

A MARKETING PITCH FOR CORPORATE CRIMINAL LAW

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ABSTRACT. *Corporate criminal law needs a marketing makeover. In the public relations frenzy that follows a corporate criminal investigation, authorities are outgunned and outmaneuvered. Judging by the pastiche of '90s-era design choices on the website the Department of Justice uses to announce corporate penalties, authorities are either unaware of the importance of marketing or do not care. Prosecutors aren't marketing professionals. Nor, for that matter, are most scholars writing about corporate misconduct.*

Humdrum publicity undermines corporate sanctions and dulls the edge of criminal justice. Criminal dispositions should single out truly contemptible practices from merely sharp, unproductive, or undesirable ones. In this way, criminal law gives victims the recognition they deserve and deters wrongdoers who would preserve their good name. Corporate punishment today falls far short of these communicative ambitions. It is a fleeting affair diluted by civil and administrative alternatives, PR spin, and a frenetic media environment. It can be hard even to identify after the fact who the corporate criminals are. Unsurprisingly, corporations view criminal charges as inconvenient economic uncertainties and criminal sanctions as mere costs of doing business. Public perceptions have largely followed suit.

For punishment to convey its intended message, society must hear it. Some marketing savvy could help. Yet legal scholars working to improve corporate criminal justice (let alone government functionaries enacting it) rarely seek the advice of colleagues in

marketing departments. This Article lays the groundwork for dialogue about how to market corporate criminal law better and thereby make it more effective.

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“But one thing is certain even in the brand advertising context: if the ad is never delivered, there is no way it can be effective.”¹

INTRODUCTION

Can you name ten corporate criminals? Bernie Madoff, Martha Stewart, and Jeff Skilling don’t count. Those are all individuals who worked for businesses, not the businesses themselves. In any case, Bernie Madoff Investment Securities L.L.C. was forced into liquidation rather than conviction;² Martha Stewart committed crimes on her own accounts, not for Martha Stewart Omnimedia Inc.;³ and the Enron Corporation went bankrupt before it could be charged.⁴ So, try again. How about just five? Three?

It’s surprising the task should be so difficult. Corporate crime inflicts twenty times more economic damage each year than every

1. TIM HWANG, *SUBPRIME ATTENTION CRISIS: ADVERTISING AND THE TIME BOMB AT THE HEART OF THE INTERNET* 81 (2020).

2. See Adam Hayes, *Bernie Madoff: Who He Was, How His Ponzi Scheme Worked*, INVESTOPEDIA (Apr. 30, 2021), <https://www.investopedia.com/terms/b/bernard-madoff.asp>.

3. See Jonathan D. Glater, *Stewart Likely to Influence Her Company, Even from Jail*, TUSCALOOSA NEWS (July 17, 2004), tuscaloosanews.com/story/news/2004/07/17/stewart-likely-to-influence-her/27871261007/.

4. See Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (Nov. 26, 2021), <https://www.investopedia.com/updates/enron-scandal-summary/>.

street crime combined.⁵ While corporate criminal law is dramatically underenforced,⁶ brand name corporations do find themselves on the wrong side of the criminal process every year. Their crimes aren't all boring accounting anomalies. They include all the grist of daytime TV drama: homicide, arson, sexual assault, promoting terrorism, peddling narcotics.⁷ Yet most people—including most law students and even many law professors—don't even know that corporate criminal law exists.⁸

One problem, as we have discussed in earlier work, is that corporate criminal sanctions are rarely calibrated to corporate offenses.⁹ Authorities—prosecutors and judges alike—default to a tired narrative in which corporate sanctions must be, first and foremost, financial. But monetary payments are more characteristic of civil damages than criminal punishment.¹⁰ So the public's confusion is understandable. One might at least expect that corporate criminal fines would be especially large. What then are onlookers to make of the fact that the civil monetary consequences of corporate misconduct usually outstrip criminal penalties by a multiple of six?¹¹

This Article draws attention to a different problem: there's no effort to market corporate criminal enforcement. The Department of Justice (“DOJ”) keeps many criminal resolutions secret—only

5. Compare Rodney Huff, Christian Desilets & John Kane, *The 2010 National Public Survey on White Collar Crime* NAT'L WHITE COLLAR CRIME CTR. 12 (2010), <http://www.fraudaid.com/library/2010-national-public-survey-on-white-collar-crime.pdf>, with Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 98 (2010), <https://doi.org/10.1016/j.drugalcdep.2009.12.002>.

6. See generally Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991 (2022) (arguing that corporate criminal law is so underenforced in the United States that it is doubtful the United States could actually claim to have a functioning corporate criminal justice system).

7. *Id.* at 1000–01 (listing examples).

8. *Id.* at 993; Mihailis E. Diamantis, *Corporate Criminal Law Is Different*, Harv. L. Record (Feb. 28, 2022), <https://hlrecord.org/corporate-criminal-law-is-different/>.

9. W. Robert Thomas, *Incapacitating Corporate Criminals*, 72 VAND. L. REV. 905, 946–56 (2019); Mihailis E. Diamantis, *Clockwork Corporations*, 103 IOWA L. REV. 507, 516 (2018).

10. See *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (finding a statute was civil in nature in part because it imposed “[n]o affirmative disability or restraint . . . and certainly nothing approaching the ‘infamous punishment’ of imprisonment. . . .”); W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 413 & nn. 76–80 (2021) (collecting citations).

11. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014).

the prosecutors and the corporate criminals know about them.¹² Of criminal resolutions that see the light of day, a large portion never make it into the public record because prosecutors often conclude their investigations with sterilized agreements akin to civil settlements rather than trial and conviction.¹³ Nearly all the remaining investigations plead out without much fanfare.¹⁴

Even the sliver of corporate criminal cases that go to trial rarely enjoy the media attention that accompanies high-profile prosecutions of individual offenders. Sometimes the DOJ's Office of Public Affairs issues press releases to its website, but their drab presentation and banner ads are more reminiscent of a mid-90s weblog than any modern-era publicity effort.¹⁵ The most reliable resource for finding out about corporate crime is an academic website: the Corporate Prosecution Registry.¹⁶ Its managers cull what information they can find from publicly available resources, doing their best in the face of the DOJ's refusal to respond to freedom-of-information requests.¹⁷ Anyone who accesses the Registry can run search queries and download a CSV spreadsheet, alongside a dictionary of technical codes for deciphering what is first and foremost a repository of information intended for academics, statisticians, and policy wonks.

Contrast this with the glossy brochures, polished statements, and advertising blitz that characterizes a corporate target's spin on the same set of facts.¹⁸ In an average corporation, one out of

12. Kathleen M. Boozang & Simone Handler-Hutchinson, "Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care, 35 AM. J.L. & MED. 89, 118 (2009) ("The DOJ's offices should adopt a consistent unified approach to enhancing transparency in this area, first, by requiring subject companies to prominently post their agreements on their company websites, and second, by requiring that all agreements be posted on the DOJ's criminal website.").

13. See Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 454, 458–59 (2019).

14. See Diamantis & Thomas, *supra* note 6, at 998–99.

15. See, e.g., *Stericycle Agrees to Pay Over \$84 Million in Coordinated Bribery Resolution*, U.S. DEPT OF JUST. (Apr. 20, 2022), <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

16. Brandon L. Garrett & Jon Ashley, *Data & Documents*, CORP. PROSECUTION REGISTRY, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/>.

17. See Justin Wise, *DOJ Withholding Public Records in Violation of FOIA, Says Garrett's Collaborator in Duke-UVA Corporate Prosecution Registry*, DUKE LAW NEWS (Nov. 22, 2021), <https://law.duke.edu/news/doj-withholding-public-records-violation-foia-says-garretts-collaborator-duke-uva-corporate/>.

