SOLUTIONS

IS CORPORATE CRIMINAL LIABILITY UNIQUE?

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The authors of many of the articles in this symposium are specialists in corporate and white collar crime. Since I am not, I hope to bring an outsider’s perspective to some key issues and common assumptions. My thesis is that many of the criticisms leveled against corporate criminal liability are not unique. Rather, they are examples of problems that are common in the federal criminal justice system. These issues should be taken very seriously, but in analyzing them and considering solutions it is important not to focus exclusively on corporations as defendants, or even white collar defendants in general. When skillful well-funded advocates raise these issues in the context of corporate criminality it provides an important opportunity. The critique of corporate criminality sheds light on issues that are too easily ignored when they affect only individuals and groups that have few advocates and little political or economic power. Broadening the scope of the enquiry reveals that the problems highlighted by the critics of corporate and white collar liability are often most severe in other contexts, so that the case for overall reform is stronger, rather than weaker, than the case for reform limited to corporate or white collar cases and defendants.

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1. Several other scholars have drawn comparisons between the treatment of corporate crime and street crime. For example, Darryl Brown has argued that the treatment of white collar offenses contains the seeds of progressive approaches that might eventually be extended to benefit defendants accused of street crimes. See Darryl K. Brown, The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement, 1 OHIO ST. J. CRIM. L. 521, 544 (2004) [hereinafter Brown, Promising Dynamics] (arguing that practical barriers to corporate crime enforcement have potential to moderate the government’s pattern of populist-punitive enforcement in ways that could lead to improvements across the criminal justice enforcement spectrum); Darryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. PA. L. REV. 1295, 1345-58 (2001) (“Thus, street crime enforcement could take strides toward preventive, compliance-oriented, less punitive, regulatory strategies that we have devised for white-collar wrongdoing.”); see also Geraldine Scott Moohr, Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model, 8 BUFF. CRIM. L. REV. 165, 167-68 (2004) (noting that prosecutorial power, while a problem for white collar defendants, may be of even greater concern for non-white collar defendants, who generally have less power and resources).
The criticisms that fit this mold run as follows. First, it is said that federal criminal law has run amok. The federal code is not a unified code in any meaningful sense, but more of an overstuffed grab bag. Nobody even knows exactly how many federal offenses there are, but it’s clear that federal criminal law has expanded to include a plethora of regulatory matters that simply don’t belong in the criminal arena. Civil or regulatory treatment is sufficient, and anything more is overkill. Second, the main standard of liability is overbroad; criminal liability can be imposed on corporations when there’s no true fault. Arguably, even the Department of Justice recognizes this problem in its prosecutorial guidelines and policies. Third, federal sentences for white collar and regulatory offenses are far too harsh. Heavy collateral costs are imposed on third parties, such as employees and shareholders. Last, federal prosecutors wield too much power. Corporate defendants can’t, realistically, fight criminal charges. If prosecution is threatened, they have no choice but to waive all of their rights and comply with the government’s demands, which require them to become agents in developing the case against individual corporate officials. The bottom line is that good companies and good people are being tarred as criminals and treated disgracefully. In essence, what’s bad for GM—and the rest of corporate America—is bad for the nation.

In assessing these arguments, I will focus on federal criminal law, though some states have also expanded the statutory basis for corporate criminal liability. I agree that federal criminal law is indeed overbroad in two senses: there are too many federal offenses covering too much conduct, and many individual offenses are overbroad and badly drafted. This has many negative consequences, and it should be a cause for concern. But these consequences are felt throughout the system, not merely by corporate and white collar defendants. These problems point

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2. Some important issues, such as the jurisprudential question whether it is ever appropriate to impose criminal liability on an artificial entity, are not discussed here. See, e.g., Donald R. Cressey, The Poverty of Theory in Corporate Crime Research, in 1 ADVANCES IN CRIMINOLOGICAL THEORY 31, 36 (William S. Lauffer & Freda Adler eds., 1989) (arguing a corporation is an entity controlled by people, and therefore has no identity of its own); V.S. Khanna, Is the Notion of Corporate Fault a Faulty Notion?: The Case for Corporate Mens Rea, 79 B.U. L. REV. 355, 356 (1999) (asking how a corporation, which has no mind, can possess a state of mind); Paul H. Robinson, The Virtues of Restorative Process, the Vices of “Restorative Justice,” 2003 UTAH L. REV. 375, 384-85 (2003) (commenting that extending criminal liability to corporations “risks obscuring the moral content of criminal liability”); John S. Baker, Jr., Corporations Aren’t Criminals, WALL ST. J., April 22, 2002, at A18 (stating corporate criminal liability “ignores the moral basis on which substantive criminal law rests—the requirement that a defendant be personally responsible for his actions”). David Skeel and William Stuntz have cautioned if criminal law is expanded to cover more technical violations, trials—which by their nature tend to focus on behavior on the outer edge of criminal liability, rather than the core—will increasingly deal with technicalities and trivialize. David Skeel & William Stuntz, Another Attempt to Legislate Corporate Honesty, N.Y. TIMES, July 10, 2002, at A21.

3. In 2003, Stateside Associates prepared a report analyzing state policies that could impact the prosecution of crimes committed in the course of doing business, covering both liability of individual employees and corporate liability. Its report, which covers the period beginning in 2000, found that in nearly every state there was legislative activity that added new crimes, expanded liability for existing offenses, or altered mens rea requirements. See STATESIDE ASSOCIATES, 50 STATE CORPORATE CRIMINALIZATION ASSESSMENT (NOV. 7, 2003) (on file with author).
to the urgent need for overall reform and revision of the federal criminal laws, including a reduction in the number of federal crimes, and careful—and clear—redrafting of individual offenses across the board. Nor is there anything unique about the fact that the Department does not enforce corporate criminal liability as broadly as many federal statutes would permit, or that as a matter of policy the Department restricts liability. This is the inevitable consequence of the current breadth of the federal criminal code, which now covers, in one way or another, nearly all of the offenses covered by state criminal law.

It is also true that liability can be imposed on corporations for the actions of corporate employees, even in the absence of specific proof of corporate fault. This is not unique. American criminal law imposes liability without fault under other well established doctrines that can, in some cases, lead to sanctions far more severe than any visited on corporations. It’s undeniable the federal criminal sanctions that may be imposed on corporations and white collar defendants are very harsh, and—in the eyes of many—disproportionate to the harm caused. But these sanctions are right in line with the federal sentencing policies applicable to other defendants and other crimes. Such long sentences do indeed make it a very high risk strategy to go to trial. Once again, this is typical. Corporate and white collar defendants, like every other group of defendants in the federal system, are under extreme pressure to plead guilty to get sentencing concessions. Only a small fraction of federal criminal cases go to trial,4 and the prosecution generally requires not only a waiver of trial related rights, but also the waiver of other rights as the price of its agreement to sentencing concessions. And, finally, the pressure to cooperate with the government and incriminate others is a fact of life throughout the federal system.5

These issues state an agenda for review and reform. The question is the appropriate scope of the agenda. Should reform efforts focus on the scope of criminal liability and procedural protections applicable to corporate and white collar defendants? That is far too narrow an agenda. Because these problems cut across the board, it’s quite misleading to consider them in isolation. Moreover, as a matter of fairness there’s little appeal to piecemeal solutions that benefit only a privileged few. Indeed limiting the agenda now would likely be the final step, not the first step, because it would remove the strongest interest group from the political equation and thus significantly decrease the chances of broader reform. More fundamentally, in many ways the case for reform is weaker, not stronger, in the case of corporate criminal liability and individual white collar defendants. The frequency of corporate misconduct, the extraordinarily serious consequences of such conduct, and the difficulty of proving many corporate and white collar

5. See infra Part IV.
offenses\textsuperscript{6} should make us cautious about restricting the legal tools that are available to combat corporate misconduct. Criminal liability should not be the only remedy, but the hammer of corporate criminal liability should remain in the toolkit of responses to serious corporate misconduct, particularly since many other tools have been eliminated or restricted. Nor should prosecutors have less leverage than usual in dealing with the best educated, most sophisticated, and most well represented class of defendants. And, finally, it’s time to recognize that excessive sanctions have real and terrible costs not only for defendants, but equally serious collateral costs. This is just as true in the case of drug offenses as it is in the case of the criminal conviction of a corporation. It’s time to count the costs of the unprecedented severity of the current federal sentencing laws, and ask whether they are too high. And it’s time to reassess the use of criminal liability to address problems that could more efficiently, effectively, and humanely be dealt with by civil and regulatory means.

Part I of this essay discusses the overbreadth of the federal criminal code, as it affects all defendants. Part II considers issues related to the respondent superior standard of criminal liability, and Part III discusses the severity of federal sentences. Part IV discusses the power wielded by federal prosecutors, and Part V considers the question of whether the foregoing states a case for reform, and, if so, how broad that agenda should be. It concludes that it would be a mistake to consider the corporate and white collar issues separately from other types of offenses, and argues that the scholars of white collar and corporate law should take up the cause of comprehensive federal code reform.

I. THE FEDERAL CRIMINAL CODE IS OVERBROAD

When former Attorney Generals Edwin Meese and Richard Thornburgh addressed the Corporate Criminality conference that led to this symposium issue, one of the main themes both sounded was the overbreadth of the federal criminal code. The overfederalization critique is right on target,\textsuperscript{7} but the problem goes far beyond

\begin{itemize}
\item \textsuperscript{6}See Brown, Promising Dynamics, supra note 1, at 526-37 (exploring several practical enforcement barriers that make corporate crime harder to investigate and prosecute, including its complexity and the private setting in which it occurs); John Hasnas, Ethics and the Problem of White Collar Crime, 54 AM. U. L. REV. 579, 592-95 (2005) (discussing how the liberal features of the criminal law, such as the mens rea requirement and the attorney-client privilege, impose high costs on the prosecution of white collar crimes).
\end{itemize}
corporate and white collar crime. Corporate specialists are just discovering, and publicizing, a central truth about the current federal criminal justice system: the federal criminal code urgently needs a systematic review and revision to pare it down, clarify it, and bring it in line with modern criminal codes.

A. The Overbreadth of Federal Criminal Law

The federal criminal code is a bloated and disorganized hodgepodge. In truth, there is no federal criminal "code." The federal crimes have not been gathered together. Many are found in Title 18, but many others are scattered throughout the remaining titles of the code. They are found, for example, in Title 26, dealing with the Internal Revenue Code, and Title 21, dealing with food and drugs. They are found, in fact, in virtually every title of the code. How many federal crimes are there? Astonishingly, no one knows for sure. A recent study estimated that the number exceeds 4000. The number of federal crimes (as well as the number of federal prosecutions) has been increasing astronomically. In the past twenty-five years there has been a thirty percent increase in federal offenses carrying criminal penalties.

