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## ARTICLES

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*Brandon L. Garrett\**

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\* Professor of Law, University of Virginia School of Law. Many thanks to Jennifer Arlen, Peter Henning, Dan Richman, and participants at the Criminal Justice Roundtable conference at the University of Virginia School of Law for their helpful comments on earlier drafts; and Benjamin Lubarsky, Brian Rho, and Elaine Singerman for their invaluable research assistance.

## INTRODUCTION

A corporate criminal is no scapegoat, assures the Department of Justice (“DOJ”), because it is always a priority to target all culpable individuals at a company. DOJ policy emphasizes that “[o]nly rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers,” even if the company settles its case with prosecutors.<sup>1</sup> After all, under the respondeat superior standard that applies in federal criminal cases, a corporation can be prosecuted if and only if an employee committed a crime.<sup>2</sup> As the Supreme Court has put it, “[T]he only way in which a corporation can act is through the individuals who act on its behalf.”<sup>3</sup> Yet, as is increasingly the subject of high-profile criticism, more often than not, when the largest corporations are prosecuted federally, individuals are not charged.<sup>4</sup> In this Article, I develop data describing these individual prosecutions—which tend to result in light sentences when convictions are obtained.<sup>5</sup> These data illustrate the special challenges of bringing corporate prosecutions, and they suggest why, in contrast to what prominent critics have argued, bringing more individual cases is no adequate substitute for prosecuting companies. I conclude by proposing how corporate prosecutions could be brought to enhance individual criminal accountability.

The corporation appears to be a kind of a scapegoat: perhaps not entirely blameless, as in the traditional concept, but literally impossible to actually jail—yet capable of receiving the brunt of blame and punishment, while the individual culprits go free.<sup>6</sup> Data presented in this Arti-

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<sup>1</sup> See U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-28.200 (2008) [hereinafter U.S. Attorneys’ Manual], available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>, archived at <http://perma.cc/6QFL-6Z76>.

<sup>2</sup> *Id.*; see *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 491–95 (1909) (approving corporate criminal liability under a respondeat superior standard).

<sup>3</sup> *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

<sup>4</sup> See, e.g., *infra* notes 7, 9.

<sup>5</sup> Preliminary data on this subject are described briefly in a recent book, Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* 83 (2014) [hereinafter Garrett, *Too Big to Jail*] (describing how of 255 deferred and non-prosecution agreements entered by federal prosecutors between 2001 and 2012, approximately one-third of the agreements were accompanied by individual prosecutions). These data presented here are updated but also far more fine grained, examining separate questions concerning how many charges resulted in acquittals, dismissals, and trials, and what types of sentences were granted upon conviction.

<sup>6</sup> A “scapegoat” can be defined as “one that bears the blame for others,” and in particular a non-person incapable of moral blame, as in “a goat upon whose head are symbolically

cle suggest that the problem of individual and corporate prosecution requires far more careful consideration. In about two-thirds of deferred and non-prosecution agreements (“DPAs” and “NPAs”) with companies, no individual officers or employees were prosecuted for related crimes.<sup>7</sup> Many were quite high-profile prosecutions; well over half were public corporations, and many were Fortune 500 and Global 500 companies.<sup>8</sup> The companies are required to admit their crimes and accept responsibility for them, and yet the individual culprits faced no criminal consequences.

The problem becomes far more complex, however, when one asks what occurs when individual officers and employees *are* charged. In this Article, I study the outcomes in those cases in some detail. Prosecutors typically obtained light sentences and experienced quite high numbers of outright losses in the form of acquittals and dismissals. As will be described in Part I, from 2001 to 2014, prosecutors entered 306 deferred and non-prosecution agreements with companies.<sup>9</sup> Among those, 34%, or 104 companies, had officers or employees prosecuted, with 414 total individuals prosecuted.<sup>10</sup> Most prosecuted individuals were not high-up officers of the companies, but rather middle managers of one kind or another. Of the individuals prosecuted in these cases, thirteen were presidents, twenty-six were CEOs, twenty-eight were CFOs, and fifty-nine were vice-presidents.<sup>11</sup> What happened in these cases? Of the 414 individuals, 266, or 65%, pleaded guilty.<sup>12</sup> And forty-two were convicted at a trial, an elevated trial rate of 10%.<sup>13</sup> How were convicts sentenced for these corporate crimes? The average sentence, including those who received probation but no jail time, was eighteen months. As I will de-

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placed the sins of the people after which he is sent into the wilderness in the biblical ceremony for Yom Kippur.” Merriam-Webster’s Collegiate Dictionary 1108 (11th ed. 2003).

<sup>7</sup> Garrett, *Too Big to Jail*, supra note 5, at 83 (noting that individuals were prosecuted accompanying 89 of 255 agreements).

<sup>8</sup> Id. at 62 (noting that thirty-one percent of corporations were either a Fortune or Global 500 firm the year they settled their prosecutions).

<sup>9</sup> I have maintained for some time the most complete data available on such federal deferred and non-prosecution agreements with corporations. See Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, U. Va. Sch. L., [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/home.suphp](http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp), archived at <http://perma.cc/SNK7-MZHT> (last updated July 31, 2015).

<sup>10</sup> See *infra* Section I.A.

<sup>11</sup> See *infra* Section I.A.

<sup>12</sup> See *infra* Section I.A.

<sup>13</sup> See *infra* Section I.A.

scribe, that is somewhat lower than average sentences for many of the relevant federal crimes. The average sentence among those who did receive jail time was higher—forty months.<sup>14</sup> But it was only 42% or 128 of the 308 individuals convicted (266 who pleaded guilty and 42 who were convicted at trial) who received any jail time.<sup>15</sup> This is a low imprisonment rate.<sup>16</sup> To be sure, many convicts paid large fines. Of the individuals prosecuted, 144 individuals were fined, with an average fine of \$382,000.<sup>17</sup>

Of still greater concern was the large number of prosecution losses: 15% of the cases were unsuccessful, which, as I will develop in Part I, is far higher than what is typical in federal white-collar prosecutions.<sup>18</sup> Fifty-two individuals had charges dismissed pretrial. Eleven were acquitted at trial.<sup>19</sup> Still other cases were not ultimately successful; nine had convictions reversed on appeal.<sup>20</sup> In addition, forty individuals were charged but have not been convicted, either because the cases are still pending, or individuals are fugitives or have not been successfully extradited.<sup>21</sup>

“There is no such thing as too big to jail,” Attorney General Eric Holder announced in a stern video message in May 2014, underscoring that no financial institution “should be considered immune from prosecution.”<sup>22</sup> Yet it is increasingly common to hear complaints, including from prominent politicians, judges, journalists, and academic commentators, that the government “has prosecuted only a handful of individuals in the Wall Street meltdown of 2008.”<sup>23</sup> Presidential candidate Hillary Clinton has said, “Even though some institutions have paid fines and even admitted guilt, too often it seems like the people responsible get off

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<sup>14</sup> See *infra* Section I.A.

<sup>15</sup> See *infra* Section I.A.

<sup>16</sup> For detailed comparisons with U.S. Sentencing Commission data, see *infra* Subsection I.A.1.c.

<sup>17</sup> See *infra* Subsection I.A.1.c.

<sup>18</sup> See *infra* Subsection I.A.1.c.

<sup>19</sup> See *infra* Subsection I.A.1.c.

<sup>20</sup> See *infra* Subsection I.A.1.c.

<sup>21</sup> See *infra* Subsection I.A.1.c.

<sup>22</sup> Jonathan Weil, *There Is Still Such a Thing as ‘Too Big to Jail,’* BloombergView (May 6, 2014, 4:03 PM), <http://www.bloombergvew.com/articles/2014-05-06/there-is-still-such-a-thing-as-too-big-to-jail>.

<sup>23</sup> Alicia Mundy, *U.S. Effort to Remove Drug CEO Jolts Firms*, *Wall St. J.*, Apr. 26, 2011, at A1; see also Henry N. Pontell et al., *Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions After the 2008 Financial Meltdown*, 61 *Crime L. & Soc. Change* 1, 10–12 (2013) (discussing reasons why the federal government has failed to make significant prosecutions in response to the global meltdown of 2008).

with limited consequences (or none at all).”<sup>24</sup> The concerns have also been raised in areas of federal criminal practice unrelated to banks or to the causes of the financial crisis. For example, then-Senator Arlen Specter asked in 2010 hearings why no employees of Siemens were prosecuted for foreign bribery violations after the company paid record fines to settle a Foreign Corrupt Practices Act (“FCPA”) prosecution. Senator Specter asked, “[W]ho’s going to jail?”<sup>25</sup> (Subsequently eight employees were indicted, but none have to date been extradited to the United States.)<sup>26</sup> In environmental prosecutions, critics have also asked why executives have not been targeted following deadly spills, mine explosions, and other disasters.<sup>27</sup>

Federal Judge Jed Rakoff has offered a prominent critique of this problem, arguing that prosecutors are too quick to settle corporate cases on lenient terms after hasty investigations; he concludes that prosecuting individuals would be more effective than “imposing internal compliance measures that are often little more than window-dressing.”<sup>28</sup> Professor Dan Richman has added that “simplistic clamoring for more heads” will not address an underlying need for “more systemic regulatory reforms.”<sup>29</sup> Still others have long argued that corporate criminal liability

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<sup>24</sup> Lisa Lerer, *Hillary Clinton to Propose Increasing Capital Gains Taxes*, Associated Press (July 20, 2015, 4:58 PM), <http://bigstory.ap.org/article/3d72340b0baa4370a1ad974f001b47e2/clinton-propose-increasing-capital-gains-taxes>, archived at <http://perma.cc/2H2D-KRWY>.

<sup>25</sup> Christopher M. Matthews, *Senators Question FCPA Enforcement Policies in Hearing*, Main Just. (Nov. 30, 2010, 7:25 PM), <http://www.mainjustice.com/justanticorruption/2010/11/30/senators-question-fcpa-enforcement-policies-in-hearing>, archived at <http://perma.cc/ENK6-WUVV>.

<sup>26</sup> Press Release, Fed. Bureau of Investigation, *Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme* (Dec. 13, 2011), <http://www.fbi.gov/washingtondc/press-releases/2011/eight-former-senior-executives-and-agents-of-siemens-charged-in-alleged-100-million-foreign-bribe-scheme>, archived at <http://perma.cc/BZP8-EUUT>; Ashby Jones, *Extradition Is Hurdle in FCPA Prosecutions*, Wall St. J. (Oct. 2, 2012, 6:14 PM), <http://www.wsj.com/articles/SB10000872396390444004704578028430536186670>.

<sup>27</sup> David M. Uhlman, *For 29 Dead Miners, No Justice*, N.Y. Times (Dec. 9, 2011), <http://www.nytimes.com/2011/12/10/opinion/for-29-dead-miners-no-justice.html> (noting that “[w]e should not underestimate, however, the difficulty of prosecuting high-ranking officials in large corporations”).

<sup>28</sup> Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. Rev. Books, Jan. 9 2014, at 8, available at <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions>. For an article discussing Judge Rakoff’s criticisms and presenting data from my book, see Michael Rothfeld, *Firms Are Penalized, but Workers Aren’t*, Wall St. J., Jan. 17, 2014, at C1.

<sup>29</sup> Daniel C. Richman, *Corporate Headhunting*, 8 Harv. L. & Pol’y Rev. 265, 280 (2014).

standards should be altered, sharply limited, or even abolished as inconsistent with the purposes of criminal law.<sup>30</sup> Whether the allure of individual prosecutions substitutes for efforts to provide sound regulation of corporations, much less prosecution of noncompliant corporations remains an important subject.

The relative lack of individual prosecutions raises a puzzle: One might expect it to be far easier for prosecutors to bring white-collar cases when they benefit from the company's cooperation. Companies typically agree to fully cooperate with investigations that may continue long after the firm settles its case. Companies conduct detailed internal investigations, turn over documents, records, and emails, and they agree to produce employees for interviews.<sup>31</sup> DOJ officials began to respond to critics with remarks in 2014 that highlighted the importance of "true" corporate cooperation that provides "evidence against" the "culpable individuals."<sup>32</sup> In September 2015, the DOJ released a new memorandum, amending its guidelines to reflect a focus on individual accountability for corporate crimes, stating, among other changes, that no longer will corporations receive any credit for cooperation without providing all relevant facts regarding individual misconduct.<sup>33</sup> The DOJ also acknowledged "many substantial challenges unique to pursuing individuals for corporate misdeeds."<sup>34</sup> Despite the remarkable access prosecutors can obtain from companies, prosecutors still often do not succeed in holding individuals accountable. Moreover, there is a separate scapegoating concern that, when employees or individuals are charged, they may be iden-

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<sup>30</sup> See, e.g., Albert W. Alschuler, Two Ways to Think About the Punishment of Corporations, 46 *Am. Crim. L. Rev.* 1359, 1359 (2009); Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 *Minn. L. Rev.* 1095, 1098–99 (1991); V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 *Harv. L. Rev.* 1477, 1478–79 (1996); Ellen S. Podgor, A New Corporate World Mandates a "Good Faith" Affirmative Defense, 44 *Am. Crim. L. Rev.* 1537, 1537–38 (2007); James R. Copland, Manhattan Inst. for Policy Research, Regulation by Prosecution: The Problems with Treating Corporations as Criminals, *Civ. Just. Rep.*, Dec. 2010, at 1, 1–2.

<sup>31</sup> See generally Brandon L. Garrett, Corporate Confessions, 30 *Cardozo L. Rev.* 917, 930–31 (2008) (discussing Supreme Court doctrine on coerced statements).

<sup>32</sup> Marshall L. Miller, Principal Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, Remarks at the Global Investigation Review Program (Sept. 17, 2014), available at <http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller>, archived at <https://perma.cc/T7GA-VHLT?type=source>.

<sup>33</sup> Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], available at <http://www.justice.gov/dag/file/769036/download>.

<sup>34</sup> *Id.* at 2.

tified based on the information the company offered to prosecutors. The higher-ups, who may control negotiations with prosecutors, may themselves remain above the fray while lower-level employees are “thrown under the bus.”

After detailing these empirical findings, this Article turns in Part II to explaining why it is that corporate prosecutions are not associated with many successful individual prosecutions. Critics are right to suggest that prosecuting individuals has been a priority for some corporate crimes but not others—with, for example, antitrust being an exception. The “corporate scapegoat” problem goes to the heart of a central rationale for settling corporate prosecutions. However, there are other important rationales that I will detail in Part II of this Article. Although such cases have largely escaped criticism, it may be just as problematic or more so when *only* individuals are prosecuted and not the corporation. Justice is not fully served by individual prosecutions if only the company can pay adequate fines, restitution to victims, or change practices and policies to prevent future crimes. In my view, justice is served by prosecuting corporations.<sup>35</sup> But neither individual nor corporate prosecutions are necessarily a ready substitute for each other. While corporate cooperation can help overcome practical obstacles, corporate complexity raises still others, particularly regarding showing intent. Establishing culpability of individuals acting within complex organizations can be difficult. For strict liability offenses, the conduct may be easy to prove, but less worthy of prosecution due to low culpability. Prosecuting thousands of traffic tickets may make little sense—particularly if the company can pay one massive ticket to cover the social cost. Or if the conduct was very serious but committed by low-level employees, focusing on the corporation may be the best way to address the problem. Regulatory crimes may be best resolved by settling with the regulated entity. In such areas, treating the corporation as the scapegoat makes eminent sense.

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<sup>35</sup> For a sampling of the literature, see, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 689–93 (1997) (arguing that corporate prosecutions effectively deter delinquency by corporate agents); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind. L.J. 473, 477–78 (2006) (arguing that corporate prosecutions effectively alter group behavior to prevent wrongdoing among corporate agents); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions*, 56 S. Cal. L. Rev. 1141, 1145 (1983) (arguing that deterrence is not the sole purpose of corporate criminal law). For an overview, see Garrett, *Too Big to Jail*, *supra* note 5, at 254–55 (proposing reforms to “mak[e] corporate prosecutions more effective”).

In Part III, I will explore three types of reforms. First, I will examine proposals to enact new substantive crimes to reach complex corporate malfeasance or even financial negligence, which I view as ill advised. Instead, I will propose a series of legislative changes that may do far more good. Statutes of limitations could be extended for categories of complex corporate cases. The Speedy Trial Act could be revised to permit deferred prosecutions for corporations only if the firm cooperates to identify culpable individuals.<sup>36</sup> Sentencing statutes and guidelines could be revised to similarly tighten requirements for corporate cooperation. Second, I will explore changes to DOJ policy and practice. In some areas, prosecutors may have rested secure having obtained a corporate settlement with eye-catching fines. Using corporate prosecutions to charge individuals—securing “more heads”—would require stricter policies and added resources for investigations and enforcement.<sup>37</sup> A third approach, emerging in a few recent cases, uses corporate settlements to change the incentives for employees and officers at the firm, using what I have termed “structural reforms” to prevent future criminality.<sup>38</sup>

Despite DOJ policy that “only rarely” should “culpable individuals” not be prosecuted, far too many corporate cases lack individual prosecutions.<sup>39</sup> The uneven results in individual prosecutions that are brought illustrate why the pattern persists. However, I will conclude in this Article that, contrary to what some critics have argued, corporate prosecutions need not come at the cost of individual accountability—corporate prosecutions can and should be used to enhance individual accountability and deter corporate crime.

### I. INDIVIDUAL PROSECUTIONS AND CORPORATE CRIMES

The relationship between individual criminals and corporations may be compatible, entirely opposing, or still more complex. White-collar criminals typically work for larger companies, and they may be taking advantage of their employer and acting solely in their own interest, acting in their employer’s interest, or acting both to advance themselves and the larger corporate enterprise. For that reason, depending on the case, the focus of prosecutors may be squarely placed upon the culpable

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<sup>36</sup> Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–74 (2012).

<sup>37</sup> Richman, *supra* note 29, at 280.

<sup>38</sup> See *infra* Section II.F.

<sup>39</sup> U.S. Attorneys’ Manual, *supra* note 1.



individuals, but it may also be placed on the corporation itself. Take as an example the prominent deferred prosecution agreement entered in 2014 with Toyota, resulting in a \$1.2 billion settlement and detailed admissions concerning misleading consumers regarding safety issues.<sup>40</sup> The safety violations at Toyota, concerning floor mats that could entrap passengers as well as “sticky” accelerator pedals, had resulted in deaths and endangered millions of drivers.<sup>41</sup> Because corporate policies and compliance were implicated, prosecutors understandably focused on enforcement at the corporate level.

At the time the case was settled, the Attorney General pronounced, “Rather than promptly disclosing and correcting safety issues about which they were aware, Toyota made misleading public statements to consumers and gave inaccurate facts to Members of Congress.”<sup>42</sup> However, individuals clearly had (by definition) been involved in the underlying conduct and in making the lengthy series of false statements that the prosecutors described in some detail when the case was settled. Perhaps they did not personally profit from the crimes, but individuals may have received promotions, bonuses, or other rewards for engaging in the conduct.

