

**CORPORATE CRIME AND CORPORATE
BANKRUPTCY**

ALEXANDER GOUZOULES*

ABSTRACT

Mass-tort bankruptcies often arise from underlying criminal conduct, yet organizational criminal charges are pursued inconsistently. In some high-profile Chapter 11 reorganizations, such as that of Purdue Pharma, prosecutors intervened decisively, using the leverage of enormous criminal-restitution liability to shape bankruptcy proceedings. In other cases, including those against several non-profit organizations facing abuse scandals, organizational charges were not pursued. When they choose to intervene, prosecutors exercise extraordinary influence over corporate reorganization, in part because many aspects of criminal law sit outside the centralizing machinery that bankruptcy uses to coordinate creditors.

At times, prosecutors' discretionary intervention may advance legitimate aims, such as preventing corporate recidivism and mandating reform. But it may also siphon value away from victim-creditors and exacerbate tension between state and federal authorities. Moreover, recent history, including formal demands made of major law firms and informal political pressure exerted on companies during merger review, suggests that executive branch discretion can be leveraged to extract inappropriate concessions from private actors. That risk is especially acute in the Chapter 11 context, where prosecutors can play the role of a holdout creditor and virtually everything related to corporate governance and structure is subject to negotiation.

Bridging scholarship in bankruptcy and criminal law, this Article diagnoses a growing problem in an undertheorized area. It reviews the historical development of these areas of law, analyzes areas of doctrinal

* Associate Professor of Law at the University of Missouri School of Law. The author greatly appreciates the opportunity to present this Article at the 2025 Chicago-Wharton-Harvard Insolvency & Restructuring Conference and the 2025 BYU/University of Chicago Winter Bankruptcy Conference. The author gratefully acknowledges feedback from Jared Ellias, Michael Francus, David Gamage, Brook Gotberg, Christopher Hampson, Eric Hintz, and Thom Lambert. Helpful research assistance was provided by Brynna Smith.

overlap and conflict, and suggests solutions. By situating organizational prosecution within the broader phenomenon of social debt bankruptcy, this Article seeks to incorporate the distributive and procedural aims of Chapter 11 into discussions of criminal law.

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INTRODUCTION

Firms that injure the public on an immense scale increasingly turn to the bankruptcy system to resolve their resulting liability.¹ Bankruptcy's rise as a system for mass-tort resolution has generated controversy and significant scholarly discussion.² But although these cases have come to be known as "mass-tort bankruptcies,"³ that shorthand risks obscuring the important and underexamined role played by criminal charges against Chapter 11 debtors.

When an insolvent business reorganizes in bankruptcy, prosecutors can leverage criminal liability to influence plan provisions and regulate the reorganized debtor.⁴ Because criminal law is exempt from many centralizing aspects of bankruptcy, such as the automatic stay, prosecutors' bargaining power over insolvent corporate debtors is especially significant.⁵ For example, in the bankruptcy of Purdue Pharma, the debtor entity owed billions of dollars in fines and criminal forfeiture awards to the Department of Justice.⁶ These claims allowed prosecutors to act as a kind of holdout creditor, ultimately dictating the contours of the firm's reorganization.⁷

In contrast, in other mass-tort cases involving equally significant malfeasance, charges against the debtor are absent and prosecutors remain aloof. For example, in the bankruptcies of multiple Catholic dioceses,

1. See, e.g., Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1161 (2022) (discussing "bankruptcy as a common endgame for mass-tort cases"); Yair Listokin & Kenneth Ayotte, *Protecting Future Claimants in Mass Tort Bankruptcies*, 98 NW. U. L. REV. 1435, 1436 (2004).

2. Compare Anthony J. Casey & Joshua C. Macey, Essay, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 974–77 (2023) (arguing that Chapter 11 is an effective and appropriate system for resolving mass torts), with Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. F. 525, 525–27 (2024) (arguing that the bankruptcy system fails to vindicate procedural rights to the extent of traditional litigation), and Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1263–67 (2023) (noting the lost ability of victims to participate in litigation when mass torts are resolved through the bankruptcy system).

3. E.g., *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 227 (2024) (Kavanaugh, J., dissenting).

4. See Transcript of Confirmation Hearing at 8:8–9, *In re FTX Trading, Ltd.*, No. 22-11068 (Bankr. D. Del. Oct. 7, 2024) (noting that debtor's cooperation with DOJ's goals prevented indictment); Yesha Yadav & Robert J. Stark, *The Bankruptcy Court as Crypto Market Regulator*, 96 S. CAL. L. REV. 1479, 1479 (2024) (arguing that FTX and similar cases resulted in bankruptcy courts "being drafted into this kind of quasi-regulatory service").

5. See Jared A. Elias & George Triantis, *Government Activism in Bankruptcy*, 37 EMORY BANKR. DEVS. J. 509, 515–16 (2021) (examining aspects of bankruptcy that can impede civil regulatory bodies from leveraging bankruptcy to achieve policy goals).

6. See Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1111–12 (2022).

7. See Jonathan C. Lipson, "Special": *Remedial Schemes in Mass Tort Bankruptcies*, 101 TEX. L. REV. 1773, 1790–91 (2023) (noting that "a troubling settlement with the United States Department of Justice . . . foreclosed" the possibility of converting the reorganization into a Chapter 7 liquidation).

triggered by clergy sexual abuse scandals,⁸ organizational charges were not brought against debtor entities.⁹ Neither was the debtor indicted during the reorganization of the Boy Scouts of America or USA Gymnastics, both also arising from pervasive sexual abuse.¹⁰

Organizational criminal liability thus plays an important but sporadic and unpredictable role in “social debt”¹¹ bankruptcy. But as Ralph Brubaker acknowledged in another context, “insolvency of the corporation, in particular, is the point at which theories of effective ‘corporate’ punishment tend to break down.”¹² Organizational prosecution during Chapter 11 may have unanticipated results, such as reducing compensation for victims by adding additional claimants and administrative expenses or by diminishing a debtor’s going-concern value through the imposition of expressive punishment.¹³

This Article centers the important and understudied interactions between organizational prosecution and Chapter 11 reorganization, arguing that an entity’s criminal liability is more than merely an additional complication in bankruptcies driven by tort claims. It shows how prosecutors can operate as super-creditors with leverage that other claimants lack, and neither bankruptcy nor criminal law adequately constrains that power. It also highlights the lack of any systematic theory as to when prosecutors should (or should not) charge insolvent entities that have petitioned for Chapter 11 relief. In advancing these claims, this Article examines how the corporate bankruptcy and criminal justice systems work together—and how important their complicated relationship truly is.

These analyses build upon and interface with several important areas of scholarship. Within the criminal law literature, scholars continue to debate the theoretical justifications for, and practical implications of, the

8. See, e.g., Laura N. Coordes, *Bankruptcy Overload*, 57 GA. L. REV. 1133, 1171–75 (2023) (describing cases).

9. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 56 (2006); John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. REV. 1061, 1065 (2003).

10. See Simon, *supra* note 1, at 1195–1200 (discussing cases).

11. The term was coined by Jonathan Lipson. See Jonathan C. Lipson, *The Rule of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41, 43 (2023) [hereinafter Lipson, *The Rule of the Deal*]; Jonathan C. Lipson, Response, *First in Time; First Is Right: Comments on Levitin’s Poison Pill*, 101 TEX. L. REV. ONLINE 33 (2022) [hereinafter Lipson, *First in Time; First Is Right*]. I use it in this piece in part because the dominant “mass tort” label does not fully convey the occasional importance of criminal charges.

12. Ralph Brubaker, *Taking Exception to the New Corporate Discharge Exceptions*, 13 AM. BANKR. INST. L. REV. 757, 768 (2005).

13. See Lipson, *supra* note 7, at 1790–91.

prosecution of abstract corporate entities.¹⁴ This Article thus contributes to these discussions, which have rarely focused on specific dynamics of insolvency.

Meanwhile, bankruptcy scholars such as Nicole Langston and Abbye Atkinson have produced insightful analyses of the relationship between criminal law and bankruptcy law, focusing primarily on individual rather than organizational prosecution.¹⁵ And Melissa Jacoby has inspired a broader re-examination of bankruptcy's differential treatment of businesses and individual debtors.¹⁶ This work extends and bridges those efforts by examining how bankruptcy's treatment of organizational criminal conduct differs from its treatment of criminal conduct by individuals.

Other leading bankruptcy scholars—notably Jonathan Lipson and Adam Levitin—have analyzed the importance of criminal charges in specific public-harm bankruptcies such as Purdue Pharma.¹⁷ Most theoretical work on mass-tort bankruptcy, however, has focused on civil liability.¹⁸ One foundational work that contributes to this Article's analysis is Jared Ellias and George Triantis's *Government Activism in Bankruptcy*, which explained how regulators exercise leverage to achieve policy goals in the bankruptcy context.¹⁹ By analyzing the special bargaining power of prosecutors with a focus on unique features of criminal law, this Article seeks to connect and extend these ongoing and important conversations.

Before beginning, a roadmap. Part One charts and compares the historical development of both corporate prosecution and Chapter 11.²⁰ It argues that modern corporate criminal liability is the product of two phases of expansion. First, criminal doctrine gradually expanded throughout the

14. See, e.g., V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479 (1996) (“[C]orporate criminal liability should be replaced with a corporate liability strategy that achieves deterrence at lower cost.”).

15. See, e.g., Nicole Langston, *Discharging Government Debt*, 78 VAND. L. REV. 73, 105 (2025); Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 930–57 (2017).

16. See MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 4–11 (2024); Melissa B. Jacoby, *Fake and Real People in Bankruptcy*, 39 EMORY BANKR. DEVS. J. 497, 503 (2023).

17. See Lipson, *supra* note 7, at 1788–91; Lipson, *First in Time; First Is Right*, *supra* note 11; Levitin, *supra* note 6, at 1082.

18. See, e.g., William Organek, *Mass Tort Bankruptcy Goes Public*, 77 VAND. L. REV. 723 (2024); Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1761–63 (2023); Ellias & Triantis, *supra* note 5; Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 368 (1994).

19. See Ellias & Triantis, *supra* note 5, at 545–49.

20. An initial terminological clarification: This Article generally uses “Chapter 11” to refer to bankruptcy reorganization of business entities, notwithstanding the fact that Chapter 11 is also occasionally used by exceptional individual debtors. It also generally uses “corporate crime” to refer to organizational charges against business entities, notwithstanding the fact that such charges can also be brought against alternative business forms such as LLCs or partnerships.

twentieth century to allow for vicarious criminal liability, but actual prosecution was severely limited by punishment schemes designed around individuals rather than large-scale business entities.

The second phase of expansion, beginning in the late 1980s and taking effect in the 1990s, involved sentencing reforms that authorized punishments suitable for large firms. Because the Bankruptcy Code was drafted before the second phase, in an era where corporate criminal liability was generally insignificant to large firms, Chapter 11's structure does not fully anticipate the power of modern prosecutors wielding entity charges. Consequently, there are few checks on a prosecutor's ability to wield prosecutorial discretion to influence bankruptcy outcomes.

Part Two explores entity charges in the modern bankruptcy context. It introduces three significant corporate reorganizations in which federal prosecutors played various roles: FTX, General Motors, and Purdue Pharma. It then explores non-profit bankruptcies arising from criminal activity in which organizational charges were absent: the Catholic dioceses cases, USA Gymnastics, and the Boy Scouts of America. While the exercise of prosecutorial discretion in any particular case may be understandable and expected, the overall picture is an arbitrary one, with the role of criminal charges in the social debt bankruptcy cases ranging from non-existent to decisive.

Part Three then situates the interactions between Chapter 11 and organizational prosecution within bankruptcy and criminal law doctrine and theory. It notes three priorities shared by both bodies of law: victim compensation, the protection of innocent employees, and respect for principles of federalism. These interests are accommodated in both bankruptcy and criminal practice, but those accommodations can be undermined when Chapter 11 debtors face criminal charges. Part Three thus calls attention to the special challenges of advancing criminal law and bankruptcy goals simultaneously.

Part Four assesses these interactions. It first notes that prosecutorial intervention can be seen through the lens of the "traditionalist" school of bankruptcy scholarship, which has long advocated for the advancement of the public interest through corporate bankruptcy. Cases like *GM* and *Purdue* demonstrate that prosecutors may deploy their bargaining power in Chapter 11 cases to further the public-policy goals of the executive branch. But this Part also warns that the use of the bankruptcy forum to extract additional

concessions from debtor firms is politically sensitive²¹ and potentially open to abuse.²²

Finally, the Article concludes with some suggested reforms. It argues that both bankruptcy judges supervising Chapter 11 cases and district judges supervising criminal proceedings should be vigilant against the potential use of the bankruptcy forum to extract inappropriate political concessions from insolvent firms. It also suggests that the Department of Justice's Justice Manual be amended to provide guidance on charging decisions that is attuned to the special context of insolvency. The Article then closes with brief observations and conclusions.

I. THE HISTORICAL DEVELOPMENT OF CORPORATE PROSECUTION AND CHAPTER 11

Real or potential criminal charges against debtor entities have played a role in some of the most noteworthy bankruptcy cases of the last two decades.²³ Yet much of the Bankruptcy Code's treatment of criminal law is targeted toward individuals,²⁴ and the Code says surprisingly little about organizational culpability. This Part argues that the timing of historical developments accounts for this partial silence.

Critically, the modern law of corporate crime developed in two phases—first, formal doctrinal expansion in the early and mid-twentieth century; and second, sentencing reform that made corporate charges attractive to prosecutors, which took effect in the 1990s.

The Bankruptcy Code was primarily drafted before the second phase, during an era when large corporate prosecutions were insignificant. A few provisions that address the relationship between a corporate discharge and entity culpability were later added on an ad hoc basis. These have been criticized as largely unprincipled and leave key questions unanswered.

21. See Elias & Triantis, *supra* note 5, at 545–49 (examining potential hazards of government activism in bankruptcy).

22. See Christopher D. Hampson & Elise Bernlohr Maizel, *Ethics & Independence in Trump's War on Big Law*, 16 CALIF. L. REV. ONLINE 69, 71 (2025) (examining capacious executive branch demands on private entities); *United States v. Adams*, 777 F. Supp. 3d 185, 192 (S.D.N.Y. 2025) (“Everything here smacks of a bargain: dismissal of the Indictment in exchange for immigration policy concessions.”).

23. See, e.g., *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024); Transcript of Confirmation Hearing, *supra* note 4, at 8:8–9 (noting that debtor's cooperation with DOJ's goals prevented indictment); *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 165 (2d Cir. 2016); *Enron Corp. v. California ex rel. Lockyer (In re Enron Corp.)*, 314 B.R. 524, 530 (Bankr. S.D.N.Y. 2004).

24. See, e.g., 11 U.S.C. § 523(a) (providing that penal debt is nondischargeable in individual cases).

Accordingly, the Bankruptcy Code does not fully account for the relationship between prosecution and Chapter 11 reorganization.

