Forecasting the How and Why of Corporate Crime's Demise

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I. INTRODUCTION

Periodically, scholars who write in the field of corporate crime are apt to conjure alternatives to the existing order, sometimes going so far as to imagine a world in which corporate crime ceases to exist and is replaced by something demonstrably different. Recognizing the implausibility of corporate crime's disappearance, I prefer instead to explore an adjacent topic, namely the identification of those dynamics most likely to depress corporate crime's enforcement to intolerably low levels. After all, if we think corporate crime's laws and institutions are worth saving, then we ought to probe the factors that most threaten its enforcement.

The law of corporate criminal liability—which is simply the *federal* law of corporate crime—has elicited deep criticism from many quarters.[2] Respondeat superior, the judge-

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2. "The debate over corporate liability for crimes is long-standing and reveals, if nothing else, a remarkable ambivalence among scholars and jurists as to how best to convey the criminal law's unique message of condemnation to the organizational offender." William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1350 (1999); *see also* Miriam H. Baer, *Three Conceptions of Corporate Crime (and One Avenue for Reform)*, 83 LAW & CONTEMP. PROBS. 1, 6–21 (2020) (analyzing academic dissensus regarding corporate crime's normative purpose).

created attribution rule that affixes criminal blame to corporations, simultaneously enables the government to exercise too much power while securing too little accountability and deterrence. No contemporary scholar enthusiastically embraces respondeat superior, and many observers have ably identified the flaws in the guidance documents federal prosecutors have constructed in respondeat superior*'s* place. Nevertheless, neither the Supreme Court nor Congress has shown the slightest inclination to replace the formal rule, much less to extinguish the government's soft law treatment of corporate crime.

This Article accordingly assumes that corporate crime's "demise" will arise, not from a direct attack, but from a series of indirect punches. Corporate criminal liability does not rest upon a coherent theory of punishment. Rather, it is a blunt attribution rule that premises the corporation's liability on that of one of its agents or employees.[3] Thus, *corporate* criminal liability relies quite a bit on *individual* criminal liability. And whereas corporate liability is both vicarious and faultless,[4] individual liability is far more often premised on proof of culpable misconduct.[5]

Some might say the relationship is reciprocal and that individual liability relies just as much on the threat of corporate liability.[6] But that dependence is more a matter of policy than law. The government *can* prosecute individuals without the corporation's assistance; it's just more difficult and costly to do so.[7] By contrast, the government *cannot* prosecute the corporation without evidence of some underlying crime.[8] Accordingly, if we want to better understand corporate crime's future, we should direct our focus to the substantive and procedural rules we rely on to redress instances of individual wrongdoing.[9]

Conventional wisdom insists that white-collar crime's problems lie primarily with

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3. *See generally* W. Robert Thomas, *Corporate Criminal Law is too Broad—Worse, It's too Narrow*, 53 ARIZ. ST. L.J. 199 (2021); CHARLES DOYLE, CONG. RSCH. SERV., RL43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW 3 (2013).

4. "[C]ourts and legislatures have embraced enforcement strategies, both implicit and explicit, but only one liability rule: vicarious liability." Laufer, *supra* note 2, at 1357. Although corporate responsibility is faultless, it nevertheless relies on a single actor's transgression of law, which often *is* defined by a culpable mental state. *See* Vikramaditya S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 370–71 (1999).

5. There are notable exceptions, but much of white-collar crime's corpus requires proof of purpose, knowledge, or at least recklessness. *See, e.g.*, Samuel Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 549 (2014) (highlighting "criminal law's polestar of individual fault"); David Kwok, *Underestimating Fraud*, 109 KY. L.J. 359, 384 (2020) ("Fraud typically encompasses a minimum of knowledge as mens rea.").

6. *See generally* Jennifer Arlen & Renier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Laufer, *supra* note 2.

7. For the economic argument that corporate liability is practically ineffective absent corporate self-policing, *see* Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH 156, 162 (Tina Søreide and Abiola Makinwa eds., 2020) ("The threat of individual criminal liability for corporate misconduct generally is not effective when government officials are the only parties seeking to detect misconduct.") [hereinafter *Promise and Perils*].

8. *See* Thomas, *supra* note 3, at 204 (noting that "the organization cannot be held criminally responsible unless one single individual can be held criminally responsible"). Although outside the scope of this essay, organizational liability's reliance on individual liability has also inspired concern among those who study artificial intelligence and the eventual automation of the workplace. *Id.* at 204–05; *see generally* Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. REV. 893 (2020).

9. In using the term "individual," I mean only to exclude corporate liability. I consider conspiracy and complicity statutes to fall well within the "individual" moniker, as they purport to punish natural persons.

federal prosecutors, who lack the resources or will to make white-collar crime a high-level priority.[10] Even if this narrative expresses several kernels of truth, it remains incomplete insofar as it ignores the judiciary and legislature. It takes no account of changes in constitutional and statutory interpretation, in the substantive criminal laws Congress has either enacted or failed to enact, and in the background procedural rules that govern complex investigations of corporate and white-collar crime. It projects corporate enforcement weaknesses as ones that can be easily redressed and reversed, rather than more complex consequences of how our social, political, and legal institutions are organized.

Moreover, the "bad prosecutor" narrative fails to capture an emerging dilemma, which is that white-collar crime represents a narrow slice of a criminal justice system that has become the focus of broad and sustained critique.[11] Long-simmering feelings about biased policing and mass incarceration[12] place white-collar crime's enforcers in a tough spot, in that they must defend tools that have played direct and supporting roles in propping up a system widely viewed as racist, pathologically punitive, and highly inefficient.[13]

Meanwhile, an amalgamation of social and political developments has propelled to the forefront a series of legal arguments that seek to rein in executive branch power, whatever the cost: from debates over delegation and statutory interpretation to questions of government surveillance and privacy, commentators across the ideological spectrum seem to prefer a smaller, less powerful government presence, particularly in the realm of criminal law. Indeed, this is one area where the efforts to reduce government power have been notably bipartisan.[14]

Whatever their merits, these developments cannot possibly help the federal enforcers tasked with investigating and prosecuting white-collar and corporate crime. Arguments that have gained traction over the past decade could easily narrow the substantive statutes and government-friendly procedural rules that make corporate crime's enforcement possible. Accordingly, the remainder of this Article explores the scenario in which white-collar offenses become narrower and more difficult to prove. If federal white-collar crime

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10. *See generally* Trung Nguyen, *The Effectiveness of White-Collar Crime Enforcement: Evidence From the War on Terror*, 59 J. ACCT. RSCH. 5 (2021) (identifying correlation between government's attack on terrorism and increase in white-collar crime); JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020) (criticizing government's enforcement priorities).

11. To be clear, there is no such thing as a single criminal justice system; rather, there are 51 different systems comprised of at least 50 states and the federal system. John F. Pfaff, *Why the Policy Failures of Mass Incarceration are Really Political Failures*, 104 MINN. L. REV. 2673, 2674 (2020) ("What we have, however, is not a system but a set of systems—plural—that span city, county, state, and federal governments . . . ."); *see also* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 MICH. L. REV. 519, 519 (2011) ("Criminal law enforcement in the United States is multi-jurisdictional.").

12. *See, e.g.*, Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1338–40 (2021) (citing the United States' unmatched incarceration rate and its deleterious effect on poorer communities and people of color).

13. For a general introduction to these criticisms and the reform movements they have inspired, see RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017).

14. On criminal justice reform's bipartisan nature, see Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 492–93 (2019) (citing "bipartisan bills introduced at the national level . . . ."); Norman L. Reimer, *Opening Remarks*, 7 J. L. ECON. & POL'Y 573, 573–74 (2011) (citing bipartisan discussions regarding overcriminalization).

narrows in scope, so too should the government's ability to credibly threaten corporate offenders. In a world where many already view corporate accountability as excessively weak and an insufficient deterrent, this trajectory ought to trigger concern.

Several elements of this prediction have already fallen into place. First, district and appellate courts have reduced the deference they have previously granted prosecutors in interpreting federal criminal statutes.[15] Several Supreme Court justices, in turn, have conveyed their interest in revisiting the nondelegation doctrine and revising the meaning of the concept known as "lenity."[16] And finally, a handful of ideologically diverse justices have signaled their inclination to rewrite the procedural doctrines that have long promoted the government's collection of information from business entities.[17]

Many, but not all, of these developments have been met with cautious enthusiasm or agnostic shrugs of the shoulders, particularly where criminal law is the backdrop. When the judiciary's intervention threatens regulatory power, pro-government voices are quick to speak up. But when the rollbacks impact the government's *criminal* enforcement powers, these doctrinal narrowing developments have elicited more support and less outcry than one might have expected even a decade ago. The government can no longer claim a reliable, cheerleading "enforcement lobby" among judges or academics. Plenty of commentators still cheer the occasional takedown of a greedy executive or corporate behemoth, but many more jurists and public thinkers are just as apt to question the scope and exercise of government surveillance and punishment. Whereas prosecutors and FBI agents may have once been perceived as heroes, today, they are just as easily portrayed as villains. Surely, these revised perceptions of the government's essential enforcement institutions imply important spillover effects for how and how well the government enforces corporate and white-collar crime,

Federal prosecutors would thus do well to examine the handwriting on the wall. As a nation emerges from the inescapable conclusion that mass incarceration has inflicted tremendous harm and that its corresponding bureaucracy is overdue for top-to-bottom reform, it is inconceivable that the dual phenomena of broadly written criminal statutes and unchecked procedural powers will remain intact.[18] To the contrary, government enforcers should be prepared for a gradual eclipse of the advantages they have long enjoyed: broad laws, extensive delegations of power, and expansive investigative powers.

