ARTICLES

ERASING THE VICTIMS OF CORPORATE CRIME[†]

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ABSTRACT

A casual observer would be excused for thinking that corporate crimes are generally victimless. Even an informed observer would be hard-pressed to articulate how, if at all, the criminal justice system accounts for victims in resolving cases against corporations. As prosecutors focus on big-sticker fines and compliance mandates, victims drop out of the equation. Sometimes, prosecutors even seem to take steps to actively exclude victims. The vague impression that victims are missing from corporate criminal justice is empirically verifiable. Drawing on an original, hand-collected data set of corporate criminal resolutions and investigations, I argue that the most striking thing about corporations' victims is how little we know about them.

This Article seeks to reintroduce prosecutors, judges, and scholars to the victims of corporate crime. It uncovers mechanisms through which the criminal justice system erases the many thousands of people corporations physically and financially injure each year. Only by finding out who corporate crime's victims are can we begin to acknowledge and remedy the wrongs they suffer. Below, I offer several proposals for surfacing victims' voices and interests.

† The *American Criminal Law Review* has not independently reviewed the data and analyses described herein. Data on file with author.

* Professor of Law, The University of Iowa, College of Law and Department of Philosophy. I am grateful to my research assistants—Jacklyn Vasquez, Andrew Ascher, Jessica Davis, Payton Raso, and Jacob Schiller—for their many hours tracking down information about the victims of corporate crime to carry out the study described below. The available data seemed almost calculated to thwart their effort.

INTRODUCTION: HOW TO ERASE A VICTIM

A few years ago, two Boeing 737 MAX planes crashed, killing 346 people.[1] The same cause has been attributed to both crashes: a faulty autopilot system had tipped both planes into irreversible nose-dives.[2] Investigations showed that, leading up to the tragedies, Boeing personnel cut corners, ignored warnings, hid material changes from airlines, denied any need to retrain pilots, and exerted "undue pressure" on the Federal Aviation Administration (FAA)—the organization charged with overseeing air safety.[3] The company promoted a culture that played fast and loose with safety protocols and silenced people who voiced concern.[4]

A criminal case against Boeing would have been a slam dunk on any number of possible charges, from manslaughter,[5] to wire fraud,[6] to securities fraud,[7] to lying to federal authorities.[8] Nonetheless, no one familiar with the workings of corporate criminal law was surprised when the Department of Justice (DOJ) announced it would not prosecute the company.[9] Economically important corporations like

1. Andrew Tangel, Andy Pasztor & Mark Maremont, *The Four-Second Catastrophe: How Boeing Doomed the 737 MAX*, WALL ST. J. (Aug. 16, 2019), https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-11565966629.

2. Jack Nicas, Natalie Kitroeff, David Gelles & James Glanz, *Boeing Built Deadly Assumptions into 737 Max, Blind to a Late Design Change*, N.Y. TIMES (June 1, 2019), https://nyti.ms/2WCoTHk; Mika Gröndahl, Keith Collins & James Glanz, *The Dangerous Flaws in Boeing's Automated System*, N.Y. TIMES (Apr. 4, 2019), https://nyti.ms/37KLBi1.

3. *Status of the Boeing 737 MAX: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure*, 116th Cong. (May 2019).

4. David Gelles, *'I Honestly Don't Trust Many People at Boeing': A Broken Culture Exposed*, N.Y. TIMES, https://nyti.ms/2NfMPKZ (Oct. 15, 2021); *see also* Andy Pasztor & Alison Sider, *Internal Boeing Documents Show Cavalier Attitude to Safety*, WALL ST. J. (Jan. 10, 2020), https://www.wsj.com/articles/internal-boeing-documents-show-cavalier-attitude-to-safety-11578627206; Bill Chappell & Joel Rose, *Whistleblower Joshua Dean, Who Raised Concerns About Boeing Jets, Dies at 45*, NAT'L PUB. RADIO (May 2, 2024), https://www.npr.org/2024/05/02/1248693512/boeing-whistleblower-josh-dean-dead (providing that individuals who raised concerns about the 737 MAX were fired for raising concerns); Bill Chappell, *Boeing Whistleblower John Barnett, Who Raised Alarm Over Plane Quality, Is Found Dead*, NAT'L PUB. RADIO (Mar. 12, 2024), https://www.npr.org/2024/03/12/1238033573/boeing-whistleblower-john-barnett-dead.

5. 18 U.S.C. § 1112. Boeing caused death by selling faulty planes "without due caution and circumspection." *See id.*

6. 18 U.S.C. § 1343. Boeing transmitted false reports concerning plane safety to the FAA for the purpose of advancing its "scheme or artifice to defraud" the agency and Boeing customers. *See id.*

7. 18 U.S.C. § 1348. Through its various public misrepresentations about plane safety, Boeing "knowingly execute[d] . . . a scheme or artifice to defraud" investors about the value of Boeing stock. *See id.*

8. 18 U.S.C. § 1001. Through its submissions to the FAA, Boeing "knowingly and willfully falsifie[d] . . . a material fact" concerning a "matter within the jurisdiction of the executive . . . branch of the Government." *See id.*

9. Deferred Prosecution Agreement, United States v. Boeing Co., No. 4:21-CR-005-O, 2021 WL 7287662 (N. D. Tex. Jan. 7, 2021), https://www.justice.gov/opa/press-release/file/1351336/download.

Boeing[10] routinely receive pre-trial diversion agreements rather than convictions.[11] Even the lenient terms of Boeing's agreement were lamentably unremarkable:[12] "a total criminal monetary amount" that totaled just 3.3% of Boeing's pre-crash annual revenue.[13]

Shortly after the agreement was announced, the DOJ unwittingly took steps that finally turned heads. In its characteristic resolve to push the case to a speedy closure (as open matters are bad for business), the DOJ needed to cut victims out of the process. Grieving, angry, and indignant, families of the deceased had wanted to exercise their federal right to participate,[14] to have their views noted and accounted before Boeing and federal authorities shook hands.[15] Their testimony would have taken time. Even worse, it would have risked drawing scrutiny to a settlement process that ordinarily would have been negotiated behind closed doors.[16] In a bid for expedition, prosecutors argued that "the [families] do not qualify as 'crime victims' [under federal law]," and so their pleas had no legal significance.[17] *That* drew attention. National media, which normally snoozes through corporate investigations until the credit reel plays, suddenly perked up.[18] Jaded experts, long familiar with the DOJ's shenanigans, voiced concern.[19]

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10. *See* Andy Uhler, *As Companies Like Boeing Go, So Goes the U.S. Economy*, MARKETPLACE (Oct. 28, 2020), https://www.marketplace.org/2020/10/28/as-companies-like-boeing-go-so-goes-the-u-s-economy/ (describing Boeing's economic significance).

11. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1301 (2013) (describing "a disturbing trend where corporations avoid criminal charges by entering deferred prosecution or non-prosecution agreements").

12. Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 1002–03 (2022) ("The concessions that prosecutors levy through pre-trial diversion are paltry . . . reckoned as a percentage . . . of annual corporate revenue (on average, <1% for large corporations).").

13. *Id.*; Press Release, Off. of Pub. Affs., Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion.

14. *See infra* Part II.

15. *See, e.g.*, David Schaper, *Families of 737 Max Crash Victims Want DOJ to Rescind Boeing's Settlement Agreement*, NAT'L PUB. RADIO (Feb. 11, 2022), https://www.npr.org/2022/02/11/1080049312/families-of-737-max-crash-victims-want-doj-to-rescind-boeings-immunity-de [https://perma.cc/8P7C-JE8Q] ("Federal prosecutors are making that argument in response to an effort by the families to rescind this deal that gives Boeing and its executives immunity from criminal prosecution.").

16. Peter R. Reilly, *Outlawing Corporate Prosecution Deals When People Have Died*, 55 ARIZ. ST. L.J. 1351, 1367 (2023) ("DPAs are usually negotiated behind closed doors, in a process that hinders participation rather than promoting it.").

