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BEYOND YATES: FROM ENGAGEMENT TO ACCOUNTABILITY IN CORPORATE CRIME

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Over a two-day stretch in early September 2015, the U.S. Department of Justice (DOJ or Department) set forth new guidance on individual accountability in cases of corporate crime. The main event was the release of a memorandum signed by Deputy Attorney General Sally Yates (the Yates memo) that makes several revisions to the DOJ's Principles of Federal Prosecution of Business Organizations.[1] Most significantly, the Yates memo says that corporations facing

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1. U.S. Dep't of Justice, Memorandum from Deputy Attorney Gen. Sally Quillian Yates to Assistant Attorney Gen. and U.S. Attorneys (Sept. 9, 2015) [hereinafter Yates Memorandum]. The Principles of Federal Prosecution of Business Organizations, found in the U.S. Attorneys Manual, set forth the standards that federal prosecutors are to consider when making charging decisions against a business entity. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9.28.000, http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

DOJ scrutiny are now eligible for cooperation credit only if they provide prosecutors with *all* relevant information about the individual agents involved in crimes under investigation.[2] The policy purports to be "all or nothing."[3] Either companies identify culpable individuals, or they can say goodbye to any chance of leniency. There is no room for "partial credit."[4]

This Essay assesses the Yates memo to situate it within the current social context of corporate criminal prosecutions. What I find is that the Yates memo represents a missed opportunity. Its guidelines amount to political talking points that are unlikely to produce meaningful change. As a practical matter, the guidelines are virtually impossible to execute, at least in ways that differ from what occurs in the present enforcement regime. As a normative matter, they also risk causing significant and socially undesirable harms to firms and their employees. This analysis suggests that proponents of corporate criminal law reform should look elsewhere for progress. My recommendation is to shift the conversation from enforcement to more meaningful civic engagement. I conclude with a proposal to drive collaboration among DOJ officials, corporate leaders, educators, religious figures, lay groups, and other social actors who profess an interest in finding and fixing the social roots of corporate wrongdoing. While the Yates memo is fine as a starting point for further discussion, the goal should be to move from rhetoric to systemic improvement.

I.
Background on the Yates Memo

The problem of corporate wrongdoing remains an ongoing challenge. Individuals who commit crimes in business firms continue to cause significant harm to citizens, financial institutions, and the economy at large. Accordingly, one of the DOJ's top priorities is to protect the public from criminal mal-

2. Yates Memorandum, *supra* note 1.

3. Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep't of Justice, Remarks at New York University School of Law (Sept. 10, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

4. *Id.*

feasance committed by corporate actors or within corporate settings.[5]

In recent years, and especially in the wake of the 2008 global financial crisis, many question the Department's track record in the prosecution of corporate wrongdoing.[6] Criticism follows largely from the popular perception that individual corporate wrongdoers are unlikely to face the full weight of the law for their bad actions. Conventional wisdom suggests that effective corporate criminal deterrence depends on holding individual flesh-and-blood actors accountable—managers fear and feel the pain of going to jail; lifeless entities do not. When a frustrated and financially hard-hit public sees a dearth of individual prosecutions following bank collapses and widespread evidence of predatory lending, it is only natural for questions to arise about the efficacy of federal enforcement. Polls taken five years after the collapse of Lehman Brothers, for example, find that fifty-three percent of respondents believe that not enough was done to prosecute bankers.[7] Judge Jed Rakoff, arguably the most prominent critic of contemporary federal enforcement policy, worries that the lack of such prosecutions could "be judged one of the most egregious failures of the criminal justice system in many years."[8] Similar claims appear on the campaign trail as the nation prepares for the next presidential election.[9]

The Yates memo represents a response to these concerns. Cast as "a sign of a new resolve at DOJ" to target individual corporate criminals, not just entities, it lays out "six key steps to strengthen [the DOJ's] pursuit of individual corporate

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5. Yates Memorandum, *supra* note 1, at 1.

6. *See, e.g.*, MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WAGE GAP (2014); Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS, Nov. 10, 2011; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014; Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES, Apr. 30, 2014.

