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## *ESSAY*

### THE METAMORPHOSIS OF CORPORATE CRIMINAL PROSECUTIONS

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#### INTRODUCTION

CORPORATE criminal enforcement has exploded in this country. Billion-dollar fines are now routine, where they were unimaginable a decade ago, across a range of industries, from Big Pharma to the largest megabanks to defense contractors and energy companies. We have federal prosecutors and the Department of Justice (“DOJ”), together with the white-collar bar, to thank for this. Their innovations have transformed what was, in decades past, a backwater area of criminal practice, in which corporate enforcement was uncommon and any resulting fines often quite minor, into a rapidly changing and exciting field of practice.<sup>1</sup> Yet deep concerns remain. General Motors recently received an out-of-court deferred prosecution agreement that permits the company to avoid a conviction for concealing defects over many years—actions that cost over a hundred people their lives—accompanied by no charges for any employees.<sup>2</sup> We have seen major financial institutions like AIG, Bar-

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<sup>1</sup> For an overview, see Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* 1–18 (2014).

<sup>2</sup> David M. Uhlmann, *Justice Falls Short in G.M. Case*, N.Y. Times, Sept. 20, 2015, at SR5, <http://nyti.ms/1V1Kzkq>. For a report expressing concern with a wide range of recent civil and criminal corporate settlements, see Office of Sen. Elizabeth Warren, *Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy* (Jan. 2016), <http://>

clays, Credit Suisse, HSBC, JPMorgan, Lloyds, and UBS prosecuted repeatedly in a space of just a few years. Just imposing eye-catching corporate fines is not enough to generate lasting accountability.

Now, the DOJ has begun to rethink the evolving corporate prosecution approach. Professors Elizabeth Joh and Thomas Joo have written a wonderful essay critically examining the new Yates Memo—the DOJ’s new set of guidelines for individual accountability in corporate crime investigations—which has been dubbed, in the typical style of the white-collar bar, after Sally Yates, the Deputy Attorney General who drafted the memo.<sup>3</sup> Joh and Joo question how effective the new DOJ policy shift will be and “urge greater consideration of complexity” in corporate prosecutions.<sup>4</sup> They fear, as I do, that a stilted focus on only individual accountability might permit excessive leniency to be afforded to corporations. Fortunately, this policy change is not purely an “all-or-nothing” change, as I will describe, due to the way in which it interacts with other aspects of the larger set of corporate charging principles that the DOJ has already adopted. That is also an additional weakness of the policy change. It is unclear what a course correction means where, at bottom, prosecutors simply have discretion to charge corporations—or not—and settle the corporate cases that are brought through opaque, intensive, and highly complex negotiations.

Most recently, the DOJ has incorporated the Yates Memo into its broader set of corporate charging guidelines contained within the U.S. Attorneys’ Manual and made additional changes to those guidelines, including setting out the needs for corporate self-reporting and better coordination between federal enforcement agencies that so often work in tandem.<sup>5</sup> Those larger changes, while useful, represent an incremental shift in the overall approach. Perhaps most troubling, the DOJ has not tightened its criteria for granting leniency in the form of deferred or non-prosecution agreements to corporations. Nor has the DOJ, despite statements that recidivism will be taken seriously, changed its guidelines to address the concern that corporations violate agreements and commit

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[www.warren.senate.gov/files/documents/Rigged\\_Justice\\_2016.pdf](http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf), archived at <https://perma.cc/6LS7-GNWN>.

<sup>3</sup> Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 *Va. L. Rev. Online* 51 (2015).

<sup>4</sup> *Id.* at 54.

<sup>5</sup> U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-28.000 (2015) [hereinafter U.S. Attorneys’ Manual], <http://www.justice.gov/usam/united-states-attorneys-manual>, archived at <https://perma.cc/J7C9-6UR3>.

new crimes but still obtain leniency.<sup>6</sup> The DOJ also has not meaningfully addressed the substance of prosecution agreements, from calculation of fines, to the scope of compliance reforms sought, to the supervision of the agreements. A deeper rethinking of the federal corporate charging guidelines is much needed, and the paramount concern with leniency in corporate prosecutions—to avoid undue collateral consequences—should instead be directed at individuals.

