

The Boom and Bust of American Imprisonment

A Book Review of:

WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL.
By Eugene Soltes. 2016.

CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S
CORPORATE AGE. By Samuel W. Buell. 2016.

FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE
UNDERMINE THE RULE OF LAW. By Darryl K. Brown. 2016.

Brandon L. Garrett*

“I’m set up to fail here,” said a miner at the Upper Big Branch mine in West Virginia.¹ He was supposed to spread rock dust around the sprawling underground mine to prevent explosions, but dusting machines were broken, and there were not adequate supplies.² Mining explosions can be caused when methane buildup contacts a heat source, when particles of coal dust contact a heat source, or a combination of both.³ Large fans circulating air can prevent the buildup of both methane and dust.⁴ Limestone powder or rock dust can render the coal dust inert and also absorb heat from any explosion to make it more minor.⁵ Here in the Upper Big Branch mine, though, as another miner said, “so often, I couldn’t count,” there was “low air,” or improper ventilation.⁶ A mining superintendent described a far-reaching conspiracy to hide a range of persistent violations from inspectors and to

*Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs, University of Virginia School of Law. © Brandon L. Garrett, 2017.

1. Celeste Monforton, *Trial of Mining CEO Blankenship: Quotes from Week 2*, SCIENCEBLOGS: THE PUMP HANDLE (Oct. 16, 2015), <http://scienceblogs.com/thepumphandle/2015/10/16/trial-of-mining-ceo-blankenship-quotes-from-week-2/> [https://perma.cc/ETV3-2DN4].

2. *Id.*

3. Nat’l Inst. for Occupational Safety & Health, CDC, *Mining Feature: Coal Mine Explosion Prevention* (Dec. 9, 2011), <https://www.cdc.gov/niosh/mining/features/coalmineexplosion.html> [https://perma.cc/DVT3-9UCY].

4. *Id.*

5. *Id.*

6. Monforton, *supra* note 1.

falsify records, all for cost-cutting reasons.⁷ In April 2010, a massive explosion in the mine claimed the lives of twenty-nine workers.⁸ It was the deadliest mining disaster in the United States in forty years.⁹

Five years later, Don Blankenship, the former CEO of Massey Coal, faced federal criminal charges at a trial. In December 2015, Blankenship was acquitted of the most serious charges of securities fraud and conspiracy and was convicted of a misdemeanor mine-safety offense.¹⁰ The trial lasted twenty-four days, and the jury deliberated for nine days.¹¹ At sentencing in April 2016, he told the judge, “[i]t’s important to me that everyone knows that I am not guilty of a crime.”¹²

The judge, describing Blankenship’s remarkable rise to head Massey Coal, said, “Instead of being able to tout you as one of West Virginia’s success stories, however, we are here as a result of your part in a dangerous conspiracy.”¹³ Blankenship received a prison sentence of one year, less than those of underlings who pleaded guilty and fully cooperated with prosecutors.¹⁴ The rejected charges could have earned him up to a thirty-one-year sentence.¹⁵

But any criminal conviction of a CEO of a corporation is a rare event. After all, Blankenship denied knowledge of day-to-day affairs at the mine.¹⁶ He could afford top lawyers; he ran up \$5.8 million in legal fees even before the trial began.¹⁷ (By comparison, court-appointed lawyers for indigent defendants are paid on average about \$53 an hour in West Virginia, and the

7. Howard Berkes, *Massey Mine Boss Pleads Guilty As Feds Target Execs*, NPR: THE TWO-WAY (Mar. 29, 2012), <http://www.npr.org/sections/thetwo-way/2012/03/29/149639345/massey-mine-boss-pleads-guilty-as-feds-target-execs> [<https://perma.cc/36YB-C6R4>].

8. Ian Urbina, *No Survivors Found After West Virginia Mine Disaster*, N.Y. TIMES (Apr. 9, 2010), <http://www.nytimes.com/2010/04/10/us/10westvirginia.html?pagewanted=all> [<https://perma.cc/X39C-CL6Y>].

9. *Id.*

10. Bourree Lam, *A Guilty Verdict in Don Blankenship’s Trial*, ATLANTIC (Dec. 3, 2015), <https://www.theatlantic.com/business/archive/2015/12/blankenship-trial-verdict/418641/> [<https://perma.cc/6U8L-PWDD>].

11. *Id.*

12. Alan Blinder, *Donald Blankenship Sentenced to a Year in Prison in Mine Safety Case*, N.Y. TIMES (Apr. 6, 2016), <https://www.nytimes.com/2016/04/07/us/donald-blankenship-sentenced-to-a-year-in-prison-in-mine-safety-case.html> [<https://perma.cc/XDW5-UEEM>].