It may take a while to get fully underway, but once the process begins, it will be difficult to reverse. Rather than try to blunt it, policymakers should cast their attention to other legal actors who might fill the federal government's enforcement vacuum where white-collar and corporate misconduct are concerned. Years ago, scholars wrote of the potential taming effects of civil enforcement proceedings and punitive damages, which

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15. *See infra* Part III.B.

16. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).

17. For discussion regarding procedural rollbacks, see Part II.C; United States v. Jones, 565 U.S. 400, 413 (2012) (Sotomayor, J., concurring); Carpenter v. United States, 138 S. Ct. 2206, 2263 (2018) (Gorsuch, J., dissenting); Jacob Sullum, *Neil Gorsuch Joins Sonia Sotomayor in Questioning the Third-Party Doctrine*, REASON (June 22, 2018, 6:30 PM), https://reason.com/2018/06/22/neil-gorsuch-joins-sonia-sotomayor-in-qu/ [https://perma.cc/JG8R-9YS4].

18. Scholars have already begun to imagine a more pared-down federal criminal justice system. *See generally* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. 791, 792 (2019).

functioned as potential middle-ground solutions to the debate over tort law and criminalization.[19] Today, we can see the practical benefits of those in-between solutions playing out in various venues, many of them emerging from the offices of state attorneys general.[20] The silver lining here is that a corporate enforcement system untethered from its federal framework might eventually give way to a type of liability that is more democratic, more responsive, and ultimately more coherent.

The remainder of this Article proceeds as follows. Part I briefly discusses the implications of corporate crime's status as a judge-made attribution rule. Part II examines several emerging trends that subtly threaten federal white-collar[21] crime's continuing vitality, which in turn impacts corporate crime. Part IV ends on a more positive note, revealing several upsides of evolving from a system that perceives the response to corporate wrongdoing as a predominantly federal or criminal task.

II. THERE IS NO SUCH THING AS CORPORATE CRIME

The "corporate crime" of which most commentators speak is not a singular, statutorily defined offense but rather a broad and unforgiving attribution rule.[22] The federal criminal code[23] (found mostly in Title 18 and scattered throughout other titles) prohibits and punishes behavior by "persons" and, in some cases, "organizations." The definitional provisions of the federal code, 1 U.S.C. Section 1 and 18 U.S.C. Section 18 make clear that a "person" includes corporations, partnerships, companies, and other business entities, and that an "organization" is a "person" other than a natural individual.[24]

So, companies are persons, and there are many things persons cannot legally do without running afoul of the federal code. But these statutes fail to tell us *when* we will consider a natural person's criminal activity to be treated as a corporate person's conduct. To reach that conclusion, we need an attribution rule, and the rule that federal courts currently employ is the one the Supreme Court first announced in its 1909 watershed case,

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19. Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE. L.J. 1795 (1992).

20. *See infra* Part IV.

21. The term "white-collar crime" means different things to different people. Sociologists and criminologists often use the term to refer to types of offenders, whereas practitioners and legal scholars use it as a shorthand for certain types of offenses, namely crimes of deceit that revolve around money, property, or business-related transactions. *See* Sally S. Simpson, *Reimagining Sutherland 80 Years After White-Collar Crime*, 57 CRIMINOLOGY 189, 189–90 (2019) (discussing the debate); Andrew Verstein, *White-Collar Violent Crime*, 49 WAKE FOREST L. REV. 873, 878 (2014) (citing the Department of Justice's offense-centric definition). For an excellent overview of this area, see Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2004).

22. *But see generally* Thomas, *supra* note 3 (acknowledging corporate crime's breadth but insisting that corporate crime is also underinclusive).

23. The federal criminal code is not particularly codelike. *See* Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 35 (2019) ("It is . . . remarkable just how large and inaccessible the resulting collection of statutes [known as 'federal criminal law']—which, strictly speaking, is not properly referred to as a 'code' at all—has become after more than a century of statute-by-statute accumulation."); Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) ("There actually is no federal criminal 'code' worthy of the name."). Nevertheless, it does include the major white-collar offenses such as fraud and bribery. *See* Green, *supra* note 21, at 12 (referring to "presumptively core white collar offenses such as perjury, bribery, and obstruction of justice").

24. 1 U.S.C. § 1; 18 U.S.C. § 18.

New York Central.[25] This case, which affirmed the constitutionality of the newly enacted Elkins Act, permitted the government to punish a corporation for its employee's violation of a federal price-fixing law.[26] Drawing on tort law and prudential principles, the Court concluded that government enforcement would be permanently disabled if it weren't permitted to hold corporate entities criminally responsible for their employees' criminal violations.[27]

Thus, under *New York Central*'s rule of respondeat superior, the corporation becomes vicariously liable for its agent or employee's crime, provided the natural person in question acts within the scope of his employment *and* harbors an intention of benefitting the employer-corporation.[28] Subsequent courts have interpreted these elements quite generously, enabling the government to threaten nearly all major corporate actors with prosecution under a variety of circumstances.[29] Nevertheless, the government rarely makes good on this threat. The regulatory, political, and economic costs of prosecuting a legitimate business often outweigh its deterrent benefits.[30] Even when a company's top executives have engaged in pervasive or repeated wrongdoing, the collateral consequences of even an indictment can send a company into a tailspin, taking its employees and investors with it.[31] To avoid—or at least control and moderate—these collateral consequences, prosecutors instead pursue extra-judicial agreements (deferred and non-prosecution agreements) and promote leniency programs that trade the declination of charges for the corporation's voluntary disclosure of wrongdoing.[32]

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25. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96. (1909). For more on the common law development of corporate criminal liability, see generally W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479 (2018).

26. *N.Y. Cent.*, 212 U.S. at 495–96.

27. *Id.* at 494–95. The Court borrowed the rule from tort law. *See generally* Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. 1093, 1125–31 (2020).

28. *N.Y. Cent.*, 212 U.S. at 494–96.

29. The scope of employment extends to any action undertaken in one's authority, actual or apparent. *See* Alexandra Babin, *Corporate Criminal Liability*, 58 AM. CRIM. L. REV. 671, 675–76 nn.28–32, 709 (2021) (citing authorities). The intent to aid the company is hypothetical and, therefore, easy to prove. *See* Thomas, *supra* note 3, at 210 (describing the inquiry as whether an organization *could have* benefited from an employee's conduct, not whether they actually benefited).

30. *See, e.g.*, Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1063 (2008).

31. The standard example of this tailspin is the Arthur Andersen accounting firm, whose indictment triggered an exodus of its clients that resulted in the company's effective demise long before the Supreme Court overturned its trial conviction. *See* James Kelly, *The Power of an Indictment and the Demise of Arthur Andersen*, 48 S. TEX. L. REV. 509, 522–23 (2006). As others have pointed out, Andersen's predicament may have been relatively singular: it occupied a highly regulated business sector; its indictment imperiled its license to audit firms and therefore spurred an immediate exodus of clients; and it was organized as a partnership, placing all partners at significant personal financial risk. *See generally* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013). Post-Andersen, several companies have survived corporate indictments and convictions, although it remains unclear how many of those convictions reflected negotiated terms. *Id.*

32. Deferred and Non-Prosecution Agreements "have been used in virtually all areas of corporate criminal wrongdoing." Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 537 (2015); *see also* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016) (examining DPAs' implications for corporate governance). For more egregious cases of wrongdoing, the government may still demand a guilty plea from a corporation's subsidiary, which presumably limits the conviction's collateral consequences to the subsidiary. *See* Peter J. Henning, *Seeking Guilty Pleas From*

Over the past two decades, the Department of Justice (DOJ or "Department") has attempted to normalize this process by publishing a series of charging policies.[33] The oldest and most substantial of these can be found in the Department's publicly available Justice Manual.[34] The Department has also circulated written guidance on corporate compliance, adding concrete layers of advice to the high-level guidance already contained in the Organizational Sentencing Guidelines.[35] And finally, the Department's Fraud Division has implemented a voluntary disclosure policy encouraging firms to disclose violations of the Foreign Corrupt Practices Act in exchange for leniency and the possible declination of charges.[36]

Viewed as a whole, these policies—which I refer to here as the DOJ's shadow law of corporate criminal liability—narrow the sweep of the respondeat superior rule and replace it with a framework premised on a mishmash of fault principles, regulatory aims, and prudential considerations.[37] Whereas the formal rule of respondeat superior holds the corporation criminally liable for nearly all its employees' misconduct, the more nuanced shadow law inquires: how far up the chain the wrongdoing permeated; which efforts were taken to prevent the wrongdoing; whether the firm voluntarily disclosed the wrongdoing and cooperated in subsequent investigations; and which actions the firm took to remediate the conditions that led to the underlying wrongdoing.[38] It further inquires whether the corporation has already been punished civilly and whether the direct or collateral consequences of prosecution might cause excessive dislocations to innocent shareholders, employees, or consumers.[39]

In sum, the DOJ's shadow law replaces respondeat superior with a vague rule of collective fault, and it does so quietly, skirting the legislative imprimatur of a vote and foregoing the transparency of a binding judicial precedent.[40] At its best, the shadow law prompts prosecutors to examine the corporation's role in fostering, permitting, and

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Corporations While Limiting the Fallout, N.Y. TIMES: DEALBOOK (May 5, 2014), https://dealbook.nytimes.com/2014/05/05/seeking-guilty-pleas-from-corporations-while-limiting-the-fallout/ [https://perma.cc/Q2BJ-LP3X].

