

## TOO VAST TO SUCCEED

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TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS. BY *Brandon L. Garrett*. Cambridge and London: Harvard University Press. 2014. Pp. ix, 365. \$29.95.

### INTRODUCTION

If sunlight is, in Justice Brandeis's words, "the best of disinfectants,"<sup>1</sup> then Brandon Garrett's<sup>2</sup> latest book, *Too Big to Jail: How Prosecutors Compromise with Corporations* might best be conceptualized as a heroic attempt to apply judicious amounts of Lysol to the murky world of federal corporate prosecutions.

"How Prosecutors Compromise with Corporations" is the book's neutral-sounding secondary title, but even casual readers will quickly realize that Garrett means that prosecutors compromise *too much* with corporations, in part because they fear the collateral consequences of a corporation's criminal indictment.<sup>3</sup> Through an innovation known as the Deferred Prosecution Agreement, or DPA,<sup>4</sup> prosecutors reach extrajudicial contractual agreements with corporations. Although prosecutors have long touted the transformative potential of these agreements, Garrett concludes that their benefits are often superficial and short-lived (pp. 149–50). Moreover, prosecutors negotiate these compromises with little oversight or accountability (p. 2). Even worse, this overly soft approach toward entities has infected prosecutorial resolve to prosecute individual offenders (pp. 83–84), thereby

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1. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933).

2. Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law.

3. "The 'too big to jail' concern is that some companies may be so valuable to the economy that prosecutors will not hold them accountable for crimes." P. 252.

4. Prosecutors can enter into either a "deferred" prosecution agreement (DPA) or "non" prosecution agreement (NPA) with corporate offenders. There is, however, little difference between the two. Accordingly, except when otherwise noted, I use the term DPA to refer to both categories of agreements.

enabling corporate managers to escape liability for their criminal wrongdoing (Chapter Four). No wonder, then, that Garrett perceives a grievous accountability gap in the corporate crime landscape.

One can hardly fault Garrett for questioning the substance and procedures underlying the corporate DPA. The name itself is a bit of a misnomer.<sup>5</sup> The typical agreement neither portends a true “deferral” of criminal charges, nor reflects any intention on the part of the government to prosecute its signatory. To the contrary, in most if not all cases, it represents an agreement *not* to prosecute the entity *ever*, provided the entity fulfills a number of conditions, including the payment of fines, provision of cooperation in subsequent investigations, and the implementation of a variety of internal governance reforms.<sup>6</sup>

As Garrett observes, DPAs are highly variable; their contents differ, often with little explanation or justification (p. 48). Some agreements extract significant concessions from the corporate offender regarding its governance structure and daily business activities, while others do not (p. 48). Some require external monitoring and verification, while others rely on disclosures generated internally by the corporation (p. 48). Moreover, nothing within the DPA process itself measures, much less guarantees, the efficacy of these reforms (p. 279). Although the federal government likes to take credit for transforming corporate America,<sup>7</sup> it has, as Garrett points out, offered fairly little evidence substantiating its rosy claims.<sup>8</sup>

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5. Cf. pp. 54–55. Like Garrett, at least one scholar has compared the DPA to the similarly named deferred prosecution agreement for “first-time offenders who have committed relatively minor offenses.” David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1304–07 (2013) (noting and criticizing differences). Notwithstanding its name, the corporate DPA has little in common with the diversion agreements reserved for first-time individual offenders. *Id.* For a recitation of how corporate DPA agreements first came into being, see Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, in 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1517, 2005), where the former United States Attorney for the Southern District of New York describes the first use of a DPA with Prudential bank. See also Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006); Court E. Golombic & Albert D. Lichy, *The “Too Big to Jail” Effect and the Impact on the Justice Department’s Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1301–04 (2014).

6. See p. 67 (describing deferred prosecution agreement with KPMG, which included the payment of fines, disgorgement of fees and restitution, and other measures).

7. See, e.g., Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecutions in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1185 (2006) (boasting of DPAs collective ability to “regulat[e] by prosecution”).

8. Pp. 278–79. The Government Accounting Office itself has questioned the DPAs overall efficacy. See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009), <http://www.gao.gov/assets/300/299781.pdf> [<http://perma.cc/ZFC2-5NNH>]. In response, the DOJ has created the position of Compliance Counsel and has sought funds to aid in the evaluation of DPA compliance. See Joel Schectman, *Compliance Counsel to Help DoJ Decide Whom to Prosecute*, WALL STREET J. (July 30, 2015, 1:44 PM), <http://blogs.wsj.com/riskandcompliance/2015/07/30/compliance->

To prove his points, Garrett vividly retells numerous corporate criminal scandals—from Arthur Andersen’s shredding of documents (pp. 19–20) to Siemens’s bribing of numerous foreign officials (pp. 1–3)—and intersperses these anecdotal accounts with data culled from his review of over 255 DPA agreements he and the University of Virginia Law School library have collected and maintained (pp. 295–301).

At first glance, one might mistake this book as yet another attack on corporate and government elites, but embedded in Garrett’s book is a more sophisticated reform argument, portions of which Garrett and others have previewed elsewhere.<sup>9</sup> Troubled by what he perceives as a federal reluctance to come down hard enough on corporate offenders, Garrett seeks to upend the DPA process altogether. In lieu of DPAs and similar compromise agreements, corporate indictments should become the norm (p. 274). Following the entity’s indictment, judges should supervise corporate plea agreements and articulate lengthier and more demanding internal governance reforms (pp. 282–84), overseen by court-supervised third-party monitors selected through a competitive bidding process (pp. 191, 284).

Garrett’s reform proposal features several moves, the primary and most important of which is to wrest power from the federal prosecutor and place it with the Article III judge, whose supposed mission is to erect more far-reaching reforms that serve the “the public interest” and thereby reduce the incidence of corporate crime (pp. 282–84). Garrett’s secondary goal echoes the theme of Judge Rakoff’s popular *New York Review of Books* essay,<sup>10</sup> which

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counsel-to-help-doj-decide-whom-to-prosecute/ [http://perma.cc/2GGD-VJLK]; see also U.S. DEP’T OF JUSTICE, OVERVIEW, 2013 BUDGET SUMMARY, and 2013 PERFORMANCE PLAN 14 (2012), <http://www.justice.gov/jmd/2013summary/pdf/fy13-bud-summary-request-performance.pdf> [http://perma.cc/RZ3D-MHX5].

9. Garrett’s views have evolved. See, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) [hereinafter Garrett, *Structural Reform Prosecution*] (conceptualizing the DPA process as a form of “structural reform” litigation and generally praising it while articulating concerns regarding assessment and transparency); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011) (describing government’s DPA approach to multinational corporations and critiquing inconsistencies across agreements); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015) (citing government’s failure to leverage corporate settlements into prosecutions of individual offenders).

For similar arguments that DPAs have been too soft on corporate offenders, see Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013), for an argument in favor of more corporate indictments. See also Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942 (2005) (proposing a “death penalty” statute that would subject the corporate offender to involuntary dissolution upon its third violation of certain crimes); Uhlmann, *supra* note 5 (critiquing the “middle ground” DPA approach).

10. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014, at 4. For a powerful response to Rakoff’s critique, see Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 265–76 (2014), which raises the concern that a “focus on [corporate] headhunting” may distract from more fruitful efforts to better understand and prevent future financial crises.

is to focus greater effort on the prosecution of the individual corporate officers and managers who have propagated serious harms (Chapter Four).

This Review takes up *Too Big to Jail's* organizational agenda. The debate over individual offenders continues elsewhere, and has motivated the Department of Justice to announce a new policy encouraging criminal and civil prosecutors to better coordinate their efforts to punish those individuals most responsible for corporate crime.<sup>11</sup> Whatever the merits of this approach, one cannot help but wonder how significantly the government can increase its prosecution and conviction of individual actors, given white-collar crime's technical complexity and the inherent difficulty in proving culpable mens rea among well-insulated officers and directors.<sup>12</sup>

One might harbor just as much skepticism toward an agenda that attempts to rid corporate entities of their criminogenic characteristics.<sup>13</sup> Perhaps the intervention of federal judges and a more aggressive Department of Justice can reduce the corporate entity's propensity to violate certain laws, but it is just as possible that these reforms will backfire, leaving in their wake a mix of failed prosecutions, jailed scapegoats, and expensive but ineffective governance reforms.<sup>14</sup> Corporate crime may present a problem that is too important to ignore, but some remedies are worse than the diseases they seek to cure. Garrett is certainly not alone in his criticism of the DPA,<sup>15</sup> but before we abandon it, we should consider how well its alternative holds up under close examination.<sup>16</sup>

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11. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Assistant Att'ys Gen. and U.S. Att'ys (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download> [<http://perma.cc/NWF7-KPR4>]; see also Press Release, U.S. Dep't of Justice, Deputy Att'y Gen. Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> [<http://perma.cc/49BK-HHP6>] (describing Department's new policy).

