Notes

LEVELING THE PLAYING FIELD: APPLYING FEDERAL CORPORATE CHARGING CONSIDERATIONS TO INDIVIDUALS

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ABSTRACT

The American prison system is grappling with a well-publicized carceral crisis. In the words of former U.S. Attorney General Eric Holder, "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason." And, as a result of developments in federal law over the past few decades, the power of federal prosecutors to decide when and how to charge individuals with crimes is crucial to when and how American citizens go to prison.

Many ideas have been proposed to revise prosecutorial discretionary powers, but few have been heeded by the Department of Justice (DOJ). However, this Note posits that the DOJ has already paved the way to enhanced guidance for federal prosecutors when charging individuals with crimes. This is because the DOJ's prosecutorial guidance for charging corporations with federal crimes is more robust than the guidance for charging individuals. In particular, a discussion on collateral consequences is included in the corporate charging guidance, yet lacking in the individual charging guidance.

This enhanced corporate guidance has had the purposeful impact of curtailing the prosecution of corporate crime. This Note argues that a similar discussion of collateral consequences in the individual charging guidance could have important and far-reaching effects on the federal criminal regime. Perhaps more importantly, such a discussion could remedy some of the unfairness presented by the current system in which

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federal prosecutors are guided to consider a superior set of factors before charging corporations with crimes.

INTRODUCTION

In 2008, federal prosecutors charged Carol Anne Bond with using a chemical weapon[1] in violation of the Chemical Weapons Convention Implementation Act of 1998.[2] Bond, a Pennsylvanian microbiologist, had obtained an arsenic-based compound from work and a vial of potassium dichromate from Amazon online.[3] She intended to use the chemicals to cause an "uncomfortable rash" on her former best friend, Myrlinda Haynes, after finding out that her own husband was the father of Haynes's unborn child.[4] Bond's plan included spreading the chemicals in locations outside of Haynes's home, including her mailbox.[5]

Though these chemicals are potentially lethal at "high enough doses," lethality was never a threat in this case.[6] Furthermore, because the chemicals are extremely visible,[7] Haynes simply "avoid[ed]" the chemicals when she saw them outside of her house.[8] In the end, the only physical injury suffered throughout Bond's twenty-four failed attempts to get back at her former best friend was a "minor chemical burn on [Haynes's] thumb, which she treated by rinsing with water."[9] For this, Bond received a six-year sentence in federal prison.[10]

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1. Joint Appendix at 13 (Indictment), Bond v. United States, 1315 S. Ct. 2355 (2011) (No. 09-1227); *see also id.* at i (indicating the date of Bond's indictment).

2. 18 U.S.C. § 229 (2012); *see also* Bond v. United States, 134 S. Ct. 2077, 2085 (2014) ("Federal prosecutors . . . charged Bond with two counts of mail theft . . . . [T]hey also charged her with two counts of possessing and using a chemical weapon, in violation of [18 U.S.C. §] 229(a).").

3. *Bond*, 134 S. Ct. at 2085.

4. *Id.*

5. *Id.*

6. *See id.* ("Both chemicals are toxic to humans and, in high enough doses, potentially lethal. It is undisputed, however, that Bond did not intend to kill Haynes.").

7. *See id.* (stating that "[t]he chemicals that Bond used are easy to see"); *see also PubChem Open Chemistry Database*, *Compound Summary for Potassium Dichromate*, NAT'L CENTER FOR BIOTECH. INFO., http://pubchem.ncbi.nlm.nih.gov/compound/24502#section=Top [https://perma.cc/ARG6-U29C] (describing potassium dichromate as a compound that is "orange to red colored" and "bright").

8. *Bond*, 134 S. Ct. at 2085.

9. *Id.*

10. *Id.* at 2086. Bond's sentence has been generally attributed to her chemical-weapons charge, although she was also charged with two counts of mail theft, in violation of 18 U.S.C. § 1708. It is impossible to know the breakdown of her sentence for certain, because the sentencing

The U.S. Supreme Court overturned Bond's sentence in 2014, referring to the federal chemical-weapons charge against her as "unusual"[11] and "surprising."[12] Noting a number of Pennsylvania laws that allow for local prosecution of her offensive conduct,[13] the Court concluded that a federal prosecution of Bond was neither necessary[14] nor appropriate.[15] Furthermore, and perhaps central to the holding,[16] the Court implied that this case demonstrated an inappropriate exercise of federal prosecutorial charging power: "[I]n its zeal to prosecute Bond, the Federal Government has 'displaced' the 'public policy of . . . [Pennsylvania]' that Bond does not belong in prison for a chemical weapons offense."[17]

The prosecutor, with all the power of her office, literally holds the lives of individuals in her hands.[18] The job of the federal prosecutor is

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documents from her original appeal were sealed. *See* Defendant-Appellant's Supplemental Reply Brief at 4 n.*, On Appeal from the United States District Court for the Eastern District of Pennsylvania, Bond v. United States, 681 F.3d 149 (2012) (No. 07-528), *rev'd*, 1345 S. Ct. 2077 (2014).

11. The Court mentions that this case and the federal chemical-weapons charge are unusual two separate times in the opinion. *See Bond*, 134 S. Ct. at 2092 ("[W]ith the exception of this unusual case, the Federal Government itself has not looked to section 229 to reach purely local crimes."); *id.* at 2093 ("This case is unusual, and our analysis is appropriately limited.").

12. *See id.* at 2085 ("Federal prosecutors naturally charged Bond with two counts of mail theft . . . . More surprising, they also charged her with two counts of possessing and using a chemical weapon . . . .").

13. *See id.* at 2092 (stating first that "Pennsylvania has several statutes that would likely cover [Bond's] assault" and then referencing 18 PA. CONS. STAT. § 2701 (2012) (simple assault), § 2705 (reckless endangerment), and § 2709 (harassment)).

14. *See id.* ("It is also clear that the laws of the Commonwealth of Pennsylvania (and every other State) are sufficient to prosecute Bond.").

15. *See id.* at 2093 ("[T]here are no apparent interests of the United States Congress or the community of nations in seeing Bond end up in federal prison, rather than dealt with (like virtually all other criminals in Pennsylvania) by the State.").

16. *See, e.g.*, Robert J. Anello & Richard F. Albert, *Missing Fish, Obstruction Statute and Prosecutorial Discretion*, N.Y. L.J. (Dec. 3, 2014), http://www.newyorklawjournal.com/id=1202677879102/Missing-Fish-Obstruction-Statute-and-Prosecutorial-Discretion?slreturn=20151119114235 [https://perma.cc/PY85-HMTW] ("The Supreme Court's . . . decision in . . . [*Bond*] suggest[s] that some members of the court are deeply troubled by the combination of the vast reach and severity of federal criminal law and the breadth of prosecutorial discretion.").

17. *Bond*, 134 S. Ct. at 2093 (quoting Bond v. United States, 131 S. Ct. 2355, 2366 (2011)). In making this statement, the Court referenced Justice Stevens's concurring opinion in *Jones v. United States*, 529 U.S. 848 (2000). There, Justice Stevens described how the choice to federally prosecute a crime, when the federal sentence will be much higher than any sentence imposed at the local level, "illustrates how a criminal law . . . may effectively displace a policy choice made by the State" and upsets the federal–state balance. Jones v. United States, 529 U.S. 848, 859 (2000) (Stevens, J., concurring).

18. *See infra* Part II.

inarguably complex: she is "the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[19] Yet, for all the momentous complexity of her decisions, she is guided primarily not by rules, but by suggestions.[20] This is not to imply that a scheme of well-defined rules would make for a better system, but simply a statement of fact.

Still, in the words of former U.S. Attorney General Eric Holder, "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason."[21] And, as a result of developments in federal law over the past few decades, the power of federal prosecutors to decide when and how to charge individuals with crimes is crucial to when and how American citizens go to prison.[22]

Many ideas have been proposed to revise prosecutorial discretion,[23] but few have been heeded by the Department of Justice (DOJ).[24] However, it is possible that the DOJ itself has already paved the way to enhanced guidance for federal prosecutors when charging individuals with crimes. This is because the DOJ's prosecutorial guidance for charging corporations with federal crimes is more robust than the guidance for charging individuals.[25] In particular, a discussion on collateral consequences (the extrajudicial ramifications of prosecution) is included in the corporate charging guidance, yet lacking in the individual charging guidance.[26] This enhanced corporate guidance has had the purposeful impact of curtailing the prosecution of corporate crime.[27] The prosecution of individual crime deserves at least as much purposeful consideration, especially in light of the "too many Americans" in federal prison.[28]

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19. Berger v. United States, 295 U.S. 78, 88 (1935).

20. *See infra* Part III.

21. Eric Holder, Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [https://perma.cc/BQ49-XEFB].

22. *See infra* Part I.

23. *See infra* Part III.

24. Generally, lobbying and proposals for reform have been most successful in the area of corporate crime. *See infra* Part III.A.

25. *See infra* Part III.B.

26. *See infra* Part IV.

27. *See infra* Part IV. The increased equitable considerations in corporate charging guidance have also been the subject of much criticism. *See infra* Part V.

28. Holder, *supra* note 21.

This Note posits that the evolution of corporate prosecutions during the last two decades demonstrates that the application of corporate charging guidance to the DOJ's individual charging guidance could have important and far-reaching effects on the federal criminal regime. First, Parts I and II explain why federal charging discretion is crucial to Americans going to prison. Part I details how federal prosecutorial power increased with the emphasis on determinative sentencing starting in the 1980s. This Part then discusses the real stakes of charging discretion and the large-order effects of federal prosecutions. Part II reviews the general origins of, and current controls for, prosecutorial charging power.

Then, moving to the charging power of federal prosecutors specifically, Part III discusses the different guidance used for charging individuals and corporations with crimes. Part IV discusses the difference that guidance makes. Lastly, Part V describes how and why we should level the playing field by applying corporate charging considerations to individuals.

I. THE RISE AND STAKES OF FEDERAL PROSECUTORIAL CHARGING POWER

A. The Rise of Federal Charging Power

Federal prosecutorial power increased substantially after the implementation of the Federal Sentencing Guidelines in the late 1980s. Though the Sentencing Guidelines were designed to make federal sentencing more uniform by removing judicial discretion, they had the real effect of transferring discretionary power from federal judges to federal prosecutors.[29]

The implementation of the Sentencing Guidelines began in 1984, when Congress passed the Sentencing Reform Act (SRA).[30] The SRA was a bipartisan initiative,[31] a product of a mounting demand for greater uniformity and "truth" in federal sentencing during the 1970s and 1980s.[32] The SRA instituted the U.S. Sentencing Commission

29. *See infra* notes 37–47 and accompanying text.

30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551 and 28 U.S.C. §§ 991–98).

31. J.C. Oleson, *Blowing out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 696 (2011).

32. *See id.* at 698 (explaining that the SRA was "conceived at a moment in U.S. history when the belief in indeterminate sentencing yielded to the belief in determinate sentencing"). Professor Oleson claims it is not "mere coincidence that Robert Martinson published his infamous 'What

(USSC), which was responsible for promulgating the new Guidelines.[33] This new system was designed to eliminate the "unwarranted sentencing disparity"[34] that arose when judges had wide-ranging discretion in determining a defendant's prison sentence.[35] With this broad judicial discretion, "[t]he length of time a person spent in prison appeared to depend on 'what the judge ate for breakfast' on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence."[36]

The SRA "fixed" these unwarranted sentencing disparities with the Sentencing Guidelines, which were effectively mandatory for all federal judges.[37] The Guidelines consist of a sentencing grid, with

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Works?' article (thereby sounding the death knell for the rehabilitative movement in the United States) just one year before Senator Kennedy launched the legislative initiative that would culminate in [the SRA's] passage[,]" but rather that "penology and attendant sentencing practices were changing" and "both Martinson's article and Kennedy's initiative tapped into that shifting zeitgeist." *Id.* (citations omitted); *see id.* at 700 ("By the early 1970s, some critics began to condemn the horror stories about identical offenders before different judges, one who received a sentence of probation while the other was sentenced to imprisonment."). Professor Oleson also notes that this type of sentencing was condemned by Judge Marvin Frankel as "'judicial lawlessness' in 1972, and soon thereafter, the retributive calls for parity and predictability began to drown out the rehabilitative charge for transformation." *Id.* at 700–01 (citing Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 1 (1972)).

33. 28 U.S.C. § 991 (2012). *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1690 (1992) ("[T]he SRA established as the centerpiece of reform a specialized administrative agency, the U.S. Sentencing Commission, to become expert in sentencing research and to devise guidelines for federal judges.").

34. *See* Oleson, *supra* note 31, at 702 ("Indeed, it has been said that the primary goal of the Guidelines was the reduction of unwarranted sentencing disparity."); *see also supra* note 32 and accompanying text (discussing widespread calls for greater sentencing uniformity in the years preceding the SRA).

