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Economic Lawfare: The Geopolitics of Corporate Justice

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The presentation will summarize my book project, which under contract with Harvard University Press. The summary is below and the paper that follows is an excerpt: chapter 3 and the methodological appendix of the book.

Abstract

Large corporations are increasingly on trial. Over the last decade, many of the world's biggest companies have been embroiled in legal disputes over corruption charges, fraud, environmental damage, taxation issues or sanction violations, ending in convictions or settlements of record-breaking fines, well above the billion-dollar mark. For critics of globalization, this turn towards corporate accountability is a welcome sea-change showing that multinational companies are no longer above the law, simply because they are too big, too mobile and too important for economic growth. But the new world of corporate justice has a decidedly geopolitical dimension as well that helps to explain this new aggressive pursuit of corporate prosecutions. It requires market power to be able to impose legal norms beyond national boundaries, and the United States in particular has skillfully expanded its effective jurisdiction beyond its territory. As a result, the prosecution of corporate misconduct turns into geopolitical tensions that fundamentally reshape national legal approaches to corporate justice.

Book outline

1. Introduction
2. The moral economy of global corporate justice
3. Corporate prosecutions in the United States
4. Extraterritoriality through market power
5. Economic lawfare
6. Worldwide diffusion of negotiated justice
7. Conclusion

Chapter 3: Corporate prosecutions in the United States

At the ten-year anniversary of the fall of Lehman Brothers the New York Times published an article entitled "The CEOs of Wall Street Sent to Jail".[1] Publicly denouncing what is largely incomprehensible to the general public, the entire page under the title was left blank. For an episode that has affected the lives of millions and created severe economic consequences for thousands of victims, the lack of criminal prosecution is indeed striking.[2] Not only had global financial institutions proven to be "too big to fail", they now appear to have been "too big to jail".[3] Neither the market had disciplined corporate behavior through its ultimate punishment – bankruptcy – nor the legal system through trial and conviction. In the eyes of many, recent events demonstrated what they had long suspected: that big corporations are above the laws of both markets and states.

Diving deeper into the aftermath of the financial crisis reveals a more complicated story. Prosecutors across the country did not simply turn a blind eye to corporate crime. Quite on the contrary, the Department of Justice was under high pressure to make large financial institutions accountable for negligence, mismanagement, fraud or other criminal activities that caused the near collapse of the entire economy. Responding to public outcry over greed and undue privilege, the government's intention was no different in 2009 than in had been after earlier financial crises, where the boom and the bust was followed by a crackdown, additional regulation and judicial consequences. After the savings and loans crisis, more than 1100 managers and executives from failed banks were prosecuted in the 1990s, leading to a total of 839 convictions.[4] Sentences were far from negligible, including prison time and considerable financial fines.[5]

[1] Anonymous, "The C.E.O.s of Wall Street Sent to Jail," *New York Times*, 16 2018.
[2] Henry N. Pontell, William K. Black, and Gilbert Geis, "Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions after the 2008 Financial Meltdown," *Crime, Law and Social Change* 61, no. 1 (February 1, 2014): 1–13; Robert Quigley, "The Impulse towards Individual Criminal Punishment after the Financial Crisis," *Virginia Journal of Social Policy & the Law* 22 (2015): 103.
[3] Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge, MA: Harvard University Press, 2014).
[4] Home page of the Special Inspector General for the Troubled Asset Relief Plan www.sigtarp.gov; Jesse Eisinger, "Why Only One Top Banker Went to Jail for the Financial Crisis," *The New York Times*, April 30, 2014.
[5] To cite just one example, Charles H. Keating, one of the most emblematic cases, was sued for $1,1 billion and served a prision time of 4,5 years. Robert D. McFadden, "Charles Keating, 90, Key Figure in '80s Savings and Loan

What had changed in the last decades was not the desire to seek retribution, but the difficulty in winning corporate prosecutions. Targeting individuals in highly complex organizations is a challenge for prosecutors. White-collar crime typically requires understanding a specific firms' business activities, their internal organization and competition. What is more, one needs to connect misconduct within the corporations to individuals which can be held accountable. Precisely this has gotten more and more difficult, as judges interpreted the law increasingly in favor of corporate and executive rights, narrowed white-collar criminal statues and overturned prosecutors in a series of white-collar cases since the turn of the century.[6] Between 1995 and 2016, the share of white-collar crime prosecutions at the federal level fell from 17,6% to 9,6%.[7] Organizational sentences dropped to an all-time low in 2019. Tellingly, 94,6% of all convicted organizational defenders had plead guilty.[8] After a series of fiascos and losses in court, prosecutors continued to tackle corporate criminality, but apparently focused on easy cases in recent decades. James Comey referred to such prudent prosecutors as "the chickenshit club". Freshly appointed as US attorney for the Southern District of Manhattan in 2002, he tried to push back by encouraging his team to bring cases even if they are not likely to win.[9] What Comey did not foresee, however, was an alternative route to corporate prosecution that opened up at roughly the same period: negotiated settlements. Taken together, the difficulty in bringing corporate cases and the attractiveness of settlements profoundly transformed the Department of Justice's approach to corporate criminal prosecutions within less than twenty years.

It is impossible to understand what happened in global markets without studying the evolution of the US approach to corporate criminal enforcement. This chapter begins by

Crisis, Dies," *New York Times*, April 2, 2014, www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-90.html.

[6] Buell, Samuel W, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (New York, N.Y.: W.W. Norton & Company, 2016); Jennifer Taub, *Big Dirty Money: The Shocking Injustice and Unseen Costs of White Collar Crime* (New York, N.Y.: Viking, 2020).

[7] Eisinger, "Why Only One Top Banker Went to Jail for the Financial Crisis."

[8] Organizational sentences concern collective undertakings such as companies, trade unions or associations. They have always been rare in absolute numbers and decreased from 252 cases in 1996 to 99 in 2018. United States Sentencing Commission, "Fiscal Year 2018: Overview of Federal Criminal Cases" (June 2019), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

[9] Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (New York: Simon and Schuster, 2017).

discussing the tensions prosecutors face in tackling corporate crime and the history of incremental administrative changes to enforcement practices. A second section then provides an overview of the trends in corporate criminal prosecutions, highlighting three notable tendencies: the increased use of considerable financial penalties regularly breaking new records, the shift towards negotiated agreements rather than convictions, a decrease in the prosecution of individuals and as a consequence a drop in prison sentences associated with corporate criminality. The section then turns to criticism with legal scholarship and from the general public. A third section then analyzes biases in corporate criminal enforcement in the US, underlining in particular the home preference of prosecutors. Foreign firms are considerably more likely to receive severe criminal sanctions, both at the organizational and the individual level. This bias allows law enforcement to keep up a façade of being tough on corporate criminality, when most indicators show the contrary.

1. The evolution of corporate criminal enforcement

One readily compares corporate criminality with individual crimes, but not only the fictious nature of corporate personhood sets them apart. Companies are economic actors, whose life cycle is defined by the rules of the market. A company can die, as a manner of speaking, by becoming insolvent. Sentences for corporate crime can include the withdrawal of a company's license, but the severity of financial fines can indirectly produce the same result: forcing a company into bankruptcy. According to the Organizational Sentencing Guidelines, the severity of punishment has to be proportionate to the seriousness of the crime, the offender's culpability and the history of misconduct. In the most serious criminal cases, the preamble of the guidelines states, "the fines should be set sufficiently high to divest the organization of all of its assets."[10] Indeed, a look at the overall trends reveals that one-third to one half of all sentenced companies are unable to pay the entire fine.[11]

Unfortunately, the economic effect does not just produce itself as the result of a conviction, in ways that are measured and proportionate to the criminal offense. Markets are information

[10] United States Sentencing Guidelines, §8, www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8.

[11] Jennifer Arlen, "Corporate Criminal Liability: Theory and Evidence," in *Research Handbook on the Economics of Criminal Law*, ed. Alon Harel and Keith Hylton (Cheltenham, U.K.: Edward Elgar, 2012), 148.

systems, able to react quickly to signals, sometimes adequately, sometimes wrongfully. When companies are brought to trial, market confidence can falter, affecting investment decisions, staff mobility and consumer behavior, well before the end of an investigation. Publicly listed companies in particular are highly sensitive to market reactions, which can result from litigation ahead for the actual sentence. This creates a severe challenge for the principle of due process of law, according to which a defendant is assumed innocent until proven guilty. The problem with corporate criminality is that this due process cannot always be guaranteed.

The case most often cited as a critical juncture is Arthur Andersen, the accounting firm that had audited the balance sheets of energy-trader Enron and shredded documents shortly after the company collapsed. Indicted for fraud, Arthur Andersen was convicted by a jury in June 2002 and within months the firm closed down, costing tens of thousands of people their jobs. Far more important than the actual fine, the reputational damage was bitterly felt when the Supreme Court overturned the conviction in 2005. Cleared by the law, condemned by the market, Arthur Andersen's case illustrated the disconnection between judicial and market discipline. As a result, prosecutors became more cautious in their pursuit of corporate crime.[12]

The market and the law follow logics that are rarely commensurable. Corporate criminality sits squarely on the intersection of the two fields. Not only does a criminal conviction impact employment, productivity and ultimately growth, it also does so in a way that can be disproportionate to the wrongdoing, or entirely disconnected as a simple market reaction to reputational damage. Over the last twenty years, the US Department of Justice has sought to find ways to do justice in corporate criminality all the while being mindful of the economic impact of their activities.[13] This tension explains the general evolution towards negotiated justice and ultimately the home bias in favor of domestic firms.

