A Restatement of Corporate Criminal Liability's

Theory and Research Agenda

Samuel W. Buell*

This Article, for a collection in which authors were asked to "imagine a world without corporate criminal liability," specifies the material questions that should be addressed if debate about the doctrine is to progress past longstanding and oft-repeated assertions. The strongest case for corporate criminal liability is based on the potential for its unique reputational effects to contribute to the prevention and deterrence of crime within corporations. Further research should take up a variety of unanswered questions about those effects having to do with mechanisms and audiences. The relevant inquiries are both theoretical and empirical. Answers will lie in further understanding of organizational and individual behavior more than in familiar models of the firm and deterrence that have largely shaped the literature to date.

A Restatement of Corporate Criminal Liability's

Theory and Research Agenda

Samuel W. Buell

I. INTRODUCTION 938
II. BASIC CASE FOR CORPORATE CRIMINAL LIABILITY 939
  1. *Enterprise Liability and the Large Modern Corporation* 940
  2. *Instrumentalism as the Exclusive Methodology* 941
  3. *Blame and Reputation in Instrumental Corporate Regulation* 942
  4. *De jure and de facto American Corporate Criminal Liability* 944
III. EXTENSIONS AND COMPLICATIONS 945
  1. *Audiences* 945
    A. *Insiders: Owners, Directors, Managers, and Employees* 946
    B. *Outsiders: Competitors and Counterparties* 948
  2. *Mechanisms* 949
    A. *Information Production* 949
    B. *Civil and Criminal Enforcement* 951

---

* Bernard M. Fishman Professor of Law, Duke University (buell@law.duke.edu). Many thanks to Jennifer Arlen, Miriam Baer, and participants in an October 2021 conference at Georgetown Law and a November 2021 Berkeley Law, Economics, and Business Workshop for helpful comments and challenges.

C. Settlement Practices 953
D. Levers of Public and Private Control 956
E. Obstacles to Internalization 957
F. Corporate "Wrongdoing" versus Corporate Crime 958
IV. ON THE RESEARCH AGENDA 958
V. CONCLUSION 960

I. INTRODUCTION

Authors in this volume were asked to imagine a world without corporate criminal liability. Under current American law and practice, which embrace the doctrine, this amounts to asking what corporate criminal liability does in the corporate arena. If we took it away tomorrow, what, if anything, might be functionally missing? Rather than posing the age-old and somewhat worn academic question of the theoretical purposes of corporate criminal liability, the counter-factual, with its call to envision a state of affairs on the ground, compels us to consider more deeply what corporate criminal liability is doing, in an exclusive way, in the current environment of law and its enforcement.

The last two decades—roughly the period since the DOJ first issued the famous "Holder Memo"[1]—have seen the busiest period of corporate criminal enforcement in U.S. history. The practice has boomed. Meanwhile, it is spreading globally, carried along by the expansion of multinational business activity and developments in law reform and legal cultures in Europe, Asia, Latin America, and elsewhere.[2] With the benefit of many years of observation, it has become more feasible and useful to move beyond the traditional contours of debates about corporate criminal liability. We can now explore instrumental dimensions of corporate prosecutions more particularly and, at the least, identify the questions we should be asking when contemplating whether holding corporations criminally liable or credibly threatening to do so profitably contributes to the project of controlling corporate crime.

The core of an instrumental argument for contemporary corporate criminal liability, to be elaborated in the body of this Article, proceeds as follows. Fifteen years ago, in a long-form contribution to the massive theoretical literature, I argued that corporate criminal liability could provide an instrumentally valuable vehicle for ascribing blame at the institutional level for wrongdoing that is the product of group activities—at least those that take place within legal entities.[3] Institutions have reputations, and those reputations have

1. The Holder Memo, and its several major successors, are integrated into the current Justice Department guidelines for prosecuting corporations. U.S. Dep't of Just., Just. Manual § 9-28.000 (2018), https://www.justice.gov/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/9V24-X2CZ] [hereinafter Just. Manual]. For the full history, see, for example, Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006); Court E. Golumbic & Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact of the Justice Department's Corporate Charging Policy*, 65 HASTINGS L.J. 1293 (2014).

2. For treatment of these developments, see Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020).

3. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006) [hereinafter *Blaming*]; *see also* Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS. 25 (2020) [hereinafter *Retribution*] (arguing that corporate criminal liability should be evaluated exclusively on

value. People closely affiliated with institutions often care about institutional reputation for at least two reasons. First, the value of the firm and its products affect those people's own economic prospects. Second, people's self-image and enduring reputations, which may have longer-term economic and psychological importance to them, are often substantially tied to the institutions to which they devote their working lives. Damage to their institution's esteem can affect individuals' self-esteem and can be experienced as damage to themselves.

Known incidents of wrongdoing can cause reductions in institutional reputations. Among audiences who collectively determine reputational capital, legal process can affect the extent to which incidents of wrongdoing are (1) known and (2) understood to be relevant to reputation. Criminal legal process, for several reasons, is the most potent among existing legal mechanisms for exposing and enhancing the reputational consequences of institutional wrongdoing. Individual criminal prosecutions for business crimes, as powerful as they may be as a deterrent mechanism, cannot serve to ascribe blame at the institutional level. Such enforcement actions, therefore, cannot be expected to cause individuals who are not themselves subjects of prosecution to understand, internalize, and react to matters of group or institutional responsibility. Corporate criminal liability, therefore, potentially supplies an instrumental mechanism that no other existing form of legal process offers.

The more that those of us in the field observe the boom times of corporate criminal enforcement, the more this form of argument raises important questions that require further work in the literature on corporate criminal liability. The purpose of this Article is to argue for which such questions are the most profitable to continue exploring. Most have to do with the mechanisms by which criminal enforcement, blame, and reputation operate and interact, given the law and institutions that have evolved to respond to corporate crime in the United States, both within and outside government. What is needed is a more detailed specification of those mechanisms and the complications that may detract from them.

The basic case for corporate criminal liability on which this Article is predicated remains contested on a variety of points. But the adoption and reflection of that case in widespread and entrenched practice, both within and outside the United States, makes it a reasonable foundation for continuing research. Nonetheless, Part II of this Article will, in brief form, argue for the basic case by summarizing the prior claims of this author and others. Part III, the core of this Article, will seek to specify important remaining theoretical and empirical questions about corporate criminal liability that call for further work. Part IV will suggest how some of those questions might profitably be addressed. Part V concludes.

II. BASIC CASE FOR CORPORATE CRIMINAL LIABILITY

The abundant literature on corporate criminal liability shares at least one idea in common: the doctrine needs justification.[4] One might question this assumption. In

---

instrumental terms because it is not possible to punish corporations retributively).

4. The view that the doctrine bears the burden seems to be universal across supporters and critics. *See, e.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM.

punishment theory, the idea that criminal punishment requires justification is premised, for the most part, on its unique capacity to impose physical harm.[5] Because corporations cannot be imprisoned or otherwise physically punished and have no effective capacity to feel bodily or psychic pain, the need for justification would not seem so obvious.[6] In other words, what is the special harm or cost in *criminal* liability for corporations, as opposed to garden-variety liability, such that we should worry at such length over the doctrine's theoretical foundations?

Nonetheless, this discussion will proceed from the standard position of assigning to corporate criminal liability the burden of finding justification. The simplest way to invoke this burden is to point out that civil and regulatory legal measures could impose all the same legal sanctions on a corporation that could be imposed through the criminal process.[7] Accordingly, criminal liability should be evaluated as an additive.

1. *Enterprise Liability and the Large Modern Corporation*

It is fairly easy to gather consensus around the foundational legal idea that if we are going to charter legal entities and permit them to pursue industrial programs, the law ought to hold them liable for the actions of their human agents that constitute violations of private and public law.[8] This may be especially true when compensation is called for, given that businesses are usually better able to fulfill compensation requirements than their employees. But the normative case for enterprise liability remains strong even if, as in the present discussion, the concern is exclusively how to reduce future legal violations by agents of business organizations.