18. E.g., *Wells Fargo's New CEO: "We Will Get It Done"*, WELLS FARGO (Mar. 1, 2020), <https://stories.wf.com/wells-fargos-new-ceo-will-get-done>; WILLIAM L. BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES: IMAGE REPAIR THEORY AND RESEARCH 50–58 (2d ed. 2014)

every ten dollars goes to marketing.¹⁹ Last year, the DOJ's Criminal Division requested a budget of \$196 million to cover all salaries and expenses.²⁰ In the same year, Walmart alone spent \$3.9 billion (twenty times more) on marketing.²¹ It's no accident that even we—two scholars who research corporate crime full time—remember more clearly that Volkswagen and Boeing initially blamed rogue employees for their crimes than why those stories eventually proved false.

Corporate criminal enforcement needs a marketing makeover. Prosecutors need better marketing chops and legal scholars working on corporate crime need to learn from marketing colleagues in business schools. After more fully characterizing the communicative failures of present-day corporate criminal enforcement (Part I), we show how these failures undermine corporate criminal justice (Part II). Victims go unacknowledged, and corporate crime goes under-deterred. We close by calling for more cross-disciplinary dialogue about how to market corporate crime better (Part III). We identify two mutually reinforcing marketing goals: building public awareness about the corporate criminal justice system generally and improving messaging about specific corporate crimes, criminals, and victims.

I. A FAILURE OF COMMUNICATION

Actions speak louder than words. Anyone interested in government messaging about crime would understandably turn first to how authorities typically treat suspected criminals. For individuals, the criminal justice response sings with loud vitriol. The average sentence for the most common federal drug trafficking offense (meth) is a brutal eight years locked in a 6'x 8' cell.²² By

(evaluating BP's "We Will Make This Right" publicity campaign following the Deepwater Horizon spill).

19. Christine Moorman, *Marketing Budgets Vary by Industry*, WALL ST. J.: CMO TODAY BY DELOITTE (Jan. 24, 2017, 12:01 AM), <https://deloitte.wsj.com/articles/who-has-the-biggest-marketing-budgets-1485234137>.

20. U.S. DEP'T OF JUST., CRIM DIV., PERFORMANCE BUDGET FY 2021 CONGRESSIONAL SUBMISSION 38, <https://www.justice.gov/doj/page/file/1246356/download>.

21. Statista Research Department, *Wal-Mart Stores, Inc Advertising Cost Worldwide in the Fiscal Years 2004 to 2022*, STATISTA (Mar. 25, 2022), <https://www.statista.com/statistics/622029/walmart-ad-spend/>.

22. U.S. SENT'G COMM'N, FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES (Apr. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf.

contrast, corporate criminal resolutions, when they speak at all, whisper with conspiratorial indifference. So, it should come as no surprise that many lay observers don't even realize the criminal law applies to corporations—after all, while corporate criminal law exists on paper, very little of it is ever seen in the real world.²³

A. What Judges Communicate About Corporate Crime

We start with the inadequacy of corporate sentencing to make good on the expressive promise of corporate punishment. Sentencing is the most formal and publicly visible (even if vanishingly rare) resolution of corporate crime. And it is broken, all the way down. One embarrassingly enduring obstacle for advocates of robust corporate criminal enforcement has been to provide a plausible account of what it means to punish a corporation.²⁴ Without a vision of what corporate conviction is for, we can hardly blame prosecutors if they pursue corporate cases with less vigor and negotiate civil resolutions to one-third of corporate criminal investigations.²⁵ There is no consensus about what corporate punishment is for. To deter? To rehabilitate? To incapacitate? To mete out just deserts? There isn't even agreement about whether any of these goals are achievable with respect to corporations in theory or in practice.²⁶

But whatever one thinks corporate punishment should do, an important mechanism through which punishment delivers on its goal is by communicating the state's condemnation of the crime.²⁷ A recurring theme throughout conversations of corporate criminal law is that punishment necessarily expresses something about the

23. It should go without saying—though many have bothered to say it anyway—that the corporate entity cannot itself be put into prison. See Thomas, *supra* note 9, at 909 (collecting citations).

24. Mihailis E Diamantis, *The Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865, 879–81 (2019).

25. See Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 89 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

26. See generally Samuel W. Buell, *Retiring Corporate Retribution*, 83 L. & CONTEMP. PROBS. 25 (2020) (arguing against the possibility of achieving retribution against corporations); Diamantis, *supra* note 9, at 518–27 (arguing against the possibility of deterring corporations through fines).

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

nature of the wrongdoing, the character of the wrongdoer, and the status of the victim.²⁸ That expressive dimension of corporate punishment is often all that sets it apart from civil or regulatory penalties, whose monetary judgments are otherwise indistinguishable.²⁹ Criminal punishment, on this view, is importantly public: it conveys society's condemnation for some types of bad behavior, stigmatizes people who carry out such bad behavior, and reaffirms the value of innocent victims.

Corporate criminal law well misses its defining expressive mark. On paper, the corporate sentences judges have at hand cannot carry the full weight and stigmatic hallmarks of sanctions available in our broader criminal justice system. In practice, the sentences that federal judges impose on corporate criminals lack even the residue of condemnatory force.

Start with the corporate sanctions that judges have available to them. Nearly all corporate sentencing at the federal level reduces to one of two sanctions: a monetary fine or corporate probation.³⁰ Neither of these sanctions is particularly well-suited, even in principle, to carry the expressive weight that theories of punishment expect of them. Fines have long been described as at best expressively ambiguous, just as likely to be interpreted as a means of buying one's way out of the "real" sanction.³¹ And probation, at least conventionally understood in the United States, signals light treatment of the sort reserved for minor, first-time infractions, celebrity criminals, and . . . well, white-collar offenders.³²

But even if the tools of corporate punishment were good on paper, in practice corporate punishment is unbearably light. Fines imposed against criminal corporations are small both in absolute numbers and especially when compared against the corporate

28. W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 398 n.1 (2021) (collecting citations).

29. See generally Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965) (distinguishing penalties from punishments).

30. While other sanctions exist, see e.g., U.S.S.G. § 8C1.1 (divestment of all assets), they are rarely used, GARRETT, *supra* note 11, at 156–57.

31. E.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 147 (2003); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621 (1996); Thomas, *supra* note 28, at 412–15.

32. Chad Flanders, *Shame and the Meaning of Punishment*, 54 CLEV. ST. L. REV. 609, 618 (2006); Thomas, *supra* note 28, at 415–17.

defendants' assets and revenues.³³ The average corporate fine is just 0.04% of market capitalization.³⁴ And this assumes a fine was imposed; approximately 20 percent of convicted businesses receive no fine at all.³⁵

While corporate probation in theory offers judges a legal hook for imposing non-monetary alternatives—the Sentencing Guidelines enumerate several conditions and give a sentencing court “almost endless” discretion to invent new conditions of probation³⁶—this hook has gone mostly unused. Judges impose corporate probation even less frequently than monetary fines.³⁷ Despite the longstanding availability of probation as a tool for implementing governance and compliance reforms, the federal government has only recently shown any serious interest in its ability to reform corrupt organizations.³⁸ Most conditions of probation are simultaneously easy to satisfy and toothless. For just one example, a convicted corporation must promise not to commit any more crimes during its term of probation.³⁹ One might be forgiven for thinking a “promise” not to break the law is superfluous—wasn't the law itself reason enough not to break it?—and yet corporations routinely breach this condition of probation without consequence.⁴⁰ Pacific Gas & Electric (“PG&E”) serves as

33. Dorothy Lund & Natasha Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis*, CLS BLUE SKY BLOG (Mar. 18, 2020), <https://clsbluesky.law.columbia.edu/2020/03/18/the-cost-of-doing-business-corporate-crime-and-punishment-post-crisis/>.

