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Progressive Punitivism in Corporate Crime

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Introduction

A. *State v. Ford Motor Co.*: *The Moral Dilemma of Prosecuting White-Collar Crime*

On August 10, 1978, after an official for Ford Motor Co. determined that the cost of fixing a defective design in Ford's Pinto outweighed the value of human life,[1] a fatal accident took the lives of three high school girls on their way to a basketball game when a van struck them. While the driver of the van sustained only minor injuries, the girls were consumed by flames after the Pinto was ignited within microseconds due to a defective design in its fuel tank.[2] Although Ford had previously estimated that approximately 180 lives could be saved by correcting the defective design, it assigned a value of $200,000 to each life and calculated the cost of improving the fuel tank of each of its 12.5 million vehicles at $11 per fuel tank. Ford determined that the most lucrative approach would be to handle the potential 180 wrongful death claims. The three teenage girls were immolated by a cost-benefit analysis performed by the corporation. In an Indiana state court, a grand jury formally charged with three counts of reckless homicide, not the driver of the van, but Ford Motor Co. What followed was the landmark case commonly referred to as the "Pinto case," the first time a corporation—the world's fourth-largest corporation[3]—faced criminal charges arising out of a defective design.[4]

The Pinto case was controversial from its inception, as even some Indiana natives believed that "[i] t will be the public that pays for it if [the prosecutor] wins,"[5] while emphasizing that [i]t's another thing that's going to increase prices," reflecting the still endemic dilemma of prosecuting corporate crime. The moral dilemma in prosecuting corporate crime is grounded on whether the

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[1] Larry Kramer, *Pinto Case Prosecution*, WASHPOST, Jan. 15, 1980
[2] State v. Ford Motor Co., No. 5324 (Ind. Super. Ct. filed Feb. 2, 1979).
[3] William J. Maakestad, State v. Ford Motor Co.: Constitutional, Utilitarian and Moral Perspectives, 27 St. Louis U. L.J. 857 (1983).
[4] Kramer, *Pinto Case Prosecution*, note 1 supra.
[5] Iver Peterson, *Indiana Officials Pressing Criminal Suit Over Pintos; 'It'll Be the Public That Pays'*, N.Y. TIMES, Dec. 2, 1979

government is justified in providing a judicial forum that *criminally* charges corporations, to allow communities to express their outrage over unconscionable business decisions, at the expense of the potential for economic devastation of companies and consequently, their employees and shareholders.[6]

When confronted with corporate crime, prosecutors operate within a dynamic framework that encompasses social, legal, and economic considerations that determine the set of tools used to prosecute corporate wrongdoing. A quintessential example of this framework is the Pinto case, reflecting the disastrous collateral consequences for Ford's employees and stockholders associated with prosecuting corporate crime. Although collateral consequences are virtually present in any criminal prosecution, they are critical in corporate crime because of the potentially deleterious effects on third parties. Moreover, there is a distinct juxtaposition in the prosecution of corporations and natural persons. In prosecuting corporations as nonhuman defendants, prosecutors are likely to face challenges proving the requisite culpable mental state of mind associated with the criminal charges beyond a reasonable doubt. Conversely, prosecutors appear to have the upper hand in the liability arena as the doctrine of *respondeat superior*, widely used to assert corporate liability, "has been expanded through common law adjudication to the point where it is less a standard than a guarantor of liability."[7] This study identifies the interplay among economic, social, and legal factors and how they affect corporate prosecution.

In making these claims, this Article will proceed as follows: Part I will provide a comprehensive overview of the realities of corporate prosecution, including broad economic

[6] William J. Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian and Moral Perspectives*, 27 St. Louis U. L.J. 857 (1983).
[7] Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 77 (2014)

concerns faced by prosecutors and the current state of the law. Part II conveys the prosecutorial methods implemented in light of the current state of affairs, including using independent external monitors to oversee a corporation and the excessive reliance on Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs). Part III explores the detrimental policy fluctuations of the United States Department of Justice (DOJ) resulting from the absence of a well-structured legislative framework to combat corporate crime. Lastly, Part IV will attempt to proffer relevant insight into the subject matter by recapitulating the interplay of the current state of the law and current prosecution methods to ultimately offer potential solutions to halt corporate crime.

I. REALITIES OF CORPORATE PROSECUTION

Sam Buell, one of the leading experts in white-collar crime and one of the prosecutors in the infamous Enron case, believes that "there is an ample dose of raw *schadenfreude*" when it comes to people's desire for having white-collar criminals prosecuted.[8] White-collar criminals rarely pose a risk of flight and have usually been in contact with law enforcement through counsel prior to their arrest. However, federal agents often insist on parading the accused while in handcuffs in public view as he is taken into FBI's offices or the courthouse.[9] This "perp walk" is staged, as "people want to see the business criminal treated the same as the street offender."[10][11] The public perception regarding the prosecution of white-collar crime must undoubtedly be aligned with that of prosecuting corporate crime. A notable difference between white-collar crime and corporate crime is that white-collar crime often refers to those crimes committed by

[8] SAMUEL W. BUELL, CAPITAL OFFENSES BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, (2016).
[9] *Id.*
[10] *Id.*
[11] Laura L. Hansen, *Corporate Financial Crime: Social Diagnosis and Treatment*, 16 J. FIN. CRIME 28 (2009).

businessmen as an adjunct to their regular business activities. While corporate crime is a crime committed by a corporation's representatives acting on its behalf, the most apparent distinction between the two is that a corporation cannot be deprived of liberty as a natural person. However, corporations may nonetheless face the shattering effects of a felony conviction.