A. The First Phase of Entity Culpability: Doctrinal Expansion

Before the turn of the twentieth century, many formal impediments barred the imposition of criminal liability on corporations. Principals were never held vicariously guilty of crimes committed by agents, and foundational concepts such as *mens rea* and the privilege against self-incrimination assumed a human defendant.²⁵ The classic law of corporations also hindered corporate prosecution, as strict application of the *ultra vires* doctrine held that any individual's violation of positive law was, necessarily, not an act of their corporate principal.²⁶ Rather than face accountability through criminal prosecution, corporations that exhibited significant malfeasance were subject to *quo warranto* dissolution by the chartering state's attorney general.²⁷

Thus, in the nineteenth century, corporations were held criminally liable only for public nuisance cases involving the omission of legal duties owed by the entity.²⁸ Human agents were guilty of their own crimes—but such guilt was not imputed to corporate entities even when the culpable conduct was undertaken for a corporation's benefit.²⁹

The increasing social and economic importance of large corporations, and especially railroad firms, ultimately spurred doctrinal evolution within criminal law (much as it inspired the equitable receiverships that were the antecedents of modern corporate reorganizations).³⁰ The close of the nineteenth and turn of the twentieth century saw the expansion of

25. See Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 525 (2016) (analyzing departure from certain Fifth Amendment rights in the corporate context); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 592–601 (2005) (analyzing departure from *mens rea* and vicarious liability principles in the corporate context).

26. See, e.g., Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. REV. 2011, 2024 (2019) (“Under the *ultra vires* doctrine, the law once held that employees are not parts of their corporate employer anytime they do something not authorized in the corporate charter.”); see also W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479, 509–10 (2018); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 352 (2003).

27. See William W. Bratton & Adam J. Levitin, *A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets*, 2020 U. ILL. L. REV. 47, 77.

28. See Khanna, *supra* note 14, at 1480–84.

29. See *id.*

30. See Mark F. Kightlinger, *Nihilism with a Happy Ending? The Interstate Commerce Commission and the Emergence of the Post-Enlightenment Paradigm*, 113 PENN ST. L. REV. 113, 151–52 (2008); DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 48–70 (2001); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1487–91 (1989).

administrative regulation, as government sought to manage such firms' place in the national economy.³¹ But legislatures also turned to criminal law to achieve economic goals, enacting regulatory statutes that included criminal penalties, like the Sherman Act (antitrust, 1890) and the Elkins Act (railroad rate neutrality, 1903).³²

Both laws imposed potential criminal liability on corporate defendants as well as individuals,³³ and courts accommodated these legislative innovations by modifying or expanding criminal doctrine.³⁴ In a 1906 habeas case arising from a Sherman Act prosecution, the Supreme Court held that a corporation lacked the Fifth Amendment privilege against self-incrimination.³⁵ Then, in 1909, the Court upheld a corporation's conviction for an Elkins Act violation, reasoning that a legislature could properly impose potential criminal liability on corporations to advance the public interest.³⁶

Criminal penalties in these regulatory statutes did not, in and of themselves, require wholesale dismantling of traditional limitations. Antitrust and rate regulation were *malum prohibitum* regulatory offenses that did not require a guilty mind.³⁷ In principle, they could be analogized to the old public nuisance cases traditionally brought against corporations, which required neither mens rea nor vicarious liability.³⁸

But judicial decisions nevertheless led to more expansive entity liability. Most significantly, in *New York Central & Hudson River Railroad Co. v. United States*, the Supreme Court reasoned that the respondeat superior doctrine—previously a creature of tort law—can result in a principal's

31. See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1599 (2018) ("Congress established the Interstate Commerce Commission, created by the Interstate Commerce Act of 1887 to regulate the railroads and to facilitate public engagement in that regulation.").

32. See Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1422–26 (2009).

33. Sections 1 and 3 of the Sherman Act mandated criminal penalties for "every person" in violation of the act, and Section 8 specified that the term "person" would include corporations and associations. Sherman Antitrust Act, ch. 647, §§ 1, 3, 8, 26 Stat. 209, 209–10 (1890).

34. See N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

35. Hale v. Henkel, 201 U.S. 43, 74–75 (1906).

36. N.Y. Cent., 212 U.S. at 495 (noting that the Interstate Commerce Commission faced difficulty in enforcing bans on impermissible railroad rebates and concessions, leading to the passage of the Elkins Act, which made "corporations criminally liable").

37. See United States v. Atchison, Topeka & Santa Fe Ry. Co., 725 F.2d 469, 470 (9th Cir. 1980) ("It is clear that the Elkins Act created a *malum prohibitum* rather than a *malum in se* offense."); Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) ("[A]ntitrust has no moral content . . ."). But see Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 444 ("[T]here is no consensus on the morality of antitrust offenses.").

38. See Atchison, 725 F.2d at 470 ("Proof of evil intent is not an element of a charge under the Elkins Act.").

criminal liability when agents commit crimes within the scope of their employment.³⁹

Most entity prosecutions of the early and middle twentieth century continued to involve *malum prohibitum* regulatory offenses.⁴⁰ But the respondeat superior doctrine expanded an entity's potential criminal liability to more capacious *malum in se* offenses, such as wire fraud or obstruction of justice, that require criminal intent.⁴¹

Today, at least in theory, a business entity may be criminally liable for any and all wrongs committed by its agents, with the possible exception of inherently individual crimes such as bigamy.⁴² Though the respondeat superior doctrine is formally bounded by its requirement that agents' wrongful acts fall within their scope of employment, tort cases demonstrate that, in the wrong circumstances, virtually any offense can be imputed to an organizational principal.⁴³

Later doctrinal expansion related to the life cycle of a corporate entity. Under the common-law doctrine of abatement, the death of a natural person before the conclusion of direct appeals terminates criminal liability, even after a guilty verdict.⁴⁴ Some early decisions followed the same approach

39. *N.Y. Cent.*, 212 U.S. at 494 ("Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting . . .").

40. *See id.* at 495 (upholding corporate criminal liability for Elkins Act violation); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1002 (9th Cir. 1972) (same for Sherman Act); *United States v. Bank of New Eng., N.A.*, 821 F.2d 844, 847 (1st Cir. 1987) (same for Currency Transaction Reporting Act).

41. *See* Stacey Neumann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459, 463–64 (2004).

42. *See* Khanna, *supra* note 14, at 1484 (noting that courts are "willing to hold corporations criminally liable for almost all wrongs except rape, murder, bigamy, and other crimes of malicious intent"); *id.* at 1484 n.37 ("Once society is willing to accept vicarious liability and to impute agents' acts to the corporation, the corporation should in theory be capable of 'committing' rape or murder."); *see also* David Arkush & Donald Braman, *Climate Homicide: Prosecuting Big Oil for Climate Deaths*, 48 HARV. ENV'T L. REV. 45 (2024) (arguing for corporate homicide prosecutions arising from contributions to climate change); Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL'Y REV. 339, 340 (2012) (arguing that corporations may be held liable for crimes under international law, such as crimes against humanity). A crime might be inherently individual if it is not possible for an employee to commit it for the benefit of an employer, broadly defined. *Cf.* Khanna, *supra* note 14, at 1484 n.37.

43. *See* *Lyon v. Carey*, 533 F.2d 649, 650–52 (D.C. Cir. 1976) (upholding imposition of vicarious tort liability upon a business where its delivery driver committed rape, while recognizing that the case "was perhaps at the outer bounds of respondeat superior" liability); *Lourim v. Swensen*, 977 P.2d 1157, 1161 (Or. 1999) (holding that Boy Scouts organization could be vicariously liable for a troop leader's acts of child abuse); *Fearing v. Bucher*, 977 P.2d 1163, 1165 (Or. 1999) (holding that an archdiocese could be held vicariously liable for a priest's acts of child abuse).

44. *See* Charles See, *Restitution in the Abatement Context*, 44 S. ILL. U. L.J. 371, 374 (2020); Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 945 (2002).

for business entities, analogizing dissolution (including by way of a merger or asset sale) to a corporation's "death."⁴⁵

But in its 1959 decision *Melrose Distillers, Inc. v. United States*, the Supreme Court resolved a circuit split on corporate abatement in a case against Maryland and Delaware subsidiaries that had dissolved upon their merger into a parent.⁴⁶ The Court held that, by default, dissolution of a corporation abates prosecution "unless the action is saved by statute."⁴⁷ The Court then found that the Maryland and Delaware business codes both included "saving" statutes which allowed for proceedings to be brought within three years of dissolution.⁴⁸

Though neither law explicitly addressed criminal charges, the Court held that entity prosecution could continue even against subsidiaries that had merged into a parent, thus creating a doctrine of successor criminal liability.⁴⁹ The Court explained this result in part through policy justifications. Observing that a corporation "cannot be sent to jail," the Court expressed unwillingness to allow firms to escape monetary punishment merely by manipulating the corporate form.⁵⁰

The resulting doctrine of successor criminal liability is little-studied and ill-defined.⁵¹ Without question, an entity's criminal liability does not necessarily abate merely because that entity has merged with or been acquired by another firm.⁵² Whether and how bankruptcy procedures, such as a Chapter 11 discharge or a free-and-clear sale under 11 U.S.C. § 363,⁵³ affect this analysis remains uncharted territory.⁵⁴ Regardless of its exact dimensions, the *Melrose* principle reflected the general willingness of

45. See *United States v. Line Material Co.*, 202 F.2d 929, 932 (6th Cir. 1953) (holding that Sherman Act prosecution of entity was abated by good faith merger).

46. 359 U.S. 271 (1959).

47. *Id.* at 272.

48. *Id.* at 273–74.

49. *Id.*

50. See *id.* at 274.

51. See Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REGUL. 1, 12 (2019) ("Few criminal law scholars have had much to say about successor liability.").

52. See *id.* at 2 ("Successor corporations are on the hook for the crimes of their predecessors, even in circumstances where the two seem like very different corporations."); Andrew K. Jennings, *The Market for Corporate Criminals*, 40 YALE J. ON REGUL. 520, 523–24 (2023) (explaining non-prosecution agreement in which acquiring firm admitted to pre-acquisition misconduct committed by acquisition target); see also FCPA Op. Proc. Release No. 2003-01 (U.S. Dep't of Just. Jan. 15, 2003) (opinion letter reviewing whether requestor would acquire criminal liability under the Foreign Corrupt Practices Act from target company by acquiring target company's assets).

53. See David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 495 (1992) (describing 363 sales).

54. Cf. Diamantis, *supra* note 51, at 15 ("With respect to spin-offs, the law of successor liability is a little less clear.").

twentieth-century courts to expand traditional doctrines in order to impose corporate criminal liability.

But notwithstanding decades of doctrinal expansion, the practical consequences of corporate crime remained limited for most of the twentieth century.⁵⁵ For almost all federal crimes, statutory maximum penalties were designed with individuals in mind.⁵⁶ When applied to large or even mid-sized businesses, even the harshest possible fines were economically negligible, deterring federal prosecutors from targeting corporations.⁵⁷

Occasionally, state prosecutors attempted to impose serious criminal liability on corporations, with mixed results. For example, a 1919 New Jersey indictment of a railroad firm for negligent homicide (after a bystander was killed in an explosion) resulted in a *nolle prosequi* and a \$1,000 fine—reflecting both that era's expansion of entity liability theories as well as the inability of its prosecutors to impose meaningful punishments on corporate offenders.⁵⁸

Decades later, Indiana prosecutors indicted the Ford Motor Company for reckless homicide due to the dangerous design of the infamous Pinto sedan.⁵⁹ Despite evidence of egregious conduct, this unusual expansion of homicide law to a corporate entity failed before a jury.⁶⁰ Just as notable as the existence of the state case was the fact that, despite public outrage at Ford (in one civil case, a jury imposed \$125 million in punitive damages against the company⁶¹), federal prosecutors did *not* bring criminal charges against it.⁶²

Midcentury criminal law scholars rarely reflected on corporate prosecutions.⁶³ When they did, they invariably noted that corporate punishments were incommensurate with the scale of major business

55. See Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 251-53 (1991).

56. See Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 408-09 (1994).

57. See *id.* (noting a firm that earned \$5 million through illegal price fixing in the early 1980s faced a maximum fine of \$1 million under the relevant statute).

58. See *State v. Lehigh Valley R.R. Co.*, 106 A. 23, 23 (N.J. 1919); Donald J. Miester, Jr., *Criminal Liability for Corporations That Kill*, 64 TUL. L. REV. 919, 926 (1990).

59. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1017-18 (1991); Steven C. Bennett, *Developments in the Movement Against Corporate Crime*, 65 N.Y.U. L. REV. 871, 872 (1990) (reviewing FRANCIS T. CULLEN, WILLIAM J. MAAKESTAD & GRAY CAVENDER, *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* (1987)).

60. See Bennett, *supra* note 59, at 872-73.

61. See Schwartz, *supra* note 59, at 1017.

62. See Frank J. Vandall, *The Criminalization of Products Liability: An Invitation to Political Abuse, Preemption, and Non-Enforcement*, 57 CATH. U. L. REV. 341, 362-63 (2008).

63. See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 46 n.217 (1982) ("[T]he study of corporate . . . culpability remains in its infancy even among scholars of law and corporate behavior.").

operations. In 1967, John Flynn observed that criminal penalties in Sherman Act cases “have been low in relation to the gravity of the offense,” rarely exceeding \$50,000 per case even after the maximum penalty was raised (from just \$5,000 in the original Sherman Act) in 1955.⁶⁴

A decade later, in 1976, James Elkins wrote that corporate “criminal fines, as presently applied, are hopelessly inadequate for deterring future criminal acts . . . [and] often so small that criminal violations are economically more advantageous than compliance.”⁶⁵ Writing twelve years after Elkins, Richard Gruner observed that “corporate fines have frequently been so small that they have had little impact on large firms.”⁶⁶

In this environment, there were few incentives for prosecutors to focus on entities rather than individuals. Thus, when reformers of the 1970s drafted and enacted the modern Bankruptcy Code, they had little reason to focus on how entity charges might impact Chapter 11 reorganizations.

B. Crime and the Bankruptcy Code

The drafters of the modern Bankruptcy Code inherited a deep tradition that bankruptcy should afford relief to the “honest but unfortunate debtor.”⁶⁷ With “honesty” as a prerequisite, the bankruptcy discharge had long been understood as forgiving only civil debt, leaving criminal punishments (and certain other debts relating to morality and justice) unaffected.⁶⁸ Separate systems, such as those governing commutations, pardons, and expungements, address second chances and fresh starts for individuals convicted of criminal offenses.⁶⁹

64. John J. Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1309 (1967).

65. James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 81 (1976). *But see* *McRitchie v. Zuckerberg*, 315 A.3d 518, 572 (Del. Ch. 2024) (discussing and rejecting concept of “law as price,” which compares the profitable violation of law to theories of efficient breach in contract).

66. Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1, 5 (1988).

67. *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

68. *See* *Kelly v. Robinson*, 479 U.S. 36, 44–46 (1986) (discussing prevailing interpretations of the Bankruptcy Act’s interactions with criminal law); *see also* *Wetmore v. Markoe*, 196 U.S. 68, 76 (1904) (“We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy . . .”).

69. *See, e.g.*, Cara Suvall, *Certifying Second Chances*, 42 CARDOZO L. REV. 1175, 1187–88 (2021); Colleen Chien, *America’s Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 543 (2020); *see also* *United States v. Murray*, 275 U.S. 347, 358 (1928) (“Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence.”).