Yet at the press conference announcing the deferred prosecution agreement, despite language in the agreement requiring Toyota to cooperate in any investigations of individual employees, the U.S. attorney stated that no individual prosecutions were anticipated.<sup>43</sup> U.S. Attorney for the Southern District of New York Preet Bharara said, “I’m not foreclosing anything necessarily,” but also that “we believe this to be a final resolution of the case, of course pending successful completion of the probationary period of three years.”<sup>44</sup> He added,

As you might imagine, when you have a company with individuals who are responsible for unlawful conduct in other jurisdictions, there are problems of evidence and problems of proof. It happens to be the

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<sup>40</sup> Toyota Gets Prosecution Deferred, No Corporate Crime Plea, No Individuals Charged, Corp. Crime Rep., Mar. 24, 2014, at 5 [hereinafter *Toyota Gets Prosecution Deferred*].

<sup>41</sup> *Id.* at 7.

<sup>42</sup> Press Release, U.S. Dep’t of Justice, Justice Department Announces Criminal Charge Against Toyota Motor Corporation and Deferred Prosecution Agreement with \$1.2 Billion Financial Penalty (Mar. 19, 2014), <http://www.justice.gov/opa/pr/justice-department-announces-criminal-charge-against-toyota-motor-corporation-and-deferred>, archived at <https://perma.cc/S9KR-B9NX?type=source>.

<sup>43</sup> *Toyota Gets Prosecution Deferred*, supra note 40, at 5.

<sup>44</sup> *Id.*

case that the rules of evidence sometimes do not allow you to use certain kinds of evidence and certain documents against certain individuals, although they might be admissible against the company itself. Although there is an admission that there were individuals who engaged in conduct which provides for a basis to bring a case against the company, they are not charged there.<sup>45</sup>

What did U.S. Attorney Bharara mean? There could be jurisdictional impracticalities involved in obtaining access to documents and emails in another country. Extraditing individuals might be a challenge. But then again, Toyota had promised its cooperation, and documents the company itself provided could be used against employees. The statement of facts described conduct by U.S. employees of Toyota.<sup>46</sup> The evidence problem U.S. Attorney Bharara referred to was that certain documents could be admissible as against Toyota as party admissions, but if they were not admissible as business records, they might then not be admissible against individual employees.<sup>47</sup> Was it really so difficult to show, however, aside from the company's bare admission, who did what to bring about these serious violations? How was it that the company admitted to conduct by individuals, but they were "not charged there"?<sup>48</sup> Those comments do not clear up the puzzle, which only deepens when one looks at a common pattern extending across cases.

#### *A. Data on Corporate and Individual Prosecutions*

A study examining whether individuals are prosecuted when corporations are prosecuted requires, as a starting place, information about when corporations are prosecuted and how often that occurs. Unfortunately, there had not been good federal data on corporate prosecutions, in part because the practice of corporate prosecutions radically shifted over the past decade. In the 1990s, corporations were typically convicted if prosecuted, and as a result, ideally at least, the U.S. Sentencing Commission would collect data on how many were prosecuted and how they were sentenced. I say "ideally," because researchers in the late 1990s found

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Fed. R. Evid. 803(2)(d) (recognizing hearsay exception for party-opponent's statement); Fed. R. Evid. 803(6) (recognizing hearsay exception for records of regularly conducted activity of a business).

<sup>48</sup> Toyota Gets Prosecution Deferred, *supra* note 40, at 5.

the Commission's data quite incomplete and lacking.<sup>49</sup> That problem grew worse over the past decade, however, since far more of the truly important corporate prosecutions now do not result in a conviction, but rather in alternatives to a conviction called deferred prosecution agreements (in which a case is initially filed but stayed on a judge's docket pending compliance with its terms), and non-prosecution agreements (in which no criminal case is filed in court).

In 1999, under then-Deputy Attorney General Eric Holder, the DOJ issued its first memo providing guidelines for corporate prosecutions.<sup>50</sup> The deferred prosecution approach was more firmly set out in 2003 in a set of revised DOJ guidelines. These DOJ principles for the prosecution of organizations, contained in the U.S. Attorneys' Manual used by federal prosecutors, were popularly called the "Thompson Memo" after Larry Thompson, the Deputy Attorney General who revised them.<sup>51</sup> While the DOJ has revised the guidelines several more times, they maintain the same basic flexible approach, encouraging consideration of a set of factors when deciding whether to pursue an indictment or conviction of a corporation, or alternatively a deferred or non-prosecution agreement.<sup>52</sup>

No data were kept on these organizational deferred or non-prosecution agreements, despite their growing prominence. The U.S. Sentencing Commission tracks data on cases in which a defendant organization is sentenced based on reporting from the federal district courts, but non-prosecution deals involve no formal sentence or judg-

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<sup>49</sup> Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, Evaluating Trends in Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission's Data?, 13 Fed. Sent'g Rep. 108, 109–10 (2000); Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms, 42 J.L. & Econ. 393, 416, 419–20 (1999); see also Letter from L. Ralph Mecham, Director, Admin. Office of the U.S. Courts, to the Honorable William W. Wilkins, Jr., Chairman, U.S. Sentencing Comm'n 2 (June 22, 1988), available at [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/topical-index-publications/19891213\\_Public\\_Access\\_Documents\\_Data.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/topical-index-publications/19891213_Public_Access_Documents_Data.pdf).

<sup>50</sup> Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Component Heads & U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999) (on file with the Virginia Law Review Association).

<sup>51</sup> Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (on file with the Virginia Law Review Association).

<sup>52</sup> See U.S. Attorneys' Manual, *supra* note 1, §§ 9-28.000–9-28.100, 9-28.300.

ment.<sup>53</sup> A deferred prosecution is filed with the court and remains on the judge's docket until the term is completed and the case is dismissed. A non-prosecution is never filed with a judge at all; such an agreement states that prosecutors will not file if the corporation complies. As I have described elsewhere, these deferred and non-prosecution agreements with companies increasingly include many of the most important prosecutions, such as those of public corporations.<sup>54</sup>

As a result of my interest in obtaining information about these agreements, for some time I have maintained with the University of Virginia Law Library the most complete data available on such federal deferred and non-prosecution agreements with corporations.<sup>55</sup> My earlier work, including a recent book, has described the characteristics of these agreements in some detail. In *Too Big to Jail*, I described how among the 255 deferred and non-prosecution agreements from 2001 to 2012, only eighty-nine had individual officers or employees prosecuted.<sup>56</sup> Among those eighty-nine deferred prosecution and non-prosecution agreements in which individuals were prosecuted, 385 people were prosecuted, including ten presidents, twenty CEOs, and twenty-seven CFOs.<sup>57</sup> I also found that among the thirty-one publicly listed firms convicted between 2001 and 2012 that had individuals prosecuted, one chairman, one president, four CEOs, and one CFO were prosecuted.<sup>58</sup>

However, in that prior work, I did not explore more deeply the characteristics of those cases, the results as they proceeded towards resolution, or how many resulted in a criminal judgment, or, if so, what types of sentences were imposed. In this project, I not only update the earlier dataset to include more recent corporate prosecutions, but also I track in detail the path that each of those individual prosecutions of employees and officers followed. What I found provides more cause for concern regarding the question of whether sufficient individual criminal accountability accompanies corporate criminal accountability.

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<sup>53</sup> See, e.g., U.S. Sentencing Comm'n, 2013 Sourcebook of Federal Sentencing Statistics tbls.51-54 (2014), <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013>.

<sup>54</sup> Garrett, *Too Big to Jail*, supra note 5, at ch. 3.

<sup>55</sup> Garret & Ashley, supra note 9.

<sup>56</sup> Garrett, *Too Big to Jail*, supra note 5, at 82-83.

<sup>57</sup> *Id.* at 107.

<sup>58</sup> *Id.*

*1. Study Findings*

The DOJ guidelines on corporate prosecutions have for some time emphasized that “[b]ecause a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers . . . .”<sup>59</sup> Thus, the guidelines suggest that culpable individuals might not be prosecuted if they are merely low-level employees. The guidelines then add: “[P]rosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.”<sup>60</sup> That language also indicates how the standard for corporate criminal liability used in federal courts is strict. As the DOJ guidelines note, “Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents.”<sup>61</sup> However, the DOJ guidelines also highlight how it may be inadvisable to hold a corporation accountable for the actions of isolated individuals; since corporate persons are more complex, the guidelines set out factors to be considered, including “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”<sup>62</sup> Based on those guidelines, one might expect to see many cases in which solely individuals are prosecuted, if they largely acted on their own and for their own benefit, but one would not expect to see large numbers of cases in which the corporation was prosecuted, but not the culpable individuals.

In 2015, the DOJ issued a new memorandum, to be reflected in a revision of the DOJ’s organizational prosecution guidelines, clarifying that to receive “any cooperation credit” a corporation must provide “all relevant facts relating to the individuals responsible for the misconduct.”<sup>63</sup> Further, civil and criminal investigations “will focus on individuals from the inception of the investigation.”<sup>64</sup> Absent “extraordinary circumstanc-

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<sup>59</sup> See U.S. Attorneys’ Manual, *supra* note 1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (emphasis omitted). For a description of the origins of that respondeat superior standard, see Garrett, *Too Big to Jail*, *supra* note 5, at ch. 2; see also Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 *Wash. U. L.Q.* 393 (1982); Shaun P. Martin, *Intracorporate Conspiracies*, 50 *Stan. L. Rev.* 399, 406–07 (1998).

<sup>62</sup> U.S. Attorneys’ Manual, *supra* note 1, § 9-28.300.

<sup>63</sup> Yates Memo, *supra* note 33, at 2.

<sup>64</sup> See *id.*

es” or approved policy (such as the Antitrust Division’s leniency policy), no culpable individuals will receive a “release” from liability when the company settles its case.<sup>65</sup> Furthermore, the new memo highlighted the need to adopt a “clear plan” to pursue individual matters, with formal declinations when individuals are not pursued.<sup>66</sup> What impact these new additions to the federal organizational prosecution guidelines will have on future cases is difficult to predict. However, the problem that this new guidance was designed to address becomes quite apparent when one looks at the charging patterns accompanying corporate settlements.

From 2001 to 2014, federal prosecutors entered into 306 deferred and non-prosecution agreements with companies.<sup>67</sup> Among those 306 companies, only 104 companies have so far had individuals charged.<sup>68</sup> Accompanying those 104 corporate cases, there were 414 individuals prosecuted.<sup>69</sup> These data reflect all individual cases that could be located. There is no official listing of such cases, and corporate prosecution agreements typically do not speak to whether any individuals have been or will be charged, although accompanying press releases may do so. Nor are the individual and corporate cases typically linked with shared docket entries by the federal courts. These cases were located through several types of searches: searches of DOJ press releases and news accounts, and then searches through federal dockets for any cases reflecting individual employees or officers named as possible subjects of federal criminal charges. These data, as a result, are likely not complete, particularly for corporate cases settled in recent years in which investigations may be pending. However, the fairly high-profile nature of these deferred and non-prosecution agreements, many involving public corporations, means individual cases are far more likely to be reported in the media.

Of those individuals charged, most were not higher-up officers of the companies, but rather middle managers of one kind or another and also some quite low-level individuals. Of the individuals charged in these cases, thirteen were presidents, twenty-six were CEOs, twenty-eight

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<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See Garrett & Ashley, *supra* note 9.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

were CFOs, and fifty-nine were vice presidents.<sup>70</sup> Of the CEOs prosecuted, perhaps the best known was Bernard Ebbers, convicted at trial for securities fraud at MCI (Worldcom) and sentenced to twenty-five years in prison.<sup>71</sup> Six of the CEOs had trials, twelve pleaded guilty, but three had charges dismissed or were acquitted. Three others have cases still pending, and one foreign CEO remains at large as a fugitive.<sup>72</sup>

In the cohort of recent corporate prosecutions, still more individual prosecutions may be yet to come, since white-collar investigations can take some time to pursue. Comparatively more of the recent prosecutions have not yet been resolved, as one would expect. For example, ten former employees of CH2M Hill Hanford Group Inc. were indicted in 2013; none of those cases have yet resulted in a judgment.<sup>73</sup> Quite a few cases described further below involve foreign employees of foreign companies who are fugitives or those who have not been extradited successfully. Investigations may be ongoing in some of the most recent cases, while in other prominent recent cases prosecutors have already publicly indicated, such as at press conferences (as in the Toyota case discussed), that no employee prosecutions are anticipated following the settlement by the corporation.

The table below illustrates these data as a time trend from 2001 to 2014. What one sees is that there is not any sharp trend towards prosecuting more individuals in cases resulting in deferred prosecution agreements. The trend is fairly flat, and the share of agreements accompanied by individual prosecutions remains fairly constant over the years. The drop-off in 2013 and 2014 may not persist as those cases may be

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<sup>70</sup> See *id.* CEOs or former CEOs were charged at Alpha Natural Resources, Inc.; American Italian Pasta Co.; ArthroCare Corp.; Aurora Foods; BDO USA LLP; BizJet International Sales and Support, Inc.; Collins & Aikman Corp.; Computer Associates; Endocare; Friedman's Inc.; General Reinsurance Corp.; Halliburton Co.; HealthSouth Corp.; Intelligent Decisions, Inc.; InterMune; Louis Berger Group; MCI (WorldCom); McSha Properties; MRA Holdings LLC; Orthoscript, Inc.; Spectranetics Corp.; Symbol Technologies; Unico, Inc.; and Wellcare Health Plans, Inc. *Id.*

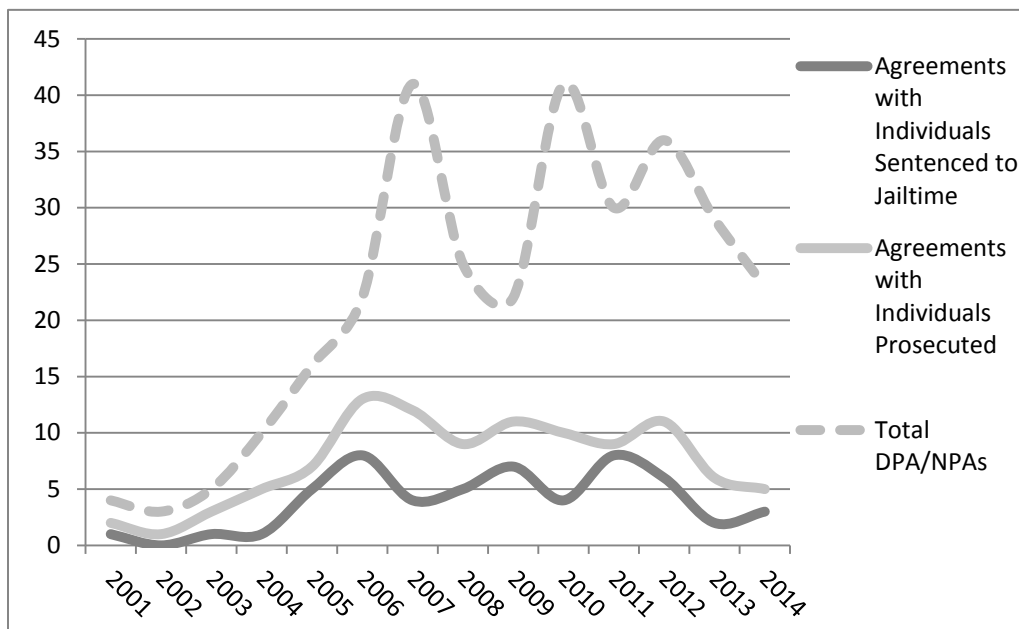
<sup>71</sup> Carrie Johnson, *Ebbers Gets 25-Year Sentence for Role in WorldCom Fraud*, Wash. Post, July 14, 2005, at A1.

<sup>72</sup> Jonathan Dienst, *Fugitive Long Island CEO Accused of \$200 Million Fraud Wants Apology*, NBC N.Y. (Nov. 21, 2013), <http://www.nbcnewyork.com/news/local/Tom-Razmilovic-Fugitive-Millionaire-Sweden-CEO-Symbol-Technologies-Long-Island-232921331.html>.

<sup>73</sup> Annette Cary, *CH2M Hill Managers Indicted for Hanford Timecard Fraud*, Tri-City Herald (Mar. 23, 2013), <http://www.tri-cityherald.com/2013/03/23/2325573/ch2m-hill-managers-indicted-for.html>.

accompanied by additional prosecutions in the next few years; there can be a time lag between the corporate settlement and charges in individual cases. However, these data suggest that we are not likely to see any sharp change in the trend, unless prosecutors change their priorities and approaches towards these cases. Prosecutors may say that they now focus on holding individuals accountable, but more evidence will have to support any claim that there is actually some new trend towards doing so.

**Table 1: DPA/NPAs Accompanied by Individual Prosecutions, 2001–2014**



This more fine-grained project examines not just the incidence but also the characteristics of each of these individual prosecutions in order to track what happened in each charged individual's case. While the above table displays one piece of the puzzle—how often companies that settle their prosecutions without a conviction have employees prosecuted—it does not tell us about what kinds of corporate cases are accompanied by individual prosecutions, and it does not tell us about what types of outcomes result in cases in which such individuals are charged.



If the sentences for the individuals who were targeted were quite severe, one might conclude that prosecutors were carefully picking the most serious cases, perhaps explaining why others went unprosecuted. If the sentences were not lengthy, one might conclude that prosecutors were not selecting cases with sufficient care, the underlying crimes did not call for lengthy sentences, or that prosecutors faced unanticipated obstacles. If cases were dismissed or dropped post-indictment, then one wonders how carefully prosecutors were pursuing some of these cases. The sections that follow describe the paths taken by these individual prosecutions in the wake of high-profile corporate prosecution settlements.

*a. Convictions and Settlements*

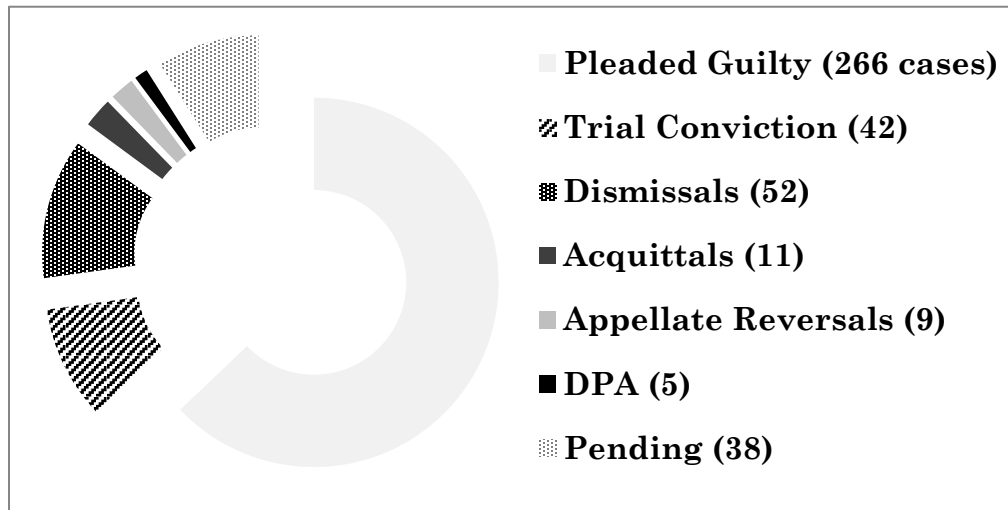
Guilty pleas are the most common result in criminal cases generally. It was not surprising that what I found when examining these individual prosecutions was that of the 414 cases, most of those convicted had pleaded guilty. Of the 414 individuals, 266 pleaded guilty and 42 were convicted at a trial. That is, however, a somewhat high trial rate of just more than 10% (42 of 414 cases). Compare that to the guilty plea rate in federal prosecutions generally, which is now about 97%, and has remained over 95% for several years now.<sup>74</sup>

One explanation for this modestly higher trial rate may be the particular business crimes that these individuals were charged with. Trial rates for fraud, for example, are almost 7%, antitrust is 6%, and bribery is almost 8%.<sup>75</sup> There were a handful of settlements that did not involve convictions. Five individuals obtained deferred prosecution agreements, much like the corporations that they worked for, permitting them to avoid both an indictment and a conviction upon successful completion of the agreement's term. The table below illustrates these data.

