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THREE CONCEPTIONS OF CORPORATE CRIME (AND ONE AVENUE FOR REFORM)

MIRIAM H. BAER*

I

WHAT IS CORPORATE CRIME?

Conventional analyses treat corporate crime and its prosecution as just another manifestation of criminal law, with all of the criminal justice system's baggage, and then some.¹ More forward thinking discussions analyze it as a variant of regulation that has yet to realize its true promise.² Neither of these views aptly describe the federal government's modern approach to corporate offending, however. The hybrid system that the Department of Justice (DOJ) has adopted to confront corporate violators is neither fish nor fowl.

As those familiar with the subject are well aware, there exists no specific offense known as "corporate crime"; rather, it is best described as a legal mechanism for holding corporations liable for their employees' violations of the law. To confuse the matter further, when a corporation's employee violates a federal criminal statute with an intent to benefit her firm, the standard government response revolves around a set of extrajudicial (that is, nonlegal) outcomes.³ If the corporation catches the violation before anyone else, disgorges the profit, and promptly reports the violation to government authorities, the corporation often escapes with a full declination of charges.⁴ If the corporation

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1. See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009) ("[M]any of the problems with corporate liability are endemic to U.S. criminal law, rather than unique.").

2. See David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 312 (2008) ("Reform undertakings . . . are a growing and controversial practice, but they have not yet received significant scrutiny by legal scholars.").

3. See generally Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

4. This policy was first announced by the Department of Justice as applying solely to violations of the Foreign Corrupt Practices Act. See U.S. DEP'T OF JUST., THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE (April 5, 2016), <https://www.justice.gov/archives/opa/blog-entry/file/838386/download> [<https://perma.cc/S67H-QJG5>]. The FCPA Pilot Program paired the possibility of declination (if the corporation voluntarily reported its wrongdoing) with a threat: if the corporation failed to voluntarily report its wrongdoing and the government became aware of the

sits on the information (or worse, buries it while the behavior worsens and spreads), but eventually discloses it and cooperates with authorities in a subsequent investigation, it has a good shot at obtaining a deferred prosecution agreement (DPA). This DPA may require any number of commitments including the payment of fines, oversight by monitors, compliance and governance changes, and promises to alter or disband certain operational practices.⁵ And finally, if a corporation goes out of its way to encourage wrongdoing, evade detection, and obstruct justice, it *still* is likely to receive a deferred prosecution of some sort, albeit a more severe and costly one, or perhaps be forced to offer up one of its subsidiaries for indictment.⁶

Both the DPA itself and its underlying procedural framework have attracted pervasive criticism from commentators—for being too weak (mostly), too strong (sometimes), too arbitrarily applied, and far too lacking in transparency and

behavior, the maximum reduction in the corporation's fine under the United States Sentencing Guidelines, even if the company subsequently cooperated in the government's investigation, would be no more than 25%. *Id.* Thus, the FCPA Pilot Program, which the Department eventually enacted as a permanent program, placed immense emphasis on voluntary disclosure. See Karen Woody, "Declinations with Disgorgement" in *FCPA Enforcement*, 51 U. MICH. J. L. REFORM 269, 285 (2018), for criticism of the policy arguing that the Department's policy conflates punitive and remedial concepts.

5. Companies can also receive a non-prosecution agreement (NPA), which completely bypasses the judicial system. On the differences between the two, see Cindy A. Alexander and Mark Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Deferred Prosecution, Non-Prosecution and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 545 (2015). Unlike an NPA, a DPA requires the filing of a criminal information in court and the judge's approval to exclude time under the Speedy Trial Act during the pendency of the agreement's probationary period. *Id.* at 548; See also 18 USC § 3161(h)(2)(excluding time from speedy trial clock to allow defendant to show "good conduct" per agreement with prosecutor). The probationary period is necessary to ensure the company implements the various changes sought by the prosecutor. See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 NYU L. REV. 311, 321–22 (2007) (analogizing DPA period to probation or pre-trial diversion programs); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1104 (2006) (explaining that DPAs "essentially provide for term of corporate probation"). "[S]ettlement agreements often contain provisions that commit the company to reforms, depending on the type of misconduct." Cindy R. Alexander, Yoon-Ho Alex Lee, *Non-Prosecution of Corporations: Toward A Model of Cooperation and Leniency*, 96 N.C. L. REV. 859, 870 (2018). For recent empirical evidence questioning how often companies enact board-level governance reforms and what that might mean for other reforms, see John Armour, et al., *Board Compliance*, 104 MINN. L. REV. 1191, 1202 (2020) ("While our data do not permit any causal interpretation of the findings, they are consistent with theoretical claims that compliance is more often overlooked, rather than overseen, by boards."). For a more positive portrayal of criminal law's effect on the corporate compliance function, see Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2138 (2019) ("For over a decade, federal regulators and criminal authorities have directed companies to intensify their compliance efforts, often in return for more favorable regulatory treatment. The response has been swift and impressive.").

6. For example, in 2007, Purdue Pharma's subsidiary, Purdue Frederick, entered a guilty plea in connection with its parent company's fraudulent promotion of its blockbuster drug, Oxycontin. See U.S. Dep't of Just., Statement of United States Attorney John Brownlee on the Guilty Plea of the Purdue Frederick Company and its Executives for Illegally Misbranding Oxycontin 2 (May 10, 2007) (describing the plea agreement), available at <https://www.ctnewsjunkie.com/upload/2016/02/usdoj-purdue-guilty-plea-5-10-2007.pdf> [<https://perma.cc/JE6P-7NX7>]. The guilty plea left the parent and its owners free to continue manufacturing and promoting the drug, much to the detriment of the patients who eventually became addicts.

follow-up.⁷ Despite these criticisms, this settlement format has flourished for roughly two or more decades.⁸ DPAs, declinations, and so-called non-prosecution agreements (NPAs) seem to be every corporate crime commentator's favorite punching bags, but the criticisms lobbed at them have made almost no dent in their presence. What accounts for this arrangement? Why, amid so little genuine enthusiasm, is the government so wedded to these extrajudicial settlements? Or alternatively: why, amid so much critique, has the government been unable to build stronger support for its primary corporate punishment apparatus?

The standard answer is grounded in political economy: extrajudicial settlements benefit government prosecutors by maximizing their discretion to punish⁹ and minimizing their burden to investigate.¹⁰ Congress avoids responsibility for defining the contours of corporate criminal liability. And finally, despite outward disapproval, corporate managers and their legal counsel embrace this arrangement because they prefer it to the more robust oversight mechanisms that might otherwise emerge if the government were to invest greater resources in back-end enforcement and front-end regulation.¹¹ Thus, the

7. The DPA's criticism emanates from both the left and right. Compare, Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L. J. 347, 349 (2014) (arguing that prosecutors have too much power to compel agreement by business actors), with BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 7 (2014) (contending that prosecutors often compromise too much of their powers with business interests), and David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1315 (2013) ("[S]uch a weak foundation in policy, it is no surprise that deferred prosecution and non-prosecution agreements are used inconsistently within the Justice Department and in cases where such agreements may not serve the interests of justice.").

8. On the history of the DPA, its close cognates, and the Department's evolving policy on the charging of business entities, see Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589, 1596 (2018), for his description of DOJ's internal policy guidance on prosecutorial charging, which dates back to the Holder Memorandum, which was issued in 1999.

9. See Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 977 (2009) ("[T]here is no judicial review of corporate compliance regulation because courts have long held unreviewable the prosecutor's discretion not to file an indictment."). See also Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192 (2016) ("The central claim of this article is that the prosecutors' discretionary authority to use D/NPAs to create and impose mandates on firms is inconsistent with the rule of law.").

10. See Alexander & Lee, *supra* note 5, at 882 (theorizing that prosecutors embrace non-plea settlements such as the DPA and NPA because they "fre[e] up enforcement resources through the more efficient resolution of criminal investigations."). Sean Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2127 (2016) (observing prosecutors may "use settlement agreements to side-step both political costs and evidentiary burdens."). For more on the costs of internal investigations, which are borne by corporate targets, see Geoffrey Miller, *The Compliance Function: An Overview*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981, 995 (Jeffrey N. Gordon and Wolf-Georg Ringe eds., 2018) ("Some companies have spent millions of dollars a year in an effort to get to the bottom of potential violations.").

