Solving Corporate Crime

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I. INTRODUCTION

Last fall's symposium, held at Georgetown Law Center from October 22–23, 2021, asked the participants to imagine a world without corporate criminal liability. The symposium brought together a mix of academics and practitioners, including a practitioners panel. The thread that ran through the panels was whether corporate criminal liability is so flawed that it should be abolished, or whether it achieves—or promises to achieve—enough good that it is worthy of keeping, albeit with reforms. This question goes to the heart of what role corporate criminal law should play in supporting an equitable, safe, and just society.

Each symposium attendee brought a unique perspective to the myriad issues and

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conundrums on both sides of the debate regarding whether to remove or reform corporate criminal liability. Despite the differences in opinion, all agree on at least one thing: the status quo is not perfect, or even optimal.

This Article does not summarize or critique the panel discussions or journal articles. Instead, we invite the reader to reconsider the role of prosecutors (and enforcers more broadly). In support of that (changed) role, we further invite the reader to consider a way to better illuminate the role that criminal enforcement, and enforcement more broadly, plays in addressing corporate compliance failures.

We urge a change in approach by government enforcers, in which they are asked to serve as problem solvers—not just case processors. We further suggest that an existing government institution undertake the analytical work that is needed to support enforcers in that problem-solving role.

After all, if one dives into Professor Brandon Garrett's Corporate Prosecution Registry,[2] one emerges from looking at hundreds of cases asking: What was the impact of government enforcement (criminal or otherwise) on compliance performance by regulated entities? Is there a better way to extract lessons from past enforcement efforts to understand how these crimes came about, and can we find a way to use that knowledge to improve the design of regulatory programs to make them less susceptible to abuse?

Before we can decide whether we need more or less (or zero) corporate criminal enforcement, we need to know more about what impact current efforts are having, along with a basis of comparison with other means and methods, including civil enforcement. The goal of enforcement is, of course, not to simply bring cases, or even more cases. The goal of enforcement is to utilize enforcement tools to drive compliance.

We propose a specific means to provide more information about enforcement efforts. We propose a method of conducting analyses on the impact of government enforcement on the frequency and extent of noncompliance. We propose that this work be undertaken by an existing government institution, one that has been hiding in plain sight as the debate about the role of corporate criminal liability in modern society has unfolded. Specifically, we propose that the Offices of Inspectors General (OIG) are ideally and uniquely situated to undertake this review and analysis. They have access to information that academics do not, and they are a government institution already charged with determining whether government agencies with regulatory authority are effectively and efficiently meeting their statutory goals.

Among other things, we propose that the OIGs examine the root causes of corporate misconduct related to their agency's goals as part of their assessment of the impacts of the government's enforcement efforts. It is tempting to say that companies break the law because of "Sutton's law," to wit, because breaking the law is "where the money is." But the reality is more complex. As Professor Buell has observed, many instances of corporate

2. *Resources*, CORP. PROSECUTION REGISTRY, https://corporate-prosecution-registry.com/resources/.

misconduct are not the result of "Enron-style corrupt management" (in which the otherwise legitimate business has become, in effect, a criminal-purpose organization), but are instead the result of multiple factors, including ineffective management, poor regulatory design, and conflicting priorities that create a corporate culture that leads to wrongdoing.[3]

OIGs can help provide answers to the question as to what causes some companies—or their officers and employees—to break the law, while others (similarly situated) do not. Doing so is a logical imperative before spending government resources to prevent such law breaking from occurring and determining how best to use limited government enforcement resources to further the statutory goals of free markets, environmental protection, and a just society.

II. EVERYONE AGREES, THERE IS A PROBLEM WITH WHITE COLLAR CRIMINAL ENFORCEMENT

Everyone (at the symposium and more broadly) seems to agree that the current approach to criminal enforcement of the law against corporations is flawed. At the symposium, the panelists diverged on solutions. Some call for abolishing corporate criminal liability altogether, while others call for various reforms.

Those on the "abolitionist" side advocate alternatives to corporate criminal liability, such as:

- Relying solely on civil and administrative remedies to address corporate wrongdoing, such as expanding or strengthening government civil and administrative enforcement tools,[4] or by bolstering private citizen enforcement, including through expanded whistleblower and bounty programs.[5] Proponents of this approach generally argue that the aims of corporate criminal sanctions—e.g., getting companies to publicly admit guilt, pay fines and restitution, and become subject to reporting and monitoring—could just as effectively, and perhaps more efficiently, be

3. *See The Endless Cycle of Corporate Crime and Why It's So Hard to Stop,* DUKE L. NEWS (Jan. 13, 2017), https://law.duke.edu/news/endless-cycle-corporate-crime-and-why-its-so-hard-stop/ [https://perma.cc/VTC7-23P5].

4. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1505 (1996) (discussing utilizing government civil and administrative enforcement tools rather than corporate criminal liability); *see also* V.S. Khanna, *What Rises from the Ashes?* 47 J. CORP. L. 1029, 1031–34 (2022) (observing that alternative liability schemes have grown to match or exceed what is available with corporate criminal liability); John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009, 1023–26 (2022) (arguing that corporate criminal liability is not necessary to reduce corporate wrongdoing but instead results in a "compliance game" focused on avoiding indictment rather than changing corporate behavior or culture); *see generally* Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (discussing utilizing private citizen enforcement rather than corporate criminal liability). Others posit that we do not even have a system of corporate criminal law because the current system cannot be distinguished from other modes of non-criminal enforcement against corporations. *See generally* Mihailis E. Diamantis & Will R. Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP L. 991 (2022).