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[12] Other companies for which indictment had been fatal include E.F. Hutton (1987), Drexel Burnham (1990), Bankers Trust (1999), and Riggs National Bank (2005). Cf. Anonymous, "A Mammoth Guilt Trip," *The Economist*, August 30, 2014, www.economist.com/news/briefing/ 21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt.

[13] Buell, Samuel W, *Capital Offenses: Business Crime and Punishment in America's Corporate Age*.

A recent history of enforcement practice

Formally, US corporate criminal law is broader and more extensive than in most other countries. The company and individual offenders are both liable for business crimes under American law, which embraces the doctrine of *respondeat superior*. Latin for "let the master answer", the principle states that a company and its executives can be liable for actions of low-level employees. Corporate criminal liability was established precisely to encourage management to effectively monitor lawful behavior within their companies. This was the reasoning behind the Supreme Court decision *New York Central & Hudson River Railroad v. United States* in 1909, which argued that the *respondeat superior* principle will ensure oversight and measures within the organization to prevent wrongdoing by individuals.

De jure, firms can thus be held accountable for employees' actions even if the firm has not benefited financially from the acts, has an explicit policy against the criminal activity or an effective compliance program, or has self-reported the activity. Although this regime formally covers all firms, it is most strictly applied to closely held firms, especially when the crime is committed by owner-managers. Larger firms characterized by a separation between ownership and management are *de facto* under a "duty-based liability regime", where prosecutors expect firms to cooperate in monitoring and enforcement efforts and reserve criminal liability for those corporations that fail to do so.[14] Corporate criminal liability covers a broad range of issues, from fraud, bribery, antitrust law and sanction violations to food and drug violations and environmental crimes. In 1991, John C. Coffee estimated that the number of regulatory statutes carrying criminal penalties was at around 300 000, a figure most likely to be even larger today.[15] Regulatory agencies will thus work with the Department of Justice to deal with cases that concern criminal offenses.[16]

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[14] Jennifer Arlen, "Arlen, Jennifer, Corporate Criminal Liability: Theory and Evidence," in *Research Handbook on the Economics of Criminal Law*, ed. Alon Harel and Keith Hylton (Cheltenham, U.K.: Edward Elgar, 2012), 144–203.

[15] Cited in Anonymous, "A Mammoth Guilt Trip."

[16] The organizational division of labor in public enforcement is complex and fragmented along territorial and sectoral lines. This book will focus on the executive branch's role in public enforcement – the Department of Justice and US Attorney's offices – even though regulatory agencies also play a role in criminal enforcement. Internal investigations within companies are carried out by the Federal Bureau of Investigation. For an instructive overview of enforcement agencies in the financial industry, see Hal S. Scott and John Gulliver, "Rationalizing Enforcement in the US Financial System," Staff Report of the Committee on Capital Markets Regulation, June 14, 2018, https://doi.org/10.2139/ssrn.3661584.

How to enforce this vast number of potential cases has evolved over time. This transformation was not driven by statutory change introduced by Congress, but through a series of guidelines the Department of Justice issued to prosecutors. The current *de facto* regime was formalized in a memorandum by then-Deputy Attorney General Eric Holder in 1999.[17] The Holder memo sought to make individuals accountable for corporate crime, rather than simply convicting the organization. This required gaining access to more detailed information held within the company. To facilitate investigations, the memo encouraged prosecutors to use their discretion and grant leniency to firms who effectively cooperated with prosecutors, in particular if they had self-reported promptly and adopted a compliance program.[18] The novel idea to barter over the course of prosecution would become central to the *de facto* duty-based corporate liability regime. Initially, negotiated agreements remained rare, however, as the decision not to indict was in effect "criminal amnesty for firms engaging in the desired conduct."[19]

This changed in 2003, when then-Deputy Attorney General Larry Thompson issued a second memo inviting prosecutors to exert more authority over firms by formalizing the conditions to avoid indictment in a deferred or non-prosecution agreement.[20] Conditions are broad and cover conduct usually over seen by regulatory agencies: they include not only monetary penalties, but also compliance programs, the appointment of monitors as well as structural changes. The formal negotiation of such obligations effectively transformed corporate criminal liability into duty-based monetary criminal liability coupled with prosecutorial authority to regulate firm practices. Firms pay for past mistakes and accept to change corporate practices and tightened oversight. Executives of publicly held companies could

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[17] Memorandum from Eric Holder, Deputy Attorney General, US Department of Justice, to Heads of Department Components and United States Attorneys, "Bringing Criminal Charges Against Corporations" (June 16, 1999). The current guidelines are contained in Principles of Federal Prosecution of Business Organizations § 9-28.900 of the United States Attorneys' Manual (USAM).

[18] Jennifer Arlen, "Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Potential Corporate Criminals into Corporate Cops," in *Criminalità d'impresa e giustizia negoziata: esperienze a confronto*, ed. Camilla Beria di Argentine (Milano: Giuffrè, 2018), 91.

[19] Arlen, "Corporate Criminal Liability: Theory and Evidence," 152.

[20] Memorandum from Larry D. Thompson, Deputy Attorney General, US Department of Justice, to Heads of Department Components and United States Attorneys, "Principles of Federal Prosecution of Business Organizations," (January 20, 2003).

avoid criminal prosecution for wrong-doings committed within their firms, but in exchange prosecutors entered into the boardroom.[21]

In the decade that followed, these negotiated settlements became a central instrument in the practice of corporate criminal enforcement. But the method came under intense scrutiny in the aftermath of the financial crisis of 2009. Even though the Department of Justice continued to stress that corporate prosecution efforts only made sense if they ended up holding individuals accountable, in reality very few officers or employees were charged. Not only Wall Street executives avoided jail, the pattern appeared to have become more massive: companies signed an agreement, ensured adequate monitoring and compliance efforts, paid a large fine, but none of the executives – the masters supposed to answer under *respondeat superior* – were brought to trial.

In 2015, then-Deputy Attorney General Sally Yates attempted to strengthen the focus on individual offenders through a new set of guidelines.[22] The Yates memo tied leniency for cooperation to the delivery of full information on individual accountability and clarified that settlements are no substitute for charges against individuals. "The rules have just changed," Yates announced. "If a company wants consideration for its cooperation, it must give up the individuals, no matter where they sit within the company."[23] However, the changes appear to have been largely aspirational and did not lead to more charges brought against executives.[24]

In the fall 2018, then-Deputy Attorney General Rod Rosenstein declared that the policy was not fully enforced, because it created practical challenges, would have impeded agreements and wasted resources. He proposed relaxing the Yates memo in order to allow for speedier resolutions, by concentrating on the individuals whose involvement was substantial. This new

[21] Anthony S. Barkow and Rachel E. Barkow, eds., *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York: NYU Press, 2011).
[22] Memorandum from Sally Yates, Deputy Attorney General, US Department of Justice, to Heads of Department Components and United States Attorneys, "Individual Accountability for Corporate Wrongdoing." (September 9, 2015).
[23] Department of Justice, "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," Justice News, September 10, 2015, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.
[24] Brandon L. Garrett, "Declining Corporate Prosecutions," *American Criminal Law Review* 57, no. 1 (2020): 109–55.

softer policy makes it likely that enforcement is not substantially different now than it was in 2003 when the Thompson memo first formalized non-prosecution and deferred prosecution agreements. It might even be laxer, as the Trump administration has ostensibly held a protective hand over corporations, pushing against the "piling on" of enforcement efforts. Unsurprisingly, corporate penalties dropped in recent years.[25] In addition, the Department of Justice expanded the possibility to decline charges altogether. Unlike traditional declinations issued when incriminating evidence was insufficient, the new declinations tested in foreign bribery enforcement apply to cases which have merits but are not pursued.[26] Even for legal experts, "the line between a non-prosecution agreement and declination can be fine."[27] Overall, partisan changes seem to affect the ambition to be tough on corporate crime, a goal stated in particular under Democratic leadership, but the trend in enforcement practices is largely independent of party color: not standardized rules govern US corporate criminal enforcement, but a flexible negotiation approach with highly variable outcomes.

Negotiated settlements

In traditional corporate criminal enforcement, prosecutors have to decide at the end of an investigation whether to bring the corporation to trial, to drop charges or to enter into a plea agreement. Plea agreements – where the corporation pleads guilty to the charges in order to avoid a lengthy trial – are attractive to both parties, when there is little uncertainty about the outcome. They result in a criminal conviction of the corporation and sentences governed by the Sentencing Guidelines for Organizations adopted in 1991. In addition, a criminal conviction always comes with considerable collateral damage, such as reputational costs or the inability to participate in public contracts. Signed at the Department of Justice or a US Attorney's Office, plea agreements have been widely used, which means that judges and juries are sidelined, even in traditional corporate criminal cases.[28]

[25] Garrett.
[26] Nicole Sprinzen and Kara Kapp, "Emerging Trends Under the DOJ's Corporate Enforcement Policy," *Corporate Compliance Insights* (blog), February 20, 2020, www.corporatecomplianceinsights.com/emerging-trends-doj-corporate-enforcement-policy/.
[27] Garrett, "Declining Corporate Prosecutions," 119.
[28] Cindy R. Alexander and Mark A. Cohen, "Trends in the Use of Non-Prosecution, Deferred Prosecution, and Plea Agreements in the Settlement of Alleged Corporate Criminal Wrongdoing" (Searle Civil Justice Institute, 2015).

