ARTICLES

THE SEARCH FOR ACCOUNTABILITY IN CORPORATE CRIMINAL LAW

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Abstract

"Accountability" can be a political buzzword. But in criminal law, it forms the foundation for punishment and brings a measure of justice for victims. Politicians and legal commentators agree that holding wrongdoers accountable is one of the primary functions of criminal law. Yet, in the context of corporate crime, the means of achieving genuine accountability are not clear. This article argues that the existence of two distinct systems of criminal law—one for street crime and the other for white-collar and corporate crime—is the reason accountability remains elusive in the corporate context. To be sure, there are certain features of criminal conduct in the corporate world that set it apart from other types of crime. However, these apparent differences cannot justify the conceptual status of corporate crime as a separate system. After examining the most common reasons for differentiating between corporate and street crime, the article demonstrates that none of these justifications is compelling. As long as we focus on the unique features of corporate criminality, we will not succeed in holding wrongdoers accountable and will therefore undermine the deterrent effects of criminal law. Instead, we must develop a unified system of criminal law that properly holds each individual offender accountable without granting special status to a whole category of wrongdoers: white-collar and corporate criminals.

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INTRODUCTION

A fundamental purpose of criminal punishment is to hold wrongdoers accountable for the harm they cause. In the realm of corporate or white-collar crime, this goal often proves to be elusive. Some scholars have responded by questioning the value of corporate criminal law in general and arguing that little would be lost if liability for corporations were abolished altogether.[1] Others recognize the shortcomings of corporate criminal enforcement, but argue for reform rather than abolition.[2] Prosecutors and lawmakers in recent years have doubled down on the idea that, without criminal punishment, no genuine accountability can be achieved.[3] This paper contributes to criminal law theory by showing that corporate crime should be conceptualized within the same theoretical framework as crime more generally. Genuine accountability and public safety require that we bridge the current divide between corporate criminal enforcement and so-called street or violent crime. A unified system of criminal law will lead to more appropriate blame directed at corporate wrongdoers (both organizations and individuals), as well as a greater focus on victims. Such a theoretical shift can pave the way for a change in societal attitudes, thus making criminal law more effective in the corporate sphere. While much has been written about specific aspects of corporate crime—such as strategies to improve deterrence,[4] the possibility of attaching moral blame to organizations,[5] and the question of whether corporate crime

1. *See, e.g.*, John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009, 1012 (2022) (arguing against corporate criminal liability); Stephen F. Smith, *Corporate Criminal Liability: End It, Don't Mend It*, 47 J. CORP. L. 1089, 1090–91 (2022) (advocating for increased civil regulation of corporations instead of corporate criminal liability). These articles appear in a special issue of the proceedings of a symposium held in October 2021 at Georgetown University Law Center titled "Imagining a World without Corporate Criminal Law."

2. *See, e.g.*, John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 976–77 (2022). This article is also part of the 2021 Georgetown symposium.

3. *See infra* pp. 5–6 (discussing Senator Warren's Corporate Crimes Against Health Care Act).

4. *See, e.g.*, Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 2023 U. ILL. L. REV. 673 (2023).

5. *See, e.g.*, THE MORAL RESPONSIBILITY OF FIRMS (Eric W. Orts & N. Craig Smith eds., 2017).

is over- or under-enforced[6]—there has not been sufficient focus in recent scholarship on articulating the conceptual structures for corporate criminal law in relation to the more "traditional" criminal law theory.[7]

The appearance of corporate crime as victimless or not deadly, in contrast to street crime, is an illusion. When wrongdoing by organizations is clearly linked to deaths of particular victims, the public responds—even if the outcry is short-lived—with passionate calls for holding perpetrators accountable. Consider, for example, the 2024 bankruptcy of Steward Health Care in Massachusetts.[8] Steward Health Care was a large private for-profit health system, which bought six struggling hospitals in Massachusetts in 2010 and then declared bankruptcy fourteen years later, laying off thousands of employees.[9] According to an investigation by *The Boston Globe's* spotlight team, Steward Health Care's story is a "cautionary tale about letting a wannabe billionaire, a titan of private equity, and a real estate investment trust become stewards of a public necessity like health care."[10]

At the center of this story is Ralph de la Torre, a cardiac surgeon who became CEO of six hospitals then known as Caritas Christi Health Care (CCHC) in 2008. A few years later, he negotiated a deal with Cerberus, a private equity firm, to acquire CCHC under the firm's "new for-profit hospital chain, Steward . . . ."[11] Because Steward was struggling to turn a profit for its new owners, de la Torre devised a plan to sell the hospitals' buildings and land to a real estate investment firm, Medical Properties Trust (MPT).[12] Steward would then have to lease back the properties from MPT "at premium prices."[13] This nearly $1.3 billion deal executed in 2016 brought in $719 million for Steward's private equity investor, Cerberus, and $71 million for de la Torre and his management team.[14] These profits did not benefit the hospitals; instead, the owners continued to deplete resources at the expense of patients' well-being.[15] At the same time, the company's executives enjoyed a board meeting in Vienna, which included "little business" and much lavish entertainment, such as "a

6. *See, e.g.*, MIRIAM H. BAER, MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME 3 (2023).

7. *See generally* ANTHONY GRASSO, DUAL JUSTICE: AMERICA'S DIVERGENT APPROACHES TO STREET AND CORPORATE CRIME (2024) (analyzing common origins and divergent paths of development of street and corporate crime).

8. Mark Arsenault & Hanna Krueger, *Turning Patients into Profit: How Steward Embodies the Risk of Private Equity's Push in American Health Care*, BOS. GLOBE: SPOTLIGHT (Dec. 31, 2024), https://apps.bostonglobe.com/metro/investigations/spotlight/2024/09/steward-hospitals/for-profit-health-care/ [https://perma.cc/B5XZ-LBKG]. For a detailed analysis of the ways in which insufficient government regulations and enforcement contributed to the downfall of Steward, see Amy Goldstein & Vani Agarwal, *Lessons from the Collapse of Steward Health Care: A Case Study*, THE BROOKINGS INST. (Oct. 2, 2025), https://www.brookings.edu/articles/lessons-from-the-collapse-of-steward-health-care/ [https://perma.cc/VE3W-3C92].

9. *See* Goldstein & Agarwal, *supra* note 8.

10. Arsenault & Krueger, *supra* note 8.

11. *See id.*

12. *See id.*

13. *Id.*

14. *Id.*

15. *See id.*

VIP tour of a Gustav Klimt exhibition[,] . . . a visit to the National Library and a private performance at the Spanish Riding School," as well as attendance at the annual Vienna Opera Ball.[16] Shortly after this trip, Steward acquired "an even fancier corporate jet" at the cost of $26.5 million.[17] In the meantime, de la Torre purchased a $40 million yacht and a sports fishing boat valued at about $15 million.[18] Steward's "success" led to multiple additional deals with MPT involving similar leaseback arrangements for hospitals across the United States and abroad.[19]

Then, in May 2024, Steward Health Care filed for bankruptcy.[20] Many commentators, including elected officials, thought that the company's executives were to blame for this failure. According to the Massachusetts governor, Maura Healey, Healey, the "situation stems from and is rooted in greed, mismanagement and lack of transparency on the part of Steward leadership in Dallas, Texas."[21] The Committee on Health, Education, Labor, and Pensions (HELP) of the United States Senate, led by Senators Bernie Sanders (an Independent from Vermont) and Bill Cassidy (a Republican from Louisiana), began investigating the company and subpoenaed CEO de la Torre to testify at a hearing in September 2024. When he failed to show up, the committee moved for civil enforcement of the subpoena and for criminal charges against de la Torre. This decision—reached by a 20-0 bipartisan vote—was "the first time in modern American history that the HELP Committee had issued a civil or criminal contempt resolution."[22] The committee was determined to hold de la Torre accountable, with Senator Sanders noting that "[i]f you defy a congressional subpoena, you will be held accountable, no matter who you are or how well-connected you may be."[23] De la Torre soon resigned from his position as Steward's CEO, though without any apparent contrition. In a statement to CBS News, he claimed that he had "amicably separated from Steward on mutually agreeable terms" and that he "will continue to be a tireless advocate for the improvement

16. *Id.*

17. *Id.*

18. *See* Brian McGrory, *Steward Chief Ralph de la Torre Has Two Yachts, Not One*, BOS. GLOBE (Feb. 9, 2024, 11:20 AM), https://www.bostonglobe.com/2024/02/09/business/steward-chief-ralph-de-la-torre-yachts/ [https://perma.cc/2QJV-CXLN].

19. *See, e.g.*, Jacob Borg, *Before Bankruptcy, U.S. Healthcare Giant Steward Agreed to Pay 15M Euros to Avoid Public Criticism in Malta*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (Jan. 14, 2025), https://www.occrp.org/en/scoop/steward-agreed-to-pay-malta-contract-predecessor-over-10-million-euros-to-avoid-public-criticism [https://perma.cc/22EK-5V5Z].

20. *See* Priyanka Dayal McCluskey & Elisabeth Harrison, *The 3rd-Largest Mass. Hospital System Is in Bankruptcy. Here's What You Need to Know*, WBUR (May 7, 2024), https://www.wbur.org/news/2024/05/07/steward-bankruptcy-hospitals-massachusetts [https://perma.cc/379G-LF4E].

21. *Id.*

22. *In Historic First, HELP Committee Holds Steward CEO Ralph de la Torre in Civil and Criminal Contempt with Bipartisan Vote*, U.S. SEN. COMM. ON HEALTH, EDUC., LAB. & PENSIONS (Sep. 9, 2024), https://www.help.senate.gov/dem/newsroom/press/news-in-historic-first-help-committee-holds-steward-ceo-ralph-de-la-torre-in-civil-and-criminal-contempt-with-bipartisan-vote [https://perma.cc/VUP2-B6MP].

23. Maya Yang, *US Senate Votes Unanimously to Hold Hospital CEO in Criminal Contempt*, THE GUARDIAN (Sep. 25, 2024), https://www.theguardian.com/us-news/2024/sep/25/ralph-de-la-torre-congress-criminal-contempt [https://perma.cc/P2Z6-LDHJ].

of reimbursement rates for the underprivileged patient population."[24] To the elected officials who blame him for Steward's collapse, de la Torre's resignation is not enough: only criminal sanctions could achieve genuine accountability. Under de la Torre's leadership, Steward did not merely fail as a company. It failed thousands of vulnerable patients and employees. Indeed, the financial mismanagement of the hospitals has directly led to injury and death. In one tragic case, a young mother died soon after giving birth to her daughter at St. Elizabeth's Medical Center, one of Steward's hospitals, due to the hospital's lack of "the necessary equipment because it had failed to pay the vendor that supplied it."[25]

One response to crises like these is to call for stricter regulations and more transparency.[26] Such efforts aim to prevent harm that results from conflicting incentives between for-profit owners and the service mission of healthcare organizations. Recently, "[c]oncerns about private equity and healthcare have grown louder as more medical companies backed by buyout firms have gone bankrupt."[27] However, such regulations cannot create accountability for past wrongs. Rather, only criminal sanctions can adequately channel the blame that many people feel executives like de la Torre deserve. In the midst of the Steward Health Care crisis, Massachusetts Senators Elizabeth Warren and Ed Markey introduced the Corporate Crimes Against Health Care Act of 2024.[28] This proposed law creates a "criminal penalty of up to 6 years in prison for executives who loot healthcare entities like nursing homes and hospitals, if that looting results in a patient's death."[29] It also imposes civil penalties for healthcare "looting" and creates clawback provisions for compensation that executives receive within ten years of a healthcare firm experiencing "serious, avoidable financial difficulties due to that looting."[30] The goal of this law is to

24. *Embattled Steward Health Care CEO Ralph de la Torre to Resign*, CBS NEWS (Sep. 28, 2024, 5:11 PM), https://www.cbsnews.com/news/steward-health-care-ceo-ralph-de-la-torre-to-resign/ [https://perma.cc/YPF9-3SG3].

25. Arsenault & Krueger, *supra* note 8.

26. In January 2025, Massachusetts passed a law expanding state oversight of hospitals. *See* Goldstein & Agarwal, *supra* note 8 (citing H.B. 5159, 193d Gen. Ct. (Mass. 2025), https://malegislature.gov/Bills/193/H5159 [https://perma.cc/847A-DMVE]).

27. Chris Cumming, *Warren Bill Would Jail Buyout Execs Whose 'Looting' of Hospitals Caused Death*, WALL ST. J. (June 11, 2024, 1:00 PM), https://www.wsj.com/articles/warren-bill-would-jail-buyout-execs-whose-looting-of-hospitals-caused-death-ffec140d [https://perma.cc/2VH5-JMB9]. Senator Elizabeth Warren calls for sentences as long as six years for private-equity executives whose dealings "put excessive pressure on a hospital's finances, resulting in a patient's death." *Id.* (noting that in the past year, "there were at least 17 bankruptcies of such healthcare businesses, according to an April report from the Private Equity Stakeholder Project, a group that seeks stricter rules for buyout firms").