A centuries-old behavioral model holds that a firm's managers consider the potential liability cost to the firm as worth devoting resources and attention to avoiding. The most direct way to avoid such costs is to take steps to decrease the likelihood that the firm's agents will commit violations by (1) employing prevention measures designed to cajole or compel agents to remain within the law and (2) engaging in self-policing efforts that will discover wrongdoing when it cannot be prevented, thereby increasing the overall probability (and, importantly, *perceived* probability) that agents will be discovered and sanctioned if and when they violate—over and above any such probability from legal

---

CRIM. L. REV. 1285 (2000); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997); John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); *Blaming*, *supra* note 3; Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009).

5. *See* Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 266 (2008) (noting the accepted philosophy of criminal law that punishment needs justification "because it involves the infliction of pain or other form of unpleasant treatment") (internal quotation marks omitted).

6. *See Retribution*, *supra* note 3, at 35–36.

7. Vikramaditya Khanna was probably the first to clearly explain the burden in this form. *See generally* Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).

8. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (AM. L. INST. 2006).

enforcement by outside parties.[9]

This is a very old idea, the roots of which evoke images of masters of the manor whose servants clumsily run over townspeople with the wheels of their carts. Moving this idea, as American law so zealously has, into the realm of the massive modern business enterprise both strengthens and complicates the case for it. The size and complexity of organizations make strong structural incentives seem more essential to the project of influencing how agents behave at work. But getting the mechanism of influence to work right—what is now called the industry of "compliance"—becomes a vastly more complicated matter than a boss telling her employee to shape up and cut it out, or she will be fired.[10] Among many other complexities, the incentives of the manager of a large multinational financial institution differ substantially from those of a medium-scale nineteenth-century farm or shop owner, not least due to the scale and complexity of modern compensation markets for workers who sell intellectual capital.

Because of convincing scholarly argument and the fact that the idea has fully persuaded enforcers and their institutions, we at least know that pure agency liability (*respondeat superior*) would not encourage the best level of prevention and self-policing. Legal regimes must credit firms for those efforts, against the maximum possible sanction, so that firms do not choose to ignore internal misconduct and take the liability risk they would face in any event[11] (if the law is pursuing enterprise liability only for compensation, this concern may not be relevant). Although it is very difficult to specify, there is an optimal mix of stick and carrot for using enterprise liability to reduce agent wrongdoing.

Perhaps other measures, such as greater investment in public enforcement institutions, could substitute for enterprise liability in the project of reducing violations.[12] But even with more public capacity, it would seem wasteful to dispense with a liability tool that can enhance deterrence at low cost. Rules are cheaper than lawyers and investigative agents, and deterrence costs can be offloaded on private entities when they invest in efforts to avoid liability. In any event, the corporate sector has so massively outgrown public enforcement institutions that even with much larger agencies, the government could not effectively police legal violations within businesses without private-sector help.

2. Instrumentalism as the Exclusive Methodology

To bracket an issue, the basic modern case for corporate criminal liability sets aside the question of whether enterprise liability is necessary to fulfill deontological imperatives.

---

9. *See generally* Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

10. *See generally* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249 (2020); Miriam H. Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599 (2020).

11. *See* Arlen & Kraakman, *supra* note 4, at 735–41 (analyzing the effectiveness of various legal regimes, including *respondeat superior*); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835 (1994) (discussing firms' incentives to avoid discovery of wrongdoing if liability is strict).

12. *See generally* SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE chs. 1, 8 (2016); Daniel C. Richman, *Corporate Headhunting*, 8 HARV. LAW & POL'Y REV. 265 (2014).

The matter of "corporate retribution," which has been debated for some time in the literature and across legal systems, does not preoccupy the American practice of corporate criminal liability, which is dominated in doctrine and enforcement practices by instrumentalist programs aimed at the forward-looking project of reducing corporate crime.[13] Moreover, as I have argued in a recent essay, retributivism with respect to corporations is a dead end because corporations, whether or not they may deserve blame for wrongdoing, cannot be punished in a retributive manner.[14] They may be capable of deserving retribution in some sense, but they are not capable of receiving it.[15] Therefore, debate about enterprise liability ought to leave the justification of retributivism aside. Further discussion about justifying corporate criminal liability should proceed from the premise that legal design in this area seeks to reduce the incidence of corporate crime at a justifiable cost.

3. Blame and Reputation in Instrumental Corporate Regulation

There is now substantial empirical and theoretical literature about the idea of reputational "sanctions" in corporate regulation[16] (note that "sanction" is not precisely the correct term since enforcers or courts cannot directly impose reputational damage to firms through judgments, sentences, or settlements). It is not controversial that (1) disclosure of wrongdoing can cause observers to lower their assessment of a firm's value and to make decisions to reduce or alter dealings with a firm; (2) legal processes can affect the extent to which wrongdoing is revealed to and understood by observers; and (3) some aspects of legal sanctions may be manipulable on the variable of how they impact a firm's reputation, even if only roughly.

Reputational effects thus constitute an additional mechanism for deterrence of corporate wrongdoing through enterprise liability. In the core case for enterprise liability, the desire of owners and managers to reduce the costs of legally-imposed penalties encourages them to invest in efforts to prevent employees from committing violations and

---

13. *See* Just. Manual, *supra* note 1, § 9-28.000; *see also id.* § 9-47.120 (FCPA Corporate Enforcement Policy).

14. *Retribution*, *supr*a note 3, at 35–36.

15. Interestingly, it can be argued that even *respondeat superior* liability in its original form was based in part on a belief about the moral responsibility of masters for the acts of their agents. *See* Paula Giliker, *Making the Right Connection: Vicarious Liability and Institutional Responsibility*, 17 TORTS L.J. 35, 50 (2009) (discussing the potential moral origins of the doctrine).

16. While the literature varies greatly on several normative questions, it agrees that reputational effects on corporations from the exposure of wrongdoing are real and can be substantially influential. *See, e.g.*, Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. LAW & POL'Y REV. 1 (2015); Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Damages from Damages?*, 30 J. LEGAL STUD. 401 (2001); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008); Jonathan M. Karpoff, John R. Lott, Jr. & Eric W. Wehrly, *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653 (2005); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993); Edward M. Iacobucci, *On the Interaction Between Legal and Reputational Sanctions*, 43 J. LEGAL STUD. 189 (2014); Cindy Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87 (Jennifer Arlen ed., 2018); Cindy Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489 (1999); Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907 (2018).

to discover and help punish violations when they do occur (assuming such efforts are rewarded in calculating sanctions). When reputational effects are added to the picture, owners and managers have an additional—and sometimes more powerful—incentive to make efforts to prevent and police employee violations to reduce costs to the firm. To the extent that enforcement can increase the incidence and extent of reputational effects in the wake of instances of wrongdoing, legal process has a stronger tool for discouraging corporate malfeasance than supposed by the foundational rationale for enterprise liability.

Another way to think about the role of reputation is in terms of the criminal law concepts of specific and general deterrence at the level of managers and employees. Legal sanctions are theoretically quantifiable, and managers can calculate how to invest in compliance to reduce or avoid such sanctions. Instances of enforcement help inform managers (inside and outside of sanctioned firms) on how to make those calculations. Such instances also demonstrate to employees inside and outside of sanctioned firms that managers have an incentive to invest in discovering and disclosing violations they may commit, raising the individual probability of sanction and, thus, the level of deterrence of individual wrongdoing.

Reputational impacts—whether feared *ex ante* or observed within firms or industries *ex post*—increase the costs that managers must consider in deciding how to invest in efforts at policing and prevention. Employees can observe these effects as well. Both inside and outside of sanctioned firms, reputational effects will be seen as increasing the likelihood that employee wrongdoing will damage firms, causing more investment in compliance and thus higher probability of sanctions of individuals. Individual "sanctions" may include both legal sanctions and private measures intended to punish, such as reduced compensation, reassignment, and termination.

However, reputational effects differ from legal sanctions in two ways most relevant to modeling deterrence. First, reputational effects are determined extra-legally by a host of factors to be discussed in Part III; thus, the legal system can neither directly nor precisely control them.[17] Second, reputational effects can have a thicker meaning than legal sanctions. Managers and employees can be expected, under some conditions, to experience reductions in their own reputations, including their self-esteem, from damage to their firm's reputation.[18] To put the point too simply for the moment, legal sanctions are a matter of corporate economics, while reputational effects are a matter not only of economics but also of individual and group psychology.