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<sup>74</sup> U.S. Sentencing Comm'n, *supra* note 53, at fig.C, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureC.pdf>.

<sup>75</sup> *Id.* at tbl.11, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table11.pdf>.

**Table 2: Dispositions in Individual Prosecutions Accompanying Organizational DPA/NPAs, 2001–2014**

What of the individuals who were not convicted and also did not have charges dismissed? Several have trials pending. Some remain fugitives at large, and in some areas federal prosecutors have gone to extraordinary lengths to try to locate and extradite foreign individuals in white-collar cases. As one would expect, in FCPA cases, international price-fixing cartel cases, international tax violation cases, and others, locating foreign employees of foreign corporations is no easy task.<sup>76</sup>

For example, FCPA cases may involve foreign bribery and often involve conduct by foreign citizen employees of foreign subsidiaries or corporations. One individual, dubbed the “Pirate of Prague,” who prosecutors had sought in the Omega Advisors case, received a ruling from the British Privy Council that he would not be extradited from the Bahamas to face charges in the United States, on the grounds that foreign

<sup>76</sup> On those practical obstacles generally, see Alison E. Lardo, *The 2003 Extradition Treaty Between the United States and United Kingdom: Towards a Solution to Transnational White Collar Crime Prosecution?*, 20 *Emory Int'l L. Rev.* 867, 867–71 (2006); Thomas G. Snow, *The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them*, 11 *Wm. & Mary Bill Rts. J.* 209, 211–18, 235–43 (2002).

bribery was not a crime in the Bahamas.<sup>77</sup> In another FCPA case involving Alcatel-Lucent, an individual is currently a fugitive.<sup>78</sup> In the largest FCPA case (involving a guilty plea, so not part of this dataset) involving Siemens, a large group of eight executives has been indicted in the United States but have not been extradited in the years since.<sup>79</sup> Similarly, prosecutors have pursued a wave of actions against Swiss banks (and increasingly other European banks) for promoting tax evasion. The former head of private banking at Bank Frey & Co., AG, which itself shut down rather than face prosecution, remains a fugitive, as was UBS banker Raoul Weil, who was indicted in 2009, until his capture in Italy and extradition in 2013 (he was then acquitted at trial).<sup>80</sup>

At the other end of the spectrum, in terms of numbers of employees prosecuted, is the Pilgrim's Pride case, in which twenty-five employees were prosecuted for immigration violations (still additional non-citizens were convicted for misuse of a Social Security Account number and hundreds of non-citizens were apprehended).<sup>81</sup> Immigration sweeps, however, are hardly anyone's idea of netting the big fish. In that case, for example, only one supervisor, a human resources employee, was prosecuted (and the charges were dismissed), while the twenty-three others were employees prosecuted for using fraudulent documentation, mostly receiving sentences of time served (ranging from about ten to twenty months).<sup>82</sup> In the IFCO Systems case, one of the more ambitious

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<sup>77</sup> David Glovin, *Kozeny Won't Be Sent to U.S.*, U.K. Privy Council Rules, Bloomberg Bus. (Mar. 28, 2012, 1:29 PM), <http://www.bloomberg.com/news/articles/2012-03-28/kozeny-won-t-be-extradited-to-u-s-u-k-privy-council-rules-1->.

<sup>78</sup> Press Release, U.S. Dep't of Justice, *Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation* (Dec. 27, 2010), <http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt>.

<sup>79</sup> Edward Wyatt, *Former Siemens Executives Are Charged with Bribery*, N.Y. Times, Dec. 14, 2011, at B4; see Matthews, *supra* note 25.

<sup>80</sup> Jay R. Nanavati & Justin A. Thornton, *DOJ and IRS Use "Carrot 'n Stick" to Enforce Global Tax Laws*, *Crim. Just.*, Summer 2014, at 4, 7; Associated Press, *Swiss Banker Raoul Weil Acquitted in Tax Evasion Trial in Florida*, *The Guardian* (Nov. 3, 2014, 5:46 PM), <http://www.theguardian.com/us-news/2014/nov/03/swiss-banker-acquitted-tax-evasion-trial-raoul-weil-florida>.

<sup>81</sup> News Release, U.S. Immigration and Customs Enforcement, Justice Department and ICE Reach \$4.5 Million Agreement with Pilgrim's Pride (Dec. 30, 2009), <http://www.ice.gov/news/releases/0912/091230beaumont.htm>.

<sup>82</sup> *United States v. Villarreal*, No. 5:08-CR-00001 (E.D. Tex. Aug. 11, 2008) (order granting dismissing indictment without prejudice); *United States v. Totosaus-Rodriguez*, No. 5:08-CR-00002 (E.D. Tex. Sept. 10, 2008).

corporate prosecutions involving immigration violations, sixteen managers and other supervisors were convicted.<sup>83</sup> However, most pleaded guilty, paid fines, and served no jail time, and the government settled the remaining cases on the eve of trial in 2011.<sup>84</sup>

In a fraud case, twenty-three employees of the New York Racing Association were convicted, including its director and a vice president.<sup>85</sup> A series of seventeen employees at KPMG were prosecuted, although most of those prosecutions were later dismissed.<sup>86</sup> More higher-ups were prosecuted in a case involving fraud at the *Newsday* Corporation, but all nine individuals received probation and no jail time.<sup>87</sup>

*b. Prosecution Losses*

These individual prosecutions accompanying corporate cases involved high rates of outright prosecution losses in the form of dismissals and acquittals. One reason why individual prosecutions may not be brought is the difficulty in winning them; prosecutors would be right to be hesitant to bring weak cases, even if the corporation has admitted that crimes were committed. Fifty-two individuals had charges dismissed pretrial. Eleven defendants were acquitted at trial. Thus, there were large numbers of prosecution losses: 15% of the 414 cases resulted in outright losses in the form of dismissals or acquittals. Still other cases were unsuccessful. Nine more have so far had trial convictions reversed on appeal. An additional group of thirty-eight cases remains in progress, either with trial or sentencing proceedings still to come or because defendants are fugitives or have not yet been extradited.

How do the acquittals and dismissals compare to dispositions in federal criminal cases more generally? The DOJ in its annual reports provides data, of a sort, on white-collar-related offenses and numbers of convictions, acquittals, and dismissals. In fiscal year 2013, for example, the DOJ reported 7,758 total white-collar convictions, and of those only

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<sup>83</sup> *United States v. Davidson*, No. 4:10-cr-00201 (S.D. Tex. Apr. 1, 2010).

<sup>84</sup> *Id.*

<sup>85</sup> David Grening, *NYRA Fined \$3M for Fraud*, *ESPN* (Dec. 12, 2003), <http://espn.go.com/horse/news/2003/1212/1684776.html>.

<sup>86</sup> See Garrett, *Too Big to Jail*, *supra* note 5, at 112–14.

<sup>87</sup> Associated Press, *Newsday and Hoy Settle Circulation Case for \$15 Million*, *N.Y. Times* (Dec. 19, 2007), <http://www.nytimes.com/2007/12/19/business/media/19newsday.html>.

about 7% were either dismissals (521) or acquittals (59).<sup>88</sup> The losses were lower in areas of particular relevance to corporate prosecutions. In securities fraud cases, there were 222 guilty verdicts, compared with only 4 acquittals and 7 dismissals.<sup>89</sup> In corporate fraud cases, there were 88 convictions, no acquittals, and 5 dismissals.<sup>90</sup> One area with more dismissals was in the area of federal-program fraud, in which there were 139 dismissals compared with 882 convictions, but that is not a crime that was the subject of corporate deferred and non-prosecution agreements.<sup>91</sup>

In the group of individuals charged alongside corporate deferred and non-prosecution agreements, an additional thirty-four individuals have not yet been convicted, either because the cases have not yet been resolved, proceedings are pending, or the individuals are fugitives or have not been extradited. These cases involve more trials than federal criminal cases on average, with forty-two trial convictions, but ten acquittals, and fifty-two with all charges dismissed (I should also note that still additional cases had some but not all of their charges dismissed).

The most high-profile loss was the acquittal of Richard Scrushy, former CEO of HealthSouth, of fraud. (He was later convicted of an unrelated bribery charge.)<sup>92</sup> Sixteen others at or formerly at HealthSouth were prosecuted, including CFOs and treasurers. All but two pleaded guilty (one was convicted at trial, and one had charges dismissed).<sup>93</sup>

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<sup>88</sup> U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report* 58 tbl.3 (2013) [hereinafter 2013 Annual Statistical Report], available at [http://www.justice.gov/usao/reading\\_room/reports/asr2013/13statrpt.pdf](http://www.justice.gov/usao/reading_room/reports/asr2013/13statrpt.pdf). In fiscal year 2012, the DOJ reported 8,029 total white-collar convictions, and of those only about 8% represented outright losses: 609 resulted in dismissals and 61 resulted in acquittals. U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report* 37 tbl.3 (2012) [hereinafter 2012 Annual Statistical Report], available at [http://www.justice.gov/usao/reading\\_room/reports/asr2012/12statrpt.pdf](http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf).

<sup>89</sup> In securities fraud cases in fiscal year 2012, there were 231 guilty verdicts, compared with only 1 acquittal and 13 dismissals. 2012 Annual Statistical Report, *supra* note 88, at tbl.3.

<sup>90</sup> 2013 Annual Statistical Report, *supra* note 88.

<sup>91</sup> *Id.*

<sup>92</sup> Walter Pavlo, *Former HealthSouth CEO, Richard Scrushy, Gets Prison Sentenced Reduced*, *Forbes* (Jan. 26, 2012, 11:02 AM), <http://www.forbes.com/sites/walterpavlo/2012/01/26/former-healthsouth-ceo-richard-scrushy-gets-prison-sentenced-reduced/>.

<sup>93</sup> See, e.g., Alison Frankel, *Sarbanes-Oxley's Lost Promise: Why CEOs Haven't Been Prosecuted*, *Reuters* (July 27, 2012), <http://blogs.reuters.com/alison-frankel/2012/07/27/sarbanes-oxleys-lost-promise-why-ceos-havent-been-prosecuted/>; Kyle Whitmire, *Ex-HealthSouth Executive Convicted at Trial*, *N.Y. Times*, Nov. 19, 2005, at C2, available at <http://www.nytimes.com/2005/11/19/business/exhealthsouth-executive-convicted-at-trial.html>; Associated Press, *Prosecutors Drop Charges Against Bennett in*

The dismissed charges were sometimes dismissed at the request of prosecutors, however, and it is not always easy to tell whether the reasons had to do with the merits of the case or other considerations not apparent from the public record. In the Reliant Energy case, brought regarding the company's role in fraud that created an artificial energy crisis in California in 2000–2001, with a dramatic rise in energy prices for consumers and a series of blackouts, prosecutors dismissed charges against the four energy traders at the center of the scheme, ostensibly to reward them for their cooperation, while providing the company with a deferred prosecution agreement in which it paid a twenty-two million dollar fine (rewarding the company for its cooperation as well?).<sup>94</sup> The case is an example in which leniency was provided both to the company and to individuals. In the Collins & Aikman case, charges were dismissed on the eve of trial in 2007.<sup>95</sup>

*c. Jail Time*

When individual officers and employees were successfully prosecuted and convicted, the resulting sentences tended to be lower than average, even given the rough available comparisons with Sentencing Commission data concerning similar crime categories. The average sentence among these individuals studied, including those who received probation but no jail time, was eighteen months, which is somewhat lower than the averages for many of the relevant federal crimes. For all federal fraud sentences, and those include small-fry welfare cheats as well as the most sophisticated financial frauds (almost 8,000 fraud convicts in fiscal year 2013), the mean sentence was twenty-six months; for antitrust it was ten months; for bribery it was twenty-two months; and for environmental offenses it was just four months.<sup>96</sup> I also note, however, that the average

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HealthSouth Case, Fla. Times-Union (July 19, 2005, 5:30 PM), <http://jacksonville.com/tu-online/apnews/stories/071905/D8BEN1880.shtml>; Press Release, U.S. Dep't of Justice, Five Defendants Sentenced in HealthSouth Fraud Case (Dec. 10, 2003), [http://www.justice.gov/archive/opa/pr/2003/December/03\\_crm\\_678.htm](http://www.justice.gov/archive/opa/pr/2003/December/03_crm_678.htm).

<sup>94</sup> Karen Gullo, Reliant to Pay \$22 Million to Resolve Federal Charges, Bloomberg (Mar. 6, 2007, 11:05 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ax2RLRaf.iHk>.

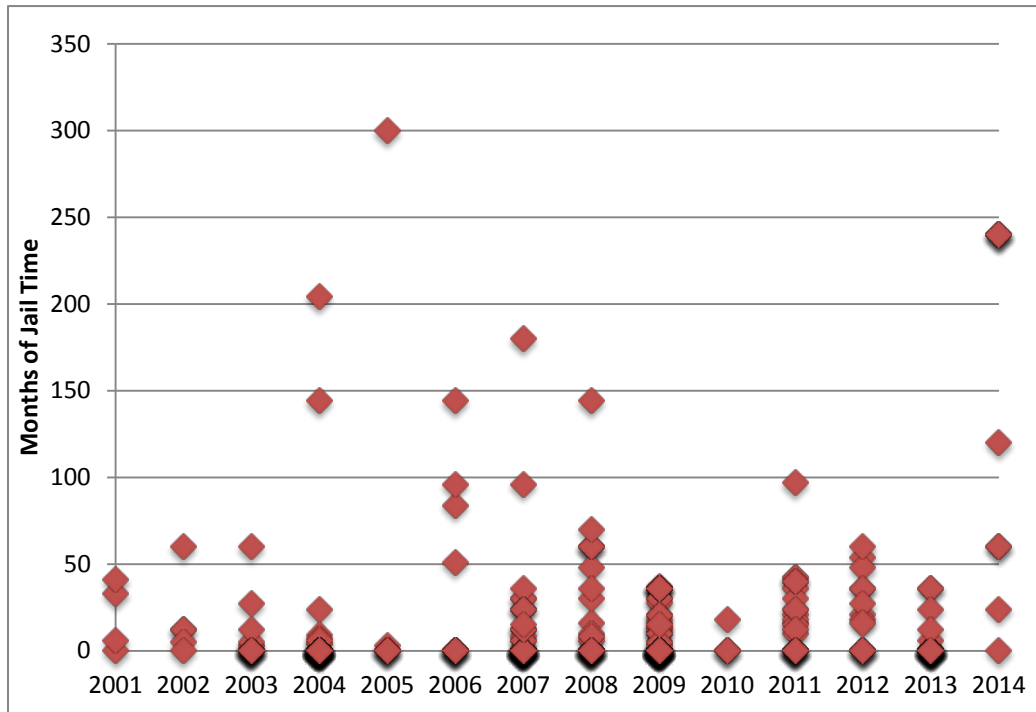
<sup>95</sup> J. Robert Brown, The Stockman Dismissal: What Really Happened?, TheRacetotheBottom.org (Jan. 12, 2009, 10:00 AM), <http://www.theracetothebottom.com/stockman/the-stockman-dismissal-what-really-happened.html>.

<sup>96</sup> U.S. Sentencing Comm'n, *supra* note 53, at tbl.13, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf>. Those Sentencing Commission statistics treat probation-only sentences as sentences of zero months. *Id.*

sentence among those who *did* receive jail time was forty months, which is somewhat high for the types of crimes involved.

Below is a scatterplot image of the variation in sentences. The highest sentences were former CEO Bernard Ebbers's twenty-five-year sentence in the Worldcom case (in 2005), three twenty-year sentences for fraud charges in the Scientific Applications International Corp. case (all in 2014), a twenty-year sentence in the ArthroCare Corp. case (2014), and a seventeen-year sentence for Timothy Rigas in the Adelphia Communications case (2004). Each stands out at the upper end of the spectrum in the below scatterplot table.

**Table 3: Scatterplot, Individual Jail Time in Months, 2001–2014**



At the other end of the spectrum, most of the marks on this scatterplot lie at a baseline of no jail time at all. Twenty-seven of the individuals prosecuted in cases accompanying corporate deferred or non-prosecution agreements received time served. And it was only 42%, or

128, of the 305 individuals convicted (263 who pleaded guilty and 42 convicted at trial) who received any jail time. (In several cases the plea agreement was sealed, and no information about the sentence could be obtained.) Should this be surprising?

One might expect that many, if not most, of these individuals did not have any prior criminal record of any significance. Nevertheless, 42% is a very low rate of imprisonment. For federal fraud prosecutions in general, 78% receive imprisonment and 15% receive probation without confinement.<sup>97</sup> A better comparison group, however, may be convicts with very low guideline sentence ranges because of, for instance, limited criminal records, since prison sentences may not even be required for these individuals. Imprisonment rates for fraud convicts who are eligible for non-prison sentences, for example, are slightly less than 50%.<sup>98</sup> Thus, this degree of non-prison sentences may not be atypical for convicts without a prior criminal history.

Moreover, the guidelines related to economic losses or gains often used to calculate fraud sentences have been the subject of both judicial criticism for their potential unfairness and malleability as well as a detailed proposal for revision from the American Bar Association.<sup>99</sup> Perhaps as a result, federal fraud sentences are particularly varied; while sentences for fraud have increased as the U.S. Sentencing Commission has adopted stricter sentences at the direction of Congress, federal judges have increasingly exercised their discretion post-*Booker v. United*

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<sup>97</sup> Id. at tbl.12, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table12.pdf>. Similarly, for bribery prosecutions, 74% receive imprisonment; for antitrust, 69% receive imprisonment; and for tax violators, 63% receive imprisonment. Id.

<sup>98</sup> Id. at fig.F, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureF.pdf>.