12. The government's conviction record for individuals accused of violating the Foreign Corrupt Practices Act (FCPA) is particularly dispiriting. See, e.g., Paul Barrett, *Justice Department Stumbles in Closely Watched Foreign-Bribery Case*, BLOOMBERG BUS. (June 15, 2015, 6:51 PM), <http://www.bloomberg.com/news/articles/2015-06-15/justice-department-stumbles-in-closely-watched-foreign-bribery-case> [<http://perma.cc/CA3X-QTHP>]; Michael Koehler, *US v Sigelman – Just the Latest DOJ FCPA Trial Debacle*, FCPA PROFESSOR BLOG (June 22, 2015), <http://www.fcpaprofessor.com/u-s-v-sigelman-just-the-latest-doj-fcpa-trial-debacle> [<http://perma.cc/66JN-8VYQ>].

13. To his credit, Garrett recognizes there are no “silver-bullet solutions” to the problem of corporate crime. P. 17. Nevertheless, he seems quite certain that his own solutions will “improve matters.” P. 17.

14. In contrast, reform proposals penned by corporate scholars tend to rely more heavily on front-end regulations that explicitly incorporate shareholder interests. See, e.g., John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEG. ANALYSIS 35, 38–40 (2014).

15. See Richman, *supra* note 10, at 277 (“[A]lthough [DPAs] are frequently excoriated as signs of undue government solicitude[,] . . . they have also been condemned as instruments of government oppression . . .”).

16. Some have argued the opposite: that the DOJ should have to justify its replacement of convictions with its DPA approach. See, e.g., Julie R. O'Sullivan, *How Prosecutors Apply the*

With the foregoing in mind, this Review unfolds as follows: Part I appraises Garrett's assessment of the status quo and offers a few reasons to be wary of his proposal's performance regarding traditional criminal justice goals, such as deterrence and retribution. Part II grapples with *Too Big to Jail's* weightier implications. At the same time that Garrett attempts to eliminate the DPA's legitimacy and transparency problems, he triggers a new set of anxieties, magnifying corporate crime's vulnerability to criminal law's legality principle, and raising more general concerns about sentencing courts' powers to erect indefinite and largely unconstrained governance reforms. Although these challenges are surmountable, they threaten a sideshow likely to interfere with Garrett's preferred result, the reduction of corporate crime.

Part III concludes by considering alternative ways to reduce the incidence of corporate crime while meeting several of Garrett's objections. My argument is admittedly counterintuitive: to make corporate criminal enforcement more effective, we should ask it to do *less*, and not more. In that regard, this Part calls for parsimony and clarity, but not lenience. Time will tell which approach is best, but we should keep this alternative in mind, particularly as the Department of Justice embarks on yet another round of prosecutorial chest thumping.

#### I. NOT QUITE SO BAD, AND NOT QUITE SO GOOD

Garrett's argument is fairly straightforward. He begins with the well-known *respondeat superior* rule, which holds corporations vicariously liable for most employee violations of federal law.<sup>17</sup> Despite this source of liability, prosecutors often choose not to seek indictments of publicly held corporations, in part because they fear the collateral consequences that may ensue if the corporation is indicted and convicted.<sup>18</sup> Instead, prosecutors seek reforms and punishment through settlement; they require the company to agree to a set of fines and compliance-related reforms that are memorialized in a DPA or in a Non-Prosecution Agreement (NPA), and then filed (sometimes) in court before an otherwise dormant judge.<sup>19</sup> The agreements, which

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"Federal Prosecutions of Corporations" *Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 65 (2014) (arguing that the DOJ must make "a compelling case" in support of DPAs). This argument, however, assumes that indictments and convictions have always been the baseline for corporate criminal law enforcement. For suggestions that this might not be the case, see *infra* notes 32–33 and accompanying text.

17. P. 4; see N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909). The federal code further provides that "except as the context provides otherwise" statutory terms throughout the code, such as "persons" and "whoever," should be interpreted to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (2012). See also 18 U.S.C. § 18 (defining "organization" to mean "person" other than an individual throughout federal criminal code).

18. See pp. 42, 59.

19. Pp. 70–76. The DPA is so named because the parties agree to toll (that is, defer) the applicable statutes of limitations and to exclude time under the Speedy Trial Act, 18 U.S.C. § 3161(h)(2). Because the parties file a DPA in court, the court has the power to review the

Garrett has collected and reviewed at length, are inconsistent, uninformative, too short in duration (p. 75), occasionally secret (or accompanied by undisclosed side deals) (p. 77), and, in Garrett's opinion, collectively unsuccessful in deterring wrongdoing and holding corporate actors accountable for the harm they have caused.<sup>20</sup>

As noted in the Introduction, the Department of Justice has, since the publication of Garrett's book, announced a change in its corporate-crime policy.<sup>21</sup> Although prosecutors may continue to weigh multiple factors in deciding whether to indict the organizational offender, they will no longer advance the corporation "any credit" for one of those factors, the company's cooperation in the government's investigation, unless the corporation identifies "all individuals involved in or responsible for the misconduct at issue" and discloses "all facts relating to that misconduct."<sup>22</sup> If the corporation declines to provide or even "learn of" such information, it will receive—according to the DOJ's new proclamation—no credit for cooperation whatsoever.<sup>23</sup>

The tone of the DOJ's newest policy—cooperate fully or else—casts a shadow over the multifaceted approach that has long characterized the DOJ's approach to charging corporations.<sup>24</sup> The corporation that declines to cooperate could, theoretically, still receive a DPA or NPA, but surely few

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agreement under its supervisory powers, but there exists little consensus over how far this power extends. For a thoughtful opinion in this regard, see *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at \*4–5 (E.D.N.Y. July 1, 2013) (concluding that district court retains power to review and reject agreements that are lawless or would otherwise undermine the court's judicial integrity). For a more aggressive approach, see *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 160–67 (D.D.C. 2015) (rejecting DPA that, in the court's opinion, was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world").

Unlike a DPA, an NPA is a fully extrajudicial agreement and outside the purview of the court. *HSBC Bank*, 2013 WL 3306161, at \*4 (advising that a non-prosecution agreement, like any decision to decline prosecution, lies outside the court's purview). Unless otherwise noted, this Review refers to both NPA and DPA agreements as DPAs. In Garrett's idealized world, NPAs would disappear altogether. P. 283.

20. Pp. 48, 77. Garrett compiled a data set of 255 deferred and nonprosecution agreements executed by publicly held companies between 2001 and 2012. Pp. 291–305.

21. See *supra* note 11.

22. See *supra* note 11.

23. See *supra* note 11. Approximately one month prior to issuing Yates's memo, the Department announced the creation of a new position of "compliance counsel" within its Fraud Division to assist DOJ fraud prosecutors in distinguishing legitimate efforts from "paper" or sham programs. See Schectman, *supra* note 8.

24. These factors—which include, among other issues, the prevalence of wrongdoing and the collateral effects of a corporate indictment—are memorialized in the United States Attorneys' Manual and sometimes referred to as the "Filip Factors," in reference to a memorandum issued by Mark Filip in 2008. See Memorandum from Mark Filip, Deputy Att'y Gen., Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys (Aug. 28, 2008), <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> [<http://perma.cc/8XC6-KCGV>] (laying out principles for federal prosecution of business organizations); see also U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-28.100–.1300 (2008), <http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecu>

defense attorneys will purposely test this theory.<sup>25</sup> In any event, whether and how the DOJ's new policy affects prosecutors falls outside the scope of this Review. The policy change is notable, however, for the parts of Garrett's critique that it addresses and for the parts it ignores.

On the plus side, the new policy affirms the DOJ's interest in pursuing individual offenders and leveraging the corporate entity's robust cooperation in doing so. This ought to please critics like Garrett. At the same time, however, the DOJ's new policy reaffirms its commitment to employing DPAs and maximizing prosecutorial discretion.<sup>26</sup> Compared to the reforms laid out in Garrett's book, the DOJ's policy revision is therefore quite modest; the process that fuels so much of Garrett's critique remains more or less intact.

With these thoughts in mind, this Part questions two of *Too Big to Jail's* most prominent contentions: first, that DPAs have failed so miserably in curbing corporate crime, and second, that Garrett's judge-centered proposal is sure to generate better outcomes.