13. *Id.*

14. *Id.*

15. Lam, *supra* note 5.

16. *Id.*

17. Ellen Rosen, *Judge Says Alpha Must Cover Legal Costs for Ex-CEO Blankenship*, INS. J. (May 29, 2015), <http://www.insurancejournal.com/news/national/2015/05/29/369907.html> [<https://perma.cc/9PHH-47UC>].

average case charges \$754 in costs.)¹⁸ Indeed, the company that bought Massey Coal is obligated to pay those legal fees, a court has ruled.¹⁹ Having served his sentence and lost on appeal, Blankenship is seeking certiorari from the U.S. Supreme Court.²⁰

The defense costs in that one case may run up to as high as half of the state of Louisiana's entire annual budget for public defense, and perhaps far more. In Louisiana, the criminal justice equivalent of bread lines formed in 2016 across the state as deep cuts in public defenders' budgets forced cuts to services. The entire system went bust. A person charged with a crime may literally have to take a number and wait to hear from a lawyer. In Orleans Parish, where the public defender must handle over 20,000 cases a year, hundreds of cases have been refused and more people linger on a wait list.²¹ In the meantime, these people may languish in jail, perhaps for something they did not do, or for minor crimes that should not even result in jail time. Or they may plead guilty to avoid remaining in limbo. Even in the most serious death penalty cases, delays are growing, and where fourteen districts could not keep up with caseloads in 2016, 33 of 44 public defender districts could not keep up with caseloads in 2017.²² The Chief Justice declared an emergency lack of funding, and a new constitutional challenge is underway.²³ Public defenders share a paltry \$33 million annual budget²⁴ in a state that would, if it were a country, have the highest imprisonment rate in the entire world.²⁵ Perversely, the main source for public-defense budgets comes from traffic-ticket revenue.²⁶

18. W. VA. PUB. DEF. SERV., ANNUAL REPORT FISCAL YEAR 2011–12, at 4, 17 (2012), <http://www.pds.wv.gov/Documents/FY2012%20Annual%20Report.pdf> [<https://perma.cc/7LE7-SMYT>].

19. Rosen, *supra* note 12.

20. Howard Berkes, *Convicted Coal Mine CEO is Taking His Case to the U.S. Supreme Court*, NPR: THE TWO-WAY (May 11, 2017), <http://www.npr.org/sections/thetwo-way/2017/05/11/528027204/convicted-coal-mine-ceo-is-taking-his-case-to-the-u-s-supreme-court> [<https://perma.cc/RGH6-6EU4>].

21. Lauren Zanolli, *Louisiana's Public Defender Crisis is Leaving Thousands Stuck in Jail with No Legal Help*, VICE NEWS (May 13, 2016), <https://news.vice.com/article/louisianas-public-defender-crisis-is-leaving-thousands-stuck-in-jail-with-no-legal-help> [<https://perma.cc/9SX4-8TB7>].

22. Nick Chrastil, *Death Penalty Public Defender Wait List Growing with Delays*, DAILY REVELLE (Nov. 25, 2016), http://www.lsunow.com/daily/death-penalty-public-defender-wait-list-growing-with-delays/article_4b9ee15c-b10c-11e6-a3af-635507081549.html [<https://perma.cc/Q476-34QA>] (describing a wait list of twelve defendants charged with capital crimes); Debbie Elliott, *Public Defenders Hard to Come by in Louisiana*, NPR (Mar. 10, 2017), <http://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana> [<https://perma.cc/7C3M-P95U>].

23. Elliott, *supra* note 22.

24. Chrastil, *supra* note 17.

25. Elliott, *supra* note 17.

26. *Id.*

The state of criminal justice in America today is deeply paradoxical. Criminal justice is rationed in the land of the free. Indigent people may serve long sentences for crimes that many people believe do not deserve harsh punishment. In contrast, for some of the most serious business crimes, elites can afford impressive legal teams to defend them. We are teetering at the edge of a mass incarceration binge. Lawmakers are reconsidering overly harsh criminal punishments. At the same time, eight years later, people are still furious that elite criminals and CEOs avoided criminal punishment in the wake of the last financial crisis. Many have complained that no Wall Street bankers went to jail. With crime dropping, prison populations are finally declining, slightly at least, after decades of explosive growth.²⁷ Yet the new presidential Administration has called for a renewed focus on law and order, and the Attorney General has adopted severe, new criminal-charging policies.²⁸ Perhaps mass incarceration will remain with us longer than optimists have thought. Regardless, to make a serious dent in mass incarceration, the reforms that so many states have adopted will have to be pushed to the next level.

What do these conflicting tendencies mean? Why do we so easily put vast numbers of people in prison for minor offenses yet struggle to hold business criminals accountable? Three new books shed light on those questions from very different perspectives. They together point the way toward a saner criminal justice system, at a moment when it seems as if some Americans are again licking their lips at the prospect of another binge of self-defeating punishment, while others remain committed to reducing the costs of mass incarceration.

First, I discuss the new book by business professor Eugene Soltes titled *Why They Do It*,²⁹ which explores psychological research on risk-taking by corporate criminals. Second, I discuss law professor Sam Buell's *Capital Offenses*,³⁰ an engaging book that examines why it is so challenging to punish business crimes due to the structure of the economy, corporations, and our

27. E. Ann Carson & Elizabeth Anderson, *Prisoners in 2015*, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/M3VV-XAVB>] (describing federal data reporting that in 2015, the number of inmates held in state and federal prisons declined to 1.5 million people, the lowest level since 1994, representing a 2.4% decrease in that year); see also Timothy Williams, *U.S. Correctional Population at Lowest Level in Over a Decade*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/us/us-prison-population.html?mcubz=3&r=0> [<https://perma.cc/6MWL-YTSL>] (reporting a decline in the U.S. prison population).

