

USING THE CORPORATE PROSECUTION AND SENTENCING MODEL FOR INDIVIDUALS: THE CASE FOR A UNIFIED FEDERAL APPROACH

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I

INTRODUCTION

A central puzzle of any criminal enforcement and punishment regime is balancing the need for ease of administration and equal treatment of similar cases with the desire to impose proportionate punishment based on the relevant facts about the crime and the person or entity who commits it. The more individualized enforcement and punishment becomes, the harder it is to administer because that kind of fact-finding takes time. And as the relevant set of factors to consider grows, it also becomes more difficult to get uniform judgments by prosecutors and judges about how to weigh the facts.

Decision-makers have different sensibilities about how to assess difficult backgrounds, substance abuse addiction, age at the time of offense, or any of the numerous other factors that might make one offender different from another. Some view those facts as mitigating culpability, while others see them as risk factors for future offending. On the other hand, an enforcement and punishment regime that relies on only a handful of easy-to-measure factors focused on the offense itself and that dictates how the factors should be treated in all cases misses some of the most important facts about culpability and individual differences in blame and the potential for change and rehabilitation. A regime focused on objective benchmarks with set consequences obtains only a superficial kind of equality because it ends up sentencing people with vastly different levels of

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culpability to the same punishment by ignoring many of the things that matter most.¹

In the federal system, there is a marked difference in how this balance is struck depending on whether the defendant is an individual or an entity. When it comes to individuals, the Department of Justice (DOJ) and the United States Sentencing Commission (the Commission) strike this balance largely in favor of administrability concerns and controlling the discretion of decision-makers, emphasizing objective factors that are easily defined and applied. While they have oscillated somewhat over time in terms of how strongly they have stated the principle, since the 1980s the emphasis has been on controlling discretion. DOJ charging memos in cases involving individuals have for decades instructed prosecutors to charge the most serious readily provable offense regardless of individual circumstances. Thus, prosecutors are to find the most serious code provisions to match the facts, thus pursuing the goal of uniformity in the direction of severity. To the extent there is flexibility, it is largely for those who cooperate with the government and offer substantial assistance to prosecutors in bringing cases against others. Otherwise, the working presumption is offenses should be assessed based on the harms they cause, and the most serious charge available should be pursued.

The Sentencing Guidelines (the Guidelines) likewise place an emphasis on those factors that leave little wiggle room in how they are defined or applied to particular cases. In drug cases, for example, the emphasis is on the quantity and type of drugs involved as opposed to focusing on why someone sells drugs or their role in a larger drug selling enterprise. In fraud cases, as another illustration, the focus is on the amount of loss caused by the fraud, not the motive for the fraud or the mens rea the defendant had with respect to that loss. In cases involving multiple perpetrators of a crime, a defendant's sentence can be increased based on the reasonably foreseeable actions of other people with whom the defendant associated to commit crime, even if the defendant never contemplated that the other people would engage in those actions.² The inquiry in these multiple offender cases is objective and does not require an analysis of the defendant's subjective intent. The Guidelines emphasize easily counted and measured facts as an attempt to get judges on the same page in how they sentence defendants. While this approach may create uniformity among judges in terms of how they decide cases, this does not necessarily involve equal treatment of similar cases because it ignores relevant facts about culpability. Defendants who knowingly cause harm are lumped in with those who do not even contemplate it.

The federal government's approach to individual criminal prosecutions contrasts sharply with the federal government's treatment of corporate entities in criminal cases. While prosecutors and the Commission have identified some key factors to dictate how a company will be charged and sentenced—most

1. See generally Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

2. U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2018).

notably, whether a company has a compliance program—for the most part, both the DOJ and the Commission have taken a far more individualized approach to corporate charging and sentencing. There is a focused concern on culpability and proportionality. And whereas the DOJ and the Commission have largely taken the view that more severe sentences are to be preferred in individual cases, they have recognized the costs of severity in the corporate realm, emphasizing the collateral consequences of punishment on others and the need to pursue alternatives other than criminal prosecutions to achieve better outcomes in terms of public safety and overall benefits.

This Article will explore the different approaches the DOJ and the Commission have taken to individual and corporate defendants and explain why aspects of the corporate model should apply to individual cases as well.³ Part II will describe the key attributes of the modern federal model for individuals. Its emphasis is on controlling the discretion of line prosecutors and judges and shows a marked preference for severity. Part III will explain how the approach to corporate criminal law enforcement emphasizes individual assessment, balancing the costs of punishment with its benefits, and considering other sanctions in making charging and sentencing decisions. Part IV will consider why corporate and individual cases have taken such divergent paths and explore some of the lessons corporate practice offers for individual cases. Part V concludes by advocating for the corporate charging and sentencing framework to be used as a model in individual cases. There is no reason to maintain a policy that sees the value in saving and recognizing the worth of companies, but ignores the value in saving and recognizing the worth of individuals.

3. My conclusion that the federal approach to individual liability should look more like the approach to entity liability shares some themes in common with Darryl K. Brown's terrific article comparing white-collar crime to street crime. Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001). While Brown sees a sharp divide between white collar crime and street crime—perhaps because he is considering nationwide trends and approaches in the abstract without focusing on a particular jurisdiction—I do not see a similar cleavage at the federal level if one looks only at cases involving individuals. White collar crimes are punished harshly in the federal system. COURTNEY SEMISCH, U.S. SENT'G COMM'N, WHAT DOES FEDERAL ECONOMIC CRIME REALLY LOOK LIKE? 2–3, fig.1 (2019) (reporting that people charged with economic crimes account for 10% of the federal prison population and that sentences for securities and investment fraud average 52 months). The Guidelines do not focus on culpability differences in white collar cases any more than they do in drug or violent crime cases, and the trend in all of them is away from individualization and toward severity. *See infra* Part II. Likewise, DOJ charging memos apply to white-collar cases as all others, so the distinction does not exist there, either. Some of the themes Brown observes about white-collar cases in general, however, do apply at the federal level to cases involving corporate entities. For example, Brown notes there is a greater focus on alternatives to criminal enforcement and the effect on third parties and other social costs in white-collar cases, Brown, *supra*, at 1312, 1333, and federal entity liability similarly focuses to a greater extent on those factors. I agree with Brown that these factors are just as relevant to all criminal cases, and thus should be playing a much larger role across the range of criminal cases, as I explain in Part V.

II

CHARGING AND SENTENCING INDIVIDUALS

Before 1987, the federal approach to prosecution and punishment was highly individualized and “almost entirely unregulated.”⁴ The federal approach followed an indeterminate sentencing model, where judges had wide discretion to choose a sentencing range with almost no oversight, and then parole officials had a similarly wide berth in assessing the ultimate release date for individuals serving sentences of incarceration.⁵ Rehabilitation largely motivated this approach, as judges and parole officers needed the flexibility both to determine the right sentence based on the rehabilitative needs of the particular defendant and to assess the defendant over time to see if he or she was ready for release.