A. *Economic Concerns as Collateral Consequences in Prosecuting Corporate Crime*

Corporations labeled as felons are precluded from engaging in commercial transactions with the federal government. This practice is known as debarment. According to Bloomberg's Freedom of Information Request to the GSA (General Services Administration), just in the 2010 fiscal year, the federal government acquired 21,980 vehicles from Ford. Similarly, corporations may also suffer from "exclusion." Exclusion occurs when a corporation is excluded from participating in federal programs such as Medicare. Therefore, "debarment or exclusion upon conviction risk substantial injury to innocent third parties—i.e., employees, stockholders, and consumers—and to the national economy as a whole." [12] Regardless of their respective motives, "[t]he characteristics of corporate criminal law result in an unusual state of affairs: neither a corporation nor a federal prosecutor has an incentive to take a corporate criminal case to trial."[13]

B. *Scienter Issues: A Contributing Factor to the Disparity between Street Crime and White-Collar Crime*

The Ford Pinto was designed and manufactured in 1973, while the revised Indiana Criminal Code did not become effective until October 1, 1976.[14] The prosecutor was then left with the challenging task of proving that Ford's recklessness was premised on its failure to recall the vehicles after October 1, 1976.[15] In light of ex post facto considerations, the trial court Judge ruled

[12] John N. Gallo & Daniel M. Greenfield, *The Corporate Criminal Defendant's Illusory Right to Trial: A Proposal for Reform*, 28 NOTRE DAME J.L.ETHICS & PUB. POL'Y 525, 536 (2014).
[13] *Id.*
[14] Ind. Code Ann. § 35-42-1-5 (West)
[15] Maakestad, *State v. Ford Motor Co.: Constitutional, Utilitarian and Moral Perspectives*, note 6 supra.

that the documents relating to Ford's decision not to improve the defective fuel tanks were inadmissible as they were "pretty far remote from the issue."[16] The prosecutor's efforts were unsuccessful at last, and Ford was ultimately acquitted.

Typically, prosecutors will face a heavier burden proving a scienter element in a white-collar case than they do in street crimes.[17] The essential scienter element of criminal charges tends to be more difficult to prove beyond reasonable doubt when prosecuting corporations. In the Pinto case, a document existed that could have demonstrated Ford's recklessness (assuming arguendo the absence of evidentiary issues). However, in a different case, the apportionment of culpability would not be so clear. For example, would it be proper for the prosecution to blame the corporation's senior management for failing to familiarize themselves with every intricate detail of the manufacturing design?[18] Or perhaps the chief engineer's negligence should be established in order to prove the corporation's recklessness in the criminal case?

The "collective knowledge" doctrine serves to attribute knowledge of a corporation's employees and agents to the corporation as an entity.[19] However, the corporation must act with the requisite culpable mental state as determined by the applicable statute, which usually involves imputing the mental state of individual employees or agents to the corporation.[20] The problem with prosecuting corporate managers for financial transgressions that occur within their supervision is that recklessness as a culpable mental state of mind is typically insufficient (e.g., knowledge is required in criminal fraud by federal statute), and most "often, knowledge at the top of the

[16] Kramer, *Pinto Case Prosecution*, see note 1 supra.
[17] *See generally* Samuel W. Buell "What is Securities Fraud" 61 Duke L. J. 511 (2011)
[18] A practice which is tends to be unsuccessful even in civil practice, as the Business Judgment Rule creates a presumption in favor of the officers which shields them from liability.
[19] *United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir. 1987)
[20] *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 722 (5th Cir. 1963) (noting that "knowledge of employees and agents of the corporation is attributable to the corporation, and that their acts may amount to willfulness on the part of the corporation.")

corporation is lacking."[21] It also is worth noting that if no individual employee has the requisite mental state of mind, corporate liability can still be imposed if the corporate employees possess the mental state collectively, [22] which in and of itself poses its complications. These complex questions reflect some of the scienter challenges prosecutors face, even before facing the complex predicament that arises during the sentencing phase.