28. Corporate Crimes Against Health Care Act, S. 4503, 118th Cong. (2024).

29. Press Release, Elizabeth Warren, Senators Warren, Markey Introduce the Corporate Crimes Against Health Care Act of 2024 (June 11, 2024), https://www.warren.senate.gov/newsroom/press-releases/senators-warren-markey-introduce-the-corporate-crimes-against-health-care-act-of-2024 [https://perma.cc/4XST-32NR].

30. *Id.* The text of the bill uses the term "unjust enrichment" to refer to looting. Corporate Crimes Against Health Care Act, S. 4503, 118th Cong. § 2(a) (2024). "Unjust enrichment" is defined as compensation derived from several aggravating circumstances, including dividend recapitalization, sale-leaseback of real estate or equipment, or involvement in any white-collar crime. *Id.* (proposing 18 U.S.C. § 674 (b)(18)).

ensure that executives are held accountable for deriving unfair profits from a struggling healthcare system.[31] Actual prison time is essential because it creates "real consequences" for financial crimes leading to injury or death.[32] There has not been any movement on this bill since Warren and Markey introduced it in June 2024, when it was "read twice and referred to the Committee on Finance."[33] Federal prosecutors have not taken any action against de la Torre based on the criminal contempt of the subpoena yet either. But this example powerfully illustrates that criminal sanctions are the tool we need to create accountability. Without prison time as a possible sanction for the offenders, it is difficult to imagine that justice can be achieved for the victims and the broader community. According to Warren, criminal liability is also the best way to deter future wrongdoing: "My Corporate Crimes Against Health Care Act would prevent what happened with Steward from ever happening again."[34] Moral philosopher Jeff McMahan agrees. According to his analysis of harm from the sale of dangerous products, "[t]hreatening executives with criminal punishment would provide much more effective deterrence and defence."[35]

This language of accountability and "real consequences" for wrongdoing is commonplace in criminal law practice. In corporate criminal law theory, however, the very concepts of accountability, moral responsibility, and blame are much more controversial.[36] The aim of this article is to show that corporate criminal law should not be treated differently than other types of criminal enforcement. My argument proceeds in four steps. In Part I, I demonstrate that there is a conceptual divide in the way scholarly and popular literature portray corporate crime and so-called street crime. In Part II, I analyze four main reasons for this difference in treatment: the blurred line between innovation and crime, the prosocial motivations of corporate crime, the "absent" victim, and the challenge of directing emotion and anger at corporate actors. In Part III, I argue that these differences do not justify a theoretical separation of criminal law into corporate crime and "street"

31. *See* Katie Lannan, *Warren Seeks Consequences for 'Corporate Crimes' in Health Care*, WGBH (June 11, 2024), https://www.wgbh.org/news/politics/2024-06-11/warren-seeks-consequences-for-corporate-crimes-in-health-care [https://perma.cc/8ZJ4-ZMND].

32. *See* Senators Warren, Markey Introduce the Corporate Crimes Against Health Care Act of 2024, *supra* note 29.

33. *Corporate Crimes Against Health Care Act*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/senate-bill/4503/all-actions [https://perma.cc/25BW-HHK3] (last visited Mar. 8, 2025).

34. Senators Warren, Markey Introduce the Corporate Crimes Against Health Care Act of 2024, *supra* note 29.

35. Jeff McMahan, *Should Corporate Executives Be Criminally Prosecuted for Their Misdeeds?*, NEW STATESMAN (June 18, 2019), https://www.newstatesman.com/politics/2019/06/should-corporate-executives-be-criminally-prosecuted-for-their-misdeeds-2 [https://perma.cc/CQ3U-UFKZ]. Deterrence can be defined as "the use of the law to reduce people's inclination to engage in misconduct by increasing their expected costs from misconduct—whether those costs are imposed by government institutions, markets (as a result of the legal prohibition), or internally (i.e., through guilt and shame over violating the law)." Arlen & Kornhauser, *supra* note 4, at 676 n.3. Arlen and Kornhauser provide a detailed discussion of various deterrence theories as applied to corporate crime. *See id.*

36. *See generally* THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 5 (explaining the possibility of attaching moral blame to organizations).

crime. Finally, Part IV provides an argument for abolishing the two-tier system in criminal law theory and suggests some practical steps for achieving uniformity.

I. WHITE-COLLAR AND STREET CRIME: WHAT IS DIFFERENT?

What are some of the most prominent differences between corporate crime and "street" crime? In this section, I explore features of corporate criminal enforcement that distinguish it from other types of criminal prosecution. In an article about what she terms the "corporate criminal enforcement ecosystem," Julie O'Sullivan notes:

> A remarkable amount of ink has been spilled on the subject of corporate criminal liability—whether we should have it, what standards ought to apply, and how it ought to be administered. What is rarely discussed is how this piece of the criminal justice system fits into the overall federal criminal enforcement universe.[37]

O'Sullivan goes on to argue that this lack of fit between corporate criminal enforcement and criminal law more generally has detrimental effects: "[D]isparities between the white-collar ecosystem and the rest of the federal docket undermine the perceived legitimacy of the criminal justice system."[38] I agree that these disparities are harmful. Three main features of criminal enforcement in the corporate space contribute to its veneer of uniqueness: (1) the focus on cooperation and rehabilitation; (2) the weak shaming sanctions attached to corporate crime; and (3) the responsibility deficit[39] generated by the dual need for holding individuals as well as entities liable for wrongdoing.

A. Focus on Cooperation and Rehabilitation

When white-collar or corporate crime occurs in the business context, it can be extremely difficult to uncover or investigate. Companies are complex structures, and their inner operations are not apparent to prosecutors and do not easily lend themselves to policing or investigation. Indeed, "organizational complexity can obscure fault."[40] As a result, prosecutors must rely on whistleblowers and self-disclosure by companies to build cases and identify wrongdoers.[41] To encourage disclosure of

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37. Julie R. O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?,* 47 J. CORP. L. 1047, 1047 (2022).

38. *Id.* at 1053.

39. *See, e.g.*, Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 194 (2007); Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 471, 473 (2018). For a counterargument that the responsibility deficit is not a real problem, see John Hasnas, *The Phantom Menace of the Responsibility Deficit*, *in* THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 5, at 94–103.

40. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1826 (2015).

41. There are still ways to police corporate crime, particularly using technological innovations. For a thorough analysis, see Rachel E. Barkow, *The New Policing of Business Crime*, 37 SEATTLE U. L. REV. 435, 438 (2014). Barkow explains that "[t]he central goal of this Article is to describe the burgeoning turn to new policing techniques in the business crime context and to offer some initial thoughts on the promises and limits of the approach." *Id.*

wrongdoing by company insiders, the Department of Justice (DOJ) has created programs that offer substantial rewards for information about criminal activity by organizations. For example, the DOJ has created additional incentives for self-disclosure and more robust rewards for whistleblowers in recent years. According to the Corporate Enforcement and Voluntary Self-Disclosure Policy issued by the DOJ in May 2025, the criminal division will decline to prosecute a company's criminal conduct in certain cases where organizations voluntarily disclose misconduct, fully cooperate in the investigation, and remediate their misconduct.[42] The DOJ also updated its Corporate Whistleblower Awards Pilot Program in May 2025, offering financial awards for individuals who provide truthful information about a number of crimes to the DOJ.[43] Further, regional DOJ offices continue to promote expanded whistleblower programs and self-disclosure incentives. The U.S. Attorney's Office for the Southern District of New York announced a Whistleblower Pilot Program in January 2024 that "encourages individuals to voluntarily disclose information concerning certain fraud, corruption, and other criminal conduct, and offers individuals [non-prosecution agreements] in exchange for cooperation in a resulting investigation and prosecution."[44] The office continues to advertise the program on its website.[45] Reliance on self-disclosure and whistleblowers is an essential tool for corporate prosecutions, and the government is likely to continue using it.[46]

In the organizational context, the decision-making process can be diffuse and complicated, which often renders the task of proving the elements of a crime difficult. Especially in cases of fraud charges against individual defendants, the government can face challenges in proving knowledge on the part of the specific decision-maker: "It may be quite clear that some employees and officers approved a misleading financial statement, but sorting out who knew what and when, where dozens each signed the relevant reports and statements, could be a frustrating if not impossible task."[47] As a result, dependence on disclosure by internal sources is inevitable for successful

42. U.S. Dep't of Just., Just. Manual § 9-47.120 (2025), https://www.justice.gov/criminal/media/1400031/dl?inline [https://perma.cc/6Q76-BM8N]. This is a more generous policy than the presumption of declination articulated in the January 2023 policy. *See* U.S. Dep't of Just., Just. Manual § 9-47.120 (2023), https://www.justice.gov/archives/opa/speech/file/1562851/dl?inline= [https://perma.cc/5J94-Q9DX].

43. U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE CORPORATE WHISTLEBLOWER AWARDS PILOT PROGRAM 1, 8 (rev. 2025), https://www.justice.gov/criminal/media/1400041/dl?inline [https://perma.cc/8F4R-KMJV].

44. David B. Anders, Ralph M. Levene & Randall W. Jackson, *White-Collar and Regulatory Enforcement: What Mattered in 2024 and What to Expect in 2025*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 5, 2025), https://corpgov.law.harvard.edu/2025/02/05/white-collar-and-regulatory-enforcement-what-mattered-in-2024-and-what-to-expect-in-2025/ [https://perma.cc/3PAM-9TJE] (citing Press Release, U.S. Att'y's Off. S.D.N.Y., U.S. Attorney Williams Announces Enforcement Priorities And SDNY Whistleblower Pilot Program (Jan. 10, 2024), https://www.justice.gov/usao-sdny/pr/us-attorney-williams-announces-enforcement-priorities-and-sdny-whistleblower-pilot [https://perma.cc/6V69-5M93]); *SDNY Whistleblower Pilot Program*, U.S. ATT'Y'S OFF. S.D.N.Y. (Jan. 14, 2025), https://www.justice.gov/usao-sdny/sdny-whistleblower-pilot-program [https://perma.cc/X3UK-GTSF].

45. *SDNY Whistleblower Pilot Program*, *supra* note 44.

46. *See, e.g.*, Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 623 (2024) (noting that currently the "most popular idea for enhancing the detection of corporate crime is whistleblower incentives" and explaining that these incentives supplement the more passive methods for obtaining leads, such as voluntary disclosure, for example).

47. Garrett, *supra* note 40, at 1826.

corporate criminal enforcement. This dependence contributes to the largely more forgiving stance towards corporate and white-collar offenders on the part of prosecutors.

Leniency in exchange for the promise of behavioral reform is also much more common in white-collar criminal cases.[48] The DOJ makes extensive use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in corporate criminal cases. "A deferred prosecution is filed with the court and remains on the judge's docket until the term is completed and the case is dismissed. A non-prosecution is never filed with a judge at all; such an agreement states that prosecutors will not file if the corporation complies."[49] For example, the majority of Foreign Corrupt Practices Act (FCPA) violations are resolved through DPAs and NPAs.[50] The stated purpose of these agreements is to provide an incentive for the company to reform in order to avoid criminal sanctions.[51] The Sentencing Guidelines for Organizations outline complex and detailed factors prosecutors should consider in granting leniency to corporate offenders.[52] In theory, at least, repeat corporate offenders should be subject to stiffer sanctions in the same way as individuals.[53] In reality, however, many companies that violate NPAs and DPAs are able to secure them again.[54]

48. Many commentators have argued that the relative leniency in corporate criminal enforcement stems from the influence of the "rich and powerful" in Congress and in the Executive Branch. *See, e.g.*, O'Sullivan, *supra* note 37, at 1062 (discussing how corporate offenders can influence "policies and practices" of the DOJ in ways average criminals cannot); Rachel E. Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*, 83 L. & CONTEMP. PROBS. 159, 177–78 (2020) (describing powerful lobbying interests in the corporate arena while arguing for a unified approach in prosecuting individuals and corporate entities). I agree with this assessment, but my focus in this paper is on addressing the theoretical reasons for the distinctions between the two systems, rather than focusing on political corruption as the underlying cause.