17. United States of America's Response to the Motion Filed by Representatives of Certain Crash Victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 for Findings that the Deferred Prosecution Agreement was Negotiated in Violation of the Crime Victims' Rights Act at 8–9, United States v. Boeing Co., No. 4:21-CR-0005-O, 2021 WL 7287662 (N.D. Tex. Feb. 20, 2022), https://www.documentcloud.org/documents/21203301-document-for-schaper-story?responsive=1&title=1.

18. *See, e.g.*, Ankush Khandori, *The Trump Administration Let Boeing Settle a Killer Case for Almost Nothing*, N.Y. MAG. (Jan. 23, 2021), https://nymag.com/intelligencer/2021/01/boeing-settled-737-max-case-for-almost-nothing.html (highlighting the extensive media coverage that the Boeing criminal investigation and settlement received).

19. *See, e.g.*, Russell Mokhiber, *Columbia Law Professor John Coffee Says Boeing Deferred Prosecution Agreement One of the Worst*, CORP. CRIME REP. (Feb. 23, 2021), https://www.corporatecrimereporter.com/news/200/columbia-law-professor-john-coffee-says-boeing-deferred-prosecution-agreement-one-of-the-worst/.

Their surprise was misplaced. The DOJ's position was that the families of people killed by Boeing's planes were not victims. That stance was legally wrongheaded[20] and morally repulsive. Yet, as this Article shows, it was just an unusually visible instance of a long-standing pattern.

Victims are supposed to be central figures in a criminal justice story that acknowledges their suffering and validates their individual worth. Corporate crime has much more extensive impacts than street crime both in terms of net economic costs and total number of people affected.[21] It exploits the colossal imbalance between rich, powerful Wall Street and naïve, defenseless Main Street. As argued in Part I, one would reasonably expect to find academic literature and legal records shot through with concern for victims of corporate crime. Yet, victims are curiously absent from discussions in these fora. Through an original study of public documents resolving corporate criminal investigations, Part II explains how this absence arises. Hand-collected and manually-coded by a team of five legal research assistants over six months, the documents reveal distressingly little about the individuals who bear the brunt of corporate misconduct and the nature or extent of the wrongs they endure. Victims appear, if at all, as aggregate line items in documents drafted by people whom they had no opportunity to consult. Prosecutors and the corporate counterparties they investigate effectively erase victims from the record.

Part III demonstrates that there is nothing necessary about this state of affairs. The DOJ may not be officially anti-victim, but it has adopted a series of policies that systematically exclude victims from the inner workings of corporate criminal justice. This Article proposes concrete steps for incorporating victims into the process. The orientation I adopt below is pragmatic rather than quixotic. Any realistic solution needs to account for the legal, economic, and political pressures that federal prosecutors navigate. For example, the DOJ must often settle felony charges out of court to avoid the potentially catastrophic collateral effects of an in-court conviction. In an attempt at compromise, one suggestion below would have prosecutors take corporate suspects to trial on misdemeanor charges, even as they settle related felony charges extrajudicially. While not ideal, this and like strategies would give victims their day in court, their chance to tell their own story, and their overdue public recognition.

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20. United States v. Boeing Co., No. 4:21-CR-5-O, 2022 WL 13829875, at *9 (N.D. Tex. Oct. 21, 2022) ("[C]redible evidence proves Movants' status as lawful representatives of 'crime victims' under the CVRA and that they therefore have standing to assert rights under the Act.").

21. FBI data shows that the economic losses attributable to white-collar crime are roughly twenty times greater than the economic losses of street crime. Mihailis E. Diamantis, *The Corporate Insanity Defense*, 111 J. CRIM. L. & CRIMINOLOGY 1, 79 n.499 (2021).

I. Law and Justice Require Victim Participation

Victims are essential to any modern understanding of criminal law. While criminologists may once have countenanced crimes against God or nature, such "victimless" offenses are now considered exceptional.[22] Today, theorists widely accept the "harm principle," which posits that legitimate criminal laws must only proscribe acts that cause tangible harm.[23] It is only by keeping victims in view that criminal law's most fundamental goals make sense—preventing future injury (to victims) and righting past wrongs (to victims).[24]

Criminal law's basic project should give victims primacy of place, or at least give them equal conceptual footing with wrongdoers.[25] Doing so forces society to reckon with its failure to protect the shared normative understandings that hold the community together.[26] Criminal conduct assails those understandings by prioritizing the illegitimate interests of criminals over the legitimate interests of their victims.[27] The law attempts to mend damage done to the social fabric, reaffirming the moral standing of the victim and negating the invalid claim of superiority implicit in the criminal's conduct.[28] Through punishment, society condemns criminals' wrongs and recognizes victims' standing as equal members of the moral community.[29]

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22. *See, e.g.*, Lawrence M. Friedman, Crime and Punishment in American History 34–35 (1993) ("[I]n the seventeenth century, no crimes appear more often in the ancient pages of court records than fornication and other victimless crimes.").

23. *See, e.g.*, Joel Feinberg, Harm to Others 15 (1984).

24. Andrew von Hirsch, Censure and Sanctions (1996); *see also* Kent Greenawalt, *Punishment,* 74 J. Crim. L. & Criminology 343, 351 (1983) ("Punishment helps assure citizens the laws as administered deal fairly with their interests.").

25. *See, e.g.*, Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 Harv. L. Rev. 1485, 1489–90 (2016) ("[C]riminal law is the primary legal institution by which a community reconstructs the moral basis of its social order, its ethical life, in the wake of an attack on that ethical life."); *see also* Vincent Chiao, Criminal Law in the Age of the Administrative State 5 (2019) ("The basic principle of public institutions [such as criminal law] is to . . . to promote the common good on terms befitting social and political equals.").

26. R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, *in* Philosophical Foundations of Criminal Law 125, 139 (R.A. Duff & Stuart P. Green eds., 2011) (criminal law "concern[s] us all as citizens" because it targets "wrongdoing that violates the polity's defining values").

27. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 598 (1996) ("By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender's assessment of whose interests count is wrong.").

28. David Garland, Punishment and Modern Society 42 (1990) ("[Punishment] ensures that, once established, the moral order will not be destroyed by individual violations which rob others of their confidence in authority. Punishment is thus a way of limiting the 'demoralizing' effects of deviance and disobedience.").

29. *See, e.g.*, Kleinfeld, *supra* note 25, at 1491 ("But if the normative order of the classroom is something we treasure, something we want to uphold in the wake of cheating, condemnatory punishment in the community's name is the tool for the job.").

Though theorists fixate on punishment, "we should not let criminal punishment dominate our discussion of what criminal law is."[30] R.A. Duff[31] and Henry Hart[32] both emphasize the equal (and arguably more important) condemnatory force of conviction. Criminal law begins to convey its condemnatory message prior to punishment. By requiring proof of guilt beyond a reasonable doubt, the criminal trial shapes the message that conviction sends.[33] Only conviction can brand a suspect "guilty" and label them a "felon," conveying society's strongest rebuke.[34] As philosopher C.L. Ten argued, "[c]ondemnation can be expressed by a system of purely symbolic punishment . . . . [T]he verdict of the court already expresses condemnation."[35]

Victims have an essential role to play at trial, where their participation can be empowering. As the parties most directly impacted by the offense, victims tether a trial. They clarify the moral stakes for the judge, jury, and public looking on. This is even more important in corporate trials, where economic narratives too easily reduce human suffering into aggregable dollar figures.[36] Through their testimony, victims can begin to shape the public account of how they were wronged.[37] Rather

30. R.A. DUFF, THE REALM OF CRIMINAL LAW 15 (2018).

31. *See generally* R.A. DUFF, TRIALS AND PUNISHMENTS (Sydney Shoemaker et al. eds.,1986); R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001) [hereinafter DUFF, PUNISHMENT].

32. *See* Henry M. Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404–05 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

33. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 808 (1997).

34. Rubio v. Superior Court, 593 P.2d 595, 598 (Cal. 1979) (noting ex-felons "have had the experience of being deprived of their personal liberty by the state and, upon their return to the community, of being stigmatized both publicly and privately because of their former status"); *see also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 195–97 (1991) ("[T]he criminal law should generally prohibit, not price.").