C. *Respondeat Superior as a Guarantor of Liability*

Respondeat superior makes a corporation vicariously liable for the acts of its agents committed within the scope of the agent's employment and for the benefit of the corporation. The doctrine was transposed verbatim into criminal law upon the ruling of the Supreme Court in *New York Central & Hudson River Railroad Co. v. United States* in 1909.[23] This landmark spearheaded the movement towards bringing criminal charges against corporations. The court applied the traditionally civil doctrine of *respondeat superior* to avoid having certain offenses go unpunished.[24] The Court relied on Congress's Commerce Clause authority to regulate interstate commerce, such as railroad companies, effectively expanding the *respondeat superior* into criminal law. The controversial ruling allows a corporation to be held criminally responsible for acts of its employees regardless of whether the corporation had explicitly prohibited such conduct. For example, "[e]vidence that a corporation took all reasonable steps to prevent the misconduct through a robust compliance program…is simply irrelevant to the question of liability."[25]

The overbreadth of the application of the *respondeat superior* doctrine is stringent to the point that it leaves corporations without the practical ability to contest criminal cases.[26] The

[21] BUELL, CAPITAL OFFENSES BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, note 8 supra.
[22] *Bank of New Eng.*, 821 F.2d 844
[23] *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909).
[24] 212 U.S. at 495
[25] Robert Luskin, *Caring About Corporate 'Due Care': Why Criminal* Respondeat Superior *Liability Outreaches Its Justification*, Am. Crim. L. Rev., 2020.
[26] *Id.*

contention is that "[i]f the *de jure* rule makes corporations almost always guilty, then the *de facto* rule becomes that corporations must always roll over for the Justice Department."[27] Scholars have posited that "the *respondeat superior* standard has been expanded through common law adjudication to the point where it is less a standard than a guarantor of liability."[28] By expanding the application of the doctrine of *respondeat superior* into criminal cases, corporations are inclined to resolve matters via settlement, which results in corporations waiving their sacrosanct right to a jury trial. The consequences of such waiver are severe, as it jeopardizes constitutional safeguards in place to rein in overly aggressive prosecutors; without the threat of trial, prosecutors might be less likely to act reasonably. Conversely, a plausible argument could be made that in light of the *schadenfreude*[29] a corporation must overcome in presenting a case to a jury, they may be better off resorting to settlement. However, this argument would fail as a defendant corporation still has the alternative of seeking a bench trial.

II. PROSECUTORIAL METHODS IN LIGHT OF THE REALITIES OF CORPORATE PROSECUTION

Corporate criminal liability is a corollary to the law's treatment of corporations as persons, and the Sentencing Guidelines of 1999 codified that principle. The central thrust of the Sentencing Guidelines is grounded on its carrot and stick policy which, by virtue of the carrot, encourages corporations to identify violations while reserving the stick for violators. For instance, a compliance program approved under the Guidelines would require a corporation to detect

[27] *Id.*
[28] O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, note 7 supra.
[29] BUELL, CAPITAL OFFENSES BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, note 8 supra.

violations,[30] discipline the perpetrator, and subsequently disclose both actions to the appropriate authorities.[31] Under the Guidelines, a corporation would also benefit from the disclosure of remedial measures following the violation, as well as for full cooperation. Presently, in order to obtain full cooperation credit, the corporation must disclose, inter alia, "information... sufficient for law enforcement personnel to identify…the individual(s) responsible for the criminal conduct."[32] The Sentencing Guidelines incentivized corporations by limiting their fine exposure, in consideration of the corporation taking steps to increase the likelihood that the individuals responsible for financial crimes be held accountable for their misconduct.[33] They are carefully crafted to create a wedge between corporation and employee by encouraging corporations to reduce their fine exposure by identifying employees who may have committed violations.

A. *Corporation's Dual Role as Suspect and Enforcer: External Independent Monitors as a Common Feature of DPAs and NPAs*

The current state of the law, "arrived at over twenty years or so, in a kind of ad hoc developments of practices by prosecutors, corporate defense lawyers and companies,"[34] requires corporations to act as both criminal suspect and enforcer, as the state commonly relies on the corporation to detect, prove and punish business crime. [35] A common denominator among DPAs and NPAs is to require a corporation, at its own cost, "to rehabilitate itself" by hiring an expensive outside "monitor" sometimes for several years.[36] The monitoring process may occur within the confines of the corporation, and the monitoring staff has the ability to inspect, ask questions, receive complaints, and report to prosecutors. The imposition of external monitors substantially

[30] U.S.S.G., §§ 8C2.5(f), 8A1.2 (comment. (n.3(k))).
[31] *Id.*
[32] *Id.*
[33] *Id.* at § 8C3.4.
[34] BUELL, CAPITAL OFFENSES BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, note 8 supra.
[35] *Id.*
[36] *Id.*

increases the cost companies pay in order to settle with the Justice Department. Company officials have repeatedly voiced their concerns over how little leverage to negotiate fees, monitoring costs, or the monitor's roles and responsibilities. These external monitors usually have an absolute decision-making authority to determine whether the company is in compliance with the agreement reached with the DOJ,[37] [38] and "for whatever reasons, monitors wield tremendous, relatively unchallenged power over their subject companies' operations." [39]

Corporations do not enjoy the same constitutional privacy protections as natural citizens. Any protection afforded by the Fourth Amendment against unreasonable searches can be circumvented by a duly issued subpoena, which is the primary tool for gathering evidence in white-collar crime investigations.[40] Similarly, corporations do not have a Fifth Amendment right against self-incrimination.[41] Consequently, corporations are fighting an uphill battle in which "even the mention by prosecutors of a potential charge against the corporation has to be treated as if it were a death threat. Any prospect of contesting the litigation vanishes."[42] Interestingly enough, the role of the corporation as enforcer has become so prevalent that corporate lawyers have expressed their discontent with having "been turned into nothing more than 'deputy prosecutors' whose job is to investigate their own clients."[43] A considerable shortcoming of this "automated self-enforcement