### I. WHY GUIDE CORPORATE CHARGING?

Why do we have federal corporate prosecution guidelines at all? In few areas of criminal law do prosecutors announce in advance, and in detail, under what circumstances they will prosecute versus offer outright leniency. For years, the DOJ had no specific guidelines, for example, on federal drug prosecutions; it was only recently that then-Attorney General Eric Holder issued guidance on when, for example, to charge mandatory minimums in drug cases.<sup>7</sup> The U.S. Attorneys' Manual contains general guidance that pretrial diversion, supervision, and leniency should be considered for some individuals, noting that "[i]nnovative approaches are strongly encouraged," but those approaches are rarely used by U.S. Attorneys, who have extended such pretrial leniency to a tiny fraction of individuals charged every year.<sup>8</sup> As federal District Judge Emmett Sullivan has put it, "people are no less prone to rehabilitation than corporations."<sup>9</sup> Instead, for years, particularly under Attorney General John Ashcroft, the DOJ policy was the opposite of lenient, encouraging prosecutors to pursue the "most serious, readily provable" charges

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<sup>6</sup> See, e.g., Garrett, *supra* note 1, at 165–68 (describing concerns regarding corporate recidivism).

<sup>7</sup> Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <http://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>, archived at <https://perma.cc/Y7ST-93YH>.

<sup>8</sup> U.S. Dep't of Justice, U.S. Attorneys' Manual: Criminal Resource Manual § 712, <http://www.justice.gov/usam/criminal-resource-manual>, archived at <https://perma.cc/WX3Q-5JE7>. Judge Sullivan points out: "Department of Justice statistics indicate that in fiscal year 2012, there were a total of 253 pretrial diversions for individual defendants, accounting for 0.9% of the reasons why Assistant United States Attorneys declined to prosecute." *United States v. Saena Tech Corp.*, Nos. 14-66 (EGS), 14-211 (EGS), 2015 WL 6406266, at \*27 (D.D.C. Oct. 21, 2015) (citations omitted). Judge Sullivan notes also that prejudgment probation is similarly underused. *Id.* at \*28.

<sup>9</sup> *Saena Tech Corp.*, 2015 WL 6406266, at \*29.

against individuals.<sup>10</sup> In 2010, these guidelines were moderated to encourage pursuit of “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction,” while also encouraging an “individualized assessment” of the defendant.<sup>11</sup>

Corporations, though, are treated differently. They have never been prosecuted only for the most serious offenses committed by their agents. Corporations have long received a separate program of treatment under the Antitrust Division’s highly successful Leniency Program (which affects both corporations and individuals, and which is not affected in its approach by the Yates Memo).<sup>12</sup> In 1999, then-Deputy Attorney General Eric Holder issued the first DOJ memo providing more general guidelines for corporate prosecutions.<sup>13</sup> It was a 2003 revision to those guidelines, however, that accompanied the modern rise in prosecutions of the largest and public companies: the “Thompson Memo,” named after Larry Thompson, the Deputy Attorney General who oversaw the revisions, as I have described elsewhere.<sup>14</sup> In the years since the 2003 change, the DOJ has revised the guidelines—which have been incorporated into the U.S. Attorneys’ Manual as a set of principles for prosecuting organizations—several more times, responding to concerns regarding attorney-client privilege and corporate payment of attorneys’ fees, as well as concerns regarding the appointment of corporate monitors. The overall structure of the principles contained in these Principles of Federal Prosecution of Business Organizations encouraged consideration of a set of

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<sup>10</sup> U.S. Attorneys’ Manual, *supra* note 5, § 9-27.400; Memorandum from John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), [http://www.justice.gov/archive/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm), archived at <https://perma.cc/4DF7-884S>.

<sup>11</sup> Memorandum from Eric Holder, Attorney Gen., U.S. Dep’t of Justice, on Department Policy on Charging and Sentencing (May 19, 2010), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>, archived at <https://perma.cc/UXQ2-UAAL>.

<sup>12</sup> U.S. Dep’t of Justice, Antitrust Div., Leniency Program, <http://www.justice.gov/atr/leniency-program>, archived at <https://perma.cc/Q3JK-PJFU>.

<sup>13</sup> Memorandum from Eric Holder, Deputy Attorney Gen., U.S. Dep’t of Justice, on Bringing Criminal Charges Against Corporations (June 16, 1999), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>, archived at <https://perma.cc/G5T7-ULMM>.