7. Michael Erman, *Five Years after Lehman, Americans Still Angry at Wall Street*, REUTERS, Sept. 15, 2013.

8. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014.

9. S.A. Miller, *Bernie Sanders Wants Wall Street Execs Jailed for 2008 Financial Crisis*, WASH. TIMES, Oct. 6, 2015, http://www.washingtontimes.com/news/2015/oct/6/bernie-sanders-wants-wall-street-execs-jailed-2008/.

wrongdoing."[10] At its core, the memo provides that "to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct."[11] Attorney General Yates says that this mandate marks a "substantial shift from prior practice" by eliminating the possibility of even partial cooperation credit in cases where disclosures about misbehaving individuals are lacking or incomplete.[12] The memo goes on to state that corporate criminal investigations should focus on individuals from the outset, and that absent extraordinary circumstances, no eventual corporate resolution should immunize individuals from liability.[13] It posits that paying early attention to individuals ought to enhance the DOJ's ability to locate people who can inform on actors higher up the corporate hierarchy—

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10. Daniel P. Chung, *Individual Accountability for Corporate Wrongdoing*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 21, 2015), http://corpgov.law.harvard.edu/2015/09/21/individual-accountability-for-corporate-wrongdoing/.

11. Yates Memorandum, *supra* note 1. The memo's six steps in full are as follows:

> (1) in order to qualify for any cooperation credit, corporations must provide to the [DOJ] all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the [DOJ] will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) [DOJ] attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

Id. at 2–3. The present essay focuses solely on the criminal law aspects of the Yates memo. Cooperation credit in this context generally refers to the DOJ's willingness to negotiate a settlement with a target firm via a deferred prosecution or non-prosecution agreement instead of pursuing formal prosecution. *See* Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 696–700; Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2009).

12. Yates, *supra* note 3.

13. Yates Memorandum, *supra* note 1, at 4, 5.

not unlike finding the drug trafficker who will flip on the cartel boss.[14]

II.
Why the Yates Memo Is No Game-Changer

The DOJ maintains that the Yates memo signifies a strategic shift that "will maximize [the Department's] ability to deter misconduct and to hold those who engage in it accountable."[15] To be sure, surface level changes are visible. Whereas earlier DOJ guidelines on corporate prosecutions made the willingness of firms to cooperate in the investigation of individual agents a factor in the cooperation calculus, such cooperation is now described as mandatory for leniency.[16]

Overall, though, the memo represents little more than a written restatement of how the game has always been played. DOJ officials spanning both the Bush and Obama administrations stressed and continue to stress the importance of aggressively pursuing individuals in cases of corporate crime. Almost a year to the day of the Yates memo's release, a leader of the DOJ's Criminal Division said that "when [corporations] come in to discuss the results of an internal investigation . . . expect that a primary focus will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, [and] how tireless your efforts were to find the people responsible."[17] Assistant Attorney General Leslie Caldwell also noted recently that "if a company wants cooperation credit . . . we expect cooperating companies to identify culpable individuals—including senior executives if they were involved—and provide the facts about their wrongdoing."[18]

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14. *Id.* at 4.

15. *Id.* at 7.

16. *Compare* U.S. Dep't of Justice, Memorandum of Deputy Attorney General Mark Filip to Heads of Department Components and United States Attorneys 1 (2008).

17. Marshall L. Miller, Principal Deputy Assistant Attorney Gen. for the Criminal Div., U.S. Dep't of Justice, Remarks at the Global Investigation Review Program (Sept. 17, 2014), http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller.

