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TWO WAYS TO THINK ABOUT THE PUNISHMENT OF CORPORATIONS

Albert W. Alschuler*

This article compares the criminal punishment of corporations in the twenty-first century with two ancient legal practices—deodand (the punishment of animals and objects that have produced harm) and frankpledge (the punishment of all members of a group when one member of the group has avoided apprehension for a crime).¹ It argues that corporate criminal punishment is a mistake but that viewing it as frankpledge is less ridiculous than viewing it as deodand. The article considers the implications of the choice between these concepts for standards of corporate guilt and for the sentencing of corporate offenders.

After a brief historical description of deodand and frankpledge, the article traces the history of corporate criminal liability from William Blackstone through Arthur Andersen. It emphasizes that this liability punishes the innocent, and it argues that the punishment of innocent shareholders and employees should not be regarded as “collateral” or “secondary.”

The article notes that subjecting corporations and their officers to punishment for the same crimes creates sharp conflicts of interest. It reviews the history of the Justice Department’s efforts to exploit these conflicts—initially by encouraging corporate officers to deliver corporate guilty pleas to gain leniency for themselves and more recently by pressing corporations to gather and deliver information about their employees.

The article suggests that defenses of corporate criminal liability fall into two categories. Arguments in the first category are expressive and match those that once might have defended

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¹ I first offered this comparison 18 years ago at the end of a comment on two conference papers. See Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312-13 (1991). Sara Sun Beale, Cheryl Evans, and the editors of the *American Criminal Law Review* encouraged me to revisit the comparison and, as they say in Congress, extend my remarks.

deodand. Arguments in the second category are instrumental and match those that once might have supported frankpledge.

“Expressive retributivists” champion the deodand perspective. They blame mindless legal entities for crimes committed by their employees. This article considers the implications of their arguments.

Other defenders of corporate criminal liability view it as frankpledge—a device for persuading everyone in an organization to monitor everyone else. This article questions the propriety of declaring some people guilty of other people’s crimes simply to encourage them to police one another. On the assumption that corporate liability is here to stay, however, the article argues that it is better regarded as a means to induce internal monitoring than as bona fide criminal punishment.

This article then considers the implications of the deodand and frankpledge positions. Neither of these positions justifies the federal rule of *respondeat superior* that authorizes the conviction of a corporation whenever an employee acting within the scope of his employment has committed a crime. The champions of both the deodand and frankpledge positions have in fact sought revision of this rule.

Expressive retributivists propose replacing the rule with a “corporate ethos” standard. The article argues, however, that this standard is incoherent and unworkable. The reform advocated by the frankpledge proponents is more sensible. If the goal of corporate criminal liability is to induce appropriate monitoring, the creation and maintenance of an appropriate corporate compliance program should provide a defense to liability.

Proposals for such a defense have not fared well, and this article considers their prospects. It suggests that, although the *respondeat superior* standard is truly indefensible, it

survives because it affords broad powers to prosecutors. The article examines how prosecutors have used and misused their extraordinary powers.

A final section of this article considers the implications of the frankpledge perspective for sentencing corporate offenders. A judge's goal in punishing a corporation should be to induce a level of monitoring that will prevent more criminal harm than the monitoring will cost.

I. DEODAND

The term deodand refers to the punishment of an animal or inanimate object that has killed a person.² The Book of Exodus endorsed the practice: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten" ³ A standard reference is *Criminal Prosecution and Capital Punishment of Animals* by E. P. Evans, published in 1906.⁴ As one alphabetically minded reader of this work noted, it chronicled 191 actions against "asses, beetles, bloodsuckers, bulls, caterpillars, cockchafers, cocks, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, locusts, mice, moles, rats, serpents, sheep, slugs, snails, swine, termites, turtledoves, weevils, wolves, [and] worms"⁵

² The word refers specifically to the English practice of forfeiting the offending animal or object to the Crown and then using the proceeds for charitable purposes. The literal translation of *deodand* is "given to God." I use the word more generically to encompass the official condemnation of animals and objects not only in England but in other places.

³ *Exodus* 21:28 (King James).

⁴ E. P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* (Faber and Faber 1987) (1906).

⁵ Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 708 (1916). Most prosecutions apparently involved pigs, for pigs ran through European streets for centuries and "were frequently involved in altercations, particularly with small children." Paul Schiff Berman, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 298 (1994). See generally Louise Harmon, *The Day the Dogs Died: A Mad Essay on the Perils of Alien Scholarship, or an Alien Essay on the Perils of Mad Scholarship*, 23 LEGAL STUD. F. 1, 14 (1999); Anna Pervukhin, *All the Lizards Stand and Say "Yes, Yes, Yes": The Element of Play in Legal Actions against Animals and Inanimate Objects* (Bepress Legal Series Working Paper No. 96, 2003), <http://law.bepress.com/expresso/eps/96>.

Under English law, any chattel found by a jury to have caused death was forfeit to the Crown.⁶ In the *Case of the Lord of the Manor of Hampstead*,⁷ “[a] cart met a wagon loaded upon the road, and the cart endeavouring to pass by . . . overturned, and threw the person that was in the cart just before the wheels of the waggon.”⁸ The jury found that the cart, wagon, loadings, and horses were all deodands because they had “moved [unto death].”⁹

Oliver Wendell Holmes devoted the first chapter of his legal classic *The Common Law* to deodands.¹⁰ Among his many illustrations: When someone was killed by a fall from a tree, “the rude Kukis of Southern Asia” required this person’s relatives to cut down the tree and scatter it in chips.¹¹ Holmes argued that primitive people attributed intentionality and blame to inanimate objects. Noting that proceedings in admiralty were still brought against vessels and that everyone called vessels “she,” he observed, “If [following a ship accident] we should say to an uneducated man to-day, ‘She did it and she ought to pay for it,’ it may be doubted whether he would see the fallacy, or be ready to explain that the ship was only property.”¹² In light of Holmes’s view of the common man, it is easy to see why someone called him the Yankee from Olympus.¹³ And it is easy to see why he declared in this chapter that “[t]he life of the law has not been logic.”¹⁴

II. FRANKPLEDGE

⁶ 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 472-73* (Cambridge Univ. Press 2d ed. 1968) (1898) (“Horses, oxen, carts, boats, mill-wheels and cauldrons were the commonest of deodands. In English men called the deodand the *bane*, that is, the slayer.”).

⁷ *Case of the Lord of the Manor of Hampstead*, (1704) 91 Eng. Rep. 195, 195 (K.B.).

⁸ *Id.*

⁹ *Id.* at 195-96 (adding that “if a tree shall fall upon the branch of another tree, and both fall to the ground, and the branch kills a man, the tree and branch are both forfeited”) (emphasis omitted).

¹⁰ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-38 (Dover 1991) (1881).

¹¹ *Id.* at 19.

¹² *Id.* at 28-29; see POLLOCK & MAITLAND, *supra* note 6, at 474 (“[I]t is hard for us to acquit ancient law of that unreasoning instinct that impels the civilised man to kick, or consign to eternal perdition, the chair over which he has stumbled.”).

¹³ See CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1945).

¹⁴ HOLMES, *supra* note 10, at 1.

Frankpledge was an English institution in which ten men were bound together and held responsible for delivering anyone in any of their ten households who had committed a crime. If the criminal escaped, all ten members of the tithing were fined.¹⁵ A precursor of this practice was in existence at least by the time of King Edgar the Peaceful,¹⁶ who died in 975 and whose mistress was named Wulfthryth.¹⁷ A law of Edgar's reign required every man to have a *borh* (or surety), and it said, "[I]f any one then do wrong and run away, let the borh bear that which he ought to bear."¹⁸ The Normans translated the Anglo-Saxon word *frithborh* as frankpledge and used the institution effectively.¹⁹ There were no professional police forces, but frankpledge gave everyone the job of capturing wrongdoers. When the members of a tithing allowed a criminal to escape, they were punished collectively for this default. F. W. Maitland speculated that frankpledge led to the jury of presentment or grand jury.²⁰ Even after the members of a community were freed of the obligation to capture wrongdoers, they were required to tell the sheriffs and justices what they knew.

Comment [A1]: I changed it to Ethelred.

III. THE COMMON LAW VIEW OF CORPORATE CRIME

¹⁵ 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 13 (3d ed. 1922) (1903); *see also* POLLOCK & MAITLAND, *supra* note 6, at 568-71 (noting variations on the frankpledge system described in text). The definitive work is WILLIAM ALFRED MORRIS, THE FRANKPLEDGE SYSTEM (1910).

¹⁶ *See Frankpledge*, 11 THE ENCYCLOPEDIA BRITANNICA 34 (Hugh Chisholm ed., 11th ed. 1910).

¹⁷ *See Edgar*, 8 THE ENCYCLOPEDIA BRITANNICA 933 (Hugh Chisholm ed., 11th ed. 1910). Edgar was the father of Ethelred the Unready, whom John Cleese portrayed in Monte Python films. *See id.*; *John Cleese Filmography*, MOVIE PLANETS, http://movieplanets.com/imdbphp/imdb_person.php?mid=0000092.

¹⁸ *Frankpledge*, *supra* note 16; *see* MORRIS, *supra* note 15, at 19 (describing this law as "the last step in the establishment of general peace suretyship").

¹⁹ *Frankpledge*, *supra* note 16, at 34; *see* MORRIS, *supra* note 15, at 31 (The "name seems to be nothing but a Norman version of the word used in the everyday speech of the English people."). *But see id.* at 2 (suggesting that "franc pledge" was a translation of the Latin term "plegium liberale"). Morris offers evidence that the Normans organized the frankpledge system during the reign of William the Conqueror and that frankpledge differed significantly from its Anglo-Saxon predecessors. *See id.* at 8-41. Notably, although earlier systems required every man to find a surety, they did not force anyone to become one. In the earlier systems, principals and sureties apparently struck their own bargains.

²⁰ *See* F. W. Maitland, *Introduction to 2 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS* xi, xxxvi-xxxvii (F. W. Maitland ed., Professional Books, Ltd. 1974) (1889); *see also* ALBERT BEEBE WHITE, THE MAKING OF THE ENGLISH CONSTITUTION 175, 181 (2d ed., rev. 1925).

Frankpledge vanished long before Blackstone wrote his *Commentaries* in the eighteenth century,²¹ but deodand persisted. It was abolished in England only in 1846.²² Yet Blackstone viewed this practice as hopelessly primitive. He attributed it to superstition and claimed that it had arisen “in the blind days of popery.”²³

For Blackstone, criminal guilt was personal. He wrote, “Punishments are . . . only inflicted for that abuse of that free will, which God has given to a man.”²⁴ In accordance with this view, Blackstone declared that “[a] corporation cannot commit treason, or felony, or other crime.”²⁵ He regarded the point as so obvious that it needed no elaboration.

IV. THE CURRENT AMERICAN VIEW

A. *Bye, Bye Blackstone: New York Central and Its Progeny*

The year 2009 marks the centennial of a giant step backwards. In 1909, in *New York Central & Hudson River Railroad Company v. United States*,²⁶ the Supreme Court muttered something about “public policy”²⁷ and the power of the corporation in “modern times.”²⁸ It then upheld a federal statute that punished corporations criminally for charging their customers too little—for undercutting government-fixed prices.²⁹ The Court not only recognized Congress’s

²¹ See *Frankpledge*, *supra* note 16, at 35 (declaring that, although frankpledge was in “active operation” in 1376, it soon began to fall into disuse and vanished altogether during the Tudor period).

²² See Deodands Act, 1846, 9 & 10 Vict., c. 62 (Eng.). In the years just preceding 1846, coroners seeking to compensate the families of workers killed in industrial accidents had resurrected the use of deodands. See Harry Smith, *From Deodand to Dependency*, 11 AM. J. LEG. HIST. 389 (1967). Deodand’s close cousin, the *in rem* forfeiture of instrumentalities of crime, persists in America today. See, e.g., *Bennis v. Michigan*, 516 U.S. 442 (1996) (upholding the forfeiture of a wife’s interest in a jointly owned automobile after her husband had sex with a prostitute in the vehicle). Indeed, revenue-hungry American legislatures have expanded instrumentality forfeiture far beyond its common law boundaries by requiring the forfeiture of real estate as well as personal property. See, e.g., 18 U.S.C. § 1963(b)(1) (2006).