28. Sari Horwitz & Matt Zapposky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html?utm_term=.a32bbff6a766 [<https://perma.cc/Y5AH-PHWY>].

29. EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* (2016).

30. SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* (2016).

federal criminal justice system. Third, I turn to law professor Darryl Brown's *Free Market Criminal Justice*,³¹ which carefully argues that free market ideology defines American criminal justice. I conclude by exploring the implications of these arguments and this research for mass incarceration as well as corporate accountability at the high and low ends of our criminal justice system—we are finally turning a corner on mass incarceration in this country, and the problems and solutions that these authors identify partly explain why and whether better things or new fears lie around that corner.

I. Why Do White-Collar Criminals Do It?

Mass incarceration is premised on the idea that criminals do morally bad things and must be locked up as punishment for those ill deeds. Corporate executives, though, when they are accused of serious business crimes, say things like “the world is not black and white,” and “you can't make the argument that the public was harmed by anything I did.”³² More candidly, Bernard Madoff said, “When I look back, it wasn't as if I couldn't have said no.”³³ In his revealing new book, Soltes explores, as the book is titled, *Why They Do It*. Soltes interviewed financial criminals by writing to them in prison and examined psychological research on risk-taking.

Unfortunately, Soltes uncovers how, much like our stereotype of street criminals, these sophisticated businesspeople relied on their intuitions and their gut. A cost-benefit analysis or a rational weighing of the chances and consequences of getting caught does not match how these criminals actually think, Soltes argues. He quotes a senior partner at KPMG who engaged in securities fraud and recalled later, “I never once thought about the costs versus rewards.”³⁴ He quotes Andrew Fastow of Enron, who describes how “we thought we were really clever” when finding ways to creatively interpret the law to keep financial transactions off of balance sheets.³⁵ Madoff described how he knew “the rules and regulations better than most people,” and could not say that he was “ignorant” of the law.³⁶ He described how he began to mount losses in his investment advisory business because he “figured that eventually things would change and then [he would] get to actually start doing the model trades.”³⁷ He did not disclose these problems to clients or return the money, a “comedy of errors” began as he took money from hedge funds to “cover the losses,” and then the situation got worse and

31. DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2016).

32. SOLTES, *supra* note 29, at 4, 165.

33. *Id.* at 287.

34. *Id.* at 99.

35. *Id.* at 234.

36. *Id.* at 289.

37. *Id.* at 297.

worse, turning “into a total fiasco.”³⁸ Rather than confront the problem early on and lose face to a smaller group of investors, Madoff leveraged the problem even more and gave the impression that the business was going better and better, when in fact it had turned into a Ponzi scheme.³⁹

These compelling accounts illustrate how executives can make decisions for personal reasons, having to do with appetite for risk and pride, that may now affect not just their friends in high society and in business but millions of shareholders and the public. Soltes argues this “fundamentally shifted the psychology of harm.”⁴⁰ Executives no longer receive “emotional feedback” from their decisions.⁴¹ The victims are anonymous. And the corporate criminals may simply not think about the broad social consequences of their actions. An executive who paid bribes to foreign government officials explained, “I looked at these payments as necessary to sell a product. I never felt I was doing anything wrong.”⁴² An executive who signed false reports said, “I know this is going to sound bizarre, but when I was signing the documents I didn’t think of that as lying.”⁴³ Why? It was because he felt “a difference between filling out a form,” even with false information, “and flat out looking someone in the eye and lying to them.”⁴⁴

Or the executive may know it is wrong but feel justified by observing that peers are all doing the same thing. Tyco CEO Dennis Kozlowski explained that the accounting gimmicks he tried were no different than those used at General Electric (GE), which the SEC later accused of bending “the accounting rules beyond the breaking point.”⁴⁵ And as to using corporate funds to support a “lavish lifestyle,” well, he said, “Every CEO before me had short-term purchases that they were doing.”⁴⁶ He noted that when he was CEO, the Tyco “board would give me anything I wanted. Anything.”⁴⁷ Culture in industry and culture in a company can explain serious and even criminal risk-taking.

As Soltes explains, we need to make sure that people hear independent voices so that people do not just make risky or corrupt decisions because they are the path of least resistance.⁴⁸ Punishing people after the fact may not

38. *Id.* at 298–99.

39. *Id.* at 300–01.

40. *Id.* at 123.

41. *Id.*

42. *Id.* at 124.

43. *Id.* at 125.

44. *Id.* at 126.

45. *Id.* at 148.

46. *Id.* at 149.

47. *Id.* at 315.

48. *See id.* (explaining the importance of uncomfortable dissonance by opining that human behavior and decision-making often remain static unless influenced by external factors).

prevent corporate crime nearly as effectively. Nor may simply teaching business ethics solve the problem if the jobs themselves are not structured so that the work is done with independent review, with “uncomfortable dissonance,” and with questioning of decisions.⁴⁹ Isolated people making highly significant and risky decisions is a recipe for disaster.

