



# WHY NOT JAIL?

INDUSTRIAL CATASTROPHES, CORPORATE  
MALFEASANCE, AND GOVERNMENT INACTION

RENA STEINZOR

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## Introduction

On April 5, 2010, an enormous explosion tore through Massey Energy's Upper Big Branch mine in Montcoal, West Virginia, propelling flames at a speed of one thousand feet per second in all directions from the point of ignition as far as two miles underground. Twenty-nine men were killed instantly in the worst mine disaster in four decades.<sup>1</sup> Numerous blatant and well-known violations of mine safety laws caused the explosion, from the chronic buildup of highly combustible methane to the malfunctioning equipment that produced the igniting spark.<sup>2</sup> In the weeks leading up to the accident, Mine Safety and Health Administration (MSHA) officials had ordered the evacuation of Upper Big Branch on three separate occasions because excessive methane made the mine too dangerous to work.<sup>3</sup> Despite these efforts to nudge Massey back into line with safety requirements, 13,000 citations for illegal conduct throughout the industry were pending before MSHA at the time, including several hundred involving the Upper Big Branch mine, because the agency was paralyzed by its own dysfunctional system for enforcing these requirements.<sup>4</sup>

To his great credit, Booth Goodwin, West Virginia's top federal prosecutor, filed criminal charges against four Massey employees, including three relatively low-level supervisors and the senior manager of the subsidiary responsible for

<sup>1</sup> Erik Reece, *The End of Illth: In Search of an Economy That Won't Kill Us*, HARPER'S MAG., Oct. 4, 2013, available at <http://harpers.org/print/?pid=242893> (subscription required).

<sup>2</sup> MINE SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION – FATAL UNDERGROUND MINE EXPLOSION 2 (Dec. 6, 2011), available at <http://www.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf>.

<sup>3</sup> Ian Urbina & Michael Cooper, *Deaths at West Virginia Mine Raise Issues About Safety*, N.Y. TIMES, Apr. 6, 2010, [http://www.nytimes.com/2010/04/07/us/07westvirginia.html?\\_r=0](http://www.nytimes.com/2010/04/07/us/07westvirginia.html?_r=0).

<sup>4</sup> Rawan Jabaji, *The Upper Big Branch Explosion: One Year Later*, THE DAILY NEED (Apr. 5, 2011), <http://www.pbs.org/wnet/need-to-know/the-daily-need/the-upper-big-branch-explosion-one-year-later/8409/>. (“[B]etween January 2009 and the April 2010 blast, Massey mines had been cited for almost 13,000 violations.”)



the Upper Big Branch mine.<sup>5</sup> The senior manager, David C. Hughart, is cooperating with Goodwin, and hopeful rumors circulate in neighboring communities that Don Blankenship, Massey's notorious chief executive officer, is the ultimate target of the investigation.<sup>6</sup> If Blankenship is indicted and either pleads guilty or is tried, the case will be the first in decades to travel up the chain of command to the person who was ultimately responsible for the catastrophe.

Why prosecutors duck opportunities to indict corporations and their executives for violations that cost lives, cause grievous injuries, and threaten environmental viability is the central, puzzling reality tackled in this volume. Criminal cases involving pollution had their heyday during the period from 1987 to 2002 but have since slowed to a trickle. Criminal prosecutors have never paid sustained attention to crimes involving workplace hazards and the sale of dangerous products, especially food and drugs, leaving erratic civil enforcement as the only deterrent. (The word "prosecutors" is used to refer to officials that bring criminal charges. In this book, the words "regulators" or "inspectors" refer to officials who focus on civil cases.)

Federal and state laws cover crimes committed both by individuals at work and the corporations that employ them. The choice of which category of defendant to indict is difficult and complicated, depending on the nature and scope of the crime, the quality and quantity of available evidence, and the remedial goals of the prosecution. Individuals can go to jail, of course, and corporations cannot. On the other hand, government criminal settlements with corporations can exact very large fines, while individual prosecutions may motivate corporate executives to establish even more effective prevention on their own. In too many cases, though, individuals escape scrutiny and corporations pay modest fines that are an expected cost of doing business and have little effect on the serious problems that plague their internal management of health, safety, and environmental risks. As illustrated by the Upper Big Branch explosion, routine regulatory civil enforcement has faded into the background, lacking the power to deter reckless behavior that has become increasingly common.