18. Leslie R. Caldwell, Assistant Attorney Gen., U.S. Dep't of Justice, Remarks at New York University Law School's Program on Corporate Compli-

These comments are borne out in practice. As one prominent defense attorney puts it, federal prosecutors "do not pull punches" in their search for culpable individuals.[19] They have been following the process described in the Yates memo on a daily basis for years.[20] Corporations routinely initiate internal investigations that seek to identify individual wrongdoers, often subjecting agents to discipline or termination. The reason is clear. Corporate criminal liability in the U.S. is one of vicarious liability. Any agent who commits a criminal act within the scope of employment and with an intent to in any way benefit the firm will generally make that firm criminally liable—thereby triggering a wide range of potentially severe organizational consequences.[21] The DOJ's policy within this framework, then and now, asks firms to identify culpable individuals if they wish to qualify for leniency.[22] Firms that self-report and provide the DOJ with evidence against culpable individuals are praised as models of cooperation and rewarded with deferred prosecution or non-prosecution agreements.[23]

The most immediate fallout from the Yates memo, then, will presumably be longer and more expensive internal investigations as firms attempt to convince prosecutors that they are leaving no stones unturned in this "new" enforcement environment. Morale could take a hit, and the price of Director & Officer (D&O) insurance might go up, but expect mainline corporate enforcement and settlement practices to remain consistent with recent trends. Indeed, despite the best inten-

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ance and Enforcement (Apr. 17, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-new-york-university-law.

19. Chung, *supra* note 10.

20. *Id.*

21. The potential consequences of a corporate conviction include monetary fines, reputational sanctions, and, in some cases, the complete demise of the entity (e.g. Arthur Andersen). *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 951, 960, 966 (2009); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 315, 321-22 (2007).

22. Lisa Kern Griffin, *Inside-Out Enforcement, in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 110, 113–14 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

23. Sidley Austin LLP, *New DOJ Guidance Puts Emphasis on Identifying Culpable Individuals in Corporate Internal Investigations* (Sept. 11, 2015), http://www.sidley.com/en/news/2015-09-11_white_collar_update.

tions that surely animate the Yates memo's attempt at reform, there is arguably not much that *can* or *should* change in light of well-known practical and normative issues that affect the situation.

A. *Practical Barriers*

It is important to be clear at the outset that the perceived lack of high-level executives facing indictment does not stem from a lack of interest or desire. Rather, the fundamental problem with expanding individual accountability is that the measures necessary to do so are complex and difficult to execute. Federal prosecutors understand that managers often play pivotal roles in creating the conditions that can lead to corporate malfeasance, and they know that the surest way to improve their professional prospects is to convict managers who are caught committing criminal wrongs. They just have a hard time making much headway given the cards they have been dealt.

The Yates memo itself opens by conceding that knowledge and responsibility are diffuse and opaque in the corporate context.[24] Proving an individual's mens rea beyond a reasonable doubt thus poses a unique challenge. "This is particularly true," the memo indicates, "when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs."[25] This recognition echoes Professor Sam Buell's notable work on the difficulty of gathering evidence and determining whether federal crimes have been violated in corporate cases.[26] Buell notes, for instance, that the higher up in the management hierarchy one goes in a large organization, the less managers seem to know about the activities on the ground that ultimately lead to trouble.[27] Part of the reason why stems from a perverse incentive inherent in criminal law: "[t]he demands of

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24. Yates Memorandum, *supra* note 1.

25. *Id.*

26. *See, e.g.*, Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007) (analyzing the organizational complexity that animates and often frustrates criminal investigations in cases of corporate wrongdoing).

27. Samuel W. Buell, *Criminally Bad Management*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., forthcoming 2016).

proof of mens rea for individual criminal liability provide an incentive for managers to insulate themselves from what is going on, possibly producing less corporate effort to prevent crime."[28]

Various temporal, spatial, and physical considerations further complicate matters. Many of the managerial behaviors that seem most distressing in corporate cases frequently look more like omissions—which the criminal law rarely sanctions—than positive, direct actions of a type that might trigger liability.[29] The actions and events that culminate in an end-result of corporate wrongdoing also typically evolve over the course of many months or years, and they may appear entirely innocent or immaterial in isolation. Standard monitoring and surveillance practices can do little to overcome these issues. Connecting the dots necessary for indictment, let alone conviction, is therefore often impossible, at least on any level other than a very small scale.

B. *Policy Concerns*

The considerable practical problems that make managers and executives difficult to prosecute are not ones that the Yates memo attempts to overcome. But even if we assume that the memo will launch a new era of enforcement energy aimed at individuals, there are separate normative concerns to take into account.