The proliferation of federal crimes and the resulting overbreadth of federal criminal law have several causes, which have been described at greater length elsewhere. First, Congress has adopted what critics have called the crime du jour approach, adding new crimes to garner publicity and political capital. Second, Congress has not been restrained by the presence of existing laws that deal with the subject at hand. Offenses dealing with the same or similar conduct as existing laws have proliferated. This gives prosecutors the option of choosing among many related offenses whose elements differ slightly, as well as the option of charging multiple offenses for the same conduct. The Supreme Court has given this form

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11. Id. at 27.
13. For example, there are a large number of federal offenses that criminalize false statements. William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 517 (2001) (citing this as one example of a common phenomenon).
14. Id. at 519-20. This pattern can be seen in many areas, including the drug and gun laws as well as white collar offenses.
of drafting a green light, holding that there is no double jeopardy bar to conviction and punishment for multiple offenses that arise out of a single act or transaction.\textsuperscript{15} Third, Congress has enacted offenses that are part of various regulatory schemes. When a new regulatory statute is adopted, it frequently includes an enforcement provision that makes willful violations of certain regulations a crime.\textsuperscript{16} Federal law has thus grown by the addition of new regulatory crimes and by the promulgation of new regulations that can be enforced by existing criminal statutes making willful regulatory violations a crime. One commentator estimated that as many as 300,000 federal regulations could be enforced by criminal sanctions.\textsuperscript{17} In addition, an American Bar Association Task Force noted that nearly 10,000 regulations mention some sort of sanction, some of which are criminal.\textsuperscript{18} And, finally, the real scope of federal criminal law has been greatly expanded by the sweeping interpretations given to some federal offenses, most notably mail\textsuperscript{19} and wire fraud,\textsuperscript{20} which now encompass a breath-taking range of conduct.\textsuperscript{21}

But overfederalization is not limited to offenses aimed at or peculiar to corporations or white collar defendants. The new crime du jour federal offenses, for example, cover a wide array of conduct, including the failure to pay child support,\textsuperscript{22} disruptive conduct by animal rights activists,\textsuperscript{23} creating, selling or


\textsuperscript{16} For a general discussion of administrative crimes, that is, statutes providing that the violation of certain administrative regulations is a crime, see WAYNE R. LAFAVE, CRIMINAL LAW § 2.6(a) (4th ed. 2003); Sanford N. Greenberg, Who Says It's A Crime?: Chevron Deference To Agency Interpretations of Regulatory Statutes That Create Criminal Liability, 58 U. PITT. L. REV. 1, 9 (1996); Mark D. Alexander, Note, Increased Judicial Scrutiny for the Administrative Crime, 77 CORNELL L. REV. 612, 612 (1992). Some scholars regard the presence of such administrative crimes as an indication of a poorly drafted criminal code. See Paul H. Robinson et al., The Five Worst (and Five Best) American Criminal Codes, 95 NW. U. L. REV. 1, 65 (2000) (treating presence of administrative crimes as a diagnostic factor). An ABA Task Force stated that there are more than 10,000 federal regulations that mention some sort of sanction, though most of them are civil. Federalization of Criminal Law, supra note 7, at 10.


\textsuperscript{18} Federalization of Criminal Law, supra note 7, at 10.


\textsuperscript{20} Id. § 1343 (2006).


possessing depictions of cruelty to animals,\textsuperscript{24} and female genital mutilation.\textsuperscript{25} Indeed, one of the most startling results of the expansion of federal criminal law is that it now largely duplicates state criminal law. As I explained in an earlier article:

Dual federal-state criminal jurisdiction is now the rule rather than the exception. Federal law reaches at least some instances of each of the following state offenses: theft, fraud, extortion, bribery, assault, domestic violence, robbery, murder, weapons offenses, and drug offenses. In many instances, federal law overlaps almost completely with state law, as is the case with drug offenses.\textsuperscript{26}

Similarly, the problems created by a multiplicity of statutes that cover the same ground, which appeared first in the context of the drug laws, are now a fact of life throughout the federal code.

\textbf{B. The Effects of Overbreadth}

The overbreadth of the federal criminal code—which affects all defendants, not merely corporations and white collar defendants—has serious consequences.\textsuperscript{27} Most important, it gives federal prosecutors too much unchecked discretion to select the few cases that will be prosecuted and which offense or offenses to charge.\textsuperscript{28} This virtually limitless discretion is the necessary consequence of a federal criminal code that far exceeds the capacity of federal prosecutors and the federal courts. Because Congress has expanded their jurisdiction so much farther than their resources, federal prosecutors have no option other than the exercise of discretion. Federal criminal law enforcement is necessarily an inch deep because it is a mile wide. So it’s quite true that federal prosecutors can’t and don’t prosecute all of the corporations whose conduct they believe violates a federal criminal law, but the point that corporate and white collar scholars often miss is that this is nothing special. For example, virtually every robbery of a business could be prosecuted under federal law,\textsuperscript{29} just as every drug transaction could be prosecuted

\textsuperscript{24} Id. § 48 (2000).
\textsuperscript{25} Id. § 116 (2000).
\textsuperscript{26} Beale, \textit{New Principles, supra} note 7, at 997-98 (footnotes omitted).
\textsuperscript{27} These problems include placing excessive demands on the resources of the federal courts and diverting resources from other critical judicial functions, delegating wide and unchecked discretion to prosecutors, creating inevitable sentencing disparity, tipping the federal-state balance, allowing federal investigators and prosecutors to evade a variety of protective state laws, increasing the potential for duplicative criminal proceedings and penalties, and reducing political accountability. See Beale, \textit{Many Faces, supra} note 7, at 765-71 (describing all of these problems), and Beale, \textit{New Principles, supra} note 7, at 983-96 (describing effects on federal courts).
\textsuperscript{28} See Beale, \textit{New Principles, supra} note 7, at 996-1004; Beale, \textit{Many Faces, supra} note 7, at 760-66.
\textsuperscript{29} The Hobbs Act, 18 U.S.C. § 1951 (2000), makes it a federal crime to obstruct or delay interstate commerce by robbery or extortion. Only a de minimis effect on commerce is required to uphold a Hobbs Act conviction. \textit{See, e.g.}, United States v. Brennick, 405 F.3d 96, 100 (1st Cir. 2005) (upholding Hobbs Act robbery conviction for robbery of a Wal-Mart store where $522.37 was taken from a business with monthly sales of $8.5 million based upon store manager’s testimony that the money would have been reinvested in the purchase of goods manufactured outside the state); United States v. Haywood, 363 F.3d 200, 202, 210-211 (3d Cir. 2004) (upholding Hobbs Act conviction for robbery of fifty to seventy dollars from a bar that sold beer that had traveled in interstate commerce for interstate commerce).
under federal law. But federal prosecutors bring federal prosecutions for only a very small percentage of robberies and drug cases. The same is true of the new offenses such as animal enterprise terrorism, failure to pay child support, and carjacking. This is the general rule within the federal system, rather than something unique or unusual.

Though the overbreadth of the federal criminal code as it applies to corporations and white collar defendants is not unique or even unusual, the excessive discretion it confers upon federal prosecutors is highly problematic. Unreviewable and unchecked prosecutorial discretion invites improper considerations, such as bias, prejudice, or political considerations. And even assuming that federal prosecutors avoid such improper considerations, the excessive discretion that is built into the current federal system inevitably creates disparity among similarly situated persons (and corporations), and it leads naturally to an erosion of procedural rights for the defense.
C. The Choice to Use Criminal Sanctions

White collar specialists might be tempted to reply that the overbreadth of the federal criminal code poses distinctive problems for corporate and white collar defendants because the question is not which system (federal or state) in which they should be prosecuted, but rather the more fundamental question whether the conduct in question should be subject to any criminal sanctions.\textsuperscript{36} Many law and economics scholars have argued, for example, that it is unjust and inefficient to employ the criminal justice system (rather than civil or regulatory approaches) to respond to corporate misconduct.\textsuperscript{37} Criminal law theorists have expressed concern that the expansion of criminal law is erasing the critical distinction between tort law and criminal law, undermining the criminal law’s moral authority and decreasing respect for and compliance with the law.\textsuperscript{38}

These are serious concerns, but they cannot be confined to the corporate or white collar context. Whether grounded in a cost-benefit analysis or concerns regarding the moral basis for criminal law, the arguments advanced against corporate and white collar offenses certainly apply to other common federal offenses,\textsuperscript{39} especially those regarding controlled substances. For decades critics have argued that the costs of criminalizing drugs outweigh the benefits,\textsuperscript{40} and many economists (including Nobel laureate Milton Friedman) support the decriminalization or legalization of some or all drugs.\textsuperscript{41}

\textsuperscript{36} See, e.g., V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477 (1996) (arguing that modifying corporate civil liability would make corporate criminal liability unnecessary); O’Sullivan, supra note 12, at 697-708 (demonstrating overbreadth of federal code by example of obstruction of justice statutes that may reach those who have done no guilty act and/or have no consciousness of wrongdoing).


\textsuperscript{39} For example, advocates of the wider availability of firearms might also make a similar argument.

\textsuperscript{40} See, e.g., SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES (Melvyn B. Krauss & Edward P. Lazar eds., 1991) [hereinafter SEARCHING FOR ALTERNATIVES]; Richard Lawrence Miller, The Case for Legalizing Drugs (1991); Committee on Data and Research for Policy on Illegal Drugs, National Research Council, Informing America’s Policy on Illegal Drugs: What We Don’t Know Keeps Hurting Us (Charles F. Manski et al. eds. 2001) (concluding that there is little relationship between severity of sanctions and prevalence or frequency of use, that perceived legal risk explains very little of the variance in individual drug use, and thus spending may not be allocated effectively); Steven Wisotsky, Beyond the War on Drugs: Overcoming a Failed Public Policy (1990); Ethan A. Nadelmann, Drug Prohibition in the United States: Costs, Consequences, and Alternatives, Science, Sept. 1, 1989, at 939, 939. For a discussion limited to marijuana, see William F. Buckley, Free Weeds: The Marijuana Debate, National Review Online, June 29, 2004, http://www.nationalreview.com/buckley/buckley200406291207.asp.