This approach to punishment came under attack in the 1980s from both the left and the right sides of the political spectrum. The right saw the approach as unduly lenient and insufficiently focused on public safety objectives, and the left saw too much disparity from the exercise of discretion by the relevant actors.⁶ Both sides converged on two central ideas: rehabilitation should no longer be the motivating objective of sentencing, and discretion needed to be cabined.⁷

In 1984, these ideas led to the passage of the Sentencing Reform Act.⁸ As part of this Act, Congress created the Commission,⁹ and charged it with promulgating mandatory guidelines to limit the discretion of judges and curb unwarranted disparities in sentencing.¹⁰ At the same time, the Commission was told to create guidelines that would “maintain[] sufficient flexibility to permit individualized sentences when warranted.”¹¹ Parole was abolished, and the Commission was required to “insure that the guidelines reflect[ed] the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant.”¹² Congress also placed limits on how wide sentencing ranges could be in the Guidelines.¹³

4. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission 1985–1987*, 45 HOFSTRA L. REV. 1167, 1169 (2017).

5. “[M]ost federal prisoners became eligible to be paroled after they had served one-third of the prison sentence” and then it was up to the parole board to decide if the person had been sufficiently rehabilitated. *Id.* at 1171. Congress directed the Parole Commission to create parole guidelines in 1976, and in about eighty percent of the cases, the Parole Commission followed those guidelines in making release determinations. *Id.* at 1171–72.

6. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 7–8, 17–25 (1973) (describing variation among judges); ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, *FED. JUDICIAL CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT* 5 (1974) (describing a similar disparity among the Second Circuit); Newton & Sidhu, *supra* note 4, at 1178–81 (describing the concerns with disparities and undue leniency as key motivators for legislators seeking to reform federal sentencing).

7. Newton & Sidhu, *supra* note 4, at 1183–85.

8. 28 U.S.C. § 991 et seq. (2018).

9. *Id.* § 991(a).

10. *Id.* § 991(b)(1)(B).

11. *Id.*

12. *Id.* § 994(k).

13. *Id.* § 994(b)(2).

Although Congress vested authority in the Commission to create new guidelines, it did not bother waiting for the Commission's analysis to take actions of its own. It passed a series of harsh mandatory minimum drug penalties driven by the type of drug and its quantity. It also created a harsh regime for individuals with previous drug offenses or violent felonies.¹⁴

The Commission was attuned to the tough-on-crime political environment of the moment when it first created the Guidelines. Initially, the Commission could not agree on an overarching philosophy of punishment. It was starkly divided between a just deserts faction led by Commissioner Paul H. Robinson, which emphasized culpability and retribution, and a more utilitarian crime control wing headed by Commissioners Michael K. Block and Ilene H. Nagel.¹⁵ At the first meeting, one of the commissioners reported that the two sides bickered about their ideological differences, with "Commissioner Robinson observ[ing] that the Department is called 'Department of Justice,' not the 'Department of Maximizing Social Utility,' to which Commissioner Block responded that the [Sentencing Reform Act] is part of the Comprehensive Crime Control Act, not the 'Comprehensive Justice and Fairness Act.'"¹⁶ Without an underlying philosophy to guide it, the Commission set out to please its tough-on-crime political overseers as its central goal. It addressed Congress's concern with disparity by ultimately creating Guidelines that emphasized objective factors that would leave little room for judicial disagreement in their application or meaning. At the urging of the DOJ, the Commission also declined a model that would give judges leeway in deciding how much of an increase should follow if a particular fact was found by the judge.¹⁷

To further cabin differential treatment by judges, the Commission largely rejected a focus on characteristics unique to the offender and instead emphasized characteristics of the offense as the key facts that would increase or decrease a sentence.¹⁸ Although mens rea was critical to criminal liability at the common law and in every criminal code adopted in the United States, the Guidelines do not focus on mens rea. Rather, the Guidelines model is one focused on the harms caused, with sentences increasing as greater harms are caused by the offense. With few exceptions, a defendant gets a longer sentence for greater harms whether or not the defendant had any awareness that his or her conduct risked causing those harms. Culpability in the traditional sense is thus not at the core of the Guidelines inquiry in individual cases.

14. Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 210–14 (2019).

15. Newton & Sidhu, *supra* note 4, at 1226.

16. *Id.* at 1227 (citing an interview with Commissioner Nagel, on file with Newton & Sidhu).

17. *Id.* at 1203, 1205–06.

18. *Id.* at 1240 ("[T]he Commissioners seized on the text and legislative history of the SRA to emphasize the primary role of offense characteristics in sentencing determinations, in order [to] ensure that the balance of sentencing considerations was not tipped too heavily in favor of individualized offender characteristics such that sentencing disparities would arise.").

Just as Congress had done with its mandatory minimum drug laws, the Commission made drug quantity and type central to its guideline regime. Moreover, the Commission built its guidelines around Congress' mandatory minimum thresholds. For example, if a drug type and quantity triggered a five-year mandatory minimum under the statutory scheme, the Commission initially decided that the same type and quantity should have a guideline of sixty-three to seventy-eight months for those in the lowest criminal history category so that it was above the statutory minimum of sixty months. A drug offense with a ten-year mandatory minimum had guideline range of one hundred and twenty to one hundred and fifty-one months.¹⁹

Even under a guideline regime, there is the potential for prosecutorial charging decisions to create disparities in sentencing. To address this, the Commission adopted what is known as a "modified real offense" approach, which bases sentences on the offense of conviction plus other "relevant conduct" found by the judge. The intention behind this approach was to allow judges to even out sentences based on what defendants actually did as opposed to letting prosecutors manipulate charges to create different sentences.²⁰ The Commission even went so far as to allow judges to increase sentences on the basis of conduct when a jury had acquitted a defendant of that same conduct as long as the judge found by a preponderance of the evidence that the defendant was guilty of that conduct. This regime was thus all about maximizing the sentence based on judicial determinations, with those judicial determinations narrowly focused on the facts of the offense and little attention paid to facts about offenders or their backgrounds.