With the new guidelines issued in the early 2000, another possibility opened up. Like plea agreements, non-prosecution and deferred prosecution agreements are pre-trial settlements, but they do *not* include a conviction. In a nutshell, these settlements between prosecutors and companies require the latter to obey the law and pay a price for committed offenses without formally admitting their guilt. While deferred prosecution agreements have to be reviewed by a judge, non-prosecution agreements are not filed and reviewed in court. Put differently, deferred prosecution agreements imply that criminal charges are filed, kept on the judge's docket until an agreed end date and eventually dismissed, while non prosecution agreements happen entirely outside of courts and entail no filing of charges. The negotiation of these agreements is voluntary and requires the cooperation of the company in order to specify the acts in question. The company can refuse and insist on its right to trial, but then faces substantial costs and risks reputational damage during the trial, a criminal record in case of conviction and a significantly higher sentence. It is easy to see why corporations would prefer a negotiated settlement.

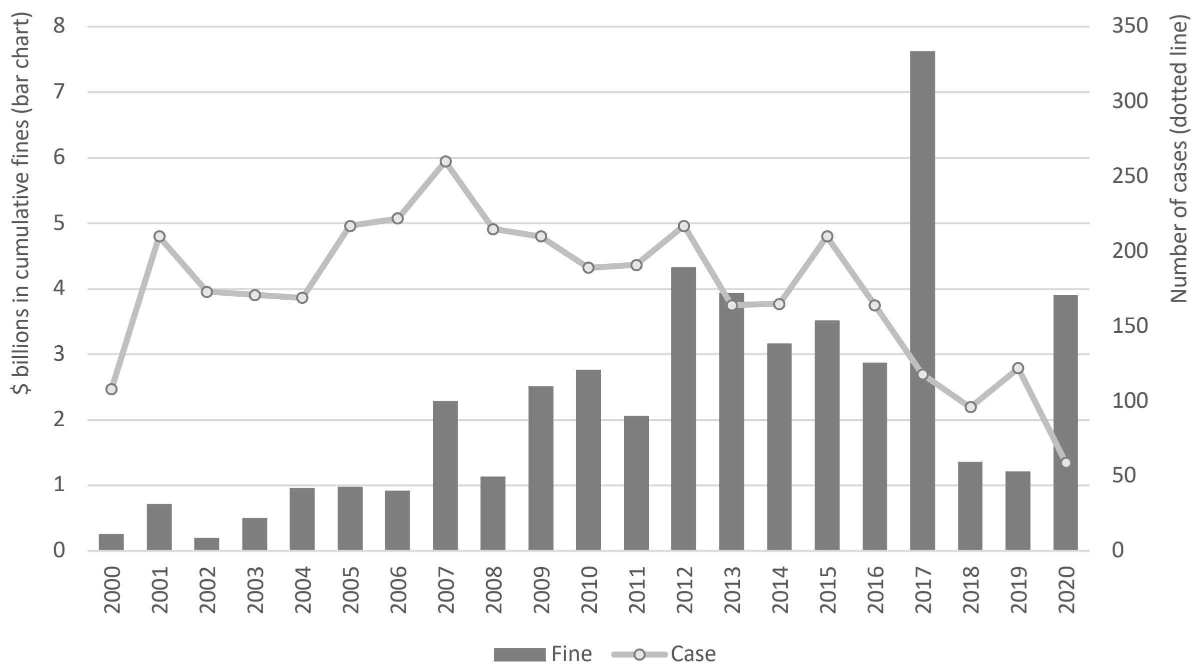
Most deferred and non-prosecution agreements go beyond a simple *ex post* sanction for past behavior. According to Barkow and Barkow, prosecutors take on an explicitly regulatory roles, as they impose conditions such as changes in staff, organizational structure and business practices, mandatory oversight by assigned monitors on the company board and new modes of corporate governance.[29] As an example, one can cite former New York Attorney General Eliot Spitzer, who referred to himself as "prosecutor-slash-regulator" to describe his ambitious agenda to reform business conduct on Wall Street.[30] Imposed changes through settlements can indeed by quite extensive, which signals that these agreements go beyond simple law enforcement and attempt to shape future corporate conduct. A recent analysis of the global financial industry demonstrates that prosecutorial activism has fundamentally reshuffled oversight of global banks, which was previously the exclusive preserve of a network of specialized regulatory agencies.[31]

[29] Barkow and Barkow, *Prosecutors in the Boardroom*, 3.
[30] See also Justin O'Brien, "The Politics of Enforcement: Eliot Spitzer, State-Federal Relations, and the Redesign of Financial Regulation," *Publius* 35, no. 3 (2005): 449–66.
[31] Pierre-Hugues Verdier, *Global Banks on Trial: U.S. Prosecutions and the Remaking of International Finance* (Oxford, New York: Oxford University Press, 2020).

2. Overview and trends

A bird's eye perspective of these evolutions brings to light the most salient trends in corporate criminal prosecution: (1) a steep rise in the amounts of financial penalties, (2) the emergence of deferred or non-prosecution agreements and (3) a slow but steady decline in the prosecution of individual offenders linked to corporate investigation. Let us consider each in turn.

Figure 3.1: Total fines and number of cases per year



Data source: Garrett and Ashley (2021) *Corporate Prosecution Registry*

First, data provided in the Corporate Prosecution Registry shows that financial penalties have grown steadily, in particular during the first decade of the 21st century.[32] With roughly 180 cases handled by federal prosecutors each year for most of the period, cumulative fines have moved from under $1 billion to several billion each year. Average fines have risen from $ 3,3 million in 2000 to $ 20 million or more in every year since 2012. Corporate criminal financial penalties can be even larger than the data on fines presented in figure 3.1, as the total payment may include disgorgement or restitution costs.

[32] Brandon L. Garrett and Jon Ashley, "Corporate Prosecution Registry," Duke University and University of Virginia School of Law, 2019, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html. For details and discussion of the data used, please refer to the annex of this book.

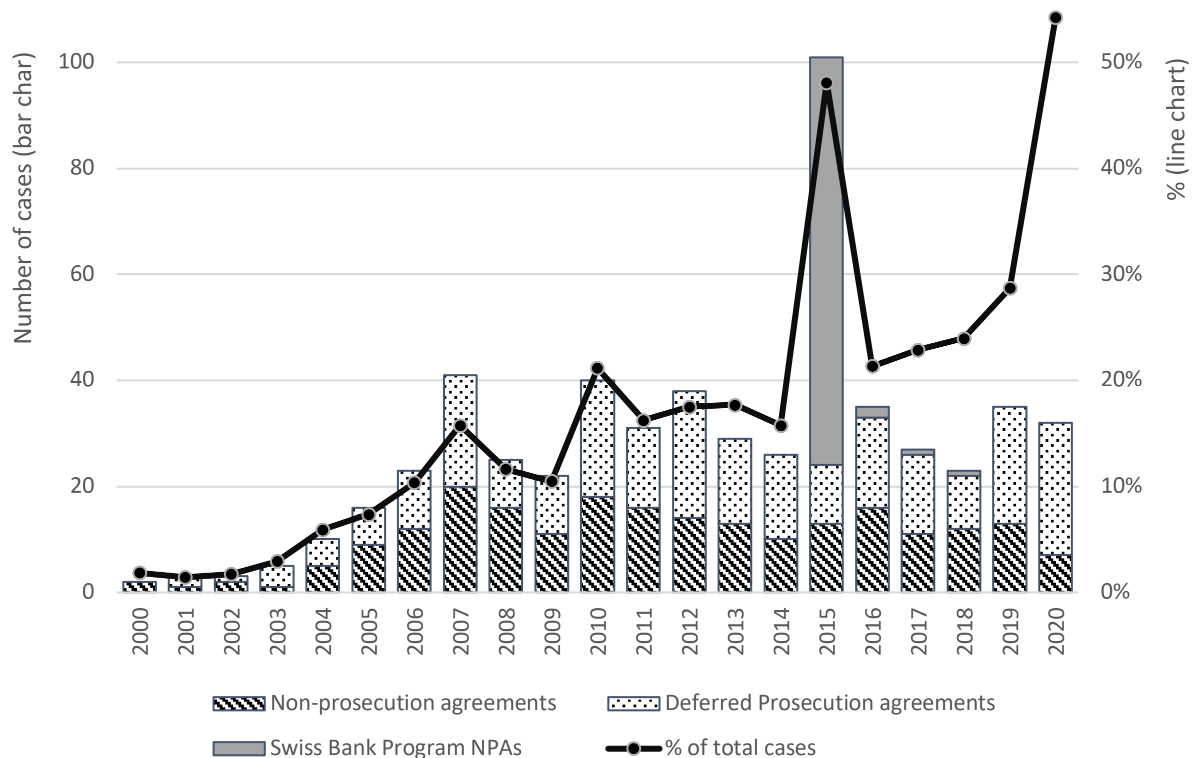
What is more, the Corporate Prosecution Registry data also does not include civil penalties and additional fines paid to regulatory agencies. To cite just one example, in 2016 Deutsche Bank settled a case of fraud charges in mortgage-backed securities trading during the subprime crisis for $7,2 billion in civil monetary penalties and consumer relief payments that are not included in this graph. For corporations that settle a series of cases, as financial institutions have done in the aftermath of the crisis, the costs far exceed what is represented in figure 3.1. With data from all part of the Justice Department and regulatory agencies at the federal and state-level, the Violation Tracker of Good Jobs First collects data from over 400 000 cases of corporate misconduct for a total $ 633 billion in penalties from 2000-2020.[33] The top ten offenders all paid over $ 10 billion each, with Bank of America ranking first, with $ 82 billion paid in 213 cases since 2000, followed by JP Morgan Chase, with $ 34 billion in 154 cases. As this data is gathered from 250 agencies in multiple domains with penalties shaped by the scope and nature of misconduct, we will concentrate more narrowly on corporate criminal fines in this book. It is, however, easy to see that corporate criminal prosecutions are illustrative of a larger trend towards rising monetary penalties. One can also understand why Attorney-General Eric Holder argued in 2013 that the money collected at the federal level and through state agencies represented close to three times the cost of the 94 US attorney offices and the Justice Department's litigation divisions. With billions of fines paid each year, the idea is gaining ground that corporate prosecutions "can be treated as a government profit center."[34]