35. *See, e.g.*, United States v. Tomko, 562 F.3d 558, 564 (3d Cir. 2009) ("Before the implementation of a Guidelines-based sentencing system in 1984, '[s]tatutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long . . . .'" (alteration in original) (quoting Mistretta v. United States, 488 U.S. 361, 363 (1989))). These statutes also determined "whether [the recipient of the sentence] should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine." *Id.* (quoting *Mistretta*, 488 U.S. at 363).

36. Blakely v. Washington, 542 U.S. 296, 332 (2004) (Breyer, J., dissenting).

37. Although federal judges technically retained the authority to sentence a defendant outside of the Guidelines range, this discretion was subject to stringent conditions, congressional monitoring, and strict appellate review. *See, e.g.*, Freed, *supra* note 33, at 1697 ("Displacing much of the discretion available in the past, the [Sentencing Guidelines], together with the underlying statute, hold[] the judge accountable for every sentencing choice. He must state reasons for each sentence, including a 'specific reason' for some sentences, and his decision is subject to appellate scrutiny." (citations omitted) (quoting 18 U.S.C. § 3553(c)(2) (2012))); *see also* United States v.

sentence lengths graduated by the crime committed and the defendant's characteristics.[38] Inside the resulting matrix, sentences are prescribed within a narrow range.[39] To sentence a defendant, all a federal judge needed to do was "select a sentence from within the [narrow] guideline range"[40]—thus, the judge's power to make sentencing decisions was severely constrained.[41]

For federal prosecutors, however, this highly structured sentencing scheme led to an *increase* in power.[42] The charges brought and facts presented by the prosecutor were key, because they were, in effect, the equivalent of choosing the defendant's sentence.[43] Though the U.S. Supreme Court struck down the mandatory nature of the Sentencing Guidelines in 2005,[44] the Guidelines remain an essential

Booker, 543 U.S. 220, 265 (2005) ("We do not doubt that Congress, when it wrote the [SRA], intended to create a form of mandatory Guidelines system.").

38. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2015).

39. *See id.* ("Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months."); *see also* 28 U.S.C. § 994(b)(2) (2012) ("If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months . . . .").

40. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2.

41. *See* Oleson, *supra* note 31, at 713 ("Judges who . . . tried to sentence below the Guidelines were stymied unless there existed a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."). Professor Oleson further notes that "[e]ven then, in deciding whether a factor had been adequately taken into consideration, judges were permitted to consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* (citation omitted). It is this "draconian nature" that "may explain why Justice Kennedy publicly condemned the harshness of the Guidelines and praised judges who found ways to exercise their departure authority." *Id.*; *see also id.* at 725 ("[A]s soon as a judge departed downward from a Guidelines sentence . . . he would be reversed, even if the departure had been applied to redress sentencing disparity created by the unequal promulgation of [DOJ district-specific] programs.").

42. *See, e.g.*, *id.* at 718 ("Having great leverage, prosecutors . . . controlled Guidelines sentencing far more than they had during the pre-Guidelines era.").

43. *See* Freed, *supra* note 33, at 1723 (explaining the concept of "relevant conduct" under the Sentencing Guidelines and noting that the "[d]iscretionary decisions of Assistant U.S. Attorneys, both as to charges and as to factual allegations, [could] powerfully expand or limit the judge's ambit for sentencing").

44. The Supreme Court held that the Sentencing Guidelines were unconstitutional as written because they required the imposition of sentences based upon additional facts that sentencing judges found by a preponderance of the evidence. *See* United States v. Booker, 543 U.S. 220, 259 (2005) ("[W]e must sever and excise . . . the provision [of the Sentencing Guidelines] that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure) . . . ."). This imposition violated the Court's Sixth Amendment holding in *Apprendi v. New Jersey* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

part of the federal sentencing process.[45] Furthermore, they remain highly persuasive. Studies show that courts have largely continued to sentence defendants within the prescribed Guidelines ranges, despite their nonmandatory nature.[46] This means that prosecutors continue to wield a certain determinative power with their decision to charge an individual with a particular violation of the law.[47]

Moreover, the number of violations a federal prosecutor can choose from when charging someone with a crime is so enormous that it is essentially countless.[48] The enormous number of federal laws

45. *See* Nelson v. United States, 555 U.S. 350, 351 (2009) ("[T]he sentencing court *must first calculate the Guidelines range*, and then consider what sentence is appropriate for the individual defendant in light of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter." (emphasis added)).

46. *See, e.g.*, Norman C. Bay, *Prosecutorial Discretion in the Post*-Booker *World*, 37 MCGEORGE L. REV. 549, 570 (2006) ("[P]ost-*Booker* sentencing statistics show that, by and large, courts continue to sentence defendants within the relevant Guidelines range."); Oleson, *supra* note 31, at 740 (using 2008 data from the USSC to explain that "[a]lthough data from the Commission suggests that national sentencing patterns have not changed dramatically after *Booker*, some circuits are showing greater fidelity to Guidelines sentencing than others" (citation omitted)).

47. Although the determinative nature of the Guidelines (and, to some extent, the less determinative nature of the "advisory" Guidelines) placed great power into the hands of the prosecutor, this is not to say that the prosecutor's decision to charge has not always been a source of great power. *See infra* Part II. Additionally, mandatory-minimum laws (laws which carry an obligatory minimum sentence upon conviction, adding to the prosecutor's "determinative" powers) are also on the rise and contributing to federal prison population growth. A 2014 Congressional Research Services (CRS) report noted that "the number of mandatory minimum penalties in the federal criminal code nearly doubled from 98 to 195 from 1991 to 2011." NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP 8 (2014). The CRS also reported that "the USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more." *Id.*

48. *See, e.g.*, *Regulatory Crime: Solutions: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 21 (2013) (statement of Lucian E. Dervan, Assistant Professor, Southern Illinois University School of Law) (stating that "currently over 4,450 criminal offenses [exist] in the United States Code and as many as 300,000 federal regulatory crimes"); Michael Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 TENN. L. REV. 137, 141 (2014) (estimating the number of federal criminal laws at between 3,000 and 4,500); Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), http://www.wsj.com/articles/SB10001424052702304319804576389601079728920 [https://perma.cc/7UPD-4C9J] (describing the American Bar Association's 1998 failed attempt to count all of the federal criminal laws in existence and estimating the number of federal regulations alone at 10,000 to 300,000); *see also* Oleson, *supra* note 31, at 712 (stating that sentences operate on a "one-way ratchet," tending to increase over time, "because 'the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather

(commonly referred to as "over-federalization")[49] makes it very likely that most Americans are in violation of *some* law.[50] This means that the federal prosecution of anyone is a matter of choice—a choice that belongs to the prosecutor.[51] The result, because "most Americans are criminals and don't know it," has been a de facto power of criminal determination exercised by federal prosecutors.[52]

B. The Stakes of Federal Charging Power

Lately, this de facto power has contributed to "too many Americans go[ing] to too many prisons for far too long."[53] The federal criminal system is overflowing with convicted individuals[54]: the federal prison population has grown 800 percent since 1980.[55] This has

than broader ones'" (quoting William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525–26 (2001))).

49. *See, e.g.*, *Task Force Urged to Curb Over-Federalization of Criminal Law*, U.S. COURTS (July 11, 2014), http://www.uscourts.gov/news/2014/07/11/task-force-urged-curb-over-federalization-criminal-law [https://perma.cc/XV53-UMPF] ("[T]he over-federalization of criminal law . . . is a cause of overcrowding in federal prisons.").

50. *See, e.g.*, Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE CRIMINAL LAW" 43, 50 (Timothy Lynch ed., 2009) ("Under [a system in which most people have committed some crime carrying serious consequences,] the authorities necessarily have vast discretion to choose who will remain free, well-respected members of society and who will be tossed in jail and lose their rights, their family, and their job."); George Will, *The Plague of Overcriminalization*, NAT'L REV. (Dec. 10, 2014), http://www.nationalreview.com/article/394392/plague-overcriminalization-george-will [https://perma.cc/67BP-B4MX?type=image] (stating that "Harvey Silverglate, a civil-liberties attorney, titled his 2009 book *Three Felonies a Day* to indicate how easily we can fall afoul of America's metastasizing body of criminal laws" and that "Professor Douglas Husak of Rutgers University says that approximately 70 percent of American adults have, usually unwittingly, committed a crime for which they could be imprisoned").

51. *See infra* Part II.

52. Kozinski & Tseytlin, *supra* note 50, at 44.

53. Holder, *supra* note 21.

54. *See infra* notes 55–56 and accompanying text.

55. *Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp [https://perma.cc/XC83-5KGC] (showing that the number of federal prisoners has grown from 24,640 in 1980 to 214,149 in 2014). 2014 actually marked the first decrease in federal prison population in over thirty-five years, as the 2013 population was 219,298. *Id.* This decrease is likely the result of a 5 percent decrease in admissions for federal prisons in 2014. *Key Statistic: Prisoners*, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, http://www.bjs.gov/index.cfm?ty+pbdetail&iid=5387 [https://perma.cc/3WU3-6XQ4]. Although the number of American citizens prosecuted federally has, in fact, been on the decrease since 2012, this has been largely attributed to policies driven by the Obama administration, including former U.S. Attorney General Holder. Whether or not these policies will endure with the next administration remains an open question. *See infra* notes 184–88 and accompanying text.

translated to an overcrowded[56] and underfunded[57] federal prison system. Enhancing the guidance federal prosecutors use when charging individuals with crimes could help to reduce the number of Americans in prison and alleviate some of these crowding and funding issues. More importantly, enhanced guidance could lessen sentencing disparities by integrating social-policy concerns that are ignored by the DOJ's current individual charging guidance.

These social-policy concerns have arisen from the collateral effects of incarcerating a large number of Americans in both federal and state penitentiaries.[58] The effects are tied to the collateral consequences of conviction, accumulated on a mass level.[59] Collateral consequences of conviction are those imposed by authoritative bodies other than the court.[60] For example, "sex offender registration, civil

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56. The 2014 report for the Congressional Research Service shows that, on the macro level, the federal prison system was 36 percent over its rated capacity in fiscal year 2013. JAMES, CONG. RESEARCH SERV., *supra* note 47, at 2. However, high-security male prisons operated at 52 percent overcapacity and medium-security male facilities operated at 45 percent overcapacity. *Id.* at 21. The report explains:

> Data show that overcrowding in BOP facilities started to increase after FY1997, and it peaked in FY2004 when overcrowding was at 41%. . . . Overcrowding remained around 35% between FY2005 and FY2010 after a steady growth between FY1997 and FY2004. However, prison overcrowding increased to 39% by the end of FY2011, the highest level since FY2004. Prison overcrowding decreased slightly in FY2012 (38%) and FY2013 (36%), due to a decrease in the institutional prison population (between FY2011 and FY2013 there were 1,085 fewer inmates held in BOP facilities), an increase in the number of beds (the BOP added 1,931 beds between FY2011 and FY2013), and greater use of contract bedspace (there were 2,615 more inmates in contract facilities in FY2013 than there were in FY2011).

Id. at 19.

57. The 2014 report also explains:

> [T]he BOP's appropriations increased more than $6.544 billion from FY1980 ($330 million) to FY2014 ($6.874 billion). Between FY1980 and FY2014, the average annual increase in the BOP's appropriation was approximately $192 million. The data show that, by and large, growth in the BOP's appropriation is the result of ever-growing appropriations for the [Salaries and Expenses] account. This is not surprising considering the constant growth in the federal prison population and the fact that the S&E account provides funding for the care of federal inmates.

Id. at 10.

58. *See, e.g.*, Taja-Nia Y. Henderson, *Teaching the Carceral Crisis: An Ethical and Pedagogical Imperative*, 13 U. MD. L.J. RACE RELIG. GENDER & CLASS 104, 105–07 (2013).

59. *See generally* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246 [https://perma.cc/4J7Q-WXUX] (discussing the massive level of Americans in prison, the collateral consequences of imprisonment, and the resulting effect on the population, particularly on African American families).

60. Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 784–86 (2016) (explaining the difference between direct and collateral consequences of conviction and noting that "collateral consequences 'are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court'" (quoting Padilla

commitment, . . . disqualification from public benefits (such as public housing or food assistance), ineligibility for business and professional licenses, termination or limitation of parental rights, and—for noncitizen defendants—deportation" are just some of the consequences of conviction imposed not judicially, but by other authoritative bodies.[61]

The simplest solution for reining in the federal criminal regime may be to decrease the number of federal criminal laws on the books. However, "political support remains small for . . . repealing federal laws."[62] This reluctance has historical origins, first emerging with force during the civil rights era when conservatives employed "phrases like 'crime in the streets' and 'law and order' [to equate] political dissent with crime."[63] A resulting "tough on crime" mentality grabbed ahold of many Americans[64] and subsists today.[65] In the face of this lingering "tough on crime" American mentality and the ever-growing amount of federal legislation, it is unlikely that the solution to the "too many Americans" in federal prison will be achieved by repealing criminal laws. Therefore, an alternative solution (and this Note) focuses on enhancing prosecutorial charging discretion.