<sup>99</sup> Am. Bar Ass'n, A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes (2014), available at [http://www.americanbar.org/content/dam/aba/uncategorized/criminal\\_justice/economic\\_crimes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf), archived at <http://perma.cc/4P8P-GGK9>; see, e.g., *United States v. Parris*, 573 F. Supp. 2d 744, 754 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506, 510–11 (S.D.N.Y. 2006); see also Frank O. Bowman III, Sentencing High-Loss Corporate Insider Frauds After Booker, 20 Fed. Sent'g Rep. 167, 169 (2008) (explaining that judges consider the sentences required by the guidelines for major fraud cases to be too high); Alan Ellis, John R. Steer & Mark H. Allenbaugh, At a "Loss" for Justice: Federal Sentencing for Economic Offenses, 25 Crim. Just. 34 (2011).



*States*<sup>100</sup> to impose below-guidelines sentences in as many as half of all fraud cases.<sup>101</sup>

*d. Probation*

There was an average of thirty months of probation imposed in the 193 cases in which probation (or supervised release) was imposed.<sup>102</sup> For the others, either they received no probation or there was no information on the docket concerning any probation. That average probation mirrors the typical probation imposed on convicted companies and the average two-year length of either corporate probation or deferred and non-prosecution agreements with companies.<sup>103</sup> A surprising number of these individuals, however, received either no probation at all or short terms of probation.

*e. Fines*

One would expect higher fines to be paid in white-collar cases involving financial crimes by professionals. Of the individuals prosecuted in these cases, 138 individuals were fined, with an average fine of \$381,000. Among fraud convicts in federal court generally, 76% received an order to pay a fine or restitution, with an average payment of \$1,743,742 and a median fine of \$113,470.<sup>104</sup> Among these individuals prosecuted in cases in which there was a corporate deferred or non-prosecution agreement, the fines varied widely. At one end of the spec-

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<sup>100</sup> 543 U.S. 220 (2005)

<sup>101</sup> Selected Sentencing, Guideline Application, and Demographic Information for §2B1.1 Offenders, Symposium on Economic Crime, U.S. Sentencing Comm'n (2013), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Selected\\_Sentencing\\_Guideline\\_Application\\_Demographic\\_Info.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Selected_Sentencing_Guideline_Application_Demographic_Info.pdf).

<sup>102</sup> In general, as noted, probation and prison/community split sentences are more common the lower the guidelines range the convict was placed in. See U.S. Sentencing Comm'n, *supra* note 53, at tbl.16, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table16.pdf>.

<sup>103</sup> See Garrett, *Too Big to Jail*, *supra* note 5, at 282; see also U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics tbl.53 (2011), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2010/Table53.pdf> (showing that 70.5% of organizations sentenced were placed on probation).

<sup>104</sup> U.S. Sentencing Comm'n, *supra* note 53, at tbl.15, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table15.pdf>. For antitrust, it was 88% that paid either a fine or restitution, with an average payment of \$37,915, and for bribery, it was 60% that paid either a fine or restitution, with an average payment of \$375,520. *Id.*

trum was the \$300 million forfeiture (along with one year of probation) imposed on the founder and director of PartyGaming Plc, a judgment which was paid.<sup>105</sup> A Jenkens & Gilchrist partner was ordered to pay \$371 million to the IRS and received a fifteen-year sentence, while another was ordered to pay over \$190 million in restitution.<sup>106</sup> Best known of all, former WorldCom CEO Bernard Ebbers, who received the longest prison sentence in the entire group, was fined \$30 million and was required to transfer all of his assets to the court.<sup>107</sup> And a former Deutsche Bank broker was ordered to pay \$115,700,000 in restitution and to forfeit \$1 million in a case involving marketing and implementation of tax shelters.<sup>108</sup>

A handful of additional individuals paid over \$1 million in fines. But, just as with fraud convicts generally, where there are very high average fines but quite a bit lower median fines, most of the others in this dataset paid fines in the low thousands.

Remarkable payments can be recovered from major corporations, and large restitution funds or forfeitures can be directed to victims of corporate crimes.<sup>109</sup> Compensating victims or obtaining fines, forfeiture, or restitution through individual prosecutions, however, is a more equivocal matter. The financial goals of white-collar prosecutions may be far better achieved by also prosecuting the entity. I also found that the corporate cases in which individuals were prosecuted had the same average

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<sup>105</sup> Docket at 1, 3, *United States v. Dikshit*, No. 1:08-cr-01265 (S.D.N.Y. Dec. 16, 2008); Spencer Ante, *PartyGaming's Billionaire Founder Pleads Guilty and Forfeits \$300 Million but Web Site Continues*, *Bus. Wk.* (Dec. 16, 2008), [http://www.businessweek.com/the\\_thread/techbeat/archives/2008/12/us\\_government\\_b.html](http://www.businessweek.com/the_thread/techbeat/archives/2008/12/us_government_b.html).

<sup>106</sup> Patricia Hurtado, *Ex-Jenkins & Gilchrist Lawyer Gets 8 Years in Tax Case*, *Bloomberg Bus.* (Mar. 2, 2013, 12:01 AM), <http://www.bloomberg.com/news/articles/2013-03-01/ex-lawyer-donna-guerin-gets-8-year-sentence-in-tax-shelter-case>, archived at <http://perma.cc/TE39-N3Q2>; Press Release, Dep't of Justice, *Former Jenkens & Gilchrist Attorney Sentenced to 15 Years in Prison for Orchestrating Multibillion Dollar Criminal Tax Fraud Scheme* (June 25, 2014), <http://www.justice.gov/opa/pr/former-jenkins-gilchrist-attorney-sentenced-15-years-prison-orchestrating-multibillion-dollar>, archived at <https://perma.cc/VDU4-TKCY?type=source>.

<sup>107</sup> Jennifer Bayot, *Ebbers Sentenced to 25 Years in Prison for \$11 Billion Fraud*, *N.Y. Times* (July 13, 2005), <http://www.nytimes.com/2005/07/13/business/13WIRE-EBBERS.html?page-wanted=print&r=0>.

<sup>108</sup> Press Release, U.S. Atty's Office S. Dist. of N.Y., *Former Deutsche Bank Broker Sentenced in Manhattan Federal Court to 42 Months in Prison for Promoting Illegal Tax Shelters That Generated Billions of Dollars in Fraudulent Tax Losses* (Mar. 22, 2013), <http://www.justice.gov/usao/nys/pressreleases/March13/ParseDavidSentencingPR.php>, archived at <https://perma.cc/YGH9-7RHY?type=source>.

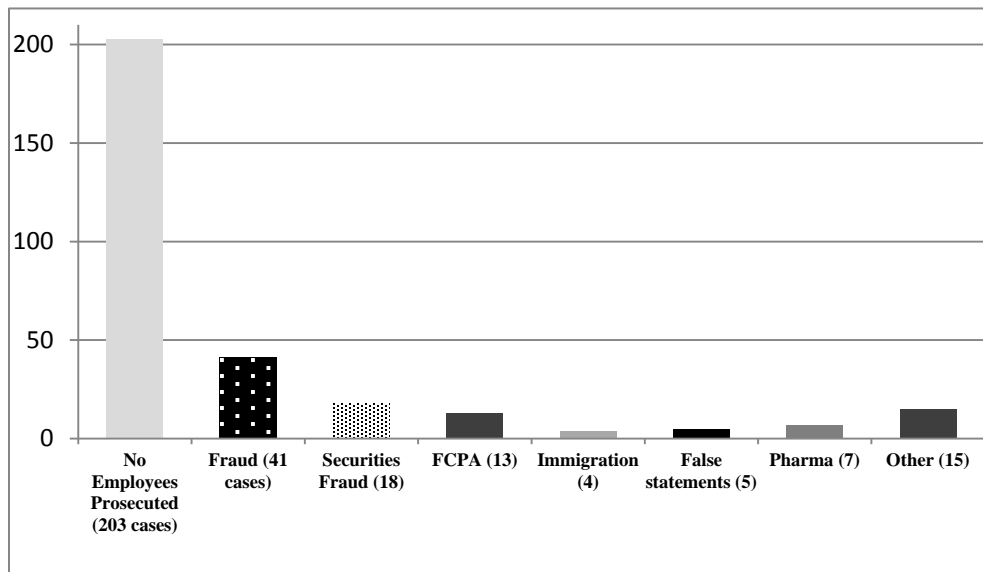
<sup>109</sup> Garrett, *Too Big to Jail*, *supra* note 5, at 123–27 (describing the federal law and practice of corporate criminal restitution and forfeitures).

finances as those in which no employees were prosecuted. Individuals were not prosecuted more often, then, in cases deserving particularly severe financial penalties on the corporation.

## 2. Characteristics of the Corporate Prosecutions

Throughout, I have compared fines and jail sentences and other characteristics of the individual prosecutions in my dataset to the Sentencing Commission's data on fraud prosecutions in federal court generally. The largest group of the individual prosecutions involved fraud, either securities fraud (18 cases) or some other type of fraud (42 cases). Over one-third of the total deferred and non-prosecution agreements from 2001 to 2014 (109 of 306 cases) involved some type of fraud prosecution. Interestingly, in 17 of 25 deferred and non-prosecution agreements involving securities fraud, there were individual prosecutions. And while there were few deferred prosecutions of companies in antitrust cases, individuals were prosecuted in three of four antitrust cases. In contrast, only 13 of 75 FCPA cases were accompanied by individual prosecutions.

**Table 4. DPA/NPA Crimes Accompanying Individual Prosecutions, 2001–2014**



Cases involving financial institutions have been of special interest to lawmakers, commentators, and the public more broadly. Among these 306 deferred and non-prosecution agreements, 66 cases involved financial institutions, defined quite broadly to include a range of types of companies that focus on financial transactions, including commercial banks, investment banks, insurance companies, and brokerages. This group includes nine insurance companies, ranging from AIG to health insurance companies like HealthSouth, and it includes not only major Wall Street financial services firms and international banks like JPMorgan and HSBC, but also smaller banks like Union Bank of California and United Bank for Africa and investment banks like Jefferies Group. Among these sixty-six deferred and non-prosecution agreements with financial institutions, 35%, or twenty-three cases, were accompanied by individual prosecutions.<sup>110</sup> Four of the nine cases involving insurance companies were accompanied by individual prosecutions.<sup>111</sup>

None of the nine cases involving violations of international sanctions under the International Emergency Economic Powers Act (“IEEPA”) were accompanied by individual prosecutions. No individual officers or employees were prosecuted in cases accompanying the fourteen deferred and non-prosecution agreements involving banks violating the Bank Secrecy Act, a set of statutes related to prevention of money laundering. (Four of those cases, like the HSBC case, involved both Bank Secrecy Act and IEEPA charges.) No U.S. bank has been convicted of a crime of money laundering, perhaps because such a conviction would require the Comptroller of the Currency to initiate proceedings to terminate the bank’s license; instead, banks are prosecuted for violations of the Bank Secrecy Act, which focuses on the lack of “internal controls” at the

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<sup>110</sup> Those cases involved deferred and non-prosecution agreements with Baystar Capital Management LLC (fraud); ConvergEx Group, LLC (securities fraud); Deutsche Bank AG (tax fraud); Diamondback Capital Management LLC (securities fraud); GE Funding Capital Market Services, Inc. (FCPA); German Bank HVB (tax fraud); Jefferies Group LLC (fraud); JPMorgan Chase & Co. (antitrust); Louis Berger Group (fraud); Mellon Bank, N.A. (theft); Merrill Lynch (false statements); Mirant Energy Trading (false commodities reporting); NETeller PLC (illegal gambling); Omega Advisors (FCPA); Prudential Equity Group (securities fraud); Rabobank (wire fraud); and UBS AG (three separate cases involving tax fraud, antitrust, and wire fraud). Each of those agreements can be obtained at Garrett & Ashley, *supra* note 9.

<sup>111</sup> Those cases involved deferred and non-prosecution agreements with AIG, General Reinsurance Corp., HealthSouth Corp., and Wellcare Health Plans, Inc. Each of those agreements can be obtained at Garrett & Ashley, *supra* note 9.

bank.<sup>112</sup> Typically the banks receive deferred or non-prosecution agreements for these internal controls violations, and the agreements may describe in some detail the failures to maintain effective anti-money-laundering programs.<sup>113</sup> The question then arises why individuals are not prosecuted for their failures to ensure that money laundering (or other violations, such as violations of international sanctions) did not occur.

Federal District Judge Emmett G. Sullivan, when considering a deferred prosecution agreement with Barclays Bank PLC concerning Bank Secrecy Act violations, expressed outrage that no employees were being charged: “No one goes to jail, no one is indicted, no individuals are mentioned as far as I can determine . . . there’s no personal responsibility.”<sup>114</sup> The prosecutor explained, “in this case, there . . . was not someone who we could prove to a court beyond a reasonable doubt that someone had committed an offense.”

The judge responded, “There’s no paper trail of \$500 million being funneled illegally to other countries? I mean, senior management . . . has to know who’s responsible for it. I mean, these weren’t just computer transfers. Someone had to mastermind this.”<sup>115</sup> The prosecutor responded, “We certainly looked,” and added that Barclays “spent \$250 million” in internal investigations.<sup>116</sup>

The judge ultimately approved the agreement, but noted, “They spent \$250 million and couldn’t find anyone responsible. That’s just shocking, you know. It is shocking, isn’t it?”<sup>117</sup>

Similar concerns were raised in the high-profile HSBC prosecution, in which the bank paid almost \$2 billion to settle Bank Secrecy Act violations in the largest case of its kind to date.<sup>118</sup> A congressional investigation described not just a weak anti-money-laundering program at the multinational bank, but also billions of dollars diverted to Mexican drug

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<sup>112</sup> 12 U.S.C. § 93(d)(1) (2012); 31 U.S.C. § 5318(h)(1) (2012); 12 C.F.R. § 563.177(c) (2012).

<sup>113</sup> Deferred Prosecution Agreement at 2, *United States v. HSBC Bank USA*, No. 12-cr-00763 (E.D.N.Y. July 1, 2013), 2013 WL 3306161.

<sup>114</sup> Transcript of Hearing on the Joint Motion for Approval of Deferred Prosecution Agreement at 5–6, *United States v. Barclays Bank PLC*, No. CR 1:10-cr-00218 (D.D.C. Aug. 17, 2010).

<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Id.* at 8, 12.

<sup>117</sup> *Id.* at 12.

<sup>118</sup> Ben Protes & Jessica Silver-Greenberg, *Bank Said to Avoid Charges Over Laundering*, N.Y. Times, Dec. 11, 2012, at A1, available at <http://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering>, archived at <https://perma.cc/H7CE-LVTS?type=source>.

cartels, groups linked to terrorism, and others, with a culture at the bank that was pervasively polluted.<sup>119</sup> The bank apparently kept staffing in its compliance division low to reduce costs and fired a head of compliance who complained about the lack of compliance resources.<sup>120</sup> No HSBC employees were prosecuted then or have been since. At the time, Senator Charles Grassley wrote a letter to the Attorney General complaining about this issue:

The Department has not prosecuted a single employee of HSBC—no executives, no directors, no AML compliance staff members, no one. By allowing these individuals to walk away without any real punishment, the Department is declaring that crime actually does pay. Functionally, HSBC has quite literally purchased a get-out-of-jail-free card for its employees for the price of \$1.92 billion dollars.<sup>121</sup>

Others in Congress echoed that concern. Senator Jeff Merkley called it a “‘too big to jail’ approach.”<sup>122</sup> Senator Elizabeth Warren stated that, in contrast to how federal prosecutors target individuals in cases not involving major corporations or financial institutions, “evidently, if you launder nearly a billion dollars for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night.”<sup>123</sup>

What explains the lack of prosecutions in these Bank Secrecy Act cases? One possibility, discussed more in the next Part, is that prosecutors view these cases as essentially about failures of compliance or regulatory violations best addressed at the corporate level. As I have described elsewhere, these agreements have become increasingly detailed

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<sup>119</sup> Staff of S. Comm. on Homeland Sec. & Governmental Affairs, Permanent Subcomm. on Investigations, Rep. on U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History 2–4 (2012).

<sup>120</sup> *Id.* at 26–28.

<sup>121</sup> Press Release, Senator Chuck Grassley, Grassley: Justice Department’s Failure to Prosecute Criminal Behavior in HSBC Scandal Is Inexcusable (Dec. 13, 2012), <http://www.grassley.senate.gov/news/news-releases/grassley-justice-department%E2%80%99s-failure-prosecute-criminal-behavior-hsbc-scandal>, archived at <http://perma.cc/H2YP-XY2C>.

<sup>122</sup> Press Release, Senator Jeff Merkley, Merkley Blasts “Too Big to Jail” Policy for Lawbreaking Banks (Dec. 13, 2012), <http://www.merkley.senate.gov/news/press-releases/merkley-blasts-too-big-to-jail-policy-for-lawbreaking-banks>, archived at <http://perma.cc/FZS5-VQ93> [hereinafter Press Release, Senator Jeff Merkley].

<sup>123</sup> Chris Good, Elizabeth Warren Wants HSBC Bankers Jailed for Money Laundering, ABC News (Mar. 7, 2013), <http://abcnews.go.com/blogs/politics/2013/03/elizabeth-warren-wants-hsbc-bankers-jailed-for-money-laundering>.

and have required compliance provisions regulating employee behavior at a level beyond what is typically found in most corporate prosecution agreements. It is only formally true, however, that these are regulatory violation cases. These cases are charged as Bank Secrecy Act cases largely to protect the bank's charter from automatic revocation. The cases may in fact involve quite serious money laundering of the precise type that puts thousands of individuals in federal prison for extremely long sentences (with mean federal sentences of thirty-five months in 2013).<sup>124</sup> That the corporate form could turn a money-laundering scheme on a grand scale into a regulatory violation for the company, and also for the individuals involved, would be a quite troubling prospect—but the question is whether prosecutors can show that employees intended to facilitate illegal money laundering;<sup>125</sup> potential difficulties in showing intent are discussed in the next Part.

Only thirteen of the seventy deferred and non-prosecution agreements regarding FCPA violations included individual prosecutions. (Compare the lack of FCPA prosecutions, for example, to the head FCPA prosecutor's comment in 2008 that "[i]t is our view that to have a credible deterrent effect, people have to go to jail."<sup>126</sup>) None of the banking or currency-reporting violations resulted in individual prosecutions, nor did export violations, such as the nine deferred and non-prosecution agreements regarding violations of the IEEPA.

What was also surprising, perhaps, was that slightly fewer (25%, or 31 of 125) *convicted* public companies or their subsidiaries had officers or employees prosecuted.<sup>127</sup> One might expect that where the largest companies were convicted, and did not receive the more lenient deferred and non-prosecution agreements, that perhaps prosecutors had stronger cases or more evidence of intentional or high-level conduct, and therefore insisted on a conviction. It is no light matter for prosecutors to decide to secure a conviction against a public company, and yet even in those cases individuals were not typically prosecuted.

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<sup>124</sup> U.S. Sentencing Comm'n, *supra* note 53, at tbl.C, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table13.pdf>.

