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THE CURIOUS CASE OF CORPORATE CRIMINALITY

Erik Luna*

INTRODUCTION

Corporations dominate the business world, accounting for an overwhelming majority of commercial revenues and serving as the nearly exclusive organizational form for large-scale enterprise.¹ They are, quite simply, the major vehicles of American capitalism and a primary source of socio-economic prosperity and innovation. But corporations are also implicated in serious harm to individuals and society: massive fraud in securities, banking, and health care; damage to the environment from air and water pollution and the generation of hazardous waste; and systematic bribery, tax evasion, and obstruction of justice. If these acts were committed by an individual, there would be little doubt that prosecution and punishment might be in store – and, indeed, contemporary law accepts the idea that corporations can be held criminally liable in such circumstances. Yet to this day corporate criminality remains a curious concept. As artificial creatures of the law, corporations per se have no emotions or culpable mental states. Nor are they subject to incarceration, the primary mode of punishment in America. To use the hoary phrase, there is “no soul to damn, no body to kick.”²

This symposium brings together leading scholars to explore the past, present, and future of corporate criminal law. The following response will offer some brief observations about several written contributions, all of which, I believe, help elucidate the peculiar institution of corporate crime.

I. DEODAND AND FRANKPLEDGE

Professor Albert Alschuler’s article takes issue with the very idea of corporations being convicted and sentenced like human defendants.³ The modern doctrine traces back to 1909 and the (in)famous New York Central case, where the U.S. Supreme Court upheld corporate punishment based on the respondeat superior

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³ See Alschuler, supra note 2, at 1366.
theory of tort law, thereby allowing a corporation to be held criminally liable for its agents’ actions taken within the scope of their employment.4 Although the Court suggested that “there are some crimes which in their nature cannot be committed by corporations,”5 Alschuler correctly notes that the opinion itself provided no guidance as to the boundaries of corporate criminality. In the ensuing decades, lawmakers and jurists have rejected most meaningful limits to the doctrine6 and allowed corporations to be held liable not only for modern financial offenses but also for serious physical crimes (e.g., homicide).7 Still, corporate criminal liability is an oddity, regardless of any approval or acquiescence by courts, politicians, and the public. Akin to saying “I love you” to an inflatable, it sounds strange to describe a corporation as a manslaughterer.8

Alschuler exposes the foibles of this practice through analogy to two ancient institutions. The first is deodand, a biblically derived custom of punishing inanimate objects or animals involved in the killing of human beings. British common law permitted actions against chattel, which if found to have caused a person’s death, would be forfeited to the Crown. The tradition of suing non-human entities continued after the American Revolution, sometimes in the form of a distinct doctrine that allowed ships to be seized without having to bring their owners within the jurisdiction.9 But whether the fiction was grounded in deodand or admiralty law, the courts were acquiescing to a type of “transcendental

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6. See, e.g., United States v. Ionia Mgmt. S.A., 555 F.3d 303, 310 (2d Cir. 2009) (refusing to limit criminal liability to cases where the corporation lacked effective policies and procedures to deter and detect employees’ criminal actions).

[U]ntil recently, the dominant precedent . . . has been that corporations are incapable of forming the criminal intent that is necessary to constitute a provable crime like homicide against a person. Also, in many state and federal statutes, homicide is defined as the criminal slaying of “another human being,” with “another” referring to the same class of being as the victim. These precedents and statutes together have acted to diminish the plausibility of the idea that corporations can, in a criminal sense, kill people.

nonsense,"\textsuperscript{10} to use Felix Cohen's phrase: property is treated as a person, denominated a party to litigation, and adjudicated guilty of wrongdoing. The fiction persists to this day and has facilitated some unconscionable results, like the forfeiture of an innocent woman's car because her husband had used it for a tryst with a prostitute.\textsuperscript{11}

Alschuler describes a second institution, \textit{frankpledge}, which is "less silly than hating an artificial person."\textsuperscript{12} Dating back to the Norman conquest of England, the practice held the male leaders of ten households responsible for keeping the peace within their community, and in particular, it required them to deliver any household member who had committed a crime. If he was not produced, all leaders could be fined regardless of whether the offender was part of their specific household, thus establishing collective liability for an individual's wrongdoing. In a sense, frankpledge was a mirror image of the older, far more brutal institution of "decimation" associated with the Roman army. If a large number of soldiers acted with cowardice, a tenth of the group could be drawn by lot and then executed.\textsuperscript{13} In more recent history, a World War II Soviet commander utilized the practice against troops who had retreated during the battle of Stalingrad.\textsuperscript{14}

Whatever the historical analogy, however, Alschuler considers the modern doctrine of corporate criminal liability to be a form of collective punishment without concern for individual culpability:

[C]riminal punishment cannot really be borne by a fictional entity [such as a corporation]. . . . 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.\textsuperscript{15}