Second, deferred and non-prosecution agreements become increasingly common after the respective DOJ guidelines outlining their use. Barely used prior to 2000, these settlements have risen to between 20 and 40 cases per year, with a peek reached in 2015 through the Swiss Bank Program, which account for 75 non-prosecution agreements in that year alone. The Swiss Bank Program is a bilateral agreement announced by the Department of Justice in

[33] Good Jobs First, "Violation Tracker," Corporate Research Project Database, September 2020, www.goodjobsfirst.org/violation-tracker.
[34] Anonymous, "A Mammoth Guilt Trip."

2013, which granted leniency to the banks that resolved criminal liabilities related to tax evasion.[35]

Figure 3.2: The rise of deferred and non-prosecution agreements



Data source: Garrett and Ashley (2021) *Corporate Prosecution Registry*

To be sure, the majority of corporate criminal cases are settled through plea agreements, which account for 86% of the cases covered in the Corporate Prosecution Registry. Together with the two newer form of settlements, negotiated agreements make up 98,7% of corporate prosecutions. Trial in front of a judge and jury or the formal dismissal of a case is very rare.

Even though deferred and non-prosecution agreements are less frequently used than plea agreements, their importance has grown over time. This is visible in absolute numbers and as a share of the total of corporate prosecution at the federal level. More importantly, it is the instrument of choice for dealing with the large corporations. Public companies, i.e. those listed on US stock exchanges, are much more likely to settle a deferred or non-prosecution

[35] For details and a complete list of non-prosecution agreements linked to this program, see Department of Justice, "Swiss Bank Program," July 17, 2015, www.justice.gov/tax/swiss-bank-program.

agreement. 57% of public companies in the data set have done so in the past, compared to only 10% of privately held companies.

Finally, Garrett shows that the increased use in deferred and non-prosecution agreement has not led to a rise in individual prosecutions, even though that was part of the initial ambition behind the new guidelines.[36] The prosecution of individual offenders in connection to corporate prosecution happens in under ten cases each year. This observation appears to be in line with the more general observation that white collar crime prosecutions are steadily declining, hitting an all-time low by the end of 2020.[37] In sum, deferred and non-prosecution agreements have become firmly established in the landscape of corporate criminal law especially for large corporations. Overall, they contribute to a trend of rising monetary penalties, but have contributed little to holding individuals accountable for corporate crime.

Criticism

The turn towards deferred and non-prosecution agreements has not gone unnoticed and sparked considerable debate in the legal profession. One eminent scholar considers it "a racket" that "erodes the most elementary protections of the criminal law, by turning the prosecutor into judge and jury, thus undermining our principles of separation of powers."[38] Another scholar and former federal prosecutor is outraged over the use of settlements in even the most serious cases, such as Massey Energy's Upper Big Branch mining disaster, where a massive explosion killed twenty-nine miners in 2010. He warns that negotiated settlements erode the punitive and deterrence value of criminal enforcement. The secretive nature of negotiations "cannot ensure that abuse of power does not occur" and denies the families of victims the right to trial.[39]

[36] Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1804.
[37] Hurtado, Patricia et al., "Trump Oversees All-Time Low in White Collar Crime Enforcement," *Bloomberg*, August 10, 2020, www.bloomberg.com/news/articles/2020-08-10/trump-oversees-all-time-low-in-white-collar-crime-enforcement; Taub, *Big Dirty Money by Jennifer Taub*.
[38] Richard A. Epstein, "The Deferred Prosecution Racket," *Wall Street Journal*, November 28, 2006, sec. Opinion, www.wsj.com/articles/SB116468395737834160.
[39] David Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability," *Maryland Law Review* 72, no. 4 (2013): 1302.

Indeed, all accounts of the recent trend highlight the untransparent and idiosyncratic nature of criminal enforcement through settlements due to high level of discretion held by the prosecutors.[40] This creates room for all sorts of favoritism, including the possibility to name corporate monitors – paid for their membership in corporate boards – which have personal ties to the prosecutors. One agreement negotiated by Christopher Christie when he was US Attorney for the District of New Jersey even includes an endowed chair on "Corporate Governance & Business Ethics" that Bristol-Myers Squibb agreed to create at Christie's alma mater, Seton Hall University School of Law.[41] Others include terms in line with policy objectives, such as the installation of slot machines in an agreement with the New York Racing Association to produce profits channeled towards public schooling in the state of New York.[42] Concerns over the effects of negotiated settlements range from the adequacy of sentences, to the capacity to bring charges against individual offenders and to the effectiveness in ensuring future compliance. Let us consider these in turn.

US Sentencing Guidelines are designed to ensure appropriate punishment for criminal acts, proposing detailed criteria for establishing fines, including consideration for the size of the company, the involvement of senior management, the degree of cooperation with internal investigations and the solidity of their compliance programs. However, when it comes to deferred or non-prosecution agreements, they are rarely used. When applied strictly, US Sentencing Guidelines appear to discourage companies from cooperating with the investigation.[43] The more flexible approach adopted by the Department of Justice introduced leniency, precisely to address this difficulty, sacrificing universally applicable rules for adequate punishment in the process.[44]

[40] Garrett, *Too Big to Jail*; Buell, Samuel W, *Capital Offenses: Business Crime and Punishment in America's Corporate Age*; John C. Coffee, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Oakland, C.A.: Berrett-Koehler Publishers, 2020).
[41] Barkow and Barkow, *Prosecutors in the Boardroom*, 4.
[42] Jake A. Nasar, "In Defense of Deferred Prosecution Agreements," *New York University Journal of Law & Liberty* 11, no. 2 (2017): 869.
[43] Jennifer Arlen, "The Failure Of The Organizational Sentencing Guidelines," *University of Miami Law Review* 66, no. 2 (January 1, 2012): 321–62.
[44] Simultaneously, the US Sentencing Guidelines became advisory rather than mandatory for federal convictions in 2005. See Arlen, 323.

The ambition of the new approach was to improve prosecutors' ability to bring charges against individual offenders. This is the explicit objective of the incentive systems repeated at multiple occasions by the Department of Justice. In practice, however, the barter logic creates important tensions within the corporations, which have to manage the trade-offs between collective benefits for the company against costs carried by individual employees. Attorney-client privilege on behalf of employees can be waived, allowing the corporate entity to exploit individuals to allow the corporation to negotiate with the government.[45] Quite simply put, the company has an interest in "delivering" individual offenders, who may feel that they are sacrificed unjustly. Unsurprisingly, prosecutors were frustrated with the identification of "small fish" rather than top executives, preferring to abandon individual criminal charges in many cases. A survey of over ten years of deferred and non-prosecution agreements shows only one third were connected to the prosecution of individuals, with very few of top executives.[46]

The effectiveness of the new enforcement regime in ensuring future compliance and improve corporate conduct is also questioned. Leniency undermines the general deterrent effect of criminal convictions, leading some to suspect that the new deals "represents a victory for the forces of big business who for decades have been seeking to weaken or eliminate corporate criminal liability."[47] To begin with, despite the massive fines, constraining compliance programs and judicial review in certain cases, we do see recidivism among corporations that have settled in the past. Analyzing 535 deferred or non-prosecution agreements entered since 1992, Public Citizens identified 38 corporations as repeat offenders. 63% of these were even able to negotiate additional settlements, most of them major global corporations. Surprisingly, the prosecutors are not punishing corporations for violating the agreements. Only seven corporations were held accountable for breaching the terms of an agreement, actually prosecuting the company in as little as three instances. Put differently, prosecution

[45] Bruce Green and Ellen Podgor, "Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents," *Boston College Law Review* 54, no. 1 (January 30, 2013): 73.
[46] Garrett, "The Corporate Criminal as Scapegoat."
[47] Russel Mokhiber, "Crime without Conviction: The Rise of Deferred and Non-Prosecution Agreements" (Speech delivered at National Press Club, Washington, D.C., 28 2005), www.corporatecrimereporter.com/deferredreport.htm.

was literally “deferred” in under 0,6% of all cases.[48] It is difficult to imagine similar leniency granted to an individual criminal defendant.