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v. Kentucky, 559 U.S. 356, 364 (2010))); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006).

61. Crane, *supra* note 60, at 785.

62. Kozinski & Tseytlin, *supra* note 50, at 55.

63. KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 48 (2004); *see also* Coates, *supra* note 59 (stating that, after the 1960s, "[t]he incarceration rate rose independent of crime—but not of criminal-justice policy," and discussing how imprisonment rates in recent decades do not follow the rise and fall of crime rates).

64. BECKETT & SASSON, *supra* note 63, at 49 (stating that it "appear[s] that the tough anticrime rhetoric struck a chord among some voters; those opposed to social and racial reform were especially receptive to calls for law and order").

65. *See* Jill Mizell, *Overview of Public Opinion*, *in* THE OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 7, 20 (Aug. 2014), https://opportunityagenda.org/files/field_file/2014.08.23-CriminalJusticeReport-FINAL_0.pdf [https://perma.cc/L383-H6UV] ("A new study by The Opportunity Agenda found that just more than half of Americans (54 percent) believe society is better served by harsher punishment for people convicted of crimes, and 46 percent believe society is better served by a greater effort to rehabilitate people convicted of crimes."). However, declining levels in the majority support for harsher punishments may indicate a coming shift in public opinion. *See, e.g.*, *id.* at 24 ("Enforcement and punishment-oriented approaches to crime have been perceived as politically appealing over the past 30 years, but in recent years these policies have not matched up with public ideas of an effective criminal justice system."). This shift is also evidenced not by a decrease in the number of federal criminal laws, but by an effort in Congress to reduce the severity of some federal sentences. *See infra* Part IV.B.

II. PROSECUTORIAL CHARGING DISCRETION GENERALLY

In the American criminal-justice system, several types of officials have the power to make far-reaching discretionary decisions.[66] But it is the prosecutor's office alone that decides whether charges will be brought against a potential defendant, and what those charges will be.[67]

The discretionary power of the American prosecutor owes itself to European origins.[68] The power to decline to prosecute harkens from the British principle of *nolle prosequi*, which resided solely with the English attorney general.[69] The American criminal-justice system fully embraced this principle, extending it to not only attorneys general, but all prosecutors.[70] Accordingly, courts upheld the ability of prosecutors to decline to prosecute in early cases such as *The Confiscation Cases*,[71] and definitively declared as early as 1925 that a court may not force a prosecutor to bring charges.[72]

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66. *See generally* Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 26–27 (2009) (excerpt from ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007)) (discussing the discretion afforded by the criminal-justice system to judges, prosecutors, and the police).

67. Peter Krug, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section V Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 645 (2002). Prosecutors have the discretionary power to make other decisions as well—they decide which documents will be provided to the defense counsel during discovery, what information will be released to the press, whether the defendant's property will be seized in accordance with forfeiture statutes, and whether to petition the court to reduce a defendant's sentence for "substantial assistance." *See* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 557–68 (1999) (discussing the different areas throughout the criminal trial process in which prosecutors exercise discretion).

68. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728 (1996) ("Like the English Attorney General, the American prosecutor has the power to terminate all criminal prosecutions. Like the French *procureur publique*, the [American] prosecutor has the power to initiate all public prosecutions. Similar to the Dutch *schout*, the [American] prosecutor is a local official of a regional government." (citations omitted)).

69. Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 401 (2008). *Nolle prosequi* translates to "unwilling to pursue." *Id.* This principle gave the attorney general "the power to end a prosecution without court inquiry." *Id.*

70. *Id.*

71. *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868).

72. *See* Milliken v. Stone, 7 F.2d 397, 399 (S.D.N.Y. 1925), *aff'd*, 16 F.2d 981 (2d Cir. 1927) ("Furthermore, the federal courts are without power to compel the prosecuting officers to enforce the penal laws, whatever the grounds of their failure may be. The remedy for inactivity of that kind is with the executive and ultimately with the people.").

Of the decisions entrusted to the prosecutor, the decision to charge an individual is arguably the most powerful.[73] It is also virtually unreviewable.[74] Consequently, limited legal avenues exist to provide a remedy to the defendant who may have been incorrectly charged.[75] The Supreme Court has held that prosecutors have absolute immunity from civil suits arising from wrongful decisions to charge,[76] and established a purposely "demanding" standard for defendants who claim to have been targeted for prosecution for impermissible discriminatory reasons.[77] As the Supreme Court has stated, "courts are 'properly hesitant to examine the decision whether to prosecute.'"[78] As a result, "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties."[79]

The merits of entrusting prosecutors with such broad, unreviewable power have been debated at length.[80] Those who argue against the prosecutor's unfettered discretion to charge maintain that this power is more dangerous than beneficial, producing disparate

73. *See, e.g.*, Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, BYU L. REV. 669, 671 (1992) ("The decision to charge an individual with a crime is the most important function exercised by a prosecutor."); Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 403 (2000) ("The prosecutor's office has become the most powerful office in the criminal justice system. Nowhere is this power more evident than in the areas of charging, plea bargaining, and sentencing.").

74. Krug, *supra* note 67, at 648 (2002) ("Although judicial mechanisms exist in the U.S. legal systems for individuals to compel a prosecutor to bring charges, it is generally accepted that they are used infrequently and are rarely successful."); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995) ("The prosecutor's decision to charge an accused is largely subject to the prosecutor's discretion. The prosecutor's charging discretion is, for the most part, unreviewable. So long as the prosecutor has probable cause to believe that the accused committed an offense, the prosecutor is entitled to bring the charge.").

75. Krug, *supra* note 67, at 645–50.

76. Imbler v. Pachtman, 424 U.S. 409, 427 (1976); *see* Krug, *supra* note 67, at 648 (discussing the limited avenues available to challenge prosecutorial discretion).

77. United States v. Armstrong, 517 U.S. 456, 463 (1996).

78. *Id.* at 465 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

79. *Id.* at 464 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

80. *See, e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1662–63 (2010) ("There is a dated notion—both untenable and unattractive—that executive actors in the criminal justice system should be stripped of all discretion. Even in its day, it was a controversial proposition. Today, the argument is almost wholly rejected."); Meares, *supra* note 74, at 863 ("The reasons underlying the prosecutor's vast discretion have been well documented by commentators . . . ."); Sarat & Clarke, *supra* note 69, at 389 ("This emphasis on, and debate over, discretion is not new.").

results[81] from incontrovertible personal incentives and biases.[82] Advocates of preserving the broad powers of the prosecutor stress both practical and equitable needs for flexibility.[83] These arguments underscore the necessity of balancing overcriminalization[84] and the insufficient resources of prosecutors' offices.[85] These advocates contend that the procedural mechanisms available to deal with prosecutorial misconduct are sufficient, or could be, if properly employed.[86]

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81. Misner, *supra* note 68, at 761 ("Sometimes barely concealed in the debate on discretion and its fine points are what may be the real issues: why does the United States have a criminal justice system which incarcerates minorities at a disproportionately high rate?").

82. *See generally* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53 (2012) (discussing how police personnel policies fuel criminal overcharging); Douglas Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement*, 29 SYRACUSE L. REV. 697, 698–99 (1978) (arguing that current checks on prosecutorial discretion are inadequate and heightened checks are therefore warranted); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554–60 (1981) (advocating for increased Due Process scrutiny of prosecutorial discretion to check prosecutorial power).

83. *See generally* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010) (arguing that prosecutorial discretion is a desirable tool that can be used to overcome inequities associated with the indeterminacy of language in legal rules). The U.S. Supreme Court has also indicated that flexibility is needed to foster equitable charging decisions. *See* United States v. Lovasco, 431 U.S. 783, 794 (1977) ("The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest.").

84. *See, e.g.*, Bowers, *supra* note 80, at 1665 ("Put succinctly, substantive overcriminalization increases not only the need for equitable discretion, but also the risk of its misuse or abuse.").

85. *See, e.g.*, Misner, *supra* note 68, at 760 ("Some supporters of the broad role of prosecutorial discretion do so from the practical point of view that a system of lessened prosecutorial discretion would result in a need for heightened resources for the inevitable increase in criminal trials.").

86. *See, e.g.*, Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 62 (2012) ("Our preliminary assessment suggests that current, albeit imperfect, accountability mechanisms can be used to sanction errant prosecutors."). MacClean and Wilks have explained that mechanisms for holding prosecutors accountable do exist:

> Although our data gathering continues, it is already clear that prosecutors are regularly held personally accountable for misconduct in office, most notably through sanctions against the prosecutors' licenses to practice law; this is despite the high threshold for securing civil remedies against prosecutors under § 1983. . . . Scholars' preoccupation with controversial or exceptional cases of prosecutorial misconduct is not only insufficient, but it does a disservice to lawyers, defendants, marginalized communities, the general public, and other affected stakeholders whose interests remain part of this conversation. While academics may dispute their efficacy, mechanisms for sanctioning prosecutorial misconduct do exist.

Id. at 81.

Nonetheless, advocates and opponents alike have offered suggestions as to how prosecutorial charging discretion (and prosecutorial discretion in general) should be modified to ensure justice is being served. Suggestions for discretion reform come in two main varieties: ex ante and ex post. Ex ante reformers focus on what could, and arguably should, be done before a prosecutor ever arrives at a discretionary decision point. Ex post reformers focus on ways to guide or limit the discretionary power of prosecutors once a decision point has arisen.

In the ex ante category, popular suggestions have included reforming education,[87] heightening hiring criteria,[88] and changing the culture of prosecutors' offices.[89] The scholars behind these suggestions generally reason that effective control of discretion must come from within.[90] These ex ante reforms are largely designed to work with the systems already in place by proposing changes to the practical, human element of prosecution: the prosecutor herself.[91] This can be juxtaposed with the goals of ex post reforms, which focus on applying external controls to prosecutors.

Popular suggestions for ex post reforms have included legislative solutions,[92] judicial remedies,[93] and official office policies[94] or

87. Kenneth Culp Davis, *Discretionary Justice*, 23 J. LEGAL EDUC. 56, 57 (1971); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1514–15 (2000).

88. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 693–94 (2006); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 568 (1999).

89. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 455–58 (1992); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 643–44 (1999). *But see* Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN ST. L. REV. 1133, 1153–54 (2005) (arguing that though the solution to prosecutorial-discretion issues may be a cultural fix, no solution exists within the American adversarial model which would cure the prosecutorial culture of its unjust, competitive nature).

90. *See* Levenson, *supra* note 88, at 568 (noting that prosecutorial-discretion "decisions are generally intuitive"); Podgor, *supra* note 87, at 1515 ("The key to changing the culture of an office is to have federal prosecutors consider ethics and professionalism in making all decisions.").

91. *See* Podgor, *supra* note 87, at 1514 n.20 (explaining that "this Article is limited to proposing a solution within the existing structure").

92. David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 200 (1995); Meares, *supra* note 74, at 901–02; Misner, *supra* note 68, at 720–22.

93. Leonetti, *supra* note 82, at 82–87; Doug Lieb, Note, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1020–21 (2014).

94. Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 262–63 (2001); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

memoranda.[95] Of these, official office memoranda are most often suggested specifically for federal prosecution (as opposed to state or local prosecution).[96] This is likely because federal prosecutorial discretion is guided primarily by the United States Attorneys' Manual (USAM),[97] which is often updated through official memoranda issued by the DOJ.[98]

The USAM provides prosecutorial guidance for both individual and corporate crimes; however, as will be discussed in the next Part, the discussions allocated to each are not equal. The following Parts will explain the differences between the prosecutorial charging guidance for individual crimes and the guidance for corporate crimes, and then discuss why these differences should be resolved.

III. CHARGING DISCRETION AND GUIDANCE FOR FEDERAL PROSECUTORS

In the federal context, some aspects of charging discretion apply regardless of whether the defendant is an individual or a corporation. First, the decision to charge a crime is a product of prosecutorial discretion alone, although cases may be referred to a prosecutor from a variety of sources.[99] This can be contrasted with charging decisions made by prosecutors at local levels, which arrive to prosecutors only because another official, usually law enforcement, has *already*

95. Michael A. Caves, *The Prosecutor's Dilemma: Obligatory Charging Under the Ashcroft Memo*, 9 J.L. & SOC. CHALLENGES 1, 19–20 (2008); Mark Osler, *This Changes Everything: A Call for a Directive, Goal-Oriented Principle to Guide the Exercise of Discretion by Federal Prosecutors*, 39 VAL. U. L. REV. 625, 627 (2005); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1013 (2005); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 49–50 (1991); Brandon K. Crase, Note, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 483–86 (2007).

96. *See, e.g.*, Caves, *supra* note 95, at 19–20 (proposing that changes to prosecutorial discretion be made through the issuance of an office memorandum); Osler, *supra* note 95, at 627 (proposing the same).