<sup>14</sup> Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep’t of Justice, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), [http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20\\_privwaiv\\_doj\\_thomp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_doj_thomp.authcheckdam.pdf), archived at <https://perma.cc/85RM-NQJK>.

nine factors when deciding whether to pursue an indictment or conviction of a corporation, or, alternatively, a deferred or non-prosecution agreement. These factors broadly focused on the seriousness of the past conduct at the firm, the firm's present cooperation, reporting and compliance at the firm, and future consequences, including collateral consequences, for the firm and others should the company be prosecuted.<sup>15</sup>

Now, those principles have been amended yet again. The most recent 2015 changes add a tenth factor to the set of considerations when charging organizations. The addition is nothing new, since, to be precise, the DOJ separated a single prior, confusing factor that considered both cooperation and self-reporting into two separate factors.<sup>16</sup> To be sure, when separating cooperation as a factor, the DOJ added a clarification that it is the firm's cooperation in the investigation of its agents that is the priority. The new guidelines also contain an entire, prominently displayed section announcing the new "focus on individual wrongdoers."<sup>17</sup> That section details how prosecutions of individuals will be a focus "at every step of the process," including from the earliest stages of an investigation.<sup>18</sup> Moreover, the guidelines now make clear that cooperation is to be more clearly limited to cooperation in identifying culpable individuals: "In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority."<sup>19</sup> The guidelines also highlight the now separately noted importance of self-reporting in the form of a "timely and voluntary disclosure," which is a truly important change, since corporate crimes may often go undetected, and corporations in the past had remained unsure as to whether self-reporting crimes would actually be rewarded.<sup>20</sup>

However, the revised principles continue to encourage the use of deferred and non-prosecution agreements for corporations, recommending

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<sup>15</sup> See U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-28.200 (2008) [hereinafter U.S. Attorneys' Manual (2008 Version)], <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>, archived at <https://perma.cc/A58J-72LV>.

<sup>16</sup> U.S. Attorneys' Manual, *supra* note 5, § 9-28.300 (including, as factor six, "the corporation's timely and voluntary disclosure of wrongdoing," and, as factor four, "the corporation's willingness to cooperate in the investigation of its agents").

<sup>17</sup> *Id.* § 9-28.210.

<sup>18</sup> *Id.* § 9-28.700(B).

<sup>19</sup> *Id.* § 9-28.700(A).

<sup>20</sup> *Id.* § 9-28.900.

their use as a middle ground, short of a conviction but not quite a declination. The principles vaguely note that whether undue collateral consequences of an indictment or conviction recommend such an approach “must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department’s need to promote and ensure respect for the law.”<sup>21</sup> The principles do say that “prosecutors should generally *seek* a plea to an appropriate offense,” and also that “generally” this should be a plea to the “most serious, readily provable offense charged.”<sup>22</sup> The principles also add a new section on coordinating parallel proceedings, to encourage closer cooperation between prosecutors and those pursuing civil, regulatory, and administrative actions.<sup>23</sup>

How important are these sorts of changes to that larger set of corporate charging principles, given the complexity of the guidelines and the emphasis on the “substantial latitude” that prosecutors retain in exercising their discretion?<sup>24</sup> One preliminary question is whether the latest round should even be considered a meaningful set of changes at all. Regarding the new stated focus on individual culpability, DOJ policy had already emphasized for some time that “[o]nly rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers,” where the company settles its case with prosecutors (since, after all, the company’s liability is necessarily premised on the crimes of its agents).<sup>25</sup> Supposedly, individuals were always a central focus of an investigation. Yet the new additions address an important practical problem, the subject of my recent article published in this journal.<sup>26</sup> There, I detail how from 2001 to 2014, prosecutors entered 306 deferred and non-prosecution agreements with companies, which are settlement deals permitting the companies to avoid an indictment and a conviction. Among those companies entering deferred and non-prosecution agreements, thirty-four percent or 104 companies, had individuals prosecuted, with 414 total individuals prosecuted to date. Nor were most of those individuals higher-ups; most were middle management. The average sentence, for those who received a sentence with jail

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<sup>21</sup> Id. § 9-28.1100(B).

<sup>22</sup> Id. § 9-28.1500(A), (B).

<sup>23</sup> Id. § 1-12.000.

<sup>24</sup> Id. § 9-28.200(B).

<sup>25</sup> See U.S. Attorneys’ Manual (2008 Version), *supra* note 15, § 9-28.200(B).