These unfortunate realities are obscured at the moment by the reemergence of a shrill campaign against regulation in any form. Spearheaded by regulated industries and conservatives, and tolerated by centrists, few days go by when a member of Congress fails to finger excessive regulation as the root cause of

<sup>5</sup> See Ken Ward, Jr., *Former Massey Official Sentenced to 42 Months in Prison*, CHARLESTON GAZETTE, Sept. 10, 2013, <http://www.wvgazette.com/News/201309100025?display=print> (discussing Goodwin's prosecutions against Thomas Harrah, Hughie Elbert Stover, Gary May, and David C. Hughart).

<sup>6</sup> *Id.*

America's most profound economic problems.<sup>7</sup> Requirements that protect public health, worker and consumer safety, and the environment are not the sole target of these relentless attacks. Efforts to implement the Dodd-Frank Act's tighter controls on the financial services industry, as well as health care reform, inspire resistance that is at least as passionate.

This deregulatory narrative has overshadowed a series of deeply troubling incidents that have imposed cumulative death and injury tolls in the thousands. These events are the inevitable result of "hollow government" – a term used here to encompass outmoded and weak legal authority, funding shortfalls that prevent the effective implementation of regulatory requirements, and the relentless bashing of the civil service. From the blowout of the Macondo well in the Gulf of Mexico – death toll 11 – to a Massachusetts pharmacy's shipment of tainted steroid injections that caused fungal meningitis – death toll 64 – the rote response is to excoriate federal officials for failing to prevent the incident without considering why they are having such difficulties.

In the aftermath of the Macondo blowout, for example, an estimated 205 million gallons of crude oil coursed into the Gulf over a period of two and a half months as BP engineers tried frantically to plug the leak. Yet Congress never upgraded the legal authority of Department of Interior regulators in the Gulf and appropriations for enhanced enforcement remain pitifully inadequate. At last reporting, some 79 inspectors police 3,500 deepwater drilling rigs and platforms. In a similar vein, remedial legislation to strengthen the Food and Drug Administration's (FDA) capacity to supervise compounding pharmacies was weakened after that industry's trade association swarmed Capitol Hill. Without aggressive FDA intervention, which will require statutory changes and money, such facilities will remain virtually unregulated by state pharmacy boards.

The phrase "too big to jail" had its genesis in *Too Big to Fail*, Andrew Sorkin's disturbing account of the 2008 worldwide financial crisis.<sup>8</sup> Both phrases have a sardonic undercurrent, gently mocking the expectation that institutions or individuals will be held accountable for causing a global recession of unprecedented proportions. But on March 6, 2013, Sorkin's clever catchphrase was adopted as truth by the nation's top prosecutor and in that instant ceased to be remotely funny. Attorney General Eric Holder said:

I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with

<sup>7</sup> For a trenchant analysis of this phenomenon, see BRIAN DOMITROVIC, *ECONOCLASTS: THE REBELS WHO SPARKED THE SUPPLY-SIDE REVOLUTION AND RESTORED AMERICAN PROSPERITY* (2012).

<sup>8</sup> ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM – AND THEMSELVES* (2009).

indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy. And I think that is a function of the fact that some of these institutions have become too large.<sup>9</sup>

Or, as the situation was characterized in a more direct fashion by a former Senate investigator in an interview with *Rolling Stone*'s Matt Taibbi: "Everything's fucked up, and nobody goes to jail. That's your whole story right there. Hell, you don't even have to write the rest of it. Just write that."<sup>10</sup> Taibbi proceeded to document in copious detail the political connections that trumped investigations of insider trading and other blatantly illegal behavior by some of the leading players in Sorkin's book.

In grand Washington tradition, Holder has tried to "walk back" his statement, promising to get tough on corporate crime.<sup>11</sup> Yet, as we shall see, his Department of Justice (DOJ) has not changed the underlying policies that motivated his statement. Half the cases brought by its criminal section were settled without guilty pleas, under a strange legal hybrid called "deferred prosecution agreements" (DPAs).<sup>12</sup> Prosecutors and media commentators constantly refer to the 2005 collapse of Arthur Andersen, which served as Enron's accounting firm, as the reason why the DOJ hesitates to charge corporations with crimes that could put them out of business. This rationale is misplaced. Arthur Andersen's clients began to desert the firm when news of Enron's collapse hit Wall Street. The DOJ indictment was issued months later. The indictment charged that Andersen partners ordered the shredding of tons of documents revealing the massive fraud it had helped Enron to perpetrate. No major publicly traded corporation wanted to be tainted by continued association with Arthur Andersen in the wake of the scandal. At best, the indictment played a minor role in the rapid demise of the firm.