\textsuperscript{41} See, e.g., Jeffrey A. Miron, Drug War Crimes: The Consequences of Prohibition (2004); Milton Friedman, The War We Are Losing, in SEARCHING FOR ALTERNATIVES, supra note 40, at 53; Milton Friedman, An Open Letter to Bill Bennett, WALL ST. J., Sept. 7, 1989 (arguing that “more police, more jails, use of the military in foreign countries, harsh penalties for drug users . . . can only make a bad situation worse,” and that criminalizing the use of drugs is “a disaster for society, for users and non-users alike”).
A full review of the arguments for and against decriminalization is beyond the scope of this essay, but one of the main elements is the high costs of our present policies. The direct costs include expenditures for police, prosecutors, courts, and prisons, and the restriction of individual liberty of those who are convicted and incarcerated. Imprisonment has a significant impact on the families of those who have been convicted, including many young children and whole neighborhoods. In addition, critics have identified a variety of other indirect effects. Drug prohibition increases two kinds of crime: systemic crimes, which occur because illegal drugs must be sold on black markets, and thus legal means are not available to settle disputes, and economic crimes committed to gain the funds necessary to pay the increased black market prices. A variety of health problems are associated with criminalizing drugs, as a result of uncertain potency and purity as well as the spread of AIDS through the use of dirty needles. The enormous profits generated by drug trafficking also increase the risk of government corruption. Even if these arguments are not persuasive with regard to certain "hard" drugs, they have considerable force when applied to other softer drugs, particularly marijuana, which accounted for more than twenty-five percent of federal drug convictions in 2006. Drug enforcement, including marijuana enforcement, has been and continues to be a major focus of the federal criminal justice system. In terms of sheer numbers, drug enforcement dwarfs the prob-

42. For a summary of the case for and against legalization, see DOUGLAS N. HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS (2005). See also the sources cited supra notes 40-41. For an interesting argument that states should be permitted to legalize or decriminalize drugs, see Paul D. Carrington, The Twenty-First Wisdom, 52 WASH. & LEE L. REV. 333 (1995), and the response by Frank Bowman, Playing "21" With Narcotics Enforcement: A Response to Professor Carrington, 52 WASH. & LEE L. REV. 937 (1995).

43. The results of conviction for a drug offense frequently includes as well a wide range of collateral consequences that hinder the offenders rehabilitation and reintegration by restricting welfare benefits, employment and skills training, and reunion with family. See generally Nora V. Demleitner, "Collateral Damage": No Re-Entry For Drug Offenders, 47 VILL. L. REV. 1027 (2002), and Eric Blumenson & Eva S. Nilsen, How To Construct An Underclass: Or How the War On Drugs Became a War On Education, 6 J. GENDER RACE & JUST. 62 (2002).

44. See infra text accompanying note 100.

45. See HUSAK & DE MARNEFFE, supra note 42, at 64-69.


47. Fordham Law Drug Policy Reform Project, supra note 46 at 408 (noting that half of FBI’s police corruption investigations involve drugs).


49. Only crack and powder cocaine convictions, which together accounted for 43.9% of the drug convictions, were more common than marijuana convictions in 2006. Id. Other drugs prosecuted in the federal system in 2006 included methamphetamine, which accounted for 21% of the convictions, and heroin, which accounted for 6.2% of the convictions. Id. For a description of the current federal drug policies, see THE PRESIDENT’S NATIONAL DRUG CONTROL STRATEGY (Feb. 2007), http://www.whitehousedrugpolicy.gov/publications/policy/ndcs07/ndcs07.pdf.
lems of corporate criminality. More than half of federal inmates are serving time for drug offenses, and the 2006 budget for the Federal Bureau of Prisons was $4.98 billion. And, as noted below, the enforcement of the federal drug laws is coupled with sentences that are even more draconian than those available for corporate criminality.

II. RULES OF CULPABILITY AND LIABILITY WITHOUT FAULT

Perhaps the sharpest and most consistent criticism focuses on the federal standard for corporate criminal liability, which is respondeat superior. Critics charge that it is both unwise and fundamentally unfair to define an entity’s liability so broadly, since respondeat superior does not require any proof of corporate fault. The critique that corporate and white collar defendants may be convicted without true fault has some bite as a descriptive matter, and it raises significant policy issues about the proper scope of federal criminal law. But it would be a serious mistake to think that this issue is sui generis. Rather, it is one of a multitude of issues regarding culpability that should be addressed by comprehensive code reform.

A good fraction of criminal law scholarship has been devoted to probing the relationship between various legal doctrines on the one hand, and fault or culpability on the other. This was an important theme of the Model Penal Code (MPC) and the wave of state code revisions that followed in the MPC’s wake.

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The budget for 2007 requested $2.65 billion for the Department of Justice, as well as additional funds for the High Intensity Drug Trafficking Areas. See id. at App. B.

50. As of September 2007, 53.7% of the inmates held in federal prisons were convicted of drug offenses. FED BUREAU OF PRISONS, QUICK FACTS ABOUT THE BUREAU OF PRISONS, http://www.bop.gov/news/quick.jsp. More than forty percent are serving sentences of no less than ten years. Id.


52. See infra Part III.

53. For a general discussion of the scope of corporate liability, see KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 1:04 (2d ed. 1992), and WELLING ET AL., supra note 21, §§ 5.1-5.8 (1998).

54. See, e.g., WILLIAM S. LAUPER, CORPORATE BODIES AND GUILTY MINDS 68-96 (2006) (rejecting vicarious liability and proposing a model of “constructive corporate fault” that focuses on the organization’s “acts and intentionality”); see also Geraldine Scott Moehr, Of Bad Apples and Bad Trees: Considering Fault Based Criminal Liability for Complicit Corporations, 44 AM. CRIM. L. REV. 1343 (2007) (noting that criticism of the respondeat superior standard may stem from antipathy to holding corporations responsible given the collateral consequences to third parties).

55. See Herbert L. Packer, The Model Penal Code and Beyond, 63 COLUM. L. REV. 594, 601 (1963) (noting that the MPC’s articulation of four modes of culpability—purpose, knowledge, recklessness, and negligence—allow one to “approach the problem of defining any specific offense or of applying such a definition to any given set of facts with analytic tools fully adequate to the task”); see also Herbert L. Packer, Mens Rea and the Supreme Court, in THE SUPREME COURT REVIEW 107, 138-39 (Philip B. Kurland ed. 1962) (discussing the treatment of mens rea by the MPC and emphasizing the MPC’s “recognition of the complexity of the concept of ‘criminal conduct’ and of the concomitant necessity for distinguishing among various components of such conduct, with respect not only to the conduct itself but to the mental elements accompanying it”); see also Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 STAN. L. REV. 681
But even the revised state codes maintain important doctrines that import liability without proof of fault, and federal law is riddled with laws that do so.

The persistence of the felony murder rule and certain rules of accomplice liability (such as the natural and probable consequences doctrine) demonstrates that many jurisdictions continue to impose very serious sanctions without a finding of fault based upon mens rea. Despite harsh and almost uniform scholarly criticism, the felony murder rule has been restricted but retained in most states and remains part of federal law. Felony murder is more pertinent to the topic at hand than might appear at first blush. In most jurisdictions felony murder liability reaches not only the felon whose own conduct causes death, but also any accomplices to the predicate felony. So in some jurisdictions felony murder imposes liability for one of the most serious offenses on the basis of vicarious strict liability. Similarly, in many jurisdictions an accomplice to one crime is also responsible for other crimes committed as a natural and probable consequence of the offense he aided and abetted, even if he does not assist or even know of the additional offenses. The natural and probable consequences doctrine can also extend an individual’s liability to murder. The popularity of these doctrines

(1983); Model Penal Code § 2.02 cmt. 1 & n.4 (1985) (explaining and illustrating the importance of the Model Penal Code’s “element analysis” concept to a rational, clear, and just system of criminal law).


57. As one commentator noted, the majority of states maintain some form of the felony murder rule, though the scope of the rule varies from state to state. See Joshua Dressler, Understanding Criminal Law 515 & n.110 (3rd ed. 2001) (noting felony murder is “retained in some form in nearly every state” and noting that the rule is not recognized in Hawaii, Kentucky, Michigan, and New Mexico). The Model Penal Code’s presumption of recklessness was adopted only in New Hampshire. Model Penal Code and Commentaries, § 210.2 cmt 6 (1980). At the federal level, 18 U.S.C. § 1111 incorporates a version of the felony murder rule. See Wellin, supra note 21, at § 16.3.

58. Two similar cases in which the death penalty was imposed on the accomplice reached the United States Supreme Court. See Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that imposition of death would not violate the cruel and unusual punishment clause because defendants were major participants in the predicate felony who acted with reckless indifference to human life); Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding that imposition of death penalty on accomplice who did not kill, attempt to kill, or intend for a killing to take place would violate cruel and unusual punishment clause).

59. See Dressler, supra note 57, at 477 (recognizing that “most jurisdictions” follow the natural and probable consequences rule); Lafave, supra note 16, § 13.3(b) (describing natural and probable consequences as the “established rule” and criticizing it as unwarranted). Some federal courts have also applied the natural and probable consequences rule, though there are relatively few cases. See Wellin, supra note 21, at § 16.3.

60. See, e.g., People v. Durham, 449 P.2d 198 (Cal. 1969) (upholding Durham’s murder conviction as the natural and probable consequence of his multi-state crime spree with co-defendant who had earlier brandished and fired firearm in order to escape from a robbery, though Durham himself had already surrendered when his co-felon fired the fatal shot).
suggests there is a real gap between the views of the scholarly community and those of the general public, which may place greater emphasis on causing harm than on fault as measured by mens rea.  

Compared to liability for homicide, corporate criminal liability for white collar offenses does not seem like such a big deal. Both these forms of accomplice liability and corporate liability seem to rest, at least in part, on similar intuitions. The first is that an actor who engages in a sufficient degree of preliminary conduct with others (whether employees or co-felons) may properly be held liable for the others’ subsequent criminal conduct, without any proof that the actor approved of, aided, or even knew of that specific conduct. In the case of the felony murder and natural and probable consequences doctrines, one who aids and abets an initial felony will not later be permitted to disclaim responsibility for predictable results. As in the case of a corporation’s liability under federal law, there is no enquiry into whether the actor was reckless or negligent with regard to a death caused by a third party. It is enough that the actor initially aided the co-felon who brought about the result. Because joining with a co-felon helped to set the situation in motion, the actor is held liable for the result. Second, the function of the felony murder and natural and probable consequences doctrines is to allow for the imposition of liability where a serious harm was caused. It is the harm, rather than the mens rea and conduct of the accomplice, which is the focus. Both themes seem to underlie respondeat superior liability for corporations.