²³ 1 WILLIAM BLACKSTONE, COMMENTARIES *300.

²⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *27.

²⁵ 1 BLACKSTONE, *supra* note 23, at *476; see also *Anonymous Case (No. 935)*, (1706) 88 Eng. Rep. 1518, 1518 (K.B.) (“A corporation is not indictable but the particular members of it are.”).

²⁶ 212 U.S. 481 (1909).

²⁷ *Id.* at 494-95.

²⁸ *Id.* at 495.

²⁹ *Id.*

power to punish corporations (an appropriate mark of judicial restraint) but also praised Congress's exercise of this power. It called the common law rule articulated by Blackstone an "old and exploded doctrine."³⁰

New York Central upheld a statute that expressly punished corporations. It did not suggest that statutes silent on the subject should be read to authorize the prosecution of these entities. The Court wrote in fact, "[T]here are some crimes[] which in their nature cannot be committed by corporations,"³¹ but no one had any idea what crimes the Court had in mind. After the decision in *New York Central*, the Supreme Court and other courts generally read criminal statutes to impose corporate criminal liability even in the absence of any indication that Congress or a state legislature favored this outcome.³²

The statute upheld in *New York Central* authorized corporate punishment whenever an "agent or other person acting for or employed by [the corporation] acting within the scope of his employment" violated the statute's prohibitions.³³ The Supreme Court did not consider whether the same rule of *respondeat superior* would apply when statutes were silent on the subject.

³⁰ *Id.* at 496. State courts had begun to allow the prosecution of corporations in the mid-nineteenth century, and although "the early prosecutions were for crimes involving a corporation's failure to act, . . . the distinction between offenses involving nonfeasance and misfeasance was short-lived." Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 808-09 n.61 (1996). Several federal district courts had approved the criminal punishment of corporations in the years just preceding *New York Central*. *Id.* at 810-12.

³¹ *New York Central*, 212 U.S. at 494.

³² *See, e.g.*, *United States v. Union Supply Co.*, 215 U.S. 50, 54-55 (1909); *Joplin Mercantile Co. v. United States*, 213 F. 926, 936 (8th Cir. 1914) ("The whole growth of the modern law tends to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals."); *London v. Everett H. Dunbar Corp.*, 179 F. 506, 510 (1st Cir. 1910); *People v. Canadian Fur Trappers' Corp.*, 161 N.E. 455, 455-56 (N.Y. 1928); *People v. Star Co.*, 120 N.Y.S. 498, 500 (N.Y. App. Div. 1909); *State v. Ice & Fuel Co.*, 81 S.E. 737, 738 (N.C. 1914); *Vulcan Last Co. v. State*, 217 N.W. 412, 414-15 (Wis. 1928).

³³ The Elkins Act, Pub. L. No. 57-103, ch. 708, 32 Stat. 847 (1903) (current version codified in scattered sections of 49 U.S.C.).

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Without much reflection, however, later decisions applied the *respondeat superior* principle of *New York Central* whenever corporations were prosecuted.³⁴

Many states have approved a less sweeping standard of liability. Following the lead of the *Model Penal Code*, they ordinarily limit a corporation's responsibility to cases in which "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."³⁵ In the federal courts and other states, however, a criminal act by any employee performing his customary duties and intended in part to benefit the corporation is sufficient. It is immaterial that the employee was specifically directed not to perform the act³⁶ or that the corporation was among this employee's victims.³⁷

Under the rule of *respondeat superior*, a single errant employee can cause the downfall of a multi-national corporation and the loss of thousands of jobs.³⁸ Prosecutorial discretion and

³⁴ See, e.g., *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945) ("The generally accepted rule is thus laid down: 'A corporation may be held criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or course of their employment.'") (quoting current 19 C.J.S., Corporations § 1362 (2008), formerly § 861); *Zito v. United States*, 64 F.2d 772, 775 (7th Cir. 1933) ("Corporations speak and act through their agents. There is abundant proof in the instant case that one McNamara was an agent of the appellant company and that he had authority to sell its products. Therefore, it naturally follows that his actions . . . are binding upon appellant company.").

³⁵ MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962). At least twelve states have approved the *Model Penal Code* formulation without significant modification, and a comparable number have approved standards based on the Code that expand, modify, or clarify its ill-defined reference to "[h]igh managerial" agents. See MODEL PENAL CODE § 2.07 cmt. 5(c) n.37 (1985). For example, the New York statute defines "high managerial agent" as any "officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees." N.Y. PENAL LAW § 20.20(1)(b) (McKinney 2009). See generally Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 app. B (2006) (reviewing the law of each state).

³⁶ See, e.g., *United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. 2006); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972).

³⁷ See, e.g., *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 970 (D.C. Cir. 1997), *aff'd*, 526 U.S. 398 (1999); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985).

³⁸ Sara Sun Beale writes, "It is . . . true that liability can be imposed on corporations for the actions of corporate employees, even in the absence of specific proof of corporate fault. This is not unique." Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1505 (2007). She notes two other instances of vicarious criminal liability in the American criminal justice system (but only two):

most corporate managers' terror of a criminal trial³⁹ keep the collapse from happening often, but the case of Arthur Andersen, LLP is a notorious example. In *Andersen*, the trial judge instructed the jury that its members need not agree about *which* corporate employee committed the crime.⁴⁰ Some courts in fact have invited the conviction of a corporation even when *none* of its employees was a criminal. These courts have envisioned the corporation as a Colossus aware of everything that any of its employees know, and they have declared that the "collective knowledge" of this imaginary giant can make the absence of *mens rea* on the part of any sentient being immaterial.⁴¹

Although the jurors in the Arthur Andersen case were not required to reach agreement about which of the firm's 85,000 employees⁴² committed a crime, they returned a special verdict reporting that they did agree; the criminal was an in-house lawyer, Nancy Temple.⁴³ One juror complained that the judge's instructions had "stacked the deck" in favor of the prosecution. "They just forced us to come back with a guilty verdict," said juror Wanda McKay. "One

[I]n some jurisdictions felony murder imposes liability for one of the most serious offenses on the basis of vicarious strict liability. Similarly, in many jurisdictions an accomplice to one crime is also responsible for other crimes committed as a natural and probable consequence of the offense he aided and abetted, even if he does not assist or even know of the additional offenses. . . . Compared to liability for homicide, corporate criminal liability for white collar offenses does not seem like such a big deal.

Id. at 1514-15. Analogizing corporate criminal liability to felony-murder rule and to the natural-and-probable-consequences doctrine does not say anything nice about it. Unlike corporate criminal liability, however, the felony-murder rule and the natural-and-probable-consequences doctrine do not punish the blameless; they simply hold deliberate wrongdoers responsible for more than they intended. Corporate criminal liability does appear to be unique.

³⁹ Dale Osterle comments, "Since an indicted firm is a dead firm, a decision to defend an indictment is suicide." Dale A. Osterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson Over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 476 (2004).

⁴⁰ *Arthur Andersen Convicted of Obstruction of Justice--Firm to Cease Auditing Public Companies*, FACTS ON FILE WORLD NEWS DIGEST, June 15, 2002, at 456G1, available at LEXIS.

⁴¹ See, e.g., *United States v. Bank of New England, N.A.*, 821 F.2d 844, 854-56 (1st Cir. 1987); *United States v. Sci. Apps. Int'l Corp.*, 555 F. Supp. 2d 40, 55-56 (D.D.C. 2008); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738-39 (W.D. Va. 1974); *State v. Zeta Chi Fraternity*, 696 A.2d 530, 535-37 (N.H. 1997).

⁴² See Ken Brown & Ianthe Jeanne Dugan, *Arthur Andersen's Fall from Grace is a Sad Tale of Greed and Miscues*, WALL ST. J., June 7, 2002, at A1 (reporting that Arthur Andersen employed 85,000 people worldwide).

⁴³ See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 486 (2006); *Arthur Andersen Convicted*, *supra* note 41.

person did one thing and tore the whole company down.”⁴⁴ Yet even after Arthur Andersen’s conviction, the government never charged Nancy Temple with a crime. The Supreme Court’s ultimate reversal of Andersen’s conviction⁴⁵ did not save the 85,000 jobs.⁴⁶

When the courts convict corporations of crimes, they do it without affording them the full protection of the Bill of Rights.⁴⁷ For ever-shifting reasons, all of them bad, the Supreme Court has held the privilege against self-incrimination inapplicable to corporations.⁴⁸ Corporate

⁴⁴ *Arthur Andersen Convicted*, *supra* note 41.

⁴⁵ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

⁴⁶ See *Brown & Dugan*, *supra* note 423. Although the government did not charge Nancy Temple, it did charge and enter a plea agreement with another Andersen employee, David Duncan. After the Supreme Court reversed Andersen’s conviction, Duncan was permitted to withdraw his plea. Greg Farrell, *Former Auditor Isn’t Done with Enron*, USA TODAY, Nov. 25, 2005, at 7B. The Ford Pinto prosecution, in which a jury acquitted Ford Motor Company of manslaughter, was another case in which prosecutors filed charges against a corporation while declining to charge the individuals alleged to have committed its crime. See BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 45 (1983). Prosecutors did charge the individuals allegedly responsible for the crimes of the Bankers Trust Corporation, but after the corporation entered a plea agreement and paid a fine of \$60 million, a jury acquitted these individuals of all of the 27-twenty-seven charges brought against them. See Matthew L. Schwartz, *Using the Criminal Law to Combat Insider Banking Misconduct*, 35 COLUM. J.L. & SOC. PROBS. 371, 371-73 (2002).

⁴⁷ See *Oklahoma Press Co. v. Walling*, 327 U.S. 186, 205 (1946) (“[C]orporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.”). See generally Henning, *supra* note 30.

⁴⁸ The Court first held the privilege inapplicable to corporations in *Hale v. Henkel*, 201 U.S. 43 (1906). It declared that a corporation was a “creature of the State” with “certain special privileges and franchises” and that “[t]here is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.” *Id.* at 74-75. A later Supreme Court decision spoke of “[t]he [state’s] reserved power of visitation” and said that “the visitatorial power . . . of necessity reaches the corporate books.” *Wilson v. United States*, 221 U.S. 361, 384-85 (1911).

An enterprise no more waives the privilege against self-incrimination by accepting a corporate charter, however, than it waives any other constitutional right. Could the state force an entity that obtained a charter to waive the right to jury trial? Or to stand trial without counsel? Do the state’s “visitatorial powers” entitle the police to break down doors and seize corporate records without search warrants and without probable cause? *Hale* itself reiterated an earlier ruling that a corporation retains some Fourth Amendment rights. 201 U.S. at 76-77 (discussing *Boyd v. United States*, 116 U.S. 616 (1886)). Moreover, the claim of a reserved “visitatorial power” as a reason for denying the Fifth Amendment privilege collapsed when the Supreme Court held that unincorporated “collective entities” could not claim the privilege either. *United States v. White*, 322 U.S. 694, 699 (1944).

The Court offered a second [reason-rationale](#) for withdrawing the privilege in *White*. It declared that “[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.” *Id.* at 698. It added that the privilege should not extend to any organization with “a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents.” *Id.* at 701. The Court argued that corporate records “embody no element of personal privacy.” *Id.* at 700.

Following a grant of immunity from prosecution, however, the government may force an individual to disclose his most intimate secrets without violating the privilege. See, e.g., *Kastigar v. United States*, 406 U.S. 441, 441 (1972). As the Supreme Court now has recognized, “the Fifth Amendment protects against ‘compelled self-incrimination, not [the disclosure of] private information.’” *Fisher v. United States*, 425 U.S. 391, 401 (1976)

defendants must produce incriminating documents even when the act of producing these documents would tend to incriminate them. Moreover, to ensure that corporations will not benefit from the privilege, the Supreme Court requires corporate officers to produce these records even when the act of production would incriminate them personally.⁴⁹ The exception to the privilege for corporations swallows the rule applicable to individuals, and the tail wags the dog.⁵⁰

B. Punishing the Innocent

Of course criminal punishment cannot really be borne by a fictional entity.⁵¹ As Baron Thurlow, a Lord Chancellor of England, put it sometime before 1792, a corporation has “no soul

(quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)). Because the Fifth Amendment privilege advances purposes other than the protection of personal privacy, the fact that corporate records “embody no element of personal privacy” supplies no reason for withholding the privilege.