33. For analysis and criticism of such policies, see generally Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589 (2018) (tracking the evolution of the government's charging policies); Lawrence D. Finder, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS L. REV. 1 (2006) (describing early analysis of deferred prosecution agreements and the Department's policies).

34. U.S. Dep't of Just., Just. Manual, §9-28.000.

35. CRIMINAL DIVISION, U.S. DEP'T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2020), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/8CQD-E55T]; U.S. SENT'G GUIDELINES MANUAL §§ 8A1.1–8F1.1 (U.S. SENT'G COMM'N 2018); Paula Desio, *An Overview of the Organizational Guidelines*, U.S. SENT'G COMM'N (2016), https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf [https://perma.cc/3A92-MCZQ].

36. U.S. Dep't of Just., Just. Manual, § 9-47.120 (2019).

37. For example, whereas the shadow law credits the company's preventive and remedial efforts, the actual attribution rule takes no account of these efforts. *See* United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009) ("[W]e refuse to adopt the suggestion that the prosecution . . . should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees.").

38. *See* U.S. Dep't of Just., Just. Manual, § 9-28.300 (2020) (listing the factors a prosecutor should consider for proper treatment of a corporate defendant).

39. *Id.* § 9-28.1100.

40. Thomas, *supra* note 3, at 219.

concealing misconduct, behaviors that easily implicate both retributive and deterrence-based theories of punishment.[41] At the same time, the DOJ *also* relies on a thinly-conceptualized theory of government regulation, one that sometimes heralds the prosecutor's ability to spur industry-level change, despite the lack of conceptual and legal guardrails we ordinarily attach to regulatory endeavors.[42] And finally, the shadow law enables prosecutors to limit the negative spillover effects that would otherwise accompany broad application of the respondeat superior rule.[43]

Notwithstanding its theoretical benefits, commentators have attacked the DOJ's shadow law from multiple angles. A product of informal guidance, it lacks democratic legitimacy.[44] Relying on open-ended factors that federal prosecutors unilaterally decide and weigh, the shadow law is opaque and promotes the erosion of separation of powers principles.[45] Declining to adhere to criminal law's standard elemental structure, it fails to

41. I am admittedly sidestepping the philosophical question of whether entities can serve as the locus of blame or retribution. These questions have spawned a rich and lively debate. Professor Buell has argued that corporate liability serves an important blaming function but that this function is expressive and instrumental. *See, e.g.*, Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS. 25, 29–31 (2020) (rejecting the theory of corporate retribution). Professor Hasnas has warned that although it might be acceptable to speak in the everyday language of blaming a corporation, it is not helpful to do so as a legal matter. John Hasnas, *Where is Felix Cohen When We Need Him?: Transcendental Nonsense and the Moral Responsibility of Corporations*, 19 J.L. & POL'Y 55, 70 (2010) (highlighting the injustice of punishing innocent members of a corporate group). Some scholars defend collective blame on instrumental grounds, while others defend it morally as a form of shared responsibility. *Compare* Danielle D'Onfro, *Corporate Stewardship*, 44 J. CORP. L. 439, 452 (2019) (defending collective sanctions instrumentally as "one way that law can effectively motivate *individuals* to address or prevent harm caused by groups or other group members"), *with* Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 439, 460–63 (2015) (advancing a moral argument grounded in theories of shared responsibility).

42. On the positive regulatory potential for DPAs and similar settlements, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (identifying the various regulatory reforms that might be achieved through extrajudicial corporate settlements). *See also* Douglas Husak, *Social Engineering as an Infringement of the Presumption of Innocence: The Case of Corporate Criminality*, 8 CRIM. L. & PHIL. 353, 354 (2014) (describing deferred prosecution agreements as "a form of social engineering" that may or may not improve public welfare). On how DPA-driven "regulation" can ultimately produce suboptimal results, see Jennifer Arlen & Marcel Kahan, *Corporate Governance Through Nonprosecution*, 84 U. CHI. L. REV. 323, 327 (2017) (arguing that DPA-style "mandates" by prosecutors "should be employed far more selectively than is called for by current federal policy and practice"). For an argument that prosecutorial regulation is the logical outgrowth of a strong prosecutor paired with a weakened regulatory state, see Gregory M. Gilchrist, *Regulation by Prosecutor*, 56 AM. CRIM. L. REV. 315, 319 (2019) (contending that the "regulatory state of prosecutors" is the "predictable consequence of plea bargaining, discretion and regulatory failure").

43. "DPAs and NPAs reduce the costs associated with prosecutorial action—there is still the cost of investigation, but there are no trials, no risk of loss, and no collateral consequences-while simultaneously offering the prospect of large monetary recoveries from corporate defendants." Griffith, *supra* note 32, at 2088.

44. "DPAs and corporate settlements evade *both* the criminal justice system *and* the formal variations of rule-making that are defined under the [Administrative Procedure Act]. They lack transparency—in how they are negotiated, in how they are enforced, and finally, in how successfully they reform corporate offenders." Baer, *supra* note 2, at 14; *see also* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192 (2016) (concluding that prosecutors' "discretionary authority to use D/NPAs to create and impose mandates on firms is inconsistent with the rule of law").

45. "When prosecutors regulate, they, too, challenge the separation of powers." Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 177, 177 (2011) (comparing prosecutorial regulation's separation concerns to the

look, feel, or sound like the rest of criminal law.[46]

Notwithstanding the foregoing, federal prosecutors can rest easy in the knowledge that their ability to mount a prosecution against a corporate offender remains strong and that their power to compel concessions from wayward corporations is even stronger. The longevity of this regime, however, ought to give them pause. The shadow law's continued success relies not only on the judiciary's continued affirmation of respondeat superior and its DPA spawn, but also on the government's ability to credibly identify an individual offense. Remember, corporate criminal law is the product of an attribution rule; absent an individual offense, there can be no corporate offense.[47] Accordingly, *corporate* crime's successful enforcement hinges on *individual* white-collar crime's definition and enforcement. And as the following Part demonstrates, there is good reason to believe the latter is headed for an overdue correction.

III. WHITE-COLLAR CRIME UNDER SIEGE

As the preceding Part explained, corporate criminal liability's formal rule, respondeat superior, is not a standalone offense, but an attribution rule. It relies heavily on the government's discovery of an underlying violation of law. For that reason, it matters a lot how broadly or narrowly courts construe white-collar offenses such as fraud, bribery, and obstruction of justice. If an instance of deception or corruption falls outside the legal definition of "fraud" or "bribery," it cannot serve as the basis of a corporate-crime prosecution. And if the pool of bad behavior that qualifies as "crime" contracts in size, that contraction necessarily affects the government's enforcement of corporations.

This Part examines several interpretive trends that have already triggered, and are likely to continue, white-collar crime's contraction.

A. Vagueness and Lenity

Start with the void-for-vagueness doctrine. First-year law students learn that a law is unconstitutionally vague when it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." The prohibition on vague penal statutes reinforces the Constitution's due process and separation of powers principles. Legislatures write the laws whose prohibitions warn citizens in advance of what they can and cannot do and the range of punishments they might suffer for violating such prohibitions. Clearly written laws, in turn, constrain enforcers from

separation concerns that arise in more traditional regulatory contexts); *see also* Gordon Bourjaily, Note, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. ON LEGIS. 543, 543 (2015) (arguing that "DPAs allow prosecutors to circumvent the safeguards of the criminal process, and they undermine public faith in the rule of law").

46. Miriam H. Baer, *Corporate Criminal Law Unbounded*, *in* OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 475, 475–496 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

47. Thomas, *supra* note 3, at 213 (concluding that respondeat superior renders corporate liability "necessarily derivative" of individual criminal liability). Thomas critiques this set-up as inherently prone to "underbreadth" because it excludes from liability certain types of corporate misconduct. *Id.* at 239–50. My point is slightly different: as the judiciary revisits certain substantive and procedural rules, individual liability is apt to become narrower and more difficult to prove. This contraction, in turn, will impact corporate criminal liability and the government's corporate enforcement efforts.

punishing arbitrarily, according to bias, or as an excuse to harm one's personal or political enemies. The void-for-vagueness doctrine thus preserves due process at the same time it reinforces democracy.