11. See Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. Q. 95, 97-98 (2004) (hypothesizing that corporate managers acquiesce in corporate crime legislation because it affects them less acutely than managerial liability or stronger civil liability regimes); see also Asaf Eckstein & Gideon Parchomovsky, *The Reverse Agency Problem* 49 (Univ. of Pa., Inst. for L. & Econ., Research Paper No. 19-38), <https://ssrn.com/abstract=3460064> [<https://perma.cc/NYW8->

DPA serves as the instantiation of public choice theory's greatest fears: government and corporate actors choose the path most beneficial to their collective interests, and in the process, effectively sell out the best interests of the general public.¹²

In this Article, I wish to explain why this elegant and otherwise plausible narrative of corporate greed and prosecutorial fecklessness falls short of explaining the DPA's durability. There is at least one additional reason that DPAs and their close cousins have been able to outlast their critics, which is society's collective inability to decide what corporate crime prosecution is supposed to accomplish. Neither academics nor practitioners seem to agree why it is we punish corporations, other than to support some high-level notion that corporate "actors" (either the entity, or the people who run them—even that question remains unanswered) should be held accountable for their wrongdoing. Below this extremely high level of abstraction, the consensus breaks down. We don't agree what constitutes corporate "wrongdoing," we don't agree whether a fictional entity is the true subject of our ire, and we don't agree what consequences should befall the entity, much less which government actor should play the starring role in implementing such consequences.

If we lack agreement on what corporate crime prosecution is supposed to accomplish, then we are far less likely to agree on a set of pragmatic steps to achieve that accomplishment. Accordingly, this Article seeks to knit questions of purpose and reform by creating a taxonomy of how commentators frequently, if subconsciously, conceptualize corporate crime. This rhetorical mode of analysis is fruitful because it reveals frictions in thinking that help us understand why policymakers have yet to devise a better alternative or, short of that, convince us that DPAs merit our undivided support. Moreover, it illuminates the institution that should play the largest role in shaping future reforms: our entirely too-reticent legislative branch.

Congress has played a remarkably small role in the overall development of corporate criminal law. It has declined to draft an all-purpose statute defining corporate crime,¹³ much less a series of statutes delineating distinctions between

6QAZ] (citing the "the zeal of corporations and enforcement authorities to consummate settlements expeditiously" and thereby conveniently scapegoat a group of directors or officers in order to shift blame from the company).

12. Public choice theory posits that government and regulated actors seek regulations and enforcement practices that redound to their collective interests, often at the expense of the general public. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) ("The public choice account holds . . . that agencies deliver regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public."); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE: A CRITICAL INTRODUCTION* 3 (1991) ("[W]e cannot simply take for granted that the legislature represents the public interest.").

13. The 1909 Supreme Court decision that affirmed corporate criminal liability was premised on a statute that explicitly premised liability on an employee's violation of law. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 491 (1909). Later expansions of the doctrine, however, have occurred largely through the judiciary's application of the concept. See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (explaining that contemporary courts "generally read criminal statutes to impose corporate criminal liability even in

worse and lesser manifestations of corporate misconduct.¹⁴ Instead, it has ceded power to its coordinate branches, occasionally threatening intervention here or there but otherwise remaining on the sidelines.¹⁵ As a result, disagreements about what corporate crime *is* and what its prosecution *should achieve* have festered alongside a growing list of problems with the criminal justice system writ large.¹⁶

The time has come for Congress to act—in some way or another—in regard to corporate crime. *How* Congress acts, and which schools of thought it ultimately embraces, can be left for later discussion, as reasonable people can disagree on corporate criminal law’s statutory direction. Regardless of the goal one chooses for corporate prosecutions, a democratically elected legislature is the institution best equipped to resolve corporate crime’s knotty debates.

The remainder of this Article is divided in two parts. Part II introduces a short taxonomy that organizes extant critique of corporate prosecutorial practice into three schools of thought. Each reflects a set of normative and descriptive claims, and in most instances, the aspirational features overtake the descriptive elements. Each group wants corporate crime prosecution to behave one way, despite the way it actually behaves.

Part III turns attention to the challenges and opportunities for legislative reform. We might not agree on corporate crime’s purpose, and we may not reach agreement on the specific reforms that best capture those purposes, but we can agree on the *situs* for future reform efforts, namely our legislative branch. If corporate crime is *really* “just another type of crime,” or “regulation by other means,” or perhaps a more radically progressive mechanism by which we permanently alter the corporation’s relationship with society, then we need a democratically elected body to choose among these goals and create the

the absence of any indication that Congress or a state legislature favo[r] this outcome”). Although Congress has declined to define corporate criminal liability in many instances, it has enacted statutes that impose collateral consequences on firms convicted of wrongdoing. See Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 465 (2019) (alluding to applicable statutes and regulations).

14. For a broader argument for a graded approach to federal white-collar crime, see Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225 (2018).

15. See, e.g., Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. LEGIS. 543 (2015) (describing a piece of 2014 proposed legislation purporting to empower judges to review DPA agreements to ensure they were in the “interest of justice”). On those few occasions where Congress has threatened intervention, the Department has responded by promulgating policies that narrow the line prosecutor’s discretion: “[W]hen bar associations and allied organizations challenged federal prosecutors’ practice of pressuring corporations to disclose attorney-client privileged information [and Congress threatened legislation], the Department responded by revising its policy to restrict the practice.” Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 83 (2016).

16. On the criminal justice system’s many other problems, see generally RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019), for a marshalling of widespread evidence of the criminal justice system’s ineffectiveness and overreliance on imprisonment; see also Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2019) (documenting the rise of the reform movement and identifying competing schools of thought).

necessary infrastructure to implement that choice. Otherwise, we may well reconvene in another two decades and wonder why settlements such as the DPA remain the primary means by which corporate entities are held accountable for the wrongdoing that occurs within their midst.

II

THREE SCHOOLS OF THOUGHT

When we talk about corporate prosecution and corporate crime, we mean different things. For some, corporate criminal prosecution is just another variant of criminal enforcement, albeit one with some necessary adaptations to account for the defendant's status as an entity and not a natural person.¹⁷ A second group conceptualizes corporate crime primarily as a form of regulation, either better (or worse) than the conventional forms of regulation we have grown used to. A third and far more ambitious perspective envisions corporate crime as one of several tools for securing profound changes in the ongoing relationship between industry and society, what one might call a transformative or progressive vision of corporate crime. Each of these schools of thought dictates a different set of practical reforms. All reject major aspects of the DOJ's current enforcement approach.

A. Corporate Crime as Crime

If corporate crime were indeed just another type of crime, one might expect prosecutions of corporate offenders to look, more or less, like prosecutions of individuals accused of committing white-collar crimes such as fraud or bribery. That is, we would expect a heavy emphasis on *statutes*¹⁸ since criminal law is often described as being dominated by the legality principle.¹⁹ This is particularly true

17. For an example of how such adaptation can stress criminal law's limits, see Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL'Y 15, 17 (2010) (observing that "in order to be punishable, corporations must be assimilated in one way or another to the paradigmatic *individual* offenders").

18. The claim that criminal law is defined primarily by its penal statutes reflects the ideal that democratically elected legislatures should delineate the contours of criminal law and its punishments. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985) ("The principle of legality forbids the retroactive definition of criminal offenses. It is condemned because it is retroactive and also because it is judicial—that is, accomplished by an institution not recognized as politically competent to define crime."); see also Peter Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 230 (2007) (identifying the norm that "a person ought not to be punished in the name of a political community unless it can confidently be said that the community officially regards his conduct as warranting" criminal punishment).

19. I have argued elsewhere that corporate crime fails to adhere to the legality principle's teachings. See Miriam H. Baer, *Corporate Criminal Law Unbounded*, in OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTIONS (R. Wright, K. Levine & R. Gold eds., forthcoming 2021) [hereinafter Baer, *Corporate Crime, Unbounded*]. For more on legality and its relationship with white-collar crimes, see Miriam H. Baer, *Insider Trading's Legality Problem*, 127 YALE L.J.F. 129 (2017).

The legality principle is admittedly aspirational, and as of late, has been criticized for its chimerical qualities as applied to actual prosecutions of individuals. See, e.g., Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1633, 1655–56 (2020) (arguing that the legality principle fails to operate as described in criminal law casebooks, and that legality's "safety net . . . is so riddled with holes that it offers little protection"). Other scholars have persuasively pushed back on claims that criminal law

of federal criminal law, of which corporate criminal law is a subspecies.²⁰ Moreover, we would expect corporate crime to follow what Judge Gerard Lynch has referred to as criminal law's "transactional" nature.²¹ That is, we would expect corporate criminal prosecution to be driven by specific acts and omissions that violate the law and not by the identity of the wrongdoer (Goldman Sachs versus MomAndPopCompany) or the identity of the wrongdoer's victims (sophisticated investors versus working-class employees).

