Is the Corporate Criminal Enforcement Ecosystem Defensible?

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I. INTRODUCTION

A remarkable amount of ink has been spilled on the subject of corporate criminal liability—whether we should have it, what standards ought to apply, and how it ought to be administered. What is rarely discussed is how this piece of the criminal justice system fits into the overall federal criminal enforcement universe. White-collar enforcement is its own ecosystem, with its own political economy that requires that the threat of corporate criminal liability exist to maintain a status quo that benefits all of its participants—lawyers, corporations, and prosecutors alike. What does that ecosystem look like, how does it compare to the functioning of the federal criminal system addressed to non-white-collar criminality, and how can the differences between them be explained—and justified?

It has been widely acknowledged that, compared to many drug, immigration, or simple fraud cases, investigating corporate crime is difficult. That said, with sufficient effort and resources, it is possible to bring corporations and their executives to account. We have had corporate crime waves in the past, and criminal convictions have followed.[1] Yet, after the financial crisis of 2008, which grew out of banks' handling of mortgage-backed securities, not a single high-ranking executive went to jail. This is despite the fact that many millions lost their jobs, their homes, and their savings; the recession that followed is said to have destroyed over $30 trillion of world wealth. It is not difficult to identify other cases of white-collar individual immunity from accountability in the recent past.[2] The empirical reality now is that very few large corporations are criminally

1. *See, e.g.*, *You Asked, We Answered: Why Didn't Any Wall Street CEOs Go to Jail After the Financial Crisis? It's Complicated.*, MARKETPLACE, https://features.marketplace.org/why-no-ceo-went-jail-after-financial-crisis/ [https://perma.cc/3WY3-GHBG] (noting corporate executives were successfully prosecuted in both the Enron and savings and loans scandals).

2. *See, e.g.*, JENNIFER TAUB, BIG DIRTY MONEY 91–118 (2020) (arguing that the upper-class may conduct crime with impunity).

sanctioned, and very few corporate executives go to jail.[3]

What is going on here? Although we have no way of knowing just how much corporate criminality exists, there is no reason to believe that corporations or their executives have become more law-abiding.[4] So, what accounts for this lack of criminal accountability?

Over the last few decades, the government has engineered or taken advantage of a variety of circumstances that have forced corporate America to forge a crime-fighting partnership with the government—in effect, compelling corporations to clear away some of the obstacles to their own potential liability.[5] The primary such circumstance is the threat of the criminal sanction under a *respondeat superior* standard of corporate liability that is exceedingly easy to satisfy. Many have argued that corporate criminal liability is unnecessary or perhaps even counterproductive because the criminal stigma adds nothing to the deterrence that civil remedies can achieve.[6] Although, as explored within, the threat of the criminal stigma may not be sufficiently proximate to deter the wrongdoing in the first instance, it has achieved its current primary purpose in the white-collar ecosystem: forcing "good citizen" corporations to cooperate extensively with government efforts to bring them to account and enhancing the government's ability to force corporations to some sort of settlement in return for leniency for the corporation and, derivatively, its executives.

First, once corporations are within prosecutors' sights, the threat is real: Convicting a corporation under the *respondeat superior* standard is like shooting fish in a barrel with a cannon. Few, if any, large corporations contemplate actually contesting their liability through trial. Second, such is the *in terrorem* effect of a potential criminal sanction that corporations are willing to undertake otherwise unthinkable steps at the behest of prosecutors.

Corporations will begin by tasking counsel to investigate: "Internal investigations have their costs, but, given the imperatives created by statutory, regulatory, prosecutorial, sentencing, civil liability, and corporate law pressures, 'the internal investigation has become the standard of care whenever credible allegations of significant misconduct are raised in organizational settings.'"[7] Where government authorities are—or are likely to

3. *See, e.g.*, Brandon Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 112 (2019) (noting that an Obama Administration DOJ policy resulted in companies that would otherwise have been prosecuted not being prosecuted if they had substantially cooperated and self-reported).

4. *See* Ankush Kardori, *There's Never Been a Better Time to Be a White-Collar Criminal*, NEW REPUBLIC (July 23, 2020), https://newrepublic.com/article/158582/theres-never-better-time-white-collar-criminal [https://perma.cc/H2KP-PHF5] (noting that a survey of 5000 companies concluded that fraud and economic crime rates are at record highs).

5. *See, e.g.*, John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 316 (2004) (observing that corporate self-policing and compliance plans have become prevalent since the adoption of the guidelines for sentencing organizations).

6. *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 26 J. LEGAL STUD. 319 (1996) (arguing there is no need for corporate criminal liability in a legal system with appropriate civil penalties); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (arguing that corporate civil liability can capture the desirable features of corporate criminal liability while avoiding corporate criminal liability's undesirable features).

7. Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 332 (2008) (footnote omitted); *see generally* Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales*

become aware of the allegations, counsel for the corporation almost always cooperate extensively with prosecutors—even taking their guidance in the conduct of the investigation—and report the results to the government. These investigations can cost hundreds of millions of dollars in attorneys' fees and other expert assistance; in some cases, the costs of the self-inculpating investigation can exceed the ultimate penalties imposed.[8] During the investigation, companies may be willing to exacerbate their potential financial exposure by waiving the attorney-client privilege and work product doctrine, thus exposing counsel's roadmap to liability to plaintiffs in collateral civil litigation. Certainly, companies pay enormous sums in disgorgement, fines, and remedial measures to avoid the criminal stigma. And as part of these settlements, companies may accede to intrusive ongoing government oversight of their compliance efforts for a potentially long period of time, including the potential for the appointment of an expensive and invasive monitor.

It is fair to assume corporations would not willingly take these steps out of a sense of civic responsibility. They do so because their cost-benefit analysis dictates that the costs of self-inculpation and settlement are less than the costs of a conviction—whether those costs be criminal fines, restitution, court-ordered monitoring, reputational effects, debarment from government contracting or de-licensing, financing problems, employee defections, customer or consumer confidence, or the like.

The threat of criminal liability has also been instrumental in inducing firms to spend enormous sums of money instituting what are touted as "effective" compliance programs. "The trajectory of compliance expenditures over the past several decades may be traced to a good corporate citizenship movement in the mid-1990s where the government proposed a public-private sector partnership to combat corporate crime."[9] Such spending has increased to the extent that "[t]here soon will be as many enterprise-wide risk, audit, legal, and compliance professionals on the payroll of corporations in the United States as municipal police officers keeping our streets safe."[10] A central part of the DOJ's approach to corporate crime is its apparent belief that compliance programs are more effective than the criminal stigma in deterring future corporate wrongdoing—or at least in promptly detecting and remediating any misconduct. This can be viewed as a radical rethinking of the prosecutorial role and the purposes of criminal punishment of corporations pursuant to which the criminal stigma is employed as a potent threat allowing prosecutors to force

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Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No", 45 AM. CRIM. L. REV. 1237 (2008) (suggesting Congressional action in this arena is focused on a problem that does not exist).

8. Avon Products spent about $350 million in investigation-related costs in an FCPA matter that concluded in a $135 million settlement. Samuel Rubenfeld, *Costly Corporate Investigations Have No Natural End-Point*, WALL ST. J. (Oct. 10, 2017), https://www.wsj.com/articles/costly-corporate-investigations-have-no-natural-end-point-1507630214 [https://perma.cc/9TGE-5QND]; *see also* Mike Koehler, *Issues to Consider From the Avon Enforcement Action*, FCPA PROFESSOR (Dec. 22, 2014), https://fcpaprofessor.com/issues-to-consider-from-the-avon-enforcement-action/ [https://perma.cc/UEN4-DQ3V] (noting that Avon's pre-enforcement action professional fees and expenses totaled approximately $500 million). Walmart paid about $900 million on internal investigations, compliance programs, and "organizational enhancements;" it ultimately paid a third of that, $282 million, in penalties to resolve its FCPA case. Robert Thomason, *Walmart's $900 Million Compliance Costs Caused FCPA Probe's Major Financial Impact*, MLEX (June 25, 2019), https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/anti-bribery-and-corruption/walmarts-$900-million-compliance-costs-caused-fcpa-probes-major-financial-impact [https://perma.cc/XY5V-98YR].