Continuing this tradition, the framers of the Bankruptcy Code signaled their intent that it would provide no “haven for criminal offenders.”⁷⁰ Thus, the automatic stay does not apply to “the commencement or continuation of a criminal action or proceeding against the debtor.”⁷¹ The Code’s definition of the term “claim,” while expansive, does not encompass non-monetary punishments such as a prison sentence.⁷² Meanwhile, an individual’s penal debt, including fines, penalties, and criminal forfeiture payments owed to governmental units, is categorically nondischargeable and thus also unaffected by bankruptcy.⁷³ Given these interlocking mechanisms, it is often said that bankruptcy is no “get out of jail free card.”⁷⁴

The drafters’ intentions toward criminal business entities, however, are more difficult to discern. For business debtors as well as individuals, the automatic stay does not halt criminal prosecution, and discharge does not reach non-monetary punishments. But at the time the Code was drafted, it was generally understood that corporate defendants could *only* be punished through monetary penalties.⁷⁵ Thus, bankruptcy’s relationship to corporate criminal law was largely determined by a simple question: Could criminal monetary penalties *against a corporation* be discharged?

70. See H.R. REP. NO. 95–595, at 342 (1977) (“The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.”).

71. 11 U.S.C. § 362(b)(1). 11 U.S.C. § 362(b)(4) also exempts proceedings brought by governmental units to enforce their police powers. A bankruptcy court could theoretically enjoin a criminal case through its general powers under 11 U.S.C. § 105, but in practice this virtually never happens. The *Younger v. Harris* abstention doctrine almost always bars a bankruptcy court from enjoining state criminal proceedings, *Barnette v. Evans*, 673 F.2d 1250, 1251–52 (11th Cir. 1982), and on comity grounds federal district courts (to say nothing of bankruptcy courts) almost never enjoin proceedings in other district courts. See *Bergh v. Washington*, 535 F.2d 505, 507 (9th Cir. 1976).

72. See 11 U.S.C. § 101(5).

73. See 11 U.S.C. §§ 523(a), 1328(a); see also Langston, *supra* note 15, at 105; Atkinson, *supra* note 15, at 920.

74. *In re Tarver*, No. 20-12219, 2023 WL 2311368, at *3 (Bankr. S.D. Ala. Mar. 1, 2023); *In re Shelnut*, No. 17-40113, 2017 WL 1078535, at *6 (Bankr. S.D. Ga. Mar. 21, 2017); *Dutch Pharmacies, Inc. v. Weathers (In re Weathers)*, Bankr. No. 08-14547, Adv. No. 11-01029, 2011 WL 5101759, at *2 (Bankr. N.D. Miss. Oct. 26, 2011); *In re Thompson*, 456 B.R. 121, 134 (Bankr. M.D. Fla. 2010). Some historical irony lurks behind this phrase, as bankruptcy laws evolved from insolvency statutes that discharged their beneficiaries from debtors’ prisons. See, e.g., Donald R. Korobkin, Essay, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2138 (2003); F.H. Buckley, *The Debtor as Victim*, 87 CORN. L. REV. 1078, 1089 (2002) (book review).

75. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 274 (1959) (“[A] corporation cannot be sent to jail. The discharge of its liabilities whether criminal or civil can be effected only by the payment of money.”); *United States v. Harford*, 870 F.2d 656 (unpublished table decision), 1989 WL 21563, at *3 (4th Cir. 1989) (affirming fine against corporate defendant but holding that “efforts of the district court to imprison it or place it on probation with special conditions are beyond the power of the court”).

1. Corporate Criminal Liability and Chapter 7

For businesses that liquidate in Chapter 7, criminal liability functionally ends, even if it formally survives. Liquidating businesses receive no discharge and are entitled to no “fresh start.”⁷⁶ Instead, their assets are sold in an orderly fashion to recover as much value as possible for creditors—a process inevitably analogized to the “death” of the corporate person.⁷⁷

Of course, under *Melrose Distillers*, corporate “death” does not necessarily abate charges.⁷⁸ Practically, however, prosecutors have not pursued successor-liability charges against firms that acquire assets or lines of business through bankruptcy auctions—and any such expansion would be unlikely to survive review by an Article III court.⁷⁹ Liquidation thus typically marks the end of meaningful criminal enforcement against an entity.

2. Corporate Criminal Liability and Chapter 11

Interactions between bankruptcy and criminal charges against entities reorganizing in Chapter 11 are more complex. The Code’s predecessor, the Bankruptcy Act of 1898 (as modified during the 1930s), contained two mechanisms for business reorganization—Chapter X, designed for large public companies, and Chapter XI, primarily designed for small firms.⁸⁰ Chapter X granted reorganized firms a near-absolute discharge (excepting only priority tax debts), while Chapter XI incorporated the same categories

76. Douglas G. Baird, *Bankruptcy Minimalism*, 98 AM. BANKR. L.J. 493, 494 n.4 (2024); 11 U.S.C. § 721; Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 730 (1984).

77. E.g., Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 1009 (“The only ‘fresh start’ relevant for a corporation is the ability of the Chapter 11 reorganization provisions to save an operating business from death through liquidation.”); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 785 (1987) (“State law promises that if the creditor is persistent, the corporate debtor can escape payment only through death: the corporation must cease operations and return its charter to the state.”); John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 824 (2011) (referencing “firms under the death sentence of a liquidation”); Note, *Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541, 2550 (2003) (noting that a firm’s Chapter 7 “is followed by the ‘death’ of the company”).

78. *Melrose Distillers*, 359 U.S. at 274.

79. Civil FCPA violations have been applied by an administrative law judge to a firm that acquired a culpable line of business through a non-bankruptcy asset sale, but that expansive application of *Melrose Distillers* was not tested by an Article III court and has been criticized in academic literature. See Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 287 (2010).

80. See Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 8 n.30 (2023).

of nondischargeable debt that were applicable in individual cases.⁸¹ While most corporate debtors considered Chapter XI preferable for unrelated reasons,⁸² its discharge exceptions proved problematic, in part because they exacerbated creditor holdout and debt-overhang problems.⁸³

When the drafters of the modern Code sought to consolidate the efficient features of the old Act's Chapters X and XI into the new Code's Chapter 11, they designed a discharge for reorganized businesses that would be unqualified by any nondischargeable debt categories. Thus, 11 U.S.C. § 523(a), the Code's key provision establishing certain categories of debt that are excepted from the discharge, expressly applies only to individuals.

The discrepancy between an unlimited discharge for businesses and a limited one for real people has been criticized on normative grounds.⁸⁴ And with respect to criminal debt in particular, it may be that this discrepancy was unintentional. At a time when criminal charges against corporations resulted solely in monetary penalties, and those penalties were almost always minor for businesses of scale, corporate criminal liability would have appeared to be of minimal significance for the overall design of Chapter 11.

C. The Second Phase of Entity Culpability: Expansion of Punishment

The U.S. Sentencing Commission's efforts to standardize criminal punishment turned to business entities in 1987, producing guidelines that took effect in 1991.⁸⁵ Organizational sentencing guidelines authorized punishments that were tailored to the scale of large businesses rather than individuals, making corporate charges more attractive to prosecutors.⁸⁶ Under revised sentencing practices, a convicted firm must remedy its

81. See Brubaker, *supra* note 12, at 762–64.

82. Buccola, *supra* note 80, at 8 (“Under Chapter X of the Bankruptcy Act, the commencement of a case had ousted the debtor’s incumbent managers. A judicially appointed trustee had been handed the reins in their place. As a consequence, managers of distressed companies had faced powerful incentives to avoid bankruptcy.” (footnote omitted)).

83. See Brubaker, *supra* note 12, at 764–66.

84. See Jonathan C. Lipson & Pamela Foohey, *The End(s) of Bankruptcy Exceptionalism: Purdue Pharma and the Problem of Social Debt*, 46 CARDOZO L. REV. 861, 893 (2025) (“There appears to be no clear and well-articulated theory justifying the distinction” between individuals and entities.); Jacoby, *supra* note 16, at 503; cf. Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 266 (2021); Diamond Alt. Energy LLC v. EPA, 606 U.S. 100, 129 (2025) (Jackson, J., dissenting) (“This case gives fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens.”).

85. See Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 744–45 (1992); Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 315 (1991).

86. See Cindy R. Alexander, Jennifer Arlen & Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393, 394 (1999).

misconduct and be penalized based on the seriousness of the offense and the firm's culpability.⁸⁷

Though federal corporate prosecution remained somewhat sporadic, the organizational sentencing guidelines greatly increased the impact of cases and the visibility of corporate culpability.⁸⁸ In traditional areas of corporate prosecution, such as antitrust, the guidelines soon opened a new era of charging decisions. Prior to 1995, the largest antitrust criminal fine assessed by federal prosecutors stood at \$6 million.⁸⁹ In 1996, five years after the organizational guidelines took effect, Archer Daniels Midland Co. agreed to a \$100 million fine.⁹⁰ That dubious record was soon eclipsed by a \$500 million fine paid by Swiss pharmaceutical company F. Hoffmann-LaRoche Ltd. in 1999.⁹¹ Indeed, the *average* criminal fine assessed on organizations for antitrust crimes between 1997 and 1999 exceeded the \$6 million amount that had stood as the record in the pre-guidelines era.⁹²

Also in this period, a new probation statute, effective as of November 1987, expanded the non-monetary punishments that might be applied to corporate defendants guilty of any crime.⁹³ Firms could be required to change policies and tighten internal controls, restrict business activities, provide notice to victims, and publicize the nature of the offense, among other restrictions.⁹⁴ Consequentially, this enhanced the ability of prosecutors to reform corporations through criminal charges, separate and apart from monetary fines.

In stark contrast to the earlier period, a leading scholar in 1999 observed that "large, publicly traded companies have become favored targets of a new breed of aggressive prosecutors."⁹⁵ More frequent entity prosecutions added

87. See Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 303–04 (2021).

88. See *id.* at 292 ("Although high fines imposed irregularly could result in efficient and adequate deterrence under certain circumstances, our results indicate that fines are too low or imposed too sporadically to effectively deter crime." (footnote omitted)); Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 522 (2004) (arguing that the "punitive turn in American criminal law" can be seen "with regard to white collar and corporate crime, for which both bases for substantive liability and severity of punishment have increased").

89. Nell I. Brown & James R. Burns, *Antitrust Violations*, 37 AM. CRIM. L. REV. 163, 203 (2000).

90. See *id.*

91. See *id.*

92. See Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 715 (2001).

93. See Gruner, *supra* note 66, at 3–5.

94. See W. Robert Thomas & Mihailis E. Diamantis, *Branding Corporate Criminals*, 92 FORDHAM L. REV. 2629, 2660 (2024); Gruner, *supra* note 66, at 45–51.

95. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1344 (1999).

vitality to another consequence of corporate criminal law—the web of statutes and regulations barring convicted firms from federal contracting, particularly in highly regulated areas such as healthcare, defense, and environmental extraction.⁹⁶ To be sure, some research suggests that very large firms manage to avoid collateral consequences even after convictions.⁹⁷ Nevertheless, for firms where significant revenue is derived from federal contracting, an entity conviction could lead to insolvency.

Because of the stakes involved and the relatively nebulous nature of corporate culpability, the exercise of prosecutorial discretion took on immense significance.⁹⁸ After eight years of experience with the new guidelines, in 1999, the Department of Justice formulated internal standards for organizational charging decisions, now found within its Justice Manual.⁹⁹

DOJ's Principles of Federal Prosecution of Business Organizations establish that a corporation should not be treated harsher or more leniently than individuals merely due to its artificial status.¹⁰⁰ In addition to normal factors that inform prosecutorial decision making, the manual provides a non-exclusive list of factors to consider in corporate charging decisions, including collateral consequences that would disproportionately harm "shareholders, pension holders, employees, and others not proven personally culpable."¹⁰¹ These formal guidelines demonstrated the growing importance of entity charges for federal prosecutors.

In 2002, however, a criminal case brought against accounting giant Arthur Andersen transformed the dynamics of corporate prosecution. Partners at Arthur Andersen were alleged to have encouraged Enron's obstruction of justice through widespread document destruction.¹⁰² The accounting firm collapsed after it was indicted, causing thousands of

96. See 10 U.S.C. § 4656.

97. See, e.g., Rena Steinzor & Anne Havemann, *Too Big to Obey: Why BP Should Be Debarred*, 36 WM. & MARY ENV'T L. & POL'Y REV. 81, 111 (2011) (noting that "the DOD has persuaded itself that its major contractors are simply too big to debar" and arguing that its procurement suspension system is "largely dysfunctional").

98. See Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1434–38 (2007); Maya Krigman, Note, *Prosecutorial Discretion of the Department of Justice in Corporate Criminal Cases*, 74 BROOK. L. REV. 231, 233 (2008).

99. U.S. Dep't of Just., Just. Manual § 9-28.200 (2023). See Kevin J. Cloherty, Matthew A. Wolfman & Steven J. Buttacavoli, *10 Years of the Organizational Sentencing Guidelines: The Time Is Right for Review*, WHITE-COLLAR CRIME REP., Apr. 2002, at 1 (explaining formulation of charging policy); Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887, 893 (2022) (arguing that the manual and other DOJ policies constitute a "shadow law of corporate criminal liability").

100. See U.S. Dep't of Just., Just. Manual § 9-28.200.

101. See *id.* § 9-28.300.

102. See William H. Simon, *Where Is the "Quality Movement" in Law Practice?*, 2012 WIS. L. REV. 387, 390.

workers to lose their jobs.¹⁰³ Most, of course, had no connection to the team that worked with Enron.¹⁰⁴ Infamously, after the damage was done, the U.S. Supreme Court ultimately overturned its conviction due to improper jury instructions, delivering a Pyrrhic victory to the defunct entity.¹⁰⁵

The Arthur Andersen case fueled a common (though contested) criticism of expanded corporate criminal liability: that indictments inflict too much damage on large firms, causing them to spiral into insolvency and inflicting a “corporate death penalty” that punishes innocent stakeholders.¹⁰⁶ On the other hand, it is generally acknowledged that industry-wide accounting practices did improve in the wake of Arthur Andersen’s destruction, demonstrating the deterrence potential of high-stakes corporate criminal prosecution.¹⁰⁷

In part because of this controversy, after 2002 federal prosecutors grew wary of inadvertently destroying firms and inflicting undue consequences on innocent employees. Instead of formal indictments, federal prosecutors began to increasingly rely on deferred prosecution and non-prosecution agreements when investigating large firms.¹⁰⁸ Whereas the DOJ entered into just seven corporate deferred prosecution or non-prosecution agreements

103. See David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1442–43 (2014); Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 17–18 (2014).

104. See Zaring, *supra* note 103, at 1442–43; Cunningham, *supra* note 103, at 17–18.

105. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705–08 (2005).

106. Alex B. Heller, Comment, *Corporate Death Penalty: Prosecutorial Discretion and the Indictment of SAC Capital*, 22 GEO. MASON L. REV. 763, 770 (2015); see also Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 513 (2018) (“For many firms, including Arthur Andersen, there are life-ending collateral consequences that automatically follow conviction . . .”); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 956 (2009) (contending that “the government has learned not to formally prosecute [corporate] entities due to the steep collateral consequences of indictment”). *But see* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 827 (2013) (contending that no public company between 2001 and 2010 went out of business as a result of conviction, but conceding that “uncertainty of indictment” could destroy a firm even in the absence of a conviction); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1244 n.38 (2016) (“Claims that criminal prosecution could result in a ‘corporate death penalty’ have been debunked, however, since companies almost never fail as a result of criminal prosecution.”).