Corporations, Soltes argues, bear the blame for putting individuals in those situations, and they should themselves be punished for not creating better norms of conduct.⁵⁰ As one convicted CFO that Soltes quotes says, “What we all think is, when the big moral challenge comes, I will rise to the occasion.”⁵¹ However, “[t]here’s not actually that many of us that will actually rise to the occasion . . . I didn’t realize I would be a felon.”⁵² Perhaps individuals are not fully to blame, however, and we must turn to “the policies that institutions create.”⁵³

II. The Structure of Corporate Crime

Criminal law is designed to provide a voice of reason, to use punishment to deter people from considering committing crimes. Law professor Sam Buell has written *Capital Offenses*, an elegant book examining why it is so challenging to punish business crimes, even for our incredibly powerful and well-resourced federal prosecutors.⁵⁴

Many prominent voices in the wake of the financial crisis have complained that individual corporate executives have eluded punishment.⁵⁵ The Department of Justice made high-profile revisions to its corporate charging policies in fall 2015 to focus on individual accountability in corporate investigations.⁵⁶ However, Buell is skeptical that such changes will

49. *Id.* at 311, 315.

50. *Id.* at 326.

51. *Id.* at 313.

52. *Id.*

53. *Id.* at 327.

54. BUELL, *supra* note 30, at xv.

55. See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [<https://perma.cc/8HDD-EBXG>] (pointing out that, despite many Americans losing their jobs and homes as a result of the financial crisis, many of the high-level employees of major financial institutions have not answered for their roles in causing the downturn); Press Release, *Merkley Blasts “Too Big to Jail” Policy for Lawbreaking Banks*, JEFF MERKLEY: U.S. SENATOR FOR OREGON (Dec. 13, 2012), <https://www.merkley.senate.gov/news/press-releases/merkley-blasts-too-big-to-jail-policy-for-lawbreaking-banks> [<https://perma.cc/WC3L-KSB4>] (noting Senator Merkley’s disdain for the U.S. Justice Department’s “deferred prosecution” policy for large financial institutions).

56. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, §§ 9–28.000 (2015); see also Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecution*, 101 VA. L. REV. ONLINE 60, 64 (2016) (describing how the revised Department of Justice guidelines instruct prosecutors to focus on individual wrongdoing).

lead to more accountability at the top.⁵⁷ Buell emphasizes that the one percent can elude punishment for a reason.⁵⁸ Passing harsher criminal laws and sentences will likely make no difference, Buell describes.⁵⁹ We did not see more prosecutions when Congress enacted harsher sentences in the wake of the Enron-era financial scandals.⁶⁰ Financial crimes are complex, and CEOs and white-collar offenders can hire the best lawyers to defend them. They can take their cases to expensive, lengthy trials, and sometimes they get acquitted.

It is not just privilege, Buell describes, although he details how companies normally pay the costs of lawyers for their executives and their employees and how the costs can run into the millions of dollars.⁶¹ It is harder than you think to prove white-collar cases. We reward, and even mythologize, “talented innovators” and companies that take risks. The line between creative business strategy—finding a loophole in the law—and outright breaking the law may be very fine. And financial crimes are often vaguely defined.

The corporation itself, however, creates a real obstacle to investigating individual accountability. Buell begins his book with a wonderful definition from Ambrose Bierce’s *The Devil’s Dictionary*, defining a corporation as “[a]n ingenious device for securing individual profit without individual responsibility.”⁶² Corporate-crime cases are so challenging to investigate precisely because corporations are complex entities. Many people may be involved in a crime, and sorting out who knew what can be impossible, even with the company providing the emails and the interviews with employees. Buell describes the aftermath of the British Petroleum (BP) Deepwater Horizon explosion, in which the company paid billions in fines, but only lower-level employees were charged and convicted.⁶³ The higher up the chain of responsibility, the more plausible deniability insulates. The case for

57. BUELL, *supra* note 30, at 257.

58. *Id.* at 178–79 (describing defenses in white-collar criminal matters that go to whether the conduct amounts to a crime).

59. *See id.* at 233 (explaining that harsher punishment of business-crime offenders will not change the problem of business crime).

60. *See id.* at 225–27 (chronicling harsher sentencing for white-collar crimes following Sarbanes-Oxley and Dodd-Frank but failing to mention any change in the rate of prosecution); Alison Frankel, *Sarbanes-Oxley’s Lost Promise: Why CEOs Haven’t Been Prosecuted*, THOMSON REUTERS (July 27, 2012), <http://blogs.reuters.com/alison-frankel/2012/07/27/sarbanes-oxleys-lost-promise-why-ceos-havent-been-prosecuted> [<https://perma.cc/39AH-3FJW>] (describing criminal prosecutions of CEOs under the Sarbanes-Oxley Act in the ten years since its passage as “as rare as a blue moon”).

61. BUELL, *supra* note 24, at 193.

62. *Id.* at ix.