At the threshold, with high-level managers likely to remain insulated from indictment-inducing activities, lower-level employees must now be favorites to emerge as the most frequent targets under the Yates protocol. The process will look something like this: firms reacting to the Yates memo's focus on individuals will cause their internal investigations to appear more intense and zealous, and they will take clear steps toward identifying and disciplining the agents down the line who

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28. *Id.*

29. *Id.* Buell notes that this issue also poses challenges when linking the actus reus with the mens rea requirement: "Moving the time frame in this way, though, only runs the problem into another pillar of criminal law, that is, mens rea. Put another way, concurrence of the elements is a requirement in analysis of criminal liability. The further back one moves in time to locate the actus reus, the weaker the argument gets about the relationship between any mens rea at that point in time and later events for which one might argue responsibility should be imposed." *Id.*

seem closest to the problem under review. Upper managers know that this strategy will provide the best opportunity to protect their own personal interests while also maximizing the odds that the entity under their watch will be offered a settlement that avoids indictment. This approach also spares the DOJ the immense practical challenge of ferreting out individuals on its own dime and on its own time—all in a way that still allows prosecutors to appear 'tough' on white-collar offenders.

Put simply, if cooperation credit now truly depends on handing over individuals to the DOJ, it is doubtful that managers will have trouble finding candidates to send packing. Managers are in the driver's seat to dictate the narrative of individual accountability. They control the information within the firm, as well as most of the procedural steps that govern the cooperative, public–private nature of corporate criminal enforcement.[30]

This dynamic courts a variety of unfortunate consequences. An overarching issue is what to do in situations where the diffusion of responsibility within an organization makes it impossible to pin culpability on any single person or group of persons. The steep incentive for managers to work toward cooperation credit—which is now purportedly steeper after Yates—suggests that agents who do not truly bear responsibility for wrongdoing could be scapegoated and sacrificed in the name of service to the entity's interests.[31] This prospect presents obvious challenges for preserving trust, morale, communication, and collaboration among persons across different layers of the corporate hierarchy.[32] The corporate atmosphere may devolve into one that reflects an 'us versus them' mentality, with employees coming to feel like outsiders in an environment where they feel undervalued, unsupported, and perceive a risk of unfair treatment.[33]

Complex organizations struggle when trust and cooperation are absent. Trust and cooperation are often absent when-

30. Griffin, *supra* note 22, at 115.

31. *Id.* at 116 ("[C]orporate management can exploit its informational advantage to influence which investigations proceed, who gets prosecuted, and what wrongdoing remains concealed.").

32. *See, e.g.*, Yockey, *supra* note 11, at 707, 714–15.

33. Scott Killingsworth, *Modelling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961 (2012).

ever surveillance increases dramatically or agents fear retaliation for sharing information with team members who they understand might soon be serving as quasi-prosecutors.[34] These conditions cause individuals to become prone to cynicism, shirking, obstruction, obfuscation, and, in some cases, outright deception.[35] They are also likely to make agents more risk-averse and less entrepreneurial, potentially to a degree that hinders socially-desirable economic development.[36]

Firms already appear cognizant of the risks that these issues pose to internal organizational balance. The Yates memo's mandate to turn over individuals—assuming it is even possible to do so in every case—could therefore lead to less self-reporting and less cooperation in the future.[37] The DOJ's next step from there is unclear given the well-known resource and access limitations it faces in corporate investigations.[38]

III.
Accountability and Engagement Beyond the Yates Memo

The practical limitations and policy implications set forth above constrain and, in some ways, caution against an overly aggressive pursuit of individuals in cases of corporate crime. There are signs suggesting that the DOJ appreciates the delicacy of the situation. A close review of the Department's continued emphasis on firm-wide settlements in corporate cases indicates a conscious choice to marshal efforts more toward

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34. Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, *in* Research Handbook on Corporate Crime and Financial Misdealing, *supra* note 27; Killingsworth, *supra* note 33, at 977 ("Whatever may be the compliance-related effects of feeling mistrusted or disrespected, the fallout when employees hold the converse opinions about supervisors is intuitively clear: you probably would cede no more authority than absolutely necessary to someone you do not respect, and it is hard to imagine reporting misconduct to, or openly questioning a compliance choice made by, a superior that you do not trust."); Yockey, *supra* note 11, at 707.