The problem is even more pervasive if we reframe it as conviction where a defendant lacks moral culpability. Many of the most commonly charged federal

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61. An emphasis on results is an important, though often criticized, theme of American criminal law. See generally Stephen J. Schulhofer, Harm and Punishment: A Critique of Emphasis on Results of Conduct in the Criminal Law, 122 U. Pa. L. Rev. 1497 (1974). The felony murder rule holds persons whose illegal behavior brought about a death responsible for the death. As Lloyd Weinreb and Dan Kahan explained:

The uneven record of legislative and judicial efforts to limit or eliminate the felony-murder doctrine suggests strongly the general themes of the law of criminal homicide. When a death occurs and its occurrence can be attributed to the conduct of an identifiable person who is not blameless, there is a strong impulse to hold that person liable for the death, even if, from his point of view, the death should be regarded as accidental. The law not only reflects considered judgments about culpability; it also reflects an unconsidered effort to find an explanation and assign responsibility for an occurrence as disturbing to our sense of order as an unnatural death.

Lloyd L. Weinreb & Dan M. Kahan, Homicide: Legal Aspects, in 2 Encyclopedia of Crime and Justice, 786, 792 (Joshua Dressler ed., 2nd ed. 2001). One study suggests, however, that public opinion does not actually support the felony murder rule, and that the public would support reducing the level of responsibility for the felon who causes death from murder to manslaughter and imposing liability on co-felons under normal principles of accomplice liability. Paul H. Robinson & John M. Darley, Justice, Liability and Blame: Community Views and the Criminal Law 169-81 (1995). With regard to the liability of an accomplice, the subjects would impose an even lower level of liability. Id. State legislatures have not generally agreed, and the felony murder rule seems to have continued political support. The apparent conflict between Robinson and Darley’s research findings and the continued support for the felony murder rule may be due, at least in part, to the fact that their research subjects were told to assume that neither robber in their hypothetical had the intention to shoot, so that the death was a pure accident. Id. at 177. In real life this certainty is not present.
crimes, including drug trafficking, weapons, and immigration offenses, are routinely applied in cases in which moral culpability is irrelevant. One recent article, for example, provided the following examples:

- an immigrant alien may be criminally convicted for unlawfully reentering the United States even if she believed that she had proper government approval to return;
- a defendant charged with felon-in-possession-of-a-firearm may be convicted even if mistaken about his felony history (e.g., he had been previously assured by a court that he did not have a felony history or he believed that his prior conviction had never been formally entered or had been expunged);
- a defendant charged with criminal possession of an unregistered firearm may be convicted even if he mistakenly thought the firearm was registered as required.62

These examples are not intended to suggest that the question of the proper basis for corporate criminal liability is unimportant. They do suggest, however, that the project of refining the federal criminal code to map individual culpability more closely is one that affects broad swaths of federal criminal law. An MPC-like revision would provide an opportunity for an across-the-board examination of federal criminal liability, taking these issues seriously, and making them part of a comprehensive agenda.63 In reevaluating corporate criminal liability, as well as other doctrines such as ignorance or mistake of law, both jurisprudential and practical concerns should be considered.

In practical terms, moreover, the consequences of the respondeat superior doctrine are substantially mitigated by the Department of Justice’s prosecutorial guidelines,64 which instruct federal prosecutors to consider factors that correlate with corporate fault, such as whether the wrongdoing in question was pervasive within the corporation,65 whether the corporation had a history of similar con-

63. Comprehensive reform of the federal criminal laws is long overdue. For an excellent description of the need for such reform and the failure of contemporary efforts, see Ronald L. Gainer, Federal Criminal Code Reform: Past and Future, 2 Buff. Crim. L. Rev. 45 (1998). See also O’Sullivan, supra note 12, at 645 (describing need for federal code reform to make federal criminal laws clear, accessible, internally consistent, “rationally organized to avoid redundancy and ensure appropriate grading of offense seriousness,” and “capable of uniform, nonarbitrary, and nondiscriminatory enforcement”).
65. McNulty Memo, supra note 64, at V.
duct, and whether the corporation had in place an active compliance program that was implemented in an effective manner. Are these voluntarily adopted policies evidence that the Department itself recognizes that it would be unjust to impose liability on the basis of respondeat superior? Do they signal the need for reform?

These policies are not unique. The Department frequently adopts administrative procedures and policies that restrict prosecutions far more narrowly than the statutes being enforced (with the caveat that the Department itself may choose to make exceptions in appropriate cases). These policies are intended to target limited resources on the most serious cases. For example, the Hobbs Act would permit federal prosecutors to bring felony charges against virtually anyone who robs a business, even if the crime nets less than $100. As a matter of policy, the Department restricts the use of the Hobbs Act, stating that it should be used for robbery cases only "in instances involving organized crime, gang activity, or wide-ranging schemes." Similarly, the Department has adopted policies to guide the exercise of discretion in charging other kinds of cases, including failure to pay child support and racketeering. And although no specialized guidelines for drug cases are provided by the Department, federal prosecutors decline to prosecute many drug cases.

66. Id. at V-VI.
67. Id. at VIII.
69. The initial guidelines adopted by Attorney General Reno advised federal prosecutors not to bring federal prosecutions for failure to pay child support unless "all reasonable available remedies have been exhausted." Michael A. Simons, Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. REV. 893, 950 (2000). Among cases meeting that standard, priority was to be given to cases that also met additional criteria, such avoiding payment by a pattern of flight from state to state or a pattern of deception, such as using false names or social security numbers. Id. The current federal policy, in contrast, no longer requires the exhaustion of all other available remedies, treating it instead as one of several factors. The policy states:

Even if the above facts are present in an individual case, a decision whether or not a federal prosecution will be pursued may also include the following considerations: 1) Whether state civil and criminal remedies reasonably available have first been pursued; 2) Whether the violator has exhibited a pattern of moving from state to state to avoid payment; 3) Whether the violator has actually attempted to conceal his whereabouts or identity including using an alias or false social security number; and 4) Whether the violator has failed to comply with a support order despite previous contempt orders in state court.

69. Prior to 1997, the United States Attorneys Manual provided some general criteria for the referral of controlled substances cases to state and local prosecutors. See Abrams & Beale, supra note 21, at 375-77 (reprinting these provisions).

70. For an interesting study of the trends and predictive factors on prosecutorial declinations, see Michael Edmund O'Neill, Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors, 41 AM. CRIM. L. REV. 1439 (2004). As one might predict, O'Neill found that drug cases with lower drug weight were more likely to be declined. But some of O'Neill's other findings were more surprising. He found that
Although the federal guidelines for prosecuting corporations are similar in some ways to the general principles of federal prosecution and specific guidelines applicable to other offenses, they are distinctive in several respects. The guidelines state that the general principles of federal prosecution are applicable to corporations, and that corporations should be treated no more harshly nor leniently than other wrongdoers.\textsuperscript{73} The corporate guidelines note, however, that the nature of artificial entities necessitates some adjustment of the general principles.\textsuperscript{74} In adapting the general principles, the corporate guidelines are something of a mixed bag. On the one hand, the guidelines are progressive in instructing prosecutors to consider the collateral consequences to the wrongdoer and third parties in determining whether to bring criminal charges.\textsuperscript{75} It might be very beneficial to extend this analysis to individual defendants.\textsuperscript{76} Other features of the guidelines regarding the cooperation of corporate defendants have been much more controversial.\textsuperscript{77} These provisions are discussed in Part IV below in connection with concerns that the prosecution has too much power.

III. FEDERAL SENTENCES ARE EXCESSIVE

The arguments discussed above focus on the reach of federal criminal law and the definition of entity liability. But other serious critiques focus on the sanctions imposed on white collar and corporate defendants. Sentences for white collar offenses have increased as a result of several factors: the elimination of parole, choices made by the United States Sentencing Commission, and the passage of the Sarbanes–Oxley Act.\textsuperscript{78} In recent years some white collar defendants have received

\textsuperscript{73} McNulty Memo, supra note 64, at II. The corporate guidelines also reference at many points the Federal Principles. See, e.g., id. at XI.B (referencing United States Attorneys Manual §§ 9-27.240 & 9-27.250 in connection with the consideration of non-criminal alternatives).

\textsuperscript{74} Id. at III.A.

\textsuperscript{75} Id. at X.

\textsuperscript{76} Cf. Brown, Promising Dynamics, supra note 1, at 545-548 (comparing enforcement choices in white collar crime to street crime).

\textsuperscript{77} McNulty Memo, supra note 64, at VII-VIII (referring, \textit{inter alia}, to waiver of attorney-client and work product privilege, shielding culpable employees, and obstructing investigations).

very long sentences, including twenty-five years for Bernard Ebbers (former CEO of Worldcom) and twenty-four years for Jeffrey Skilling (former CEO of Enron). Critics charge that some of these sentences exceed the maximum sentences available under state law for violent crimes as well as the sentences imposed in the federal system for particular cases involving organized crime or terrorism.

Federal sentences are indeed draconian, and generally longer than state sentences for comparable conduct. Are the sentences for Ebbers and Skilling too high? They are for my taste, but so are many federal sentences. From a broader criminal law perspective, this story sounds extremely familiar, rather than unusual or surprising. First, the increase in sentence severity is a nationwide phenomenon, though federal sentences are especially harsh. Severity has ratcheted up and up again in the federal system. Both the sentences imposed and time served has increased dramatically. For example, the average federal sentence imposed between 1980 and 1995 nearly doubled, and federal offenders sentenced in 1998 will spend roughly twice as long in prison as their counterparts who were sentenced in 1984.