9. William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 392 (2017).

10. *Id.* at 393.

corporations to "rehabilitate" themselves through structural and cultural reforms.[11]

The government has increasingly concluded (rightly or wrongly) that, to achieve the optimal level of cooperation and compliance initiatives, it has to reassure corporations that such extraordinary measures will be worth their while. The critical blowback that the DOJ received after the indictment of Arthur Andersen LLP in 2002, which led to the firm's implosion, resulted in a new approach in organizational crime cases: the federal government's practice of disposing of big-business cases by using so-called deferred prosecution agreements (DPs).[12] These agreements generally provide that, in return for fulsome corporate cooperation in the investigation and other considerations, the government will, after a probationary period, dismiss or forego criminal charges against the organization. To induce the requisite cooperation, the DOJ has freely offered DPs,[13] or at least in some contexts, referrals for civil regulatory resolutions.[14] The DOJ, apparently believing that even these mechanisms were insufficient to induce the necessary degree of cooperation, recently adopted a program for Foreign Corrupt Practices Act (FCPA) matters that contemplates outright declinations founded on self-reporting and cooperation rather than, as is traditional, insufficient evidence.[15] It has also elected not to pursue cases criminally when the collateral consequences—such as suspension and disbarment from government contracting—would have unfortunate third-party effects.[16]

Although there was a blip of corporate indictments around 2015, after the DOJ was criticized for relying too heavily on DPs,[17] few large corporations are now subjected to criminal sanctions even though they have imposed huge costs on society due to demonstrable wrongdoing. In the last years of the Obama Administration, the government "levied $14.15 billion in total penalties by prosecuting seventy-one financial institutions and thirty-four public companies. During the first 20 months of the Trump Administration, corporate penalties declined to $3.4 billion in total corporate penalties, with 17 financial institutions and 13 public companies prosecuted."[18] The number of white-collar

11. *See, e.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL 273–88 (2016) (discussing the prosecutorial challenges in corporate criminal reform); Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29 (2014) (discussing how deferred prosecution agreements may potentially have worse outcomes than criminal convictions); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (proposing alternatives to prosecutors in pursuing structural reform remedies); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006) (exploring the implications of significant changes in the administration of corporate criminal law).

12. *See, e.g.*, John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J. (July 25, 2005), https://www.law.com/nationallawjournal/almID/1122023111380/ [https://perma.cc/8VNS-DPM5] (questioning the lack of accountability to which corporations committing crimes are subject as a result of deferred prosecution).

13. U.S. Dep't of Just., Just. Manual § 9-28.100 (2015). For an analysis of the DOJ's settlements in corporate cases, see generally GARRETT, *supra* note 11; Garrett, *supra* note 3; 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 (2015).

14. *Id.*

15. *See, e.g.*, *id.* § 9-47.120.

16. *See, e.g.*, *id.* § 9-28.1100.

17. Garrett, *supra* note 3, at 110.

18. *Id.* at 109.

prosecutions has been plummeting for years and is now at a 20-year low.[19]

These policies and practices coincide with a lack of criminal accountability for persons within the corporations, as well as the corporations themselves. The deluge of criticism that followed the DOJ's failure to indict a single high-ranking individual after the 2008 recession led to the policy embodied in what is called the Yates Memorandum, issued in 2015.[20] That memo emphasized that prosecutors ought to focus on prosecuting individuals, not just corporations, and that corporate cooperation must include the identification of individual wrongdoers. Despite this supposed shift in DOJ policy, "there has been no noticeable increase in individual prosecutions. From 2001 to 2018, individuals were prosecuted alongside corporations entering deferred or non-prosecution agreements in 134 of the 497 total agreements with organizations (or 27%)."[21]

Cases against corporate executives concededly are harder to make than those that concern exhausted immigrants picked up at the border or drug dealers caught on tape or by undercover law enforcement.[22] But these cases are far from impossible, as demonstrated by the high-ranking executives convicted in the hideously complex Enron case. Judge Rakoff may be correct when he charges that it is primarily the enforcement ecosystem sketched out above that encourages prosecutors and the defense to focus on corporate cooperation and settlements, resulting in little individual accountability.[23] This supposition has intuitive appeal: Presumably, outside counsel will have a natural tendency to resist throwing under the bus the executives who had a hand in hiring them and who are still operating with the approval of the board unless there is truly no choice. As for the corporate client, as Professor John Coffee, Jr. explains, large companies "will happily pay a big fine as long as senior managers are protected."[24] And prosecutors who have been handed a corporate case all wrapped up in a bow may not have sufficient information to doubt defense lawyers' conclusions or incentives to jeopardize a prompt resolution of the corporate case by pushing to indict individual executives.[25] There are other contributing

19. *See, e.g.*, *Corporate and White-Collar Prosecutions at All-Time Lows*, TRAC REPORTS (Mar. 3, 2020), https://trac.syr.edu/tracreports/crim/597/ [https://perma.cc/8S7Q-V826] ("Federal white-collar prosecutions have fallen from their peak of over 1,000 in June 2010 and February 2011.").

20. Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dept. of Just., on Individual Accountability for Corporate Wrongdoing to All U.S. Att'ys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/ZW7D-54PZ]. This policy has since been incorporated, as amended in the Trump Administration, into the DOJ's Principles of Federal Prosecution of Business Organizations. *See* U.S. Dep't of Just., *supra* note 13, §§ 9-28.210, 9-28.700 (2018) ("Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.").

21. Garrett, *supra* note 3, at 112.

22. *See, e.g.*, Peter J. Henning, *Why It is Getting Harder to Prosecute Executives for Corporate Misconduct*, 41 VT. L. REV. 503, 507 (2016) ("What is becoming increasingly apparent is that prosecuting cases against corporate employees and executives, which has never been easy, is getting harder.").

23. JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE 98–101 (2021).

24. James B. Stewart, *These are the Deutsche Bank Executives Responsible for Serving Jeffrey Epstein*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/deutsche-bank-jeffrey-epstein.html [https://perma.cc/RFA4-MN3A].

25. *See* U.S. Dep't of Just., *supra* note 13, § 9-28.210 (prosecutors should attempt to resolve individual and corporate cases at the same time).

factors as well,[26] two of which I will posit below.

This status quo has manifest advantages for those who operate within it. Defense lawyers (most of them former federal prosecutors[27]) and law firms are making astonishing amounts of money by guiding corporations in creating government-required compliance programs and investigating and reporting—at the behest of their corporate clients—to the government on allegations of misconduct.[28] Other professionals, such as forensic accountants (and, full disclosure, some law professors), have done very well in this economy. As noted above, the compliance industry is assuredly booming.

Corporate America has a vested interest in maintaining the system as it now operates. Powerful companies are—more often than not—able to avoid what they clearly forecast would be the financial train wreck of a corporate conviction by paying their way out of their wrongdoing. If an indictment would threaten the viability of a company or the follow-on collateral consequences are deemed too costly, the company will certainly dodge criminal liability for anything short of the most egregious misconduct and recalcitrance in refusing cooperation.

Finally, the powers-that-be at Main Justice appear enamored of the system. The department's leadership in Republican and Democratic Administrations has consistently chosen to exploit this dynamic to devote the bulk of prosecutorial resources to other priorities—lately, immigration and drug cases—that are more politically appealing to "tough-on-crime" politicians. The DOJ's primary investment in white-collar cases has been in creating and exploiting circumstances that allow it to delegate much of the investigative work in white-collar cases to private counsel.[29] Corporate counsel, particularly in transnational cases, can conduct investigations that would consume budget-

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26. *See, e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017) (alleging that the government lacks the will and ability to prosecute corporate executives).

27. Charles Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1254 (2011).

28. The numbers are particularly eyepopping in FCPA cases. *E.g.*, Rubenfeld, *supra* note 8. Siemens AG spent more than $1 billion on legal and professional fees before agreeing to pay approximately $1.6 billion to resolve FCPA cases in the United States and Germany. *Id.*; *see also* Richard L. Cassin, *Investigation Costs Keep Climbing*, FCPA BLOG (Mar. 12, 2012, 11:28 AM), https://fcpablog.com/2012/03/12/investigation-costs-keep-climbing/ [https://perma.cc/2TT7-U3JL] (stating that companies spent tens of millions of dollars on internal investigations in the late 2000s). This is an outlier, but substantial fees and expenses are simply a cost of investigating business crimes. *See* Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 391, 397 (2014) ("[P]re-enforcement action professional fees and expenses are typically the most expensive aspect of FCPA scrutiny and enforcement."). These costs do not end with the resolution of enforcement actions. For ongoing compliance efforts required by settlement agreements, see *id.* at 410, payment of attorneys' fees for officers and directors, see Peter J. Henning, *Under Investigation, and Doing the Investigation*, N.Y. TIMES: DEALBOOK (Sept. 24, 2012, 2:21 PM), https://dealbook.nytimes.com/2012/09/24/under-investigation-and-doing-the-investigation/ [https://perma.cc/H7BM-6Q8U], and the costs of defending parallel civil suits can add millions of dollars of additional costs.