#### A. *Assessing the Status Quo*

Has the DOJ truly "compromised" too much with corporate actors? In Garrett's opinion, the DPA process, though not uniformly terrible, leaves much to be desired. Garrett buttresses this conclusion with a mix of anecdotal and quantitative evidence. The anecdotes are both memorable and damning. It is difficult to rebut these vignettes, other than to note that a different book could be written emphasizing the many ways in which corporate officers and compliance personnel have ferreted out and prevented wrongdoing. Then again, companies whose compliance programs avert wrongdoing are less inclined to trumpet their compliance victories ("Look at us! We caught an employee who was cooking our books!") other than by emphasizing the size and extent of their compliance investment and their devotion to a "culture of compliance" in glossy brochures and company

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tion-business-organizations [<http://perma.cc/E2M7-TDNW>] (incorporating the Filip factors into DOJ manual).

25. Katelyn Polantz, *In 'All or Nothing' Approach, Justice Dept. Puts White-Collar Bar on Edge*, NAT'L L.J. (Sept. 10, 2015), <http://www.nationallawjournal.com/id=1202736916462/In-All-or-Nothing-Approach-Justice-Dept-Puts-WhiteCollar-Bar-on-Edge?slreturn=20150815151811> [<http://perma.cc/KU88-7M6A>]. Notably, the United States Attorneys' Manual, as revised in November 2015, continues to state explicitly that "no single factor will be dispositive" in a prosecutor's charging decision for corporate offenders. U.S. DEP'T OF JUSTICE, *supra* note 24, § 9-28.300 cmt. (November 2015).

26. As of this writing, the DOJ is engaged in litigation challenging a federal judge's determination to overturn a DPA that failed to accord with the public interest. *See United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015) (rejecting deferred prosecution agreement on grounds that it was "grossly disproportionate" to the gravity of the corporate defendant's offense); Brent Kendall, *Appeals Court Hears Argument over Corporate Prosecution Deals*, WALL STREET J. (Sept. 11, 2015, 4:28 PM), <http://www.wsj.com/articles/appeals-court-hears-arguments-over-corporate-prosecution-deals-1442003287> [<http://perma.cc/VD9A-RQTH>] (describing appellate argument before D.C. Circuit).

websites.<sup>27</sup> In any event, most readers will have little difficulty embracing Garrett's contention that large, publicly held corporations violate the law.

Other claims are more contestable. Like a number of scholars, Garrett traces DPAs' popularity to the government's disastrous prosecution of the giant accounting firm, Arthur Andersen, which "ended in twin disasters for the company and for prosecutors" in that it destroyed the company and resulted in a conviction that the Supreme Court later overturned (pp. 12–13). Andersen's demise supposedly caused the government to embrace a "new approach" toward corporate crime (p. 44), resulting in the use of overly "nuanced and 'soft'" DPAs and the corresponding decrease of traditional charging practices and criminal convictions (p. 47).

The notion that the Arthur Andersen debacle served as the impetus for the government's expanded use of the softer—that is, weaker—DPA is powerful and pervasive in academic discourse,<sup>28</sup> but not completely correct. First, one must situate the DPA within the broader enforcement landscape that has developed since the early 1990s, when DPAs first surfaced.<sup>29</sup> In the past three decades, the compliance industry has skyrocketed in both prominence and size.<sup>30</sup> Publicly held companies routinely hire and promote chief compliance officers, conduct sophisticated internal corporate investigations and audits, publish and revise detailed codes of conduct, and eagerly participate in compliance-oriented trade organizations. At the same time, white-collar attorneys within top law firms now command sums from corporate defendants previously unheard of.<sup>31</sup> The DPA process may well fall short of its law enforcement potential, but it is impossible to ignore the extent to which compliance has become a growth industry in corporate circles, commanding significant resources and respect. If the corporate compliance industry is nothing more than a window-dressing sham, then an awfully large number of people appear to be participating in and paying for this sham.

Second, not all empiricists agree with the claim that DPAs have encouraged prosecutors to forgo corporate indictments. The DPA is by nature a compromise; it can replace the harsher process accompanied by an indictment and guilty plea, or it can serve as an alternative to declination, whereby the prosecutor declines any action whatsoever. A recently published study

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27. This is particularly the case when a compliance-related "victory" pertains to a decision to structure a unit or program in some manner that makes crime less tempting or possible. See generally Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 153–54 (2014) (discussing the difficulties inherent in verifying and validating structural compliance measures).

28. See Markoff, *supra* note 9, at 806 (setting forth claim that DPAs emerged primarily as a response to Arthur Andersen's demise); O'Sullivan, *supra* note 16, at 35 (citing Andersen prosecution as one of the "principal factors" in Department's shift to DPAs).

29. See White, *supra* note 5.

30. See, e.g., GEOFFREY PARSONS MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 168–69 (2014).

31. See Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1263–73 (2011).



analyzing DPAs, NPAs, and guilty plea agreements between 1997 and 2011<sup>32</sup> strongly refutes the portrayal of the DPA as a tool of government retrenchment. According to economist Cindy Alexander and Professor Cohen, who reviewed over 486 agreements, DPAs and NPAs did not replace traditional plea agreements during the time period they studied; to the contrary, the number of traditional plea agreements with corporate defendants remained steady while DPAs and NPAs grew in popularity. Accordingly, Alexander and Cohen conclude, the DPA and NPA have effectively “expand[ed] the reach of criminal enforcement.”<sup>33</sup>

Alexander and Cohen are not the only scholars to find some cause for optimism in the extant data on corporate-crime enforcement.<sup>34</sup> In another paper, Professors Kaal and Lacine reviewed 271 DPAs and NPAs implemented between 1993 and 2013.<sup>35</sup> Like Garrett, they too attempt to determine how often these agreements require corporations to alter their business practices, an apparently more intrusive and lasting reform than the simple promise to beef up one’s compliance program and refrain from future crime. Whereas Garrett finds that only 9 percent of the agreements he reviewed include those terms (p. 72), Kaal and Lacine report that nearly 30 percent of their dataset features changes in business practices.<sup>36</sup> How do we explain this difference? For one thing, the authors worked with overlapping but distinct datasets.<sup>37</sup> Moreover, Garrett’s definition of “business change” may be more exacting than Kaal and Lacine’s.<sup>38</sup> Nevertheless, the difference in tone is striking. Whereas Garrett views DPA-induced reform as largely the “exception, not the rule” (p. 80), Kaal and Lacine conclude that DPAs have

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32. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 540 (2015) (reporting results of study seeking to identify and analyze “all NPAs, DPAs and plea agreements entered into by public corporations between 1997 and 2011”).

33. *Id.* at 572–73. Garrett contends that corporate convictions began to decline after 2003, although it is unclear if he means this decline to refer to all publicly held corporations or a subset group of “large” corporations. P. 64. In any event, as Garrett admits, we have no way of knowing how often prosecutors declined prosecution altogether either before or after the advent of deferred prosecution agreements. Pp. 291–92.

34. Concededly, each study examines different but overlapping data. Compare Alexander & Cohen, *supra* note 32, at 540 (examining 157 NPAs and DPAs and 329 plea agreements executed between 1997 and 2011), with Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61, 84 (2014/2015) (analyzing all publicly available DPAs and NPAs executed between 1993 and 2013).

35. Kaal & Lacine, *supra* note 34, at 84.

36. *Id.* at 94.

37. Kaal and Lacine coded all publicly available DPAs and NPAs executed between 1993 and 2013. *Id.* at 84. Garrett’s governance-related analysis focuses primarily on 255 DPAs and NPAs executed between 2001 and 2012. Pp. 47–48.

38. Kaal and Lacine contend that business changes *could* “require the respective entity to fundamentally change its business model or shut down entire business units,” *id.* at 112, but their coding practice includes “all instances in which the N/DPA changed the nature or scope of the respective business practices of the entity.” *Id.* at 94.

already fueled significant corporate reforms and have the capacity to “facilitate dynamic and anticipatory forms of regulation” in the future.<sup>39</sup>

I do not mean to suggest that Kaal and Lacine’s rosier analysis is the one we should embrace. The datasets differ far too much to tell us conclusively how well DPAs have fared in changing corporate practices. Nevertheless, as new empirical work mines this subject, observers may find themselves pleasantly surprised. At the very least, they may have reason to revisit the contention that the DOJ has been too easy on corporate offenders.

### B. *Predicting the Future*

Even if one views the status quo with less concern than Garrett, one nevertheless may concur in his assessment that the current process leaves much room for improvement. Thus, it is helpful to turn to Garrett’s reform proposals—which replace DPAs with indictments and extensive reform obligations backed by judicial orders and judge-placed monitors—and inquire whether they do any better.

