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Corporate Prosecutions: American Law Enforcement in Global Markets

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Abstract

Large companies are increasingly on trial. Over the last decade, many of the world's biggest firms have been embroiled in legal disputes over corruption charges, financial 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. For legal experts, the trend is noteworthy because of the extraterritorial dimensions of law enforcement, as companies are increasingly held accountable for activities independent of their nationality or the place of the activities. Indeed, the global trend required understanding the evolution of corporate criminal law enforcement in the United States in particular, where authorities have skillfully expanded its effective jurisdiction beyond its territory. This paper traces the evolution of corporate prosecutions in the United States. Analyzing federal prosecution data, it then shows that foreign firms are more likely to pay a fine, which is on average 6,6 times larger.

Acknowlegement

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1. Introduction

Large companies are increasingly on trial. Over the last decade, many of the world's biggest firms have been embroiled in legal disputes over corruption charges, financial 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. For legal experts, the trend is noteworthy because of the extraterritorial dimensions of law enforcement, as companies are increasingly held accountable for activities independent of their nationality or the place of the activities. Indeed, the global trend required understanding the evolution of corporate criminal law enforcement in the United States in particular, where authorities have skillfully expanded its effective jurisdiction beyond its territory.

This paper examines the American enforcement of corporate conduct in global markets from a political perspective and studies potential biases. It argues that incentives are stacked against foreign firms, who have less political clout and more partial knowledge of US enforcement practices. At the same time prosecutors are eager to show that they are tough on corporate crime. Analyzing a data set of federal corporate prosecutions, the paper shows that foreign firms are more likely to pay a fine than domestic firms. On average they appear to pay fines that are 6.6 times larger for comparable cases. The data analysis is embedded in a historical analysis of the incentive structure and the evolution of corporate criminal enforcement to give a plausible account of home biases of US law enforcement in global markets.

The paper begins by discussing the tensions US prosecutors face in tackling corporate crime and the history of incremental administrative changes to enforcement practices in section 2. Section 3 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 within legal

scholarship and from the general public. Section 4 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. The conclusion suggests that this bias allows law enforcement to keep up a façade of being tough on corporate criminality, even when numerical trends indicate the contrary.

2. 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."[1] 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.[2]

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 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

[1] United States Sentencing Guidelines, §8, www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8.
[2] 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.

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.[3]

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.[4] This tension explains the general evolution towards negotiated justice and ultimately the home bias in favor of domestic firms.

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. Under the doctrine of *respondeat superior*, latin for "let the master answer", a US company and its executives can be liable for actions of low-level employees. Corporate

[3] 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.

[4] Buell, Samuel W, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (New York, N.Y.: W.W. Norton & Company, 2016).

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.[5] 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.[6] Regulatory agencies will thus work with the Department of Justice to deal with cases that concern criminal offenses.

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.[7] 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

[5] 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.

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

[7] 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).

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.[8] 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."[9]

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.[10] 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 avoid criminal prosecution for wrong-doings committed within their firms, but in exchange prosecutors entered into the boardroom.[11]

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

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[8] 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.

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

[10] 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).

[11] Anthony S. Barkow and Rachel E. Barkow, eds., *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York: NYU Press, 2011).

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.[12] 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," Sally Yates announced. "If a company wants consideration for its cooperation, it must give up the individuals, no matter where they sit within the company."[13] However, the changes appear to have been largely aspirational and did not lead to more charges brought against executives.

Weak enforcement was visible during the Republican administration that took office in 2017.[14] 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 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.[15] In addition, the Department of Justice expanded the possibility to decline charges altogether. Unlike traditional declinations

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[12] 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).

[13] 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.

[14] Brandon L. Garrett, "Declining Corporate Prosecutions," *American Criminal Law Review* 57, no. 1 (2020): 109–55.

[15] Garrett.

issued when incriminating evidence was insufficient, the new declinations tested in foreign bribery enforcement apply to cases which have merits but are not pursued.[16] Even for legal experts, "the line between a non-prosecution agreement and declination can be fine."[17]

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 must 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 to avoid a lengthy trial – are attractive to both parties, when there is little uncertainty about the facts and the outcome. They result in a criminal conviction of the corporation and sentences governed by the Sentencing Guidelines for Organizations adopted in 1991. However, 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.[18]

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 must be

[16] 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/.
[17] Garrett, "Declining Corporate Prosecutions," 119.
[18] 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).

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 non-trial resolution.