5. *See* Khanna, *supra* note 4, at 1044–45.

achieved with civil or administrative sanctions.[6] However, it is generally conceded that the reputational damage criminal sanctions can bring may be unique in terms of pushing organizations towards compliance efforts.[7]

- Increasing the number of criminal prosecutions of culpable individuals, such as corporate executives and other business leaders. Some observe that, by eliminating criminal liability for corporate entities, prosecutors may focus more on individuals, which, in turn, may bolster general deterrence.[8]

Those on the "reformist" or "keep it but fix it" side propose various strategies, including:

- Strengthening and diversifying the mix of regulatory tools the government uses to control corporate crime, with a focus on those that can improve detection of criminal offenses and enhance accountability for culpable parties.[9]

- Rethinking and redesigning corporate penalties to be more effective than existing sanctions at deterring corporate crime.[10]

- Addressing the "legitimacy crisis" created by the disparate treatment of corporate crime and street crime, including the racial and ethnic impacts of this disparity, by both increasing resources for criminally pursuing corporations and their executives who break the law and "leveling up" the treatment of non-white collar defendants to afford them similar protections and considerations as white collar defendants.[11]

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6. Others caution that eliminating corporate criminal liability would undermine deterrence because civil liability is more vulnerable to political lobbying influences by private companies. *See* Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861, 874–82 (2022).

7. *See* Samuel W. Buell, *A Restatement of Corporate Criminal Liability's Theory and Research Agenda*, 47 J. CORP. L. 937, 942–44 (2022) (discussing the reputational effects of corporate criminal liability); *see also* John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 973 (2022) (observing that the impact to stock prices of reputational loss may often exceed that of financial penalties).

8. *See* Stephen F. Smith, *Corporate Criminal Liability: End It, Don't Mend It*, 47 J. CORP. L. 1089, 1107–08 (2022) (favoring abolishing corporate criminal liability); Hasnas, *supra* note 4, at 1023–28 (arguing that corporate criminal liability is not necessary to reduce corporate wrongdoing); *see also* Khanna, *supra* note 4, at 1043–44 (observing a potential need to propose limits on the protection individuals may receive from insurance, indemnification, and bankruptcy). Critics of this view counter that corporate executives are harder to identify and prosecute than corporations, which could undermine the deterrence value of criminal liability. *See* Coffee, *supra* note 7, at 963.

9. *See* John Braithwaite, *Maximal Accountability with Minimally Sufficient Punishment*, 47 J. CORP. L. 911, 919–26 (2022) (discussing strategies to circumvent the dangers of maximalist and minimalist approaches).

10. *See, e.g.*, Coffee, *supra* note 7, at 981–82 (proposing, among other ideas, the notion of equity fines that would impose a fine in stock rather than cash); *see also* Diamantis & Thomas, *supra* note 4, at 1007–08 (observing that a proper system of corporate criminal justice would incorporate more substantial and a more comprehensive array of sanctions).

11. *See* Julie O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047, 1058–62 (2022) (asserting that the U.S. Department of Justice (DOJ) outsources corporate enforcement in

- Embracing trends which indicate that the locus of corporate criminal enforcement may be shifting away from the federal level and toward the state and local levels.[12]

At the symposium, some individuals on the practitioners panel (including one of this Article's authors) suggested that those proposing to abolish corporate criminal liability bear the burden of proof to show that doing so would improve the status quo. As the panel illuminated, those arguing in favor of eliminating corporate criminal liability must address the real-world risk that doing so could leave people, places, and markets exposed to a greater likelihood of harms.[13] Though, as noted in Part III.B, data on white collar crime is not robust, there is evidence that corporate criminal sanctions help achieve important statutory goals like supporting free and open financial markets and protecting health, safety, and the environment.[14] Those in the reformist camp tend to believe that it would be unrealistic or inequitable (or both) to imagine a future without corporate criminal liability.[15]

III. TO ADDRESS CORPORATE CRIME, ALLOW PROSECUTORS TO BECOME PROBLEM SOLVERS

A. Moving Toward Prosecutors as Problem-Solvers

Prosecutors are almost always judged by the metrics of cases brought, convictions

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ways that provide more leniency and opportunity for white collar offenders, leaving street crime offenders to disproportionately face the full force of the federal government's enforcement resources, as they have little power in the first place).

12. *See* Miriam Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887, 906–09 (2021).

13. One additional consideration against elimination of corporate criminal liability was not discussed: the impact that removing the threat of corporate criminal sanctions could have on corporate governance by eliminating it as a source of power and leverage for compliance and legal personnel and boards of directors. Internal corporate compliance efforts rely on the influence of these individuals. They can face significant challenges in implementing compliance efforts in businesses laser-focused on maximizing revenues and return on investment (ROI). The difficulty of empirically demonstrating the ROI of compliance efforts is well-recognized. How do you measure the violations (and their potential consequences) that *didn't* occur? *See, e.g.*, Hui Chen, *The Use and Measurement of Compliance Programs in the Legal and Regulatory Domains*, *in* MEASURING COMPLIANCE: ASSESSING CORPORATE CRIME AND MISCONDUCT PREVENTION 25–54 (Melissa Rorie & Benjamin van Rooij eds., 2022) (noting the general lack of an "objective standard to measure [compliance] program effectiveness"). It is reasonable to be concerned that, if the criminal sanctions remedy were removed, these individuals might lose some of their leverage to push for corporate reforms or resources for programs and initiatives that aim to support compliance goals. Those who advocate abolishing corporate criminal liability, without more empirical support for the value to be obtained by non-criminal approaches, should consider the loss of leverage for corporate compliance professionals and corporate directors that could lead to an increased risk of violations.

14. *See, e.g.*, Braithwaite, *supra* note 9, at 914, 917, 920–22 (discussing examples related to environmental justice and ecological protection, among others); Buell, *supra* note 7, at 956–57 (noting potential role of corporate criminal liability in reducing industrial risks and harms); Susana Aires de Sousa & William S. Laufer, *The State's Responsibility for Corporate Criminal Justice*, J. CORP. L. 1109, 1119–20 (2022) (arguing that abolishing corporate criminal liability would undermine the state's function in protecting the common good).