Were corporate crime just another category of crime, we would expect its procedures to more or less mirror the procedures we commonly see employed in the individual context. Following a federally directed investigation, we would expect grand juries to indict offenders. We wouldn't be particularly surprised if most of those offenders negotiated guilty pleas (that is, after all, criminal law's widely acknowledged default²²), but we would expect the typical chronology of grand jury indictments, followed by court-supervised discovery and perhaps some motion practice, followed in turn by public guilty pleas and sentencings before judges.²³ We also would expect the occasional case (perhaps 1 out of 20) to make its way to trial, thereby allowing the public to learn even more about the corporation's offense and the government's prosecution.

To the extent we identified weaknesses in corporate crime's framework, we might expect those weaknesses to mirror ones we already associated with the rest of criminal law. And to the extent we sought reforms, the endgame might be to make corporate prosecutions look more like the rest of criminal law, or to at least implement changes in corporate prosecutions in tandem with other criminal justice-related reforms. Thus, just as one observes in regard to the rest of criminal

is derived solely from statutes. See, e.g., Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 968 (2019) ("[A]lthough statutes now play an important role in the criminal law, it is incorrect to characterize our systems as purely statutory.").

This Article does not take issue with either of these corrective claims. The portrayal of criminal law as a mechanical exercise in applying duly enacted statutes is an admitted caricature. Nevertheless, there is no question that the types of laws and prosecutions we encounter *outside* corporate criminal liability function quite differently from corporate prosecutions.

20. "Federal courts declared early [after the United States' founding] that there was no such thing as federal criminal common law." Baer, *supra* note 14, at 236 n.44 (citing Texas authorities).

21. See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 932–33 (1987) ("Fundamental to our traditional law of crimes, criminal procedure and evidence is a conception of crime that is transaction-bound. Synthesizers of the common-law tradition tell us that the core of any definition of crime is a particular act or omission.").

22. See Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 256 (2019) ("In federal court, more than 97 percent of convicted defendants plead guilty."); *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (explaining that plea bargains have become "central to the administration of the criminal justice system"). This is hardly a new insight or development in criminal law. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121 (1998) ("A Martian anthropologist, sent to observe criminal justice in an urban federal district court, but lacking access to our textbooks, would have relatively little to say about trials. It is commonly understood that most cases are disposed of without trial.").

23. As Judge Lynch astutely observed a decade ago, this sequence collapses in noncorporate cases as well. See Lynch, *supra* note 22, at 2122 (observing that "in a substantial number of cases, the judicial 'process' consists of the simultaneous filing of a criminal charge by the prosecutor . . . and admission of guilt by the defendant").

law, one might expect corporate crime's reformers to focus on revising the substantive doctrines of corporate liability, improving transparency and accountability in the plea bargaining process, enlarging the defendant's access to discovery, curbing the prosecutor's extensive discretion, and addressing problems of reentry and recidivism. That is, one might expect corporate crime's reforms to mirror initiatives already making headway within the larger criminal justice system.

1. The Descriptive Reality: Corporate Criminal *Law* is Different

In reality, none of these conditions quite hold. To be sure, there *are* some overlaps in how the criminal justice system treats corporate offenders, but these overlaps are quite slim. For example, however half-heartedly the rest of criminal law adheres to the legality principle, *corporate* criminal liability's adherence is far more tenuous.²⁴ There is no singular federal statute that defines corporate attribution. That is, there is no legislatively enacted rule that tells us when a corporation will be criminally liable for its employees' wrongdoing or its failure to set up a viable compliance program.²⁵ Instead, we rely on the Supreme Court,²⁶ and tangentially, a few dictionary statutes in the federal code²⁷ to map corporate

24. For a recent article questioning the bromide that criminal law is primarily statutory in nature, see Hessick, *supra* note 19, at 978 (arguing that "common law continues to play an explicit and implicit role in the substance of criminal law").

25. Nor do penal statutes define the boundaries of the corporation's internal policing arm, also known as the compliance function. An exception may be found in statutes such as the Bank Secrecy Act (BSA), which explicitly requires financial institutions to develop compliance programs and report suspicious customer activity to the government. 31 U.S.C. § 5318 (2018); *see also* Asaf Eckstein, *The Virtue of Common Ownership in an Era of Corporate Compliance*, 105 IOWA L. REV. 507, 527 (2020) (providing overview of the BSA and anti-money laundering legislation); Serena Hamann, *Effective Corporate Compliance: A Holistic Approach for the Sec and the DOJ*, 94 WASH. L. REV. 851, 857 (2019) (explaining that the BSA requires financial institutions to implement anti-money laundering compliance programs and procedures, including "basic compliance functions like conducting "employee training," maintaining "internal policies, procedures, and controls," and employing "a compliance officer.") (citing 31 USC § 5318(h)).

26. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494 (1909) (affirming concept of vicarious corporate criminal liability). *New York Central* was notable because the statute at issue explicitly provided that the actions or omissions of an employee acting within the scope of his employment could be imputed to his employer. *Id.* at 491–92 (excerpting provision of the Elkins Act as follows: "the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier"). Following the Supreme Court's decision in *New York Central*, courts declined to limit its vicarious liability concept to instances in which Congress had explicitly promulgated such a rule. *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (observing that post-*New York Central* courts applied vicarious criminal liability broadly, "even in the absence of any indication that Congress or a state legislature favored this outcome.").

27. *See* 1 U.S.C. § 1 (2018) (except as otherwise indicated by context, terms such as "persons" and "whoever" include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"); *see also* 18 U.S.C. § 18 (2018) (defining "organization" to mean "person" other than an individual).

criminal liability's legal boundaries.²⁸ And even there, the actual law on the books diverges tremendously from the rules that have coalesced in practice.

Technically, the law of corporate criminal liability is one of *respondeat superior*. A corporation is criminally liable for its employee's crime if she violates the law while acting in the scope of her authority and with even a partial intention of aiding her corporate employer.²⁹ Liability arises regardless of whether the corporation expressly prohibits the employee from engaging in the behavior, or diligently monitors its employees to detect and prevent such behavior. Each of these elements—the scope of the employee's authority, the intention to benefit the entity, and the lack of any organizational compliance defense—has been developed over the years in federal district and appellate court decisions.³⁰

Corporate crime is thus a species of judge-generated strict vicarious liability. As Sara Sun Beale has argued, this, in and of itself, doesn't distinguish it from so-called ordinary criminal law.³¹ Other judicial doctrines—such as conspiracy liability's *Pinkerton* doctrine,³² the “natural and probable causes” doctrine that extends aiding and abetting liability, and the much maligned felony murder rule—just as easily inject varying degrees of strict, vicarious liability into criminal law and often do so according to judicial and not legislative fiat.³³

Nevertheless, corporate crime *does* differ in one significant respect from these expansive doctrines of liability.³⁴ For *Pinkerton* and its cognates to apply, the individual defendant must decide first to commit some underlying crime.³⁵ To be sure, the *consequences* are harsh—unduly so, for most criminal theorists—but the trigger for *Pinkerton* and its progeny rests with individual responsibility: You commit one statutorily defined crime (conspiracy to rob a convenience store, or to assault someone, or to defraud the government) and you end up responsible for a different and presumably more serious crime, *as if* you intended that other

28. See Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2109 (2009) (“Corporate criminal liability . . . is mostly a matter of federal common law and is spectacularly expansive.”).

29. See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1364 n.89 (1999) (“The doctrine of respondeat superior, derived from tort law, views corporations as principals, and officers, directors, and employees as agents.”). Accordingly, when the corporation's agents violate the law while acting as agents, the corporation-as-principal bears responsibility for their misconduct.

30. See generally RICHARD GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION (2004).

31. See Beale, *supra* note 1, at 1488 (noting “the difficulty of confining criminal punishments to moral blameworthiness is endemic to the definition of crimes and defenses”).

32. *Pinkerton v. United States*, 328 U.S. 640 (1946).

33. See Beale, *supra* note 1, at 1488–89 (offering three examples of strict liability in criminal law including the scope of the insanity defenses, felony murder, and immigration offenses).

34. Baer, *Corporate Criminal Law Unbounded*, *supra* note 19. Cf. Mihailis Diamantis, *Successor Identity*, 36 YALE J. REG. 1, 10 n.43 (2019) (noting limitations of *Pinkerton* and similar analogies where corporate successor liability is concerned).