35. C.L. Ten, *Positive Retributivism*, 7 SOC. PHIL. & POL'Y 195, 200 (1990); *see* DUFF, PUNISHMENT, *supra* note 31; JOHN GARDNER, *The Functions and Justifications of Criminal Law and Punishment*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 201 (2007); JOHN GARDNER, *The Mark of Responsibility*, *in* OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 177, 190–91 (2007) ("[E]ven if for some reason we abolished the whole apparatus of criminal sentences and civil remedies, we should still think twice about abolishing the trials themselves.").

36. Mihailis E. Diamantis, *The Monster Within: Representing Corporate Evil*, *in* EVIL CORPORATIONS: LAW, CULPABILITY AND REGULATION 189, 191 (Penny Crofts ed., 2024) ("[T]he sort of economic analysis prosecutors use to diagnose and describe corporate misconduct has a tendency to psychologically crowd out moral concern.").

37. *See* Jaime Malamud Goti, *Equality, Punishment, and Self-Respect*, 5 BUFF. CRIM. L. REV. 497, 504, 506 (2002) ("Only public admission by authoritative institutions that we were wronged will legitimize us in our own eyes, and punishment of the violators of our rights is the clearest and strongest statement to that effect."); Tatjana Hörnle, *Distribution of Punishment: The Role of a Victim's Perspective*, 3 BUFF. CRIM. L. REV. 175, 182–83 (1999) ("[T]he [criminal] sentence recognizes that the victim need not accept the offender's conduct. It is not sufficient to express disapproval to the general public (in addition to the offender). The recipient with the greatest interest in the declaration of wrongdoing is the person injured through the crime."); Douglas E. Beloof & Paul G. Cassell, *The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 534–38 (2005) (asserting that victim attendance "furthers the truth-seeking process by allowing victims to assist prosecutors in uncovering false testimony by defense witnesses"); *see also* Tyrone

than being passive objects of sympathy, victims have a platform at trial to become active narrators and agents of justice. Seizing this voice and having it acknowledged can be healing.[38]

Following the Victims' Rights Movement of the 1970s, state and federal criminal law formally acknowledged the central role that victims should play in the criminal justice process. For example, the federal Crime Control Act of 1990,[39] the Crime Victim's Rights Act of 2004,[40] and various state laws[41] now guarantee victims the right to attend, speak, and consult at trial. The Mandatory Victim Restitution Act requires federal sentencing courts to order convicted defendants to pay restitution to victims of most offenses.[42] These victim-focused laws do not distinguish between cases with natural and corporate defendants. Indeed, the Sentencing Guidelines for organizations explicitly instruct federal courts to "require that [a convicted] organization take all appropriate steps to provide compensation to victims . . . ."[43]

At least on paper, the DOJ also considers "the interests of . . . victims" when it decides how to resolve criminal cases.[44] Though not binding or enforceable,[45] the DOJ's guidelines acknowledge that "[i]t is important to consider the economic and psychological impact of the offense, and subsequent prosecution, on any victims . . . ."[46] Of particular relevance, DOJ prosecutors are instructed to "make best efforts to solicit the victim's views in advance of and about major case decisions," like offering plea deals or pretrial diversion agreements.[47] When a case goes to

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Kirchengast, 16 NEW CRIM. L. REV. 568, 592–93 (2013) (arguing for victim legal representation in defendants' criminal trials in order to ensure victim participation and representation in the trial process).

38. Justin Levitt, *The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1970–71 (2001) (noting that victims can benefit from a "safe forum to have their stories formally heard and acknowledged"); William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, 171 (2021) ("The inevitability of life-course pathologies resulting from violent sexual victimization come, at least in part, from the absence of acknowledgement or validation of the wrong and harm.").

39. 34 U.S.C. § 20141.

40. 18 U.S.C. § 3771 ("A crime victim has the following rights: . . . The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding. The reasonable right to confer with the attorney for the Government in the case.").

41. *See generally* MARSY'S L., http://marsyslaw.us (last visited Sept. 14, 2024). The Constitution of California provides:

> In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights: . . . To be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue.

CAL. CONST. art. I, § 28(b)(8). As of August 2024, twelve states have approved Marsy's Laws. *See Marsy's Law for All*, BALLOTPEDIA, https://ballotpedia.org/Marsy%27s_Law_for_All (last visited Jan. 17, 2022).

42. 18 U.S.C. § 3663A.

43. U.S. SENT'G GUIDELINES MANUAL § 8B introductory cmt. (U.S. SENT'G COMM'N 2018).

44. U.S. Dep't of Just., Just. Manual § 9-28.1400 (2023) (providing the "principles of federal prosecution of business organizations").

45. *Id.* § 9-28.010.

46. *Id.* § 9-28.1400B cmt.

47. *Id.*

trial, the proceedings must ordinarily be open to victims, and prosecutors must provide them an opportunity to be heard.[48] The DOJ website offers a summary list of victims' federal rights[49] and provides a complaint form for victims who think their rights have been denied.[50]

Given the central role that victims play in theory and law, one would expect them to be salient agents in the corporate criminal justice process. Victims should feature prominently in policy discourse. Prosecutors should facilitate victim participation. And all of these discussions should be reflected in public records.

II. THE HUNT FOR MISSING VICTIMS—AN EMPIRICAL STUDY

This Article began with a very different ambition. Scholars have noted the general absence of a victimology for corporate crime.[51] All types of public data are available about the victims of gun violence, car theft, and sexual assault, but data about corporations' victims is sparse.[52] Without such data, it is impossible to detect systematic disparities in the types of people corporations injure or to design effective mitigation measures. My research assistants and I set out to offer a tentative first step toward disseminating that information. We ended in defeat.

A. DOJ Publications Rarely Mention Victims of Corporate Crime

A natural place to start looking for information about the victims of corporate crime is the DOJ website. From there, visitors can navigate to two relevant resources. The first is the Bureau of Justice Statistics (BJS) website. As the primary statistical agency of the DOJ, the mission of the BJS "is to collect, analyze, publish, and disseminate information on crime, criminal offenders, victims of crime, and the operation of justice systems at all levels of government."[53] BJS organizes its

48. U.S. DEP'T OF JUST., THE ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 57–62 (2022), https://www.justice.gov/ag/page/file/1546086/download ("Department personnel engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims . . . are accorded the[ir] rights provided in 18 U.S.C. § 3771(a).").

49. *Office of the Victims' Rights Ombuds*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/office-victims-rights-ombuds (Nov. 14, 2022) ("It is the responsibility of the Victims' Rights Ombuds to receive and investigate complaints against Department of Justice employees who violate or fail to provide one or more of the following rights. . . .").

50. *Crime Victims' Rights Ombudsman—Complaint Forms*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/crime-victims-rights-ombudsman-complaint-forms (Jan. 26, 2023).

51. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 83 (2017) ("Lost in nearly any consideration of corporate criminal law is a rigorous victimology of corporate wrongdoing. . . . Evidence and principles from corporate victimology must be an inextricable part of the corporate criminal law."); *see* Hendrik Schneider, *The Corporation as Victim of White Collar Crime: Results from a Study of German Public and Private Companies*, 22 U. MIA. INT'L & COMPAR. L. REV. 171, 172–76 (2015) ("Criminology long focused on 'conventional' crimes such as street crime, crime of poverty, and hate crime (i.e. homicide, robbery, rape, etc.) and thus ignored white-collar crime altogether.").

52. Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 454 (2019).