With the basic explanation of reputational effects in view, a unique feature of criminal enterprise liability can be added to the account. While civil actions, particularly civil forms of public enforcement, may involve some responsibility ascription, only criminal liability is centrally concerned with the question of blame. Again, it may not be possible to punish a corporation retributively, but it is quite natural to blame a corporation for what amounts

17. *See* Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 550–51 (2018); *cf.* Cooter & Porat, *supra* note 16 (arguing by way of formal modeling and in the context of private law that courts should sometimes deduct nonlegal sanctions from legal penalties to produce an efficient level of damages).

18. *See* Skeel, *supra* note 16, at 1812 (noting that "corporations and corporate directors are enmeshed in communities in which reputation does indeed matter"). Professor Skeel, it should be noted, expressed skepticism in his treatment of corporate shaming about whether criminal liability would increase shaming effects over civil liability given an equivalently serious instance of exposed wrongdoing. *Id.* at 1831–32.

to a serious moral transgression. This is not a mistaken substitution of something fictional for humans, who are the only true objects deserving blame. As I and others have argued, group wrongs in institutional contexts are real and distinct things, and institutional blame is a widespread and justified social practice for identifying and calling out this phenomenon.[19] To the extent that legal process can frame reputational effects, only criminal legal process has the potential to fully exploit the powerful linkage between blame and reputation.

4. *De jure and de facto American Corporate Criminal Liability*

Take the foregoing argument as the basic, or facial, case for corporate criminal liability. It is not by any means a complete case or knock-down argument. The primary objective of this Article is to seek to specify the most important questions this case leaves unanswered and thus poses for continued research.

Before turning to that effort, a telling item of evidence warrants a note. American law and practice have strongly, and apparently enduringly, embraced a version of the basic case (it is an interesting matter of legal economics and sociology, beyond the scope of this Article, that this has happened in the United States not through legislation or judicial design but through the evolution of how lawyers have practiced corporate enforcement and its defense). Criminal *respondeat superior* liability may have been adopted without sufficient debate, but it was not adopted by accident. The *New York Central* Court and its era were consumed with the problem of how to regulate rapidly burgeoning industrial enterprises.[20] The Court, in this leading decision on corporate criminal liability, explicitly said that the foundational instrumental rationale behind enterprise liability was not only justified but essential to the ability of the federal government to deter crime in the corporate setting.[21]

When the Justice Department began systematically pursuing corporate criminal enforcement in roughly the late 1980s, at the same time the U.S. Sentencing Guidelines and their organizational sentencing scheme became law, *de jure* enterprise liability was quickly supplemented through enforcement and sentencing policies with a *de facto* regime that rewards firms with reduced sanctions for prevention and policing efforts.[22] That *de facto* regime has been constantly amplified and fine-tuned in the ensuing decades as officials, industry, academics, and observers have argued about how to optimally exploit firms' powers to reduce the incidence of corporate crime. Much of that debate and refinement has included discussion of how corporate criminal enforcement informs,

---

19. *Blaming*, *supra* note 3, at 491–500. The essential literature on group responsibility and blame begins with PETER CANE, RESPONSIBILITY IN LAW AND MORALITY (2002), LARRY MAY, THE MORALITY OF GROUPS (1987), LARRY MAY, SHARING RESPONSIBILITY (1992), CHRISTOPHER KUTZ, COMPLICITY (2000), and CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011).

20. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 496–98 (1909) (discussing the justifications for corporate criminal liability, identifying its legal provenance, and rejecting arguments that it could be unconstitutional).

21. *Id.* at 494–95.

22. *See* sources cited *supra* note 3; *see also* Arlen & Buell, *supra* note 2, at 705–09 (providing details of settlement and *de facto* corporate criminal liability practice in the United States); Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41 (2016) (introducing the origin and development of the *de facto* approach of corporate criminal liability).

expresses, and affects the reputations and psychology of managers, employees, customers, and other counterparties. All of this has been premised on a belief that when groups act through the corporate form, they can engage in patterns of wrongdoing that are correctly attributable to the corporation as an organization—its culture, compensation and compliance systems, management quality, history, and more.

The claim is not that current practice has located an ideal point to deter corporate crime; rather, it is that the story of American law and enforcement institutions is strong evidence that the basic case for corporate criminal liability sketched here has been broadly influential and not merely an academic argument. Moreover, evidence is growing that this case is influencing other nations as they alter and expand their legal approaches to corporate crime.

III. EXTENSIONS AND COMPLICATIONS

The basic case stated in Part II is now largely familiar to the field. The primary objective, then, is to complicate this case—not to simply throw doubt on it but to state more precisely the questions and problems that ought to be explored and debated as the basic case is further evaluated. The relevant questions are both theoretical and empirical. They involve, most importantly, matters of audiences and mechanisms. Much more remains to be specified about who is affected by corporate criminal liability and how. The subjects of inquiry are undeniably individuals in their actions and mental processes. The corporation is an instrument in the phenomenon of corporate crime and the law's response to it.

1. Audiences

Sparing readers from the usual four-square diagram, let us divide the relevant audiences for corporate criminal enforcement horizontally and vertically into four categories: insiders versus outsiders to the firm and managers versus employees. Insiders are persons who work for a firm in which wrongdoing has occurred and is sought to be deterred in the future. Outsiders are persons who work for other firms, particularly those in or near the same industry, where wrongdoing is sought to be deterred in the future. Managers are those who exercise powers that can be used to prevent and sanction wrongdoing within the firm. Employees are those who may engage in wrongdoing or consider the possibility of doing so. Of course, managers may themselves engage in wrongdoing, in which case they are equivalent to employees in this analysis, shifting the focus of control mechanisms to more senior-level managers, directors, and perhaps owners of the firm.

There are also other audiences for corporate criminal enforcement. The public and legislative, executive, and judicial officials may watch corporate enforcement with keen interest and draw conclusions from the imposition of corporate criminal liability, or threats to do so, in deciding whether to support legal programs, including the doctrine itself. These audiences matter greatly to the political economy of corporate criminal liability. But they do not impact deterrence mechanisms, except to the extent that political processes may cause change in the doctrines or resources available to enforcement officials and thus change the calculus of corporate actors.[23]

23. This is a complex matter, to say the least. For example, I have previously posited that satisfying public

A. Insiders: Owners, Directors, Managers, and Employees

Insiders are not distinguishable from outsiders *ex ante*. In other words, the category of corporate *insider* is relevant as an audience in deterrence analysis only in terms of how the legal system responds to a corporate crime that has already occurred. It is, of course, basic to deterrence theory that when wrongdoing is discovered, the threat to punish must be made good on so that future threats are clear and credible.

Here is where perhaps the most common criticism of corporate criminal liability arises: the claim that individual criminal punishment is a far superior deterrent to corporate criminal punishment, in both the fear it instills and its capacity to target the wrongdoer without wasteful spillover effects on others.[24] Of course, "others" in these discussions means those associated with corporations; most instances of individual punishment in the American criminal justice system impose costs, sometimes heavy ones, on persons other than the offender.

The superior potency of individual punishment as a shaper of behavior cannot be disputed. But its limitations must also be considered. Start with employees. The government, for a variety of practical procedural reasons, faces a harder task in most cases when seeking to impose punishment on individual violators than when imposing sanctions on a firm, usually in the form of a settlement (more on settlements shortly).[25] Individuals, who often have access to corporate funding for legal defenses, are more likely to press every available argument at each stage to defeat the government's case, or at least make it more costly. Prosecutors, rightly or wrongly, will be more risk-averse when deciding whether to charge individuals. In the often ambiguous legal and factual arena of white-collar crimes,[26] these charging decisions, and thus decisions about resource allocation, can be difficult.

Then there are employees who are not candidates for prosecution because they did not participate directly in wrongdoing or cannot be proven to have done so. Many corporate employees will be proximate to instances of crime and, questions of liability aside, may bear forms of responsibility for what happened, including having failed to take steps such as blowing the whistle to intervene before the wrongdoing deepened or spread.[27]

---

demand for criminal punishment of corporate malfeasance, especially in the wake of major scandals, may slacken pressure that could otherwise help produce regulatory changes that might make certain forms of wrongdoing less attractive or feasible for corporate employees. BUELL, *supra* note 12, at 234–58; *see also* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004). For an extensive discussion of the political economy aspects of corporate deterrence, see Arlen, *supra* note 11; Arlen & Kahan, *supra* note 23, at 323; Alexander & Arlen, *supra* note 16; Arlen & Kraakman, *supra* note 4; Arlen & Buell, *supra* note 2.