<sup>9</sup> *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (Mar. 6, 2013) (transcript of testimony of Att'y Gen. Eric Holder), [http://www.americanbanker.com/issues/178\\_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html](http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html).

<sup>10</sup> Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE, Feb. 16, 2011, <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216>.

<sup>11</sup> Mark Gongkoff, *Eric Holder: Actually, I Meant to Say No Banks Are Too Big to Jail*, HUFFINGTON POST, May 15, 2013, [http://www.huffingtonpost.com/2013/05/15/eric-holder-too-big-to-jail\\_n\\_3280694.html](http://www.huffingtonpost.com/2013/05/15/eric-holder-too-big-to-jail_n_3280694.html).

<sup>12</sup> In a "deferred prosecution agreement," the Justice Department agrees to drop the criminal charges after a set period of time if the company in question abides by the terms of the settlement. SORKIN, *supra* note 8, at 155. Sorkin explains that "[a]fter the indictment of ... Arthur Anderson ... led to its collapse, the government preferred the softer cudgel of deferred prosecution agreements as a kind of probation ..." *Id.*

In any event, the DOJ persists with its “too big to jail” policy in financial cases, most memorably invoking it in the case of HSBC, the world’s third-largest publicly held bank, which stood accused of laundering money for Mexican drug cartels and opening bank accounts for possible terrorists in Sudan and Libya. HSBC signed a deferred prosecution agreement, escaping any admission that it had committed multiple felonies.<sup>13</sup>

As tempting as it is to get sidetracked by the twisted logic of DOJ’s anxiety about prosecuting big banks, my focus here is on crimes that harm public health, worker and consumer safety, and the environment. Where the two areas intersect, I will explore those synergies. For example, the DOJ’s obvious inability to hold Wall Street players accountable for the meltdown continues to infuriate the public. The parallel failure to hold senior executives liable for crimes involving public health, safety, and the environment deserves a similarly high profile.

The two areas are comparable in another important way: a critical mass of traditional regulatory programs designed to prevent the worst abuses have crossed the line from workable to dysfunctional. Given the harsh rhetoric of deregulation that dominates national policy debates, the resources and political commitment necessary to accomplish their resurrection is unlikely to materialize anytime soon. Instead, ultimately more aggressive, targeted, and less expensive criminal prosecutions offer a more effective and viable solution. If handled well, such prosecutions could create robust incentives for top managers to create their own internal system of incentives and punishment.

This book illustrates these problems and searches for potential solutions by examining the root causes of five recent incidents, all of which involve substantial loss of life, billions of dollars in damage, the shocking dearth of internal corporate safety cultures, and dysfunctional regulatory systems. They include: the Massey Energy Upper Big Branch mine collapse, the Macondo well blowout oil rig and Texas City refinery explosions, the Peanut Corporation of America’s shipment of peanut paste contaminated with salmonella, and the New England Compounding Center’s sale of tainted steroid injections that caused fungal meningitis. All five involve circumstances where top management must have been aware of serious operational risk but did not pause long enough to consider the intolerable consequences at stake, instead

<sup>13</sup> Press Release, Dep’t of Justice, Office of Public Affairs, HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit \$1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), *available at* <http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html>. For the actual agreement, see Deferred Prosecution Agreement, United States v. HSBC Bank USA NA and HSBC Holdings PLC, Crim. No. 12-763 (E.D.N.Y. filed Dec. 11, 2012), *available at* <http://www.justice.gov/opa/documents/hsbc/dpa-executed.pdf>.

focusing on profitability at the expense of safety. Because each episode involves a major industry that has great importance to American social welfare, these are not traditional case studies but rather rise to the level of historical events that had major effects on the economy, social attitudes, and industry behavior. Groundbreaking journalism and extensive investigation by public and private sector entities document these failures in meticulous detail, providing a rich context for evaluating the deterrent effects of self-regulation, government regulation, and criminal prosecution.