97. *See infra* Part III.A.

98. *See infra* note 101.

99. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 04-422, U.S. ATTORNEYS: PERFORMANCE-BASED INITIATIVES ARE EVOLVING 15 (2004) ("U.S. Attorneys receive most of their criminal referrals, or 'matters,' from federal investigative agencies or become aware of criminal activities in the course of investigating or prosecuting other cases . . . . [T]he U.S. Attorney's Office decides the appropriateness of bringing criminal charges and, if deemed appropriate, initiates prosecutions.").

exercised charging discretion.[100] This distinction serves to distinguish the power of federal prosecutors in making charging decisions, beyond even the broad discretionary power of other prosecutors.

Second, after making the decision to hold a corporation or individual responsible for a crime, federal prosecutors often choose a defendant's charges based upon not only culpable conduct, but the punishment that the charges carry as well.[101] The defendant seldom chooses to go to trial after being charged, and instead elects the less-risky option of entering into a plea agreement.[102]

Of course, in plea agreements, the prosecutor has the majority of the power in determining the terms of the bargain.[103] The defendant's choices are usually limited to accepting the agreement or not.[104] Furthermore, if a binding plea agreement is settled upon, the prosecutor arguably wields even more power—after the defendant accepts the bargain, the only step left is the judge's verification (or rejection) of the agreement.[105] Everything, including the sentence, has already been determined by the prosecutor.[106] However, much of the similarity between the federal prosecutions of corporations and individuals ends here. As described in the remainder of this Part, the corporate charging guidance is more detailed, more updated, and more

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100. *See* Melilli, *supra* note 73, at 676 (discussing the independent analysis a local prosecutor must apply when reviewing police charging decisions).

101. *See, e.g.*, Jonathan Drew, *Military Selects Rarely Used Charge for Bergdahl Case*, YAHOO! NEWS (Sept. 7, 2015), https://www.yahoo.com/news/military-selects-rarely-used-charge-bergdahl-case-144326544.html [http://perma.cc/AEY3-UYPU] ("For Bergdahl, the Article 99 offense allows the prosecutors to seek a stiffer penalty than the desertion charge, which in this case carries a maximum sentence of five years in prison."); *see also* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (2015) § 9-27.300(A) (Selecting Charges—Charging Most Serious Offenses) [hereinafter USAM] ("[I]n determining [charges], it is appropriate that the attorney for the government consider, inter alia, such factors as the Sentencing Guideline range yielded by the charge . . . .").

102. *See* U.S. SENTENCING COMM'N, 2013 DATAFILE, TABLE 11: GUILTY PLEAS AND TRIALS IN EACH PRIMARY OFFENSE CATEGORY, FISCAL YEAR 2013, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table11.pdf [https://perma.cc/887E-YA7P] (explaining that 96 percent of federal criminal defendants enter into a plea bargain instead of going to trial according to data as of 2013).

103. Bay, *supra* note 46, at 554 ("If the parties enter into plea negotiations, the prosecutor wields the discretion to control the terms of an offer.").

104. *Id.*

105. FED. R. CRIM. P. 11(c)(3); *see* Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-*Booker, 37 WM. MITCHELL L. REV. 469, 493 (2011) (discussing how the use of binding plea agreements was limited under the Sentencing Guidelines, but may be expanded post-*Booker*, as the Guidelines are only advisory).

106. *See supra* note 105.

considerate of the larger effects of prosecution than the individual charging guidance.

A. Charging Individuals with Federal Crimes

When charging individuals with crimes, mandatory rules shaping federal prosecutors' decisions are limited.[107] Unquestionably, prosecutors may not selectively prosecute individuals on the basis of race, religion, or any other "arbitrary classification" or protected right.[108] Beyond the impermissibility of such selective prosecution, however, the charging discretion of federal prosecutors is largely subject to nonmandatory guidelines.[109]

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107. *See* Sara Sun Beale, *Too Many and yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 999 (1995) ("The United States Attorneys' Manual . . . does contain some general standards for the exercise of prosecutorial discretion, but they are written so broadly that they provide little guidance."); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

108. Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting *Bordenkircher*, 434 U.S. at 364). Although, as noted in Part II, prevailing on a claim of selective prosecution is difficult, and some scholars espouse the opinion that it has yet to be accomplished on the grounds of race. *See* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1361 (2008) ("[T]here are 'no reported federal or state cases since 1886 that had dismissed a criminal prosecution on the ground that the prosecutor acted for racial reasons.'" (quoting DAVID COLE, NO EQUAL JUSTICE 159 (1999))); *see also* Melissa L. Jampol, Note, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932, 932 (1997) (arguing that "the Supreme Court's decision in [*Armstrong*] impose[d] a barrier that is too high for almost any defendant alleging selective prosecution to obtain discovery, thus making the already difficult claim of race-based selective prosecution virtually impossible to prove").

109. *See* USAM, *supra* note 101, § 9-27.001 (stating that the USAM's "principles of [f]ederal prosecution . . . . have been cast in general terms with a view to providing guidance rather than to mandating results" with the intent to "assure regularity with regimentation"); *id.* § 9-27.140 (stating that "United States Attorneys . . . may modify or depart from the principles [of federal prosecution within the USAM] as necessary in the interests of fair and effective law enforcement"); Osler, *supra* note 95, at 626. Osler notes:

> What guides federal prosecutors in exercising this discretion? One would think there would be an easy answer, a directive, goal-oriented principle that would consistently guide those important choices. There is not. Rather, discretion is exercised in an inconsistent manner by local U.S. Attorneys and Assistant U.S. Attorneys, who each employ their own distinctive and personal set of guiding principles.

Id. (citations omitted).

The primary source of this guidance is the USAM.[110] The USAM contains (self-described) comprehensive, internal guidance,[111] organized into nine titles.[112] Title 9 of the USAM contains the guidelines for U.S. Attorneys in criminal matters, including the Principles of Federal Prosecution (Individual Principles).[113] Recognizing that "[t]he manner in which [f]ederal prosecutors exercise their decision-making authority has far-reaching implications," the Individual Principles seek to outline considerations for prosecutors in the major areas of prosecutorial decisionmaking: prosecuting, charging, sentencing, and negotiating plea bargains and nonprosecution agreements.[114]

Several scholars have surmised that these outlined considerations leave something to be desired in terms of guidance, depending on how one views the appropriate scope of prosecutorial discretion.[115] The Individual Principles were first published in 1980, under Attorney General Benjamin R. Civiletti,[116] seven years before the Sentencing Guidelines were originally published.[117] Although the Individual Principles have since been updated "to reflect changes in the law and current policy of [the DOJ],"[118] a comprehensive discussion of

110. *See* USAM, *supra* note 101, §§ 1-1.100–1.200 (stating that the USAM is "intended to be comprehensive," so that if "the [USAM] conflicts with earlier Department statements, except for Attorney General's statements, the [USAM] will control"); Osler, *supra* note 95, at 633 ("There are two national sources for guiding principles for prosecutors who actually try cases, including: Directives from the Attorney General and the [USAM] . . . . These two, of course, are mutually reinforcing—directives from the Attorney General will presumably be incorporated into the [USAM].").

111. *See* USAM, *supra* note 101, §§ 1-1.100–1.200 (stating that "[t]he [USAM] provides only internal Department of Justice guidance" and that it is "intended to be comprehensive," so that if "the [USAM] conflicts with earlier Department statements, except for Attorney General's statements, the [USAM] will control").

112. *Id.* § 1-1.400.

113. *Id.* § 9-1.000.

114. *Id.* § 9-27.110(A).

115. *See, e.g.*, Osler, *supra* note 95, at 626–27 ("[I]n the end [the DOJ] fails to direct any kind of principled, consistent exercise of discretion by hundreds of federal prosecutors. Instead, those prosecutors revolve in their own orbits of personal morality, a constellation of independent stars and galaxies each with their own hue of light.").

116. USAM, *supra* note 101, § 9-27.001.

117. The Sentencing Guidelines were first published in 1987. U.S. SENTENCING GUIDELINES MANUAL § 1A (U.S. SENTENCING COMM'N 2015).

118. USAM, *supra* note 101, § 9-27.001. Of the updates to the Principles since their publication in 1980, perhaps the most notable came in 2003 under Attorney General Ashcroft. The Ashcroft memo (subsequently codified at USAM § 9-27.300) established a regime in which a prosecutor was obligated to charge an individual with the highest possible charge under the circumstances of the case. *See generally* Caves, *supra* note 95, at 13–14 (describing this

prosecutorial principles and ethics has yet to be published. Accordingly, the Individual Principles contain very little discussion of principled reasoning, ethical decisionmaking prerogatives, or overarching prosecutorial goals for U.S. Attorneys.[119] Instead, they detail three reasons that a prosecutor should decline to press charges[120]: a prosecutor should not press charges if she decides that "no substantial [f]ederal interest would be served," the individual should be prosecuted in another jurisdiction (usually the state), or an "adequate non-criminal alternative" exists.[121]

Given the amount of discourse on the lack of federal prosecutorial guidance, it would seem fitting if the Individual Principles merely stated these reasons without any further detail. Yet, that is not the case—the next section of the USAM delves into each of the three reasons, with a heavy focus on explaining the meaning of "no substantial [f]ederal interest."[122] And although principles and ethics are not clearly communicated, the explanation of "no substantial [f]ederal interest" comes close to delineating a sort of ethical code for U.S. Attorneys. The explanation generally guides prosecutors to decide whether to press charges by considering the nature and seriousness of the violation, the need for deterrence, and the probable sentence, along with the individual's culpability, criminal history, and personal circumstances.[123]

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phenomenon). Although tempered by Attorney General Holder in 2010, the guidance to charge the highest possible offense still technically obligates federal prosecutors. *See* Memorandum from Att'y Gen. Eric H. Holder to All Fed. Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf [https://perma.cc/MW9E-5MUY] (noting that the determination of the highest possible charge should be "made in the context" of an individual defendant's personal circumstances).

119. *See generally* USAM, *supra* note 101, §§ 9-27.000–27.250 (discussing the considerations which federal prosecutors should take into account when deciding whether to press charges); *see also* Memorandum from Eric H. Holder, *supra* note 118 (same).

120. USAM, *supra* note 101, § 9-27.220(A). These reasons assume that the prospective defendant has violated a federal law and the prosecutor believes the admissible evidence is "sufficient" to bring a successful case against the defendant. *Id.*

121. *Id.*

122. *Id.* §§ 9-27.220–27.250.

123. *Id.* § 9-27.230(B). As noted above, the adequacy of the Principles regarding prosecutorial discretion has been a subject of debate since their promulgation. *See, e.g.*, Osler, *supra* note 95, at 626–34 (discussing the shortcomings of the Principles—in particular, ethical guidelines for prosecution). Different scholars have expressed different opinions about the published rules. Leslie Donavan opines:

> [T]he Justice Department's published rules, while a slight improvement over the previously inconsistent procedural and substantive decision-making process employed by federal prosecutors, are too general and permissive to achieve the desired level of

This discussion is actually the closest thing to an ethical code that federal prosecutors have in charging individuals. By executive order, each federal agency is responsible for regulating its own ethical standards.[124] The ethical standards for federal prosecutors are accordingly referenced by the USAM;[125] however, none of the referenced standards are actually specific to prosecution.[126] The USAM mentions the American Bar Association's ethical standards for prosecutors, but because the DOJ has not adopted them, they are referenced only as guidelines with which "familiariz[ation]" is recommended.[127]

This lack of a distinct ethical guideline is likely by design. The DOJ has explicitly stated that the Individual Principles are not intended to "require a particular prosecutorial decision in any given case."[128] One reason that the DOJ may not want to publish a more detailed set of discretionary guidelines is the possibility that such guidelines would open up prosecutorial discretion to enhanced review or novel civil suits.

However, a middle ground exists. Demonstrated by the relatively recently published federal standards for prosecuting corporate entities, the DOJ *can* issue an office memorandum updating the Individual Principles to include further principled guidance for charging

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> consistency and even-handedness in applying the criminal law to citizens at the state and local level. Thus, they and the proposals upon which the guidelines are modeled should not serve as prototypes for much needed local prosecutorial guidelines.

Leslie Donavan, Comment, *Justice Department's Prosecution Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955, 958 (1981) (citation omitted).

124. *See* USAM, *supra* note 101, § 1-4.010 (summarizing the purpose of Executive Order 11,222, which was superseded by Executive Order 12,731 on October 17, 1990); Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990) (directing agency heads to regulate ethical standards specific to their agencies).

