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WHY DO PROSECUTORS SAY ANYTHING? THE CASE OF CORPORATE CRIME*

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INTRODUCTION

One sentiment about the government's contemporary approach to corporate crime holds that prosecutors have been protective of their enormous, largely unreviewable charging discretion and have appeared to act imperiously and without a sufficient sense of accountability from one case to the next.[1] This view is most commonly

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1. *See*, *e.g.*, *A Mammoth Guilt Trip*, ECONOMIST (Aug. 28, 2014), https://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt [https://perma.cc/AZD5-KJUV] (condemning the profiteering nature of the government's prosecution of private companies, the clandestine nature of the settlements, and the manner in which the government inserts itself into these companies' decision-making structure, all of which contribute to vagueness in the law on this matter); *The Criminalisation of American Business*, ECONOMIST (Aug. 28, 2014), https://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-

held among corporations and their counsel but has also been expressed, in more measured tones, by academic critics of the Department of Justice's ("DOJ") corporate prosecution program.[2] While hankering for legislative reform, critics have persistently called for more transparency and less secrecy in corporate prosecutions, often without exploring what that might entail.[3]

It might be illuminating to flip this sort of claim on its head. Instead of asking, "Why do prosecutors act so arrogant and unaccountable?" one might ask, "Why do they say *so much* and why do they seem *so insecure* about their accountability?" In other words, if prosecutors hold all the cards when it comes to corporate prosecutions, why do they show so many of them?

American prosecutors, it should be remembered, are not obligated to say anything about their cases unless and until they go to court to present those cases at a trial. Even then, there is no requirement for public explanation but simply the reality that they must say something, or at least call a witness, to satisfy their burden of proof. Indeed, standards of professional conduct differentiate prosecutors from other lawyers, including other criminal lawyers, by restricting their freedom to speak and warning against the particular danger that prosecutorial utterances can pose to fairness in the criminal process.[4] The routine American prosecution process is filled

they-do-wrong-legal-system-has-become-extortion [https://perma.cc/X6ZQ-F2PA] (criticizing the increasing prevalence of the government's bringing criminal prosecutions against private companies and the secrecy behind the non-prosecution settlements of those cases).

2. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1326 (2013); Michael Patrick Wilt, *Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecution Agreements*, 43 AM. J. CRIM. L. 61, 65 (2015); *see also* Russell Mokhiber, *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (Dec. 28, 2005), http://www.corporatecrimereporter.com/deferredreport.htm [https://perma.cc/7MFT-76V7].

3. *See* TRANSPARENCY INT'L, CAN JUSTICE BE ACHIEVED THROUGH SETTLEMENTS? 3 (2015), http://files.transparency.org/content/download/1917/12678/file/2015_PolicyBrief1_Settlements_EN.pdf [https://perma.cc/UF4X-N2JU]. *But see* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 48–52 (Va. Pub. Law & Legal Theory Research, Working Paper No. 2017-03, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904035 [https://perma.cc/63YW-NAF5] (proposing various forms of judicial and legislative oversight).

4. *See* AM. BAR ASSOC., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.10 (4th ed. 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html [https://perma.cc/U6G4-S8JM]; *see also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1-7.400 (2017) https://www.justice.gov/usam/usam-1-7000-media-relations#1-7.400 [https://perma.cc/R6GT-6KP2].

with secrecy, from grand jury proceedings to the opacity of charging decisions to the absence of public justification for plea bargains.[5]

Defense lawyers are far less strictly regulated in what they can say outside court and are sometimes counseled, particularly in high-profile cases, to aggressively "try the case in the press."[6] Meanwhile, criminal defense attorneys usually would prefer that prosecutors keep their mouths shut and their court filings terse, and they readily accuse prosecutors of misconduct for engaging in florid or overly revealing conversation about a case prior to trial.[7]

In the always exceptional sub-field of corporate crime, however, the situation is the opposite. It is now routine practice for the DOJ, when prosecuting corporations or settling criminal charges with them, to speak loudly, often, and at length about what it is doing and why.[8] The standard large corporate settlement includes, at a minimum: a lengthy "speaking" indictment or information, or in its stead a substantively equivalent "statement of facts," that details both the underlying violations of law and the corporation's response to those violations (or lack thereof); a plea or settlement agreement that explains the measures that will be taken by the corporation to redress any harm and bolster efforts to prevent future wrongdoing; and a press release or press conference at which government officials announce the penalties in the case and justify the nature of any legal action and settlement.[9]

As this process for prosecuting corporations has grown and become more routinized over the last two decades, the defense bar has had little to say about it other than that prosecutors should be

5. *See generally* Stephanos Bibas, *Transparency & Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (discussing the lack of transparency and publicity in the prosecutorial system).

6. *See* John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L & POL'Y 77, 88 (2002).

7. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 262 (1993); United States v. Grace, 401 F. Supp. 2d. 1057, 1058 (D. Mont. 2005).

8. *See, e.g.*, Rule 11 Plea Agreement, United States v. Takata Corp., No. 2:16-CR-20810 (E.D. Mich. Feb. 27, 2017), https://www.justice.gov/opa/press-release/file/926051/download [https://perma.cc/K565-VMW2] (discussing the investigation of defective airbags); Letter from Robert L. Capers, U.S. Attorney, E. Dist. of N.Y., & Andrew Weissmann, Chief, U.S. Dep't of Justice, to Mark F. Mendelsohn, Esquire (Nov. 17, 2016), https://www.justice.gov/opa/press-release/file/911206/download [https://perma.cc/F5Y9-Z9ER] (discussing a non-prosecution agreement in an investigation of quid pro quo hiring of relatives of Chinese officials and potential clients).

9. For an extensive public collection of corporate criminal settlements, see Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry: About*, UNIV. OF VA. SCH. OF LAW, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/about.html [https://perma.cc/J6YB-4K8G].

disclosing even *more*. A common complaint directed at the DOJ is that it exercises far too much discretion in this realm and wields its power too opaquely and unpredictably.[10] Short of legislation to reform the law of corporate criminal liability, firms and their lawyers would keenly like the DOJ to be more explicit about how it intends to exercise its discretion—who is likely to be charged for what, what sorts of settlement agreements and penalties might be on or off the table, and what sort of corporate conduct is likely to lead to less or more favorable outcomes for firms.

These calls have been heard at the DOJ. In the last several years, federal prosecutors have begun saying more about the corporate prosecution process and appear to be more willing than before—and far more willing than in any other area of criminal enforcement—to tie their own hands (albeit lightly) with policy pronouncements and guidance, both in individual enforcement actions and in the more general contexts of policy papers and speeches.[11]

Prosecutors, to repeat, do not have to do any of this as a matter of law or tactics to win their cases. And when enforcement actors enjoy power and discretion, they risk giving some of that up, even if only at the margins, when they commit themselves to public reasoning about their actions.

This Essay explores various reasons why prosecutors might choose to speak about their cases, particularly in the area of corporate criminal enforcement, and especially as the DOJ has been increasingly doing so in that field over the last two decades. Examining the phenomenon might produce a clearer understanding of the general question of why prosecutors speak. Perhaps more fruitfully, focusing this examination on the sub-field of corporate

10. Erik Luna, *The Curious Case of Corporate Criminality*, 46 AM. CRIM. L. REV. 1507, 1513–14 (2009); *see also* Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1137–38 (2016) (calling for various forms of greater oversight of and control on the exercise of federal agency enforcement discretion). A more nuanced criticism from academic quarters is that the DOJ's corporate enforcement process too often involves counter-productive meddling in corporate governance. *See* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 62 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323, 324–25 (2017); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2078–79 (2016). *But see* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1, 2–3 (2014) ("[T]hough substantial commentary urges prosecutors to avoid intruding into corporate governance, this Essay explains the importance of prosecutors investing in it.").

11. *See infra* Part I.

crime might produce new insights into how to evaluate normatively what the DOJ is doing in the way it presents its corporate enforcement activities—i.e., whether its publicity efforts are helpful and, if so, whether and how these efforts could be expanded or improved.

After all, as with so much of the literature in this field, the unlikelihood of legislative reform of the practice of American corporate criminal liability leaves us necessarily addressing questions of how to optimize enforcement under current practice—by directing our efforts almost entirely to what prosecutors do.[12] There may be little to gain, in terms of law reform or novel insight, by publishing more laments about that fact.

This Essay proceeds as follows. Part I explains how prosecutors speak in the area of corporate crime and how that speech has developed over the last two decades. Part II specifies and evaluates a variety of explanations for what prosecutors have been saying. Part III considers whether recent trends have been favorable and whether we should welcome prosecutors continuing along current avenues or if we should urge them to rethink how they talk about corporate crime. The perhaps counterintuitive conclusion is that observers should be skeptical of the value of prosecutors' written policies, but they should also encourage prosecutors to continue to engage in detailed public disclosure when settling with individual corporations.

I. HOW PROSECUTORS TALK ABOUT CORPORATE CRIME

A. Birth of DPAs and NPAs

The modern corporate criminal settlement was famously born in 1994 when the United States Attorney's Office for the Southern District of New York entered into an agreement with Prudential Securities, Inc. ("Prudential") to file a criminal complaint against Prudential for securities fraud, defer that prosecution for three years, and then dismiss the complaint if Prudential complied with the terms of agreement.[13] It is now well known that the Prudential deferred prosecution agreement ("DPA") was proposed by Prudential's defense counsel, who had the clever idea of avoiding indictment and

12. *See*, *e.g.*, Cunningham, *supra* note 10, at 47–48; Griffith, *supra* note 10, at 2116–19, 2134.

13. *See* Letter Agreement from Mary Jo White, U.S. Attorney, S. Dist. of N.Y., to Scott W. Muller & Carey R. Dunne, Attorneys, Davis Polk & Wardell, on behalf of Prudential Securities Inc. (Oct. 27, 1994) (on file with the North Carolina Law Review).

conviction by urging the prosecutors to deploy a procedural device long used to divert prosecutions of low-level offenders, most often in drug prosecutions.[14] The U.S. Attorney's Office was persuaded to take this route in order to avoid a criminal conviction that could cause Prudential to collapse.