[37] *Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) note 4 at 28-29, available at http://www.gao.gov/new.items/d09636t.pdf.
[38] *See generally* Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., Dep't of Justice, on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corps. to Heads of Dep't Components
[39] Kathleen M. Boozang and Simon Handler-Hutchinson, *Monitoring' Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, AM. J. L. & MED. 89 (2009).
[40] BUELL, CAPITAL OFFENSES BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, note 8 supra.
[41] *See United States v. Hubbell*, 530 U.S. 391 (1976); *Braswell v. United* States, 487 U.S. 99 (1988); *Bellis v. United States*, 417 U.S. 85 (1974).
[42] BUELL, CAPITAL OFFENSES BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE, note 8 supra.
[43] *Id.*

process" is that if cases are rarely litigated, there could be (at least in theory) innocent corporations settling with the Justice Department to avoid engaging in a losing battle.

The practice of prosecutors meddling into a corporation's business affairs has been widely criticized. After all, it has been contended that "prosecutors are English majors with law degrees"[44] who are not qualified to run corporations. Moreover, the incorporation of monitors in "pre-trial diversion agreements are being negotiated by assistant U.S. Attorneys whose knowledge of the subject industry and specific entity may, at an early stage in the process, be too limited to enable them to draft a narrow charge."[45] The use of DPAs and NPAs requires that prosecutors monitor the corporation, as well as to conduct structural reforms to its operations, however, it has been repeatedly argued that "such reforms lies outside prosecutors' realm of expertise and authority."[46]

B. *Complacent Prosecutors: Excessive Reliance on Deferred Prosecution Agreements and Non-Prosecution Agreements*

Extensive research has shown that prosecutors are drifting away from their duties of prosecuting crime to reform the corporate structure by excessively relying on DPAs and NPAs.[47] Critics of the situation continue to argue that prosecutors are tasked with enforcing the law through litigation. They are not experts on structural corporate governance reformation.[48] Which in turn, begs the question of whether federal prosecutors are competent to implement effective DPAs and NPAs if those require complex structural reforms.[49] Nevertheless, the widespread use of DPAs

[44] James R. Copeland, *Bring These Agreements Out of the Shadows*, N.Y. TIMES, Nov. 11, 2014.
[45] Boozang et al, *Monitoring' Corporate Corruption*, note 35 supra.
[46] Interview with Mary Jo White, Partner, Debevoise & Plimpton LLP, New York, New York, CORP. CRIME REPORTER, Dec. 12, 2005, at 48, http://www.corporatecrimereporter.com/maryjo whiteinterview010806.htm [https://perma.cc/PCJ8-3QZZ]; *See generally* Janet Novack, Club Fed, Deferred, FORBES (Aug. 24, 2005), http://www. forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html [https://web.archive.org/web/20130815005133/http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway. html].
[47] *Id.*
[48] Paul E. McGreal, *Corporate Compliance Survey*, 64 BUS. LAW. 253, 260–61 (2008); P.J. Meitl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 12–13 (2007).
[49] O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, note 7 supra.

and NPAs dramatically increased in 2004 compared to 2001, which is the year of inception of DPAs and NPAs in corporate prosecutions.[50] Between 2001 and 2004, the DOJ entered into a total of thirteen settlement agreements.[51] By 2004, the DOJ was resolving an average of thirteen cases per year through the use of DPAs or NPAs. However, between 2006 and 2021, the average of cases settled through DPAs or NPAs was approximately 31 per year. [52]

Another concern surrounding the excessive usage of NPAs is the absence of judicial monitoring. While DPAs enjoy limited oversight as certain aspects of DPAs have to be approved by the court, NPAs do not enjoy this additional safeguard as charges are never filed. [53] This practice exposes NPAs to claims of lack of partiality, as they rely entirely on the prosecutor's discretion, regardless of potential harm to the public.[54] Furthermore, the use of DPAs and NPAs to resolve white-collar crime allows corporations to infer potential fines and perform a cost-benefit analysis to calculate the risk of financial exposure, as in the Pinto case. If a corporation decides that it is lucrative to bear said risk of exposure by escaping prosecution with monetary fines, it cannot be said that such corporation was deterred from engaging in criminal conduct. On the contrary, the lack of individual accountability, as it presently stands, fails to deter individuals in managerial positions from engaging in criminal conduct. The DOJ's customary reliance on DPAs generates the impression, at least at first glance, that companies are able to buy their way out of prosecution. On the other side of the spectrum, it has been argued that prosecutors, highly aware of their upper hand, can get complacent, "even lazy"[55] in their positions. Because prosecutors can get