<sup>26</sup> Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 Va. L. Rev. 1789 (2015).

time, was forty months, but over forty percent did not receive any jail time.<sup>27</sup>

The new DOJ guidance recognizes, but does not directly address, the practical challenges of identifying responsible individuals. Individual wrongdoing will now be a stated focus from the earliest stages, and the principles now seek to more directly incentivize such cooperation. A company will only get full cooperation credit for identifying all relevant individuals. But how will prosecutors know whether a company has done so, given a position of real dependence on the company's own internal investigation for information about who did what? It had long been problematic that corporations could receive credit for cooperation that, as I have argued, does not remotely resemble the criteria for "substantial cooperation" for individuals (although the Sentencing Guidelines criteria must still themselves be reformed).<sup>28</sup> Nor, as Professors Joh and Joo describe,<sup>29</sup> does cooperation of the corporation itself necessarily mean that the most responsible individuals, rather than scapegoated low-level employees, are identified. Justice is not served if the company identifies, as Deputy Attorney General Yates put it well, "the vice president in charge of going to jail."<sup>30</sup>

The limitations of the new memo extend more broadly, however. The considerations of prosecutors themselves are multifarious. Even if a company obtained full cooperation "credit," this would not necessarily translate to a more lenient outcome. There are other factors to consider. What if the company's track record of violations was long; would a recidivist really receive leniency for fully cooperating as to its latest violation? What if the company did not self-report, but only cooperated once it had been turned in by a competitor? What if the conduct was so reprehensible that prosecutors felt it deserved maximum punishment? After all, cooperation is only one of the ten factors in the principles. Similarly, self-reporting in the form of a timely and voluntary disclosure is just another factor, and while it can be considered "both as an independent factor and in evaluating the company's overall cooperation and . . . compliance," even if a company voluntarily self-discloses, "prosecution may be appropriate" based on "a consideration of all the factors set forth in these

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<sup>27</sup> Id. at 1791.

<sup>28</sup> Id. at 1843–46 (internal quotation marks omitted).

<sup>29</sup> Joh & Joo, *supra* note 3, at 58.

<sup>30</sup> Matt Apuzzo & Ben Protess, Justice Dept. Sets Its Sights on Executives, N.Y. Times, Sept. 10, 2015, at A1, <http://nyti.ms/1UI3xfX>.

Principles.”<sup>31</sup> What if a company is downright non-cooperative or fails to disclose its crimes? Perhaps such a company could still receive substantial leniency if other factors weighed in the other direction, such as self-reporting or collateral consequences to shareholders and employees. Indeed, there are examples of deferred prosecution agreements that describe companies as having initially been uncooperative or not disclosing their crimes, but that later garner leniency.

There is no reason that these latest set of changes would produce greater assurances or greater clarity to corporations. With every revision and expansion of the U.S. Attorneys’ Manual principles, prosecutors still fundamentally retain broad “all things considered” discretion in corporate charging. As I have developed in my empirical work on the subject, what the guidelines say is one thing, and what prosecutors actually do in practice is another. The guidelines do not say that most public corporations should receive deferred and non-prosecution agreements, but that is what has happened in practice. The guidelines do not speak to how corporate recidivists should be treated, and the relative lack of consequences in practice speaks volumes. Perhaps we need to look at forces operating largely outside of the DOJ to better understand what occurs in corporate prosecutions.

## II. BEYOND THE PROSECUTORS: CORPORATIONS AND JUDGES

Corporations are not ordinary defendants. A large company may itself face challenges uncovering who did what, even if it is intent on cooperating. Corporate negotiations with prosecutors are dynamic, to put it mildly, and the approaches of companies and industries matter. If other major banks start to receive plea agreements, then obtaining a deferred prosecution agreement may no longer seem so necessary to preserve a firm’s reputation. The concerns of regulators may play an important role in negotiations, and often compliance terms and supervision of agreements centrally involve specialist regulatory agencies.

Let us not forget the federal judiciary and its supervisory role. Some judges have taken on a more active role in reviewing deferred prosecution agreements before approving them, as well as some plea agreements. I have argued that judges should provide a meaningful review of the terms of such agreements, given their complexity and public im-

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<sup>31</sup> U.S. Attorneys’ Manual, *supra* note 5, § 9-28.900.

portance.<sup>32</sup> In 2013, federal Judge Richard J. Leon rejected a deferred prosecution agreement with a company for foreign bribery, “looking at the DPA in its totality” and noting that not only were “no individuals . . . being prosecuted for their conduct at issue here,” but also “a number of the employees who were directly involved in the transactions [we]re being allowed to remain with the company.”<sup>33</sup> Soon, the U.S. Court of Appeals for the D.C. Circuit may rule on appeal whether doing so was appropriate.