63. *Id.* at 109–12.

criminal accountability becomes more “you didn’t do your job well” and less “you did the following thing that caused that terrible explosion and spill.”⁶⁴

The case against Blankenship required the cooperation of the company that bought Massey Coal. It built on an earlier investigation and report to the Governor.⁶⁵ Prosecutors charged supervisors and got them to cooperate to provide evidence against the man at the top. And there was sheer happenstance. Like President Richard Nixon, Blankenship had secretly tape recorded his office.⁶⁶ In one of the eighteen tapes played at trial, Blankenship was recorded speaking about a “terrible document” outlining safety violations at the mine.⁶⁷ Without a tape like that, perhaps no one at the top would normally be held accountable. That is the typical result when corporations enter settlements with federal prosecutors—no employees are prosecuted; they are prosecuted in only about one-third of cases in which a corporation receives a federal deferred or nonprosecution agreement.⁶⁸

Buell says it gets “trickier” when you have to confront “an actual white-collar crime.”⁶⁹ The reasons flow from the very phenomenon that Soltes describes: white-collar criminals may not themselves realize they did anything wrong, and they were often taking on risks for the benefit of the corporation, without accountability within the corporation. It can be hard to decide how to calculate a white-collar sentence, for example, when the question is what the dollar amount involved was and whether to sentence purely based on that. Often business criminals do not have prior records, which is the typical way that sentences are enhanced.⁷⁰ Like Blankenship, they may deny that they knew anything or committed any crime. Buell contrasts the Enron case, where prosecutors could show that defendants knew what they were doing, with other cases where it is not so easy to prove

64. *Id.* at 111.

65. GOVERNOR’S INDEP. INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES (2011), <http://www.npr.org/documents/2011/may/giip-massey-report.pdf> [<https://perma.cc/ZNM3-F5Z7>].

66. Jef Feeley, *Secret CEO Recordings Allowed in Massey Mine Blast Trial*, INS. J. (Oct. 12, 2015), <http://www.insurancejournal.com/news/southeast/2015/10/12/384591.htm> [<https://perma.cc/6W4T-ULQH>].

67. *Id.*

68. See BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 13 (2014) (indicating that in roughly two-thirds of the cases involving deferred prosecution or nonprosecution agreements and public corporations, no employees were prosecuted); Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015) (same).

69. BUELL, *supra* note 30, at 232.

70. The Federal Sentencing Guidelines for individuals are comprised of two main elements: offense level and criminal-history category. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM’N 2016).

intent.⁷¹ Without the tapes from Blankenship's office, proving that the CEO was aware would have been very hard. Even with the tapes, the prosecutors could not prove an intentional felony. We should also be concerned with the lower-level employees and whether those who were not calling the shots may be scapegoated while the CEOs get a slap on the wrist.

Why not then prosecute the company itself? Buell describes how BP was criminally fined over four billion dollars.⁷² This was a record fine for an environmental crime according to my data on corporate prosecutions.⁷³ But it was still "only a fraction of the tens of billions" BP paid in civil suits and for cleanup costs.⁷⁴ The company's stock price "took a big hit," but the stock recovered, the company did not suffer, and Buell notes that he "didn't see anyone avoiding the pumps" at BP stations, "and neither, truth be told, did [he]."⁷⁵

Buell is certainly right that putting more people in prison is not the way to address social problems, whether the problem is corporate crime or the opioid epidemic. We need stronger corporate regulations to prevent malfeasance in the first place. Buell suggests doing more to regulate corporations and make executives feel the consequences of taking harmful risks.⁷⁶ But he recognizes how hard this is to do, particularly since most corporate law is state law.⁷⁷ We should also hold corporations themselves accountable for crimes; settlements with corporations need not "expose" a "dilemma," as Buell suggests.⁷⁸ Settlements can force the company to pay fines, make victims whole, and reform their practices, if they are done right (although they are often not).⁷⁹ Accomplishing those goals, as Buell notes, requires making compromises.⁸⁰ Only the companies, even with careful monitoring, can assure that their business practices are reformed. Only lawmakers and regulators can assure that business practices are held to a high standard as a matter of law. These are enormously socially costly crimes.

71. BUELL, *supra* note 30, at 130–36 (discussing the role of state of mind in white-collar crimes).

72. *Id.* at 112.

73. Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, U. VA. SCH. L., <http://lib.law.virginia.edu/Garrett/Corporate-prosecution-registry/browse/browse.html> [https://perma.cc/5D65-Z64N]; see also Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry: BP Exploration & Production, Inc.*, U. VA. SCH. L., http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/detail_files/983.html [https://perma.cc/KNV4-FZDU] (documenting a \$4 billion fine for environmental crime in the case of *United States v. BP Exploration & Prod., Inc.*).

74. BUELL, *supra* note 30, at 112.

75. *Id.*

76. *Id.* at 253.

77. *Id.* at 256.

78. *Id.* at 128.

79. *Id.* at 174–75.

80. *Id.*

Getting corporate crime right is enormously important. Redefining the legal duties of corporate managers to include more robust duties to the public, as Buell suggests, is a very useful proposal.⁸¹ We can require more transparency in corporate law and increase management responsibility using regulatory tools, not the blunt instrument of prosecutions.⁸² And perhaps non-criminal sanctions may be more readily proved.

III. Blame the Free Market

At the opposite end of the spectrum lies the other 99%, for whom income inequality means not just subpar social services but also bargain-basement criminal justice. Law professor Darryl Brown describes in his book, *Free Market Criminal Justice*, how American criminal justice is not so different in its basic goals from criminal justice in many countries around the world. We want security in society. We use public police to investigate crimes. We use public prosecutors to decide who to charge with criminal offenses. Yet in America criminal punishment is exceptionally extreme in its severity and in its scale.⁸³ Brown's motivating question is: What is it about American criminal justice?