35. Baer, *Corporate Criminal Law Unbounded*, *supra* note 19.

crime all along (killing the store's cashier, murdering the assault victim, or bribing a government official).³⁶

The corporate context differs because its initial trigger revolves around a series of acts that are (ostensibly) socially desirable and encouraged by law: the organization of business (sometimes, although not exclusively, in corporate form) and the consequent employment of people to work in that entity's interest. The *Pinkerton* analogy only fits if one views the accumulation of corporate power as inherently suspect.³⁷ But, of course, if the trigger for criminal liability is the "wrongful accumulation of power," corporate crime ceases to be crime.³⁸ It instead morphs into something quite different, namely a status crime for being too large, too powerful, and too prone to contribute to widening income and welfare gaps throughout society. That might fit with the progressive theory of corporate criminal liability (I'll say more on that later), but it certainly is inconsistent with the traditional, transactional theory of criminal law which posits that we punish people for their culpable actions or omissions.

2. The Descriptive Reality II: Corporate Criminal *Practice* is Different

If legality is the concept that causes corporate criminal law to diverge from the rest of criminal law, then the DOJ's corporate criminal practice widens that gap. This is because the DOJ's treatment of corporate defendants famously occurs almost exclusively outside the formal criminal justice system. Corporations of a certain size and systemic importance, insiders well know, rarely take guilty pleas before federal court judges, much less take their chances with trials.³⁹

36. *Id.*

37. *Id.*

38. As students of white-collar criminal law are well aware, Edwin Sutherland, the sociologist who coined the term in 1939, intentionally used it to refer to the high-class *offenders* who used their status and occupational positions to exploit others, often outside criminal law's boundaries. But Sutherland's offender-based definition of white-collar crime proved highly controversial and was eventually eclipsed by definitions that focused on characteristics of certain classes of *offenses*. See generally Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 481, 482–87 (2014) (describing the debate over white-collar crime's meaning).

39. See Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 453 (2019) ("Corporate prosecutions, convictions, and punishment continue to be rare events."). The government does prosecute a handful of small and closely held corporations every year, but these are usually tangential cases. The more notable prosecutions of publicly held companies or high-profile privately held institutions almost uniformly result in declinations, non-prosecution agreements or deferred prosecution agreements. See, e.g., Deferred Prosecution Agreement, United States v. Am. Online, Inc., No. 1:04 M 1133 (E.D. Va. Dec. 15, 2004), <https://www.justice.gov/criminal-fraud/file/835761/download> [<https://perma.cc/96TJ-UUZL>]; Deferred Prosecution Agreement, United States v. AIG-FP Pagic Equity Holding Corp., No. 04-453M (W.D. Pa. Nov. 30, 2004), <https://www.justice.gov/criminal-fraud/file/835556/download> [<https://perma.cc/TUA6-RYT2>]; See also GARRETT, *supra* note 7, at 291–305 (2014) (compiling 255 deferred and non-prosecution agreements made with publicly held companies between 2001 and 2012); Shane Frick, "Ice" Capades: Restitution Orders and the FCPA, 12 RICH. J. GLOB. L. & BUS. 433, 437 (2013) ("[K]nown declinations by the SEC and DOJ between 2008 and 2012" were few but "involved high profile business entities," such as Morgan Stanley).

Prosecutors often decline to seek grand jury indictments or file criminal complaints against corporate offenders, except in environmental cases, or in those instances where the offenders are small or wholly owned by the one or two investors who also happen to be the entity's co-defendant.⁴⁰ And just as there are few indictments in corporate criminal practice, there are also few guilty pleas, fewer trials, and few public sentencings.⁴¹ Thus, corporate criminal practice lies almost solely within the prosecutor's discretion, shaped in large part by the language of his or her settlement agreements. The *prosecutor* decides which corporations will pay for their employees' harms, the content of the settlement agreement the corporation will sign, and the effective quasi-sentence the corporation will suffer for its employees' harms.⁴²

Some would again argue that these distinctions are ones of degree and not kind. "Sure," one might concede, "prosecutors decide the contours of the law in corporate crime cases," but don't they do the same thing in individual cases?⁴³ Is it really so notable that corporations are often forced to relinquish certain rights in exchange for leniency?⁴⁴ And aren't judges just as effectively stripped of their sentencing discretion when prosecutors file charges that carry mandatory minimums, agree to "fictional pleas," or flood courts with so many cases that resource-starved courts have no choice but to approve whatever "going rate" appears to be the norm among the repeat actors who populate the courthouse?⁴⁵

These are, in effect, the arguments of the corporate-crime-as-crime camp. Corporate crime may vest too much power in prosecutors, but so does the rest of

40. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1779, 1804–05 (2011) (explaining that most of the offenders that received indictments or complaints were small firms); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1822 (2015) [hereinafter Garrett, *The Corporate Criminal as Scapegoat*] ("[T]here may be far more prosecutions of officers or employees of smaller firms, where owners or higher-ups may be more closely involved.").

41. See F. Joseph Warin & Julie Rapoport Schenker, *Refusing to Settle: Why Public Companies Go to Trial in Federal Criminal Cases*, 52 AM. CRIM. L. REV. 517, 518 (2015) ("In general, only a very small number of corporate prosecutions involve trials, as more than ninety percent of prosecuted corporations plead guilty.").

42. Miriam Hechler Baer, *Governing Corporate Crime*, 50 B.C. L. REV. 949, 972–75 (2009) (explaining the DOJ's power, arising out of its discretion to file or decline charges, to determine the consequences a given corporation will bear for violating one or more federal laws).

43. See, e.g., Lynch, *supra* note 22, at 2123 ("The substantive evaluation of the evidence and assessment of the defendant's responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.").

44. See Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295 (2008). Professor Richman's article addressed the debate (quite heated at the time) over the Department's policies regarding corporate privilege waivers.

45. On the ways in which the criminal justice system has ceased to look anything like the idealized justice system taught in law schools, see generally BARKOW, *supra* note 16; STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012); See also Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING* 71, 72 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing the criminal justice system as a pyramid and arguing that its top "is the world of federal offenses [and] serious cases . . . [in which] rules dominate" and at its base are state and local systems where "offenses are petty and caseloads number in the thousands"). For a primer on fictional pleas (whereby the prosecutor and defense attorney choose a fictional offense in order to secure an agreed-upon penalty), see generally Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 895 (2019).

the criminal justice system. It may threaten costly and undesirable collateral consequences, but so does the rest of criminal justice system—and with far more tragic consequences for people of color and those who are poor.⁴⁶ Corporate crime is undemocratic, opaque and unresponsive to what the public really needs and wants, *but so is the rest of the criminal justice system*.

3. The Reply: Corporate Crime's Aspiration

One might address the foregoing critique by conceding several of corporate crime's worst diversions, but defending the larger project as aspirational while embracing certain reforms. Several recent articles nicely underscore this argument. Mihailis Diamantis's analysis of corporate prosecution as a species of rehabilitation,⁴⁷ Robert Thomas's competing vision of incapacitation,⁴⁸ and William Laufer's⁴⁹ and Samuel Buell's⁵⁰ earlier respective attempts to frame corporate prosecution as a means of channeling communal condemnation and blame,⁵¹ all easily fit within the tradition of defending corporate criminal law as a morally justified⁵² and socially desirable variant of criminal punishment notwithstanding its lack of a natural person to imprison or condemn.⁵³

Still, the aspirational version falls short once we examine the latest in actual reform efforts. If the corporate-crime-as-crime argument were taken seriously, then we would focus our reform efforts on closing corporate crime's legality gap

46. See Jessica A. Roth, *The "New" District Court Activism in Criminal Justice Reform*, 74 N.Y.U. ANN. SURV. AM. L. 277, 295 (2019) (citing recent phenomenon of judges willing to speak out on and challenge "the consequences of criminal convictions for the ability of previously convicted persons to obtain employment, housing, education, and otherwise participate fully in society").

47. Mihailis Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018).

48. W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019).

49. See, e.g., WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2006); William Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variations of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1286 (2000) ("We maintain an allegiance to the foundation of the general part of the criminal law, requiring evidence of moral fault in the offending person, whether biological or corporate.").

50. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

51. On the differences between condemnation and a desert-based theory of punishment, see Thomas, *supra* note 48 at 923–25. As Thomas points out, "the majority consensus in law and legal scholarship is that retribution cannot and does not apply to corporate punishment," although he admits in the next breath that the argument is "hotly contested." *Id.* at 924. See also Laufer & Strudler, *supra* note 49, at 1292 (addressing the retribution claim).