Federal Judge John Gleeson asserted a supervisory power to receive monitors’ reports concerning a deferred prosecution agreement with HSBC.<sup>34</sup> The DOJ guidelines have long said very little about the entire subject of supervising compliance and ensuring that a corporation adheres to the terms of a prosecution agreement.

Most recently, Judge Emmett Sullivan suggested that certain factors (suggested by this author as amicus) could provide “useful guideposts” when evaluating whether a deferred prosecution agreement with a company is truly “designed to secure a defendant’s reformation” or whether the terms are “so vague or minimal as to render them a sham.”<sup>35</sup> Such interventions will be of necessity quite deferential where there is no entitlement to receive diversion and where prosecutors reach an agreement with a defendant, but they may also impact the future contours of corporate prosecutions, as they have in the past.

### III. DOES IT TAKE A PLAN?

Do the breadth of prosecutorial discretion and the multifaceted nature of the considerations the DOJ uses when charging a corporation doom any reform efforts to failure? I think not, but it takes a more comprehensive plan of attack to respond to the “too big to jail” challenge of corporate prosecutions. And, to be fair, the DOJ is continuing to rethink its approach towards corporations; the Yates memo is not the last word.

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<sup>32</sup> Garrett, *supra* note 1, at 282 (arguing that “[j]udges should consider the public interest when reviewing . . . deferred prosecution agreements” and “insist on full and open hearings before approving [such] agreements”).

<sup>33</sup> *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 166 (D.D.C. 2015).

<sup>34</sup> *United States v. HSBC*, No. 12-CR-763, 2013 WL 3306161, at \*1 (E.D.N.Y. July 1, 2013).

<sup>35</sup> *United States v. Saena Tech Corp.*, Nos. 14-66 (EGS), 14-211 (EGS), 2015 WL 6406266, at \*16 (D.D.C. Oct. 21, 2015). I note that this author served as an amicus making recommendations to the court regarding the question of what standard should be used when deciding whether to approve a deferred prosecution agreement with a corporation. See *id.* at \*19.

For example, the Fraud Section at the DOJ has retained a compliance expert to do a more rigorous job of assessing compliance, since the corporation's "remedial action[s]" and any efforts to implement an effective corporate compliance program are among the factors to be considered.<sup>36</sup> The entire area is evolving so quickly that the DOJ sensibly continues to adapt and respond to concerns, including those raised by academics, of all people.

Outside of the DOJ, perhaps, more sweeping solutions can be considered. I have suggested a broader palette of reforms to address these problems, both in my book and my recent article on the problem of individual prosecutions.<sup>37</sup> Legislation is pending in Congress, chiefly focused on the transparency of the financial terms in civil and criminal corporate settlements. Former Secretary of State Hillary Clinton has proposed as part of her presidential campaign a top-to-bottom plan for policing and preventing corporate crime and financial misconduct.<sup>38</sup> The plan carefully addresses systemic risk in financial institutions ("too big to fail"), but my interest is in "too big to jail" provisions: The plan addresses a range of concerns that companies and banks, as well as their officers and employees, can commit massive crimes at great cost to the public but receive mere slaps on the wrist. Here, I break those relevant portions of the Clinton plan down into four key recommendations.<sup>39</sup>

1. *Corporate deals should not be out of court.* I have argued for some time that non-prosecution agreements simply should not be pursued (although the Swiss Banking Program may be the exceptional circumstance in which such agreements are genuinely useful).<sup>40</sup> I have also argued that

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<sup>36</sup> Press Release, U.S. Dep't of Justice, New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 3, 2015), <http://www.justice.gov/criminal-fraud/file/790236/download>, archived at <https://perma.cc/DN4Z-F87F>.

<sup>37</sup> See Garrett, *supra* note 26, at 1839–49 (exploring possible reforms); Garrett, *supra* note 1, at 273–84.