Vagueness is joined by the rule of lenity, which urges courts to interpret ambiguous statutory terms in favor of criminal defendants.[48] The more common version of lenity kicks in only when a court determines a statute or its term displays "grievous ambiguity," such that it remains inscrutable after all other methodologies of interpretation have failed.[49] Lenity's more muscular definition calls for courts to interpret criminal laws strictly, placing a thumb on the scales in the defendant's favor whenever a criminal statute is unclear.[50] Two decades ago, lenity was an add-on concept, the kind of argument a court raised in addition to the many other reasons it invoked for interpreting a statute narrowly.[51] Today, scholars and jurists, such as Justices Gorsuch and Sotomayor, have voiced support for the re-emergence of a lenity doctrine that does far more work,[52] and frankly, threatens far more headaches for the white-collar prosecutor, whose docket relies on a bevy of open-textured and expansively written criminal statutes.[53]

Like lenity, vagueness can be employed in more or less radical ways. Judges can strike down a vague law in its entirety,[54] but they rarely do so, in part because they are disinclined

48. "The motivating purpose of the rule is to provide adequate notice to defendants (due process), and to reinforce the notion that only the legislature has the power to define what conduct is criminal and what conduct is not (separation of powers)." Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998).

49. *Id.* at 57 (stating that the majority approach to lenity "relegates it to a tie-breaker only after courts have exhausted all other interpretive aids"). "The rule 'comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' Our repeated use of the term 'grievous ambiguity' underscores that point." Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) (internal citations omitted). Dan Kahan helpfully explains that this weak version of lenity enables Congress to delegate criminal lawmaking power to the federal courts. "The historic underenforcement of lenity, I will argue, reflects the existence of another largely unacknowledged, but nonetheless well established, rule of federal criminal law: that Congress may *delegate* criminal lawmaking power to courts." Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347. Thus, it is not surprising that the same jurists who wish to alter the rule of lenity, *see infra* notes 50–53 and accompanying text, also seem poised to remake the nondelegation doctrine. *See infra* Part III.B.

50. The "rule of lenity" is a new name for an old idea—the notion that "penal laws should be construed strictly." *Wooden* 142 S. Ct. at 1082 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F.Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812)). For arguments favoring the more muscular version of lenity, see, for example, Maisie A. Wilson, Note, *The Law of Lenity: Enacting a Codified Federal Rule of Lenity*, 70 DUKE L.J. 1663 (2021); Shon Hopwood, *Restoring the Historical Rule of Lenity as Canon*, 95 N.Y.U. L. REV. 918 (2020); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695 (2017); David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523 (2018).

51. "When the Supreme Court has viewed narrow readings as best, it has sometimes (but not always) bolstered its conclusions by invoking the rule of lenity." Kahan, *supra* note 49, at 378 (acknowledging that this bolstering approach makes courts seem unprincipled in their use of the concept).

52. Justice Sotomayor agreed with Justice Gorsuch's analysis of the rule of lenity in his opinion in *Wooden*, and, accordingly, joined those parts (II–IV). *Wooden*, 142 S. Ct. at 1074–75.

53. *See, e.g.*, Kahan, *supra* note 49, at 373–77 (analyzing the federal fraud statutes, whose incompleteness necessitates judicial lawmaking).

54. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (overturning anti-noise ordinance).

to overturn duly enacted Congressional statutes.[55] Accordingly, in the white-collar context, courts invoke vagueness (and usually lenity) as the justification for narrowing—but not completely overturning—a statute.[56] This was what the Court did in *Skilling* when it held that the prohibition of defrauding someone of their right to "honest services" was, in fact, a prohibition on bribery and kickbacks.[57] The Court *could* have thrown out the honest services provision in its entirety, as Justice Scalia urged,[58] but instead rescued it by excavating a narrower, and arguably more concrete, interpretation.[59] A little more than a decade later, it is questionable whether *Skilling* would have resolved in the same way had it been decided today. It seems just as likely that the Court would have tossed the honest services provision altogether.

As a concept, vagueness can do far more than simply impact the statute whose specific terms are insuperably ambiguous. Some laws are linguistically clear but still capture an exceedingly broad range of conduct.[60] When a so-called "open-textured" statute prohibits a massive range of behavior, it enables government officials to decide whom to target and whom to leave be.[61] This, in turn, creates great uncertainty because citizens are never quite sure if their superficially illegal conduct will be prosecuted or ignored. A century ago, the Supreme Court showed little sympathy for the epistemic uncertainty caused by broad statutes.[62] Today, however, scholars and courts seem far more open to recasting "vagueness" as a multi-purpose tool that can redress the overly broad statute as much as it restrains the impenetrably ambiguous one.[63] *This* muscular version of vagueness poses a

55. "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963).

56. *See, e.g.*, Kelly v. United States, 140 S. Ct. 1565, 1571 (2020) (explaining that federal fraud law's "money or property" element "prevents these statutes from criminalizing all acts of dishonesty by state and local officials" and thereby triggering vagueness issues); Skilling v. United States, 561 U.S. 358, 403 (2010) (observing that relevant case law "requires us, if we can, to construe, not condemn, Congress' enactments").

57. *Skilling*, 561 U.S. at 408–09 (preserving the honest services fraud statute by narrowing it to cover only "bribes and kickbacks").

58. *Id.* at 415 (Scalia, J., concurring) (arguing that honest services fraud provision was unconstitutionally vague).

59. *Id.* at 408–09.

60. This is hardly limited to federal or white-collar crime. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001) ("[B]road criminal law thus means that the law as enforced will differ from the law on the books.").

61. For explication and partial defense of this dynamic, see Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1501–02 (2008) (explaining emergence and need for open textured rules); *Id.* at 1507–09 (on the need for broad rules to counteract detection avoidance); *cf.* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 793 (2016) ("[P]rosecutors have no motivation to go after *everyone* guilty of a particular offense.").

62. As Justice Holmes coolly observed, "[a] man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men." Nash v. United States, 229 U.S. 373, 376 (1913) (rejecting the argument that the Sherman Antitrust Act was unconstitutionally vague). A year later, Justice Holmes described the *Nash* decision: "[A] criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade." Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223 (1914).

63. *See* Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 238 (2017) (arguing that the gap "may be a distinction without a real difference"). Professors Low and Johnson have articulated a theory of vagueness that limits criminal law to illicit "conduct," for which there exists a "predictable correlation" between the law's meaning and the conduct to which it is applied. Peter W. Low &

far greater threat to the average white-collar statute than the version many of us learned in law school several generations ago.

The foregoing reflects deeper debates over how much delegation courts are willing to permit in criminal lawmaking.[64] If Congress drafts an open-ended law that inherently relies on judicial construction or on-the-ground judgments, it outsources some of its lawmaking responsibility to its non-legislative branches.[65] And it is not just the Supreme Court that "makes law" so much as it is the lower and appellate courts that preside over hundreds of federal prosecutions and their various disputes. [66]

There was a time when jurists and scholars treated such outsourcing as—at worst—a necessary evil.[67] Today, however, a new generation has registered far more concern with laws that bestow excessive authority upon judges and prosecutors. According to delegation's opponents, overbreadth breeds injustice, reinforces inequity, and ultimately weakens our democracy.[68] Even though these scholars may be primarily focused on the prosecution of narcotics and violent crime, their mobilization of academic and public support against broad and vague statutes all but ensures spillover effects for the typical white-collar statute. If the legislature's "outsourcing" of criminal lawmaking attracts enemies on both the political left and right, its future as an unyielding feature of federal criminal law becomes increasingly less certain.

B. Nondelegation

In line with that prediction, consider the most recent legal attacks on the Constitution's nondelegation doctrine. The Constitution's separation of powers principle prohibits the legislature from ceding its lawmaking powers to its co-equal branches, including administrative agencies.[69] But the legislature can still rely on other branches to assist in the application and interpretation of already written laws, as well as in necessary fact-finding.[70]

Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2053 (2015).

64. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 ("[B]road statutory language is understood to constitute an implicit delegation of lawmaking power to courts.").

65. *See, e.g.*, Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 410 (2021) ("Because modern criminal law is so broad, prosecutors are delegated the power to decide who to charge and with which crimes."); Buell, *supra* note 61, at 1519 (arguing that it is an "illusion to treat" the courts' interpretation of federal laws "as anything other than criminal lawmaking").

66. Buell, *supra* note 61, at 1519–20 (describing the role of courts of appeal).

67. "Federal fraud law is very broad, and its breadth is driven in part by an agenda of maintaining supple legal tools to deal with inventive and resourceful persons determined to appropriate the interests of others." Buell, *supra* note 61, at 1553. Broad interpretations of laws "remove offenders' temptation to look for loopholes ex ante by giving courts the flexibility to adapt the law to innovative forms of crime ex post." Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 139 (1997) (internal citations omitted).

68. *See generally* Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281 (2021); Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, *supra* note 50; Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. IRVINE L. REV. 855 (2020); Carissa Byrne Hessick & Joseph Edward Kennedy, *Criminal Clear Statement Rules*, 79 WASH. U. L. REV. 351 (2019). For the rare contemporary article partially rebutting several of these arguments, see Daniel C. Richman, *Defining Crime, Delegating Authority – How Different are Administrative Crimes?*, 39 YALE J. ON REG. 304 (2021).

69. Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (recognizing that although "Congress generally cannot delegate its legislative power to another Branch," it can "[obtain] the assistance of its coordinate Branches").