24. *See, e.g.*, Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789 (2015) (documenting the frequency of corporate prosecutions without individual prosecutions and arguing for improved coupling of the two mechanisms of deterrence).

25. This problem, while genuine, is empirically somewhat more difficult to specify than commonly assumed. *See generally* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823 (2014) (exploring the various ways in which criminal procedure and criminal law definitions do not advantage white collar offenders relative to street offenders as much as commonly assumed).

26. *Id.* at 841–54.

27. *See* Eugene F. Soltes, *The Frequency of Corporate Misconduct: Public Enforcements versus Private Reality*, 26 J. FIN. CRIME 293 (2019). The Soltes paper, which helpfully offers a limited entry point into the exceedingly difficult empirical problem of measuring the incidence of corporate crime, includes data from survey

Corporate prosecution offers a legal measure that may speak to and affect the behavior of employees where individual prosecution is not legally allowable or might not be prudent as a matter of discretionary justice or resource allocation. Depending on its content and form, criminal prosecution of the firm is a serious and salient mechanism for communicating to employees that: wrongdoing occurred, it resulted from failures of an institutional nature in which many may bear responsibility, and it has been costly to the business enterprise both in terms of legal sanctions and damage to reputation. To the extent that employees wish to work for successful or prestigious companies, and to the extent they attend to resumes and reputations, this message can lead to improved efforts at compliance and perhaps even better corporate culture.[28] Of course, this example is extreme, but anyone who worked in the white-collar sector around Houston in the late 1990s and early 2000s knows well that Enron—Fortune Magazine's Most Innovative Company for six years running—was the company that everyone in town wanted on their resume until, rapidly and shockingly, it was not.

Now consider managers. The potential of criminal enforcement to change behavior is especially high here because managers, including at the most senior levels up to the board, bear a fiduciary responsibility to see that the firm does not violate the law.[29] Not being personally guilty of a crime does not end the question of a manager's responsibility for it. And often, enforcement actions against firms will be accompanied by detailed findings of management failures, naming specific departments, or even identifying individual managers without naming them.[30] Managers have at least the same reasons to be concerned

respondents about observations of wrongdoing in the workplace.

28. *See generally* Thomas E. Becker, Johannes Ullrich & Rolf van Dick, *Within-Person Variation in Affective Commitment to Teams: Where It Comes From and Why It Matters*, 23 HUM. RES. MGMT. REV. 131 (2013) (modeling affective commitment to the workplace); Christian Vandenberghe & Alexandra Panaccio, *Perceived Sacrifice and Few Alternative Commitments: The Motivational Underpinnings of Continuance Commitment's Subdimensions*, 81 J. VOCATIONAL BEHAV. 59 (2012) (modeling affective and normative commitment of workers within organizations); John P. Meyer, David J. Stanley, Lynne Herscovitch & Laryssa Topolnytsky, *Affective, Continuance, and Normative Commitment to the Organization: A Meta-Analysis of Antecedents, Correlates, and Consequences*, 61 J. VOCATIONAL BEHAV. 20 (2002) (modeling and distinguishing three forms of employee commitment); Devon Proudfoot & Aaron C. Kay, *How Perceptions of One's Organization Can Affect Perceptions of the Self: Membership in Stable Organization Can Sustain Individuals' Sense of Control*, 76 J. EXPERIMENTAL SOC. PSYCH. 104 (2018) (exploring how connection to stable organizations can be sought as a means of enhancing feelings of self-control).

29. *See In re* Caremark Int'l, Inc. Derivative Litig., 689 A.2d 959 (Del. Ch. 1996) (establishing directors may be liable for corporate actions if they fail to fulfill their duty of oversight); *In re* The Boeing Co. Deriv. Litig., No. 2019-0907, 2021 WL 4059934 at *1, *33–35 (Del. Ch. Sept. 7, 2021) (finding that Boeing's directors breached their oversight responsibilities).

30. A recent article argues that this aspect of current enforcement practice is a bug, not a feature. *See* Asaf Eckstein & Gideon Parchomovsky, *The Agent's Problem*, 70 DUKE L.J. 1510 (2021). The authors assert that corporate managers and directors should be afforded hearings or separate causes of action to clear their names when a transgressing corporation has identified them in a criminal settlement as having responsibility for the relevant wrongdoing. It is surprising that the authors would be so concerned with the effects of calling out bad management by senior personnel that tolerates or leads to criminal wrongdoing within firms. Such effects are desirable, at least in the eyes of most observers. The article's argument seems to be largely premised on the questionable assumption that criminal settlements between the government and corporations routinely fictionalize the particulars of corporate failures. The authors also seem to believe that settlements commonly accuse senior personnel of committing criminal offenses. This is exceedingly rare in my experience, perhaps reserved for cases such as the Volkswagen diesel emissions affairs, in which some quite senior players indeed planned and executed the fraud.

about corporate prosecution as individual employees. In addition, in the market for corporate management, managers must be particularly careful about which firms they work for as they build resumes and reputations.[31] It should be considered too that American criminal law provides extremely limited avenues for holding managers individually liable for failing to prevent crime.[32] In the common case in which a tier of employees have violated on behalf of the firm, usually as a result of compensation incentives and compliance deficiencies, and managers bear clear responsibility for the arrangements that bred the wrongdoing, prosecution of the institution may be the only available mechanism for clearly imposing even diluted responsibility on managers, with at least possible reputational sanction and indirect economic costs.

B. Outsiders: Competitors and Counterparties

Now move from individuals for whom specific deterrence is the objective to individuals outside the firm, who may be both subjects and mechanisms of deterrence of future violations across multiple firms. Employees of other firms within or beyond the same industry who may be tempted to violate, or concerned about colleagues who might violate, will observe enforcement as a costly setback to a firm's business prospects that could affect such employees' investment of their human capital in their own firms. They may also observe that discovery and sanctioning of the wrongdoing was accomplished with the prosecuted firm's cooperation in exposing the crimes of its own employees, causing such employees at other firms to reassess the probability of being sanctioned.

Managers of other firms may observe the legal and reputational costs of a failure to adequately prevent and police wrongdoing by a firm's employees and conclude that it would be prudent to invest more in compliance, reassess compensation programs, build robust cultures, and take other measures. Managers will consider the possible effects of corporate prosecution on their careers, reputations, and prospects along the same lines as insider managers, though with less direct concern, and be further motivated to make efforts to prevent wrongdoing.

All of this is a matter of theory. But managers and their inside and outside counsel uniformly express the view that a criminal prosecution of their firm is the worst-case scenario when considering corporate legal risks. Whether or not the fear is justified, the management class fears corporate criminal liability and keenly seeks to avoid it.

A different audience for the imposition of corporate criminal liability consists of customers, investors, and other counterparties. This group, of course, is central to the phenomenon of reputational sanction. When individuals who may do business with a firm observe an instance of criminal enforcement against that firm, they may choose to alter or discontinue business with the firm. These actions can lead to substantial, even crippling, changes in the firm's revenues, costs, market value, ability to recruit talent, credibility in dealing with regulators, and more—with all the effects those problems, or the prospect of them, can have on the motivations of inside managers and employees to prevent and police

---

31. Skeel, *supra* note 16, at 1832–35 (discussing the benefits and costs that corporate sanctions incur to its managers).

32. *See generally* Samuel W. Buell, *Criminally Bad Management*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 59 (Jennifer Arlen ed., 2018); Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471 (2018).

individual misconduct.

Brand associations are a deep and complicated matter of psychology and can be extremely sticky, as either a positive or negative matter.[33] This larger outside audience imposes the reputational sanction that corporate criminal liability may be able to exploit in service of deterrence. It may be as important to consider how enforcement communicates to this audience as to account for its effects on managers and employees who operate and are subject to internal compliance systems. In this connection, employees must also be viewed as *prospective* employees, that is, as a category of counterparty in the first instance. As modern firms increasingly compete for precious intellectual capital and talent,[34] managers must consider the impairment to recruiting that can result from a firm being tarnished by scandal, especially one implicating the criminal label.