15. *See generally* Aires de Sousa & Laufer, *supra* note 14.

obtained, and sanctions imposed. This misguided approach elevates "throughput" (process) over "output" (results). As we would use these terms, "throughput" is a measure of the rate at which something is done. Here, it is the production of convictions and sanctions. "Output" is the measure of outcomes—that is, what the efforts have achieved. Almost all prosecutors live in the trap of throughput metrics, in which "[n]ot everything that can be counted counts, and not everything that counts can be counted."[16] To understand and address unwanted human behaviors, enforcement efforts must be informed and measured by something more than just those things that can be readily counted, such as the numbers of prosecutions.

Notably, in the private sector, effective corporate managers seek to address instances of noncompliance within their organization not merely by counting them, but by seeking to determine the root causes and then looking to address those causes.[17]

To apply that construct to the role of public enforcers requires information that is not yet readily available.[18] We propose in Part IV below a method to provide analyses to support efforts to reduce levels of corporation misconduct. Enforcers who do not have the benefit of such an analysis are left to operate in the role of "case processors," bringing case after case without knowing whether they are identifying, let alone addressing, the underlying causes of wrongdoing. To address persistent non-compliance, government managers of enforcement must be given the information needed to move into the role of "problem solvers" and their continued investigations should supply the information needed to unearth and address systemic root causes of corporate crime. These efforts may also disclose ways to revise laws and regulations to reduce their susceptibility to abuse. Moreover, without that broader analysis of the root causes behind corporate criminal behavior, when the public (including legislators) seeks to assess the value of enforcement efforts, they count "what can be counted," judging enforcement efforts by numbers of cases, sizes of fines, and lengths of prison terms, rather than by how effective enforcement has been at achieving statutory goals.

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16. *See generally* WILLIAM BRUCE CAMERON, INFORMAL SOCIOLOGY: A CASUAL INTRODUCTION TO SOCIOLOGICAL THINKING (1969).

17. Of course, there are those corporate managers who do not make such inquiries or who conduct ineffective review. As Professor Estes has pointed out, in instances where "executives have little interest in understanding the causes of destructive behavior within their own firm . . . it's not surprising that [such] firms that are found liable . . . are often reoffenders in the future." *See* EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 325-26 (2016); *see also* EVALUATION OF CARNIVAL CORPORATION & PLC INTERNAL INVESTIGATION PROGRAM (2021); United States v. Princess Cruise Lines, Ltd., No. 16-20897-CR (S.D. Fla. Sep. 16, 2021) (Court Appointed Monitor report identifying various factors leading to the failure of the Company to have an effective, independent, and empowered internal investigation program).

18. Currently, root cause examinations tend to be performed, if at all, on a one-off, company-specific basis by private actors with the requisite access to company employees and records, such as corporate ethics and compliance groups, corporate legal counsel (in-house or outside), corporate consultants, or court-appointed monitors. Government enforcers could, however, develop the expertise and resources to make root cause examinations a regular part of the investigative or prosecutorial processes. The government could also perform ongoing, high-level reviews of findings from prior root cause examinations to identify trends and risk factors that would help inform efforts to control corporate crime. This could be part of the OIG reviews proposed in Part IV below.

The concept of the "prosecutor as problem solver" has been understood and discussed for many years in some areas of law enforcement.[19] The notion is that, because cases provide unique sources of information about misconduct, the prosecutor can use that information to gain insight into "the ways in which criminals undermine and pervert the structures of society to suit their ends, [and] prosecutors can help shape changes to society's structures (laws, regulations, inspection regimes) so as to limit the ability of criminals to succeed."[20]

This approach reflects a crime control strategy "whose ultimate goal is not to send corrupt persons to prison, but to reduce opportunities for and susceptibility to crime."[21]

There are some useful models of prior successful approaches in organized crime control. For example, in the 1980s, the New York State Organized Crime Task Force (OCTF) examined decades of corruption and racketeering investigations and prosecutions of the New York City construction industry "to identify ways to change laws, city contracting practices, municipal codes, and licensing of vendors as ways to limit corruption."[22] The proposals that resulted from this effort "reflect the ability of law enforcers to identify ways that public programs can be susceptible to, and protected from, criminal behavior."[23] But, as shown by the examples described below, the design of regulatory programs do not always reflect the "widely understood value of utilizing the experience of investigators and prosecutors to design programs to make them less susceptible to being undermined or perverted."[24]

Rather than abolish corporate criminal liability, why not instead undertake further empirical review of both the root causes of non-compliance and the impact of all forms of enforcement on compliance levels? To draw an analogy to the epidemiological context, it would be like debating over cures for a disease without also examining the causes of its spread in society. A successful disease control program, like an effective program of obtaining regulatory compliance, requires more than repeatedly treating the stream of afflicted individuals (case processing). It requires searching for and eliminating the root causes of the disease and its distribution (problem solving).[25]

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19. *See* Ronald Goldstock, *The Prosecutor as Problem-Solver, Leading and Coordinating Anticrime Efforts*, 7 CRIM. JUST. 3 (1992) (explaining that in the 1930's, prosecutors came to understand that "a different approach was required to deal with complex criminal activity such as organized crime, labor racketeering, official corruption, and fraud[,] . . . which call for proactive investigation and close cooperation between police and prosecutors").

20. Solow, *infra* note 31, at 8.

21. RONALD GOLDSTOCK, CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY, FINAL REPORT OF THE NEW YORK STATE ORGANIZED CRIME TASKFORCE 2 (1989) (alterations omitted).