Federal sentences are high for white collar offenders, but also for other offenses that make up a large percentage of the federal caseload, such as offenses involving drugs or weapons. For example, James McFarland and Andre Curtis were both convicted of Hobbs Act robberies and related gun offenses. McFarland committed four robberies that netted less than $2300. He was sentenced to 1170 months, which is more than ninety-seven years. Curtis committed eight small-time armed robberies in a ten-day period, some of which netted him only twenty dollars; the total was no more than $2160. His sentence was 2271 months, or more than 189

79. See generally Ellen S. Podgor, Throwing Away the Key, 116 Yale L.J. Pocket Part 279, 281-282 (2007), http://thepocketpart.org/2007/02/21/podgor.html ("The sentences given to white-collar offenders seem oddly imbalanced when compared to those given to international terrorists and violent criminals.").
80. See id. at 282-83.
81. For a chart comparing federal and state penalties for a variety of offenses see Federalization of Criminal Law, supra note 7, at 30 chrt. 7 (depicting federal sentences that exceed those in the states for most offenses, with the largest disparities for drug possession, drug trafficking, and weapons offenses).
82. For a general discussion of the trend toward increasing punitiveness and its causes and effects, see Sara Sun Beale, The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness, 48 WM. & MARY L. REV. 397 (1996) [hereinafter Beale, Market-Driven News]. Sentences in the United States are more likely to include incarceration than sentences in other countries for the same offense, and defendants sentenced to prison in the U.S. are sentenced to longer terms of imprisonment than their counterparts who are sentenced to prison in other countries for the same offenses. Id. at 411-12.
84. Id.
85. The appeals in these cases are reported in United States v. Curtis, 344 F.3d 1057 (10th Cir. 2003), and United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001) (per curiam), aff'd by an equally divided court 311 F.3d 376 (5th Cir. 2002). See Beale, Many Faces, supra note 7, at 761-62 (discussing the McFarland and Curtis cases).
years. No one was hurt. Indeed no shots were fired. The key element driving up the McFarland and Curtis sentences was the mandatory minimum sentence for each crime committed with the use of a firearm. Congress increased the enhanced sentence for the use of a firearm in the commission of certain felonies in 1984, 1986, 1998, and 2000.\textsuperscript{86} 18 U.S.C. § 924(c) now provides for mandatory, consecutive penalties of five years for the first enhancement. For subsequent offenses or offenses involving especially dangerous conduct or weapons, the penalty must be enhanced by a minimum consecutive sentence of twenty-five or thirty years.\textsuperscript{87} The federal drug laws also emphasize mandatory minimum sentences, and provide for extremely long sentences, especially for crack cocaine.\textsuperscript{88} Federal law requires a mandatory minimum sentence of five years for possession with intent to distribute five grams of crack,\textsuperscript{89} which is the equivalent of five packets of the sweetener used in coffee. The sentence is doubled if the offense occurred within 1000 feet of a school,\textsuperscript{90} which would include major portions of most densely settled cities.\textsuperscript{91}

For decades the United States has pursued increasingly more punitive policies, and we now imprison a much higher proportion of our population than any other nation in the world.\textsuperscript{92} Although they are not the only factor, harsh drug sentencing laws, particularly those requiring mandatory minimum sentences, have been identified as one of the most significant factors driving our expanding prison populations, and leading to unprecedented levels of imprisonment.\textsuperscript{93} Although state laws may also impose long sentences for some drug offenses, the average federal sentence for drug trafficking is twice as high as the average state sentence for similar offenses.\textsuperscript{94} Penalties for drug crimes are among the most severe meted

\begin{thebibliography}{99}
\bibitem{beale2002unintended} Id. at 1668 & nn.117-120.
\bibitem{beale2002unintended} The United States Sentencing Commission has recognized the harshness of sentences for crack cocaine, especially relative to sentencing for powder cocaine, and in May 2007 recommended to Congress that the guidelines be revised in its report, \textit{U.S. SENT\\’G COMM\\’N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY} (May 2007), http://www.ussc.gov/r_congress/co accuse2007.pdf [hereinafter COCAINE AND SENTENCING POLICY]. At this writing, Congress has taken no action on the Commission's recommendations, which will go into effect on November 1, 2007 absent Congressional action.
\bibitem{beale2002unintended} Id. § 860(a) (2000).
\bibitem{beale2002unintended} See United States v. Pitts, 908 F.2d 458, 460 (9th Cir. 1990) (stating that defendant offered to prove that eighty percent of Spokane fell within the schoolyard zone under 21 U.S.C. § 860, which includes schools, playgrounds, pools, video arcades, and other places where youth may congregate).
\bibitem{beale2002unintended} See Beale, \textit{Market-Driven News, supra} note 82 at 410-11 (noting U.S. incarceration rate of more than 700 per 100,000 is five times that of the highest rate in Europe and twelve times that of Japan).
\bibitem{beale2002unintended} Id. (noting that in 2001 the average federal sentence for drug trafficking was 72.7 months, compared to the average state sentence of thirty-five months). By 2006, the average federal sentence for drug trafficking had increased to eight-two months. \textit{U.S. SENT\\’G COMM\\’N, FINAL QUARTERLY DATA REPORT FY 2006 30 tbl.18 (Mar.}
\end{thebibliography}
out within the federal system. As shown in Table 1, between 2001 and 2006 the average sentence for drug trafficking substantially exceeded the average sentences for both assault and manslaughter each year, and in several years the average sentence for drug trafficking also exceeded that for sexual abuse and arson.

**Table 1. Average Sentence Length in Months for Various Primary Offenses in Fiscal Years 2001 through 2006.**

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug Trafficking</td>
<td>69.4</td>
<td>72.1</td>
<td>76.9</td>
<td>81.3</td>
<td>74.6</td>
<td>82.0</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>33.2</td>
<td>38.8</td>
<td>33.0</td>
<td>34.8</td>
<td>25.9</td>
<td>46.0</td>
</tr>
<tr>
<td>Assault</td>
<td>31.0</td>
<td>31.2</td>
<td>30.4</td>
<td>30.7</td>
<td>27.7</td>
<td>34.3</td>
</tr>
<tr>
<td>Sexual Abuse</td>
<td>58.8</td>
<td>56.1</td>
<td>73.0</td>
<td>95.2</td>
<td>75.4</td>
<td>100.8</td>
</tr>
<tr>
<td>Arson</td>
<td>82.1</td>
<td>87.4</td>
<td>87.2</td>
<td>66.2</td>
<td>67.3</td>
<td>77.1</td>
</tr>
<tr>
<td>Firearms</td>
<td>71.2</td>
<td>70.0</td>
<td>77.2</td>
<td>71.8</td>
<td>77.4</td>
<td>77.4</td>
</tr>
<tr>
<td>Fraud</td>
<td>14.0</td>
<td>14.3</td>
<td>14.4</td>
<td>16.0</td>
<td>14.9</td>
<td>18.6</td>
</tr>
</tbody>
</table>

The table also reveals that the penalties for firearms offenses, driven by mandatory minimums, also exceeded those for many crimes of violence. Although the firearms cases may have involved additional criminal activity (such as a crime of violence under state law), that is not a necessary element of many firearms offenses carrying a significant mandatory minimum sentence. Note also that the impact of the harsh drug and firearms sentencing laws is magnified, because these cases make up such a large proportion of the federal caseload. In 2006, for example, drug and firearms offenses were the most serious crime for 47.2 percent of the federal offenders who were sentenced. In contrast, the average penalty for fraud, the major white collar offense category, was quite modest, though the table does


97. Id. (showing 9.7% in fraud offenses and 4.8% in “other white collar” offenses).
show an increase, particularly in 2006.

Thus judged from the broader perspective of federal criminal law, the enhanced sentences for white collar defendants are severe but not out of line with the draconian sentences available for drug and weapons offenses. But the white collar and corporate offenses also impose serious hardships on third parties. In the case of corporate sanctions, employees may lose their jobs and their retirement security, and investors may be hard hit. The ripple impact, moreover, is felt throughout the community, as local governments and other businesses see their own revenues fall.

Are these secondary effects distinctive? Unfortunately, they are not. The secondary impacts of federal drug policies dwarf the effect of policies regarding corporate and white collar offenses. The collateral impact of harsh federal sentencing, especially for drug offenses, is felt most starkly in some segments of the community, particularly the African-American community. Blacks make up approximately forty-five percent of the prisoners incarcerated for drug offenses in the federal system. Federal drug policies are one of the causes of the high rate of imprisonment of African-Americans, a phenomenon that imposes significant costs on their home communities. As Tracey Meares explains:

High rates of imprisonment of young African-American men and women translates into many broken families in African-American communities. It is difficult to measure how family ties and connections and individual psyches may be devastated when family members and close friends are removed from communities. Although quantification of emotional harm is practically impossible, some judgments about the ways in which high incarceration levels affect the vitality of families, the life chances of children left behind, and the economic circumstances of African-American communities are possible.

First, imprisonment contributes to the already high percentage of families headed by single African-American women. Because the mortality rate for African-American men is somewhat higher than that for African-American women, the female to male ratio is already quite high in some African-American communities. High levels of incarceration of African-American men add to this ratio. Increases in the ratio of African-American women to African-American men are likely to lead to a lower probability of marriage and formation of two-parent families.

Second, the removal of young adults from the community means fewer adults to monitor and supervise children. Inadequate supervision leads to increased opportunities for children to become involved in delinquency and

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99. This information is based upon the data in the Federal Justice Statistics Research Database, http://fsrc.urban.org/analysis/ez/displays/s_cross.cfm (last visited Oct. 5, 2007). In 2003, 38,190 of the 87,789 federal inmates incarcerated for drug charges were Black.
crime. The increasing rate of African-American women sentenced to prison presents an additional hazard to poor African-American communities and especially to the children growing up in them, although the absolute numbers are small compared to the numbers of African-American men imprisoned.

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Because African-American women often are the primary caretakers of children in poor communities, there is a growing risk that children are in danger of losing both parents to the criminal justice system. As a result, these children face a very high risk of future criminal involvement. Moreover, communities will suffer a loss because each additional incarcerated adult erodes the important community adult/child ratio that is a predictor of greater neighborhood supervision.

In addition to the negative consequences that high rates of imprisonment undoubtedly have on the amount of emotional support and caregiving available to the families of incarcerated individuals, high imprisonment rates are also likely to have a detrimental effect on the economic well-being of families in impoverished neighborhoods. The prevalence of low economic status and unemployment among families predicts low levels of community social organization. Given the well-established association between poverty and families headed by single women, there can be little doubt that high rates of incarceration of African-American men will contribute to the deepening poverty in the African-American community.100

Thus corporate and white collar scholars and commentators have put their fingers on a problem all right: our sentencing laws have ratcheted up time and time again, with serious collateral effects. This is true across the board, and we urgently need to reevaluate and recalibrate federal sentencing laws.