With the relevant actors in the story of corporate deterrence organized, we can now move to consider a host of questions and complications having to do with the mechanisms by which the legal system reaches these audiences.

2. Mechanisms

Given the size of the present economy, blame and reputation in the corporate sector are central questions of information production and transmission. To further explore the mechanisms of corporate criminal deterrence and the role of corporate criminal liability in those mechanisms, it is necessary to examine more carefully how information may be produced and transmitted when enforcement occurs and what forces might operate to distort or impede the flow of such information.

A. Information Production

For organizational purposes, we might divide the process of information production regarding corporate wrongdoing into three phases: initial revelation, investigation, and enforcement and resolution. At the initial revelation stage, information sources are typically non-governmental. Initial revelation will most often come from investigative and other journalism, whistleblowers going public, decisions by firms to self-disclose to the public, and highly visible accidents and other misfortunes (environmental spills, transportation crashes, precipitous stock drops, and the like). At this stage, legal process

---

33. For an example of research into the complex and often subconscious mechanisms of brand association, see Gráinne M. Fitzsimmons, Tanya L. Chartrand & Gavan J. Fitzsimmons, *Automatic Effects of Brand Exposure on Motivated Behavior: How Apple Makes You "Think Different"*, 35 J. CONSUMER RSCH. 21 (2008). A question meriting further consideration is how firms might reduce reputational effects from scandals through name changes and similar efforts at rebranding (thanks to Frank Partnoy for raising this). Corporations have the means to do this relatively easily, which individuals lack. Perhaps market incentives explain why large firms subject to major scandals have, with limited exceptions, not chosen to comprehensively rename and rebrand. Brands may often be too valuable to cast aside, and counterparties not so easily fooled.

34. The public sphere is awash as the COVID-19 pandemic begins to recede, with reports of major shifts in labor markets that favor "knowledge" workers and their demands. *See, e.g.*, THE FUTURE OF WORK AFTER COVID-19, MCKINSEY & CO. (2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19 [https://perma.cc/2QXC-WNCR] (describing the future of work and the labor markets post-COVID-19). Whether this trend holds up to longer-term analysis remains to be seen. On the flip side, one must consider the possibility that fluidity in employment markets might cause workers to believe that finding themselves at a firm enmeshed in scandal would be a problem relatively easily addressed through exit.

typically has little to do with the transmission of information about the wrongdoing, yet the reputational impacts on firms from serious bad news can be severe. Some empirical work suggests that these impacts tend to outstrip the negative reputational effects of later legal proceedings, although this work has limitations in both the scope of the data it examines and how it measures reputational effects.[35]

As firms begin the process of investigating wrongdoing and, at some stage, government investigators become involved, additional details about the nature and extent of the wrongdoing may emerge, especially if firms take steps "to get ahead of the problem" by disclosing what has been discovered. Regardless of when the products of investigative efforts see the light of day, the investigative process is a powerful engine for producing information about corporate wrongdoing. Resource-intensive internal investigations have become *de rigueur* in the management of scandals in large corporations. The legal, compliance, and forensic industry that has grown around this process is now an economy of its own. The collection of information from witnesses and data, and the organization of that material into an explanatory account of what went wrong within the firm, can lead to a far deeper understanding of a problem than might be gleaned from an expose in *The Wall Street Journal* or at ProPublica.[36] The existence of corporate criminal liability—coupled with policies that offer reduced sanctions for sharing investigative fruits—provides a powerful incentive for firms to investigate wrongdoing after its initial discovery rather than to ignore it or cover it up.[37]

The formal enforcement process potentially amplifies reputational impacts on firms by both expanding on and ratifying information produced during the initial revelation and investigation.[38] If a case is litigated, tried, or settled in a form that includes detailed

35. For example, Karpoff, Lee & Martin, *supra* note 16, which is perhaps the most oft-cited study, uses a large data set of firms sanctioned for "books and records" violations under the securities laws to study the reputational consequences of firms from "cooking the books." This form of violation is an overinclusive proxy for fraud since it includes many technical accounting violations and even Foreign Corrupt Practices Act bribery cases. The authors derive reputational penalty, at bottom, by subtracting later legal penalties from earlier loss in market capitalization without considering the relevance of the market's initial expectation of legal penalties, for which later settlements are not necessarily a good measure. The authors also do not examine a myriad of variables involving events between the initial revelation of the fraud and ultimate legal sanctioning that may substantially affect the reputational effects of revealed corporate misconduct. Cindy Alexander's 1999 study did more to examine differences across cases according to several variables, including the nature of the offense and aspects of firms' responses to disclosure of the offenses, but her data (78 public companies sanctioned between 1984 and 1999) was constrained by the study's timing relatively early in the modern era of corporate enforcement. *See* Alexander, *supra* note 16.

36. Consider, for example, Patrick Radden Keefe's remarkable book about Purdue Pharma. PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021). Radden Keefe's account achieves much of its depth and persuasiveness from the painstaking work he did with the massive materials generated from discovery and investigation connected to legal actions.

37. *See* Iacobucci, *supra* note 16, at 203 (arguing, as a matter of formal modeling, that measures that increase the frequency with which instances of corporate wrongdoing will be discovered and exposed end up increasing overall information in the market and reducing noise in the assessment of firm reputation, thereby increasing the influence of reputational effects).

38. *See* Parella, *supra* note 16, at 913. Roy Shapira explains the information-production role of legal process in reputational sanctions as follows:

> Legal scholars often assume that the only issue with reputational sanctioning is whether misconduct is revealed or not: once bad news breaks, the market supposedly reacts automatically. But in reality the market reaction itself is the issue. Market players often lack the information or incentives to

findings, audiences are further informed about the particulars of the wrongdoing and observe an endorsement of a version of the facts by legal officials that may carry more weight than what is contained in media reports or from voluntary revelations by the firm. The case becomes a matter of record, so to speak. Liability rules (both corporate liability and liability for the substantive violations) are at issue and mark the matter as falling within a formal category of wrong, as determined in a process controlled by professional, procedural, and other norms. The involvement of the legal system may significantly increase reputational impacts. Even the prospect of its involvement—both as a source of negative information and as an authority with the power to impose financial penalties—must affect the calculations of observers early in an affair.[39] And its "seal of wax"[40] at the end, in whatever form, is an obstacle to efforts to deny, refute, or ambiguate a firm's exposed wrongdoing.[41] Finally, remedial aspects of the sanctioning process, including reform of the firm under the supervision of a monitor if one is imposed, may convey further information regarding the nature, meaning, and future relevance of the misconduct to assessments of the firm—depending on the transparency associated with such reform and monitoring work.[42]

B. Civil and Criminal Enforcement

This may be the most fruitful juncture for addressing the longstanding question directed at corporate criminal liability of why civil legal processes cannot just as well serve the instrumental objectives discussed to this point. There are a few observations to be made, some theoretical and others of a more practical bent.

The first and most common point is the theoretical claim of what I called in the title of a prior article "the blaming function of entity criminal liability."[43] It has long been agreed among criminal law scholars that criminal prosecution is unique among legal processes in conveying moral judgments involving responsibility ascription. Indeed, a large and longstanding literature worries—as a normative matter—that assigning the label criminal to too many kinds of violations risks squandering the criminal law's potent expressive powers, earned over centuries of development of law and legal culture.[44]

> accurately interpret revelations of misconduct . . . . [b]ecause market players find it hard to calibrate reputational judgments on their own, they often look for information coming from the legal system as a second opinion that helps them revise their initial reaction.

Shapira, *supra* note 16, at 7.

39. *See supra* note 35 and accompanying text.

40. SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) ("[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment.").

41. *See* Iacobucci, *supra* note 16, at 191 ("The literature [measuring reputational sanctions] overlooks an important interaction between formal and informal penalties: the reputational sanction that the wrongdoer bears from certain conduct will generally depend on the size of the legal penalty associated with that conduct.").

42. *See* Veronica Root Martinez, *Greater Publicness in Monitor Reporting*, HARV. L. REV. (forthcoming 2022).