22. *Id.* One of the authors of this Article served as a prosecutor at OCTF during this time period.

23. *Id.* at 8–9. For a description of how these efforts reduced the susceptibility to crime in New York City, see JAMES B. JACOBS, COLEEN FRIEL & ROBERT RADICK, GOTHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME (2001).

24. Solow, *infra* note 31, at 9.

25. *See* Goldstock, *infra* note 43, at 7 (observing that "the creation of a sophisticated crime-control strategy is much like the search for a cure for a disease," requiring "recognition and description of the symptoms, analysis and understanding of the mechanisms through which the integrity of the system is compromised, and the

B. Provide Prosecutors (and others) with Additional Analyses of the Effectiveness of Criminal (and Other) Enforcement Efforts

Another limitation to the debate about the value of corporate criminal remedies is the widespread scarcity of empirical information on white collar crime. This includes a lack of comprehensive data on both reported[26] and unreported white collar crime rates,[27] as well as a lack of reliable metrics for measuring the effectiveness of criminal sanctions and other methods to reduce corporate crime and achieve underlying social goals.[28] Government officials choose among a wide array of enforcement tools—such as criminal and civil enforcement, strict permitting regimes, broad inspection programs, public education, compliance assistance, and voluntary disclosure and amnesty programs—but the choices are made without empirical support as to the relative value of each tool. Without the empirical data, it is unclear whether the government is using the best means to achieve the statutory goals. This leads to "bean counting" of the number of enforcement actions brought, without regard to their overall impact on reducing violations.

White collar criminal enforcement efforts are still primarily judged by the number of indictments, case resolutions, and the amount of penalties and other sanctions imposed.[29] It has long been recognized that such measures "are not an appropriate measure of effectiveness in dealing with most crime, and the pressure to produce quantity rather than quality can badly distort tactical and strategic goals."[30] Instead, "the development of sophisticated [crime control] strategies and the analyses on which they are based require strategic analysts trained to review broad data bases [sic] and analyze trends within areas of actual or potential criminal activity."[31]

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development and implementation of a program of treatment using existing remedies or developing new ones").

26. *See* Terry L. Leap, *The Elusive Impact of White-Collar Crime*, *in* DISHONEST DOLLARS: THE DYNAMICS OF WHITE-COLLAR CRIME 4 (2018). Unlike the Federal Bureau of Investigation's national crime reporting program for street crimes such as murder, rape, robbery, aggravated assault, burglary, and larceny-theft, there is no comprehensive national database on white collar crime. *See id.* Moreover, there is "no consensus on how to define white collar crime." U.S. Bureau of Just. Stat., *White Collar Crime*, https://www.bjs.gov/index.cfm/content/content/dcrp/tables/index.cfm?ty=tp&tid=33 [https://perma.cc/6YP5-49F8]. The U.S. Bureau of Justice Statistics defines white collar crime as including: bank fraud; consumer fraud; insurance fraud; medical fraud; securities fraud; tax fraud; environmental offenses; false claims and statements; illegal payments to governmental officials (giving or receiving); and unfair trade practices (*e.g.*, unsafe working conditions). *Id.*

27. *See* Coffee, *supra* note 7, at 974–75 (considering the effects of financial penalties on compliance); *see also* Diamantis & Thomas, *supra* note 4, at 995 (estimating that only five percent of corporate crime ever comes to light).

28. *See, e.g.*, Chen, *supra* note 13, at 52 (noting the "absence of empirical evidence" to guide the U.S. Sentencing Commission and DOJ in setting standards for granting credits for compliance programs in the wake of criminal misconduct).

29. *See* Hasnas, *supra* note 4, at 1023 (observing that prosecutors are evaluated based on the number of successful enforcement actions they bring, rather than their actual success in reducing corporate wrongdoing).

30. *See* Goldstock, *infra* note 43, at 9.

31. *Id.* at 8. As one of the authors of this Article has observed in the context of environmental criminal enforcement: "Unfortunately, focusing on case numbers or penalty amounts to assess the rigor or effectiveness of federal enforcement programs will remain a popular exercise. Those who care about the end goals of criminal enforcement—such as deterring intentional violations, creating a level playing field to benefit organizations that have invested in compliance, and guiding the development of sustainable compliance programs—should attempt to see past those numbers to the underlying problem: more than three decades of resource constraints continue to

Yet, this type of strategic data-driven analysis could be far more robust. Agency resource constraints may be partly to blame. But an even more significant factor may be just how hard it is to devise frameworks for measuring the effectiveness of white collar enforcement efforts.

Private sector compliance programs face similar challenges. It is well-recognized that meaningful compliance metrics are both important, and exceedingly difficult to devise.[32] Because there is no widely accepted "objective standard to measure [compliance] program effectiveness," there is "no way to test whether any approach is effective."[33] It has been suggested that corporate compliance professionals could look "to other prevention and detection industries," such as health and safety, for "measurement frameworks that already exist and that might be applicable to corporate compliance."[34] White collar government enforcers and regulators might similarly benefit from looking to other disciplines for a model approach. As set forth in Part IV below, this Article proposes that the field of medical epidemiology is a place to start.[35]

C. Root Causes of Corporate Crime

Stakeholders recognize that the debate over corporate criminal liability occurs in something of an empirical vacuum. We do not yet have a robust understanding of the root causes of corporate crime, or whether and how corporate crime is impacted by government enforcement efforts.

1. What is Meant by "Root Cause"?

In the context of this discussion, a root cause, as distinguished from a direct or "proximate" cause, is an underlying reason that a crime or other noncompliance occurred within an otherwise legitimate organization.[36] A root cause is causation at a systemic level.

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limit the value of this important work." Steven P. Solow, *Look at Resources, Not Case Numbers*, ENVIRON. F., May/June 2022, at 29.