<sup>125</sup> See *infra* notes 183–84 (citing relevant statutes and noting the intent requirement).

<sup>126</sup> Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, 22 *Corp. Crime Rep.* 36 (2008), available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm>, archived at <http://perma.cc/8MQG-792R>.

<sup>127</sup> See Garrett, *Too Big to Jail*, *supra* note 5, at 96.

*B. Prior Research on White-Collar Prosecutions*

Far too little is known about the relationship between federal individual and corporate prosecutions. Cases involving both individuals and entities are not necessarily jointly docketed in the federal case management system. No official data are kept on the question of when and whether individuals are prosecuted alongside a corporation. Given the underlying lack of case tracking of such relationships, the question has been a difficult one for scholars to study. What made this study possible was the fact that these deferred and non-prosecution agreements were so heavily dominated by high-profile matters, including prosecutions of public corporations, and news reports could be readily searched for information concerning individuals charged with crimes. More run-of-the-mill corporate crimes by small or family businesses would raise serious difficulties in obtaining information about whether any individuals were charged.

More fundamentally, data on “white-collar” prosecutions of individuals, or corporate or business crimes by individuals, do not exist. The category of “white-collar” offenses is sociological and not legal, and even within criminology scholarship there is no agreement on what constitute white-collar offenses.<sup>128</sup> The Department of Justice’s own imperfect categorization of white-collar crime does not include, for example, RICO, corruption offenses, and others that can sometimes be very much business-related. At the same time, as noted, fraud prosecutions are also a highly imperfect proxy, where they may range from minor welfare cheating to major Wall Street securities frauds.

It is clear, however, that far more individuals are prosecuted for white-collar offenses each year in cases in which no company is prosecuted. At most, two hundred or so organizations are prosecuted in federal court in a given year, and the number of prosecuted organizations has been declining. In contrast, there are many thousands of individuals prosecuted for white-collar related or business crimes.

The number of federal fraud convictions rose between 1996 and 2012 from about 6,000 cases per year to over 8,000 cases per year, though they fell as a percentage of the federal docket. In fiscal 2014, fewer than 7,000 people were convicted of fraud in federal court, a drop from 2012

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<sup>128</sup> For a discussion, see Garrett, *Too Big to Jail*, *supra* note 5, at 87–88.



when over 8,500 people were convicted of fraud.<sup>129</sup> In addition, average fraud sentences nearly doubled during that time, reflecting sentencing enhancements by Congress and perhaps the increased seriousness of cases brought. (The sentences are highly variable, however, and judges often grant more-lenient fraud sentences than the sentencing guidelines call for.)<sup>130</sup> No good data are kept on how many of those cases are higher-ups versus lower-level actors or in how many cases there was a potential case to be brought against the organization itself. The Department of Justice has occasionally reported on its successes in holding higher-ups accountable, although without clearly explaining where its figures come from; one such DOJ report stated that between 2002 and 2008, the members of its Corporate Fraud Task Force prosecuted 200 CEOs, more than 120 vice presidents, and 50 CFOs.<sup>131</sup>

Presumably, under the strict respondeat superior standard, many thousands of those individuals were employees working in the scope of their employment, and corporate prosecutions could potentially have been brought. The fewer than 200 organizational prosecutions brought each year may be the remnant of the many times more cases declined or simply not pursued against corporations.

Prior work has examined the question of individual and corporate criminal responsibility by looking at corporate prosecutions of particular types and in prior time periods (which themselves reflect different enforcement priorities and approaches). Professor Kathleen Brickey pursued an ongoing study of corporate fraud prosecutions, and in examining cases brought from March 2002 through January 2006, found that “the

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<sup>129</sup> U.S. Sentencing Comm’n, 2012 Sourcebook of Federal Sentencing Statistics tbl.3 (2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table03.pdf> (stating that 8,634 offenders, or over 10% of the federal criminal docket, consisted of fraud convicts). For a classic study of individual white-collar prosecutions in the federal system, see David Weisburd et al., *Crimes of the Middle Classes: White-Collar Offenders in the Federal Courts* 104–06 (1991).

<sup>130</sup> U.S. Sentencing Comm’n, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 6, 67 (2012); U.S. Sentencing Comm’n, Final Report on the Impact of *United States v. Booker* on Federal Sentencing 75 (2006); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 *Duke L.J.* 823, 838–40 (2014) [hereinafter Buell, *Is the White Collar Offender Privileged?*]. As Buell noted, “particularly in the last several years, it has become common for a federal district judge to impose a sentence of imprisonment on a white collar offender that is measured in double-digit years, and not infrequently in decades.” *Id.* at 835; see also Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 *Cardozo L. Rev.* 1611, 1645–46 (2007) (discussing below-guidelines sentencing).

<sup>131</sup> Corp. Fraud Task Force, Office of the Deputy Att’y Gen., Report to the President, at iii (2008), available at [www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf](http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf).

corporate fraud prosecution cycle following Enron's collapse has produced an unparalleled number of criminal trials of senior corporate executives in just three years."<sup>132</sup> Professor Brickey found that forty-six defendants went to trial, of which twelve were CEOs, COOs, professors, chairmen of the board, or senior partners; however, in those trials, eighteen were convicted, eleven were acquitted, and fifteen involved deadlocked juries.<sup>133</sup> However, in addition to those forty-six cases Professor Brickey studied, seventy-three defendants pleaded guilty.<sup>134</sup> That pattern, focusing just on the large corporate fraud cases post-Enron, is quite similar to the larger pattern observed across deferred and non-prosecution agreements after 2001.

A study in the mid-1970s by Professors Marshall Clinard and Peter Yeager, focusing on the 582 largest publicly owned corporations in the United States, found that, accompanying those federal enforcement efforts (both civil and criminal), only sixteen individual corporate employees or officers served prison sentences, averaging only thirty-seven days.<sup>135</sup> However, there may be far more prosecutions of officers or employees of smaller firms, where owners or higher-ups may be closely involved. Moreover, the largest public companies were then dominated by manufacturing companies.<sup>136</sup> This may not reflect the types of public companies (or the types of regulations and crimes) most prominent today. Clinard and Yeager did explore in detail, however, the difficulty in specifying legal responsibility "due to the division of tasks within a corporation," and where "corporate violations are usually far more complex than conventional crimes."<sup>137</sup> Clinard and Yeager also found that measures of firm and industry "were not strong predictors of corporate violations" and instead that something about corporate culture or environment must have played a role.<sup>138</sup> I take up those themes in the next Part.

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<sup>132</sup> Kathleen F. Brickey, *Enron's Legacy*, 8 *Buff. Crim. L. Rev.* 221, 246 (2004); Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 *J. Crim. L. & Criminology* 397, 401, 419 (2006) [hereinafter Brickey, *In Enron's Wake*].

<sup>133</sup> Brickey, *In Enron's Wake*, *supra* note 132, at 406-07.

<sup>134</sup> *Id.* at 403.

<sup>135</sup> Marshall B. Clinard et al., *U.S. Dept. of Justice Law Enforcement Assistance Admin., U.S. Dep't of Justice, Illegal Corporate Behavior*, at xxii, 208-209 (1979).

<sup>136</sup> *Id.* at xvii (describing how of the 582 public companies studied, 477 were manufacturing).

<sup>137</sup> *Id.* at xxii.

<sup>138</sup> *Id.* at xxiii.

A study by Professor Mark Cohen in the late 1980s found that, in sixty-five percent of non-antitrust-related federal corporate prosecutions, individuals were prosecuted.<sup>139</sup> Looking at such categories of non-public companies raises real challenges, however, because there may not be news reports regarding whether individuals were prosecuted, and the individual prosecutions may often not be jointly docketed with the prosecution of the company.

Apart from such archival empirical research, of the type conducted in this Article as well, still other researchers have also examined theoretical models of corporate offending, by focusing on sanctions and deterrence inside and outside the firm, and on normative and moral factors that may affect individuals.<sup>140</sup> Some argue that corporate executives may be particularly sensitive to sanctions that would affect their reputations.<sup>141</sup> As Professor Dan Kahan put it, your average corporate executive “probably cares a lot about what his family, his colleagues, his firm’s customers, his neighbors, and even the members of his health club think.”<sup>142</sup> However, sanctioning individuals may not be enough; the view of prosecutors in the United States has been that altering corporate culture and practices is also important to preventing business crime.

## II. EXPLAINING INDIVIDUAL AND CORPORATE PROSECUTIONS

In a recent speech, delivered shortly before announcing his retirement, then-Attorney General Eric Holder spoke on financial fraud prosecutions generally, and underscored, “we have almost always reserved the right to continue our civil and criminal investigations into individual executives at the respective firms.”<sup>143</sup> That much is borne out by my

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<sup>139</sup> Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–1990*, 71 B.U. L. Rev. 247, 268 (1991).

<sup>140</sup> For a survey of the research and a discussion of the role of moral considerations, see Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 Law & Soc’y Rev. 549 (1996); see also, e.g., Gilbert Geis & Joseph DiMento, *Should We Prosecute Corporations and/or Individuals?*, in *Corporate Crime: Contemporary Debates* 72, 79 (Frank Pearce & Lauren Snider eds., 1995) (discussing moral and hierarchical pressures on employees).

<sup>141</sup> See, e.g., Brent Fisse & John Braithwaite, *The Impact of Publicity on Corporate Offenders* 247 (1983); Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & Econ. 489, 493 (1999).

<sup>142</sup> Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 643 (1996).

<sup>143</sup> Press Release, U.S. Dep’t of Justice, Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014) [hereinafter Holder, Remarks on

analysis of the terms of these corporate prosecution agreements (at least outside of the antitrust context, and Holder's subject in the speech was financial fraud). Holder cited to the DOJ's statistics concerning mortgage fraud prosecutions, although then noting that

when it comes to more complex transactions that involve more sophisticated traders – as opposed to run-of-the-mill “liar loan” cases or out-and-out Ponzi schemes – a criminal prosecution of an individual can be difficult, more complicated, to mount. This is true for any number of reasons – from possible advice-of-counsel defenses; to the adequacy or inadequacy of written disclosures; to the difficulty to establish materiality and intent. And in some instances, it is simply not possible to establish knowledge of a particular scheme on the part of a high-ranking executive who is far removed from a firm's day-to-day operations.<sup>144</sup>

White-collar defense lawyers offer a different view; they have tended to complain that few prosecutions of individuals occur because “[p]rosecutors do not possess the same kind of leverage over individuals that they do over companies. . . . [I]ndividuals are more likely to test the prosecution's case.”<sup>145</sup> The claim that individuals are less risk averse and more likely to risk a trial is highly debatable; individuals settle their cases and plead guilty in the same overwhelming fashion as do corporations, and individuals face jail time. However, as the sections that follow explain, there are real obstacles when bringing individual prosecutions for corporate crimes. The obstacles flow from the complexity of large organizations, where responsibilities are divided, authority is diffuse, specialists and lawyers will provide advice and may provide assurances of legality, and individual accountability is harder to obtain.

#### *A. Organizational Complexity*

A rising chorus of voices has criticized the failure to prosecute privileged white-collar offenders. Yet employees should not be in the same privileged position that their employers are in. Following the Supreme Court's ruling in *Upjohn Co. v. United States*, the corporation retains at-

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Financial Fraud], available at <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.

<sup>144</sup> Id.

<sup>145</sup> Matthew Fishbein, *Why Individuals Aren't Prosecuted for Conduct Companies Admit*, N.Y. L.J., Sept. 19, 2014, at 4.

torney-client and work product privilege, and therefore can decide whether to waive it when cooperating with regulators and prosecutors.<sup>146</sup> If employees speak to the corporation's lawyers during an internal investigation, they may incriminate themselves, and the company may want to turn them in to show how it is cleaning house and cooperating fully with prosecutors.<sup>147</sup> However, if employees refuse to speak to corporate counsel, then the company can fire them; many companies have "talk or walk" policies, and understandably do not tolerate uncooperative employee behavior.<sup>148</sup> Complaints were raised for years that federal prosecutors and DOJ policy had created a "culture of waiver,"<sup>149</sup> although, as I have described elsewhere, most corporate prosecution agreements have not included an explicit privilege waiver.<sup>150</sup> Quite apart from access to information, individuals may have spoken to lawyers or accountants and received advice that their planned conduct was legal. Such evidence may not be an outright defense to a crime like fraud in which intent to defraud must be shown, but it may be strong evidence of "good faith" conduct.

Organizational complexity may be one particular challenge in corporate prosecutions and one sound reason to focus on the corporation rather than individuals. Attorney General Holder explained, "Responsibility remains so diffuse, and top executives so insulated, that any misconduct could again be considered more a symptom of the institution's culture than a result of the willful actions of any single individual."<sup>151</sup> Organizational complexity may be precisely the source of the criminality. Criminologists suggest that corporate fraud is often a "team sport" and the product of "group-think" or the culture within an organi-

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<sup>146</sup> 449 U.S. 383, 394–95 (1981).

<sup>147</sup> Garrett, *supra* note 31, at 940.

<sup>148</sup> Charles Gasparino, Merrill Fires a Vice Chairman for Refusal to Testify on Enron, *Wall St. J.* (Sept. 19, 2002, 12:01 AM), <http://www.wsj.com/articles/SB1032380350579468595>.

<sup>149</sup> Preet Bharara, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 *Am. Crim. L. Rev.* 53, 92 (2007); Samuel W. Buell, Criminal Procedure Within the Firm, 59 *Stan. L. Rev.* 1613, 1619 (2007); Lisa Kern Griffin, Compelled Cooperation and the New Corporate Criminal Procedure, 82 *N.Y.U. L. Rev.* 311, 316 (2007); Daniel Richman, Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem, 57 *DePaul L. Rev.* 295, 299–300 (2008).

<sup>150</sup> See Garrett, *Too Big to Jail*, *supra* note 5, at 92.

<sup>151</sup> See Holder, *Remarks on Financial Fraud*, *supra* note 143.

zation.<sup>152</sup> Socialization within an organization can create pressure against breaking ranks and raising questions.<sup>153</sup> The corporate culture may be most to blame, and punishing the entity may result in the very changes that can best do away with that culture.

Moreover, organizational complexity can obscure fault. It may be quite clear that some employees and officers approved a misleading financial statement, but sorting out who knew what and when, where dozens each signed the relevant reports and statements, could be a frustrating if not impossible task. Attorney General Holder further explained,

Many financial criminals are savvy enough to avoid using email, which may leave a trail for investigators to follow. And intent may only be evidenced sometimes in the form of verbal instructions – evidence that can provide the sort of “smoking gun” that is needed to secure a conviction, but that can *only* be attained from a cooperating witness.<sup>154</sup>

If this were conduct designed ultimately to benefit the corporation, then perhaps the corporation itself would be punished and should remedy the harm. As Judge Gerald E. Lynch has put it well, corporate sanctions, and perhaps corporate prosecution alone, are justified “when the corporate form makes it difficult to establish culpability on the part of any particular individual.”<sup>155</sup>

One response to corporate complexity would be to treat the entity as a “collective,” where one need not examine whether any single employee had the requisite mens rea. Only one court has considered a “collective knowledge” theory under which partial crimes by more than one employee might result in corporate criminal liability, and in a case in which that theory need not have been, arguably, relied upon (other courts have considered such a theory in civil cases).<sup>156</sup> Such a theory might help to

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<sup>152</sup> Sridhar Ramamoorti, *The Psychology and Sociology of Fraud: Integrating the Behavioral Sciences Component into Fraud and Forensic Accounting Curricula*, 23 *Issues Acct. Educ.* 521, 529 (2008).

<sup>153</sup> James William Coleman, *The Criminal Elite: Understanding White-Collar Crime* 194–99 (4th ed. 1998).

<sup>154</sup> See Holder, *Remarks on Financial Fraud*, *supra* note 143.

<sup>155</sup> Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *Law & Contemp. Probs.* 23, 51 (1997).

<sup>156</sup> *United States v. Bank of New Eng.*, 821 F.2d 844, 855 (1st Cir. 1987). For a court adopting the theory in a civil case, see *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 497 (S.D.N.Y. 2005). But see *Southland Sec. Corp. v. INSpire Ins. Solutions*, 365 F.3d 353, 366–67 (5th Cir. 2004).

hold a company accountable where individual responsibility is unclear—but holding the company accountable is not the primary challenge. Deferred and non-prosecution agreements, as well as plea agreements, can permit the company to accept responsibility without litigation about which employees did what at trial. Understandably, few companies take the risk of challenging a prosecution case at trial. A collective knowledge theory, however, would not help to hold individual employees responsible.

### *B. Prosecutorial Reluctance or Resources*

As a matter of policy, as noted in the Introduction, the Department of Justice emphasizes in its principles that prosecution of the corporation, even a corporate guilty plea, is no substitute for prosecution of individuals. The DOJ's Antitrust Division does give outright leniency deals to both corporations and employees as part of settlements with corporations that are the first to cooperate. Such antitrust immunity agreements, to corporations that turn in other members of a price-fixing cartel, may include a promise not to prosecute cooperating employees, but prosecutors also “carve out” and prosecute those employees who do not cooperate, and particularly the high-level ones.<sup>157</sup> In the antitrust setting, prosecutors do not try to accomplish structural reform or rehabilitate companies: They want to strictly deter wrongdoing and incentivize individuals and companies to turn in the entire group of companies engaged in a price-fixing conspiracy. Indeed, those immunity deals are kept confidential and, as a result, they do not appear in the collection of corporate non-prosecution or deferred prosecution agreements. Whether an optimal balance is obtained in the antitrust area regarding individual and corporate liability raises complex questions in that area. It has been much debated in academic and policy circles, in part because, as Professors John Connor and Robert Lande have described, it is often lower-

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<sup>157</sup> Scott D. Hammond, Deputy Assistant Att’y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, Address at the Annual American Bar Association Section of Antitrust Law Spring Meeting: Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations 7–8 (Mar. 29, 2006), available at <http://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations>. The Antitrust Division has altered its approach towards “carve-outs” in recent years. See Press Release, U.S. Dep’t of Justice, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division’s Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013), <http://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out>.

level employees who may “take a bullet for the team” by pleading guilty and serving a prison term only to be subsequently re-hired or even rewarded by the firm or industry.<sup>158</sup> Outside of antitrust, no other setting, however, involves such a hard-nosed and clearly defined approach to corporate prosecutions and their relationship with individual prosecutions.

Outside the antitrust setting, not only is there no fixed policy on when and whether employees and officers will be prosecuted, but I have also found very few deferred prosecution or non-prosecution agreements that explicitly discuss employee prosecutions. To be sure, the agreements, as noted, routinely state that cooperation of the company in individual investigations will be required. But it is never clear whether any such investigations are actually anticipated.

One exception was an agreement in the AmSouth Bancorp case, which said that if the firm complied, then “the United States will not prosecute any current or former AmSouth employee based upon any of the conduct described.”<sup>159</sup> One suspects, however, that more agreements involve tacit agreements not to prosecute individual employees. Any such non-prosecution agreements, in the nature of declinations, would likely not be public documents.