White added a third [reason-rationale](#) for withdrawing the privilege. It appears to be the only one still standing:

The scope and nature of the economic activities of incorporated and unincorporated organizations . . . demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible

White, 322 U.S. at 700. More recently, *Braswell v. United States*, 487 U.S. 99 (1988), declared that “recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.” *Id.* at 115.

The government, however, has no greater interest in enforcing the laws against white-collar crime than in enforcing the laws against murder, rape, and robbery. The framers of the Constitution sacrificed the most effective enforcement of these criminal prohibitions when they established the privilege, and there is no reason to imagine that they meant a different rule to apply to the government’s investigations of crimes like price fixing and bribing foreign officials. By punishing corporations without affording them the protections of the Bill of Rights, the government has its cake and eats it too.

⁴⁹ *Braswell*, 487 U.S. at 113-14 (1988).

⁵⁰ The Court’s distinction between corporations and individuals initially meant a great deal more than it does today. Unlike corporations, individuals once were permitted to withhold documents whose contents would tend to incriminate them. Today both corporations and individuals can usually be required to produce incriminating documents. *See United States v. Doe*, 465 U.S. 605, 605 (1984); *Fisher v. United States*, 425 U.S. 391, 401 (1976).

⁵¹ The Supreme Court has called the corporation “a mere creature of the law, invisible, intangible, and incorporeal.” *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809); *see also Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (calling the corporation “an artificial being, invisible, intangible, and existing only in contemplation of law”).

to damn, no body to kick.”⁵² This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too. The embarrassment of corporate criminal liability is that it punishes the innocent along with the guilty.⁵³

The Justice Department’s Manual for United States Attorneys responds to this embarrassment with a shrug: “Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties.”⁵⁴ The Manual

⁵² John Coffee recycled Thurlow’s remark as the title of a noted article. See John C. Coffee, “*No Soul to Damn, No Body to Kick*”: *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981). With one brief interruption, Thurlow was Lord Chancellor from 1778 until 1792. He presumably made his statement before leaving that position. See Alexander Wood Renton, *Edward Thurlow Thurlow*, 26 THE ENCYCLOPEDIA BRITANNICA 903-04 (Hugh Chisholm, ed., 11th ed. 1910). Many scholars have quoted Thurlow, but no one has tracked his statement to a primary source. Coffee noted its quotation in MERVYN KING, PUBLIC POLICY AND THE CORPORATION I (1977).

⁵³ The late-nineteenth and early-twentieth-century penology that gave rise to corporate criminal responsibility rejected the concept of blame altogether. Roscoe Pound voiced the views of most serious thinkers about crime in the Age of Darwin when he spoke of the legal system’s “exaggerated respect for the individual,” declared that behavioral science had “routed” the concept of free will, and wrote, “We recognize that in order to deal with crime in an intelligent and practical manner we must give up the retributive theory.” Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 4 (2003) (citations omitted). Pound and his contemporaries maintained that the criminal law and all law should be entirely forward-looking and instrumental.

Although the Supreme Court’s opinion in *New York Central* did not discuss penology, a noted 1927 article on the criminal punishment of corporations did. See Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827 (1927). This article, which Henry Edgerton wrote ten years before his appointment to the D.C. Circuit, declared, “[T]he assumption that crime involves ‘guilt’ is quite erroneous.” *Id.* at 842. Edgerton saw no significant difference between crimes and torts., *id.* at 836, and he apparently viewed the retributivist position as a form of sadism:

The argument against corporate criminal responsibility, that the corporation cannot itself be “guilty” and therefore should not be punished, rests on the tacit assumption that the aim of criminal law is retributive . . . consists, in other words, in the pleasure which some persons derive from the infliction of pain upon those whom they conceive to deserve it.

Id. at 832. Edgerton announced,

The chief civilized purpose of criminal law is deterrence—the prevention of acts which are conceived to injure one social interest or another. The question is not whose mind is “guilty,” but whose responsibility will serve this deterrent purpose It seems evident that this purpose is further served if corporate criminal responsibility is added to the criminal responsibility of the corporation’s representatives.

Id. at 833. He added, “Corporate criminal responsibility tends to prevent crime not only by influencing the corporation’s representatives of all degrees to abstain from conducting its business in unlawful ways, but also by influencing those of higher or remote degree to restrain subordinates.” *Id.* at 835.

⁵⁴ DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.1000 (2008).

discusses the unjustified pain caused by the punishment of corporations under the heading “Collateral Consequence,” listing it as one of many things a prosecutor “may consider” in deciding whether to file charges and enter deferred prosecution agreements.⁵⁵ Sara Sun Beale observes:

In the case of corporate sanctions, employees may lose their jobs and their retirement security, and investors may be hard hit. . . . Are these secondary effects distinctive? Unfortunately, they are not. The secondary impacts of federal drug policies dwarf the effect of policies regarding corporate and white collar offenses.⁵⁶

Beale then describes how the mass incarceration of drug offenders has devastated families and neighborhoods.⁵⁷

The analogy is flawed. When an offender with children is sent to prison, his children may suffer, yet criminal justice officials may have no way to punish the offender appropriately without hurting other people.⁵⁸ The human perpetrators of the crimes now attributed to corporations, however, can be convicted and incarcerated without punishing innocent shareholders and employees as well. Undeserved suffering that can be avoided should be avoided.⁵⁹

The penalties imposed on innocent shareholders and employees when corporations are convicted are not incidental, collateral, or secondary. They are what the punishment of a

⁵⁵ *Id.*; see also *id.* at § 9-28.300 (listing as one of nine factors a prosecutor “should” consider “collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable”).

⁵⁶ Beale, *supra* note 38, at 1522.

⁵⁷ *Id.* at 1522-23 (quoting Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 206-07 (1998)).

⁵⁸ Courts, sentencing commissions, and legislatures should do much more than they currently do to minimize the secondary effects of criminal punishment. See generally Darryl K. Brown, *Third Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002).

⁵⁹ Defenders of corporate criminal liability note that it may be impossible to determine which corporate employees committed a crime, especially when all of them point fingers at one another. See, e.g., Edgerton, *supra* note 54, at 834. Imagine, however, that Mom or Dad or both of them have killed their only child. Mom denies her guilt and accuses Dad; Dad denies his guilt and accuses Mom. No physical or other evidence reveals which parent is telling the truth, if either of them is. The prosecutor concludes that neither Mom nor Dad can be proven guilty beyond a reasonable doubt. Is the appropriate solution to convict the “marital entity”? Or the “family”?

collective entity is all about. The description of these penalties as collateral simply illustrates the persistent power of mystical deodand thinking. Professor Beale and the authors of the U.S. Attorneys' Manual apparently classify the punishment of the corporate entity as primary and the punishment of the human beings inside it as secondary. In their view, the entity can be evil although the people who comprise it are mostly good. Unlike Baron Thurlow, they imagine that the entity has not only an ethos but a soul. The devils inside it must be exorcised despite the human cost.⁶⁰

⁶⁰ Professor Beale writes:

[T]he argument that it is improper to impose criminal fines that effectively “punish” the “innocent” shareholders, employees, creditors, and others, proves far too much. These arguments apply equally to punitive damages, and indeed to any money judgment against a corporation, since such a judgment also reduces the shareholders' equity (as well as its ability to pay its' employees and creditors).

Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. XX (2009).

Of course a widget-manufacturing company should pay for the steel it has purchased, and a court should force it to pay if it refuses to honor its contract. Equally, this company should pay for the injuries its employees inflict in the course of their employment. These injuries are as much a cost of widget-production as the cost of steel, and this cost should be reflected in the price of widgets. Forcing the corporation to pay even “punitive” damages may be appropriate when wrongdoing is difficult to detect or when injuries are small enough that victims have little incentive to sue. Although called punitive, these damages may do no more than require the corporation to “internalize” some costs it has inflicted on people not before the court. *See BMW of North America v. Gore*, 517 U.S. 559, 582 (1996). Forcing the company's innocent shareholders to pay the cost of producing widgets before they pocket the profits is obviously appropriate. *Punishing* them when they have done nothing wrong is—equally obviously—inappropriate.

Beale asks, “Do criminal penalties really differ in some fundamental way from other damages that are properly imposed upon corporations?” Beale, *supra*, at XX. The answer is yes. The law distinguishes between civil and criminal proceedings for a reason. Sadly, Professor Beale and many others have missed it.

Not only is the criminal punishment of corporations unjustified in principle; it is probably less effective in practice than civil regulation. Civil regulation removes the requirement of proof beyond a reasonable doubt and permits the imposition of sanctions by administrative agencies rather than courts. *See, e.g., V. S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (offering an extended argument that civil sanctions deter corporate wrongdoing more effectively than criminal sanctions); Jennifer Arlen, *Corporate Crime and Its Control*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 492-97 (Peter Newman, ed., 1998) (maintaining that lower procedural hurdles and sanctioning costs make civil penalties more cost-effective deterrents of corporate wrongdoing than criminal punishment). The Supreme Court currently affords legislatures broad leeway to declare sanctions civil rather than criminal. Criminal safeguards are required only when the “clearest proof” establishes that a sanction is “so punitive either in purpose or effect . . . as to ‘transfor[m] what was clearly intended as a civil remedy into a criminal penalty.’” *Hudson v. United States*, 522 U.S. 93, 99-100 (1997) (quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)) (overruling the more restrictive standard of *United States v. Halper*, 490 U.S. 435 (1989)).

Of course nothing in this article opposes the regulation and taxation of corporations or the use of civil sanctions to enforce the legal obligations of these entities.

On the European continent, corporations usually are not subject to criminal prosecution, but recent years have seen substantial slippage in the American direction. *See generally* Sara Sun Beale & Adam G. Safwat, *What*

C. Manufacturing Leverage

Subjecting real wrongdoers and the fictional entities that employ them to prosecution for the same crimes leads to sharp conflicts of interest. Corporate officers fearful of prosecution may offer the corporation's guilty plea and its payment of a substantial fine to avoid the risk of jail themselves. The Justice Department once was receptive to these bargains,⁶¹ but it now presses hard in the opposite direction. Following the policy expressed in the 2003 Thompson Memorandum⁶² as modified by the McNulty Memorandum in 2006⁶³ and then by later revisions,⁶⁴ it offers to let corporations off the hook in exchange for their assistance in prosecuting their officers and employees. Since 2003, the Department has entered at least 103 deferred prosecution and non-prosecution agreements (DPAs and NPAs) in which corporations have avoided prosecution by waiving their legal rights and agreeing informally to the imposition

Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 BUFF. CRIM. L. REV. 89 (2004).

⁶¹ I recall being offended by several such bargains when I worked in the Justice Department's Criminal Division in 1968-69, and the Department's policy was apparently no different in 1985. In the spring of that year,

[defense attorney Tom] Curnin told [E. F.] Hutton's board that it faced two choices: plead guilty to a massive list of felonies or face a trial that would likely see three senior Hutton executives convicted and drive Hutton out of business. Curnin advised settling with the government . . . On May 2, Hutton agreed to plead guilty to 2,000 counts of mail and wire fraud, as well as pay a \$2 million fine plus \$750,000 for the cost of the investigation. Hutton also agreed to pay \$8 million in restitution . . . In return, Curnin wrung two major concessions [one of which was that] no Hutton executives would be prosecuted . . .

Wikipedia, E.F. Hutton & Co., http://en.wikipedia.org/wiki/E_F_Hutton (last visited September 30, 2009); see also JESSE KORNBLUTH, *HIGHLY CONFIDENT: THE CRIME AND PUNISHMENT OF MICHAEL MILKEN* 136 (1992); Nathaniel C. Nash, *E.F. Hutton Guilty in Bank Fraud: Penalties Could Top \$10 Million*, N.Y. TIMES, May 3, 1985, at A1.

⁶² Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. [hereinafter Thompson Memo].

⁶³ Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. [hereinafter McNulty Memo].

⁶⁴ The Department's current Principles of Federal Prosecution of Business Organizations are contained in the U.S. Attorneys' Manual. See DEP'T OF JUSTICE, *supra* note 545, at §§ 9-28.000 to 9-28.1300.

of sanctions.⁶⁵ Many agreements have required the corporations to assist the government in convicting their officers.