32. *See* Chen, *supra* note 13.

33. *Id.* at 51; *see also* David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 368 (2015) (summarizing studies showing that "the levels of observed unethical behavior by corporate employees has continued at a steady level over the past decade," raising the question of whether corporate compliance programs are effective at stemming what would otherwise be a growth in unethical behavior or ineffective at driving down unethical behaviors).

34. *See* Chen, *supra* note 13, at 51.

35. The challenge of measuring the effectiveness of enforcement efforts underscores the importance of strategic approaches to how, where, and to whom information about criminal prosecutions and convictions is communicated. Is information being published in the right places and in the right ways to get the attention of critical stakeholders, such as corporate executives and ethics & compliance officers? Where do these stakeholders turn to get their news and learn about compliance risks facing their organizations? If the government cannot answer these questions, it may not get the full ROI of its criminal enforcement efforts, potentially undermining the deterrence effect of criminal sanctions. An effective communications strategy might mean branching out beyond agency press releases and major news publications to include trade press, social media, and other (even non-traditional) sources.

36. Some may urge a broader, meta-approach to understanding corporate crime, one that would question

Addressing a root cause should address behaviors and issues broader than the issue that was at hand.[37] There can also be more than one root cause—more than one systemic issue—for a given instance of noncompliance.[38] As elaborated below, guidance on investigating and prosecuting corporate misconduct has begun to focus on the need to uncover root causes.

2. "Bad Apples" or Something Larger?

Within companies there is a strong, institutional predilection to attribute corporate misconduct to individual rogue "bad apples."[39] Organizations, their leaders, and boards of directors may be driven to a blame response, in part to avoid having to face issues that are complex, embarrassing, or threatening—including to leadership itself.[40]

But if the goal is to prevent future violations, it is necessary to determine whether violations arise from a systemic, rather than an individual, level. It is now well-recognized that corporate compliance failures may relate to issues of corporate culture, and an instance of non-compliance may be a symptom of a broader weakness in corporate culture or governance. As the DOJ states in its guidance to federal prosecutors on evaluating corporate compliance program effectiveness, "[b]eyond compliance structures, policies, and procedures, it is important for a company to create and foster a culture of ethics and compliance with the law at all levels of the company."[41] Federal prosecutors are now asked to consider the steps a company has "taken in response to its measurement of the compliance culture."[42] This notion of needing to consider the potential for culture to be a root cause of an individual instance of criminality is consistent with the DOJ's approach, articulated in October 2021, "making clear that all prior misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company . . . That record of misconduct speaks directly to a company's overall commitment to compliance programs and the appropriate culture to disincentivize criminal activity."[43] Going forward,

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the very process of incorporation itself and the economic system of private capital. Whatever merits might come from such a discussion, we are writing to seek to enhance enforcement efforts in the world as it is.

37. *See, e.g.*, CTR. FOR CHEM. PROCESS SAFETY, GUIDELINES FOR INVESTIGATING PROCESS SAFETY INCIDENTS 204 (3d ed. 2019) (defining root cause as a "fundamental, underlying, system-related reason why an incident occurred that identifies a correctable failure(s) in management systems").

38. *See id.*

39. *See* MATTHEW SYED, BLACK BOX THINKING: WHY MOST PEOPLE NEVER LEARN FROM THEIR MISTAKES—BUT SOME DO 225 (2015). This is "not just because managers instinctively jump to the blame response. There is also a more insidious reason: managers often feel that it is expedient to blame. After all, if a major company disaster can be conveniently pinned on a few 'bad apples,' it may play better in PR terms. 'It wasn't us; it was them!'" *Id.*

40. *See* CHRIS ARGYRIS, OVERCOMING ORGANIZATIONAL DEFENSES: FACILITATING ORGANIZATIONAL LEARNING 25 (1990). Such organizations may engage in what is known as "organizational defensive routines." *Id.* These routines are characterized by actions "that prevent individuals or segments of the organization from experiencing embarrassment or threat. Simultaneously, they prevent people from identifying and getting rid of the causes of the potential embarrassment or threat." *Id.* Such defensive behaviors "are antilearning, overprotective, and self-sealing." *Id.*

41. *See, e.g.*, U.S. Dep't of Just. Crim. Div., *Evaluation of Corporate Compliance Programs* (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/9HM6-5CT4].

42. *Id.* at 16.

43. DOJ Press Release, Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th

"prosecutors can and should consider the full range of prior misconduct, not just a narrower subset of similar misconduct."[44]

Within the private legal services and consulting industries, there is likewise a growing recognition of corporate culture as a risk management issue. More firms are starting to offer culture-based risk management and related services.[45]

Corporate culture deficiencies have also been identified as root causes in several recent and notorious compliance failures, including the fatal crashes of two Boeing 737 Max airplanes in 2018 and 2019;[46] the aggressive marketing of opioids by Purdue Pharma that has helped lead to more than 200,000 overdose deaths in the decades-long opioid crisis;[47] the fraudulent opening of millions of unauthorized or fake customer banking accounts at Wells Fargo;[48] and the intentional and illegal discharge of oil into the ocean by Princess Cruise Lines ships over a period of nearly eight years.[49]

National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [https://perma.cc/9RFE-UT7Q].

44. *Id.* (emphasis added). This approach was recently reiterated in April 27, 2022, remarks by Deputy Attorney General Lisa Monaco on DOJ enforcement priorities during a keynote address at the New York City Bar Association's 10th Annual White Collar Crime Institute. *See* DOJ Press Release, Deputy Attorney General Lisa O. Monaco Delivers Remarks Announcing Charges in Connection with Multibillion-Dollar Collapse of Archegos Capital Management (Apr. 27, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-announcing-charges-connection [https://perma.cc/EP88-TFV2].