The free market, or its ideology at least, may be part of the problem, Brown argues.⁸⁴ To call criminal justice a "free" market, when the end result of a transaction typically puts a person behind bars, requires a certain amount of irony. Brown takes us to that troubling place with sensitivity and great attention to detail. In what way is criminal justice a market? What is being bought and sold is nothing less than life and liberty. In a laissez-faire, free-market system, the state does not try to even out social inequality. What laissez-faire attitudes mean for criminal cases is that people get only what they can afford. The rich can hire a dream team, while poor people may barely get a lawyer. If you can't afford a lawyer, you get substandard justice. You may get a public defender, or often worse, a court-appointed lawyer. In some places, you may be detained for some time before seeing a lawyer. Or in misdemeanor cases, you may never get a lawyer, despite the serious consequences of nonfelony convictions. Your lawyer may not have the wherewithal to investigate your case. Prosecutors will propose a cookie-cutter plea bargain. If you do not accept it—as your own lawyer will tell you—the punishment at trial will be more severe. Criminal trials rarely occur anymore. After you are convicted, liberal market values will define what happens on appeal and postconviction, including that you will not get a

81. *Id.* at 256.

82. *Id.* at 255.

83. BROWN, *supra* note 31, at 1–2.

84. *Id.* at 3.

lawyer postappeal at all, except perhaps in a death penalty case, unless you can afford one.⁸⁵

This is a free-market system in that everyone gets the legal defense they can afford.⁸⁶ Defendants willingly and freely enter contracts to plead guilty in exchange for a reduced sentence. But that is all a fiction. These plea contracts can sometimes be about as free and willing as an agreement to pay into a Mafia protection racket. The poor barely get anything resembling a day in court. They are free to negotiate—from a position of abject powerlessness—and the market of plea bargaining results in prosecutors rubber stamping convictions en masse. The system efficiently and cheaply puts millions of people in prison. If free-market ideology is to blame for our severe “anything-goes” system, Brown suggests, it may also be to blame for the reason we place priority on imprisonment: to make sure that property is kept secure.⁸⁷

Running with that market analogy, perhaps criminal justice is an example of a market failure, which is defined as a situation in which goods and services are not efficiently allocated.⁸⁸ Why do markets fail? They can permit abuse of monopoly power. There can be information failures, including those due to fraud, so people do not fully know what they are buying or selling. Or preexisting inequality can distort markets. Criminal justice suffers from all of these faults. Prosecutors have an almost complete monopoly on power, as Brown describes, and have more control over sentences and bargains than in just about any other country.⁸⁹ Inequality distorts justice, as public defenders lack resources to effectively handle their growing caseloads.

Information failures abound, as defendants have scant resources to investigate the facts or the law that might get them the sentences they really deserve or no punishment at all. Prosecutors have loose obligations to disclose the facts to defendants, particularly in cases that are plea bargained.⁹⁰ Wrongful convictions have exploded in our country, with hundreds exonerated by DNA testing and over a thousand more by other evidence in the past few decades, often because so little work is put into investigating

85. *See id.* at 88 (“Instead, as the doctrine now stands, the right to retain counsel with personal funds gives the fullest protection to a private interest on which the law places great value within criminal procedure and beyond: the individual right to unfettered market access.”).

86. *See id.* (“The law of privately funded defense is unusually forthright in its embrace of market values.”).

87. *Id.* at 198.

88. *Id.* at 75.

89. *Id.* at 30.

90. *Id.* at 141–42; *see also* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that the Constitution does not require the disclosure of impeachment information prior to a guilty plea).

facts before we rush to convict people.⁹¹ Even our much-vaunted criminal procedure, layers of appeals, and habeas largely perform symbolic functions, as Brown describes, and rarely result in meaningful relief.⁹²

Our criminal justice system also embraces the ideology of local democracy. Local democracy should be checked when minority rights are severely affected. Should we let a county decide not to fund its public defenders but still impose harsh justice on the poor? Should we allow states to tolerate failing public defenders funded only by unreliable and skimpy traffic-ticket revenues? Should we allow county prosecutors to seek severe sentences using near-monopoly power? We mass process cases, and we get mass incarceration, which has enormous social costs.

Nor does it have to be that way. Some jurisdictions do fine without plea bargaining the bulk of cases, as Brown describes.⁹³ Mass incarceration could be prevented if we had a system, Brown suggests, in which there were more meaningful checks and balances on prosecutorial and police power than democratic accountability through elections.⁹⁴ Some other form of accountability is needed. As I describe in the Conclusion to this Review, perhaps those changes are coming—only perhaps—because the market in criminal justice has come crashing down.