49. Garrett, *supra* note 40, at 1800.

50. *See, e.g.*, Todd Haugh & Mason McCartney, *DPA Discounts*, 61 AM. CRIM. L. REV. 35, 37 (2024) (noting that pretrial diversion agreements "are now the primary means by which the criminal justice system is imposed on many of our largest and most high-profile corporate wrongdoers"); Mike Koehler, *Has the FCPA Been Successful in Achieving its Objectives?,* 4 U. ILL. L. REV. 1267, 1290 (2019) ("[T]he vast majority of corporate enforcement actions are resolved through alternative resolution vehicles such as non-prosecution agreements ('NPAs'), deferred prosecution agreements ('DPAs'), administrative actions, and with increasing frequency so-called 'declinations with disgorgement.'").

51. *See, e.g.*, Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. LEGIS. 543, 555 (2015).

52. U.S. SENT'G COMM'N, THE ORGANIZATIONAL SENTENCING GUIDELINES 8–9 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf [https://perma.cc/WW5B-SM7M]; *see also* AM. BAR ASS'N, A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/economic-crimes/20130918-19-symposium/Plenary_Session_III_Report.pdf [https://perma.cc/2NYX-A36T]. The 2014 report serves as "shadow guidelines" developed by a taskforce of the Criminal Justice Section of the American Bar Association, which some judges use in sentencing defendants for economic crime.

53. *See* Lisa Monaco, Deputy Attorney General, Dep't of Just., Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime (Mar. 7, 2024) (emphasizing consequences for corporate recidivists).

54. For a recent (notorious) example, see Mark Walker & Glenn Thrush, *Boeing May Evade Criminal Charges for Violating Settlement*, N.Y. TIMES (June 21, 2024), https://www.nytimes.com/2024/06/21/us/politics/boeing-doj-deferred-prosecution-agreement.html [https://perma.cc/K4QY-S6T3]. The comparative leniency in how prosecutors treat

One of the key considerations for lenient treatment of corporate offenders is the existence of an effective compliance program in a company. "A central part of the DOJ's approach to corporate crime is its apparent belief that compliance programs are more effective than the criminal stigma in deterring future corporate wrongdoing—or at least in promptly detecting and remediating any misconduct."[55] Internal compliance checks are also intended to serve the purpose of rehabilitating criminal organizations. Underlying this model is the belief on the part of prosecutors and regulators that companies are capable of significant cultural change.[56] Criminal justice reform efforts have pushed for more leniency in street crime cases and the recognition that individuals may benefit from second chances as well, especially where their criminal behavior stems from substance use issues or other circumstances that may not be in their control.[57] Still, the rewards that prosecutors offer in the corporate context for an organization's attempt to change are disproportionately more generous. According to Rachel Barkow, "[t]here is no reason to maintain a policy that sees the value in saving and recognizing the worth of companies, but ignores the value in saving and recognizing the worth of individuals."[58] However, prosecutors and the public alike seem to believe that the prosocial potential of a criminal corporation is much greater than any societal contribution that an individual who has committed a "street" crime may be able to make.[59] Indeed, "[t]here soon will be as many enterprise-wide risk, audit, legal, and compliance professionals on the payroll of corporations in the United States as municipal police officers keeping our streets safe."[60] These facts illustrate the contrast between corporate criminal enforcement's focus on self-policing and the reliance on government-imposed monitoring in the context of street crime.[61]

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corporate criminals as compared to individuals is not unique to the United States. A report issued in September 2025 found that over 40% of corporate violations documented in Violation Tracker UK in 2025 carried no penalty and that fines tended to be low when they were imposed. Maia Kirby, *Penalties: No Leniency for People, but Plenty for Corporations*, GOOD JOBS FIRST (Sept. 24, 2025), https://goodjobsfirst.org/penalties-no-leniency-for-people-but-plenty-for-corporations/ [https://perma.cc/538R-8ZZ2] ("Of the 5,293 corporate violations announced in 2025 and documented in Violation Tracker UK, 2,155 carried no monetary penalty at all.").

55. O'Sullivan, *supra* note 37, at 1049.

56. Barkow, *supra* note 48, at 178.

57. *See, e.g.*, AKHI JOHNSON & MUSTAFA ALI-SMITH, DIVERSION PROGRAMS, EXPLAINED (Vera Inst., 2022), https://vera-institute.files.svdcdn.com/production/inline-downloads/diversion-programs-explained.pdf [https://perma.cc/UV5Z-FJ9D] (summarizing alternatives to incarceration or "diversion programs"); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1542 (2003) (describing "problem-solving courts" such as drug courts as a response to "societal changes that placed courts in the frontline of responses to substance abuse, mental illness, or family breakdown") (quotations omitted).

58. Barkow, *supra* note 48, at 161.

59. *See* discussion *infra* Part II.B.

60. William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 393 (2018).

61. Corporate monitorship is an important issue, but its discussion is beyond the scope of this paper. For a recent analyses of monitorships, see, for example, Todd Haugh & Hui Chen, *Remaking Monitorships: A First Principles Approach to Monitor Effectiveness*, 2025 U. ILL. L. REV. 109, 109 (2025).

B. Weak Shaming Sanctions

There is very little stigma surrounding a criminal conviction for a corporation as an entity. Most people are not aware that many mainstream financial institutions, like Goldman Sachs and Bank of America, have been convicted of multiple crimes.[62] Indeed, "most people—including most law students and even many law professors—don't even know that corporate criminal law exists."[63] The prevalent view of criminal law is that it focuses on individuals, and most of us do not think of company liability in criminal terms. As discussed in more detail in Section I.C below, this diffusion of responsibility is another unique feature of white-collar or corporate criminal law that sets it apart from "standard" conceptions of criminal responsibility. Even when we do learn that companies have been convicted of crimes, we do not generally change our consumer behavior as a result.[64] Brand loyalty, through habit, seems to be stronger than any moral indignation at a company's criminal behavior, however significant.

Individuals who have been convicted of and even served jail time for white-collar offenses generally experience somewhat weaker societal sanctions as well. In some cases, they may continue with successful careers soon after serving their sentence. In his 2021 *New Yorker* article titled *Life After White-Collar Crime*, Evan Osnos wrote that "America's record in recent years suggests that, in the nation at large, too little shame attaches to white-collar crime."[65] Martha Stewart is one familiar example: "Barely six months after the home-wares mogul Martha Stewart emerged from prison—she had been convicted of lying to investigators about a stock trade—she was hosting two new television shows."[66] As another example of the lack of shame associated with white-collar crime, Osnos quotes Luigi Zingales, a finance professor at the University of Chicago, who made the following observation: "There are trustees of business schools today who have been convicted of bribery and insider trading, and I don't think people notice or care."[67]

Public blaming of convicted white-collar criminals tends to be more ambivalent than blame directed at other wrongdoers. It is also sometimes mixed with a degree of admiration, compassion, or fascination. Elizabeth Holmes, the former CEO of

62. *Violation Tracker*, GOOD JOBS FIRST, https://violationtracker.goodjobsfirst.org [https://perma.cc/L9LZ-4WKZ] (last visited Mar. 15, 2025) (providing search engine from which to find violations by searching relevant company's name).

63. W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 2 STETSON BUS. L. REV. 1, 3 (2023); *see also* W. Robert Thomas & Milhailis E. Diamantis, *Branding Corporate Criminals*, 92 FORDHAM L. REV. 2629, 2631–2632 (2024) (arguing that prosecutors uniquely hide corporate crime from public view).

64. Coffee, *supra* note 2, at 973.

65. Evan Osnos, *Life After White-Collar Crime*, THE NEW YORKER (Aug. 23, 2021), https://www.newyorker.com/magazine/2021/08/30/life-after-white-collar-crime [https://perma.cc/4G4M-CZJX]. At the center of Osnos's article is the story of a white-collar support group that provides a space for those with convictions for corporate crimes to meet and discuss their experience and think about rebuilding their lives after prison. *See id.*

66. *Id.*

67. *Id.*

Theranos, was convicted of defrauding investors of hundreds of millions of dollars and was sentenced to over eleven years in prison.[68] Yet, less than a year after reporting to prison, Holmes was the subject of a profile in *People* magazine—complete with complimentary photographs on the cover for the public to ponder while waiting in line at the checkout register at your average grocery store.[69] The extensive interview with Holmes casts her as a victim, undergoing "hell and torture" for having to serve her time and endure separation from her family, including two young children who were born while Holmes's criminal trial was under way.[70] In this very sympathetic portrayal, Holmes denies any responsibility for her actions, emphatically complains of the unfairness of the criminal justice system, and makes herself out to be an aspiring champion for all who have been unjustly convicted.[71] This fascination with a young, talented, and at one time extremely successful businesswoman seems untainted by the shame and disapprobation that the public commonly attaches to criminal convictions.

Lori Loughlin, of *Full House* fame, served two months for a conspiracy conviction stemming from paying bribes to have her daughters admitted to the University of Southern California as recruits on the crew team, even though they did not participate in crew.[72] Five years later, she is back on TV, starring in a new Amazon series *On Call*.[73] This relatively forgiving attitude is not in itself a bad thing. The problem rather consists in its contrast with the much harsher reputational and social collateral consequences of convictions for more traditional crimes.

C. Diffusion of Responsibility Between Individuals and Companies

In her keynote address to the American Bar Association's 39th National Institute on White Collar Crime in 2024, then Deputy Attorney General Lisa Monaco emphatically stated: "Our first priority has been—and will continue to be—individual accountability. Companies can only act through individuals."[74] But individual

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68. *See* Press Release, U.S. Att'y's Off. N.D. Cal., Elizabeth Holmes Sentenced to More than 11 Years for Defrauding Theranos Investors of Hundreds of Millions (Nov. 18, 2022), https://www.justice.gov/usao-ndca/pr/elizabeth-holmes-sentenced-more-11-years-defrauding-theranos-investors-hundreds [https://perma.cc/8S7P-VCVV]. I will return to the Theranos case when analyzing the reasons for our differing views of white-collar and street crime in Part II, *infra* pp. 18–20.

69. Danielle Bacher, *Elizabeth Holmes Breaks Her Silence in First Interview from Prison: 'It's Been Hell and Torture' (Exclusive)*, PEOPLE (Feb. 12, 2025, 11:49 AM), https://people.com/elizabeth-holmes-breaks-her-silence-in-first-interview-from-prison-it-s-been-hell-and-torture-exclusive-8789737 [https://perma.cc/B8CH-3M3G].

70. *Id.*

71. *Id.*

72. *See* Eric Levenson & Cheri Mossburg, *Lori Loughlin Released from Prison After 2-Month Sentence for College Admissions Scam*, CNN (Dec. 28, 2020, 4:08 PM), https://www.cnn.com/2020/12/28/us/lori-loughlin-prison-release/index.html [https://perma.cc/9YAN-69C8]. I discuss another defendant from the Varsity Blues cases below. *See infra* pp. 23–24.

73. *See* C.L. Gaber, *After Scandal, Lori Loughlin Looks for Her Next Act*, L.V. REV.-J. (Feb. 21, 2025, 7:36 AM), https://www.reviewjournal.com/livewell/after-scandal-lori-loughlin-looks-for-her-next-act-3309049/ [https://perma.cc/3TEK-FQ99].

74. Lisa Monaco, *supra* note 53. This emphasis on individual accountability was initially articulated in a memo to the DOJ by then Deputy Attorney General Sally Yates in 2025. Memorandum from Sally Quillian

prosecutions for corporate crimes are still relatively rare, have a high failure rate, and sometimes result in disproportionally light sentences.[75] Furthermore, "[m]ost prosecuted individuals [are] not high-up officers of the companies, but rather middle managers of one kind or another."[76] Lower-level employees are less likely to benefit from "institutional protections" that might insulate them from prosecution.[77] Senior management of a company is in charge of negotiations with prosecutors and determines what information should be disclosed to investigators. This power differential likely accounts for the fact that "lower-level employees are 'thrown under the bus'" in criminal investigations of corporate misconduct.[78] In addition, the actions of lower-level employees are often in closer proximity to the decision that breaks the law. Higher-up officers are unlikely to document a direct illegal order; thus, evidence of wrongdoing is more difficult to obtain.[79] In cases where senior executives create a culture that promotes unethical or criminal behavior, a direct connection between such company culture and wrongdoing can also be difficult or impossible to establish.[80]

Statistics about the relative numbers of individual and company prosecutions are difficult to assemble for a variety of reasons, including the fact that categorization of "white-collar crime" is broad. It is also a category that is "sociological and not legal."[81] For example, fraud can refer to cheating on public benefits, as well as to "major Wall Street securities frauds."[82] Furthermore, those who are at the top of the corporate hierarchy are less likely to be prosecuted: "The higher-ups, who may control negotiations with prosecutors, may themselves remain above the fray while lower-level employees are 'thrown under the bus.'"[83]

In December 2024, the DOJ announced a $650 million settlement of criminal and civil investigations of the consulting company McKinsey for aiding and abetting crimes of Purdue Pharma.[84] McKinsey earned an estimated $93 million from the consulting work that twenty-five or so of its partners did for Purdue over the

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Yates to All U.S. Attorneys et al., Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015), https://s3.documentcloud.org/documents/2393039/justice-dept-memo-on-corporate-wrongdoing.pdf [https://perma.cc/4RJZ-38VK].