45. *See, e.g.*, Anthony Kaufman Consulting, *Culture as a Law Firm Service* (2022); *What We Do,* HUI CHEN ETHICS, https://huichenethics.com/what-we-do/ [https://perma.cc/9GFY-Y2YB ("Is your program adequately addressing the risks you face? Is it using efficient use of resources in producing measurable results? How does it compare to your peer organizations? Does it meet regulatory and enforcement expectations?"); *Prevent and Manage Incidents*, SAYFR, https://sayfr.com/ [https://perma.cc/HVK8-C578] ("By measuring and addressing culture in a robust way, we help customers reduce risk and learn from failures."); *Stay ahead with Kroll*, KROLL, https://www.kroll.com/en/about-us [https://perma.cc/HB92-R6TF] ("Kroll provides proprietary data, technology and insights to help our clients stay ahead of complex demands related to risk, governance and growth"); R&G INSIGHTS LAB, https://www.ropesgray.com/en/RGInsightsLab [https://perma.cc/VG52-BEHJ] (among other things, the Lab has worked with clients "to assess compliance programs; conduct risk assessments and culture reviews; [and] perform diversity, equity and inclusion audits"); *Risk + Compliance*, GUIDEPOST SOLUTIONS LLC, https://guidepostsolutions.com/solutions/risk-compliance/ [https://perma.cc/983N-Y96T] ("We believe that ethical crises and similar problems can be successfully managed by including a forward-looking compliance review as part of the response to the crisis.").

46. *See* Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 J. CORP. L. (forthcoming 2022) (quoting David Gelles statement that "[T]he true cause of the crashes wasn't faulty software. It was a corporate culture gone horribly wrong.").

47. *See* Keith Ongeri, *A New Prescription: The Case for Enterprise Liability Reform in Light of the Opioid Epidemic*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 865, 877 (2021) ("Purdue Pharma's aggressive marketing was simply a piece in a mounting pile of evidence that demonstrated an aggressive corporate culture that prioritized sales over everything else.").

48. *See* Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 ADM. SCI. 1, 3 (2018) ("The root cause of sales practice failures was the distortion of the Community Bank's sales culture and performance management system, which when combined with aggressive sales management, created pressure on employees to sell unwanted or unneeded products to customers and, in some cases, to open unauthorized accounts.") (quoting 2017 report by Independent Directors of the Board of Wells Fargo).

49. *See Closing Letter of the Court Appointed Monitor (April 19, 2017 – April 18, 2022)* in United States of America v. Princess Cruise Lines, Ltd., No. 16-20897 (S.D. Fla Apr. 6, 2022) (identifying, among other factors,

Closely related to the notion of culture as a compliance risk factor, a growing body of research shows a previously unexamined linkage between compliance, risk management, and systemic issues related to a lack of diversity, equity, and inclusion (DEI). It is increasingly clear that a lack of DEI is itself a source of risk to compliance, including financial improprieties and environmental, health, and safety failures. "Spirals of silence," in which employees stay silent in the face of compliance failures, can emerge in non-diverse and non-inclusive workplaces.[50] Silence in the face of improper or questionable conduct has figured in high-profile disasters, including the 1978 crash of United Airlines Flight 173, which spurred the airline industry to adopt a practice, known as Crew Resource Management, designed to break down hierarchies and communication barriers among airline crew, as well as the partial sinking of the Costa Concordia cruise ship in 2012, when over 30 people lost their lives—a tragedy which prompted similar reforms in the maritime industry.[51]

3. Reducing Governmental "Invitations to Fraud"

An examination of the causes of corporate misconduct should also consider whether laws and regulations are themselves flawed in ways that increase their susceptibility to fraud or other misconduct.[52] For example, some otherwise commendable criminal enforcement initiatives were required because some regulatory programs unintentionally created clear opportunities for fraud. Two prominent examples from the world of environmental regulation and enforcement, previously analyzed by one of the authors of this Article, are the U.S. government's program to comply with the Montreal Protocol by phasing out the use of certain chlorofluorocarbons (CFCs), chemicals known to damage the stratospheric ozone layer, and the U.S. Environmental Protection Agency's (EPA) Renewable Identification Number (RIN) program designed to enhance the production of renewable fuels and reduce greenhouse gas emissions.[53]

In both the CFC and RIN fraud examples, the regulatory programs were designed without a robust evaluation of the program's susceptibility to fraud, resulting in programs without adequate fraud protections. The regulators did not realize that because of this oversight they were, tacitly, generating invitations to lucrative black markets—for illegal CFC smuggling in one instance and the marketing of invalid RIN credits (not actually

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an anti-learning culture and an immature compliance culture as root causes of the illegal activity).

50. *See generally* Frances Bowen & Kate Blackmon, *Spirals of Silence: The Dynamic Effects of Diversity on Organizational Voice*, 40 J. MGMT. STUDIES 1393 (Sept. 2003).

51. *See generally* ANTONIO DI LIETO, BRIDGE RESOURCE MANAGEMENT: FROM THE COSTA CONCORDIA TO NAVIGATION IN THE DIGITAL AGE (1st ed. 2015).

52. While this Article often references examples in the environmental area, these analyses also apply to other areas of corporate regulation and enforcement.