34. GARRETT, *supra* note 11, at 70.

35. U.S. SENT'G COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, (2015), <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table51.pdf>.

36. Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1439 (2009).

37. GARRETT, *supra* note 11, at 164 (“The guidelines have been amended to encourage probation to do more. But these new powers are not commonly used.”).

38. Dylan Tokar, *Revamped DOJ Compliance Unit Takes on Greater Role in Corporate Settlements*, WALL ST. J. (June 22, 2022), https://www.wsj.com/articles/revamped-doj-compliance-unit-takes-on-greater-role-in-corporate-settlements-11655940214?mod=hp_minor_pos12.

39. 18 U.S.C. 3563(a)(1) (2008); U.S.S.G. § 8D.3(a).

40. JOHN C. COFFEE JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 69 (Westchester Publ'g Servs., 2020); GARRETT, *supra* note 11, at 165-68. Indeed, one of the first times that a corporation suffered any consequences for breaching its agreement happened only this year, after prosecutors learned of Deutsche Bank AG's post-DPA misconduct only after reading about it in the Wall Street Journal. Patricia Kowsmann & David Michaels, *Deutsche Bank Violates DOJ Settlement, Agrees to Extend Outside Monitor*, WALL ST. J. (Mar. 11, 2022), <https://www.wsj.com/articles/deutsche-bank-violates-doj-settlement-agrees-to-extend-outside-monitor-11647016959>.

a case study in this trend. Earlier this year, it successfully emerged from five years of federal probation despite, in that interval, pleading guilty to 84 counts of manslaughter and facing ongoing criminal inquiries for two more major fires.⁴¹ In short, neither the law nor the realities of corporate sentencing have shown themselves capable of delivering on the criminal law's distinctly expressive character.

As a fallback, one might be tempted to hope that a judgment of conviction, standing alone, offers enough somber condemnation to make up for what corporate punishment lacks. After all, the very fact that a corporation has been convicted of a crime—as opposed to, say, found liable of a civil breach or regulatory infraction—says something about the seriousness of the misconduct, right?⁴² But while corporate convictions carry condemnatory force, they cannot, standing alone, make up for the expressive inadequacy of corporate sentencing.⁴³ Because first, conviction and sentencing are expressively intertwined; how the state responds to a conviction informs how seriously the rest of society should treat this determination.⁴⁴ Thus, when judges sentence corporations to pittance punishments, they undermine the gravity that conviction might otherwise afford.⁴⁵ Second, and especially relevant here, the bare fact of a legal judgment does not, cannot, speak for itself. Assuming that a conviction can bear at least some of the expressive weight of state punishment, someone needs to carry that message to the public. A legal judgment like a conviction needs to be heard to be believed.

B. What Prosecutors Communicate About Corporate Crime

There is an even more basic problem with hoping that conviction can condemn: it assumes that corporations actually get

41. *California's Embattled Utility Leaves Criminal Probation, But More Charges Loom*, ASSOCIATED PRESS (Jan. 24, 2022), <https://www.npr.org/2022/01/24/1075267222/californias-embattled-utility-leaves-criminal-probation-but-more-charges-loom>.

42. Thomas, *Conventional Problem*, *supra* note 10, at 420 n. 120 (collecting cites).

43. Feinberg, *supra* note 28, at 402; *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U.P.A. L. REV. 1503, 1567–68 (2000).

44. This is not the same as saying that conviction and sentencing are the same; these two moments in the criminal process can be understood to express very different things. *See* Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, at 25–38 (2022).

45. Thomas, *Conventional Problem*, *supra* note 10, at 420–23.

convicted for their wrongdoing. As it turns out, very few business organizations face any kind of criminal process. Corporations rarely encounter the criminal justice system, both in absolute (just .03 percent have felony convictions) and relative terms (individuals are 287 times more likely to have a felony conviction).⁴⁶ Fully one-third of “corporate criminal settlements” involve a disposition that is, ironically, not criminal at all—a civil agreement with prosecutors in exchange for a promise to *avoid* prosecution.⁴⁷ Even those unable to sidestep criminal process entirely still virtually never see a jury, pleading guilty instead of undergoing a trial and conviction (courts decide only around 2 percent of corporate criminal resolutions).⁴⁸

Corporate convictions and prosecution agreements are inconsistently communicated, with sporadic press releases from the DOJ’s Office of Public Affairs substituting for meaningful, consistent disclosure of corporate wrongdoing. Even when authorities uncover misconduct, official records of it can be hard to come by.⁴⁹ The problem is so bad that securities laws have adopted “safe harbor” provisions to protect companies that accidentally, but still illegally, enter certain deals with convicted corporations.⁵⁰

Of course, when the agreements themselves are publicly available (sometimes the DOJ keeps them secret⁵¹), one doesn’t necessarily have to rely on press releases. One can always read the agreements for oneself. Since corporations are very motivated to avoid trial, prosecutors have an opportunity to use the agreements’ ubiquitous statement of facts (all prosecution agreements have a facts section) to shape the narrative of misconduct. What one finds instead is a heavily negotiated, sterile chronology of events, bereft of any tinge of judgment or evaluation. In most cases, even the words “guilt” and “admit” are conspicuously absent. PG&E again serves as telling example. The company recently entered into an agreement with the DOJ to avoid prosecution for two major

46. Diamantis, *supra* note 10, at 510.

47. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

48. Diamantis & Thomas, *supra* note 6, at 998–99.

49. Wise, *supra* note 17.

50. *E.g.*, 17 C.F.R. § 230.506(d)(2)(iv) (2021).

51. Boozang & Handler-Hutchinson, *supra* note 12, at 117–18.

wildfires.⁵² Despite all of its prior criminal history and ongoing criminal investigations for yet other fires, PG&E's most recent prosecution agreement formally acknowledges no wrongdoing.⁵³

Some commentators look at the agreements that prosecutors strike with corporations and see a kind of “game” that’s expressively disconnected from the seriousness of its object.⁵⁴ William Laufer asks “Where Is the Moral Indignation over Corporate Crime?” because he cannot find it.⁵⁵ “In the absence of affective outrage, anger, disapproval, and indignation, government functionaries successfully placate stakeholders with scripted retributive text, and yet leave in place the risk-taking, innovation, and entrepreneurship associated with moving the economy forward.”⁵⁶ In short, if the federal government is trying to communicate something meaningful to the public about corporate criminals and corporate misconduct, it is doing a spectacularly poor job of it.

II. BROKEN MESSAGING UNDERMINES JUSTICE

Marketing matters. Whatever truth there is to actions speaking louder than words, the fact is, the words employed in criminal law speak volumes. The language of criminal justice sets priorities, shapes values, repairs social breaches, and creates shared understanding about who/what is important. These first-order social effects can impact behavior in positive ways, but the current stock-in-trade of DOJ enforcement, i.e., corporate fines and diluted terms of supervision, repeatedly falls short. Messaging around criminal enforcement partially structures the decision space that corporations, managers, and consumers must constantly navigate.⁵⁷ Its impact is palpable and demonstrable. When authorities fail to adequately condemn corporate crime and send muddled messages about its significance, they lose a prime

52. Associated Press, *The Nation's Largest Utility Agrees To Pay More Than \$55 Million for Two Wildfires*, NPR (Apr. 12, 2022), <https://www.npr.org/2022/04/12/1092259419/california-wildfires-pacific-gas-electric-55-million>.

53. *Id.*

54. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 79–80 (2018) [hereinafter *Missing Account*].

55. William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?*, in REGULATING CORPORATE CRIMINAL LIABILITY 19 (Dominik Brodowski et al eds. 2014).