107. See Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1744 (2003) (“Those of us who argued against allowing audit firms to offer legal services won the debate . . . because Arthur Andersen acted in the manner predicted by the studies cited in my article and thereby brought about the Enron debacle, which functionally ended any substantial encroachment by accounting firms into the field of legal representation . . .” (footnote omitted)); William T. Allen & Arthur Siegel, *Threats and Safeguards in the Determination of Auditor Independence*, 80 WASH. U. L.Q. 519, 520 n.2 (2002) (arguing that auditor independence “took [a] large . . . step forward when Arthur Anderson [sic] was forced into bankruptcy as a result of its Enron choices its partners made”).

108. See Paulsen, *supra* note 98, at 1436.

between 2000 and 2002, the number increased dramatically after Arthur Andersen, with some subsequent years featuring as many as forty.¹⁰⁹

In these arrangements, prosecutors typically agree to hold charges in abeyance in exchange for fines, corporate assistance in prosecuting individuals, and internal reforms.¹¹⁰ Firms can be required to close lines of business, establish board-level committees, implement training and compliance programs, engage outside consultants, or change personnel.¹¹¹ And unlike plea agreements or judicial settlements, deferred prosecution agreements are subject to such minimal judicial supervision that one commentator labeled courts as exhibiting “absolute judicial passivity.”¹¹² Long gone was the old model, where corporate conviction primarily or exclusively resulted in monetary penalties.

The rise of deferred prosecution and non-prosecution agreements brought the expansion of corporate criminal liability into its final phase, in which prosecutors act as general regulators of culpable firms.¹¹³ Viewed charitably, deferred prosecution and non-prosecution agreements offer something for both sides: Firms avoid the potentially catastrophic consequences of indictment, while the government retains the freedom of action to remedy culpable conduct.¹¹⁴ Nevertheless, prosecutors’ reliance on DPAs and NPAs has been criticized on a variety of grounds, with some arguing that they are potentially abusive while others contend that they are overly lenient, rendering some firms “too big to prosecute.”¹¹⁵

109. Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589, 1628–29 (2018).

110. See Paulsen, *supra* note 98, at 1436; Michael Patrick Wilt, *Who Watches the Watchmen? Accountability in Federal Corporate Criminal Prosecution Agreements*, 43 AM. J. CRIM. L. 61, 62 (2015).

111. See Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2089–90 (2016).

112. Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1634 (2016).

113. See Griffith, *supra* note 111, at 2089–90; James R. Copland, *What Do We Mean by a “Pro-Business” Court—and Should We Care?*, 67 CASE W. RES. L. REV. 743, 761 (2017).

114. See Zaring, *supra* note 103, at 1444; Paulsen, *supra* note 98, at 1436.

115. Andrew Chinsky, Note, *How Can We Smartly Fight Financial Crimes?: Judge Rakoff, the Financial Crisis, DPAs, and Too Big to Prosecute*, 8 HARV. L. & POL’Y REV. ONLINE 12, 20 (2014) (charting argument “that DPAs and the subsequent creation of internal compliance measures designed to prevent future wrongdoing are often unjustified” because they replace individual prosecutions, which would create more effective deterrence); see also Rena Steinzor, (Still) “Unsafe at Any Speed”: Why Not Jail for Auto Executives?, 9 HARV. L. & POL’Y REV. 443, 467–68 (2015) (“[D]eferred prosecution agreements . . . establish an extraordinarily corrosive double standard between the well-paid executives employed by multi-billion-dollar, multi-national corporations and their individual consumers.”); Paulsen, *supra* note 98, at 1436 (arguing that bargaining imbalances vest “nearly absolute power in the government’s hands,” leaving the target corporation “at the mercy of the prosecutor”); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORN. L. REV. 310, 311–12 (2004) (arguing that the regulation of corporate culture is a matter of state law improperly controlled by federal DPAs); Copland, *supra* note 113, at 761 (“The federal government’s shadow regulatory state effected through DPAs and NPAs obviously departs from the normal administrative process . . .”).

D. Modern Theories of Corporate Punishment

Punishment justification plays a central role in academic analysis of criminal law,¹¹⁶ and the criminal law literature reflects significant unease over modern doctrine authorizing corporate prosecution.¹¹⁷ Several widely recognized goals of punishment—such as incapacitation,¹¹⁸ rehabilitation,¹¹⁹ or restorative justice¹²⁰—map poorly onto the prosecution of abstract entities for the actions of their agents.¹²¹

The goal of deterrence aligns much more naturally with corporate prosecution.¹²² Relatedly, corporate criminal charges may be justified by the prevention of recidivism.¹²³ Several scholars also contend that entity

116. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1497 (2016) (“The focus on punishment’s justification . . . gives criminal theory an almost wholly normative orientation: the purpose of the enterprise is not in the first place to understand punishment as a social phenomenon (nor to understand crime as a social phenomenon), but firstly and mainly to identify grounds on which to support or oppose punishment.”).

117. See, e.g., Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 411 (2012) (noting “deep-seated ambivalence about corporate criminal liability”); W. Robert Thomas, *Making Sense of Corporate Criminals: A Tentative Taxonomy*, 17 GEO. J.L. & PUB. POL’Y 775, 776 (2019); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 578 (2012); Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1771 (2005); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 356 (1999); Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2049 (2016); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 648 (1994); Robert E. Wagner, *Criminal Corporate Character*, 65 FLA. L. REV. 1293, 1293 (2013).

118. See, e.g., *United States v. Batrez-Barraza*, 640 F. App’x 814, 817 (10th Cir. 2016) (“[E]ven if a milder sentence could serve as a deterrent, the court could reasonably perceive a need for further protection through incapacitation.”).

119. See Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1237 (2013) (“Rehabilitation is making a comeback after about four decades of dormancy; it is ascending in popularity as a theory of punishment.”).

120. See Rachel J. Wechsler, *The Non-Punishment Principle and Restorative Justice*, 174 U. PA. L. REV. 363, 369–70 (2026) (explaining that restorative justice is “not punitive” and “embodies the flexibility and tailoring needed to effectively contextualize and respond to situations involving individuals who have both caused harm and experienced harm”).

121. See, e.g., John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009, 1012 (2022) (“[T]here is no theoretical justification for corporate criminal liability.”). But see Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1795 (2015) (“Justice is not fully served by individual prosecutions if only the company can pay adequate fines, restitution to victims, or change practices and policies to prevent future crimes.”).

122. See Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861, 861 (2022) (justifying corporate criminal charges on deterrence grounds). But see Stephen F. Smith, *Corporate Criminal Liability: End It, Don’t Mend It*, 47 J. CORP. L. 1089, 1097 (2022) (“[T]ort law and civil penalty statutes already give corporations strong monetary incentives to do what they can to police misbehavior by their officers and employees.”); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980).

123. Kaleb Byars, *Recidivist Organizational Offenders and the Organizational Sentencing Guidelines*, 66 B.C. L. REV. 745, 746 (2025); Andrew K. Jennings, *Follow-Up Enforcement*, 70 DUKE

prosecutions are justified by the expressivist function of criminal law.¹²⁴ For expressivists, the formal condemnation and blaming function of criminal law justifies the indictment of corporate entities.¹²⁵ In other words, criminal charges vindicate the public interest by packing a “stigmatic punch” not fully achieved by civil regulation.¹²⁶ In a time of significant discontent over perceptions that large institutions play by different rules,¹²⁷ the ability to assign criminal blame to corporate entities is a significant aspect of organizational prosecution.

But not all are convinced. Normative critics of organizational prosecution continue to argue that criminal law can be coherently applied only to individuals.¹²⁸ Meanwhile, others have contended that, in practice, corporations can serve as scapegoats, taking on blame while allowing guilty individuals to avoid prosecution.¹²⁹ Thus, despite its gradual historic expansion, entity prosecution remains controversial.

E. Bankruptcy After the Second Phase

Amendments to the Bankruptcy Code during the second phase of corporate criminal expansion chipped away at the theoretical distinction between an absolute business discharge and a qualified individual discharge. Most prominently, in 2005, Congress added 11 U.S.C.

L.J. 1569, 1569 (2021); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942 (2005).

124. See Uhlmann, *supra* note 106, at 1259; Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 6 (2012); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 525 (2006); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 834 (2000); Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 865 (2013).

125. Gilchrist, *supra* note 124, at 6 (“Expressivists contend that th[e] expression [of formal condemnation and opprobrium] has a value—apart from any deterrent effect—that can help justify the imposition of punishment.”); Buell, *supra* note 124, at 525 (“[C]riminal legal process[] adds unique and strong communicative force to any societal conclusion about institutional fault.”).

126. W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 399 (2021); see also Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 618 (2012).

127. See JACOBY, *supra* note 16, at 4–8 (“The American legal system tends to be more deferential to artificial persons like big corporations than to humans of modest means. . . . [B]ankruptcy law treats fake people, such as corporations, differently than it treats . . . individuals”); Diamond Alt. Energy LLC v. EPA, 606 U.S. 100, 129 (2025) (Jackson, J., dissenting) (“This case gives fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens.”).

128. See Hasnas, *supra* note 121, at 1012 (“[T]here is no theoretical justification for corporate criminal liability . . .”).

129. See Garrett, *supra* note 121, at 1790 (explaining argument).

§ 1141(d)(6), limiting for the first time the discharge received by a business debtor in Chapter 11.

That amended section exempts from the corporate discharge debt owed to the government arising from fraud.¹³⁰ Though rarely litigated and little discussed, this modest addition of nondischargeable criminal debt for businesses departed from the previously strict separation of individual and business discharges. Inevitably, the importation of nondischargeable penal debt into corporate bankruptcy led to discussions of whether corporate entities met bankruptcy's standard for "honest but unfortunate" debtors, a core idea for individuals that is challenging to apply in the business context.¹³¹

Congress may have blurred these lines again in 2019. Courts have split as to whether a business's cramdown plan under the new Subchapter V system for small businesses incorporates the general nondischargeability provisions of § 523(a) that ordinarily apply to individuals.¹³² An entity's penal debt also appears to be nondischargeable in Chapter 12, a typically preferential reorganization mechanism available to family farms and fisheries.¹³³ These small incursions into the absolute nature of a reorganized business's discharge are contested.¹³⁴ Nevertheless, they demonstrate persistent unease around the idea that, for businesses but not individuals, bankruptcy might serve as a haven for criminal offenders.¹³⁵

But taking a broader view, the more surprising development is how *little* the Bankruptcy Code changed in response to the dramatic expansion of corporate criminal liability.

In the modern era, prosecutors can win stratospheric judgments against corporate defendants, with potential penalties reaching hundreds of millions or even billions of dollars.¹³⁶ Yet prosecutorial discretion is essentially

130. 11 U.S.C. § 1141(d)(6); see William Hildbold, LL.M. Thesis, *Will Section 1141(d)(6) of the Bankruptcy Code Destroy Corporate Chapter 11 Reorganizations by Rendering SEC Claims Nondischargeable?*, 17 AM. BANKR. INST. L. REV. 551, 554 (2009).

131. See *United States v. Fusion Connect, Inc.* (*In re Fusion Connect, Inc.*), 634 B.R. 22, 38–39 (S.D.N.Y. 2021).

132. See Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 AM. BANKR. L.J. 571, 621 (2019); Kathleen Zimmerman, Note, *Neither Here nor There: The Small Business Creditor's Discharge Nightmare Under Subchapter V*, 91 MO. L. REV. 621, 622 (2026). Compare *Cantwell-Cleary Co. v. Cleary Packaging, Inc.* (*In re Cleary Packaging, LLC*), 36 F.4th 509 (4th Cir. 2022), with *Lafferty v. Off-Spec Sols., LLC* (*In re Off-Spec Sols., LLC*), 651 B.R. 862, 870 (B.A.P. 9th Cir. 2023), *appeal dismissed*, No. 23-60034, 2023 WL 9291577 (9th Cir. Nov. 2, 2023).

133. Daniel J. Bussel & Austin J. Damiani, *Chapter 11 at the School of Subchapter V: Part II*, BANKR. L. LETTER, July 2024, at 1.

134. See *id.*

135. See JACOBY, *supra* note 16, at 4–12.

136. See, e.g., Press Release, U.S. Dep't of Just., Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009) (announcing criminal fine settlement of \$1.195 billion in case involving misbranding with intent to defraud or mislead).

absolute.¹³⁷ In choosing whether to pursue criminal forfeiture judgments as priority administrative expenses, waive them entirely, or agree to a middle ground whereby fines are scheduled as unsecured claims, prosecutors hold a de facto veto over successful corporate reorganization.¹³⁸

Moreover, with the expansion of non-monetary remedies available for corporate crime, prosecutors now hold a credible threat to pursue criminal charges even after plan confirmation.¹³⁹ For some reorganized corporations, even a post-reorganization conviction with no monetary judgment attached might be disastrous, if collateral consequences included being barred from federal contracting. Few rational creditors would agree to a plan where criminal liability remains unresolved, especially if federal contracting is a core line of business.

In short, for a culpable debtor, a prosecutor's powers are analogous to those of a holdout creditor, with the ability to block reorganization until demands are met.¹⁴⁰ Governments concerned only with monetary compensation might rely on civil regulatory action, with the lower standards of proof that accompany civil enforcement. But criminal prosecutors bring greater bargaining power to extract concessions in deferred prosecution and non-prosecution agreements (or in the plan itself) that will bind the reorganized debtor.¹⁴¹ Regulatory violations can be cured, but the specter of Arthur Andersen looms for firms facing criminal conviction.

And importantly, the unique features of corporate charges immunize prosecutors against certain bankruptcy systems that normally mitigate governmental power in the bankruptcy context. Jared Ellias and George Triantis have analyzed how bankruptcy law can serve as "a force multiplier" for state policy goals, allowing regulators to extract concessions from firms that would be unlikely outside of the unique Chapter 11 context.¹⁴² But they

137. See Mridula S. Raman, *Prosecutorial Discretion and the Crime of Abortion*, 43 YALE L. & POL'Y REV. 171, 185 (2024) ("Prosecutorial discretion is immense, almost always unreviewed, and virtually unreviewable.").

138. See Levitin, *supra* note 6, at 1111–12.

139. Cf. Alistaire Bambach, *The SEC in Bankruptcy: Past and Present*, 18 AM. BANKR. INST. L. REV. 607, 610–11 (2010) ("[A]n SEC monetary claim is potentially an overhang on the company's ability to reorganize. . . . The staff also has authority to disclose the existence of our investigation if it is in the public interest and would protect the SEC's monetary claims. We can go into the bankruptcy court, disclose our investigation, and tell the judge how our investigation could impact the debtor's reorganization.").

140. See Stephen J. Lubben, *Holdout Panic*, 96 AM. BANKR. L.J. 1, 1 (2022).

141. See, e.g., *In re Bally Total Fitness of Greater N.Y., Inc.*, No. 07-12395, 2007 WL 2779438, at *12 (Bankr. S.D.N.Y. Sept. 17, 2007) ("Nothing in this Confirmation Order or the Plan shall result in the discharge of any Reserved SEC Claims . . .").