Most deferred and non-prosecution agreements go beyond a simple *ex post* sanction for past behavior. According to Anthony and Rachel 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.[19] 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.[20] 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.[21]

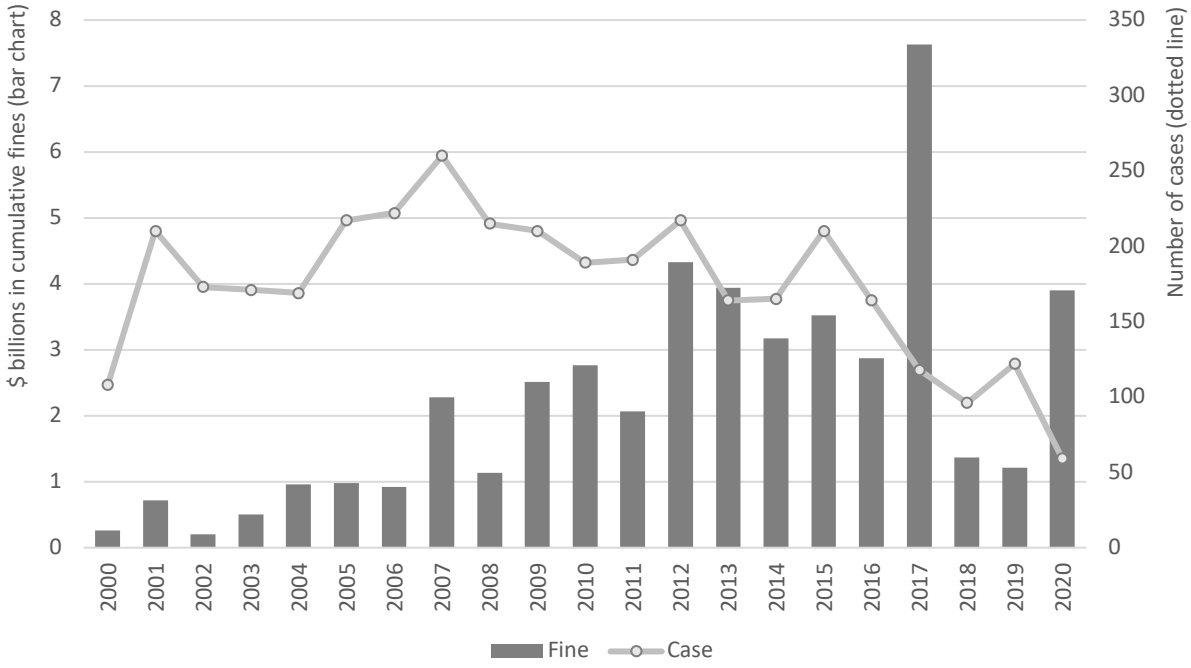
3. Overview and trends

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

[19] Barkow and Barkow, *Prosecutors in the Boardroom*, 3.
[20] 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.
[21] Pierre-Hugues Verdier, *Global Banks on Trial: U.S. Prosecutions and the Remaking of International Finance* (Oxford, New York: Oxford University Press, 2020).

prosecution of individual offenders linked to corporate investigation. Let us consider each in turn.

Figure 1: Total fines and number of cases per year



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

First, the Corporate Prosecution Registry, a data set of corporate prosecutions at the federal level, shows that financial penalties have grown steadily, in particular during the first decade of the 21st century.[22] 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 1, as the total payment may include disgorgement or restitution costs. 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