All told, Alschuler's article provides a compelling case against corporate criminal liability, illuminating its problems with provocative metaphors. My only question is whether a meaningful distinction can be drawn between a blameless person affected by corporate punishment and an equally innocent individual harmed by any other form of criminal sentencing. According to Alschuler, shareholders and employees supposedly receive penalties that "are not incidental,

\begin{itemize}
\item \textsuperscript{10} Felix S. Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 Colum. L. Rev. 809, 809 (1935).
\item \textsuperscript{11} Bennis v. Michigan, 516 U.S. 442, 443, 453 (1996).
\item \textsuperscript{12} Alschuler, \textit{supra} note 2, at 1377.
\item \textsuperscript{13} \textit{See}, e.g., SARA ELISE PHANG, \textit{ROMAN MILITARY SERVICE: IDEOLOGIES OF DISCIPLINE IN THE LATE REPUBLIC AND EARLY PRINCIPATE} 123-29 (2008).
\item \textsuperscript{14} \textit{See} ANTONY BEEVOR, \textit{STALINGRAD: THE FATEFUL SIEGE}; 1942-1943, at 117 (1999) (discussing how the divisional commander adopted the Roman punishment of decimation, walking along the front rank counting and shooting every tenth man).
\item \textsuperscript{15} Alschuler, \textit{supra} note 2, at 1367-68.
\end{itemize}
collateral, or secondary16 to corporate punishment, and yet there is no definitive test or set of criteria to differentiate between, for example, primary and secondary effects. The case caption provides one crude standard: if your name is in the heading—say, People v. Smith, and you happen to be Smith—then any adverse consequence imposed on you is aptly described as a primary, direct, and intentional result of the proceeding. Other than that, however, the distinctions tend to be contextual rather than categorical. Frankly, I am not at all sure why the “penalty” inflicted upon a former Enron security officer is different in kind from that imposed on the erstwhile bodyguard for an incarcerated celebrity. Both have lost their jobs and may experience the stigma of having worked for a convicted criminal.

Some might contend that criminal liability is a natural extension of the original legal fiction of corporate jurisprudence, where corporations are considered persons in the eyes of the law. This anthropomorphizing of business entities provides tangible benefits for those who interact with corporations. Shareholders in particular receive unique advantages, chief among them, limited liability for corporate conduct: as long as an investor remains a passive provider of capital, he risks only his investment and can neither be civilly sued nor criminally prosecuted for the misdeeds of the corporation.17 In fact, his exposure may be less than that of other types of equity holders. In business forms lacking a liability shield (e.g., sole proprietorships), owners may be held personally liable for all sorts of wrongdoing, including the misconduct of their employees (i.e., vicarious liability) and sometimes in the absence of a culpable mental state (i.e., strict liability). Such equity owners are the business, so to speak, and thus responsible for offenses committed under its guise. In contrast, a shareholder cannot be held liable for corporate crime unless he was more than a mere owner of stock (e.g., he was also an executive involved in the criminal activity). By the act of incorporation, a business becomes a separate entity from its owners; “and no corporation can, by violating a law, make any one of its stockholders who does not himself participate in that violation

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16. Id. at 14.

[T]he activity required to pierce the veil goes well beyond the typical shareholder role as a passive provider of capital. Courts generally refuse to impose liability on shareholders unless they have control of the corporation and there has been misuse of the corporate form, such as fraud, undercapitalization, or intermingling of corporate and individual transactions. My study of 1600 piercing-the-veil cases found no case in which shareholders in a public corporation were held liable and no civil case in which individual shareholders identified as passive in corporations of any size were held liable. Most successful piercing cases in the study involved individuals who served as both shareholders and managers or corporate groups in which the parent corporation was the shareholder and could name the individuals who managed the subsidiary.

criminal liability therefor." All of this might be viewed as an implicit deal for shareholders: as long as an investor remains passive, uninvolved in day-to-day corporate operations, his exposure is capped at the value of the stock. If the corporation is convicted of crime, however, any complaint that "innocent" shareholders are being unfairly punished will fall on deaf ears.

This may seem harsh, no doubt, and I have serious misgivings about the above characterization. Like Alschuler, I am not a fan of corporate criminal liability, which should be scrapped in favor of the jurisprudentially sound approach of prosecuting individuals for their crimes and holding businesses liable in tort. Moreover, a corporate case may have derivative effects that are more widespread than an individual prosecution. It is hard to deny that the collapse of Arthur Anderson had an aggregate impact far greater than the downfall of a lone businessman. But on the individual level of injured parties, the harm may be the same regardless of its source. The putative victim of corporate prosecution does not have an inherently superior claim of innocence or beef about undeserved punishment vis-à-vis the families, work relations, and communities affected by severe sentences for non-corporate crime.