35. Langevoort, *supra* note 34; Killingsworth, *supra* note 33.

36. Langevoort, *supra* note 34.

37. Chung, *supra* note 10.

38. *See* Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecution Declinations*, 79 Notre Dame L. Rev. 221, 222–23 (2003) ("One important factor remains a constant, however: resources, even at the national level, are scarce. Scarcity compels the federal government to choose among competing policy objectives, each of which demands attention and, ultimately, funding.").

improving corporate governance systems and management practices at a broad level and away from the targeting of individual executives.[39] Of course, the Department will still endeavor to bring cases along the lines of Skilling, Rajaratnam, and Madoff. But for every high-profile example, "what the Justice Department wants above all else . . . is effective corporate management practices designed to prevent, and certainly not to foster, crime by a firm's employees."[40] This desire is why deferred prosecution and non-prosecution agreements typically require firms to address issues like incentive structures, auditing, tone at the top, the appointment of independent monitors, and overall approaches to compliance architecture.[41] Prosecutors appear more intent on addressing the roots and causes of corporate crime than going after lower-level agents whose indictments are unlikely to induce industry or firm-wide change—and which may even set back such goals.[42]

Under this view, the Yates memo raises several red flags. As Professor Buell points out, the memo preserves DOJ policy by encouraging firms to better police themselves but, unfortunately, does so in a way that "confirms the misapprehension that more corporate managers would be in prison if prosecutors just wanted that more."[43] Another, larger concern follows from the memo's signaling power. By not saying anything new on individual accountability in a package that claims to be doing precisely that, there is a risk that the Yates memo will be taken as an empty rhetorical gesture meant to score quick political points with an angry public. In that case, and if the public comes to observe nothing materially different about indi-

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39. Buell, *supra* note 27; BRANDON GARRETT, TOO BIG TO JAIL 47–48 (2014). It is also important to note at this point that several additional forces beyond government enforcement are often thought to play a role in deterring corporate crime. These forces include reputational sanctions, civil enforcement regimes, the market for talent, and investor preferences.

40. Buell, *supra* note 27.

41. *See* Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 BUS. LAW. 61 (Winter, 2014/2015).

42. Buell, *supra* note 27; GARRETT, *supra* note 39, at 47–48; 95–104.; Griffin, *supra* note 22, at 122 ("But DOJ's approach to corporate crime has evolved so that it is not solely, or even primarily, retributive. Prosecutors envision DPAs as mechanisms of industry-wide deterrence.").

43. Buell, *supra* note 27.

vidual accountability in a post-Yates world—at least at the executive level—then questions about the DOJ's legitimacy, social capital, and worthiness for public confidence will continue to persist.

The Department's best chance at avoiding this result is to embrace its prior efforts to improve corporate behavior irrespective of the number of individuals currently under indictment. It is better for the Department to be honest and frank with the public about the challenges, both practical and normative, inherent in prosecuting individuals than to make unrealistic commitments. Its reluctance to do so is telling about current levels of civic engagement. Possibly the Department fears that large segments of the public will not accept any answer other than one which involves a higher volume of individual prosecutions, irrespective of the consequences on firm behavior and employee morale that might follow.

One way forward in this environment is to redouble efforts to engage public reasoning on the realities and origins of corporate crime. As a modest start, I propose creating a task force that will bring together perspectives from DOJ officials, corporate leaders, legal and business educators, religious figures, lay groups, psychologists, citizen surveys, and academic and industry conferences. The task force's goal would be twofold: (1) to educate the public and gain its acceptance of corporate enforcement policy; and (2) to develop ideas for building ethical corporate cultures and encouraging agents to internalize ethical values.