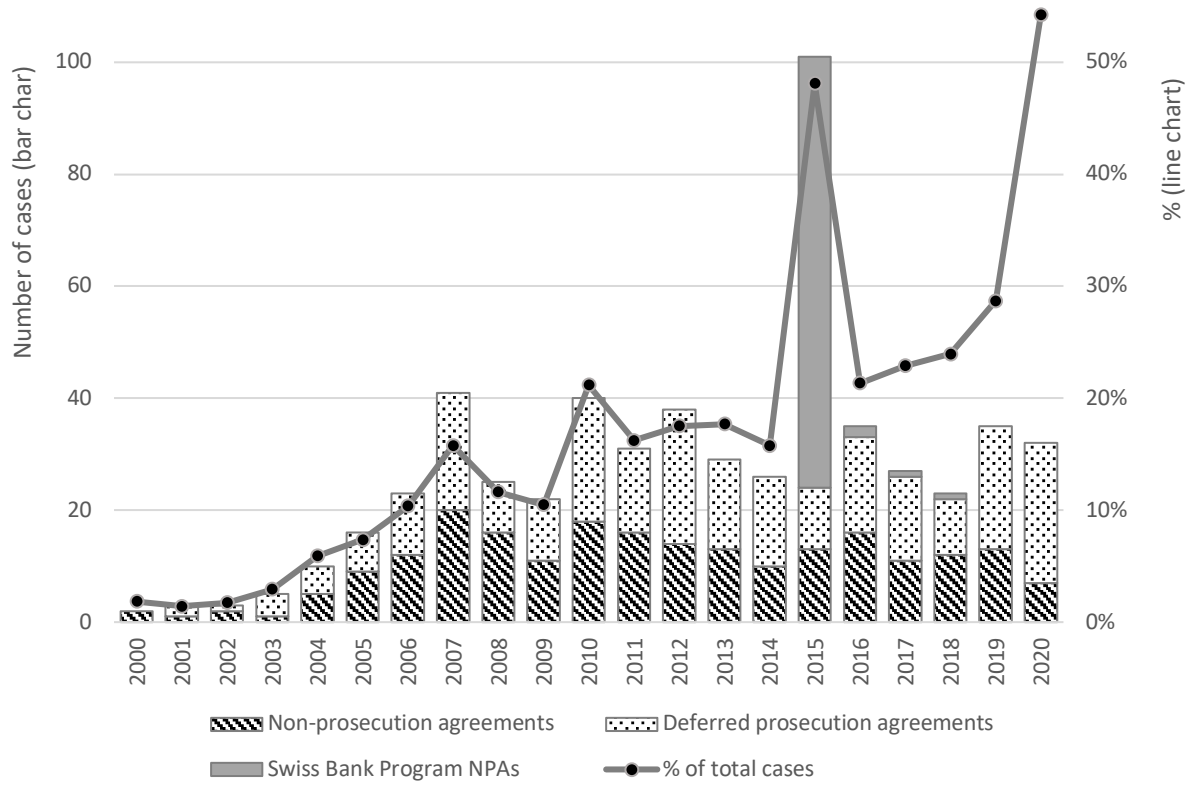
[22] Brandon L. Garrett and Jon Ashley, "Corporate Prosecution Registry," Duke University and University of Virginia School of Law, 2021, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html. For details and discussion of the data used, please refer to the appendix.

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 1.

Comparing this limited overview of corporate criminal fines at the federal level with more comprehensive datasets that include civil regulatory violations at different levels of government confirms a general trend towards rising monetary penalties. With data from all parts 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.[23] 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, this paper will concentrate more narrowly on corporate criminal fines. Still, the overall trend clarifies 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."[24]

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

Figure 2: The rise of deferred and non-prosecution agreements



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

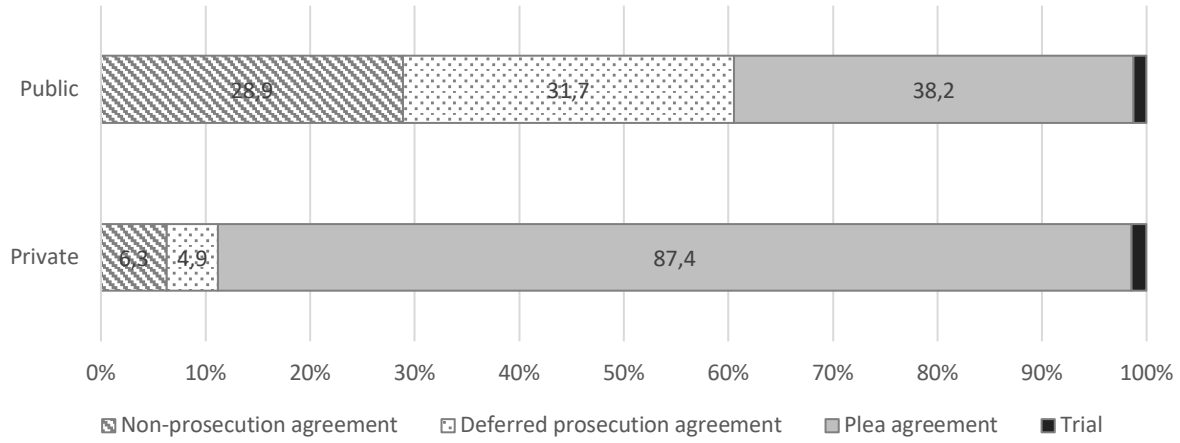
Figure 2 shows the second trend: deferred and non-prosecution agreements become increasingly common after the respective Department of Justice guidelines outlining their use. Barely used prior to 2000, these settlements have risen to between 20 and 40 cases per year, with a peek reached in 2015 through the Swiss Bank Program, which account for 75 non-prosecution agreements in that year alone. The Swiss Bank Program is the bilateral agreement signed between Swiss authorities and the Department of Justice in 2013. Aiming to break the stand-off between the two countries over banking secrecy, it grants leniency to the banks that resolved criminal liabilities related to tax evasion.[25]

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 forms of settlements, negotiated agreements make up 98,7% of corporate

[25] 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.

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 agreement. 60% of the 322 public companies in the data set have done so in the past, compared to only 11% of 3328 privately held companies (figure 3). Inversely, only 38 % of public companies enter into plea agreements, compared to 87% of privately held companies. The new framework for dealing with corporate criminality is clearly geared towards large and complex organizations, as we see by this variation in disposition types.