II. THE BANALITY OF CORPORATE CRIMINAL LIABILITY

This last point is central to Professor Sara Sun Beale's symposium article, which offers a potent rejoinder to the many critics of corporate criminal liability, including Alschuler. According to Beale, corporate criminal liability is far from unique. The argument in favor of using civil or administrative sanctions in lieu of criminal punishment, for instance, could apply to a wide range of crimes, not just corporate wrongdoing. Similarly, she provides several doctrinal examples where individuals, like corporations, can be held criminally liable in the absence of moral blameworthiness, while also suggesting that the problems of prosecutorial discretion, excessive punishment, and collateral consequences are endemic to U.S. criminal justice. More generally, Beale rejects the prevailing depiction of corporations as fictions. "Rather, they are enormously powerful – and very real – actors whose conduct often causes very significant harms both to individuals and to

18. Union Pac. Coal Co. v. United States, 173 F. 737, 739 (8th Cir. 1909); see, e.g., 18 C.J.S. Corporations § 517 (2009) ("Inasmuch as a distinct legal entity is created when a company is incorporated, no corporation can by violating a law make any one of its stockholders who does not personally have knowledge of or participate in that violation criminally liable for it."); Distinctness of corporate entity—Crimes and penalties, 1 FLETCHER CYC. CORP. § 34 (2009) ("The same rules apply to shareholder liability for corporate crimes as apply to corporate torts; shareholders are not personally guilty of crimes committed by the corporation, or ascribed to it, unless it can be proven that they personally participated."). It should be noted, however, that there are non-corporate business forms that limit the liability of equity owners, such as the limited liability company (LLC) and the limited partnership (LP).

society as a whole." She emphasizes the wealth of major corporations, their clout in the political process, and the damage they can do in excess of individual misconduct. The argument in favor of corporate criminal liability is bolstered by the recent experience in western industrial nations. Many of America's peers have introduced statutory grounds for corporate punishment, expanded the legal bases for liability, and made it easier to prosecute corporations, all of which Beale sees as a rebuke of those who oppose corporate criminal liability.

On the whole, Beale makes a powerful case for maintaining much of the current doctrine on corporate criminality. While I disagree with many of her claims and conclusions, ours is a difference of opinion where both sides have merit and deserve a full airing. Persuasive counterarguments can be mustered from Alschul-
er's article and the works by other critics of corporate criminal liability. Here I broach only a few points of contention, beginning with the assertion that a corporation is not a fiction. Beale may have used the phrase in a more colloquial sense, in which case she has a point: corporations are not altogether ethereal but instead pervaded by material aspects, from the buildings that serve as corporate headquarters to the machinery that produces commercial goods. If, however, the word is employed as a term of art, then a corporation is a legal fiction — "an assumption that something is true even though it may be untrue" — where, as mentioned, a non-human entity is treated as a person under law. Neither describing it as an "actor" nor ascribing to it great harm changes a corporation into an actual human. Automobiles may be involved in millions of injuries each year, but only Disney can give cars the qualities of human beings. Although this ends the debate for me — only humans can possess a culpable mens rea, for example, and may thus be morally blameworthy for their actions — many others, maybe most Americans, would disagree, believing that corporate criminal liability is justifiable. But to be convincing, the argument would have to be premised on some sort of utilitarian formula, not the alchemic conversion of legal fictions into demonstrable facts.

Perhaps the key question for such calculus will be the relative harm to individuals, including the injury to innocent people. If Alschuler seems to give too much weight to the undeserved suffering from corporate punishment as compared to third-party harms in other cases, Beale does not seem to acknowledge the aforementioned difference in impact between corporate and individual punishment. Beale is absolutely correct that drug enforcement has had a devastating effect on individual defendants, families, and communities. As I have argued

20. Id.
21. See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 465 (11th ed. 2003) (defining "fiction" as "something invented by the imagination or feigned").
22. BLACK'S LAW DICTIONARY 913 (8th ed. 2004) (defining "legal fiction").
23. Courts and legislatures have long accepted this legal fiction. See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).
elsewhere, there is no area of American criminal justice that is in greater need of reform than drug prohibition. But if we focus on individual cases, there is an undeniable difference in third-party harms from prosecuting a person versus a major corporation. If an individual is convicted and punished for a drug offense, the family may be deprived financial and emotional support, his lawful employer may lose a trusted worker, and the community may surrender one of its members. But if a corporation is the target, literally thousands of people may lose their jobs, customers may be denied their source of goods and services, and entire communities may be destroyed. Beale downplays collateral consequences because they have “no necessary relationship to the question of the corporation’s criminal liability.” But the ostensibly collateral consequences of a drug conviction might be all that matters to the defendant, who may become ineligible for government grants, may lose his professional license or be unable to find employment, may have his child custody arrangements negatively affected, and so on. Although corporations don’t have children, they do have employees who may face unemployment as a collateral consequence of any corporate prosecution and subsequent business failure.