The Thompson memorandum authorized prosecutors to consider adversely both a corporation's failure to waive the attorney-client privilege and its advancement of legal fees to officers under investigation.⁶⁶ The McNulty memorandum, however, softened the Thompson memorandum's language concerning waivers of the attorney-client privilege.⁶⁷ These waivers became far less frequent in post-McNulty DPAs and NPAs.⁶⁸ Moreover, in 2006, a federal district court held that the Department of Justice violated the Sixth Amendment right to counsel by pressing a corporate employer not to pay its officers' legal fees.⁶⁹ Deferring to this decision, the McNulty memorandum declared that, in evaluating cooperation, "[p]rosecutors generally should not take into account whether a corporation is advancing or reimbursing attorneys' fees."⁷⁰ The Second Circuit later upheld the district court's decision.⁷¹

The McNulty memorandum noted that it was responding to concerns expressed by "[m]any . . . associated with the corporate legal community."⁷² Thanks largely to the lawyers' lobby,⁷³ the Department now allows corporations to pay the legal fees of their accused

⁶⁵ See Lawrence D. Finder, Ryan D. McConnell, & Scott L. Mitchell, *Betting the Corporation: Compliance or Defiance? Corporate Pre-Trial Agreement Update 2008* at 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1332033. Cases in which the government lets corporations off the hook altogether in return for their assistance may not result in DPAs and NPAs.

⁶⁶ Thompson Memo, *supra* note 623, at 5.

⁶⁷ McNulty Memo, *supra* note 634, at 8-11.

⁶⁸ See Finder et al., *supra* note 656, at 11. Even agreements that do not require explicit waivers of the privilege may require cooperation that a corporation cannot give unless its lawyers reveal information obtained in confidence.

⁶⁹ *United States v. Stein* (Stein I), 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). The district court later excluded the statements of two corporate officers because, in response to government pressure, the corporation had threatened these officers with a loss of their jobs and of corporate payment of their legal fees unless they gave the statements. *United States v. Stein* (Stein II), 440 F. Supp. 2d 315, 337-38 (S.D.N.Y. 2006).

⁷⁰ McNulty Memo, *supra* note 634, at 11; U.S. DEP'T OF JUSTICE, *supra* note 55, at § 9-28.730.

⁷¹ *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

⁷² McNulty Memo, *supra* note 634, on the first of two pages preceding page 1.

⁷³ See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 83-84 (2007) (noting that the Chamber of Commerce, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, former Attorney General

employees. Nevertheless, the Department may still demand as a condition of its favor that corporations investigate these employees⁷⁴ and discipline or fire them.⁷⁵ What corporate investigators learn, moreover, must be delivered to the government.⁷⁶ A later section of this article will consider other features of the Justice Department's DPAs and NPAs, including their provisions for compliance programs and the appointment of corporate monitors.⁷⁷ For now, it is enough to note that corporate criminal liability creates acute conflicts of interest for corporate managers while affording enormous bargaining power to the government.⁷⁸

V. TWO CONCEPTIONS OF CORPORATE CRIMINAL LIABILITY

Misguided though it is, corporate criminal liability is probably here to stay. Much to my regret, we cannot return to the eighteenth century. The question in the twenty-first century is how best to conceptualize this practice. There are two alternatives, which we can call deodand and frankpledge.

A. *The Corporation as Deodand*

People indignant about an injury produced by a corporation's employees may treat the corporation as deodand. They may truly personify and hate the corporation. They may hate the

Edwin Meese, and former Acting Solicitor General Walter Dellinger III had all denounced the Thompson Memorandum).

⁷⁴ See DEP'T OF JUSTICE, *supra* note 545, at § 9-28.800 (describing the requisites of corporate compliance programs).

⁷⁵ See *id.* at § 9-28.900 ("Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers . . .").

⁷⁶ See *id.* at § 9-28.700 ("[T]he prosecutor may consider . . . the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the organization, including senior executives."); *id.* at § 9-28.720 ("Whichever process the corporation selects [for gathering information], the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct?").

⁷⁷ See *infra* text accompanying notes 131-560-54.

⁷⁸ A former Assistant Attorney General in charge of the Justice Department's Criminal Division and his co-author write that "in most cases—especially those resolved since the Thompson Memorandum was issued—cooperation is perhaps the most important factor in a prosecutor's assessment of whether to bring criminal charges against the company itself." Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memorandum in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1135 (2006). See also Andrew Weissman, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1321 (2007) ("It is now a commonplace position among the white collar bar post-*Enron*—among both defense and prosecution—that corporate defense consists largely of being an arm of the prosecutor.").

mahogany paneling, the Lear jet, the smokestack, the glass tower, and all of the people inside. They—the mahogany and all of them—are responsible for the medical fraud, the oil spill, the price fixing, and the illegal campaign contributions. To superstitious people, villains need not breathe. They may include Exxon, Warner Lambert, and the cable company.

Scholars have advanced refined variations of the deodand position. Dan Kahan declares, “Punishing corporations . . . is understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability ‘sends the message’ that people matter more than profits.”⁷⁹ Endorsing a similar “expressive retributivist” position, Peter Henning observes, “The label ‘criminal’ has social significance aside from the particular punishment imposed on the offender.”⁸⁰

The punishment of corporations can indeed be expressive, and so can the punishment of other things. I myself have repudiated false valuations by punishing my computer. When a family member or colleague has discovered my discipline of the machine, however, I have usually been embarrassed. Expressing one’s values by smashing a computer can be therapeutic, but it is not recommended for children or for grownups.⁸¹

Henning, moreover, is correct that the label “criminal” has a special social significance. He is not alone in arguing that corporate punishment is appropriate because it can stigmatize an entity and affect its reputation in ways that civil liability cannot.⁸² The word “criminal” has its

⁷⁹ Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618-19 (1998).

⁸⁰ Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. XX (2009).

⁸¹ Kahan’s penology echoes that of Emile Durkheim, who maintained that a society’s imposition of criminal punishment furthers its solidarity. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 62-66 (MacMillan 1933) (George Simpson, trans). To paraphrase both Durkheim and Kahan, imposing punishment expresses a community’s values and feels really good. The society that slays together stays together.

⁸² See, e.g., Buell, *supra* note 434, at 491 (“[T]he criminal process can impose a unique form of reputational sanction, the effects of which can flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors toward compliance.”); Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1289-90 (1990); Stephen A.

distinctive significance, however, because this word means blameworthy. Someone who applies this word to objects and entities that are not blameworthy uses the label falsely. The desired social stigmatization may not materialize,⁸³ and if it does, it occurs only because, once the label is -applied, some members of the public associate blameless things with real criminals. You can fool some of the people all of the time, and that may be enough.⁸⁴

In an essay titled *In Defense of Corporate Criminal Liability*,⁸⁵ Lawrence Friedman defends a position like that of Kahan and Henning. He recognizes that from a deterrent or “economic” perspective, “criminal liability fares poorly as compared to civil liability.”⁸⁶ He also recognizes that, because a corporation has no mind, it cannot be an appropriate target of “pure

Salzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U.L. REV. 421, 431-32 (1991); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1311-12 (2000).

⁸³ Compare Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395, 414-15 (1991) (concluding that whether a firm’s act is sanctioned as a civil or a criminal wrong does not significantly affect the damage its reputation suffers), with Buell, *supra* note 434, at 504 (“Managers and their counsel apparently do not see civil and criminal sanctions as substitutes.”) and Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 280 (2008) (“The perception that the reputational consequences of a conviction could exceed even the substantial monetary penalties in any parallel civil litigation explain why firms under investigation for criminal violations are willing to do almost whatever it takes—including waiving attorney-client privilege, assisting the government’s prosecution of their senior officers, and paying millions of dollars in civil fines—to avoid an indictment.”).

⁸⁴ See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 273 (1968) (“The more indiscriminate we are in treating conduct as criminal, the less stigma resides in the mere fact that a man has been convicted of something called a crime.”).

Samuel Buell argues that blaming and punishing collective entities is not simply expressive. He advances what might be called a mixed deodand-frankpledge position. Buell observes that organizations influence the behavior of their members, that people do in fact blame organizations, and that blaming organizations can influence people inside and outside these organizations to make the organizations better. See Buell, *supra* note 434, at 497, 501.

One wonders whether Buell would extend his defense of punishing collectivities to non-commercial groups—say, college fraternities and families. The members of some fraternities influence each other to behave very badly, and so do the members of some families. Fraternities and families can develop bad reputations, and a fraternity or family’s reputation can prompt people to reform it. Buell argues for the punishment of a corporation whenever one of its agents has committed a crime to “further[] the purposes of her institution.” *Id.* at 530. Would he equally favor the criminal conviction of a family whenever one of its members committed a crime to advance the family’s purposes? Or of a college fraternity when one of its members stole a keg of beer for a party?

⁸⁵ Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J. L. & PUB. POLICY 833 (2000). The author of this article teaches constitutional law at New England. He is not the Lawrence Friedman who teaches legal history at Stanford.

⁸⁶ *Id.* at 838.

Kantian retribution.”⁸⁷ Friedman nevertheless contends that expressive retributivism justifies corporate punishment. “The expressive retributivist’s commitment is ‘to assert[] moral truth in the face of its denial.’”⁸⁸

Friedman argues that punishing corporations differs from punishing mahogany in two ways.⁸⁹ First, echoing a theme of Pamela Bucy, he observes that a corporation has an “identifiable persona” or “ethos” distinct from the personalities of the people who work for it,⁹⁰ and second, he notes that a corporation can express itself.⁹¹ The Supreme Court held in *First National Bank of Boston v. Bellotti*⁹² that corporations have a constitutional right to speak.⁹³

The Supreme Court’s argument in *Bellotti*, however, was that the act of incorporation should not cause people to lose a right they would otherwise possess—the right to speak as a group.⁹⁴ Imagine, then, an *unincorporated* group with an identifiable persona distinct from those of its members and one that can express itself—a barbershop quartet. Imagine in addition that,

⁸⁷ *Id.* at 844-45.

⁸⁸ *Id.* at 843 (quoting Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY AND JEAN HAMPTON, FORGIVENESS AND MERCY 111, 125 (1988)).

Andrew Taslitz writes:

[A]s a newer generation of scholars and policymakers have increasingly come to recognize, this vision of the corporation [as an aggregation of its individual members] is seriously flawed. There are “social facts” with as real consequences for political culture as any physical, material facts. In the social world, corporate persons are real. They have an identity and a unique character separate and apart from that of their individual shareholders, directors, officers, and employees.

Andrew E. Taslitz, *Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 532-33 (2006). Of course, in bygone social worlds and perhaps some current ones too, demon-infested animals and inanimate objects were real, and this “social fact” had consequences. For Professor Taslitz, the fact that most people believe something apparently makes it a “social” fact, and because “social” facts are to be treated as real facts, he would presumably endorse the punishment of animals and objects by the people who inhabited these worlds. Taslitz might endorse human sacrifice too. That the gods wanted human blood was once a social fact with as real consequences for political culture as any physical, material facts.

⁸⁹ See Friedman, *supra* note 85, at 844-45 (adverting to my earlier use of the deodand analogy).

⁹⁰ *Id.* at 847-48. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099 (1991).

⁹¹ Friedman, *supra* note 87, at 848-52.

⁹² *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁹³ *Id.* at 784-85.

⁹⁴ *Id.* at 777 (“If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.”).

without any knowledge on the part of the tenor, bass or baritone, the lead singer of this group has bribed the judge of a music contest, stolen four plaid sports coats, and poisoned the lead singer of a rival quartet. Would Friedman express his commitment to moral truth by convicting and punishing the entire quartet? If not, would the group's incorporation change the outcome?⁹⁵

Or consider another body with a persona distinct from those of its members that speaks as an entity—the Justice Department's Office of Legal Counsel. The release of "torture memos" written by several lawyers of this Office during the administration of President George W. Bush has prompted discussion of whether the lawyers should be prosecuted.⁹⁶ The Obama administration's Justice Department has seemed reluctant to proceed. Its willingness to let bygones be bygones appears to be influenced by the political distraction a trial would cause.