142. See Ellias & Triantis, *supra* note 5, at 512.

also explained that bankruptcy mechanisms, such as the automatic stay and the discharge, potentially undermine ordinary systems of regulation.¹⁴³

Because prosecutors enjoy broader exemptions from the stay and discharge than civil regulators, organizational charges in bankruptcy allow the government to engage in even more pervasive regulation, with few disadvantages. The deep tradition of near-absolute prosecutorial discretion in criminal law also gives prosecutors freedom of action that is unusual relative to other governmental actors.¹⁴⁴

Given the important and unfettered role prosecutors play in these cases, there have been surprisingly few efforts to articulate theories about whether and when they should intervene. Modern theories of entity prosecutions, with their focus on deterrence, the prevention of recidivism, and expressive blaming, apply with different force in the bankruptcy context.

For one thing, although corporate charges may usually be justified by deterrence interests, malfeasance that precipitates bankruptcy may already be deterred by the bankruptcy itself. Managers and shareholders should already be incentivized to avoid conduct that may lead to bankruptcy, regardless of whether criminal charges are levied on the firm during bankruptcy proceedings.¹⁴⁵ Bankruptcy thus reduces the deterrence justification for corporate charges by providing its own deterrent mechanism.¹⁴⁶

Moreover, in Chapter 11, expressive punishment may stand in tension with the goal of maximizing recovery for innocent creditors, including victims. Though public scorn can be heaped upon infamous companies like Purdue even in the absence of expressive criminal prosecution, in some cases prosecution may reduce the current value of assets by increasing opprobrium.¹⁴⁷ Outside of bankruptcy, this “shaming” may be unproblematic or desirable, but inside of bankruptcy, when remaining assets

143. See *id.* at 514–16.

144. See Raman, *supra* note 137, at 186 (“The few existing constitutional restraints on charging, such as on discriminatory, selective, or vindictive prosecutions, are so difficult for defendants to prove that they have little practical value. Moreover, when two statutes criminalize identical conduct but have different penalties, prosecutors have the freedom to choose which provision to charge.” (footnote omitted)).

145. See Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni & Jean-Pierre Ponssard, *Are Cartel Fines Optimal? Theory and Evidence from the European Union*, 42 INT’L REV. L. & ECON. 38, 41 (2015) (noting “desirable deterrent effect” of bankruptcy on managers and shareholders who might engage in antitrust crimes). Cf. Michael S. Knoll, *Products Liability and Legal Leverage: The Perverse Effect of Stiff Penalties*, 45 UCLA L. REV. 99, 116 (1997) (“[I]ncreasing the stiffness of tort penalties has no additional deterrent effect once the point of bankruptcy is reached . . . when there are no prior potential liabilities that can be increased by raising penalties.”).

146. See Knoll, *supra* note 145.

147. See Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 452–53 (2022); Jennings, *supra* note 52, at 535.

become tainted by public stigma, the result might be lower distributions to victims.¹⁴⁸

Finally, Chapter 11 contains its own tools for the prevention of recidivism. Notably, § 1104(a) allows for the displacement of a firm's current management by a trustee where that management has engaged in, among other things, fraud or dishonesty.¹⁴⁹ If potential recidivism is already addressed through the bankruptcy process, the need for entity charges during Chapter 11 may be reduced.

In short, the specter of corporate charges can transform prosecutors into the most important actors in a social debt bankruptcy. But it is not obvious when they should choose to assume this role. In at least some cases, prosecutorial intervention may add administrative expenses while producing few or largely redundant benefits. The next Part provides specific examples demonstrating the sporadic nature of entity prosecutions against corporate debtors.

II. MODELS OF PROSECUTORIAL PARTICIPATION IN CHAPTER 11 CASES

To borrow from Frank Easterbrook and Daniel Fischel's observation about veil-piercing, prosecutorial intervention in Chapter 11 cases is "[l]ike lightning . . . rare, severe, and unprincipled."¹⁵⁰ This Part provides an overview of several major social debt cases where prosecutors played varying roles, and several where they did not.

A. *Prosecutorial Intervention in Major Social Debt Cases*

This Section demonstrates the regulatory power of prosecutors in the Chapter 11 context through three case studies, demonstrating formal and informal prosecutorial intervention. Not meant to be exhaustive, these cases instead exemplify three potential dynamics of prosecutorial intervention: informal intervention (in the FTX case), conflicted intervention (in the GM case), and decisive intervention (in the Purdue case).

1. *Informal Intervention: FTX*

In some business bankruptcies, prosecutors participate informally, with the lurking possibility of organizational charges against the debtor ensuring a seat at the table where major decisions are made. This informal approach

148. See Parikh, *supra* note 147, at 452–53.

149. See 11 U.S.C. § 1104(a).

150. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

may be especially likely in cases where a trustee has replaced the culpable firm's original management and that trustee is willing to informally meet the government's demands. The recent bankruptcy of the cryptocurrency trading firm FTX is instructive.

FTX rapidly collapsed after revelations that customer funds had been secretly deployed to support the balance sheet of a related entity.¹⁵¹ The firm's principals—most notably founder and central figure Samuel Bankman-Fried¹⁵²—were quickly indicted by federal prosecutors.¹⁵³ After the firm entered Chapter 11, a trustee was appointed and the firm was placed under the control of restructuring expert John Ray III.¹⁵⁴

Ultimately, federal prosecutors did not indict FTX. Instead, during the confirmation hearing in the FTX case, debtor's counsel explained to the bankruptcy court that the post-petition firm's "cooperation [with] the government . . . has avoided criminal indictments of the debtor."¹⁵⁵ Counsel for the debtor later noted that certain plan provisions had been negotiated with the Department of Justice.¹⁵⁶

Counsel did not elaborate on the exact form that the entity's cooperation took. But Jonathan Lipson and David Skeel have documented the unusual extent of the firm's participation in the prosecution of culpable insiders.¹⁵⁷ Specifically, they note that the firm provided "millions of dollars of assistance," as well as "immediate and unfettered access" to company data, to the U.S. Attorney's office that was prosecuting Bankman-Fried.¹⁵⁸

To some extent, this dynamic shows the system working as designed. All companies are encouraged by law to cooperate with prosecutors in investigating culpable insiders and are formally rewarded with sentencing mitigation for providing such cooperation.¹⁵⁹ Outside of bankruptcy, however, internal investigations that lead to such cooperation are

151. Lauren M. Wagner, *A Simple Decision in a Complex Case: Appointment of an Examiner Is Not Discretionary*, AM. BANKR. INST. J., July 2024, at 12, 47; Lev E. Breydo, *Contagion. FTX, a Sector's Crisis & Crypto's Silent Victims*, 98 AM. BANKR. L.J. 97, 124–30 (2024).

152. See generally Jennifer S. Fan & Xuan-Thao Nguyen, *Founder Worship, Effective Altruism, and Corporate Governance*, 113 KY. L.J. 1, 2 (2024–25) (discussing Bankman-Fried's outsized role at the firm).

153. See Breydo, *supra* note 151, at 173.

154. Kara J. Bruce, *Crypto Failure in the Shadows*, 69 VILL. L. REV. 691, 694 (2024).

155. Transcript of Confirmation Hearing, *supra* note 4, at 8:8–10.

156. *Id.* at 180:9–12 (“[W]e were asked to note for the record by the U.S. Department of Justice that there are provisions that we have included in the plan that were negotiated. . . . In the confirmation order that are negotiated provisions . . . that were multi-agency negotiations amongst the DOJ and other . . . governmental units that resolved any concerns any of those government entities had.”).

157. See Jonathan C. Lipson & David Skeel, *FTX'd: Conflicting Public and Private Interests in Chapter 11*, 77 STAN. L. REV. 369, 373 (2025).

158. *Id.* at 373, 378.

159. See Katrice Bridges Copeland, *The Yates Memo: Looking for “Individual Accountability” in All the Wrong Places*, 102 IOWA L. REV. 1897, 1900 (2017).

notoriously slow.¹⁶⁰ White-collar defense counsel stands ready to contest prosecutorial overreach, and agreements between entities and prosecutors are meticulously and painstakingly negotiated.¹⁶¹

The dynamics in Chapter 11 are quite different. When management has been replaced by a trustee, debtor's counsel has minimal incentives to contest prosecutorial demands.¹⁶² Indeed, they may already be performing an investigatory function not dissimilar from prosecutors, seeking evidence of fraudulent transfers that might suggest criminal activity.

By moving quickly and informally during Chapter 11 proceedings and enlisting the aid of debtor's counsel, prosecutors may have advanced the public interest by obtaining a quick conviction of Bankman-Fried. At the same time, the debtor entity may have preserved value for stakeholders by avoiding indictment or the expense of extensive negotiations over a formal non-prosecution agreement. Indeed, some have positioned Bankman-Fried's quick and decisive conviction, facilitated by the Chapter 11 process, as an exception to the popular critique that authorities underenforce elite crime and pervasively show leniency toward the wealthy.¹⁶³

There are, however, cautionary notes to this story as well. Lipson and Skeel observed that the *Brady* doctrine, which provides defendants access to exculpatory evidence *in the possession of prosecutors*, might be bypassed when a debtor's bankruptcy counsel uncovers evidence of potential crimes (for example, when seeking evidence of fraudulent transfers) and selectively turns over incriminating material to a U.S. Attorney's Office.¹⁶⁴ More broadly, the natural alignment of a post-petition firm under new management and a prosecutor's office against the firm's pre-petition officers may impede an individual's criminal defense, even when charged conduct is less culpable than Bankman-Fried's. Prosecutorial intervention in bankruptcy can thus be highly significant even when informal, as these dynamics operate in the shadow of potential entity charges that would disrupt a reorganization.

160. See *id.* at 1900–01.

161. See *id.* at 1924.

162. See Lipson & Skeel, *supra* note 157, at 373.

163. See Jacob Abolafia, “Safety, in a Republican Sense”: Trump v. United States, *Democracy, and an Antisubordination Theory of the Criminal Law*, 134 YALE L.J. F. 43, 59 (2024) (positioning the prosecution of Bankman-Fried as an exception to the “failure to investigate and prosecute the crimes of the powerful”); Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 562 (2024) (noting that many corporate scandals result “in no senior person landing in prison,” with the “exception of the occasional nearly one-person fraud band like a Bernard Madoff, Elizabeth Holmes, or Samuel Bankman-Fried”).

164. See Lipson & Skeel, *supra* note 157, at 454.

2. *Conflicted Intervention: General Motors*

In other Chapter 11 cases, prosecutors may participate formally, subject to political limitations that restrict their freedom of action. The bankruptcy of General Motors in the aftermath of the 2008 financial crisis was unusual in several respects. Paired with the contemporaneous Chrysler bankruptcy, the case turned on the Obama Administration's broader policy objective of rescuing the auto industry and the broader economy.¹⁶⁵

GM's bankruptcy also arose in the context of a massive recall involving a flawed ignition switch, which had caused the death of over 100 people.¹⁶⁶ Most damningly, evidence showed that company executives were aware of the danger for over a decade before the recall, leading to a criminal investigation by the Department of Justice.¹⁶⁷

Potential criminal liability of the firm was enormous, but the executive branch was also committed to rescuing the firm as part of its response to the financial crisis.¹⁶⁸ As the Second Circuit would later note, had the government brought charges, "managing how to juggle bankruptcy with a criminal prosecution" could have delayed or impeded the reorganization.¹⁶⁹

In an unusual bankruptcy reorganization, virtually all GM assets were sold, free and clear, to a new entity funded in part by federal TARP funds.¹⁷⁰ Liabilities and some assets were retained by the old entity, which proceeded to liquidate.¹⁷¹ Federal prosecutors facilitated this rescue by entering a deferred prosecution agreement through which the new, reorganized firm agreed to forfeit \$900 million while the old liquidation entity agreed to certain admissions.¹⁷² The DPA precisely divided the consequences of criminal charges between the two entities, ensuring that the new company would cooperate as needed by prosecutors but would not be burdened by overhanging criminal liability.¹⁷³

Ultimately, the deferred prosecution agreement in the GM bankruptcy demonstrates tensions that may arise in entity prosecutions of very large

165. See Elias & Triantis, *supra* note 5, at 523.

166. See Constance E. Bagley, Mark Roellig & Gianmarco Massameno, *Who Let the Lawyers Out?: Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 U. PA. J. BUS. L. 419, 444 (2016).

167. Jason R. Parnell & Robert W. Emerson, *Bankruptcies and Bailouts: The Continuing Impact of the Financial Crisis on the Franchise Auto Dealer Industry*, 21 U. PA. J. BUS. L. 288, 335–36 (2018).

168. See *id.* at 332–37.

169. See *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 165 (2d Cir. 2016).

170. David G. Epstein & Tevin Bowens, *Better than a Discharge*, 71 SYRACUSE L. REV. 443, 471 (2021).

171. *Id.*

172. See Parnell & Emerson, *supra* note 167, at 332–37.

173. *Id.*

firms. On the one hand, GM was, at the point of its agreement with federal prosecutors, dependent on governmental intervention and support for its survival.¹⁷⁴ GM had no meaningful ability to stand on its rights and defend itself in court.

Yet, given the Obama Administration's stated goal of rescuing the auto industry, it is equally likely that policy considerations severely limited prosecutors.¹⁷⁵ As the Second Circuit noted, a vigorous prosecution would have impeded an outcome that was a presidential priority.¹⁷⁶ The dynamics of bankruptcy reorganization can thus constrain both sides, pressuring firms to resolve potential charges while also pressuring prosecutors to contribute to the successful reorganization of major firms.

3. *Decisive Intervention: Purdue Pharma*

The bankruptcy of Purdue Pharma, a result of its criminal and tortious contributions to the opioid epidemic, became one of the most notorious Chapter 11 reorganizations in history¹⁷⁷—largely because of proposed non-debtor releases for its owners, the Sackler family, which were ultimately struck down by the Supreme Court.¹⁷⁸ Just as significant, though somewhat overshadowed by the non-debtor releases, was the disposition of the firm's criminal liability, which was inextricably linked with the culpability of the Sacklers.

Faced with federal charges in 2007, Purdue admitted in a plea agreement that it had falsely marketed OxyContin as non-addictive.¹⁷⁹ Rather than cease its behavior, Purdue continued its culpable conduct, contributing to the addictions and deaths of thousands.¹⁸⁰ The firm's criminal liability for post-2007 conduct had the potential to consume all of its assets.¹⁸¹

174. See Ellias & Triantis, *supra* note 5, at 523.

175. See Robert E. Wagner, *Bailouts and the Potential for Distortion of Federal Criminal Law: Industrial Espionage and Beyond*, 86 TUL. L. REV. 1017, 1035 (2012) ("It is also likely that government organizations like the FBI or United States Department of Justice will receive political encouragement to give companies like GM as much assistance as they can. . . . [P]oliticians who supported TARP will be judged in part based on whether these companies succeed . . .").

176. Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135, 165 (2d Cir. 2016).