52. Some scholars, such as Amy Sepinwall, promote a kind of corporate retributivism that functions as a proxy for punishing insulated high-level corporate employees. See, e.g., Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L. J. 411, 415 (2012) (arguing that one can "justify prosecuting and punishing the corporation as a way of targeting the senior officials whose very position within the corporation legitimately subjects them to blame").

53. For earlier treatments on the topic, which cite the corporation's inanimate character and corresponding lack of moral responsibility, see Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 313 (1991); John C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981).

and enacting laws that delineate corporate crime's boundaries.⁵⁴ If we wished for the law on the books to better reflect the law on the ground, we would retire the musty doctrine of *respondeat superior* and replace it with a doctrine that more accurately reflects the rules of attribution most prosecutors endeavor to apply in the first place. We might also be more open to drafting an affirmative defense, such as the oft-mentioned but never enacted good-faith compliance defense.⁵⁵ And finally, we would seek legislative solutions to the problems caused by the Department's bypass of the judicial system. The thrust of this reform effort might be to divert corporate prosecutions back into the criminal justice system, thereby narrowing prosecutorial discretion gained by shunting so many cases into the DPA or declination categories.⁵⁶

Corporate criminal scholars have sought variants of the above reforms, but their arguments have not made much headway. As a result, the corporate crime as "just another type of crime" argument becomes untenable. It doesn't reflect actual practice and it appears unlikely to do so in the future. Accordingly, it might be helpful to switch gears and consider alternate visions.

B. Corporate Crime as Regulation

The second way to conceptualize corporate prosecution is to view it as an alternative, and perhaps preferable mode of administrative regulation,⁵⁷ one that outruns (or subverts, depending on one's point of view) the traditional rules-backed-by-enforcement regimes that predominate under the Administrative Procedure Act (APA).⁵⁸

Whereas the "crime camp" justifies prosecution as necessary to procure punishment for a past *wrong*, the "regulation camp" perceives the corporate prosecution (and more importantly, the extrajudicial settlement it produces) as

54. Baer, *Corporate Criminal Law Unbounded*, *supra* note 19. See also Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1124–25 (2016) (citing authorities for the proposition that courts were in the process of developing an alternative basis of corporate liability when DPAs became popular).

55. See Steven R. Salbu, *Mitigating the Harshness of FCPA Enforcement Through A Qualifying Good-Faith Compliance Defense*, 55 AM. BUS. L. J. 475, 479 (2018) (arguing for "qualifying good-faith compliance" defenses in FCPA cases). But see Peter J. Henning, *Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 904–14 (2012) (warning of the drawbacks to such defenses).

56. See GARRETT, *supra* note 7, at 273–74 (arguing that corporate offenders should more often be indicted than permitted to settle through a DPA or NPA); Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013).

57. "We live in an age when prosecutors are a significant source of corporate regulation." Rachel Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 177 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); see also Douglas Husak, *Social Engineering As an Infringement of the Presumption of Innocence: The Case of Corporate Criminality*, 8 CRIM. L. & PHIL. 353, 354 (2014) (describing deferred prosecution agreements as "a form of social engineering" that may or may not merit the same legal treatment as the criminal punishment of natural persons).

58. See Matthew C. Turk, *Regulation By Settlement*, 66 U. KAN. L. REV. 259, 261–62 (2017) (noting that the negotiation of agency settlements is confidential).

an opportunity for the government to exercise control over an unruly corporate actor and regulate it in the manner it ought to have been regulated in the first place. The justifications, in turn, for such enforcement-ushered regulation include the arguments lodged in favor of government intervention: market failures, information asymmetries and agency costs, the need for coordination, and some civic duty to act in the public interest.⁵⁹

This distinct way of conceptualizing corporate crime necessarily underscores distinct concerns, which in turn produce different calls for reform. A criminal justice frame promotes better alignment between corporate crime and the criminal justice system's norms and institutions. A regulatory frame, by contrast, focuses greater attention on the process by which corporations and prosecutors reach agreement, and the commitments that comprise those agreements. Has the government extracted sufficient promises of reform from the corporate offender? Will those commitments create beneficial spillovers throughout the broader corporate community? Has the prosecutor obtained the proper tools to oversee these changes and ensure that they are actually occurring as promised? And might the same concerns of regulatory capture pervade the deferred prosecution context, where prosecutors and white-collar defense attorneys enjoy an alarmingly chummy relationship?

Under the regulation narrative, the key issue isn't that corporate crime diverges from the rest of criminal law, or that DPAs depart even further from some idealized criminal trial. Rather, the concern is that the DPA and its ilk might not be achieving their reformatory mission. If corporate crime prosecution functions best as a form of regulation, prosecutors-as-regulators must be held accountable for securing desirable outcomes. Moreover, like other regulators, they need to avoid capture, act responsibly, and avoid secretive shortcuts. And they need to validate longstanding claims that their DPAs and similar settlements have achieved industry-wide improvements in corporate compliance and law adherence. This, they have not done.

According to critics in this camp, the DOJ's settlement agreements do too little, claim too much, and focus on the wrong factors.⁶⁰ They worry as well that the regulators in this narrative (unquestionably federal prosecutors) enjoy too much power and too little oversight—and far too few incentives to verify the benefits of the corporate settlements they proudly announce on websites and in the press.⁶¹ Moreover, the process's secrecy remains quite the stumbling block for the regulation crowd. DPAs and corporate settlements evade *both* the criminal justice system *and* the formal variations of rule-making that are defined under the APA. They lack transparency—in how they are negotiated, in how they are enforced, and finally, in how successfully they reform corporate offenders.⁶² Even

59. See generally Croley, *supra* note 12, at 3–4 (noting the regulatory landscape).

60. See, e.g., GARRETT, *supra* note 7, at 66–67.

61. “DPAs undermine the rule of law by facilitating a shadow system of adjudications away from any oversight.” Bourjaily, *supra* note 15, at 547.

62. *The Corporate Criminal as Scapegoat*, *supra* note 40, at 1835.

if fueled by the best of intentions, they represent the worst elements of regulation: developed in secret and ostensibly in service of corporate and government interests.

As is the case with the corporate-crime-as-crime claim, the crime-as-regulation argument merges descriptive and normative arguments. The descriptive prong attempts to construct a realistic account of what the government is doing when it identifies and investigates a corporate offender, strikes an agreement reflecting a package of commitments by both parties, and announces that agreement to the rest of the world. It attempts as well to explain, in analytical terms, the non-binding policies that the DOJ has issued in regard to its corporate charging and settlement policies.⁶³ None of these constitute “formal” regulation, but taken together, they create a set of quasi-regulatory norms.⁶⁴

When the discussion moves from the descriptive to the normative, the regulatory camp cleaves into two subgroups: those who view corporate prosecution as a potentially desirable (and indeed, essential) form of regulation; and those who view it as a redundant,⁶⁵ wasteful, or illegitimate manifestation of power.⁶⁶ For the former group, the operative word is *more*. The government should pursue *more* corporate offenders, and it should strike *more* ambitious settlement agreements which impose *more* obligations on covered firms and induce bystander companies to enact *more* internal reforms before they, too, come under the prosecutor’s watchful eye. For the latter group, the prescription either amounts to a more surgical approach—acting only in those situations in where prosecutorial “regulation” advances social welfare—or ceding the entire practice to private and civil enforcement institutions.⁶⁷

The “as crime” and “as regulation” theories thus generate substantial friction. Both camps begin on the same page: DPAs are a turn-off for those who wish corporate criminal liability to function more like criminal law; at the same time, they provoke profound disappointment in those who desire the effective regulation of private industry. Finally, it is important to note that *both* groups

63. See generally Mark, *supra* note 8, at 1627–31, 1641–44 (summarizing policies).

64. Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 832–34 (2018).

65. E.g., Daniel Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 322 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1485–86 (1996) (voicing skepticism for corporate criminal liability in light of strong civil enforcement regimes).

66. See Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192 (2016) (arguing that DPAs demand corporate changes that, in many instances, are inconsistent with the rule of law).

67. For an example of the surgical critique, see Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-prosecution*, 84 U. CHI. L. REV. 323, 346 (2017) (arguing that corporate settlements should focus on shoring up internal monitoring failures within firms). For arguments favoring the wholesale abandonment of corporate criminal prosecution, see Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 320 (1996) (arguing that there should be no corporate crime); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009).

have expressed their concern that corporations perceive DPAs as little more than a cost of doing business.⁶⁸ From here, however, the prescriptions and rhetoric diverge. The as crime group draws its attention to penal laws and proscriptive doctrines. The as regulation group concerns itself with issues such as transparency, measurability, and accountability.