56. Laufer, *Missing Account*, *supra* note 54, at 109–10.

57. *See infra* at note 128 (discussing the impact of 2021’s “Monaco Memo”).

opportunity to check corporate misconduct. Indeed, they may even enable it.

A. A Failure to Condemn or Validate

Criminal law enacts society's most coercive peacetime institution. Life and liberty uniquely and routinely hang in the balance. At its best, criminal law's determinations speak with singular gravitas about our deepest commitments, about what we value, and about what we do not. What criminal law say may sometimes shock us, as when it reveals a dark side of our collective psyche that we had. This power of criminal law is reflected, for better and for worse, in the word it deploys to refer to wrongdoers, about wrongs, and about the wronged.

With respect to wrongdoers, the criminal law licenses a host of deeply stigmatic epithets—"thief," "murderer," "tax cheat," "sex offender"—which function by collapsing an offender's public identity into the fact of his or her conviction. To be sure, these criminal epithets are not the state's exclusive property: these labels are leveled in society broadly, even without a conviction. Even so, their stigma derives in part from a relationship to the criminal justice system—an important reminder of the symbiotic relationship between legal and moral norms.⁵⁸ Indeed, even the more sanitized, technical labels used by the criminal justice system are inescapably condemnatory.⁵⁹ Ostensibly neutral terms like "criminal," "offender," or "felon" never remain truly neutral because the general public is meant to, and usually does, recognize that the preconditions for applying such a label—namely, a criminal conviction—are inherently stigmatizing.⁶⁰

58. Cf. David A. Skeel, *Shaming in Corporate Law*, 149 U.P.A. L. REV. 1811, 1820 (2001) ("Shaming sanctions are so integrally connected to social norms that it is not entirely clear where one leaves off and the other begins."). To that point, the state recognizes some obligation to police usage of the labels it enables. For example, tort law recognizes that it is not just defamatory but defamatory *per se* to say falsely that someone is a criminal. RESTATEMENT (SECOND) OF TORTS § 570 (1977).

59. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 257 (1990) ("When the penal system . . . begins to use a particular vocabulary to describe offenders and to characterize their conduct, such conceptions and vocabularies . . . frequently enter into conventional wisdom and general circulation."). See generally Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 565–66 (2018) (discussing felonry's legal and pejorative meanings).

60. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1373 (2009) ("The word 'criminal' has its distinctive significance, however, because this word means blameworthy.").

But when it comes to labeling corporate criminals, that same stigmatic vocabulary is nowhere to be found. No equivalent words apply to businesses: corporations are neither “killers” when they kill nor “thieves” when they steal. At most, a firm might be called “the next Enron,” suggesting that the worst names we can think of to describe bad corporations are just the names of other bad corporations.⁶¹ The irony here is that corporations would arguably be a better target for these kinds of labels. For individual convicts, our harsh criminal epithets often overshoot the expressive mark. The stigma of conviction can become an unjust and unproductive barrier to eventual social and economic reintegration, even for one-off, out-of-character offenses.⁶² By contrast, corporate criminality routinely arises in circumstances that reflect a real propensity or institutional culture of wrongdoing—in other words, “not just that somebody pursued faulty preferences, but that the group arranged itself badly.”⁶³ Yet for corporate convicts, we don’t even seem to be aiming at expressive goals.

The message of criminal justice is not limited to condemning wrongdoers for condemnation’s sake. It also expresses validation of the victim who has been wronged, of the social norms that have been transgressed, and of our renewed commitment to repairing the social fabric bent by criminal misconduct.⁶⁴ The criminal justice system provides victims with a public forum to demand acknowledgment of their injury, and to reassert their status and dignity. Validation here is inextricably tied to condemnation. A victim of a crime is not similarly situated to a victim of an earthquake, tornado, or act of God; though both are harmed, only

61. E.g., Ryan Browne, *‘The Enron of Germany’: Wirecard Scandal Casts a Shadow on Corporate Governance*, CNBC (June 29, 2020, 5:22 AM), <https://www.cnbc.com/2020/06/29/enron-of-germany-wirecard-scandal-casts-a-shadow-on-governance.html>.

62. See Lynn S. Branham, *Eradicating the Label “Offender” from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53, 55–56, 59 (2019); John Braithwaite, *Shame and Criminal Justice*, 42 CAN. J. CRIMINOLOGY 281, 284–91 (2000).

63. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 502 (2006).

64. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 842 (2000) (“[T]he commission of an act the community, through its laws, deems wrong should be met with disapprobation for the sake of the victim and the sake of the community.”); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009) (“As an expression of the community’s moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents. . . .”). See generally Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).

the former was wronged.⁶⁵ A criminal trial provides the possibility of a public accounting, conviction reaffirms the community's support for victims, and sentencing makes further space for communal repair. These practices, as with so many elements of the criminal justice system, can be abused and even be abusive. Nonetheless, the importance of victim recognition in criminal law is exemplified by the recent, high-profile prosecution of Jeffrey Epstein, who unexpectedly died just before his trial could commence.⁶⁶ Ordinarily, this would have required immediate dismissal of all charges. However, the presiding judge provided first Epstein's victims an opportunity to testify in open court about their experiences. He reasoned that doing so was necessary to fulfill "the court's responsibility . . . to ensure that the victims in this case are treated fairly and with dignity."⁶⁷

Governmental silence in the face of corporate criminality further wrongs its victims. By choosing to prosecute cases sparingly, the government invites the message that corporations are above the law—that the harms befalling victims are more akin to unfortunate acts of God than to decisions of corporate neglect, indifference, or greed.⁶⁸ These are some of the invisible victims of a criminal justice system that simultaneously punishes black and brown offenders too harshly, white-collar criminals too softly, and corporate criminals virtually not at all.⁶⁹

Even those cases brought to some form of resolution too often undermine, rather than vindicate, victims' interests in the criminal justice system. Consider the DOJ's deferred prosecution

65. T.M. Scanlon, *Punishment and the Rule of Law*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 219, 231 (2003) (tying the need to "affirm a victim's sense of being wronged" to the function of punishment to "condemn the agent who inflicted the wrong"); see also R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 132 (2003). See generally Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS 1* (Wesley Cragg ed., 1992).

66. For discussion see Mihailis E. Diamantis, *Invisible Victims*, 2022 *Wis. L. Rev.* 1, 26–29.

67. Ali Watkins, *Jeffrey Epstein's Victims, Denied a Trial, Vent Their Fury: 'He Is a Coward'*, *N.Y. TIMES*, (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/nyregion/jeffrey-epstein-hearing-victims.html>.

68. Buell, *supra* note 63, at 495–96 (noting that individual employee's "crimes often benefit organizations and are committed for that reason"). The perception of equal treatment under the law has motivated corporate criminal liability since its inception. W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 *FLA. ST. U. L. REV.* 479, 534–36 (2017).

69. Diamantis, *Invisible Victims*, *supra* note 66; Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 *Hastings L.J.* 1, 51 (2012); William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 *AM. CRIM. L. REV.* 155, at 191–93 (2021).

agreement with Boeing over the airline manufacturer's role in creating defective and dangerous planes, including those that caused the fatal crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302.⁷⁰ Families of the deceased lambasted the deal, which they didn't know was being negotiated. They argued that the federal government had traded a financial pittance in exchange for inoculating Boeing forever from any charges in the wrongful deaths of 346 people.⁷¹ Humiliatingly, federal prosecutors were thereby forced to explain in open court that the families had not been consulted because, according to the DOJ's determination, the passengers killed were not victims of any federal crime.⁷² Instead, the real victims were commercial airlines that bought defective Boeing planes. Whether prosecutors were accurate in their narrow assessment of federal law⁷³—a contestable assumption, given the steady criticism that prosecutors have faced for being overly reluctant to pursue white-collar charges⁷⁴—is almost beside the immediate point, which is that the current approach to corporate criminal law carries real, immediate consequences. What the criminal justice system does matters in large part because of what those actions say about society's commitment to the victims through its condemnation of the wrongdoers. When it comes to corporate crime, the criminal justice system is mostly silent.