Now, turning back to elite criminals, even a distorted market may not be so bad for the privileged who can game it in their favor. Actual, not metaphorical, markets experience cycles of boom and bust. Many have been concerned that elites profit from these cycles while everyday people suffer harsh consequences. Corporate prosecutions follow in the wake of market busts, yet some of the largest business crimes may go unpunished. Buell, who served as a federal prosecutor, including on the Enron Task Force, explains why.⁹⁵ Buell points out that street crimes may be far easier to prove than complex financial crimes. Yet that does not mean that we should focus primarily on street crimes. The social consequences of business crimes can be enormous, as Buell describes. If white-collar offenders ignored sophisticated legal and business advice and went ahead and committed crimes, is there any reason to think they are less reprehensible? Crimes like drug possession punish the low-level addict or corner dealer and not the

91. See *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [<https://perma.cc/V4YB-EP5A>] (last visited Oct. 19, 2017) (showing DNA and non-DNA exonerations by year, from 1989 to 2016, totaling over 2,000).

92. See BROWN, *supra* note 31, at 208 (concluding that U.S. criminal procedure is designed to achieve fair process rather than the correct outcome).

93. BROWN, *supra* note 25, at 104–05.

94. See *id.* at 198–99 (discussing how the United States, like other jurisdictions, “rel[ies] on public prosecution and police monopolies,” despite its distrust of state authority and political commitment to democracy).

95. BUELL, *supra* note 24, at xvii–xviii.

kingpin. And unlike business criminals, the poor do not usually get investigators and lawyers to argue that their individual life stories merits sympathy and leniency at sentencing. The results when they do get a team, for example in death penalty cases, are stunning and often make the difference between a life sentence and a death sentence.⁹⁶

Can this longstanding inequality in our justice system ever be remedied? If anything, politics seems to be moving towards tolerating more inequality in America and not less. We punish street crimes or immigration offenses or drug possession in massive waves because it is cheap and easy to put people who lack resources to defend themselves behind bars. The role that race plays in our willingness to tolerate bargain-basement justice for the poor but not for elites cannot be ignored.⁹⁷ The role of race in policing, arrests, and plea bargaining cannot be ignored either.⁹⁸

We do not respond the same way to white-collar crime waves.⁹⁹ In business-crime cases, jurors and judges see the full picture of a person's life. Elites get short sentences. They get fairer justice. We shouldn't wish less on anyone. The other 99% deserve the same. No one is calling for life in prison for Wall Street super-predators. The question is whether any will be jailed at all. We should respond to inequality in criminal justice by ratcheting punishment down and increasing fairness for all. Buell recommends as much, as does Brown. Yet both leave us wondering whether that can occur in the Land of the Free, where ingrained structures and thinking produced mass incarceration on a scale the world has never before seen. These books, however, leave us in a place more optimistic than one might suppose.

Conclusion

All three of these wonderful books, from different perspectives, point towards restorative justice and away from punishment. We need serious regulatory involvement to prevent corporate crimes from occurring in the

96. Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661, 724–25 (2017).

97. See, e.g., Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 235–36 (1994) (observing that racial minorities are disproportionately poor and that they disproportionately require public defenders).

98. For example, a recent study found that race was a statistically significant factor in plea bargaining and outcomes over a two-year period in Manhattan cases examined by the Vera Institute for Justice. Gene Demby, *Study Reveals Worse Outcomes for Black and Latino Defendants*, NPR (July 17, 2014), <http://www.npr.org/sections/codeswitch/2014/07/17/332075947/study-reveals-worse-outcomes-for-black-and-latino-defendants> [https://perma.cc/K535-38AR]; see also, e.g., Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA TODAY (Nov. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/> [https://perma.cc/EPV5-GXRE] (pointing out the reality of “racially lopsided arrests” and discussing the importance of investigating potential causes of the racial disparity in arrest cases).

99. BUELL, *supra* note 24, at 213.

first place. Better resources for mining inspectors could have prevented the Upper Big Branch disaster. More resources for the SEC and other Wall Street watchdogs can far more effectively prevent financial crimes than a few token prosecutions after the fact. Corporations can be rehabilitated, and more minor offenses and sanctions can be used to prevent corporate misconduct, as Soltes and Buell suggest.

For more-typical criminal cases, Brown describes how things could be different, and how they were different when England responded to a similar crime wave from the 1970s through the 1990s but kept more power in the hands of judges and did not completely deregulate criminal justice.¹⁰⁰ Local prosecutors can similarly focus on preventing crime and rehabilitating communities. Perhaps things can be different in the United States as well, despite the loosely regulated system that has produced mass incarceration on the largest scale that the world has ever seen.

Perhaps the boom in mass incarceration in our criminal justice system is finally turning into a bust, for exactly the reasons and using exactly the tools that these authors point towards. Whether “common sense” and “comparative moderation” continue to prevail in the United States remains in question. But for over a decade, we have started to move away from criminalizing drugs,¹⁰¹ from the death penalty (but not life sentences),¹⁰² and from overly harsh sentencing laws.¹⁰³ We have started to shift towards rehabilitation and alternatives to incarceration, particularly at the state level. American mass incarceration costs over \$180 billion a year, according to a Prison Policy Initiative estimate that took into account not just the costs of running prisons (over \$80 billion) but also court costs and policing costs.¹⁰⁴ The social costs borne by families and communities are far greater.¹⁰⁵ Mass

100. BROWN, *supra* note 31, at 212–13.

101. NAT’L CONFERENCE OF STATE LEGISLATURES, DRUG SENTENCING TRENDS (July 30, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/drug-sentencing-trends.aspx> [<https://perma.cc/KG66-Y2PM>] (“States are rethinking how they respond to drug crimes” and “have lowered penalties.”).