70. *Id.*

As a practical matter, the Supreme Court has required only that Congress include an "intelligible principle" in its delegation of fact-finding power to administrators, permitting regulators or other delegees to flesh out the law's details.[71] To say this rule is deferential is an understatement. Two Supreme Court cases, however, suggest that such deference may eventually meet its end, as at least five Supreme Court justices have signaled an interest in revisiting the doctrine when the right opportunity arises.[72] If they do, the new rule they create will almost certainly destabilize the various regulatory enforcement frameworks that traverse criminal and civil lines. Even if the main target of the "new" nondelegation doctrine is the administrative agency's overall rulemaking authority, it seems highly likely that the tougher, stricter rule of nondelegation will affect regulatory crimes and, therefore, regulatory enforcement.

C. Statutory Construction

At a higher level of generality, consider how the Court has employed statutory-construction tools to narrow white-collar crime's scope in even the most mundane of cases. In the now-infamous *Yates v. United States*, the Court concluded that a broadly phrased obstruction of justice statute did not encompass the (illegal) catch of fish a commercial fisherman concealed when he docked his ship at a port.[73] To be sure, federal prosecutors could find better things to do with their time than pursuing ordinary fishermen for lying about the size of grouper they caught. Nevertheless, the Court's holding is exceedingly difficult to rationalize with the statute's language, which very plainly forbade the concealment of "any tangible object."[74]

Yates is hardly the only case in this category. One can easily rattle off a list of representative decisions. *McDonnell* narrows the types of behavior that can serve as the basis of a bribe's quid pro quo.[75] *Sekhar* reminds prosecutors that a person can only extort someone else for "property" and not for some intangible benefit of uncertain value.[76] And the Court's recent decision in *Kelly* intones that the "property" obtained in a mail or wire fraud scheme must be the primary object of the scheme and not some tangential side piece.[77] One could say this is cherry-picking, but it is difficult not to see a trend.

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71. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

72. *See* Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). Justice Gorsuch's opinion criticizes the Court's administrative delegation jurisprudence and urges a reconsideration of the doctrine. *Id.* at 2131–48. Justices Roberts and Thomas joined his opinion. *Id.* at 2131. Writing separately, Justice Alito stated that he would support an effort to revisit the nondelegation doctrine. *Id.* at 2130. Finally, in *Paul v. United States*, in a statement concurring in a denial of certiorari, Justice Kavanagh wrote that he, too, would be open to reconsidering the Court's nondelegation precedents. 140 S. Ct. 342, 342 (2019).

73. Yates v. United States, 574 U.S. 528, 537 (2015). The defendant violated regulations prohibiting the catching of grouper smaller than a certain size. *Id.* at 528. The illegal catch was first detected while the ship was out at sea, but by the time the defendant docked, he had replaced the illegal fish with larger fish. *Id.* Prosecutors charged him with obstructing a federal investigation under 18 U.S.C. section 1519. *Id.*

74. The plurality opinion nevertheless concluded, "[t]angible object" in Section 1519 . . . is better read to cover only objects one can use to record or preserve information, not all objects in the physical world." *Id.* at 536.

75. McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016).

76. Sekhar v. United States, 570 U.S. 729, 736 (2013) (imposing concrete property limitation in Hobbs Act extortion case).

77. Kelly v. United States, 140 S. Ct. 1565, 1574 (2020). To this list, one might also add a recent obstruction of justice case, *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018) (imposing nexus and "particular

Since the Supreme Court decides, at best, only a handful of white-collar cases per decade, one might argue that the trend (if it is, in fact, a trend) is less important than I make it out to be. As Professor Buell has observed, lower courts have often moved in the opposite direction of the Supreme Court, expanding white-collar crime's practical scope even when the Court issues an opinion favoring contraction.[78] But one cannot help but wonder how long this contrasting dynamic will last, particularly in the face of an anti-enforcement movement that has increasingly drawn bipartisan support. At bottom, this is an empirical claim that scholars should monitor carefully. If the preceding paragraphs do, in fact, foretell a more permanent realignment, the question is no longer *whether* the Court-led judiciary will narrow federal criminal statutes, but *by how much*.

D. The Prosecutor's Response: Risk Aversion and Sticky Substitution

How might a narrower statutory footprint affect government prosecutors? The standard assumption is that prosecutors will substitute easier cases (usually street crimes) for the harder ones (white-collar and corporate crimes).[79] But the situation is a bit more complicated than that. For political reasons, the DOJ and its United States Attorneys' Offices cannot simply disband their major frauds units and give up prosecuting white-collar and corporate offenders. The political reaction would be severe. Accordingly, the more plausible response is a subtler form of substitution, wherein prosecutors choose different types of white-collar cases without abandoning the category altogether. Indeed, the federal code's statutory design of broad, ungraded statutes promotes this unfortunate version of arbitrage.[80]

Prosecutors desire a certain number of convictions per year, in part because convictions signify success in detecting, proving, and possibly correcting serious violations of criminal statutes.[81] Ordinarily, we can expect the government's portfolio of cases to include a range of white-collar cases. The less serious cases—the ones that resolve quickly and involve modest losses—are valuable because they help train prosecutors and derail minor schemes before they become major ones. The more serious cases take up more time and resources, but the government implicitly plans for such complexity and assumes a payoff (in the form of future deterrence and expressive condemnation) that makes the extra

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investigation or audit" requirements on tax obstruction prosecutions).

78. Buell, *supra* note 61, at 1520–27 (warning that one must "look below the Supreme Court to develop a qualitatively useful understanding of federal criminal law").

79. Aziz Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1575 (2018). Huq and Lakier derive much of their discussion from Stuntz's famous "tax/subsidy" framework. *Id.* at 1566; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 782 (2006); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1275–76 (1999).

80. *See* Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 245–51 (2018) (describing overlap and lack of statutory gradation among federal fraud statutes).

81. Early work in this field assumes prosecutors maximize convictions weighted by their respective sentences. William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63 (1971). Later models incorporate additional factors, such as the prosecutor's institutional context, budget constraints, and future career aspirations. *See, e.g.*, John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 188 (2015) ("In petty cases, prosecutors are said to try to maximize convictions rather than sentences."); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 98 (2005) ("Economic models of plea-bargaining urge prosecutors to obtain as much criminal punishment as possible within a limited office budget.").

effort worth it.[82]

Now, imagine the Court changes the interpretive rules—probably not all at once, but over a period of years. Statutes that once would have been broadly interpreted receive stricter, narrower interpretations, while others are tossed completely on account of their vagueness. Statutory schemes that previously passed muster are increasingly challenged on delegation grounds—and ultimately altered or upended—by courts no longer deferential to the government's enforcement needs.

This "new" judiciary fearlessly rejects claims of necessity and forcefully restricts Congress from outsourcing its lawmaking responsibilities to other branches. Deep-pocketed defendants, heartened by these developments, invest more money and effort in challenging prosecutions, even when offered sweet plea deals. And corporations, watching all of this take place, suddenly think twice about sinking more money into their expensive compliance programs.

This alteration in posture fosters two responses within the prosecutor's office. For the cases the government has already indicted, its hands are tied. Whether it wants to or not, the government must spend more time than it previously budgeted supporting its already-filed caseload. That means defending more cases on appeal, defending (and quite possibly losing) more pre-trial motions, and living with jury instructions more likely to produce partial or full acquittals.

Depending on the jurisdiction, this already-filed group of cases may be quite substantial. Although the median time from filing a criminal case to its disposition is reportedly less than a year, resolution times can be substantially higher for sophisticated crimes and cases filed in busy courthouses.[83] Thus, the government may find itself with a sizable group of white-collar cases that "cost" more to prosecute than originally expected.

Because the government *is not* a true market actor,[84] it cannot simply walk away from more difficult cases that have already been filed and fall at the margins of a court's newly constructed definition of "fraud," "bribery," or "obstruction." To maintain morale and legitimacy, the government must defend the cases it previously charged, even if a positive outcome is less likely.[85] Accordingly, however much time or effort the government has budgeted for the year, it will likely find itself locked into expending greater effort defending an otherwise average caseload.

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82. The extra effort is also personally valuable to ambitious line prosecutors. *See* Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 628 (finding evidence that attorneys in high-salary cities choose government work in order to secure trial experience); Edward Glaeser, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 262 (2000) (theorizing that "prosecutors also may also seek to further their careers" by trying high profile cases).

83. *As Workloads Rise in Federal Courts, Judge Counts Remain Flat*, TRAC REPS. (Oct. 14, 2014), https://trac.syr.edu/tracreports/judge/364/ [https://perma.cc/MVF7-6U94] (summary of federal statistics indicating that median time for resolution of federal criminal case from filing to disposition is slightly more than 7 months, but higher for very busy jurisdictions); *see also* Christopher Slobogin, *The Case for a Federal Criminal Court System (and Sentencing Reform)*, 108 CALIF. L. REV. 941, 946–47 (2020).

84. On the distinctions between government and private actors, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) ("Government actors respond to political incentives, not financial ones.").

85. I am, of course, speaking exclusively of ambiguous or marginal cases. The government should promptly move for dismissal when a new Supreme Court decision explicitly forecloses a pending case.