29. The Siemens investigation, for example, involved "analysis of 38 million financial transactions; 1.6 million hours of billable time by counsel and the company's forensic auditors totaling over $850 million; 1,750 interviews and 800 informational meetings concerning Siemens operations in 34 countries; $5.2 million in translation costs; and $150 million on creating an extensive anti-corruption kit." Claudius O. Sekenu & Tiffany A. Archer, *Alarming Lessons from Siemens*, INT'L FIN. L. REV. 42, 42 (2009), https://www.arnoldporter.com/~/media/files/perspectives/publications/2009/07/alarming-lessons-from-siemens/files/publication/fileattachment/arnoldporterllpiflrjulyaugust-2009.pdf [https://perma.cc/7FCH-4ZLX]..

killing amounts of government resources and time to replicate. The DOJ then leverages its resources to impose some measure of (generally civil) accountability for corporate wrongdoing that it otherwise could, given the DOJ's budget priorities. The DOJ also garners vast sums in disgorgement of tainted profits and penalties.[30] And to the extent prosecutors have come to view their job as rehabilitating corporations through forced adoption of compliance programs, they can claim victory. The DOJ would point to the compliance programs and monitoring it imposes on corporations to support its claim that its non-criminal resolutions, in fact, prevent future white-collar crimes.

If the DOJ and other stakeholders in this ecosystem are satisfied with the status quo and the system operates as a public-private partnership that introduces demonstrable efficiencies in the use of government resources, what is to hate? My objection is twofold.

First, there is no clear evidence that this system actually serves the purposes of criminal sanctioning; there is a lot of money sloshing around, but it is not clear to what end. Indeed, given the dearth of evidence, one could conclude that the corporate criminal sanction exists not to serve penal purposes but rather simply to keep the corporate ecosystem—which works so well for its participants—chugging along. This instrumental use of the criminal stigma may be defensible, but it ought to be justified on its own merits, not on unsupported penological grounds.

Second, there are manifest differences in the treatment of white-collar cases and those that populate the rest of the docket. The disparate treatment of these offenders is glaring—a fact that has not escaped public notice.[31] To make matters worse, this disparity has an undeniable racial and ethnic face: corporate crimes, most often committed by White offenders, are treated through the relatively painless processes described above, while thousands of Black and Hispanic defendants are jailed for drug and immigration offenses. And to be clear, the corporate ecosystem facilitates these disparities; it permits prosecutors to rely on the public-private enforcement system to achieve what the DOJ views as sufficient white-collar results, while allowing it to divert most of its investigative and prosecutorial resources to pursuing drug and immigration cases.

This state of affairs is dangerous. The failure to bring high-profile corporations and their executives to criminal account in numbers that even approach those subjected to federal incarceration leads many to the conclusion that the federal criminal system has been captured by elites happy to give their friends a break while jailing the poor, often Black and Hispanic, defendants. If criminal law is perceived as a rigged game, it loses its power to inspire the general populace to comply with its norms.

More important, disparities between the white-collar ecosystem and the rest of the federal docket undermine the perceived legitimacy of the criminal justice system. This is not an abstract cost. We have seen that where public confidence in the legitimacy of

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30. *See* Steve Goldstein, *Here's the Staggering Amount That Banks Have Been Fined Since the Financial Crisis*, MARKETWATCH (Feb. 28, 2018, 11:27 AM), https://www.marketwatch.com/story/banks-have-been-fined-a-staggering-243-billion-since-the-financial-crisis-2018-02-20 [https://perma.cc/V46V-BFWU] (providing an overview of bank fines since the financial crisis).

31. *See, e.g.*, TAUB, *supra* note 2 (describing shortcomings in white-collar crime punishment); RAKOFF, *supra* note 23; EISINGER, *supra* note 26 (describing the frequent failure to prosecute executives); Kardori, *supra* note 4 (describing fertile conditions for white-collar crime); Michael Hobbes, *The Golden Age of White Collar Crime*, HUFFINGTON POST (Feb. 10, 2020)), https://www.huffpost.com/highline/article/white-collar-crime/ [https://perma.cc/AG25-67NF] (describing the influx of perceived white-collar corruption).

government and its processes fail, disastrous consequences ensue. The stoking of questions about the legitimacy of our electoral system led to an insurrection at the Capitol; an ongoing lack of trust in the government's public health officials is leading to the unnecessary deaths of thousands of Americans stricken by the COVID–19 virus.

II. THE COSTS OF CORPORATE CRIME

Because I explore the influence of biases on enforcement priorities, I should begin by revealing my own. I elected to focus on white-collar crime as a prosecutor because it seemed to me that, in the general run of federal cases, these offenders were among the most culpable I encountered. They were, for the most part, persons of privilege by virtue of wealth, position, or education who elected to commit crimes out of greed, callousness, and a selfish desire for self-advancement or satisfaction at the expense of others. They were not persons driven to crime by poverty, need, addiction, or a lack of legitimate alternatives, as was often the case in immigration and many lower-level drug prosecutions. A few defendants had made very poor choices based on what they believed to be financial imperatives and bitterly regretted their decisions. But corporate wrongdoers generally operated with a kind of arrogance and entitlement that convinced them that if they were doing it, it could not be criminal; they offered rationalizations rather than excuses. They could not legitimately claim that duress, self-defense, fear, mental illness, a lack of education, or even stupidity forced their hands. And—this is a fact not a bias—they imposed, in the aggregate, enormous societal injury.

The financial losses attributable to white-collar offenses dwarf the dollar costs of street crime. White-collar crime is difficult to quantify because it is an ill-defined category, and much of it is undetected or unreported.[32] The FBI, a compulsive detailer of crime statistics, does not even try to measure the incidence of white-collar crime on a regular basis, nor do other government entities.[33] (This in and of itself signals the lack of priority this enforcement category presents.) Still, "[s]ome estimates . . . put the annual costs associated with white-collar crime in the United States at about half a trillion dollars (just shy of Sweden's GDP), which is twenty times the total economic costs associated with every other sort of crime in the United States."[34] Others put estimated costs much higher.[35] In June 2021, IRS Commissioner Chuck Rettig told a Senate panel that the IRS's previous

32. Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO ST. J. CRIM. L. 481, 482–83 (2011); *See* Mark A. Cohen, *The Costs of White-Collar Crime*, *in* THE OXFORD HANDBOOK OF WHITE COLLAR CRIME 78, 78–100 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen eds., 2016). "The true extent and expense of white-collar crime are unknown," partly because of data collection and compilation difficulties. *See generally* CYNTHIA BARNETT, U.S. DEP'T OF JUST., THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA (2000), https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf [https://perma.cc/P7Y9-ESUV] (discussing the methodologies used to categorize and quantify white-collar crime).

33. Simpson, *supra* note 32, at 482–83; Cohen, *supra* note 32.

34. Mihailis E. Diamantis, *Functional Corporate Knowledge*, 61 WM. & MARY L. REV. 319, 324 (2019); *see also* TAUB, *supra* note 2, at xiii ("White collar crime in America, such as fraud and embezzlement, costs victims an estimated $300 billion to $800 billion per year."); RODNEY HUFF, CHRISTIAN DESILETS & JOHN KANE, THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 12 (2010).

35. Michael H. Hurwitz, *Focusing on Deterrence to Combat Financial Fraud and Protect Investors*, 75 BUS. LAW. 1519, 1520 (2019–2020) (noting that the Association of Certified Fraud Examiners puts the loss from fraud alone at five percent of Gross National Product or about $1 trillion in 2018).

estimate of the "tax gap" did not include the use of cryptocurrency, offshore evasion, and other types of tax dodges.[36] As a result, Rettig reported that tax evasion alone might cost the United States about $1 trillion a year.[37] By contrast, The FBI estimates that street-level property crimes, such as theft and burglary, cost approximately $16 billion annually.[38] To put it in more evocative terms:

> Tax evasion, to pick just one crime concentrated among the wealthy, already siphons up to 10,000 times more money out of the U.S. economy every year than bank robbers. In 2017, researchers estimated that fraud by America's largest corporations cost Americans up to $360 billion annually between 1996 and 2004. That's roughly two decades' worth of street crime every single year.[39]

Dollars alone do not begin to measure the total impact of any type of criminal conduct. Certainly, one can understand why prosecutors would privilege violent crime, mob, and terrorism cases. But these are not the only types of cases that impose non-monetary harms. Many corporate offenses, such as environmental crimes, also threaten the physical well-being of the public and the planet. How does one even begin to total up the costs of the environmental crimes committed by entities like BP and Volkswagen that future generations will have to bear? How does a court put a dollar figure on the cost that is, to my mind, the greatest cost imposed by white-collar crime: the danger it presents to social relations?

"White-collar crime . . . strikes at the very fiber of our society by undermining trust and confidence in our political, governmental, and financial systems."[40] For example, tax cheats make law-abiding citizens feel like suckers for paying their fair share; insider traders cause average investors to shun a financial marketplace perceived to be rigged by the unfairly enlightened; cartel behavior leads consumers to believe that supply and demand is a concept sold to them by a greedy industry; and, corrupt politicians persuade the average citizen that their government is bought and paid for by special interests, and their vote is meaningless. As noted above, the sapping of public confidence in societal institutions can have terrible consequences.