No one appears to have considered a less *ad hominem* way of resolving the controversy—exempting the lawyers from prosecution while authorizing a trial of the Office of Legal Counsel itself. If this office were found guilty, it (or perhaps the entire Justice Department) could be placed on probation and required to implement a compliance program,⁹⁷ or the Office might enter a deferred prosecution agreement and allow a monitor to review its compliance efforts.⁹⁸

⁹⁵ In most states and in the federal courts, unions and unincorporated business associations can be convicted of crimes. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 13.5d (2d ed., Thomson West 2003).

⁹⁶ See, e.g., Editorial, *The Torture Debate: The Lawyers*, N. Y. TIMES, May 7, 2009, at A32 (discussing whether the authors of the torture memos should be prosecuted or otherwise disciplined).

⁹⁷ These sanctions are among those the Federal Sentencing Guidelines authorize for corporate offenders. See U.S. SENTENCING GUIDELINES MANUAL §§ 8D1.1(a)(3), 8D1.4(c)(1) (2008) (declaring that a convicted corporation with 50 or more employees is to be placed on probation and may be ordered to institute an effective compliance program if it does not have one already). See generally Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017 (1992).

⁹⁸ See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1714-1716 (2007). Critics might object that because all of the Bush administration lawyers have left the Office of Legal Counsel, criminal sanctions are no longer necessary. The departure of all breathing wrongdoers from a corporation, however, does not save it from punishment. The U.S. Attorneys' Manual notes that "the culpable or knowledgeable personnel may have been . . . fired, or they may have quit or retired." U.S. DEP'T OF JUSTICE, *supra* note 545, at § 9-28.700(B). This circumstance leads the Manual to declare, not that the Justice Department should refrain from prosecuting the corporation, but only that the "corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence . . . and in doing so expeditiously." *Id.*

In addition, the Office might be fined. Critics might object that the sovereign Justice Department cannot prosecute itself and also that it is pointless to take money from the public treasury in order to pay this money into the public treasury. After a \$50 billion bailout, however, the federal government now owns 60 percent of General Motors.⁹⁹ Presumably this company is still subject to prosecution for the crimes committed by its agents. Moreover, whether the government owns a rescued corporation or not, this corporation may use the money it has received from the treasury to pay its fines to the treasury.¹⁰⁰ If the government considers the defendant too big to fail, it may then draw more money from the treasury to enable it to pay more fines to the treasury. The carousel might go round and round. In the end, apart from some administrative expenses, the process could be costless and wonderfully expressive. If Lewis Carroll were still around, he could write about it.¹⁰¹

B. The Corporation as Frankpledge

Most defenders of corporate criminal liability view it as frankpledge. They justify the punishment of corporations on the ground that innocent managers, anxious to avoid the punishment of innocent shareholders, will act as patrol officers. Everyone will police everyone else and will have appropriate incentives to create a law-observant corporate culture.¹⁰² With the

⁹⁹ See Bill Vlasic, *Chief Says G.M. Is Adapting Its Culture*, N. Y. TIMES, Oct. 8, 2009, at B3.

¹⁰⁰ Rescued banks currently buy T-bills with money that the government has obtained by selling T-bills.

¹⁰¹ See LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* (Charles L. Dodgson ed., 1934) (1872).

¹⁰² See, e.g., Edgerton, *supra* note 534, at 835. Jennifer Arlen and Reinier Kraakman offer an elaborate analysis of what combinations of strict *respondeat superior* liability and responsibility for negligent monitoring can best induce corporations to monitor their employees efficiently. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U.L. REV. 687 (1997).

From an economic perspective, a sound system of individual and corporate liability must advance three objectives—inducing corporate employees to act efficiently, inducing corporate monitors to monitor efficiently, and encouraging the optimal pricing of a company’s product. Our current regime offers a curious mixture of strict and fault-based liability. For the most part, our civil justice system seeks to promote the efficient conduct of corporate employees by holding them liable only when they have acted negligently. At the same time, our criminal justice system generally imposes liability only when an agent has inflicted harm with criminal intent. From a “frankpledge” perspective, the principle of *respondeat superior* in civil cases then seeks to promote the efficient monitoring of employees by holding firms *strictly* (and jointly) liable for the employees’ *negligently* produced harms, and the principle of *respondeat superior* in criminal cases seeks to promote the efficient monitoring of employees by

Thompson memorandum, moreover, the parallel to frankpledge becomes sharper still. The group can avoid punishment by delivering the individual wrongdoer to the authorities. Echoing the Norman Kings of England, the Justice Department's Manual for United States Attorneys declares, "Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes."¹⁰³

The Normans' version of frankpledge was in some respects less objectionable than its twenty-first century analogue. William the Conqueror and his successors imposed a duty of policing on every member of a tithing and imposed monetary sanctions when the tithing failed to perform this duty effectively. The Normans did not imagine that the tithing was guilty of the crimes committed by the people it failed to apprehend or that all of its members deserved punishment for these crimes rather than for their own failures to police.¹⁰⁴

Our own criminal justice system frequently presses offenders to aid in the apprehension and prosecution of other offenders. Ordinarily, however, it does not create crimes and threaten the innocent simply to gain their cooperation. Our justice system does not, for example, declare a drug dealer's family, friends, and roommates guilty of his crimes simply because declaring them criminals would strongly encourage their cooperation. Even if careful economic analysis could

holding firms *strictly* (and jointly) liable for the employees' *intentionally* produced harms. Economists have long debated the relative merits of negligence and strict liability, but as far as I can tell, the current regime does not reflect any coherent economic principle. I do not understand why anyone imagines that this mixed system comes close to producing optimal prices. See generally Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

¹⁰³ U.S. DEP'T OF JUSTICE, *supra* note 545, at § 9-28.200(A). Under the Federal Sentencing Guidelines, the monetary penalty imposed on a convicted corporation will be reduced by as much as 60 percent if it had an "effective" compliance program in place prior to the crime. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)(1) (2008).

¹⁰⁴ See *supra* text accompanying notes 15-20.

show the imposition of this vicarious liability cost-effective, it would cause most non-economists to gag.¹⁰⁵

Moreover, as Jennifer Arlen has noted, corporate criminal liability can backfire. It can prompt managers to do less policing than they would if their firms faced only civil liability, for internal policing may produce information that will lead to a firm's indictment and conviction.¹⁰⁶ Consider, for example, the advice a lawyer might give a brokerage firm that is considering whether to tape-record its brokers' calls: "To the extent the proposed recordings deter brokers from committing fraud, they will reduce the firm's potential criminal liability. But if the deterrence is imperfect, some tapes may contain evidence of fraud. These tapes will be subject to subpoena, and when the government obtains them, it may use them to indict the firm and perhaps put it out of business."¹⁰⁷

I do not think highly of the institution of frankpledge, but it seems less silly than hating an artificial person. Holding the members of a group responsible for the other members' crimes is not as strange as imagining that a legal fiction deserves punishment.

VI. SOME IMPLICATIONS OF THE COMPETING VIEWS

This section considers where the "deodand" and "frankpledge" views of corporate criminal liability would take the law. Neither perspective justifies the federal courts' current standard of corporate liability, but the differing perspectives point to differing reforms. This

¹⁰⁵ See *State v. Akers*, 400 A.2d 38, 40 (N.H. 1979) (holding unconstitutional a statute that punished parents when their children drove off-highway vehicles on the highways).

¹⁰⁶ See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL. STUD. 833, 836-37 (1994).

¹⁰⁷ See Arlen & Kraakmann, *supra* note 1024, at 708-09. The prospect of civil liability has a double effect too; a firm may decide not to monitor when monitoring could produce damaging evidence that opposing civil litigants might discover. If corporate managers dread criminal conviction more than civil liability, however, the threat of criminal prosecution is likely to magnify their fear of generating damaging evidence.

Especially because even one criminal act can potentially cause a firm's demise and no one knows how prosecutors will respond to the firm's monitoring efforts, the effect of our regime of criminal liability on the behavior of corporate managers is uncertain. A regime of strict liability on paper administered by prosecutors who may consider innocence a full defense, a partial defense, or no defense at all is not one in which managers can easily calculate the optimal investment in discouraging improper conduct.

section evaluates these reforms and explains why the political prospects of both reform proposals are dim. Although the current standard of corporate liability is indefensible, it affords great power to prosecutors. This section examines how prosecutors have used and abused their power. It ends with a description of how judges who accepted the “frankpledge” perspective would sentence corporate offenders.

A. *The Respondeat Superior Standard of Corporate Liability*

Neither the “deodand” view of corporate criminal liability nor the “frankpledge” view justifies the *respondeat superior* standard now employed in the federal courts to determine a corporation’s criminal guilt.¹⁰⁸

1. *The Deodand View.* A corporation’s “ethos” or “persona”—the essence alleged to justify its punishment for “expressive retributive” reasons—is not established by the wrongful act of a single employee, and the isolated wrongful act of a “high managerial agent”¹⁰⁹ may not manifest a corporation’s “personality” either. Even the “rude Kukis of Southern Asia,” who allegedly punished trees for fatal falls,¹¹⁰ might have had difficulty hating an otherwise virtuous corporation with tens of thousands of employees whenever one employee did something wrong.

Blaming an entity apparently demands an atmospheric assessment of the entity’s *spirit*, and Pamela Bucy has proposed that juries make this assessment. She advocates what she calls “the corporate ethos standard” and says that this standard “directs criminal liability toward only those corporations which are ‘deserving’ of prosecution as demonstrated by their lawless ethos.”¹¹¹

¹⁰⁸ See *supra* text accompanying notes 33-3940.

¹⁰⁹ See *supra* text accompanying note 35 (describing the liability standard of the Model Penal Code).

¹¹⁰ HOLMES, *supra* note 10, at 44.

¹¹¹ Bucy, *supra* note 902, at 1157. Bucy explains that the word ethos “refers to the characteristic spirit or prevalent tone of sentiment of a community, institution, or system.” *Id.* at 1123. For example, Texaco is reputedly selfish, greedy, mean and secretive; Exxon tranquil and elegant; and Shell lordly and sedate. *Id.* at 1124 (citing ANTHONY SAMPSON, *THE SEVEN SISTERS* (1975)).

Bucy elaborates:

To ascertain the ethos of a corporation, and to determine if this ethos encouraged the criminal conduct at issue, the factfinder should examine: the corporate hierarchy, the corporate goals and policies, the corporation's historical treatment of prior offenses, the corporation's efforts to educate and monitor employees' compliance with the law, and the corporation's compensation scheme, especially its policy on indemnification of corporate employees.¹¹²

Bucy would ask juries to consider whether a corporation's board did its job or instead operated as a figurehead,¹¹³ whether corporate goals were "so unrealistic that they encourage[d] illegal behavior,"¹¹⁴ whether employees were "required to sign a statement each year indicating that they are familiar with pertinent government regulations *and* indicating that that they realize such violations will result in dismissal,"¹¹⁵ whether the corporation had an ombudsman,¹¹⁶ and more.

A medieval academic similarly might have opposed the indiscriminate punishment of objects that killed people and might have proposed a more careful assessment of each object's ethos. Was an accused wheel well designed? Was it made of the best material? Was it inspected and repaired on a regular basis? Had it previously provided useful service? Had it been involved in prior accidents?

Bucy's proposal provides few standards, invites prosecutors to appeal to the anti-corporate sentiments of some jurors, and probably would yield outcomes based mostly on the jurors' proclivities, the trial lawyers' rhetoric, and how much harm the defendant's agents had

Of course organizations do differ in their ethoi. Some in fact are wholly devoted to criminal activity. The most thoroughly criminal organizations, however—for example, the Bloods, the Crips, and the Mafia—are not usually incorporated. Although these organizations sometimes have been named as defendants in civil injunctive actions, *see generally* Scott E. Atkinson, Note, *The Outer Limits of Gang Injunctions*, 59 VAND. L. REV. 1693 (2006), I have never seen one of them prosecuted. Neither legislatures nor prosecutors nor anyone else has seen a need to prosecute these organizations in addition to the criminals who inhabit them.

¹¹² Bucy, *supra* note 902, at 1101.

¹¹³ *Id.* at 1129.

¹¹⁴ *Id.* at 1133.

¹¹⁵ *Id.* at 1136.