[50] Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, http://lib.law.virginia.edu/Garrett/prosecution-agreements/home.suphp (last updated June 7, 2013)
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Brandon L. Garrett, Structural Reform Prosecution, 93 VA. L. REV. 853, 855–56 (2007).
[55] *Id.*

corporations to go through the same evidence-collection procedures, that will eventually reach the same sort of settlement, producing the same sort of check for the government,"[56] prosecutors do not have an incentive to scrutinize individual cases, much less to "make careful distinctions among them."[57] In their defense, it has also been argued that federal prosecutors lack the resources to compete with the deep coffers of large corporations able to spend millions on high-powered defense firms.[58]

Regardless of the DOJ's motive for the wide usage of NPAs and DPAs, white-collar defense attorneys have come to heavily rely upon this settlement practice in order to circumvent the rigorous application of *respondeat superior* to corporate crime, along with the grave collateral consequences of a conviction, including disbarment and exclusion for a corporation.[59]

III. COLLATERAL CONSEQUENCES IN THE DEPARTMENT OF JUSTICE'S POLICY FLUCTUATIONS PROSECUTING CORPORATE CRIME

A. *The Evolution of the Triangle Relationship between Corporation, Employee, and State*

In previous administrations, corporations have been faced with a double-edged sword when the DOJ assesses their cooperation on the basis of waiving basic legal protections such as the attorney-client privilege, the work-product doctrine, and the ability to secure legal counsel for their employees. On the one hand, corporations have a vested interest in mitigating the criminal exposure of (potentially disgruntled) former employees in order to avoid further legal

[56] *Id.*
[57] *Id.*
[58] David Cay Johnston, *New DOJ White-Collar Crime Policy Just Reheated Cabbage*, AL JAZEERA AM., Sept. 15, 2015, http://america.aljazeera.com/opinions/2015/9/new-doj-white-collar-crimepolicy-just-reheated-cabbage.html [https://perma.cc/XR6W-57HE] (arguing that the DOJ does not have the resources to successfully prosecute complicated corporate criminal activity).
[59] *Id.*

consequences. On the other hand, this practice had been discouraged, and at some point, prohibited by the DOJ.

In 1999, the Holder Memo memorialized the DOJ's guidelines for federal prosecution of corporations.[60] As a result, the Holder Memo came to be known for its emphasis on cooperation. Specifically, it recommended that prosecutors take into account, inter alia, whether the corporation disclosed the complete results of internal investigations, advanced legal fees on behalf of its employees, and waived its attorney-client and work-product privileges in order to assess the extent of the corporation's cooperation.[61]

On the heels of the Enron scandal, the Thompson Memo was released in 2003 reaffirming previously established principles of the Holder Memo, except now binding prosecutors to follow guidelines that were merely advisory under the Holder Memo, heightening pressure corporations.[62] The Thompson Memo's revisions served as *de facto* requirements for corporations to waive their attorney-client privilege and work-product doctrine as a prerequisite to consideration for cooperation.[63] In addition, the Thompson Memo encouraged federal prosecutors to scrutinize "the authenticity of a corporation's cooperation"[64] by determining whether a corporation was "purporting to cooperate" while actually impeding the investigation.[65] For instance, the payment of attorneys' fees for the corporation's employees or agents, even in a joint defense agreement,

[60] Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys (June 16, 1999), available at http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html.
[61] *Id.*
[62] Memorandum from Larry D. Thompson, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines. htm.
[63] Beth Wilkinson and Alex Young K. Oh., *The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective*, 2009, at https://www.paulweiss.com/media/1497187/pw_nysba_oct09.pdf
[64] Holder Memorandum, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps. to Dep't Component Heads and U.S. Attorneys, note 56 supra.
[65] *Id.*

was considered an aggravating factor in determining cooperation and contributed to a determination of "whether the corporation appears to be protecting its culpable employees and agents."[66] Corporations, in turn, were compelled to demonstrate the "authenticity" of their cooperation by resorting to increasingly creative measures, such as conditioning legal fees for employees embroiled in the investigation on their agreement to provide testimony to prosecutors.[67]

In response to the prosecutorial overreach of the *de facto* prerequisite of waiving the attorney-client and work-product privileges in exchange for cooperation credit, the Southern District of New York ruled in United States v. Stein that scrutinizing the payment of employees' defense costs by the corporation violated the Fifth Amendment due process clause and the Sixth Amendment right to counsel.[68] In light of the District Court's decision, and after acknowledging that the "corporate legal community" had voiced their concerns regarding the waivers of legal protections,[69] The McNulty Memo was issued in 2006 as a band-aid. The McNulty Memo sought to limit the practice of demanding waivers of legal protections in cases where there was a "legitimate end," and through the "least intrusive wavier necessary," and only with authorization from the assistant attorney general.[70] However, the state's appeal of the district court's decision in *Stein* continued to spark widespread criticism among "a wide range of commentators and members of the American legal community and criminal justice system … that the Department's policies

[66] *Id.*
[67] Wilkinson et al. *The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective*, note 59 supra.
[68] *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006)
[69] Memorandum from Paul J. McNulty, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, § VII (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_ memo.pdf.
[70] *Id.*

have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection." [71]