This brings us to the issues of prosecutorial discretion and comparative analysis. As for the former, Beale contends that if prosecutors have too much power, it is a problem endemic to the entire criminal justice system rather than corporate crimes alone. Today, it is scarcely debatable that prosecutors exercise vast and largely unchecked discretion at each stage of the criminal process. Likewise, most agree that this discretion is subject to outrageous abuses, due to the belligerent nature of American adversarialism, the politicization of the criminal justice system, and the self-interests of prosecutors, whose success and career prospects are often measured by the quantity and notoriety of their convictions. The fact that abuses of discretion may occur in any criminal case is not a particularly compelling argument against limiting it in one category. Indeed, a corporate prosecution may multiply the concerns raised by discretionary decision-making, due to the large number of innocent parties that could be impacted and the potentially distortive self-interests in pursuing a major corporation. As for the lessons of comparative analysis, Beale believes developments in other nations demonstrate that corporate criminal liability is not “an outdated historical vestige” without a valid role in modern jurisprudence. I do not doubt that the basis for corporate prosecutions has

25. Beale, Response, supra note 19, at 1500.
expanded in Western Europe; the question for me, however, is whether this development justifies the amount of discretion exercised by American prosecutors in corporate cases.

Despite the apparent convergence of criminal justice systems, significant differences remain between the prosecutorial function in the United States and in Europe. Continental prosecutors regard themselves as judicial officers who apply the law as a science and find the truth through rational analysis. They accept the job as an end itself, rather than a means to a high-paying position with a private law firm, and their status as representatives of the public interest is unencumbered by raw politics. Accountability comes through hierarchy, guidelines, the review of superior prosecutors, and the desire to conform to role conceptions, imbued by a collegial environment of high professional ethics. Pressures do exist, especially the sometimes overwhelming quantity of cases that must be disposed of. But unlike the United States, the number and rate of convictions and the amount of punishment are not the basic measures of success. The judicial-minded goals of finding the truth and achieving just outcomes are paramount, affecting oversight of police investigations, the preparation of case files, the exercise of case-ending discretion, the presentation of evidence, and all other aspects of the prosecutorial function. This is not to say that determining the “objective truth” is (always) possible or that European prosecutors “get it right” every time. However, the legal culture, the education and training, and the hierarchy and expectations of prosecutors all shape their self-perception and practice. These soft factors constrain European prosecutors as much as any hard legal limit. So although corporate criminal liability may have increased in peer nations, the merits of which can be debated as a theoretical matter, abusive decision-making in corporate prosecutions may be less of a concern in Western Europe than in the United States.

III. CORPORATE COMPLIANCE AS AFFIRMATIVE DEFENSE

Like Beale, Professor Pamela Bucy offers several arguments in support of corporate criminal liability, beginning with the extensive harm that such entities can inflict upon individuals and society in general. That danger is heightened by business norms and structures that emphasize success by any means, a level of tolerance for legal violations, and employee ignorance as to the full range of


corporate activities. Bucy also notes some aspects of corporate entities that may encourage government use of the criminal sanction, like the deterrent value of punishing corporate executives and the relative ease of prosecuting the corporation rather individual actors. But Bucy also provides reasons not to prosecute corporations. Similar to Alschuler, she recognizes that corporate punishment can have a detrimental impact on employees, shareholders, customers, and others, the vast majority of whom may be innocent of any wrongdoing. In addition, the breadth of prosecutorial discretion in this area may hinder business innovation and valuable risk-taking. Punishment becomes especially tenuous when the government is not required to prove knowledge of the violation and a duty to comply with the regulations, or worse yet, when corporate executives have done everything within their power to ensure legal compliance.\(^{32}\)

Given the various arguments for and against corporate criminal liability, Bucy presents a skillfully drafted legislative proposal and concomitant amendment to the Federal Rules of Criminal Procedure, attempting to strike a new balance between the power of the prosecutor and the exculpatory claims of the corporate defendant. Specifically, she articulates an affirmative defense to criminal liability where “the entity demonstrates that at the time of the offense it had in place an effective corporate compliance program relevant to any crimes committed.”\(^{33}\) The article concludes with a list of elements for an effective corporate compliance plan – for example, a training program for directors, executives, and other employees on their compliance-related obligations – followed by a discussion about what should be done when a violation occurs.

Bucy’s proposal comports with the suggestions of others in favor of a corporate compliance defense.\(^{34}\) In fact, it builds upon judicial precedents and legal scholarship, the policies of the U.S. Sentencing Commission and Department of Justice, and the prophylactic practices of corporations trying to avoid criminal liability.\(^{35}\) The proposal makes eminent sense, and I pause here only to raise a pair of concerns, one regarding the body of crimes for which corporations may be liable and the other about the possibility that any reform in this area will be adopted. As for the former, there are many in the world of law and business (as well as at least a few academics) who suspect that the general class of white-collar offending,

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32. See, e.g., United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (holding that a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent); see also Bucy, supra note 31, at 6.