In addition to regulatory failure, the most significant challenge to criminal prosecutions is the deeply engrained tendency among investigators and prosecutors to take the route of least resistance, bringing civil cases against corporations and settling for amounts less than the compliance costs the company avoided by breaking the law. Of course, the legal burden for criminal cases – “beyond a reasonable doubt” – is far more difficult to meet than the “preponderance of the evidence” standard generally applicable to civil cases. The first connotes the conclusion that there is no other reasonable explanation for what happened while the second means only that the evidence shows it is more likely than not that the defendant was at fault. Three additional factors deter prosecutors: the risk of losing, limited resources, and apprehension about the intensity of the potential defense. An attitudinal pivot will be the hardest to accomplish, not least because prosecutors are awash in misleading legal commentary asserting that they cannot win criminal cases under current law.<sup>14</sup>

I argue here that criminal prosecution should be considered by federal and state authorities whenever industrial activities cause grave harm to public health, consumer or worker safety, or the environment. Existing law, including the judicial “responsible corporate officer” doctrine, provides ample authority to support such indictments. The potential for prosecutions under state manslaughter rules is especially encouraging.

In many cases, “accidents” cause the harm, with that term defined as an admittedly unintended consequence that was nevertheless the inevitable outcome of a series of acts or omissions by managers who should and did know better. Unfortunately, legal scholars’ preoccupation with the *mens rea* of crimes – the knowing state that justifies the harsh penalty of imprisonment – has undermined the development of criminal law in the health, safety, and environmental arenas. Unless and until *mens rea* is conceived more broadly to

<sup>14</sup> See, e.g., Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503 (2007) (warning against weakening corporate criminal liability laws because of the difficulty of prosecuting).

include systematic and prolonged acts or omissions that magnify risk, the criminal option will be drastically underused.

Criminal prosecutions should target the highest level of official against whom adequate evidence can be developed, avoiding cases against line supervisors who acted or failed to act because they feared reprisal. Once executives and their corporations are charged criminally, settlements should require defendants to acknowledge their crimes and, where the corporation is the defendant, take every feasible step toward establishing enduring safety protocols that pervade their operations top-to-bottom and side-to-side.

Scholars have long identified criminal prosecutions as the expression of a society's moral revulsion regarding specific conduct. In this sense, the criminal justice system is as important to the ultimate embodiment of a society's values as it is in keeping public peace. The great legal historian Lawrence M. Friedman has written:

[C]riminal justice tells us where the moral boundaries are; where the line lies between good and bad. It patrols those boundary lines, day and night, rain or shine. It shows the rules directly, dramatically, visually, through asserting and enforcing them. (There are lessons from nonenforcement, too: from situations where the boundaries are indistinct, or the patrol corrupt or asleep; and society is quick to learn these lessons, too.) ...

... [T]he history of criminal justice is not only the history of the forms of rewards and punishment; it is also a story about the dominant *morality*, and hence a history of power.<sup>15</sup>

Viewed from this perspective, the criminal justice system is a sad commentary on the values our society claims to hold dear. America's 5,000 prisons hold about 2.3 million inmates, more than in any other country that records such statistics, including Russia.<sup>16</sup> An additional 4.1 million people live under the supervision of correctional institutions, primarily on probation, for a total of 6.4 million, or one in thirty-four Americans. African Americans are eight times more likely to be incarcerated than whites. A young black man has a 32 percent

<sup>15</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 10 (1993).

<sup>16</sup> Comprehensive statistics on prison populations can be found at the Bureau of Justice Statistics website. LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, NO. NCJ 239972, *CORRECTIONAL POPULATIONS IN THE UNITED STATES* (2011), available at <http://www.bjs.gov/content/pub/pdf/cpush11.pdf>. The comparative rates were calculated in the mid-2000s. BECKY PETTIT, *INVISIBLE MEN* 11–12 (2012). For more extensive discussion of the acute social problems and injustice caused by mass incarceration, in addition to the Pettit book, see PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF CRIMINAL JUSTICE* (2009), TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007), and MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011).

chance of going to prison; his white counterpart has a six percent chance. Prisons cost the nation about \$60 billion annually.<sup>17</sup>

Until the 1970s, the number of Americans in prison was roughly comparable to other developed countries. Over the next three decades, the nation pulled out ahead of that norm. A large private sector prison industry was established, and contractors became at least as powerful as the criminologists, sociologists, policymakers, wardens, prison guards, and elected officials with an interest in the system. A conservative political movement demanded zero tolerance for the most minor crimes; in fact, these are the same interest groups that now demand deregulation of the industrial sector. Apparently, government has an essential role to play in incarcerating its citizens but not in protecting them from the worst threats of industrialization.