Federal Judge Jed Rakoff has argued that prosecutors conduct overly hasty investigations, settling with the corporation on lenient terms that impose “internal compliance measures that are often little more than window-dressing.”<sup>160</sup> That story jibes with patterns observed in the data. Not only do most deferred and non-prosecution agreements fail to carefully specify compliance reforms to be adopted, but also most are not accompanied by individual prosecutions. At press conferences announcing corporate prosecutions, such as at the Toyota deferred prosecution agreement press conference, prosecutors have stated that no individual prosecutions were contemplated. And yet the text of corporate agreements unfailingly requires that the company fully cooperate in ongoing investigations of culpable individuals. To be sure, in some cases, a re-

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<sup>158</sup> John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, *Cardozo L. Rev.* 427, 437–442 (2012) (discussing criticism of focus on individual penalties in antitrust context, including those by an OECD policy roundtable, and describing outcomes for employees convicted in cartel prosecutions).

<sup>159</sup> *Deferred Prosecution Agreement* ¶ 18, *United States v. AmSouth Bancorp.*, No. 04-167 (S.D. Miss. Oct. 12, 2004).

<sup>160</sup> Rakoff, *supra* note 28, at 11.



markable investment would have to be put into identifying wrongdoers within a complex organization and pursuing expensive litigation of those cases. That these cases are hard fought and can result in high-profile acquittals or dismissals may also give prosecutors some pause before considering going beyond the settlement with the corporation to pursue individual officers and employees. Perhaps priorities are slowly changing; in more recent speeches, as noted, DOJ officials have highlighted the importance of “true” cooperation that provides “evidence against” the “culpable individuals.”<sup>161</sup>

### *C. Defense Resources*

There has been a rise in substantial white-collar practices at large law firms, accompanying the rise in the size of corporate criminal prosecutions (if not the number of such prosecutions).<sup>162</sup> Many of these individual cases described involved prosecution losses; one could attribute some of this to defense resources and effectiveness. White-collar prosecutions can also take quite a bit of time. For example, prosecutions of former Enron employees were ongoing well into the next set of corporate scandals. Most prominently, former Enron CEO Jeffrey Skilling was not sentenced until 2006; he claimed at sentencing, “I am innocent of every one of these charges,” and his appeals ultimately resulted in a ten-year reduction in his sentence in 2013.<sup>163</sup>

To be sure, prosecutors can in some respects leverage the defense resources of the corporation against those of the individuals. As described, they can obtain prosecution agreements in which the company agrees to fully cooperate and turn over documents, interview records, and the fruits of its internal investigations into the employee conduct. That said, prosecutors have been leery of demanding that a company waive attorney-client or work product privilege, as well as demanding that a company cease reimbursing individual legal bills. When prosecutors ap-

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<sup>161</sup> Miller, *supra* note 32.

<sup>162</sup> Garrett, *Too Big to Jail*, *supra* note 5, at 5; Charles D. 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, 1221 (2011).

<sup>163</sup> *Skilling v. United States*, 561 U.S. 358, 373, 375 (2010); Kristen Hays, *Skilling Maintains Innocence, Vows Appeal*, *Hous. Chron.*, Oct. 24, 2006, at A1, available at <http://www.chron.com/business/enron/article/Skilling-maintains-innocence-vows-appeal-1876814.php>; Peter Lattman, *Ex-Enron Chief’s Sentence Is Cut by 10 Years, to 14*, *N.Y. Times*, June 22, 2013, at B2, available at <http://dealbook.nytimes.com/2013/06/21/prison-sentence-of-ex-enron-ceo-skilling-cut-by-10-years-2>.

peared to have been encouraging KPMG to waive privilege and refuse to pay employee legal bills, they were widely criticized and many of the individual prosecutions were later thrown out by a federal district judge, who cited constitutional concerns with the prosecution's conduct.<sup>164</sup> At the time, DOJ guidelines noted that cooperation would be an important factor in deciding whether to prosecute a company, and that prosecutors would consider whether the company was supporting "culpable employees" by "advancing of attorney's fees" or not making "witnesses available" and disclosing "the complete results" of an internal investigation.<sup>165</sup> Prosecutors have as a result altered policy in the U.S. Attorneys' Manual and backed off from trying to use their influence over the company to undercut defense representation resources.<sup>166</sup> That said, companies still have quite a bit to gain by cooperating with prosecutors and identifying who was responsible for committing the crimes in question.<sup>167</sup>

There is also the possibility that corporations can exercise other types of influence to discourage prosecutions of their employees. Some fear that they influence prosecutors by hiring former colleagues as defense counsel, or by obtaining audiences at the highest levels of the Department of Justice during negotiations with prosecutors. Given contrary incentives of prosecutors to obtain high-profile victories in white-collar cases, these fears of undue influence may not have much explanatory power.

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<sup>164</sup> For a lengthy description of the KPMG case and its aftermath, see Garrett, *Too Big to Jail*, supra note 5, at 88–100, 112–16; see also *United States v. Stein (Stein III)*, 541 F.3d 130, 146–51 (2d Cir. 2008); *United States v. Stein (Stein II)*, 495 F. Supp. 2d 390, 420–24 (S.D.N.Y. 2007); *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 356–69 (S.D.N.Y. 2006); Garrett, supra note 31, at 926–30. Draft legislation was proposed in response to the perceived problem. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3.

<sup>165</sup> Memorandum from Larry D. Thompson, supra note 51.

<sup>166</sup> The DOJ announced the first set of changes to that policy in 2005. Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 1 (Oct. 21, 2005), [http://federalevidence.com/pdf/Corp\\_Prosec/McCallum\\_Memo\\_10\\_21\\_05.pdf](http://federalevidence.com/pdf/Corp_Prosec/McCallum_Memo_10_21_05.pdf). Additional changes were made in 2006 and again in 2008. Memorandum from Mark R. Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 13 (Aug. 28, 2008), available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>; Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 8–11 & n.3 (Dec. 12, 2006), available at [http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty\\_memo.pdf](http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf).

<sup>167</sup> George M. Cohen, Essay, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 Va. L. Rev. In Brief 153, 162 (2007).

How could prosecutors and regulators, as well as investigators who pursue corporate crime, be provided with more resources? Professor Mary Kreiner Ramirez proposes that a Corporate Crimes Division be created at the Department of Justice.<sup>168</sup> The existing Financial Fraud Enforcement Task Force coordinates prosecutions and policy among regulators and individual U.S. Attorney's Offices;<sup>169</sup> perhaps providing greater resources to that group, to a new entity, and to the regulators and investigators would all have a real impact. Proposals to further centralize corporate crime enforcement authority at DOJ, however, may not be advisable, and may not generate resources that are not already available; such efforts could even dilute resources or hinder effective enforcement.<sup>170</sup> Given that regulators such as the SEC annually go hat in hand to Congress complaining of inadequate enforcement and investigation resources, new proposals may continue to fall on deaf ears. In other areas, such as the Antitrust and the Environment and Natural Resources Divisions, resource constraints may not be such a problem.

#### *D. Mens Rea and Weak Prosecution Cases*

Corporate deferred and non-prosecution agreements presumably reflect a settlement and a compromise across multiple dimensions. One reason for prosecutors to settle a case is that they are unsure of a trial victory. Lacking sufficient evidence to be sure of a corporate conviction could similarly mean that prosecutors are unsure whether they can convict individuals—as we have seen, when they do prosecute individuals, they do sometimes fail to secure convictions. However, one is also concerned that in these corporate prosecutions, the requisite investigation is

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<sup>168</sup> Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 Marq. L. Rev. 971, 1001–09 (2010). For a general examination of how institutional design can shape prosecution policy and practice, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 895–906 (2009).

<sup>169</sup> Exec. Ord. No. 13,519, 3 C.F.R. 271 (2015) (creating Financial Fraud Enforcement Task Force in place of the preexisting Corporate Fraud Task Force). For other federal prosecution task forces related to corporate crime, see, for example, Press Release, Fed. Bureau of Investigation, *Corporate Fraud: Options Cases Aim for Level Field* (Feb. 14, 2007), [https://www.fbi.gov/news/stories/2007/february/options\\_021407](https://www.fbi.gov/news/stories/2007/february/options_021407).

<sup>170</sup> For criticism of efforts to centralize policy or enforcement authority at Main Justice, and the perverse consequences of such efforts, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757, 757 (1999); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 Duke L.J. 2087, 2087 (2009).

not conducted to assess whether individual cases could be brought, even if the case against the company is best settled.

The chief obstacle in organizational cases can be the complexity of the organization, in which intent can be hard to show where responsibilities are diffuse and shared. For example, the HSBC case has attracted substantial attention due to the lack of employee prosecutions and the deferred prosecution agreement received by the bank; the federal judge that eventually approved the agreement noted “the heavy public criticism” of it.<sup>171</sup> The case was one of the largest money laundering and sanctions-violations cases in U.S. history. The bank admitted to failures to implement effective anti-money-laundering programs to monitor transactions from Mexico, and as a result billions of dollars, including at least \$881 million in drug trafficking proceedings, passed through its bank; other failures around the world resulted in approximately \$660 million in payments processed to regimes in Cuba, Iran, Libya, Sudan, and Myanmar, for which such transactions are barred by international sanctions.<sup>172</sup> Trillions of dollars in transactions had been flagged and not reviewed.<sup>173</sup>

In settling the case with HSBC, which paid almost \$2 billion in forfeiture and fines, the Government described an “institution-wide lack of accountability,” efforts to “freeze” staffing levels in the compliance division, resulting in a “staffing crisis,” and outright efforts to discourage requests for more compliance resources, including “a policy not to conduct due diligence on other HSBC Group Affiliates.”<sup>174</sup> The statement of

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<sup>171</sup> *United States v. HSBC Bank USA*, No. 12–763, 2013 WL 3306161, at \*7 (E.D.N.Y. July 1, 2013) (citing, for example, Jesse Singal, *HSBC Report Should Result in Prosecutions, Not Just Fines, Say Critics*, *The Daily Beast* (July 18, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/07/18/hsbc-report-should-result-in-prosecutions-not-just-fines-say-critics.html>; Matt Taibbi, *Gangster Bankers: Too Big to Jail*, *Rolling Stone* (Feb. 14, 2013), <http://www.rollingstone.com/politics/news/gangster-bankers-too-big-to-jail-20130214>; Editorial, *Too Big to Indict*, *N.Y. Times*, Dec. 11, 2012, at A38, available at <http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html>).

<sup>172</sup> *HSBC Bank USA*, 2013 WL 3306161, at \*8–9.

<sup>173</sup> Ben Protess & Jessica Silver-Greenberg, *HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering*, *N.Y. Times*, Dec. 10, 2012, at A1, available at <http://dealbook.nytimes.com/2012/12/10/hsbc-said-to-near-1-9-billion-settlement-over-money-laundering>.

<sup>174</sup> *Id.*; see also Government’s Memorandum in Support of the Deferred Prosecution Agreement at 7, *United States v. HSBC Bank USA*, No. 12–763 (E.D.N.Y. Jan. 30, 2013) (referring to staffing); Statement of Facts ¶¶ 25, 28, *United States v. HSBC Bank USA*, No. 12–763 (E.D.N.Y. Dec. 11, 2012), available at [http://lib.law.virginia.edu/Garrett/prosecution\\_agreements/sites/default/files/pdf/HSBC\\_1.pdf](http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/HSBC_1.pdf) (referring to staffing issues).

facts incorporated in the deferred prosecution agreement described conduct by particular employees. For example, a “senior executive” described that anti-money-laundering efforts had “gone down the hole in the past 18 months.”<sup>175</sup> The HSBC “head of compliance” admitted that in its Mexican subsidiary, there was “no recognizable compliance or money-laundering function.”<sup>176</sup> As suspicious activity mounted in Mexico, a senior compliance officer at HSBC Mexico argued to supervisors that they could not “keep rubber-stamping unacceptable risks merely because someone on the business side writes a nice letter . . . We have seen this movie before, and it ends badly.”<sup>177</sup> Regarding payments that violated international sanctions, red flags were raised for years. For example, a head of compliance argued that HSBC’s practices “could provide the basis for an action . . . for breach of sanctions,” but was told that due to “significant business opportunities,” the procedure should continue.<sup>178</sup> These were not faceless compliance failures, but concerns regarding illegality were raised by people and were dismissed out of hand by superiors, who were themselves not prosecuted.

Far more information was revealed when a U.S. Senate Subcommittee on Investigations conducted hearings resulting in a detailed report on the case, than had been revealed in the statement of facts accompanying the deferred prosecution agreement.<sup>179</sup> Emails described how employees had brought problematic transactions to their supervisors regarding possible terrorist organizations, and had been told things like, “I should fire you right now,” and “Are you out of your f—— mind,” and telling the head of compliance, when complaining about insufficient staff and resources, that her comments were “inappropriate,” and then firing her.<sup>180</sup> Among others, Senator Jeff Merkley objected to the deferred prosecution agreement that the bank HSBC received for violations of banking regulations by citing a still larger problem that has occupied much pub-

<sup>175</sup> Statement of Facts, *supra* note 174, ¶ 28.

<sup>176</sup> *Id.* ¶¶ 29–30.

<sup>177</sup> *Id.* ¶ 34.

<sup>178</sup> *Id.* ¶ 66.

<sup>179</sup> Press Release, S. Permanent Subcomm. on Investigations, HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist Financing Risks (July 16, 2012), <http://www.hsbc.ac.senate.gov/subcommittees/investigations/media/hsbc-exposed-us-finacial-system-to-money-laundering-drug-terrorist-financing-risks>.

<sup>180</sup> Staff of S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 119, at 27–28; Carrick Mollenkamp & Brett Wolf, Special Report: HSBC’s Money-Laundering Crackdown Riddled with Lapses, Reuters (July 13, 2012, 8:59 PM), <http://www.reuters.com/article/2012/07/14/us-hsbc-compliance-delaware-idUSBRE86C18H20120714>.

lic attention: “[F]our years after the financial crisis, the Department appears to have firmly set the precedent that no bank, bank employee, or bank executive can be prosecuted.”<sup>181</sup> And at the time, Senator Elizabeth Warren put it this way:

[I]f you’re caught with an ounce of cocaine, the chances are good you are going to jail. If it happens repeatedly, you may go to jail for the rest of your life. But evidently, if you launder nearly \$1 billion for drug cartels and violate our international sanctions, your company pays a fine and you go home and sleep in your own bed at night . . . .<sup>182</sup>

The HSBC prosecution agreement had detailed an endemic lack of compliance across the bank’s operations, including at central compliance departments and not just far-flung subsidiaries. Yet in the biggest such money-laundering and sanctions case in U.S. history, no officers or employees were prosecuted for their roles.

Then-Assistant Attorney General Lanny Breuer offered this explanation why: “As bad as HSBC’s conduct was, this is not a case where the HSBC people intended—intended—to create money laundering.”<sup>183</sup> The suggestion was that the problem involved the difficulty of proving the intent of individuals working at the bank (perhaps putting to one side individuals working at foreign subsidiaries). Should we credit such a statement? Was that the best that the DOJ could offer, and should it be obligated, as a matter of policy and practice at least, to say more when such serious violations go unpunished at the individual level? The calculus in such cases cannot simply be reduced to the difficulty of proving intent. Presumably it also involved practical considerations, negotiations with the bank itself, and the potential gains from targeting employees. As I have described, the HSBC case was no aberration. Bank employees simply are not prosecuted when the bank settles a prosecution for such

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<sup>181</sup> Press Release, Senator Jeff Merkley, *supra* note 122.

<sup>182</sup> Patterns of Abuse: Assessing Bank Secrecy Act Compliance and Enforcement Hearing Before the S. Comm. on Banking, Housing & Urban Affairs, 113th Cong. 10 (2013) (statement of Sen. Elizabeth Warren).

<sup>183</sup> James O’Toole, HSBC: Too Big to Jail?, CNN (Dec. 12, 2012, 1:08 PM), <http://money.cnn.com/2012/12/12/news/companies/hsbc-money-laundering>. Amendments to the Bank Secrecy Act in 1994, reacting to *Ratzlaf v. United States*, 510 U.S. 135 (1994), made clear prosecutors need only show action taken “for the purpose of evading the reporting requirements,” rather than requiring “that the defendant knew that structuring was illegal.” 31 U.S.C. §§ 5322(a), 5324(a) (1994); H.R. Rep. No. 103–438, at 22 (1994).

money laundering-related charges. To be sure, only the bank itself is obligated to satisfy Bank Secrecy Act provisions requiring the “financial institution” itself to adopt adequate anti-money laundering controls.<sup>184</sup> But any number of other crimes could be charged if employees engaged in money laundering, made false statements, concealed illegal transactions, or approved fraudulent transactions. Can it be that there was never the ability to show intent? And what about non-money laundering charges: Could it be that no employees committed other forms of fraud, or the same Bank Secrecy Act violations that the bank itself admitted were committed? The heated public criticism of the HSBC agreement should not have surprised the DOJ. One wonders whether the bank really did serve as a scapegoat in that case, and whether the same type of calculus may commonly be conducted in other types of corporate criminal cases.<sup>185</sup>

From the outside it is very difficult to know, because corporate prosecution agreements are often not transparent and do not include detailed statements of fact concerning the mens rea of the individual officers and employees (the HSBC case is somewhat exceptional because we also have publicly available the detailed results of the Senate Subcommittee investigation). Not having to prove mens rea is a chief advantage of pursuing the corporation and not the individuals. Perhaps that is one reason so many corporate prosecutions settle. Professor Henry W. Edgerton observed long ago, in 1927, how “juries—as has long been notorious in civil cases—are not so reluctant to find corporations guilty as to find individuals guilty.”<sup>186</sup>

The deferred and non-prosecution agreements are dominated by fraud prosecutions (wire fraud, securities fraud, mail fraud, as well as tax fraud and health care fraud) in which mens rea may pose an obstacle.<sup>187</sup> Fraud does require proof of intent to engage in a scheme to defraud, although intent to defraud can be proven circumstantially; as the D.C. Circuit has put it, “The requisite intent under the federal mail and wire fraud statutes may be inferred from the totality of the circumstances and

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<sup>184</sup> See, e.g., 31 U.S.C. § 5318(h) (2012) (“[E]ach financial institution shall establish anti-money laundering programs . . .”).

<sup>185</sup> See *supra* Section I.B.

<sup>186</sup> Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 *Yale L.J.* 827, 834 (1927).