<sup>38</sup> Hillary Clinton: Wall Street Should Work for Main Street [hereinafter Clinton Plan], <https://www.hillaryclinton.com/p/briefing/factsheets/2015/10/08/wall-street-work-for-main-street>, archived at <https://perma.cc/9CUX-Y2QU>.

<sup>39</sup> I previously outlined these four features of the Clinton Plan in an op-ed. See Brandon L. Garrett, It Takes a Plan (To End 'Too Big to Jail'), *Huffington Post* (Oct. 15, 2015), [http://www.huffingtonpost.com/brandon-l-garrett/it-takes-a-plan-to-end-too-big-to-jail\\_b\\_8296140.html](http://www.huffingtonpost.com/brandon-l-garrett/it-takes-a-plan-to-end-too-big-to-jail_b_8296140.html), archived at <https://perma.cc/A6NC-ARH8>; Brandon L. Garrett, It Takes a Plan (To End 'Too Big to Jail'), *CLS Blue Sky Blog* (Oct. 14, 2015), <http://clsbluesky.law.columbia.edu/2015/10/14/it-takes-a-plan-to-end-too-big-to-jail/>, archived at <https://perma.cc/UF9Z-SEH8>.

<sup>40</sup> In 2010, the United States and Switzerland signed a treaty providing for the exchange of information on potential tax evaders. The DOJ subsequently announced that it would offer non-prosecution agreements to Swiss banks that voluntarily disclosed their roles in helping individuals avoid U.S. taxes. For a more detailed explanation, see Garrett, *supra* note 1, at

deferred prosecution agreements have been overused. The DOJ has begun to respond by more often entering plea agreements in the most serious corporate prosecution cases in practice, but not, as noted, as a matter of any formal policy change. The DOJ Guidelines should be changed to reflect the priority of corporate convictions, not just deals. The Clinton plan criticizes the “overuse” of out-of-court corporate prosecution agreements and calls for DOJ guidelines clarifying that those agreements should “be used in limited circumstances.”<sup>41</sup> The DOJ chose not to make any such change in its recent round of revisions to its guidelines. Corporations should know that they cannot count on out-of-court leniency deals for the most serious crimes. They should typically be convicted. (In contrast, I strongly agree with Judge Emmett Sullivan that we should be thinking far more broadly about deferred and non-prosecution agreements for individual offenders.)<sup>42</sup>

2. *Corporate deals should be in the open.* We should know what fines companies are really paying and what is tax deductible or offset through credits. The Clinton plan endorses the bipartisan transparency in corporate settlements legislation proposed by Senators Elizabeth Warren and James Lankford. Some agreements are quite clear on the tax consequences of a settlement. The JP Morgan settlement, for example, included \$1.7 billion in forfeiture, but stated that the forfeiture was to be treated as a penalty and that JP Morgan must not see a tax deduction or credit from that settlement amount.<sup>43</sup> Others are more opaque. They often do not explain any sentencing guidelines calculation for how the fine was determined, either. The problem also extends to civil settlements, such as BP’s, which have been silent on the question.<sup>44</sup> Some settlements have also included set-offs against payments that companies have already made or have agreed to make to state and local enforcers or feder-

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244–45. The DOJ has detailed the Swiss Bank Program and provided materials from each of the cases on a useful website. See U.S. Dep’t of Justice, Swiss Bank Program, <http://www.justice.gov/tax/swiss-bank-program>, archived at <https://perma.cc/39H9-C6NL>.

<sup>41</sup> Clinton Plan, *supra* note 38.

<sup>42</sup> *United States v. Saena Tech Corp.*, Nos. 14-66 (EGS), 14-211 (EGS), 2015 WL 6406266, at \*21 (D.D.C. Oct. 21, 2015).

<sup>43</sup> See Verified Complaint, Exhibit D to the Deferred Prosecution Agreement, at 1–6, *United States v. JPMorgan Chase Bank*, No. 14-CR-\_\_\_ (S.D.N.Y. Jan. 6, 2014), <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/JPMC%20DPA%20Packet%20%28Fully%20Executed%20w%20Exhibits%29.pdf>, archived at <https://perma.cc/H3DE-BQDV>; Garrett, *supra* note 1, at 124.