#### 1. Deterrence

As I have argued elsewhere, it is extremely difficult to predict how well Garrett’s program of indictments and court decrees will reduce the incidence of corporate crime.<sup>40</sup> Deterrence is an elusive outcome whose underlying mechanisms are notoriously difficult to harness.<sup>41</sup> Superficially, the analysis seems simple enough: criminals are deterred when the costs of their behavior outweigh the benefits.<sup>42</sup> “Costs” are represented primarily by the

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39. *Id.* at 117.

40. See Miriam H. Baer, *Book Review: Too Big to Jail: How Prosecutors Compromise With Corporations*, CRIM. L. & CRIM. JUST. BOOKS (May 2015), <http://cljbooks.rutgers.edu/books/too-big-to-jail.html> [<http://perma.cc/UUY4-RHDT>]. For further discussions of problems relating to deterrence, see generally Miriam H. Baer, *Evaluating the Consequences of Calibrated Sentencing: A Response to Professor Kolber*, 109 COLUM. L. REV. SIDEBAR 11, 20 (2009). See also *id.* (“[I]t is not at all clear that uncalibrated punishment leads to ‘massively inaccurate’ deterrence.” (footnote omitted)); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953–56 (2003) (laying out reasons for doubting deterrence as a justification for punishment).

41. See generally Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2386 (1997) (“[T]he deterrence question is more difficult than many of us have assumed[,] and . . . criminalization can create unintended, and sometimes perverse, incentives.”).

42. See CESARE BECCARIA, *On Crimes and Punishments*, in ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 21 (Richard Bellamy ed., Richard Davies et al. trans., Cambridge Univ. Press 1995) (1764) (“If an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so.”); JEREMY BENTHAM, *THEORY OF LEGISLATION* 72–74 (R. Hildreth trans., Weeks, Jordan & Co. 1840) (1802); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968) (“Some persons become ‘criminals,’ therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ.”).

criminal sanction, modified by its probability of occurrence.<sup>43</sup> In the corporate context, deterrence becomes a bit trickier; to encourage self-policing, corporations must receive some credit for monitoring and promptly reporting wrongdoing to authorities.<sup>44</sup>

A social planner can increase a criminal offender's expected costs by increasing sanctions or by improving the probability that sanctions will ensue. Criminals respond more readily to the latter than the former.<sup>45</sup> That being said, the response to an increase in the expected value of punishment is not necessarily compliance. Would-be offenders faced with the possibility of detection or greater punishment may respond either by substituting one crime for another<sup>46</sup> or engaging in detection avoidance.<sup>47</sup>

The foregoing discussion illuminates the challenges for Garrett's reforms. Rather than deterring misconduct, a pumped-up enforcement regime might induce corporate employees to evade detection.<sup>48</sup> This may be particularly the case for those who are already engaged in fraud or bribery, since they cannot terminate their misconduct easily without drawing attention to previous illegal activity.<sup>49</sup> Accordingly, even if the corporation fears an aggressive district court's harsher sentence, and in response deploys heightened efforts to investigate internal misconduct, its employees may well respond by destroying evidence or deliberately misleading corporate and

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43. Becker, *supra* note 42, at 176–77.

44. See generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 694 (1997) (advancing argument for “mixed liability” regime that takes into account the firm’s monitoring and reporting of wrongdoing to authorities); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (examining problems with strict-liability regimes for corporate crime).

45. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, in 42 CRIME AND JUSTICE IN AMERICA, 1975–2025, at 199 (Michael Tonry ed., 2013) (concluding that probability of detection most affects deterrence); Daniel S. Nagin & Greg Pogarsky, *An Experimental Investigation of Deterrence: Cheating, Self-Serving Bias, and Impulsivity*, 41 CRIMINOLOGY 167, 178 (2003) (reporting results of cheating experiment indicating certainty outweighs severity of punishment). For an overview of the deterrence literature, see Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998).

46. Katyal, *supra* note 41, at 2391–95.

47. Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006) (articulating theory of detection avoidance). Sanchirico’s account builds on Arun S. Malik’s foundational piece, *Avoidance, Screening and Optimum Enforcement*, 21 RAND J. ECON. 341 (1990).

48. See Miriam H. Baer, *When the Corporation Investigates Itself*, in HANDBOOK OF FINANCIAL CRIME AND MISDEALING (Jennifer Arlen ed., forthcoming 2016) (draft manuscript on file with author); Alex Raskolnikov, *Irredeemably Inefficient Acts: A Threat to Markets, Firms, and the Fisc*, 102 GEO. L.J. 1133, 1136 (2014) (describing “resistance costs” as the costs that ensue when criminals attempt to avoid detection and punishment); Sanchirico, *supra* note 47, at 1337 (explaining how sanctioning a given activity “encourages those who still commit the violation to expend additional resources avoiding detection”).

49. I articulate this argument more fully in Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1297–99 (2008), where I explain the deterrence challenges for “mid-fraud perpetrators” who cannot easily terminate their current or future misconduct without also increasing the likelihood of detection of their previous misconduct.

government investigators.<sup>50</sup> Accordingly, Garrett's newly invigorated prosecutors ironically may find themselves *worse* off insofar as they encounter increased difficulty securing evidence of wrongdoing.

## 2. Retribution

Notwithstanding the foregoing, one might nevertheless embrace Garrett's vision for its retributive effects, particularly with regard to corporate criminal fines, which he contends are underutilized.<sup>51</sup> To reach this conclusion, however, one must propose a coherent and consistent definition of desert applicable to corporate entities. Not only do scholars vigorously disagree on the propriety of "blaming" a corporation,<sup>52</sup> but laypeople also apparently experience difficulties in evaluating the corporate entity's blameworthiness.<sup>53</sup>

Even as applied to individuals, retribution is remarkably elastic.<sup>54</sup> We may agree generally that moral desert justifies punishment (roughly speaking, retributivism<sup>55</sup>), or that individual punishments ought to track

50. See *supra* note 48.

51. Pp. 67–70. One might also reject the DPA because of its so-called expressive effects. For an argument along these lines, see Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (2012). Expressive theories of punishment revolve around the messages a given enforcement action sends, whereas retributive theories focus solely on the actor's moral desert. See Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 929 (2010) (explaining that the state's communication of condemnation to the offender "is distinct from the . . . government's 'expression' of messages . . . to an undefined public at large").

52. The debate, which Garrett's book references, has raged for quite some time. See pp. 268–70. For a sampling, see generally Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991), which articulates an argument for punishing organizations that foster crime-inducing cultures. See also generally Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL'Y 15, 24–25 (2010); Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, 60 HARV. BUS. REV. 132 (1982); Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 123 (2010) (arguing for retribution's restoration "as a goal of organizational criminal liability"). For arguments that entity-level retribution is incoherent, see Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009), and also Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411 (2012), which defends corporate criminal liability but agrees that organizations cannot properly be "blamed" as entities.

53. Summarizing several studies and one of their own, psychologists Tom Tyler and Avital Mentovich conclude: "people have trouble putting organizational conduct into the person-focused models through which culpability and punishment are typically evaluated." Tom R. Tyler & Avital Mentovich, *Punishing Collective Entities*, 19 J.L. & POL'Y 203, 228 (2010).

54. See Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 741 (2009) ("[T]he concept of desert is sufficiently elastic that almost any existing sanction can plausibly be defended as deserved.").

55. Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25, 28–29 (Mark D. White ed., 2011).

individual cases of desert (what we commonly call proportionality<sup>56</sup>), but we have yet to devise a foolproof device for determining how much Punishment Y should normatively attach to persons (much less organizations) engaging in Conduct X.

In the midst of these disagreements, it seems quite likely that *some* judges would impose punishments that Garrett and like-minded supporters would perceive as well deserved, while others would just as easily impose fines or similar sanctions that fall below this standard. (One of the villains in Garrett's book, incidentally, is a federal judge who fails to adequately sentence a corporate subsidiary for its FCPA violations (pp. 166–68)). Even if one shares Garrett's premise that corporations and their high-level employees have unjustly benefited from prosecutorial weakness, it is difficult to ignore corporate desert's amorphous nature, much less the point that corporate shareholders and employees often pay corporate crime's enormous bill.<sup>57</sup> In sum, Garrett's model may well promote a harsher sentencing regime, but it is far from clear that it promotes one that is particularly attuned to our collective intuitions of moral desert.

### 3. Transparency

Garrett's least assailable criticism of DPAs and corporate prosecutions in general is his contention that prosecutors target corporate offenders in a manner that is "strikingly opaque" (p. 16). Much of the decisionmaking that matters most to observers of corporate crime takes place far from the courtroom, in conference rooms and over telephone calls between corporate defense attorneys and prosecutors and, where circumstances warrant, high-level DOJ officials (pp. 254, 261).