The Prudential DPA consisted of a four-page letter that read like a modified version of the standard cooperation agreement for individual cases that the Southern District of New York was using in the early 1990s.[15] It required the usual forms of cooperation and established the ordinary grounds for breach: provision of corporate documents, assistance in gaining access to witnesses, and agreement to be held in violation (and thus subject to prosecution) for failure to comply with the terms of the deal or commission of any subsequent crime.[16] In addition, it required Prudential to pay a $330 million penalty and install a new, government-approved outside director who would act as an "ombudsman" to receive anonymous ethics and compliance complaints.[17]

Thus, even at the inception of the modern corporate settlement, the DOJ was involved in the business of corporate reform in conjunction with criminal investigations. However, the Prudential DPA contained no statement of facts or other details of Prudential's wrongdoing, much less any admission by Prudential to any matters of fact or law.[18] Nor did this agreement contain any explanation or signals as to why the DOJ chose to exercise its discretion to defer prosecution. The letter did include, as an attachment, a letter from Prudential's lawyers appealing to the government's discretion and suggesting the DPA.[19] That letter talked at some length about Prudential's efforts to reform itself in the area of compliance and cooperate with various government investigations.[20] The Prudential DPA was filed with a magistrate judge in the Southern District of New York, who signed an order deferring the prosecution for three

14. *See* Letter from Scott W. Muller & Carrey R. Dunne, Attorneys, Davis Polk & Wardell, on behalf of Prudential Securities, Inc., to Kenneth J. Vianale, Assistant U.S. Attorney, S. Dist. of N.Y., & Baruch Weiss, Senior Trial Counsel, S. Dist. of N.Y. (Oct. 13, 1994) (on file with the North Carolina Law Review).

15. *See* Letter Agreement from Mary Jo White, *supra* note 13.

16. *See id.*

17. *Id.*

18. *Id.*

19. *Id.* (letter attachment).

20. *Id.*

years.[21] The U.S. Attorney, then Mary Jo White, issued a press release[22] and the *New York Times* and *Wall Street Journal* published brief stories reporting the resolution.[23] Three years later, another magistrate judge signed a dismissal order.[24]

Another well-known first-generation settlement was the non-prosecution agreement ("NPA")[25] reached in 1996 between the DOJ and the Arthur Andersen accounting firm in connection with an investigation of Colonial Realty, a Connecticut company that Andersen audited.[26] This four-page letter agreement contained no statement of facts, no legal allegations, no admission of wrongdoing—indeed, it noted that Andersen denied any wrongdoing—and no reform or oversight obligations.[27] The agreement was simply a contract to trade a promise not to prosecute for a promise to cooperate, plus $10 million. No explanation was given, or event hinted at, with respect to the exercise of prosecutorial discretion. The U.S. Attorney in Connecticut issued a brief press release.[28]

21. *See* Deferral of Prosecution, United States v. Prudential Sec., Inc., No. 1:94-mj-02189-UA (S.D.N.Y. Oct. 27, 1994), ECF No. 3.

22. *Government to Defer Prosecution Over PSI Limited Partnership Sales*, 26 Sec. Reg. & L. Rep. (BNA) 1468, 1468 (Nov. 4, 1994).

23. *U.S. to Reprimand Rather Than Indict, A Prudential Unit*, WALL ST. J., Oct. 27, 1994, at A8; Kurt Eichenwald, *U.S. Filing Expected on Prudential*, N.Y. TIMES (Oct. 27, 1994), http://www.nytimes.com/1994/10/27/business/us-filing-expected-on-prudential.html ?pagewanted=print [https://perma.cc/N3ND-MLQQ (dark archive)]. Prudential's lawyer called the settlement "unusual" and, when asked whether more such agreements should be expected in the future, flatly opined, "No." *Government to Defer Prosecution Over PSI Limited Partnership Sales*, *supra* note 22, at 1469. Prognostication is difficult.

24. *See* Order for Dismissal, United States v. Prudential Sec., Inc., No. 1:94-mj-02189-UA (S.D.N.Y. Oct. 27, 1997), ECF No. 4.

25. A NPA and a DPA differ principally in one way: a DPA provides for the government to file charges but not pursue them, and in a NPA, the government agrees to refrain from filing charges. *See* Robert J. Sussman & Gregory S. Saikin, *Corporate Crimes: The Penalties and the Pendulum*, 43 ADVOCATE (TEX), Summer 2008, at 39, 45 n.36.

26. *See* Letter from Edwin J. Gale, Acting U.S. Attorney, Dist. of Conn., Peter A. Clark, Assistant U.S. Attorney, Dist. of Conn., & Thomas J. Murphy, Assistant U.S. Attorney, Dist. of Conn. to Eliot Lauer, Attorney, Curtis, Mallet-Prevost, Colt & Mosle, on behalf of Arthur Andersen LLP, & Shaun S. Sullivan, Attorney, Wiggin & Dana, on behalf of Arthur Andersen LLP (Apr. 15, 1996) (on file with the North Carolina Law Review).

27. *Id.* ("It is understood that neither this agreement nor any action taken by Andersen under this agreement is an acknowledgement or admission in any way by Andersen that it has acted improperly or has violated any law, rule, regulation, professional standard, or other standard of practice.").

28. *See* Steve Burkholder, *Arthur Andersen Paying $10.3 Million to End Probe into Real Estate Deals*, 28 Sec. Reg. & L. Rep. (BNA) 568, 569 (Apr. 26, 1996); *see also Arthur Andersen to Pay $10 Million to Settle Colonial Realty Case*, WALL ST. J., Apr. 24, 1996, at C26; George Judson, *Accountants to Pay $10 Million to Victims of Real Estate Fraud*, N.Y.

Andersen's involvement in this story is perhaps ironic given that the firm's supposed death-by-trial in 2002, in connection with the collapse of Enron,[29] followed its refusal to accept a DPA that would have required an admission of wrongdoing in that affair.[30] In the intervening years, the DOJ's views of what a corporate criminal resolution ought to accomplish had, as will be discussed, evolved substantially.

B. Current DPA and NPA Practice

By way of contrast, move forward to current practice. Criminal lawyers have long talked about the "speaking indictment," that is, a charging document that sets forth in factual detail the government's case.[31] Prosecutors are not required to plead their cases with granularity. The law on the subject requires only that the charging instrument provide sufficient notice for the defendant to be able to meet the accusations—what offense, committed roughly where, when, by whom, and not much more.[32] Prosecutors, however, are free within reason to draft liberally, as long as they do not gratuitously use the charging instrument to prejudice the defendant or uncharged persons.[33] It seems that in the field of corporate crime, we should now add to the idea of the "speaking indictment" the concept of the "speaking settlement."

Between the early 1990s and the present, the corporate criminal settlement has exploded in prevalence. One recent study reports a

TIMES (Apr. 24, 1996), http://www.nytimes.com/1996/04/24/nyregion/accountants-to-pay-10-million-to-victims-of-real-estate-fraud.html [https://perma.cc/62W9-KU53 (dark archive)].

29. *See* Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917, 917 (2004); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 479–87 (2006).

30. *See* Brickey, *supra* note 29, at 926; Buell, *supra* note 29, at 489 n.86.

31. Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 1003–04 (2010).

32. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 117 (1974) (noting that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense"); United States v. Tykarsky, 446 F.3d 458, 474 (3d Cir. 2006) (noting that an indictment is "not impaired" when it charges more than is necessary for a conviction). *But see* United States v. Olson, 262 F.3d 795, 798–99 (8th Cir. 2001) (finding the indictment insufficient because it failed to include an essential element of the crime charged).

33. *See, e.g.*, United States v. Cooper, 384 F. Supp. 2d 958, 961 (W.D. Va. 2005) (striking surplusage from an indictment regarding the defendant's prior issues with environmental agencies due to prejudice); United States v. Gotti, 42 F. Supp. 2d 252, 292–93 (S.D.N.Y. 1999) (striking "conspired to murder" language from a RICO indictment due to the risk of unfair prejudice).

total of nearly 500 criminal resolutions of all types between the DOJ and public corporations between 1997 and 2011, with a rise in annual corporate settlements from ten in 1997 to a high of almost eighty in 2010.[34] There is not space here to conduct an empirical measurement of the verbosity of settlement documents over time—this Essay is in part a call for how to make such measurement more accessible. But it is clear to all in the field that the trend has been away from barebones and towards detail, in both disclosure of background facts and in contract terms.

For example, in September 2016, Och-Ziff Capital Management ("Och-Ziff"), a hedge fund, entered into a DPA, while one of its subsidiaries pled guilty, in connection with violations of the Foreign Corrupt Practices Act ("FCPA").[35] The Och-Ziff settlement agreements are thick enough for a good-sized binder clip.[36] The company fully admitted wrongdoing, including conceding all of the allegations in a *thirty-two-page* statement of facts that told the story, down to the level of damning emails, of the firm's bribery activities in the resource sector of several African nations.[37] The financial penalty of $213 million was justified with a detailed analysis of how the U.S. Sentencing Guidelines would have treated the case.[38] The company was made to promise that it would make no public statements that contradicted any aspect of the agreement.[39] Och-Ziff agreed to extensive compliance reforms (detailed in a seven-page appendix)[40] and the hiring of a compliance monitor (whose powers and obligations were set forth in an even longer appendix).[41]

The Och-Ziff agreement even includes a section in which the DOJ sets forth in writing "relevant considerations" that led to the decision to enter into the agreement.[42] The ensuing list includes the

34. *See* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 540 (2015) (studying plea agreements as well as non-prosecution and deferred prosecution agreements).

35. Press Release, U.S. Dep't of Justice, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2017), https://www.justice.gov/usao-edny/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213 [https://perma.cc/4UG5-9C9Q].

36. *See* Deferred Prosecution Agreement, United States v. Och-Ziff Capital Mgmt. Grp. LLC, No. 16-516 (NGG) (E.D.N.Y. Sept. 29, 2016); Plea Agreement, United States v. Oz Africa Mgmt. GP, LLC, No. 16-515 (NGG) (E.D.N.Y. Sept. 29, 2016).