53. *About BJS*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/about (last visited Oct. 15, 2024).

publications into dozens of different "series," many of which—like "Human Trafficking Data," "Violent Victimization of College Students," and "Stalking Victimization"—report data about victims. However, none of the series relate to corporations or corporate crime. The most relevant BJS publication is the annual "Criminal Victimization" report, but it too focuses overwhelmingly on street crime.[54] Words like "corporation," "business," "white-collar," and "fraud" never appear.[55]

The second source of potentially relevant information on the DOJ website is the DOJ's own press releases. The Department often uses these to announce investigations and trumpet resolutions.[56] Information about victims from these press releases could be extracted, coded, and studied, but it is simply not there. Consider the DOJ's press release about the Boeing investigation.[57] It mentions "victims" three times.[58] The first time describes a fund created for relatives of those who died in the crashes (this was in early 2021, a year before the DOJ stated that they were not really "victims").[59] The second expresses the hope that the fund "provides some measure of compensation to the crash-victims' families and beneficiaries."[60] The third time directs potential beneficiaries of those who died in the crash to contact the Fraud Section's Victim Witness Unit.[61] There are no names, no stories, no victim quotes, and no information about victim characteristics.[62] Web searches for "DOJ" and the names of various individuals killed in Boeing's crashes return only results concerning the case that families filed *against* the Department for failing to consult with them before settling with Boeing. This entire exercise illustrates the DOJ's general tendency to mute victims' concerns in corporate cases and reduce them expeditiously to single "measures of compensation."[63] Victims' interest in criminal justice may start with compensation, but it surely should not end there.

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54. RACHEL E. MORGAN & ALEXANDRA THOMPSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION, 2020 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cv20.pdf.

55. *Id*. The U.S. Sentencing Commission does publish annual statistics about convicted corporate criminals. *See, e.g*., U.S. SENT'G COMM'N, QUICK FACTS ON ORGANIZATIONAL OFFENDERS (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Organizational-Offenders_FY21.pdf. None of the statistics pertain to victims. The reports never even use the word "victim." *Id*.

56. W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 2 STETSON BUS. L. REV. 1, 4 (2023) ("Sometimes the DOJ's Office of Public Affairs issues press releases to its website, but their drab presentation and banner ads are more reminiscent of a mid-90s weblog than any modern-era publicity effort.").

57. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion.

58. *Id*.

59. *Id*.; *see also supra* note 17 and accompanying text.

60. Press Release, U.S. Dep't of Just., *supra* note 57.

61. *Id*.

62. *Id*.

63. *Id*.

B. Learning About Victims from Public Records Is Impossible

Because the DOJ's published materials were not a helpful source of information on corporate crime's victims, my research assistants and I had to turn elsewhere. The next most promising source of information about victims of corporate crime seemed to be the pretrial diversion agreements[64] and public court documents that resolve investigations. The DOJ's new Corporate Crime Case Database would be a natural place to look for such information, but at the time of writing this Article, it had just eighty-nine entries (and none prior to 2023).[65] Fortunately, two academics, Brandon Garrett and John Ashley, have already compiled a trove of present and past resolutions into their publicly available Corporate Prosecution Registry.[66] The Registry's goal is to "provide comprehensive and up-to-date information on federal organizational prosecutions."[67] To date, it is the most complete repository of corporate criminal trial verdicts, plea agreements, or pretrial diversions.[68]

In the hope of finding insights about the victims of corporate crime, a team of five legal research assistants and I spent six months digging into the documents available in the Corporate Prosecution Registry. To narrow the universe of cases, we focused on specific years. Because existing data shows that the DOJ treats large and small corporations differently, we set different parameters for each group. For large corporations, i.e. those listed in the S&P 500 (and equally large foreign corporations), we pulled all sixty-one cases resolved between 2010 to 2020. We chose this decade because it was contemporary (reflecting current DOJ policy) and spanned presidencies from both political parties. For the much more numerous set of smaller corporations, i.e. those not listed in the S&P 500, we focused on just two years: 2010 and 2018. We chose these years to avoid the start of any new presidential administration and to include samples from presidents of both parties. The set comprised seventy-two resolutions against small corporations.

We then reviewed and hand-coded every resolution. We extracted several types of information, including the category of disposition (declination, pretrial

64. Pretrial diversion agreements are civil resolutions pursuant to which a criminal defendant can avoid conviction by committing to abide by specified terms. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2088 (2016) ("The solution that emerged was a process whereby prosecutors would extract concessions from the corporation in exchange for a conditional promise *not* to prosecute, in the form of either a deferred prosecution agreement (DPA) or a nonprosecution agreement (NPA).").

65. *Corporate Crime Case Database*, U.S. DEP'T OF JUST., https://www.justice.gov/corporate-crime/corporate-crime-case-database?page=0 (last visited Oct. 15, 2024).

66. *Data & Documents,* CORP. PROSECUTION REGISTRY, https://corporate-prosecution-registry.com/browse/ (last visited Oct. 15, 2024).

67. *About*, CORP. PROSECUTION REGISTRY, https://corporate-prosecution-registry.com/about/ (last visited Oct. 15, 2024).

68. The Corporate Prosecution Registry does not contain pretrial diversion agreements that the DOJ has opted not to release publicly. The DOJ has yet to reply to Garrett's and Ashley's FOIA requests for these hidden agreements. Justin Wise, *DOJ Withholding Public Records in Violation of FOIA, Says Garrett's Collaborator in Duke-UVA Corporate Prosecution Registry*, DUKE L. (Nov. 11, 2021), https://law.duke.edu/news/doj-withholding-public-records-violation-foia-says-garretts-collaborator-duke-uva-corporate/.

diversion, plea, or conviction at trial), the type of crime, the nature of the harm caused, the type of penalty imposed, the fine amount (if any), the length of corporate monitorship (if any), and available information about the victims of the offense. The following three tables present some summary statistics about the types of investigations and dispositions in the study.

Table 1 shows the number and type of crime that the DOJ accused corporations in the sample of committing. The table breaks out results for big and small corporations. Comparing the two groups reveals that, despite some natural variation in the proportions, big and small corporations were investigated for an overlapping range of offenses.

Table 1

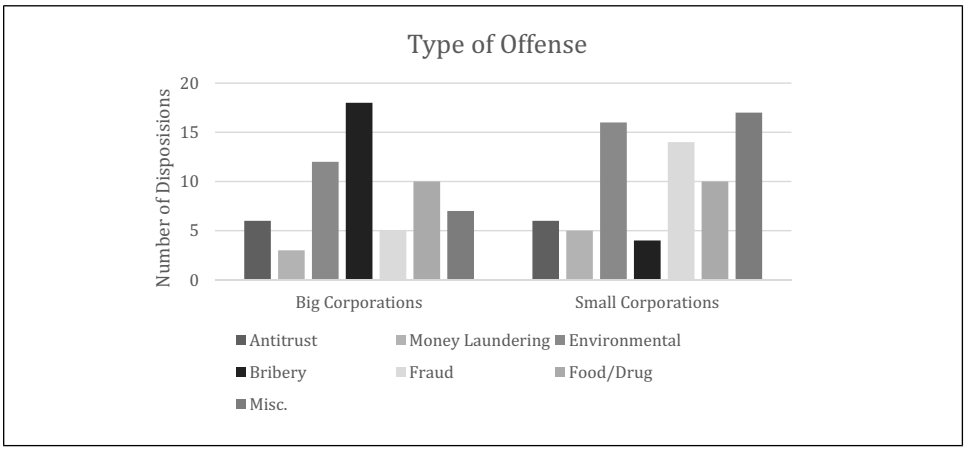


Table 2 shows how the DOJ resolved investigations against corporations in the sample. The data are largely consistent with past research. Trials were extremely rare for both large and small corporations because the overwhelming majority of convictions result from plea deals.[69] Enforcement against small corporations is more stringent: they are much more likely to be convicted (whether by a plea deal or through trial) and much less likely to receive a declination.[70] Big corporations were much more likely to receive pretrial diversion agreements that protect them (and their stakeholders) from the collateral consequences of conviction. Somewhat surprising was the relatively high number of declinations for large corporations,

69. Diamantis & Laufer, *supra* note 52, at 454.

70. William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 Am. Crim. L. Rev. 1307, 1315 (2007).

roughly one-in-five. Some commentators have previously suggested that declinations were a disappearing disposition for corporate investigations.[71]