Not all these costs necessarily flow from corporate misconduct, but given the enormous recoveries the DOJ and the Securities and Exchange Commission have secured from corporate wrongdoers in settlements, one has to believe that corporate offenders' share of the dollar cost estimates is substantial. Corporations also have the size and power to inflict greater harm than an individual could, whether measured in money, environmental or health problems, or other consequences. Most importantly, the cost of corporate wrongdoing—in terms of societal trust and confidence in institutions and markets—far exceeds that threatened by ordinary mortals.

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36. Laura Davison, *Tax Cheats are Costing the U.S. $1 Trillion a Year, IRS Estimates*, L.A. TIMES (Apr. 13, 2021, 4:27 PM), https://www.latimes.com/business/story/2021-04-13/tax-cheats-are-costing-the-us-1-trillion-a-year-irs-estimates [https://perma.cc/XMJ8-3V3J].

37. *Id.*

38. TAUB, *supra* note 2, at xiii.

39. Hobbes, *supra* note 31.

40. William H. Webster, *An Examination of FBI Theory and Methodology Regarding White-Collar Crime Investigation and Prevention*, 17 AM. CRIM. L. REV. 275, 279 (1980).

III. THERE IS NO EVIDENCE THAT THE CORPORATE ECOSYSTEM WORKS TO FURTHER THE PURPOSES OF PUNISHMENT

To return my critique, the first reason that our system of corporate criminal enforcement is troubling is that, despite the dimensions of the problem presented by corporate criminality sketched above, we cannot say with any certainty that what we are doing fulfills any of the purposes of criminal punishment.

Certainly, this state of affairs does not satisfy those who believe that retribution or moral accountability is appropriate in the corporate context.[41] Most commentators, however, believe that the primary goal of corporate criminal liability must be deterrence.[42] Some argue that the deterrent function of the criminal stigma is best served in the supposedly rational cost-benefit world of corporate agents,[43] although others might question whether such *homines economici* exist, in corporations or out. But the evidence supporting the article of faith that criminal sanctions deter the offender and others from committing further crimes is mixed,[44] including in the context of corporate crime.[45]

And there is no evidence to suggest that the resolution of criminal cases through deferred prosecution agreements or declinations serves to deter future misconduct.[46] There is, in fact, anecdotal evidence to the contrary. Professor Brandon Garrett's definitive study of corporate criminal dispositions, *Too Big to Jail*, demonstrated that leniency—in the form of non-prosecution and DPs—all too often resulted in recidivism.[47] Some major corporations have broken one DP after another, resulting in more fines and compliance requirements but no prosecutions of individuals.

If there is one thing that commands a scholarly consensus, it is that the threat of being found out—rather than the severity of the penalty—is the primary factor in most people's deterrent calculus.[48] It is difficult to believe that the inconsequential number of actual

41. *See, e.g.*, William S. Laufer, *Where is the Moral Indignation Over Corporate Crime?*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 19 (Dominik Brodowski et al. eds., 2014).

42. *See, e.g.*, Harvey L. Pitt & Karl A. Groskaufmanis, *Mischief Afoot: The Need for Incentives to Control Corporate Criminal Conduct*, 71 B.U. L. REV. 447, 449–50 (1991) (stating that deterrence of misconduct is the chief goal of corporate criminal liability); John T. Byam, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 582 (1982) ("Criminal law jurisprudence offers several rationales for imposing punishments upon criminal offenders, but only one of these rationales, deterrence, is applicable to such economic entities as corporations.").

43. *See, e.g.*, Peter Cleary Yeager, *The Elusive Deterrence of Corporate Crime*, 15 CRIMINOLOGY & PUB. POL'Y 439, 441 (2016) (discussing the "considerations and implications for corporate deterrence").

44. *See, e.g.*, Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010) (explaining that "there is a marginal deterrent effect to some changes in criminal justice policy").

45. *See, e.g.*, Yeager, *supra* note 43, at 442 (explaining that "new laws tend to be trained on yesterday's problem rather than on new, oncoming ones").

46. *See* Rachel Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Approach*, 83 LAW & CONTEMP. PROBS. 159, 177 (2020) ("Yet there is little evidence to back up the view that compliance and the conditions imposed by the government in NPAs and DPAs are actually working to deter crime.").

47. GARRETT, *supra* note 11, at 165–68.

48. *See, e.g.*, VALERIE WRIGHT, SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING

corporate and individual white-collar prosecutions carry with them any deterrent bite. Even if the risk of being caught could be accurately forecast, it is so minimal at present that rational agents might actually conclude that crime will likely pay in the currency they seek.

There is also no evidence that the compliance programs the government demands work to detect and prevent further crime.[49] It is logical to believe such efforts should be effective—if they are well designed. But the DOJ's own inaugural in-house compliance expert, Hui Chen, asserted that "[t]he ubiquity of corporate misconduct is . . . surprising given the staggering amount firms spend on compliance efforts," citing the Wells Fargo, Volkswagen, and Petrobras cases.[50] She attributes the fact that the compliance movement has not prevented the "malfeasance [that] remains deeply entrenched in private enterprises today" to compliance programs' ineffective design.[51] Given that there has been a market in "effective" compliance programs at least since 1991,[52] it is not encouraging that 30 years hence we have not yet identified that which might actually achieve our goals. To the extent that the DOJ justifies the corporate ecosystem by asserting that it empowers prosecutors to "rehabilitate" corporate offenders by building a law-abiding ethos through compliance requirements, one has to conclude that its efforts have been largely ineffective.

Although I recognize that a corporate "culture of compliance" is a tricky thing to define and implement,[53] I believe it is the primary determinant of law-abiding behavior within corporations. Because of this, and because of my doubts about the legitimacy of pure retributive justice and the efficacy of deterrence, I believe that positive general prevention ought to be the primary rationale for corporate criminal liability.[54] Scholars have a variety of takes on the definition and attributes of positive general prevention (and terms for it), but one can describe it simply as a belief that punishment's purpose is not to scare potential criminals straight but rather to positively inculcate societal values and signal that those who transgress those values will suffer accordingly. Penal sanctions define important norms of law-abiding conduct, and their application reinforces those norms and reassures people that the social order is operating as it should. Importantly, "[s]uch norms

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CERTAINTY VS. SEVERITY 4 (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf [https://perma.cc/PV8G-QVKQ] (explaining that "[p]eople who perceive that sanctions are more certain tend to be less likely to engage in criminal activity"); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 72 (2005) ("Research has found that offenders are more sensitive to the probability of punishment than to its severity. Thus, increased severity may cause crime rates to remain the same or even increase.").

49. *See, e.g.*, Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS. 47, 55 (2020) ("This turn to internal compliance promises the prevention of unlawful behavior without the need for costly and risky public enforcement actions that, if unsuccessful, may undercut a law's deterrent effects. Yet we presently have little reason to believe this promise is being fulfilled."); Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV. 117 (Mar.–Apr. 2018); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 681 (2009) (evaluating whether settlement agreements with corporate monitors work to improve corporate behavior).

50. Chen & Soltes, *supra* note 49, at 118.

51. *Id.*

52. *See* Baker, *supra* note 5, at 317 (discussing the carrot and stick approach recommended by the U.S. Sentencing Commission).

53. *See* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 935 (2017) (discussing the difficulties of defining culture of compliance).

54. *See* Marcus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 681 (2005) (examining the German criminal law theory of positive general prevention).

guide and restrain behavior even when the chances of detection and punishment are slight. Given the many difficulties of preventing crime by rehabilitation, incapacitation, or deterrent threats, norm-reinforcement is probably the most important crime-preventative effect of punishment."[55]

Positive general prevention depends on public confidence in the rationality, proportionality, and fairness of the criminal justice system and its results. If the relative enforcement priorities or criminal penalties are felt to be disproportionately imposed on one population to the exclusion of the other, "there is a risk of either confusing common morality or flouting it and bringing the law into contempt."[56] "In other words, disproportionate penalties undercut the law's desired norm-reinforcing messages and reduces public respect for the criminal law and the criminal justice systems."[57] This is in line with research that attempts to discern why people comply with the law, not why they violate it. To vastly oversimplify, studies demonstrate what intuition would suggest: People comply with the law when they perceive the justice system to be legitimate and fair.[58] If one accepts that the purpose of corporate criminal liability is positive general prevention, the current corporate enforcement ecosystem is a dismal failure because of legitimacy concerns raised by disparities between corporate crime enforcement practices and those applied to the rest of the docket, as discussed below.