37. *See* Deferred Prosecution Agreement, *supra* note 36, at A-1-32.

38. *Id.* at 7–8.

39. *Id.* at 17–18.

40. *Id.* at C-1 to -7.

41. *Id.* at D-1 to -10.

42. *Id.* at 3–5.

amount of discount off of the bottom end of the Sentencing Guidelines range that the DOJ granted Och-Ziff as a credit for the firm's decision to self-report, the extent of the company's efforts to assist in the FCPA investigation and to remedy its compliance program and internal controls, the agreement to tolerate a monitor, the widespread extent of the wrongdoing in "high-risk jurisdictions," and the company's lack of criminal history.[43]

C. The DOJ's Policies and Guidelines

Agreements to settle cases are not the only place where prosecutors have been talking about corporate criminal settlements. As the practice has matured and become more routine, the DOJ has issued a series of policy documents and speeches that have progressively said more about what the government is doing, when it does or does not prosecute corporations, and why.

The saga of the DOJ corporate prosecution guidelines—the journey through the "memos" (that is, guidelines revisions) of Deputy Attorneys General Holder, Thompson, McNulty, Filip, and Yates—has been told often enough in ample detail.[44] To condense, the DOJ has created and published something for prosecuting corporations, which is unique in its manuals and practices, governing the charging decisions of its personnel: a lengthy roadmap through a multi-factor analysis that the prosecutor must conduct in order to decide on the correct resolution of a corporate criminal case, whether it be charging, settling, or declining to prosecute.[45]

The DOJ has done this, at this level, for no other kind of defendant or offense. Of course, the guidelines are not enforceable.

43. *Id.*

44. *See generally, e.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (examining "the terms of the deals that prosecutors now negotiate with companies, how prosecutors fine companies to punish them, the changes companies must make to prevent future crimes, and whether prosecutors pursue individual employees"); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006) ("Although the rise in the number of agreements may not be directly linked to the fall of Enron and Andersen and the rise of the Thompson Memo, the temptation to link the three events is overwhelming."); Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293 (2014) (examining the impact of recent developments in the corporate criminal context on the Justice Department's historical reliance on deferred prosecutions).

45. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.000 (2017), https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/MEN4-7ZKD].

The *law* of charging corporations remains the same as it is throughout federal and state criminal practice: nearly unreviewable discretion in the absence of invidious discrimination.[46] Yet the leadership at the DOJ in Washington has spent much energy over the last two decades pouring over and refining these corporate prosecution guidelines, with the periodic splashy release of revisions via press conferences and speeches.[47] Each iteration of the guidelines has, for the most part, expanded them and made them more detailed, as the DOJ adapts to how prosecutors learn what works in corporate enforcement. Or what is not successful, as in the Filip Memo's retreat on waivers of attorney client privilege[48] or the Yates Memo's flag-planting about re-emphasizing individual prosecutions in corporate enforcement.[49]

The corporate prosecution guidelines have become a lingua franca, or common space, in which prosecutors, the defense bar, lobbying groups, the press, and academic critics who write about corporate enforcement skirmish over policy and practice. They are not law. But in some ways they are strangely law-like. Since negotiation, not litigation, is the primary means by which corporate criminal cases are resolved, the guidelines become the "rules" in the

46. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464–65 (1996); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Brady v. United States, 397 U.S. 742, 757–58 (1970); *see also In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1153 (D.C. Cir. 2005) (noting that the guidelines are "not required by any constitutional or statutory provision" and "exist to guide the Department's exercise of its discretion").

47. *See*, *e.g.*, Lanny Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Address at the New York City Bar Association (Sept. 13, 2012), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association [https://perma.cc/QR43-WWWR]; Leslie R. Caldwell, Assistant Attorney Gen., U.S. Dep't of Justice, Address at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st [https://perma.cc/ZXL4-8KDY]; Leslie R. Caldwell, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at New York University Law School's Program on Corporate Compliance and Enforcement (Apr. 17, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law [https://perma.cc/MN43-2FMP]; Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school [https://perma.cc/YF8F-P4W4].

48. Jonathan D. Glater & Michael M. Grynbaum, *U.S. Lifts a Policy in Corporate Crime Cases*, N.Y. TIMES (Aug. 28, 2008), http://www.nytimes.com/2008/08/29/business/29kpmg.html [https://perma.cc/BQS4-MK3N (dark archive)].

49. Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES (Sept. 9, 2015), https://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0 [https://perma.cc/J84X-2H36 (dark archive)].

shadow of which the government and corporations settle. And their authority has accreted over time through repeated use in practice, to the point that even some critics who continue to call for more meaningful doctrines of corporate criminal liability in American law propose a kind of black-letter adoption of the government's prosecution guidelines.[50]

From these developments of the last two decades, the DOJ and its sister agency, the Securities and Exchange Commission ("SEC"), seem to be taking the lesson that even more guideline adoption would be better. In November 2012, the DOJ and SEC jointly released "A Resource Guide to the U.S. Foreign Corrupt Practices Act," a 100-page document that both explains the government's views on the particulars of the statutory scheme and contains several chapters on principles guiding enforcement discretion, how the government determines penalties, and what sorts of settlements may be available in various contexts.[51]

In a related vein, the Fraud Section at the DOJ issued two related documents in 2016: a nine-page memo announcing a one-year FCPA "pilot program" that explains what companies can do in responding to wrongdoing in order to receive up to a fifty percent reduction in penalty from the bottom of the applicable Sentencing Guidelines range,[52] and an eight-page memo that provides additional detail on how companies ought to structure and evaluate their compliance programs in order to obtain maximum credit from the

50. W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 44 FLA. ST. U. L. REV. (forthcoming 2018) (manuscript at 47).

51. *See* CRIM. DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., U.S. SEC. & EXCHANGE COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [https://perma.cc/8ZS4-9R2N].

52. FRAUD SECTION, CRIM. DIV., U.S. DEP'T OF JUSTICE, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE (2016). For two examples of commentary on the pilot program, see generally *Baker & McKenzie Partner Robert Kent on the New World of FCPA Compliance*, CORP. CRIME RPTR., Dec. 12, 2016, at 1, 3–4 (discussing the pilot program in relation to the Harris investigation) and Bruce E. Yannett, Andrew M. Levine & Philip Rohlik, *The Difficulty of Defining a Declination: An Update on DOJ's Pilot Program*, NYU COMPLIANCE AND ENFORCEMENT BLOG (Nov. 16, 2016), https://wp.nyu.edu/compliance_enforcement/2016/11/16/the-difficulty-of-defining-a-declination-an-update-on-the-dojs-pilot-program/ [https://perma.cc/MGL4-Y4FU] (discussing the pilot program's guidance on how to receive a declination). For two recent enforcement examples, see *General Cable Gets Non Prosecution Agreement to Pay $75 Million to Settle FCPA Charge*, CORP. CRIME RPTR., Jan. 9, 2017, at 7–8 and *Rolls Royce to Pay $810 Million to Get Prosecutions Deferred in Bribery Case*, CORP. CRIME RPTR., Jan. 23, 2017, at 6–7.

DOJ in the exercise of enforcement discretion.[53]Also, back in 2008, the DOJ published detailed guidance in a document called the Morford Memo on how corporate monitors used in criminal settlements should be selected, and how the scope of their duties and evaluation of their performance should be determined.[54] Corporate enforcement authorities in the United Kingdom, the jurisdiction that most commonly works in coordination with the United States, seem to believe they too should be making their processes more transparent.[55]

Through the DOJ's policies and practices, a common law of corporate criminal enforcement has emerged in the twenty-plus years since the Prudential settlement. It is contained primarily in the record of disclosed, detailed settlements that tell a story about who got what for doing what, and secondarily in an unusually verbose set of policy pronouncements, about what the DOJ is doing in the field of

53. FRAUD SECTION, CRIM. DIV., U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (2015), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/6C87-KR8Q]; *see also* Jonathan J. Rusch, *Memorandum to the Compliance Counsel, United States Department of Justice*, 6 HARV. BUS. L. REV. ONLINE 69, 86 (2016) ("For foreign bribery and corruption matters, the *FCPA Resource Guide* has been a substantial step in that direction, but has proved to be too brief in presenting its much-touted hallmarks of compliance."). The Fraud Section had made a small splash earlier by announcing that it had hired a private-sector lawyer to work as "compliance counsel" who helps advise both the DOJ and corporations about how to assess the quality of compliance efforts. Press Release, U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 2, 2015), https://www.justice.gov/criminal-fraud/file/790236/download [https://perma.cc/L2TY-T759]; *see also* Ryan Rohlfsen & Nicholas F. Rodriguez, *DOJ Announces New Compliance Counsel and Outlines Metrics for Evaluating Corporate Compliance Programs Under Scrutiny*, ROPES & GRAY (Nov. 5, 2015), https://www.ropesgray.com/newsroom/alerts/2015/November/DOJ-Announces-New-Compliance-Counsel-and-Outlines-Metrics.aspx [https://perma.cc/B3GJ-AGAN].

54. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to Heads of Dep't Components, U.S. Dep't of Justice (March 7, 2008). For criticism on the lack of guidance and coverage of the memorandum, see *Ashcroft Defends Role as Federal Monitor; DOJ Releases Guidance on Selection Process*, 82 Crim. L. Rep. (BNA) 636 (Mar. 19, 2008),. For critical analysis of the use of monitors in corporate criminal settlements, see Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 681 (2009); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1714–15 (2007).