177. See Simon, *supra* note 1, at 1188.

178. Harrington v. Purdue Pharma L.P., 603 U.S. 204, 204 (2024).

179. *In re* Purdue Pharma L.P., 635 B.R. 26, 34 (S.D.N.Y. 2021).

180. See Lipson, *The Rule of the Deal*, *supra* note 11, at 61. Massachusetts regulators documented over 150,000 visits to prescribing doctors by Purdue's OxyContin sales representatives after the 2007 plea deal in that state alone. Complaint Exhibit 1, *Commonwealth v. Purdue Pharma, L.P.*, 36 Mass. L. Rptr. 56 (Mass. Super. Ct. 2019), <https://www.mass.gov/doc/exh1-salesvisitsbypurdueinmassachusetts> [https://perma.cc/N5LH-Y8QT].

181. See Lipson, *supra* note 7, at 1791; Levitin, *supra* note 6, at 1105.

Adam Levitin was the first to extensively analyze and document the impact that federal prosecutors had on the Purdue bankruptcy.¹⁸² As Levitin explained, the Department of Justice filed prophylactic proofs of claim for nearly ten billion dollars in criminal fines and forfeiture liability (along with an equivalent amount in civil liability for False Claims Act violations).¹⁸³ DOJ argued that its forfeiture judgments would not be bound by the automatic stay, asserting that it could recover virtually all of the firm's assets outside of the bankruptcy process.¹⁸⁴

Purdue had little choice but to settle, pleading guilty to conspiracy to defraud the United States, among other charges.¹⁸⁵ It agreed to \$3.5 billion in criminal fines and \$2 billion in criminal forfeiture liability.¹⁸⁶ In exchange, DOJ agreed (1) to treat its criminal fines (and civil liability) as unsecured claims rather than property subject to forfeiture and (2) to credit Purdue's distributions to state and local governments against its federal criminal liability, reducing that amount from \$2 billion to \$225 million.¹⁸⁷

This agreement made Purdue's reorganization viable, but the DOJ settlement also included a snapback provision that Levitin insightfully identified as a poison pill.¹⁸⁸ DOJ required Purdue to restructure itself into a public benefit company owned by governmental creditors, providing that any other disposition—including conversion to Chapter 7—would restore the full amount of criminal forfeiture liability as a superpriority administrative expense claim.¹⁸⁹ The new entity, to be known as Knoa Pharma, was to use Purdue's valuable assets in part to fund opioid abatement measures.¹⁹⁰

Once these arrangements were approved (the plea by a district court and the settlement by the bankruptcy court), all incentives for alternative arrangements were taken off the table, as any resolution other than restructuring into a public benefit company would wipe out recoveries for virtually all creditors other than the federal government.¹⁹¹

182. See Levitin, *supra* note 6, at 1110–12; see also Lipson, *First in Time; First Is Right*, *supra* note 11, at 33.

183. See Levitin, *supra* note 6, at 1110.

184. See *id.* at 1110–11.

185. See *id.* at 1111.

186. See *id.*

187. See *id.*

188. See *id.* at 1113; Lipson, *The Rule of the Deal*, *supra* note 11, at 78.

189. Levitin, *supra* note 6, at 1112; see also Lipson, *supra* note 7, at 1791; William Organek, "A Bitter Result": Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies, 96 AM. BANKR. L.J. 361, 369–70 (2022).

190. See Parikh, *supra* note 147, at 470.

191. See Lipson, *supra* note 7, at 1791; Levitin, *supra* note 6, at 1110–16.

The origin of the public-benefit company proposal is unclear.¹⁹² Levitin deems it most likely that some aspects of the settlement (potentially those that guaranteed the firm's survival as a public benefit company) originated from Purdue.¹⁹³ He observed that it "is hard to see why DOJ would care if Purdue reorganized as a public benefit company or not."¹⁹⁴

Articulating a contrary view, William Organek found it plausible that the federal government "sought to use Purdue's bankruptcy to further federal healthcare policy."¹⁹⁵ The opioid-abatement goals of the planned post-bankruptcy firm¹⁹⁶ are generally analogous to other public-policy interventions through the bankruptcy system.¹⁹⁷ For example, the Obama Administration's reorganization of Chrysler was accomplished so as to encourage the development of energy-efficient vehicles.¹⁹⁸ But irrespective of the government's opaque motives, its actions demonstrate its power to shape the results of a Chapter 11 reorganization through entity prosecution.

Jonathan Lipson has suggested another implication of the DOJ settlement in *Purdue*, arguing that it "strongly suggested that the Sacklers would not be prosecuted individually."¹⁹⁹ Lipson explained that the government had committed itself to a complex arrangement that depended in part on payments from the Sacklers over the course of years.²⁰⁰ Those payments, which would result in significant resources flowing to state and local public health programs, might be disrupted by individual prosecutions.²⁰¹ Accordingly, the arrangement may have disincentivized state as well as federal prosecutions.²⁰² Interestingly, while informal DOJ involvement in the FTX bankruptcy facilitated rapid prosecution of culpable principals, its direct involvement in *Purdue* may have resulted in the opposite outcome.

192. See Samir D. Parikh, Essay, *Mass Exploitation*, 170 U. PA. L. REV. ONLINE 53, 65 n.66 (2022).

193. See Levitin, *supra* note 6, at 1115.

194. *Id.*

195. Organek, *supra* note 18, at 747.

196. See William A. Organek, *Purdue's Side Effects: Using Due Process to Realign Mass Tort Bankruptcies*, 50 BYU L. REV. 1031, 1043 (2025).

197. See generally Parikh, *supra* note 147, at 465.

198. See Coordes, *supra* note 8, at 1154; Ellias & Triantis, *supra* note 5, at 524.

199. Lipson, *The Rule of the Deal*, *supra* note 11, at 80; see also Coordes, *supra* note 8, at 1157.

200. See Lipson, *The Rule of the Deal*, *supra* note 11, at 80.

201. See *id.* at 81–82.

202. See *id.*

B. The Conspicuous Absence of Non-profit Defendants

Prosecutors have been described as “the criminal justice system’s real lawmakers,” because their discretion to bring or forgo charges is “nearly limitless.”²⁰³ Indeed, the decision *not* to intervene can be just as consequential to a reorganization. Notably, federal prosecutors seem generally unwilling to play a significant role in prosecuting reorganizing debtors that are not organized for profit.

Some of the most severe social debt cases that have entered the bankruptcy system resulted from harms caused by non-business entities.²⁰⁴ For example, nearly twenty Catholic dioceses, archdioceses, and religious institutes turned to Chapter 11 to manage mass-tort liability that stemmed from clergy sexual abuse scandals.²⁰⁵

Individual abusers within the clergy were criminally charged, religious entities were held vicariously liable in tort,²⁰⁶ and institutional criminal charges were discussed by some commentators.²⁰⁷ In some respects, these cases were strong candidates for organizational prosecution. Culpable conduct involved not just the direct abuse of victims (for which organizations might have scope-of-employment defenses against vicarious liability²⁰⁸), but also efforts by higher-ranking officials to cover up that abuse (culpable actions more clearly undertaken by agents for the benefit of their organizational principal).²⁰⁹ Nevertheless, very few criminal charges were brought against religious institutions, and prosecutors played no recorded role in shaping these bankruptcy cases.

To some extent, this exercise of prosecutorial discretion is unsurprising. Although the Religion Clauses of the First Amendment do not necessarily bar the neutral prosecution of a religious entity for violating generally

203. Raman, *supra* note 137, at 189 (quoting William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001)).

204. See Foohey & Odinet, *supra* note 2, at 1302.

205. Baker, *supra* note 9; Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 363–65 (2006); Marie T. Reilly, *Catholic Dioceses in Bankruptcy*, 49 SETON HALL L. REV. 871, 875 (2019).

206. See *Fearing v. Bucher*, 977 P.2d 1163, 1165 (Or. 1999).

207. Laura Russell, Note, *Pursuing Criminal Liability for the Church and Its Decision Makers for Their Role in Priest Sexual Abuse*, 81 WASH. U. L.Q. 885, 886 (2003); Katherine Lynn Morris, *Cardinal Law and Cardinal Sin: An Argument for Application of R.I.C.O. to the Catholic Sex Abuse Cases*, 15 RUTGERS J.L. & RELIGION 298, 299 (2014); Sarah J. Kropp, Comment, *Solving the Penn State Problem: Holding the Institution Accountable for Its Conspiracy of Silence*, 42 CAP. U. L. REV. 167, 168 (2014).

208. See, e.g., MODEL PENAL CODE § 2.07(1)(a) (A.L.I. 1985) (requiring that an action be within an employee’s scope of employment for most corporate convictions).

209. See Marci A. Hamilton, *Church Autonomy Is Not a Better Path to “Truth”*, 22 J.L. & RELIGION 215, 218 (2006–07).

applicable laws,²¹⁰ they do prohibit governmental interference in matters of internal religious governance.²¹¹ Thus, the type of structural reforms routinely imposed on businesses through deferred prosecution and non-prosecution agreements would be constitutionally dubious, to say nothing of politically controversial, in the diocesan cases.

But the absence of prosecutors in non-profit Chapter 11s extends beyond religious debtors. The Boy Scouts of America (BSA) was also a trusted institution forced into bankruptcy by mass-tort liability arising from heinous sexual abuse.²¹² BSA entities were similarly held vicariously liable in tort cases, suggesting that respondeat superior principles would not have foreclosed entity-level criminal liability.²¹³ Yet federal prosecutors did not charge the BSA entity or participate as claimants in its restructuring. Nor did they intervene in the reorganization of USA Gymnastics, also caused by liability for widespread abuse.²¹⁴ Neither the Religion Clauses nor the Religious Freedom Restoration Act would have precluded intervention in these cases.

Thus, prosecutors appear more likely to bring entity charges and participate in a Chapter 11 reorganization where the debtor entity is a business organization. Organizational prosecutions against not-for-profit entities are not unheard of but are less common.²¹⁵ This trend cannot be explained by a gap in culpable behavior—the cases involving Catholic dioceses, the Boy Scouts, and USA Gymnastics, as well as other similar scandals,²¹⁶ demonstrate that non-profit organizations are more than capable of behavior that shocks the conscience.

210. See *Emp. Div. v. Smith*, 494 U.S. 872, 881 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Ramirez v. Collier*, 595 U.S. 411 (2022).

211. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

212. See Bojan Mishko Srbinovski, *The Two Poles of Article III: Formalism and Functionalism in Bankruptcy Jurisdiction*, 71 *DRAKE L. REV.* 173, 232 (2024).

213. *Lourim v. Swensen*, 977 P.2d 1157, 1161 (Or. 1999).

214. See Simon, *supra* note 1, at 1197.

215. See Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 *U.C. DAVIS L. REV.* 205, 206 (2004) (“Traditionally, commentators on nonprofit law have lamented the unsatisfying level of its enforcement.”); Elizabeth Barnes Coburn, Note, *Nonprofit Organizations and Anti-Corruption Statutes: Incentives for Compliance*, 34 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 447, 454 (2020) (“[N]either the DOJ nor the SEC has ever prosecuted a nonprofit for violating the FCPA.”); Joshua E. Perry, *For Patients and Profits: Ethical Astuteness and the Business of Dialysis*, 2 *BELMONT L. REV.* 37, 43 (2015) (recognizing that most health-care provider prosecutions have involved for-profits, but acknowledging that “the nonprofit sector has not been immune from government prosecution arising out of illicit reimbursement practices”).

216. See, e.g., Veronica Root, *Modern-Day Monitorships*, 33 *YALE J. ON REG.* 109, 138 (2016) (discussing abuse scandal that took place at Penn State University).

More likely, the measures prosecutors routinely demand from for-profit organizations are difficult to translate to the non-profit context.²¹⁷ For-profit businesses can be nudged, through entity charges and negotiated bankruptcy restructuring, to further public-policy interests, ranging from energy-efficient vehicles (Chrysler) to opioid abatement (Purdue). It is less obvious how the government could accomplish such goals through an organization like the Boy Scouts.

This differential approach reinforces the importance of regulatory goals in bankruptcy-related charging decisions. It also suggests that the pursuit of criminal fines and other monetary punishments from Chapter 11 debtors may be largely instrumental—pursued primarily to create bargaining power over a culpable, insolvent organization rather than to collect assets that would otherwise be distributed to creditors.

III. DOCTRINAL TENSIONS CREATED BY INTERACTIONS BETWEEN CHAPTER 11 AND CRIMINAL LAW

Building on the prior analysis, this Part analyzes commonalities and contradictions at the intersection of corporate criminal law and corporate restructuring. It focuses on three issues of concern to both areas of law: victim compensation, the importance of protecting innocent employees, and accommodations for the federal system. Notably, while both bankruptcy and criminal law advance these goals in their own ways, those accommodations are put under pressure when Chapter 11 debtors face entity charges.

A. *Victim Compensation in Chapter 11 and Criminal Prosecution*

Social-debt cases in Chapter 11 and decisions to charge organizational defendants both implicate compensation for victims of the entity's conduct. Bankruptcy and the criminal justice system each operate, according to their own internal logic, to provide payments to victims. But when the two systems interact, victim compensation may be diluted.

217. Cf. Cunningham, *supra* note 103 (discussing internal reforms in the for-profit context); Pamela Foohey, *Bankrupting the Faith*, 78 MO. L. REV. 719, 722 n.17 (2013) (noting the unique nature of non-profit entity bankruptcies).

1. *Compensating Victims Through Chapter 11*

Firms reorganize in Chapter 11 to preserve going-concern value that would otherwise be lost, were the firm to be sold in a liquidation.²¹⁸ Indeed, according to a leading theory of bankruptcy law (generally termed the “proceduralist” school), the recovery of going-concern value that would otherwise be eroded through bargaining and collective-action problems associated with insolvency is the central appropriate justification for Chapter 11.²¹⁹

Through bankruptcy, surplus value that is captured through reorganization is distributed to creditors. These distributions may take the form of direct payments or an interest in the reorganized entity.²²⁰ The old firm then “continues,” in the sense that its relationships, human capital, and deployment of assets are maintained.²²¹ Given its reordered capital structure, the appearance of continuity is something of an illusion.²²²

Presented in the abstract, Chapter 11’s focus on preserving a criminally liable entity (albeit in a reorganized form) might seem detached from the human impact of corporate misconduct.²²³ But where the firm is guilty of malfeasance, the ranks of its creditors will almost always include victims with tort claims against the debtor entity.

Victims thus participate in bankruptcy as creditors and receive payment through the confirmed plan. Accordingly, they stand as beneficiaries of Chapter 11’s ability to preserve surplus going-concern value. Chapter 11 also empowers victim-creditors to vote on plan confirmation, giving them

218. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 758 (2002).

219. See Coordes, *supra* note 8, at 1144–45; Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to Stern v. Marshall*, 87 AM. BANKR. L.J. 191, 195 (2013); Douglas G. Baird, Essay, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573, 578 (1998).

220. See, e.g., Baird & Rasmussen, *supra* note 218, at 779.

221. See, e.g., Lynn M. LoPucki, *The Nature of the Bankrupt Firm: A Response to Baird and Rasmussen’s The End of Bankruptcy*, 56 STAN. L. REV. 645, 651–52 (2003); Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. U. L.Q. 403, 417–18 (2001).