<sup>44</sup> Garrett, *supra* note 1, at 135 (noting that, in entering a civil consent decree with BP, the Environmental Protection Agency did not explain how it reached a penalty of \$15 million).

al agencies. Entire agreements with corporations have been hidden, although University of Virginia law students have filed FOIA requests and successfully obtained many of them.<sup>45</sup> The plan says that all such corporate agreements must be publicly disclosed. The DOJ should be requiring as much on its own. Despite detailed criticism on this front as to the lenient fines imposed and the failure to calculate them in any transparent way,<sup>46</sup> the DOJ did not address the calculation of fines at all in its revised guidelines, and it has never done so except to say that punishment and deterrence can be accomplished by “substantial fines.”<sup>47</sup>

3. *Individuals should be held accountable.* As noted, corporations that receive non-prosecution and deferred prosecution agreements typically manage to insulate individuals from prosecution, although they invariably agree to fully cooperate with prosecutors. When individuals are charged, they are typically low-level employees, not higher-ups, and they often do not receive jail time. I have proposed to extend statutes of limitations in corporate criminal investigations.<sup>48</sup> The Clinton plan would do so for major financial fraud, which may make complex investigations more practicable.

4. *Prosecutors need far more enforcement resources.* In corporate prosecutions, there is a role reversal: The federal prosecutors are the David to the defendants, who are the corporate Goliaths of the world. Enforcers and prosecutors need substantial resources to tackle cases involving hundreds or thousands of employees at major companies. The Clinton plan is the first serious plan to bolster enforcement. When the multinational corporation Siemens was investigated in the largest foreign bribery case of its time, the firm cooperated, and in the process, Siemens spent over a billion dollars hiring attorneys and investigators to represent it.<sup>49</sup> Prosecutors and regulators could move mountains with a fraction of those resources.

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<sup>45</sup> Univ. Va. Law Sch., First Amendment Clinic Obtains 18 More of DOJ’s Secret Deals with Corporate Offenders (June 4, 2015), [http://www.law.virginia.edu/html/news/2015\\_sum/foia.htm](http://www.law.virginia.edu/html/news/2015_sum/foia.htm), archived at <https://perma.cc/Z8JL-92JK>.

<sup>46</sup> See Garrett, *supra* note 1, at 67–70, 149–50.

<sup>47</sup> U.S. Attorneys’ Manual, *supra* note 5, § 9-28.1500(B).

<sup>48</sup> Garrett, *supra* note 26, at 1841–42.

<sup>49</sup> Nathan Vardi, *The Bribery Racket*, *Forbes* (May 28, 2010), <http://www.forbes.com/global/2010/0607/companies-payoffs-washington-extortion-mendelsohn-bribery-racket.html>; see also Garrett, *supra* note 1, at 9–10.

## CONCLUSION

We have long needed a detailed plan of action to revamp our evolving system of corporate prosecutions, which are very much the envy of the world corporate enforcement community but which are also still very much a work in progress. Professors Joo and Joh carefully dissect the Yates memo and illustrate how limited its impact will likely be, as well as the potentially perverse consequences of its priorities. It is not altogether clear that it is in fact a new policy. Since their writing, the DOJ has announced broader changes to its corporate charging guidelines. These changes are incremental and preserve broad charging discretion that has not served prosecutors or corporate prosecutions well in the past. Far more promising changes are possible, and some may be genuinely in the works at the DOJ, through legislation, and in plans that may be adopted by future administrations yet to come. To merely say the focus will be placed more on individual prosecutions raises practical questions, including whether this focus will come at the expense of careful corporate level enforcement. To bolster investigation and enforcement resources, the DOJ must reorient the entire system by rethinking the rules for civil disbarment, enhancing civil fines, incentivizing whistleblowers better, and strengthening prosecution priorities for the most serious offenders.

We are in the midst of a rethinking of our system of criminal justice in this country. We are reconsidering our mass incarceration and overly harsh sentences, with their collateral consequences on entire communities and generations of young people, and we are focusing on efforts to promote reentry, rehabilitation, and prevention, rather than punishment. When one turns to the most privileged offenders in this country, the picture is reversed. The most far-reaching corporate crimes have received leniency for years now, as the result of careful thinking and rethinking of the precise contours of a federal leniency program designed to avoid excess collateral consequences for corporate offenders. Rehabilitation is not taken seriously enough, with concerns that compliance may often be overly cosmetic. Corporate fraud enforcement needs more powerful teeth. In the years to come, hopefully we will see a reversal of federal priorities, with new efforts to avoid collateral consequences for individuals committing relatively small offenses, combined with far more rigorous prosecution of the largest corporate crimes.