43. *Blaming*, *supra* note 3, at 473.

44. *See generally* Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

While some civil enforcement actions, such as SEC proceedings, invoke language of blame, they do not have the power of criminal proceedings to focus relevant audiences on the moral dimension (or, in conventional enforcement terms, "seriousness") of any instance of wrongdoing. As some of us have argued, the SEC, as well as possibly other enforcement agencies, does not do as much as it could to shape its enforcement process to maximize messaging effects.[45] But no civil enforcement matter, under present foundational legal arrangements, can have the salience and impact of a criminal prosecution.[46]

With individuals, the ascription of responsibility that comes with criminal prosecution is heavily underwritten in many cases by the fact that the exclusive criminal sanction of imprisonment is at stake. But that is not the only reason that criminal process carries special moral and expressive weight. Theorists, when arguing the basic definitional problem, have concluded that the availability of imprisonment as a penalty is not what defines something as belonging within the category of crime.[47] Corporations thus can be impacted by the unique ability of criminal legal process to officially ascribe the finding of "crime" as long as one accepts the sociological and economic premises argued above that institutional wrongdoing is a genuine phenomenon apart from individual wrongdoing and that human ascription of responsibility to institutions in accounting for and explaining wrongdoing is both real and reasoned.

The present doctrine of corporate criminal liability—as distinct from doctrine defining crimes (more on that shortly)—is mismatched with the ascription of blame. *Respondeat superior* liability attaches easily, broadly, and with hardly any reference to the relationship between an individual's crime and matters of institutional fault. This could be changed, of course, although this Article is not an occasion to continue debate about doctrinal alternatives.[48] The point, for now, is that *respondeat superior* is not the actual regime of corporate criminal liability in the United States. That regime is the *de facto* system that has developed for arguing about and sanctioning corporate crime cases as they are negotiated

45. *See* Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 519–20 (2018) (arguing for more frequent findings or required admissions of wrongdoing in civil enforcement settlements); Shapira, *supra* note 16, at 51–56. *See generally* S.E.C. v. Citigroup Glob. Mkts., Inc., 752 F.3d 285 (2d Cir. 2014) (reversing a decision that rejected a settlement in part for lacking any admission of wrongdoing); S.E.C. v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (rejecting a settlement in part for lacking any admission of wrongdoing).

46. In this connection, an anecdote: when in government practice, I once attended a settlement negotiation between a large firm and senior Justice Department officials, at which the firm was attempting to persuade the Department not to pursue a criminal action lest it devastate their business. When it was pointed out to the firm that they would surely face a serious SEC action, in any event, a well-known, senior white-collar lawyer was heard to respond, far too candidly, "No one cares about the SEC." *See generally* Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1029 (2022) (exploring theoretical sufficiency of civil enforcement).

47. Joel Feinberg provided one of the most influential definitions: "Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or those 'in whose name' the punishment is inflicted." Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965).

48. I have argued, for example, that making the "intent to benefit" element of *respondeat superior* liability an actually demanding element, as opposed to a pro forma matter as under current case law, might be a move in this direction. *See Blaming*, *supra* note 3, at 530–35. Others have argued for providing a defense for a firm's effective policing efforts or for forms of holistic assessment of the role of corporate culture. *See, e.g.*, Bucy, *supra* note 4; Diamantis, *supra* note 17; Andrew Weissmann & David Newman, *Rethinking Corporate Criminal Liability*, 82 IND. L.J. 411 (2007).

between the Justice Department and the corporate bar. That regime, deeply reflected in extensive government guidelines and in a long record of resolutions that now comprise, effectively, a "common law" of corporate criminal liability, is consumed with thick questions of institutional responsibility. We thus do have *a* criminal law system, if not an ideal one, for officially blaming corporations for crimes for which they bear organizational responsibility.

Then there is the institutional dimension of the prosecution function within government. It has long been observed that criminal process includes at least two features that civil process lacks that enhance criminal process' ability to transmit information and impose strong messages about responsibility. First, there are the government's criminal investigative tools, such as the grand jury and its secrecy, electronic surveillance, search warrants, and other tactics. Second, there is the shadow of the burden of proof beyond a reasonable doubt, which can convey an increased bonding effect on criminal judgments.[49] Concededly, these factors are not directly in play if criminal enforcement against corporations is dominated by corporate cooperation through internal investigations and settlements that do not involve court judgments. However, at the least, the existence of these phenomena partly explains the power that criminal process has to force out information about corporate wrongdoing. Finally, there is the political economy of executive branch enforcement, which explains why the Justice Department, whatever its faults, is less vulnerable to the softening effects of corporate capture than most or all civil enforcement agencies.[50]

C. Settlement Practices

The dominance of settlement in the enforcement of corporate criminal liability, particularly in the form of deferred and non-prosecution agreements, makes the mechanisms of blaming and reputational sanction harder to tease out than they would be in a system dominated by guilty pleas and trials. This becomes even more difficult when criminal settlements are encompassed within potentially noisy "global" settlements that may include private litigation, civil regulatory enforcement, bankruptcy resolutions, voluntary investments in remediation, and even enforcement actions in other nations' legal systems.

Here, we should distinguish between sanctions and factual findings, and the institutional locus of each, in the legal system's production of reputational consequences. Intuitively, sanctions and factual findings should operate as compliments: the more serious a sanction attached to a particular account of wrongdoing, the more attention and weight an observer is likely to give to the story. Also, as a matter of intuition, sanctions imposed and factual findings made through adjudicative processes, especially jury trials, should cement any incident of corporate wrongdoing in the minds of relevant observers more than penalties and facts in settlement documents.

One paper has shown reason to doubt that, among settlement mechanisms, guilty pleas

49. *See* Khanna, *supra* note 7, at 1512–17.

50. For a full discussion of this point, see Jennifer Arlen, *A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861 (2022); *see also* Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 202–10 (2017) (discussing the issue of capture in the context of Foreign Corrupt Practices Act enforcement).

are apt to cause greater reputational consequences than deferred or non-prosecution agreements.[51] This is somewhat surprising because conventional thinking held that pleas include judicially sanctioned judgments of guilt and court-imposed sanctions in the form of formal criminal sentences, while deferred and non-prosecution agreements include only negotiated payments and other sanctions, as well as negotiated admissions of fact. Also, the frequency of the complaint that the government settles far too many corporate cases without requiring pleas of guilty or taking cases to trial implies a belief that guilty pleas are more meaningful and punitive as a means of imposing accountability for corporate crime.[52] The study thus highlights the substantive disclosure and admission of wrongdoing, not formal legal label, as the most impactful component of settlements.

It may be that admissions of corporate wrongdoing with detailed factual concessions are the most effective way to communicate blame and impose responsibility in a system, rightly or wrongly, dominated by settlement.[53] Prosecutors should certainly not be discouraged from the current practice of requiring explicit and permanent corporate admissions and detailed, agreed-to accounts of malfeasance in their settlement instruments.[54] There may be many ways that current enforcement practices could be reformed to capitalize better on the informational effects of corporate criminal liability, including by trying more cases in court and creating forms of judicial review that would result in written opinions addressing the facts and legal aspects of corporate criminality.[55] One unexpected benefit of judicial review of settlements with written opinions might be that courts would be free to "name and shame" when describing corporate wrongdoing and the roles of all involved, whereas prosecutors at least believe they are required to anonymize factual statements in settlements, in keeping with general practices of not

---

51. *See generally* Alexander & Arlen, *supra* note 16. These authors find no basis to conclude that guilty pleas communicate more strongly to third parties than non-plea settlements. *Id.* at 139. For a prior paper also questioning the standard view that non-plea corporate settlements are less potent than corporate guilty pleas, see Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

52. *See* Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1484–92 (2017).

53. For the most in-depth theoretical treatment of the functions of admissions in settlements to date, see Verity Winship & Jennifer K. Robbennolt, *Admissions of Guilt in Civil Enforcement*, 102 MINN. L. REV. 1077 (2018). For examination and criticism of the government's failure to exploit this mechanism when sanctioning health care misconduct through civil False Claims Act proceedings, see Jacob T. Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 WASH. L. REV. 371, 375 (2021) ("DOJ's reluctance to require admissions in FCA cases is surprising and problematic not only because it undermines its enforcement goals, but because it flies in the face of DOJ's clear, and well-reasoned, criminal-side policy against allowing resolutions without acceptance of responsibility.").