Some might imagine that escalating crime rates justified this laser focus on so-called “street crime.” But crime rates have fallen in most cities, in some cases quite precipitously, at the same time that prison populations continued to grow. Over the decade beginning in 2001, eight million people were arrested for marijuana; simple possession charges accounted for 88 percent of this total and marijuana was the target of 52 percent of all drug arrests.<sup>18</sup> African Americans were 3.73 times more likely to be arrested than whites. Recently and to his credit, Attorney General Holder announced that federal prosecutors would stop charging minor drug offenders with crimes that trigger mandatory minimum sentences, a step that could begin to turn this powerful tide.<sup>19</sup>

Holder was motivated by the common view among criminologists that, as the rate of incarceration increased, a tipping point was reached and prison became a counterproductive, off-target response to perceptions of social threat, as opposed to the actual incidence of violent street crime. Nowhere is this cruel irony illustrated more plainly than in the extension of the zero tolerance movement into the public schools, where children as young as twelve are fed into the juvenile branch of the criminal system for misbehavior such as shouting, wearing the wrong color clothing, leaving class without

<sup>17</sup> PETTIT, *supra* note 16, at 1; see also JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS* 11 (2006), available at [http://www.vera.org/sites/default/files/resources/downloads/Confronting\\_Confinement.pdf](http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf).

<sup>18</sup> This and the following statistics on racially discriminatory marijuana arrests were reported by the AMERICAN CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2013), available at <https://www.aclu.org/sites/default/files/assets/090613-mj-report-rfs-reli.pdf>.

<sup>19</sup> Eric Holder, Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates, San Francisco, CA (Aug. 12, 2013), transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

permission, or shoving a classmate.<sup>20</sup> The disruption caused by the time off from school, stigmatization, and economic hardship imposed on low-income parents by these poorly supervised programs has significantly increased the chances that teenagers will drop out of school and end up in prison themselves.

The most troubling manifestation of discord in American politics is the skyrocketing rate of the public's distrust of government.<sup>21</sup> These concerns parallel an unprecedented concentration of wealth: according to economist Joseph Stiglitz, the amount of money that goes to the upper one percent of the American people has doubled since 1980, and the amount that goes to the top 0.1 percent has tripled.<sup>22</sup> Perceptions that the middle class is having a harder time earning a dwindling living and that its children may well not be better off than their parents are deeply troubling to many Americans. When the vicious cycle of racially discriminatory mass incarceration of poor people is juxtaposed against the vivid descriptions of the crimes committed by well-heeled corporate executives, it is hard to imagine the contrast does not have a corrosive effect on people's confidence in government institutions. Quite apart from the intrinsic unfairness of the failure to prosecute white collar crime far more aggressively, we sacrifice the benefits of deterring events that harm ordinary people.

Silver Spring, Maryland

August 4, 2014

<sup>20</sup> TEXAS APPLESEED, *TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS* 84, 91, 5, 55 (2010), available at [http://www.texasappleseed.net/images/stories/reports/Ticketing\\_Booklet\\_web.pdf](http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf) (describing incidents where students were ticketed for disrupting classrooms, wearing gang-related colors, leaving without permission, or pushing another student down).

<sup>21</sup> In November 1958, when Eisenhower was president, 73 percent of the public said they trusted government. That number steadily eroded, rising sharply and only temporarily in response to events like the terrorist attacks on September 11, 2001. Nineteen percent said they trusted government in October 2013. *Public Trust in Government: 1958–2013*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (Oct. 18, 2013), <http://www.people-press.org/2013/01/31/trust-in-government-interactive/>. Public attitudes toward state and local government are generally significantly more positive, with 57 percent having a favorable view of state government and 63 percent having a favorable view of local government in April 2013. *State Governments Viewed Favorably as Federal Government Hits New Low*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS (Apr. 15, 2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/>.

<sup>22</sup> JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012).