The more resources the government is forced to expend defending its previously filed cases, the less time it has for investigating new matters and testing new theories of liability. On the contrary, in a world in which the judiciary signals skepticism and hostility to government overreach, prosecutors will eschew risky new theories of liability and become particularly risk-averse. Indeed, if risk aversion is already a pathology among white-collar prosecutors, it will become more pervasive and stronger. And the general public, aware only of a drop-off in prosecutions, will blame the executive branch for its lack of gumption.

All of this creates feedback loops for corporations. If white-collar criminal statutes become narrower, fewer behaviors can be classified as crimes. Fewer crimes mean reduced vulnerability to investigations and prosecutorial demands. Reduced vulnerability, in turn, impacts the corporation's willingness to self-police and voluntarily report instances of wrongdoing to public authorities, leading to even fewer cases, convictions, and heavily promoted instances of whistleblowing. If even *some* of this scenario plays out as predicted, federal enforcers will find themselves climbing a much steeper hill.

IV. PROCEDURAL CONTRACTION

Part III explored the impact of interpretive trends that may narrow key white-collar statutes and thereby reduce respondeat superior's pressure on corporations. These trends would still leave intact many of the statutory prohibitions on core behaviors the legislature has sought to prohibit. Paradigmatic fraud schemes and quid pro quo bribery will still be illegal, regardless of how strictly the judiciary approaches questions of statutory interpretation. The law would, in many respects, still *look* the same, but it would not function or feel the same.

The present Part focuses on a series of *other* constitutional interpretive trends that are apt to destabilize the procedural tools the government has long relied upon to secure information. Thus, prosecutors may eventually struggle to prove the crimes that remain on the books.

I have already discussed these procedural threats elsewhere at length.[86] For the sake of brevity, I will refer to the problem here as one of privacy and personhood: the more the judiciary embraces a robust theory of corporate personhood while simultaneously affirming the need for a revised theory of personal privacy, the more roadblocks enforcers will encounter in their efforts to secure information from corporations and other businesses. If corporations become full-fledged "persons" under the Constitution, and, as "persons," they seek to opportunistically claim the same protections from government intrusion as ordinary individuals, the investigative building blocks enforcers take for granted—from subpoenas to so-called "private" corporate investigations—will become defeasible and increasingly challenged under the Constitution.[87]

Currently, constitutional criminal procedure empowers government enforcement agencies along three dimensions. First, the corporation's internal investigation—including

86. For a deeper look at these procedural threats, see Miriam H. Baer, *Law Enforcement's* Lochner, 105 MINN. L. REV. 1667 (2021); *see also* Miriam Baer, *Personhood, Procedure and the Endurance of Corporate Compliance*, *in* RESEARCH HANDBOOK OF CORPORATE PURPOSE AND PERSONHOOD 320, 320–43 (Elizabeth Pollman & Robert B. Thompson eds., 2021) [hereinafter *Personhood, Procedure*].

87. *See* Baer, *Law Enforcement's* Lochner, *supra* note 86, at 1688–89 (tracking changes in the Court's concept of "corporate personhood").

its search of its internal documents and emails and its interrogation of its employees—is ordinarily considered "private" and, therefore, not subject to constitutional constraints.[88] Second, even when the government directs the investigation, prosecutors can subpoena corporations and other business entities for massive amounts of information; business entities such as corporations enjoy little protection under either the Fourth or Fifth Amendments.[89] There are many reasons for this, but the most important one is that the Court treats the subpoena as a lesser intrusion than a Fourth Amendment search.[90] A grand jury or administrative subpoena must meet the Fourth Amendment's "reasonableness" requirement, but that simply means it must be executed in good faith, with no intent to harass, and drafted in a way to seek evidence that *might* be relevant to the *topic* of investigation.[91]

At the same time, thanks to the Supreme Court's 1906 decision in *Hale v Henkel*, business entities categorically enjoy no protection under the Fifth Amendment's privilege against self-incrimination.[92] Nor do their agents when acting in a representative capacity.[93] According to *Hale* and its progeny, the privilege protects only natural persons and not artificial "collective entities."[94]

Accordingly, the corporation served with a documentary subpoena enjoys relatively few legal protections beyond attorney-client privilege or work product claims.[95] This framework facilitates the government's demands for corporate self-policing. Indeed, the government's subpoena power and the private search doctrines work in tandem. *First*, the government leverages its resources by demanding corporate "self" policing, which the corporation pays for[96] and which largely evades the constraints of either the Fourth or Fifth

88. *Id.* at 1691.

89. *Id.* at 1705–07.

90. *See* Hale v. Henkel, 201 U.S. 43, 73 (1906) (distinguishing the subpoena from a physical search); Chris Slobogin, *Subpoenas and Privacy*, 55 DEPAUL L. REV. 805, 815 (2005) ("[T]he [*Hale*] Court held that the Fourth Amendment did not prevent the use of a subpoena *duces tecum* to compel the production of documentary evidence.").

91. United States v. R. Enters., Inc., 498 U.S. 292, 293 (1991) (noting that a subpoena will be upheld "unless the district court determines that there is no reasonable possibility that the materials sought will produce information relevant to the grand jury's investigation").

92. Braswell v. United States, 487 U.S. 99, 105 (1988). For a discussion of the corporation's lack of Fifth Amendment privilege, see Brandon Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 128–33 (2014).

93. By contrast, an employee subpoenaed in his personal capacity can invoke the Fifth Amendment's protections. *See, e.g.*, Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 716 (2020) (observing that this right "erect[s] a barrier to prosecutors' acquiring their evidence").

94. For criticism of the *Hale* court's reasoning, see *Personhood, Procedure*, *supra* note 86, at 329–31. For criticisms of the collective entity doctrine as applied to a corporation's agents, see generally Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 B.U. L. REV. 1523 (2021); Richard Nagareda, *Compulsion "To Be a Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1580–81, 1641 n.253 (1999).

95. Whereas the corporation enjoys no privilege against self-incrimination, it does receive the protections of the attorney-client privilege. Arlen & Buell, *supra* note 93, at 721 ("Corporate clients enjoy the privilege just as individuals do.").

96. *See* Griffith, *supra* note 32, at 2124 (discussing how governments develop compliance regimes and then "requir[e] corporations to adopt intrafirm governance mechanisms to carry out [those compliance regimes]").

Amendments.[97] *Second*, the government can verify corporate policing's authenticity by serving its own documentary subpoenas. It is this secondary power (along with the government's access to whistleblowers[98]) that suppresses the corporation's impulse to undercut its own investigation or make false claims to government investigators.[99]

This framework has existed for decades, enabling the federal government to successfully secure billions of dollars in financial penalties and spur the creation of the modern corporate compliance industry.[100] But this framework may not last forever. First, at least one lower court has called out the fiction that corporate investigations, particularly those overseen by overbearing federal prosecutors, are truly "private" and outside the Constitution's purview.[101] Whether this case is an outlier or the first of many dominoes to fall remains to be seen.

Second, the Supreme Court has slowly begun to redefine the Fourth Amendment "search," not by hewing to a circular "expectation of privacy" test,[102] but instead by examining the technologies the government has employed in conjunction with the scope and degree of information it has amassed.[103] Thus far, these "mosaic theory"[104] cases have revolved around the government's use of high-level technology to prove narcotics and theft-related offenses.[105] Given the interests at stake, it is not too far a stretch to imagine

97. *See Law Enforcement's* Lochner, *supra* note 86, at 1670. The exception is when the government's investigators appear overly enmeshed with private actors. For demonstrative examples, see *United States v. Connolly*, No. 16-CR-370, 2018 WL 2411216 (S.D.N.Y. May 15, 2018), and *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (affirming lower court's determination that the U.S. Attorney's Office interfered in an investigation to such a degree that it became "state action").

98. Arlen, *supra* note 7, at 14–15 (discussing importance of whistleblowing regimes).

99. *Cf. id.* at 14 (corporations are unlikely to cooperate unless they "face a material risk that enforcement officials will detect and successfully prosecute them for unreported misconduct").

100. On the compliance industry's growth and contributions to corporate investigations, see Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2156 (2019) (heralding compliance program's ability to create a paper trail). For arguments that this framework unfairly places directors and officers at risk of being scapegoated, see Asaf Eckstein & Gideon Parchomovsky, *The Agent's Problem*, 70 DUKE L.J. 1509, 1538 (2021). Finally, notwithstanding this framework, some research suggests that corporate crime is again on the rise. *See, e.g.*, Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285 (2021).

101. *Connolly*, at *8. For discussion of *Connolly*, see Baer, *Law Enforcement's* Lochner, *supra* note 86, at 1695–98; *see also* COFFEE, *supra* note 10, at 85–87 (analyzing implications for interviews with corporate witnesses).

102. The conventional approach calls for a court to begin by asking whether there was a "search." *See* Carpenter v. United States, 138 S. Ct. 2206, 2215 n.2 (2018). "Search," in turn, has been defined either in regard to one's reasonable expectation of privacy or in respect to a "physical intrusion" on one's person, property or effects. Florida v. Jardines, 569 U.S. 1, 5 (2013).

103. *Carpenter*, 138 S. Ct. at 2216 (noting the uniqueness of tracking a person's past movement through a cellphone). *Carpenter*'s holding reflects the "mosaic theory" of Fourth Amendment protection.