¹¹⁶ *Id.* at 1137.

caused. The impossibility of translating deodand sentiments into an operational standard of liability reflects the “let’s pretend” character of the group-blame concept,¹¹⁷ and the difficulty of formulating anything other than knee-jerk standards of culpability suggests placing the punishment of organizations on a different basis. The goal of corporate criminal punishment should be instrumental. It should be to induce an appropriate level of monitoring within an organization and nothing else.¹¹⁸

2. *The Frankpledge View.* If the goal of group liability is to encourage appropriate monitoring, the issue should be whether the group has monitored appropriately. The Norman inventors of frankpledge, however, did not address this question directly. Instead, they applied a standard of strict liability, presuming a failure to monitor whenever one member of a tithing escaped punishment for a serious crime.

The modern law of corporate criminality similarly employs a strict liability standard, but the modern standard is worse. For one thing, even if the criminal has not escaped, this standard presumes a failure to monitor whenever a member of the group has committed a crime. The group’s delivery of the wrongdoer to the authorities may prompt forbearance or leniency, but it does not eradicate the group’s responsibility. Moreover, the modern law treats any criminal act by any member of a 10,000-person group as proof of the other members’ failure. That position is roughly 1000 times more misguided than treating the wrongful act of any member of a *ten*-person group as conclusive proof of the other members’ default. A teacher who cannot determine

¹¹⁷ Bucy’s proposed standard is less anthropomorphic than the standard proposed by two other champions of the deodand perspective. William Laufer and Alan Strudler would have a jury determine “whether the corporation purposely, knowingly, recklessly, or negligently engaged in the illegal act”—something the jury could infer by examining “whether the average corporation of like size, complexity, functionality, and structure, given the circumstances presented, would have the required state of mind.” Laufer & Strudler, *supra* note 824, at 1310.

¹¹⁸ See Coffee, *supra* note 523, at 448 (“The study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications and anthropomorphic analogies.”).

which of his students misbehaved may keep an entire class after school, but even the most tyrannical teacher does not detain every student in the school system.

The rule of strict liability arose because people believed that the acts of an agent could be attributed to the agent's principal, and that was that. The rule had no articulated purpose. Courts and legislatures had decided to punish corporations, and they saw no other way to do it. The rule of *respondeat superior* never had a reason, and there is no reason to retain it.

When one rejects deodand mythology and recognizes that the goal of corporate punishment is to ensure an appropriate level of internal policing, the appropriate principle of liability becomes clear. Whether a criminal case against a corporation can be triggered by the criminal act of any employee or only by a ~~criminal~~ act approved or tolerated by a high managerial agent, the defendant should at a minimum be permitted to show as an affirmative defense that it had an appropriate compliance program in place prior to this act. When a corporation implements a suitable compliance program, it does what the authors of the law of corporate criminal liability (at least the non-superstitious authors) meant it to do. The government should ask for no more.¹¹⁹

Strict *respondeat superior* liability gives managers an incentive to establish effective compliance programs, but an affirmative defense of due care or appropriate monitoring would give them a stronger incentive. The expected benefits of compliance programs are greater when they can lead to a defense than when they cannot. Contrary to common intuition, strict liability probably weakens rather than strengthens the deterrent force of the criminal law.¹²⁰ The Supreme

¹¹⁹ It is difficult for a judge, jury, or prosecutor to know when a firm's investments in monitoring are optimal. Recognizing appropriate monitoring as an affirmative defense, however, casts the burden of uncertainty on the defendant. When a firm recognizes that it may bear this burden, it is likely to over-invest rather than under-invest in compliance programs.

¹²⁰ See Dan M. Kahan, *Ignorance of the Law is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 133-35 (1997) (arguing that when the law treats reasonable mistakes of law as a defense, it encourages knowledge of the law more effectively than when it imposes strict liability for mistakes).

Court has in fact limited the *respondeat superior* principle in sexual harassment cases for precisely this reason. Giving “credit . . . to employers who make reasonable efforts to discharge their duty” encourages them to establish programs to stop harassment.¹²¹ It does so more effectively than holding them strictly liable for whatever harassment occurs.

Rewarding firms for establishing compliance programs encourages them to establish compliance programs. In addition, the proposed affirmative defense removes the incentive *not* to monitor that strict *respondeat superior* liability sometimes creates.¹²² A firm need not fear that an appropriate compliance program would produce incriminating information that the government could use to destroy it.¹²³

The United States Attorneys’ Manual lists “the existence and effectiveness of the corporation’s pre-existing compliance program” as one of nine factors to be considered in determining whether to file charges.¹²⁴ These factors are described as “additional” to “the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal charges.”¹²⁵ The listed factors “are intended to be illustrative” rather than “exhaustive,”¹²⁶ and “the existence of a compliance

¹²¹ Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

¹²² See *supra* text accompanying notes 108-096-07.

¹²³ A possible objection to the proposed defense is that it would not force firms to “internalize” some of the costs of their activities and would lead to inefficient pricing. Promoting optimal pricing, however, is much more a goal of civil liability than of criminal punishment, and the proposed defense would not relieve corporations of their civil obligations. These firms would remain obligated to compensate the victims of crimes committed by their agents on their behalf. Forcing firms to internalize the costs of their activities is one thing; *punishing* them when they have done everything they can fairly be expected to do is something else.

¹²⁴ U.S. DEP’T OF JUSTICE, *supra* note 545, at § 9-28.300(A) (2008).

¹²⁵ *Id.*

¹²⁶ *Id.* at § 9-28.300(B).

program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents.”¹²⁷

The Manual does not notably confine the discretion of prosecutors. A prosecutor who considers the listed factors and finds himself with some yeses, some no’s, and some maybes can do whatever he likes. Indeed, even a prosecutor with all yeses or all no’s can do whatever he likes. The Justice Department has never explained why the existence of an *appropriate* compliance program should not be “sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents.”¹²⁸ There appears to be only one thing beyond an appropriate compliance program the government could want—perfection. The suitability of a compliance program, moreover, should not be judged by the length of the chancellor’s (or prosecutor’s) foot. Rather, the question should be one of cost-effectiveness: if additional or different expenditures on compliance would be unlikely to prevent more harm than they would cost, a corporate defendant should not be expected to make them.¹²⁹

B. The Real Purpose of the Respondeat Superior Standard

Although the current standard of corporate liability makes no sense from either the “deodand” or the “frankpledge” perspective, a recent *New York Times* column by former Attorney General John Ashcroft revealed why this standard has endured for 100 years and may last 100 more.

Ashcroft’s column praised federal deferred prosecution agreements:

These court-authorized agreements . . . under certain circumstances offer[] more appropriate methods of providing justice in the best interests of the public as well as a company’s employees and shareholders. They avoid the destructiveness of

¹²⁷ *Id.* at § 9-28.800(A).

¹²⁸ *Id.*

¹²⁹ I suggest some qualifications to this proposition in *infra* text accompanying notes [477-80174-77](#).

indictments and allow companies to remain in business while operating under the increased scrutiny of federally appointed monitors.¹³⁰

Ashcroft's column did not directly answer the question, "compared to what?," but its answer was clear: compared to full enforcement of the law.

DPAs and NPAs do look great when compared to full enforcement of the law, but full enforcement of the law is unthinkable. Every Fortune 500 company presumably has had at least one employee who violated a federal criminal law while carrying out his duties. The law of corporate crime thus makes every Fortune 500 company subject to prosecution, conviction, and punishment. In addition to the reputational damage a criminal conviction is likely to bring, conviction may bar a company from obtaining needed business licenses, holding a national bank franchise, receiving Medicaid and Medicare payments, auditing the accounts of publicly traded corporations, and contracting with the government.¹³¹ The *respondeat superior* standard apparently empowers the Justice Department to put most American companies out of business and to bring the economy to a standstill—and to do so just as other federal agencies are bolstering failing companies to keep the economy from coming to a standstill.¹³²

Ashcroft provided an example:

In September 2007, . . . the Justice Department and the nation's five largest manufacturers of prosthetic hips and knees reached agreements over allegations that they gave kickbacks to orthopedic surgeons who used a particular company's artificial hip and knee reconstruction replacement products. The allegations meant that the companies faced indictment, prosecution and a potential end to their business.

Think of the effect on the community if these companies had been shuttered: employees would have lost their jobs, shareholders and pensioners would have lost their savings and countless people in need of hip and knee replacement would have been out of luck, as these five companies accounted for 95 percent of the market.

¹³⁰ John Ashcroft, *Bailout Justice*, N.Y. TIMES, May 5, 2009, at A27.

¹³¹ See Hamdani & Klement, *supra* note 835, at 278-79 (discussing the potential collateral consequences of a criminal conviction to a firm in a regulated industry).

¹³² Ashcroft noted this irony—but only as an argument for entering deferred prosecution agreements, not as a reason for revising the standards of corporate criminal responsibility and restricting the power of prosecutors.

The Justice Department could have wiped out an entire industry that has a vital role in American health care.

Instead, the companies paid settlements to the government totaling \$311 million. They agreed to be monitored by private sector individuals and firms with reputations for integrity and public service The monitoring costs were borne exclusively by the companies, saving taxpayers tens of millions of dollars that could be then used for other investigations In these types of circumstances, a deferred prosecution agreement is clearly better for everyone.¹³³

Of course the nation need not fear a prosecutor-prompted economic collapse. No prosecutor wants to put a corporation out of business simply because one rogue employee committed a crime. Federal prosecutors merely want the *power* to put every corporation out of business whenever a low-level employee has committed a crime.¹³⁴ This power enables prosecutors to impose whatever sanctions they like for whatever conduct they do wish to punish. The power to do the unthinkable lets prosecutors do the thinkable without much sweat. When prosecutors exercise their sweeping powers responsibly (as nearly all of them believe that they do), they may save the jobs of thousands of people and enable companies to stay in business—all as measured from the fantasy baseline of full-enforcement. Like John Ashcroft, the prosecutors may then congratulate themselves on their restraint.

¹³³ *Id.* In considering whether the agreements Ashcroft described were “clearly better for everyone,” note that the tens of millions of dollars in monitoring costs and the \$311 million paid directly to the government probably will be reflected in the price of prosthetic knees and hips. Because people enjoy walking and hate pain, one imagines that the demand for these products is not very elastic, and if the financial burdens are spread evenly throughout the industry (95 percent of the market), manufacturers can treat them in the same way they would treat an increase in the cost of steel. These costs probably can be passed on to consumers without much difficulty. Because manufacturers forced patients to pay too much by giving kickbacks to surgeons, a criminal remedy was required, and the remedy was to force the patients to pay more.

¹³⁴ The U.S. Attorneys’ Manual declares, “[I]t may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.” DEP’T OF JUSTICE, *supra* note 545, at § 9-28.500(A). Note that the language of this provision, like the language of most of the rest of the Manual, does not commit the Department of Justice to anything. Even when a corporation has “a robust compliance program in place,” the Department “may” decide “to impose liability under a strict *respondeat superior* theory for the single isolated act of a rogue employee.”

Practitioners at two recent conferences on corporate criminality agreed that, in negotiating with the government, corporate suspects have a knife at a gunfight.¹³⁵ Even when an accused corporation has a plausible defense, it usually cannot risk the adverse consequences of an indictment, let alone a conviction. The corporation's only bargaining chip comes from the reluctance of prosecutors to pull the trigger. As one defense attorney explained, "If you're Boeing, the government no more wants to put you out of business than you want to go out of business." Defense attorneys report, however, that corporate boards do not respond favorably to the argument, "We don't think the government means to shoot." These boards instruct counsel to agree to whatever they must in order to avoid an indictment.¹³⁶

Although federal prosecutors pride themselves on their responsibility and restraint, they cannot always be trusted. In his *New York Times* column, John Ashcroft acknowledged that he served as a paid monitor for one of the five prosthetic manufacturing companies whose DPAs he praised.¹³⁷ He failed to note that the company he monitored, Zimmer Holdings, had agreed to pay his consulting firm, The Ashcroft Group, between \$207 and \$52 million for 18 months of service.¹³⁸ By negotiating the Zimmer Holdings agreement, the United States Attorney for New Jersey, Christopher J. Christie, had benefitted his former boss, Mr. Ashcroft, at least as clearly as

¹³⁵ Conference, *Achieving the Right Balance: The Role of Corporate Criminal Law in Ensuring Corporate Compliance*, Georgetown University Law Center (Apr. 21, 2009) (video available at http://www.instituteforlegalreform.com/component/ikr_events/30/item/62.html); Conference, *Regulation by Prosecutors*, New York University Law School (May 8, 2009) (video available at http://www.law.nyu.edu/centers/adminofcriminallaw/events/regulationbyprosecutors/ECM_PRO_062107).