The Guidelines had the effect of increasing sentences for federal crimes. Although the Commission initially set sentences for most crimes based on the past practices of judges, it deliberately increased sentences for white collar and drug offenses in the initial set of Guidelines at the urging of Congress.²¹ Over time, most of the Commission's changes to the guidelines—largely at the direction of or from pressure by Congress—have been to increase sentences.²² To be sure, there were notable reductions for crack cocaine sentences in 2007 and for all drugs in 2013, and the Commission made those changes retroactive. But the story of the Guidelines has predominately been one of increasing the severity of federal sentences. Thus, the uniform application of the Guidelines means

19. In 2014, the Commission lowered all drug guidelines by two levels. U.S. SENT'G GUIDELINES MANUAL app. C, amend. 782 (U.S. SENT'G COMM'N 2014). As a result, the five-year mandatory minimum now falls within a guideline range of 51 to 63 months, and the ten-year falls within the range of 97 to 121 months. U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N 2018).

20. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 88–89 (2003); Newton & Sidhu, *supra* note 4, at 1224.

21. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 899 (1990).

22. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 766–767 (2005) ("Of the hundreds of sentencing amendments proposed by the Commission, all but a handful of those amendments involved increases in sentences.").

increased severity. When the Guidelines became advisory in 2005 with the Supreme Court's decision in *United States v. Booker*,²³ many judges around the country used their newfound discretion to give below-Guidelines sentences. The post-*Booker* world of advisory guidelines has thus become one of greater inter-judge disparity, with some judges adhering to the longer Guidelines sentences and others viewing them as greater than necessary to achieve the goals of 18 U.S.C. § 3553(a).²⁴

For more than four decades, the DOJ's approach to charging and sentencing individuals has reflected these same trends toward severity and away from accounting for individualized differences in a particular defendant's background or case. In 1980, Attorney General Benjamin Civiletti first published *The Principles of Federal Prosecution*, which instructed federal prosecutors to bring the most serious charges available.²⁵ In the wake of the publication of the first Guidelines Manual (the Manual), the DOJ, through Associate Attorney General Stephen Trott, issued a memo to all prosecutors, stating that "plea agreements should not be used to circumvent the Guidelines" and reiterated that they were to charge "the most serious offense or offenses consistent with the defendant's conduct."²⁶ The DOJ thus committed to fostering the modified real offense model of the Guidelines by not allowing its prosecutors to reduce charges. Attorney General Richard Thornburgh issued similar instructions in a memo in 1989, stating that "a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct" and warning that "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons."²⁷

The policy has softened only somewhat under Democratic Administrations. In 1993, Attorney General Janet Reno continued to instruct federal prosecutors that they ordinarily should bring the most serious, readily provable offense, but added that they should engage in an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent

23. 543 U.S. 220 (2005).

24. A few judges use their discretion to give above Guidelines sentences, but that happens far less frequently than judges who use their discretion to go below the Guidelines range. See UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT: FISCAL YEAR 2019, at 11 tbl.8 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2019_Quarterly_Report_Final.pdf [<https://perma.cc/8CFD-ZUQ2>] (showing judges gave upward departures in .5% of cases compared with non-government downward departures in 2.3% of cases, and upward variances in 1.9% of cases compared with non-government downward variances in 18% of cases).

25. Vera Inst. of Just., *The Sessions Memo: Back to the Past?*, VERA INST. OF JUST.: THINK JUST. BLOG (May 25, 2017), <https://www.vera.org/blog/the-sessions-memo-back-to-the-past> [<https://perma.cc/MW87-C9LA>].

26. Memorandum from Stephen S. Trott, Assoc. Att'y Gen. to All Litigating Div. Heads and All U.S. Att'ys (Nov. 3, 1987), reprinted in *Trott Memorandum*, 6 Fed. Sent'g Rep. 342, 342 (1994).

27. U.S. Dep't of Just., Plea Policy for Federal Prosecutors: Plea Bargaining Under the Sentencing Reform Act (Mar. 13, 1989), reprinted in *Thornburgh Bluesheet*, 6 Fed. Sent'g Rep. 347, 347-48 (1994).

with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.”²⁸ After Attorney General John Ashcroft eliminated the individualized assessment prong of Reno’s memo in 2003 and told prosecutors that they “must” rather than “should” bring the most serious, readily provable offense,²⁹ Holder reverted back to the Reno position in 2010.³⁰ But even under the Holder and Reno approaches, the presumption remained in favor of bringing the most serious charges available.

Jeff Sessions once again removed the individualized assessment language in 2017, but he acknowledged that there could be “circumstances in which good judgment would lead a prosecutor to conclude that a strict application” of the policy is not warranted.³¹ In those instances, the line attorney must seek approval from a supervisor and document the reasons for the divergence.³²

Thus for decades, and under both Republican and Democratic Administrations, the DOJ has sought to cabin the individual discretion of prosecutors by instructing them—albeit with varying degrees of flexibility—to bring the most serious charges available. The assumption is that it is in the government’s interest to seek the most serious charge it can prove, regardless of the effects of bringing that charge on third parties and without doing a serious evaluation of whether non-criminal alternatives might be better.

The approach at the DOJ and in the Commission toward individuals has thus been similar: the charging and punishment practices have largely pointed in the direction of severity and cabining the discretion of line prosecutors and judges.

III

CHARGING AND SENTENCING CORPORATIONS

In theory, the approach to corporate charging and sentencing could follow this same basic blueprint. Prosecutors could be required to charge the most serious readily provable offense, unless certain narrow exceptions apply, and the sentencing of corporations could hinge largely on objective factors associated with the offense instead of unique attributes of individual corporations. While

28. Memorandum from Janet Reno, Att’y Gen. to Holders of U.S. Att’ys’ Manual, Title 9 (Oct. 12, 1993), *reprinted in Reno Bluesheet*, 6 Fed. Sent’g Rep. 352 (1994).

29. Memorandum from John Ashcroft, Att’y Gen. to All Fed. Prosecutors (Sept. 22, 2003), *reprinted in Memorandum from Attorney General John Ashcroft Setting Forth Justice Department’s Charging and Plea Policies*, 16 Fed. Sent’g Rep. 129, 130 (2003).

30. Memorandum from Eric H. Holder, Jr., Att’y Gen. to All Fed. Prosecutors (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<https://perma.cc/A92W-UXN5>]. Holder released a separate memo specifically addressing drug cases, telling prosecutors that they should reserve bringing charges carrying mandatory minimum penalties for more “serious, high-level, or violent drug traffickers.” Memorandum from Eric H. Holder, Jr., Att’y Gen. to the U.S. Att’ys & Assistant Att’y Gen. for the Crim. Div. (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/Y5ZX-TYA9>].

31. Memorandum from Jefferson B. Sessions, Att’y Gen. to All Fed. Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/DNZ9-7MTV>].

32. *Id.*

there are some similarities between corporate charging and individual charging practices along these lines, for the most part, the approach to charging and punishing corporations follows a much more individualized model that is designed to focus on culpability differences among entities and is more attuned to the costs of prosecutions and longer sentences.