55. *See* Karolos Seeger & Andrew Lee, *UK's Financial Conduct Authority and Prudential Regulation Authority Announce Changes to Enforcement Process*, NYU COMPLIANCE & ENFORCEMENT BLOG (Feb. 2, 2017), https://wp.nyu.edu/compliance_enforcement/2017/02/02/uks-financial-conduct-authority-and-prudential-regulation-authority-announce-changes-to-enforcement-processes/ [https://perma.cc/58ST-8UT4].

corporate crime and why. There is every reason to expect this process of articulation to continue and ramify.[56]

None of this is law, although many outside the government wish it were.[57] There is no requirement of consistency, or proportionality, or even rationality in the resolutions that the DOJ reaches with individual corporations, and many outside the government think all of those things ought to be required.[58] Occasionally the DOJ chooses to hold its cards quite close in a corporate settlement, and some critics think that sort of guardedness disserves the public interest.[59]

But, seen from another angle, the DOJ's approach to corporate enforcement stands apart from the brevity with which prosecutors at the state and federal levels speak in nearly every other area of criminal enforcement. In evaluating the prosecution of corporate criminality and thinking about how to reform the practice, it might be fruitful to consider prosecutorial behavior in this field from that perspective. At the risk of belaboring the point, the law requires none of what the DOJ has been doing. Therefore, when it comes to corporate crime, why do prosecutors say anything?

II. WHY PROSECUTORS TALK THE WAY THEY DO

Public disclosure by prosecutors can run the gamut from nothing more than terse, required court filings—sparsely pleaded indictments and bland motion papers—to the extensive, factually detailed settlement papers and policy pronouncements that typify the DOJ's approach to corporate crime. To understand what the DOJ has been doing in the corporate crime field, it will help to canvass broadly the political, economic, strategic, and professional motivations that might

56. This is subject to the caveat that no one can currently predict whether the Trump administration will have interest in continuing the more or less straight-line development of corporate crime policy that has characterized the last three presidencies.

57. *See* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192–93, 214–17, 226 (2016) (discussing unchecked discretion that runs contrary to the rule of law and suggesting more consistency and enforcement, perhaps through enhanced guidelines and judicial oversight)*; see also* Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60, 61–62, 72 (2016) (discussing ineffectual changes to the U.S. Attorneys' Manual and the need for more robust enforcement mechanisms for DOJ prosecutors).

58. *See* Arlen, *supra* note 57, at 231.

59. *See* Brief for Professor Brandon L. Garrett as Amicus Curiae Supporting Appellee at 19–23, United States v. HSBC Bank USA, 863 F.3d 125 (2d Cir. 2017) (Nos. 16-308(L), 16-353, 16-1068, 16-1094) (noting that secrecy leads to recidivism and harms good compliance); *see also* GARRETT, *supra* note 44, at 254 (noting that the public never knows if decisions are sound or even which corporate crimes prosecutors investigate in the first place).

cause prosecutors to disclose information about their cases and talk about what they are doing.[60] In the field of corporate crime, some motivations are more explanatory than others. This Essay moves through the following explanations, proceeding roughly from less attractive to more appealing: to cause prejudice, for career advancement, to obtain public support and promote legitimacy, to please Congress, to satisfy industry and the defense bar, to generate evidence, and to further the purposes of punishment.

A. To Prejudice the Jury Pool

Let's start with perhaps the most self-interested and unattractive motivation for prosecutors to talk about their cases. It has long been a complaint of defense lawyers that, in high-profile cases, prosecutors hold press conferences to announce criminal charges and include lurid facts in their indictments so the press will disseminate the gory details to the public.[61] The effect is to cement the idea of guilt in the minds of the community at large, making it far more likely that persons called for jury service in any such case will, consciously or not, harbor fixed prejudices against the defendant.[62] Starting with arrest, charging, and a press conference, the presumption of innocence is replaced by a presumption of guilt. While the law on the subject is unfavorable for defendants, sometimes such disclosures can give rise to a constitutional claim for moving the location of trial or, ex post, for a new trial.[63]

Disclosure for the purpose of prejudicing the jury pool is, of course, improper. But it also cannot be policed as long as the prosecutor's disclosures consist of facts that are spelled out in the charging instrument that the prosecutor is required by law to file (that is, is based on the evidence), and the prosecutor is careful to liberally insert the word "allegation." Of course, even the cynical prosecutor might refrain from this kind of disclosure in a high-profile case, calculating that any benefits in solidifying public attitudes are

60. Disclosures made in the discovery process are not treated as of interest here since the question is why prosecutors share information with the public (including, of course, subjects of prosecution), and discovery material is typically shared only with charged persons and entities. In any event, "discovery" usually runs the other way in corporate crime: during the investigative phase (after which almost all cases settle), the documents and witness testimony run almost entirely from the corporation to the government.

61. *See*, *e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 354 (1966); United States v. Coast of Me. Lobster Co., 538 F.2d 899, 902 (1st Cir. 1976).

62. *See, e.g.*, United States v. Cutler, 58 F.3d 825, 836 (2d Cir. 1995).

63. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 377–79 (2010); *see also Cutler*, 58 F.3d at 838.

outweighed by the strategic advantages lost in tipping one's hand about the proof.

This perhaps common narrative in the criminal justice system does not fit federal prosecution of corporate crime. Given the DOJ's hard-earned reputation for independence and professionalism, one would like to think that DOJ lawyers are more responsible and careful than the prosecutor who is tempted to inflame public sentiment. But predispositions do not matter much because corporate cases simply are not pursued with an eye toward trial. In the overwhelming majority of cases, the prosecutor does not hold a press conference and release case documents until the defendant has already agreed to settle and thus waive any trial rights.[64] Potential jurors are not a relevant audience.

B. For Career Advancement

Drawing a lot of attention in the area of corporate crime could be a way for prosecutors to get to future jobs they may want, whether those jobs are in higher office or in the private legal sector—or so they might think. A sometimes accurate stereotype of prosecutors is that they are hungry press hounds who choose their cases and roll them out to achieve the maximum possible public exposure for themselves: the murder indictment press conference, surrounded by the victim's family; the big drug gang take-down, with the tables festooned with kilos of powder and menacing firearms; and, yes, the press conference carried live on CNBC to announce the massive fine and the admission of wrongdoing secured in the latest criminal settlement with a Fortune 500 company.

This story is at least a bit more nuanced in the case of corporate crime. Most federal prosecutors, even most U.S. Attorneys, are not aiming for elected office—and they did not need votes to get their jobs in the first place. If these prosecutors have an eye on a future job, it is almost always one of three positions: a more senior appointment with the DOJ, a partnership at a marquee law firm, or a general counsel-type position at a major corporation or investment firm. Press

64. *See* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 811 (2013) (noting that more than ninety percent of corporate convictions end in plea agreements and that in the year 2010, 139 out of 145 corporate convictions resulted in plea agreements); *see also* Alexander & Cohen, *supra* note 34, at 563; Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1801–02 n.102 (2011) (pointing to U.S. Sentencing Commission data from 2000–2008 showing that 176 corporate convictions out of 1,924 (or 9%) occurred at trial).

does not hurt, to be sure; name recognition always helps in these job markets. But the more direct leverage comes from having built a resume that includes "big" prosecutions, whether measured by complexity, size of settlement, importance of defendant, or seriousness and extent of wrongdoing.

The resume-building motivation might tilt in favor of playing up the features of a corporate prosecution through public disclosure of facts and settlement documents. At least equally, it tilts in favor of going to trial, a course that the prosecutor largely controls but that has been rare in corporate prosecutions, as some observers have lamented.[65] The DOJ's issuance of policy guidance, meanwhile, probably does little for individual resumes, unless one thinks that the likes of Larry Thompson and Eric Holder needed a memo named after them to get where they have gotten.

Some have worried that career motivations may have caused prosecutors to become increasingly attracted to the corporate criminal settlement over the last decade or so, at the expense of individual prosecutions.[66] On this account, prosecutors prefer easy cases, especially ones that come with newspaper articles and big checks, to hard cases that require long, drawn-out investigations and risky, onerous trials.[67] The result is that prosecutors grab the low-hanging fruit of settling charges with the cooperation of compliant corporate defendants, then leave the higher, but perhaps better, fruit of individual cases unpicked, as they lose interest and move on to the tree or orchard of the next alarming industry scandal.

The Yates Memo would seem to indicate either that the recent DOJ leadership shared some of this worry or that prosecutors do not like to be criticized for lacking zeal.[68] Still, one wonders why the ambitiously careerist prosecutor would not seek out trials over settlements, especially high-profile trials involving senior corporate executives. In any event, it is unlikely that a preference for corporate over individual prosecutions, or vice versa, would change anything

65. For one full lament, see generally JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017) (discussing how the modern DOJ has lost the will and ability to go to trial in corporate prosecutions).

66. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1790 (2015); Jed. S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014, at 4, 6.

67. *See* EISINGER, *supra* note 65, at xiv–xv.

68. Aruna Viswanatha, *Rules to Spur Executive Charges*, WALL ST. J., Nov. 17, 2015, at A4; Peter J. Henning, *The Prospects for Pursuing Corporate Executives*, N.Y. TIMES, (Sept. 14, 2015), https://www.nytimes.com/2015/09/15/business/dealbook/theprospects-for-pursuing-corporate-executives.html [https://perma.cc/4ZB5-56C8 (dark archive)].

about the prosecutorial taste for attracting public attention. In the end, the DOJ's compunction to talk a great deal more about what it does in the field of corporate crime than in other areas is not convincingly attributable to the career ambitions of its prosecutors.

C. For Public Support and Legitimacy

Even when they are appointed (as in the federal system) rather than elected, prosecutors seem to share an abiding and reasonable belief that because their "client" is the public, the client has a right to know what the prosecutor is doing and should, in some general sense, approve of and support the prosecutor's work. Of course, this only goes so far. Few prosecutors take suggestions from the public about whom to indict or even what kinds of crime to concentrate on. Prosecutors act with a fiduciary-like concept of their relationship to the communities in which they work—"your officials know your best interests"—while wanting communities to know that they are devoting themselves to that task. The primary vehicles for communicating this message are the press conference, press release, newspaper interview, website, community meeting, and the like. In U.S. Attorneys' offices, these activities comprise a major part of the head prosecutor's job.

When the interests of the case collide with the interest in informing the public, however, the case wins. Prosecutors have no compunctions about terse filings, motions to seal pleadings and courtrooms, protective orders, the use of clandestine investigative measures, and so on—when such secrecy serves the purpose of obtaining convictions. Recall the shopworn quote, "We do not comment on ongoing investigations," which at least limits such comments to anonymously sourced leaks.

