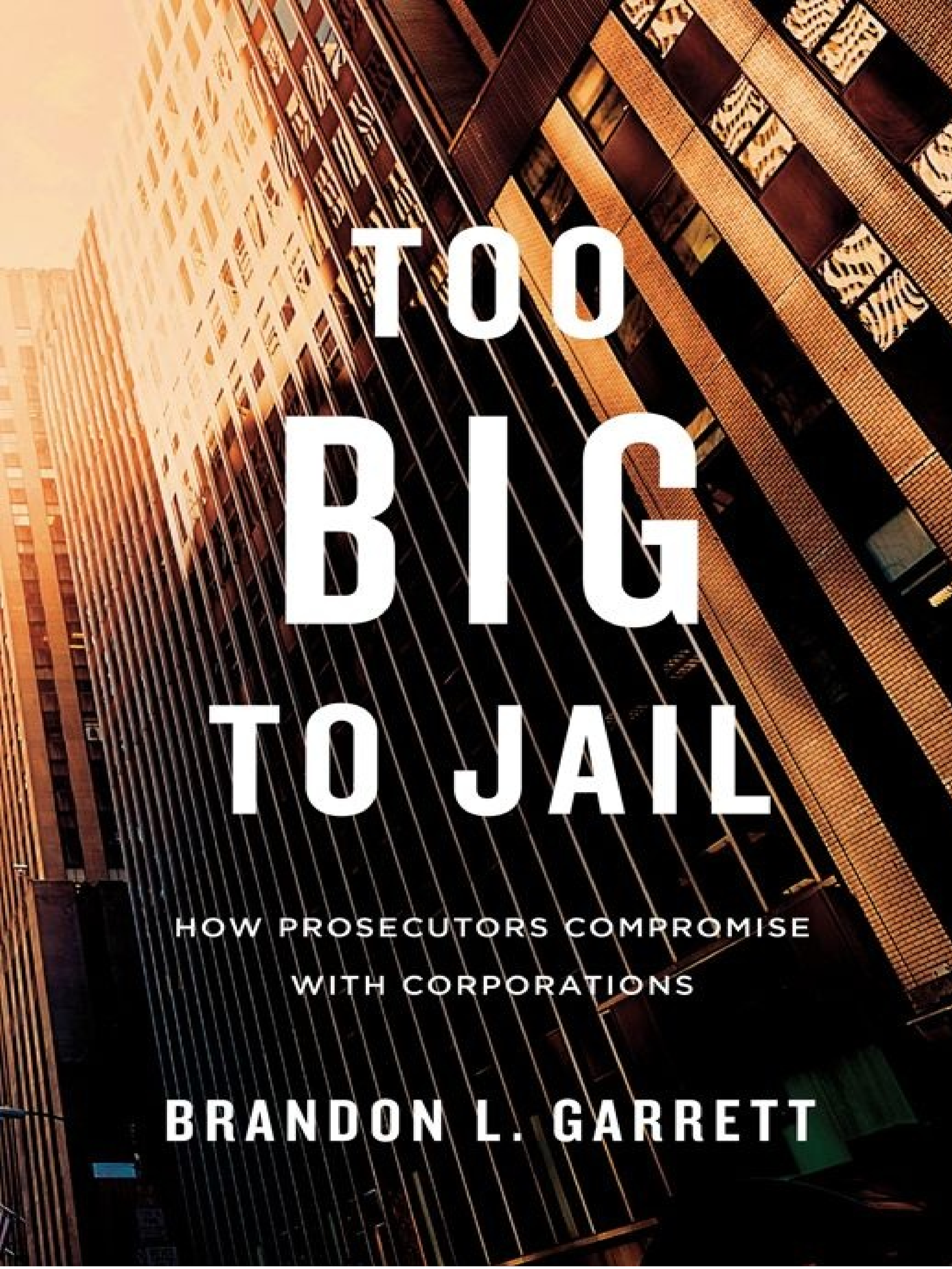
TOO
BIG
TO JAIL
HOW PROSECUTORS COMPROMISE
WITH CORPORATIONS
BRANDON L. GARRETT

TOO BIG TO JAIL

How Prosecutors Compromise with Corporations

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To Kerry

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ABBREVIATIONS

ABA	American Bar Association
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CFTC	Commodities Futures Trading Commission
DOJ	Department of Justice
DPA	Deferred prosecution agreement
ENRD	Environment and Natural Resources Division
EPA	Environmental Protection Agency
FBI	Federal Bureau of Investigation
FCPA	Foreign Corrupt Practices Act
FDA	Food and Drug Administration
FDCA	Food, Drug, and Cosmetics Act
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act
GAO	General Accountability Office
HHS-OIG	Department of Health and Human Services Office of Inspector General
IRS	Internal Revenue Service
LIBOR	London InterBank Offered Rate
NPA	Non-prosecution agreement
OCC	Office of the Comptroller of the Currency
OSHA	Occupational Safety and Health Administration
SEC	Securities and Exchange Commission

1

United States vs. Goliath

"I know what this is about. I have been expecting you."[1]

It was not until 2006 that The Banker finally got the knock on his door. Six police officers and prosecutor were standing there with an arrest warrant.

He later recalled, "I was a true Siemens man, for sure. I was known as the keeper of the slush fun We all knew what we were doing was illegal." The Banker was in charge of just some of th multinational bribery operations at Siemens Aktiengesellschaft, a German multinational firm, ranke in the top 50 of the Fortune Global 500 list of the world's largest corporations. It has more tha 400,000 employees in 190 countries and makes everything from trains to electrical power plants home coffeemakers. Among its many activities was paying more than a billion dollars in bribe around the world to secure lucrative business from foreign governments. Now Siemens would b prosecuted, and not just in Germany but also in the United States.

This book is the first to take a close look at what happens when a company is prosecuted in th United States. A corporate prosecution is like a battle between David and Goliath. One woul normally assume that federal prosecutors play the role of Goliath. They wield incredible power, wi the ability to hold a corporation liable for a crime by even a single employee and the benefit expansive federal criminal laws. It is hard to think of federal prosecutors as the little guy in any figh Yet they may play the role of David when up against the largest and most powerful corporations in th world.