75. *See* Garrett, *supra* note 40, at 1790, 1808–10.

76. *Id.* at 1791.

77. Gregory Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335, 360 (2018).

78. Garrett, *supra* note 40, at 1795.

79. Gilchrist, *supra* note 77, at 360–61 (discussing the fact that lower-level personnel are disproportionally targeted in criminal investigations "as a matter of evidence").

80. *Id.* at 363.

81. Garrett, *supra* note 40, at 1820 (noting that "[f]ar too little is known about the relationship between federal individual and corporate prosecutions").

82. *Id.*

83. *Id.* at 1795.

84. Press Release, U.S. Dep't. of Just., Justice Department Announces Resolution of Criminal and Civil Investigations into McKinsey & Company's Work with Purdue L.P.; Former McKinsey Senior Partner Charged with Obstruction of Justice [hereinafter Press Release, McKinsey Obstruction of Justice] (Dec. 13, 2024), https://www.justice.gov/opa/pr/justice-department-announces-resolution-criminal-and-civil-investigations-mckinsey-companys [https://perma.cc/N39Z-EXBB].

course of about fifteen years.[85] The DOJ's press release explains that this settlement "pertains to McKinsey's advice to Purdue concerning the sales and marketing of Purdue's extended-release opioid drug, OxyContin, including a 2013 engagement in which McKinsey advised on steps to 'turbocharge' sales of OxyContin."[86] This resolution is the first of its kind, where a consulting firm is held criminally liable for providing advice that results in a crime committed by the client.[87] It reflects, in the words of the press release, "the Justice Department's ongoing efforts to hold actors accountable for their roles in the opioid crisis."[88] The government's settlement with McKinsey includes a five-year deferred prosecution agreement, during which the firm agreed not to work on matters related to "marketing, sale, promotion or distribution of controlled substances."[89] Prosecutors also charged a former senior partner, Martin Elling, for obstruction of justice for knowingly destroying evidence.[90] Elling pleaded guilty to the charges and was sentenced to six months in federal prison, as well as 1,000 hours of community service and two years of supervised release.[91] While Elling's liability here hinges on the attempt to conceal the crimes, rather than on actually participating in their commission as the company did, the DOJ did pursue both individual and company liability at least on some level.

Perhaps unsurprisingly, McKinsey's press release announcing the settlement does not sound terribly remorseful. The company is "deeply sorry for [its] past client service to Purdue Pharma and the actions of a former partner who deleted documents related to his work for that client."[92] The announcement goes on to say that the company "should have appreciated the harm opioids were causing in our society,"[93] which sounds a bit like a child who is forced to apologize and says that they did not know what they had done was wrong. There is no mention of the facts, though there is a link to the DOJ statement of facts in the release (it is doubtful that the public will go on to access the PDF and read the seventy-one-page document in

85. Walt Bogdanich & Michael Forsythe, *McKinsey to Pay $650 Million in Opioid Settlement with Justice Department*, N.Y. TIMES (Dec. 15 2025), https://www.nytimes.com/2024/12/13/business/mckinsey-oxycontin-settlement.html [https://perma.cc/T4AZ-ZL4N].

86. Press Release, McKinsey Obstruction of Justice, *supra* note 84.

87. *See id.*

88. *Id.*

89. *Id.*

90. Elling pleaded guilty to violations of 18 U.S.C. § 1519 (Destruction, alteration, or falsification of records in Federal investigations and bankruptcy). See United States v. Martin Elling, No. 24-CR-00045 (W.D. Va. Dec. 13, 2024); Dennis Tosh, *Former McKinsey Partner Pleads Guilty to Obstruction Charge Tied to Firm's Advice to Purdue Pharma*, THOMPSON FDA (Jan. 15, 2025, 12:45 PM), https://fda.complianceexpert.com/news/former-mckinsey-partner-pleads-guilty-to-obstruction-charge-tied-to-firms-advice-to-purdue-pharma [https://perma.cc/6FCU-7WLJ].

91. Michael Forsythe, *Ex-McKinsey Partner Sentenced in Obstruction Case*, N.Y. TIMES (May 22, 2025), https://www.nytimes.com/2025/05/22/business/mckinsey-obstruction-opioids.html [https://perma.cc/3N84-G9GX].

92. *Deferred Prosecution Agreement Relating to Our Work for Purdue Pharma*, MCKINSEY & CO. (Dec. 2024), https://www.mckinsey.com/about-us/opioidfacts [https://perma.cc/KD5S-ZE3K].

93. *Id.*

full). McKinsey claims that it has improved its risk management practices and created policies and codes of conduct that will prevent future misconduct.[94] This example illustrates the diffusion of responsibility between the company (which blames the erring individuals in its midst) and the individuals (who are convicted and punished for nothing more than concealment of evidence).[95] It remains to be seen whether the prosecution results in any long-term or meaningful changes at McKinsey, and whether it will have a ripple effect on the way other consulting companies choose to advise their clients. Relatives of victims feel that these measures do not create sufficient accountability for "corporate leaders who aggressively promoted and profited from opioid sales."[96] Elling's conviction and sentence is a step towards holding individuals accountable, but it is accountability that the company is quick to disavow.

Criminal responsibility in the corporate context can be attributed both to individuals and the company. As a result, there is a sense that responsibility has not properly attached to anyone at all. Scholars refer to this phenomenon as a "responsibility deficit."[97] It is difficult to attribute moral agency to a company as a whole, and it can be problematic to hold it accountable for criminal actions in any way other than fines.[98] In McKinsey's case, the $650 million fine is a mix of criminal and civil penalties, with the criminal portion making up about half the amount (a penalty of over $231 million, a forfeiture amount of over $93 million, and a payment of $2 million to the Virginia Medicaid Fraud Control Unit).[99] One of the unique achievements of this case is that the company was required to admit wrongdoing: "In recent years, McKinsey has settled government investigations in the United States and overseas by paying hundreds of millions of dollars while not admitting any wrongdoing. That is no longer true."[100] Still, when crimes are committed by companies through individuals who work for them, it can be difficult to clearly identify who is to blame and deserving of criminal sanctions.[101] While forced to admit to wrongdoing in a settlement, the company can minimize its culpability by shifting blame to the individual partners involved.

94. *Id.*

95. I explore the theme of accountability for the opioid crisis in more detail below. *See Infra* pp. 30–31, 34–35.

96. Brian Mann, *McKinsey & Company to Pay $650 million for Role in Opioid Crisis*, NPR (Dec. 13, 2024), https://www.npr.org/2024/12/13/nx-s1-5155962/mckinsey-purdue-opioid-prosecution-doj [https://perma.cc/FWW3-U9UC] (quoting Ed Bisch, an activist who lost his son to an Oxycontin overdose, as saying "[n]o one goes to jail . . . [i]t has to stop because these companies look on [corporate] fines as a cost of doing business").

97. John Hasnas, *supra* note 39, at 89.

98. *See, e.g.*, Kendy Hess, *The Unrecognized Consensus About Firm Moral Responsibility*, *in* THE MORAL RESPONSIBILITY OF FIRMS 169–87 (Eric W. Orts & N. Craig Smith eds., 2017); Matthew Caulfield & William S. Laufer, *Corporate Moral Agency at the Convenience of Ethics and Law*, 17 GEO. J.L. & PUB. POL'Y 953, 973 (2019).

99. *See* Press Release, McKinsey Obstruction of Justice, *supra* note 84.

100. Bogdanich & Forsythe, *supra* note 85.

101. *See, e.g.*, Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 510 (2004) (noting many white-collar offenses present difficulties in determining responsibility).

II. WHITE-COLLAR AND STREET CRIME: WHY ARE THEY TREATED DIFFERENTLY?

There is broad consensus among academic commentators that there are two separate systems of criminal law: one for white-collar crimes and another for street crimes. Some scholars have even argued that corporate criminal law is so radically different from the standard conception of criminal law, that it does not actually exist as a legitimate category.[102] In their article titled *But We Haven't Got Corporate Criminal Law!*, W. Robert Thomas and Mihailis Diamantis claim that corporate criminal law lacks the four distinctive features of criminal law, which include: (1) the use of "uniquely demanding procedure," (2) punishment for the worst kind of conduct, (3) resort to the harshest available penalties, and (4) the expression of "distinctive moral condemnation."[103] While they focus on different features distinguishing corporate law from other types of criminal enforcement than I discussed in Section I above, their analysis confirms the widespread awareness that two separate types of criminal law exist. Anthony Grasso explores the historical origins of these differences in depth in his book *Dual Justice: America's Divergent Approaches to Street and Corporate Crime*.[104] The guiding question of the book is this: "Why does the American state excessively incarcerate the poor and racial minorities for street crimes while turning a blind eye to the crimes of corporate executives?"[105] Grasso argues that the historical origins of this difference between the harsh treatment of street crimes and the relatively lenient regulatory approach to white-collar offenses go back to "eugenic ideas that say—this kind of person is pathologically flawed and this kind of person is naturally superior."[106] The different views of offenders underlie the belief that their wrongdoing should be punished differently.[107] My goal in this section is to provide a comparative analytical framework for the divergence between the two systems, with a view to recent examples rather than historical foundations (which Grasso and others have examined in detail). I identify and make explicit four main assumptions that tend to serve as justifications for viewing street crime very differently than white-collar or corporate crime. First, there is a sense that the line between innovation and transgression is a blurry one. If we punish the transgressions of those who are pushing existing boundaries too harshly, we may end up discouraging creativity and

102. *See* Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 993 (2022).

103. *Id.* at 992. The authors note that other commentators have also recognized that corporate criminal law "diverges from traditional understandings of what criminal law is." *Id.* at 993 (quoting Miriam H. Baer, *Corporate Criminal Law Unbounded*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 475, 476 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021)).

104. GRASSO, *supra* note 7.

105. *Id.* at 2.

106. *Anthony Grasso on America's Divergent Approaches to Corporate Crime and Street Crime*, CORP. CRIME REP. (Dec. 3, 2024, 1:17 PM), https://www.corporatecrimereporter.com/news/200/anthony-grasso-on-americas-divergent-approaches-to-corporate-crime-and-street-crime/ [https://perma.cc/B4UJ-AZG7].

107. *See id.*

progress in the market.[108] Second, corporate crime often appears as an unintended consequence of prosocial behavior with noble goals.[109] Third, in white-collar or corporate crime, the victims are often only remotely or indirectly present, which makes this type of wrongdoing less prone to blame.[110] Fourth, it is sometimes difficult to locate a specific offender in the corporate context, and companies prove to be an elusive object for public anger or blame.[111] Ultimately, I believe that each of these four main structural reasons for approaching street crime and corporate crime differently is based on false assumptions. In Part III, I argue that none of these assumptions provides a valid justification for the existing divide.

A. The Line Between Crime and Creativity

In his statement announcing an eleven-year sentence for Elizabeth Holmes—the former CEO of Theranos—U.S. District Judge for the Northern District of California Edward Davila reflected on the reasons for her wrongdoing in order to craft an appropriate punishment. Holmes was convicted on four counts of wire fraud and conspiracy, and prosecutors had asked for a fifteen-year sentence.[112] In its eighty-two-page memorandum, the defense team argued that home confinement would be an appropriate sentence for a person who strived to serve the greater good of humanity with her company and was a devoted mother with a strong bond with her son.[113] While Judge Davila's sentence was much closer to that requested by prosecutors, his remarks at sentencing showed some sympathy for the defendant:

> The tragedy of this case is that Ms. Holmes is brilliant. She had creative ideas. She is a big thinker. She was a woman moving into an industry that was dominated by, and let's face it, male ego. That young women entrepreneurs are regrettably denied access to, but she made that. She made that. She got into that world.[114]

Holmes's sentencing took place in November 2022.[115] Just eight years earlier, Forbes had named her as the "world's youngest self-made woman billionaire—

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108. *See* discussion *infra* Part II.A.

109. *See* discussion *infra* Part II.B.

110. *See* discussion *infra* Part II.C.

111. *See* discussion *infra* Part II.D.

112. *See* Akriti Sharma & Kanishka Singh, *U.S. Seeks 15 Years for Elizabeth Holmes over Theranos Fraud*, REUTERS (Nov. 14, 2022, 10:00 AM), https://www.reuters.com/world/us/us-seeks-15-years-elizabeth-holmes-over-theranos-fraud-2022-11-12/.