IV. FEDERAL PROSECUTORS WIELD TOO MUCH POWER, AND DEFENDANTS HAVE TO GIVE UP THEIR RIGHTS

One of the most serious complaints about the treatment of corporate and white collar defendants is that prosecutors have so much power that the system is no longer adversarial in any meaningful sense. According to this critique, federal prosecutors wield so much power, formally and informally, that any entity or individual that comes into the prosecution's cross hairs is already a dead duck. The threat to prosecute a corporation has been likened to holding a gun to its head.101 Resistance is not only futile, it can be deadly. Corporations must do what they are told under these circumstances, waiving a whole panoply of rights, including the


right to attorney-client privilege, and accepting burdensome sanctions and ongoing requirements that may interfere with the corporation’s future business decisions. 102 The government requires the corporation and its counsel to become a part of the government’s investigative team, breaching the corporation’s attorney-client privilege, interfering with its relationship with its employees, and in many cases interfering with their ability to defend themselves. 103 In one case, involving the accounting firm KPMG, the court found that the government’s implementation of the Thompson Memorandum violated the defendants’ Fifth Amendment right to a fair trial and Sixth Amendment rights to counsel by pressuring KPMG not to pay the defendant-employees’ legal fees and to put pressure on its employees to waive their constitutional rights. 104

A focal point of the criticism has been the implicit and explicit pressure for the waiver of attorney-client and work product privileges, leading to what has been decried as a culture of waiver. 105 This pressure, it is said, fundamentally reshapes the lawyer-client relationship in a manner that is inconsistent with the normal adversarial system. 106 Indeed, the corporation is forced to become the adversary of its employees, and it is forced to take actions that are inconsistent with many ethical values, including organizational justice, respect for employee privacy, and trust. 107

Corporate defendants feel enormous pressure not only because of the broad standard of liability, but also because of the drastic consequences of being indicted. A good deal has been written about the overwhelming pressure felt by corporations that face the prospect of a criminal prosecution. Seeking metaphors that express the extreme vulnerability of corporations, scholars have compared them to eggshell skull plaintiffs in tort cases, 108 and compared the decision to defend against an


103. Id. at 333-39; see also Lawrence D. Finder, Internal Investigations: Consequences of the Federal Deputation of Corporate America, 45 S. TEX. L. REV. 111, 117 (2003) (noting “that cooperation will effectively deputize [a corporation] into becoming a de facto agent of the government”).


106. See generally Moehr, supra note 1, passim.

107. See generally Hasnas, supra note 6, at 631-54 (arguing that white collar crime cannot be investigated without theories of entity liability and procedures that compel corporate actions that are inconsistent with the values of organizational justice, privacy, confidentiality, trust, and ethical self assessment); Finder, supra note 103, at 120-26 (arguing that waiver of traditional safeguards such as attorney-client privilege and work product protection causes a rift between the company and its employees, eroding individuals’ Fifth Amendment protection against self-incrimination, and raises ethical concerns that may prevent a company from performing an adequate internal investigation).

108. Bharara, supra note 101, at 73.
indictment to suicide. The pressure, it is said, comes from several sources. Liability can easily be established under the respondeat superior standard, but equally important, the filing of the indictment itself can trigger a reaction from the market and from customers that are fatal long before a case comes to trial. Additionally, both the Department of Justice’s guidelines for the prosecution of corporations and the organizational sentencing guidelines create enormous incentives for cooperation, even as modified in response to criticism. And, finally, some entities are especially at risk because they specialize in work for which they would become ineligible upon conviction, such as government contracting or auditing financial statements. Accepting these arguments as true, the question remains whether the situation is unique. In many ways it is not. All defendants in the federal system face pressure to plead guilty, and almost all do so. More than ninety-five percent of all federal defendants plead guilty, waiving a whole panoply of rights. The federal sentencing guidelines create a powerful incentive for any defendant to plead guilty to receive sentencing concessions, and the pressures are


110. This point is made by many commentators. See, e.g., Bharara, *supra* note 101, at 73; Moohr, *supra* note 1, at 173; Osterle, *supra* note 109, at 471-73.

111. There is an extensive literature describing the impact of the Department’s prosecutorial policies and the organizational guidelines. See, e.g., John S. Baker, *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 320-30 (2004) (arguing that the organizational sentencing guidelines place good corporations at risk and have led to a view that self-reporting is a legal duty); Griffin, *supra* note 102, at 316-52 (summarizing the Justice Department’s prosecutorial policies as essentially mandating cooperation, and the resulting increase in privilege waivers and deferred prosecution agreements); Hasnas, *supra* note 6, at 619-30 (arguing that the guidelines create strong incentives for organizations to plead guilty without mounting any sort of defense); William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643 (2002) (questioning the fairness of trading organizational cooperation for mitigation of sanctions because it creates incentives for upper management to scapegoat subordinates); Lawrence D. Fidler & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1-2 (2006) (noting that the use of non-prosecution and deferred prosecution agreements doubled between 2002 and 2005 and that the use of features such as waiver of attorney-client privilege has increased since the implementation of the Department’s policy).


113. Some of the arguments may be overstated. For example, one study found no effect on share prices of news reports of civil charges and settlements of fraud charges compared with reports of malum prohibitum criminal charges. Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 413-15 (1991).


115. A reduction of two or three levels is available if a defendant accepts responsibility. U.S. SENTENCING GUIDELINES Manual § 3E1.1. A three-level reduction equals, on average, a thirty-five percent reduction in the sentence. See Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1415 & n.274 (1997) (collecting sources for the thirty-five percent figure). This reduction is not available to a defendant who “puts the government to its burden of proof at trial by denying the essential factual element of guilt.” U.S. SENTENCING GUIDELINES Manual § 3E1.1, at Application Note 2. In order to claim
even more intense for defendants in drug and firearms cases. Sentences for drug and firearm offenses are extremely high, and mandatory minimum sentences for both are applicable to many defendants. Unless the defendant cooperates, even a relatively low-level drug dealer and a felon possessing a firearm are subject to mandatory minimum sentences of ten years.\(^{116}\) For most of these defendants, the only mechanism that allows a court to sentence a defendant to less than the mandatory minimum requires that the defendant have provided substantial assistance to the prosecution in the investigation of another person.\(^{117}\)

In the case of the pressure to provide substantial assistance, there is one additional feature that gives the prosecution even more leverage: for all practical purposes the prosecutor is the sole judge of whether a defendant has provided substantial assistance. Both the statutory authorization for substantial assistance and the guideline implementing it allow the court to sentence below the mandatory minimum only in cases in which the prosecutor seeks such a sentence, and the Supreme Court has upheld this limitation.\(^{118}\)

The percentage of cases in which the defendant received sentencing concessions for substantial assistance has increased since the introduction of the sentencing

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\(^{116}\) Defendants who possess fifty grams of crack with intent to distribute, for example, face a mandatory minimum sentence of ten years. See 21 U.S.C. § 841(b)(1)(A)(iii) (2006). According to the Sentencing Commission, this amount would characterize the defendant as a mid-level street dealer, not a manager, wholesaler, or king pin. See COCAINE AND SENTENCING POLICY, supra note 89, at 45 fig.10. The majority of individuals prosecuted for cocaine offenses perform low level functions, and this is particularly true of crack defendants. Id. at 36 & 38 fig.5 (noting that two-thirds of crack defendants were street level dealers in 2000). In a sample of defendants in 2000, the Commission found that crack couriers and street level dealers were both sentenced to an average of more than 100 months. Id. at 43 fig. 9. Defendants convicted of firearms offenses face similarly draconian sentences. A person who has a previous conviction for any offense punishable by more than a year's imprisonment commits a federal offense punishable by a mandatory sentence of ten years if he or she possesses any firearm or ammunition that has been shipped in interstate commerce. See 18 U.S.C. §§ 922(g), 924(a)(2) (2007). Federal law requires a mandatory minimum consecutive sentence of five years for a first offense of carrying a firearm during the commission of a drug offense or crime of violence, even if it was not used. 18 U.S.C. § 924(c). A second or subsequent conviction requires a mandatory consecutive sentence of twenty-five years, and this provision has been interpreted as applicable to a second gun carried by the defendant or a co-felon in a single offense. See Beale, UNINTENDED CONSEQUENCES, supra note 86, at 1674-75 (discussing the cases interpreting the second or subsequent offense language in § 924(c), including Deal v. United States, 508 U.S. 129 (1993)).

\(^{117}\) U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. This is the only mechanism for relief from mandatory minimum firearm sentences. In the case of drug offenses, there is another mechanism, 18 U.S.C. § 3553(f) the so called “safety valve” provision, but it is applicable only to first time offenders who meet stringent criteria. It is not applicable, for example, if the defendant had a firearm or other dangerous weapon. It also requires that the defendant, no later than the time of sentencing, have truthfully provided the government with all information and evidence that he has with regard to the offense or offenses that were part of a common plan or scheme, which may, like substantial assistance, require the defendant to provide information regarding others.

guidelines, from less than five percent\textsuperscript{119} to more than fourteen percent of all cases nationwide in 2006.\textsuperscript{120} Not surprisingly in light of the mandatory minimums, the rate of substantial assistance is even higher in drug trafficking cases, where more than one quarter of defendants receive substantial assistance reductions.\textsuperscript{121} These substantial assistance departures resulted in a median sentencing reduction of forty months, which was more than forty percent of the Guideline minimum sentence.\textsuperscript{122} Many white collar defendants also received substantial assistance departures, which in many cases permitted them to avoid imprisonment altogether.\textsuperscript{123} In fraud cases, approximately fifteen percent of defendants received substantial assistance reductions.\textsuperscript{124} Surprisingly, firearms defendants did not fare as well; only 11.5 percent received substantial assistance reductions.\textsuperscript{125} This may be due to the fact that in some of the common types of cases, such as possession by a previously convicted felon, many defendants lack useful information regarding other persons against whom the government is seeking to build a case. In contrast both drug and many white collar cases, which by their nature involve multiple participants, are difficult to prosecute without the assistance of insiders.\textsuperscript{126} The typical prosecutorial technique in such cases is to proceed methodically through a series of cases, requiring each defendant to “flip,” that is to assist in the investigation and prosecution of others.\textsuperscript{127} Of course not every

\textsuperscript{119} Ian Weinstein, \textit{Regulating the Market for Snitches}, 47 BUFF. L. REV. 563, 563-64 n.2 (1999) (noting that substantial assistance departures were 3.5% in 1989, the first year of the Guidelines, and had increased to 7.5% in 1990).