¹³⁶ A former federal prosecutor comments:

[T]he process of negotiating a deferred prosecution agreement . . . is not really a negotiation. Any push back by the company on a provision that the government requests is not only going to be shot down, but the government may see it as a reflection that the company's claimed contrition is not genuine..

Interview of David Pitofsky, Partner, Goodwin Procter LLP, New York, New York, CORP. CRIME REP., Nov. 28, 2005, at 8, available at <http://corporatecrimereporter.com/pitofskyinterview010806.htm>.

¹³⁷ Ashcroft, *supra* note 1302.

¹³⁸ See Claire Heininger, *Oversight of Corporate Monitors is Urged: Congressmen Say Ashcroft Contract Shows Need for More Regulation*, N.J. STAR-LEDGER, Apr. 3, 2009, at 26.

he had benefitted the public.¹³⁹ In another DPA, Christie aided his law school alma mater, Seton Hall, by requiring Bristol-Myers Squibb to endow a chair there in business ethics with a contribution of \$5 million.¹⁴⁰ And when Christie left the U.S. Attorney's Office to run for governor, he accepted \$23,800 in campaign contributions from people connected with the law firm of Herbert J. Stern, a former U.S. Attorney and federal judge whom Christie had chosen for a \$3 million monitoring contract.¹⁴¹ The *New York Times* reports, "The Justice Department has appointed at least 30 former prosecutors and other government officials as well-paid corporate monitors in arrangements that allow companies to avoid criminal prosecution, according to . . . data released . . . by Congress."¹⁴²

Recent Justice Department memoranda limit the power of U.S. Attorneys to select their friends as monitors¹⁴³ and to direct payments to favored law schools,¹⁴⁴ but even the best

¹³⁹ See Cynthia Burton, *Christie Speaks to Congressional Subcommittee*, PHILA. INQUIRER, June 26, 2009, at B1 ("The estimate for Ashcroft's fees is between \$20 million and \$52 million for monitoring the rehabilitation of Zimmer holdings A copy of a bill from Ashcroft, distributed by committee Democratic staff, showed little specific backup for the charges.").

¹⁴⁰ See Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 174 (2008); Sue Reisinger, *New DOJ Policy: Just Call it the Christopher Christie Amendment*, LAW.COM, May 21, 2008, <http://www.law.com/jsp/article.jsp?id=1202421573691> (last visited Sept. 30, 2009).

¹⁴¹ See Josh Margolin & Claire Heinger, *Foes See Tarnish on Christie's Sparkling Image, Campaign Contributions Smack of Pay-to-Play, They Charge*, N.J. STAR-LEDGER, Apr. 5, 2009, at 17. At the end of his first six months as monitor of a medical and dental school, Stern submitted bills totaling \$5.8 million—\$199,600 for his own services at a rate of \$500 per hour, \$992,787 for the services of other lawyers in his office, and the remainder for two accounting firms. Stern became the school's monitor after it acknowledged overbilling Medicaid by just under \$5 million. See David Kocieniewski, *Cost of Inquiry at University in New Jersey Draws Criticism*, N.Y. TIMES, Aug. 9, 2006, at B1.

At this writing, Christopher Christie has won the June 2009 Republican primary, and the most recent poll indicates that he will be elected Governor of New Jersey. See Cynthia Burton, *Christie Reaches for the Urban Vote*, PHILA. INQUIRER, July 15, 2009, at B1.

¹⁴² Eric Lichtblau & Kitty Bennett, *30 Ex-Government Officials Got Lucrative Posts as Corporate Monitors*, N.Y. TIMES, May 23, 2008, at A23.

¹⁴³ See Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice 3 (Mar. 7, 2008), available at <http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf> (providing that "United States Attorneys and Assistant Attorneys' General may not make, accept, or veto the selection of monitor candidates unilaterally" and that "the Office of the Deputy Attorney General must approve the monitor").

¹⁴⁴ See Memorandum from Mark Filip, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, U.S. Dep't of Justice (May 14, 2008) (on file with author) (declaring that DPAs and NPAs may not require payments to private parties other than crime victims).

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intentioned prosecutors may not merit the credit they give themselves for reasonableness and good government. Whether the compliance programs and monitors imposed by DPAs and NPAs can justify their high cost is an essentially unexamined question.

Federal prosecutors have shown little awareness that cost-effectiveness is the issue. The U.S. Attorneys' Manual invites prosecutors to consider whether a corporation's compliance program "is adequately designed for maximum effectiveness in preventing and detecting wrongdoing."¹⁴⁵ But of course there is no maximum. The amount of money a firm could spend on monitoring is limited only by the amount of money it has. It might place a monitor or two at every employee's elbow, and no standard indicates at what point short of absurdity it must stop. Once an employee of the firm has committed a crime, the firm's monitoring obligations depend on what feels right to a United States Attorney unconstrained by any standards.

The U.S. Attorneys' Manual acknowledges "that no compliance program can ever prevent all criminal activity by a corporation's employees,"¹⁴⁶ but defense attorneys at a recent conference on corporate crime noted that prosecutors paid little attention to this provision.¹⁴⁷ When these attorneys pleaded for mercy by pointing to their corporate clients' compliance programs, prosecutors responded that the programs could not have been effective if the crime occurred.

A 2009 study purports to examine "whether settlement agreements with corporate monitors actually work to improve corporate behavior going forward."¹⁴⁸ It concludes that "in

¹⁴⁵ DEP'T OF JUSTICE, *supra* note 545, at § 9-28.800(B).

¹⁴⁶ *Id.*

¹⁴⁷ Video: Panel 3: How Should Corporate Compliance Programs Be Factored into Government Decisions, Conference on Achieving the Right Balance: The Role of Corporate Criminal Law in Ensuring Corporate Compliance, held by Georgetown University Law Center (Apr. 21, 2009) (*available at* <http://www.chambercast.com/ramgen/video/ilr/090526d.rm>).

¹⁴⁸ Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 681 (2009).

general” these agreements “are at risk of not achieving their goals on any consistent basis.”¹⁴⁹ In 2005, Kimberly Krawiec reviewed the available empirical evidence on the effectiveness of corporate ethics and conduct codes, internal compliance structures, and training programs intended to reduce sexual harassment and increase diversity. She reported that the evidence was sparse and “decidedly mixed, with many of the most recent and methodologically sound studies finding no significant correlation between the most widely used internal compliance structures and reduced organizational misconduct.”¹⁵⁰ Notably, none of the three large-scale studies that purported to test the effectiveness of the compliance programs favored by the Federal Sentencing Guidelines indicated that these programs had reduced illegal conduct. Two of the three studies in fact “found unanticipated positive correlations between internal compliance structures and legal violations.”¹⁵¹ How much compliance programs serve their stated purposes and how much they are gimmickry and posturing remain open questions.

¹⁴⁹ *Id.* at 682. Essentially, this study shows only that ethics and compliance officers do not think highly of the former prosecutors and others who are appointed as corporate monitors. The professionals complain that these monitors lack experience, gain little understanding during their one-shot appointments, and focus more on compliance mechanics than on developing an appropriate corporate culture. One senses that the compliance officers might prefer the selection of members of their own fraternity. Their professional association, the Society of Corporate Governance and Ethics, now offers training and an examination leading to certification as a compliance and ethics professional. *Id.* at 692.

¹⁵⁰ Kimberly Krawiec, *Corporate Decisionmaking: Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U.L. REV. 571, 591-97 (2005).

¹⁵¹ *Id.* at 593 (citing M. Cash Matthews, *Codes of Ethics: Organizational Behavior and Misbehavior*, in 9 RESEARCH IN CORPORATE SOCIAL PERFORMANCE AND POLICY 107, 108-09, 125 (William C. Frederick & Lee E. Preston eds., 1987); Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS, 367 (2002); Marie A. McKendall & John A. Wagner III, *Motive, Opportunity, Choice and Corporate Illegality*, 8 ORG. SCI. 624 (1997)).

A positive correlation between compliance programs and violations might suggest only that the managers of firms whose employees commit violations are likely to implement compliance programs. The positive correlation between the number of fire trucks at a fire and the size of the fire does not indicate that fire trucks are ineffective at fighting fires.

I doubt that any quantitative methodology can reveal whether monitors and compliance programs reduce crime, but researchers can determine whether the telephone numbers set up to receive whistleblowers' calls receive well-founded complaints and whether corporate employees believe that the firm's compliance programs have changed either their own behavior or the behavior of others. I am more sympathetic to employee surveys of this sort than Krawiec appears to be, but the evidence produced by these surveys is as inconclusive as that produced by the data crunchers. *Id.* at 592.

Neither John Ashcroft nor any other Attorney General in the past century has sought a narrowing of the *respondeat superior* standard of corporate liability. Although half the states employ narrower standards,¹⁵² Congress seems very unlikely to follow their lead. An alliance of Ralph Nader, the Justice Department, and most Members of Congress could be expected to resist any effort to deny prosecutors an important “tool” in the fight against corporate crime. Like the rest of the federal criminal justice system, the *respondeat superior* standard transforms prosecutors into czars while the politicians stand and say “yes, yes, yes.”¹⁵³ This standard serves its real purpose marvelously.¹⁵⁴

C. The Prospect for Reform: Some Political Notes

For [forty-three](#) years and more, writers have proposed that a corporation should not be punished when it can “prov[e] by a preponderance of the evidence that it, as an organization, exercised due diligence to prevent the crime.”¹⁵⁵ As noted, however, members of Congress are not likely to approve a measure that opponents could characterize as soft on corporate crime.

¹⁵² See note 35 *supra*.

¹⁵³ The last half-century has seen many Congressional contributions to the prosecutors’ “tool kit”—among them, the federal sentencing guidelines, *see* 18 U.S.C. §§ 3551-3625 (2006); 28 U.S.C. §§ 991-98 (2006); mandatory minimum drug and firearms sentences, *see, e.g.*, 18 U.S.C. §§ 860, 929, & 3561(b)(1) (2006); RICO, 18 U.S.C. §§ 1961-68 (Supp. 2009); the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today or PROTECT Act, Pub. L. 108-21, 117 Stat. 650 (2003); and the declaration that a scheme or artifice to defraud includes a “scheme or artifice to deprive another of the intangible right to honest services.” *See* 18 U.S.C. § 1346 (Supp. 2009). *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes.”).

¹⁵⁴ Preet Bharara argues that “efforts to reduce the risk of prosecutorial excess are . . . better directed at the source of prosecutors’ leverage rather than at their conduct.” BHARARA, *supra* note 734, at 54. He observes, “[T]he potential for excess will continue to loom large so long as prosecutors may persuasively (and legally) threaten to indict, and thus potentially destroy, any company, no matter how blameless, for the misdeeds of a single, low-level rogue employee.” *Id.* at 56. Bharara is now the United States Attorney for the Southern District of New York. *See* Benjamin Weiser, *Schumer Aide Is Confirmed As United States Attorney*, NEW YORK TIMES, Aug. 8, 2009, at A16.

¹⁵⁵ The quoted language appears in Note, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1243, 1257 (1979). For earlier suggestions of the same sort of defense, *see* MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962) (providing that in some circumstances “it shall be a defense if the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission”); Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 GEO. L.J. 547, 563 n.73 (1962) (proposing that a corporation be allowed to “rebut a presumption of responsibility for [some]

At a recent conference on the role of corporate criminal law, former Deputy Attorney General Larry D. Thompson, the author of the Thompson Memorandum,¹⁵⁶ suggested a less political route to the approval of an “appropriate monitoring” defense. Thompson—now the general counsel of PepsiCo and a supporter of the defense—proposed that the Supreme Court adopt this defense as an amendment to the Federal Rules of Criminal Procedure.¹⁵⁷ Thompson’s proposal, however, appears to conflict with the Rules Enabling Act, which provides that procedural rules may “not abridge, enlarge or modify any substantive right.”¹⁵⁸

Although the Supreme Court is unlikely to approve an “appropriate monitoring” defense as an amendment to the criminal rules, it might do so as a matter of federal common law in an appropriate case. The Supreme Court and other courts altered the traditional common law when, extending the holding of *New York Central* beyond cases in which Congress had spoken to the issue, they approved general corporate criminal liability and the *respondeat superior* standard. Courts have the power to revise their own handiwork.