The distinction affects more than the prescription of specific remedies; it also affects the tone and rhetoric of the critiques. Criminal *law* is inherently a story of statutory frameworks and individualized justice: of laws that hold entities responsible for their employees' *actions*, of theories of punishment and states of mind, and of a search for proportionality in individualized punishment.⁶⁹ Regulation, by contrast, focuses on securing broader and longer-term industry-level goals. It is far more a story of *outputs*, of the aggregate terms an industry adopts through formal settlements and informal pressure, of the manner by which the government holds corporate actors accountable for adhering to those terms, and of the means by which the government verifies the benefits of its quasi-regulation.

For years, each camp has focused on these different facets of corporate criminal practice. The as-crime group searches for and debates the proper boundaries of corporate criminal responsibility. The as-regulation group asks how prosecutors can do a better job overseeing corporate rehabilitation efforts and validating rosy claims of enhanced compliance. While these two areas of corporate crime scholarship have blossomed, the DPA and its variants have reigned supreme, notwithstanding widespread agreement that they accomplish far less than they should. This is no accident; our scattered focus enables a sub-optimal regulatory instrument to persist despite its many flaws. Corporate crime is, to put it simply, overdetermined. It bears just enough resemblance to ordinary crime and regulation to make both camps feel that they are on the verge of accomplishing something useful. No wonder, then, that the third camp I describe below looks upon the entire practice with utter dismay.

C. Corporate Crime Through a Third Lens: The Progressive Critique

For some observers, corporate criminal prosecution promises more profound outcomes than punishment or regulation. For this final group, corporate crime intimates the state's untapped powers to transform the corporation's relationship with the state and society. Under this ambitious and progressive narrative, corporate crime prosecution represents one of several mechanisms that might be used to redress structural inequality and violations of democratic norms. This transformative vision would dramatically alter the corporation's mission as well as its internal governance structure. As a practical matter, it also would likely

68. "[I]t appears that the private firms of today are all too willing to pay monetary fines as a consequence for failing to prevent and detect misconduct." Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1040 (2017).

69. I recognize that this is itself an idealized vision of criminal law that contemporaries increasingly reject.

wipe out the DPA process that has become a fixture of corporate investigations and prosecutions.

The transformative theory of corporate crime is both aspirational, and an offshoot of the emerging scholarship that has coalesced around a school of thought known as the law and political economy (LPE) approach.⁷⁰ Commentators who embrace the LPE critique express skepticism of corporate and financial elites on the one hand, and government elites (including federal prosecutors) on the other. Indeed, LPE adherents seek a realignment in how the government governs private business, and how responsive it is to the needs of the general public. Their critique of Wall Street and corporate crime in general⁷¹ represents a small component of a much broader concern with concentrations in wealth and corporate power, as well as rising economic inequality and reduced social mobility.⁷²

Commentators concerned with unchecked corporate power have, at times, equated even ostensibly legal exercises of power and excessive risk-taking with corporate criminality.⁷³ The company (or the entire industry) is a “criminal”

70. “Law and political economy approaches are grounded in the premise that the economy and political life are not fully separable but mutually shape and influence one another.” Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy Response to the Columbia Law Review’s 2018 Symposium*, 118 COLUM. L. REV. ONLINE 179, 181 (2018). See generally LAW & POL. ECON. BLOG, <https://lpeproject.org/blog> [<https://perma.cc/3M59-78ZE>]. For additional exploration of this approach and its implications for the regulation of private industry, see K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1622 (2018); STEVEN RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* (2013) (explaining how corporate and financial power bred a breakdown in controls which ultimately produced excessive risk-taking, poor corporate governance, and a lack of accountability among the financial elite).

71. See, e.g., JENNIFER TAUB, *BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME*, at xxiv–xxvii (2020) (attributing underpunishment of high-profile white collar crimes to inequality, class differences, and “extreme wealth”).

72. K. Sabeel Rahman, *Realizing Democracy*, 18 STAN. SOC. INNOVATION REV. 3, 4 (2020) (“economic inequality has been increasing for decades while social mobility has been declining.”); K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL’Y REV. 321, 327–29 (2016) (focusing on the ills of concentrated private power and the under-responsiveness of government institutions to the public interest).

73. Numerous commentators have either cited corporate risk or compensation practices, or have employed the term “fraud,” without identifying the specific individuals who engaged in fraudulent practices. See, e.g., David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1418 (2014) (observing that some of the post-financial crisis arguments for corporate prosecution “seemed like anger at bankers for receiving disproportionate rewards for what turned out to be exceptionally risky behavior.”); Rena Steinzor, *White-Collar Reset: The DOJ’s Yates Memo and Its Potential to Protect Health, Safety, and the Environment*, 7 WAKE FOREST J.L. & POL’Y 39, 46 (2017) (“Many Americans are deeply disturbed by the fact that financial institutions and their employees could drain billions of dollars out of the economy by committing fraud in the issuance, bundling, and marketing of subprime mortgages, precipitating market collapse and a recession that caused millions of innocent bystanders to lose their jobs and their homes.”).

Several criminal law scholars have questioned this effort to channel popular anger into criminal prosecution. As Gregory Gilchrist writes, “The popular anger toward corporate management is often predicated on blame for recklessness and greed, rather than blame for violating positive law. As such, the anger is . . . directed toward a kind of culpability that is a poor fit for criminal law.” Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335, 335 (2018). See also

because it has made many people poorer or sicker, all the while reaping profits.

⁷⁴ Consider William Laufer and Maxwell Caulfield's recent description of this narrative:

[I]t is said we should abolish the corporation or "corporate capitalism" because it is irredeemably evil; because its criminality is "inherent," part of its "essence", in its "DNA," or is its "nature." In slightly more palpable formulations, an original sin of criminality is projected on specific markets, sectors, or industries, like Wall Street or Big Pharma. These critiques . . . lead to one of two conclusions. Either critics assume the extreme position that certain classes of corporations are criminal and thus a cancer we must excise whatever the consequences, or they have a dilettantish orientation toward critique and progress, preferring merely rhetorical criticisms to genuine reforms.⁷⁵

This view of corporate capitalism, as rephrased by Laufer and Caulfield, liberally describes corporations as "criminals." They may or may not be criminals in the formal sense, but they are the beneficiaries of a political and economic system that has enabled them to grow unfettered by regulation and concentrate large swaths of power and capital, all the while avoiding accountability for the harms they have inflicted on others.

The vision has garnered substantial momentum over the past decade, partially in response to the government's anemic response to the 2008 financial crisis and Great Recession which followed.⁷⁶ Consider this emblematic recounting of what caused the crisis and what little the federal government (allegedly) did to redress it:

The crisis originated in the political power of financial elites to free themselves from regulations and laws dating back to the New Deal. . . . [and] contributed to the greatest upward transfer of wealth in modern American history. Financial elites took out-sized compensation payments while the American and global economies paid the tab. . . . Despite the loot garnered, no senior manager at any major bank faced any real legal

Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. POL'Y REV. 265, 265 (2014) (voicing skepticism that corporate headhunting is a "socially productive response to the collapse."); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 584 (2012) ("That the public . . . would yearn so keenly for punishment without even knowing, much less understanding, what corporate executives knew, said or did suggests not a shortage of punishment but rather" a reflection of moral outrage in response to a financial crisis that left the general public worse off but did not significantly affect the numerous corporate officers who caused the crisis).

⁷⁴ RAMIREZ, *supra* note 70, at 5 (describing CEO's who "destroyed their firms and the economy with impunity" and warning of the need for future infrastructure that will "resist elite subversion").

⁷⁵ William S. Laufer & Matthew Caulfield, *Wall Street and Progressivism*, 37 YALE J. ON REG. BULL. 36, 39-40 (2019) (emphasis omitted).