Figure 3: Variation in dispositions by company type



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

Finally, Garrett's work reveals a third trend: 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.[26] 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

[26] Brandon L. Garrett, "The Corporate Criminal as Scapegoat," *Virginia Law Review* 101, no. 7 (2015): 1804.

prosecutions are steadily declining, hitting an all-time low by the end of 2020.[27] 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."[28] 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.[29]

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.[30] 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 includes an endowed chair on "Corporate Governance

[27] Hurtado, Patricia et al., "Trump Oversees All-Time Low in White Collar Crime Enforcement," *Bloomberg*, August 10, 2020; Jennifer Taub, *Big Dirty Money: The Shocking Injustice and Unseen Costs of White Collar Crime* (New York, N.Y.: Viking, 2020).
[28] Richard A. Epstein, "The Deferred Prosecution Racket," *Wall Street Journal*, November 28, 2006, sec. Opinion.
[29] David Uhlmann, "Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability," *Maryland Law Review* 72, no. 4 (2013): 1302.
[30] Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Cambridge, MA: Harvard University Press, 2014); 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).

& Business Ethics" that Bristol-Myers Squibb agreed to create at Christie's alma mater, Seton Hall University School of Law.[31] 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.[32] 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.[33] 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.[34]

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 must 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.[35] Quite simply put, the

[31] Barkow and Barkow, *Prosecutors in the Boardroom*, 4.
[32] Jake A. Nasar, "In Defense of Deferred Prosecution Agreements," *New York University Journal of Law & Liberty* 11, no. 2 (2017): 869.
[33] Jennifer Arlen, "The Failure Of The Organizational Sentencing Guidelines," *University of Miami Law Review* 66, no. 2 (January 1, 2012): 321–62.
[34] Simultaneously, the US Sentencing Guidelines became advisory rather than mandatory for federal convictions in 2005. See Arlen, 323.
[35] Bruce Green and Ellen Podgor, "Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents," *Boston College Law Review* 54, no. 1 (January 30, 2013): 73.

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.[36]

The effectiveness of the new enforcement regime in ensuring future compliance and improve corporate conduct is also questioned.[37] 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."[38] 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 was literally "deferred" in under 0,6% of all cases.[39] 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

[36] Garrett, "The Corporate Criminal as Scapegoat."
[37] Huw Macartney and Paola Calcagno, "All Bark and No Bite: The Political Economy of Bank Fines in Anglo-America," *Review of International Political Economy* 26, no. 4 (July 4, 2019): 630–65.
[38] 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.
[39] 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/. In late 2021, the US Department of Justice under the Biden administration announced that it was preparing to target companies that had violated the terms of their deferred prosecution agreements with legal action. Stefania Palma, "DoJ Warns of Impending Corporate Crime Crackdown," *Financial Times*, November 10, 2021.

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 result of prosecution in roughly one fourth of the cases studied. However, executive pay did not vary significantly during or in the aftermath of prosecution.[40] 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).[41] 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. The "chickenshit club" was a consequence of the untenable position of 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

[40] 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.

[41] 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.

ultimately meant economic stability. Unfortunately, it may well prove impossible to combine economic and legal objectives into effective corporate criminal enforcement.[42]

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 (1) political accountability, (2) the public interest and (3) career motives. [43]

First, 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.[44] 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.[45] 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.[46] Likewise, US Congress plays an import role in supervising criminal enforcement by controlling appointments and the budget, but also through regular oversight hearings. In addition, Congress can change the appliable law or transfer authority between agencies. Through these mechanisms, prosecutors can be held

[42] 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*, June 4, 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).
[43] 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.
[44] 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.
[45] 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.
[46] 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.

accountable and are likely to adapt to the priorities of the executive or the legislative branch, as one can see from the drop in cases brought under the Trump administration.

Secondly, 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 sentence. 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, 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.

Finally, numerous accounts 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.[47] Since they have to secure political support in order to be nominated in the first place, their career ladder is colored by partisan priorities.[48] 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, and it is likely that they 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 mindful, challenging the powerful, but in ways that have the right political backing. Deferred and non-prosecution agreements helped to solve precisely this

[47] 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.

[48] 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.

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.

In addition, the new settlements also brought significant benefits: the 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.[49]

Illustrative of this development is the 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."[50] 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. Through flexibly negotiated settlements over criminal liability, they moved center stage in

[49] 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.
[50] 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.

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 that are independent from the actual effectiveness of the new policy in fighting corporate crime.

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."[51] 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."[52] One area where this trend is striking is in the systematic home bias of prosecutorial decisions.

4. 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

[51] 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.