33. Bucy, supra note 31, at 1446.

34. See Alschuler, supra note 2, at 1392 (arguing that the goal is to induce internal corporate monitoring).

35. See id. at 1392 (listing factors that encourage compliance programs such as the U.S. Attorney’s Manual, the Federal Sentencing Guidelines, the rules of several administrative agencies, and the corporation law of Delaware); Bucy, supra note 31, at 1443-46 (referring to the Sentencing Guidelines’ steep sentence reduction for any organization that had an effective compliance and ethics program in place at the time of offense, and the U.S. Department of Justice’s direction to federal prosecutors to consider the “existence and effectiveness of the corporation’s pre-existing compliance program” before indicting).
including corporate crime, often lacks the element of harmful wrongdoing and therefore has no place in a decent penal code.36 Nearly a half-century ago, Professor Sanford Kadish noted that some regulatory crime “resembles acceptable aggressive business behavior” without moral stigma.37 Not only does it appear indistinguishable from ordinary business activity, but the relevant conduct may be “affirmatively desirable in an economy founded upon an ideology . . . of free enterprise and the profit motive.”38 To this day, it is still debatable whether anti-trust violations and insider trading, for instance, are sufficiently reprehensible to justify criminal sanctions.39 An affirmative defense may have no impact on the overcriminalization of business activity and only a limited effect on corporate precautions, and some might argue that a defense could entrench dubious laws or impede perfectly legal, productive endeavors by encouraging corporations to steer far wide of the relevant activity.

The second concern is practical, whether an affirmative defense for corporations is viable in the wake of some of the most dramatic financial scandals in U.S. history. The Enron debacle infuriated many American citizens, as did Bernard Madoff’s mass investment scam. These incidents and others like them – such as the accounting fraud of Adelphia and WorldCom, and the investment shenanigans of the Stanford Financial Group – may shock the public and even provoke calls for reform, often with little thought about the status of white-collar crime (or more narrowly, corporate crime) or analogous instances of misconduct in the past. Accounting fraud and Ponzi schemes are nothing new,40 which should prompt reflection on how such swindling is still possible today. But collective anger can impede calm deliberation and pursuit of sensible resolutions, with the mass media stoking public resentment through words and pictures. There was, for example, Enron chairman Ken Lay advising employees to buy corporate stock, when, in

38. Id. at 436.
40. “Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors.” Alexander v. Compton, 229 F.3d 750, 759 n.1 (9th Cir. 2000).

The term ‘Ponzi scheme’ is derived from Charles Ponzi, a famous Boston swindler. With a capital of $150, Ponzi began to borrow money on his own promissory notes at a 50% rate of interest payable in 90 days. Ponzi collected nearly $10 million in 8 months beginning in 1919, using the funds of new investors to pay off those whose notes had come due.

United States v. Masten, 170 F.3d 790, 797 n.9 (7th Cir. 1999).
fact, he knew the company was in distress and Lay himself was vigorously converting stock to cash. 41 The reports about Madoff also seem exasperating, like the roundtable interview where he made the offhanded claim that it would be impossible for major securities fraud to go undetected. 42

In the end, Madoff was right: his wrongdoing was eventually discovered — but not before billions of dollars were lost. With business crime of this magnitude, the most powerful images tend to be those of innocent individuals harmed by the wrongdoing and its revelation, investors whose retirement funds vanished, and company employees who lost their jobs. Their stories can be heart-wrenching, and when a critical mass of public outrage is reached, government action might look like a foregone conclusion. In the aftermath of Enron’s meltdown and other corporate scandals, Congress passed the 2002 Sarbanes-Oxley Act by nearly unanimous vote (423-3 in the House, 99-0 in the Senate). Public and political outrage drove the legislation, as House sponsor Michael Oxley quipped: “Summary executions [for corporate executives] would get 85 votes in the Senate right now.” 43 Among other things, Sarbanes-Oxley makes senior executives individually responsible for financial reports, backed by new crimes and harsher penalties. Some might also expect a tough government response to prevent the type of investment scams uncovered in recent times. On June 29, 2009, the trial court doled out a 150-year sentence for Madoff, whose wrongdoing the judge described as “extraordinarily evil,” “not merely a bloodless crime that takes place on paper, but one that takes a staggering toll.” 44 One newspaper foresaw Madoff suffering “everlasting consumption in the jaws of the Devil,” 45 while another suggested that his crimes would “put an entire era on trial.” 46

In truth, though, Bucy’s proposed affirmative defense would have little relevance for Ponzi schemes and similar financial stratagems (e.g., pyramid scams). 47

41. See, e.g., Paula Dwyer, The SEC to Top Execs: Read the Fine Print, BUSINESS WEEK, July 26, 2004 (explaining that Lay urged workers to follow his lead and buy Enron stock although he was dumping far more stock than he publicly acquired).