104. "The mosaic theory requires courts to apply the Fourth Amendment search doctrine to government conduct as a collective whole rather than in isolated steps. Instead of asking if a particular act is a search, the mosaic theory asks whether a series of acts that are not searches in isolation amount to a search when considered as a group." Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 320 (2012). Because it measures the government's surveillance activity in the aggregate, the mosaic theory poses future dilemmas for corporate and white-collar investigations. *See* Baer, *Law Enforcement's* Lochner, *supra* note 86, at 1698 (querying why the massive amount of data collected in the SEC's investigation of Deutsche Bank's LIBOR case is any less a "search" than the seven days' worth of cell-site location information at issue in *Carpenter*).

105. For predictions of where *Carpenter* will lead, see generally Matthew Tokson, *The Next Wave of Fourth*

entrepreneurial lower courts eventually expanding the concept to investigations of business entities, particularly when those investigations amass thousands of documents, emails, texts, and data relating to the employees' activities over a period of months or years. And here again, society's rapidly changing views about workplace surveillance and digital consumer privacy may encourage judges to take the defendant's side in this fight.[106] Even if the defendant whose "privacy" is threatened is technically the corporation, it may well be able to convince a lower court that it is acting at the behest of its officers or employees.

This trajectory becomes more plausible once one considers the Court's corporate personhood jurisprudence. Justice Alito's majority opinion in *Hobby Lobby* analogized the corporation's rights under the Religious Freedom Restoration Act to its rights under the Fourth Amendment,[107] reasoning that entity-level rights were necessary to protect the rights of those "associated with" the enterprise.[108] The more the Court embraces this derivative or "associational" theory of personhood, the more easily corporate targets can urge the Court to revisit its self-incrimination jurisprudence under the Fifth Amendment.[109]

If the Court eventually extends the privilege against self-incrimination to corporations, it will place corporations on the same footing as individuals who receive documentary subpoenas. The contents of the subpoenaed materials will still fall outside the privilege, as they were not previously "compelled." But the corporation's *act of producing* those records—and the supposed testimonial aspects of that act—will now become the locus of heavy litigation. Just like an individual does today, the corporation will claim that by producing records in response to a broad subpoena, it has effectively testified to their existence, authenticity, and possession.[110] The prospect of time-consuming litigation alone will cause prosecutors to draft narrower subpoenas, serve them less often, and accede to corporate requests for more limited production. The government's leverage to demand information—and to pressure corporations to investigate themselves—will plummet.

Amendment Challenges After Carpenter, 59 WASHBURN L.J. 1 (2020).

106. On workplace surveillance, see generally Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 772 (2017) (examining workplace surveillance's negative impact on privacy). On consumer and digital surveillance, see generally SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019).

107. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014).

108. "[E]xtending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company." *Id.* at 707. This idea – that the corporation can evade laws it dislikes by raising constitutional arguments on behalf of certain constituents– has generated pushback from corporate law scholars. *See, e.g.*, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678-79 (2015) (arguing that "in many matters, [the large, publicly-traded corporation's] interests could not be clearly identified with any particular group of individuals"). As Elizabeth Pollman explains, "it would be hard to justify extending a derivative right to a public corporation, especially with regard to rights that extend beyond contract and property interests incidental to the corporate form. The participants in a public corporation generally do not constitute a relatively stable, identifiable group of persons, and their organization and relationships with each other are not associational." Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 628 (2016).

109. *See* Baer, *Law Enforcement's* Lochner, *supra* note 86, at 1689–90 n.122 (citing recent litigation urging courts to recognize corporate Fifth Amendment rights in the wake of the Court's *Hobby Lobby* decision). *See, e.g.*, Christopher Slobogin, *Citizens United and Corporate Human Crime*, 41 STETSON L. REV. 127 (2011) (imagining *Citizens United's* implications for corporate Fifth Amendment claims); Garrett, *supra* note 92, at 144–45, 157–58 (considering Fourth and Fifth Amendment applications of both *Citizens United* and *Hobby Lobby* decisions).

110. United States v. Hubbell, 530 U.S. 27, 36 n.19 (2000) (setting forth the "act of production" concept).

Notice, then, the juxtaposition of the developments described in Parts I and II. At the very moment that white-collar crime's substantive scope is poised to contract in a messy and uncertain manner, its underlying procedural framework is apt to become vulnerable to other doctrinal revolutions. If these changes occur in roughly the same time frame, they will create a one-two punch. First, the judiciary will narrow white-collar crime's substantive scope; then, it will subvert the government's ability to investigate the chargeable wrongdoing that remains and pervades corporate organizations. For readers whose anxiety levels have climbed to intolerable heights, this Article's final Part offers some partial solace.

V. SILVER LININGS

This Article's core prediction is that the executive branch's power to broadly interpret and enforce white-collar crime will wane. That reduction in power, in turn, will impact the government's ability to investigate and prosecute corporations and other business entities. Even if one disagrees with this prediction, the possibility that several of its components may come true merits constructive analysis of alternatives to federal corporate prosecution. Accordingly, this final Part highlights the silver linings one might harvest from a narrative of federal decline.

The primary alternative to federal enforcement is state-level enforcement, and the alternative to corporate criminal liability is some combination of front-end regulation[111] and back-end civil enforcement that encompasses a wide range of sanctions.[112] Many have analyzed these options from economic and normative perspectives. What interests me most is the possibility that state institutions might be able to fill the vacuum left by a weakened federal enforcement apparatus.

There may be value in reducing the DOJ's centrality as the pre-eminent enforcer of corporate and white-collar crime. State Attorneys General and local district attorneys are bound, not by federal definitions of fraud or bribery, but rather by their own state codes and state judiciaries' definitions of crime.[113] Many states employ a different definition of corporate crime, including the Model Penal Code's "executive control" test, which provides a narrower and arguably more sincere rule than respondeat superior.[114] Moreover, states that have enacted the Model Penal Code have also likely enacted its explicit rejection of the rule of lenity.[115]

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111. On the value of front-end regulation, see Vikramaditya S. Khanna, *What Rises from the Ashes*?, 47 J. CORP. L. 1029 (2022).

112. For certain types of wrongdoing, the story is admittedly more complex than one of pure alternatives. Regulation and civil and criminal enforcement interact in a complicated and dynamic fashion. "Criminal and civil regulatory enforcement are both substitutes and complements." Mariano-Florentino Cuéllar & Keith Humphreys, *The Political Economy of the Opioid Epidemic*, 38 YALE L. & POL'Y REV. 1, 34 (2019) (speaking of health care enforcement); *see also* Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (alluding to such "layering" in the securities fraud context).

113. For an excellent overview of the state attorney general model, as well as the state attorney general's relationship with local district attorneys, see Barkow, *supra* note 11.

114. *See generally* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006) (advocating Model Penal Code § 2.07's executive control test).

115. MODEL PENAL CODE § 1.02(3) (AM. L. INST. 1962). "A dozen states have had anti-lenity statutes for decades . . . ." Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What A Long Strange*

State attorneys general and local prosecutors are, of course, bound by doctrines of constitutional criminal procedure, but they can more easily shift to a civil liability framework as needed, and they seem more adept at marrying *civil* liability to notions of *corporate* shame.[116] In the corporate context, that is a particularly valuable talent.

State enforcement agencies are also, by definition, decentralized.[117] That there are 50 of them creates equal opportunities for coordination and competition. There are, of course, many benefits to be had from centralization, particularly if agencies coordinate their punishments and build relationships of mutual trust. Moreover, for certain multinational corporations with more global offenses, the federal government will, by necessity, remain the primary enforcement authority. But in many instances, corporate crime—even crime perpetrated by national and multinational corporations—carries a local flavor, causing environmental, health, and other welfare harms to cities and other communities.[118] To that end, there may be something salutary about ceding more of white-collar crime's enforcement responsibility to state prosecutors and to local district attorneys who have developed both the interest and expertise in holding companies and their executives accountable for the localized harms they have caused. To the extent they need help prosecuting a specific matter, the more local offices can hire and partner with private firms.[119] And whereas state prosecutors may have once lacked the resources to pursue the most dangerous schemes and offenders, their savvier successors have discovered ways to secure necessary funds through civil settlements and state treasuries.[120]

Indeed, state AG offices *already* bring major cases pertaining to the environment, consumer protection, cybercrimes, and public welfare.[121] They have also become, in one

Trip It's Been", 28 GEO. MASON L. REV. 49, 123 (2020) (providing historical and doctrinal overview of the anti-lenity statutes).

116. The Purdue Pharma case (discussed in Professor O'Sullivan's contribution to this Issue) is instructive. Julie O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047 (2022). Whereas the federal prosecution in 2007 resulted in charges for Purdue's subsidiary and pared-down misdemeanor charges for three executives, cases brought by state attorneys general pushed the parent company into bankruptcy and provided a far more fulsome account in state filings of the behaviors—by both the company's management and its owners—that triggered a national opioid crisis. *See id.*; Miriam H. Baer, *The Information Shortfalls of Prosecuting Irresponsible Executives*, 70 DEPAUL L. REV. 191 (2001) (arguing that the 2007 prosecution of Purdue Pharma's executives demonstrates the information-related drawbacks of charging executives with strict liability offenses: the government has less to prove, but it also has less to say in its publicly filed charging documents).