Table 2

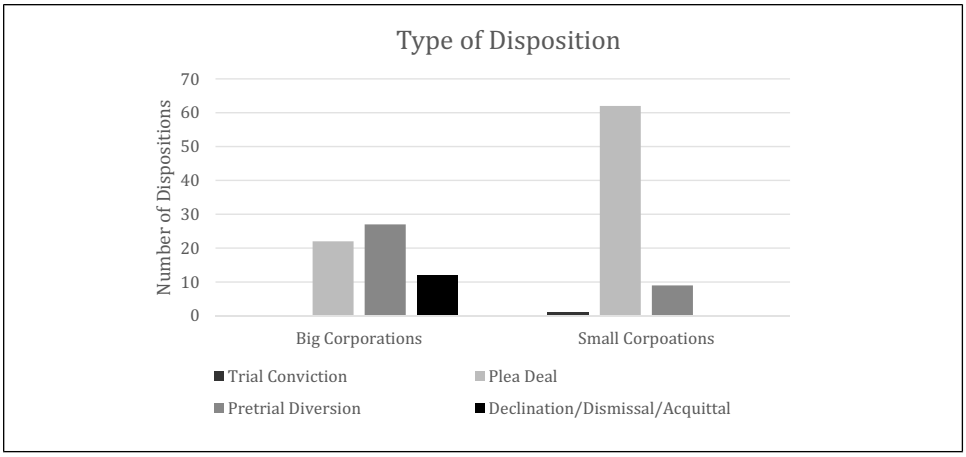


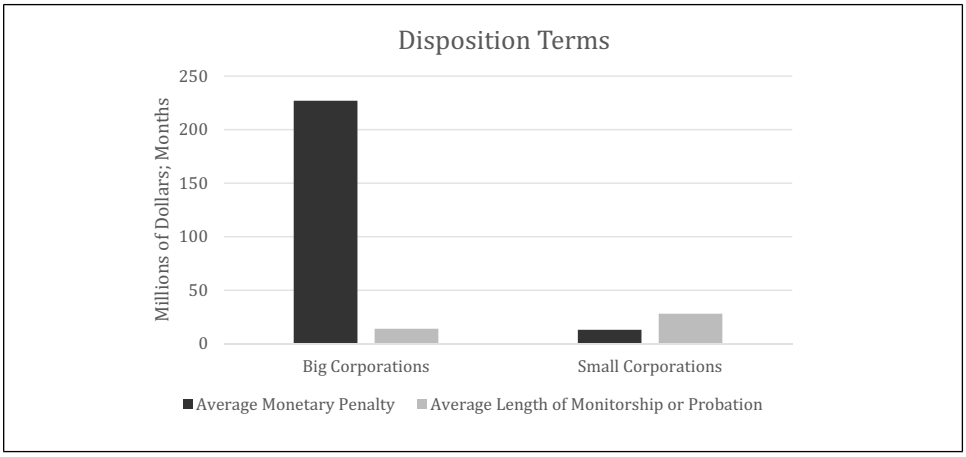
Table 3 summarizes the sanctions against corporations that failed to secure a declination. Whether imposed by a court after conviction or by the DOJ under the terms of a pretrial diversion, adverse resolutions commonly involve two key elements: a monetary penalty and a term of supervision. Table 3 breaks out the average monetary penalty and average length of supervision for big and small corporations. As expected, fines against large corporations (which have more assets and greater revenues) are much higher. However, the terms of supervision they receive are much shorter. This is counterintuitive. One might expect that implementing compliance protocols at large organizations would be a more complex and drawn-out process, thus requiring a longer term of supervision.[72] Table 3 may reflect a tradeoff between fines and supervision that suggests corporate management prefers to avoid external oversight, buying less supervision through larger fines.[73]

71. Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 188 (2008) ("[Critics] contend that diversion agreements actually have replaced declinations, providing prosecutors with an opportunity to extract a pound of flesh when previously they would have had to settle for nothing.").

72. Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REGUL. 1, 18 (2019).

73. Mihailis E. Diamantis, *Looking at Monitorships from an Academic Perspective*, *in* GLOBAL INVESTIGATIONS REVIEW, GUIDE TO MONITORSHIPS 1, 4 (Anthony S. Barkow et al. eds., 4th ed. 2024).

Table 3



The real subjects of the study were the victims of corporate crime, not the corporate offenders. After compiling all the information from available public documents, we looked for generalizations to extract about victim identity or impact. We were particularly interested in understanding how the DOJ interacts with individual victims, so we started by separating out cases alleging crimes that implicate the interests of identifiable victims. Tables 4 and 5 show the number of crimes by big and small corporations, respectively, that harmed individuals as opposed to only more abstract interests such as market competition (e.g. antitrust violations) and banking integrity (e.g. money laundering). Of course, there is no bright-line between abstract interests and individual interests. For example, a harm to the environment can create elevated risks of future health complications for individuals. Unless identifiable individuals experienced concrete harms from the corporate misconduct, we coded the case as involving only abstract harms.[74] The tables also break out the numbers by disposition type (i.e. conviction versus diversion).

Tables 4 and 5 show that roughly one in four corporate crimes harm identifiable individuals. Interestingly, this ratio holds for both big and small corporations. It also persists through disposition types. In other words, the presence or absence of identifiable individual victims has no measurable impact on whether prosecutors seek to convict a corporation or offer pretrial diversion.

This statistic about individual victims was also our only statistic about them. Upon digging into the twenty-five percent of cases where corporations harmed identifiable people, it became apparent that saying anything of further criminological interest was

74. Two cases against large corporations implicated harms to other identifiable corporations, one for stock manipulation and another for mortgage fraud. We lumped these into abstract interests because corporate interests lack both the moral and emotional dimension that make victim participation in criminal process so important.

Table 4

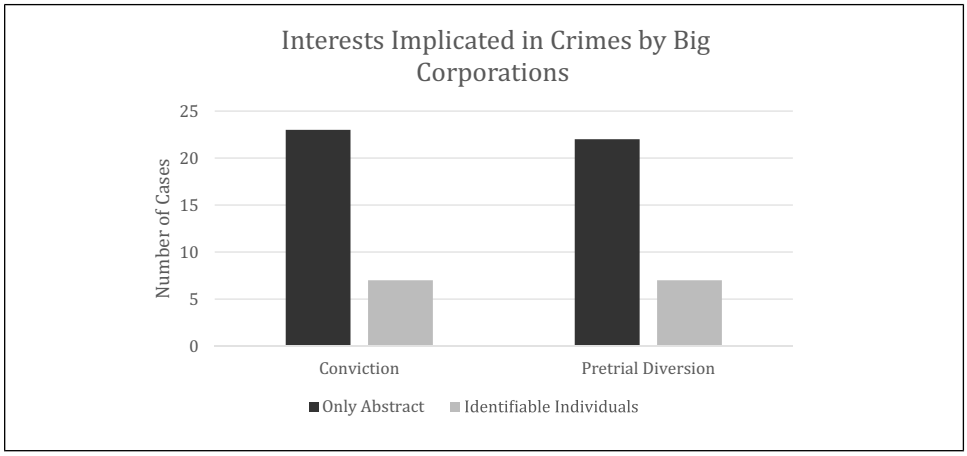
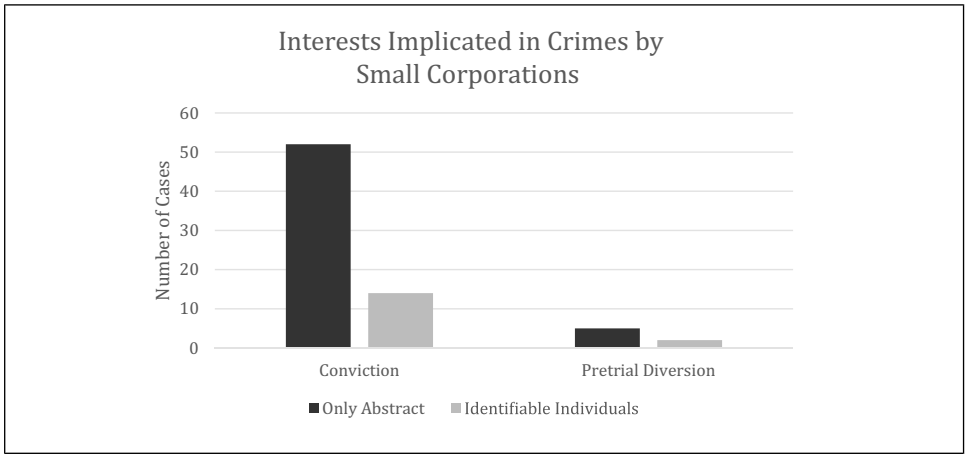