When the Commission tackled individual sentencing, it did so against a political backdrop of intense congressional interest in increasing severity and reducing disparities among individual defendants. In contrast, Congress paid little attention to entity liability. Corporations were rarely prosecuted in the pre-Guidelines era and if they were convicted, they typically received relatively minor fines.³³ Congress took virtually no interest in this regime, so the Commission thus had greater freedom to operate on a blank slate and think about the sentencing of organizations separately from the baggage attached to the regime governing individuals.

The Commission separately considered organizational defendants and issued The Federal Sentencing Guidelines for Organizations (Organizational Guidelines) in 1991.³⁴ In many ways, the approach mirrors the one the Commission took in creating the Guidelines that apply to individuals. In setting the fine ranges for entities, the Commission sought to achieve both “just punishment” (a retributive end) and deterrence (a utilitarian goal).³⁵ The Commission likewise sought to cabin the discretion of judges because their past sentencing practices in corporate cases revealed enormous variation in approach.³⁶ And the resulting guidelines increased the punishment given to corporations, just as they had for individuals.³⁷

But the application of these concepts to entities resulted in differences compared to the approach to individuals. It is conceptually more difficult, of course, to identify a just desert for a company “that has ‘no soul to be damned and no body to be kicked.’”³⁸ The Commission thus had to pause to consider what made one entity more culpable than another beyond just considering the nature of the crime charged. It reserved its most serious fines, which are designed to be “sufficiently high to divest the organization of its assets,” for companies that are operated primarily for criminal purposes, such as boiler rooms engaged in

33. Robert S. Bennett, Hilary Holt LoCicero & Brooks M. Hanner, *From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney*, 68 BUS. LAW. 411, 414–15 (2013).

34. Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 208 (1993).

35. *Id.* at 210.

36. *Id.* at 214–17.

37. Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 700, 708 (2002).

38. Nagel & Swenson, *supra* note 34, at 218 (quoting John C. Coffee, Jr., “No Soul To Damn: No Body To Kick”: An Unscandalized Inquiry Into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1981)).

fraudulent schemes.³⁹ Among companies operating for lawful purposes, the Commission assigns them a “culpability score,” which is designed to give lesser sentences to those companies that report to and cooperate with authorities and had compliance programs in place when the crimes took place, and greater sentences to those companies that had seemed to give tacit approval to the crime or where the offense involved senior management.⁴⁰

Corporations had pressed the Commission to mitigate sentences in the Organizational Guidelines if they had compliance programs in place, and the Commission agreed as long as the programs were genuine attempts at deterring and detecting wrongdoing.⁴¹ The presence or absence of a compliance program became a centerpiece of the Organizational Guidelines. The presence of a program could lower a company’s penalties.⁴² In contrast, the absence of an effective compliance program in a company with fifty or more employees allows courts to place those companies on probation with a variety of conditions.⁴³ Other civil regulators have followed the Commission’s “carrot-and-stick approach to compliance.”⁴⁴ This framework gives companies incentives to create compliance programs and has created a cottage-industry of compliance professionals.⁴⁵

Paradoxically, given that it is harder to conceptualize blameworthiness for an entity than it is for an individual person, the general approach of seeking to tie punishment to culpability is one that received more direct attention in the context of companies than in the case of individuals in the Guidelines. To be sure, the Guidelines identify harms caused as a ground for greater punishment in individual cases. But those harms are not linked to mens rea, so there may be instances where an individual with no idea that harm was a risk is burdened with an increase in his or her sentence. The focus on the characteristics of the offense is thus not about culpability in any meaningful sense because of the lack of a mens rea requirement showing the defendant had some kind of awareness that risk of harm was possible. Presumably, the Commission did not spend much time on the mens rea attached to sentencing factors because it believed culpability would be

39. *Id.* at 232–33.

40. *Id.* at 233, 235, 237.

41. *Id.* at 236. Amendments to the Guidelines in 2004 sought to strengthen the requirements of compliance programs to make them more effective. Frank O. Bowman, III, *Drifting Down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing*, 39 WAKE FOREST L. REV. 671, 685 (2004). But as Brandon Garrett and Greg Mitchell note, it remains “hard to know what evidence is needed to meet” the Commission’s stated requirement that a compliance program be “‘reasonably designed, implemented, and enforced so that the program [was] generally effective in preventing and detecting criminal conduct.’” Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 47, 57 (quoting U.S. SENT’G GUIDELINES MANUAL § 8B2.1(a)(2)).

42. U.S. SENT’G GUIDELINES MANUAL § 8C2.5(f) (U.S. SENT’G COMM’N 2018).

43. *Id.* §§ 8D1.1(a)(3), 8D1.4(b); see also Nagel & Swenson, *supra* note 34, at 237.

44. Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—And How to Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 116, 119.

45. Bowman, *supra* note 41, at 679 (calling compliance programs, officers, and consultants “the children of the Guidelines”); Murphy, *supra* note 37, at 710 (“The organizational guidelines have been credited with helping to create an entirely new job description: the Ethics and Compliance Officer.”).

sufficiently addressed by the offense of conviction. But in the case of corporations, the Commission believed that would not be sufficient because companies are responsible for the crimes of their agents under respondeat superior, and thus the Commission wanted to take extra care to consider the company's relationship to those crimes. The result is a guideline framework more sensitive to culpability in the corporate arena than the individual one.

Another difference between individual and corporate guidelines is that the Commission paid close attention to the fact that companies face other sanctions for their criminal conduct. As one former commissioner noted in a co-authored article, because companies face "substantial non-criminal penalties such as debarment, treble civil damages, and shareholder derivative actions," the Commission considered how to weigh those collateral consequences in setting its corporate punishments.⁴⁶ Its Organizational Guidelines therefore advise courts "in setting the fine within the guideline fine range" to "consider any collateral consequences of conviction" and that such consequences "may provide a basis for a lower fine within the guideline fine range."⁴⁷ While individuals face a host of collateral consequences for their convictions, the Guidelines do not similarly instruct courts to take them into account in imposing punishments.⁴⁸

There are also differences in how the DOJ approaches corporations in its charging policies. Eric Holder's initial charging memo encouraged prosecutors to "seek a plea to the most serious, readily provable offense charged," just as they are instructed to do with individuals.⁴⁹ But the DOJ's practice has been far more nuanced when it comes to entity liability. The series of corporate charging memos put out by Deputy Attorneys General Holder, Thompson, McNulty, Filip, and Yates give prosecutors "a lengthy roadmap through a multi-factor analysis that the prosecutor must conduct in order to decide on the correct resolution of a corporate criminal case, whether it be charging, settling, or declining to prosecute."⁵⁰ As Sam Buell has noted, "[t]he DOJ has done this, at this level, for no other kind of defendant or offense."⁵¹

46. Nagel & Swenson, *supra* note 34, at 245–46.

47. U.S. SENT'G GUIDELINES MANUAL § 8C2.8 cmt. n.2 (U.S. SENT'G COMM'N 2018).

48. This is true across all offenses in the case of individuals, including those involving white-collar crimes where regulatory actions and civil suits might be more likely. *See supra* Part II.