In sum, if the corporate enforcement ecosystem is defensible, that defense must be founded on what it inarguably does achieve: It permits the DOJ to leverage its resources through this public-private partnership, outsourcing much of its corporate crime investigative work so that it can devote the bulk of its attention to other enforcement priorities. The first question, given the focus of this symposium, is whether this could be achieved without the threat of corporate criminal liability. Although it must be conceded that this dynamic is fed by regulatory pressure as well as the threat of the criminal stigma, my belief—founded on the extraordinary measures corporations undertake to avoid a criminal conviction and the civil sanctions they are all too happy to pay—is that it could not. As Professor Brandon Garrett has noted, "corporations do not fear civil cases the way they fear prosecutions—for good reason. Criminal prosecutions bring with them far more serious consequences."[59] The next question is whether this leveraging is a good thing; that is, should the criminal stigma be used for these instrumental purposes? Most criminal theorists would answer with a resounding "no"; economists may well have a different answer.

IV. CORPORATE CRIME IS TREATED VERY DIFFERENTLY THAN STREET CRIME, CREATING A LEGITIMACY CRISIS

The second and, given my focus on general positive prevention, most important

55. Frase, *supra* note 48, at 72; *see also* Dubber, *supra* note 54, at 699 (noting that positive general prevention, "which today is the dominant theory of punishment in German criminal law . . . seeks to prevent crime not by scaring potential lawbreakers into compliance, but by bolstering the law-abidingness of the rest of the population").

56. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 25 (1968).

57. Frase, *supra* note 48, at 75.

58. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (arguing that people obey the law because they sense it is legitimate rather than because they fear punishment).

59. GARRETT, *supra* note 11, at 16.

reason I find the corporate enforcement ecosystem troubling is that it encourages the DOJ to effectively outsource enforcement to the regulated entities themselves with negotiated oversight by DOJ and to focus its resources disproportionately on the powerless—the poor and traditionally disadvantaged groups. The patent disconnects between the operation of the white-collar ecosystem and that of the rest of the criminal justice system demonstrate that we have two systems of criminal justice: one for the privileged, mostly White, corporate offenders and one for the poor, and often Black or Hispanic, defendants. This creates a legitimacy crisis, not just a PR issue.

It is not difficult to identify disparities in the treatment of white-collar and "street crime" cases. With respect to individuals, expert and well-financed white-collar counsel are present to fight for their clients throughout the investigation, honing their defense at each stage. Appointments are made and proffer agreements signed if and when white-collar offenders are interviewed; street crime offenders, by contrast, are interrogated, often without counsel, and no such accommodations are extended to them. Prosecutors generally rely on grand jury subpoenas to gather physical evidence in white-collar cases, allowing lawyers to challenge the subpoenas in advance of production; street crime offenders are generally subjected to warranted police searches of their property and can only object after the fact by way of suppression motions. In white-collar cases, counsel's focus is on heading off indictment; street offenders' counsel generally only appear after arrest, when an indictment is almost sure to follow.

Critically, white-collar counsel are given the opportunity to make presentations to the government, arguing that the facts, the law, and the equities ought to preclude indictment. If counsel are unsuccessful in persuading line prosecutors, they may be able to "appeal" that decision, sometimes up the ranks at Main Justice. We do not know how often such presentations are successful, given that the DOJ does not publish declination statistics. We know, however, that because such presentations and appeals are unheard of in street crime cases, white-collar offenders are 100% more likely to succeed than non-white-collar suspects.

If counsel are unsuccessful in dissuading the DOJ, white-collar offenders, unlike persons accused of street crimes, generally surrender at a mutually agreeable time when the time comes for arrest; there are no handcuffs and police cars present, and "perp walks" are a rarity. White-collar offenders are more likely to be released on bail—a large advantage when preparing a defense. Their cases are twice as likely to be dismissed as drug offenders' cases. And if corporate defendants elect to go to trial, the company pays for a defense team that can put the government's case to the test in ways that are unheard of in street crime cases.

Perhaps the most striking disparity in treatment concerns charging. As documented by Professor Garrett, in 73% of the cases where corporations secured a DP for their concededly criminal conduct, no corporate executives were indicted.[60] Corporations can only act through their agents; indeed, they cannot even be convicted absent proof that an individual agent within the corporation—acting within the scope of her employment and with the intention of benefiting the corporation—performed the criminal act. So how is it that no corporate agents were held to criminal account? In non-white-collar cases, the DOJ shows no such compunctions about using the criminal sanction. For example, one

60. *See* GARRETT, *supra* note 11 and accompanying text.

commentator estimated that in the year before the pandemic impaired federal law enforcement efforts, "[j]ust 359 new defendants were prosecuted for white-collar crime across all 94 federal districts, down 25 percent from five years before."[61] By contrast, in 2018, 21,974 individuals were sentenced for immigration offenses (96.3% of whom were Hispanic), and 18,636 individuals were sentenced for drug trafficking (48.2% Hispanic and 24.9% Black).[62]

DOJ policies also privilege corporations vis-à-vis individuals in crucial ways. Under the Department's Principles of Federal Prosecution of Business Organizations[63] (Principles), corporations receive individualized consideration in the charging phase, with attention being paid to a variety of circumstances relevant to the offender and the offense.[64] "The DOJ has done this, at this level, for no other kind of defendant or offense."[65] In individual cases DOJ charging policy is cookie-cutter and considerably harsher in nature:

> DOJ charging memos in cases involving individuals have for decades instructed prosecutors to charge the most serious readily provable offense regardless of individual circumstances. Thus, prosecutors are to find the most serious code provisions to match the facts, thus pursuing the goal of uniformity in the direction of severity. To the extent there is flexibility, it is largely for those who cooperate with the government and offer substantial assistance to prosecutors in bringing cases against others. Otherwise, the working presumption is offenses should be assessed based on the harms they cause, and the most serious charge available should be pursued.[66]

Professor Barkow concludes that "whereas the DOJ and the [Sentencing] Commission have largely taken the view that more severe sentences are to be preferred in individual cases, they have recognized the costs of severity in the corporate realm . . . ."[67] It is not difficult to see where these accommodations are made.

The Principles require that prosecutors consider whether the collateral consequences of a corporate conviction argue against indictment.[68] Although some have objected to the dominance of this factor in prosecutorial decision-making,[69] one can understand why a prosecutor would not want to be the person who, by indicting a company, robs Medicaid and Medicare recipients of a life-saving drug by operation of debarment rules. But one wonders why similar consideration could not be extended to the collateral consequences flowing from convictions of individual offenders in street crime cases. Such consequences

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61. Kardori, *supra* note 4.

62. U.S. SENT'G COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 110, 129 (2018).

63. U.S. Dep't of Just., *supra* note 13.

64. Barkow, *supra* note 46, at 160.

65. Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 832 (2018); *see also* Barkow, *supra* note 46, at 169.

66. Barkow, *supra* note 46, at 160.

67. *Id.* at 161.

68. U.S. Dep't of Just., *supra* note 13.

69. *See generally* GARRETT, *supra* note 11; *see also* O'Sullivan, *supra* note 11, at 76 (arguing that overreliance on this factor defeats the regulatory function of collateral consequences such as debarment and gives an "unprincipled windfall to those corporations that are too big to fail or that offer products or services too important for consumers to do without").

can be devastating for the defendants, their families—particularly their children—and their communities.[70]

Similarly, the Principles require that prosecutors consider whether other alternatives for accountability, such as civil liability, are available.[71] These, too, are not part of DOJ's charging considerations in individual cases. One of these alternative mechanisms for accountability—the plentiful use of deferred prosecution agreements—provides a critical advantage for corporate offenders over individuals. A DP essentially gives corporations a pass if they are cooperative, pay a big fine, beef up compliance, and keep their noses clean for a period. One can see that such a device might also be appropriately employed in many individual cases, for example, where the defendant's non-violent crime was spurred by drug dependence, and treatment appears promising. But the DOJ only sparingly uses it in individual cases. In recognition of this disparity, Judge Emmett Sullivan penned the following exhortation to the DOJ in *United States v. Saena Tech. Corp*.:[72]

> The Court respectfully requests the Department of Justice to consider expanding the use of deferred-prosecution agreements and other similar tools to use in appropriate circumstances when an individual who might not be a banker or business owner nonetheless shows all of the hallmarks of significant rehabilitation potential. The harm to society of refusing such individuals the chance to demonstrate their true character and avoid the catastrophic consequences of felony convictions is, in this Court's view, greater than the harm the government seeks to avoid by providing corporations a path to avoid criminal convictions. If the Department of Justice is sincere in its expressed desire to reduce over-incarceration and bolster rehabilitation, it will increase the use of deferred-prosecution agreements for individuals . . . .[73]

Yet another obvious example concerns the DOJ policies that give outright passes to corporations (and some of their executives) in large part regardless of the extent of their misconduct. For example, the antitrust policy promises a walk to the first cartel member in the door, assuming the company did not originate the conspiracy, reported itself before detection, and cooperates and remediates.[74] This is a boon not offered to other types of criminal conspiracies. I recognize that cartels are populated by so-called "legitimate" businesses. Still, I'm not sure why the existence of articles of incorporation should make a difference when that "legitimate" entity's business model is founded on criminally inflated prices. Indeed, when street criminals use a legitimate enterprise to shield their crimes from notice, those enterprises are deemed "fronts" behind which to hide criminal profits; why is this not true of cartel participants? Certainly, in individual cases, the DOJ is very stringent in assessing when immunity should be granted and provides that this is the last possible

70. *See* Barkow, *supra* note 46, at 175–76.