<sup>187</sup> On challenges of detecting and deterring corporate fraud more broadly, see Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 *Va. L. Rev.* 1295, 1341–42 (2008). For a richer theory of complex commercial frauds, see Samuel W. Buell, *Novel Criminal Fraud*, 81 *N.Y.U. L. Rev.* 1971, 1974–75 (2006).

need not be proven by direct evidence.”<sup>188</sup> U.S. Attorney Preet Bharara summarized the finger pointing that typically occurs in white-collar prosecutions well:

This guy’s going to testify, “My accountant’s a smart guy—I just relied on my accountant.” The accountant’s going to say, “I just relied on what he gave me,” and everyone has plausible deniability. That’s a simple example of a way in which people can get away with even criminal activity when they’re making false certifications to the government.<sup>189</sup>

Due to the lack of transparency of the corporate agreements, and the underlying complexity of the conduct itself, critics of the failure to prosecute mortgage fraud following the Global Financial Crisis cannot easily say whether prosecutors were right or wrong to claim that proving intentional fraud simply posed too many challenges. Perhaps more forceful investigations could have turned up smoking gun evidence of intent to defraud. Or perhaps these were sophisticated actors who could point fingers at each other, or their lawyers, or their accountants, or their risk managers, or others, just like in U.S. Attorney Bharara’s pithy example.

The problem returns us to the problem of organizational complexity. Indeed, observers of some of the most high-profile trials, such as the trial of HealthSouth CEO Richard Scrushy, in which he was acquitted, have highlighted the sheer complexity of the indictment, the length of the trial itself (five months), the necessity of relying on testimony of other executives who had pleaded guilty, and “the lack of a paper trial directly linking Scrushy to the fraud.”<sup>190</sup> Prosecutors can certainly try to make cases less complex for jurors; some believe that explains outcomes in the Tyco case, at which CEO Dennis Kozlowski and CFO Mark Swartz had a mistrial, but they were convicted at a more streamlined “short and sweet” second trial.<sup>191</sup> A more concise explanation of com-

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<sup>188</sup> *United States v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979); U.S. Attorneys’ Manual, *supra* note 1, § 949.

<sup>189</sup> George Packer, *A Dirty Business*, *New Yorker*, June 27, 2011, at 42, available at <http://www.newyorker.com/magazine/2011/06/27/a-dirty-business>.

<sup>190</sup> Brickey, *In Enron’s Wake*, *supra* note 132, at 410–11; Reed Abelson & Jonathan Glater, *A Style That Connected with Hometown Jurors*, *N.Y. Times*, June 29, 2005, at C1.

<sup>191</sup> Brickey, *In Enron’s Wake*, *supra* note 132, at 409–11; Carrie Johnson, *For Prosecutors, Shorter Is Sweeter: Government Got Chance to Analyze, Fix Mistakes*, *Wash. Post*, June 18, 2005, at D1; Pete McEntegart, *One Angry Man: A Juror Gives an Inside Account of Why the Tyco Trial Fell Apart*, *Time*, Apr. 12, 2004, at 47.



plex criminality may help secure convictions at cases that go to trial, but that does not address the difficulty of uncovering sufficient evidence to proceed to trial in the first instance.

#### *E. Massive Misdemeanors*

What if the corporate crime did not involve a fraud or a crime in which intent must be shown, but rather a strict liability offense? In contrast to fraud prosecutions, in areas in which the offenses are strict liability or regulatory offenses, such as for some environmental crimes, or immigration crimes, or certain food and drug offenses, issues of proof may be far more simplified and prosecuting both individuals and corporations would not pose the same obstacles. Such offenses would likely be relatively easy to pursue against individuals, but would doing so be worthwhile? Some very large-scale corporate prosecutions may involve conduct that for the individuals involved amounts to a misdemeanor or regulatory violation.

The sheer scope of the harm involved may make the case one involving massive fines. One could see how in such a case, individual wrongdoers would be unable to meaningfully contribute to the payment of the appropriate penalties. Take the largest misdemeanor prosecutions of all time: the Big Pharma settlements of misdemeanor pharmaceutical misbranding charges, such as the \$1.3 billion guilty plea of Pfizer's subsidiary Pharmacia & Upjohn in 2009.<sup>192</sup> Would justice have better been done if thousands of sales employees had been convicted of misdemeanors as well? Perhaps if they faced the more serious charges that Pfizer and its subsidiary both avoided, because a non-misdemeanor would have resulted in disbarment from Medicare and Medicaid that could have harmed the public.<sup>193</sup> Only two sales managers were prosecuted in that Pfizer case, and perhaps understandably, both received probation, arguing that they were low-level individuals who were following orders of

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<sup>192</sup> See 21 U.S.C. § 333(a)(1) (2012) ("Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than \$1,000, or both."); Plea Agreement at 2, 6, *United States v. Pharmacia & Upjohn Co.*, No. 1:09-cr-10258-DPW-1 (D. Mass. Aug. 31, 2009), available at [http://lib.law.virginia.edu/Garrett/plea\\_agreements/pdf/Pharmacia.pdf](http://lib.law.virginia.edu/Garrett/plea_agreements/pdf/Pharmacia.pdf).

<sup>193</sup> 42 U.S.C. § 1320a-7 (2006); Health Care Programs: Fraud and Abuse; Revised OIG Exclusion Authorities Resulting from Public Law 104-191, 63 Fed. Reg. 46,676, 46,680 (Sept. 2, 1998) (codified at 42 C.F.R. pts. 1000, 1001, 1002, 1005).

many levels of supervisors.<sup>194</sup> Prosecutors could have used such cases, though, to work their way up the chain and hold higher-ups accountable. Doing so would certainly add far more of a deterrent to such a misdemeanor prosecution at the corporate subsidiary level.

But one would likely not feel as if justice is done if large numbers of employees or even supervisors are prosecuted for truly misdemeanor violations, such as immigration violations, while the company pays the fine. Misdemeanor prosecutions would themselves not result in serious punishments, and if the goals of the criminal statute are regulatory, then the best course may be to pursue the public welfare-type offense against the corporation, which is in the best position to pay the fine, compensate victims, and adopt regulatory reforms. Corporations may be in the best position to pay restitution to and compensate victims. Individuals may not be able to pay sufficient fines, as discussed, and in the case of a “massive misdemeanor,” fines may be the most appropriate punishment.

#### *F. Structural Reforms*

Corporations can be rehabilitated, given the mutability and flexibility of the organizational form, and a central goal of these prosecution agreements is to secure the adoption of structural reforms. Managers can be fired, new leadership can adopt compliance programs and governance reforms, and independent monitors can review changes to policies and practices.<sup>195</sup> The structural reform of a leading company can set out a model for industry and assist in broader efforts by regulators to promote best practices to prevent violations from happening in the first instance.<sup>196</sup> Ideally, corporate prosecutions can serve those goals to promote ethics and compliance; in practice such efforts may be uncertain and uneven.<sup>197</sup> However, those are goals quite apart from individual prosecutions.

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<sup>194</sup> Jim Edwards, *Pfizer Exec: Company Approved of Off-Label Bextra Promotion*, CBS Moneywatch (June 22, 2009 5:15 PM), <http://www.cbsnews.com/news/pfizer-exec-company-approved-of-off-label-bextra-promotion>; David Evans, *Pfizer Broke the Law by Promoting Drugs for Unapproved Uses*, Bloomberg (Nov. 9, 2009, 12:01 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4yVInYxCGoA>.

<sup>195</sup> See Garrett, *Too Big to Jail*, *supra* note 5, at ch. 10.

<sup>196</sup> For early work describing a structural reform model for corporate prosecutions, as well as its features and challenges, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853 (2007).

<sup>197</sup> See Garrett, *Too Big to Jail*, *supra* note 5, at ch. 10; see also Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 952–53, 966 (2009) (referring to

Further, I am not convinced that taking those structural reform goals seriously necessarily comes at the expense of pursuing individual prosecutions. Indeed, I argue, and develop further in the next Part, that some means for securing more successful structural reforms, like specifying governance terms of agreements, demanding that the company audit compliance, imposing monitors, and seeking judicial supervision of implementation of compliance, can be largely accomplished by delegating structural reform to courts, monitors, and the company. Prosecutors could then focus on what they do best: holding individuals accountable.

### III. PRIORITIZING INDIVIDUAL ACCOUNTABILITY

A range of reforms could improve the intersection of corporate and individual criminal liability. I do not advocate still-broader definitions of federal white-collar crimes; they are already quite broad and sentences are already quite stiff. Instead, I focus on the discretion exercised by prosecutors and the resources they require to undertake complex corporate investigations. First, I propose that longer statutes of limitations provide more time for complex corporate investigations. Second, I propose changes to the Speedy Trial Act, to prevent deferred prosecution agreements from being approved by judges should a company not cooperate by providing information regarding culpable individuals and their conduct. Third, I describe how additional investigative resources could assist the relevant enforcement agencies as well as prosecutions. Finally, I describe how corporate prosecution agreements can themselves create conditions that deter individual corporate crimes and enhance accountability within organizations.

#### *A. Legislation to Improve Corporate Criminal Enforcement*

What can be done to make corporate prosecutions more effective (and more common)? Some argue that we simply need more-expansive federal criminal laws that can criminalize more business conduct. I agree with federal criminal law scholars who view the answer as not to broaden white-collar crimes to make negligent business decisions or negligent

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compliance); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *Vand. L. Rev.* 1343, 1386, 1393–94 (1999) (referring to compliance and ethics); Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 *Am. Crim. L. Rev.* 159, 164–67 (2008) (referring to deferred prosecutions).

supervision at financial institutions crimes. Despite policy and constitutional concerns, some have recommended as much.<sup>198</sup> Professors Sam Buell and Peter Henning have elegantly dissected the shortcomings of such approaches.<sup>199</sup> Federal crimes are already quite broad, including federal fraud and other key crimes commonly charged against corporations. To be sure, it is a separate question whether there should have been prosecutions for risk-taking behavior preceding the Global Financial Crisis in 2007 and 2008. In cases in which corporations were prosecuted, and in which prosecutors *have* concluded that crimes were committed, critics are right to ask why prosecutors have not named who in particular committed such crimes. As I have discussed, it is impossible to know from the outsider's perspective to what degree undetected crimes could have been uncovered. One potential way to enhance the ability to target high-ups would be to expand the responsible corporate officer doctrine beyond the limited settings in which it currently applies, so that corporate officers would face strict but misdemeanor criminal liability for supervising employees who committed federal crimes.<sup>200</sup>

What other statutory or policy changes could empower criminal prosecutions for financial and corporate crimes? Perhaps a sustained investment in investigation resources and far larger teams of financial fraud prosecutions could make the playing field more even. In other areas, if there is a concern that regulatory enforcers and prosecutors do not have adequate resources, we deputize and incentivize private attorneys general. Businesses may very much resent the increased litigation that results, and perhaps there are dim hopes for such legislation, where if anything, for example, Congress has acted to limit private securities litigation.<sup>201</sup> However, the Dodd-Frank Act empowers whistleblowers in various provisions, with accompanying regulations that may bring far

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<sup>198</sup> Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys (June 16, 1999) (on file with the author); Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. Rev. Books, Nov. 10, 2011, at 23, 25–26; Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, Atlantic, Jan./Feb. 2013, at 60, 70–71.

<sup>199</sup> See Buell, *Is the White Collar Offender Privileged?*, supra note 130; Peter J. Henning, *The Debate over Wall St. Enforcement*, N.Y. Times (Oct. 27, 2014, 11:58 AM), <http://dealbook.nytimes.com/2014/10/27/the-debate-over-wall-st-enforcement>.

<sup>200</sup> For a discussion of responsible corporate officer doctrine, see Garrett, *Too Big to Jail*, supra note 5, at 109–10.

<sup>201</sup> On the ability of the financial industry to weaken financial reforms post-Global Financial Crisis, see Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. Cin. L. Rev. 1283, 1289–91 (2013).

more corporate misconduct to light.<sup>202</sup> Below I detail proposals for future legislation and policy changes that could similarly enhance the ability to bring corporate and individual prosecutions: (1) lengthening statutes of limitations for financial crimes; (2) adding corporate-prosecution-specific criteria for approval of deferred prosecution agreements under the Speedy Trial Act; and (3) revised organizational sentencing guidelines.

### *1. Statutes of Limitations*

Another policy change could be to lengthen statutes of limitations for key corporate crimes, recognizing that such complex investigations require corporate cooperation over many years in order to unravel who did what. Prosecutors have been reported to face real pressure to adequately investigate cases in the wake of the 2007 financial crisis, and have filed civil charges with other statutes of limitations, facing the expiration of the criminal limitations period.<sup>203</sup> The new DOJ guidance on charging individuals notes the problem of delays in corporate investigations, and suggests making “all efforts” to charge culpable individuals within limitations periods or to obtain a tolling agreement or court order tolling the limitations period.<sup>204</sup> The general federal statute of limitations is five years.<sup>205</sup> The Savings and Loan Scandal in the late 1980s resulted in an extension to seven years, from five years, of the Major Fraud Act of 1988, regarding federal procurement fraud.<sup>206</sup> Congress expressed concern that the “extraordinary complexity” of such procurement fraud cases required more time for adequate investigation.<sup>207</sup> Theft of a major

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<sup>202</sup> See Corporate Law—Securities Regulation—Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC., 124 Harv. L. Rev. 1829 (2011).

<sup>203</sup> Jason M. Breslow, *As Deadlines Loom for Financial Crisis Cases, Prosecutors Weigh Their Options*, Frontline (Jan. 22, 2013, 9:40 PM), <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/as-deadlines-loom-for-financial-crisis-cases-prosecutors-weigh-their-options/>.

<sup>204</sup> Yates Memo, *supra* note 33, at 6.

<sup>205</sup> 18 U.S.C. § 3282(a) (2012) (“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”).

<sup>206</sup> 18 U.S.C. § 1031(f) (2012); The Major Fraud Act, and the Government Fraud Law Enforcement Act of 1987: Hearing on H.R. 3911 and S. 1958 Before the Comm. on the Judiciary, 100th Cong. 11 (1988) (statement of Sen. Orrin G. Hatch).

<sup>207</sup> S. Rep. No. 100-503 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5969, 5970-71.

artwork now brings with it a twenty-year statute of limitations.<sup>208</sup> Indictment of “John Doe” unknown defendants is permitted in cases in which a felon’s DNA profile is known; perhaps “John Doe” defendants could be named within a statute of limitations where a corporation has admitted to a crime, but no individuals have yet been specifically identified.<sup>209</sup> Offenses that “affect[]” a financial institution, including fraud and wire fraud that affect a financial institution, now have a ten-year statute of limitations.<sup>210</sup> An extension to a ten-year statute of limitations, for example, could be drafted to include all offenses by or affecting organizations, whether they be financial institutions or other corporations or partnerships. An extension could alternatively be drafted to include all offenses involving actual or intended monetary loss or gain of over, say, ten million dollars. Or longer, say, even fifteen-year statutes of limitations could be adopted in specific areas, such as crimes involving financial institutions, or cases involving public corporations and their subsidiaries.

## 2. *Speedy Trial Act Improvements*

An additional policy change could target the decision to provide corporations with deferred prosecution agreements. Under Title 18, United States Code, Section 3161(h)(2) of the Speedy Trial Act, a judge may defer the prosecution of a defendant to permit the defendant to show “good conduct.”<sup>211</sup> The provisions of the Act were generally intended to “strengthen[] the supervision over persons released pending trial” and encourage the then-“current trend” of creating diversion programs as an alternative to prosecution for low-level, nonviolent individual offenders.<sup>212</sup> However, the drafters of that Speedy Trial Act provision, in 1974, were totally unfamiliar with the concept of a corporate deferred prosecution agreement, the first of which were entered in the 1990s, and which

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<sup>208</sup> 18 U.S.C. § 3294 (2012).

<sup>209</sup> See § 3297.

<sup>210</sup> § 3293. Congress added a “mortgage lending business” to the definition of “financial institution” in 2009. § 20.

<sup>211</sup> § 3161(h)(2) (“Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.”).

<sup>212</sup> See H.R. Rep. No. 93-1508, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7401; S. Rep. No. 93-1021, at 36-37 (1974); see also Anthony Partridge, *Fed. Judicial Ctr., Legislative History of Title I of the Speedy Trial Act of 1974*, at 117 (1980) (referring to good behavior).

did not begin to be common until after 2003, when the Department of Justice revised its guidelines for organizational prosecutions.<sup>213</sup> Such deferred prosecution agreements typically focus on not just criminal fines, forfeiture, restitution, or community service payments, but also on cooperation, adoption of compliance, and other “structural reforms.”<sup>214</sup> What “good conduct” means for a corporation, required to satisfy detailed conditions subject to supervision by prosecutors, means something very different than for an individual. Corporate offenders are nothing like nonviolent, juvenile, or low-level individual offenders. Nor does the statute provide any standard for a judge to evaluate whether a case is appropriate for deferral of prosecution. As a result, judges have increasingly struggled to assess what their role should be when deciding whether to approve a deferred prosecution of a corporation, which can raise far more complex issues than the typical individual matter.<sup>215</sup>

The Speedy Trial Act could, and should, be revised to include a separate provision specific to corporations seeking deferred prosecution agreements. One part of that revised standard could provide judges with a set of standards for deciding whether to grant such a waiver of the regular speedy trial deadlines. One statutory consideration could be the adequacy of the cooperation of the company. A judge could inquire whether that cooperation produced evidence concerning the culpable individuals at the company.

Judges currently scrutinize the adequacy and degree of a criminal defendant’s “substantial assistance” at sentencing; for corporations, they could do so at the deferred prosecution stage, which is increasingly the

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<sup>213</sup> Garrett, *Too Big to Jail*, supra note 5, at ch. 3.

<sup>214</sup> Garrett, supra note 196.

<sup>215</sup> E.g. *United States v. HSBC Bank USA*, No. 1:12-cr-00763-JG, 2013 WL 3306161, at \*3 (E.D.N.Y. July 1, 2013) (citing to a judge’s supervisory authority and noting that “approving the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself”). I submitted an amicus brief on this issue regarding a proposed deferred prosecution agreement, in which I presented in greater detail my views concerning the scope of a judge’s review authority under the current Speedy Trial Act provision. Memorandum of Law of Amicus Curiae Law Professor at 18–19, *United States v. Saena Tech Corp.*, No. 14-cr-00066-EGS (D.D.C. Aug. 22, 2014). In contrast, a defendant may not challenge the prosecutor’s discretionary decision to *deny* a deferred prosecution agreement. *United States v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988) (“A defendant has no right to be placed in pretrial diversion. The decision . . . is one entrusted to the United States Attorney.” (citations omitted)).

stage that matters for the largest corporate offenders.<sup>216</sup> Judges have in rare cases also rejected as contrary to the public interest corporate plea agreements that involved immunity or non-prosecution of the relevant corporate officers or employees.<sup>217</sup> The first judge to do so, Federal District Judge Richard J. Leon, rejected outright a deferred prosecution agreement with a company, “looking at the DPA in its totality,” and noting that not only were “no individuals . . . being prosecuted for their conduct at issue here,” but also “a number of the employees who were directly involved in the transactions are being allowed to remain with the company.”<sup>218</sup>

In order to clarify the role of a judge when reviewing a corporate prosecution agreement, the relevant considerations could be set out in the Speedy Trial Act at the deferred prosecution approval stage to ensure that a company receives leniency only if it provides “substantial” cooperation that actually supports prosecutions of culpable individuals, or if it can provide very good reasons why such individual prosecutions cannot result.