49. Memorandum from Eric Holder, Jr., Deputy Att'y Gen., to All Component Heads and U.S. Att'ys on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter The Holder Memo on Prosecuting Corporations], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/CG9L-4C69>].

50. Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C.L. REV. 823, 832 (2018). DOJ has offered similar analysis on monitor selection. *See, e.g.*, Memorandum from Brian Benczkowski, Assistant Att'y Gen., to All Crim. Div. Personnel on Selection of Monitors in Criminal Division Matters (October 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download> [<https://perma.cc/T34E-TSEA>] (establishing standards, policies, and procedures regarding determinations of whether a monitor is appropriate and to any DPA, NPA or plea agreements which require a monitor).

51. Buell, *supra* note 50, at 832.

The host of factors prosecutors are asked to consider include the “existence and adequacy of the corporation’s compliance program,” though the DOJ does not specify any features required for effective compliance.⁵² In a guidance document explaining how the DOJ evaluates corporate compliance programs, it emphasizes that “the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs” and instead “make[s] an individualized determination in each case.”⁵³ Prosecutors are also supposed to consider any “remedial actions” taken by the company; the collateral consequences to others, including “shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public;” and the adequacy of other possible remedies including civil or regulatory actions.⁵⁴ Moreover, the Manual adds, the long list of factors to consider is not exhaustive and no single factor should be deemed dispositive.⁵⁵ Instead, DOJ prosecutors are told that they need to use their “thoughtful and pragmatic judgment in applying and balancing these factors.”⁵⁶

This model is thus a departure from the approach in individual cases where prosecutors are told to focus on bringing the most serious charges the evidence will support and are not encouraged to use their discretion to balance the variety of interests that might be at stake. On the contrary, the DOJ is sensitive to the costs of excessive charging in corporate cases and looks to see if other options are available to avoid those costs. In the corporate context, there is “broad prosecutorial discretion.”⁵⁷

That is not to say there are not parallels between individual and corporate cases. In both individual and entity cases, there is an emphasis on cooperation. Just as prosecutors are willing to give individuals enormous sentencing breaks for offering substantial assistance, they are also willing to reward companies that cooperate by helping to identify individuals responsible for criminal conduct. Indeed, the reward for cooperating is even greater for corporations because federal prosecutors would much prefer to bring charges against an individual than against the corporate entity because the deterrence value is greater from individual prosecutions.⁵⁸

It is also important to note that, although corporate charging recognizes the need to balance multiple factors and for individualized assessment, some factors

52. The Holder Memo on Prosecuting Corporations, *supra* note 49.

53. CRIM. DIV., U.S. DEPT. OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [https://perma.cc/W4L6-DB98].

54. U.S. Dep’t. of Just., Just. Manual § 9-28.300 (2018).

55. *Id.*

56. *Id.*

57. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2087 (2016).

58. Memorandum from Sally Yates, Deputy Att’y Gen., to All Component Heads and U.S. Att’ys, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (Alon Harel & Keith N. Hylton eds., 2012).

have taken on added importance in the calculus. In particular, compliance programs have become *de rigueur* for companies seeking to avoid prosecution. While there is “neither a checklist nor a formula” as to what that compliance program should look like, certain features have been emphasized.⁵⁹ For example, prosecutors look for the company’s training efforts, a mechanism for employees to report wrongdoing, how the company evaluates third parties with whom it deals, whether the people responsible for compliance have sufficient seniority and independence within the organization, and the disciplinary measures companies use for those who violate compliance policies.⁶⁰ Companies, in turn, have sought to get a certain high percentage of its employees to finish training programs or create lists of those who have been terminated or denied promotions in response to compliance failures to show they are satisfying these concerns.⁶¹ So in that sense, compliance programs and certain features of their design have become like the key objective facts in individual cases that drive punishment, such as loss amounts or drug quantity. But the DOJ seems more attuned to the limits of this approach in corporate cases. It is far more sensitive to individual differences among companies, even in assessing their compliance programs, and no one feature of a compliance program or metric is determinative.

IV

EXPLORING THE DIVERGENT MODELS OF CORPORATE AND INDIVIDUAL CHARGING AND SENTENCING

It is worth considering why both the DOJ and Commission have taken such different approaches between individual and corporate defendants. Some differences are explained by the inherent nature of entity liability, including the consideration of some factors—such as the involvement of management or the existence of a compliance program—that matter uniquely to corporations without an individual analog. But that does not explain the emphasis in corporate cases on individual facts and circumstances, culpability, and the weighing of collateral consequences because all of those factors are—or should be—just as relevant to individual prosecutions.

One reason for the divergence might be that different theories of punishment dominate in the two contexts. In particular, it might be that, in the corporate space, retribution is less of a motivating factor than in the individual space.⁶² To be sure, the public gets angry at entities and calls for them to get their just deserts, even if those entities are not human and therefore not objects of a theory of

59. EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 53.

60. *Id.*

61. Chen & Soltes, *supra* note 44, at 122–23.

62. *Cf.* Brown, *supra* note 3, at 1323 (arguing that whereas “[s]treet crime law maintains a relatively stronger emphasis on moral culpability and expressive condemnation,” “[c]orporate crime policy . . . takes place more in a deterrence mode”).

justice in the same way.⁶³ Additionally, commentators often argue that the expressive and symbolic aspects of retributive justice apply in corporate cases.⁶⁴ And the Commission specifically mentioned just punishment as a motivator in creating its Organizational Guidelines.