Some companies are not just "too big to fail" but also "too big to jail": they are considered to be valuable to the economy that prosecutors may not hold them accountable for their crimes. Th expression "too big to jail" has mostly been used to refer to failures to prosecute Wall Street banks. dismayed reaction to the lack of prosecutions after the last financial crisis is understandable, but see why corporations may escape prosecution, it is important to understand exactly how a compa can be prosecuted for a crime and the many practical challenges involved. The very idea that corporation can be prosecuted for an employee's crime seems odd on its face, and even amon criminal lawyers, the topic of corporate crime had long been obscure. Over the past decade, corpora crime exploded in importance—not only because of greater public interest in accountability but als because prosecutors transformed their approach to targeting corporations.

In this book, I present data collected from more than a decade of cases to show what really happe when prosecutors pursue corporate criminals. I examine the terms of the deals that prosecutors no negotiate with companies, how prosecutors fine companies to punish them, the changes compani must make to prevent future crimes, and whether prosecutors pursue individual employees. Th current approach to corporate prosecutions raises "too big to jail" concerns that extend beyond Wa Street banks to the cases brought against a wide range of companies. I argue that prosecutors fail effectively punish the most serious corporate crimes. Still more troubling is that not enough is know about how to hold complex organizations accountable; prosecutors exacerbate that problem by settlin corporate prosecutions without much transparency. My main goal in exploring the hidden world o corporate prosecutions is to encourage more public attention to the problem of punishing corpora crime. To go deeper inside the decision making of prosecutors and companies, in each chapter n only do I present data describing the larger patterns in corporate prosecutions and non-prosecution but I also tell the stories of how particular companies such as Siemens fared. The Siemens story is a important one to begin with: the case broke all records for the biggest prosecution for foreign bribery

How were the Siemens bribes paid? The Banker did not pay them himself. True to his nicknam he instead “organized the cash” by transferring funds from anonymous bank accounts in Switzerla and Lichtenstein or using dummy corporations to hide where the money was coming from and whe it was going. He explained how he carried the cash undetected: “For a million euros, you don’t need big suitcase because the bills aren’t very big. A briefcase is enough—200,000 euros isn’t so much th you couldn’t carry it in your coat pocket.”[2] In the countries where Siemens was pursuing lucrativ government contracts—whether it was Greece, Nigeria, Argentina, or Bangladesh—executives hire “consultants” to help them “win” the government contracts. The consultants received a fee an personally delivered the bribes to government officials.

Siemens paid bribes around the world—more than a billion dollars from 2002 to 2007. Th Banker’s division dealt with telecommunications and had a bribery budget of $40–50 million a yea He recalled how the telecom unit was kept “alive” by bribes and how other major divisions at Siemen operated this way. Bribery was pervasive and “common knowledge.”

Bribing foreign government officials is a crime in Germany, the United States, and many oth countries. In 2008, prosecutors in Germany charged The Banker with corruption, leading to conviction, two years’ probation, and a $170,000 fine.[3] He received leniency on account of h cooperation with the authorities. When he later spoke to journalists, he expressed disappointment th Siemens treated him like an “outsider” and gave him a “kick in the pants” while people at the top we not held accountable. “I would never have thought I’d go to jail for my company,” he later said. “Sur we joked about it, but we thought if our actions ever came to light, we’d all go together and the would be enough people to play a game of cards.”[4]

The controversy surrounding this global bribery scheme would eventually bring in prosecuto around the world, notably those in the United States. They would wield a powerful new approach targeting corporations, one I explore throughout this book. In the Siemens case, was The Banker rig that underlings would be the only ones held accountable, or would the storm reach the summit—t top executives or the company itself?

No Soul to Be Damned, No Body to Kick

How exactly are corporations convicted of a crime? The word *corporation* comes from *corpus*, th Latin word for “body.” A corporation may be a body, but it is a collective body that can act onl through its employees. As the British lord chancellor Edward Thurlow reportedly remarked in the la eighteenth century, corporations have “no soul to be damned, no body to kick.”[5] Corporate person obviously cannot be imprisoned. However, companies can face potentially severe and even leth consequences, even if in theory they can be “immortal.” They can be forced to pay debilitating fin or suffer harm to their reputation. When convicted they can lose the government licenses that mal doing business possible; for example, a company can be suspended or even barred from entering in contracts with the federal government.

The federal rule for corporate criminal liability is powerful and long-standing. In its 1909 decisio in *New York Central & Hudson River Railroad v. United States*, the Supreme Court held that corporation could be constitutionally prosecuted for a federal crime under a broad rule.[6] The rule simple: an organization can be convicted based on the criminal conduct of a single employee. Th standard comes from a rule called the master-servant rule or respondeat superior—“let the mast answer” in Latin—which makes the master responsible for the servant’s acts. Under that rule, a employer was responsible for an employee’s wrongs if those wrongs were committed in the scope o employment and at least in part to benefit the employer. As the Court suggested in *New York Centra* the master or corporation may be in the best position to make sure employees are properly supervis to prevent lawbreaking. The Court emphasized “the interest of public policy,” since giving compani “immunity” from criminal prosecution would make it hard to “effectually” prevent “abuses.”[7] Rath than spend time on theoretical questions about when and whether corporations should constitute leg persons, I focus on whether corporate prosecutions are actually effective in preventing crime. Man have debated corporate personhood, including in response to the Court’s ruling in *Citizens United Federal Election Commission* (2010) that the First Amendment protects corporations again regulation of election spending.[8] To understand corporate prosecutions, though, what matters is n *Citizens United* but rather the strict master-servant rule from the less well-known *New York Centr* case.

Today, a corporation is a “person” under federal law, as are other types of business organization The very first section of the U.S. Code, with definitions that apply to all federal laws, including tho dealing with crimes, defines a person to include “corporations, companies, associations, firm partnerships, societies, and joint stock companies, as well as individuals.”[9] As a result, feder prosecutions may be brought against any type of organization. The *U.S. Sentencing Commissio Guidelines Manual* uses the word *organization* because the guidelines cover criminal sentences for a kinds of companies, including partnerships not formally incorporated by a state. Prosecutors convi giant multinational corporations such as Siemens, large domestic public corporations with millions shareholders, and mom-and-pop companies with just a few owners or only one owner.