53. Steven P. Solow & Anne M. Carpenter, *The State of Environmental Crime Enforcement: A Survey of Developments in 2012*, BLOOMBERG L. (Mar. 15, 2013, 12:00 AM), https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/X9IDMJV0000000?bna_news_filter=environment-and-energy#jcite [https://perma.cc/QM3F-LG45].

linked to the production of any renewable fuels) in the second instance.[54]

Such blind spots highlight a broader problem—the general lack of formal "management of change" processes in the design of regulatory programs.[55] A management of change process would require regulators to systematically review at the outset whether new or revised programs could create unintended risks, as well as to build protections against such risks into the program design. Currently, before a regulation or demand for information can be issued, it may be subject to a variety of internal governmental reviews. This includes review under the Paperwork Reduction Act, the Regulatory Flexibility Act, the Negotiated Rulemaking Act, and OMB Circular A-4. As one author of this Article has proposed, consideration "should be given to an additional 'law enforcement review' to identify the susceptibility of a program to fraud or criminal abuse, as well as enforcement personnel's view of whether the program's requirements are enforceable."[56]

Risk factors for corporate non-compliance can also come from within an agency's culture, just as they may lie within a company's culture. This occurs in individual instances of agency fraud and corruption.[57] It can also be seen in the example of the U.S. Department of the Interior's (DOI) Minerals Management Service (MMS), the agency that was charged with oversight of the safe and proper operation of offshore oil wells in the years and months leading up to the 2010 British Petroleum Deepwater Horizon well blowout. Eighteen months before the disaster, the DOI OIG issued a memorandum finding "a Culture of Ethical Failure" within MMS that resulted in lax or even corrupt agency oversight of offshore operations.[58] The OIG investigation revealed "a program that had aggressive goals and admirable ideals, but was launched without the necessary internal controls in place to ensure conformity with one of its most important principles: 'Maintain the highest ethical and professional standards.'"[59] It was not until May 2010, one month after the explosion, that DOI undertook efforts to reform MMS, including breaking it into new divisions with separate missions related to leasing, revenue collection, and safety enforcement.

While prosecuting these cases is important, the government's return on its enforcement investment is limited if the learnings from cases are not mined for;

54. *See, e.g.*, Doug Parker, *White Paper Addressing Fraud in the Renewable Fuels Market and Regulatory Approaches to Reducing this Risk in the Future*, E & W STRATEGIES 1, 4 (Sept. 4, 2016) ("Structural vulnerabilities in the regulations, limited agency oversight, and a lack of market transparency within the [RIN program] made this program a ripe target for massive fraud and illicit gain.").

55. Management of change is generally defined as "a combination of policies and procedures used to evaluate the potential impacts of a proposed change so that it does not result in unacceptable risks." AMERICAN BUREAU OF SHIPPING, GUIDANCE NOTES ON MANAGEMENT OF CHANGE FOR THE MARINE AND OFFSHORE INDUSTRIES 1 (2013). Management of change processes are widely used in the oil-and-gas, marine, and other industries.

56. Solow, *supra* note 31.

57. *See, e.g.*, *Federal Jury Convicts Four Navy Officers of Bribery*, DEP'T OF DEF. OFF. OF INSPECTOR GEN. (June 29, 2022), https://www.dodig.mil/Criminal-Investigations/Article/3085145/federal-jury-convicts-four-navy-officers-of-bribery/ [https://perma.cc/PD4X-D5LM].

58. *Id.*

59. Memorandum from Earl Devaney on OIG Investigations of MMS Employees to Secretary Kempthorne 3 (Sept. 9, 2008), https://legacy-assets.eenews.net/features/documents/2008/09/10/document_pm_02.pdf [https://perma.cc/D9JD-AYHE].

(1) guidance on how to better design regulatory programs, including from those who enforce regulations and can help assess a proposed regulation's susceptibility to fraud and other misconduct; (2) an assessment of the degree to which oversight and enforcement efforts are operating both efficiently and effectively, as well as within a strong culture of ethics and professionalism; and (3) opportunities to promptly act on findings from such reviews that reveal significant risk factors.[60] One way that regulators can expand their efforts to perform these types of analyses is through existing agency OIGs, as discussed in Part IV below.

IV. A PROPOSAL TO HELP SOLVE CORPORATE CRIME

This Article proposes a straightforward strategy to better understand the role and value of corporate criminal liability—use the skills and resources of the analysts and investigators in agency OIGs to conduct epidemiological-style reviews of government efforts to address corporate crime and other forms of non-compliance to allow the work of prosecutors to move away from bean counting and towards problem solving.

A. The Non-Compliance Puzzle

Violations are committed by companies of all sizes, publicly and privately held, in every industry, and under essentially every government program. Violators are not limited to those companies operating on the fringe—that is, companies being squeezed by competition, those with inadequate resources to meet regulatory requirements, those without internal controls or compliance programs, or those simply run by scofflaws.

Even companies with healthy financials and enviable profits, that are seemingly well-managed, with gold-plated compliance programs, commit serious violations, while other companies facing far more challenging business and regulatory environments appear to be model corporate citizens. What, then, best predicts when and where violations will occur?

The answer to this question is of enormous importance to the public, government, and businesses. Governmental expenditures on enforcement are in the hundreds of millions each year, and, as Professor Laufer has pointed out, private expenditures on compliance have reached "A Very Special . . . Milestone."[61] Estimates of the cost of white collar crime to the public range from the hundreds of billions to over $1.5 trillion per year.[62] Yet the ROI for expenditures on enforcement and compliance, and how much they reduce the costs

60. *Id.*

61. *See* William S. Laufer, *A Very Special Regulatory Milestone*, 20 J. BUS. L. 392, 398 (2017) (private sector compliance costs are nearing municipal policing costs); *see also* Chen, *supra* note 13, at 52 ("Perhaps it is time investors and business leadership turned the question back to the compliance department: after having invested $X millions in your function, just how much financial loss has been prevented by your program to justify that investment?").