But the government seems far more motivated by utilitarian concerns than retributive ones when it comes to entity liability. “The DOJ has wholeheartedly adopted the deterrence theory of corporate criminal liability advocated by utilitarian theorists who defend the idea of using criminal processes against corporations.”⁶⁵ One can see this animating the range of DOJ guidance in the corporate sphere, from its emphasis on cooperation and self-reporting to its focus on compliance programs and how they aim to detect and stop wrongdoing. Eric Holder’s initial corporate charging memo emphasized “the important public benefits that may flow from indicting a corporation” and how “an indictment often provides a unique opportunity for deterrence on a massive scale.”⁶⁶ As Sam Buell has observed, “[t]he Department’s commitment to [deterrence] theory has only grown stronger over time,” with “federal prosecutors . . . engaged in a campaign to, in effect, regulate corporate legal compliance.”⁶⁷

The Commission’s focus on compliance programs is also grounded in utilitarian concerns. Indeed, a former commissioner conceded as much, noting that the organization “guidelines are geared toward deterrence” and the emphasis on compliance is a “means to ‘rehabilitate’ corporations that have engaged in criminal conduct by requiring them, as a term of probation, to institute and maintain effective compliance programs.”⁶⁸ Rehabilitation is also a central theme in the DOJ’s imposition of conditions as part of non-prosecution agreements (NPAs) and deferred prosecution agreement (DPAs).⁶⁹

The Organizational Guidelines’ emphasis on restitution can also be seen in utilitarian terms. The first step in the Organizational Guidelines’ framework is to order restitution, which is not viewed as punishment,⁷⁰ and any punitive fines come after that. As one former commissioner notes, the Organizational Guidelines focus first on restitution because “[p]unishment is . . . not the ultimate

63. See Samuel W. Buell, *Retiring Corporate Retribution*, 84 LAW & CONTEMP. PROBS., no. 4, 2020, at 25, 26–27 (discussing how public opinion might demand the punishment of corporations, but a corporation “cannot be made to endure the punishment in a way that would count as retributive”).

64. See, e.g., Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 477 (2006) (arguing that a greater focus should be placed on punishing blameworthy entities in order to better exploit criminal law’s expressive capital); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1263–64 (2016) (“The criminal law is our most powerful tool for expressing what conduct is outside the bounds of acceptable corporate behavior” and “for expressing how we expect corporations to conduct their affairs.”).

65. Buell, *supra* note 50, at 850.

66. The Holder Memo on Prosecuting Corporations, *supra* note 49.

67. Buell, *supra* note 50, at 850.

68. Murphy, *supra* note 37, at 703.

69. See Garrett & Mitchell, *supra* note 41, at 58 & nn.47–49 (Describing how these agreements seek to rehabilitate corporations through improved compliance regimes).

70. U.S. SENT’G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT’G COMM’N 2018).

purpose of the organizational guidelines.”⁷¹ Indeed, if a fine would preclude a company from being able to pay restitution, the fine is waived, because the interests of victims come first.⁷² In individual cases, in contrast, restitution comes last and punishment comes first.⁷³ The assumption is that victims are to be satisfied by the punishment itself. But there is ample evidence that long sentences do not help victims and that many would prefer to have defendants doing other things besides serving time to redress the harms they have caused.⁷⁴ However, that is just not something that seems to enter the calculus of prosecutors or the Commission in individual cases even though it is a primary concern in entity cases.

Entity liability is thus a sphere where utilitarian goals dominate and where the government seems interested in striking the right balance between costs and benefits of criminal punishment. To be sure, the government’s approach might not always be the right one for maximizing benefits, and one can legitimately question whether criminal prosecutors are well suited to make substantive regulatory demands on companies.⁷⁵ But federal prosecutors and policy makers are far more sensitive to the tradeoffs of government interference in corporate cases and thus work hard to ensure the benefits of their involvement outweigh the costs.

One does not see that same emphasis in individual cases. One possible reason might be that retributive concerns play a greater role in cases involving people instead of entities.⁷⁶ The desire to make individuals pay for their offenses and the harms they cause is strong: the original blueprint for the Guidelines was expressly grounded in a just deserts philosophy. Although the Commission ended up departing from it in many ways, its harm-based focus, with incremental increases based on offense facts, remains at the core of the Guidelines today.

To be sure, even if a greater focus on retributive justice does account for the ways in which federal legislators, prosecutors, and policy makers approach individual versus corporate cases, that does not necessarily mean that their approaches in individual cases reflect sound retributive principles. On the

71. Although restitution is emphasized as a priority, in practice, fewer than one-third of settlements and convictions against corporations include restitution damages. See BRANDON L. GARRETT, *TOO BIG TO JAIL* 126 (2004).

72. Murphy, *supra* note 37, at 704.

73. *Id.* at 706.

74. See DANIELLE SERED, *UNTIL WE RECKON* 161 (2019) (“Many people assume—incorrectly—that incarceration is the “toughest” response to crime, when in fact some dignified, humane alternatives to prison turn out to be more difficult and more effective, perhaps in part because of what they require of the people who participate These programs in New York and across the country often include education, mental health treatment, community service, and vocational training as ways to help hold people accountable.”).

75. See, e.g., Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 177, 185–97 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Miriam H. Baer, *Three Conceptions of Corporate Crime (and One Suggestion for Reform)*, 84 *LAW & CONTEMP. PROBS.*, no. 4, 2020, at 1, 21–22.

76. See Brown, *supra* note 3, at 1325 (“[W]hile we use deterrence rhetoric sometimes in street crime discussions, an expressive and retributive moralism drives policymaking.”).

contrary, some sentences seem disproportionate to a defendant's fault. The lack of attention to mens rea in the Guidelines and the federal approach to conspiracy liability are just two notable examples of how the federal approach to individual liability fails to reflect a just deserts philosophy. There are countless others, from the lumping together of individuals with vastly different records for career criminal status to the way drug quantity and loss drive sentences instead of someone's motive or role in the offense.

More fundamentally, even if retributive justice—however poorly accomplished—is one of the motivating concerns in individual cases, it is not the exclusive one. Federal actors are also interested in utilitarian concerns when it comes to individual prosecutions. They often speak about deterrence and incapacitation as central motivators in a particular charging or sentencing policy. But they are not as attentive to empirical information and tradeoffs with criminal prosecution and sentencing when they engage in the utilitarian calculus in individual cases as they are in corporate cases.

For starters, legislators, prosecutors, and policy makers are far less sensitive to the costs of government interference and harsh policies in the case of individual prosecutions. The assumption seems to be that more serious charges and longer sentences are always better for utilitarian goals. But that is often not the case. Longer sentences make it harder for individuals to reenter society when they are released from their periods of incarceration because the conditions of confinement worsen behavioral problems and long periods away from support networks means people struggle upon release. That is why individuals receiving retroactive reductions in their federal drug sentences from the Commission's Guideline changes recidivated at a lower rate (43.3%) than individuals who served their full sentences (47.8%).⁷⁷ Indeed, there is evidence that longer sentences can increase the risk of recidivism.⁷⁸ And while incapacitation can be beneficial to public safety, some people would have stopped offending even without being incarcerated. In fact, at a certain point, most individuals will age out of criminal behavior.⁷⁹ Sentences thus often extend beyond a point at which they provide any incapacitative benefit at all, yet prosecutors and policymakers rarely acknowledge or factor this in for individual cases. Thus they often fail to consider less restrictive sentences, much less alternatives to criminal enforcement.