70. Press Release, U.S. DEP'T OF JUST., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay Over \$2.5 Billion (Jan. 7, 2021), <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion>.

71. Niral Chokshi, *Families of Boeing Crash Victims Say the U.S. Failed to Consult Them*, N.Y. TIMES, (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/business/boeing-crash-victim-families.html>; see John C. Coffee, *Nosedive: Boeing and the Corruption of the Deferred Prosecution Agreement*, HARV. L. SCH. FORUM ON CORP. GOV. (May 25, 2022) <https://corpgov.law.harvard.edu/2022/05/25/nosedive-boeing-and-the-corruption-of-the-deferred-prosecution-agreement/>.

72. Michael Laris, *Those Killed in 737 Max Crashes Aren't 'Crime Victims,' Justice Says*, WASH. POST, (May 4, 2022), <https://www.washingtonpost.com/transportation/2022/05/04/boeing-737-max-crime-victims/>.

73. Indeed, a federal court has ruled that it was not accurate. David Shepardson, *U.S. Judge: Passengers in Fatal Boeing 737 MAX Crashers Are 'Crime Victims'*, Reuters (Oct. 21, 2022), <https://www.reuters.com/world/us/us-judge-passengers-fatal-boeing-737-max-crashes-crime-victims-2022-10-21/>.

74. See JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017); Jed. S. Rakoff, *Getting Away with Murder*, N.Y. REV. (Dec. 3, 2020) (reviewing JOHN C. COFFEE JR., *CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT* (2020)), <https://www.nybooks.com/articles/2020/12/03/getting-away-murder-executive-prosecution/>.

Perhaps this moralized account of criminal law reads as too rosy, too naive. After all, the content of any message that criminal punishment is understood to convey is “shaped in large part by the perceived legitimacy of the criminal justice system.”⁷⁵ And recent years have begun to surface for a broader public the pervasive and systematic racial, ethnic, and class injustices that criminal justice activists and scholars have long decried as rampant within our existing criminal institutions. Criminal punishment, on this view, sends a dark, unflattering “message about who is in control and about who gets controlled.”⁷⁶ But even on this view, the silence around corporate crime is deafening. What clearer message about control could be sent than by an ostensible institution of criminal law that settles one-third of its cases through private agreements between the government and companies the government resolves not to prosecute?

B. Undermining Deterrence

Hard-nosed economists may dismiss the fact that poor marketing in corporate criminal law enforcement fails to validate victims and condemn corporate wrong. These soft values may seem disconnected from the world of business and personal incentives that are supposed to drive—and are supposedly key to preventing—corporate misconduct. While we think it is morally objectionable to focus exclusively on dollars and cents in criminal justice, we agree with the broader point that prevention should be a lodestar of corporate criminal enforcement policy.

Recent advances in behavioral and organizational psychology demonstrate how short-sighted the dollars-and-cents perspective is, even from an economic perspective.⁷⁷ People (both natural and legal) are not just sophisticated, profit-maximizing totalizers. For better or worse (we think better), non-financial considerations also influence people’s decisions. That vector of influence is where

75. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 *BUFF. CRIM. L. REV.* 145, 169 (2001); see also ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 18–20 (1993).

76. Harcourt, *supra* note 75, at 168.

77. See Jennifer Arlen & Lewis A. Kornhauser, *Battle for our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct* (forthcoming 2023); Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics*, in *THE ENCYCLOPEDIA OF LAW AND ECONOMICS* (Geritt de Geest, ed., 2009).

effective marketing in criminal law could shape behavior. While some have lamented “the ineffectiveness of the criminal stigma as a deterrent to corporate activities,” that state of affairs is far from inevitable.⁷⁸

The textbook economic account of how criminal sanctions are supposed to deter corporate misconduct fails on multiple fronts. It maintains that the threat of a criminal fine increases the expected costs of breaking the law, which in turn incentivizes corporations to behave.⁷⁹ The trouble is this: a fine sufficient to counteract the short-term economic gains from many corporate crimes would have to be so large that no politically savvy prosecutor could pursue it⁸⁰ and no corporation would be able to pay it.⁸¹ To complicate matters further, the textbook economic account fails to acknowledge conflicting incentives inherent in the corporate structure.⁸² While corporate shareholders ultimately bear the cost of any corporate fine, corporate managers decide how a corporation behaves.⁸³ So corporate fines fail to incentivize the right parties. Available empirical data seem to validate this reasoning—they show that larger corporate fines do not induce better corporate behavior.⁸⁴

78. John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 602–03 (1982).

79. See, e.g., Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1496 (1996). (“A corporation exposed to liability internalizes the costs of harm and provides incentives for its managers to avoid harm. Because the cost of harm is internalized, the costs of production will reflect the true economic costs and the level of production will approach the optimal level.”); see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

80. See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 956 (2009) (“Although corporate entities are technically criminally liable for nearly all of their employees’ misconduct, the government has learned not to formally prosecute these entities due to the steep collateral consequences of indictment.”).

81. See John C. Coffee, Jr., “No Soul to Damn and No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 390–93 (1981).

82. Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & PUB. POL’Y 1, 14 (2010).

83. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009) (“This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too.”). *But see* W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601, 645 (2017) (“[T]he state’s blind eye towards the influence of corporate law means that it sabotages its own attempt to punish corporations with criminal fines . . .”).

84. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 11, 24 (Anthony S. Barkow & Rachel E. Barkow eds.,

Despite the shortcomings of the textbook economic account, criminal enforcement *does* seem to deter corporate misconduct. As many examples bear witness—whether it is a firm like BP’s chronic workplace safety violations,⁸⁵ or an industry, like those impacted by DOJ’s Swiss Bank Program—criminal enforcement can influence corporate behavior for the better, even where repeated civil enforcement has fallen short. Paradoxically, criminal law has this impact even though criminal financial penalties are usually just a fraction of what total civil penalties are.

These real-world results beg the question: If not stiffer penalties, what explains criminal law’s deterrent power? Modern behavior economics offers an answer that resonates well with long-standing philosophical perspectives on the nature of criminal law. The bottom line is that people care about more than money. They care about how other people see them and about how they see themselves.⁸⁶ They care about their standing in society and their good name. In an economic sense, these values may not seem meaningfully different from money: they are all sources of personal utility. But there is a sense in which values like social standing reflect a fundamental break with a dollars-and-cents perspective on the world.⁸⁷ Its accounting logic is different because social standing is, unlike money, inherently personal and nonfungible. Two people cannot ordinarily exchange social standing. Nor can one person collect another’s social standing and thereby have twice as much. Social standing is not commensurable with money in any meaningful sense. While money can help to influence people’s perceptions, one cannot buy a good name.

Social and moral values matter for corporate behavior because they motivate the employees and managers who act for the corporation. People are inclined to make choices that help them preserve a positive image in their own and others’ eyes. This observation should be uncontroversial. It’s not that moral and social values always trump financial reward in rational people’s

2011) (“There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect . . .”).

85. See generally W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It’s Too Narrow*, 51 ARIZ. ST. L.J. 505 (2021) (discussing BP example throughout).

86. See Arlen & Kornhauser, *supra* note 77, at 17 (“Criminal law can deter by establishing or enhancing norms because, as previously discussed, people are averse to considering themselves, and being perceived by others, as immoral.”).

87. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 144 (1989).

motivational calculus. It's just that, all else equal, normally socialized people tend to avoid choices that would bring them into disrepute.⁸⁸ According to some (probably inarticulable) equation, most people would forgo some financial opportunity to preserve their good name. There are probably also some fundamental moral and social values that most of us would prioritize over any financial opportunity, no matter how lucrative.

In the corporate context, it is not only the moral and social standing of individual employees that enters the motivational calculus. The corporation's status matters too. This is because the individuals who compose the organization sympathetically identify with it.⁸⁹ They feel the organization's shame in some measure as their own and take pride in its collective successes and good name.⁹⁰ This can move individuals, and by extension the organization itself, to care about how the organization behaves.

Despite its undersized monetary penalties, criminal law may be able to influence corporate behavior because of its awesome power to shape corporate social and moral standing. Researchers established long ago that criminal law has more going for it than just the threat of sanction.⁹¹ People largely perceive criminal law to be an authoritative and legitimate reflection of what matters most socially and morally. As a result, people tend to conform to its prescriptions beyond what a purely egotistical cost-benefit calculus would predict.⁹² This empirical data fits well with leading legal theory, which identifies criminal law as being uniquely positioned (among legal institutions) to condemn wrongdoing.⁹³ Criminal law's public expressive force—to say who and what violates our most basic shared understandings—distinguishes it

88. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 371 (1999) (noting that dispute “destroys an asset that the fine cannot destroy—the offender’s reputation”).

89. Buell, *supra* note 63, at 491 (“[T]he criminal process can impose a unique form of reputational sanction, the effects of which flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors towards compliance.”).

90. BRAITHWAITE, *supra* note 87, at 126, 141–44.

91. MINN. HOUSE RSCH. DEP'T, DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE: A PRIMER 1, 2 (2019).

92. PAUL ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 176, 184–186, 188 (2013) (“[T]he criminal law’s moral credibility is essential to effective crime control . . .”).

93. See Hart, *supra* note 27, at 404 and accompanying notes.

from civil law and may explain why criminal law can deter misconduct even where civil law falls short.⁹⁴

When prosecutors and agencies ignore basic marketing principles, they undermine the deterrent impact of the public expressive act inherent in corporate criminal enforcement. Effective messaging and value projection are core competencies of marketing professionals.⁹⁵ That is, of course, why corporations invest so heavily in their marketing departments.⁹⁶ They aim to shape a positive public corporate image. Criminal acts stand as contradictions to this positive image. But criminal acts will only affect public perception if the government effectively communicates about their incidence and moral significance. That is where marketing insights can help.

Corporations want to avoid bad press just as much as they want good press. Part of what motivates them are sales. Generally speaking, good publicity increases sales and bad publicity decreases them.⁹⁷ Other scholars have observed that the reputational impact of a criminal conviction can depress corporate share value and consumer confidence.⁹⁸ But, as discussed above, psychological, identity-based motivations of the employees and managers are a powerful, non-financial driver too. Indeed, even when it comes to positive marketing, sales can't explain the full extent of investment in public image either. Data reveals that more than 80 percent of brands over-invest in TV advertising (as

94. We regard it as a separate question whether criminal law's expressive force can deter all by itself or whether it must be supplemented by material sanctions (like fines or jail time). Cf. Arlen & Kornhauser, *supra* note 77, at 19. For present purposes, we only need the weaker claim—that criminal law's expressive force enhances criminal law's existing deterrent effect.

95. Lynne Golodner, *The Message Matters*, FORBES (Dec. 23, 2020, 7:40 AM), <https://www.forbes.com/sites/forbesagencycouncil/2020/12/23/the-message-matters/?sh=5dcf8ef13b36>.

96. As Brent Fisse long ago noted, "the very history of modern corporate public relations began when government criticism and the assaults of Upton Sinclair and other muck rakers provoked response." Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U.L. REV. 107, 133 (1971).

97. At least, this is true for established brands. For unknown brands, negative publicity may sometimes increase sales by boosting public awareness. Jonah Berger, et al., *Positive Effects of Negative Publicity: When Negative Reviews Increase Sales*, 29 MKTG. SCI. 815 (2010). The cited study focused on the impact of positive and negative critic reviews; it's no clear whether the counterintuitive result generalizes to the bad publicity inherent in criminal conviction.

98. Khanna, *supra* note 79, at 1500–08.

measured by return on investment).⁹⁹ Even when it comes to more cutting-edge online advertising, there is “surprisingly ambiguous empirical evidence that these ads do anything at all.”¹⁰⁰ So, firms’ behavior reveals a concern over positive publicity that outstrips purely sales-based considerations. It stands to reason the same concern extends to negative publicity of the sort inherent in criminal convictions. In the hands of the public entities charged with investigating and judging corporate crime, marketing could be a powerful tool for tapping into this concern and influencing corporate behavior.

The time is ripe for courts and prosecutors to act. In the coming years, marketing principles will likely become even more effective tools for corporate deterrence. The oldest members of Gen Z turn twenty-five this year. They are beginning to discover their purchasing power, choose employers, and decide where to invest. Corporate values matter to Gen Z at each juncture. As consumers, “the core of Gen Z is the idea of manifesting individual identity. Consumption . . . [is] a means of self-expression.”¹⁰¹ Consequently, Gen Z consumers seek out corporations that they perceive to be an ideological fit. They “increasingly expect brands to ‘take a stand.’ . . . About 80 percent refuse to buy goods from companies involved in scandals.”¹⁰² As employees, Gen Z care about integrity.¹⁰³ They want to work for firms that share their ideological aspirations, even when doing so means taking a lower wage. As investors, every indication is that Gen Z will double-down on the present movement toward ESG-informed allocations of capital.¹⁰⁴ In a near future, where corporate values and identity

99. Bradley Shapiro, et al., *TV Advertising Effectiveness and Profitability: Generalizable Results from 288 Brands*, 89 *ECONOMETRICA* 1855 (2021).

100. HWANG, *supra* note 1, at 79.

101. Tracy Francis & Fernanda Hoefel, *True Gen’: Generation Z and Its Implications for Companies*, MCKINSEY & COMPANY (Nov. 12, 2018),

<https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-gen-generation-z-and-its-implications-for-companies>.

102. *Id.*

103. Ashley Stahl, *How Gen-Z is Bringing a Fresh Perspective to the World of Work*, *FORBES* (May 4, 2021, 9:00 AM), <https://www.forbes.com/sites/ashleystahl/2021/05/04/how-gen-z-is-bringing-a-fresh-perspective-to-the-world-of-work/> (“Gen-Z’s expectations in the workplace are values-driven and aligned with their personal morals.”).

104. *Majority of Generation Z Investors Identify Green and Sustainable Investing as the Biggest Trend of 2021*, *BLOOMBERG* (Feb. 3, 2021), <https://www.bloomberg.com/company/press/majority-of-generation-z-investors-identify-green-and-sustainable-investing-as-the-biggest-trend-of-2021/> (“For the majority of Generation Z students polled, ‘companies with a purpose’ is a key driver for their investment decisions and many are investing ‘for a better tomorrow.’”); David Webber et

are expected to shape every major aspect of corporate operations—from sales, to hiring, to funding—the expressive power of criminal law would be a powerful deterrent, if only corporate enforcers would seize it.

III. A MARKETING 101 PLAN FOR CORPORATE CRIMINAL LAW

As we've shown, corporate enforcement has a marketing problem. Its many failures of communication undermine the most basic moral and preventive aspirations of corporate criminal law. This is an unforced error that some creative thinking and attention to marketing basics could begin to remedy, without even requiring much additional expense. In closing, we spell out a skeletal plan for the DOJ to consider—Marketing 101 for corporate criminal law, if you will.