This legitimation motive is germane to the DOJ's corporate crime program. Perhaps no area of criminal enforcement, aside from anti-terrorism efforts, has so preoccupied the American public's mind over the last two decades.[69] "What are they doing about those corporate criminals?" has been a persistent question since even

69. *See generally* SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE (2016) (discussing issues of American public life raised by the subject of corporate crime, how American law defines white collar crime, the machinery of criminal enforcement in the business world, and political and societal complications raised by these issues); *see also* Garrett, *supra* note 64, at 1776 ("In the past, domestic prosecutions of foreign corporations were not particularly noteworthy. . . . All of this has changed. Federal prosecutors now advertise how they target foreign corporations.").

before the 2001 collapse of the Enron Corporation and has been an even more common one since the 2008 financial crisis.[70] It is obvious why federal prosecutors, whose jurisdiction has traditionally been thought to be primary, if not dominant, over corporate crime, would feel defensive about these questions.

The first way to address such public concerns is to prosecute corporate cases. But it is natural that, as the government does this, it would want to engage in colorful public displays about what it is doing—assembling "task forces," issuing policy papers, holding press conferences to explain how each filed or settled action fits into the larger "campaign" against corporate crime, etc.

There is another specific reason for officials to call as much attention as possible to the cases that the government does bring in this area. Prosecutors understand, though the public often does not, that not everything corporations do that makes the public angry is an appropriate or legally eligible candidate for criminal prosecution. It is a fact of the current relationship between the corporate sector and the regulatory state—about which I have written at some length[71]—that criminal prosecution has come to occupy an ill-fitting role as a backstop in dealing with the problem of how to manage and regulate the activities of the large, modern firm. Federal prosecutors have been partially responsible for this in their zeal to step into various regulatory breaches with the tools of federal criminal law.[72] But they likely also experience anxiety about the limits of those tools in dealing with problems that are much larger in their implications than the

70. *See, e.g.*, *Investigating and Prosecuting Financial Fraud After the Fraud Enforcement and Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–4 (2010) (statement of Sen. Edward Kaufman); JEFF CONNAUGHTON, THE PAYOFF: WHY WALL STREET ALWAYS WINS 65–95 (2012); GOV'T ACCOUNTABILITY INST., JUSTICE INACTION: THE DEPARTMENT OF JUSTICE'S UNPRECEDENTED FAILURE TO PROSECUTE BIG FINANCE 5–7 (2012), http://g-a-i.org/wp-content/uploads/2012/08/DOJ-Report-8-61.pdf [https://perma.cc/LF7N-MFP9]; Editorial, *Going Soft on Corporate Crime*, N.Y. TIMES, Apr. 10, 2008, at A26; Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES, Feb. 26, 2011, at B1, B7; *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013), http://www.pbs.org/wgbh/pages/frontline/untouchables [https://perma.cc/XVA2-R7G3]; Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011), http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216 [https://perma.cc/FP4H-FTQ9]; *60 Minutes: Prosecuting Wall Street* (CBS television broadcast Dec. 4, 2011), https://www.cbsnews.com/videos/prosecuting-wall-street-pt-1 [https://perma.cc/4A39-H9EW].

71. *See generally* BUELL, *supra* note 69 (discussing the history and legal framework of prosecuting corporations involved in white collar crime).

72. *See* Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 10, at 177; Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 581–82 (2012).

relatively narrow legal category of crime—limits that the public often does not understand and might not care about if it did.

Thus, when the DOJ, at the press conference accompanying a corporate settlement, drops a thick pile of paper and announces the collection of a large financial penalty, it is trying hard to say, "Here is what we are doing about corporate crime." The hope, although perhaps fanciful, is that the public will eventually come to the conclusion that the government is indeed "tough" on corporate crime—with the result that prosecutors will be able to sleep better at night believing they have done the public's work.

D. To Please and Mollify Congress

Federal prosecutors have a more intimate relationship with their legislature than most state prosecutors. Congress, particularly the judiciary committees and certain members of those committees, is regularly on the DOJ's back about both prosecutions and policy. The DOJ has a tendency to jump when Congress calls because of the legislature's control over budgets and criminal statutes, with both mechanisms operating as either a carrot or a stick.[73] Congress can increase or decrease the DOJ's resources for investigating and prosecuting corporate crime, particularly on the critical dimension of staffing. Congress can also expand the law governing business crime—as it did, for example, with the Sarbanes-Oxley legislation[74]—or it can erect hurdles to such prosecutions—as it threatened to do, for example, with regard to the DOJ's treatment of waivers of the corporate attorney-client privilege.[75]

73. *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 793–802 (1998); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2092–93 (2009) [hereinafter Richman, *Political Control*].

74. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 903–06, 116 Stat. 745, 805–06 (codified as amended at scattered sections of 18 and 29 U.S.C. (2012)); *see also* Kathryn Keneally, *The Sarbanes-Oxley Act: A Primer*, 4 J. TAX PRAC. & PROC. 15, 17–18 (2003).

75. *See generally* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897 (2006) (discussing corporate attorney-client privilege waivers and proposing the establishment of a uniform corporate attorney-client privilege modeled after the control group test); Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No"*, 45 AM. CRIM. L. REV. 1237 (2008) (discussing legislation related to corporate attorney-client privilege waivers and arguing that corporate attorney-client privilege waivers do not threaten the underlying rationales for attorney-client privilege and the work product doctrine).

This congressional pressure can cause prosecutors to move in two directions that are potentially in tension. On the one hand, because members of Congress are even more sensitive than prosecutors to public unhappiness about corporate crime, the DOJ will want Congress to believe that the DOJ is serious about the prosecution of corporate crime. On the other hand, because members of Congress are sensitive to the pleas of corporate lobbyists about claimed government overreaching, the DOJ will want Congress to believe that the DOJ is reasonable and measured in its approach to investigating and prosecuting corporate crime. The latter motivation produces a common dynamic in federal criminal law: the DOJ tends to hold back, at least with some regularity, from pressing the outer limits of its statutory powers, lest it provoke Congress into curtailing those powers by legislation.[76]

Thus, when the DOJ makes a noisy announcement about a high-profile corporate enforcement action, it is in part gesturing down Pennsylvania Avenue in the direction of Congress to show that its prosecutors have been busy. The case then gets added to the running list of corporate prosecutions that the DOJ will roll out for congressional committees when members of Congress come demanding to know what the Department has been doing.[77] It should be noted, of course, that this dynamic has far more influence on officials at Main Justice in Washington, who work in the shadow of Capitol Hill and know that the unpleasant task of congressional testimony can be demanded of them at any moment. U.S. Attorneys need concern themselves less with the direct meddling of Congress,[78] though they face constant pressure from Main Justice to produce the data that the DOJ's leadership uses to justify its budgets and to keep Congress at bay.[79]

At the same time, the DOJ is sometimes quick to modify its practices when it sees a restless Congress preparing to interfere with prosecutorial powers. There is no evidence, of which I am aware, that the original corporate prosecution guidelines (the Holder Memo) were issued in response to any congressional complaints. The likely strongest motivation was to standardize prosecutorial practices in the

76. *See* Richman, *Political Control*, *supra* note 73, at 2111, 2114.

77. *See, e.g.*, *Investigating and Prosecuting Financial Fraud After the Fraud Enforcement and Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 4, 6–7 (2010) (statements of Senator Edward E. Kaufman and Lanny A. Breuer, Assistant Att'y Gen., United States Department of Justice).

78. *See* Richman, *Political Control*, *supra* note 73, at 2093–94.

79. *See id.* at 2097.

growing field of corporate criminal enforcement that had produced concerning inconsistency and unpredictability.[80]

But in the absence of the DOJ's continual and deep attention, from the top of the Department, to how its prosecutors exercise charging discretion in this one area, it would have been far easier for the DOJ's critics to make the case that the federal doctrine of corporate criminal liability ought to be narrowed by statute. The use of written charging guidelines and centralization of authority at Main Justice has been one way that the DOJ has kept Congress's hands off of some of federal prosecutors' favorite tools, including the RICO and money laundering statutes and the FCPA.[81]

In two notable instances in the area of corporate crime, the DOJ has staved off legislation by issuing written guidance changing policy. When Congress—largely in response to overbearing prosecutorial behavior in the KPMG tax shelter affair[82] and the reaction of federal courts in New York to that behavior[83]—became interested in passing legislation restricting prosecutors' abilities to obtain waivers of attorney-client privilege, the DOJ changed its policy to prohibit most waiver requests.[84] Congress duly lost interest in the legislation. Similarly, when Congress—largely in response to two kerfuffles involving then U.S. Attorney Chris Christie and former Attorney

80. *See* Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1053 n.104 (2008).

81. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-47.000 (2016) https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977 [https://perma.cc/QD4D-QHMW]; *Id*. § 9-105.000, https://www.justice.gov/usam/usam-9-105000-money-laundering [https://perma.cc/74ZR-EVR8]; U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-110.000 (2012) https://www.justice.gov/usam/usam-9-110000-organized-crime-and-racketeering [https://perma.cc/GTU5-JWH4].

82. United States v. Stein, 435 F. Supp. 2d 33, 335–36 (S.D.N.Y. 2006) *aff'd*, 541 F.3d 130 (2d Cir. 2008). For the full background on this fascinating saga, see generally EISINGER, *supra* note 65, at 125–46; TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2014) (discussing government efforts to combat tax shelters).

83. *See Stein*, 541 F.3d at 157–58; *Stein*, 435 F. Supp. 2d at 365, 367.

84. *New DOJ Guidance on Attorney-Client Privilege Waivers Sparks Lots of Discussion at Compliance and Ethics Event*, PREVENTION OF CORP. LIABILITY: CURRENT REPS. (BNA) (Oct. 20, 2008), https://www.bloomberglaw.com/document/XAD0VCOO000000 [https://perma.cc/U7CC-8Z7P (staff-uploaded archive)]; Gregory J. Wallance & Jens D. Ohlin, *DOJ Announces Revisions to McNulty Memo But Leaves Open Questions About Privilege Waivers*, 3 White Collar Crime Rep. (BNA) (No. 22) (Oct. 24, 2008), https://www.bloomberglaw.com/product/blaw/document/XETSM3G5GVG0 [https://perma.cc/N63V-H2ML (staff-uploaded archive)]. Congress at one time even threatened to legislate generally on the process of deferred and non-prosecution agreements, though the effort did not progress very far. *See* Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 162 (2008).