So to the extent utilitarian concerns are motivating policy in individual cases, the actual calculation of costs and benefits is far more deficient in that context

77. Kim Steven Hunt & Andrew Peterson, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, 26 FED. SENT'G REP. 339, 340 (2014).

78. See COUNCIL OF ECON. ADVISERS, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE JUSTICE SYSTEM* 39 (2016) ("Each additional sentence year leads to a 4 to 7 percentage point increase in recidivism after release."); RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 44 (2019) ("The longer sentences people serve, the harder it is for them to reenter successfully into society . . . One study using data from Texas found that each additional year of a prison sentence caused a 4–7% increase in an individual's recidivism rate once he or she was released.")

79. *Id.* at 45–46.

than in entity cases because policy makers seem to see only benefits to government interference and longer sentences and not the tradeoffs that have become obvious in the corporate sphere. Consider, for example, the collateral consequences a conviction has on others. In the corporate context, the DOJ is especially concerned with the effect a criminal charge will have on third parties. A policy of charging a corporation with any crime, much less the most serious one, would often mean making many corporations go out of business because in certain industries companies would be debarred if convicted.⁸⁰ The DOJ has resisted this approach because of its concern with the consequences of that outcome for third parties, so it adopted a more nuanced approach where often no charges are brought at all.

But as Sara Sun Beale has persuasively argued, individual defendants also face collateral consequences as a result of criminal convictions, and the effects of a criminal charge on third parties in individual cases can be equally devastating—if not more so.⁸¹ “[I]nnocent parties harmed by the punishment of individual defendants are often less able to protect their assets than the shareholders, who have no liability beyond their investment in the shares of the corporation.”⁸² Beale thus argues that prosecutors should evaluate these effects on a case-by-case basis in both contexts to help them determine whether to bring charges.⁸³

If prosecutors were more sensitive to third-party effects in individual cases, they would see the enormous consequences of incarceration, “ranging from lost wages from the incarcerated individual to the costs of prison visits and calls, which can be crushing for families already living on the edge of subsistence.”⁸⁴ In more than two-thirds of criminal cases, incarceration is so destabilizing to a family’s finances that it leads them to struggle to meet basic needs like food and housing.⁸⁵ Children bear the harshest consequences of incarceration. Having an incarcerated parent makes them far more likely to suffer from behavioral problems and to struggle academically.⁸⁶ This, in turn, creates a greater risk of criminal behavior, with the children of incarcerated parents being more likely to end up incarcerated themselves.⁸⁷ The effects of incarceration on families should thus be a paramount concern in charging and sentencing individuals, and yet it is not central to federal policy. Shareholders fair better than children when it comes to considering third-party effects.

80. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1501–02 (2009). *But 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, 836 (2013) (“[T]he ‘corporate death penalty’ is no more than a bogeyman.”).

81. Beale, *supra* note 80, at 1503.

82. *Id.* at 1486.

83. *Id.* at 1503.

84. BARKOW, *supra* note 78, at 47.

85. *Id.*

86. *Id.* at 48.

87. *Id.*

Perhaps the DOJ is more willing to consider third party collateral consequences in the corporate context than the individual context because the harm to third parties from corporate prosecutions is more easily quantified. The end of a company and the financial loss it brings can literally be measured in dollars. In contrast, while an individual prosecution can also bring about financial losses to the loved ones of an incarcerated family member, other aspects of third party loss—such as the effects of incarceration on children and their own prospects for future offending or negative effects on communities⁸⁸—might be less tangible to prosecutors and thus more easily ignored. But one should not mistake ease of administration and measurement for accuracy. Not counting third party costs in the case of individual prosecutions can have a devastating impact—financial and otherwise. Indeed, from a public safety perspective, which is the paramount utilitarian concern in this case of criminal enforcement, the effects of prosecuting an individual may have large ripple effects on others that create a public safety risk.

Federal actors also fail to focus on the many collateral consequences that the defendant faces in individual cases. In the context of corporate prosecutions, the Guidelines and DOJ policy emphasize that other consequences—such as civil fines or the risk of debarment—should be factors in assessing the appropriate criminal response, with the assumption that a criminal punishment should be reduced in light of other penalties being imposed. But in individual cases, there is a lack of attention to the ways in which a criminal conviction brings a devastating array of collateral consequences for the defendant. These can include the loss of public housing, federal welfare benefits, a driver's license, and other necessary occupational licenses.⁸⁹ In some cases, a conviction can mean a lifetime on a sex offender registry.⁹⁰ But neither DOJ policy nor the Guidelines sees these collateral consequences as requiring mitigation through the federal government's criminal response. These other consequences are viewed as additions to whatever punishment follows from seeking the most serious, readily provable offense.

Again, the philosophy when it comes to individuals seems to be that the more onerous the consequences, the better. Indeed, one can see this in the government's approach to whether a case should be brought federally as opposed to being left to the states. The DOJ's U.S. Attorneys' Manual notes that "the ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted."⁹¹ A paramount consideration for bringing a case federally is thus a concern that a state punishment might not be sufficiently harsh.⁹²

88. *Id.* at 90.

89. *Id.*

90. *Id.* at 93–95.

91. U.S. Dept. of Just., Just. Manual § 9-27.240 (2018).

92. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574–76 (2011).

Perhaps the DOJ and the Commission take a different view of punishment in corporate cases because of a greater faith in the government's ability to reform companies through other means and a more pessimistic take on what besides incarceration and harsh consequences can do that for individuals. The Commission's Organizational Guidelines place great weight on compliance programs because of a view that compliance programs can make a real difference in the risk of reoffending. The DOJ is likewise willing to offer charging concessions and to use NPAs and DPAs in exchange for changes to corporate behavior because it seems confident in its ability to regulate company behavior and governance for improved outcomes.⁹³ These requirements are often quite intrusive into company practices, ordering entities to shut down lines of business or change personnel.⁹⁴ Yet there is little evidence to back up the view that compliance and the conditions imposed by the government in NPAs and DPAs are actually working to deter crime.⁹⁵ Indeed, even companies are not sure whether the compliance programs they have in place are effective.⁹⁶ If a company's compliance expert is not sure what works, "there are very good reasons to suppose that generalist prosecutors who are not embedded in the day-to-day operation of the subject firm" don't know, either.⁹⁷ And the DOJ itself admits that there is a lack of empirical basis for how it evaluates compliance.⁹⁸ So the evidence does not back up a theory that rests on the government's greater confidence in entity cases to address underlying conditions that promote criminality.