\textsuperscript{120} USSG DATA REPORT 2006, \textit{supra} note 94, at 3 tbl.2. There is considerable variation in the use of substantial assistance. In some circuits, more than twenty-five percent of defendants receive reductions for substantial assistance. \textit{See id.} at 3-5 tbl.2 (listing substantial assistance departure rates of 27.4% for Third Circuit and 25.4% for Sixth Circuit).

\textsuperscript{121} Id. at 9 tbl.3 (listing substantial assistance rate of 26.0% for drug trafficking cases, and 19.6% for drug cases involving the use of a communication facility).

\textsuperscript{122} Id. at 18 tbl.6 (listing median reduction of forty months, a 43.5% reduction from the Guideline minimum sentence).

\textsuperscript{123} The median sentence for those convicted of embezzlement, bribery, tax, gambling, administration of justice offenses, environmental, and food and drug offenses who provided substantial assistance was no imprisonment, or a 100% reduction from the Guideline minimum. \textit{Id.} Only twelve antitrust cases were prosecuted in 2006; nine of those defendants received credit for substantial assistance. \textit{Id.} at 9 tbl.3

\textsuperscript{124} Id. (listing substantial assistance rate of 15.2% for fraud cases).

\textsuperscript{125} USSG DATA REPORT 2006, \textit{supra} note 94, at 9 tbl.3.

\textsuperscript{126} \textit{See generally} Hasmas, \textit{supra} note 6, at 588-630 (noting that the nature of white collar crime makes it impossible to enforce without the cooperation of insiders, and arguing that this structural feature creates a situation where enforcement naturally tends toward overbroad substantive standards and coercive pressures on insiders).

\textsuperscript{127} \textit{See, e.g.,} Kathleen F. Brickey, \textit{Enron’s Legacy}, 8 BUFF. CRIM. L. REV. 221, 264-75 (2004) (describing prosecutors’ “building block” approach in a series of major cases and concluding that “cooperation up the chain of command was critical to reaching the top”); Moohr, \textit{supra} note 1, at 183-89 (describing prosecutors’ use of series of plea bargains with cooperation agreements to move up the chain); David M. Zlotnick, \textit{Federal Prosecutors and the Clemency Power}, 13 FED. SENT’G REP. 168, 169 (2001) (noting that the theory for successfully prosecuting a drug trafficking ring is to “flip lower-level participants against their higher-up co-conspirators”). \textit{See also} R. Michael Cassidy, \textit{Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to
defendant’s assistance is needed, and some defendants who wish to provide substantial assistance are denied that opportunity—and the concessions it would bring—because the prosecution can obtain the evidence in question without their assistance.\textsuperscript{128}

Both corporate defendants and drug and firearm defendants face virtually irresistible pressures to waive their rights and cooperate with the government in the investigation and prosecution of third parties, pressures that many critics believe are excessive.\textsuperscript{129} The traditional image of the adversarial system is at variance with the reality that the system operates much more like an administrative\textsuperscript{130} or inquisitorial system.\textsuperscript{131} There are, of course, differences. The literature regarding corporate defendants points to the additional pressures exerted by the market and customers.\textsuperscript{132} It’s open to question whether these are more severe than the pressures facing individual defendants in drug and firearms cases. Many defendants in drug and firearm cases will lack the resources to hire retained counsel and will be held in custody pending trial, which means an immediate separation from friends and family, as well as an interruption or loss of employment.\textsuperscript{133} Upon

\textsuperscript{128} See Stephanos Bibas, \textit{Plea Bargaining Outside the Shadow of Trial}, 117 \textit{Harv. L. Rev.} 2463, 2485-2486 (2004) (describing the examples of (1) a prosecutor who “indicts twenty members of a violent gang and offers cooperation agreements to the first two who will testify against the others,” so that the first one in the door gets the sentence reduction, and (2) a prosecutor who needs only one of five individuals to cooperate, and may be inclined to offer the deal to the client of the most experienced attorney). For a case in which one defendant made multiple efforts to cooperate, but was rebuffed, and another defendant was willing to cooperate, but had no useful information to provide, see United States v. Jaber, 362 F. Supp. 2d 365, 380-81 (D. Mass. 2005) (stating that “Jaber labored mightily to cooperate with the government” but his efforts were unsuccessful “ostensibly because of a change in personnel in the United States Attorney’s office,” and Moomh “did everything he could to help the government” but “did not have much to offer”).

\textsuperscript{129} Critics have proposed various means of reducing the number of cases in which cooperation is compelled or proving procedural protections to limit its effects. Compare Griffin, supra note 102 (arguing that government policies that compel corporations to conduct internal investigations and require employees to waive their privilege against self-incrimination should entitle employees to enjoy immunity for compelled disclosures), with Weinstein, supra note 119, at 564-68 (describing the market for cooperation as “overheated” and proposing imposition of a numerical limit on the number of defendants who may be rewarded with sentence mitigation in order to impose a cost on prosecutors to encourage them to use fewer cooperators).


\textsuperscript{131} For a comparison of current federal procedures and European inquisitorial systems, see Moohr, supra note 1, at 191-210.

\textsuperscript{132} See supra Part III.

\textsuperscript{133} Federal law provides that in the case of defendants charged with drug offenses punishable by imprisonment of more than ten years it shall be presumed that that no conditions of release will assure appearance of defendant for trial or safety of the community, and hence pretrial detention is appropriate. 18 U.S.C. § 3142(c) (2004). The same presumption applies to the offense of using a firearm in the commission of a felony under § 924(c). Id. § 924(c). The most recent federal data shows that defendants charged with drug trafficking or
conviction, many face mandatory minimum sentences of five, ten, or twenty-five years unless they plead guilty and provide substantial assistance in the investigation and prosecution of others. Does a corporate or white collar defendant really face any greater pressure to cooperate with the government?

V. SHOULD WE SAVE THE CORPORATIONS FIRST?

The earlier parts of this essay seek to make two points. First, the contemporary prosecution of corporate and white collar defendants raises a series of very significant issues: limiting the scope of federal criminal law, bringing the definition of federal crimes into conformity with appropriate principles of culpability, ratcheting down excessively punitive federal sentences, and considering the balance between prosecution and defense in the federal system. And second, each of these problems affects every defendant in the federal system to a lesser or greater degree, though many classes of defendants are far less able than corporate defendants to bring these issues to the attention of Congress or the public.

So what is the proper response? As noted in the introduction, we should consider these issues as part of a comprehensive reform of federal criminal law, rather than cherry picking a few reforms for the favored few. There are two reasons for keeping corporate and white collar defendants in the same boat with defendants facing other kinds of charges. First, corporate and white collar defendants are in the best position to focus public and legislative attention on the problems, and are far more likely to do so when they feel a real stake in the outcome. This is vitally important because there are systematic political and social pressures that predispose American legislatures to adopt criminal justice policies that are excessively punitive and unduly favorable to the prosecution.134 Legislators and prosecutors have similar incentives when it comes to harsh enforcement of criminal laws, and together they make a powerful alliance. Legislators face political pressure from

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134. See generally Stuntz, supra note 13, passim.
voters to pass laws that are seen as tough on crime, such as mandatory minimum sentences, and laws that make it easier for prosecutors to gain convictions, such as creating overlapping crimes. Elected district attorneys face similar pressures from their constituents to attain high conviction rates and to do so efficiently. In addition to prosecutors and police, there are other strong political interest groups that influence legislators to continue to make laws that are tougher on crime. For example, ideological groups may seek symbolic victories through the passage of new criminal statutes. On the other hand, there is little political pressure to narrow the criminal laws or reduce sentences. Considering the stigma of criminal prosecution, few interest groups will advocate for making less behavior criminal or for lighter enforcement. Because most street criminals have far fewer financial resources than corporate and white collar defendants, they are less likely to contribute to political campaigns. There is no large voting bloc representing the interests of criminals. Indeed in many states felons cannot vote at all. With the heavy pressures towards expansion of criminal liability, the movement is towards harsher enforcement. However, in many cases corporate crime is already dealt with more, rather than less, favorably than street crime, and there may be a very beneficial spillover in treating these issues together.

Any discussion of reforms must also take account of the unprecedented power now wielded by corporations and the manner in which that power is used. As Christine Hurt rightly observes in another article in this volume, the determination whether criminal sanctions are warranted turns on the societal value of the

135. See id. at 534-38 ("[M]ore prosecutions and convictions are, from voters' standpoint, a good thing, and elected officials will want to please the voters.").

136. See id. at 552-54 ("[G]roups supporting hate crime laws seek symbolic victories, legislative affirmations of their groups' importance and protected status.").

137. See id. at 555 (explaining that because individuals or groups who lobby against broad criminal liability on the ground that it might be applied to them will suffer a stigma and reputational loss, few if any engage in such lobbying).

138. Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 Iowa L. Rev. 219, 254 (2004). Professor Wright has noted that, for purposes of public choice analysis, criminal justice legislation falls into several different categories. Id. at 255-60. In the case of changes-in-punishment statutes, prosecutors, and in some cases victims groups, are recognized in addition to the organized interest groups who normally prevail in the legislative process. See id. at 258. Legislation faces little resistance even though it will impose large costs on the public at large, because those costs will be diffuse, not immediate, and difficult to trace. Id.

139. In many jurisdictions, a felony conviction precludes one from voting, disenfranchising the one interest group that would arguably have the most at stake in pushing for reform. See Wright, supra note 138, at 254.

140. Cf. Brown, Promising Dynamics, supra note 1. Professor Brown argues that corporate crime is harder to investigate and enforce and offers a broader range of civil and regulatory enforcement mechanisms than street crime, and that corporate defendants can use their resources to take advantage of these alternatives to prevent many of the ancillary costs imposed by criminal enforcement. Id. at 544, 546. The influence of these corporate actors can be balanced against the political pressure for harsher sanctions, leading to a broader range of enforcement options for street crime. See id. at 547.

interests being violated by certain conduct. It should also take account of the frequency of the conduct and the magnitude of the social interests involved. In the same way that it is important to recognize that we are now in a global economy (and thus individuals in every country are affected by actions that occur beyond our national boundaries), it is also critical to recognize that we now live in a society in which artificial entities are ubiquitous and wield power over virtually every aspect of each individual’s daily life. Corporations and other legal entities wield more power, and have greater influence, than at any time in history. As a result, these entities have the ability to, and do, have an unprecedented ability to affect the lives of individuals in every possible way, from their pocketbooks to their health.

And how have the corporations used this unprecedented power? Serious corporate misconduct has been widespread, involving multiple industries, with very significant social costs and consequences, and in many cases involving conduct that was repeated and pervasive, rather than isolated, and carefully planned.