In theory, a corporation can be prosecuted for just about any crime that an individual can b prosecuted for (except for crimes with heightened intent, such as homicide). In practice, corporatio

are prosecuted for crimes likely to take place in a business setting, such as accounting fraud, bankin
fraud, environmental violations, foreign bribery, money laundering, price fixing, securities fraud, an
wire fraud. Important corporate prosecutions are chiefly brought by federal prosecutors, in contrast
prosecutions of smaller-scale corporate crimes or prosecutions of individuals, which a
overwhelmingly brought at the local level.[10]

Data on Corporate Prosecutions

Over the past decade, there has been an increase in the size and importance of federal prosecutions corporations, though not in the number of cases brought. One of my goals in writing this book was uncover and present data explaining how corporations are actually prosecuted. As Figure 1 illustrates, the data that I have gathered show a large spike in corporate criminal fines over the pa few years.

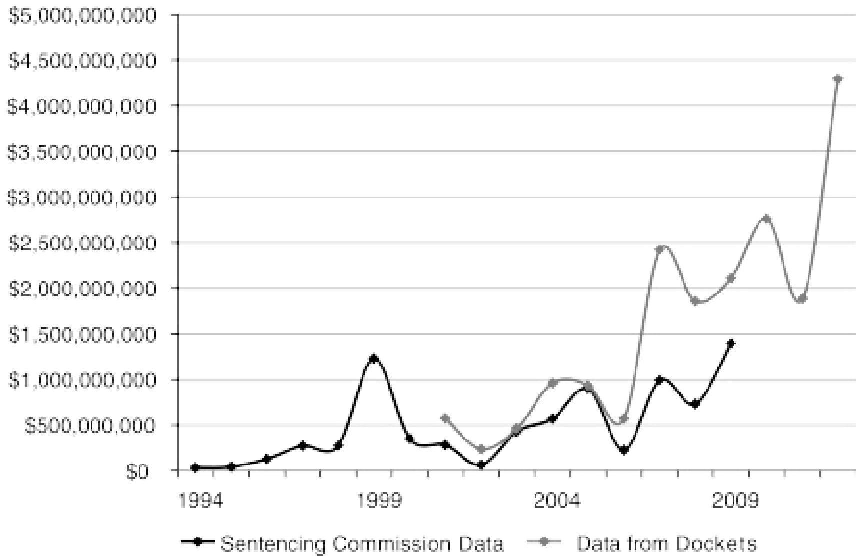

Figure 1.1 Total Criminal Fines for Organizations, 1994–2012

In the past, given the modest sentences for companies, it was often not worth the effort prosecute them.[11] Corporate fines grew after 1991, when the U.S. Sentencing Commission, a grou convened by Congress to write rules for sentencing federal criminals, adopted the first sentenci guidelines specifically designed for corporations. More resources were also devoted to corpora prosecutions in response to Enron and other corporate scandals that shook the United States in t early 2000s, prompting the Department of Justice to form an Enron Task Force and later a Corpora Fraud Task Force (now called the Financial Fraud Enforcement Task Force).[12] Figure 1.1 shows tot fines for the approximately 3,500 companies convicted from 1994 to 2009. It includes data from t Sentencing Commission for the earlier period, but from 2001 to 2012 the more dramatic rise in fin is shown in the data that I collected by hand from more than 2,250 court dockets and corpora prosecution agreements.

To understand what has really changed, we need to look behind the aggregate data displayed Figure 1.1. The bulk of those corporate fines were actually paid in a small number of blockbust cases, such as the Siemens case. For example, the large spike in 2009 is because the pharmaceutic giant Pfizer paid a then-record fine of nearly $1.2 billion. That single fine made up about half of t total for that year. Other massive antitrust cases, foreign bribery cases, and illegal pharmaceutic sales cases involve fines in the hundreds of millions. There is still more about corporate prosecutio that those totals do not capture. The criminal fines are only a fraction of the costs imposed companies. For example, as part of criminal settlements, companies were required to pay billio more to victims of fraud. Also not reflected in the fines are structural reforms that prosecutors requi companies to adopt to prevent future crimes.

What is clear from the reported activity of prosecutors is that over the past decade they hav embraced a new approach: deferred prosecution agreements. Prosecutors enter agreements that allo the company to avoid a conviction but which impose fines, aim to reshape corporate governance, ar bring independent monitors into the boardroom. The rise of such deferred prosecution agreements, ar non-prosecution agreements, in which no criminal case is even filed, means that the offici Sentencing Commission statistics on corporate convictions, as shown in Figure 1.1, fail to captu many of the most important cases. Corporate fines are up, but the big story of the twenty-first centu is not corporate fines or convictions but prosecutors changing the ways that corporations are manage Prosecutors now try to rehabilitate a company by helping it to put systems in place to detect ar prevent crime among its employees and, more broadly, to foster a culture of ethics and integrity insic the company. This represents an ambitious new approach to governance in which federal prosecuto help reshape the policies and culture of entire institutions, much as federal judges oversaw scho desegregation and prison reform in the heyday of the civil rights era in the 1960s and 1970s.

What initially attracted me to studying these corporate agreements with prosecutors was that, as former civil rights lawyer, I was surprised to see prosecutors taking on for themselves the hard wor of changing institutions. I have spent years researching wrongful convictions and DNA exoneratior in individual criminal cases, in which errors may implicate larger problems in our criminal justic system. I turned my attention to the very different world of corporate prosecutions because a sing prosecution of a company such as Siemens can have enormous repercussions in the U.S. and the glob economy, particularly since other industry actors will be watching and nervous about whether the might be next. I quickly learned, however, that there is not much information out there about when how corporations are prosecuted.