125. USAM, *supra* note 101, § 1-4.000.

126. *See* Office of Gov't Ethics, Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. pt. 2635 (2015) (regulating all executive branch employee behavior regarding general conflicts of interest, required financial disclosures, and responsibilities for the administration of the executive branch ethics program); U.S. Dep't of Justice, Human Resources Order DOJ 1200.1: Chapter 11-1, Procedures for Complying with Ethics Requirements (Sept. 12, 2003), https://www.justice.gov/jmd/hr-order-doj-12001-part-11-ethics [https://perma.cc/A9WU-GMRN] (providing general procedures for complying with the OGE standards within the DOJ).

127. USAM, *supra* note 101, § 9-2.101; *see* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.1 (AM. BAR ASS'N 2014) (outlining special ethical considerations for prosecutorial charging discretion).

128. USAM, *supra* note 101, § 9-27.120(B); *see* DAN K. WEBB, ROBERT W. TARUN, & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS § 16.04[1] at 16-11 (1993) ("The government took pains to disclaim any notion that the Principles would be binding and enforceable against [the DOJ] in the case of non-compliance.").

decisions, while sacrificing neither prosecutorial flexibility nor decisionmaking authority.

B. Charging Corporations with Federal Crimes

When charging corporations with crimes, the DOJ's guidance for federal prosecutors is both more detailed and more revised than the guidance for cases of individual crimes. In fact, one scholar has remarked that "in no other area [than corporate crime] do federal prosecutors provide such detailed guidelines to explain and to limit (albeit in a non-binding way) how they exercise their discretion . . . . Nor are there comparable areas in which prosecutors so frequently make revisions to guidelines that constrain their own discretion."[129]

The DOJ first published the Principles of Federal Prosecution of Business Organizations (Business Principles) in the USAM in 2008,[130] almost three decades after the Individual Principles were published.[131] The Business Principles had their start almost a decade prior to that, however, with a memorandum written by then–Deputy Attorney General Eric Holder (known as the "Holder memo").[132] The memo was drafted in response to complaints of a lack of uniformity in the charging of corporations.[133] It outlined eight factors (the "Holder factors") for prosecutors to consider when deciding whether to bring charges against a corporate entity, including the "pervasiveness of wrongdoing" in the corporation, any history of similar conduct by the

129. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1796 (2011).

130. Press Release, U.S. Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), https:justice.gov/archive/opa/pr/2008/August/08-odag-757.html [https://perma.cc/8N73-XPEA].

131. The Individual Principles were first published in 1980. USAM, *supra* note 101, § 9-27.001.

132. Beth A. Wilkinson & Alex Young K. Oh, *The Principles of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective*, NYSBA INSIDE, Fall 2009, at 8. The Business Principles were originally titled "Federal Prosecution of Corporations," in accordance with the title of the Holder memo. Memorandum from Eric H. Holder, Deputy Att'y Gen. to All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999). Most often though, they were simply referred to as the "Holder memo." The title change came in 2003, with the first round of revisions to the Business Principles. *See infra* note 138.

133. Attorney General Holder revealed this motivation to the Wall Street Journal in 2006. *See* Peter Lattman, *The Holder Memo and Its Progeny*, WALL ST. J. (Dec. 13, 2006), http://blogs.wsj.com/law/2006/12/13/the-holder-memo [https://perma.cc/9NME-BZD3].

corporation, and the corporation's cooperation with the prosecution.[134] Notably, factor seven was based on the "collateral consequences" of bringing criminal charges against a corporation, "including disproportionate harm to shareholders and employees not proven personally culpable."[135]

Though the Holder memo went into effect without contention, it soon became the topic of much debate in the wake of the shocking unravelings of corporate behemoths such as Enron and WorldCom.[136] As a result, then–Deputy Attorney General Larry Thompson updated the Holder memo's guidance with his own memorandum in 2003 (known as the "Thompson memo").[137] The Thompson memo revised the Holder factors, primarily focusing on the "authenticity" of corporate cooperation with the DOJ in the face of allegations of wrongdoing,[138] and added a factor to be considered by prosecutors while deciding whether to charge a corporation.[139] It also made the consideration of these factors (which would eventually become the Business Principles) mandatory for all federal prosecutors.[140]

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134. Memorandum from Eric H. Holder, *supra* note 132. Of course, application of the Business Principles works in tandem with application of the Individual Principles, which apply to *all* federal prosecutions. *See* USAM, *supra* note 101, § 9-28.300 (Factors to Be Considered) ("Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment . . . ." (citations omitted)).

135. Memorandum from Eric H. Holder, *supra* note 132.

136. *See* Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1449–50 (2007) (noting that the Holder memo was "released . . . without much fanfare" because, in 1999, "the United States was experiencing unprecedented business prosperity, and corporate prosecution was hardly en vogue"; however, this all changed following the well-publicized discovery of a series of corporate scandals).

137. *See id.* at 1450 ("In response to this wave of business crime, the DOJ reprioritized the prosecution of corporate entities. The Thompson Memo, the most significant of the three Deputy Attorney General memos, was released in early 2003 as part of this renewed DOJ effort."); Wilkinson & Oh, *supra* note 130, at 8 ("The first-revised Principles, issued by then-Deputy Attorney General Larry D. Thompson in 2003 . . . came on the heels of the Enron and WorldCom scandals . . . .").

138. Memorandum from Deputy Att'y Gen. Larry D. Thompson to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation.").

139. *See id.* (adding "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" to the factors to be considered by prosecutors in charging a corporate entity).

140. *See* United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (stating that the Thompson memo was binding on all federal prosecutors, while the Holder memo had merely been advisory).

The changes to the Holder factors prompted by the Thompson memo generated lengthy debate, criticism, and proposed legislation.[141] The majority of the debate surrounded the "corporate cooperation" factor.[142] Although little change existed between the literal discussions of this factor in the Holder and Thompson memos, the general policies of the Thompson memo were interpreted as implicitly encouraging prosecutors to request attorney-client privilege waivers as a condition of corporate cooperation.[143] Eventually, the DOJ responded to these concerns.[144] In 2006, then–Deputy Attorney General Paul McNulty published another memorandum updating the guidance to prosecutors (known as the "McNulty memo").[145] The McNulty memo "expand[ed] upon [the DOJ's] long-standing policies concerning how [to] evaluate the authenticity of a corporation's cooperation"[146] by announcing that corporations need not waive attorney-client and work product protections to gain credit for cooperating with prosecutors.[147]

However, the McNulty updates to the Holder factors did not end the debate,[148] and two additional memoranda have since been

141. *See generally* Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No*,*"* 45 AM. CRIM. L. REV. 1237, 1238–43 (2008) (discussing the evolution of DOJ policy regarding corporate attorney-client privilege waivers as a result of the vigorous opposition of white-collar defense practitioners to the lasting practical implications of the Thompson memo). O'Sullivan uses this discussion as the backdrop for her primary argument, which is that attorney-client privilege is "virtually the last means by which corporations can resist government efforts to impose potentially ruinous liability on corporate actors, whether or not such consequences are warranted. . . . [This] account[s] for the bar's full-throated roar in objection to DOJ policy." *Id.* at 1251.

142. *Id.* at 1238–43.

143. *Id.* at 1240.

144. *See* Wilkinson & Oh, *supra* note 130, at 9 ("In response to these judicial and legislative rebukes, then-Deputy Attorney General Paul McNulty revised the Principles in 2006 . . . .").

145. Memorandum from Deputy Att'y Gen. Paul J. McNulty to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (2006); Paulsen, *supra* note 136, at 1451 ("In December 2006, the DOJ replaced the Thompson Memo with the McNulty Memo . . . .").

146. Memorandum from Paul J. McNulty, *supra* note 145, at 2.

147. *See id*. at 8 ("Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation.").

148. *See, e.g.*, O'Sullivan, *supra* note 141, at 1241 ("The ink was barely dry on the McNulty Memo before American Bar Association President Karen J. Mathis issued a press release stating that these guidelines 'fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations.'" (citation omitted)).

published by the DOJ.[149] In 2008, then–Deputy Attorney General Mark Filip published an update to the Holder factors (known as the "Filip memo") focusing on "what measures a business entity must take to qualify for the long-recognized 'cooperation' mitigating factor,"[150] definitively clarifying that official DOJ policy bars prosecutors from asking for waivers of attorney-client privilege.[151] Nonetheless, some scholars and commentators have argued that, despite the Filip memo's compelling language, nothing has actually changed in the practice of investigating corporations: cooperation (in any real sense) still practically requires corporations to waive their privilege and let their attorneys divulge otherwise-confidential facts to prosecutors.[152]

The Filip memo also announced that, moving forward, the Holder factors would be included in the USAM, partly as a symbol of their stability and continuity.[153] Thus, the Business Principles were instituted, almost ten years after the Holder factors were originally published. The most recent updates to these Principles come from a 2015 memorandum published by Deputy Attorney General Sally Yates (known as the "Yates memo").[154] The Yates memo, for the first time in over a decade, moved away from the focus on attorney-client privilege waivers to emphasize "seeking accountability from the individuals who

149. Memorandum from Deputy Att'y Gen. Mark Filip to Heads of Dep't Components and U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008); Memorandum from Deputy Att'y Gen. Sally Quillian Yates to the Assistant Att'y Gen., Antitrust Div., et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

150. Memorandum from Mark Filip, *supra* note 149, at 1.

151. *See id.* at 9 ("[P]rosecutors should not ask for such waivers [of attorney-client privilege] and are directed not to do so."); *see also* Wilkinson & Oh, *supra* note 130, at 9 ("The [Filip memo] . . . completely removed consideration of a waiver of the attorney-client privilege and the payment of employees' legal fees as factors in corporate charging decisions.").

152. *See* Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J. (Sept. 10, 2008), http://www.newyorklawjournal.com/ id=1202424398325/The-Filip-Memorandum-Does-It-Go-Far-Enough? [https://perma.cc/8YKG-YU6X] ("The thrust of the Filip Memo is that DOJ simply wants the facts . . . . The obvious problem is that the 'facts' uncovered in an internal investigation are actually an attorney's distillation of numerous interviews and documents and therefore [privileged] work product.").

153. *See* Memorandum from Mark Filip, *supra* note 149, at 1. The memo states:

> [E]arlier practice has drawn criticism from some quarters for implying that Department policy is subject to revision with every changing of the guard. Accordingly, these Principles please should henceforth be referred to as the Department's "Principles of Federal Prosecution of Business Organizations," or the "Corporate Prosecution Principles," or by the relevant section of the U.S. Attorneys' Manual, as other sections typically are.

Id. at 2; *see also* USAM, *supra* note 101, § 9-28.000 (containing the USAM publication of the "Principles of Federal Prosecution of Business Organizations").

154. Memorandum from Sally Quillian Yates, *supra* note 149.

perpetrated the wrongdoing" in corporate misconduct cases.[155] Nonetheless, the same essential factors that federal prosecutors consider in deciding whether to charge a corporate entity with a crime remain unchanged,[156] the vast bulk of which survived from the original Holder memo in 1999.[157]

IV. GUIDANCE MATTERS FOR FEDERAL PROSECUTIONS

A. Shaping Federal Prosecutions Through Charging Guidance

An examination of prosecutions shows a major difference in the way that individuals and corporations are charged with crimes. Far more often than in cases of individual crimes, corporations guilty of criminal conduct will be offered deferred prosecution agreements (DPAs).[158] These agreements, "essentially . . . probationary agreement[s] [where] the government files some kind of criminal charge . . . but then agrees to hold the charge open as long as the [defendant] successfully fulfills the terms of the agreement,"[159] allow corporations to avoid the consequences of federal prosecution.

For example, in 2009, Toyota was forced to recall millions of vehicles after a deadly car accident revealed massive safety concerns with vehicle design.[160] Investigations eventually uncovered that "unintended acceleration" had cost the lives of eighty-nine people

155. *Id.* at 1; *see id.* at 2 ("[T]his memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.").

156. USAM, *supra* note 101, § 9-28.300(A). Although the factors remain the same, the 2015 updates to the Business Principles prompted by the Yates memo included the splitting of the former factor (A)(4) ("the cooperation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents") into two separate factors, now (A)(4) ("the corporation's willingness to cooperate in the investigation of its agents") and (A)(6) ("the corporation's timely and voluntary disclosure of wrongdoing"). *Id.*

157. *See id.* § 9-28.300(A) (listing the ten factors that prosecutors should consider in reaching a decision as to whether to bring charges against an entity); *see also supra* note 134 and accompanying text.

158. *See infra* notes 232–41 and accompanying text.