Moreover, prosecution does not seem to have systematic effect on the personal situation of the company’s CEO. Even without charges brought against them directly, one might expect that CEO’s are held accountable for the legal difficulties the companies went through, either by losing their position or through reduced executive pay. A recent study finds that “heads do roll” as a consequence of prosecution in roughly one fourth of the cases studied. However, executive pay did not vary significantly during or in the aftermath of prosecution.[49] Without suggesting that legal battles leave a company unscathed, we can see that criminal liability does not result in turnover or diminished pay for the top executive in 75% of recent cases. Finally, a recent evaluation of the effectiveness of criminal fines in the financial industry finds that repeat offenders are often very large companies, but they also receive a smaller fines than non-recidivist companies (measured as a percentage of assets and revenue).[50] Without a credible risk of prosecution, significant and systematic personal consequences for management and adequate monetary penalties, criminal sanctions may have simply become the cost of doing business for large corporations.

Benefits from the new world of corporate justice

The success of negotiated settlements cannot be explained with reference to the principles of justice and equity, nor do they provide legal certainty and succeed in effectively shaping corporate conduct. They do, however, provide prosecutors with an instrument to bring more challenging cases, to improve access to the companies’ staff, servers and archives and thus to address issues that were previously outside of reach. Remember that 95% of corporate convictions saw the organizational offender plead guilty, suggesting that complex cases are simply not prosecuted. Comey’s “chickenshit club” reflected the untenable position of

[48] Rick Claypool, “Soft on Corporate Crime: Justice Department Refuses to Prosecute Corporate Lawbreakers, Fails to Deter Repeat Offenders” (Public Citizen, 26 2019), www.citizen.org/article/soft-on-corporate-crime-deferred-and-non-prosecution-repeat-offender-report/.
[49] Brandon L. Garrett, Nan Li, and Shivaram Rajgopal, “Do Heads Roll? An Empirical Analysis of CEO Turnover and Pay When the Corporation Is Federally Prosecuted,” *Journal of Law, Finance, and Accounting* 4, no. 2 (December 13, 2019): 137–81.
[50] Dorothy Lund and Natasha Sarin, “The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis,” *Faculty Scholarship at Penn Law*, February 17, 2020, https://scholarship.law.upenn.edu/ faculty_scholarship/2147.

prosecutors, who were ill-equipped to take up the fight with large corporations, despite the help of investigators and regulatory agencies. By introducing negotiated settlements more flexible than plea bargains, the Department of Justice tried to develop a more ambitious corporate justice policy that nonetheless allowed considering collateral damage, which ultimately meant economic stability. Unfortunately, it may well prove impossible to combine economic and legal objectives into effective corporate criminal enforcement.[51] Let us therefore consider the other benefits of negotiated corporate justice for the government and prosecutors. This requires understanding the scope of government authority and the motivations guiding prosecutors, in particular political accountability, the public interest and career motives. [52]

As part of the executive branch of government, the Department of Justice and the attorney general's offices report ultimately to the president. Long-standing norms limit the ability of politicians to intervene in specific cases, however, to ensure a separation of powers. Frequently repeated by politicians and prosecutors, this principle of non-intervention in judicial decision allows political decision-makers to decline responsibility when they are pushed to influence specific prosecutions.[53] Even if the separation was put into question under the Trump administration, it is fair to say that executive influence most commonly takes the form of nominations to senior positions, overall guidelines and resource allocation.[54] These decisions can profoundly affect administrative priorities, as one can see by the shift to counter-terrorism in the aftermath of September 11, 2001 or the surge in financial industry cases brought after the crisis of 2009.[55] Likewise, US Congress plays an import role in supervising criminal enforcement by controlling appointments and the budget, but also

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[51] For criticism on Eric Holder's attempt to combine justice policy with economic concerns, see Jillian Berman, "Eric Holder's 1999 Memo Helped Set The Stage For 'Too Big To Jail,'" *HuffPost*, April 6, 2013, www.huffpost.com/entry/eric-holder-1999-memo_n_3384980; Arthur Wilmarth, "Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street," *University of Cincinnati Law Review* 81, no. 4 (September 18, 2013).
[52] For an in depth discussion, see Banks P Miller and Brett W Curry, *U.S. Attorneys, Political Control, and Career Ambition* (New York: Oxford University Press, 2019); Verdier, *Global Banks on Trial*, 23–26.
[53] Bruce A. Green and Fred C. Zacharias, "'The U.S. Attorneys Scandal' and the Allocation of Prosecutorial Power," *Ohio State Law Journal* 69, no. 2 (August 1, 2008): 186–254.
[54] Cf. Sally Q. Yates, "Protect the Justice Department From President Trump - The New York Times," *New York Times*, July 28, 2017, sec. Opinion, www.nytimes.com/2017/07/28/opinion/sally-yates-protect-the-justice-department-from-president-trump.html.
[55] Juan C. Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (New York: Public Affairs, 2013); Brandon L. Garrett, "The Rise of Bank Prosecutions," *Yale Law Journal Forum* 126, no. 33 (May 23, 2016): 33–56.

regular oversight hearings. In addition, Congress can change the appliable law or transfer authority between agencies. Through these mechanisms, prosecutors can be held accountable and are likely to adapt to the priorities of the executive or the legislator, as one can see from the drop in cases brought under the Trump administration.

Beyond their political accountability, prosecutors may also be motivated by the defense of the public interest. Prosecutors' self-understanding of their role, repeated in canonical speeches and ethics rules, is to defend the innocent and to ensure that the guilty receive an appropriate sanction. Their primary objective is to serve justice, to distinguish between right and wrong, unlike regulators who may consider issues relevant for production and growth. In the adversarial criminal justice system described in chapter 2, prosecutors also serve as the guardians against abuse from concentrated political or economic power. Being tough on corporate crime is in principle aligned with an egalitarian understanding, where citizens need to be protected from public harm at the hands of corporate players.

Numerous accounts also point to the importance of career motives in prosecutorial choices. Although some prosecutors embark on a life-long career in public service, a great many choose it a stepping-stone to political careers or success in private law firms seeking to benefit from their litigation experience. In particular US attorneys and senior officials in the Department of Justice often have political ambitions and actively seek to build a reputation by bringing noteworthy cases.[56] Since they have to secure political support in order to be nominated in the first place, their career ladder is colored by partisan priorities.[57] Whether prosecutors are aiming for a private career or public office, a record of successful prosecutions and landmark cases is an important asset. One can understand that prosecutors do not want to embark onto cases they will lose, but also evaluate carefully cases that they might be heavily criticized for. At the same time, they need to demonstrate that they are aggressive and do not shy away from powerful opponents. This delicate balancing act requires being both aggressive and

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[56] James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems* (Baltimore: Johns Hopkins University Press, 1978); Miller and Curry, *U.S. Attorneys, Political Control, and Career Ambition*, 9–11.

[57] US attorney's routinely offer the resignation when a new president becomes elected. Moreover, they rely on political ties within their jurisdiction. As one put it "you do not become a US attorney without the support of your state's senators." Cited in Miller and Curry, *U.S. Attorneys, Political Control, and Career Ambition*, 11.

mindful, challenging the powerful, but in ways that have the right political backing. Deferred and non-prosecution agreements helped to solve precisely this conundrum. Prosecutors were finally able to bring difficult cases and declare victory, without bringing large corporations to their knees in ways that would create economic fallout.

The settlements also brought a second significant benefit: money collected from fines flowing into public chests. The settlement amounts often exceed victim compensation, and in some cases victims are hard to identify. Where the money goes can vary depending on the type of crime and the agencies involved in the prosecution, but it is fair to say that a substantial portion goes into public budgets. Fines can go to federal or state general funds, or funds dedicated for future enforcement and education.[58] Illustrative of this development is case of New York District Attorney Cyrus Vance, who secured $808 million from criminal penalties against three international banks – HSBC, Standard Charted and BNP Paribas – in 2015, representing nearly 10 times his office's annual budget. As he is legally required to spend the funds on criminal justice projects, "it has transformed Mr. Vance into a kind of Santa Claus for the law-enforcement world, with a sack filled with new programs and equipment". For the District Attorney, this meant a "once in a life-time chance" to make "transformative investments", even though he insisted that he was not investing "in anything crazy". Critics are less sober in the evaluation of the massive amounts, arguing that "it is a strange thing to have an elected district attorney who finds himself in the role of making grants and shaping the field."[59] To be sure, the idea behind general funds or earmarked funds for future enforcement and education is precisely to avoid any appearance of impropriety. It is nonetheless clear that the sums involved are not trivial and that they do distribute resources to law enforcers and public budgets in ways that can even benefit certain participants individually.

To summarize, the last two decades of corporate criminal law enforcement have provided prosecutors with new tools to tackle cases that were previously outside of their reach.

[58] Kathleen Pender, "When Government Fines Companies, Who Gets Cash?," *SFGATE*, May 6, 2010, www.sfgate.com/business/networth/article/When-government-fines-companies-who-gets-cash-3189724.php.
[59] James C. McKinley, Jr., "Cyrus Vance Has $808 Million to Give Away," *The New York Times*, November 6, 2015, sec. New York, www.nytimes.com/2015/11/08/nyregion/cyrus-vance-has-dollar-808-million-to-give-away.html.