42. See, e.g., Factbox: Bernard Madoff quotes, REUTERS, Dec. 17, 2008, http://www.reuters.com/article/ousiv/idUSTRE4BG0C120081217 (“In today’s regulatory environment, it’s virtually impossible to violate rules . . . but it’s impossible for a violation to go undetected, certainly not for a considerable period of time.”).


46. Diana B. Henriques, Madoff Is Sentenced to 150 Years for Ponzi Scheme, N.Y. TIMES, June 30, 2009.

47. Although it is possible for a Ponzi scheme to exist within an otherwise legitimate enterprise, such scams tend to be part of the core “business” conducted by owner-management rather than the misconduct of a rogue employee. For instance, in order for an agreement to constitute an “investment contract” subject to federal regulation, an investor must be “led to expect profits solely from the efforts of the promoter or a third party.” S.E.C. v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). Implicit within this definition is active marketing and promotion of the investment scheme, as well as the “undeniably significant . . . essential managerial efforts which affect the failure or success of the enterprise.” S.E.C. v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482 (9th Cir. 1973).
Moreover, the legislative response to the Enron et al. fiasco might prove to be an exception. It has been suggested that white-collar offending is less likely to incite "moral panics,"

48 a social phenomenon of public fear and anger that can trigger momentous legislative and enforcement activity.49 And, of course, not all white-collar crime involves corporations, though they often get painted with the same broad brush. But regardless of whether the spate of financial wrongdoing inspires more penal provisions and harsher punishments, and despite the unfairness of associating such misconduct with all of corporate America, the current environment hardly seems conducive to the enactment of a new defense for corporations. For instance, recent multi-billion dollar federal bailouts did not sit well with many citizens, given A.I.G.'s use of public largesse to pay executive bonuses and General Motors' bankruptcy after the cash infusion. Besides, the current Administration has signaled a desire for a stronger regulatory regime, and it is not at all obvious that the Justice Department (and its state analogues) would support a legislative narrowing of corporate liability, even if cast as a limited trial defense where the corporation bears the burden of proof.

IV. CORPORATE REHABILITATION

If change is to come, it may well have to take place within the existing framework of corporate crime, with a particular focus on the question of sentencing. After discussing various arguments about business wrongdoing and concluding that corporate criminal liability is justifiable, Professor Peter Henning lays out an exceptionally thoughtful case for rehabilitation as the ultimate goal of any punishment imposed on the offending organization.50 Once the responsible employees are fired and restitution provided to the identifiable victims, "the issue should

1973). In any event, it would be virtually impossible to demonstrate the existence of an effective compliance program if a Ponzi scheme ripened within a corporation.

48. See Michael Levi, Suite Revenge?: The Shaping of Folk Devils and Moral Panics about White-Collar Crimes, 49 Brit. J. Criminology 48, 63 (2009); cf. Stanley Cohen, Folk Devils and Moral Panics (Routledge 1972). In contrast to street crime, business offenses are usually concealed in private transactions, lack physical danger to direct victims and others, tend to occur over extended periods of time, and are committed by people who look "like us" (i.e., stereotypical ordinary citizens). As criminologist Michael Levi recently wrote, "white collar criminals are more like Faustian devils who, when revealed as large-scale lawbreakers, being central to the social structure, are also threats to our moral selves." Levi, supra, at 65. Only on occasion is the white-collar criminal perceived as a "folk devil," generating a moral panic in society and rash, sometimes draconian action by politicians. Ken Lay et al. are the exception, their misconduct having prompted a stern congressional response via the Sarbanes-Oxley Act. But more often than not, Levi argues, white-collar criminals elude the moniker of folk devils engaged in evil deeds. See id. at 63. The case of Bernie Madoff may prove to be an outlier. Although he was demonized in the public, the culmination of Madoff's criminal case was not as climactic as might have been expected. It was quite telling, for example, that news of his virtual life sentence received second-billing to the ongoing coverage of Michael Jackson's death. See, e.g., Frank Rich, Bernie Madoff Is No John Dillinger, N.Y. Times, July 5, 2009, at WK8. Whether the Madoff affair prompts legislative change is yet to be seen.


be what steps should the organization take to reform itself to limit the possibility that the wrongdoing will occur in the future.”51 According to Henning, the existence of a compliance program is not always enough. Almost all publicly traded companies have some type of compliance regimen, informed by a plethora of rules on instituting an effective program. Yet some organizations continue to violate the law, often as a result of a dysfunctional corporate culture. In such situations, Henning suggests that the criminal justice system can promote the restructuring of a corporation toward an ethos of respect for legal obligations. This does not necessarily require a conviction, as prosecutors can employ their vast charging discretion as a prod for change. The mere threat of criminal charges and the potential consequences at trial may encourage corporations to enter into “deferred prosecution agreements” (DPAs) and “non-prosecution agreements” (NPAs), which can require extensive internal renovations overseen by a monitor of the government’s choosing.52