Once the Second Circuit affirmed *Stein* in August 2008,[72] then-Deputy Attorney General, Mark Filip, issued a new memorandum along the vein of the Court's opinion. This time, the implementation of DOJ policies was the product of "comments from other actors within the criminal justice system, the judiciary, and the broader legal community" emphasizing "what measures a business entity must take to qualify for the long-recognized 'cooperation' mitigating factor, as well as how payment of attorneys' fees by a business organization for its officers and employees, or participation in a joint defense agreement, will be considered."[73] After the ruling in *Stein*, the DOJ stands by its position issued in the Filip Memo (also known as the Principles of Federal Prosecution of Business Organizations) recognizing the constitutionality of the attorney-client and work-product privileges, and no longer requires waivers of such legal protections in exchange for a cooperation consideration. In fact, the Filip Memo, which is presently in effect, specifically directs that "prosecutors should not ask for such waivers and are directed not to do so." [74] It further specifies that "mere participation of a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit."[75] The implementations reflected in the Filip Memorandum are still the prevalent view among DOJ policy and have served as the framework to protect the sacrosanct legal protections.

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[71] Memorandum from Mark R. Filip, Deputy Attorney Gen., Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, U.S.A.M. §§ 9-28.700 (Aug. 28, 2008) , available at http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf. note 5, § 9-28.710

[72] *United States v. Stein*, note 64 supra.

[73] Filip Memorandum, Dep't of Justice, on Principles of Fed. Prosecution of Bus. Orgs. to Heads of Dep't Components and U.S. Attorneys, note 67 supra.

[74] *Id.*

[75] *Id.*

B. *The Yates Memo and its Emphasis on Individual Accountability*

Grounded on the premise that corporate crime is committed by "flesh-and-blood people" and thus prosecutorial practice should also incorporate individual wrongdoers, then-Deputy Attorney General Sally Yates announced sweeping changes to DOJ Principles in its September 2015 Memo.[76] In a nutshell, the Yates Memo required that prosecutors wishing to advance charges against a corporation, without an accompanying charge for an individual, must explain the "extraordinary circumstances" for such decision, as well obtain approval from the U.S. attorney of the appropriate assistant attorney general.[77] In addition, the Yates Memo came up with six "key steps" that offers guidance for prosecuting individual wrongdoers:

> (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct;
>
> (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
>
> (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
>
> (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
>
> (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and
>
> (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay. [78]

[76] Memorandum from Sally Q. Yates, Deputy Attorney Gen., Dep't of Justice, on Individual Accountability for Corporate Wrongdoing, (Sept. 9, 2015), available at https://www.justice.gov/archives/dag/file/769036/download.
[77] *Id.*
[78] *Id.*

The central premise of the Yates Memo was the emphasis placed on the reporting requirement in exchange for cooperation consideration. Particularly its requirement to identify *all* culpable individuals in order to receive—not full cooperation credit—but to be considered as a cooperating entity. The Yates Memo further encourages the prosecution of individuals by requiring that prosecutors memorialize the reasons for any declination of prosecution against individuals, imposing ongoing cooperation obligations for corporations. However, some of the most palpable effects of the Yates Memo are the stringent cooperation requirements, which apply even in the case of senior management, as well as the requirement to identify and actively procure evidence against violators.

Some critics have opined that the Yates Memo is merely a public message released preceding an election year, as the DOJ already had a track record for prosecuting individuals.[79] Following the Yates Memo, the Justice Department continued to rely on the use of DPAs over full prosecution, which resulted in individual wrongdoers continue avoiding accountability.[80] In support of this conclusion, it is readily apparent that in the couple of years following the Yates Memo, prosecutions of individuals declined,[81] even though the central thrust of the memo is grounded on individual accountability. The Yates Memo failed to substantiate its intent to enhance individual accountability by providing prosecutors with a procedural vehicle in order to achieve its objective, as the Yates Memo did not limit the use of DPAs and NPAs.[82]

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[79] Matt Apuzzo & Ben Protess, *Justice Department Sets Sights on Wall Street Executives*, N.Y. TIMES, Sept. 9, 2015,,http://www.nytimes.com/2015/09/10/us/politics/new-justicedept-rules-aimed-at-prosecuting-corporate-executives.html [https://perma.cc/72AF-GN94]

[80] OFFICE OF SEN. ELIZABETH WARREN, RIGGED JUSTICE: 2016: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (2016)

[81] Transactional Records Access Clearinghouse (TRAC), *Corporate and White-Collar Prosecutions at All-Time Lows*, Syracuse University, Mar. 3, 2020, https://trac.syr.edu/tracreports/crim/597/

[82] *See* RIGGED JUSTICE, supra note 62, at 1.