54. *See* Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 825 (2018) ("It is now routine practice for the DOJ, when prosecuting corporations or settling criminal charges with them, to speak loudly, often, and at length about what it is doing and why.").

55. In the United Kingdom, resolution through a DPA is subject to a form of judicial review that courts are not able to undertake in the United States. *See, e.g.*, Serious Fraud Off. v. Rolls-Royce PLC [2017] EWHC (QB) U20170036 ¶¶ 61–64, 126–44 (Eng.), https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf [https://perma.cc/EX7N-ELXZ] (judgment of Sir Brian Leveson in the Southwark Crown Court approving deferred prosecution agreement); SFO OPERATIONAL HANDBOOK: DEFERRED PROSECUTION AGREEMENTS, SERIOUS FRAUD OFF. (2019), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ [https://perma.cc/MA38-J9JB].

naming uncharged individuals.[56]

Meanwhile, there can be little question that loss of expressive capital is a cost of pervasive settlement practices in the enforcement of corporate criminal liability. The government faces a dilemma, however, if its resources are short of truly massive. Without settlement and incentives to firms to pursue settlements, the government will be able to manage far fewer investigations and prosecutions. Trials require large resources, of course. Corporate cooperation in investigations—in place of painstaking grand jury procedures, for example—remains the most efficient means to unearth and establish details of corporate crime with relative dispatch. Fewer cases with bigger bangs would not necessarily sum to greater overall deterrence. As foreign jurisdictions pursue American-style corporate criminal liability, they have been moving to design systems for criminal settlements, or what Europeans prefer to call "non-trial resolutions."[57]

Then there is the elephant in the room of collateral consequences. More central to corporate criminal liability than most forms of civil regulatory liability is the problem that an entailment of conviction or even indictment can be the loss of legal right to continue to do business in a sector or industry, up to the point of closure of the firm. This is no mere fine or reputational sanction. Debarment and delicensing can constitute a death penalty imposed by another authority, typically an applicable regulator, that is not a party to the criminal action. The commonality of automatic (as opposed to discretionary) exclusion has probably been exaggerated. But the specter of exclusion is a major contributor to the dominance of settlements. The government is not wrong in viewing the complete termination of a firm's business as an excessive sanction in all but rare cases.

If settlement's dominance dilutes the force of corporate criminal liability as a deterrent instrument, then regulatory schemes involving debarment and delicensing should be re-examined. Surprisingly, these schemes, which pepper the administrative state in non-systematic ways, were not designed to work in conjunction with institutions of corporate prosecution. Even research cataloging what they are and how they operate is scant. It is incontrovertible that if corporate criminal liability is never actually imposed—that is, if firms simply are not convicted of crimes as a practical matter—that corporate criminal liability will be of questionable deterrent value. Some instances of corporate wrongdoing, just like some individual crimes, call for full prosecution at each step and stage (examples surely come to mind). Moreover, per the standard "death of the jury trial" worry, prosecutors who do not have their cases tested often enough will not be practiced in prudent case selection. Until the legal rubric of collateral consequences for corporations is better

---

56. *See* Just. Manual, *supra* note 1, § 9-11.130. The government's practice of not naming uncharged persons in settlements stems from its longstanding policy against naming "unindicted co-conspirators," which has some roots in the purposes of grand jury secrecy. These policies might warrant some reexamination and contextual refinement.

57. *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, recs. XVII, XVIII (Nov. 25, 2021), https://www.oecd.org/corruption/oecdantibriberyconvention.htm [https://perma.cc/ZW6X-GE2Y]; ORG. FOR ECON. COOP. & DEV., RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION (2019), https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf [https://perma.cc/5D2Y-C68D] (describing other countries' growing use of non-trial corporate criminal resolutions).

documented and, ultimately, reformed, even observing the effects of corporate criminal liability well enough to argue about its purpose will remain difficult.

D. Levers of Public and Private Control

Debate about corporate criminal enforcement must also consider in greater detail how both government and corporate actors can influence the impact of corporate criminal liability through their responses to any given incident of wrongdoing. There is, again, the settlement versus full prosecution question, as well as the question of how the government structures settlements to convey information. Prior to these matters is the means by which the government selects its cases and determines how much resources to spend on them. As with individual crime, prosecutors choose a small number of overall violations to focus on and sometimes decline prosecution even after partial or full investigation. This process is famously unregulated in the American constitutional structure.

It is worth considering whether there might be alternatives in structuring the *deployment* of corporate criminal liability to the current situation of, to put it roughly, "here is an opportunity to do some cases about insider trading in the hedge fund industry, so let's go ahead see if we can get some deterrence," or "the banking industry has been irresponsible about how it incents its traders and these Libor cases have some really incriminating electronic communications, so let's do those." The extent of media attention is undeniably material to the communicative impact of corporate enforcement. It is reasonable for prosecutors to consider this aspect in the allocation of their resources, but attention might be more profitably focused on the *where* of corporate scandals (does a case reveal a new or pervasive problem previously unnoticed or underappreciated?) than the *who* (does a case involve famous or infamous persons?). It is also worth asking whether the intense, at least expressed, focus on the government imposing individual criminal liability in corporate investigations has been concerned too much with individual liability as a substitute for corporate liability and not enough with how *coupling* a corporate prosecution with individual prosecutions may maximize the impact of legal response to corporate wrongdoing.[58]

Firms have more power to influence the informational and expressive impacts of corporate criminal liability than the literature has recognized. Compliance investments, self-reporting, and cooperation through internal investigations are not only ways to reduce liability in the event of enforcement; they are also ways to reduce the reputational impact of wrongdoing being revealed, through enforcement or otherwise. When a scandal hits, firms want to "get out ahead" of enforcement in large part to reassure owners, directors, investors, lenders, customers, employees, and other counterparties. These efforts must be somewhat effective, or firms would not invest so eagerly in them as standard moves in the crisis-management playbook. It says something interesting about the reality of institutional

58. This, of course, was the impulse behind the splashy "Yates Memo" during the Obama Administration. Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dept. of Just., on Individual Accountability for Corporate Wrongdoing to All U.S. Att'ys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/ZW7D-54PZ]. A substantial problem with the Yates Memo itself, and the discussion in the field that ensued from it, was the omission of the problem of the substantive scope of white-collar criminal liability, which explains more about the non-prosecution of individuals in corporations than the policies and motivations that affect prosecutors' decisions.

wrongdoing and blame that managers themselves believe that "cleaning house" by firing culpable or careless individuals and rolling out shiny new systems for monitoring and compliance while advertising such measures is a way to dampen reputational consequences.

Prosecutors are left with the task of monitoring whether such organizational responses contribute to the reduction of corporate crime (positive for deterrence) or are insincere "optics" measures that only slacken reputational sanctions (negative for deterrence). The Justice Department has spent much effort in recent years emphasizing its focus on the details of how it determines good compliance. Whether the Department is a sufficiently resourced and competent institution to perform this function effectively remains a matter of important debate.[59]

E. Obstacles to Internalization

A sticking point for the model of corporate criminal enforcement as an information-transmittal mechanism is the possibility that corporate actors, at both management and employee levels, will fail to internalize messages of institutional responsibility. Since the government is often viewed as an untrustworthy adversary, many firms are very large and complex, personnel can usually move rapidly and easily across firms, and individuals are reliably motivated to resist self-reflection and to ascribe responsibility for problems to others, the communicative mechanisms of deterrence will have gum in the works. And there is the problem of short memories flooded with information: messages that are internalized and forgotten will not influence behavior when it comes time to act or refrain from acting.

It is not clear whether this question should be worried over more as a problem of individual and group behavioral psychology, uniformly problematic across firms, or as a phenomenon linked to corporate culture and to the specific contours of a given matter. In other words, rationalization and denial might be harder in, for example, the Volkswagen company's pervasive and high-level emissions cheating scandal than in the enforcement action against Goldman Sachs stemming from a managing partner's efforts to conceal huge bribes paid to Malaysian officials in connection with government bond offerings. Skepticism about basic behavioral models of deterrence, grounded in the complexities of psychology, is just as warranted in considering corporate enforcement as in any realm of criminal justice.[60] Further research is needed to test aspects of how managers and employees process enforcement against firms. Those of us who study this field probably spend too much time with legal professionals who warn corporate personnel about the dire consequences of criminal prosecution to their firms and not enough time with those personnel themselves.