113. *Elizabeth-Holmes-Sentencing-Memorandum*, DOCUMENTCLOUD, https://www.documentcloud.org/documents/23303976-elizabeth-holmes-sentencing-memorandum/ [https://perma.cc/PB35-3FDW] (last visited Mar. 15, 2025).

114. Bobby Allyn, *Read What a Judge Told Elizabeth Holmes Before Sending Her to Prison for 11 Years*, NPR (Nov. 23, 2022, 2:09 PM), https://www.npr.org/2022/11/23/1138988456/read-what-a-judge-told-elizabeth-holmes-before-sending-her-to-prison-for-11-year [https://perma.cc/6EDN-QS3V].

115. Her conviction was affirmed by the Ninth Circuit Court of Appeals. *See, e.g.*, Mallory Moench, *Theranos Founder Elizabeth Holmes Loses Fraud Appeal*, BBC (Feb. 25, 2025), https://www.bbc.com/news/articles/c1jpg0069wgo [https://perma.cc/MMR2-UZSP]; United States v. Holmes, 129 F.4th 636 (9th Cir. 2025). On March 26, 2026, Holmes's sentence was reduced by 12 months as a result of "sentencing guideline change that benefits first-time offenders," as well as "a finding that none of Holmes's investor-victims actually experienced financial hardship from

worth $4.5 billion—in 2014, when she was 30 years old."[116] The judge also acknowledged that Holmes did not seem to exhibit the same drive for luxury or self-enrichment as others who have committed fraud.[117] Her fraud, in a somewhat unusual way, was driven by the obsession with the potentially life-changing promise of the blood testing startup.[118] Still, Holmes's fraud was deserving of a relatively harsh punishment: "This is a fraud case where an exciting venture went forward with great expectations and hope only to be dashed by untruth, misrepresentations, hubris, and plain lies."[119] In the end, the line between innovation and fraud had been clearly established in this case. For Holmes, however, the failure of her company was a result of risky business decisions that could have—with better luck—worked out. Another young entrepreneur recently sentenced to twenty-five years in prison for financial fraud, former CEO of the cryptocurrency exchange FTX, Sam Bankman-Fried, has made similar claims about the events leading to his arrest and trial.[120] He has expressed regrets for making risky business decisions but never acknowledged legal or moral failings and claimed that he could have turned things around if he had been allowed to continue running the company.[121] In a press release announcing the sentence, then Attorney General Merrick Garland stated: "Anyone who believes they can hide their financial crimes behind wealth and power, or behind a shiny new thing they claim no one else is smart enough to understand, should think twice."[122]

The line between innovation and crime is not as clear as the justice system would like us to believe, however. For example, some commentators note that Steve Jobs, the founder of Apple who was Holmes's icon and role model,[123] may have crossed legal lines. A 2014 *New York Times* article exploring whether Mr. Jobs may have been in jail if he had not died three years earlier cites the following observation: "Mr. Jobs 'was a walking antitrust violation,' said Herbert Hovenkamp, a professor at the University of Iowa College of Law and an expert in

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losing their money." *Federal Court Cuts Holmes Sentence after Finding No Investor Suffered Hardship*, INVESTMENTNEWS (Mar. 31, 2026), https://www.investmentnews.com/regulation-legal-compliance/federal-court-cuts-holmes-sentence-after-finding-no-investor-suffered-hardship/265955 [https://perma.cc/JUK4-3VWW].

116. *Profile: Elizabeth Holmes*, FORBES, https://www.forbes.com/profile/elizabeth-holmes/ [https://perma.cc/VW2Y-F8FR] (last visited Mar. 10, 2025); JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP 213 (2018).

117. Allyn, *supra* note 114.

118. *Id.*

119. *Id.*

120. David Yaffe-Bellany & Matthew Goldstein, *Sam Bankman-Fried Makes His Last Stand*, N.Y. TIMES (Feb. 27, 2024), https://www.nytimes.com/2024/02/27/technology/sam-bankman-fried-fraud-ftx.html [https://perma.cc/NT8G-664X]; Press Release, U.S. Dep't of Just., Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes [hereinafter Press Release, Samuel Bankman-Fried Sentenced] (Mar. 28, 2024), https://www.justice.gov/archives/opa/pr/samuel-bankman-fried-sentenced-25-years-his-orchestration-multiple-fraudulent-schemes [https://perma.cc/Q2RW-J8UA].

121. Press Release, Samuel Bankman-Fried Sentenced, *supra* note 120.

122. *Id.*

123. CARREYROU, *supra* note 116, at 30.

antitrust law. 'I'm simply astounded by the risks he seemed willing to take.'"[124] In a case where the company emerged as a world leader of technological innovation, any wrongdoing, even if criminal, may be easily forgiven. As Samuel Buell puts it in his book *Capital Offenses: Business Crime and Punishment in America's Corporate Age*:

> If Jobs broke the law, he did so with that driven mind of the innovator that sees rules and structures as there to be broken. He can be forgiven, perhaps, for thinking the law didn't apply to him—that the ends of Apple's innovations justified the means of sometimes stepping over legal lines.[125]

This blurring of the lines does not apply only to a few entrepreneurs especially prone to big dreams and risky ventures. Rather, it is an essential feature of our economic system which "has deliberately licensed creativity and risk taking"[126] in the name of progress and innovation. According to Osnos, "[i]n American culture, white-collar crime is often portrayed less as evidence of unfettered greed than as a misguided sibling of success."[127]

The apparent lack of a clear line between innovation and crime may reflect real moral uncertainty in (at least some) corporate crime cases. Stuart Green has argued that there is a genuine ambiguity in white-collar offenses, "a kind of moral complexity and uncertainty . . . that is rarely seen in the case of more traditional crimes."[128] For example, "[m]any instances of alleged extortion, fraud, and similar offenses are difficult to distinguish from conduct that involves 'merely aggressive' business, litigation, or political behavior."[129]

Scholars have argued that there is an overlap between creativity and crime in other contexts, beyond the white-collar realm as well.[130] Tracing the heightened propensity for both creativity and crime in adolescents, Esther Hong argues that "[a]dolescents and emerging adults share a common developmental basis for their heightened connections to criminal and creative behavior."[131] She notes this overlap in the technology innovation space in particular, describing the blurred lines between creativity and crime in the early times of Facebook and FTX.[132] The public's fascination with the origins of those companies as creations of young people reflects society's fixation on "the idea of the eccentric genius accomplishing

124. James B. Stewart, *Steve Jobs Defied Convention, and Perhaps the Law*, N.Y. TIMES (May 2, 2014), https://www.nytimes.com/2014/05/03/business/steve-jobs-a-genius-at-pushing-boundaries-too.html [https://perma.cc/4YP8-9HNC].

125. SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 13 (2016).

126. *Id.* at 15–16.

127. Osnos, *supra* note 65.

128. Green, *supra* note 101, at 502–03.

129. *Id.* at 506.

130. *See* Esther Hong, *The Age of Creativity and Crime,* 99 S. CAL. L. REV. 499, 499 (2026).

131. *Id.* (manuscript at 20–21).

132. *See id.* (manuscript at 44–45).

extraordinary things."[133] This description echoes Judge Davila's words about the "tragedy" of Holmes's case.[134]

B. Prosocial Reasons for Corporate Crime

We value innovation for its own sake, but we especially admire those who contribute positively to society through their creative endeavors. In this way, medical inventions stand out as particularly important. Elizabeth Holmes insists that her company's failure was a result of bad luck and perhaps mistakes, but not fraud.[135] She continues scientific work behind bars: "'There is not a day I have not continued to work on my research and inventions,' she says. 'I remain completely committed to my dream of making affordable healthcare solutions available to everyone.'"[136] Regardless of how lofty Holmes's goal of revolutionizing healthcare and making blood testing accessible and affordable for everyone may have been, using lies and misrepresentations to achieve it cannot be justified. But the prosocial goal itself makes the actions appear less blameworthy. Moreover, while in Holmes's case the prosecutors succeeded in proving that she was aware that her company's blood testing device did not work as intended, this knowledge can be hard to prove. Drawing the distinction between mere failure and fraud can be especially difficult in white-collar cases. This challenge is less likely to arise in the context of violent or street crimes, where there usually is no prosocial motivation driving the criminal behavior.

Prosocial motivations, therefore, complicate moral and legal judgments of white-collar crime, creating the appearance that it involves an entirely different type of criminality than street offenses: "Prosocial fraud presents unique challenges because its defining characteristics—prosocial motivation and moral ambiguity—render it less responsive to traditional legal and social sanctions."[137] In sum, the fact that mixed motives seem to be more likely in cases of white-collar crime provides a reason for putting it in a different category (one less deserving of blame and punishment) than street crime.

Matters are further complicated by the fact that crimes committed by organizations, rather than individuals, do not have clearly established motives. Firms can be criminally liable for the acts of their employees under the *respondeat superior* doctrine, such that no specific intent or *mens rea* needs to be established for the company itself.[138] This approach makes sense because it is notoriously difficult to

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133. *Id.* (manuscript at 46) (quoting Lauren Goode, *Why the World Fell for Sam Bankman-Fried*, WIRED (Dec. 2, 2022, 9:00 ET), https://www.wired.com/story/plaintext-why-the-world-fell-for-sam-bankman-fried-ftx/ [https://perma.cc/Z9LF-Q9L7]).

134. *See* Allyn, *supra* note 114 and accompanying text.

135. *See* Bacher, *supra* note 69.

136. *Id.*

137. Julia Y. Lee, *Prosocial Fraud*, 52 SETON HALL L. REV. 199, 229 (2021).

138. "Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents." Garrett, *supra* note 40, at 1801 (quoting U.S. Dep't of Just., U.S. Att'ys' Manual § 9-28.200 (2008)).

attribute intentions to the acts of a group or an organizations.[139] In the absence of criminal motive, we can assume that companies act for the purpose of turning a profit, a prosocial activity on which the existence of free market societies depends. Accordingly, "[the] problem that plagues the law of white-collar crime [is that] criminal law has to draw lines around areas of social and economic activity that, unlike dealing drugs and homicide, are largely legitimate."[140]

C. The Distant Victim

White-collar or corporate crime can appear to be different because in many instances it does not have a proximate, readily identifiable victim. The fact that the victim is socially distant changes both the wrongdoer's incentives and the public's assessment of the offense.[141] It is well established that we "are less motivated to avoid conduct that creates a risk of harm to many unidentified people but will not definitely harm a particular person."[142] Thus, the decisions by corporate executives and employees that create substantial harm often come about in situations where the individuals who are harmed are remote and unspecified, especially at the particular time that the decision is being made in an impersonal conference room. In his article *Life After White-Collar Crime*, Osnos writes about Tom Hardin, who was charged with insider trading and chose to cooperate, becoming "one of the most productive informants in the history of securities fraud."[143] Reflecting on his reasons for engaging in criminal behavior, Hardin highlighted the sense that he would not get caught for small infractions, the fact that wrongdoing was widespread, and that it was not causing harm to specific people:

> I'm, like, I would never get caught if I buy a small amount of stock . . . . This is like dropping a penny in the Grand Canyon . . . You can say, "I'm highly ethical and would never do this." But once you're in the environment, and you feel like everybody else is doing it, and you feel you're not hurting anybody? It's very easy to convince yourself.[144]

Even if the overall cost of white-collar and corporate crime "runs in the billions of dollars annually, causing downstream harms to employees, consumers, and the general public,"[145] there is no immediately visible or felt injury in many individual cases of wrongdoing at the corporate level.

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139. *See, e.g.*, Michael Bratman, *The Intentions of a Group*, *in* THE MORAL RESPONSIBILITY OF FIRMS 36–52 (Eric W. Orts & N. Craig Smith eds., 2017).

140. BUELL, *supra* note 125, at 87.

141. *See*, *e.g.*, Mihailis E. Diamantis, *Erasing the Victims of Corporate Crime*, 62 AM. CRIM. L. REV. 1, 5 (2025) (noting that "[i]t 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)").