71. U.S. Dep't of Just., *supra* note 13.

72. United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 46 (D.D.C. 2015).

73. *Id.* at 46.

74. *See* U.S. DEP'T OF JUST., ANTITRUST DIV., *Leniency Program*, https://www.justice.gov/atr/leniency-program [https://perma.cc/Y8XU-EEAK] (providing links to the DOJ's specific policies on individual and corporate leniency).

alternative to secure a defendant's cooperation and testimony.[75]

There are a variety of complex factors that have led to this state of affairs, many of which have been explored at length elsewhere. Some disparities are difficult to "cure," such as the availability in corporate crime cases of well-paid and resourced counsel and other advantages that stem from wealth disparities. Others, such as the DOJ's failure to individualize charging decisions outside the corporate context, could be. I would like to focus on two factors contributing to these disparities that receive little or no attention in the literature and may be actionable. First, large corporations and those who represent them have the power and influence to intercede at the DOJ, resulting in corporate offenders receiving greater consideration—and considerably more mercy—than the general run of offenders. A second factor is impossible to document but seems, to me, difficult to deny: political elites, and at least some portion of the public, operate under misconceptions regarding the relative dangerousness and culpability of white-collar criminals as compared to other offenders, and these beliefs are, at least in part, founded on the type of implicit biases that pervade American society.[76]

V. CORPORATE POWER AND INFLUENCE

Corporate offenders and others who have a stake in the current system influence the policies and practices of the DOJ in ways that are not present in street crime cases. As Professor Barkow has explained, "when the DOJ has gone too far in the corporate sphere, powerful interests lobby against it. In contrast, there is little political fallout when the government is too harsh in individual cases. The pushback in individual cases is largely only present when there is too much leniency."[77]

Examples of the rich and powerful using their connections to affect law enforcement decisions in Congress and the Executive Branch are not hard to come by. Many congress members unapologetically refuse to increase the IRS's auditing and enforcement budget despite the IRS Commissioner's testimony regarding an estimated one trillion dollar tax gap. It is difficult to understand how Congress could deliberately impair the IRS's ability to collect taxes legally owed and unlawfully evaded without reference to the fact that it is the wealthy and powerful who are the biggest tax dodgers.[78] Another egregious example concerns President Trump's clemency decisions, in which (by my estimate) well over 100 white-collar offenders, often decidedly of the high-flying variety, were pardoned—many, if not most, of these exercises of clemency were the result of lobbying by the powerful and

75. U.S. Dep't of Just., *supra* note 13, §§ 9-23.000–23.400.

76. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (Anniv. Ed. 2020); JENNIFER EBERHARDT, BIASED: THE NEW SCIENCE OF RACE AND INEQUALITY (2019); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/SJ4Q-QJFK].

77. Barkow, *supra* note 46, at 178.

78. *See, e.g.*, Davison, *supra* note 36 (stating that "the richest 1% of Americans don't report about 20% of their income to the IRS"); Hobbes, *supra* note 31 (discussing how the wealthy have gotten away with white collar crime over the years).

well-connected rather than on merit.[79]

What is truly discouraging, however, is evidence that corporate power and influence—exercised through corporate counsel's connections—have considerable sway at Main Justice. Two examples of such interventions on behalf of corporate actors responsible in part for the ravages of the opioid epidemic provide a heartbreaking case study.

First, federal line prosecutors in Texas, supported by their Republican U.S. Attorney, spent two years putting together a case against Walmart for violating the Controlled Substances Act.[80] The prosecutor believed that they had put together "highly damning evidence" showing that Walmart pharmacists throughout the country had lodged objections with the company to filling prescriptions from doctors running pill mills.[81] Walmart pharmacists, in fact, internally reported hundreds of thousands of suspicious or inappropriate opioid prescriptions. Walmart compliance officials, however, told pharmacists that they could not cut off these doctors; rather, one opioid compliance officer sent an executive an email saying that Walmart's focus should be on "driving sales."[82] Before the prosecutors could indict the company and this compliance official, Walmart, which purported to be cooperating with the investigation, repeatedly appealed to high-ranking DOJ officials. The DOJ told the line prosecutors to stand down, and, in 2018, Walmart was told that the DOJ was declining both cases.[83] If press reports are to be believed, this declination had everything to do with political influence, not the strength of the case.[84] Finally, in December 2020, the DOJ filed a civil suit alleging that Walmart had done that which prosecutors unsuccessfully sought to pursue criminally: it unlawfully dispensed controlled substances from its pharmacies for years.[85]

Second, Purdue Pharma engaged in decades of criminal misconduct in support of its zealous efforts to rake in billions through sales of its highly addictive opiate drug, OxyContin.[86] As is detailed by Patrick Radden Keefe in *Empire of Pain*, in the early 2000s, a couple of line prosecutors in the Western District of Virginia, with the support of their Republican U.S. Attorney, put together a criminal case against Purdue and three of its top executives.[87] Notably, a small office did this without a task force: they found a way to review millions of pages of documents yielded by nearly 600 subpoenas and interview some 300 people.[88] The prosecutors planned to charge the company and the three

79. *List of People Granted Executive Clemency by Donald Trump*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_people_granted_executive_clemency_by_Donald_Trump [https://perma.cc/5KGZ-T2AF].

80. Jesse Eisinger & James Bandler, *Walmart Was Almost Charged Criminally Over Opioids. Trump Appointees Killed the Indictment*, PROPUBLICA (Mar. 25, 2020, 5:00 AM), https://www.propublica.org/article/walmart-was-almost-charged-criminally-over-opioids-trump-appointees-killed-the-indictment [https://perma.cc/6Y9V-BGQH].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Laurel Wamsley, *Justice Department Sues Walmart, Alleging It Illegally Dispensed Opioids*, NPR (Dec. 22, 2020, 3:00 PM), https://www.npr.org/2020/12/22/949266706/justice-department-sues-walmart-alleging-it-illegally-dispensed-opioids [https://perma.cc/QNB5-PBFZ].

86. PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021).

87. *Id.* at ch. 20.

88. *Id.* at 264–66.

executives with misbranding, wire and mail fraud, and money laundering[89] and to ask for a fine of $1.6 billion, given that Purdue had already made more than $9 billion in OxyContin sales.[90] A lawyer at the DOJ, tasked with evaluating the line assistants' prosecution memo, concluded that the evidence was "rock solid" and recommended that the case go forward.[91]

But Purdue hired a number of former prosecutors as defense counsel, two of whom had served as the U.S. Attorney in the Southern District of New York.[92] These defense lawyers used their connections at Justice to push for leniency at the highest levels.[93] After their interventions, the DOJ decreed that the line prosecutors could only proceed against the company for one count of felony misbranding, not fraud or money laundering, and that the individuals could only be charged with a single misdemeanor.[94] Thus, in 2007, three top executives pled to a single misdemeanor count, and Purdue "pled guilty to misbranding OxyContin by falsely marketing it as less addictive, less subject to abuse and diversion, and less likely to cause dependence and withdrawal than other pain medications. Purdue . . . also agreed to pay more than $600 million, of which over $100 million was paid to settle civil False Claims Act liability for knowingly causing the submission of false claims to federal healthcare programs for OxyContin."[95] To put the fine assessed in perspective, Purdue Pharma was making about $100 million a month from OxyContin sales.[96]

Unchastened, the company continued to push its drug on the public. Finally, it was again indicted and pled guilty in 2020 to three felony counts.[97] The Settlement agreement between the DOJ and Purdue Pharma documented that "[f]rom 2010 to February 2018, Purdue engaged in strategies that resulted in prescriptions of its drugs for uses that were not for a medically accepted indication, were unsafe, ineffective, and medically unnecessary, and that were diverted for uses that lacked a legitimate medical purpose."[98] It describes "the fraudulent scheme to cause extremely high volume prescribers to write medically unnecessary OxyContin prescriptions for Federal healthcare program beneficiaries"[99] and, in doing so, revealed evidence that senior executives and the board, including Sackler family members, knew or were at best willfully blind to these illegal

89. *Id.* at 273.