General John Ashcroft[85]—began to pursue legislation governing the appointment of monitors in corporate criminal settlements, the DOJ issued guidelines to control the selection and supervision of monitors.[86] Congress again lost interest in legislating.

Corporate crime is politically high profile, affects powerful actors in the economy, and is subject to exceptionally broad prosecutorial powers. Naturally, Congress would tend to be interested in meddling in this area of criminal enforcement more than in some others, and the DOJ would be particularly keen to protect its potent position in the field. A logical question is why the DOJ's public performances around corporate prosecutions would have any effect on Congress.

Likely the standard political economy explanation holds here, with a bit of emphasis: Congress generally prefers not to restrict prosecutorial powers through legislation, and indeed often expands those powers, so it can benefit from the perception that it has zero tolerance for crime; Congress counts on federal prosecutors to exercise their powers judiciously, lest the breathtaking scope of those powers embarrass the entire government; and prosecutors oblige in order to preserve their unfettered power.[87] In corporate crime, this dynamic is only more likely to operate because of the desire among most members of Congress to walk a fine line between being anti-business crime but pro-legitimate business activities.

E. To Satisfy Industry and the Defense Bar

Federal prosecutors have a reason to talk about what they are doing in the area of corporate crime that has no analogue in the enforcement of "regular" criminal law. Prosecutors, it turns out, are susceptible to a kind of lobbying. This pressure, which influences their tendency to make written policies and disclose them, is related to the pressure that industry can indirectly place on prosecutors through its influence on Congress. But it goes beyond that. It comes from the influence of industry lawyers on government lawyers. The dynamic has to do with the increasingly infamous and lucrative "revolving door" in corporate crime law practice, but the point is subtler than the

85. *See* Arlen, *supra* note 57, at 213–14; Carol Morello & Carol D. Leonnig, *Christie Has History of Pushing Limits*, WASH. POST, Feb. 11, 2014, at A1, A10; Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES, Jan. 10, 2008, at A1.

86. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to Heads of Dep't Components, U.S. Attorneys (Mar. 7, 2008), https://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors [https://perma.cc/6SZB-HD45].

87. The definitive account is William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (discussing how politics drive the broadening of criminal law and expansion of prosecutorial discretion).

claim that prosecutors seek to please the corporate defense bar so that it will hire them.[88]

Speculation is required here because the point is likely impossible to observe empirically. There is a shared view within the corporate crime bar—prosecutors and defense lawyers alike who, of course, do switch sides and work together with regularity—that the practice of corporate criminal enforcement requires a transparency and predictability that is not demanded in other areas of criminal prosecution. I do not think this belief is primarily motivated by a tendency to collude in order to keep each other fully employed. It likely has something to do with a shared sense that the bar in this area is involved in a kind of economic regulation—a practice that has wider policy implications—that does not apply in other areas of criminal enforcement. Perhaps this shared culture stems from a belief that the subjects of criminal enforcement in this area, especially the corporations themselves, are for the most part law-abiding legal persons engaged in legitimate activities and therefore, must be treated with a level of care and given a degree of notice and clarity that are not demanded elsewhere in criminal law.

Of course, many would say that this notion is a pathology: corporations should be treated like ordinary criminals, and disadvantaged offenders should get all the informal process that corporations receive.[89] But that is a normative point. Descriptively, what we might call the "culture of the conference room" in the practice of corporate crime is both more complicated in its origins than some think and more powerful in how it influences the willingness of prosecutors, indeed their sense of obligation, to explain what they are doing.

It would be easy to miss this final point because it seems that federal prosecutors and the corporate defense bar constantly disagree about both law and policy when it comes to corporate crime. But this is skirmishing at most, just something to talk about at the least. Indeed, the continual conversation—not just in conference rooms but in the newspapers and bar journals, at endless conferences on the subject, in congressional testimony, and in law reviews—is evidence that the bar as a whole *agrees* that this is an appropriate area for

88. *See* BUELL, *supra* note 69, at 176–203; Harvey Silverglate, *The Revolving Door at the Department of Justice*, FORBES (June 22, 2011), https://www.forbes.com/sites/harveysilverglate/2011/06/22/revolving-door/#4e4b54f25bf9 [https://perma.cc/3BC8-R7VN].

89. *Cf.* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1297 (2001) (arguing that wrongdoing in a corporate setting is treated differently from wrongdoing on the street).

policymaking dialogue. Imagine the shock if an assistant attorney general were to walk into the next conference on corporate crime and say, "Game over, folks, and we are taking the ball with us. From now on, you will get as much information about what we are doing as the John Gottis and Pablo Escobars of the world." Federal prosecutors have fully internalized the (albeit controversial) idea that corporate prosecution is a form of industry regulation.

F. To Produce More Evidence

In individual prosecutions that are parts of larger investigations, a prosecutor's use of a "speaking indictment," as well as other types of detailed court filings, often has a strategic purpose. By describing allegations in terms of what the prosecutor's evidence, including witnesses and documents, shows, the prosecutor hopes to encourage the charged defendant, as well as others charged and uncharged, that litigation is likely to fail and that cooperating with the government is the wisest course. In other words, the prosecutor discloses information about the prosecutor's case in the hopes of strengthening the case. In the prosecutor's best scenario, a series of such disclosures as charges are rung up in an ongoing campaign against, for example, the mafia or a drug cartel creates a cascade effect in which newly arrested or even confronted subjects quickly "flip," believing resistance to be futile.

There might be some of this motivation in disclosing information about corporate prosecutions, but not likely as much. In an investigation involving multiple firms in a single industry, a prosecutor might think that disclosure of a strong case against one corporation could make others more pliable. For example, this could have been driving some of the fanfare around initial settlements in the LIBOR and FX currency trading scandals, and perhaps also in the government's civil settlements with the large banks for mortgage-backed securities trading under the FIRREA statute.[90] A prosecutor

90. Press Release, U.S. Dep't of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty (June 27, 2012), https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and [https://perma.cc/32WD-T5JY]; Press Release, U.S. Dep't of Justice, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement [https://perma.cc/ET3H-472B]; Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-

might think that disclosure of details in a corporate settlement could motivate defendants and witnesses to offer testimony as the government pursues individual prosecutions in the wake of the settlement. My own impression is that these strategic motivations tend to be swamped by the prosecutor's stronger desire to send the usual broader policy messages about deterring corporate crime.

G. To Serve the Purposes of Punishment

Federal prosecutors undoubtedly would say that the analysis to this point over-complicates things: they talk a lot about corporate crime because that is how one achieves the policy objectives of criminal law in this field. The DOJ's written policies on corporate prosecutions are explicit in announcing the government's objectives: to promote "good corporate citizenship"; to obtain deterrence on a wide scale; to reform criminogenic institutions; to help make victims whole; and the like.[91] The best-known part of those policies—the ten factors that are meant to guide the decision whether to charge a corporation—are in large part an effort to fit ordinary thinking about criminal punishment to the odd case of the business institution.[92] Prosecutors must weigh the seriousness and extent of the wrongdoing, the corporation's tendency toward recidivism, and the corporation's contrition (in the form of cooperation, remedial effort, and reform).[93] When it comes to both charging and sentencing, prosecutors are meant to think about these sorts of things in any criminal case.

It is clearly the view of the DOJ, as well as many who think about white collar crime, that the business sector is fertile ground for the criminal law to send messages. On this account, white collar criminals pay more attention than "street" offenders to what the law and the government are doing, and they use that information more self-consciously to plan their activities.[94] "This is great," thinks the

Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas [https://perma.cc/EE6L-9X7Q].

91. *See* U.S. DEP'T OF JUSTICE, *supra* note 45, at § 9-28.200.

92. *Id.* § 9-28.300.

93. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.000 (2017), https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution [https://perma.cc/6627-4WJZ].

94. *See* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 411 (1980) ("[T]here is no money equivalent to the pain of imprisonment, perhaps especially to the affluent, educated, 'sensitive' person—the white-collar criminal"); *Online Extra: A Talk with Justice's No. 2*, BLOOMBERG BUSINESSWEEK (Feb. 23, 2004), https://www.bloomberg.com/news/articles/2004-02-22/online-extra-a-talk-with-justices-no-dot-2 [http://perma.cc/FML7-65QJ] (noting that white-collar criminals are "exquisitely sensitive to pain").

jaundiced prosecutor who sees first-hand the parade of recidivists through the system in drug, gun, and organized crime cases. "Here is an area where the basic theories of punishment might actually work!"

Starting with the most defendant-centric theories, the DOJ believes its corporate prosecution program, perhaps above all, is designed to send a strong message—even a message that stigmatizes—to the corporate defendant itself. The purposes of this message are to punish the defendant, including through negative publicity, to deter the corporate defendant from committing (or perhaps better, allowing) future violations of law, and to rehabilitate the defendant so that it promotes legal compliance in the future.[95]

It has long been a DOJ practice in the settlement of a corporate prosecution, whether or not it involves a guilty plea, to require at least a defendant's factual, if not also legal, admission to wrongdoing.[96] That admission, together with a detailed statement of facts and an announcement of financial and other penalties, is broadcast in publicly available documents that are disseminated widely, at least in cases involving large corporations.

One might think that publicity is not necessary when a prosecution seeks to impose retribution and obtain specific deterrence because the defendant is already paying attention. But even within the confines of a large corporation, public and widespread disclosure of the nature of the wrongdoing, the penalties, and the rehabilitative measures imposed can garner the attention of the many stakeholders in the corporation who may be spread around the world. And the publicity itself is part of the punishment: it may impose a reputational consequence on the firm, and even to some extent on its managers, that has the potential to discourage future episodes of wrongdoing.[97] Requiring a firm to admit wrongdoing in a highly publicized setting may contribute to the seriousness with which stakeholders view the problem, promoting introspection and reform.[98]

95. *See* Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1425 (2009).