[52] 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.[53] He finds on average five to seven times higher fines for foreign companies.[54]

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. The dataset does not include information about assets or revenue of the companies, but it does distinguish between privately held and publicly listed companies, which are far larger.

A regression analysis allows to analyze whether certain types of companies, disposition types of types of crimes were correlated with higher fines and or total payments when controlling for each other. A regression on log fines, like the one Garrett has provided 10 years ago, confirms that foreign companies pay higher fines for comparable crime categories, but the exponential has grown from a magnitude of 7 to 28.[55] Such a massive increase – paying on average 28 times more than a domestic company when most fines are already in the millions – indicates that the analysis might overlook some feature of the data that should be taken into account. Indeed, a striking number of prosecutions result in nominal fines: throughout the entire period 28% of all companies prosecuted paid no fine whatsoever. The following

[53] Brandon L. Garrett, "Globalized Corporate Prosecutions," *Virginia Law Review* 97, no. 8 (January 1, 2011): 1775–1875.
[54] 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.
[55] For details, see appendix.

analysis therefore adopted a two-part model that first tries to explain the probability of paying a fine at all and second to estimate the most likely volume of the fine if there is one.

In the first step, a probit regression estimated the binary result “pay a fine” or “pay no fine”, using as independent variables the company types, the disposition types and the crime categories.[56] The marginal effect of the company types and shows that the probability of getting a fine increases by 14.8% when the company is foreign rather than American. Similarly, public companies are 7.7% more likely to receive a fine.

The second step of the analysis focuses on only the cases where companies have paid a fine in order to estimate how much each factor contributes to the size of the fine. The linear regression on log fines presented in table 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 the lower and upper limit of a 95% confidence interval listed in the last two columns. Even after controlling for the other characteristics, foreign companies receive a fine that is 6.6 times larger than the fines paid by domestic companies. Public companies also pay larger fines, 8.2 times bigger than the ones received by privately held companies. The regression analysis also indicates considerable variation in fines according to crimes committed, with the largest fines in in antitrust cases, securities fraud and kickbacks, but also pharmaceutical fraud and foreign corrupt practices.

The two-part model indicates that foreign and public companies are more likely to pay fines and will received penalties of greater magnitude. We should expect the positive effect for public companies, since they are larger than private companies. As big and complex organizations, they have a greater possibility to commit crimes that affect a large number of victims. But it is not clear why the country of origin should increase chances of receiving a fine, once one controls for all other variables, and why the fine is systematically larger independent of the disposition and the type of crime committed.

[56] A logit and probit regression produced very similar results. Please refer to the appendix for details of the data analysis.

Table 1: Linear Regression on Log Fines (for cases with fines only)

Variable	Coefficient	Standard Error	Exponential (coef)	95% interval	
Type of company					
Foreign	1,89***	0,15	6,61	4,95	8,83
Public	2,11***	0,18	8,22	5,77	11,70
Type of disposition					
DP	Ref.				
NP	-0,87**	0,29	0,42	0,24	0,73
Plea	-2,54***	0,22	0,08	0,05	0,12
Trial	-1,33**	0,49	0,27	0,10	0,69
Type of crime					
Maritime Pollution	1,39***	0,30	4,01	2,25	7,16
Antitrust	3,43***	0,24	30,78	19,32	49,03
Bank Secrecy Act	0,67	0,56	1,96	0,65	5,91
Bribery	1,60**	0,48	4,95	1,91	12,78
Controlled Substances	-0,73	0,39	0,48	0,23	1,04
Environmental	0,86***	0,20	2,36	1,59	3,51
FCPA	1,82***	0,30	6,18	3,43	11,13
FDCA / Pharma	2,24***	0,29	9,43	5,37	16,55
False Statements	0,4	0,27	1,49	0,89	2,51
Food	-0,63*	0,30	0,53	0,30	0,96
Fraud - Accounting	0,74	1,06	2,10	0,26	16,75
Fraud - General	1,08***	0,22	2,96	1,94	4,52
Fraud - Health Care	0,97**	0,37	2,65	1,28	5,48
Fraud - Securities	3,33***	0,73	28,05	6,69	117,52
Fraud - Tax	1,08**	0,34	2,94	1,50	5,78
Gambling	-1,22*	0,59	0,29	0,09	0,94
Immigration	-1,12***	0,29	0,33	0,19	0,58
Import / Export	0,71**	0,27	2,03	1,20	3,44
Kickbacks	2,60***	0,63	13,44	3,88	46,53
Money Laundering	0,09	0,40	1,09	0,49	2,41
Workplace Safety	0,27	0,46	1,31	0,53	3,21
Obstruction of Justice	1,38**	0,52	3,97	1,44	10,96
Other	Ref.				
Wildlife	-0,82**	0,30	0,44	0,25	0,78
Constant	13,33***	0,28			
N			2601		
R^2			0.444		

* p<0.05, ** p<0.01, *** p<0.001

These findings have been checked in multiple ways, by considering total payments rather than fines, examining year-specific effects, comparing the original linear regression with the results of a two-part model and studying the differences between the likelihood to receive a fine at all with the increase in volume of these penalties. All of these checks confirm that foreign

companies receive a fine more frequently and will pay a significantly higher amount when compared to the same types of American companies that are prosecuted for the same crimes and conclude through the same disposition. The two-part model above presents the most conservative estimate, a remarkable magnitude of 6.6 in fine size based solely on the origin of the company.