90. *Id.*

91. KEEFE, supra note 86, at 274; *see also Paul Pelletier on Corporate Crime and Corporate Power in America*, 35 CORP. CRIME REP. No. 44 (Nov. 15, 2021, 2:47 PM) (discussing DOJ memo).

92. KEEFE, *supra* note 86, at 272.

93. *Id.* at 275–76.

94. *Id.* at 276; *see also* Edward Helmore, *Purdue Pharma Escaped Serious Charges Over Opioid in 2006, Memo Shows*, GUARDIAN (Aug. 19, 2020, 5:00 PM), https://www.theguardian.com/us-news/2020/aug/19/purdue-pharma-oxycontin-justice-department-memo-opioid [https://perma.cc/6XRW-ZENM] ("Purdue's deal with the government has come back under scrutiny in recent years.")

95. Settlement Agreement between the United States and Purdue Pharma, L.P., at 3 add. A (Oct. 21, 2020), https://www.sec.gov/Archives/edgar/data/1005201/000100520118000014/exhibit1010-purduesettleme.htm [https://perma.cc/W6F6-Y8R4] [hereinafter Settlement Agreement].

96. KEEFE, *supra* note 86, at 279–85.

97. Press Release, U.S. Dep't of Just., Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies (Nov. 24, 2020), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies [https://perma.cc/NPQ7-FJNR].

98. Settlement Agreement, *supra* note 95, at 6 add. A.

99. *Id.* at 3.

practices.[100] Why, then, have no individuals—either at the company or in the Sackler family, which owned Purdue—been criminally charged pursuant to the latest investigation?

The answer undoubtedly lies in part in the influence the company exerted through its attorneys, but that does not entirely explain a glaring incongruity. Yes, Purdue's opioid was a "medicine" approved by the FDA, and yes, doctors prescribed these medications—providing a veneer of respectability to the enterprise—but the practices Purdue admitted to, in the course of its guilty pleas, reveal the thinness of that veneer. In short, given the practices the company and its executives have admitted to and their lethal consequences, it and its executives are as pernicious as any other drug kingpins and certainly more culpable than your average street dealer. Yet a DOJ that has long prioritized drug cases—and has shown no mercy in convicting and jailing predominantly Black and Hispanic dealers—let Purdue Pharma continue its dealing for many years before public outrage forced it to action. Further, it has failed to indict the individuals who steered this profitable criminal enterprise.

No doubt, those who decided not to indict corporate executives would argue that the evidence was simply insufficient. Earlier prosecutors vehemently disagreed, and the content of the settlement agreement certainly seems to support the view that management and members of the board were complicit. I cannot resolve that question. What concerns me, however, is the suspicion that the decision reflects an unconscious belief that drug dealers in suits are less dangerous or culpable than drug dealers on street corners.

VI. UNCONSCIOUS BIAS

I am far from the first to note the obvious: there is a jarring disconnect between the race and ethnicity of those who are subjected to the most concerted enforcement efforts and resources and those who benefit from the workings of the white-collar ecosystem. Only about 10% of federal cases sentenced recently reflected "white-collar" crimes.[101] Of the approximately 10% of all offenders sentenced under the general economic crimes guideline, 43.4% were White, 26.8% were Black, and 22.9% were Hispanic.[102] Most of those selected for prosecution and convicted in the economic crimes category were not corporate sharks; in fact, the majority appear to be relatively low-level offenders.[103] By contrast, the largest category of crimes sentenced in 2020 (41.1%) were immigration offenses, and of these, 96.7% of those sentenced were Hispanic, 1.9% White, and 0.9% Black.[104] Of those convicted of drug trafficking, the next largest category of offenders (26.1%), 43.8% were Hispanic, 27% were Black, and 26.1% were White.[105]

One might attribute these disparities to the fact that white-collar cases are difficult and resource-intensive. One might also argue that budgetary constraints—not a desire to treat white-collar offenders gently—cause these disparities. One might further contend that the

100. *Id.* at 6–42.

101. U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 46 (2020), tbl.4.

102. *Id.* at 46 tbl.4; *Id.* at 153 tbl.E-1.

103. For example, only 18.4% of those sentenced for an economic crime had a college education. *Id.* at 157 tbl.E-5. The median loss amount was $51,281. *Id.* at 158 tbl.E-6.

104. *Id.* at 129 tbl.I-1.

105. *Id.* at 110 tbl.D-2.

disproportionate incarceration of Black and Hispanic offenders is unfortunate, but it is largely an unavoidable result of benign enforcement priorities. For example, one could argue that the predominance of Hispanic offenders in immigration cases is due to the populations seeking entry on our southern border. (One cannot make this argument with respect to drug cases; despite similar rates of drug use and dealing among White and Black populations, Black suspects are about 2.5 times more likely to be arrested and incarcerated for drug possession crimes than White suspects.[106])

These arguments are not persuasive because decisions about budgets and their allocation—as well as what should be pursued criminally and what should not—are made by public officials and must themselves be justified. For example, the decision to treat the immigration crisis through criminal law instead of immigration law is the result of political and social pressure. The source of those pressures must be examined. If we look at the genesis of these decisions, we may discover troubling answers. One recent study revealed, for instance, that the decision to treat the opioid crisis primarily as a public health matter, while the crack epidemic was almost entirely addressed through criminal prosecutions, was influenced by racial associations—crack use was associated with Black communities while opioid abuse was perceived to be a problem plaguing White communities.[107] To return to the subject of this symposium, the question is, why have we engineered and accepted an ecosystem that dictates that corporations and their executives are rarely prosecuted because policymakers have diverted the lion's share of attention to other priorities, such as immigration and (certain) drug cases.

It is inarguable that enforcement priorities often reflect principled differences in perspective. One can understand, even if one does not agree with, the FBI's repurposing of many of its agents from white-collar work to anti-terrorism investigations post-9/11. I laid out my beliefs earlier but readily concede that we could argue all day over whether an insider trader is more or less dangerous and culpable than your average ecstasy dealer or desperate immigrant scaling border walls. In part, the difficulty is in comparing apples and oranges. However, note—at the risk of being tedious—in my view, comparing Purdue Pharma's executives to other drug kingpins is comparing apples and apples.

But it is also inarguable that racism and other types of animus pervade criminal law enforcement and that, to some extent, enforcement priorities reflect that fact.[108] Some of this has been driven by the insistent, false messaging of political opportunists. The Nixon Administration declared the "war on drugs" that has devastated Black communities over the last 50 years for that express purpose. The administration believed that it could attack its "enemies"—perceived to be Black and anti-war communities—by accusing them of drug abuse and prosecuting them harshly. As one of the war's architects, John Ehrlichman,

106. *See, e.g.*, Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS (Sept. 30, 2014) ("Blacks remain far more likely than whites to be arrested for selling drugs (3.6 times more likely) or possessing drugs (2.5 times more likely)."), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/ [https://perma.cc/H3RZ-GVGV].

107. Carmel Shachar, Tess Wise, Gali Katznelson & Andrea Louise Campbell, *Criminal Justice or Public Health: A Comparison of the Representation of the Crack Cocaine and Opioid Epidemics in the Media*, 45 J. HEALTH POL. POL'Y & L. 211, 212 (2020).

108. *See supra* note 76 and accompanying text.

later conceded: "Did we know we were lying about the drugs? Of course we did."[109] And President Trump encouraged Americans to believe that Mexican immigrants are "rapists" and "drug dealers;"[110] he urged Americans to fear undocumented immigrants—claiming that such populations are "roaming free to threaten peaceful citizens"[111]—despite studies finding no causal connection between undocumented aliens and crime.[112] Research reveals, however, that most of the bias that pervades criminal law enforcement is unconscious,[113] although it is no doubt informed by this type of messaging.

To be clear, do I believe that most citizens, politicians, and—in particular—federal prosecutors are advocating certain enforcement priorities out of an explicit desire to harm certain communities or out of a belief in the inferiority or inherent criminality of Black, Hispanic, or immigrant populations? Emphatically "no." But can one assume that enforcement priorities are uninfluenced by the implicit biases created by politically expedient, pernicious messaging? In particular, can one assume that persons setting the enforcement priorities and those carrying them out are uninfluenced by the implicit racial bias that studies have shown pervade our society? Just as emphatically: "no." The public's, policymakers', and prosecutors' evaluations of culpability, or lack of culpability, turn in part on their experience as mediated by race and ethnicity. Is it surprising, then, that the white-collar ecosystem operates as it does—with a limited budget, a seeming lack of enthusiasm at the highest levels of the DOJ, and a paltry number of convictions—given that the majority of corporate offenders are White men—in other words, they look a lot like those enforcing the law?

Let us begin with a profile of those making enforcement decisions at the DOJ.