Table 5



impossible. Individual victims were most conspicuous in their absence. They largely remained numerical abstractions. Except in very rare cases—we know, for example, that Honeywell International employee Delvin Henry died in 2003 while working with a mislabeled chemical[75]—public documents reflect no names, no ages, no genders, and no races. All we know about the harmed victims are stipulated amounts of

75. Plea Agreement at 9–10, United States v. Honeywell Int'l Inc., No. 07-31-RET-SCR (M.D. La. Sept. 13, 2007).

restitution. There is little evidence that the DOJ ever consulted victims or invited them to participate, as law and internal policy prescribe.[76]

Though not part of the dataset, the official record of the DOJ's investigation into Boeing illustrates how the DOJ can subtly erase victims from view. The criminal information laying out the charges never mentions the plane crashes or deaths.[77] The much lengthier deferred prosecution agreement, which resolved the case in 2021, does no better. In the main text of the agreement, victims appear only as recipients of payments under a "Crash-Victim Beneficiaries Compensation Amount."[78] There is no mention of the fact that anyone died until Attachment A, which contains the statement of facts.[79] Of the fifty-four paragraphs in the statement of facts, thirty-eight detail Boeing's conspiracy to defraud the FAA.[80] Just four sentences refer to individual victims in any way:

> On October 29, 2018, Lion Air Flight 610, a Boeing 737 MAX, crashed shortly after takeoff into the Java Sea near Indonesia. All 189 passengers and crew on board died. . . . On March 10, 2019, Ethiopian Airlines Flight 302, a Boeing 737 MAX, crashed shortly after takeoff near Ejere, Ethiopia. All 157 passengers and crew on board died.[81]

Official public documents tell us nothing more.

There is no way to construct a meaningful victimology of corporate crime from publicly available documents. This is a surprising defeat, especially given the robust participation rights that victims are supposed to have under federal law. But it is also an opportunity to propose policies that would integrate victims more meaningfully into the criminal justice process. Doing so would promote victim interests and create a data trail that criminologists could begin to study.

III. Incorporating Victims into Corporate Criminal Justice

The DOJ has the moral and legal responsibility to involve victims in resolving investigations of corporate crime and to create a record of that involvement. Only then can criminal law honor victims' losses, acknowledge their worth, and subject itself to proper public scrutiny. As a practical matter, the DOJ is the only entity that is positioned to do this. When nearly half of all large corporate criminals receive pretrial diversion agreements, which sidestep court supervision and

76. *See* U.S. Sent'g Comm'n, *supra* note 43; U.S. Dep't of Just., *supra* note 44.

77. *See, e.g.*, Criminal Information, United States v. Boeing Co., No. 4:21-CR-005-O (N.D. Tex. Jan. 7, 2021).

78. Deferred Prosecution Agreement at 12, United States v. Boeing Co., No. 4:21-CR-005-O, 2021 WL 7287662 (N.D. Tex. Jan. 7, 2021), https://www.justice.gov/opa/press-release/file/1351336/download.

79. *Id.* at A-14.

80. *Id.* ¶¶ 16–52.

81. *Id.* at A-14–16.

oversight, no other body has meaningful contact with or legal authority over many of the most impactful cases.[82] Here are some ideas the DOJ should consider.

A. Collect and Report Data About Victims

One obvious first step is for the DOJ to collect and publish data about victims. Though the Sentencing Commission publishes statistics on corporate crime,[83] its reports focus on offender attributes and sentences received.[84] They generally contain no information about victims or diverted cases. The DOJ should supplement this effort by recruiting its Bureau of Justice Statistics to generate information about victims in every corporate criminal investigation the agency conducts. Relevant information would include the number of victims, their demographic attributes, the harm they suffered, the type of crime they experienced, and their involvement (if any) in the investigation, trial, or resolution. Any of the BJS' existing victimization reports could serve as a starting template.

While publishing victim data would help with public oversight, it would do little directly to advance victim participation in the criminal justice process. That is a more complicated endeavor. The remaining sections explain why and offer three further proposals for reform.

B. Appoint Victim Representatives

There are two initial challenges with involving victims. First, most corporate crimes harm abstract interests—like market integrity or environmental wellbeing—that cannot speak for themselves.[85] Second, even when corporate crime impacts individuals, there are often so many victims that involving all of them would make it impossible to proceed.[86] The Victims' Rights Movement and its resulting legislation arose before the modern era of corporate prosecution. The ideal of victim

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82. *See, e.g.*, United States v. Fokker Servs. B.V., 818 F.3d 733, 743 (D.C. Cir. 2016) (overturning district court's rejection of a pretrial judgement agreement in a decision that "preserves the Executive's long-settled primacy over charging decisions and that denies courts substantial power to impose their own charging preferences").

83. *See* U.S. SENT'G COMM'N, 2023 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2023), https://www.ussc.gov/research/sourcebook-2023. The Sentencing Commission explains:

> The Organizational Datafile contains documentation on organizations sentenced pursuant to Chapter Eight of the *Guidelines Manual* in 2023. The Commission collects available data on organizational structure, size, and economic viability; offense of conviction; mode of adjudication; sanctions imposed (including probation and court-ordered compliance and ethics programs); and application of the sentencing guidelines.

Id.

84. *See, e.g.*, U.S. SENT'G COMM'N, ORGANIZATIONAL OFFENDERS (Aug. 2023), https://www.ussc.gov/research/quick-facts/organizational-offenders.

85. *See supra* Tables 4, 5.

86. Erik Luna, *The Curious Case of Corporate Criminality*, 46 AM. CRIM. L. REV. 1507, 1521 (2009) ("[M]any cases of corporate crime . . . [involve a] large number of victims.").

participation is more suited to crimes by individuals, where direct impacts tend to be relatively circumscribed.

Civil procedure has a ready-made solution to the numerosity problem: the class action. In cases where the civil plaintiffs are "so numerous that joinder of all members is impracticable," courts may appoint a small number of representative plaintiffs to pursue the suit on behalf of the entire class.[87] Similarly, where a large number of victims suffered harms from a single course of corporate criminal conduct—for example, salmonella poisoning from recklessly tainted food—the DOJ could identify a small number of representative victims to participate and consult on behalf of the rest.[88] The Victims' Rights Act itself contemplates that, where there are too many victims, the court can devise a "reasonable procedure to give effect to [their procedural rights]."[89] Class representatives are a suitable compromise between the status quo (virtually no victim participation) and the impractical ideal (every victim participating individually). In the 2021 Boeing case, the DOJ could have contacted relatives of any of the 346 people Boeing killed, whom news media did more to recognize and humanize than did the criminal justice process.[90]

A similar device could help even in cases where the "victim" of a corporate crime is an abstract or collective public good in which society shares a common interest. The DOJ could appoint an expert to participate on behalf of the shared interest, to voice the stakes for it, and to opine on the suitability of different resolutions. A similar proposal is already familiar to environmentalists. "[B]ecause natural resources and environmental goods are inanimate objects, their ability to sue would likely require some guardianship component. Following a guardian ad litem concept, a natural object [should be able to] assert its own rights by allowing a guardian to litigate on its behalf."[91] Similar guardians ad litem could represent market

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87. FED. R. CIV. P. 23(a)(1).

88. The DOJ itself contemplates that a "lottery" could be used to identify victim participants in such cases. U.S. DEP'T OF JUST., *supra* note 48, at 61. The DOJ explains:

> In cases with a large number of victims, it may be impractical for each victim to attend personally. . . . In such circumstances, prosecutors should [pursue] procedures to accord this right to the greatest extent possible given the resources available. Options include . . . a lottery and schedule for attendance.

Id.

89. 18 U.S.C. § 3771(d)(2).

90. *See, e.g.*, Bill Bostock, *These Are the Victims of the Boeing 737 Max 8 Crash in Ethiopia*, BUS. INSIDER (Mar. 12, 2019), https://www.insider.com/ethiopia-airlines-victims-aboard-crashed-boeing-737-max-named-2019-3; David Gelles, *The Emotional Wreckage of a Deadly Boeing Crash*, N.Y. TIMES (Mar. 9, 2020), https://www.nytimes.com/interactive/2020/03/09/business/boeing-737-crash-anniversary.html.

91. Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox,* 31 VA. ENV'T. L.J. 55, 101 (2013); *see* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1974); Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENV'T. L.J. 531, 584 (1998). Kelch explains:

> With respect to a legal mechanism for assertion of animal interests, we can allow animal groups or concerned individuals to be the 'guardians' of the interests of animals. This is hardly foreign to

efficiency, banking integrity, public health, or any of the many other collective social goods that corporate crime most often offends.

Allowing guardians ad litem to participate in the corporate criminal justice process on behalf of abstract social and economic interests would differ morally and legally from the environmentalists' proposals. First, it is important for many environmentalists that natural resources themselves have independent moral and legal standing.[92] As Justice Douglas wrote in his famous *Sierra Club* dissent: "The voice of the inanimate object ... should not be stilled."[93] By contrast, the point of appointing a guardian ad litem to participate on behalf of market efficiency or public health would be to reintroduce *human* interests into the process. These are often "lost sight of in 'a quantitative compromise between two conflicting interests,'" prosecutors and corporate malefactors.[94] A guardian ad litem could represent the collective interest we share in impacted social goods, even when it is not possible to demonstrate particularized harm to a discrete individual.[95]

A second difference with the guardians ad litem for which environmentalists advocate is that there are no legal barriers to implementing the present proposal immediately. Suits on behalf of environmental interests often run afoul of the Constitution's standing requirement. Plaintiffs' injuries must be "concrete and particularized."[96] Environmental harms that cause generalized injury do not count. The present proposal does not raise standing concerns because it does not contemplate any new rights or causes of action. It merely injects guardians to represent social goods in types of cases that already exist.

As with existing proposals, it will be important to select the right representative. Justice Douglas noted that not all possible representatives are suitable stand-ins: "[t]hose who hike the Appalachian Trail into Sunfish Pond ... certainly should have standing to defend those natural wonders.... Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas

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the law, as guardians are routinely appointed for children and those not competent to assert their own claims.

Id.; *see also* Sierra Club v. Morton, 405 U.S. 727, 750 n.8 (1972) (Douglas, J., dissenting) ("[Appointing representatives for natural objects] would not be significantly different from customary judicial appointments of guardians *ad litem*, executors, conservators, receivers, or counsel for indigents."); Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1, 33 (1990) ("The action *erga omnes* has its roots in the Roman law right of any citizen to bring an action (*actio popularis*) to protect the public interest.").

92. *See* Preston Carter, Note, *"If an (Endangered) Tree Falls in the Forest, and No One Is Standing Around....": Resolving the Divergence Between Standing Requirements and Congressional Intent in Environmental Legislation*, 84 NOTRE DAME L. REV. 2191, 2209 (2009) ("[Under current law, claimants on behalf of the environment] are forced to couch their claims in terms of self-interest, as opposed to an ethical, moral, or public interest in the environment itself.").

93. *Sierra Club*, 405 U.S. at 749 (Douglas, J., dissenting).

94. *See* Stone, *supra* note 91, at 461 n.39 (quoting Smith v. Staso Milling Co., 18 F.2d 736, 738 (2d Cir. 1927)).

95. *See also id.* at 492 ("[T]he strongest case can be made from the perspective of human advantage for conferring rights on the environment.").

96. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

may be treated differently."[97] Similarly, guardians appointed to represent abstract social goods should have enduring personal investment and expertise in the good they represent. For example, they might be leaders of relevant non-profits or industry groups, so long as they do not have potentially compromising commitments that would hinder their representation. Ideally, we could rely on prosecutors to appoint representatives. There may be some concern that the same dynamics that lead the DOJ to adopt a soft-touch approach to corporate criminals would incline them toward appointing less than zealous representatives.[98] In such cases, at least when cases go to trial,[99] the court may appoint its own expert witness to speak for the social values at stake.[100]

C. Default to Charge Offenses that Center Victim Interests

When prosecutors decide what charges to file, they frame and characterize a defendant's alleged misbehavior. There are often multiple options available because the federal criminal code consists of many overlapping statutes that could equally apply to the same facts.[101] Unenforceable DOJ guidelines state that a line "prosecutor at least presumptively should charge . . . the most serious, readily provable offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction."[102] In practice, prosecutors have wide discretion to select among charges that plausibly fit the facts.[103] A prosecutor may file harsher charges to punish a defendant who refuses a plea deal or lighter charges to reward a cooperating witness. For crimes mentioned in pretrial diversion agreements, prosecutorial discretion is absolute.[104] The ubiquitous statement of facts section in these agreements lays out a narrative (co-signed by the corporation) sufficient to secure a speedy conviction in court if the corporation defaults. The crimes chosen to characterize corporate suspects' misconduct reflect the DOJ's priorities and strategic considerations. This choice also sends a message about which interests matter most to the criminal justice system.

When there are overlapping possible charges against a corporate suspect, the DOJ should favor charges that center individual victims rather than abstract interests. In the 2021 Boeing case, for example, the DOJ decided to charge a violation

97. *Sierra Club*, 405 U.S. at 751–52 (Douglas, J., dissenting); Stone, *supra* note 91, at 470 ("[I]f any ad hoc group can spring up overnight, invoke some 'right' as universally claimable as the esthetic and recreational interests of its members and thereby get into court, how can a flood of litigation be prevented?").

98. *See* Carter, *supra* note 92, at 2235 ("Political pressure would be more of a concern if the Secretary were empowered to appoint attorneys to represent the chartered groups; the Secretary could simply appoint attorneys who were hesitant to bring suit, or who were not best suited to represent the groups' interests.").

99. *See infra* Part III.D.

100. FED. R. EVID. 706.

101. Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006).

102. U.S. Dep't of Just., Just. Manual § 9-28.1500 (2023).

103. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981).

104. United States v. Fokker Servs., 818 F.3d 733, 741–42 (D.C. Cir. 2016).

of 18 U.S.C. § 371, i.e. conspiracy to defraud the United States government.[105] The charge was accurate—Boeing had misled the FAA.[106] But it also sent the message that the *true* victim was the FAA, rather than the 346 people who died in the two crashes. Consequently, the individual victims fell out of the picture and the criminal justice logic twisted to the point where the DOJ found itself arguing that the individuals were not victims at all. The message conveyed by the case would have been very different if the DOJ had instead charged a violation of 18 U.S.C. § 1112: "[m]anslaughter is the unlawful killing of a human being" through an act taken "without due caution and circumspection."[107] One would assume that the same facts that established that Boeing lied to its safety regulator would also suffice to show an absence of "caution and circumspection."

Boeing is not the only case where the DOJ faced a charging choice-point and favored abstract interests. In 2015, the DOJ charged General Motors with engaging in a scheme to defraud the National Highway Traffic Safety Administration (NHTSA).[108] General Motors' faulty ignition switches caused 124 deaths.[109] In 2017, the DOJ charged Takata with defrauding automobile manufacturers.[110] Takata airbags with deadly defects were installed in millions of vehicles, killing dozens of people and injuring hundreds more.[111] In 2020, the DOJ charged Chipotle for endangering public health by mislabeling food.[112] Chipotle products sickened over one thousand individuals with foodborne illnesses.[113] Framing the stakes of corporate misconduct in abstract terms—as defrauding the NHTSA or risking public health—fails to acknowledge the impact General Motors, Takata, and Chipotle had on actual people's lives. When drafting pretrial diversion agreements or filing charges in court, prosecutors should pursue "the most serious, readily provable offense" *to individuals*.[114]

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105. Deferred Prosecution Agreement, United States v. Boeing Co., No. 4:21-CR-005-O, 2021 WL 7287662 (N.D. Tex. Jan. 7, 2021), https://www.justice.gov/opa/press-release/file/1351336/download.

106. *Id.* ("[T]he Company's MAX 737 Flight Technical Pilots deceiv[ed] the FAA . . . about an important aircraft part . . . that impacted the flight control system.").