Given the foregoing, one must laud Garrett's proposal to indict more and defer less as an unabashed improvement. Criminal indictments are generally public knowledge, as are court decrees and settlements.<sup>58</sup> Garrett's reforms render corporate prosecutions more open to the public, more easily assessed by researchers, and therefore, more accountable to criticism.

Then again, the transparency gains under Garrett's model are necessarily limited.<sup>59</sup> In a world in which guilty pleas are the norm and trials the

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56. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3094 (2015).

57. Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 *J.L. & POL'Y* 1, 7–8 (2010).

58. See, e.g., Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards A New Role for Internet Access to Court Records*, 62 *VAND. L. REV.* 921, 923 (2009) ("Federal court records have always been open to public inspection . . .").

59. On transparency's shortfalls throughout the criminal justice system, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. REV.* 911, 912 (2006) (observing that prosecutors and defense counsel "reach many [charging and sentencing decisions] in private negotiating rooms and conference calls" and that "in-court proceedings are mere formalities that confirm these decisions").

exception,<sup>60</sup> we can safely assume that most corporate defendants will opt for guilty pleas over potentially lengthy and embarrassing trials. Guilty pleas, even when accompanied by fulsome admissions of guilt, convey far less information than trial testimony. Still, one ought to take one's victories where one finds them. If prosecutors are forced to say, on the record, why they are seeking a particular remedy; corporate offenders are forced to admit the scope of their wrongdoing and the reasons certain remedies should not apply; and courts are obligated to explain, to the defendant and the general public, the reasons for imposing a given set of reforms as part of the corporate offender's sentence, then surely Garrett's reform has moved the ball forward in ways more significant and binding than alternative proposals.<sup>61</sup>

## II. WEIGHTIER IMPLICATIONS

As I suggest in Part I, there are reasons to question Garrett's critique and how well his proposed reforms improve deterrence, retribution, and transparency. Then again, one might reasonably respond that incremental, uncertain advances are better than nothing at all. If public policy improvements arise out of experimentation and innovation, then Garrett has contributed to this literature by constructing a coherent and detailed alternative to a process that continuously invites demands for revision and reform.<sup>62</sup>

In this Part, I explore a different set of concerns. Garrett envisions a world in which judges (or judge-placed monitors) issue mandates aimed at improving corporate governance practices and rehabilitating criminogenic cultures. His model thus imagines an aggressive and ongoing intrusion spearheaded by the judiciary into the corporate offender's business and internal governance affairs.

The centerpiece of Garrett's reform package is judge-directed corporate rehabilitation—what I refer to here as “corporate institutional reform” or “CIR” for short. CIR self-consciously draws on the civil-rights reform

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60. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) (observing that plea bargains are no longer the exception but rather the norm). On the dearth of trials in the corporate context, as well as an assessment of why corporate offenders might choose otherwise, see generally F. Joseph Warin & Julie Rapoport Schenker, *Refusing to Settle: Why Public Companies Go to Trial in Federal Criminal Cases*, 52 AM. CRIM. L. REV. 517 (2015).

61. Lawrence Cunningham has proposed a scheme that would require prosecutors to publicize the reasons they chose a DPA over other alternatives. Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 50–56 (2014) (setting forth approach that would encourage prosecutors to consider corporate governance arrangements while also requiring them to articulate the reasons underlying their DPA agreements).

62. Cf. Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008) (arguing that policymakers should be more willing to adopt policies that promise uncertain outcomes, assuming such policies can be reversed in later periods).

model<sup>63</sup> that has long been the subject of robust debate.<sup>64</sup> Like the civil rights consent decrees designed to ensure public institutions' compliance with a host of federal and constitutional obligations, Garrett would have district courts devise and preside over internal corporate reforms designed to quell disparate violations of law.<sup>65</sup>

Distinct from the feasibility concerns raised in Part I, CIR triggers a series of weighty theoretical concerns, which I group for clarity into three categories. First, it magnifies corporate criminal liability's weaknesses under criminal law's legality principle. Second, with respect to the breadth and types of reforms Garrett envisions, it provokes challenges reminiscent of those raised by the indeterminate sentencing and institutional reform literatures. Finally, insofar as CIR places its power in federal judges, it implicitly downplays state courts' practical and normative influence over corporate actors.

I discuss each of these issues in turn.

#### A. Legality

The venerable legality principle commands the state to specify in advance which behaviors are forbidden and which punishments generally may ensue when individuals engage in such behavior. "In its modern form," Professor Robinson explains, "it means that criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition that is expressed with adequate precision and clarity."<sup>66</sup> The principle is not a single rule, but rather "a legal concept embodied in a series of legal doctrines."<sup>67</sup> The legality principle eschews not only retroactive criminal law, but also judge-made law.<sup>68</sup>

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63. "Institutional reform cases are paradigmatic exercises of judicial power in the public sphere and have been for the last half-century." David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1018–21 (2004) (describing the number and type of local and federal government institutions that "were sued for constitutional and federal statutory violations" and "came under the dominion of injunctions and consent decrees").

64. For an overview of the debate, see John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1410–15 (2007) (contextualizing scholarly critique in light of structural reform's evolution); Zaring, *supra* note 63, at 1018–37 (summarizing and analyzing arguments).

65. "When regulators or prosecutors seek a civil consent decree to reform an institution, they must do it in court, with notice and a chance for the public to participate, and where the judge must explicitly consider the public interest. The same standards should govern corporate prosecutions." P. 282. *See also* pp. 17, 282–84, 286.

66. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005).

67. *Id.*

68. "It is condemned because it is retroactive and also because it is judicial—that is, accomplished by an institution not recognized as politically competent to define crime." John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985).

Ostensibly, corporate criminal liability adheres to these doctrines. Scholars commonly trace the *respondeat superior* liability rule back to the Supreme Court's 1909 decision in *New York Central and Hudson River Railroad Co. v. United States*.<sup>69</sup> The federal code now defines the corporation—along with other forms of business associations—as a “person” except in those instances in which the statutory context suggests otherwise.<sup>70</sup> Together, *New York Central's* *respondeat superior* rule and the code's definitional provision render the corporation criminally liable for many of its employees' crimes, provided those employees commit the crimes while acting within the scope of their employment and with a partial purpose of benefiting the corporation.<sup>71</sup> Given *New York Central's* longevity, one might conclude that corporate criminal liability's contours are well established and that corporate officers have had more than sufficient opportunity to discern them.

The calculus changes, however, when we conceptualize corporate criminal liability not as a vicarious assessment of guilt for an employee's transgression of codified law, but instead as society's separate and distinct condemnation of the corporation as an entity.<sup>72</sup> As any recently issued DOJ press release amply demonstrates, prosecutors view the DPA process as a vehicle for communicating the government's condemnation of the *corporation's* behavior: the *corporation* fostered a bad culture; the *corporation* misled or failed to cooperate with government investigators; *the corporation* spent insufficient resources on its compliance program, and so forth.<sup>73</sup> Statements such as these overwhelmingly support Professor Buell's claim that criminal liability fulfills an important “blaming function.”<sup>74</sup>

It is this second type of liability, the *real* crime underlying the corporation's DPA (or heaven forbid, guilty plea) that has yet to be fleshed out sufficiently by statute. Years ago, before the DPA emerged as a viable alternative to indictments and declinations, several district courts appeared poised

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69. 212 U.S. 481, 492–97 (1909).

70. 1 U.S.C. § 1 (2012).

71. Irina Kotchach Bleustein et al., *Corporate Criminal Liability*, 52 AM. CRIM. L. REV. 851, 853–58 (2015) (cataloging legal authorities for each of *respondeat superior's* elements). Congress has further codified corporate criminal liability by defining an “organization” as any “person” who is not an individual. 18 U.S.C. § 18 (2012).

72. A number of scholars have attempted to theorize alternative theories of direct liability. See, e.g., Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 526–34 (2006) (exploring alternatives to *respondeat superior* that better serve criminal liability's “blaming function”); Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 655–661 (2000) (analyzing theories of direct liability).

73. See, e.g., Press Release, Dep't of Justice, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with \$900 Million Forfeiture (Sept. 17, 2015), <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred> [<http://perma.cc/J9K4-2LRK>] (describing ways in which General Motors “misled” investigators, “actively concealed the truth” from the public).

74. Buell, *supra* note 72.



to articulate a theory of direct corporate criminal liability.<sup>75</sup> Had they done so, they arguably would have violated the maxim that there exists no such thing as federal criminal common law.<sup>76</sup> But this movement toward a judicially articulated theory of direct corporate liability is in the past, and if there exists a separate crime of promoting criminal behavior within one's organization, Congress has yet to articulate its elements or boundaries.<sup>77</sup>

Now, one might respond that none of this is particularly new, that the government frequently charges offenders with one crime while intending to punish them with another,<sup>78</sup> and that much of the foregoing critique relates more to enforcement risk than liability. The legality principle guarantees only that laws will be formally announced beforehand; it extends no knowledge rights with regard to how often or aggressively the government will enforce those laws.<sup>79</sup> Anyone who has driven her car at a speed above the posted limit well understands this fact.