142. Arlen & Kornhauser, *supra* note 4, at 699.

143. Osnos, *supra* note 65.

144. *Id.*

145. BAER, *supra* note 6, at 147 (citing Urksa Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1887–88 (2013)).

There has not been sufficient attention to the victims of white-collar or corporate crime in the academic literature either.[146] In fact, some commentators have claimed that corporate victimology is missing or nonexistent.[147] If such a study of the experience of victims were to be developed, it would help to bridge the gap between corporate and street criminal law theory. "A corporate victimology would likely reveal layers of victimization across a wide spectrum of stakeholders; reset our perception of corporate culpability in relation to possible sanctions; and correct the misperception that corporate wrongs are somehow less-than-serious wrongs against the State, wrongs against the community, and wrongs against us."[148]

D. Anger Without Object

The harm caused by corporate wrongdoing provokes indignation, anger, and blame. However, the emotional charge of these responses tends to be less intense when aimed at companies than at specific individuals. Writing about the 2010 oil spill in the Gulf of Mexico—"the largest oil spill in history, lasting for five months and discharging nearly five million barrels of oil into the gulf"[149]—David Shoemaker describes the short-lived and powerless anger that the public directed at the owner of the oil rig, the company BP. He notes that "the precise *target* of all this anger seems spectral and elusive."[150] Some people channeled the blame to BP gas stations, which turned out to have been sold by the company to independent small business owners.[151] Other targets of anger were hard to identify, "[s]o the anger simmered, but without a clear outlet, it quickly dissipated."[152]

In the example of Steward Health Care discussed in the Introduction, the anger of the public and politicians was aimed at the company's CEO Ralph de la Torre, with Senator Warren proposing a criminal law that would ensure he would (or at least could) end up in prison.[153] The company itself does not seem a proper object of anger and blame. There is a lively debate in philosophical and legal academic literature about the possibility of assigning blame and retributive punishment to organizations.[154] Without aligning with one side of the discussion or the other, it is

146. Diamantis, *supra* note 141, at 8, 15 (noting that the "data about corporations' victims is sparse" and that "[t]here is no way to construct a meaningful victimology of corporate crime from publicly available documents").

147. *See* Laufer, *supra* note 60, at 413.

148. *Id.* at 415 (citing Dave Whyte, *Victims of Corporate Crime*, *in* HANDBOOK OF VICTIMS AND VICTIMOLOGY 446 (Sandra Walklate ed., 2007)).

149. David Shoemaker, *Blameworthy but Unblameable: A Paradox of Corporate Responsibility*, 17 GEO. J.L. & PUB. POL'Y 897, 898 (2019).

150. *Id.*

151. *Id.*

152. *Id.*

153. *See supra* pp. 5–6.

154. *See*, *e.g.*, Samuel W. Buell, *Retiring Corporate Retribution*, 83 L. & CONTEMP. PROBS. 25 (2020); THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 5 (collecting articles by authors who support the idea of corporate moral agency (Part I of the book), those who oppose it (Part II), and those who take a broader view (Part II)).

noteworthy that this diffusion of responsibility results in the absence of a unified and appropriate target for the emotions triggered by harmful actions of corporations and their managers or employers. It is clear that we should preserve the language of responsibility, which forms the foundation for corporate criminal liability:

> Acts can be ascribed to corporations, and it makes perfect sense to do so. Modern industrial society would be unintelligible without a coherent moral and linguistic framework for attributing the oil spill to the energy company, the overdose deaths to the pharmaceutical firm, the defective air bag to the automobile parts manufacturer, and so on.[155]

Yet, attribution is not the same as moral indignation and blame, so the way we talk about corporate crimes is radically different than our language for individual criminal behavior. For example, "corporations are neither 'killers' when they kill nor 'thieves' when they steal. At most, a firm might be called 'the next Enron,' suggesting that the worst names we can think of to describe bad corporations are just the names of other bad corporations."[156] Even if corporations are blameworthy for the harm they cause, their wrongdoing seems not to elicit the same level of sustained moral disapprobation as that aimed at individual offenders. The idea that criminal punishment is appropriate only in cases where perpetrators are at least in some sense "at fault" is deeply ingrained in criminal law theory and practice.[157] Because in many cases of corporate wrongdoing it can be difficult to identify the individual or entity at fault, the incentive to blame or punish becomes diminished.[158]

III. FAILED JUSTIFICATIONS FOR THE DIVIDE BETWEEN WHITE-COLLAR AND STREET CRIME

There are compelling psychological explanations for the theoretical separation between corporate and street crime. However, the reasons we treat the two systems differently do not carry any normative authority. As I explain in the sections below, each of the common justifications fails upon closer analysis. First, there is no reason to believe that criminal and reputational sanctions for wrongful conduct would deter innovation in any meaningful way.[159] Second, the emphasis on prosocial motivation for corporate crime is itself a result of the dual justice system rather than a reason to separate corporate and street crime. "Noble" motives cannot serve

155. *Id.* at 36.

156. Thomas & Diamantis, *A Marketing Pitch for Corporate Criminal Law*, *supra* note 63, at 13.

157. Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521, 522 (2017) ("Among the orthodoxies pervading criminal law doctrine and theory perhaps none is so well entrenched as the *fault principle*, which holds that one may be punished only where one is blameworthy, and one is blameworthy only where one is at fault.").

158. *Id.* at 566–67 (arguing against this claim because blame and fault can be disassociated in many cases, including that of executives of corporations that engage in criminal behavior causing harm).

159. *See* discussion *infra* Part III.A.

as excusing conditions for criminal behavior.[160] Third, criminal law should center victims in order to carry out its retributive function.[161] Finally, the diffusion of public anger in response to corporate misconduct should not dictate policy or determine enforcement priorities.[162]

A. *The Drive to Innovation Is Not Threatened by Criminal Law*

The need to protect business innovation does not justify a separate criminal justice system. This argument—that we should be careful not to overcriminalize, or else creative innovators will be deterred from taking the risks necessary to drive industries forward—is flawed because it rests on a confusion between means and ends, inappropriate in criminal legal theory. The undisputed fact that innovation is an important social goal does not imply that improper means of achieving it are socially acceptable. While conversations about the harms of overcriminalization are very important,[163] the leap to special treatment for corporate criminal law is not justified. In part, the different view of criminal behavior in the corporate context comes from the fact that it more often applies to companies as separate persons, who are not human. Since organizations are not subject to the prototypical criminal punishment of incarceration, there can be a conflation of criminal and civil penalties for corporate misconduct because both involve fines. There is no qualitative difference, in that sense, between civil and criminal sanctions for companies that violate the law. In fact, enforcement agencies can choose whether to pursue wrongdoers civilly or criminally based on the circumstances, and since the burden of proof is higher in criminal cases and the outcome (financial penalty) is potentially the same, they might opt for the civil route simply because it has a higher chance of success.[164]

Some commentators have argued that criminal enforcement does not provide additional deterrence and thus is not actually necessary.[165] However, there are several problems with this argument. First, deterrence effects are notoriously difficult to measure and predict correctly.[166] Second, there is a separate purpose to criminal sanctions, which is to create a greater sense of accountability and justice for victims, as well as to express societal condemnation for the most wrongful kind of conduct.[167] The fact that neither white-collar nor corporate criminal law currently serves its expressive function well enough is not a reason to give it up; rather, it

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160. *See* discussion *infra* Part III.B.

161. *See* discussion *infra* Part III.C.

162. *See* discussion *infra* Part III.D.

163. W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It's Too Narrow*, 53 ARIZ. ST. L.J. 199, 217–28 (2021); BAER, *supra* note 6, at 24–31.

164. This is the case at least because civil cases require proof by a preponderance of the evidence, rather than the more stringent standard of proof beyond a reasonable doubt required in criminal cases.

165. *See generally* Smith, *supra* note 1 (arguing that civil enforcement for corporate law violations is preferrable to criminal sanctions).

166. *See* Arlen & Kornhauser, *supra* note 4, at 677 (noting that the authors are undertaking, "to [their] knowledge, the first assessment of optimal corporate and individual liability for organizational misconduct").

167. *See* Diamantis & Thomas, *supra* note 102, at 998.

highlights the need for reforms that will better communicate societal condemnation for corporate wrongdoing.[168]

There is a balancing act between costs and benefits in imposing harsh criminal penalties on wrongdoing. As can be expected, the pendulum can swing back and forth in terms of how aggressive prosecutors will be in going after companies or individuals for corporate misconduct. For example, in the wake of the Arthur Anderson prosecution that led to the dismantling of Enron, there was a push for more leniency.[169] The idea is that it is unfair to punish "innocent" shareholders by destroying the company for the wrongdoing committed by some of its leaders. There is also a sense that continued existence of a criminal corporation is beneficial for victims, because they can receive greater compensation for their losses if the company's business can go on creating profit.[170] For example, Sam Bankman-Fried argued that if he had been allowed to continue running FTX, he could right the wrongs caused by his fraudulent actions and compensate customers for their losses.[171] This consequentialist justification of second chances is unimaginable in standard criminal law. Yet, though it did not happen in Bankman-Fried's case, there are many examples of the DOJ offering lenient treatment to companies because the financial benefits to shareholders and customers outweigh the losses that harsh criminal sanctions would incur.[172]

Psychological factors that contribute to an individual's criminal behavior can be important for determining a defendant's culpability and therefore for deciding what type of sentence is appropriate.[173] Judges consider all these circumstances at sentencing both in cases of street crimes and financial crimes. If anything, the privileged lives of many white-collar defendants as compared to the circumstances that typical street crime defendants find themselves in signal a greater level of culpability. But no generalization is appropriate here, as sentencing is an extremely fact-specific process. My point is only that there is no reason to approach all white-collar or corporate crimes as a distinct category based merely on their context.

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168. *See, e.g.*, Thomas & Diamantis, *Branding Corporate Criminals*, *supra* note 63, at 2671–72 (advocating for "corporate branding" to shame corporate criminals); Thomas & Diamantis, *A Marketing Pitch for Corporate Criminal Law, supra* note 63, at 9 (noting the expressive inadequacy of corporate sentencing).

169. *See, e.g.*, Bourjaily, *supra* note 51, at 568.

170. *See, e.g.*, David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1235–83 (2016).

171. David Yaffe-Bellany et al., *Sam Bankman-Fried Testifies That He Made 'Larger Mistakes' at FTX*, N.Y. TIMES (Oct. 30, 2023), https://www.nytimes.com/2023/10/27/technology/sam-bankman-fried-testifies-ftx.html [https://perma.cc/6R26-TK8K].

172. *See* Haugh & Chen, *supra* note 61, at 125.

173. *See*, *e.g.*, Porter v. McCollum, 558 U.S. 30, 41 (2009) (asserting that a defendant's "troubled history" can be relevant to his "moral culpability" for first-degree murder and noting factors such as "(1) [defendant's] heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.") (citation omitted).

B. Prosocial Motivations for Corporate Crime Should Not Create a Separate Criminal Enforcement Universe

Prosocial motivations that drive white-collar or corporate crime should not justify treating it differently than other types of criminal activity. There is no conceptual reason to attach greater significance to motives in this area than in the sphere of street crime, where motives or circumstances can play an appropriate role in sentencing but do not affect enforcement priorities. Using lies to get a medical startup off the ground is not any more commendable than stealing to feed your family in the eyes of criminal law. The public's ambiguous response to white-collar criminals, as apparent in the media portrayals of Elizabeth Holmes or Lori Laughlin, is an interesting psychological phenomenon, but it is not a reason for making conceptual distinctions in criminal law theory.[174]

One of the functions of criminal law is to express our values as a society, declaring that certain types of behaviors are so unacceptable as to require punishment.[175] Thus, white-collar or corporate criminals are no more deserving of leniency because of their otherwise prosocial motives or actions than street criminals who lead otherwise productive lives. The background of an individual offender is of course important for determining appropriate punishment, but it does not mean that there is a radically different type of criminal responsibility in the business context. White-collar criminals often see themselves as productive members of society who have merely made a mistake. Elizabeth Holmes, in her recent interview, doubled down on her innocence by "consider[ing] her trial and conviction in a San Jose courtroom in 2022 to be a miscarriage of justice" and insisted that her startup "Theranos failed. But failure is not fraud."[176] Similarly, Sam Bankman-Fried denied committing fraud and maintained his innocence throughout his trial, acknowledging only that "he had made mistakes, citing 'significant oversights' that hurt FTX's customers."[177]

Tom Hardin, who pled guilty to insider trading but avoided prison time by becoming an informant, told Evan Osnos that he often hears other white-collar criminals describe their wrongdoing as a "mistake." In Hardin's view, "[a] mistake is something we do without intention. A bad decision was made intentionally. If you're classifying your bad decisions as mistakes, you're not accepting responsibility."[178] Osnos also describes the lack of remorse expressed by Gordon Caplan, "a co-chairman of the law firm Willkie Farr & Gallagher until 2019 [who] was indicted for paying seventy-five thousand dollars for a test proctor to fix his daughter's A.C.T.

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174. *See supra* pp. 10, 14–16.

175. *See, e.g.*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 518 (2006) (describing entity liability in corporate law as having an expressive function of "sending the message that 'people matter more than profits.'") (citing Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996)).