93. See Barkow, *supra* note 75, at 185–97. For criticisms of DOJ's ability to do this, see, for example, Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 75, at 62; Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHI. L. REV. 323 (2017); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016).

94. Baer, *supra* note 75, at 2 (noting that these agreements "may require any number of commitments including the payment of fines, oversight by monitors, compliance and governance changes, and promises to alter or disband certain operational practices").

95. See, e.g., Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 681 (2009).

96. See generally Chen & Soltes, *supra* note 44 (noting that, of the 70% of companies with compliance programs that attempt to measure their effectiveness, only 20% are "confident" or "very confident" that they are using the right metrics); Griffith, *supra* note 57, at 2105–06 (citing one study in which only fifty-two percent of compliance officers stated they were "confident" or "very confident" that they were using metric that "gave them a true sense of the effectiveness of the compliance function" and quoting one compliance officer as saying, "[w]e just don't know if it works").

97. Griffith, *supra* note 57, at 2128; see also Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 10 (2010) (noting the government's attempt at rehabilitating companies is often nothing more than "the implementation of questionable governance provisions").

98. See BARKOW, *supra* note 78, at 109; see also Tim Erblich, *Measurement Matters: A Conversation with Ethics Advocate Hui Chen*, ETHISPHERE INST. (2017), https://magazine.ethisphere.com/chen_q42017/ [<https://perma.cc/2QRF-GBCB>] (where DOJ's former Compliance Counsel notes companies should be doing better at measuring "everything" from the effectiveness of training to the usage of whistleblower mechanisms).

Perhaps instead the government sees that there are costs to pursuing criminal charges in entity cases that make it more willing to see what else might work even if it has to proceed with incomplete information. The legacy of Arthur Andersen looms large in the corporate arena. There was enormous political pushback after Andersen's collapse, and when the DOJ has gone too far in the corporate sphere, powerful interests lobby against it. In contrast, there is little political fallout when the government is too harsh in individual cases. The pushback in individual cases is largely only present when there is too much leniency. The media focuses on those cases where someone is treated too leniently, and it sets off massive public resistance. But rarely does it report on cases where an individual is sentenced too harshly.⁹⁹ Similarly, whereas those third parties harmed by corporate prosecutions often include shareholders and employees who are well positioned to lobby for change, the third parties harmed by excessive individual prosecutions—family members and people in disproportionately poor communities—often lack the resources and organization to get attention to these issues because they are instead focused on more basic needs to survive.

The finances in the two areas also differ and may account for the variation. The government can force companies to pay for compliance, whereas the large mass of indigent defendants cannot finance alternatives to incarceration. This means the state has to make those investments, and it seems more willing to stick with prisons than invest in other options, even if those options are more cost-effective, because of the politics that favor superficially tougher approaches.

There is yet another possible difference in the two spheres. The idea of compliance is grounded in the notion that cultural change at companies is possible. Key government decision makers seem to believe this is true. But they seem far more skeptical that individuals can change or in the government's ability to intervene through mechanisms other than incarceration to get them on a path to better outcomes. To be sure, we are now seeing some alternative models in federal courts around the country where individuals are diverted to drug or other treatment programs instead of being charged criminally.¹⁰⁰ But these are the rare exception rather than the dominant approach, and they are reserved for the lowest-level offenses. In contrast, alternatives to criminal prosecution—whether through no involvement by criminal prosecutors at all or through the use of NPAs and DPAs so no charges ultimately get brought—are widely sought for entities and they are used even in cases of serious and widespread misconduct.¹⁰¹

99. See BARKOW, *supra* note 78, at 105–24.

100. See, e.g., U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf [<https://perma.cc/45HG-NPGN>]. DOJ policy also allows prosecutors to consider alternatives to prosecution, including pre-trial diversion. Dept. of Just., Just. Manual, § 9-27.250 (2018).

101. For an excellent overview, see generally GARRETT, *supra* note 71.

V

CONCLUSION: USING CORPORATE CHARGING AND SENTENCING AS A MODEL

While the DOJ and the Commission may not yet see the value of applying their approach to corporations in cases involving individuals as well, the approach they take in corporate cases is, in fact, a helpful model for individual cases. As Judge Emmet Sullivan has noted, “people are no less prone to rehabilitation than corporations . . . [a]nd society is harmed at least as much by the devastating effect that felony convictions have on the lives of its citizens as it is by the effect of criminal convictions on corporations.”¹⁰² There should be more flexibility in how individuals are assessed instead of reflexively assuming the most serious charge is the appropriate one. Individual culpability should be a central inquiry, as should the prospect of rehabilitation. Just as in corporate cases, seeking criminal charges and punishment in individual cases has real costs that should be considered. Longer sentences can lead to recidivism and harm public safety. Incarceration can have devastating effects on families and third parties. Collateral consequences of convictions for individuals should be weighed when thinking about the right punishment for an individual. Taking into account these factors will lead to charges and sentences that are better calibrated to improve public safety—the ultimate utilitarian goal.

There is no reason the approach to corporate prosecutions and sentencing cannot work in individual cases. The solutions here are all within the existing framework of DOJ and Guideline policy and just require taking the approach currently used for entities and seeing its virtue in individual cases as well.¹⁰³ There just has not been the will to do so, perhaps because key federal policy makers have been blind to the downsides of their approach in individual cases and have not faced political pushback for the status quo. In contrast, wealthy and powerful corporate actors have lobbied hard for more careful treatment when it comes to pursuing entities. One cannot deny the big difference in the politics of the two settings. But where the federal government has been forced to confront the costs of criminal prosecution and the harm it can bring because of corporate lobbying for a closer look, it has opted for a more nuanced framework. The key is to get those concerned with individuals to ask prosecutors and the Commission to learn from their own practices in corporate cases and see that there is a better model.

It will likely take grassroots efforts to bring about this change. In particular, it would require a change in the leadership at the DOJ and the Commission to recognize this as a needed shift worth making. That means the president needs to rethink who gets appointed to critical positions at the DOJ and in spots on the Commission. As candidates for the presidency on the left and right have started

102. See *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 46 (D.D.C. 2015).

103. For a broader set of reforms modeled on an approach to economic crime, see Brown, *supra* note 3, at 1345–57, arguing for community policing, drug treatment courts, and restorative justice models.

to emphasize criminal justice reform as part of their agenda,¹⁰⁴ it may become more politically palatable to re-think the divergence between cases with corporate and individual defendants. If the goal is public safety or proportionate punishment, corporate prosecution provides a model well worth emulating in individual cases.

104. President Trump ran a Super Bowl ad touting his criminal justice reform achievements, and candidates for the 2020 Democratic nomination also touted criminal justice reform as part of their agendas.