222. See Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 130 n.45 (1984) (“A corporation that passes through bankruptcy and ‘continues,’ has, in effect, sold its assets, stripped of the claims of its investors, to a new entity, and distributed the proceeds of that sale to the existing investors.”); *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 613 (7th Cir. 2005) (noting that the Bankruptcy Code “effectively treats the date on which the bankruptcy begins as the creation of a new firm”).

223. See, e.g., Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 884 (2019) (documenting the evasion of environmental cleanup and black-lung treatment obligations by insolvent coal companies).

more say in the ultimate fate of the entity defendant than they would have outside of bankruptcy.²²⁴

Whether or not Chapter 11 is the optimal mechanism to address mass tort cases is one of the central questions of modern bankruptcy scholarship.²²⁵ Regardless of the merits of each side in that debate, the key observation for the purposes of this Article is that the logic of Chapter 11 operates to increase aggregate payments to creditors, including victims of an insolvent firm, beyond what would be achieved through non-bankruptcy collection law.

2. *Compensating Victims Through Criminal Prosecution*

Outside of bankruptcy, the financial interests of individual victims seeking compensation generally align victims with prosecutors and against offenders. Criminal restitution awards that often accompany conviction require offenders to compensate victims for the costs of their crimes.²²⁶

Initially a form of “criminal equity” focused on disgorgement of ill-gotten gains, restitution awards evolved to serve mixed goals of criminal punishment and victim compensation.²²⁷ Within the federal system, courts may order restitution for any offense, and the Mandatory Victims Restitution Act requires it for many crimes.²²⁸

Criminal restitution serves goals that overlap with but are distinct from tort law. Both systems provide compensation and deterrence. However, criminal restitution also serves rehabilitative interests, forcing offenders to acknowledge and reflect upon their victims in a way that impersonal punishment does not.²²⁹ Moreover, in some instances, criminal restitution may produce a more effective deterrent than tort judgments, because unlike civil remedies, criminal restitution may not be paid by a third party such as

224. See, e.g., *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 243 (2024) (Kavanaugh, J., dissenting) (“[N]on-debtor releases in mass-tort bankruptcy plans, including this one, have been approved by all but a comparatively small group of victims and creditors.”).

225. Compare *Casey & Macey*, *supra* note 2, at 974–77, with *Gluck, Burch & Zimmerman*, *supra* note 2, at 525–27, and *Foohey & Odinet*, *supra* note 2, at 1263.

226. See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 99–105 (2014); Jarred L. Barlow, Note, *Ending Restitution’s Gilded Age: Bankruptcy, Criminal Law Exceptionalism, and Forgiveness*, 61 AM. CRIM. L. REV. 95, 95 (2024).

227. See Cortney E. Lollar, *Invoking Criminal Equity’s Roots*, 107 VA. L. REV. 495, 540 (2021); Laura I Appleman, *Nickel and Dime into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1505–06 (2016).

228. Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 22–27 (2016).

229. See Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 938 (1984); see also *Grey v. Allstate Ins. Co.*, 769 A.2d 891, 900–01 (Md. 2001) (comparing civil judgments and criminal restitution).

an insurance company.²³⁰ On the other hand, tort judgments may provide more compensation for victims, as criminal restitution awards rarely take into account pain and suffering or other measures of damages beyond actual losses.²³¹

Thus, although criminal law is primarily focused on punishment, victims often receive compensation through the prosecution of well-resourced defendants. And at least outside of bankruptcy, criminal prosecution is often harmonized with tort law in ways that benefit victims. For example, in some states, a victim who has signed a release in order to receive an insurance payment may nonetheless recover from the tortfeasor if the state orders criminal restitution.²³² As a California court explained, “a release by a victim cannot waive the People’s right to have a defendant pay restitution ordered as part of his sentence.”²³³

Within bankruptcy, criminal restitution from *individual* defendants can also be harmonized with a corporate debtor’s reorganization. In Chapter 11 cases, bankruptcy judges have successfully coordinated with prosecutors to use restitution awards from convicted insiders to supplement distributions to victim-creditors of the firm. Such harmonization, however, does not translate well when entities are prosecuted within the unique procedural context of Chapter 11.

3. Victim Compensation, Chapter 11, and Entity Prosecutions

Inside bankruptcy, the interests of tort claimants may conflict with those of prosecutors.²³⁴ With tort victims standing as general unsecured creditors of an insolvent debtor, funds diverted to address criminal liability are necessarily unavailable to provide compensation. Three particular dynamics exacerbate this problem.

First, serious interactions between a company and prosecutors are costly, and in Chapter 11 these costs are incurred as priority administrative expenses. For example, Lipson and Skeel have shown that FTX’s support of the prosecution of Bankman-Fried resulted in millions of dollars in administrative expenses—assets flowing to professionals rather than

230. See Note, *supra* note 229, at 941.

231. *Id.* at 940.

232. See, e.g., *People v. Bernal*, 123 Cal. Rptr. 2d 622, 626 (Ct. App. 2002).

233. *Id.*

234. Indeed, the problem of insolvent perpetrators was noted by commentators as early as Blackstone, who wrote that after the public crime is “avenged . . . by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor.” 4 WILLIAM BLACKSTONE, COMMENTARIES *6.

victims.²³⁵ In that particular case, creditors ultimately received the full value of their claims (at least on paper), mitigating these concerns. But in other settings, administrative expenses incurred through criminal defense can divert assets that would otherwise flow to victims.

Second, the pursuit of prosecutors' regulatory goals may reduce the value of the estate, leaving less for victims. In *Purdue*, the settlement agreement between the DOJ and the firm effectively barred the possibility of converting the case to a Chapter 7 liquidation. In theory, liquidation might have maximized total value for individual creditors, had the poison-pill structure not been in place. Prosecutors thus shut down any meaningful challenge to the plan based on the "best interests of creditors" test.

Finally, prosecutors may direct funds to entities other than individual victims. In *Purdue*, the debtor disgorged significant assets that were directed to a range of worthy recipients, including opioid abatement projects and local governments that had been forced to deal with waves of drug overdoses. Outside of bankruptcy, this type of restitution would complement tort judgments paid to individual victims. But within the zero-sum context of insolvency, money flowing to these goals can have the unfortunate effect of leaving less for victims and their families.

Of course, in the right case, prosecutors might ensure that victims remain the driving focus of Chapter 11 proceedings. Certain reorganizations without prosecutorial involvement, including several diocesan bankruptcies and the USA Gymnastics cases, have been criticized as reaching undesirable results for victims.²³⁶ The bargaining power that prosecutors bring could serve as a check on "bankruptcy grifters."²³⁷

But in the wrong bankruptcy case, entity charges may not be in the best interests of crime victims.²³⁸ Organizational charges that do not align with the interests of victims may be especially unwarranted, as most values vindicated by an entity's indictment can also be served, at least to a degree, by individual prosecutions of that entity's culpable human agents.

235. Lipson & Skeel, *supra* note 157, at 373–74.

236. See Foohey & Odinet, *supra* note 2, at 1297, 1304.

237. See Simon, *supra* note 1, at 1161.

238. This tension is not unique to bankruptcy cases or organizational charges. Scholars focused on individual prosecutions have also documented prosecutorial strategies that diverge from the interests of victims. See, e.g., Rachel J. Wechsler, *Victims as Instruments*, 97 WASH. L. REV. 507, 579 (2022) (arguing, in the context of gender-based violent crimes, that prosecutorial decisions should "respect victims' individuality and ensure that . . . paternalistic actions are tailored to their individual needs and circumstances").

B. Protection of Innocent Employees in Chapter 11 and Criminal Prosecution

The need to minimize disruptions to innocent workers is a significant consideration in both Chapter 11 and criminal law. In both areas, however, the system's pursuit of this goal is contested and challenged by mainstream scholarship. To the extent that this goal plays a central role when these systems interact, aspects of those systems that have drawn criticism are likely exacerbated.

1. Traditionalist Arguments for Chapter 11

Bankruptcy “traditionalists” argue that the preservation of viable firms is justified by the substantive goals of saving jobs, protecting stakeholders, and advancing the public interest.²³⁹ Legislative history tends to support the traditionalist argument. Then-Justice Rehnquist summarized Congress's statements on Chapter 11 as emphasizing the “fundamental purpose” of “prevent[ing] a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”²⁴⁰

But the traditionalist view has long been challenged by proceduralists, who contend that bankruptcy should favor reorganization rather than liquidation only when a firm's distress is caused by bargaining and collective action problems solvable through bankruptcy procedure. Douglas Baird summarized the proceduralist objection through a concise hypothetical:

The paradigmatic firm is a restaurant in a large city. When the restaurant closes, workers lose their jobs, but they can find work elsewhere. A new restaurant or another firm can move into the space, and life goes on. If a bad restaurant is replaced by a much better one, employment levels in the city may even increase. Keeping a bad restaurant in business postpones the inevitable and delays a desirable shift of labor and capital to somewhere the inputs can be put to better use. Hence, bankruptcy law is useful only when the restaurant is good and would be able to survive in the market but for fights among creditors and other investors.²⁴¹

239. See Coordes, *supra* note 8, at 1145; Gotberg, *supra* note 219, at 194; Baird, *supra* note 219, at 578.

240. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984).

241. Baird, *supra* note 219, at 580.

Debate between these competing camps is longstanding and complex.²⁴² For purposes of this Article, it suffices to observe that, while the preservation of jobs is central to one account of Chapter 11, under the dominant competing account, short-term benefits to employment should play little to no independent role in the fundamental decision about whether an insolvent firm should liquidate or reorganize.

2. *Employment and Corporate Prosecution*

The destruction of jobs after the indictment of Arthur Andersen had an enormous impact on the law of corporate criminal prosecutions. Much of the modern process for holding culpable firms to account, with its emphasis on investigations leading to deferred prosecution and non-prosecution agreements, has evolved to avoid repetition of that incident.²⁴³ Rather than risking the destruction of otherwise viable firms through indictments, authorities typically work to vindicate criminal law interests with a light footprint.

However, the focus on job preservation in criminal law has drawn substantial opposition among some theorists, commentators, and members of the public. There is widespread concern that over-sensitivity to the Arthur Andersen effect has resulted in firms that are “too big to prosecute.”²⁴⁴ Some empirical data support this general charge. For example, most firms that are actually convicted are small businesses, with plea deals being more common for medium-sized firms, while deferred prosecution and non-prosecution agreements tend to be reserved only for the largest entities, where job loss would be systemically impactful.²⁴⁵

Few would welcome a repeat of Arthur Andersen’s collapse. But in the wake of the financial crisis, the Department of Justice itself acknowledged the legitimacy problems created by the perception that different rules applied to the largest firms.²⁴⁶ In an era of substantial populist discontentment, this longstanding critique of federal charging priorities

242. See, e.g., Adam Feibelman, *Bankruptcy and the State*, 38 EMORY BANKR. DEVS. J. 1, 12 (2022).

243. See Zaring, *supra* note 103, at 1444; Paulsen, *supra* note 98, at 1436.

244. See Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 458–60 (2019) (summarizing debate and scholarship); Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925, 940 (noting prosecutorial trends after Arthur Andersen).

245. See Diamantis & Laufer, *supra* note 244, at 458.

246. See Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law*, 34 REV. BANKING & FIN. L. 655, 687 (2015); Chinsky, *supra* note 115, at 14.

should be taken seriously.²⁴⁷ In short, the tendency to consider potential job loss when determining whether to indict an organization is far from uncontroversial.

3. *Employment Centrality When Debtor Firms Are Prosecuted*

At first glance, “saving jobs” would appear to be one of the least objectionable public-policy goals. But as discussed, the extent to which that objective should play a legally significant role either in the bankruptcy or in criminal charging decisions has been deeply contested for different reasons.

These critiques converge when prosecutors participate in Chapter 11 cases. An example can be seen in the Purdue case, where the federal government’s intervention virtually guaranteed that the debtor entity would be reorganized as the public benefit company Kinoa Pharma rather than be liquidated. While the Chapter 11 system, left alone, might have ended in Purdue’s liquidation, the combination of prosecutorial intervention and Chapter 11 resulted in the firm’s preservation as a going concern.²⁴⁸

The tendency of both systems to favor entity preservation appears to be magnified when those systems interact. Chapter 11’s backstop—the principle that firms worth more in liquidation should indeed liquidate—can easily be bypassed if prosecutors agree to waive or reduce criminal liability on the condition that the firm be preserved. To some, that result may be a preferable one. But bankruptcy proceduralists and critics of the non-prosecution agreement model may find common ground for concern.

Interestingly, critics of employment centrality in these respective fields have tended to argue from sharply different baselines. The proceduralist opposition to bankruptcy’s traditional emphasis on employment was in part an outgrowth of the law-and-economics movement.²⁴⁹ In criminal law, in contrast, opposition to the centrality of employment concerns in charging decisions has been articulated by progressive and populist critics, who lament a perceived decline in accountability by the wealthy.²⁵⁰ The interface

247. See, e.g., Shai Dothan, *Democracy, Populism, and Concentrated Interests*, 56 LOY. L.A. L. REV. 459, 461 (2023).

248. See Levitin, *supra* note 6, at 1110–16.

249. See David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1115 (2000).

250. See, e.g., Christopher Modlish, Note, *The Yates Memo: DOJ Public Relations Move or Meaningful Reform That Will End Impunity for Corporate Criminals?*, 58 B.C. L. REV. 743, 745 (2017) (arguing that a “decline in prosecution of white-collar crime is . . . angering ordinary Americans who feel as though the system is fixed in favor of the wealthy and powerful”). Cf. Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335, 337 (2018) (“[S]ome have even pointed to the failure to prosecute individuals in the wake of the financial crisis as a factor in the recent shift toward populism among the electorate.”).

of these superficially similar critiques further demonstrates the nuanced and complex interactions between organizational criminal law and Chapter 11.

C. Cooperative Federalism in Chapter 11

1. Federalism and Criminal Law Outside of Bankruptcy

Criminal prosecutions are initiated by federal, state, or local authorities. For most crimes, state and local authorities serve as the default prosecutors, while federal prosecutors intervene more selectively.²⁵¹ As Erin Blondel has noted, the federal criminal code “almost entirely overlaps with state criminal law,” but the federal system’s enforcement footprint is relatively small.²⁵² With state prosecutors traditionally taking the lead in enforcing most laws, intervention by federal authorities is sporadic.²⁵³

At times, the Supreme Court has gestured at certain crimes being traditionally or inherently local, designating others as traditionally or inherently federal.²⁵⁴ But this way of dividing state from federal criminal law is difficult to coherently maintain, as a vast array of malfeasance—ranging from the possession of controlled substances to treason—is criminalized by both state and federal law.²⁵⁵ Other seemingly traditional local crimes (such as assault) are transformed into federal crimes by coincidental details (such as the fact that the victim was delivering the mail).²⁵⁶

Blondel has persuasively argued that a better model is one of cooperative federalism.²⁵⁷ She explains that the federal criminal system complements the states by serving as a backstop—supplementing state prosecutions by

251. *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (“Under our federal system, the States possess primary authority for defining and enforcing the criminal law.” (internal quotation marks omitted)); see, e.g., Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 521–22 (2011).