There is no official registry for corporate offenders, nor is there an official list of deferr prosecution and non-prosecution agreements by federal prosecutors. I decided to create the resources. Over the years, with invaluable help from the UVA Law Library, I created a database wit information on every federal deferred prosecution or non-prosecution agreement with a company. I one place or another, this information was publicly available, but I wanted to put it together in order learn who these firms were, what they did, what they were convicted of, and how they were punished

There have been more than 250 such prosecution agreements entered over the past decade. I mac this database available online as a public resource, and it remains the most authoritative and comple source.[13] I then amassed a second and much larger archive of more than 2,000 federal corpora convictions, mostly guilty pleas by corporations, and placed these data online as well.[14] These da have real limitations; although prosecutors pound their chests when bringing the largest corporatior to justice, in many other cases no charges are brought. We have no way to know how often prosecuto decline to pursue charges against corporations—they do not usually make those decisions public- except when they enter non-prosecution agreements. We do not know how often corporations comm crimes, as the government does not keep data on corporate crime, which is hard to detect and define.

More than 250 federal prosecutions since 2001 have involved large public corporations. These a the biggest criminal defendants imaginable. Prosecutors have taken on the likes of AIG, Bristol-Mye Squibb, BP, Google, HealthSouth, JPMorgan, KPMG, Merrill Lynch, Monsanto, and Pfizer. Suc Fortune 500 firms can and do mobilize astonishing resources in their defense. The Siemens ca illustrates the titanic scale of the power plays at work in federal corporate prosecutions, making the unlike anything else in criminal justice.

Convicting Siemens

The story of the prosecution of one of the world's biggest corporations began in one of the world smallest countries—the principality of Lichtenstein. In early 2003, a bank in Lichtenstein owned b the royal family was having auditors review its records. The bank auditors noticed something strang millions of euros were bouncing around between Panama, Lichtenstein, and the British Virgin Island The bank secrecy laws in Lichtenstein, like those in Switzerland, make banks an attractive place f some people to keep money. Auditors were on the lookout for unusual transactions that might be th work of terrorists or other criminals trying to take advantage of this secrecy to engage in mone laundering. They noticed odd transactions between offshore companies, including large sums goi into an account of an offshore firm called Martha Overseas Corp. That company was incorporated Panama, but it was controlled by an executive of Siemens working in Greece—and the money goi into the account was coming from another offshore company, one based in the British Virgin Islan and controlled by another executive of Siemens.

The bank informed Siemens of this problem in 2004 and began to block these money transfe They also notified bank regulators in Germany and Switzerland, who in turn contacted regulators Austria and Italy. Two years later, German police appeared on The Banker's doorstep in Munich an seized documents from more than thirty Siemens offices.[15]

The case of Siemens (and three of its subsidiaries in Argentina, Venezuela, and Banglades became a truly global prosecution. Siemens had paid more than $1.4 billion in bribes between 200 and 2007 to government officials in sixty-five countries in Asia, Africa, Europe, the Middle East, an South America. All sorts of major public works projects were implicated. The focus of the U.S. cas against Siemens was kickbacks paid under the U.N. oil-for-food program in Iraq, in which Siemen paid $1.7 million in return for forty-two contracts with $80 million in revenue and over $38 million profits.[16]

At first glance, the Siemens scandal might seem to be a problem for German prosecutors, n American ones. After all, why would bribes paid to foreign officials by a German company, alread under investigation in Germany, trouble U.S. prosecutors? But many companies, Siemens included, d business in the United States. Bribe transactions may pass through U.S. wires. Even more importa Siemens is a public corporation with stock listed on the New York Stock Exchange (NYSE), givin U.S. prosecutors jurisdiction. The U.S. Department of Justice (DOJ) and the U.S. Securities an Exchange Commission (SEC), which regulates companies with publicly listed stock, both hav authority over a firm such as Siemens.

It would be U.S. prosecutors who seized the lead in this multinational case and collected the lion share of the fines. The DOJ and the SEC began to investigate upon hearing of the raids; both hand matters related to foreign bribery. When a company such as Siemens has ties in the United States, falls under a law called the Foreign Corrupt Practices Act (FCPA). The FCPA makes it a violation t bribe foreign officials, to keep inaccurate books and records, or to have inadequate internal procedur to prevent bribe payments. This criminal law was enacted in 1977 in the wake of the Waterga scandal and revelations that corporations regularly bribed government officials. The SEC discovere in the mid-1970s that hundreds of U.S. companies had spent millions of dollars from slush funds f illegal bribery overseas.[17] The head of enforcement at the SEC at the time recalled wondering, "Ho does Gulf Oil record a transaction of a $50,000 cash payment? I wanted to know, what account d they charge? Do they have an account called 'Bribery'?"

The idea of a bribery account was not far off the mark in the Siemens case. Prosecutors discovere that Siemens kept "cash desks" in its offices—literally desks filled with cash—where employe could withdraw large sums to write off as "useful expenditures," which were understood to be bribe The SEC called the bribery "unprecedented in scale and geographic reach." The DOJ called "corruption on an absolutely stunning scale."[18]

For decades, FCPA prosecutions were very rare, but in the past decade they accelerated. Federa prosecutors have generally become more aggressive regarding foreign corporate prosecutions, but o reason FCPA prosecutions became more common was a late 1990s expansion of the statute i response to an international treaty to combat corruption. That treaty was signed by many of the maj first-world countries, including Germany, which banned foreign bribery itself for the first time upo signing. Perhaps U.S. prosecutors felt more comfortable prosecuting a German corporation f something that was now also illegal in Germany and of concern to its prosecutors. Indeed, in th Siemens case, the DOJ and SEC collaborated closely with the Munich Public Prosecutor's Office.

In response to the threat of a federal prosecution, Siemens's board launched a massive intern investigation, spending more than $500 million investigating the case. Siemens also hired attorneys a New York law firm, who billed an additional $800 million. The attorneys then brought on boar accountants who reviewed 40 million bank documents and 127 million accounting records, billin $100 million more just on information technology to analyze all of that data.[19] The investigato uncovered $100 million in bribes to Argentine officials, perhaps well spent, since Siemens secured $1 billion contract to create national identity cards. They found $5 million in bribes for mobile phon contracts in Bangladesh. The list went on and on. They reviewed transactions in more than sixty-fiv countries and uncovered over $1 billion in bribes not found by European regulators.[20]

Why would a company such as Siemens want to investigate its own wrongdoing? It does not help murder suspect to confess his guilt to one crime and then go on to admit to dozens of others. Th might even be a good way to get the death penalty. Yet Siemens not only confessed but also spe hundreds of millions hiring top-notch lawyers to uncover its own crimes—and rather than seal its fat somehow this all helped the firm.