In the past two decades, the forms of misconduct have varied over time, but the volume of misconduct has remained high. In the 1990s, the most serious criminal offenses—ranked by the size of the criminal fines imposed—included antitrust, environmental, fraud, campaign finance, and food and drug offenses. In antitrust cases, criminal fines totaling more than $1.2 billion were imposed on corporations, including the single largest fine of the decade—$500 million—for a worldwide conspiracy to fix and raise prices and allocate market shares for vitamins. Other antitrust convictions involved fixing the prices for a wide variety of products including graphite electrodes, feed additives used for livestock, and chemical preservatives used in dairy products and baked goods. The signature misconduct of the current decade, in contrast, has been the misrepresentation of corporate finances by various means including inflating earnings and assets, and concealing or mischaracterizing expenses. Enron is, of course, the most prominent example; the disclosure of its use of special purpose entities to shift debt off its books and hide losses led to the loss of approximately $100 billion in shareholder equity. But Enron was not alone. Many other major American corporations also misrepresented their finances. This included not only other energy companies, but also corporations in other industries including technology, communications, and health

142. Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER, http://www.corporatepredators.org/top100.html (listing 100 largest criminal fines in the 1990s). The offenses fell into 14 categories of crime: environmental (38), antitrust (20), fraud (13), campaign finance (7), food and drug (6), financial crimes (4), false statements (3), illegal exports (3), illegal boycott (1), worker death (1), bribery (1), obstruction of justice (1), public corruption (1), and tax evasion (1). Nine of the twenty-five most serious cases involved antitrust violations; the fines in those nine cases totaled approximately $1.2 billion. The largest single fine, $500 million, was imposed upon F. Hoffmann-La Roche Ltd. in 1999 for leading a worldwide conspiracy to fix and raise prices and allocate market shares for vitamins. *Id.* Mokhiber, the editor of the Corporate Crime Reporter, draws his data from that publication.

143. *Id.* (describing criminal fines imposed upon UCAR, Archer Daniels Midland, Pfizer, and Eastman Chemical Company).

care. Disclosure of the schemes caused massive losses in share value for companies including Adelphia Communications, WorldCom, and Global Crossing. Prosecutors estimated that the disclosure of Dynergy's use of fictive "round trip" energy trades to create an appearance of active trading caused a loss of $100 million. Widespread problems have also come to light in other industries. Three major cruise lines have all pleaded guilty to dumping waste oil, dry cleaning chemicals, and other toxic substances. Virtually all of the major pharmaceutical companies are being investigated for, or have already settled or pleaded guilty to, charges of serious misconduct.

The pattern is clear: there is a great deal of misconduct that has had, or could have had, significant consequences for the public. In some cases the losses are staggering. Neither Congress nor the Department of Justice created these problems. They are real, they are extremely serious, and they require a serious response.

Moreover, there are many reasons to think that corporations and other entities are more than simply the sum of all of their employees and that punishing individual employees individually for criminal conduct will not always be sufficient. Recent high profile cases, including Enron, Arthur Andersen, and KPMG, involved conduct that appears to have been characteristic of the entity, rather than the actions of a few renegade employees. Companies can develop distinctive cultures (or an ethos) including values that are contrary to general norms, which they encourage their employees to flout. Moreover, a good deal of psychological and organizational research has verified that people do act differently in organizational or group settings, and research has also identified a variety of mechanisms. These include, for example, the tendency of people to behave in accordance with their social identity, the reduction or diffusion of responsibility that individuals experience in a group, and cognitive dissonance that results in individuals having difficulty in recognizing, revealing or stopping harmful behav-

145. Id. at 92-93.
146. Id. at 92.
147. See id. at 94 ("Carnival, Norwegian, and Royal Caribbean [] pleaded guilty to charges involving the dumping of waste oil, dry cleaning chemicals, and other toxic substances, and falsifying records to conceal this conduct.")
148. Id. at 94-95.
149. See Geraldine Szott Moohr, An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime, 55 U. Fla. L. Rev. 937, 965-66 (2003) (describing Enron's culture of misplaced incentives, disdain for regulation, and "Darwinian market discipline to evaluate employees" that encouraged law-breaking); Kathleen F. Brickey, Andersen's Fall From Grace, 81 Wash. U. L.Q. 917, 917-30 (2003) (describing earlier SEC sanctions against Andersen in other cases, its lack of repentance, and the sustained and widespread shredding of documents that occurred on a "widespread basis and was a collective effort of the firm"); Samuel W. Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473, 488-90 (2006) (describing KPMG's embrace of tax shelter that profession as a whole had concluded did not meet professional standards as a result of relentless pressure exerted by senior partners to "sell, sell, sell," using "ruthless execution (and) hand to hand combat").
ior within an institution.\textsuperscript{151} All of these lead generally to the conclusion that it would be misleading to think of the problems of white collar and corporate criminality as a few bad apples in the barrel; in some cases, it’s the barrel that is rotten and is spoiling some of the apples.\textsuperscript{152} So the responsibility and liability of the firm should be at least a significant part of the focus.

The existence of widespread corporate misconduct does not prove that entity criminal liability is an appropriate remedy, but it ought to shift the terms of the debate. It is not clear that we should define the problem as just (or even mostly) a problem of the beleaguered corporations hamstrung by excessive regulations and overzealous prosecutors. To the contrary, one might argue this is a time when we need to add to (or improve) the legal tools for dealing with serious corporate misconduct,\textsuperscript{153} not the time when we should eliminate the tools we have. In fact, this is exactly what is occurring throughout Western Europe. For just the reasons noted above—the increased power of corporations, highly publicized cases of misconduct, and a sense that greater legal control and accountability is needed—many Western European nations are adopting and expanding criminal liability for corporations.\textsuperscript{154} In short, despite the difficulty in defining the proper scope of criminal liability for corporate entities, it’s premature to say that there is no role for such liability.\textsuperscript{155}

What about instances of overzealous or misguided prosecutions? Unfortunately, in every domain of criminal law one can find instances of misguided or unwarranted prosecutions. This is true in the case of drug enforcement, gun offenses and sex crimes. There’s nothing unique about the concerns that arise in the corporate arena, and indeed, one could make a good argument that unjustified prosecutions here are less significant than unwarranted prosecutions of individual

\textsuperscript{151} See Buell, supra note 149, at 494-96 (describing these phenomena and providing citations to psychological literature); see generally John M. Conley & William M. O’Bart, Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct, 60 LAW & CONTEMP. PROBS. 5 (1997) (emphasizing that corporations are cultural entities and applying anthropological techniques to analyze behavior in light of corporate culture).

\textsuperscript{152} See Moohr, supra note 149, at 973-74 (arguing that focusing only on individual liability ignores the systemic failures and structural disorders in U.S. companies).


\textsuperscript{154} See Beale & Safwat, supra note 37, at 110-126, 163 (describing developments in Denmark, Finland, France, the Netherlands, and Switzerland).

\textsuperscript{155} For thoughtful discussions of the proper scope of criminal liability, see, e.g., Buell, supra note 149 (arguing that entity liability properly instantiates social practice of blaming institutions as well as individual actors, and advocating refinement of doctrines to make best use of law’s expressive capital); Bucy, supra note 150 (proposing that liability be limited to cases in which the corporate ethos promoted the criminal conduct); William S. Laufer & Alan Strudler, Corporate Intentionality, Desert, and Variants of Vicarious Liability, 37 AM. CRIM. L. REV. 1285 (2000) (proposing standard of constructive corporate fault); Gerald E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 LAW & CONTEMP. PROBS. 23, 44-54 (1997) (focusing on moral function of criminal law).
defendants. Corporations have access to the best legal talent to defend them, and the sanctions available in a criminal prosecution of a corporation are largely identical to those that are—or could be—available in a civil enforcement action. In contrast, the criminal prosecution of an individual defendant can result in a loss of liberty for many years, as well as the loss of civil rights, including the right to vote.\footnote{See Marc Mauer, Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, 12 Fed. Sent'g Rep. 248, 249 (Mar./Apr. 2000) (reporting that in 1998 an estimated 3.9 million Americans were barred from voting due to felon disenfranchisement laws); Kara Gotsch, It's Right to Grant Former Felons the Right to Vote, Wash. Post, May 13, 2007, at B8 (noting that prior to Maryland's 2007 re-enfranchisement act, one out of thirty-seven adult residents of the state were disenfranchised due to felony convictions).}

V. Conclusion

Although the criticisms leveled against corporate and white collar liability are substantial, it is clear that they are not unique to this, or any, one area of federal criminal prosecutions. The criticisms of corporate criminality raise important questions across the spectrum of federal criminal law, not just in the corporate and white collar context. The breadth of the federal criminal law must be reexamined, both relative to what conduct is more properly covered by state criminal codes and in relation to what conduct can be more effectively dealt with through non-criminal enforcement. The issue of the proper roles of mens rea and entity liability in our federal criminal law should also be reexamined. The current sentencing guidelines and mandatory minimums create overly harsh sanctions for criminals, from corporations to street drug dealers. Finally, the enormous power given to prosecutors should be reviewed, in light of the pressure it puts on defendants to cooperate with the government, particularly those without high-priced representation. We have not really come to grips with the questions raised by a system that is, in truth, more administrative or inquisitorial than adversarial, which resolves the guilt of virtually all defendants without a trial.\footnote{For an insightful discussion of some of these issues, see Lynch, supra note 130.} A thoroughgoing reexamination is called for in all of these areas, dealing with all classes of defendants. To narrow the reform discussion to corporate and white collar prosecutions overlooks the political power and influence that these defendants have to initiate criminal law reform across the board, and it removes important tools that may be useful to stop serious corporate misconduct.

Looking at the wider body of federal criminal prosecutions, it becomes clear that there is an urgent need to reevaluate both the increasing harshness of criminal sanctions and the criminalization of conduct that can be dealt with through civil and regulatory means. As criminal sanctions become more and more severe, and more and more activity is criminalized, real costs are imposed not only on defendants, but also on innocent third parties. These terrible collateral costs,
whether they are imposed on employees and shareholders or children and communities, should be seriously considered in reviewing the current costs of the federal sentencing laws. Further, the scope of the criminal laws must be reexamined. Is it moral, efficient, or even effective to criminalize conduct that could be dealt with through civil and regulatory regimes? While these problems exist in the context of corporate and white collar prosecutions, it would be a mistake to overlook the need for review and reform of the greater criminal system.