⁷⁶ Whether the government's response was anemic lies in the eye of the beholder. If one cares solely about criminal prosecutions of high-level corporate officers, the government concededly did fairly little in the wake of the financial crisis. See David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1437 (2013) (observing that criminal cases relating to the subprime mortgage crisis "have been few and far between"). On the other hand, if one broadens the term "enforcement" to include the criminal and civil settlements the government negotiated with financial institutions, the story becomes more complex. For a measured assessment of the enforcement efforts that followed the financial crisis, see William W. Bratton & Adam J. Levitin, *A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets*, 2020 U. ILL. L. REV. 47, 76-90 (2020) (analyzing and collecting post-crisis enforcement actions).

accountability under the rigged financial regulatory and corporate governance systems.⁷⁷

Notice the operative language: systems were “rigged,” financial elites walked away with “loot,” and no one faced any “real legal accountability” for the suffering imposed on American workers and consumers. Concededly, one could minimize this argument to refer solely to the DOJ’s failure to identify and pursue specific violations of federal criminal statutes, or to the government’s failures to implement lasting and meaningful legislative reforms aside from the Dodd Frank Act.⁷⁸ But the sweeping language—language that is reflective of critiques increasingly found elsewhere in legal and social science scholarship—suggests a far more ambitious agenda than either the as-crime or as-regulation conceptions allow.

Buttressing the progressive critique is the incontrovertible fact that a number of high-profile corporations have become recidivists.⁷⁹ The typical response to such recidivism is to execute a new DPA with the offending company, with perhaps (but not necessarily) more onerous terms.⁸⁰ In light of these repeated violations, it is not surprising that the public has come to view the word “criminal” as an appropriate status term to apply to selected corporations and entire industries.⁸¹ Consider the 2019 Democratic Presidential Primary. Candidates

77. Steven A. Ramirez & Neil G. Williams, *Deracialization and Democracy*, 70 CASE W. RES. L. REV. 81, 98–99 (2019). Ramirez and Williams are hardly unique in the use of this language. In his recent book describing the fallout of the Financial Crisis, Nobel laureate economist Joseph Stiglitz writes: “[W]hile tens of millions around the world lost their jobs and millions in America lost their homes, none of the major finance executives who brought the global economy to the brink of ruin were held accountable. None served time; rather, they were rewarded with mega-bonuses.” JOSEPH E. STIGLITZ, *PEOPLE, POWER, & PROFITS* 4 (2019).

78. For a nuanced account of both regulation and enforcement under Dodd Frank, see Bratton & Levitin, *supra* note 73, at 76–90, examining enforcement actions brought against banks and other institutions.

79. See Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 124–25 (2020) (“In January 2018, HSBC settled a new deferred prosecution agreement over rigging currency transactions . . . [W]ithin weeks of being let off the hook, it received yet another deal for yet another crime . . . Both Citibank and HSBC have been prosecuted many times in serious cases over the last decade.”). Other notable repeat offenders include Hewlett-Packard, Johnson & Johnson, and Marubeni. See Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1022–25, 1025 n.97 (2017); Veronica Root Martinez, *The Government’s Prioritization of Information Over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS., No. 4, at 85, 93–98, (describing additional recidivist corporate offenders).

80. As Veronica Root Martinez’s work establishes, a recidivist company is less likely to suffer additional penalties if the new violation involves a different statute and different agency from the previous one. See Root, *supra* note 68, at 1019 (“[F]irms are sometimes treated as recidivists when they engage in multiple violations of a legal requirement investigated by the same governmental enforcement agent but are not treated as recidivists when subsequent violations of law are resolved with multiple governmental agencies or departments.”).

81. For an early example, see Matt Taibbi, *The Great American Bubble Machine*, ROLLING STONE (April 5, 2010), <https://www.rollingstone.com/politics-news/the-great-american-bubble-machine-195229/> [<https://perma.cc/LGN4-RH4G>] (concluding that Goldman Sach’s “reach and power have enabled it to turn all of America into a giant pump-and-dump scam, manipulating whole economic sectors for years at a time”). Taibbi never used the word “criminal,” but his article liberally draws on the florid language of criminality, using words such as “scam,” “corrupt,” “fraud” and “gangster economics.”

described the pharmaceutical industry as filled with “criminals” that deserved to be punished;⁸² decried the private health insurance industry as a “criminal” industry that deserved to disappear;⁸³ and insisted that Wall Street was full of “criminals” whose financial firms never should have been bailed out on such industry-positive terms.⁸⁴ As these examples demonstrate, the crime-as-epithet underscores more than a simple yearning for additional prosecutions or better regulations; it suggests a desire to dramatically transform the relationship between society and the private sector.⁸⁵

Viewed through this lens, the DPA process isn’t just a disappointment; it is an unmitigated disaster. The DPA’s very purpose—to enable the corporation to continue intact while it implements modest changes in its compliance and governance functions—is directly at odds with a progressive, transformative theory of political and economic realignment. Notwithstanding the government’s sincere claims that it has found, in the DPA, “a tool to effect firm and industry-side change,”⁸⁶ corporate offenders and their critics *both* view DPAs as a means towards preserving the *status quo*. Under the standard agreement, the company continues as is, maintaining its operations while it keeps its C-suite and its board of directors largely intact. (The government may, of course, require the company to part ways with a bad actor or two, but that represents a modest cost of settling

82. In October 2019, now Vice President-elect Kamala Harris claimed, “[A]s president of the United States, I would ensure that the United States Department of Justice, understand that you want to deal with who is really a criminal? Let’s end mass incarceration and end that failed war on drugs, and let’s go after these pharmaceutical companies for what they’ve been doing to destroy our country.” *The October Democratic Debate Transcript*, WASH. POST (Oct. 16, 2019), <https://www.washingtonpost.com/politics/2019/10/15/october-democratic-debate-transcript/> [https://perma.cc/N8MT-2DU2]. Others agreed, including Secretary Julian Castro, who stated, “They need to be held accountable, not only financially, but also with criminal penalties.” *Id.* For scholarly arguments mixing the socio-economic and corporate crime critiques of the pharmaceutical industry, see Eugene McCarthy, *The Pharma Barons: Corporate Law’s Dangerous New Race to the Bottom in the Pharmaceutical Industry*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 29, 31 (2018) (“The drug company executives who fraudulently marketed these deadly drugs have faced little, if any, criminal liability for their actions. Indeed, they have become extremely wealthy just as Gould, Carnegie, and Morgan did a century before them.”).

83. In the June 2019 primary presidential debate, President-elect Biden argued, “We can deal with the insurance companies by, number one, putting insurance executives in jail for their misleading advertising, what they’re doing on opioids, what they’re doing paying doctors to prescribe.” *Transcript: Night 2 of the First Democratic Debate*, WASH. POST (June 28, 2019), <https://www.washingtonpost.com/politics/2019/06/28/transcript-night-first-democratic-debate/> [https://perma.cc/V8W3-YPHG]. As commentators of the debate noted, Senator Bernie Sanders has campaigned to “scrap the private health insurance system as we know it.” *Id.*

84. See *The October Debate Transcript*, *supra* note 82. Secretary Castro additionally commented, “And, you know, you can draw a straight line between making sure that we hold executives accountable, whether it’s these drug manufacturers or Wall Street executives that should have been held accountable a decade-and-a-half ago.” *Id.*

85. For a powerful critique of this punitive instinct and the prescriptive proposals that have accompanied it, see Laufer & Caulfield, *supra* note 75, at 45–46. See also Zaring, *supra* note 76, at 1435 (commenting that the use of white-collar prosecutions to regulate corporate misconduct reflects “some degree of mob justice,” particularly in the “perp walks [and] the handcuffing of executives for parades before the press”).

86. Samuel W. Buell, *Criminally Bad Management*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 59, 83 (Jennifer Arlen ed. 2018).

the case.) The bottom line is that the DPA functions as a tool of preservation even as prosecutors prefer to portray it as a tool of reform. Accordingly, for those who seek major alternations in the distribution of political and economic power, the corporate criminal prosecution represents yet one more piece of evidence that corporate and government actors have become players in an unhealthy game.

III

REFORMING (OR TRANSFORMING?) CORPORATE CRIME

Part II organized corporate crime's critiques into three different schools of thought. Readers could well debate the finer points of the taxonomy, but these arguments would fail to rebut the basic point that corporate criminal law's commentators seek extremely different goals, which in turn makes it difficult to critique, much less improve on the Executive Branch's attraction to extra-judicial corporate settlements.

How might we get past this intellectual stalemate? Perhaps the better approach is to put aside specific reforms and instead focus on the optimal institution to mediate disputes and develop consensus. Among the three branches of government, the most logical choice would appear to be the legislature.