96. For a comprehensive collection of such settlements over time, see Garrett & Ashley, *supra* note 9.

97. *See* Buell, *supra* note 29, at 491–525; *see also* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 491 (1999); Stephen Choi & Marcel Kahan, *The Market Penalty for Mutual Fund Scandals*, 87 B.U. L. REV. 1021, 1025 (2007); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Consequences to Managers for Financial Misrepresentation*, 88 J. FIN. ECON. 193, 194 (2008); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582 (2008).

98. *See* Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 513 (2014); Verity Winship & Jennifer K.

Thus, disclosure of the prosecutor's case and of the justifications for her actions may have a role to play in corporate crime that is missing, or at least less present, in "ordinary" criminal cases.

The DOJ's primary and openly professed ambition in prosecuting corporate crime is to reduce the incidence of corporate crime, principally by encouraging corporate managers to take steps to prevent or reduce wrongdoing by employees.[99] Regular and widespread disclosure of both the details of enforcement actions and of policy guidance can be viewed as central, even essential, to the pursuit of this objective. The DOJ's persistent public emphasis on the benefits to corporations, in both charging discretion and penalties, from cooperation, self-reporting, and vigorous compliance programs—an emphasis which has been sharpened by recent policies in FCPA enforcement—is designed to send a strong message. That message is that corporations should police their employees, both to prevent crime in the first instance and to ensure that wrongdoers are punished in the second instance, and it will be expensive to fail to do so.[100]

The DOJ has wholeheartedly adopted the deterrence theory of corporate criminal liability advocated by utilitarian theorists who defend the idea of using criminal processes against corporations.[101] The Department's commitment to this theory has only grown stronger over time, as it has increased both the extent of its policy pronouncements on the subject[102] and, more substantially, the extent to which its settlement documents speak at length about the defendant corporation's efforts, or lack thereof, at compliance, cooperation, and reform.[103] In the area of corporate prosecutions, federal prosecutors are engaged in a campaign to, in effect, regulate corporate legal compliance—at least as it relates to compliance with federal criminal law.[104] Obviously, the success of such an effort would

Robbennolt, *Admissions of Guilt in Civil Enforcement*, 101 MINN. L. REV. (forthcoming 2018) (manuscript at 31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942279 [https://perma.cc/QS2R-VLWD].

99. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, to All U.S. Attorneys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/TE9B-CGSR].

100. *See id.*

101. *See*, *e.g.*, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Conduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 691 (1997).

102. *Supra* Section I.C.

103. *Supra* Section II.F.

104. *See* Lisa Kern Griffin, *Inside-Out Enforcement*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 10, at 110, 122; Harry First, *Branch Office of the Prosecutor: The*

depend, at least in large part, on the government's ability to disseminate its messages throughout particular industries and the corporate sector as a whole.[105]

III. WHAT SHOULD WE WANT PROSECUTORS TO SAY?

In discussions about the American criminal justice system, which is now dominated and pervaded by prosecutorial discretion, a common call is for "accountability" of prosecutors.[106] This demand needs much specification. In the most general sense, I take it to mean that prosecutors ought to be required to exercise their discretion in the public interest and that there ought to be mechanisms for holding them to that obligation. This, however, leaves a lot to be explained in terms of what the public interest is and how prosecutors might be held to it.

With respect to corporate crime, it seems reasonable to think that federal prosecutors would understand their duty to include reducing the incidence of criminal violations by employees of large corporations, when cost effective. While deterrence of crime is a notoriously difficult subject for empirical proof,[107] the government's basic theory of corporate crime over the last two decades—using the threat of criminal prosecution to leverage the power of corporations over their employees to prevent and detect individual crimes—is plausible. Whether the DOJ's contemporary approach is the optimal program for dealing with corporate crime is, of course, hotly debated, and it is not the purpose of this Essay to take up that controversy.[108]

Assume that enforcement realities guarantee that the government will continue to depend on its power over corporations as

New Role of the Corporation in Business Crime Prosecutions, 89 N.C. L. REV. 23, 25 (2010).

105. *See* Dorothy Thornton, Neil A. Gunningham & Robert A. Kagan, *General Deterrence & Corporate Environmental Behavior*, 27 LAW & POL'Y 262, 277–81 (2005).

106. *See* Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010) (pointing to a deficiency in prosecutorial accountability in the United States and the need for "[a] responsible exercise of power . . . consistent with current public preferences and with fundamental, long-term legal principles").

107. *See* Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LIT. 5, 6 (2017).

108. *See, e.g.*, Arlen & Kahan, *supra* note 10, at 373 ("Prosecutors are trained to think about what is needed to make sure crime does not happen. But this is not, and should not be, the standard employed to establish 'effective' or 'reasonable' compliance. Compliance is costly.").

one of its principal means of deterring and detecting business crime.[109] Determining whether prosecutors make decisions and take actions in this area in furtherance of a good faith and reasonably effective effort along these lines depends on having information about what they are doing and, to at least some extent, what they are thinking. Accountability depends on transparency, sunlight disinfects, and so on. Particularly because the topic of how corporate crime ought to be treated in the criminal justice system is so controversial—including on the very question of what is a crime in the first place—this field demands regular public justification for prosecutorial decisions.

Transparency, however, is not an unalterable good. In criminal enforcement, secrecy is often necessary to the acquisition of evidence because individuals engaged in wrongdoing work to conceal their activities. Evidence, it goes without saying, is the essence of a successful prosecution. In addition, in an adversarial system—and prosecutors of corporate crime face the best adversaries in criminal practice—over-sharing of information and strategy can lead to defeat at the hands of skilled counsel, including in cases that, on their merits, ought to have resulted in punishment. Badly motivated corporate managers might also use the government's disclosures about how it makes its corporate cases, and how it exercises its charging and sanctioning discretion, as a roadmap for unlawful activities designed to evade legal sanction.

Not surprisingly, then, the conclusion here is that prosecutors talking publicly about corporate criminal enforcement has some good reasons and desirable effects but also some unattractive motivations and potential downsides. Disclosure designed to deter corporate crime should be welcomed when its benefits exceed its drawbacks in hampering effective enforcement. Disclosure meant to further the professional ambitions of prosecutors, however, has no value. Nor is it clear that the public has any real interest in disclosure that is designed only to foster legitimacy—the *idea* that prosecutors are doing their job—whether that idea is encouraged among the public generally or more specifically with observers in Congress.

109. *See* BUELL, *supra* note 699, at 154–55; *see also* ANDREW WEISSMANN ET. AL., U.S. CHAMBER INST. FOR LEGAL REFORM, REFORMING CORPORATE CRIMINAL LIABILITY TO PROMOTE RESPONSIBLE CORPORATE BEHAVIOR 2 (2008), http://www.instituteforlegalreform.com/uploads/sites/1/WeissmannPaper.pdf [https://perma.cc/ADX3-Q32X] ("For many corporations, a criminal indictment is tantamount to a corporate death penalty and thus the current standard for corporate criminal liability places disproportionate power in the hands of the government.").

Whether the public realizes it or not, the public's agenda is corporate criminal enforcement, not the politics of corporate crime. Consider a recent example, one that happens to have mostly involved the prosecution of individuals, not firms. The U.S. Attorney for the Southern District of New York determined the prosecutions stemming from the 2008 financial crisis constituted "the biggest insider trading bust since the infamous Ivan Boesky case back in the 1980s," which "at the time [was] the largest crackdown ever on white collar crime."[110] This wave of prosecutions attracted a great deal of press, most of which was encouraged by the U.S. Attorney.[111] No doubt one objective of publicity in this context was to create the impression that miscreant traders in the hedge fund industry will get caught and punished, and thus deter insider trading.[112] One cannot measure deterrent effect in this context because the incidence of insider trading is not observable. But it is more than reasonable to think that eighty prosecutions involving wiretaps, informants, and cooperating witnesses, where previously there had been only sporadic criminal enforcement, had some chilling effect on the relevant criminal activity.

At the same time, even if he doubted the deterrent value in doing so, then-U.S. Attorney for the Southern District of New York Preet Bharara surely would have been eager to publicize his anti-insider trading campaign. Indeed, at one point in the campaign he declared insider trading to be "rampant" on Wall Street,[113] a message

110. CHARLES GASPARINO, CIRCLE OF FRIENDS: THE MASSIVE FEDERAL CRACKDOWN ON INSIDER TRADING 104, 224 (2013); *see* Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis,* N.Y. TIMES MAG. (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html [https://perma.cc/YNQ8-6C6C (staff-uploaded archive)].

111. *See, e.g.*, Massimo Calabresi & Bill Saporito, *The Street Fighter*, TIME, Feb. 13, 2012; Press Release, U.S. Dep't of Justice, U.S. Attorney's Office for the Southern District of New York Recovers Nearly $4 Billion from Criminal and Civil Cases Since January 2013 (Feb. 11, 2014), https://www.justice.gov/archive/usao/nys/pressreleases/February14/Collections2013PR.php [https://perma.cc/N8EL-K3WN] (discussing the wave of prosecutions for insider trading); *see also* Sonam Sheth, *Donald Trump Just Fired Preet Bharara – Here's a Look at the Sheriff of Wall Street's Most High-Profile Cases*, BUS. INSIDER (Mar. 11, 2017), http://www.businessinsider.com/preet-bharara-trump-fired-high-profile-cases-2017-3 [https://perma.cc/8GDC-HV4M]; *U.S. Attorney Preet Bharara Addresses Insider Trading Prosecutions, Public Corruption at Milbank Tweed Forum*, NYU LAW (Oct. 9, 2015), http://www.law.nyu.edu/news/us-attorney-preet-bharara-insider-trading-prosecutions-milbank-tweed-forum [https://perma.cc/LKP3-44TF].

112. The revelation that wiretaps were being used in this area for the first time had to have been a particularly informative moment, causing potential violators to exercise much more caution in sharing tips about inside information.