117. As Barkow observes, the state AG is still a centralized model insofar as it represents and makes enforcement decisions that affect the entire state. Barkow, *supra* note 11, at 522.

118. Regulatory, environmental harms, and white-collar crimes are among the types of offenses state AGs frequently take up. *See id.*, at 546–57 (describing categories of cases state attorneys general are authorized to prosecute). Some states create broad authority for state attorneys general to prosecute any case the latter believes, within the office's discretion, is appropriate. *Id.* According to Barkow, state AGs use this plenary power sparingly, preferring instead to offer their assistance to local district attorneys. *Id.* at 557–58.

119. "State attorneys general frequently reach out to private counsel to assist with the state's business . . ." Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 735 (2011).

120. There are obviously downsides to this point, insofar as the state attorney's desire for deep pockets structures her decisions. *Id.* at 736 (conceding that state enforcers are not "immune to the pull of money").

121. "State AGs' responsibilities cut across a wide range of issues, from criminal enforcement to consumer welfare to environmental protection to preventing terrorism." Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 113–14 (2018). "State enforcement tends to ramp up precisely when—and because—federal enforcers have determined to cut back on enforcement."

scholar's account, a securities enforcer of last resort.[122] In recent years, they have shown themselves to be savvy and adept in banding together[123] and securing large settlements, demanding shame-inducing admissions, and constructing industry-level reforms.[124] Unlike the United States Attorney, whom the President appoints, the state Attorney General is often an elected official, untethered to the state's governor (or the governor's political party) and therefore better able to maintain the office's independence.[125]

Capture may also be less of a problem for state AG offices, particularly those offices that have become, in Professor Zephyr Teachout's words, "the largest public interest law firm in the country."[126] Teachout, a progressive law professor who has been a candidate for governor and briefly for New York's Attorney General, has spoken enthusiastically of the office's power to pursue "big pharma, polluters, and fossil fuel companies" who cause a state's residents harm. To the extent Teachout and other reformers seek and successfully capture these positions, it seems doubtful that the line prosecutors they hire will be the types whose career aspirations cause them to adopt obsequious stances with corporate defendants.[127] The revolving door will no longer revolve in the same direction, much less at the same rate.

Concededly, not everyone who runs for their state's AG office will be a progressive reformer. But decentralization can promote a healthy degree of competition among state and federal enforcers. Instead of leaving a major case with a federal line prosecutor, decentralization allows for decision-making among a much larger field of politically responsive actors. This, in turn, permits more nodes of entry for judges, stakeholders, and affected groups.[128] To the extent it promotes more deliberation among affected parties and

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Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 719 (2011).

122. *See* Andrew K. Jennings, *State Securities Enforcement*, 47 B.Y.U. L. REV. 67, 127 (2021) (discussing how state attorneys general have become "residual enforcers" in the securities context).

123. "State attorneys general have developed and refined the practice of multistate litigation as a powerful law enforcement tool. In groups ranging from two states to all fifty, the attorneys general now routinely prosecute cases jointly, closely coordinating with each other and sharing legal theories, discovery materials, court filings, litigation expenses, and even staff." Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 1998 (2001).

124. For a sampling of the burgeoning literature in this area, see sources cited *supra* notes 121–123. *See also* Elysa M. Dishman, *Enforcement Piggybacking and Multistate Action*, 2019 BYU L. REV. 421, 447–50 (2019) (listing numerous instances of effective cooperation between state AGs in different sectors); Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611, 1612 (2015) ("My claim is that before, during, and even after the Great Recession, a handful of state attorneys general (AGs) led the way on enforcement.").

125. "In states where the Governor and the Attorney General are independently elected, the two officers may come from different political parties with diametrically opposed partisan agendas." William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453 (2006). Attorneys general also harbor different career aspirations from federal line prosecutors. "[A]lmost all state attorneys general are elected politicians, and many seek higher office." Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2104 (2015).

126. Ginia Bellafante, *Will Zephyr Teachout Finally Have Her Moment?*, N.Y. TIMES (Nov. 16, 2021), https://www.nytimes.com/2021/11/12/nyregion/zephyr-teachout-attorney-general.html [https://perma.cc/DUL8-7QKR].

127. To be fair, it is unclear how "captured" federal prosecutors have been in corporate prosecutions and settlements. Nevertheless, it is doubtful that today's crop of attorneys general would be *more* captured, particularly in offices that reflect Professor Teachout's viewpoint.

128. On the benefits of decentralization, see Leider, *supra* note 65, at 458–59. *See also* Barkow, *supra* note

places more information in the public record, decentralized enforcement can promote more responsive and democratic outcomes.[129]

Defederalization might also bring about a renewed effort to develop a true fault-based theory of corporate crime, as well as an opening for state corporate law and fiduciary duty principles to play a larger role. Whereas severe partisanship and gridlock may derail Congressional reform, state legislatures may be better positioned to enact corporate crime legislation that comes closer to approximating the public's intuitions about organizational and personal responsibility, and which makes a better effort to gauge the proper fault line between criminal and civil liability.[130] To the extent many of us find the shadow law described in Part I to be lawless and insufficiently transparent, state legislation would be a welcome development.

To be sure, the dynamic I describe in this final Part is deliberately fuzzy, incomplete, and admittedly reflective of wishful thinking. There are many paths corporate enforcement can take, and events beyond our predictive abilities may alter the interpretive trajectories described in Part II. Moreover, it is far from clear that state enforcement agencies can adequately fill federal enforcement's vacuum. In any event, some nub of federal criminal law will always serve as a backstop for the most extreme and obvious violations of law.[131] As I stated at the beginning of this piece, federal corporate crime will never meet its demise. If substantive and procedural trends continue along the same trajectory, however, then the heady days of prosecutorial task forces, perp walks, and federal power to "criminalize" industries will eventually become a hollow and bitter memory. To that end, it is better to recognize the dynamic now than to pretend it does not exist.

VI. CONCLUSION

Until recently, federal enforcement institutions enjoyed a relatively smooth, upward trajectory in terms of lawmaking and enforcement power. Buoyed in the 20th Century's first half by the emergence of a strong administrative state, white-collar enforcement institutions enjoyed the joint support of a Congress and a judiciary who believed that a robust enforcement apparatus was necessary to redress the abuses of private industry.[132] In the 20th Century's second half, libertarian ideologies strangled administrative efforts, but enforcement institutions still continued to grow, benefitting both from the "bad apple"

11, at 532 (observing that the argument for federalism "rests on values such as democratic political participation, increased representation of diverse interest, and innovation").

129. I do not mean to downplay the challenges of coordinating multiple state offices while taking into account competing stakeholder concerns. For an excellent overview of these issues, see Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT L. 189, 220–21 (2012) (discussing stakeholder participation and mediation of conflicts).

130. Then again, perhaps one should not hold one's breath. *See, e.g.*, 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 (1992) (responding to Kenneth Mann's seminal article on punitive civil sanctions and raising concern that "that the line between civil and criminal penalties is rapidly collapsing"). That was in 1992.

131. Indeed, the American experience in regard to financial fraud and securities regulation is uniquely intertwined with the background threat of criminal enforcement. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 274 (2007) (observing that "the prospect of criminal enforcement radically distinguishes securities enforcement in the United States from that of the rest of the world").

132. Huq & Lakier, *supra* note 79, at 1590–92; *see also* Barkow, *supra* note 11, at 523–24 (citing explosion of federal criminal statutes "between 1970 and 1998").

narrative that deregulators themselves were so eager to embrace, as well as the substantive and procedural spillovers of the law-and-order movement. When regulation retreated, enforcement remained powerful and grew even stronger.[133]

Today, however, an additional realignment appears to be underway. Enforcement as we know it is well on its way to becoming nearly as suspect as regulation. Prosecutors and government investigators already receive far less deference they once attracted from the judiciary and academia. Practically speaking, reduced deference translates into fewer and weaker legal tools to complete the government's enforcement mission. If this account is correct, there will be fewer substantive offenses to prosecute and less effective tools to pursue the offenses that remain on the books. As a result, there will be wrongdoing–and plenty of wrongdoing in corporate settings–but no easy path to prove and punish specific crimes.

One can view this story as a grievous loss or instead treat it as a long overdue correction. Despite some inflated claims, federal criminal law has *never* served as the optimal tool for reining in private sector misconduct. Nor has it ever induced optimal deterrence. Respondeat superior is a terrible substitute for front-end regulation, and the government's shadow-law of corporate liability has only sporadically produced the permanent structural changes reformers so eagerly desire. Accordingly, federal criminal law's contraction should induce scholars and policymakers to turn their attention elsewhere, to states and state attorneys general, and to legal interventions other than criminal liability. Some will worry that the "new world" is bound to look a lot like the old one, but with even less accountability for corporations and their executives. That outcome is possible, but it is hardly inevitable, and the search for a better intervention is preferable to the nostalgic reliance on a system that could never live up to its lofty aspirations.

133. *See* Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 578 (2012) (arguing that "it is easier to attract public and political support for state-sponsored punishment than it is to attract similar support for regulation").