62. *See* James C. Helmkamp, Kitty J. Townsend & Jenny A. Sundra, *How Much Does White Collar Crime Cost?*, NAT'L WHITE COLLAR CRIME CTR., https://www.ojp.gov/pdffiles1/Photocopy/167026NCJRS.pdf [https://perma.cc/J455-4P4E] (discussing the problems associated with estimates of the annual costs of white-collar crimes).

to the public from white collar crime, is difficult to ascertain.[63]

The current dialogue around these issues is not informed by sufficient empirical information. For their part, scholars have identified factors and developed theories from their fields of study to help explain organizational behavior and why some enforcement and compliance programs succeed while others fail. While providing useful insights, this work does not give the complete picture. Instead what is needed is an intensive, objective, empirical, and interdisciplinary approach.

This Article proposes that OIGs utilize a mode of analysis analogous to the methods used in long-term epidemiological studies. Epidemiology looks at large numbers of subjects and invests the time and resources necessary to detect the root causes of diseases and to suggest pathways to cures. Such studies are expected to be impartial and to propose effective remedies.

This proposal does not seek to question the underlying goals that drive current laws, but to take those values as a given and examine how well they are achieved under current models of governance and corporate management. The objectives of an approach under this proposal would include:

- Identifying and addressing the root causes of corporate noncompliance (diagnosing the pathology of compliance failures);
- Assessing the impact of government criminal, civil, and administrative oversight and enforcement efforts on obtaining higher or lower compliance rates; and
- Identifying and applying lessons from past government enforcement efforts to improve the design of regulatory and enforcement programs to protect them from fraud and abuse.

B. Why OIGs?

Such a proposal aligns with the general purpose of OIGs to determine whether an agency is fulfilling its mandates. The types of questions OIGs are already tasked with examining include: How are agency aims being vindicated?; How is the agency's interest in private sector regulatory compliance being aided by criminal, civil, and administrative enforcement tools?; Is the agency using its resources efficiently and effectively?; What is the value or ROI the agency is getting on its enforcement programs?

63. *See* Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 965 (2018) (discussing "challenges associated with measuring effectiveness" of compliance programs); *see also* Chen, *supra* note 13, at 51 ("In order to bring consistency between stated goals and actual performance of corporate compliance programs, and to satisfy the public interest of preventing and detecting violations of law, it is imperative that legal and regulatory regimes begin to measure effectiveness in both quantitative and qualitative terms, at the component and programmatic levels.").

For instance, the Office of Special Review and Evaluation of EPA's OIG "focuses on oversight of programs, offices, and centers, evaluating whether and how they are effectively and efficiently meeting legal, regulatory, congressional, and public requirements and expectation[s] as well as how the EPA implements, executes, and enforces new and existing requirements and on the extent to which stakeholders can rely on those requirements."[64] The Office of Audit of the Department of the Treasury's OIG "performs engagements designed to promote economy, efficiency, and effectiveness in Treasury's programs and operations."[65] The Department of Defense's (DoD) OIG is responsible for "[r]ecommending policies for, and to conduct, supervise, or coordinate other activities to promote economy and efficiency in the administration of, or preventing and detecting fraud and abuse in DoD programs and operations."[66]

Examples of past EPA OIG reports consistent with the proposal outlined above include:

- Report: Compliance with Enforcement Instruments, Report No. 2001-P-00006 7 (Mar. 29, 2001) (finding that EPA's Office of Enforcement and Compliance Assurance ("OECA") "cannot provide a completely accurate picture of EPA's enforcement achievements since OECA is not collecting comprehensive data or using appropriate performance measures").

- Limited Knowledge of the Universe of Regulated Entities Impedes EPA's Ability to Demonstrate Changes in Regulatory Compliance, Report No. 2005-P-00024 (Sept. 19, 2005) (finding that "[v]arious data quality issues impact OECA's ability to adequately identify the size of its regulated universe and associated compliance information").

- EPA Needs to Conduct Environmental Justice Reviews of its Programs, Policies, and Activities, Report No. 2006-P-00034 (Sept. 18, 2006) (finding that until "program and regional offices perform environmental justice reviews, the Agency cannot determine whether its programs cause disproportionately high and adverse human health or environmental effects on minority and low-income populations").

- At a Glance: Resource Constraints, Leadership Decisions, and Workforce Culture Led to a Decline in Federal Enforcement, Report No. 21-P-0132 (May 13, 2021) (finding that a "decline in the EPA's enforcement activities may expose the public and the environment to undetected harmful pollutants").

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64. *About EPA's Office of Inspector General*, EPA, https://www.epa.gov/office-inspector-general/about-epas-office-inspector-general#IG_bio [https://perma.cc/ZB6N-6SLH].

65. *Office of Audit*, TREASURY, https://oig.treasury.gov/office-audit [https://perma.cc/C6QY-Y4UZ].

66. *About DOD Office of Inspector General*, DODIG, https://www.dodig.mil/About/ [https://perma.cc/W4JM-LNA5].

These reports represent the kind of building blocks upon which the analysis that is needed can be obtained. OIGs have unique access the relevant data and information that would be needed to perform these analyses.

V. CONCLUSION

Everyone agrees on statutory goals such as a clean environment, safe consumer products, and stable financial markets. Everyone also recognizes that some companies fail while others succeed at complying with laws aimed at achieving these goals. But there can be a more vigorous focus on understanding the root causes of the failures, as well as on the effectiveness of various government actions at addressing the root causes. Without such an understanding, identifying remedies is difficult if not impossible, opportunities to learn from past efforts are missed, and strategic efforts to combat corporate misconduct and meet statutory goals are hindered.

Agency OIGs appear to have the mandate, the expertise, and the access to perform practical reviews that could help identify root causes of corporate noncompliance and help agencies develop better means to address corporate misconduct. This Article proposes that OIGs adopt an empirical and interdisciplinary approach, based on epidemiological methods. The outcome of that work could provide answers to some of the questions raised at last October's Georgetown Law Center symposium. More importantly, this work could help illuminate for prosecutors (and others) the effectiveness of various government enforcement tools (criminal, civil, and administrative) at meeting statutory goals.