Then again, the penalty for speeding is usually a fine. Garrett's remedial scheme envisions far more serious consequences, imposing longer and more extensive reforms on a wider array of corporate entities. CIR magnifies corporate criminal law's legality problem because it vastly increases criminal law's stakes. I discuss just how high those stakes might be in greater detail below.

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75. For a discussion of this alternate theory of corporate criminal liability, see RICHARD S. GRUNER, *CORPORATE CRIMINAL LIABILITY AND PREVENTION* § 3.03[4][a], at 3–18 (2004), who describes, as an alternative to *respondeat superior*, corporate liability “as a consequence of the failure of corporations to satisfy a nondelegable corporate duty to comply with applicable laws in carrying out corporate activities” (footnote omitted). The nondelegable duty standard of liability bears some resemblance to the so-called compliance defense that a number of contemporary scholars have championed. See Peter J. Henning, *Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 904–14 (2012) (comparing variations of the compliance defense).

76. Whether the bar on federal criminal common law actually exists is subject to debate. See Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193 (2002) (describing rule and ways in which courts have evaded it). For a thoughtful discussion on its aspirational qualities and practical constraints, see Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1826–28.

77. Concededly, this is not always the case. The Bank Secrecy Act of 1970 criminalizes a financial institution's willful failure to implement an anti-money laundering compliance program. See 15 U.S.C. § 5318(h) (2012) (setting forth basic compliance requirements); 31 U.S.C. § 5322 (2012) (establishing criminal penalties).

78. For the classic critique of pretextual prosecutions, see Daniel C. Richman and William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005). One difference between Richman and Stuntz's treatment and my own is that their discussion focuses on the prosecutor's substitution of one crime (for example, tax evasion) for another (murder). In the corporate context, the pretext (*respondeat superior*) means their punishment is in fact premised on a theory of direct liability that Congress has yet to formally acknowledge.

79. As Justice Holmes pragmatically observed, “the law is full of instances where a man's fate depends on his estimating rightly . . . . If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.” *Nash v. United States*, 229 U.S. 373, 377 (1913).

## B. Remedial Overreach

The most interesting part of Garrett's proposal is his rehabilitative claim. Garrett believes corporate cultures require far more extensive intervention than most DPAs require (p. 15). To fix this problem, he self-consciously borrows from the civil rights institutional-reform context (p. 7), thereby creating a CIR regime. Like its civil-rights cousin, CIR lodges quite a bit of power with the federal district court judge. To assess just how much power, I employ two lenses: indeterminate sentencing and civil rights litigation.

### 1. Indeterminate Sentencing

Criminal justice institutions can elect one of two types of punishment systems. Determinate sentencing systems announce, *ex ante*, the amount or range of punishments to be applied to a given set of offenders and under a given set of circumstances. Some of these announcements are mandatory and generated by the legislature (for example, so-called "three strikes" and mandatory-minimum laws), while others are advisory and delegated to agencies tasked with devising complicated guideline schemes. Determinate sentencing schemes encroach on judicial power insofar as they limit the menu of punishment choices available to the sentencing judge.<sup>80</sup>

An indeterminate scheme enables the court to tailor its sentence to reflect a particular defendant's situation. When the primary punishment is imprisonment, judges may choose from a wide range of options, restrained only by some legislative maximum.<sup>81</sup> More relevant to readers of this Review, indeterminate schemes have evolved to include a class of interventions distinct from imprisonment, often indeterminate in duration, and ostensibly designed to prevent the repetition of certain types of misconduct, such as illegal drug use or sexual molestation. These schemes are often referred to—derogatorily or not—as "risk assessment" or "risk management" sentencing regimes.<sup>82</sup>

On the surface, risk-management schemes targeted at drug addicts and sex offenders bear little resemblance to the reforms Garrett seeks to impose

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80. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING* 5–6 (1998).

81. Prior to his untimely death, Professor Markel criticized the classical indeterminate scheme as immoral and unconstitutional, in part because it promoted arbitrary differences in sentences. Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 116 (2012) (criticizing courts' "virtually unfettered discretion regarding the punishment or release of offenders within their jurisdiction, so long as the ultimate sentence lies somewhere within the extremely broad band of punishment authorized by the legislature").

82. E.g., Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1129 (2011). For recent assessments, see Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L.J. 1 (2015) [hereinafter Hamilton, *Adventures in Risk*], Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015), and John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT'G REP. 158 (2014).

on corporate offenders. Risk management schemes target individual offenders far less powerful or wealthy than the average corporate offender, and they provoke criticism precisely because they threaten the individual defendant's liberty interests.<sup>83</sup> CIR, by contrast, imposes limitations primarily on how corporations conduct business and make money.

Despite these differences, the indeterminate sentencing analogy is instructive. The basic component of an indeterminate sentencing scheme is its restriction of one set of behaviors to prevent some *other* set of behaviors. As Professor Slobogin explains, the state is animated by "predictive conduct," or conduct that predicts a certain type of unwanted behavior, and "object conduct" which is the unwanted behavior.<sup>84</sup> Although predictive and object conduct can be "of the same type" (for example, one type of fraud predicts a second type of fraud), they can also be different; indeed, in some cases, the predictive conduct may not even be a crime.<sup>85</sup> From this perspective, indeterminate sentencing bears an uncanny resemblance to CIR: each model relies on Behavior X to predict Future Crime Y and then responds by imposing on the criminal offender a sentence that severely limits or prohibits Behavior X, even when Behavior X is otherwise legal.

Risk-based sentencing draws criticism when courts misinterpret or fail to document sufficiently a nexus between predictive and object conduct.<sup>86</sup> Although Slobogin is not completely opposed to such programs, he advances a number of principles to shore up their efficacy and legitimacy.<sup>87</sup> These include the state's obligation to: (a) "prove a probability and magnitude of risk proportionate to the duration and nature of the contemplated intervention";<sup>88</sup> (b) "adopt the least invasive means of accomplishing its preventive goals";<sup>89</sup> (c) and finally, adhere to the legality principle by articulating in advance, and "preferably through legislation," the predictive conduct justifying government intervention.<sup>90</sup>

Consider the multiple problems that ensue when one tries to apply Slobogin's very reasonable principles of proportionality, parsimony, and legality to CIR. At a minimum, even a streamlined version of Slobogin's framework requires either Congress or an administrative agency to define in

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83. *E.g.*, Hamilton, *Adventures in Risk*, *supra* note 82, at 3, 49.

84. Slobogin, *supra* note 82, at 1133–34.

85. *Id.*

86. *See, e.g.*, Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 215 (2013) (identifying potential race-based disparities in application of actuarial tools); Hamilton, *Adventures in Risk*, *supra* note 82, at 57–61 (voicing concerns with excessive reliance on questionable actuarial tools); Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671 (2015) (marshaling arguments against risk-based sentencing).

87. Slobogin, *supra* note 82, at 1129–30 ("[P]roperly constituted, indeterminate sentencing is both a morally defensible method of preventing crime and the optimal regime for doing so, at least for crimes against person and most other street crimes.").

88. *Id.* at 1131.

89. *Id.*

90. *Id.* at 1134 ("If the predictive conduct is not a crime, the government must adduce proof that it is imminently risky or the legality principle will be violated." (footnote omitted)).

advance “predictive” conduct for a given category of corporate offenders. Further, it requires the government to collect reliable *data* establishing the link between predictive conduct and the object crimes Garrett seeks to prevent. Finally, Slobogin’s framework would impose on judges the obligation of identifying the “least invasive” means by which to prevent “object conduct,” thereby creating maximal opportunities for corporate defense attorneys to challenge a given remedy as excessive or unnecessary.

In sum, if we apply even a modified version of Slobogin’s framework to CIR, Garrett’s buoyant reform regime quickly takes on water.<sup>91</sup> Surely, this is not the result Garrett intends or desires.

Of course, one might respond that Slobogin’s principles have no place in the corporate context, and that the restraints Slobogin articulates are intended solely to protect individual liberties. But this merely opens a new can of worms. Why would we relax the legality principle for some defendants but not others? Why would we require scientifically reliable data justifying judicial interventions in the lives of individuals but not within corporations? Even if one takes the view that organizational “rights” are wholly derivative of the people who populate them,<sup>92</sup> the idea of applying a “risk assessment” regime minus the restraint and rigor we believe necessary for individuals is a troubling one.