159. Paulsen, *supra* note 136, at 1438.

160. Danielle Douglas & Michael A. Fletcher, *Toyota Reaches $1.2 Billion Settlement to End Probe of Accelerator Problems*, WASH. POST (Mar. 19, 2014), https://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html [https://perma.cc/6747-9W3W]. The deadly car accident that precipitated the vehicle recall involved a California Highway Patrol Officer and three of his family members, "speeding out of control in a Lexus at more than 125 mph before the car crashed, killing all four occupants." *Id.*

driving Toyota vehicles.[161] To make matters worse, Toyota lied about the cause of the unintended acceleration by claiming that the design defect resulted from poorly designed floor mats that "trapped" gas pedals.[162] Toyota knew, but kept to itself, a second, more likely cause of the deadly car accidents: "sticky" pedals.[163]

Toyota had been notified about a problem with their pedals more than a year prior, but had chosen not to disclose the information to U.S. manufacturers and authorities.[164] During the 2009 recall, they tried to conceal their fatal error by only supplying information about defective floor mats and falsifying timelines to make it seem as if they had only just become aware of a potential issue with their pedals.[165] Had Toyota acted lawfully and revealed information regarding the sticky pedals to U.S. authorities right away, lives might have been saved.

Yet, despite Toyota's deadly (in)actions, criminal cover-up, and the deaths of eighty-nine people, the federal prosecution against Toyota wrapped up last year with only a DPA.[166] Why? Arguably, one reason is that the Business Principles contain a wider range of flexible guidelines and detailed criteria for prosecutors than do the Individual Principles. The Business Principles' guidance for prosecutors deciding whether to charge a corporation is roughly twice the length of the same guidance in the Individual Principles.[167] Correspondingly, leading

161. *Toyota 'Unintended Acceleration' Has Killed 89*, CBS NEWS (May 25, 2010), http://www.cbsnews.com/news/toyota-unintended-acceleration-has-killed-89 [https://perma.cc/DJK6-RYJW].

162. Douglas & Fletcher, *supra* note 160.

163. *See id.* ("Toyota knew that models it had not recalled had similar floor-mat problems . . . . Also, the company hid from federal regulators a second cause of unintended acceleration in its vehicles: a sticky gas pedal."). The sticky pedals were "caused by plastic material inside the pedal that could cause the accelerator to become stuck in a partially depressed position." *Id.*; *see also* Exhibit C, Statement of Facts at 4–5, United States v. Toyota Motor Corp., 2014 WL 10584763 (S.D.N.Y. Mar. 20, 2014) (No.14-CRIM-186), http://www.justice.gov/sites/default/files/opa/legacy/2014/03/19/toyota-stmt-facts.pdf [https://perma.cc/5BGQ-SWCE] [hereinafter DOJ Toyota Facts] (accompanying the Deferred Prosecution Agreement and describing Toyota's advance knowledge of the pedal defect in more detail).

164. *See* DOJ Toyota Facts, *supra* note 163, at 4–5 (describing Toyota's advance knowledge of the pedal defect).

165. *Id.*

166. Toyota could have been prosecuted for wire fraud, but the DOJ chose to present Toyota with a DPA. *See* Deferred Prosecution Agreement, United States v. Toyota Motor Corp., 2014 WL 10584763 (S.D.N.Y. Mar. 20, 2014) (No.14-CRIM-186), http://www.justice.gov/sites/default/files/opa/legacy/2014/03/19/toyota-def-pros-agr.pdf [https://perma.cc/PDT6-7FTC].

167. The Business Principles' guidance for prosecutors deciding whether to press charges against a corporation is contained in USAM sections 9-28.200 to 9-28.1300, approximately sixteen

scholar Brandon Garrett has stated that corporations are punished "[n]ot by relying on strict and narrow sentencing guidelines, as with individuals, but by using more flexible guidelines that may give the biggest fish the best deals."[168]

Most notably, the Business Principles guide federal prosecutors to consider the collateral effects of prosecuting business entities.[169] The Business Principles devote an entire section[170] to listing the extralegal consequences that a prosecutor may want to consider, including effects on innocent third parties and other sanctions that might accompany the criminal charge.[171] In contrast, the Individual Principles mention collateral consequences exactly one time, with no depth or discussion, and only in reference to evaluating whether another jurisdiction could prosecute an individual more effectively.[172]

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printed pages. The Individual Principles' guidance for prosecutors deciding whether to press charges against an individual defendant is contained in USAM sections 9-27.200 to 9-27.260, approximately eight printed pages.

168. BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 14 (2014). Garrett goes on to explain that large firms "often receive deferred prosecution agreements and pay lower fines, if any: 47 percent of those getting deferred prosecution or non-prosecution agreements paid no fine at all" and that "[a]lmost every time prosecutors explained how a fine was calculated, it was at the very bottom, or quite a bit below the bottom, of the range suggested in the sentencing guidelines." *Id.*

169. USAM, *supra* note 101, § 9-28.1100 (Collateral Consequences).

170. This section is approximately one page in length of the sixteen pages of guidance in the Business Principles for prosecutors deciding whether to press charges against a corporation. *See supra* note 156 and accompanying text.

171. USAM, *supra* note 101, § 9-28.1100(B) This comment states:

> In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs.

Id.

172. *See generally* USAM, *supra* note 101, § 9-27.000. The sole mention of collateral consequences in the Individual Principles reads: "[The prosecutor] should also be alert to the possibility that a conviction under state law may, in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under [f]ederal law." *Id.* § 9-27.240(B)(3). In the "substantial federal interest" factors in section 9-27.230, factor (A)(7) ("[t]he probable sentence or other consequences if the person is convicted") seems to contemplate a discussion of collateral consequences; however, such discussion is missing from the elaboration of factor (A)(7) in section 9-27.230(B)(8). *Id.* § 9-27.230. These discussions leave much to be desired—collateral consequences exist for individual convictions as much as they do for corporate convictions. *See infra* Part V.A.

This is a significant difference. A line-by-line comparison of the factors listed for consideration in the Individual and Business Principles shows that most of the Business Principles factors are either very similar to the Individual Principles[173] or inapplicable in the individual context.[174] Of the three factors that do not fall into these categories,[175] the consideration of collateral consequences is not only the most relevant to the prosecution of individuals, it is also the factor with the best chance of having a meaningful effect on the current federal criminal regime.

B. Limiting Federal Prosecutions Through Charging Guidance

Between 2004 and 2014, corporate prosecutions decreased by a remarkable 29 percent,[176] with the most substantial decline coming

173. *Compare* USAM, *supra* note 101, § 9-27.220(A)(3) (instructing that prosecutors should decline to prosecute cases if "[t]here exists an adequate non-criminal alternative to prosecution"), *with id.* § 9-28.300(A)(9) (requiring prosecutors to consider "the adequacy of remedies such as civil or regulatory enforcement actions" when deciding whether to criminally charge a corporation); *compare id.* § 9-27.230(A)(2) (requiring prosecutors to consider "[t]he nature and seriousness of the offense"), *with id.* § 9-28.300(A)(1) (requiring prosecutors to consider "the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime" when weighing whether to criminally prosecute a corporation); *compare id.* § 9-27.230(A)(4) (requiring prosecutors to consider "[t]he person's culpability in connection with the offense"), *with id.* § 9-28.300(A)(2) (requiring prosecutors to consider "the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management"); *compare id.* § 9-27.230(A)(5) (requiring prosecutors to consider "[t]he person's history with respect to criminal activity"), *with id.* § 9-28.300(A)(3) (requiring prosecutors to consider "the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it"); *compare id.* § 9-27.230(A)(6) (requiring prosecutors to consider "[t]he person's willingness to cooperate in the investigation or prosecution of others"), *with id.* § 9-28.300(A)(4) (requiring prosecutors to consider "the corporation's willingness to cooperate in the investigation of its agents").

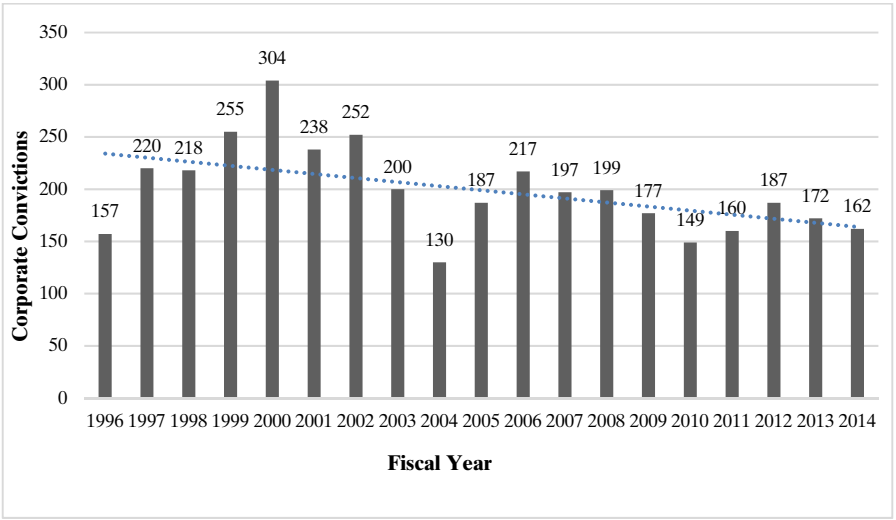
174. *Id.* §§ 9-28.300(A)(5), (A)(10).

175. The three factors left include: USAM sections 9-28.300(A)(6) ("timely and voluntary disclosure of wrongdoing" by the defendant), (A)(7) ("remedial actions" taken), and (A)(8) ("collateral consequences" of prosecution). *Id.* § 9-28.300.

176. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, JUSTICE DEPARTMENT DATA REVEAL 29 PERCENT DROP IN CRIMINAL PROSECUTIONS OF CORPORATIONS, at tbl.1 (Corporate Prosecutions Filed, FY 2004–2014) (Oct. 13, 2015), http://trac.syr.edu/tracreports/crim/406 [https://perma.cc/3YZE-LZM4] [hereinafter TRAC CORPORATE DATA]. This data tracks corporate charges and convictions from 2004 until 2014, and is available only as a result of a case-by-case records search completed by Transactional Records Access Clearinghouse (TRAC), following a seventeen-year litigation effort under the Freedom of Information Act to gain access to the information. *Id.* Compiled data for the number of corporate charges brought prior to 2004 is limited. The USSC publishes the annual number of corporate convictions in its *Sourcebook*, but these numbers do not include unsuccessful prosecutions, and thus are not a conclusive source for the total number of corporate prosecutions filed. *See id.* at tbl.2

after the Business Principles were finally published in the USAM in 2008.[177] Similarly, corporate convictions have also decreased on average.[178] Data shows an all-time high of 304 convictions in 2000, followed by a drop to an all-time low of 130 after the publication of the Thompson memo in 2003, to a relative low of 162 in 2014 (see Figure 1 below).[179]

Figure 1. Corporate Criminal Convictions[180]



(Corporations Convicted of Federal Crimes FY 1996–2014); U.S. SENTENCING COMM'N, ANNUAL REPORTS & SOURCEBOOKS ARCHIVES, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/annual-reports-sourcebooks-archives [https://perma.cc/W6MY-59VB]. Furthermore, some scholars have reported that the information available from the USSC is limited in other ways, including missing and incomplete data for corporate prosecutions generally. *See, e.g.*, Garrett, *supra* note 129, at 1805 ("[T]he Commission's datasheets are missing data important to the questions examined [in this article]. Problems with Commission data have apparently been longstanding. . . . A landmark 1999 study. . . . warned future researchers to 'proceed with caution before drawing inferences' from the Commission's organizational convictions data, where the Commission itself had acknowledged that its data 'are neither comprehensive nor representative.'" (quoting Cindy Alexander, Jennifer Arlen & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393, 402 & n.26 (1999))).

177. TRAC CORPORATE DATA, *supra* note 176, at tbl.1; *see also id.* at tbl.5 (Corporate Referrals, Prosecutions Filed and Convictions—Before and After Filip Guidelines).

178. *Id.* at tbl.1.

179. *See id.* at fig.2 (Corporations Convicted of Federal Crimes, FY 1996–2014) (data sourced from USSC Sourcebooks). *But see supra* note 176 and accompanying text for discussion of potential USSC data shortfalls.

180. TRAC CORPORATE DATA, *supra* note 176, at fig.2 (chart recreated for formatting; original made by TRAC, based on data sourced from the USSC *Sourcebooks*).

These numbers can be contrasted with the number of individual convictions over the past decade, which has remained above 91 percent of the prosecutions pursued since 2000, and above 92 percent since 2006.[181] The rate of individual convictions further increased between 2008 and 2011, rising to 93 percent.[182] Individual prosecutions over the past decade followed a similar pattern, increasing by 9 percent from 2008 until 2011 (see Figure 2 below).[183] The number of individual prosecutions began decreasing in 2012,[184] but this has been largely attributed to recent policies that are directly tied to the current administration.[185] These recent policies include disfavoring nonviolent drug offender[186] and felony immigration prosecutions.[187] Whether these

181. Data found in the U.S. Attorneys' Annual Statistical Reports for the fiscal years of 2000 through 2013. U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR U.S. ATT'YS, ANNUAL STATISTICAL REPORTS, https://www.justice.gov/usao/resources/annual-statistical-reports [https://perma.cc/62E8-ESXL].