252. See Erin C. Blondel, *The Structure of Criminal Federalism*, 98 NOTRE DAME L. REV. 1037, 1039 (2023). See also Scott M. Sullivan & Iben Sullivan, *The Empirics of Criminal Federalism*, 21 OHIO ST. J. CRIM. L. 377, 379 (2024) (“The division of power between state and federal authority in enforcing criminal law often feels abstract . . . because most federal and state law is fundamentally aligned in substance, even if diverging in their details.”).

253. See Daniel C. Richman & William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 608 (2005); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 981 (1995).

254. See Alison L. LaCroix, *Redeeming Bond?*, 128 HARV. L. REV. F. 31, 32 (2014) (“[A] majority of the Court believes that there exists a stable category of ‘purely local’ activities.”).

255. See, e.g., Alexander Gouzoules, *Dual Allegiance: Federal and State Treason Prosecutions, the Treason Clause, and the Fourteenth Amendment*, 53 IND. L. REV. 593, 602 (2020) (surveying state and federal treason laws and cases).

256. See, e.g., Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 417 (2003).

257. See Blondel, *supra* note 252, at 1039.

bringing intensive resources to bear in order to correct enforcement breakdowns.²⁵⁸ Under Blondel's cooperative model, federal prosecutors often take the lead in investigating white-collar crimes committed by large corporations—not because such crimes are inherently federal (they are not),²⁵⁹ but because such investigations are resource intensive.²⁶⁰

State authorities do not lack capacity to investigate and prosecute intensive cases such as those involving financial crime. They can and do bring such cases, and win them.²⁶¹ Instead, Blondel's insight is that, rather than jealously guard their criminal-enforcement prerogatives, states typically ask for and welcome supplemental help provided by federal authorities.²⁶² Nor does federal criminal enforcement truly encroach on the state enforcement role, as the comparatively tiny federal system has no capacity to supplant state authorities as the primary public-safety providers.²⁶³

At least, that is the picture outside of Chapter 11.

2. *The Federalism Implications of Entity Prosecutions in Chapter 11*

Chapter 11 can flip cooperative federalism on its head. Outside of bankruptcy, discretionary federal prosecution typically overlaps with and supplements state prosecution. But where the target is an insolvent entity, different sovereigns may find themselves competing for the same assets, attempting to enforce different priorities, or seeking to vindicate separate interests.

This phenomenon was clearly demonstrated in the early stages of the Purdue case. Twenty-five state attorneys general initially argued that the company should be liquidated, preferring to put an end to the culpable entity rather than attempting to recover going-concern value.²⁶⁴ That possibility was foreclosed by the DOJ's criminal-restitution settlement with the firm, which positioned the federal government as a super-priority creditor.²⁶⁵

To be sure, federal authorities did not use their controlling position to divert money from the states—on the contrary, substantial sums were routed

258. *See id.* at 1075–79.

259. *E.g.*, Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 811 (1996) (“[F]ederal attention should . . . be focused on corporate and white collar crime [among other areas, because these] are the kinds of cases that truly transcend state boundaries.”).

260. Blondel, *supra* note 252, at 1087–88.

261. *See, e.g.*, Andrew K. Jennings, *Criminal Recordkeeping*, 102 WASH. U. L. REV. 223, 224–27 (2024).

262. Blondel, *supra* note 252, at 1098.

263. *See id.* at 1045–49.

264. *See* Levitin, *supra* note 6, at 1115.

265. *See* Lipson, *The Rule of the Deal*, *supra* note 11, at 78.

to state and local governments, in accordance with DOJ anti-piling policies.²⁶⁶ But its position did allow it to head off arguments that the case should take any route other than the reorganization of Purdue as a public benefit company.²⁶⁷ It also may have disincentivized state and local prosecutors from pursuing individual charges against the Sacklers.²⁶⁸

In short, the creditor-against-creditor dynamic that is so common to bankruptcy makes no exception when the creditors in question are different sovereigns exercising their interests to enforce their respective criminal laws. While cooperative federalism may be the dominant model outside of bankruptcy, the special context of Chapter 11 leads to distortions. In many or most cases, DOJ policy and discretionary decisions may prevent direct competition with state prosecutors. But application of these policies can be conditioned in ways that give federal authorities leverage over state prosecutors.

IV. A NEW TRADITIONALISM AND THE RISK OF OVERREACH

As discussed, organizational charges in bankruptcy provide the government with expansive leverage over reorganizing firms, which can be used to regulate and reform them. Governmental actors may intervene to serve a variety of non-bankruptcy objectives: improved governance,²⁶⁹ environmental protection and climate mitigation,²⁷⁰ or abatement of the opioid epidemic.²⁷¹ While deferred prosecution and non-prosecution agreements outside of bankruptcy regularly mandate expanded compliance and internal governance reforms, rarely do they go so far as to alter the very nature of a business or to implement wide-ranging public-policy goals.²⁷² This Part highlights positive and negative aspects of that dynamic.

A. Bankruptcy Policy and Prosecutorial Intervention

Public good can be achieved through these forms of intervention. In its best light, this form of public-interest enforcement can be cast as a revival of bankruptcy traditionalism.²⁷³ The traditionalist view, championed by

266. *See id.*

267. *See id.*

268. *See id.*

269. *See* Yadav & Stark, *supra* note 4, at 1532 (discussing cryptocurrency firm bankruptcies).

270. *See* Ellias & Triantis, *supra* note 5, at 545–49 (discussing auto industry bankruptcies).

271. *See* Coordes, *supra* note 8, at 1157 (discussing Purdue Pharma bankruptcy).

272. *See* Gregory M. Gilchrist, *Regulation by Prosecutor*, 56 AM. CRIM. L. REV. 315, 350–51 (2019).

273. *See, e.g.,* Gotberg, *supra* note 219, at 195.

Elizabeth Warren,²⁷⁴ Karen Gross,²⁷⁵ and others,²⁷⁶ held that corporate bankruptcy is an appropriate mechanism for achieving substantive policy goals, thereby advancing the best interests of community stakeholders and the wider public. The rival proceduralist model, which casts Chapter 11 as a mechanism solely focused on maximizing value by correcting distortions associated with insolvency, has over time assumed a central position in bankruptcy scholarship and discourse.²⁷⁷

When government stands as the dominant creditor in a large firm's reorganization, however, the proceduralist focus on the creditors' bargain and the traditionalists' focus on the public interest come together. Proceduralist scholarship largely emphasizes bargaining—hypothetical *ex ante* bargaining under the older Creditors' Bargain Theory,²⁷⁸ and actual *ex post* bargaining under Anthony Casey's New Bargaining Theory.²⁷⁹ Fundamentally, organizational charges in Chapter 11 reproduce the bargaining dynamic that underlies deferred prosecution and non-prosecution agreements outside of bankruptcy, translating that dynamic into the special context of insolvency.²⁸⁰ Thus, prosecutorial participation in social debt bankruptcy cases can be comfortably explained through proceduralist models.

But in social debt cases where government emphasizes goals like climate mitigation, the resulting bargains achieve public-policy goals reminiscent of progressive, "traditionalist" conceptions of corporate bankruptcy. And they do so without dramatic departures from leading proceduralist models about the appropriate focus of bankruptcy law. Thus, another unique aspect of the intersection between corporate crime and Chapter 11 is a surprising

274. Warren, *supra* note 77, at 777 ("[B]ankruptcy policy becomes a composite of factors that bear on a better answer to the question, 'How shall the losses be distributed?'").

275. KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 19 (1999) ("In the bankruptcy context, dual perspectives [of debtors and creditors] are insufficient. There is yet another perspective to consider: the interests of community.").

276. See Skeel, *supra* note 249, at 1117–18 (positioning bankruptcy scholar Vern Countryman as a bridge from New Deal-era progressive hostility toward corporate reorganization toward Warren's view of reorganization as a means to achieve distributional goals).

277. See Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1711 (2020) ("[C]orporate bankruptcy law's proper purpose is to solve the incomplete contracting problem that accompanies financial distress.").

278. See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982) ("[B]ankruptcy [is] a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position.").

279. See Casey, *supra* note 277, at 1715 (emphasizing the "noncontractible uncertainty associated with financial distress").

280. Cf. *id.* at 1716 ("Chapter 11 implements a renegotiation framework to facilitate *ex post* bargaining.").

harmonization of bankruptcy traditionalism and proceduralism in certain cases.

B. Inappropriate Demands and Prosecutorial Overreach

On the other hand, there are compelling reasons to be skeptical about the advancement of the public interest through organizational prosecution of insolvent firms. For one, as discussed in the previous Part, it is not clear how prosecutors should balance general public-policy goals (such as climate mitigation or opioid abatement), on the one hand, with the specific goal of maximizing compensation for victim-creditors on the other.²⁸¹ There is also a degree of arbitrariness in nudging only firms that have entered bankruptcy toward prosocial goals, while firms that remain solvent are left unaffected. Ellias and Triantis have noted other potential hazards of governmental activism in the bankruptcy context, including the democratic concern that such initiatives should best proceed through the legislative process.²⁸²

More recent history suggests an even deeper problem with discretionary prosecutorial regulation. Whereas goals such as opioid abatement are broadly uncontroversial, Executive Branch demands of private actors can veer far outside generally acceptable boundaries. Major law firms targeted by recent executive actions have agreed to reform policies toward clients, employees, and pro bono projects to align more closely with the Trump Administration's political values.²⁸³ Universities have been pressured to reform academic programs as well as student-conduct policies—from banning masks to removing recognition from student organizations—as the price of resolving investigations or restoring suspended grant awards.²⁸⁴ Some evidence suggests that, before judicial intervention, the DOJ moved to dismiss charges against New York City mayor Eric Adams in exchange for a tacit agreement to cooperate with the Administration's priorities on

281. See Parikh, *supra* note 192, at 69.

282. See Ellias & Triantis, *supra* note 5, at 547.

283. See Hampson & Maizel, *supra* note 22, at 71; S.I. Strong, *Pro Bono Publico Versus Pro Bono Presidential*, 94 GEO. WASH. L. REV. ARGUENDO 1, 3 (2025); see also *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 91 (D.D.C. 2025), *appeal filed and consolidated sub nom. Perkins Coie LLP v. U.S. Dep't of Just.*, No. 25-5241 (D.C. Cir. argued May 14, 2026) (“Paul Weiss . . . agreed to ‘adopt a policy of political neutrality with respect to client selection and attorney hiring’ and ‘dedicate the equivalent of \$40 million in pro bono legal services’ ‘to support the Administration’s initiatives.’” (citation omitted)).

284. See Bernadette Meyler, Symposium Essay, *Leveraging Institutions: Imposing Unconstitutional Constraints on Individual Speech Through State and Private Organizations*, 78 STAN. L. REV. ONLINE 9, 11 (2025).

immigration and crime.²⁸⁵ And a merger involving the parent company of CBS News was approved shortly after that company agreed to alter the content of some of its broadcasting.²⁸⁶

Together, these distinct examples demonstrate the enormous sweep of potential demands that the Executive Branch could impose on private actors in exchange for discretionary actions, such as an agreement to schedule criminal forfeiture liability as a general unsecured claim.

One can imagine, for example, an insolvent multinational that is the target of a pending investigation for potential violations of a capacious criminal statute like the Foreign Corrupt Practices Act. An indictment of the firm, and the addition of the federal government as a major claimant, might impede plan confirmation or make it impossible. A non-prosecution agreement resolving potential liability, on the other hand, would facilitate a successful reorganization.

With such leverage in hand, only professional ethics and rule-of-law norms stand in the way of prosecutors demanding, for example, that the multinational reform a media division to produce content favorable to a given administration or unfavorable to its opponents. Perhaps a vigilant bankruptcy judge, wielding procedural expertise and the considerable discretion conferred by the Code, would block such an inappropriate demand. But little codified law directly enables her to do so.

To date, the immense bargaining power of prosecutors wielding potential entity charges against Chapter 11 debtors has not been used to coerce political favors out of insolvent corporations. But this troubling possibility no longer appears fanciful, and it may be another reason for skepticism about the propriety of organizational charges against insolvent firms.

CONCLUSIONS

The interactions between corporate criminal liability and Chapter 11 reorganization are consequential and under-theorized. This Article has charted the respective histories of these bodies of law, arguing that their interactions were largely unanticipated by the Code's framers. It has then observed that prosecutorial participation in Chapter 11 bankruptcies has been

285. See *United States v. Adams*, 777 F. Supp. 3d 185, 192 (S.D.N.Y. 2025) ("Everything here smacks of a bargain: dismissal of the Indictment in exchange for immigration policy concessions.").

286. David Shepardson, *Lawmakers Say Paramount Skydance 'Stonewalling' Probe into Trump Merger Approval*, REUTERS (Nov. 12, 2025), <https://www.reuters.com/world/lawmakers-say-paramount-skydance-stonewalling-probe-into-trump-merger-approval-2025-11-12/> [<https://perma.cc/2Z8B-6UUS>] ("The merger was approved after Skydance agreed to ensure CBS news and entertainment programming would be free of bias, hire an ombudsman for at least two years to review complaints, and end diversity programs.").

sporadic but sometimes decisive. From these discussions, certain general principles can be derived.

First, prosecutors have a legitimate role to play in social debt bankruptcy cases. Charges against a reorganizing debtor entity can lead to commendable outcomes, like the speedy conviction of a culpable insider through enhanced cooperation, a heightened focus on victims, or the prevention of recidivism through negotiated plan provisions related to structure and governance. Nevertheless, judges should ensure that prosecutors do not use the leverage provided by the bankruptcy forum to detract from victim recovery or extract inappropriate political concessions from significant debtor entities.

Specific red flags should heighten judicial vigilance. Three factors in particular are likely indicators of prosecutorial overreach. The first is the filing or announcement of criminal charges immediately before or shortly after bankruptcy milestones, such as the petition or DIP financing approval. Enforcement actions that track the bankruptcy process rather than investigatory developments should be viewed with suspicion. A second concerning indicator would be conditioning deferred prosecution, non-prosecution, or sentencing recommendations on bankruptcy outcomes such as plan structure, creditor treatment, or asset sales. And a third red flag would be prosecutorial focus on a debtor entity that is out of proportion with any corresponding focus on individual offenders.

Critically, both bankruptcy judges presiding over Chapter 11 cases and district court judges presiding over criminal proceedings should remain alert to such indicators. Coordination between both types of judges may be the most effective way to check prosecutorial overreach in this area.

For their part, prosecutors should be cognizant of the unique consequences of criminal charges in the context of Chapter 11. Here, at least in some cases, criminal charges risk diverting value from victims. Moreover, discretionary participation in a given case may lead to unnecessary tension between federal and state authorities, disrupting the dynamic of cooperative federalism that generally characterizes enforcement. The Justice Manual's guidelines for organizational prosecution have little to say about these concerns, and one partial solution might be an amendment of the Manual to better address charging decisions in the context of insolvency.

More broadly, the interactions between criminal enforcement and corporate bankruptcy are worthy of more discussion and study than they have received to date. Somewhat lost in the dynamic, ongoing debates over mass-tort resolution in the bankruptcy system is the role that criminal law can play in many social debt cases. All participants in the system will be better served by a scholarly literature that takes fuller account of these interactions.