During the Trump administration, the Yates Memo was redefined, at least in the civil context, by Deputy Attorney General Rod Rosenstein. [83] In November 2018, Rosenstein announced that the "all or nothing approach" of the Yates Memo was inefficient for civil cases under the False Claims Act and allowed for corporations to obtain maximum credit to companies that identify every individual substantially involved in the misconduct while still awarding some credit to those corporations that cooperate in a "meaningfully" form without necessarily identifying every employee with potential liability exposure.[84]

IV. PROPOSED SOLUTIONS TO HALT CORPORATE CRIME

A. *Invite Legislators to Legislate*

Presently, it appears counterproductive to continue abiding by the doctrine set forth in such an archaic ruling. A jury should not be able to decide the plight of an entire organization on the basis of the misconduct of one of its employees. Accordingly, it has been suggested at the American College of Trial Lawyers that perhaps the legislature should replace the doctrine with the language of the Model Penal Code as the standard for securing a conviction in corporate crime.[85] Section 2.07(1) of the Model Penal Code provides in relevant part as follows:

> the commission of the offense was authorized, requested, commanded, performed, or *recklessly* tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment…'High managerial agent' is defined as an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may

[83] Deputy Attorney General Rod J. Rosenstein, Keynote Address at NYU Program on Corporate Compliance & Enforcement, New York University Law School (Oct. 6, 2017)
[84] *Id.*
[85] Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution,* https://www.actl.com/docs/default-source/default-document-library/newsroom/indicting_corporations_revisited_lessons_of_the_arthur_anderson_prosecution_2005.pdf?sfvrsn=37f4e68_4

> fairly be assumed to represent the policy of the corporation or association. (emphasis added) [86]

The Model Penal Code imposes recklessness as to the requisite culpable mental state of mind while not being as rigid as the application of the *respondeat superior doctrine* to civil cases. While defining recklessness as a person who "…consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."[87] If the legislature adopts such a standard, prosecutors should devote their attention and resources to prosecute. This modification would also rein prosecutors from engaging in the practice of reforming corporate structures through the use of NPAs and DPAs.

B. *Enact Voluntary Asset Forfeiture Mechanisms as a Form of Restitution*

Traditionally in criminal prosecutions, the concept of restitution has been an equitable remedy to obtain justice and to restore a victim to an otherwise favorable condition. The enactment of voluntary asset forfeiture regulations through quasi-criminal proceedings would be a formidable tool to have corporate wrongdoers relinquish profits obtained through corporate wrongdoing. Federal statutes have been akin to asset forfeiture under specific circumstances and upon the commission of specific crimes.[88] For example, the United States Code Service authorizes the forfeiture of property of interest in property obtained or maintained in violation of racketeering laws:

> (a) Whoever violates any provision of section 1962 of this chapter…shall forfeit to the United States, irrespective of any provision of State law—
>
> > (1) any interest the person has acquired or maintained in violation of section 1962 [18 USCS § 1962];

[86] *Id.*
[87] MODEL PENAL CODE § 2.02(c) recklessness defined (Am. Law Inst., Proposed Official Draft 1962).
[88] 18 U.S.C.S. § 1963 (LexisNexis, Lexis Advance through Public Law 117-65, approved November 23, 2021, with a gap of Public Law 117-58).

> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962]; and
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, in violation of section 1962 [18 USCS § 1962].[89]

Mandatory asset forfeiture upon the commission of a financial crime was originally introduced in 1973[90] and eventually was codified in the Sentencing Guidelines.[91] Presently, most defendants are ordered to pay restitution upon conviction as part of their sentences.[92] The recognition of voluntary asset forfeiture would enhance judicial economy while also restoring public justice by returning the ill-gained profits to the corporation's victims. It is also notable that by virtue of the quasi-criminal nature of the proceeding, corporations could avoid a criminal conviction and potentially even public scrutiny, which would be a highly appealing consideration. In exchange for subjecting itself to voluntary asset forfeiture, a corporation should obtain cooperation credit under the Sentencing Guidelines. Voluntary restitution could conceivably be a more fruitful approach, as it would ensure that victims are able to promptly recover the funds in question, as opposed to having to wait for an adjudication, or risk a potential bankruptcy or depletion of funds prior to mandatory restitution, which occurs upon conviction.

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[89] *Id.*
[90] Andrews, *Reform in the Law of Corporate Liability,* 1973 CRIM. L. REV. 91, 94.
[91] U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(d)(5).
[92] Courtney Semisch, *U.S. SENTENCING COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19*, 2009, available at http://goo.gl/OsqgAu

A foreseeable issue regarding voluntary asset forfeiture would be producing an accurate valuation. It is likely that even relying on forensic accountants and other experts. Such valuations would be merely an approximation of the real value of profits obtained through corporate wrongdoing. A potential solution would be to create a rebuttable presumption in favor of the state to resolve potential discrepancies in dueling valuations. Contrary to the traditional rule of lenity[93], which is triggered at the time a defendant is charged,[94] this proposed rebuttable presumption would only be applicable after a finding has been made that the corporation engaged in a corporate crime. This presumption to favor the state's approximate valuation would further serve as a deterrent to corporate crime and could potentially minimize the value of a corporation's cost-benefit analysis to infer penalty amounts, as Ford did while manufacturing its infamous Pinto. While it may seem overzealous to create a presumption favoring the state, the presumption would only be applicable upon the finding explained *supra* and would be rebuttable in nature, providing a safeguard to defendants to produce clear and convincing evidence of the accuracy of their proposed valuation.