5. Possible explanations for home bias

This bias does not automatically suggest that foreign firms are subject to outright discrimination, but it calls for an explanation. To begin with, the gap might be due to different behavior of foreign and domestic firms. Indeed, the most obvious explanation might simply be rooted in the extent of the criminal activities: maybe foreign companies are less law abiding and more egregiously in violation of US statutes. Evidence from the systematic bribery networks of companies like Siemens and Alstom or the blatant anti-trust violations of the massive Japan-based auto-parts cartel suggests that certain types of business activities were tolerated to a greater extend abroad. And yet, the hypothesis that American firms have a lower overall level of criminal activity does not sit well with evidence from the Violation Tracker, listing many US companies with several dozen cases of regulatory, civil and criminal violations.[57] It also does not provide a good grasp on differential treatment in sectors where fraudulent activity was rampant throughout, as one may argue with respect to the conduct in the financial industry revealed by the 2008 crisis. In addition, if one suspects systematic violations of US laws to be more common abroad, where companies felt removed from US law enforcement, this trend should get weaker over time, as companies learn about the reach of American prosecutions. Instead, we see the opposite: as mentioned above, in the simple regression analysis that Garrett applied in 2011, the differential on fines has grown fourfold from 7 to 28 over the last ten years.

[57] Good Jobs First, "Violation Tracker."

It could be, however, that 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. In this variation of the original hypothesis about corporate conducts, foreign firms do not have the same experience and information about how to navigate the judicial system to defend their interests well. Although there is anecdotal evidence to suggest that such misjudgments may explain the severity of specific penalties, for example in the case of BNP Paribas,[58] 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. To cite just one example, Volkswagen has signaled in its 2018 annual reports that the legal defense costs during the Dieselgate scandals amounts to over one billion dollars.[59] Such expenditures on legal advice indicate that foreign companies go to considerable length to acquire the knowledge necessary to defend their case.

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 is to ensure effective law enforcement ex post.[60] 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. Moreover,

[58] 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.
[59] 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.
[60] For discussion, see Garrett, "Globalized Corporate Prosecutions."

domestic companies may have greater access to decision-makers to signal issues of concern that can harm their competitors. It is an explicit goal of US law enforcement on economic regulatory statutes to level the playing field and impose the same constraints on foreign companies that apply within the domestic market. How much this ambition shapes the type of information brought to the attention of enforcement agencies has not been systematically analyzed, nor does the data analyzed here include cases not brought or dropped by prosecutors or dismissed by judges.

In sum, available data does not allow to speak of outright discrimination against foreigners, but it does raise important questions about the origins of the observed home bias of US law enforcement. The combination of career motivations of prosecutors and the incentives provided by the political setting seem to facilitate the increasingly extraterritorial ambition of US law enforcement. At the same time, foreign companies do not seem to benefit from the political protection that may shield domestic companies from prosecutorial activism.

6. Conclusion

This paper has shown the rise in financial sanctions for criminal violations and highlights the underlying philosophy the Department of Justice has sought to implement by introduction a more flexible negotiation approach. 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.[61] Negotiated settlements put a veil over the fundamental problems of corporate criminal law enforcement.

[61] Coffee, *Corporate Crime and Punishment*, ix.

Targeting foreign firms may be one way to demonstrate that enforcers can be tough on corporate crime. 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 must 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 in the United States, it is likely that foreign company sanctions will become the fig leaf for an inefficient corporate criminal justice system in the United States.

7. Appendix

The data analysis uses 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.[62] 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. 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.[63] 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.

Accessed at the end of 2020, the original data set from the Corporate Prosecution Registry includes 4338 entries.[64] The analysis 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 was 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

[62] Garrett and Ashley, "Corporate Prosecution Registry."
[63] E.g. Garrett, "Globalized Corporate Prosecutions"; Garrett, *Too Big to Jail*; Garrett, "Declining Corporate Prosecutions."
[64] As the data set is regularly checked updated with additional cases for the most recent period, the precise number of cases may vary, even when extracting the data for the same time period.

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 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.