Like the vast majority of criminal defendants big or small, corporate or human, Siemen eventually pleaded guilty. Each year just a handful of corporations have trials, just as few individu defendants have them. The Siemens plea bargain was entered in the U.S. District Court for the Distri of Columbia and included $450 million in fines paid to the DOJ, $350 million to the SEC, and $80 million to the Munich Public Prosecutor's Office.[21]

Paying a record $1.6 billion in fines for activities it helped to discover may sound like a raw dea But like any other criminal defendant, Siemens bargained to avoid a "trial penalty." At a trial, th fines could have been far greater; the plea agreement cited a sentencing guidelines fine range of $1.3 billion to $2.7 billion. Consider too the gains that Siemens received from paying bribes over the year Siemens may have profited many times over from bribes used to secure lucrative governme contracts around the globe.

The cooperation may have paid off in other ways beyond a lower fine. Siemens pleaded guilty on to violations of FCPA accounting requirements and not to payment of illegal bribes, which also prohibited by the FCPA (and which Siemens admitted it had done on a grand scale). In so doin Siemens apparently avoided being suspended or barred from U.S. government contracting, whic would have had a huge impact on its long-term business—perhaps far more harmful than any fine.[22]

But the plea agreement went further than simple punishment. Siemens had to rehabilitate itse through a range of structural reforms. The company agreed to undertake compliance obligation including a new ethics program specially designed to detect and prevent foreign bribery and oth corruption. Siemens also agreed to commit “no further crimes” and to cooperate with the U. government in ongoing investigations, particularly of its own employees.

Most significant, Siemens agreed to submit to a continuous audit by a corporate monitor, wh would for four years have power to review documents, speak to employees, supervise complian efforts, and make recommendations about how Siemens would improve its corporate governance prevent corrupt payments. The monitor selected, Dr. Theo Waigel, was extremely prominent; he ha been a German minister of finance and was the first non-American monitor appointed in a feder prosecution. The selection of a German monitor to oversee compliance at a German firm represented new kind of cross-national collaborative prosecution. Siemens also hired a separate independent U. counsel to help monitor FCPA compliance.

The prosecutions led to the resignation of Siemen’s CEO at the time, who wrote a memoir title *Summit Storms* denying knowledge of the corruption schemes.[23] There were also addition convictions. Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela all pleaded guilty an agreed to pay $500,000 fines.[24] Munich prosecutors convicted two former Siemens employees addition to The Banker.[25] U.S. prosecutors announced grand jury indictments of six additional form executives at Siemens. Siemens was the cooperator—the corporate informant, if you will—blowin the whistle on its former employees. In return, the prosecutors lauded Siemens’s “outstanding” help.

The Banker’s fears were thus realized. He was right that individual low-level employees like hi would get prosecuted as scapegoats while those at the top would go free. But perhaps the prosecutio would lead to significant changes in how Siemens operates. The former CEO may never have bee implicated, but the company did have a chance to transform itself.

In the French novelist Honoré Balzac’s novel *Le Père Goriot*, a jaded Parisian advises a young stude that honesty “will get you nowhere.” “The secret of great fortunes, when there’s no obviou explanation for them, is always some forgotten crime—forgotten, mind you, because it’s bee properly handled.”[26] Today, just as in 1830s Paris, great business crimes can go undetected an unpunished. In the wake of the last financial crisis, many people have asked if prosecutors are doin enough to bring corporations to justice. Prosecutors have been using a new strategy for fightin business crime, seeking to target not only greedy people but also corporations themselves. The ne approach represents a real break from the past, and it is as fascinating as it is understudied. Eac chapter of this book poses a different question to explore a different aspect of how corporations a now prosecuted.

How is a corporation prosecuted? The corporate trial of the century, the 2002 trial of the Big Fiv accounting firm Arthur Andersen, was the rare case that shows what happens when a corporation take its case before a jury. Andersen was prosecuted for its obstruction of efforts to investigate its role i the collapse of Enron. The sheer scale of the document destruction by Andersen was remarkable- trucks were carting off documents to be shredded around the clock—but did employees intend break the law? Andersen tried its case in the media, mobilizing protesters, a public relation campaign, and squadrons of top lawyers. Federal prosecutors brought the case as a showpiece demonstrate their new seriousness about corporate crime. At the eleventh hour, Andersen rejected th deal prosecutors offered and took the case to the jury. This was a serious gamble: if Andersen wa convicted, it would be barred from doing certified accounting for public companies. The case ended twin disasters for the company and for prosecutors: a conviction that destroyed the firm yet w thrown out on appeal by the U.S. Supreme Court.

How do prosecutors negotiate with corporations? Prosecutors compromise. Regrouping and lickin their wounds after the Andersen case, federal prosecutors developed a new, subtler form of jujitsu: th deferred prosecution. The approach had humble origins in a plan to give lenient treatment to first-tim drug offenders in Brooklyn back in the 1930s—file a case, defer it or put it on hold to give th defendant a chance to stay clean, and if he does, have the judge dismiss it. The later prosecution KPMG, a major accounting firm like Andersen, ended very differently from that of its form competitor. KPMG avoided a grand jury indictment and a conviction by signing a deferre prosecution agreement. The agreement saw KPMG pay large fines, close down part of its busines and hire a monitor to supervise a new compliance program. This is an example of the most strikin change in the past decade: many of the largest firms now receive deferred prosecution agreements non-prosecution agreements. Well over half (148 of 255, or 58 percent) of the firms receiving suc agreements between 2001 and 2012 were public firms or their subsidiaries. These agreemen ostensibly reward efforts by corporations to implement reforms on their own, but often it is not cle what reforms are demanded or whether they actually work.