176. Bacher, *supra* note 69.

177. Yaffe-Bellany et al., *supra* note 171.

178. Osnos, *supra* note 65.

exam."[179] Caplan blamed his decision to commit this crime on the "very corrupt system" of college admissions and explained that he "convinced himself that paying to change his daughter's test results was scarcely more objectionable than other forms of influence and leverage that get kids into school."[180] Caplan was sentenced to one month in prison and to a year of supervised release, along with 250 hours of community service and a $50,000 fine.[181] Of course, the scale of Holmes's and Bankman-Fried's criminal activity and the harm they caused is at an entirely different level, and their respective eleven and twenty-five year sentences reflect the seriousness of the offenses as compared to Hardin's or Caplan's. The point that I hope to illustrate by considering this range of examples is that the public and the press seem to be more sympathetic or forgiving to otherwise successful people who commit financial crimes.[182] Often, sympathy results from the perception that white-collar crime occurs in the context of otherwise prosocial behavior and is therefore less blameworthy. There may also be a more utilitarian moral calculus at play when the public evaluates white-collar misconduct. Somehow financial success can offset the harm of criminal behavior in the public's eye. This phenomenon is interesting and deserving of analysis, but it does not provide a valid reason for a wholesale partition of white-collar or corporate offenses from other types of crime.

C. Victims Have an Equal Claim to Justice

However distant the victims of white-collar or corporate crime may appear, criminal law must be enforced in a way that brings accountability to offenders. Indeed, criminal law should always have victims at the center, holding those who have caused harm accountable for their wrongful actions. In 2021, the First Circuit Court of Appeals affirmed the criminal conviction of John Kapoor, the former CEO of Insys Therapeutics.[183] Judge Selya opened his opinion with a powerful statement on the significance of accountability: "A noted British ethologist once observed that '[t]he total amount of suffering per year in the natural world is beyond all decent contemplation.' Some of this suffering is unavoidable, but some is caused by those who callously place profits over principle."[184] Kapoor was convicted of charges brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d),

179. *Id.*

180. *Id.* Caplan was sentenced to one month in prison and a $50,000 fine and regained his law license about two years later. Elizabeth MacBride, *Gordon Caplan's Comeback: Is Redemption Still Possible in America?*, FORBES (June 4, 2022, 10:57 AM), https://www.forbes.com/sites/elizabethmacbride/2022/06/04/the-redemption-of-gordon-caplan-is-it-possible-for-america-to-forgive-a-wealthy-man/ [https://perma.cc/3LZB-MB32].

181. Press Release, U.S. Att'y's Off. D. Mass., Fourth Parent Sentenced to Prison in College Admissions Case (Oct. 3, 2019), https://www.justice.gov/usao-ma/pr/fourth-parent-sentenced-prison-college-admissions-case [https://perma.cc/N33R-GCHA].

182. Some researchers have found that the perception of white-collar crime as less harmful than street crime has given way to perceptions of it as "equally or more damaging than conventional crimes," particularly in the wake of the "savings and loan crisis, the Enron scandal, and the Great Recession." Simon St-Georges et al., *Jobs and Punishment: Public Opinion on Leniency for White-Collar Crime,* 76 POL. RSCH. Q. 1751, 1758 (2023).

183. *See* United States v. Simon, 12 F.4th 1, 15 (1st Cir. 2021).

184. *Id.* at 14 (quoting RICHARD DAWKINS, RIVER OUT OF EDEN 131–32 (Basic Books 1995)).

and was sentenced to over five years in prison.[185] Under Kapoor's leadership, the company engaged in a variety of illegal marketing schemes in order to sell its product, the opioid Subsys.[186] In Judge Selya's words, the case "involves a group of pharmaceutical executives who chose to shunt medical necessity to one side and shamelessly proceeded to exploit the sickest and most vulnerable among us—all in an effort to fatten the bottom line and pad their own pockets."[187]

This case stood out given the complete lack of criminal prosecutions against members of the Sackler family who owned Purdue Pharma, a larger player in the pharmaceutical market and the maker of the opioid painkiller OxyContin.[188] Purdue is considered to be responsible to a significant degree for the opioid crisis that continues to ravage the country and that has caused about 727,000 deaths between 1999 and 2022.[189] The press picked up on the contrast, with headlines like "Some opioid executives are finally going to prison: A rare moment of serious accountability for an American corporation."[190] The same article notes the stark contrast between the relative impunity for corporate misdeeds as compared to punishment for street crime: "You can go to prison for accidentally killing one person with your car. That's the minimum standard . . . . The idea that you can run a company and cause societal-level devastation and walk away from that relatively unscathed is mind-boggling."[191]

Jeff McMahan argues that executives who sell (and aggressively market) potentially lethal products should face criminal liability when those products kill.[192] He believes that absence of intent to kill is "offset by the fact that the scale of [the executives'] action ensures that it will cause a vast amount of suffering and many deaths—far more than ordinary murderers cause."[193] Their actions are especially deserving of blame, according to McMahan, because "the executives' action is not merely premeditated but is dictated by years of meticulous planning, usually with careful attention to the law, which provides ample opportunity for moral reflection."

185. *Id.* at 15; Press Release, U.S. Att'y's Off. D. Mass., Founder and Former Chairman of the Bd. of Insys Therapeutics Sentenced to 66 Months in Prison (Jan. 23, 2020), https://www.justice.gov/usao-ma/pr/founder-and-former-chairman-board-insys-therapeutics-sentenced-66-months-prison [https://perma.cc/R4Z6-F2UG].

186. *Simon*, 12 F.4th at 15–16.

187. *Id.* at 15.

188. *See, e.g.*, Laura Poitras, *I've Seen How Overdose Wrecks Lives—Why Have the Sackler Family Members Behind OxyContin Avoided All Charges?*, THE GUARDIAN, https://www.theguardian.com/commentisfree/2023/mar/06/us-opioids-crisis-richard-sackler-purdue-pharma [https://perma.cc/EE3H-UWZC] (Mar. 6, 2023).

189. *Understanding the Opioid Overdose Epidemic*, CDC, https://www.cdc.gov/overdose-prevention/about/understanding-the-opioid-overdose-epidemic.html [https://perma.cc/XY99-MGFP] (last visited Mar. 13, 2025).

190. German Lopez, *Some Opioid Executives Are Finally Going to Prison*, VOX (Jan. 24, 2020, 11:30 AM), https://www.vox.com/policy-and-politics/2020/1/24/21080016/insys-trial-john-kapoor-verdict-opioid-epidemic-subsys [https://perma.cc/7DPN-ZGVB].

191. *Id.* (quoting statement from Rick Claypool, research director at Public Citizen).

192. McMahan, *supra* note 35. Dealers who sell lethal doses of illegal drugs can be prosecuted for involuntary manslaughter. For an example of one such conviction that the Massachusetts Supreme Judicial Court ultimately overturned on appeal, see Commonwealth v. Carrillo, 483 Mass. 269, 278 (2019). A comparative analysis of these principles would be interesting, though it falls beyond the scope of this paper.

193. McMahan, *supra* note 35.

The focus on victims' suffering helps to dispel the illusion that white-collar crime is somehow less likely to harm or kill. The idea that criminal law can give voice to victims by imposing punishment on offenders counsels in favor of prosecuting individuals for white-collar or corporate crimes. Victims can participate in criminal proceedings both by providing evidence as witnesses at the adjudication stage and by providing impact statements at the sentencing stage. Criminal enforcement against white-collar and corporate wrongdoers "can render victims identifiable and give them a public voice," thus helping to address the "socially distant victim problem."[194]

To some extent, the "distant victim" problem is created through successful marketing by white-collar offenders themselves (or their lawyers).[195] If the prosecutors were more willing to emphasize the suffering corporate crime causes, then the public would be more likely to recognize its impact and feel that it is personal and concerns real individuals.[196] The psychological fact of a more attenuated line between wrongdoing and harm in the corporate crime context should not factor into moral or legal judgments about the offender's behavior. It may explain why the popular imagination or the prosecutor's docket are not as focused on white-collar or corporate criminals, but it does not mean that these actors are less blameworthy or should be the object of criminal punishment less often. White-collar crime is a broad category, and its harm is difficult to measure, both in terms of lives lost and financial losses.[197] However, this complexity does not justify the differential treatment afforded to this type of crime as a category distinct from "traditional" crime.

Defendants may argue that the complexity of financial matters would make it impossible to establish a causal link between mismanagement of a company and death or injury to particular victims. For example, in the case of Steward Health Care discussed in the Introduction, the executives may contend that "victims"—their hospitals' patients—would not have been any better off had they continued to operate as non-profits.[198] In fact, the reason for selling the hospitals in the first place was that they were in financial trouble and could not function successfully.[199] But this is not so much a unique problem of the absent victim, as it is a problem of causality that the criminal law is used to addressing in all types of cases. The causal link between a defendant's action and the resulting harm can be established where evidence is sufficient in cases of both corporate and street crime. In sum, the distant victim is another common but illusory reason for distinguishing between white-

194. Arlen & Kornhauser, *supra* note 4, at 722.

195. *See* Thomas & Diamantis, *A Marketing Pitch for Corporate Criminal Law, supra* note 63, at 4 (describing the use of "glossy brochures, polished statements, and advertising blitz[es] that characterize a corporate target's spin on [criminal activity]").

196. *See id.* at 14.

197. BAER, *supra* note 6, at 44–45.

198. *See supra* pp. 2–4.

199. Applauding Steward's takeover of the traditionally Catholic hospitals, Boston's Cardinal Sean O'Malley stated: "Many people have the misperception that the Catholic hospitals have disappeared from the Archdiocese of Boston . . . . They have simply moved under the ownership of Steward Health . . . but they continue to fulfill the mission of serving the poor." Arsenault & Krueger, *supra* note 8.

collar and street crime. As I argue in Part IV, theorists should see beyond appearances and seek a unified approach that does not create a separate category for corporate offenses, distinguishing them from "traditional" criminal law.[200]

D. Misdirected Public Anger Does Not Require a Different Approach to Corporate Crime

Blame and anger are more easily sustained when aimed at individuals rather than collectives. Much has been written about the ability of groups to form intentions, experience guilt or remorse.[201] It is clear that companies as entities do not have feelings. But is it less clear whether blame or retribution can be appropriately ascribed to them.[202] This is a debate about whether or not organizations have moral agency, and there is vigorous disagreement among scholars about the answer.[203] There are complex and immensely important questions at play here: whether companies as entities can be blameworthy, whether blame for corporate wrongdoing always should attach to particular individuals, and whether retributive punishment is possible or desirable.[204] But these questions are not unique to corporate criminal law. The relationship between blame and criminal punishment is complicated in traditional criminal law as well.[205] Consequently, the difficulty in locating an object of blame in cases of corporate crime does not provide a valid reason for differentiating between these two systems.

IV. BEYOND THE DIFFERENCES: CRIMINAL LAW UNIFIED

In November 2025, a federal bankruptcy court approved a plan by the opioid manufacturer Purdue Pharma and its owners, the Sackler family, to settle thousands of lawsuits over the harms caused by Oxycontin.[206] This $7.4 billion settlement is the largest for a company's "instrumental role in creating the opioid

200. *See* discussion *infra* Part IV.

201. *See, e.g.*, Michael Bratman, *The Intentions of a Group, in* THE MORAL RESPONSIBILITY OF FIRMS 36–52 (Eric W. Orts & N. Craig Smith eds., 2017). Bratman has published extensively on group intentions theory in other contexts as well, including books such as *Shared and Institutional Agency*, *Shared Agency: A Planning Theory of Acting Together*, *Structures of Agency: Essays*, and others. MICHAEL E. BRATMAN, SHARED AND INSTITUTIONAL AGENCY (2022); MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER (2014); MICHAEL E. BRATMAN, STRUCTURES OF AGENCY: ESSAYS (2007).

202. *See, e.g.*, Shoemaker, *supra* note 149, at 898; Buell, *Retiring Corporate Retribution*, *supra* note 154, at 36.

203. *See* THE MORAL RESPONSIBILITY OF FIRMS, *supra* note 5 (arguing for and against corporate moral agency).

204. Recall Lisa Monaco's statement in 2024 about individual enforcement being DOJ's priority because companies always act through individuals. *See* sources cited *supra* note 74 and accompanying text.

205. For a discussion of the relationship between blame and punishment in traditional criminal law, see Maria Granik, *Moral Blame and Criminal Punishment*, 60 CRIM. L. BULL. 1 (2024).