In an initial attempt to analyze the data set, we reproduced the linear regression on log fines and total payments that Garrett has provided in 2011 on 918 cases and 2014 on a more complete set of 2180 cases.[65] Similar to his findings, we found a substantial multiplicative effect on the size of fines and payments for foreign firms (table 8.4). 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. The results of the linear regressions are presented in table 8.4. and indicate that foreign firms pay fines that are 28 times larger and total payments that are 14 times larger than domestic firms, all else being equal. This is an enormous difference: we are not talking about 28% but 2800%!

Puzzled by the sheer magnitude of this effect, we decided to provide a slightly different analysis. As is visible from table 8.3, a significant number of corporate prosecutions end in no fines or payments: 28% of the whole data set, with a trend that is stable over time. Foreign companies are less likely to receive only nominal fines, which happens in 12% of all cases, against 30% for US companies. It appears worth separating out the probabilities of getting a fine in the first place and then to analyze the effects on the magnitude of the penalties. In order to do so, we adopted a two-part model.

[65] Garrett, "Globalized Corporate Prosecutions," 1812; Garrett, *Too Big to Jail*, 302–3.

Table 2: Linear Regression on log fines vs. total payment

	Fine			Total payment		
	Coefficient	Standard Error	Multiplier Effect	Coefficient	Standard Error	Multiplier Effect
Type of company						
Foreign	3,34***	0,31	28,2	2,64***	0,27	14,0
Public	2,38***	0,37	10,8	2,79***	0,32	16,3
Type of disposition						
DP	Ref.			Ref.		
NP	-2,31***	0,5	0,1	-2,55***	0,43	0,1
Plea	0,26	0,42	1,3	-1,31***	0,36	0,3
Trial	0,61	0,9	1,8	-2,78***	0,77	0,1
Type of crime						
Maritime Pollution	2,98***	0,64	19,7	1,55**	0,55	4,7
Antitrust	4,36***	0,49	78,3	2,90***	0,42	18,2
Bank Secrecy Act	-3,86***	0,81	0,0	0,74	0,7	2,1
Bribery	2,40*	0,98	11,0	1,88*	0,84	6,6
Controlled Substances	-2,85***	0,69	0,1	-3,64***	0,6	0,0
Environmental	2,34***	0,41	10,4	1,09**	0,35	3,0
FCPA	4,37***	0,61	79,0	1,54**	0,53	4,7
FDCA / Pharma	3,60***	0,6	36,6	1,99***	0,52	7,3
False Statements	1,04	0,54	2,8	0,32	0,46	1,4
Food	0,99	0,63	2,7	-0,32	0,54	0,7
Fraud - Accounting	-2,96	1,56	0,1	0,05	1,35	1,1
Fraud - General	-0,6	0,41	0,5	1,30***	0,35	3,7
Fraud - Health Care	-2,26***	0,61	0,1	2,10***	0,53	8,2
Fraud - Securities	-2,71**	0,98	0,1	-1,77*	0,85	0,2
Fraud - Tax	3,50***	0,66	33,1	2,42***	0,57	11,2
Gambling	-2,76**	1,02	0,1	-0,17	0,88	0,8
Immigration	-1,36*	0,55	0,3	-1,85***	0,47	0,2
Import / Export	0,79	0,54	2,2	0	0,46	1,0
Kickbacks	-1,33	1,01	0,3	-2,93***	0,88	0,1
Money Laundering	-3,02***	0,66	0,0	-0,98	0,57	0,4
Workplace Safety	0,91	0,94	2,5	-0,59	0,81	0,6
Obstruction of Justice	2,31*	1,11	10,1	1,92*	0,96	6,8
Other	Ref.	-	-	Ref.	-	-
Wildlife	1,12	0,63	3,1	-0,33	0,54	0,7
Constant	7,40***	0,52	-	11,26***	0,45	-
N		3573			3573	
R^2		0,23			0,17	

The first part of the two-part model uses a probit regression to determine the probability of getting a fine (table 3 below). The interpretation of the coefficients cannot be directly done with those models, but it is possible to calculate the « marginal effects », which indicate how

the point of percentage changes. In the second part of the two-part model we run a linear regression on log fine. The distribution of log fines, i.e. of fines that are actually bigger than zero, follow a reasonably normal distribution. The log regression on these fines is presented below, indicating a multiplier effect of 6.6 for foreign firms and 8.2 for public firms on the amount of the fine.

Comparing the coefficients of the probit and linear regressions of the two-part model allows to check if the probability of receiving a fine and the amount of the fine are determined in similar ways. If both coefficients have the same sign (positive or negative), it suggests that the process of selection (if the case should be punished with an effective fine or not) and the amount of the fine follows the same dynamic. This is the case for foreign companies: they are more likely to get a fine, and when they get a fine, the amount of fine is larger. In the same logic, non-prosecution agreements are less likely than deferred prosecution agreement to have a fine, and when they do, the amount is smaller.