Who goes to jail? Usually no one. In about two-thirds of the cases involving deferred prosecution non-prosecution agreements and public corporations, the company was punished but no employe were prosecuted. This is surprising, because a corporation is like no other snitch. KPMG did not ju sign an agreement—it also agreed to turn over information to prosecutors, fire employees involve and refuse to pay their attorneys' fees. Employees are in a terrible bind—they can be fired for n cooperating in an investigation of what went wrong, and their employer may also turn them in, alon with their documents and emails, to get a good deal from prosecutors. A judge threw out prosecution of former KPMG employees, finding prosecutors had pressured KPMG to take action against them Just as in the Siemens case, few employees were ultimately convicted. A handful of notable case involve convictions of CEOs and high-level officials, but not many. It can be very hard to ho employees accountable in complex cases where many people took part in decisions—but that makes all the more crucial for prosecutors to really hold the company accountable.

What role do victims play in corporate prosecutions? Victims cannot easily participate in corpora criminal cases. The victims of the tragic and preventable explosion at the Texas City refinery in 200 tried to make their voices heard and convince the judge to make sure BP never acted so reckless again. They failed. Other victims had modest successes. Companies can pay large sums in restitutio to victims—a few cases involve multimillion-dollar restitution funds—but most do not. In additio some corporations do community service—not by cleaning up litter or whitewashing graffiti but b contributing money to causes such as the environment, affordable health care, or investor awarenes With the persistence of cases in which judges ignore victims' objections to lenient corpora settlements, one lesson of the BP incident is that we need better ways for judges to consider the publ interest in corporate prosecutions.

How is a corporation punished? Not by relying on strict and narrow sentencing guidelines, as wi individuals, but by using more flexible guidelines that may give the biggest fish the best deals. Few major public corporations are convicted each year; they usually get leniency. Yet many mom-and-po corporations plead guilty each year, and their names illustrate how far from the Fortune 500 they ca be: Andy's Orchids, Joe's Cajun Seafood, Little Rhody Beagle Club, and Ohio Fresh Eggs. Many a unable to pay a fine, and a few are put out of business—the corporate "death penalty." In contras large firms often receive deferred prosecution agreements and pay lower fines, if any: 47 percent those getting deferred prosecution or non-prosecution agreements paid no fine at all. Almost ever time prosecutors explained how a fine was calculated, it was at the very bottom, or quite a bit belo the bottom, of the range suggested in the sentencing guidelines. If prosecutors are not adequate rehabilitating firms, then they should impose the full criminal fines that the law demands.

Who oversees corporate prosecution agreements? A new kind of person—the corporate monitor—ca play a crucial part in overseeing the process of trying to rehabilitate a prosecuted company. Monito have sweeping powers and represent a new role in criminal justice. The monitor appointed supervise reforms at Bristol-Myers Squibb did more than oversee compliance—he asked the board fire the CEO and investigated entirely new violations. Although 25 percent of the deferred prosecutio and non-prosecution agreements provide for monitors (65 of 255 agreements), this raises the questio of why 75 percent do *not*. And none of the work that monitors do is made public. Nor is selection these high-paid monitors transparent, leading to controversy over allegations of favoritism a cronyism. A substantial number of agreements (31 percent) do not even speak to implementing compliance program. One wonders again how seriously prosecutors are taking corporate reforms.

What criminal procedure rights do corporations have? Corporations have many of the san constitutional criminal procedure rights as individuals. How often are those rights used in crimin cases? Not often. But one corporation went to trial and had a conviction reversed. Linds Manufacturing was exonerated and had a trial conviction dismissed after "flagrant" prosecutori misconduct came to light. Lawyers specializing in white-collar crime and corporate defense form growing and prominent part of practice at the nation's top law firms, and we may see much mo constitutional litigation by corporations seeking still more lenient results in criminal cases.

How are foreign corporations prosecuted? Foreign corporations are increasingly important targets ar pay far larger fines on average: $35 million compared with $4.7 million for domestic firms. O example is the prosecution of a multinational defense contractor, BAE, based in the United Kingdor U.K. authorities had long declined to prosecute it for extensive bribery, but the United State eventually took action, resulting in a prosecution agreement. Although few foreign countries ho corporations strictly criminally liable, they must now reckon with the unparalleled reach of U. prosecutors. Indeed, in response to the BAE case, the U.K. passed a new Bribery Act much like th FCPA. Corporate prosecutions have gone global.

Are corporate prosecutions effectively preventing crime? Corporate prosecutions can be ma stronger, as I detail in Chapter 10. However, there are fundamental questions that cannot be answere as prosecutors target corporations in a way that is strikingly opaque. What is the corporate crime rat Not only is there little in the way of data, but also defining what constitutes a crime can be difficul How many companies go unpunished? Are some corporate crimes uncovered but not investigated charged? While I present data describing outcomes in corporate prosecutions, these data still cann tell us everything we would want to know about how well prosecutors exercise their discretion, whic largely remains a black box.

Given that corporations have "no soul to be damned, no body to kick," a number of scholars hav argued over the years that corporations should not be prosecuted at all. They contend that since on individuals can be held morally accountable for crimes, prosecuting a corporation is as nonsensical prosecuting a stone. Critics also point out that the company can be fined in a civil case brought by a agency such as the SEC, which may be more experienced with industry practices and regulations ar better able to supervise structural reforms. In my view, criminal punishment of the most seriou corporate violators is justified, because the corporation itself may promote a culture of lawbreakin that can be remedied only at the corporate level. And corporations do not fear civil cases the way the fear prosecutions—for good reason. Criminal prosecutions bring with them far more seriou consequences, including potentially debilitating fines, harm to reputation, and collateral consequenc such as suspension and debarment.

Most corporate violations are not handled criminally, and the decision to bring a corpora criminal case should not be reached lightly. But society's ideas about what should be criminal punished can and should evolve. Congress has not been shy about defining new business-relate crimes. Over the past decade, holding corporations criminally accountable has become more firm ingrained in prosecution practice, in sentencing, and perhaps also in our culture. Companies such Siemens probably did not think much about the FCPA a decade ago; now they know a serious breac can mean prosecution. Ten or fifteen years ago people might not have asked after a financial cris why no big banks were prosecuted. Now it is a common belief that the company itself shou sometimes be held accountable.