182. *Id.*

183. U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR U.S. ATT'YS, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT 7–8 (Fiscal Year 2013), http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf [https://perma.cc/AD83-H438] [hereinafter DOJ FY13 REPORT].

184. *Id.*

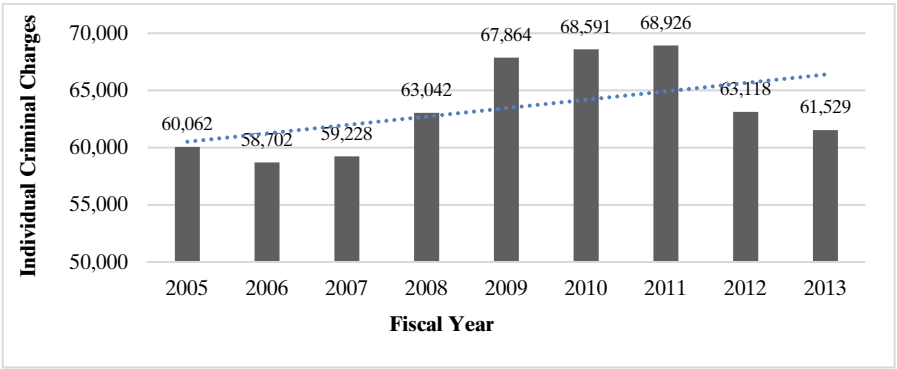
185. *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 44–49 (2011) (discussing the link between the recent criminal-justice reform overtures and the present budgetary constraints, and doubting whether the reform mindset will remain once the budget changes with a new administration); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105 (2013) ("While the nation's appetite for incarceration appears to be waning, state, local, and federal criminal justice systems continue to adjudicate millions of cases annually, and little reason exists to conclude that criminal prosecution and conviction will abate as the preferred public response to misconduct." (citations omitted)); Jeffrey A. Tucker, *Obama Starts Winding Down the U.S. Prison State—And About Time, Too*, NEWSWEEK (Oct. 19, 2015), http://www.newsweek.com/obama-starts-winding-down-us-prison-state-and-about-time-too-381172 [https://perma.cc/N9VJ-79VT] (discussing President Obama's efforts at prison reform in the last years of his presidency).

186. *See, e.g.*, Richard A. Serrano & Ian Duncan, *Federal Authorities Eased up on Drug Cases in 2014*, BALT. SUN (Feb. 13, 2015, 3:40 PM), http://www.baltimoresun.com/business/federal-workplace/bs-md-federal-drug-cases-20150217-story.html [https://perma.cc/9NAM-48CU] (discussing Attorney General Eric Holder's comments on easing prison overcrowding through the new DOJ policies which started in 2013, and the resulting decrease in federal prosecutions).

187. *See, e.g.*, Dan Cadman, *Immigration Prosecutions' Five-Year Trend Downward, Particularly in the Interior*, CTR. FOR IMMIGRATION STUDIES (Apr. 10, 2015), http://cis.org/cadman/immigration-prosecutions-five-year-trend-downward-particularly-interior [https://perma.cc/5NS2-V2PN]; *see also* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS FOR SEPTEMBER 2015 (Oct. 27, 2015), http://trac.syr.edu/traceports/bulletins/immigration/monthlysep15/fil [https://perma.cc/2SEX-B94X].

policies will continue with the next administration remains an open question.[188]

Figure 2. Individual Criminal Charges[189]



V. LEVELING THE PLAYING FIELD

A. Guidance for Considering Collateral Consequences

Based on the data above, the institution of the Holder factors and, to an even larger extent, the publication of the Business Principles has had a curtailing effect on the federal prosecution of corporate crime.[190] This curtailing effect was both purposely intended and stabilized by the publication of the Business Principles in the USAM. Thus, the numbers of prosecutions and convictions of corporations have decreased, even as the same numbers have increased for individuals.[191] The major differences between the Individual Principles and the Business Principles (or lack thereof) demonstrate that the discussion of collateral consequences in the Business Principles is at least partially responsible for this difference.[192] Thus, the crucial question becomes:

188. *See supra* note 185 and accompanying text. Thus, these administration-specific policies, currently serving to curb individual prosecutions, cannot be compared to the curbing guidance instituted by the Business Principles, which were made stable and permanent by publication in the USAM in 2008. *See supra* Part III.B.

189. DOJ FY13 REPORT, *supra* note 183, at 8 (Criminal Chart 2.1—Criminal Cases Filed) (chart recreated for formatting; original made by U.S. Department of Justice Executive Office for U.S. Attorneys based on DOJ data).

190. *See supra* Part IV.B.

191. *See supra* Part IV.B.

192. *See supra* Part IV.A.

Why consider the collateral consequences of charging corporations with crimes but not those of charging individuals with crimes?

In reference to considering the collateral consequences of prosecuting a corporation, the Business Principles state, "[P]rosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may . . . have played no role in the criminal conduct."[193] The Business Principles go on to add that "[p]rosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts."[194] Thus, according to the USAM, the official reasons for considering the collateral consequences of charging corporations with crimes stem from concerns for innocent third parties and fears about the economy as a whole.[195]

The DOJ began to officially consider the collateral consequences of prosecuting businesses with the Holder memo, after the corporate scandals of the 1980s and 1990s.[196] However, the DOJ's focus on these collateral consequences intensified after the collapse of Arthur Andersen, and many scholars theorize that it was this event which solidified the importance of collateral consequences in the DOJ's

193. USAM, *supra* note 101, § 9-28.1100(B).

194. *Id.*

195. DOJ officials supporting the consideration of collateral consequences in the context of corporate criminal charges have also stressed these factors. For example, in 2012, the Assistant Attorney General remarked:

> [I]n reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders . . . . I personally feel that it's my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation . . . . And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in [corporate] crime cases that literally keep me up at night, and which must play a role in responsible enforcement.

Lanny A. Breuer, Assistant Att'y Gen., Dep't of Justice, Remarks at the New York City Bar Association (Sept. 13, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html [https://perma.cc/KQZ7-UYSV]. Scholars have also noted these concerns. *See generally* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 400–02, 407–08 (1981) (describing various "externalities" attaching to corporate prosecutions).

196. *See supra* Part III.B; *see also* Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law*, 34 REV. BANKING & FIN. L. 655, 664 (2015) ("[F]ollowing the savings and loan crisis of the 1980's and the Enron scandal in 2001, the DOJ adopted a written policy of taking collateral consequences into consideration in deciding whether to bring criminal charges against systemic institutions.").

corporate charging policy.[197] In fact, Arthur Andersen's collapse, and the subsequent attention that the DOJ paid to collateral consequences in the corporate crime context, has been dubbed "the Andersen effect."[198]

But the consequences of prosecuting businesses are not alone in having collateral effects. Just like criminal convictions of corporations, criminal convictions of individuals affect "far more than the convicted individual."[199] The DOJ itself recognizes that "almost every conviction of an individual[] will have an impact on innocent third parties."[200] So, the collateral consequences of prosecuting individuals clearly encompasses the first concern of the DOJ when prosecuting corporations: innocent third parties. What about the DOJ's second concern, the economy as a whole?

When it comes to individual prosecutions, the effects on innocent third parties cannot be separated from the harm caused to the economy as a whole. Federal and state convicts, and their families, face consequences of conviction including increased health concerns, social stigma, licensing bans, housing restrictions, and a lack of employment prospects.[201] When viewed at the individual level, these effects of incarceration may seem less weighty than the collateral effects of prosecuting a corporation. However, such a perspective would be shortsighted.

This is primarily because "too many Americans" are in prison.[202] With the number of individual incarcerations propelled to mass levels in recent decades,[203] the collateral consequences of conviction have

197. *See, e.g.*, Foster, *supra* note 196, at 662 ("The job losses from the closure of Arthur Andersen and other economic impact factors created some concern and facilitated the changed policy at the DOJ to consider collateral consequences, but only for systemically important institutions.").

198. Alex B. Heller, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 770 (2015).

199. Logan, *supra* note 185, at 1108. Logan goes on to explain that family and friends of convicts frequently must endure "spill-over" effects of a loved one's incarceration like stigma, violence, and disdain, in addition to serious health and financial issues. *Id.* at 1108–09; *see also supra* Part I.B.

200. USAM, *supra* note 101, § 9-28.1100(B).

201. *See supra* notes 59–60 and accompanying text; *see also supra* note 172 and accompanying text.

202. *See supra* Part I.B.

203. *Id.*; *see also* Henderson, *supra* note 58, at 105–07.

resulted in cyclical poverty,[204] inequality,[205] and reinforced criminal behavior.[206] Each of these results has constituted a prime contributor to present-day social-justice breakdowns.[207] For example, a recent economics study showed that being incarcerated for a felony (a time period of a year or more) "reduce[d] the odds of post-prison employment by 24 percent and increase[d] the odds of living on food stamps by 5 percent."[208] Furthermore, some research has shown that the longer an individual is incarcerated, the greater the chance that the individual will turn to crime when finally released from prison.[209] These and other difficulties have led scholars to conclude that America's mass incarceration epidemic has "produced a new social group" of convicts and former convicts who have been cast out from society.[210] This social divide is especially prevalent with regard to racially disadvantaged

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204. *See* Coates, *supra* note 59 ("It is estimated that between 30 and 50 percent of all parolees in Los Angeles and San Francisco are homeless. In that context—employment prospects diminished, cut off from one's children, nowhere to live—one can readily see the difficulty of eluding the ever-present grasp of incarceration . . . ."); Stephanos Bibas, *The Truth about Mass Incarceration*, NAT'L REV. (Sept. 16, 2015), http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform [https://perma.cc/E3CN-PEXY] ("[P]rison does much to draw inmates away from lawful work. In the month before their arrest, roughly three quarters of inmates were employed, earning the bulk of their income lawfully. . . . helping to pay for rent, groceries, utilities, and health care. But prison destroys their earning potential.").

205. *See, e.g.*, John Tierney, *Prison and the Poverty Trap*, N.Y. TIMES (Feb. 18, 2013), http://www.nytimes.com/2013/02/19/science/long-prison-terms-eyed-as-contributing-to-poverty.html?pagewanted=all [https://perma.cc/2PHM-9FF7]. Tierney writes:

> When researchers try to explain why AIDS is much more prevalent among blacks than whites, they point to the consequences of incarceration, which disrupts steady relationships and can lead to high-risk sexual behavior. When sociologists look for causes of child poverty and juvenile delinquency, they link these problems to the incarceration of parents and the resulting economic and emotional strains on families.

Id.

206. *See* Bibas, *supra* note 204 ("[P]risons are breeding grounds for crime. Instead of working, . . . most prisoners are forced to remain idle . . . . [P]rison clusters together neophytes and experienced recidivists, breeding gangs, criminal networks, and more crime.").

207. *See* Henderson, *supra* note 58, at 106 ("People of color and the poor are overrepresented among [prison] population[s], leading to the implication that minority-group and class bias infects the criminal justice system . . . . America's carceral crisis is widely considered the most critical civil rights and civil liberties issue of the present . . . ." (citations omitted)).

208. Bibas, *supra* note 204 (discussing a study by Michigan economics professor Michael Mueller-Smith).

209. *See id.* (discussing a study by Mueller-Smith which found that "long sentences on average breed much more crime after release than they prevent during the sentence").

210. *See* Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DÆDALUS: Summer 2010, at 8, https://www.amacad.org/content/publications/pubContent.aspx?d=808 [https://perma.cc/M2RR-VL6Q] ("America's prisons and jails have produced a new social group, a group of social outcasts who are joined by the shared experience of incarceration, crime, poverty, racial minority, and low education.").

minorities and low-income populations, constituting a major area of modern civil rights concerns.[211] These concerns extend to the next generation as well—studies show that children with an incarcerated parent are more likely to suffer academically, mentally, socially, and physically than their peers.[212]

In short, the cumulative effects of prosecuting individuals are significant. Yet, U.S. Attorneys consider such effects in the context of charging corporations with crimes, but not when deciding when and how to charge individuals with crimes. Given the overfederalized state of the U.S. criminal regime and the too many Americans in prison,[213] it might be time to level the playing field, and expand the consideration of collateral consequences to individual defendants. As the revered Judge Learned Hand once commanded: "Thou shalt not ration Justice."[214]

B. Practical Implications: Arguments for and Against the Consideration of Collateral Consequences

Opponents may argue that the collateral consequences of prosecution should be considered for corporations, and not for individuals, because of the different natures of corporations and individuals.[215] Primarily, a corporation is not a natural person. Therefore, in addition to potentially encompassing many individuals, a corporation itself cannot actually commit a crime.[216]

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211. *See supra* note 207 and accompanying text.