102. Garrett, *supra* note 87, at 663.

103. ALISON LAWRENCE, NAT’L CONFERENCE OF STATE LEGISLATURES, TRENDS IN SENTENCING & CORRECTIONS 4 (July 2013), <http://www.ncsl.org/Documents/CJ/TrendsInSentencingAndCorrections.pdf> [<https://perma.cc/3NHQ-3W62>].

104. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/H77B-U9VA>]. For a wonderful graphical illustration, see Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POL’Y INITIATIVE (Mar. 12, 2014), <http://www.prisonpolicy.org/reports/pie.html> [<https://perma.cc/8VVY-MJ2A>] (illustrating incarceration in the United States).

105. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276, 1281–85 (2004) (discussing the high social cost of mass incarceration); Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 225 (2009) (discussing high incarceration rates in inner cities).

incarceration, however, has now become a term, and one of opprobrium for concerned policymakers and citizens on both sides of our political divide.¹⁰⁶

There are two ways to reduce mass incarceration: admit fewer prisoners and keep them in prison for less time.¹⁰⁷ Both of those solutions are being implemented on a greater scale. For example, a “Right on Crime” coalition of legislators in Texas implemented measures to reduce incarceration by seventeen percent from 2007 to 2015, and during that time, crime fell by twenty-seven percent.¹⁰⁸ Texas avoided spending half a billion dollars to build three prisons and instead closed three prisons, improved access to probation, addiction treatment, and alternatives to prison, and saved about three billion dollars.¹⁰⁹ California, New Jersey, and New York led the country in reducing prison populations, by twenty percent or more, and experienced the largest drops in violent crime.¹¹⁰ A federal “smart on crime” initiative supports such efforts to reinvest savings from reducing incarceration by prevention.¹¹¹ More than thirty states have adopted these types of reforms, including Alaska, Georgia, Ohio, Oklahoma, Kentucky, Maryland, Mississippi, Texas, and many more.¹¹² Suddenly, rehabilitation and reentry are becoming a new focus for research and policy; some states are restoring voting rights to felons.¹¹³

106. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1–2 (David Garland ed., 2001); see, e.g., Sen. Rand Paul, *Keep Pushing Criminal Justice Reform in Ky.*, COURIER J. (Mar. 28, 2016), <http://www.courier-journal.com/story/opinion/2016/03/28/paul-keep-pushing-criminal-justice-reform-ky/82352596/> [<https://perma.cc/L7VU-7KUL>] (discussing the need for reform).

107. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 316 (2009).

108. Tina Rosenberg, *Even in Texas, Mass Imprisonment is Going Out of Style*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/opinion/even-in-texas-mass-imprisonment-is-going-out-of-style.html?mcubz=1> [<https://perma.cc/Z7Y7-F29Z>].

109. Jason Pye, *Savings from Prison Reforms in Texas Top \$3 Billion*, FREEDOMWORKS (July 6, 2015), <http://www.freedomworks.org/content/savings-prison-reforms-texas-top-3-billion-crimes-rates-hit-lowest-point-1968> [<https://perma.cc/874E-GXKF>].

110. MARC MAUER & NAZGOL GHARDNOOSH, THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (2014), <http://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf> [<https://perma.cc/G9E5-6L5X>].

111. See U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> [<https://perma.cc/D7BD-SG3W>] (providing an overview of a federal approach to reducing incarceration).

112. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, BJA JUSTICE REINVESTMENT INITIATIVE: WHAT IS JRI?, https://www.bja.gov/programs/justicereinvestment/what_is_jri.html [<https://perma.cc/VUF2-5P9N>]; BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, BJA JUSTICE REINVESTMENT INITIATIVE: JRI SITES, https://www.bja.gov/programs/justicereinvestment/jri_sites.html [<https://perma.cc/VQ48-KYEJ>].

113. NAT’L CONFERENCE OF STATE LEGISLATORS, FELON VOTING RIGHTS (Sept. 29, 2016), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>

Hopefully, those state and local efforts will continue, and these problems will continue to be studied, so that these efforts can be evaluated and improved upon. Far more must be done to make more lasting reductions in mass incarceration, given the scale of the increase in incarceration in this country in the 1980s and 1990s.¹¹⁴ Soltes, Brown, and Buell supply answers at the top and bottom of our divided criminal justice system, and they suggest a connection between the two. The mass incarceration binge can come crashing down, and perhaps it is finally starting to do so. We need less-punitive responses to our most important social problems. Risky behavior is

hard to deter and punishment is not the best way to prevent it, but punitive voices are now calling for a turn back to the tough-on-crime 1980s. Meanwhile, state and local governments are forging ahead with smart-on-crime reforms. We are at a crossroads. We need voices of reason, like Soltes's, Buell's, and Brown's, today more than ever.

[<https://perma.cc/N8NE-GDXJ>] (describing recent state legislation restoring felons' voting rights, including in Delaware, Maryland, Virginia, Washington, and Wyoming).

114. LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 3 (2016).