Still, there are good reasons to worry whether the right corporations are being prosecuted ar whether the punishments fit the crimes. Prosecutors say that they target the most serious corpora violators. Yet the fines are typically greatly reduced in exchange for little oversight. If or justification for prosecuting a company in the first place is egregiously bad compliance, then or wonders why so little is typically done to deter or correct it. Are these prosecutions really helping t reform corporate criminals? Which compliance programs actually work? We simply do not know While there are no silver-bullet solutions to these vexing problems, there are concrete ways improve matters, including by insisting on more stringent fines, imposing ongoing judicial revie monitoring, and mandating transparency.

Corporate prosecutions upend our assumptions about a criminal justice system whose playing field tilted in favor of the prosecution. It is admirable that prosecutors have taken on the role of David prosecuting the largest corporations—but if they miss their shot at Goliath, the most serious corpora crimes will be committed with impunity. The surge in large-scale corporate cases shows how feder prosecutors have creatively tried to prevent corporate malfeasance at home and overseas, but re changes in corporate culture require sustained oversight of management, strong regulators, and sou rules and laws. Congress enacts new criminal laws intended to bolster regulations, but it is perennial unwilling to provide adequate resources to many agencies to carry out enforcement of tho regulations. That is why prosecutors can fill an important gap—and when they do prosecute corporation, they can wield the most powerful tools. A broader political movement toward great corporate accountability more generally, with stronger regulations and enforcement, could mak prosecutions far less necessary. But if we take as a given the larger dynamics of our economic an political system, modest changes could improve the role criminal cases play in the larger drama.

Corporate criminal prosecutions serve a distinct purpose—to punish serious violations and gross deficient compliance—and this purpose is not served if companies obtain kid-glove non-prosecutio deals in exchange for cosmetic reforms. Corporate convictions should be the norm, and in speci cases in which prosecutors defer prosecution, they should impose deterrent fines and stringe compliance requirements. A judge should carefully supervise all corporate agreements to ensure the effective implementation. Sentencing guidelines and judicial practices could be reconsidered, b prosecutors themselves can revitalize the area by adopting a new set of guidelines to strengthen th punishment reserved for the most serious corporate criminals.

Although I propose reforms, my main goal in this book is to describe the hidden world of corpora prosecutions. Corporate crime deserves more public attention. What is particularly chilling about th problem is that corporate complexity may not only enable crime on a vast scale but also make su crimes difficult to detect, prevent, and prosecute. We need to know much more. When we ask if som companies are being treated as "too big to jail," it is not enough to ask whether the largest firms are important to the economy that they are treated as immune from prosecution. We also need to as whether individuals are held accountable. We need to evaluate whether the corporate prosecutions th are brought are working. We need to look beyond the press releases announcing eye-catching fines an ask whether adequate criminal punishment is imposed and whether structural reforms are working.

The Banker feared that although Siemens was punished, most others would not face the sam consequences. He may have been right to worry. After all, not only do prosecutors regularly offe leniency, but we do not know how many corporate crimes go undetected or unprosecuted. As Th Banker put it: "The Eleventh Commandment is: 'Don't get caught.' "[27]

The Company in the Courtroom

“I obstructed justice,” admitted David Duncan, a former senior managing partner for Arthur Anderse as he testified in federal court on May 13, 2002.

Andersen was one of the five largest accounting firms in the world, and Duncan had led a larg team doing accounting work for the Enron Corporation both in Houston, where Enron was based, ar around the globe.[1] An energy, commodities, and services company, Enron had ambitious ventures i electricity, natural gas, communications, and even water. It had been named “America’s Mo Innovative Company” by *Fortune* for several years running and was one of the largest corporations the country.

With the formalities out of the way, the prosecutor asked, “Did there come a time in the fall o 2001 that you committed a crime?”

“Yes.”

“What did you do?”

“I instructed people on the engagement team to follow the document retention policy, which knew would result in the destruction of documents,” Duncan answered.[2]

About a month before this trial, Duncan had pleaded guilty to obstruction of justice. He faced maximum of ten years in prison, but he had yet to be sentenced and was free on bail.[3] If h cooperated, prosecutors could offer him a shorter sentence. At this trial, Duncan was providing th cooperation, but not by testifying against any of his former co-workers, Enron CEO Kenneth Lay, o anyone else at Enron. Instead, he was testifying against his former employer. The criminal defenda was Arthur Andersen itself, the firm where he had worked for twenty years—and which was now o trial for its life.[4]

On day six of the trial, Duncan took the stand. He began by recalling his life just a few month before as a different time, when he “did well” as a partner at Andersen. Partners were paid based on “grading system,” and with all of his Enron business, he scored in the top 10 percent.[5] He was eve asked to serve on the CEO’s advisory council in late 2001, shortly before Andersen fell apart. Dunca had been fired just four months previously, in January 2002, because Andersen concluded that he ha played an improper role in destroying documents. Now the tables were turned, and he was th government’s star witness in a long and complicated trial. If Duncan had committed a crim Andersen could be liable for it, so it would be Andersen arguing he had not done so.

Andersen and Enron

Arthur Andersen was a real person, one who founded his eponymous accounting firm in 1913. He wa a paragon of business ethics, with the motto “Think straight, talk straight.” Andersen was known turn down potential clients, no matter how much they would pay, if they used flawed accountin methods. More than a founder and namesake, he would come to embody the firm’s reputation fo integrity. The modern Andersen was one of the “Big Five” accounting firms, with offices around th world and the largest of corporate clients. Andersen, called simply “the Firm” by employees, wa headquartered in Chicago, Illinois, and had almost 30,000 employees in the United States and a tot of more than 85,000 worldwide. Andersen was known for emphasis on training new hires on i culture, standards, and procedures—the nickname for an employee was “Android.”[6] But the cultu was changing as partners focusing on consulting work took on more power within the company. In th late 1980s the firm created Andersen Consulting, which began to earn more of Arthur Andersen revenue.[7] By the late 1990s, Andersen Consulting was at odds with the auditing side of the firm, an in 1997 it broke off. With its auditing business slowing and the loss of the consulting business, the was increasing pressure to keep clients and raise revenues.[8]