206. Geoff Mulvihil, *Judge Formally Approves Opioid Settlement for Purdue Pharma and Sackler Family Members Who Own the Company,* PBS (Nov. 18, 2025), https://www.pbs.org/newshour/nation/judge-formally-approves-opioid-settlement-for-purdue-pharma-and-sackler-family-members-who-own-the-company [https://perma.cc/J6FT-4GBP]. The lawsuits were brought by a bipartisan coalition of states, including Massachusetts, New York, California, Colorado, Connecticut, Delaware, Florida, Illinois, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and West Virginia. *See* Press Release, Mass. Off. Att'y General, AG Campbell Helps Secure $7.4 Billion, up to $108 Million for Massachusetts, From Purdue Pharma and the Sackler Family for Fueling the Opioid Crisis (Jan. 23, 2025), https://www.mass.gov/news/ag-campbell-helps-secure-74-billion-up-to-108-million-for-massachusetts-from-purdue-pharma-

crisis."[207] The settlement has traveled a complicated path. In June 2024, the Supreme Court overturned a previous settlement between Purdue Pharma, the Sacklers, and the state attorneys general, in which the Sacklers agreed to pay between $5.5 and $6 billion.[208] This first settlement included releases from all future liability for the Sacklers, in exchange for the substantial payment they would make to the Purdue Pharma estate for distribution to debtors. The Supreme Court held that the bankruptcy code "does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[209] Such a release would have granted the Sacklers, who were not themselves a party to the bankruptcy proceedings, protection from all future lawsuits even though not all claimants had agreed to it. In a story covering the case when it was just heading to the Supreme Court, *The New York Times* described the issue in stark ethical, rather than legal terms: "A battle between money and principle is at the heart of the Purdue litigation."[210] As a matter of principle, which demands accountability for wrongdoing, the Sacklers should not be able to avoid liability.[211] However, many (including the attorneys general who negotiated the settlements, families of victims, and the dissenting Supreme Court Justices[212]) believed that it was more important to provide financial compensation to victims, even if it were to come at the expense of letting the Sacklers off the hook. As it turns out, the settlement did not collapse, and the Sacklers have agreed to put even more money on the table.[213]

Either way, the battle between money and principle has not been resolved. Indeed, genuine accountability requires that the Sacklers be held criminally liable for causing hundreds of thousands of deaths and immeasurable suffering by putting profit above all else.[214] In Part III, I argued that the common justifications for

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and-the-sackler-family-for-fueling-the-opioid-crisis [https://perma.cc/EGV7-YNKV]. Other plaintiffs included individuals, families, and local governments. *Id.*

207. *See* Press Release, Mass. Off. Att'y General, *supra* note 206; *see also* Dietrich Knauth, *Purdue Pharma, Sacklers Reach $7.4 Billion National Opioid Settlement*, REUTERS (Jan. 23, 2025, 5:53 PM), https://www.reuters.com/business/healthcare-pharmaceuticals/purdue-pharma-sacklers-reach-74-bln-national-opioid-settlement-2025-01-23/ (detailing Purdue Pharma settlement).

208. *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 251 (2024) (Kavanaugh, J., dissenting).

209. *Id.* at 227 (majority opinion).

210. Abbie VanSickle & Jan Hoffman, *What the Supreme Court's Decision to Hear the Purdue Pharma Case Means*, N.Y. TIMES (Aug. 11, 2023), https://www.nytimes.com/2023/08/11/us/supreme-court-purdue-case.html [https://perma.cc/PMD5-FNJW].

211. For a detailed account of the Sackler family and Purdue Pharma, see PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021).

212. Justice Kavanaugh dissented, with Justices Roberts, Sotomayor, and Kagan joining him. *Harrington*, 603 U.S. at 227–278.

213. *See* Knauth, *supra* note 207.

214. *See* O'Sullivan, *supra* note 37, at 1063–65 (explaining how executives avoided liability for the lethal consequences of selling addictive drugs). O'Sullivan notes that "a DOJ that has long prioritized drug cases—and has shown no mercy in convicting and jailing predominantly Black and Hispanic dealers—let Purdue Pharma continue its dealing for many years before public outrage forced it to action."; *see also* Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 567 (2024)

having a separate criminal justice system for corporate and street crime are inadequate. These unjustified differences are very significant. Mihailis Diamantis recently summarized them as follows:

> These striking contrasts between the law of the street and the law of the C-suite are not just vague impressions. The numbers speak for themselves. While 8.6% of the adult population in the United States has a felony conviction, less than .03% of corporations do. Even when courts and prosecutors do deliver corporate sanctions, they are paltry. The average corporate criminal fine is less than 0.04% of its market capitalization and less than 1% of its annual corporate revenue. Half of corporations caught in the act pay no fine at all; more than half get away without even having to agree to any sort of supervised reform. To put this in the context of the average working American, the typical corporate criminal penalty amounts to about $400 and a promise to do better.[215]

Given these disparities, it is crucial to achieve greater uniformity in criminal prosecutions of entities and of individuals.[216] But even more broadly, it is important to have a unified conceptual approach to enforcement for both corporate, or white-collar, and street crime. Prosecutors need to do a better job in educating the public and the media about accountability in the corporate realm. Some commentators have suggested using branding to develop a culture of shame for corporate offenders.[217] Directing public blame and indignation at corporate wrongdoers consistently, given the way it operates in traditional criminal law, would represent a productive step to unification: "In the ideal case, shaming sanctions induce the audience to condemn criminal behavior and identify defendants as authors of that behavior, but they do not render defendants themselves objects of contempt."[218]

To be sure, there are important differences between organizational and individual crime, as well as between white-collar and street crime. However, the important differences are not between categories of crime but rather between individual cases. Theorists and practitioners should treat them as such. We need more consistent and arguably less lenient enforcement against individuals and entities for corporate crime, as many commentators have argued. "This may mean criminalizing less, prosecuting more by directing prosecutors' resources to this area of the law, creating gradations of white-collar crimes."[219] Consistent enforcement is necessary

(juxtaposing "mass incarceration for illegal drug sales and low-level property crime with the treatment of those who built the legal opiate industry and became hugely rich off it"); Sarah Stillman, *Sentenced to Life for an Accident Miles Away*, NEW YORKER (Dec. 11, 2023), https://www.newyorker.com/magazine/2023/12/18/felony-murder-laws [https://perma.cc/44QN-UREG] (questioning whether felony murder doctrine could be applied in corporate criminal law and noting that "the doctrine is rarely levelled against people of influence").

215. Mihailis Diamantis, *Corporate Criminal Law Is Different*, HARV. L. REC. (Feb. 28, 2022), https://hlrecord.org/corporate-criminal-law-is-different/ [https://perma.cc/Z9TA-CPHZ].

216. *See generally* Barkow, *supra* note 48 (advocating for a unified approach to criminal liability for entities and for individual actors).

217. *See* Thomas & Diamantis, *Branding Corporate Criminals*, *supra* note 63, at 2658.

218. *Id.* at 2655.

219. BAER, *supra* note 6, at 150.

both for deterrence to be effective and for the expressive function of criminal law to do its work properly.[220]

The challenges of prosecuting crime in an organizational context are not unique to white-collar crime. Rather, questions about how to attribute liability to a group arise in the context of international law, creating ambiguity about what theory of liability can be used to attribute harmful actions to particular individuals who are in control of a group's decisions.[221] Similarly, the conceptual difficulties with felony murder raise questions about attributing liability for death in the absence of an intention to kill. Courts have struggled with how far felony murder can be applied.[222] It is not unreasonable to extend these questions to the white-collar context, exploring criminal liability for death that results unintentionally from criminal activity. This is what Senator Elizabeth Warren Corporate Crimes Against Health Care Act aims to do—make it clear that corporate crimes leading to death are no less deserving of punishment than violence like armed robbery. In her critique of the unfair way in which the controversial doctrine of felony murder is used by prosecutors, Sarah Stillman asks: "Could fossil-fuel-company executives be held liable for murder for criminally deceiving the public about carbon emissions that killed people?"[223] McMahan in turn suggests that executives who kill through careless or intentionally misleading marketing should face prosecution.[224] These are questions that would get scholarly attention if the strict dividing line between corporate and street crime were removed as I argue it should be.

One important strategy for integrating these currently distinct systems of criminal law is to introduce white-collar criminal law into the law school curriculum, on equal footing with traditional criminal law as it is currently taught. Exposing law students to these issues early on in their legal training would ensure that future lawyers are trained not to compartmentalize the two systems.[225] This more balanced criminal law education would help to address the current gap in knowledge about corporate crime and to attract more sustained theoretical attention to its foundational concepts. It would also serve the unified purpose of criminal law: to express societal values and to demonstrate that those who transgress them will face consequences, thus reinforcing social norms.

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220. Arlen & Kornhauser, *supra* note 4, at 721 (noting that individual enforcement "is a crucial part of the law's ability to express society's condemnation of the prohibited conduct"). For an empirical analysis of the effects of punishment, see Benjamin van Roojj, Malouke Esra Kuiper & Alexis Piquero, *How Punishment Affects Crime: An Integrated Understanding of the Behavioral Mechanisms of Punishment* (U. AMSTERDAM CTR. FOR L. & BEHAV., RSCH. Paper No. 2024-01, 2024).

221. *See*, *e.g.*, Maria Granik, *Indirect Perpetration Theory: A Defence*, 28 LEIDEN J. INT'L L. 977 (2015).

222. *See, e.g.*, Commonwealth v. Brown, 81 N.E.3d 1173, 1191 (Mass. 2017) (Gants, C.J., concurring) (finding that conviction for felony murder requires finding of actual malice).

223. Stillman, *supra* note 214.

224. *See* McMahan, *supra* note 35.

225. *See* Diamantis, *Corporate Criminal Law is Different*, *supra* note 215 (describing telling students in a Corporate Crime course: "Forget everything you thought you learned as a 1L about how criminal justice works, or, more importantly, doesn't work. When you enter this classroom, you step through the looking glass. Everything is backwards[.]").

CONCLUSION

In her dissent in *Trump v. United States*, Justice Jackson explained that granting broad immunity to a president for certain criminal acts is dangerous because it undermines the core assumption of criminal law, which is that it applies equally to all.[226] Under this "accountability paradigm," there is a set of rules that governs all criminal cases: "[N]o one is above the law; an accused person is innocent until proven guilty; and criminal defendants may raise defenses, both legal and factual, tailored to their particular circumstances, whether they be Government officials or ordinary citizens."[227] Key to the effective functioning of criminal law is that its framework is uniform but able to address the unique circumstances of each individual defendant. This uniformity of application supports the role that criminal law serves in our society, including deterrence and accountability:

> [F]rom a theoretical perspective, philosophers have long considered deterrence to be a key justification for adopting and maintaining systems that ensure accountability for criminal conduct. For that same reason, some commentators also maintain that decreasing the certainty of accountability for wrongful acts at least arguably reduces incentives to follow the law.[228]

To be sure, these arguments have exceptional force in the context of presidential immunity. However, they also help articulate very clearly the dangers of having a separate criminal justice system for certain kinds of offenders. To preserve the power and integrity of criminal law, its main goals and rules should apply to all individuals in the same way, regardless of the type of offense they have committed.

There is broad agreement that a responsibility gap exists in corporate criminal enforcement and that a better system of imposing liability on executives and companies who cause harm is needed, especially in cases where their criminal actions cause injury or death. While most scholars of criminal law teach and write about street crime, there is also a significant amount of academic work on white-collar or corporate crime. However, few commentators write about both, because most view the two types of crime as distinct areas of the law or disciplines of study. This theoretical separation is neither justified nor productive. I believe that a consistent analytical approach to white-collar and street crime would enable us to improve both frameworks by achieving a better understanding of culpability and effective deterrence.

Throughout this article, I have argued for the need to pay sustained attention to theoretical assumptions that inform prevailing views of white-collar and corporate crime. A careful look at the reasons for differing perceptions of these two

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226. Trump v. United States, 603 U.S. 593, 705 (2024) (Jackson, J., dissenting).
227. *Id.* at 690.
228. *Id.* at 701 (citing PLATO, LAWS 274 (B. Jowett transl. 2000); JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 20 (1830); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 44 (1976); Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 156, 156 n.37 (2015)).

categories of wrongdoing reveals that the divide between the two systems is neither justified nor justifiable. Corporate criminal enforcement does not threaten innovation any more than traditional criminal law stifles creativity. Prosocial motivation for financial crimes—where it exists—does not render them less blameworthy or punishable. Perhaps most importantly, white-collar and corporate crime harms real victims whose rights are equally deserving of vindication. In addition, the psychological mechanisms that diffuse public anger at corporate wrongdoing do not mitigate the substantial harms it causes. More in-depth study of parallel cases from the two categories of crime will uncover important commonalities. For example, does criminal law create accountability for executives selling dangerous addictive drugs like fentanyl in ways that are comparable to the punishment it imposes on dealers of illegal drugs? These types of questions rarely arise in law school classes or in scholarly discussions of criminal law, perpetuating the systemic divide. White-collar and corporate misconduct does not merit its special status in criminal enforcement theory and practice.[229]

229. Some researchers estimate that "only 3% of federal prosecutions target white-collar crime." St-Georges et al., *supra* note 182, at 1753. Exact estimates are difficult because there is no uniform definition of what counts as white-collar.