The obvious place to start is the fundamental four pillars of marketing: product, price, place, and promotion. These “4Ps,” referred to collectively as the “marketing mix,” provide a conceptual framework that has had a dominating influence on marketing theory and practice since being coined in the 1960s.¹⁰⁵ Closer attention to each suggests, if not an answer for how to improve the status quo, then at least a roadmap for future exploration and integration with existing best practices.

Product. “The product variable of the marketing mix deals with researching customers’ needs and wants and designing a product [or service, or idea] that satisfies them.”¹⁰⁶ Courts and prosecutors need to think more creatively about the product on offer—namely, corporate sanctions. At present, the criminal

al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1250 (2020) (“To win the millennial generation, index funds have turned their attention not simply to share price—the conventional marker of shareholder value—but to the social issues that millennial investors care about: shareholder values.”).

105. See Efthymios Constantinides, *The Marketing Mix Revisited: Towards the 21st Century Marketing*, 22 J. MKTG. MGMT. 407, 407–09 (2006) (tracing the marketing mix’s historical development); see also Chai Lee Goi, *A Review of Marketing Mix: 4Ps or More?*, 1 INT’L J. MKTG. STUD. 2, 2–3 (2009) (collecting citations). Of course, many scholars have argued that “the traditional ‘marketing mix’ concept and the notion of the ‘4 Ps’ of marketing . . . may not fully describe modern marketing programs.” KEVIN LANER KELLER, *STRATEGIC BRAND MANAGEMENT* 187 (3rd ed. 2008). But our point is that the federal government needs to start somewhere.

106. WILLIAM M. PRIDE & O.C. FERRELL, *FOUNDATIONS OF MARKETING* §1-2a (9th ed. 2022).

penalties that corporations face are indistinguishable from civil remedies available to regulators, civil enforcers, and private plaintiffs. Some scholars see promise in this approach,¹⁰⁷ while others see the potential for abuse.¹⁰⁸ We see a body of law that offers a familiar product in an already saturated market.

Criminal law is an opportunity for public authorities to offer a novel product that caters to an as-yet unserved social and economic need. Criminal justice occupies a unique social and legal position. It speaks with singular authority and licenses otherwise forbidden government responses. Applied to individuals, criminal law offers a unique suite of sanctions that reflect and augment the social and moral significance of conviction. Prosecutors and judges should consider the demand that only corporate criminal law can fill, and to tailor corporate sanctions to cater to it. In so doing, they would hopefully uncover corporate criminal law's distinctive communicative power and develop marketing-inspired punishments to amplify it. Corporate criminal law should look, sound, and feel more like *criminal* law.

Price. “The price charged for a product helps establish its value.”¹⁰⁹ Of the 4Ps, price may seem an awkward fit for strategizing about how to improve corporate criminal law. While there isn't a capitalistic market of exchange for corporate sanctions in any familiar sense,¹¹⁰ corporate sanctions do require public funding. The more the government pays, the more corporate misconduct it can detect, investigate, prosecute, and punish. Like pricing in a capitalist market, expenditures on enforcement send a signal about the value authorities place on corporate justice.

By this measure of value, we have long known that the government has a long way to go. Prosecutors pursue just the smallest fraction of corporate misconduct,¹¹¹ yet the effort strains their relatively meager resources. The fact is, the DOJ's inflation-

107. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 953 (2007).

108. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reform*, in PROSECUTORS IN THE BOARDROOM 62, 65 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011).

109. WILLIAM M. PRIDE & O.C. FERRELL, FOUNDATIONS OF MARKETING §1-2b (9th ed. 2022).

110. Market exchanges aren't entirely unfamiliar to discussions of corporate crime. In the context of, Andrew Jennings has introduced the concept of a market for corporate criminals. Andrew Jennings, *The Market for Corporate Criminals*, 40 YALE J. REGUL. (forthcoming 2023).

111. Diamantis & Laufer, *supra* note 13, at 454.

adjusted discretionary budget has been *declining* for years.¹¹² Even when serious violations come to light, authorities find themselves hobbled.¹¹³ Because they don't have the manpower to look into the crime themselves, they ask corporate suspects to investigate themselves.¹¹⁴ Prosecutors can't dedicate the time for trial, so they resolve cases through civil diversion.¹¹⁵ They can't afford to sanction corporations properly either. Rather than force criminal corporations to reform, prosecutors have them hire their own private overseers.¹¹⁶ Even the task of collecting fines sometimes seems a step beyond what the DOJ can manage.¹¹⁷

Clearly, allocating additional public dollars to corporate enforcement would improve things, but the most important initial public investment wouldn't be financial at all. Indeed, as John Braithwaite has argued, purely economic thinking can be counterproductive for corporate criminal law.¹¹⁸ Legislators may be to blame for underfunding, but prosecutors have only themselves to blame for their apparent unwillingness to invest their own moral capital. Corporate resolutions have become transactional affairs communicated in careful, sterilized language.¹¹⁹ Contrast this with the indignation and full-throated condemnation that often accompanies enforcement against individual offenders. Until prosecutors are willing to publicly put

112. U.S. DEP'T OF JUST., FY 2022 BUDGET SUMMARY (2022), <https://www.justice.gov/jmd/page/file/1398931/download>.

113. The picture is complex. Lack of funding is actually just one of many reasons DOJ seems unwilling to meaningfully pursue cases against corporations.

114. This is a long-standing trend. Alec Koch, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 349 (1997) ("[C]orporate self-investigation has become the norm.").

115. Editorial Board, *The Case of the Missing White-Collar Criminal*, BLOOMBERG VIEW (June 22, 2014), <https://www.bloomberg.com/view/articles/2014-06-22/the-case-of-the-missing-white-collar-criminal> [<https://perma.cc/9QP4-B7F6>] ("Prosecutors with limited resources, no matter how dedicated to justice they may be, can't ignore the attractions of such negotiated settlements.").

116. See Mihailis E. Diamantis, *Monitorships: An Academic Perspective*, in GLOBAL INVESTIGATIONS REVIEW – GUIDE TO MONITORSHIPS 91, 101–02 (Anthony S. Barkow et al. eds., 3d ed. 2019).

117. Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 454 (2011) ("[T]he available data shows a massive gap between penalties imposed 'on the books' and penalties collected in reality.").

118. BRAITHWAITE, *supra* note 87, at 141–42 (1989) (arguing that an adopting "overly economically rational conception of the corporation" is self-defeating with respect to designing corporate punishment).

119. See generally Laufer, *Missing Account*, *supra* note 54.

their moral authority behind their pursuit of corporate criminals, the whole corporate criminal justice system will remain underpriced and undervalued.

Place. Place refers primarily to the channels through “which firms distribute their products to consumers.”¹²⁰ Private firms have the option to distribute their products and services through direct channels—that is, directly from the firm itself to the market—or alternatively through indirect channels provided by intermediaries. Punishment, by contrast, cannot be similarly outsourced; when it comes to criminal punishment, only the state can deliver the goods. What should the government do instead? For starters, both judges and the DOJ should take better advantage of the channels they control. Even the limited channels available to the government today could be better used.

Most fundamentally, the courtroom itself is the clearest channel through which the state publicizes and promotes its judgments. As decades of TV dramas have made apparent, the judicial bench can be a source of solemn drama. Even if the role of courts is currently limited in the status quo, courts should take seriously the dignified power of their courtroom to draw attention to corporate wrongdoing.¹²¹ One notable recent example occurred when PG&E pleaded guilty in California state court to 84 counts of manslaughter for causing the 2017 Camp Fire.¹²² In accepting this pre-negotiated plea deal, the presiding judge required that PG&E’s CEO attend and participate in the plea colloquy by admitting the company’s guilt individually to each of the 84 manslaughter charges, during which the court read out each victim’s name.¹²³ This solemnizing process brought weight and traction to a process that today too often resembles a bureaucratic signing of forms. To the extent that plea agreements remain common currency within corporate sentencing, judges should

120. KELLER, *supra* note 105, at 219; *see also* PHILIP KOTLER & KEVIN LANE KELLER, *MARKETING MANAGEMENT* 794 (15th ed. 2016) (defining a marketing channel as “a set of interdependent organizations involved in the process of making a product of service available for use of consumption”).

121. Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 961–63 (1998).

122. Michael Liedtke, *PG&E Confesses to Killing 84 People in 2018 California Fire*, ASSOCIATED PRESS (June 16, 2020), <https://apnews.com/article/bill-johnson-fires-us-news-courts-paradise-67810cb4d9b6b90e451415b76215d6c9>.

123. *Id.* While PG&E was a state criminal case, a similar power already exists in the Sentencing Guidelines. U.S. SENT’G GUIDELINES MANUAL § 8C2.5 cmt. 15 (U.S. SENT’G COMM’N 2021). *See generally* Barnard, *supra* note 121.

recognize and take seriously the performative dimension of their position.

With respect to the executive branch, and as noted in Part II, the DOJ's Office of Public Affairs only sporadically publicizes criminal resolutions on a website that appears to have missed the late-90s Internet revolution. Long ago, John Coffee complained that the federal government "has trouble being persuasive; rarely is it pithy; never can it speak in the catchy slogans with which Madison Avenue mesmerizes us."¹²⁴ But the problem is not purely about presentation; it is also about message. Prosecutors should not be content to issue—or have issued in their name—sanitized expressions of gratitude towards corporate offenders at the end of a corporate prosecution.

At the very least, corporate criminal settlements should not be kept a secret. Federal judges, former prosecutors, and scholars of all stripes have all raised concerns about the DOJ's use of prosecution agreements. Even Congress has recently entered the fray, ordering the DOJ to provide an annual report on recent prosecution agreements.¹²⁵ Despite its growing reliance on prosecution agreements as an alternative to criminal prosecution, the DOJ continues to provide halting, incomplete information about its practices. Organizations like the Corporate Prosecution Registry provide a laudable service by trying to fill this information gap.¹²⁶ But it should not be the responsibility of a handful of private citizens to pester the government into providing basic, complete, and accurate information about the ways in which the DOJ prosecutes—or, more to the point, excuses from prosecution—crime in corporate America. If the DOJ is committed to strengthening its response to corporate misconduct, an important first step would be to shine more light on the use of prosecution agreements. As a starting point, the DOJ should release detailed information about its existing agreements. Going forward, it should commit to making this information available, in a timely manner, without insisting on lengthy petition processes

124. Coffee, *supra* note 81, at 425.

125. Elkan Abramowitz & Jonathan Sack, *Congress Requires DOJ to Report on Deferred Prosecution Agreements*, N.Y. L.J. (July 8, 2021), <https://www.law.com/newyorklawjournal/2021/07/08/congress-requires-doj-to-report-on-deferred-prosecution-agreements/>.

126. Brandon L. Garrett & Jon Ashley, *Data & Documents, Corp. Prosecution Registry*, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/>.

and litigations. And as to the legislative branch, Congress should insist that any reports the DOJ prepares on prosecution agreements are comprehensive, expeditious, and publicly available. These commitments to transparency would represent an important, and long-overdue, step in strengthening the federal government's response to corporate crime.

Promotion. The final category is the most flexible and comprehensive, bringing together all that has been discussed in this Article. Promotion, or marketing communications generally, concerns how the government “attempt[s] to inform, persuade and remind consumers—directly or indirectly—about” the product being offered.¹²⁷ As the prior sections make clear, the federal government's marketing communications are intermittent, outdated, and generally unimpressive. Much of our complaint with the current state of corporate punishment goes deeper than just merely lackluster public relations; part of the failure here is that the government is not taking seriously its obligation to impose sanctions that rise to the level of the misconduct being sanctioned. That said, even taken at face value the sanctions already in place, the federal government could be doing significantly more with the sanctions already in place to move the needle.

Government speech doesn't necessarily have to be flashy in order to be effective; sometimes, what matters most is just that the government has decided to speak in the first place. Worth at least qualified praise in this respect are recent efforts by key leaders in the DOJ—first Deputy Attorney General Lisa Monaco, later Attorney General Merrick Garland¹²⁸—to signal publicly intentions to pursue corporate wrongdoing more aggressively than the prior administration.¹²⁹ These comments made national news, and have since been promulgated and amplified by legal and compliance professionals who have a vested interest in keeping

127. KELLER, *supra* note 105, at 218; accord WILLIAM M. PRIDE & O.C. FERRELL, FOUNDATIONS OF MARKETING §1-2d (9th ed. 2022) (“The promotion variable relates to activities used to inform and persuade to create a desired response. Promotion can increase public awareness of the organization and of new or existing products.”).

128. Lisa O. Monaco, Deputy Att’y Gen., Keynote Address at American Bar Association’s 36th National Institute on White Collar Crime (Oct. 28, 2021); Merrick B. Garland, Att’y Gen., Delivers Remarks to the American Bar Association Institute on White Collar Crime (Mar. 3, 2022).

129. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 153–55 (2020) (cataloguing a steep decline in enforcement during the Trump Administration).

their corporate clients apprised of pending risks.¹³⁰ And most importantly, there are preliminary, if tepid, indications that the DOJ is taking action to back up its words.¹³¹

John Coffee may have been correct that public officials struggle to match the rhetorical talents of marketing professionals.¹³² While there is certainly low-hanging fruit to be gathered, the government will always be outgunned in this respect when it comes to resources and talent. But why try to beat them, when you can join them—or rather, they can join you? In the same way that courts and prosecutors have increasingly employed compliance and governance experts to assist in evaluating, monitoring, and implementing said reforms, it is time to look to marketing professionals to assist in marking corporate criminal enforcement.

IV. CONCLUSION

Main Justice is not Madison Avenue, and it shouldn't be. All the same, the government should not squander its limited opportunity for attention by neglecting as an afterthought the publicity of successful criminal resolutions. The proposals here are gestural. Executing any of them would require much more careful consideration of institutional landscapes and consultation with stakeholders. Some may confront insurmountable structural barriers or resource constraints. Our goal is not to prescribe any particular course of action (at least not yet). Rather, we hope to open channels of communication between corporate enforcers and marketing professionals, between corporate scholars and marketing departments. A more effectively marketed corporate criminal law—one that informs the public of its presence, openly

130. *E.g.*, Chris Prentice, *U.S. Justice Dept. Toughens on Corporate Crime, Will Pursue More Individuals*, REUTERS (Oct. 28, 2021, 1:32 PM) <https://www.reuters.com/world/us/us-justice-dept-toughens-policies-toward-white-collar-crime-2021-10-28/>; Stephanie Yonekura & Rupinder Garcha, *DOJ Enforcement in 2020: What the Monaco Memo and US Anti-Corruption Strategy Forecast for the Year Ahead*, CORP. COMPLIANCE INSIGHTS (Jan. 20, 2022), <https://www.corporatecomplianceinsights.com/doj-enforcement-2022-monaco-memo-anti-corruption/>.

131. William Burck et al., *Predictions That the Biden Administration Would Increase Enforcement and Regulatory Actions Proven Accurate; More to Come*, JD SUPRA (July 14, 2022), <https://www.jdsupra.com/legalnews/predictions-that-the-biden-1587836/>.

132. *See, e.g.*, Olivier Serrat, *Marketing in the Public Sector*, KNOWLEDGE SOLS. (Asian Dev. Bank), Jan. 2010, at 4 (discussing challenges in using marketing in the public sector).

affirms victims, and publicly condemns corporate malefactors—may finally stand a chance of achieving its moral and preventive ambitions.