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109. Ehrlichman revealed in a 1994 interview that Nixon declared a "war on drugs" to target perceived enemies—that is, Black people and anti-war "hippies":

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Jamila Hodge, *Fifty Years Ago Today, President Nixon Declared the War on Drugs*, VERA INSTITUTE OF JUSTICE: THINK JUSTICE BLOG (June 17, 2021), https://www.vera.org/blog/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs [https://perma.cc/K82Q-G8LN].

110. Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/ [https://perma.cc/7GYY-XLNR].

111. Miriam Valverde, *Nearly 180,000 Illegal Immigrants with Criminal Records, Ordered Deported From Our Country, are Tonight Roaming Free to Threaten Peaceful Citizens*, POLITIFACT (July 22, 2016), https://www.politifact.com/factchecks/2016/jul/22/donald-trump/trump-nearly-180000-illegal-immigrants-have-crimin/ [https://perma.cc/P4XW-T9RT].

112. *See, e.g.*, Melinda Wenner Moyer, *Undocumented Immigrants Are Half as Likely to Be Arrested for Violent Crimes as U.S.-Born Citizens*, SCI. AM. (Dec. 7, 2020), https://www.scientificamerican.com/article/undocumented-immigrants-are-half-as-likely-to-be-arrested-for-violent-crimes-as-u-s-born-citizens/ [https://perma.cc/J9HR-GHEA]; Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html [https://perma.cc/2FHQ-USUH].

113. *See, e.g.*, JENNIFER EBERHARDT, BIASED: THE NEW SCIENCE OF RACE AND INEQUALITY (2019).

According to an Associated Press analysis of government data over three decades, there is a persistent lack of diversity in the ranks of U.S. attorneys; that lack of diversity reached a new low in the Trump Administration. "Eighty-five percent of [Trump's] Senate-confirmed U.S attorneys [were] white men, according to AP's analysis, compared with 58% in Democratic President Barack Obama's eight years, 73% during Republican George W. Bush's two terms, and at most 63% under Democrat Bill Clinton."[114] This means that, during the last administration, "White men [led] 79 of the 93 U.S. attorney's offices in a country where they make up less than a third of the population. Nine . . . U.S. attorneys [were] women. Two [were] Black, and two Hispanic."[115]

I have no doubt that these numbers have improved in the Biden Administration. But there is far less turnover in rank-and-file prosecutors between administrations, and the Department is an overwhelmingly White male enclave. A survey in 2015 showed that only "8 percent of assistant U.S. attorneys are African American and 5 percent are Latino. Only 38 percent of assistant U.S. attorneys are women."[116] The lack of diversity also extends to those agencies that bring cases to the AUSAs. "Then-FBI Director James Comey said in 2016 that the bureau's failure to recruit more minorities had become 'a crisis.' In the U.S. Drug Enforcement Administration, recent court filings show 8% of the agency's more than 4,000 special agents are Black while about 77% are white."[117]

When might this lack of diversity make a difference? I have focused thus far on how unconscious biases might influence politicians and DOJ management to decide that immigration and drug cases ought to consume what seems to me, in view of the serious harms caused by anemic enforcement of corporate white-collar criminality, a disproportionate share of DOJ's attention. But implicit biases also figure into individual decisions and may, in some cases, inform decisions not to pursue white-collar corporate executives.

It should come as no surprise that studies, while concededly not conclusive, support the view that federal prosecutors' decision-making is subject to the same unconscious biases the rest of the population harbors.[118] And it is not difficult to find anecdotes about the extent to which implicit bias has affected the decision-making of line assistants, as identified by U.S. Attorneys concerned that this is a very real problem. For example, as Danny Williams Sr., formerly a U.S. Attorney in Oklahoma, related:

Tulsa police had arrested two groups, one white and the other Black, in separate

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114. Jake Bleiberg, Aaron Morrison, & Jim Mustian, *Trump's Top Federal Prosecutors are Overwhelmingly White Men*, ASSOC. PRESS (Oct. 6, 2020), https://apnews.com/article/race-and-ethnicity-donald-trump-shootings-racial-injustice-george-w-bush-f6995edcc2158df1f8b0cb4f9574bdaf [https://perma.cc/ZD7Y-JKAB].

115. *Id.*

116. Raman Preet Kaur, *When It Comes to U.S. Attorneys, All Americans Need a Seat at the Table*, CTR. FOR AM. PROGRESS (June 2, 2007), https://www.americanprogress.org/issues/courts/news/2017/06/22/434808/comes-u-s-attorneys-americans-need-seat-table/ [https://perma.cc/A76S-MD56].

117. Bleiberg, *supra* note 114.

118. *See, e.g.*, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 U. CHI. J. POL. ECON. 1320, 1320, 1350 (2004); *Dep't of Justice, The Federal Death Penalty System: A Statistical Survey 1988-2000*; U.S. DEP'T OF JUST. (Sept. 12, 2000), https://www.justice.gov/archive/dag/pubdoc/_dp_survey_final.pdf [https://perma.cc/DV35-HPYK]; *see also* Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 758 (2006).

> armed robberies, and the cases ended up before federal prosecutors. The facts were similar, so Williams said he was surprised that the proposed charges that reached his desk were different: The Black defendants were facing more potential prison time.
>
> Williams, who is Black, said he asked the assistant U.S. attorney who'd handled the cases what factual difference accounted for the disparity. The career prosecutor, who is white, responded that the white defendants were college students, Williams said.

"I don't want this story to come off as I thought the guy was racist. I just think that he didn't grasp, in the charging decision, the way he treated these two different groups differently," Williams said. "It's just an example of, this is why you need diversity." The Brennan Center at NYU brought together 12 former federal prosecutors, most of whom had served as U.S. Attorneys, to talk about these issues. "The perspectives related by former U.S. Attorneys during the . . . focus group reveal[ed] the constant need for federal prosecutors and their supervisors to remain attentive to racial disparities in the criminal justice system and, in particular, the difficulties of addressing unconscious racial bias."[119] To return to our drug-dealing case study, as one former U.S. Attorney recounted,

> I had an [Assistant U.S. Attorney ("AUSA") who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, "Why do you want to drop the gun offense?" and he said, "He is a rural guy who grew up on a farm. The gun he had with him was a rifle. He is a good ol' boy, and all the good ol' boys have rifles, and it's not like he was a gun-toting drug dealer." But he [was] a gun-toting drug dealer, exactly.[120]

The U.S. Attorney told the story to acknowledge that "the question of whether to dismiss a gun charge carrying a statutory mandatory minimum sentence turned on the prosecutor's perception of the defendant's culpability, which was in turn informed in part by race."[121]

VII. WHAT IS TO BE DONE?

The issues I and others have raised are complex and defy easy solutions. At a minimum, a rethinking of our enforcement priorities is past due. The conversation must involve uncomfortable conversations about why these priorities have had such disparate racial and ethnic impacts. Thus, we should question whether the criminalization of immigration is likely to serve the purposes of punishment. And we should reevaluate whether, after 50 years of a "war on drugs," we ought to concede that our efforts to jail our way out of the problem have failed and explore alternatives with purpose. The legitimacy crisis the disparities discussed above create could be ameliorated by increasing enforcement resources to vigorously pursue—and criminally convict—corporations and their executives who break the law. We should also increase the extent to which corporate criminality is likely to be discovered and our ability to find evidence to convict individuals

119. BRENNAN CTR. FOR JUST., RACIAL DISPARITIES IN FEDERAL PROSECUTION 11 (2010).
120. *Id.*
121. *Id.*

by extending the *qui tam* mechanism beyond False Claims Act cases and augmenting whistleblower rewards and protections.

With respect to disparities in treatment, we should not respond by stooping to the lowest common denominator, attempting to treat corporate offenders as we currently treat non-white-collar individual defendants. Instead, we should devote the resources and alter the relevant DOJ policies necessary to level up. This would include increasing the funding for and numbers of appointed defense counsel; instituting individual charging guidelines that consider more than just the highest readily provable count; creating a formalized DP policy for individual offenders; institutionalizing a mechanism by which non-white-collar defense counsel can make the same pitches that white-collar counsel regularly make; and creating a policy that dictates that if white-collar counsel can call the Deputy Attorney General and get a meeting, she should also be equally available to the heads of the federal public defender offices in every district. These policies must be paired with a culture change at the DOJ so that individuals in non-white-collar cases are recognized as deserving of individualized consideration, and prosecutors understand that mercy may be appropriate in every case. We must further attempt to align these two ecosystems by recognizing that white-collar offenses are as, if not more, dangerous to society than many drug or immigration offenses. For this and other reasons, it is imperative that the DOJ makes concerted efforts to increase the diversity of the federal prosecutorial ranks and trains assistants regarding implicit biases.