## 2. Institutional Reform Litigation

The alternative model for understanding CIR is the one Garrett self-consciously invokes in his book: structurally oriented civil rights litigation (pp. 176–77). As a former civil rights lawyer, Garrett has more experience with this model than many of us, and one can easily see why he draws parallels between the two models. Nevertheless, the comparison provokes a number of questions.

First, and perhaps most obvious, is the distinction between the underlying harms motivating the respective reforms. Corporate greed and risk-taking, the supposed ills most responsible for criminal conduct, differ distinctly in degree and kind from the bigotry that has fueled the movement for structural reform within municipal institutions.<sup>93</sup> However much we welcome the

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91. For an argument that the prosecutor’s *current* power to impose such mandates violates the rule of law, see Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements* (N.Y.U. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 15-10, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2609111](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609111) [<http://perma.cc/XFU9-S2VC>]. Garrett’s proposal, which delegates power to both prosecutors and federal judges, appears to solve some of the separation-of-powers issues cited by Arlen.

92. See, e.g., Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678 (2015) (arguing that the Supreme Court historically “granted constitutional rights to corporations to derivatively protect the rights of the natural persons that [we]re assumed to be represented by [or interacting with] the corporation”).

93. See, e.g., Zaring, *supra* note 63, at 1018–21 (tracing institutional reform’s roots back to the Supreme Court’s decision in *Brown v. Board of Education* and other iconic civil-rights

judiciary's interference in policing and education to ensure access to fundamental rights and liberties, we may register less enthusiasm when the federal judiciary turns its attention to internal business affairs of for-profit businesses.<sup>94</sup>

Second, CIR's proponents might consider the civil rights model as a potential warning for what might occur in the corporate context.<sup>95</sup> Following a period of extended critique that federal judges had "usurp[ed] the policy-making function of elected officials"<sup>96</sup> institutional-reform-litigation reform gradually changed. Judicial consent decrees became "narrower and more focused."<sup>97</sup> Top-down mandates yielded to negotiated agreements,<sup>98</sup> and litigants were required to generate a "heavier investment in demonstrating causal links between challenged conditions and constitutional violations."<sup>99</sup> As the decrees grew narrower and more grounded, civil rights reform litigation "stabilized as a form of litigation with a range of generally accepted remedies adopted in a few leading cases and imitated elsewhere."<sup>100</sup>

What lessons can corporate-crime scholars draw from this backstory, assuming one accepts it as accurate? One may say that it demonstrates the consent decree's continuing vitality and utility as a means of generating lasting organizational reform. One might just as easily conclude, however, that it alerts us to the many challenges awaiting federal judges should CIR become the rule and DPAs the exception.

In his first analysis of DPAs published in 2007, *Structural Reform Prosecution*, Garrett praised the DPA process precisely because it avoided the civil rights model's democratic challenges:

[S]tructural reform by prosecutors in the criminal law setting should be far less troubling than civil structural reform before a judicial decisionmaker. The chief criticism raised in civil structural reform was that unaccountable

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decisions). "[S]tructural reform injunctions . . . owe their birth to *Brown v. Board of Education* . . ." Jeffries & Rutherglen, *supra* note 64, at 1408.

94. The judiciary's interference in prisons, school districts, and other public institutions has of course triggered voluminous debate. For an overview, see, for example, Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1995–96 (1999), which surveys the commentary regarding prison-reform litigation. See also Zaring, *supra* note 63, at 1022–37 (contrasting major rules of thought).

95. Garrett himself briefly mentions this in his piece. P. 177.

96. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 9 (2003).

97. Jeffries & Rutherglen, *supra* note 64, at 1411.

98. William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 93 (2015) (noting that for more recent cases, "once liability is conceded or found by the court, the remedial regime is negotiated by the parties").

99. Jeffries & Rutherglen, *supra* note 64, at 1411. As Garrett himself has previously observed: "Critics of civil interventions typically called, not for an end to reform, but for stricter and principled limits to judicial discretion. In turn, civil courts fashioned such remedial limits." Garrett, *Structural Reform Prosecution*, *supra* note 9, at 921.

100. Jeffries & Rutherglen, *supra* note 64, at 1412.

private parties sought to reform institutions under the aegis of unaccountable courts. . . . Structural reform prosecutions answer those criticisms. . . . Prosecutors are executive actors and politically accountable.<sup>101</sup>

Since then, Garrett's cautious optimism has largely evaporated, leaving him increasingly "troubled" by the DPA process (p. 47). Prosecutors compromise too much; hence, Garrett's turn to indictments, sentencing decrees, and judicially placed monitors. But this just gets us back to square one: by transferring power from the minimally responsive federal prosecutor to the tenured-for-life, Article III judge, Garrett renders his proposal vulnerable to the very complaints he explored in his 2007 article.<sup>102</sup>

Perhaps CIR would withstand these complaints, emerging leaner and more effective, just like its civil rights cousin. But it is just as possible that it would collapse under the weight of opposition—which could be quite considerable, given the well of resources available to corporations and their lobbyists. Whatever its outcome, the sideshow itself could detract mightily from the venerable goal of reducing corporate crime. As scholars such as Professor Tyler have long understood, procedural legitimacy goes a long way toward securing organizational compliance.<sup>103</sup> To secure such legitimacy in the corporate context, Garrett might consider shifting his gaze in the direction of a different sovereign.

### C. Corporate Federalism

If there is any gap in Garrett's otherwise thorough examination of corporate crime, it is his reticence to consider state law's possible role in reducing or aggravating the factors that produce corporate crime. Corporate law remains very much the product of state statutes and common law judicial opinions.<sup>104</sup> Delaware occupies a preeminent perch within this world, owing to its popularity for incorporations and the development of a specialized

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101. Garrett, *Structural Reform Prosecution*, *supra* note 9, at 920 (footnote omitted).

102. For a discussion of the ways in which Congress renders federal prosecutors and enforcement agencies responsive to the people's will (or to a congressional committee chair's will, depending on how one views things), see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. REV.* 757, 789–805 (1999), for a description of various tools of "influence" and "control."

103. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (laying out procedural-justice theory of compliance). For Tyler's application of the theory in the corporate context, see Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 *BROOK. L. REV.* 1287 (2005).

104. Delaware's corporate law is particularly dependent on what Professors Kahan and Rock refer to as "a classical or 19th century common law model of lawmaking" whereby judicial opinions incrementally shape law through legal opinions resolving individual cases. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 *VAND. L. REV.* 1573, 1576 (2005).

chancery court whose jurists are well respected for their knowledge and understanding of corporate law.<sup>105</sup>

Although Delaware's judiciary plays no direct role in enforcing federal criminal law, its doctrines greatly determine the governance structures that corporate actors are most likely to adopt, and these structures, in turn, play an important role in either restraining or encouraging corporate crime. For example, the business-judgment rule effectively precludes judicial oversight of risky behavior.<sup>106</sup> This might be an unobjectionable outcome in and of itself, but it contributes to the incidence of corporate crime when there exists a connection between excessive risk taking and one's willingness to commit fraud and similar offenses.<sup>107</sup> At the same time, other doctrines collectively reduce the opportunity for manager-driven fraud, depending on how and when they apply. The fiduciary duty of loyalty,<sup>108</sup> the obligation under *Caremark* to ensure in good faith that the company employs some system of internal controls,<sup>109</sup> and the various provisions enabling (or preventing) shareholders from filing derivative suits all play a role in supporting (or dismantling) the legal oversight infrastructure that keeps corporate managers and directors on the straight and narrow.<sup>110</sup>

Concededly, state corporate law is not the last word on corporate governance. Federal securities laws alter the balance of power by imposing disclosure obligations on publicly held corporations and by fielding an enforcement unit willing and able to bring legal and administrative actions

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105. *Id.* at 1605, 1609 (describing "wide respect" with which Delaware's Court of Chancery is viewed); see also Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708 (2002) (describing benefits of Delaware's judiciary).

106. Under the business judgment rule, "the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'" *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). It "precludes judicial second-guessing so long as the board's decision 'can be attributed to any rational business purpose.'" *In re MFW S'holders Litig.*, 67 A.3d 496, 526 (Del. Ch. 2013) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

107. This is particularly the case if risk taking either causes or correlates strongly with unethical behavior. "[E]thical slippage is often the precursor to what later becomes a violation of law . . ." Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1214 (2011) (explaining how relatively minor ethical violations develop into "sequentially bigger levels of cheating").

108. One of the more cited cases articulating this duty is a New York case: "The concept of loyalty, of constant, unqualified fidelity, has a definite and precise meaning. The fiduciary must subordinate his individual and private interests to his duty . . . whenever the two conflict." *Bayer v. Beran*, 49 N.Y.S.2d 2, 5 (Sup. Ct. 1944).

109. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996). For an overview and partial critique of *Caremark's* oversight-enhancing effect, see generally Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559 (2008).

110. On shareholder derivative suits, see Anne Tucker Nees, *Who's the Boss? Unmasking Oversight Liability Within the Corporate Power Puzzle*, 35 DEL. J. CORP. L. 199, 229-35 (2010).

against violators.<sup>111</sup> Theoretically, Congress could enhance the SEC's role in articulating internal governance norms, but barring some new scandal, that expansion seems quite unlikely. As Professors Kahan and Rock point out, scholars and politicians tend to hold state corporate law, particularly that of Delaware, in high regard.<sup>112</sup> Such esteem is useful: when Delaware jurists take a stand on one issue or another, the corporate bar listens.<sup>113</sup>

If Garrett's reform proposal casts federal prosecutors as weaklings and federal judges as untapped heroes, it more or less ignores state actors and state law, or perhaps assumes them to be impervious to change. Concededly, one cannot fault Garrett for focusing on federal judges given CIR's federal provenance: state judges, after all, do not enforce federal law, much less federal *criminal* law. Nevertheless, the singular focus on federal courts highlights CIR's limitations. State judges and legislatures possess far greater capacity to affect corporate governance *norms* than the individual Article III judge. If norms play as large a role as we presume in promoting compliance, then corporate-crime scholars might do well to turn their gazes away from Main Justice and the U.S. Attorneys' Offices, and instead focus their collective attention on the legal actors whose voices seem to count most with corporate officers and directors.

### III. DOING LESS, ENFORCING MORE

Although cohesive and attractive, Garrett's proposal triggers a number of practical and conceptual concerns. Some, such as the hesitations explored in Part I, reflect the ordinary difficulties that any public policy proposal faces. Others, such as those laid out in Part II, are more serious and ought to inspire some reluctance and soul-searching, even among those who share Garrett's concern that the federal government pervasively underenforces corporate crime.

None of this is to say that we should do *nothing*. The DPA process inspires unhealthy amounts of cynicism for the very reasons Garrett lays out so well in his book. Accordingly, how might one reform the DPA process yet also allay the misgivings raised in Part III?

Consider the following: first, imagine Congress enacted a set of laws narrowing and codifying the formal prohibitions that produce corporate criminal liability in the first place. If corporate criminal liability reflects society's view that a corporation deserves punishment because *it* (and not its

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111. It is, for this very reason, that Kahan and Rock describe the relationship between Delaware and federal authorities as symbiotic. See Kahan & Rock, *supra* note 104, at 1577–78, 1619–20. For an overview of the shareholder's governance powers and protections under federal law, see Arthur R. Pinto, *An Overview of United States Corporate Governance in Publicly Traded Corporations*, 58 AM. J. COMP. L. 257, 267–73 (2010).

112. Kahan & Rock, *supra* note 104, at 1587–88 (describing Congress's unwillingness to intrude on Delaware's area of expertise).

113. See Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016–17 (1997) (analogizing corporate law opinions to "sermons" which help establish norms among officers, directors, and corporate lawyers).



employees) did something (or failed to do something), then we ought to say, in a formal and binding way, just what that “it” is, and we ought to have that debate in the open, engaging as many stakeholders as we can.

By the same token, Congress could articulate, even in the broadest of terms, the factual predicates justifying certain types of corporate penalties. Purely discretionary, open-ended remedial sentencing does not shed its drawbacks when we apply it to corporations instead of individuals. If we believe remedial sentencing should be principled and informed by data, then we should lay down some firm rules in advance. To that end, Congress could enact a corporate rehabilitation statute that improves on the United States Sentencing Guidelines, whose guidance on forward-looking remedial interventions is, at best, imprecise.<sup>114</sup> Such a statute might distinguish between “ordinary” and “extraordinary” incidents of corporate guilty pleas, thus requiring the sentencing judge to justify more serious interventions, or to make explicit factual findings supporting such interventions. The idea here is not to stymie judicial oversight, but to improve its predictive and rehabilitative value.

All of the foregoing would, incidentally, create the more robust role for the judiciary that Garrett and his supporters seek. Instead of relying on its underused and vague “supervisory authority” to reject the occasional DPA, the court would be restored to its traditional role of interpreting statutes and filling interstitial gaps.<sup>115</sup>

Finally, to strengthen this scheme, we might also address the collateral costs that cause prosecutors and publicly held corporations to resort to extrajudicial agreements in the first place. Garrett is skeptical of collateral costs, but concedes their effect on certain types of regulated entities (pp. 59, 255). Accordingly, if we really desire prosecutors and corporations to abandon DPAs and seek indictments (not to mention trials), then we need to look more seriously at the administrative regulations that relate to government contracts and debarment, as well as the various licensing regimes that

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114. Chapter 8B.1’s Introductory Commentary provides only that sentencing courts should “take all appropriate steps” to repair or remove “the harm” threatened by a given offense. See e.g., U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 8B1 introductory cmt. (2015), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf> [<http://perma.cc/JK6A-C6TL>]. Other provisions are equally unhelpful. See e.g., *id.* § 8B1.2 (remedial orders); *id.* § 8B1.3 (community service); *id.* § 8D1.1 (probation).

Section 8D1.1 demonstrates the superficiality of the guidance that the Sentencing Guidelines currently provide. Sure enough, the section lists a number of conditions under which courts may impose a term of probation—including whenever such term is necessary to “ensure that changes are made within the organization” and “reduce the likelihood of future criminal misconduct.” *Id.* at (a)(6). But the section fails to articulate any constraints on the length or content of probation. Nor does it distinguish between different types of probation conditions, much less describe the types of evidence sufficient to support a court’s imposition of particularly costly or intrusive conditions. To that end, the commission’s probation section functions very much like a blank check.

115. “[S]eparation of powers does not mean that judges lack the capacity to ‘make law.’ In many situations, interstitial judicial lawmaking is both politically legitimate and institutionally unavoidable.” Jeffries, *supra* note 68, at 220.

pertain to banks, health care institutions, and other regulated corporate entities.<sup>116</sup>

The foregoing suggestions are sure to invoke just a bit of nausea in those who, like Garrett, fear that corporate America has benefited unjustly from excessively lenient treatment. The contention is more controversial than many critics care to admit; much of the behavior that produced the 2008 financial crisis, although irresponsible and risky, was not necessarily criminal fraud.<sup>117</sup> Nevertheless, those who subscribe to Garrett's thesis that corporate criminal liability has been underutilized would do well to consider that well known, if overused maxim: less is more.

If you want to condemn corporate offenders, encourage internal reform, and improve corporate culture, then perhaps you should do less. Enact narrower theories of corporate criminal liability; devise laws and guidelines that constrain prosecutorial *and* judicial discretion; and impose collateral consequences only in response to a predefined set of circumstances that are both rare and sufficiently serious enough to warrant a company's imminent demise.

Many of Garrett's supporters will reject these suggestions out of hand and with good reason. The approach I outline above relies on several leaps of faith: that narrower, democratically enacted criminal statutes encourage greater compliance; that prosecutors and judges, bound by more restrictive laws, robustly enforce the behavior that continues to fall within their purview; and that the many other institutions that regulate internal corporate governance stand ready and willing to fill the gaps created by a narrower federal criminal enforcement regime. Given the behavior that forms the narrative fabric of *Too Big to Jail*, one can hardly fault the reader who opts for Garrett's far more expansive agenda.

#### CONCLUSION

Corporate crime poses a tremendous challenge, which Garrett's book admirably conveys. As Garrett himself recognizes, corporations are fallible. So too are prosecutors and judges. There exists no mechanism guaranteed to compel compliance with the thousands of commands that make up the federal criminal code. The only guaranteed law-abiding corporation is the defunct one.

If nearly all publicly held corporations are bound to become corporate criminals in the technical sense, our legal system ought to have a better system defining *ex ante* which failures deserve condemnation and which ones do not. And our system ought to do a better job specifying the bases on which judges can and should intervene in and rearrange corporate affairs.

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116. On debarment, see John N. Gallo & Daniel M. Greenfield, *The Corporate Criminal Defendant's Illusory Right to Trial: A Proposal for Reform*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 525, 547 (2014) (arguing for revision of debarment rules).

117. See Richman, *supra* note 10, at 268.

Were we to take these steps, the structural reform model that Garrett envisions, in which prosecutors indict corporate offenders, judges impose a mix of punishments and reforms, and corporate actors learn from their mistakes, might eventually take shape in a manner that *Too Big to Jail*'s supporters and skeptics equally embrace.