Through flexibly negotiated settlements over criminal liability, they moved center stage in regulatory enforcement and were able to extract substantial sums from targeted corporations. While companies clearly prefer deferred and non-prosecution agreements to criminal convictions, law enforcers also reap considerable benefits, despite the fact that one can doubt the effectiveness of the new policy. Critics therefore call for more transparency of what one report calls a "shadow regulatory state", where "English majors with law degrees are remaking entire industries, without clear legal authorization, public transparency or much if any judicial oversight."[60] In comparison to regulators, prosecutors do not systematically collect information or solicit public comments when they issue decisions. Their focus is on the case at hand, not in establishing principles that can apply uniformly to an entire industry. As a consequence, "haphazard interventions by prosecutors could create inefficient rules and competitive disparities among firms."[61] One area where this trend is striking is in the systematic home bias of prosecutorial decisions.

3. Global enforcement – home bias

As US law enforcers have expanded their reach, it is possible to compare the impact of the recent evolutions for foreign and domestic firms. This section shows that foreign firms pay considerably higher fines, across all areas of criminal charges. Indeed, a good portion of recent trends in corporate criminal enforcement is due to the fact that more and more foreign firms are now targeted by US authorities. Global enforcement may have given prosecutors an even more appealing solution to the initial conundrum of having to be tough on corporate crime without bringing impossible cases or risking political fallout. Being tough on foreigners may just be the ideal strategy.

Of the cases listed in the Corporate Prosecution Registry, 16% are foreign companies, but they account for almost 60% of all fines collected and 52% of total payments. Average fines are

[60] James R. Copland, "Bring These Agreements Out of the Shadows," *New York Times*, November 11, 2014, www.nytimes.com/roomfordebate/2014/11/11/do-deferred-prosecutions-keep-banks-honest-or-let-them-cheat/bring-these-agreements-out-of-the-shadows; Isaac Gorodetski and James R. Copland, "The Shadow Lengthens: The Continuing Threat of Regulation by Prosecution," Legal Policy Report (Manhatten Institute, August 24, 2015), https://www.manhattan-institute.org/html/shadow-lengthens-continuing-threat-regulation-prosecution-5898.html.

[61] Verdier, *Global Banks on Trial*, 26.

significantly higher for foreign firms in each year since 2001. Garrett analyzed the home bias of globalized corporate prosecution a decade ago by comparing US Sentencing Commission data with his own collection of deferred and non-prosecution agreement and publicly reported convictions.[62] He finds on average five to seven times higher fines for foreign companies.[63] The differential has not changed much in the last decade and holds independent of disposition types, as table 3.1 shows.[64] Whether foreign companies plead guilty, negotiate an agreement or are convicted, their fines are substantially higher than fines imposed on domestic companies. It is noteworthy that foreign companies are more likely to negotiate deferred and non-prosecution agreements, which account for 30% of all foreign company cases, against 69% which enter a plea agreement. By contrast, plea agreements make up 90% of all domestic cases, while only 5% and 4% are deferred and non-prosecution agreements.

Fines are meant to reflect the nature of the crime committed and damage done, and we would expect it to vary with the size of the company. Indeed, there is considerable variation in fines across domains. Antitrust, foreign corrupt practices and pharmaceutical cases have significantly larger fines throughout the data set. The spectrum of fines is quite spread, with many firms receiving nominal fines, while others pay hundreds of millions of dollars. If one considers the record-breaking top end, one also finds securities fraud and bank secrecy, in particular in the aftermath of the financial crisis, as well as landmark cases in environmental damage. To analyze whether certain crime category and types of companies were correlated with higher fines and or total payments, the log regression presented in table 3.1 estimates the variation according to each feature among companies that are otherwise comparable.[65] The table also shows the coefficient indicating how many times larger fines or payments where when controlling for the other factors. The dataset does not include information about

[62] Brandon Garrett, "Globalized Corporate Prosecutions," *Virginia Law Review* 97, no. 8 (January 1, 2011): 1775–1875.

[63] From 2001-2008, the average foreign fine reported by the US Sentencing Commission was $17 million, compared to $2,9 million for domestic companies. Garrett's own data set reveals an average foreign fine of $38 million compared to $7,5 million for domestic companies by 2010. In deferred and non-prosecution agreements, he finds an average foreign fine of $25 million, compared to domestic average fines of $5,7 million. Garrett, 1810.

[64] The table only analyzes only the subsection of cases that did not have missing values.

[65] Since there is a wide range of fines with some exceptionally high value, a log regression appeared most appropriate. Table 3.1 shows the estimate and standard error in the first two columns, and then presents the exponentials of the coefficients to show how many times larger the fines were for a given category, within a 95% confidence interval listed in the last two columns.

assets or revenue of the companies, but it does distinguish between privately held and publicly listed companies, which are far larger.

Table 3.1: Log Regression of Fines

Variable	Coefficient	Standard Error	Exponential of the coefficient	95% interval	
foreign	3,21	0,31	24,78	13,56	45,68
public	1,86	0,35	6,42	3,22	12,70
Type of crime					
Act to Prevent Pollution From Ships	3,18	0,64	24,05	6,82	84,34
Antitrust	4,44	0,49	84,77	32,51	221,55
Bank Secrecy Act	-4,05	0,81	0,02	0,00	0,08
Bribery	1,97	0,98	7,17	1,05	48,82
Controlled Substances / Drugs / Meth Ac	-2,77	0,68	0,06	0,02	0,24
Environmental	2,41	0,41	11,13	4,98	24,78
FCPA	3,95	0,59	51,94	16,16	165,89
FDCA / Pharma	3,46	0,60	31,82	9,79	103,34
False Statements	1,08	0,54	2,94	1,02	8,48
Food	1,05	0,63	2,86	0,83	9,84
Fraud - Accounting	-3,55	1,56	0,03	0,00	0,62
Fraud - General	-0,66	0,41	0,52	0,23	1,16
Fraud - Health Care	-2,29	0,61	0,10	0,03	0,34
Fraud - Securities	-3,67	0,97	0,03	0,00	0,17
Fraud - Tax	1,95	0,62	7,03	2,09	23,73
Gambling	-3,35	1,02	0,04	0,00	0,26
Immigration	-1,44	0,55	0,24	0,08	0,69
Import / Export	0,84	0,54	2,32	0,81	6,68
Kickbacks	-1,60	1,01	0,20	0,03	1,45
Money Laundering	-2,93	0,66	0,05	0,01	0,20
OSHA / Workplace Safety / Mine Safety	0,94	0,94	2,56	0,40	16,37
Obstruction of Justice	2,37	1,11	10,70	1,21	95,38
Other	Ref.	-	-	-	-
Wildlife	1,20	0,63	3,32	0,96	11,40
Constant	7,59	0,34	-	-	-
N	3573				
R squared	0,218				

The regression analysis shows that foreign companies pay fines that are almost 25 times larger than comparable domestic companies that have committed similar crimes. As one might expect, public companies also pay larger fines, but only by a magnitude of 6. This is not surprising since they are large and complex organizations, with a greater possibility than many privately held companies to commit substantial crimes that affect a large number of victims. The regression analysis also indicates considerable variation according to crimes committed,

confirming that the largest fines appear in antitrust cases, foreign corrupt practices, pharmaceuticals and maritime pollution. Even though the confidence intervals in the analysis are quite large, it becomes clear that foreign companies pay higher fines. The same is true when considering not just fines but total payments, although the differential is somewhat smaller: including disgorgement and restitution costs, foreign companies pay over thirteen times more than domestic companies when controlling for other factors, while public companies pay 16 times more than privately held companies.[66] Such differences are considerable, amounting to millions (and sometimes billions) of dollars.

This does not automatically suggest that foreign firms are discriminated against, as several explanations might account for the variation. To begin with, the gap might be due different behavior of foreign and domestic firms. Foreign firms might be unacquainted with the US legal systems, underappreciating the imperative to cooperate well with internal investigations and committing errors over the course of their interaction with US authorities. Although there is anecdotal evidence to suggest that such misjudgments may explain the severity of specific penalties,[67] it is a weak explanation for the overall trend. Not only have most global companies adapted their compliance efforts to US standards, but companies are also always accompanied by American law firms in their legal representation.[68] One can of course admit as an hypothesis that American firms are more law-abiding than their foreign counterparts, but evidence from the Violation Tracker suggests otherwise, listing many US companies with several dozen cases of regulatory, civil and criminal violations.

A second set of explanations points to a selection bias in the foreign cases US prosecutors chose to take on. Since prosecutions across boundaries are more difficult and complex, US authorities may be more selective in their pursuit of foreign companies and focus their attention on particularly harmful conduct. In addition, they have an incentive to send a strong signal through harsher sanctions, in order to deter future criminal activities, given how hard it

[66] A log regression of total payments is reproduced in the appendix.

[67] Jaclyn Jaeger, "BNP Paribas Debacle Offers Lessons in Compliance," *Compliance Week*, 06 2014, www.complianceweek.com/bnp-paribas-debacle-offers-lessons-in-compliance/3577.article.

[68] Volkswagen has signaled in its 2018 annual reports that the legal defense costs during the Dieselgate scandals amounts to over one billion dollars. See also Thomas Tuma and Volker Votsmeier, "Burning Money: VW Squanders Millions on Legal Fees," March 30, 2017, www.handelsblatt.com/english/companies/burning-money-vw-squanders-millions-on-legal-fees/23568420.html.

is to ensure effective law enforcement ex post.[69] These hypotheses hold some credence and indicate it is important to understand why law enforcement efforts moved increasingly beyond territorial boundaries, with an explicit ambition to protect US consumers and US firms from unfair competition and malevolent practice.