107. 18 U.S.C. § 1112.

108. Complaint, United States v. $900,000,000 in U.S. Currency, No. 1:15-cv-07342 (S.D.N.Y. Sept. 17, 2015).

109. Chris Isidore, *Death Toll for GM Ignition Switch: 124*, CNN (Dec. 10, 2015), https://money.cnn.com/2015/12/10/news/companies/gm-recall-ignition-switch-death-toll/index.html.

110. Rule 11 Plea Agreement at 2–35, United States v. Takata Corp., No. 2:16-cr-20810-GCS-EAS (E.D. Mich. Feb. 27, 2017).

111. Tom Krisher, *US Reports Another Takata Air Bag Death, Bringing Toll to 33*, AP NEWS (Dec. 9, 2022), https://apnews.com/article/business-takata-corp-government-and-politics-53787c88a25cac65fe678c3b06db8c5c.

112. Deferred Prosecution Agreement at 1–3, United States v. Chipotle Mexican Grill, Inc., No. 2:30-cr-001880-TJH (C.D. Cal. Apr. 21, 2020).

113. Press Release, Off. of Pub. Affs., Dep't of Just., Chipotle Mexican Grill Agrees to Pay $25 Million Fine and Enter a Deferred Prosecution Agreement to Resolve Charges Related to Foodborne Illness Outbreaks (Apr. 21, 2020), https://corporate-prosecution-registry.s3.amazonaws.com/media/press-release/chipotle-pr.pdf.

114. U.S. Dep't of Just., Just. Manual § 9-28.1500 (2023).

D. Insist on Trials When There Are Individual Victims

"Invisible victims" are those who experience crime but will never see the inside of a courtroom.[115] They are invisible to the criminal justice system because trial is the only official venue for criminal justice to recognize them and denounce the wrong they suffered. Trial is the place where offenders must face their victims and either defend their actions or apologize. In corporate criminal law, virtually all victims are, at least to some extent, invisible. Prosecutors cut victim participation rights short whenever a corporation receives a pretrial diversion agreement or a plea deal.[116]

Invisible victims exist for complex reasons of morality and policy. For one thing, trials are not free—they take up judicial and prosecutorial resources that are already in short supply.[117] But there are defendant-focused reasons too. Large corporations receive pretrial diversion agreements because prosecutors worry about collateral damage.[118] In 2002, federal charges drove the nation's fourth largest accounting firm, Arthur Andersen, out of business.[119] The cautionary lesson the DOJ derived was that automatic collateral effects of a felony conviction—like disqualification from certifying publicly traded corporations' accounts—can kill corporations and harm thousands of innocent stakeholders.[120] In many cases, even when prosecutors would like to take a corporate case to trial, their hands are tied by the "Arthur Andersen effect."[121]

Or are they? By over-emphasizing defendants' interests, prosecutors lose sight of victims, even when a creative compromise could acknowledge both. As Tables 4 and 5 show, the presence or absence of individual victims does not presently seem to influence the DOJ's charging outcomes. Consider the following

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115. Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, 4 (2022) ("No victim should be invisible. No doctrine should automatically constrain criminal law's ability to acknowledge those who have a legitimate claim to its recognition.").

116. *See supra* Table 2.

117. *See* Davila v. Davis, 582 U.S. 521, 537 (2017) ("We cannot assume that these costs would be negligible, and we are loath to further burden . . . scarce federal judicial resources." (internal quotation marks and citations omitted) (quoting Murray v. Carrier, 477 U.S. 478, 487 (1986))); McCleskey v. Zant, 499 U.S. 467, 491 (1991); Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("Judges and prosecutors conserve vital and scarce resources.").

118. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 799–800 (2013) ("For many commentators, it is now unquestioned dogma that a criminal indictment alone can easily destroy even a large, powerful corporation.").

119. Delroy Alexander, Greg Burns, Robert Manor & Flynn McRoberts, *The Fall of Andersen*, CHI. TRIB., https://www.chicagotribune.com/2002/09/01/the-fall-of-andersen/ (Mar. 30, 2019).

120. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 956 (2009) ("Although corporate entities are technically criminally liable for nearly all of their employees' misconduct, the government has learned not to formally prosecute these entities due to the steep collateral consequences of indictment."); Markoff, *supra* note 118, at 799–800.

121. *See* Mihailis E. Diamantis, *Clockwork Corporations*, 103 IOWA L. REV. 507, 513 (2018) ("Many people blame prosecutors for the pitfalls of [pretrial diversion agreements], but prosecutors are hard to fault. [Pretrial diversion agreements] are a reasonable response to the legal and practical constraints prosecutors face, including, most importantly, the effects a successful conviction can have on a large public corporation.").

novel approach that the DOJ could implement today under its existing charging authority. Prosecutors currently view pretrial diversion as an all-or-nothing affair —either the collateral consequences of conviction warrant settling all possible charges or none of them. But there is room for more nuance. In some industries, collateral effects follow only upon conviction of specified or felony-level offenses.[122] By carefully selecting which crimes to charge, the DOJ could sidestep the most worrisome collateral effects.

For example, where a corporation has harmed individual victims but unacceptable collateral effects would attach to a felony conviction, the DOJ could commit to taking misdemeanor charges to trial instead. Many felonies also have lesser-included misdemeanor offenses.[123] The DOJ could bifurcate its approach by settling felonies out of court through pretrial diversion agreements while trying related misdemeanors in court. By continuing their practice of settling felonies, prosecutors could still avoid legitimate concerns about the collateral effects of felony convictions. Then, by filing misdemeanor charges in court, prosecutors could create a space for meaningful victim participation and public acknowledgment of them. Where a suitable misdemeanor is not available under federal law,[124] the DOJ may need to coordinate with state authorities. For example, state authorities might charge Boeing with misdemeanor assault, thereby allowing victims to recount in court how the company "recklessly cause[d] bodily injury to" their loved ones.[125]

Another possible compromise that could give victims their day in court while avoiding disastrous collateral consequences would emerge if prosecutors thought creatively about not just *what* to charge, but also about *whom* to charge. Corporate crime often implicates multiple entities within the corporation's organizational structure: at a minimum, any subsidiary where the crime occurs and the parent that controls the subsidiary.[126] This opens the possibility that prosecutors could settle charges with the parent (where collateral consequences would presumably hit hardest) and still allow victims to participate in the trial of the subsidiary (where collateral consequences would be more constrained).[127]

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122. *See, e.g.*, 15 U.S.C. § 80a-9; 29 U.S.C. § 1111.

123. This initiative would be even easier to implement if federal authorities created misdemeanor-level versions of white-collar crimes that currently only exist as felonies, as Miriam Baer has proposed. Miriam Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 232 (2018) ("Congress [should] make greater use of both white-collar misdemeanors and low-level felonies . . . .").

124. BETTY J. FARR, ARK. FED. PUB. DEF. ORG., TABLE OF FEDERAL MISDEMEANORS, (U.S. SENT'G COMM'N Apr. 2012), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/4_Table_Federal_Misdemeanors.pdf (providing a list of federal misdemeanors).

125. TEX. PENAL CODE § 22.01(a)(1).

126. *See* Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 150 (2020) ("[T]he modern business configuration that would seem most likely to meet the exacting test for agency is that between parent and subsidiary because the parent company owns the subsidiary.").

127. Andrew K. Jennings, *Criminal Subsidiaries*, 92 FORDHAM L. REV. 2013, 2019 (2024) ("Expanded use [of subsidiary-only convictions] would serve the public interest by combining the features of [pretrial diversion]—the standard mechanisms for achieving criminal law ends short of conviction—with conviction's expressive function, all without the social cost associated with convicting a parent.").

Neither policy—charging misdemeanors or subsidiaries—would give both sides all they want or deserve. Corporate defendants would still have to face the expense and embarrassment of trial. Victims would still find themselves with truncated involvement—participating in a case involving a misdemeanor or a subsidiary that does not reflect the true significance of the wrong they endured. Compromises are rarely perfect. Even so, these proposals could be a first step toward finally giving victims of corporate crime some of the recognition they are owed and toward creating the sort of record that the public needs to hold prosecutors accountable.