212. *See* Paola Scommegna, *Parents' Imprisonment Linked to Children's Health, Behavioral Problems*, POPULATION REFERENCE BUREAU (Dec. 2014), http://www.prb.org/Publications/Articles/2014/incarcerated-parents-and-childrens-health.aspx [https://perma.cc/EXS8-YHU3] (discussing how "U.S. children of incarcerated parents are an extremely vulnerable group, and much more likely to have behavioral problems and physical and mental health conditions than their peers"); Tierney, *supra* note 205 (discussing a study by Yale sociologist Christopher Wildeman which found that "children are generally more likely to suffer academically and socially after the incarceration of a parent").

213. *See supra* Part I.

214. IRVING DILLIARD, THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND, at xix (1952) (describing a quote from a speech for the Legal Aid Society of New York on February 16, 1951, in reference to ensuring that defendants have the counsel needed to ascertain fair trials).

215. *See, e.g.*, Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1880–81 (2005) ("Yet corporations are by nature a vastly different type of criminal than a drug addict or juvenile offender.").

216. *See generally* Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 411–15 (2007) (discussing how corporations can "act" only through the actions of the individuals working within them).

However, the argument that the distinguishable nature of corporations supports a different set of prosecutorial considerations is greatly reduced by the fact that the American criminal system personifies corporations for purposes of criminal treatment. Most countries do not hold corporations responsible for crimes committed within the corporate domain,[217] but the United States has chosen a different system.[218] Both Congress and the U.S. Supreme Court have decided that corporations can, and will, be held responsible for crimes like individuals.[219] As long as the law treats corporations and individuals similarly for purposes of crime, the argument that their dissimilar natures support different prosecutorial treatment carries less force.[220]

This premise similarly addresses another possible argument that corporations and individuals should be treated differently: some may argue that, because corporate employees may be prosecuted criminally even when the corporation itself is not,[221] the prosecution of corporate entities should not be compared to the prosecution of individuals. Instead, one might argue, individual prosecutions should be compared to the prosecution of individual corporate employees. However, as stated above, federal criminal law purports to see no difference between corporations and individuals—they are all "persons."[222] It

217. *See* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 129 (2008) ("Few other Western countries impose entity liability, and those that do impose it comparatively infrequently and under the threat of far less serious punitive consequences.").

218. *Id.*

219. The U.S. Supreme Court held that corporations can be held liable for any crime under the doctrine of respondeat superior in 1909. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–96 (1909). Congressional legislation also indicates that corporations are liable for all legal violations, just like individuals. *See* 1 U.S.C. § 1 (2012) (stating that the definition of "person" throughout the United States Code includes corporate entities).

220. *Cf.* Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 908–31 (2011) (discussing generally the abrogation of many corporate constitutional rights under the law). Furthermore, although absolute corporate criminal responsibility through respondeat superior is currently the de juris rule in the United States, some scholars have argued that it should be eliminated or modified. *See, e.g.*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 526–33 (2006).

221. *See supra* note 155 and accompanying text; *see also* Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 97–104 (2004) (discussing the critiques of corporate criminal liability generally and reasons why liability might be better imposed solely on individual corporate actors).

222. *See supra* note 219 and accompanying text. Furthermore, it is often difficult to simply substitute a comparison of prosecuted corporate employees for the prosecution of corporations

therefore makes no difference whether corporate employees are charged if the corporation has not also been charged because a "person" who has committed a crime has still gone (deliberately) unpunished. Under the law at least, individuals and corporations are on the same playing field. It is under prosecutorial charging guidance that they are treated differently.

Regarding the consideration of collateral consequences in particular, when former Attorney General Eric Holder discussed the consideration of economic effects as a potential reason *not* to prosecute corporations in 2013,[223] public backlash followed.[224] "Too big to fail" or "too big to jail" became the mantra of those who disagreed with the DOJ's policy of considering the collateral effects of criminally charging corporations.[225] Consideration of collateral consequences in this manner, denouncers correctly asserted, "create[s] a public perception that the legal system is unfair."[226] Deciding whether or not to prosecute criminal acts on the basis of a corporation's wealth is akin to a system in which "the economically weak get prosecuted, [and] the

themselves because of the typical "collective" nature of corporate crimes. For further discussion on this point, see generally Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015).

223. Eric Holder, Att'y Gen., Remarks before the Senate Comm. on the Judiciary Hearing on Oversight of the U.S. Dep't of Justice, 113th Cong. (Mar. 26, 2013), (unpublished hearing transcript), http://congressional.proquest.com:80/congressional/docview/t65.d40.03060003.t03? [https://perma.cc/2USG-Y9NT] (responding to questions of Senator Grassley).

224. *See, e.g.*, Danielle Douglas, *Holder Concerned Megabanks Too Big to Jail*, WASH. POST (Mar. 6, 2013), https://www.washingtonpost.com/business/economy/holder-concerned-megabanks-too-big-to-jail/2013/03/06/6fa2b07a-869e-11e2-999e-5f8e0410cb9d_story.html [https://perma.cc/3ZCB-RZS2] (discussing Holder's remarks and the "too big to fail" implications); Andrew Ross Sorkin, *Realities Behind Prosecuting Big Banks*, N.Y. TIMES: DEALBOOK (Mar. 11, 2013), http://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/?_r=0 [https://perma.cc/5JVF-6RZ9] (discussing same).

225. *See, e.g.*, William D. Cohan, *Justice Dept. Shift on White-Collar Crime Is Long Overdue*, N.Y. TIMES: DEALBOOK (Sept. 11, 2015), http://www.nytimes.com/2015/09/12/business/dealbook/justice-dept-shift-on-white-collar-crime-is-long-overdue.html [https://perma.cc/6CC8-NQ6Z] (describing "too big to jail" and the "Holder Doctrine" as "horribly misguided").

226. Foster, *supra* note 196, at 658. Another argument against "too big to jail" revolves around a belief that this idea led to the "failure to prosecute any [major] institution or person for the events that led to the financial crisis and all the ensuing social devastation." Roger Parloff, *Eric Holder's Business Legacy: 'Too Big to Jail'?*, FORTUNE (Sept. 26, 2014), http://fortune.com/2014/09/26/eric-holders-business-legacy-too-big-to-jail [https://perma.cc/87JS-CTQT]. However, the legal and factual situation surrounding this claim is far more complicated than the argument facially implies. Much of the questionable activity leading to the 2008 financial crisis was just that—questionable. Whether any of the subsequently contemplated prosecutions could have succeeded if they had been pursued is far from settled. Thus, placing the blame for the lack of prosecutions here on "too big to jail" is an oversimplification.

economically powerful do not."[227] A general argument against the consideration of collateral consequences, in any context, may therefore be that such considerations are inequitable.

However, this argument is premised upon the assumption that collateral consequences are considered for one group (wealthy corporations) and not for another (individuals). Applied in this manner, the consideration of collateral consequences undoubtedly raises concerns. But this is not the only way in which the federal system could apply considerations of collateral consequences. If federal prosecutors were guided to consider the collateral effects of charging individuals with crimes, in addition to considering the same for corporations, some of the concerns for fairness may be eliminated.

Of course, some would argue that expanding the considerations of federal prosecutors in this manner would only lead to further disparate results. An increase in disparity usually results from any increase in the discretionary powers of an official.[228] Here, adding a consideration for federal prosecutors when charging individuals would likely broaden discretionary power, as opposed to limiting it, because it would expand the issues that prosecutors could consider when making charging decisions.

This Note does not address the question of whether the American system of broad prosecutorial discretion is inherently good or bad. But it is important to remember that our prosecutors have ethical duties as "minister[s] of justice."[229] With this duty in mind, expanding considerations to ensure equal application of the law is harmonious with the prosecutor's role.

Lastly, current practices and trends point toward a growing legal emphasis on the collateral effects of individual incarcerations. After decades of rulings that deemed individual collateral consequences to be inconsequential,[230] the U.S. Supreme Court held in 2010 that lawyers must advise their clients when deportation is a secondary consequence of a guilty plea.[231] This decision may indicate a shift in the Court's view

227. Foster, *supra* note 196, at 658.

228. *See, e.g.*, *supra* Part I.

229. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2014).

230. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1806–16 (2012) (discussing judicial rulings which evidenced a lack of constitutional restraint on collateral consequences, up until the 2010 *Padilla* ruling).

231. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

of collateral consequences, which have traditionally been thought of as less important than the direct consequences of conviction.[232]

Additionally, the connection between the consideration of collateral consequences and the granting of DPAs is extremely relevant to the topics discussed in this Note. DPAs, now primarily used to avoid corporate prosecutions (as in the Toyota case[233]), were originally developed as a more judicious way to prosecute juveniles.[234] The idea was to "avoid the stigma associated with formal processing and the resultant change in self-image, associations, and behavior associated with the negative societal reaction to the stigma."[235] During the 1960s, the use of DPAs expanded, and they became popular methods for prosecuting drug offenders.[236]

Despite these humane origins, today federal prosecutors are six times more likely to offer a DPA to a corporation than to an actual human being.[237] This is fundamentally attributable to prosecutors' consideration of collateral consequences when charging corporations with crimes.[238] The practice has garnered attention from public

232. *See* Logan, *supra* note 185, at 1113 ("*Padilla* in particular might also signal a desire on the part of the Court to do away with the long-criticized doctrinal divide between direct and collateral consequences more generally, requiring courts . . . to 'focus[] on the importance of particular consequences rather than their criminal or civil labels.'" (alteration in original) (citation omitted) (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1147 (2011))); *see also Padilla*, 559 U.S. at 366 (stating that the Court is not definitively classifying deportation as a collateral consequence here "because of its close connection to the criminal process").

233. *See supra* note 166 and accompanying text.

234. Greenblum, *supra* note 215, at 1866.

235. *Id.* (quoting GENNARO F. VITO & DEBORAH G. WILSON, THE AMERICAN JUVENILE JUSTICE SYSTEM 22 (1985)).

236. *Id.*

237. This number is calculated from two figures. First, the number of pretrial diversions for individual defendants in 2012, which was 0.9 percent. Mark Motivans, FEDERAL JUSTICE STATISTICS, 2012—STATISTICAL TABLES, at 12 tbl.2.3 (2015), http://www.bjs.gov/content/pub/pdf/fjs12st.pdf [https://perma.cc/SG5D-P66X]. Second, the percentage of DPAs and nonprosecution agreements for corporations from 2004 to 2009, which was 5.7 percent. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 16 (2009), http://www.gao.gov/assets/300/299781.pdf [https://perma.cc/9854-ZJ5W]. *See* United States v. Saena Tech Corp., 140 F. Supp. 3d 11, 42 (D.D.C. 2015) (citing the sources for the above numbers as a basis for comparing the number of DPAs offered to individuals and corporations).

238. *See, e.g.*, Greenblum, *supra* note 215, at 1880–83 (describing the "transplant" of DPAs from individuals to corporations, and how economic considerations played a factor in that transplant).

opponents in recent years,[239] and now may be a focus of judicial attention as well.

In a recent opinion, Judge Emmet Sullivan, a federal district judge for the District of Columbia, wrote about his disappointment in the DOJ's disproportionate employment of DPAs.[240] Integrating collateral consequences, Judge Sullivan emphasized that "society is harmed at least as much by the devastating effect that felony convictions have on the lives of its citizens as it is by the effect of criminal convictions on corporations."[241] In the end, the recurring theme is simply this: the consequences of prosecuting individuals matter.

CONCLUSION

With the advent of collateral-consequence considerations in corporate criminal prosecutions, the DOJ has paved the way for enhanced guidance to be issued to federal prosecutors for charging individuals with crimes. A discussion of collateral consequences in individual charging guidance, already included in corporate charging guidance, could have important and far-reaching effects on the federal criminal regime. More importantly, it could remedy some of the unfairness presented by the current system in which federal prosecutors are guided to consider a superior set of factors before charging corporations. As Judge Sullivan noted: "[P]eople are no less prone to rehabilitation than corporations."[242]

It might be argued that the solution to this problem is to constrain, not increase, the consideration of collateral consequences. But why should fairness demand that everyone be worse off? In the interest of both "[ad]minister[ing] justice"[243] and alleviating the mass-incarceration epidemic, federal prosecutors should be expanding

239. *See, e.g.*, Jonathan Sack, *Deferred Prosecution Agreements—The Going Gets Tougher*, FORBES (May 28, 2015, 11:25 AM), http://www.forbes.com/sites/insider/2015/05/28/deferred-prosecution-agreements-the-going-gets-tougher [https://perma.cc/PEE5-AALX].

240. *See Saena Tech Corp.*, 140 F. Supp. 3d at 42 ("Congress provided the deferred-prosecution tool without limiting its use . . . . [T]he Court is disappointed that deferred-prosecution agreements or other similar tools are not being used to provide the same opportunity to individual defendants to demonstrate their rehabilitation without triggering the devastating collateral consequences of a criminal conviction.").

241. *Id.* at 46.

242. *Id.*

243. *See supra* note 229 and accompanying text.

equitable considerations, not eliminating them. In short, we should "*not* ration Justice."[244]

244. DILLIARD, *supra* note 214, at xix (emphasis added).