### *3. Organizational Sentencing Guidelines Revisions*

The Organizational Sentencing Guidelines provide a detailed and somewhat flexible set of guidelines for the sentencing of organizations in federal court.<sup>219</sup> While they are not used in cases negotiated out of court in deferred and non-prosecution agreements, while the guidelines are themselves now advisory,<sup>220</sup> and while many corporate plea agreements are presented as “binding” agreements to federal judges,<sup>221</sup> the Guidelines can still have an effect on negotiations between prosecutors and companies. The Guidelines, for example, emphasize corporate compliance as a mitigating factor, and have influenced the development of compliance programs and compliance as a central feature of corporate

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<sup>216</sup> See 18 U.S.C. § 3553(e); U.S. Sentencing Guidelines Manual § 5K1.1(a)(1) (2014) (asking the judge to consider “the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered”).

<sup>217</sup> *United States v. Carrigan*, 778 F.2d 1454, 1462, 1466–67 (10th Cir. 1985); *United States v. Freedberg*, 724 F. Supp. 851, 853 (D. Utah 1989).

<sup>218</sup> *United States v. Fokker Servs. B.V.*, No. 14-cr-121 (RJL), 2015 WL 729291, at \*5 (D.D.C. Feb. 5, 2015). That ruling is as of the date of publication, still pending appeal.

<sup>219</sup> U.S. Sentencing Guidelines Manual § 8D1.1 (2014).

<sup>220</sup> *United States v. Booker*, 543 U.S. 220, 246 (2005).

<sup>221</sup> See *Garrett, Too Big to Jail*, *supra* note 5, at 154.



prosecution guidelines and negotiations.<sup>222</sup> Scholars, such as Professor Jennifer Arlen, have called these Guidelines a “failure” because they fail to adequately reward cooperation and self-reporting by companies.<sup>223</sup> The Guidelines reward an organization that “fully cooperated in the investigation.”<sup>224</sup> What that full cooperation means is then further defined:

A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the organization itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the organization nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the organization’s efforts to cooperate fully, the organization may still be given credit for full cooperation.<sup>225</sup>

This additional commentary from the Sentencing Commission appropriately calls cooperation regarding culpable individuals a “prime test” of cooperation. However, it highlights just cooperation that can “identify” the individuals responsible and not also the cooperation required to fully investigate those individuals and then prosecute them. To be sure, individuals may assert Fifth Amendment privilege or attorney-client and other privilege, and not cooperate themselves, as the commentary indicates. However, full corporate cooperation could be defined as providing full information regarding culpable individuals and cooperating during the pendency of all investigation and prosecution of culpable individuals. The cooperation that can earn an organization credit looks nothing like the “substantial assistance” that individuals must provide and alone can benefit from, if prosecutors move to recognize it at sentencing and in which case a judge must then evaluate the significance of the individual’s assistance.<sup>226</sup> The new guidance from the Department of Justice

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<sup>222</sup> U.S. Sentencing Guidelines Manual § 8B2.1 (2014) (“Effective Compliance and Ethics Program”); id. § 8C2.5(3); Garrett, *Too Big to Jail*, supra note 5, at ch. 3.

<sup>223</sup> Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. Miami L. Rev. 321, 346 (2012).

<sup>224</sup> U.S. Sentencing Guidelines Manual § 8C2.5(g)(1)–(2) (2014).

<sup>225</sup> Id. § 8C2.5 cmt. n.13 (2014).

<sup>226</sup> 18 U.S.C. § 3553(e) (2012); U.S. Sentencing Guidelines Manual § 5K1.1 (2014).

will hopefully tighten the requirements for obtaining credit for corporate cooperation; the Sentencing Commission can now tighten the guidelines requirements as well.<sup>227</sup>

Absent stricter standards and guidance from the Sentencing Commission, legislation in the form of an organization-specific standard for Title 18, United States Code, Section § 3553(e) could similarly tighten the test for corporation cooperation and link it more closely to true self-reporting of misconduct and significant assistance in investigating and prosecuting culpable individuals within the organization. A range of other changes to the Organizational Guidelines could and should be made, and are beyond the scope of this Article; however, that simple change could highlight the importance of cooperation in individual prosecutions to the sentence that a corporation ultimately receives.

### *B. Department of Justice Policy*

The Department of Justice, as noted, has increasingly articulated a policy preference for targeting culpable individuals in corporate crime cases. The DOJ Guidelines contained in the U.S. Attorneys' Manual have long emphasized, as described, that “[o]nly rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers.”<sup>228</sup> Public concern regarding criminal prosecutions of corporations that describe culpable conduct, but which are unaccompanied by individual prosecutions, has made the question quite stark—if that has been the policy, then why is no one going to jail? Perhaps the new policy indicating that such language should be taken more seriously, and tasking prosecutors with a focus on individual culpability at the earliest stages of corporate investigations, will represent a real change in practice. Anecdotally, corporate counsel do appear to be receiving the message that cooperation must be more concrete and focused on individual criminal responsibility, because DOJ officials have recently highlighted the importance of “true” corporate cooperation that provides “evidence against” the “culpable individuals.”<sup>229</sup> There certainly has not been any discernable trend towards more individual prosecutions

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<sup>227</sup> The Yates Memo adds that prosecutors will not support “a cooperation-related reduction at sentencing” absent the company providing “complete factual information about individual wrongdoers.” Yates Memo, *supra* note 33, at 3 n.2.

<sup>228</sup> See U.S. Attorneys' Manual, *supra* note 1, § 9-28.200(B).

<sup>229</sup> Miller, *supra* note 32.

in corporate cases. Further, as described, in such cases, although there are defensible reasons why prosecutors might choose to focus solely on the entity, there is so much variation between areas of federal practice that the impression one has is of an entirely ad hoc approach.

Could the new changes or still additional changes at the DOJ level improve matters? Prosecutors should have to do far more to justify, even if internally, why they have targeted individuals in some areas and not in others. Are employees who participate in price fixing simply more culpable than bankers who ignore signs of money laundering or sales representatives who promote off-label marketing of prescription drugs? Perhaps so, but simply stating that the DOJ will endeavor to prosecute all culpable individuals does not explain what the actual policy or practice is. Declinations need not and should not be public, to protect reputations of persons that prosecutors conclude did no criminal wrong. But where prosecutors have found that a company's employees committed crimes, but no employees are prosecuted, more should be explained. There is even a concern that nonpublic amnesty or side-letter deals have been reached with employees. To what degree that occurs, we cannot know. The DOJ has at least clarified the relative importance of individual culpability in corporate cases and the degree to which prosecutors should credit cooperation that does not result in clear proof of individual culpability. Finally, the DOJ has announced that to be "eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct."<sup>230</sup>

### *C. Individual Accountability Through Corporate Prosecution*

Even in cases in which the corporation is the ostensible focus, judges and prosecutors can do more to insist on personal accountability. Structural reforms can themselves create detailed forms of accountability within a firm, linking compensation, bonuses, and supervision to compliance with criminal law and related regulations. The HSBC agreement, for example, which received prominent criticism because it resulted in no individual prosecutions, also contained terms requiring that all senior executives have bonuses based on "the extent to which the senior executive meets compliance standards and values," together with the amount

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<sup>230</sup> Yates Memo, *supra* note 33, at 3.

of the “clawed back” bonuses for senior officers.<sup>231</sup> The bank spent hundreds of millions of dollars on compliance improvements to prevent money laundering, including hiring almost eight hundred new employees (where they had only about ninety full-time anti-money-laundering employees before) and adding new automated systems to detect potentially problematic transactions. Such far-reaching compliance reforms may have great benefits to the public interest, perhaps farther reaching than individual prosecutions, even if these benefits cannot be easily measured in penalty dollars paid or months of jail time served.

In addition, corporate prosecutions can serve a “blaming” function, as Professor Samuel Buell has noted, but the scapegoat concern remains if that reputational harm falls more on the artificial entity than on the particular people whose actions brought about the criminal activity.<sup>232</sup> Senior management can be required to personally take responsibility for crimes; for example, there is the CEO “walk of shame” provision in the Organizational Sentencing Guidelines, in which the judge can require a corporation that has accepted responsibility for its crime to send its CEO in to appear in court and receive the sentence and perhaps personally accept responsibility.<sup>233</sup> In just a few high-profile cases, federal judges have insisted that the CEO or executives do so, but perhaps judges should more routinely ask that the top management place their reputations more concretely on the line; prosecutors could also more often demand apologies as part of settlements.<sup>234</sup>

All of this is to highlight that there is no necessary tradeoff between corporate and individual accountability. While perhaps aspirational, the DOJ guidelines are quite right to highlight how “prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.”<sup>235</sup> Corporate criminal prosecutions can be used to enhance accountability within firms, to secure cooperation in investigations of individuals, and to accomplish still other important

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<sup>231</sup> Statement of Facts at 27, 30, *United States v. HSBC Bank USA*, No. 12–763 (E.D.N.Y. Dec. 11, 2012).

<sup>232</sup> Buell, *supra* note 35, at 500–01.

<sup>233</sup> See U.S. Sentencing Guidelines Manual § 8C2.5 cmt. n.15 (2014) (“The court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the organization has clearly demonstrated recognition and affirmative acceptance of responsibility.”).

<sup>234</sup> Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 *S. Cal. L. Rev.* 959, 961–62 (1999).

<sup>235</sup> See U.S. Attorneys’ Manual, *supra* note 1, § 9-28.200.

goals, such as payment of fines and compensation of victims.<sup>236</sup> While in some areas there are real questions raised by the relative lack of individual prosecutions, it would be a mistake to conclude that corporate prosecutions can be wholly substituted for individual prosecutions.

#### CONCLUSION

The criticisms of federal failures to prosecute top executives and officers after high-profile corporate crimes, particularly after the Global Financial Crisis, have been unrelenting.<sup>237</sup> The non-prosecution of officers and individuals that I have documented, accompanying settlements in some of the largest and most serious corporate crimes, provides still more cause for concern. Department of Justice explanations for the lack of individual prosecutions in particular high-profile cases like the HSBC case, or in general as a matter of policy, are not always convincing or fully responsive.

As timely as this problem is today, the concern is not a new one. Take a law review note published in 1976, which complained of how the “complexity of modern corporate decisionmaking tends both to obscure and to diffuse responsibility for corporate actions.”<sup>238</sup> Consider also a law review note published in 1961 (by now-Professor Alan Dershowitz), which similarly expressed concern with government “inability and unwillingness to obtain criminal convictions against individuals as well as corporations in cases of acquisitive corporate crime.”<sup>239</sup> A 1946 congressional report focused on how few antitrust prosecutions resulted in

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<sup>236</sup> On the question whether internal enforcement and plaintiffs’ litigation could better hold officers accountable, see, e.g., Megan W. Shaner, *The (Un)Enforcement of Corporate Officers’ Duties*, 48 U.C. Davis L. Rev. 271, 283–84, 322 (2014).

<sup>237</sup> To add additional examples to the collection of critical responses cited in the Introduction, see, e.g. Jesse Eisinger, *The Feds Stage a Sideshow, While the Big Tent Sits Empty*, N.Y. Times DealBook (Dec. 8, 2010, 3:09 PM), [http://dealbook.nytimes.com/2010/12/08/where-are-the-financial-crisis-prosecutions/?\\_r=0](http://dealbook.nytimes.com/2010/12/08/where-are-the-financial-crisis-prosecutions/?_r=0); Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. Times, (Apr. 14, 2011), <http://www.nytimes.com/2011/04/14/business/14prosecute.html>; Frank Rich, *Obama’s Original Sin*, N.Y. Mag. (July 3, 2011), <http://nymag.com/news/frank-rich/obama-economy/presidents-failure>. For an analysis of these criticisms and an explanation of why they are overstated, see Peter Henning, *If There Is Overcriminalization, Why Are There So Many Complaints About the Failure to Prosecute Wall Street Bankers?* (forthcoming, on file with author).

<sup>238</sup> Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 Yale L.J. 1091 (1976).

<sup>239</sup> Comment, *Increasing Community Control over Corporate Crime—A Problem in the Law of Sanctions*, 71 Yale L.J. 280, 292 n.50 (1961).

jail sentences for corporate officers.<sup>240</sup> Professor Edwin H. Sutherland's seminal work on the problem of white-collar crime focused on concerns that business elites escaped adequate punishment for the harms they caused.<sup>241</sup> One can look at any given decade over the past century and readily observe similar media, scholarly, and government criticism of prosecutors for getting the balance of corporate and individual prosecutions wrong.<sup>242</sup> What would it mean to get that balance right?

The empirical data presented in this Article place the non-prosecution of individuals accompanying corporate prosecution agreements in the context of what happens when individuals are charged. What one sees are a high percentage of prosecution losses far exceeding what is typical in white-collar matters, the relative lack of jail time or severe sentences, and the mixed results. These enforcement patterns are less monolithic than commonly understood.<sup>243</sup> Prosecution practices do vary, and not all corporate prosecutions are alike. Nor are the results obtained dramatically different, in some areas, from the far larger numbers of fraud prosecutions, for example, of individuals that tend to lack prior criminal records. However, to the extent that one is troubled by the uneven results in these individual prosecutions, I have underscored how these criticisms of current practice should not be taken too far to suggest that individual prosecutions are a substitute for corporate prosecutions.

Corporations are useful scapegoats. Putting to one side practical obstacles towards prosecuting individuals, and the ways that corporate cooperation can in theory assist in overcoming those obstacles, prosecuting corporations can accomplish unique and important social and criminal goals. This reasoning supported the U.S. Supreme Court's approval of a respondeat superior standard for corporate criminal liability. As the Court put it in its 1909 ruling in *New York Central Railroad v. United States*, it "is a part of the public history of the times" that the particular

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<sup>240</sup> Staff of Monopoly Subcomm., Comm. on Small Bus., 79th Cong., United States Versus Economic Concentration and Monopoly 257 (Comm. Print 1946).

<sup>241</sup> Edwin H. Sutherland, White Collar Crime (1949); Edwin H. Sutherland, White-Collar Criminality, 5 Am. Soc. Rev. 1, 9 (1940).

<sup>242</sup> For a bibliography that does one version of that, examining scholarship on the question of corporate criminality liability during the twentieth century, see Joseph F.C. DiMento, Gilbert Geis & Julia M. Gelfand, Corporate Criminal Liability: A Bibliography, 28 W. St. U. L. Rev. 1 (2001).

<sup>243</sup> For a discussion of the variety of approaches towards federal corporate prosecutions, see Brandon L. Garrett, Globalized Corporate Prosecutions, 97 Va. L. Rev. 1775, 1788–1800 (2011) (discussing corporate prosecutions and international regulation).

regulations “could not be effectually enforced so long as individuals only were subject to punishment for violation of the law,” and that situation was why corporations were made criminally liable by Congress for railroad rate violations.<sup>244</sup> Former employees, even if prosecuted, cannot change the corporate policies or culture going forward. They may often be unable to pay a fine or provide restitution to victims. And sometimes even their cooperation in investigations may not be as valuable as that of the corporation itself, depending on what was memorialized in corporate emails and other documents.

Corporations are complex scapegoats. As I have described, the answers to those puzzles cannot be definitively obtained from examining enforcement data, although some evidence does emerge from these patterns. The deferred and non-prosecution agreements disproportionately involve fraud prosecutions in which mens rea may pose an obstacle. Bank secrecy and FCPA cases may also involve still additional practical obstacles including far-flung operations with foreign employees and complex shared compliance responsibilities. Prosecuting individuals requires a substantial investment of resources, and in areas in which large numbers of individuals are prosecuted for seemingly regulatory or non-violent behavior, such as immigration violations or nonviolent drug offenses, those cases are often extremely easy to prove and inexpensive to bring en masse. En masse case processing of so many people, though, should not be the primary goal of our federal criminal system.

A sensible place to begin reconsidering priorities is to consider alternatives to prosecution for nonviolent offenders, as the Department of Justice has begun to do,<sup>245</sup> and conversely, to ask whether resources and cooperation of corporations could be better leveraged. In some areas, such as antitrust, prosecutors have such an approach firmly in place. In others, individual prosecutions are not a priority. Whether a turn towards using corporate prosecutions to more often investigate and prosecute individuals is desirable in particular areas of white-collar practice raises additional complex policy questions.

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<sup>244</sup> 212 U.S. 481, 491, 495 (1909).

<sup>245</sup> Yates Memo, supra note 33; Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013); Press Release, James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks: Alternatives to Incarceration Program: The Use of “Drug Courts” in the Federal and State Systems (May 21, 2012), <http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-speaks-alternatives-incarceration-program-use-drug>.

Corporate complexity can be turned into an advantage. I do not suggest that treating the corporation as a scapegoat is necessarily a pejorative. Focusing on prosecuting the corporation alone can accomplish important social goals, ranging from compensating victims to structural reform, particularly if there is a real focus on implementing effective structural reforms that buttress the goals of regulation. Better use of a corporation as an informant and a cooperator in order to target individual wrongdoers can achieve important social goals as well. There need not be a costly tradeoff between prosecuting individuals and corporations. The costs and benefits should be carefully considered. Much remains unknown about the relationship between preventing crime at the corporate level and at the individual level. While these are not easy problems to study, our currently unconsidered and ad hoc approach towards individual and corporate accountability deserves the criticism it has received.

The entire project of federal corporate prosecutions has rapidly and radically changed over the past decade with the rise of deferred and non-prosecution agreements, the changing terms used to require companies to adopt structural reforms, and the stunning growth in blockbuster fines against corporations in criminal cases. As a result, much remains to be studied and considered as this program of federal corporate criminal enforcement evolves. These data on individual prosecutions accompanying deferred and non-prosecution agreements with corporations suggest far more work needs to be done to examine how prosecutorial discretion is exercised not only in organizational cases but also in accompanying individual prosecutions. Prosecutorial discretion in deciding how to charge an organization is only one piece of the puzzle. Commentators have been right to increasingly focus on the relationship between individual accountability and the corporation. When and whether treating a corporation as a scapegoat is socially useful—which it clearly sometimes is—also raises questions regarding the purposes of corporate criminal liability more broadly.

Complex corporate crimes can best be addressed by complex corporate settlements. How effective those settlements are in holding individuals accountable and preventing future crimes raises still more troubling questions. The Department of Justice has not been amenable to making transparent what occurs when these corporate agreements are implemented, much less to collecting data regarding these prosecutions or their performance. Even if there is no one-size-fits-all prescription for



when corporate employees should be prosecuted, it is clear from these data that individual prosecutions have been neglected, including because there are real challenges in bringing such prosecutions in corporate crime cases. Given the magnitude of these most serious corporate crimes, we should all care deeply about better understanding the relationship between the criminal treatment of individuals and of corporations. Further, as I have argued in this Article, the solution is not to abandon corporate prosecutions in favor of individual prosecutions, as some critics have suggested. A range of statutory, sentencing, and policy changes should be made to tighten the connection between corporate and individual accountability. Corporate prosecutions need not come at the cost of individual accountability. Instead, corporate prosecutions can and should enhance individual accountability.