This criminal justice-based approach to corporate reform is not without its problems. As Henning notes, rehabilitation as an aim of punishment fell into disrepute several decades ago. He mentions a number of reasons for the downfall of the rehabilitative ideal, such as sentencing disparities among similarly situated offenders, but suggests that none apply in the context of corporate crime. One objection might be relevant to public opinion, however—the lack of moral censure. When applied to an individual, rehabilitation might appear to be a boon for the offender rather than a form of punishment. Because the crime is deemed the product of a disorder rather than an act of free will, there may be no condemnation of wrongdoing, no call for offender accountability, and no affirmation of the victim’s right not to be victimized. Like other grievances against rehabilitation, this criticism may be totally inapposite to organizational punishment. How the public will view corporate rehabilitation, however, remains to be seen.

Another concern is the aforementioned potential for prosecutorial abuse, epitomized by a DPA that resulted in a corporation endowing a law school chair at the U.S. Attorney’s alma mater.53 As of now, there are no guidelines as to the propriety and specific terms of a DPA or NPA, nor are there any limits as to the time length and intensity of prosecutorial oversight of an agreement. In essence, a corporation may be held in receivership by a prosecutor, who becomes a sort of super-CEO or board chairman with the power to seek indictments should he become dissatisfied. Needless to say, the idea of state control of a private enterprise is problematic in an

51. Id. at 14.
52. See id. at 16 (“[By] focusing more on prospective questions of corporate governance and compliance, and less on the retrospective question of the entity’s criminal liability, federal prosecutors have fashioned a new role for themselves in policing, and supervising, corporate America.”); see also Brandon L. Garrett, Structural Reform Prosecution, 93 Va. L. Rev. 853 (2007).
53. See Henning, supra note 50, at 1432 (discussing scandal in which Bristol-Myers Squibb endowed a chair at the law school alma mater of the United States Attorney negotiating the agreement); see also Stephanie Martz, Trends in Deferred Prosecution Agreements, CHAMPION, Nov. 2005, at 45.
economy premised on free markets, even more so if the predicate crime is of
doubtful validity. All of this points to the question of whether prosecutors, as
partisans in an extremely competitive and sometimes politicized adversarial
process, should effectively serve as adjudicators of corporate guilt and punish-
ment. Henning may be right that corporate rehabilitation is the appropriate
justification for punishment, but the theory that reigns in any given case will be
that of the prosecutor, who may believe that deterrence or retribution or expressive
condemnation is the correct rationale. What is more, the specter of self-interested
decision-making looms large, where cases are pursued and agreements reached
based not on the best interests of victims and society at large but on the personal
benefits that accrue to prosecutors. The agency costs of prosecutorial discretion in
this area are different only in degree rather than in kind from those associated with
non-corporate crime, with the basic question staying the same — cui bono, “for
whose benefit.” But the possible rewards for prosecutors, in terms of publicity and
career advancement, are far greater when the target is a major corporation.

This leads me to ponder whether the above problems might be alleviated by
integrating principles of restorative justice into Henning’s rehabilitative model of
DPAs and NPAs. Restorative justice can be described as an approach to punish-
ment that brings together all relevant parties to a crime in a group decision-making
process to reach a mutually agreeable outcome.54 In general, the participants are
those who have been directly affected by the crime or have a cognizable stake in its
resolution: victims, offenders, family members, law enforcement representatives,
and others within a “community of interest.”55 Somewhat like alternative dispute
resolution practices in private law, restorative justice utilizes non-adversarial,
informal procedures, where victims and other stakeholders are provided the
opportunity to describe the harm that has been caused, to offer their views on the
offender and the source of wrongdoing, and to put forward their ideas about
punishment. Typically, a case is referred to a restorative justice process as a form
of diversion from prosecution or as a condition of probation after an accepted
guilty plea. Through mediated dialogue and negotiation, premised on collabora-
tive, consensus-based decision-making, the process seeks participant agreement
on an appropriate resolution. One could imagine a DPA or NPA calling for, inter
alia, corporate leadership (e.g., executives and board members) to take part in a
restorative justice process and to fulfill any obligations under the resulting
participant agreement.