Finally, it is relevant to consider the political setting. It is also difficult to estimate the effect of lobbying presence, but domestic companies might be better equipped to work with law-makers and US authorities to shield domestic companies from investigations. The data analyzed here does not include cases not brought or dropped by prosecutors or dismissed by judges. Digging into the political setting and understanding the increasing extraterritorial reach of prosecutorial outreach is the objective of the following chapter.

4. Conclusion

This chapter has anchored the transformation of global corporate justice in the evolution of corporate criminal law in the US in the last two decades. Showing the rise in financial sanctions for criminal violations, it highlights the underlying philosophy the Department of Justice has sought to implement by introduction a more flexible negotiation approach. These negotiated settlements rose to popularity because they provided solutions to two inextricable challenges: (1) the David against Goliath problem, where prosecutors needed additional means to push for internal investigations into complex organizations, (2) the due process vs. market problem, where trial and convictions can lead to disproportionate punishment independent of the legal process. Career incentives for law enforcers are also aligned. Prosecutors that rise to managerial status in their overworked and understaffed bureaucracies "are those who have learned to stay within budget and achieve early settlements that allow their agency to claim victory", Coffee writes.[70] Nobody wants to be part of the "chickenshit club", but the prospects of losing a battle and simultaneously being responsible for an unforeseen economic impact and resulting job losses are daunting. Negotiated settlement put a veil over these two fundamental problems.

[69] For discussion, see Garrett, "Globalized Corporate Prosecutions."
[70] Coffee, *Corporate Crime and Punishment*, ix.

Unfortunately, the societal impact of the evolution is disturbing. "Our justice system is broken", summarizes Eisinger.[71] As judges and juries are sidelined, outcomes are shaped by everything we know weighs on social interactions – power, economic resources, social ties, as well as explicit and implicit biases. Negotiations are unequal, within the realm of corporate criminality and within society as a whole. In the country with the highest incarceration rate in the world, the parallel is easily made: "the poor sign plea bargains and go to jail; the privileged sign deferred-prosecution agreements and avoid it."[72] Criminal enforcement is in the limelight for failing to protect citizens against the abuse of power by big corporations.

Targeting foreign firms may be one way to demonstrate that enforcers can be tough on corporate crime. Tellingly, the only banker that went to jail in the aftermath of the financial crisis was Kareem Serageldin, born in Egypt, an executive of a Swiss bank, convicted for crimes committed in London.[73] When US authorities prides themself on extracting billions from corporations for criminal violation, it is necessary to go beyond the presentation of individual cases. One also has to answer for the cases US authorities did not pursue, and those that may have been let off too easily. Without a more systematic approach and oversight, it is likely that foreign company sanctions will become the fig leaf for a failed corporate criminal justice system.

[71] Patrick Raddan Keefe, "Why Corrupt Bankers Avoid Jail," *The New Yorker*, July 31, 2017, www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail.
[72] Keefe; see also John Pfaff, *Locked In: The True Causes of Mass Incarceration-and How to Achieve Real Reform* (New York: Basic Books, 2017).
[73] Eisinger, "Why Only One Top Banker Went to Jail for the Financial Crisis."

8. Appendix

The quantitative analysis in this book is based on the Corporate Prosecution Registry assembled Brandon Garrett and John Ashley in a joint project by the Legal Data Lab at the University of Virginia School of Law and Duke University School of Law.[74] It includes regularly updated data on federal organizational prosecutions in the United States since 2001, as well as deferred and non-prosecution agreements with organizations since 1990.

Other data sources on organizational sentences exist but have shortcomings. The US Sentencing Commission publishes comprehensive sentencing data, made available through the Inter-University Consortium for Political and Social Research (ICPSR), with data updated annually since 1988.[75] An examination in 2000 found important flaws with the quality of the data, most notably a substantial number of missing cases, in particular a disproportionate number of large fines.[76] With hand-collected data on convictions of public corporations, Alexander, Arlen and Cohen have shown that organizational sentences include in reality a far higher number of publicly held companies and significantly higher fines (moving the median from $70000 to $3.1 million for 1988-1996). The Commission's data collection is based on self-reported data by the courts, sentenced under chapter eight of the Organizational Sentencing Guidelines. Since it does not follow up on self-reported data nor include sentences under alternative crime-specific provisions, there are continuing discrepancies between the underlying body of organizational sentences and the Commission data, although a series of improvements have been introduced over time.

Moreover, the official data published by the US Sentencing Commission does not include fines obtained as a result of negotiated agreements, which make up an increasingly large part of

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[74] Brandon L. Garrett and Jon Ashley, "Corporate Prosecution Registry," Duke University and University of Virginia School of Law, 2019, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html.

[75] U.S. Sentencing Commission, "Organizations Convicted in Federal Criminal Courts Series," Interuniversity Consortium for Political and Social Research, 2021, www.icpsr.umich.edu/web/NACJD/series/85.

[76] Cindy R. Alexander, Jennifer Arlen, and Mark A. Cohen, "Evaluating Trends in Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission's Data?," *Federal Sentencing Reporter* 13, no. 2 (September 1, 2000): 108–13.

corporate prosecutions. Today, several sources provide overviews of corporate and non-prosecution agreements. For instance, the Law Firm Gibson and Dunn provides annual data on deferred and non-prosecution agreements in client updates available online.[77] Although a useful resource for searching case documents and comparing timelines, the categories of data presented are not identical throughout the years.

In order to provide for a more complete data source on corporate prosecutions, Brandon Garrett began hand-collecting data in 2006, building a registry of corporate offenders with the help of John Ashley and the University of Virginia Law Library, in a dataset that is continuously updated. Identified through news searches and official press releases, the data set covers all publicly reported cases, including deferred and non-prosecution agreements, with access to the text of plea agreements, docket sheets and SEC filings. When information was not freely available, it was obtained through Freedom of Information Act requests by the University of Virginia Law Library team and students of the First Amendment Law Clinic at the University of Virgina School of Law. The data set is described in detail in several of Brandon Garrett's publications, including comparison with the structure and scope of the US Sentencing Commission data.[78] It concentrates on federal courts, and does not include state court prosecutions. Major corporate cases tend to be brought by federal prosecutors or in cooperation with them. A notable exception is the Manhattan District Attorney's Office and the New York Attorney General's Office, specifically with respect to criminal activities on Wall Street. Still, for the analysis of the evolution of corporate criminal law, Garrett's data and analysis is today widely recognized as the most reliable source of information. According to John C. Coffee, arguable one of the eminent scholars of US corporate law, Brandon Garret "has set a new standard for scholarship in the field."[79]

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[77] E.g. Gibson Dunn, "2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements," Gibson Dunn, January 9, 2020, www.gibsondunn.com/2019-year-end-npa-dpa-update/.

[78] E.g. Brandon Garrett, "Globalized Corporate Prosecutions," *Virginia Law Review* 97, no. 8 (January 1, 2011): 1775–1875; Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge, MA: Harvard University Press, 2014); Brandon L. Garrett, "Declining Corporate Prosecutions," *American Criminal Law Review* 57, no. 1 (2020): 109–55.

[79] John C. Coffee, *Corporate Crime and Punishment: The Crisis of Underenforcement* (Oakland, C.A.: Berrett-Koehler Publishers, 2020), xii.

Accessed at the end of 2020, the original data set from the Corporate Prosecution Registry includes 4338 entries. The analysis in this book concentrates on the period from 2000 to 2020, which meant excluding 15 cases listed prior to 2000 and eliminating entries where no information was provided on the year of the case (63 cases). In addition, the comparative analysis of fines and total payments concentrated on cases with trial convictions, plea agreements, deferred or non-prosecution agreements, since these are the cases where one should expect monetary penalties. Cases, which resulted in acquittal, dismissal before and during trial and declinations where the case by dismissed by the prosecutors, were not included (610 entries), also because the universe of such cases which do not make it into the data set is potentially much larger. As the eliminated entries are distributed roughly equally over the years, no significant cluster effects occur in the research population. The dataset finally used contains 3650 entries.

In addition, we manually corrected information of fines or total payments for 26 cases, by comparing the data set with the PDF files and additional information available for each case. The error check was based on assumption that total payments should correspond to the sum of fines, payments for forfeiture or disgorgement, restitution and community service and in certain cases additional regulatory payments listed. By examining the 50 entries where this was not case, we found some errors that were easily identifiable as missing numbers or small calculation errors and proceeded to correct them. We also informed the data manager of some of the inconsistencies we found.

For the analysis of the firms' home, we also reduced the country information to one single location in 11 cases. When several countries of origin were listed, which happened in cases that combined a parent company and some of its subsidiaries, we coded according to location of the headquarters of the parent company. In the rare cases where affiliates were targeted jointly, we coded a case as foreign if at least one of the parties was located outside of the United States.

The 20 highest fines and total payments are listed in table 8.1 and 8.2.. One can see a number of emblematic cases such as the emissions fraud by Volkswagen known as "dieselgate" or the

explosion of BP's Deepwater Horizon rig and the environmental damage caused by the ensuing oil spill in the Gulf of Mexico.