C. *Restrict the Usage of NPAs and DPAs to Exceptional Circumstances and Subject to Approval of a Supervising Attorney*

Amend the USAM to delineate under what circumstances would it be acceptable to use NPAs and DPAs to validate the intent reflected in Yates Memo pertaining to individual accountability. The present DOJ policy in the USAM grants prosecutors broad (and perhaps excessive) discretion regarding the usage of DPAs. DPAs, in turn, do not contribute to the deterrence of white-collar crime, as DPAs in and of themselves allow corporations to conduct an analysis into whether it would be lucrative to expose themselves to a monetary fine, as Ford did in the Pinto case. Furthermore, DPAs do not help clarify the boundaries of permissible legal conduct

[93] *Rule of Lenity*, Merriam-Webster.com Legal Dictionary, (2021).
[94] Zachary Price, *The Court after Scalia: The Rule of Lenity,* Sep 2. 2016, *https*://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/

as they quickly resolve matters without conducting a trial, developing a record, or setting a precedent for the purpose of *stare decisis*. Reliance on DPAs should be reserved for exceptional circumstances, with specific terms discussed with a supervising attorney, and subject to judicial review and appeal. Except for determining whether a DPA involves misconduct, a district court has no authority to consider the merits of a DPA.[95]

The limitation, or even complete eradication, of DPAs, does not equate to the state running out of prosecutorial mechanisms. The state will still have useful tools to choose from in its toolbox. For instance, in cases that would *actually* warrant a DPA, such as cases in which the defendant (whether it be a corporation or a natural person) commits a minor offense and has no history of violations, it should not be unfeasible to decline prosecution altogether or to refer the matter for civil or administrative enforcement and apply the adequate punitive measures through either of those forums.

D. *Enforce the Yates' Memo Provision for Prosecuting Individuals*

Former Judge Jed Rakoff of the United States District Court of the Southern District of New York has opined that an endemic problem is the lack of simultaneous prosecutions among corporations and individuals, an aspect of corporate criminal cases he finds disturbing.[96] Prosecuting corporations is a rare occurrence. However, the prosecution of corporations, along with the prosecution of their managerial agents, is rare.[97] "In recent decades, . . . prosecutors have been increasingly attracted to prosecuting companies, often even without indicting a single individual."[98]

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[95] *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125 (2d Cir. 2017)
[96] Jed S. Rakoff, *Why Have No High Level Executives Been Prosecuted In Connection With The Financial Crisis?*, CLS BLUE SKY BLOG, Nov. 15, 2013, http://clsbluesky.law.columbia.edu/2013/11/15/why-have-no-high-level-executives-beenprosecuted-in-connection-with-the-financial-crisis; see generally Elkan Abramowitz & Jonathan Sack, The 'Civil-izing' of White-Collar Criminal Enforcement, N.Y. L.J., May 7, 2013, at 3.
[97] *Id.*
[98] *Id.*

> Just going after the company is . . . both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.[99]

Oddly enough, even after the Yates Memo public message emphasizing individual prosecutions, such a concept has yet to materialize. Instead, Judge Rakoff believes that the DOJs' focus on primarily prosecuting corporations was rationalized as part of an attempt to transform "corporate cultures."[100]

The USAM provides in relevant part that "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, the imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued…"[101] A solution to deter corporate crime would be following the guidance already reflected in the United States Attorneys' Manual (USAM) and charging individuals simultaneously when charging corporations, as intended for when the Yates Memo was released.[102]

[99] *Id.*
[100] *Id.*
[101] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.200.B (2008).
[102] Yates Memorandum Yates, note 72 supra.

CONCLUSION

The purpose of this study has been to expand on the present prosecutorial framework to widen prosecutorial reach through the suggestion of creative tools while simultaneously ensuring appropriate safeguards for corporations as defendants. As shown in this Article, corporate wrongdoing presents unique challenges to criminal procedure, particularly the prosecution of corporate defendants *vis-à-vis* natural persons. The plethora of difficulties in light of the absence of a well-structured legislative framework has generated an unsteady ground for both prosecutors and defendants alike. Consequently, the lack of legislation that allows for swift policy shifts in the DOJ regulations for prosecuting corporate crime could occasionally serve as a *de facto* loophole to avoid corporate liability.

Legislators should address this pressing dilemma by replacing the inadequate *respondeat superior* doctrine to impose liability in corporate criminal cases based on a statute that aligns with the provisions found in the Model Penal Code. Similarly, a deviation from the standard mandatory forfeiture to favor voluntary forfeiture in the Sentencing Guidelines could have promising consequences for courts, as well as all parties involved, by expediting a case while ensuring prompt and full restitution for victims.

For better or worse, prosecutors have come to depend on settlement agreements to engage in complex corporate restructuring as means of pursuing justice on behalf of the public. While the benefits of NPAs and DPAs speak for themselves, transparency should be preserved but must also be of compulsory nature. In addition, the wide prosecutorial discretion in relying on these settlement agreements should be streamlined in the interest of public justice. Finally, the DOJ must be held accountable for its undertaking of seeking individual prosecutions, which is now over a decade late.