Myriad details about corporate restorative justice in the U.S. would need to be
fleshed out. Among other things, restorative justice can be separated into distinct

54. See, e.g., Erik Luna & Barton Poulson, Restorative Justice in Federal Sentencing: An Unexpected Benefit
of Booker?, 37 McGeorge L. Rev. 787, 789 (2006); John Braithwaite, Restorative Justice: Assessing Optimistic
55. Allison Morris & Warren Young, Reforming Criminal Justice: The Potential of Restorative Justice, in
RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 11, 14 (Heather Strang & John Braithwaite eds., 2000).
conceptions, substantive and procedural, and various processes can be described as restorative.\textsuperscript{56} For instance, discrete crimes like burglary are amenable to the best-known restorative practices: victim-offender mediation, family group conferencing, and circle sentencing. But in many cases of corporate crime, the complexity of wrongdoing, the large number of victims, and the difficulty of assessing aggregate harm could require a different model, perhaps along the lines of a "truth and reconciliation commission."\textsuperscript{57} Unfortunately, the brevity of this response precludes a thorough review of the theory and practice of restorative justice. There is voluminous literature on the topic,\textsuperscript{58} however, including in-depth discussions of restorative justice for corporate crime. In a series of works, Professor John Braithwaite has marshaled evidence that restorative justice can reduce reoffending by corporations.\textsuperscript{59} Numerous factors may be at work here, including the non-adversarial nature and open inquiry of restorative practices and, in particular, the face-to-face meetings between corporate leaders and victims.

As compared to the typical process of reaching a DPA and NPA, which interpose legal advocates and bear some resemblance to standard corporate deals, the presence of actual victims and the articulation of the injuries they have suffered may frustrate any attempt to neutralize or abstract away the offense. "[E]ven the worst of corporate malefactors has a public-regarding self that can be appealed to," Braithwaite notes, "a self-categorization as 'responsible businessman,' for example."\textsuperscript{60} Directly confronting the harm caused to victims may have a powerful impact on a corporate executive, appealing to his positive self-image and motivating him to ensure against future victimization. Moreover, the crime can be condemned and the offender held accountable through a process that allows victims and other stakeholders to express their views on the appropriate outcome, thereby incorporating their own theories of punishment into an agreed-upon

\textsuperscript{56} See generally Erik Luna, In Support of Restorative Justice, in CRIMINAL LAW CONVERSATIONS 585, 586 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009).

\textsuperscript{57} See Zvi D. Gabay, Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime, 8 CARDozo J. CONFLICT RESOL. 421, 476-84 (2007) (describing a truth and reconciliation commission that would focus on restoration and "making amends").


\textsuperscript{60} Braithwaite, Assessing Optimistic, supra note 54, at 58.
resolution. To be sure, the prosecutor will have the final say on the propriety and content of a DPA or NPA with the corporation. But that decision may be less susceptible to abuse against the background of opinions expressed by those affected by the crime and the resolutions they would find acceptable.

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In the end, however, I am no more confident about the prospects for corporate restorative justice in America than the feasibility of other proposed reforms offered in this symposium. And in all fairness, each and every claim I have made here could be countered in an iterative process of assertion and response. This is part of what makes the topic so vexing. In fact, corporate criminal liability may serve as a type of jurisprudential Rorschach test: what people see is a reflection of their own position on punishment theory, for instance, and their attitude toward capitalism. Nonetheless, the symposium contributions help elucidate the issues presented by corporate criminality, clarifying in my own mind the various problems and potential solutions. Henning’s insightful discussion of corporate rehabilitation should be taken to heart by federal prosecutors, judges and sentencing commissioners, forcing them to consider the necessary reforms to prevent future crimes. Bucy’s proposed affirmative defense offers an excellent model for striking a fairer balance between the power of prosecutors and the prophylactic efforts of corporations. In turn, Beale has penned one of the sharpest arguments in favor of corporate criminal liability, which may inspire, inter alia, a broader inquiry that extends beyond our own borders. And Alschuler has made concrete the intuition of many that something is wrong with the law, namely, that “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.” I couldn’t agree more — although like Alschuler, I suspect that corporate liability may be a permanent part of the American legal system. What we might hope for is greater clarity in the way we view corporate criminal liability and the reform of its more discreditable manifestations. The idea of punishing corporations may always be curious, but it need not be unjust.

61. See, e.g., id. at 14-15 (discussing restorative justice approach to Australian insurance fraud case, culminating in a resolution "grounded in the different kinds of theories the rich plurality of players involved in this restorative justice process came up with").

62. In her first oral argument on the U.S. Supreme Court, Justice Sonia Sotomayor seemed to challenge the idea of corporations as bearers of constitutional rights. See Citizens United v. FEC, 129 S. Ct. 2893 (No. 08-205), reargued Sept. 9, 2009, p. 33, available at http://www.supremecourts.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf (noting that it was "courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with ... [by imbuing] a creature of State law with human characteristics"); See also Jess Bravin, Sotomayor Issues Challenge to a Century of Corporate Law, WALL ST. J., Sept. 17, 2009, at A19.

63. Alschuler, supra note 2, at 1392.