With growing cynicism and skepticism about corporate criminal enforcement a persistent concern, a task force along these lines would help ensure that policymakers stay attuned to input from stakeholders with knowledge of and thoughtful opinions about this matter as part of an ongoing conversation. If responsive to public concerns and transparent about its deliberative process, the task force should also bolster the legitimacy and credibility of the parties involved, even in situations where not everyone agrees with its recommendations. Indeed, displaying fidelity to good process is arguably the most important factor in the entire exercise.

The agenda for the type of task force I envision can cover a variety of topics bearing on individual accountability. What it cannot do, however, is make perfunctory comments or pay lip service to prior suggestions for reform. This will naturally re-

quire a willingness to listen and compromise so that the judgment of those involved has room to mature. Items for discussion may include: structural challenges within the current enforcement climate; costs and benefits of different enforcement models; arguments and rationales for various enforcement models; the chain of events that brought us to this point; the exercise of prosecutorial discretion; how public enforcement resources should be deployed; and, most crucially, how to address the problem of corporate crime at the source—the people who work in organization—while they are still in the process of forming their moral compass.

Animating the entire process should be Killingsworth's objective of ensuring that agents "connect compliance mandates to basic values like honesty, integrity, respect, teamwork, loyalty, citizenship, and accountability, thus triggering their intrinsic motivation to report and reducing the need for extrinsic incentives."[44] DOJ leaders ought to spend time in meaningful discourse with parents, teachers, compliance officers, business professors, priests, rabbis, imams, and anyone who plays a formative role in the lives of future corporate managers. The aim should be to reflect on actual encounters and scenarios that result in corporate malfeasance in order to dissect the most ethical course to take and where breakdowns might have occurred. Participants would also benefit from exploring issues like hiring, training, and promotion practices, to say nothing of the personal background and biological factors that many believe predict tendencies toward misconduct.[45]

Ultimately, public confidence depends on understanding the role and nature of criminal law and procedure, as well as seeing how these forces interact with specific practices and behaviors inherent in corporate activity and which are of most pressing public concern.[46] No amount of engagement can cover every reality or eventuality, and it would be a mistake to claim otherwise. The aim is simply to bring about a process of dialogue that accepts and can respond to the ever-evolving issues that bear on the question of individual accountability.

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44. Killingsworth, *supra* note 33, at 970.

45. *See* Langevoort, *supra* note 34.

46. *See* Ben Bradford et al., *Trust and Confidence in Criminal Justice: A Review of the British Research Literature* (Nov. 2008) (working paper) (on file with author).

What ought to emerge from the task force process is a confidence that the people and institutions involved in criminal justice and corporate compliance strive to behave effectively, fairly, honestly, and in keeping with community values.

I realize that some will consider the prospect of altering expectations or results through better public engagement to be nothing other than pie in the sky. There are clues, though, that even a body as entrenched in enforcement as the DOJ is may now be more amenable to softer methods of stakeholder collaboration. While admittedly said in the context of investigatory cooperation, just a few months ago Assistant Attorney General Caldwell spoke of her desire to "encourage and reward good corporate citizenship," making specific reference to the importance of "open and transparent dialogue" between firms and prosecutors.[47] My hope and expectation is that she would also be open to expanding the circle of transparency and conversation to include other knowledgeable actors with an interest in the role of the corporation and the criminal law in society.

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In the end, maybe it is wrong to be pessimistic about the Yates memo's potential to shift the enforcement landscape. Perhaps the tide is turning and individual indictments for managerial wrongdoing and irresponsibility will blossom. But I struggle to discern many reasons for optimism given the stubborn challenges that remain in investigating and prosecuting culpable executives. I worry that perpetuating the Yates memo's rhetoric when its chances to produce meaningful results are slim will further reduce the public's confidence in the DOJ's ability to serve as a guardian of corporate and market integrity.

The time has come to forge a new path toward individual accountability—one that goes beyond enforcement to build on public support, lay expertise, and buy-in from a diverse group of social actors with skin in the game. A frustrated pub-

47. Caldwell, *supra* note 18.

lic demands progress instead of empty gestures. Sometimes that means hitting the reset button on existing modes of outreach and engagement to find an approach that is more inclusive, responsive, and, with any luck, more sustainable.