113. Peter Lattman, *U.S. Is Said to Pursue Broad Insider Trading Inquiry*, N.Y. TIMES, Nov. 21, 2010, at 24.

that might perversely have encouraged the belief that most violators still were not being caught and thus the risk of prosecution remained low. He also must have thought that publicizing his efforts, at a time when the anti-Wall Street sentiment was at one of its all-time highs, would cause the public to believe there was an active sheriff on the financial crime beat. This would perhaps calm the outrage a bit and, in terms of the strange theology of market regulation, perhaps "restore public faith in the markets" so that the capital would keep on flowing.[114] It might also, of course, identify him personally as the guy cracking down on business crime.[115]

Moving to specific forms of disclosure that have been discussed in this Essay, I suggest that the conclusion might be the opposite of what was expected. Objective analysis might be expected to wind up favoring the careful and regular policy pronouncement over the splashy revelation of the details of one corporate crime or another. Again, it is the policy material—the DOJ's pre-commitment in writing on matters of discretion—that the defense bar and many academic commentators have persistently clamored for, and which the government has periodically provided in part to satisfy those constituencies.[116]

But there is reason to be skeptical of whether policy memos, guidelines, and the like are the best evidence of what prosecutors do, and will do in the future, and of their reasoning and motivations. There are many audiences for such policy pronouncements, the last among which might be the people who actually contemplate whether to commit corporate crime. Indeed, some observers have sharply questioned whether the obsessive focus in these documents on compliance programs, as well as the similar focus in the corporate sentencing guidelines, promotes a wasteful compliance industry that expensively elevates form over substance in the management of large firms.[117] Not only does this serve the interests of prosecutors in legitimizing what they are doing by making it seem more law-like and more driven by policy objectives, but also it serves the interests of the

114. *See* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 713 (2006).

115. If intended, this worked; Bharara landed on the cover of Time Magazine. Calabresi & Saporito, *supra* note 111.

116. *See* Arlen & Kahan, *supra* note 10, at 327 ("Calls abound for federal authorities to provide adequate guidance to prosecutors on when to impose [criminal settlement] mandates and what form they should take."); *see also* sources cited, *id*. at 327 n.9.

117. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 490 (2003); *see also* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 954 (2009).

private bar and related professionals who sell their services to corporations on the claim that their expertise can help companies avoid trouble with the DOJ.

An example to be especially skeptical about is the recent Yates Memo. The DOJ revised its corporate prosecution guidelines to insert lots of additional language about the importance of prosecuting individuals in corporate cases and not substituting a corporate settlement for charging individual violators.[118] The guidelines had never said anything about *not* charging individuals, and the DOJ had never described itself as uninterested in that objective. But legal and media commentators, as well as some members of Congress, had been complaining in the wake of the financial crisis that the Department had lost its appetite for individual white-collar prosecutions.[119] Prosecutors, especially federal prosecutors, cannot stand to be called lazy. And it may have been true that senior officials in the DOJ were aware of individual examples in which line prosecutors had walked away from corporate settlements without showing enough zeal about following up on individual prosecutions—or, even worse, implicitly traded a corporate settlement for a decision to stand down on individuals.

So the DOJ issued a policy memo, with an extensive media rollout, that changes virtually nothing about the realities of corporate crime prosecution. The Yates Memo keeps saying to try harder to pursue individual prosecutions.[120] But it does not address the most common reason that individual prosecutions fail or never get off the ground in the first place: the criminal laws of the United States and the nature of the large corporate institution combine to make it extremely difficult in all but the most flagrant cases of corporate crime to succeed in assigning liability to individual corporate managers.[121] The DOJ knows this better than anyone, especially in the wake of the mortgage-backed securities trading fiasco.

118. U.S. DEP'T OF JUSTICE, *supra* note 45, at §§ 9-28.210, .300; Memorandum from Sally Quillian Yates, *supra* note 99.

119. *See, e.g.*, Chris Arnold, *After Five Years, Why So Few Charges in Financial Crisis?*, NPR (July 26, 2013, 4:55 PM), https://www.npr.org/2013/07/26/205866019/few-on-wall-street-have-been-prosecuted-for-financial-crisis [https://perma.cc/X9H9-PBAZ (staff-uploaded archive)].

120. Memorandum from Sally Quillian Yates, *supra* note 99.

121. For more extensive discussion, see Samuel W. Buell, *Criminally Bad Management* in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (J. Arlen ed., forthcoming 2018) (manuscript on file with the North Carolina Law Review); Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, CRIM. LAW & PHIL. (July 31, 2017), https://link.springer.com/content/pdf/10.1007%2Fs11572-017-9434-9.pdf [https://perma.cc/DV33-VKK6 (staff-uploaded archive)].

The DOJ also well knows (because it invented the practice) that the credible threat to impose criminal liability on *corporations*, not individuals, is the principal means by which the DOJ obtains evidence of crimes within large corporations.[122] Indeed, to the extent that the Yates Memo has any hard edges, they are about *corporate*, not individual, liability: the memo instructs prosecutors that they may not give a corporation credit for cooperation unless and until the company has done everything it can to give the DOJ provable cases against employees.[123] Thus the Yates Memo can be read as a somewhat cynical, or at least cute, response to the years of criticism of the DOJ for supposed weakness on prosecuting executives, especially in the financial sector. Even though the memo could do nothing about law or problems of proof, it seems to have spurred a mild panic in some private quarters that the government is really coming to take lots of management scalps.[124]

When it comes to federal prosecutors, we should watch what they do, not what they say. The growing phenomenon of the "speaking settlement" is to be warmly welcomed and further encouraged. Give us lots of detail about the nature of the underlying wrongdoing and the strength of the case: who was involved, what was done, where it occurred, how long it lasted, and so on. Be specific. And always get an admission so the facts become a lasting and indisputable record of the case. Put numbers on things whenever possible. Tell the public what the sanctions are going to be and how they were calculated. Describe in detail the extent to which the crimes were or were not attributable to corporate culture, compliance programs, management directives, and the like—explain how it was a case of *corporate* crime, not just respondeat superior liability.

Quantitatively or qualitatively, score the quality of a company's efforts at remediation and cooperation relative to other cases. Tell the public how prosecutors reasoned their way to this particular

122. *See* First, *supra* note 104, at 87–88.

123. Memorandum from Sally Quillian Yates, *supra* note 99.

124. *See, e.g.*, *Government & Internal Investigations Advisory: The Yates Memo and the DOJ's Focus on Individuals*, ALSTON & BIRD (Sept. 14, 2015), http://www.alston.com/advisories/DOJ-yates-memo/ [https://perma.cc/ZT49-7KT3]; *Legal Issues Business Leaders Need to Know in 2016*, ARNALL GOLDEN GREGORY (2016), http://www.agg.com/files/Publication/b22380dd-68ac-4249-a9ad-16073de65b33/Presentation/PublicationAttachment/c7a8777d-66de-4daa-9bdc-16fc367a91d0/AGG-Business-Leaders-Legal-Issues-2016.pdf [https://perma.cc/2BAB-TFJA]; *The Yates Memo—A Renewed US Focus on Individual Misconduct in Corporate Investigations*, NORTON ROSE FULBRIGHT (June 2016), http://www.nortonrosefulbright.com/knowledge/publications/140884/the-yates-memo-a-renewed-us-focus-on-individual-misconduct-in-corporate-investigations [https://perma.cc/Z683-68GF].

settlement.[125] And when possible—perhaps this is asking too much—get the company to agree to disclose its own investigative report on the wrongdoing.[126]

What we get through this disclosure mechanism is not the bland language of unenforceable policy pronouncements but a kind of common law of corporate enforcement—a body of case law, if you like, that we can read and study. We get empirical data, the lack of which has been the biggest barrier to rigorous study of the most important phenomenon in the present American criminal justice system: how and why prosecutors wield their power.[127] If lawyers and academics can begin to tell crisper-edged stories about what the DOJ has been doing from case to case in the enforcement of criminal law against corporations, clearer messages might emerge about how to comply with the law, and greater transparency will exist about whether the DOJ's actions are serving the public interest.[128] If the DOJ is going to continue to issue policy statements about corporate crime, those statements should tell federal prosecutors what they must file or disclose when they settle a case and specifically what those documents must say about both the wrongdoing and the exercise of prosecutorial discretion in response to that wrongdoing.

CONCLUSION

The enormous and mostly unreviewable power that federal prosecutors exercise in a process dominated by settlements warrants ample skepticism about the motivations underlying what they choose to disclose and say. But it remains remarkable, and in need of explanation, that there is so much more disclosure and speaking in the field of corporate crime than in any other area of federal prosecution. Professional self-interest and Washington politics may

125. Cunningham, *supra* note 10, at 48–56; Wilt, *supra* note 2, at 64; *see also* Beverly Earle & Anita Cava, *The Mystery of Declinations Under the Foreign Corrupt Practices Act: A Proposal to Incentivize Compliance*, 49 U.C. DAVIS L. REV. 567, 569 (2015).

126. The reports in cases like the General Motors ignition switch scandal have been valuable resources. *See* ANTON VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS, JENNER & BLOCK (2014), https://www.beasleyallen.com/webfiles/valukas-report-on-gm-redacted.pdf [https://perma.cc/DQ6Z-UMLB].

127. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128 (2008) (asserting that many believe prosecutorial discretion is the "opposite of law" and has "ripple effects throughout the criminal justice system").

128. In other words, the objective should be to encourage and feed the work of analysts such as Cindy Alexander and Mark Cohen. *See generally* Alexander & Cohen, *supra* note 34 (discussing the transformation in corporate criminal law enforcement through the use of DPAs and NPAs).

explain some of this behavior, but the effort to accomplish something programmatically likely explains more of it.

This behavior has the potential to benefit the public. It is to be encouraged and, if possible, channeled. In particular, case-specific information over a large number of cases has greater value than policy boilerplate. A prosecutor's description of facts that a firm agrees to as a condition of settlement cannot fully substitute for what might be learned through full-blown litigation and trial. But settlement will continue to dominate for the foreseeable future, and those of us who wish to study and debate the practice of corporate criminal enforcement should encourage more of what we can get.