When the signs are opposed, the first and second stages of the analysis can be considered as distinct processes, in ways that would not show up in a linear regression. For example, the plea cases are more likely to result in a fine, but the amount is smaller than deferred prosecution settlements. Securities fraud is less likely to result in a fine compared to other cases, but when it does, the amount of the fine will be significantly larger. This seem to reflect the observation that securities fraud ends in no fine in 70% of all cases in the data set but is the second largest effect after antitrust on fine size above zero.

Overall, the two-part model provides a more accurate picture of the biases revealed in the data set.

Table 3: Linear regression on log fine and two-part model estimating probability (probit) and size of fines (linear regression)

	Linear regression on log fine			Two-part model						
				Probit		Linear regression on log fine				
Variable	Coef.	SE	Multiplier	Coef.	SE	Coef.	SE	Multiplier	95% interval	
Type of company										
Foreign	3,34***	0,31	28,22	0,56***	0,09	1,89***	0,15	6,61	4,95	8,83
Public	2,38***	0,37	10,80	0,27**	0,1	2,11***	0,18	8,22	5,77	11,70
Type of disposition										
DP	Ref.			Ref.		Ref.				
NP	-2,31***	0,5	0,10	-0,36**	0,12	-0,87**	0,29	0,42	0,24	0,73
Plea	0,26	0,42	1,30	0,46***	0,1	-2,54***	0,22	0,08	0,05	0,12
Trial	0,61	0,9	1,84	0,28	0,22	-1,33**	0,49	0,27	0,10	0,69
Type of crime										
Maritime Pollution	2,98***	0,64	19,69	0,90***	0,25	1,39***	0,30	4,01	2,25	7,16
Antitrust	4,36***	0,49	78,26	0,51***	0,13	3,43***	0,24	30,78	19,32	49,03
Bank Secrecy Act	-3,86***	0,81	0,02	-0,86***	0,19	0,67	0,56	1,96	0,65	5,91
Bribery	2,40*	0,98	11,02	0,28	0,25	1,60**	0,48	4,95	1,91	12,78
Controlled Substances	-2,85***	0,69	0,06	-0,54***	0,16	-0,73	0,39	0,48	0,23	1,04
Environmental	2,34***	0,41	10,38	0,52***	0,11	0,86***	0,20	2,36	1,59	3,51
FCPA	4,37***	0,61	79,04	0,65***	0,17	1,82***	0,30	6,18	3,43	11,13
FDCA / Pharma	3,60***	0,6	36,60	0,53**	0,16	2,24***	0,29	9,43	5,37	16,55
False Statements	1,04	0,54	2,83	0,21	0,14	0,4	0,27	1,49	0,89	2,51
Food	0,99	0,63	2,69	0,49**	0,17	-0,63*	0,30	0,53	0,30	0,96
Fraud - Accounting	-2,96	1,56	0,05	-0,65	0,36	0,74	1,06	2,10	0,26	16,75
Fraud - General	-0,6	0,41	0,55	-0,33***	0,1	1,08***	0,22	2,96	1,94	4,52
Fraud - Health Care	-2,26***	0,61	0,10	-0,65***	0,14	0,97**	0,37	2,65	1,28	5,48
Fraud - Securities	-2,71**	0,98	0,07	-0,78**	0,24	3,33***	0,73	28,05	6,69	117,52
Fraud - Tax	3,50***	0,66	33,12	0,50**	0,17	1,08**	0,34	2,94	1,50	5,78
Gambling	-2,76**	1,02	0,06	-0,4	0,24	-1,22*	0,59	0,29	0,09	0,94
Immigration	-1,36*	0,55	0,26	-0,18	0,13	-1,12***	0,29	0,33	0,19	0,58
Import / Export	0,79	0,54	2,20	0,09	0,13	0,71**	0,27	2,03	1,20	3,44
Kickbacks	-1,33	1,01	0,26	-0,49*	0,24	2,60***	0,63	13,44	3,88	46,53
Money Laundering	-3,02***	0,66	0,05	-0,74***	0,15	0,09	0,40	1,09	0,49	2,41
Workplace Safety	0,91	0,94	2,48	0,21	0,24	0,27	0,46	1,31	0,53	3,21
Obstruction of Justice	2,31*	1,11	10,07	0,42	0,32	1,38**	0,52	3,97	1,44	10,96
Other	Ref.			Ref.		Ref.				
Wildlife	1,12	0,63	3,06	0,61***	0,18	-0,82**	0,30	0,44	0,25	0,78
Constant	7,40***	0,52		0,1	0,13	13,33***	0,28			
N		3573			3573			2601		
R^2		0,226			-			0,444		

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