Table 8.1: Top 20 of total fines

Company	Fine	Disposition	Date	Crime
Volkswagen	2 800 000 000	plea	21/04/2017	Fraud - General
The Goldman Sachs Group	2 315 087 872	DP	22/10/2020	FCPA
BP Exploration & Production	1 256 000 000	plea	29/01/2013	Environmental
Pharmacia & Upjohn	1 195 000 064	plea	26/04/2007	Fraud - Health Care
Credit Suisse	1 136 988 928	plea	21/11/2014	Fraud - Tax
GlaxoSmithKline	956 814 400	plea	10/07/2012	FDCA / Pharma
Citicorp	925 000 000	plea	10/01/2017	Antitrust
Alstom Network Schweiz	772 289 984	plea	25/11/2015	FCPA
Reckitt Benckiser Group	750 000 000	NP	11/07/2019	Fraud - Health Care
Barclays	710 000 000	plea	10/01/2017	Fraud - General
Deutsche Bank	625 000 000	DP	23/04/2015	Antitrust
Olympus Corporation	612 000 000	DP	29/02/2016	Kickbacks
Societe Generale	585 552 896	DP	05/06/2018	FCPA
JPMorgan Chase	550 000 000	plea	10/01/2017	Antitrust
Eli Lilly & Co.	515 000 000	plea	30/01/2009	FDCA / Pharma
Tenet Healthcare	512 788 352	NP	30/09/2016	Fraud - General
AU Optronics Corp.	500 000 000	trial	02/10/2012	Antitrust
Abbott Laboratories	500 000 000	plea	02/10/2012	FDCA / Pharma
Yazaki Corp.	470 000 000	plea	01/03/2012	Antitrust
Siemens	448 500 000	plea	06/01/2009	FCPA

For those familiar with individual cases, it is also visible that the fines and total payments listed here underestimate actual payments made by companies in the context of each case, since the amounts listed only concern corporate criminal penalties at the federal level. To cite just one example, French bank BNP Paribas had to pay $8.9 billion in total, which consisted of a $140 million fine and $8.83 billion in forfeiture. The forfeiture further divides into monetary penalties of $508 million imposed by the Federal Reserve Bank, $2.24 billion imposed by the New York State Department of Financial Services and $2.24 billion paid to the New York County District Attorney's Office. Only the remaining $3.84 billion paid to the federal government and the criminal fine are listed in the dataset. Details on each case is available on the Corporate Prosecuton Registry's website.

Table 8.2: Top 20 of total payments

Company	Total Payment	Disposition	Date	Crime
BP Exploration & Production	4 000 000 000	plea	29/01/2013	Environmental
BNP Paribas	3 978 800 128	plea	01/05/2015	Import / Export
The Goldman Sachs Group	2 921 088 000	DP	22/10/2020	FCPA
Volkswagen	2 800 000 000	plea	21/04/2017	Fraud - General
Evergreen International	2 003 000 064	plea	20/04/2005	Maritime Pollution
Credit Suisse	1 803 489 024	plea	21/11/2014	Fraud - Tax
JPMorgan Chase Bank	1 700 000 000	DP	06/01/2014	Bank Secrecy Act
Reckitt Benckiser Group	1 400 000 000	NP	11/07/2019	Fraud - Health Care
Pharmacia & Upjohn	1 300 000 000	plea	26/04/2007	Fraud - Health Care
HSBC Bank USA, N.A.,HSBC Holdings	1 256 000 000	DP	11/12/2012	Bank Secrecy Act
Toyota Motor Corp.	1 200 000 000	DP	09/03/2014	Fraud - General
Takata Corp.	1 000 000 000	plea	07/03/2017	Fraud - General
GlaxoSmithKline	999 999 424	plea	10/07/2012	FDCA / Pharma
Citicorp	925 000 000	plea	10/01/2017	Antitrust
J.P. Morgan Securities, JPMorgan Chase & Co. ,JPMorgan Chase Bank	920 203 584	DP	25/09/2020	Fraud - General
General Motors	900 000 000	DP	17/09/2015	Fraud - General
Alstom Network Schweiz	772 289 984	plea	25/11/2015	FCPA
Adelphia Communications	715 000 000	NP	01/05/2005	Fraud - Securities
Barclays	710 000 000	plea	10/01/2017	Fraud - General
Abbott Laboratories	698 499 968	plea	02/10/2012	FDCA / Pharma

For an overview of the variation in cases across different types of crimes it is helpful to consider the number of cases in each category, as well as the average and median amounts paid as fines or total monetary penalities. Table 8.3 provides such an overview and allows to see the great spread between record-breaking financial sanctions on the one hand and nominal amounts in others. In a significant number of cases, the fine and even the total payment was indeed 0.

Finally, to compare the log regression on fines and total payments, table 8.4 juxtaposes both. The third column in each regression indicates the exponential of the coefficient, i.e. the multiplicative impact of the category, when controlled for the other factors. It allows to see that foreign firms listed on US stock exchanges pay fines that are almost 25 times larger than domestic public firms prosecuted for the same type of crime. Total payments are almost 14 times larger. I would like to thank Yuma Ando, who has provided outstanding assistance in the data analysis.

Table 8.3: Penalties by type of crime

Type of crime	Number of cases	Fine			Total payment		
		Mean	Median	Number of cases with 0 fine	Mean	Median	Number of cases with 0 payment
Maritime Pollution	125	1 841 169	800 000	4	18 297 386	1 000 000	3
Antitrust	290	39 307 344	4 511 033	33	39 504 324	4 531 033	21
Bank Secrecy Act	57	3 573 798	0	38	99 544 160	154 817	10
Bribery	36	9 090 617	250 000	9	9 248 967	593 750	3
Controlled Substances / Drugs	88	584 051	201	43	1 176 829	5 000	36
Environmental	601	3 376 911	75 000	84	8 810 116	120 000	41
FCPA	159	60 846 164	7 500 000	21	67 741 432	8 751 795	18
FDCA / Pharma	126	43 251 836	195 000	20	53 338 936	450 000	13
False Statements	173	1 181 574	40 000	39	1 693 881	100 000	20
Food	107	927 338	14 000	16	1 307 101	25 000	10
Fraud - Accounting	13	466 538	0	8	27 293 536	250 000	3
Fraud - General	577	14 826 035	10 000	243	27 676 724	366 268	78
Fraud - Health Care	116	18 432 096	0	65	27 168 654	489 012	12
Fraud - Securities	37	18 358 784	0	26	62 422 640	600 000	17
Fraud - Tax	135	21 265 612	1 365 000	26	44 498 080	2 311 000	12
Gambling	33	43 092	100	16	12 704 982	40 000	6
Immigration	164	254 833	2 000	61	1 076 493	29 500	39
Import / Export	176	8 130 339	50 000	44	37 009 892	100 000	26
Kickbacks	34	22 363 786	0	19	23 143 078	202 521	15
Money Laundering	95	655 011	0	54	7 966 804	116 420	28
Workplace Safety	39	271 355	25 000	9	2 813 717	73 500	8
Obstruction of Justice	27	8 692 927	175 000	4	16 374 216	200 000	1
Other	257	1 996 555	15 000	77	3 469 143	52 000	31
Wildlife	108	108 109	15 000	13	188 455	25 150	7

Table 8.4: Log Regression of fines vs. total payment

Variable		Fine			Total Payment		
		Coefficient	Standard Error	Multi-plicative impact	Coefficient	Standard Error	Multi-plicative impact
foreign		3,21	0,31	24,78	2,63	0,27	13,87
public		1,86	0,35	6,42	2,77	0,30	15,96
Type of crime	Maritime Pollution	3,18	0,64	24,05	1,51	0,55	4,53
	Antitrust	4,44	0,49	84,77	2,85	0,42	17,29
	Bank Secrecy Act	-4,05	0,81	0,02	0,96	0,70	2,61
	Bribery	1,97	0,98	7,17	1,80	0,85	6,05
	Controlled Substances	-2,77	0,68	0,06	-3,97	0,59	0,02
	Environmental	2,41	0,41	11,13	1,06	0,35	2,89
	FCPA	3,95	0,59	51,94	1,76	0,51	5,81
	FDCA / Pharma	3,46	0,60	31,82	1,86	0,52	6,42
	False Statements	1,08	0,54	2,94	0,32	0,47	1,38
	Food	1,05	0,63	2,86	-0,32	0,55	0,73
	Fraud - Accounting	-3,55	1,56	0,03	-0,15	1,35	0,86
	Fraud - General	-0,66	0,41	0,52	1,28	0,36	3,60
	Fraud - Health Care	-2,29	0,61	0,10	2,02	0,53	7,54
	Fraud - Securities	-3,67	0,97	0,03	-2,04	0,84	0,13
	Fraud - Tax	1,95	0,62	7,03	1,71	0,54	5,53
	Gambling	-3,35	1,02	0,04	-0,45	0,88	0,64
	Immigration	-1,44	0,55	0,24	-1,93	0,47	0,15
	Import / Export	0,84	0,54	2,32	0,08	0,47	1,08
	Kickbacks	-1,60	1,01	0,20	-2,52	0,87	0,08
	Money Laundering	-2,93	0,66	0,05	-1,05	0,57	0,35
	Workplace Safety	0,94	0,94	2,56	-0,65	0,82	0,52
	Obstruction of Justice	2,37	1,11	10,70	1,75	0,96	5,75
	Other	Ref.	-	-	Ref.	-	-
	Wildlife	1,20	0,63	3,32	-0,35	0,54	0,70
Constant		7,59	0,34	-	9,97	0,30	-
N			3573			3573	
R squared			0,218			0,163	