A bright spot in the late 1990s was the growing Enron engagement team, as the group doing Enro work was called. At the trial, Duncan said Enron was a “very big” client. How big? It generate somewhere between $50 to $55 million in fees each year, an amount that rose annually, reaching $5 million in 2000. Under Duncan’s leadership, about a hundred employees worked full-time on Enro matters, including on-site at Enron’s offices. Their approach was unusual, since Andersen did not onl audits of Enron’s financial statements but also “integrated audits,” which gave opinions on Enron compliance and internal controls. They hoped this would be a model for consulting work with oth corporate clients.[9]

Ultimately, the close relationship between Enron and Andersen became a liability rather than a asset. On August 14, 2001, Jeffrey Skilling, Enron’s CEO, suddenly resigned, as it became clear th Enron’s supposedly vast assets were a house of cards. The value of Enron’s stock was falling, and a Enron accountant who used to work for Andersen warned of a “wave of accounting scandals.”[10] Th whistle-blower told Enron CEO Kenneth Lay that there was a serious problem with the way Enro reported its finances. This development had to be taken seriously by Andersen as well, since the fir had been reviewing Enron’s books for years. On August 28, the *Wall Street Journal* reported o possible misconduct at Enron, and the SEC announced an informal inquiry.[11] Andersen began its ow internal investigation and realized that, among other problems, there had been an outright error. Th led Enron to admit that its earnings were $1.2 billion lower than reported—a major announceme known as a “restatement.” A restatement can damage the reputation of a company, and unde securities laws, shareholders can sue for being misled by inaccurate financial statements. Indee lawsuits were imminent.

Enron had reported profits that did not exist and kept losses off its balance sheet using comple entities. One was called Chewco, a shell corporation named after Chewbacca, the big furry sideki from the movie *Star Wars*. As a shell, Chewco did not do its own business or have employees operations. Instead it was used to hide losses occurring in another Enron company, named Joi Energy Development Investment Limited, or JEDI, after the set of *Star Wars* characters. Despite t whimsical names of these shell companies, their consequences were serious.

In October 2001, Enron issued an earnings report suggesting that these were one-time-on problems. Duncan responded with a memo stating that this was misleading and that Enron shou correct its report. Andersen decided to ignore Duncan's advice. At the time, one of Andersen lawyers in the main Chicago office, Nancy Temple, wrote an email to an outside lawyer suggestin edits to tone down Duncan's memo so that it would not look as though Andersen "had a responsibilit to follow up." She also asked that her name be deleted from the memo, along with any "reference consultation with the legal group."[12] Those edits came back to haunt Andersen.

Andersen was already on thin ice as a recidivist. The U.S. Securities and Exchange Commissio (SEC), which regulates public corporations, had just settled civil charges against Andersen with record fine of $7 million and a permanent injunction requiring that Andersen never violate securiti laws again. In that case, auditors who raised concerns about the accounting processes used by a maj client, Waste Management, were told by supervisors to do nothing. Years later, Waste Managemen restated $1.7 billion in earnings, which was then the largest such correction in history (Rite Aid ha since seized the title).[13] If Andersen was found to have violated the SEC decree by breaking securiti laws, then the SEC could prevent Andersen from doing any future work for public corporations. Th would mean the end of Andersen, since doing work for public corporations was its lifeblood. The were more reasons aside from Enron that made such SEC action seem like a real possibility, since t SEC had also begun to inquire into accounting irregularities at other Andersen clients, includin Boston Chicken, Global Crossing, Sunbeam, and WorldCom.

Types of Companies

A criminal prosecution may affect different types of companies quite differently. Although a compan may be prosecuted in federal court, all companies are recognized and created under state law. In th United States, about 2 million corporations are created each year by filing incorporation papers with state and paying a filing fee. Delaware has long been known as the leading state for incorporation because of its reputation for being convenient and legally favorable. There are 50,000 more corpora persons registered in the state than human residents.[14] One key reason to form corporations is th concept of “limited liability,” which means that if the corporation goes under, the owners are n liable for its debts. The same concept applies to the aptly named limited liability company (or LLC the most popular type of business entity today.

Some of the most significant criminal prosecutions are of the biggest public corporations; abo 5,000 are listed on major American stock exchanges.[15] A prosecution of a public company may hu the company’s share price and therefore harm the vast number of people who own the stock. Whi those shareholders are the owners, they normally have no reason to know about the crimes. Th shareholders do not run the company; they elect a board of directors, which hires management, such the CEO, to run day-to-day operations. Most of the millions of corporations in the United States a privately owned, and a prosecution of a private company mostly affects the owners. Some are fami businesses and very small. Some are shell companies, like Chewco, that do not have any actu operations. While there are legitimate reasons to use a shell, such as nature conservation groups usin a dummy company to buy land to preserve, they can also be used for nefarious reasons, including ta evasion, money laundering, and fraud.

Arthur Andersen, LLP was a limited liability partnership, a less common type of company that owned by its partners, a term for co-owners who work together. Professional firms such as law firm and accounting firms are often LLPs. A prosecution of such a partnership raises special issues. Arthur Andersen went under, the partners could lose both their jobs and their stake in the compan the amount of money they had paid in once they were made a partner. The partners would no however, be responsible for all of the debts or liabilities that Andersen incurred, including as a resu of lawsuits by victims of Enron who blamed Andersen.

Federal law makes corporations and other types of organizations liable for criminal acts. C course, federal laws also regulate companies in all sorts of other ways. Public corporations like Enro must accurately report detailed information to the SEC, which regulates the stock markets. A priva partnership like Arthur Andersen does not need to report financials to the SEC, but it was an auditin firm, and its accountants had the job of making sure that firms like Enron kept their books in order. was responsible to the SEC for the accuracy of its client’s financials. Under SEC rules, the agenc could prohibit (disbar) convicted professionals, including accountants, from doing work for publ corporations.[16] Andersen would lose its major customers if disbarred and would likely “die” by goin bankrupt or ceasing operations.