Consider the alternatives: federal prosecutors are the actors who first devised the DPA and its closely related cognates.⁸⁷ Thus, the DOJ's incentive to deconstruct this process is minimal to nonexistent. Judges, meanwhile, have periodically attempted to get in on the action, and have largely failed. District judges might prefer to oversee the DPA process with some precision, or to goad officials into extracting more meaningful reforms from corporate offenders.⁸⁸ Appellate judges, however, have largely blocked this avenue of reform.⁸⁹

Thus, we circle back to the legislative branch, and with good reason. Democratically elected representatives can and should resolve foundational questions—whether, for example, we want a more progressive system of corporate oversight, whether we wish to refashion *respondeat superior* to codify the rules of attribution prosecutors employ on the ground, or whether we wish to impose more progressive and far reaching reforms on corporate offenders. It simply won't do to say that every time a corporation's employee commits a crime with an intent to benefit his employer, the company has violated the law and

87. See Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 37 INST. ON SEC. REGUL., no. 2, at 815, 817 (2005) (former United States Attorney for the Southern District of New York explaining genesis of her office's first DPA); Wray & Hur, *supra* note 5, at 1103 n.33 (describing a series of first-generation DPAs devised by federal prosecutors).

88. For arguments along these lines, see Brandon Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1489–90 (2017) (discussing how judges have attempted to raise public interest related concerns in response to proposed settlements).

89. See, e.g., *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017); *United States v. Fokker Servs. BV*, 818 F.3d 733, 741–43 (D.C. Cir. 2016).

therefore government can intervene.⁹⁰ *No one* buys such an expansive argument because the federal code itself is simply too voluminous. We can imagine far too many federal crimes that trigger *respondeat superior* but in no way threaten society's welfare, much less suggest the type of group culpability scholars have in mind when they defend corporate liability. If we want corporate crime to mean something *and* to express something meaningful, we need our lawmakers' powers to draft a set of laws that embody those sentiments.⁹¹

All of this, of course, sidesteps the elephant in the room: prosecutors and corporate offenders across certain industries will continue to seek extrajudicial settlements so long as the mere filing of charges plausibly threatens steep collateral consequences.⁹² Thus, if we really wish to divert what are effectively criminal prosecutions *back* into the criminal justice system, we need Congress to pay attention to the legal and structural factors that produce the demand on the corporate side for extrajudicial settlements.⁹³

Applying these principles then, a wish list for Congressional legislation might look something like this:

1. *Laws that define and subdivide criminal liability.*

From the perspective of authority, this would seem to be the least difficult of Congress' tasks, since the legislature unquestionably exercises primary responsibility to define federal criminal law.⁹⁴ Concededly, narrowing corporate crime's definitional scope threatens political costs; its likely payoffs, however, substantially outweigh those costs. Were Congress to once and for all draft a set of statutes superseding *New York Central's respondeat superior* rule, it would finally find itself able to adjust the gap between law on the books and law on the ground. Corporate offenders would no longer be able to slough off criminal liability as overdetermined and unjust. Prosecutors would still have the power to pursue the worst offenders (which they already do), but they would have to prove something more than "Corporation X's employee violated this law."

90. "[S]ettled practice diverges stridently from formal doctrine; efforts by various actors within the federal system have, over the past twenty years, sought to narrow, albeit in a second-best manner, the scope of corporate criminal liability for genuine cases of corporate wrongdoing." Thomas, *supra* note 48, at 917 (explaining how prosecutors have effectively altered respondeat superior's broad, strict liability scope).

91. *Cf. Zaring, supra* note 76, at 1436 (citing expressive value of litigating and prosecuting corporate misconduct openly in court). As I have argued elsewhere, a narrower (and duly enacted) definition of corporate crime could play a strong role in channeling corporate prosecutions away from extrajudicial settlements and back into the formal judicial process. *See Baer, supra* note 54, at 1132-33.

92. "Many commentators believe that 'a criminal indictment alone can easily destroy even a large, powerful corporation.'" Bailey Wendzel, Matthew Angelo, Mariana Jantz & Alexis Peterson, *Corporate Criminal Liability*, 56 AM. CRIM. L. REV. 671, 686 (2019). *But see* Markoff, *supra* note 56, at 828 (finding that the "Anderson effect" is the "exception and not the rule").

93. *See also* Baer, *Too Vast to Succeed, supra* note 54, at 133-34. Some have argued for the elimination of DPAs and NPAs. *See Bourjaily, supra* note 15.

94. *See* Miriam H. Baer, *Insider Trading's Legality Problem*, 127 YALE L.J.F. 129, 138 (2017) (discussing the legality principle and its interaction with, among other things, federal criminal law).

Finally, instead of drafting just *one* statute to define “the law” of corporate crime, Congress could undertake the process of enacting a *series* of statutes that defined so-called lesser corporate crimes (“corporate misdemeanors”) and more serious corporate crimes (“aggravated corporate crime”).⁹⁵ Ironically, the drafting of *several* statutes defining lesser and more serious versions of corporate crime might be a less politically fraught exercise than the attempt to define corporate liability in just *one* statute.

2. *Laws that reduce incentives for extrajudicial settlements.*

Most corporate crime scholars concur that extrajudicial settlements are valuable in limited instances but have become too pervasive and are subject to too little oversight. Congress could therefore ease the *demand* for extrajudicial settlements by enacting laws that effectively limit the collateral consequences that occur upon the filing of a federal indictment or information. This would not spare corporate offenders from state-driven collateral effects, but it might create just enough breathing room for a few more corporate offenders to take their chances with the criminal justice system, and even a few to take their chances with jury trials. If we believe that the information and accountability effects created by a jury trial are valuable public goods in and of themselves, we should encourage Congress to clear the way for more corporations to defend themselves in court. This, in turn, would allow for greater voice (by judges and juries) and improved legitimacy (in the eyes of the public).

3. *Laws that improve regulatory oversight and civil enforcement mechanisms.*

Finally, Congress could strengthen laws that provide for civil enforcement through private causes of action (including *qui tam* suits) and could additionally beef up investigatory tools and resources for regulatory enforcement agencies. Theoretically, this might reduce the frequency and scope of DPAs because it would empower *regulators* to do the jobs that prosecutors seem to be doing when they attempt to “regulate” corporate actors through DPA agreements.

* * * *

These are the more modest—and admittedly incremental—approaches that Congress could undertake.⁹⁶ They reflect ideas culled from both the “crime” and “regulation” camps. To those who follow corporate law’s progressive critique, they are likely too timid, although in the aggregate, they almost surely would alter

95. As I have written elsewhere, one of the benefits of relying on a legislature to develop criminal law is that it can subdivide a family of transgressions into several crimes. *See id.* at 145–46 (“By placing the onus for criminal law-making squarely on the legislature, the legality principle provides the mechanism and opportunity for differentiating a string of similar yet morally distinct actions.”).

96. Readers will note that I have not proposed laws empowering judicial oversight of DPAs because at least one court has, through its sweeping language, placed the constitutionality of such legislation in question. *See United States v. Fokker Servs. BV*, 818 F.3d 733, 741–43 (D.C. Cir. 2016) (describing prosecutors’ discretionary charging powers as falling within the Executive Branch’s constitutional responsibility to execute the laws).

the enforcement landscape in a more meaningful and lasting way. The more vexatious issue is that Congressional action in this area still seems fanciful. There is no shortage of recent scholarship arguing for legislation, but Congress has yet to show sustained or serious interest in taking up these issues.⁹⁷

But an increasingly restive general public, paired with future revelations of graft and misappropriation, may be the exogenous factors that force Congress's hand. As both the political right and left grow wary of prosecutorial power, Congress eventually may have no choice but to weigh in on topics relating to corporate crime and prosecution. When it does, its members will have to grapple with the competing views of punishment and regulation that have so suffused corporate crime's debates.

DPA's and their ilk have papered over long-simmering views about distributions of power, inequality, and institutional elites. To be sure, no single statute can solve these issues. A serious approach to corporate crime demands more than just *one* statute; it demands many, which in turn requires the legislature's sustained interest and intervention. For years, Congress has successfully evaded this obligation, but eventually, it will reach the point where it will be unable to shirk its responsibilities. When that time comes, we might finally formulate a viable alternative to a settlement process that manages to be as intractable as it is reviled.

97. See, e.g., Nick Werle, *Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L.J. 1366 (2019) ("I propose a legislative reform that would authorize judicial review of deferred prosecution agreements to ensure prosecutors have collected sufficient evidence prior to finalizing corporate settlements."). As Peter Reilly notes, legislative bodies in foreign countries have been more willing to delimit corporate crime and shape corporate settlements through oversight and limitations on prosecutorial discretion. Peter R. Reilly, *Sweetheart Deals, Deferred Prosecution, and Making A Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1118 (2018).