russia*, *supra* note 14.

<sup>88</sup> See *Western Businesses Pull Out of Russia*, *supra*, note 12.

those engaged in criminal acts and others who might consider such activities in the future. These acts of private businesses provide strong expressive statements from the private sector that assist the government in combatting criminal conduct, irrespective of whether the business reason for the activities was to achieve the government's goal.<sup>89</sup>

Although a statute may not exist to provide a law-related remedy, or even be needed, the conduct of businesses in assisting the government is what should be considered important. The current image projected by Corporate America has suffered with the Savings and Loan Scandal, Enron, and protests such as Occupy Wall Street. This is, therefore, an important opportunity to redefine businesses as aligned with the government in stopping criminality not because of their self-serving desire to avoid their own criminal acts, or their attempt to avoid criminal liability because of acts of corporate constituents, but rather for the important purpose of assuring that obstruction of justice and Russian aggression and other alleged criminal activity are not solely government responsibilities, but also the responsibility of businesses.

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<sup>89</sup> See generally Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (2012) (discussing the role of expressivism and corporate criminal liability).