A recent amicus brief in the Second Circuit authored by Andrew Weissmann and other Jenner & Block lawyers advocated judicial revision of the *respondeat superior* standard.¹⁵⁹ This brief emphasized that recent Supreme Court decisions have limited the application of this

crimes . . . by showing that the corporation in good faith did everything within its power to prevent the commission of the offense”). For more recent support of an “appropriate monitoring” defense, see John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 321 (2004); Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731, 764-65 (1996); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of their Employees and Agents*, 41 LOY. L. REV. 279, 308-28 (1995); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414 (2007); Ellen S. Podgor, *A New Corporate World Mandates a “Good Faith” Affirmative Defense*, 44 AM. CRIM. L. REV. 1537 (2007); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 RUTGERS L. REV. 605 (1995).

¹⁵⁶ See *supra* text accompanying notes 62-78.

¹⁵⁷ Larry D. Thompson, Remarks to the Conference on Achieving the Right Balance: The Role of Corporate Criminal Law in Ensuring Corporate Compliance, Georgetown University Law School, April 21, 2009 (*video available at* http://www.instituteforlegalreform.com/component/ilr_events/30/item/62.html).

¹⁵⁸ 28 U.S.C. § 2072 (2006).

¹⁵⁹ Brief for the Association of Corporate Counsel et al as Amici Curiae Supporting Appellant, *United States v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2009) (07-5801-CR).

standard even in civil cases. For example, in *Faragher v. City of Boca Raton*,¹⁶⁰ the Court held that an employer might be civilly liable for a supervisory employee's sexual harassment of a subordinate, but it allowed the employer "to show as an affirmative defense . . . that [it] had exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided."¹⁶¹

Similarly, in *Kolstad v. American Dental Association*,¹⁶² the Court held that an employer would not be liable for punitive damages simply because a supervisory employee had intentionally discriminated on the basis of sex in hiring. Even in a case of intentional discrimination, punitive damages would be inappropriate if the discriminatory act was "contrary to the employer's 'good-faith efforts to comply with Title VII.'"¹⁶³ The Court spoke of the "perverse incentives" that strict adherence to the *respondeat superior* principle would create,¹⁶⁴ and it said, "'Giving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes' Title VII's objective of 'motivating employers to detect and deter Title VII violations.'"¹⁶⁵

Weissmann and his colleagues argued that the reasons for modifying the *respondeat superior* standard in criminal cases were at least as compelling as the reasons for modifying it in sexual harassment cases. Moreover, the reasons the Supreme Court gave for protecting corporations from liability for punitive damages were also reasons for protecting them from criminal conviction and punishment. The Second Circuit, however, summarily rejected the

¹⁶⁰ 524 U.S. 775 (1998); see also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (a companion case that the Court analyzed much as it did *Faragher*).

¹⁶¹ *Faragher*, 524 U.S. at 805.

¹⁶² 527 U.S. 526 (1999).

¹⁶³ *Id.* at 545 (quoting *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 545-46 (quoting *Kolstad*, 139 F.3d at 974 (Tatel, J., dissenting)).

arguments of Weissmann’s brief on the ground that they were “contrary to the precedent of our Circuit.”¹⁶⁶

A final route to the approval of an appropriate monitoring defense runs through the Department of Justice. Unlikely though the prospect may seem, a fair-minded Attorney General might abandon the noncommittal pabulum-language of the U.S. Attorneys’ Manual and announce that the Department will not charge corporations with crimes when they have implemented appropriate compliance programs.¹⁶⁷ United States Attorneys and their assistants would be unlikely to be too generous to corporate suspects in determining when this de facto defense applied.

D. Sentencing Corporations

Viewing the punishment of corporations as frankpledge rather than deodand has implications for sentencing corporations. Because corporate criminal punishment is not really criminal punishment as people customarily understand it, harsh exemplary penalties are inappropriate. The goal should be to induce an appropriate level of monitoring within the organization.

Many laws and regulations—from the U.S. Attorneys’ Manual to the Federal Sentencing Guidelines to the rules of several administrative agencies to the corporation law of Delaware—encourage firms to establish compliance programs.¹⁶⁸ Almost every publicly-traded corporation now appears to have one, much to the benefit of lawyers’ bank accounts.¹⁶⁹ Some people appear

¹⁶⁶ United States v. Ionia Mgmt S.A., 555 F.3d 303, 310 (2d Cir. 2009).

¹⁶⁷ Oddly, scholars continue to express hope for rulemaking by prosecutors. *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1003-07 (2009); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 593-604 (2000).

¹⁶⁸ *See* KRAWIEC, *supra* note 1502, at 584-91.

¹⁶⁹ Kimberly Krawiec observes that “powerful interest groups have a stake in and benefit from compliance-based liability regimes, particularly legal compliance professionals such as lawyers, compliance and ethics consultants, in-house compliance and human resources personnel, and diversity trainers.” *Id.* at 574-75. She adds that “legal

to have forgotten that, although monitoring is a very good thing, an organization can have too much of it.¹⁷⁰ For example, if a regime of monitoring and surveillance would cost \$500,000 but prevent criminal harms of only \$100,000, the monitoring would be wasteful. A threatened fine of \$1 million for a \$100,000 crime might induce a corporation to implement this wasteful monitoring program.

Reluctant though I am to admit that economists can ever be right, some of them do understand how best to calculate the fines of corporate offenders.¹⁷¹ In most cases, a court should assess the harm produced by the corporation's criminal act and then make a judgment about how often this sort of criminal act is detected. It should multiply the harm produced times the *ex ante* chance that the crime would go undetected and then add a few dollars to tilt the balance in favor of law observance. For example, if the offense has produced \$1 million in harm and the court's judgment is that only one of every four similar offenses is likely to be punished, the fine might be \$4,010,000. This sort of fine would assure that crime would not pay but would not require corporations to spend more to prevent crime than the crime is likely to cost.¹⁷²

A court should then subtract from the fine any civil damages the corporation has paid or can reasonably be expected to pay as a result of its crime. If \$500,000 in criminal fines would induce appropriate monitoring, requiring the corporation to pay \$500,000 in fines and then \$500,000 in civil damages could induce excessive monitoring.

compliance professionals have been at the forefront of the push to adopt internal compliance structures, sometimes overstating to a significant degree both the risks of a failure to adopt such structures and the benefits of having such structures in place." *Id.* at 611. Although "the tendency of legal compliance professionals to overstate both a new legal risk and their ability to contain that risk though internal compliance structures has been well documented . . . business organizations [have adopted] the legal compliance professionals' recommendations." *Id.* at 611-612 (citations omitted).

¹⁷⁰ See *supra* text accompanying notes [122-126](#) and [145-51](#).

¹⁷¹ The analysis that follows is drawn primarily from Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321-22 (1996). For a different economic perspective, see ARLEN & KRAAKMAN, *supra* note [1024](#).

¹⁷² The suitability of this formula is unaffected by whether courts recognize appropriate monitoring as a defense. The formula's sanctions should induce firms to implement appropriate compliance programs whether or not the defense is recognized.

Other economic issues are debatable. When a corporation's gain from crime exceeds the victims' loss, should the fine require the corporation to disgorge this gain? Many economists would say no,¹⁷³ but I think the answer is yes. The corporation's shareholders may be innocent, but they should not profit from a crime committed on their behalf. Courts should not encourage crime even when, from the vantage point of economists, this crime is efficient.¹⁷⁴

Should the fine be reduced when it may cause the corporation to fail and innocent employees to lose their jobs? Like the economists, I think the answer is no. If a company can achieve financial success only by committing crimes, it ought to fail, and its employees ought to seek work elsewhere. Similarly, if an appropriate level of monitoring to prevent the commission of crimes would cause a company to fail, it should fail, and its employees should seek work elsewhere.¹⁷⁵

Use of the proposed formula is not appropriate in every case, and even when appropriate, it is unlikely to give judges a clear, practical yardstick for sentencing. When a corporation's act has been made criminal for reasons other than the economic harm it produces, the formula offers no help. It also offers little help when the anticipated harm is uncertain, diffuse, and long-term.

¹⁷³ See, e.g., Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395 (1991); Jennifer H. Arlen, *Why the Commission's Proposal is Not Good Economics*, 3 FED. SENT'G REP. 138 (1990); Jeffrey S. Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 FED. SENT'G REP. 133, 135 (1990). Compare FISCHEL & SYKES, *supra* note 171, at 345 (arguing that sanctions based on the offender's gain rather than the victim's loss over-deter), with A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 918 (1998) ("[S]etting damages equal to harm generally results in proper deterrence even when the harm is less than the defendant's gain; a policy of removing the defendant's gain may result in over deterrence. An exception arises, however, when the defendant's gain is socially illicit, in which case extracting the defendant's gain is desirable.").

¹⁷⁴ Although I have argued that the existence of an appropriate compliance program should provide a defense to criminal liability, the existence of such a program should not relieve a corporation of its obligation to compensate the victims of crimes committed by its agents on its behalf. Similarly, a compliance program should not relieve a corporation of a duty (preferably a civil duty) to disgorge any profit it has gained from the criminal activities of its agents.

¹⁷⁵ The loss of innocent workers' jobs remains a horrid feature of liability regimes in which penalties go beyond the proposed fines—as they usually do when a loss of business licenses and other collateral consequences render conviction a *de facto* death sentence for a corporation.

Consider, for example, a corporate officer who has violated the Foreign Corrupt Practices Act¹⁷⁶ by bribing a foreign official to approve a highly beneficial project. In the short run, the officer's bribery might have done more good than harm. Still, the officer should be punished as a criminal, and the fact that his bribery was likely to accomplish good things should not reduce his sentence. If the officer's corporate employer did not appropriately discourage his conduct, the employer should be subject to sanctions as well (preferably civil sanctions). Over the course of many decisions, an honest foreign official will serve his country better than a corrupt one, but no one can put a dollar value on this benefit. Similarly, the harm that bribery by an American business may cause to peoples' perception of America cannot be calculated. A court might presume that the economic damage caused by the bribe equaled the amount of the bribe, for the corporate officer presumably would have been willing to reduce his price or otherwise use these funds to benefit the public in order to gain the consideration he received from the corrupt official. Looking only to the amount of the bribe, however, would likely to underestimate substantially the long-term harm.

In other cases, a court may be able to calculate the economic harm caused by a crime with reasonable precision, but even when it can, it may be unable to offer more than a blind guess about the frequency with which this sort of crime is detected.

Sometimes, to be sure, more than a blind guess may be possible. Daniel Fischel and Allan Sykes note, for example, that the odds of detecting a major oil spill are one hundred percent. In this sort of case, they say, the fine should simply equal the harm.¹⁷⁷ Yet even in this sort of case, the formula may not help much. Harm means more than provable economic damages. In view of the lasting environmental harm produced by an oil spill, an oil company should be encouraged to

¹⁷⁶ Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1-3 (2006).

¹⁷⁷ FISCHEL & SYKES, *supra* note 171, at 343-44.

spend much more to prevent the spill than simply the cost of cleaning it up and compensating the people who can prove damages. In many situations, assessing the total cost of crime—including the psychological trauma it produces and a share of the salaries of the police officers, prosecutors, and judges who bring offenders to justice—is impossible.

The point of the economist's formula is just to suggest a general approach. Judges should view the punishment of corporations as King Edgar the Peaceful would have if he had attended the University of Chicago. They should not attribute intentionality and blame to an artificial person, and they should not try to make this imaginary person suffer.

CONCLUSION

The reasons offered for punishing corporations as criminals are expressive and instrumental. The expressive reasons match those that once might have been offered to justify the punishment of animals and inanimate objects that produced harm (deodand). The instrumental reasons match those that once might have been offered to justify punishing all members of a group when one member eluded punishment for his crimes (frankpledge). Neither set of reasons is very good, but the frankpledge set is better than the deodand set. Recognizing that the reasons for punishing corporations are instrumental suggests a revision of the current standard of corporate liability and also suggests an approach to corporate sentencing. The expressive approach appears to dominate popular writing, but attributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.