59. *See, e.g.*, Arlen & Kahan, *supra* note 23, at 323 (arguing mandates in settlements are only appropriate "if a firm is plagued by policing agency costs" and are "properly designed to reduce policing agency costs"); Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigations and Reform*, 66 FLA. L. REV. 1, 1 (2014) (arguing prosecutors should better account for issues of corporate governance amid investigations).

60. For a summary of how behavioral research raises questions about common core assumptions regarding effective corporate compliance, see Donald C. Langevoort, *The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71.

F. Corporate "Wrongdoing" versus Corporate Crime

To this point, the discussion has exclusively concerned legal doctrine holding corporations criminally responsible for offenses committed by their agents. Any such doctrine, and its enforcement, depends in the first instance on criminalization of conduct that corporate agents may have occasion to commit or contemplate. When discussing the problem of controlling dangerous and harmful activities in the corporate context, scholars and policy analysts tend to use terms like "corporate crime," "corporate misconduct," "corporate wrongdoing," and "corporate malfeasance" as if there were a natural category of such things. Of course, there is not. What constitutes "corporate crime" is a question of positive law, dependent on what a legal system chooses to designate as criminal acts.

To be sure, near consensus should be achievable on some basic premises. Intentional fraud on investors, consumers, and contractual counterparties; intentional and substantial spoliation of public resources without legal permission; deliberate obstruction of justice; express bribery of public officials to further business objectives; and knowing distribution of products with actively concealed risks to health and life all fit easily in most people's conceptions of what a legal system ought to treat as corporate crime. But the American system, as well as others, attaches criminal penalties to many business activities—such as some anti-competitive behaviors, workplace safety lapses, or small environmental violations—that arguably constitute "corporate crime" solely as a positive matter, rather than a normative one.

There may be good arguments for deterring such conduct with criminal penalties. It is questionable, however, whether directing criminal sanctions at firms in such cases represents anything like the blaming and reputational sanctioning process mostly discussed in this Article or operates more like a regulatory activity carried out by a legal process that happens to involve prosecutors.[61] An old point in the literature of criminal law applies here: if a particular contribution of corporate criminal liability is to ascribe institutional responsibility for serious wrongs in a manner that garners the attention of those in a position to take steps to reduce future such wrongs, then the frequent application of the doctrine to matters that do not involve serious institutional wrongdoing may undermine the doctrine's capacity to exercise special influence.[62]

IV. ON THE RESEARCH AGENDA

The foregoing discussion points to several tasks facing the research program on corporate criminal liability. I do not purport to have the methodological skills to carry many

---

61. *See* Miriam H. Baer, *The Information Shortfalls of Prosecuting Irresponsible Executives*, 70 DEPAUL L. REV. 191 (2022) (examining this problem in the context of prosecuting corporate misconduct with strict liability regimes such as the responsible corporate officer doctrine).

62. When Edward Iacobucci, for example, rightly stresses that increasing or decreasing legal sanctions can be an instrument for increasing or decreasing reputational effects because legal sanctions are signals about reputation, he must assume a legal regime that fits reasonably well with public views about the relative seriousness of various forms of wrongdoing as reflections of degrees of corporate responsibility. *See* Iacobucci, *supra* note 16, at 192 (explaining that reputational sanctions are not independent of legal penalties). As with much of what this Article addresses, the matter is complex. For example, while more "serious" crimes in the corporate setting may draw greater public reprobation, such crimes generally carry heightened mens rea requirements that may make it easier for insiders or outsiders to firms to limit responsibility ascription to a small number of individuals.

of them out. But they may offer a way of propelling debates on this topic beyond worn discussions about theories of corporate personhood and about comparing the deterrent impacts of enterprise versus individual liability.

First, reputational "sanctions" should be modeled more fully and studied further. Relevant input variables certainly include the size, legal form, ownership structure, geographic dispersion, violation history, product line(s), and brand identity of the firm; the breadth, duration, and harmfulness of the wrongdoing; how the law defines and punishes the wrongdoing; the manner of the wrongdoing's initial revelation; the transparency and duration of the public and private investigative process; the firm's steps, if any, to manage reputational effects during an investigation and prior to sanctioning; the form in which prosecutors sanction the firm and disclose the facts of the wrongdoing; and the sanctions themselves. Relevant output measures include not only gross values such as market capitalization but also other measures in capital and product markets such as creditworthiness, product prices, sales volume, counterparty risk assessments, and measures of consumer attitude.[63] The more it turns out that reputational effects are sensitive to case particulars, the less force there would be in the argument that reputational "sanctions" are a blunt, uncontrollable, and over-potent instrument.

Second, more on-the-ground behavioral studies of corporate employee decision-making and conduct are needed, not only on the question of, to borrow from Eugene Soltes, "why they do it,"[64] but also on the question of "how they react to it" when the firm is subject to exposure of wrongdoing and subsequent enforcement. Such work should attempt to compare in this regard the reactions of owners (investors), directors, senior managers, middle managers, and rank-and-file employees, and should compare the reactions of those inside firms enmeshed in criminal scandals with those in adjacent firms within the same or similar industries. Further down the road will lie comparative work on the behavior of corporate personnel across jurisdictions and business and legal cultures, given that an increasing number of scandals in large corporations are international in scope. A more common complication is the impact on the firm of wrongdoing within a remote component of a large multinational firm.

Third, the recent increase in more institutionalized studies of the criminal enforcement process should continue. That is, less argument about *de jure* corporate criminal liability and more argument about *de facto* corporate criminal enforcement would be welcome. In particular, research should seek ways to further explore the comparative effects of (1) extrajudicial settlement, (2) settlement with judicial oversight, (3) plea with judicially imposed sanctions, and (4) bench or jury trial followed by judicially imposed sanctions. Relatedly, comprehensive descriptive work on the existence and impact of debarment and delicensing rules, and policy work on clarification and improvement of such regimes, are needed.

---

63. The only paper I am aware of that has considered variables to reputation at this level is Alexander & Arlen, *supra* note 16, which is centrally concerned with differences among forms of criminal settlement. The authors contribute much by identifying many of the factors discussed here as relevant. They do not examine the relationship between variables to reputational effects and the reactions of employees and managers in addition to counterparties. The paper is not primarily empirical and does not address the problem of how to measure reputational effects through output variables.

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

Fourth and finally, corporate culture, to use the concededly vague term, remains the black box in the study of corporate crime. As soon as one agrees that institutional wrongdoing is a real phenomenon, one acknowledges that intangible organizational causal mechanisms exist and that such mechanisms are productive or preventive of individual misconduct on the job. Within the field, the causal problem tends to be placed in a catch-all category of "culture." This category is poorly defined and poorly understood because the causal mechanism for corporate wrongdoing is as complex as the large modern firm itself. Ultimately, however, that causal mechanism, fully theorized, must be the target of efforts to prevent corporate crime—whether they take the form of holding or threatening to hold corporations criminally liable, or entirely different behavioral instruments.

V. CONCLUSION

Corporate criminal liability grows more influential in legal systems and markets, even as some scholars continue to object to the doctrine and practice, primarily on theoretical grounds.[65] The case for corporate criminal liability thus should be evaluated soberly but in its most favorable light, first as a matter of theory and then in terms of present implementation. The strongest theoretical case is grounded in the phenomenon of reputational effects, the effect of reputational consequences on managers and employees in the corporate sector, and the role of the criminal legal process in producing and communicating those effects. Together, these matters relating to reputation offer a mechanism for encouraging efforts to prevent and punish corporate wrongdoing—over and above what other legal and non-legal incentives can supply—in service of the undeniably important task of reducing industrial risks and harms that ever grow in scale.

The ensuing question of theory, of course, is at what cost? Before that question can be considered, however, one must establish that enforcement of corporate criminal liability can proceed in a manner that proves the theoretical case for its deterrent mechanism. In other words, there is little profit in continuing to speculate about high costs from "harm to innocent shareholders"[66] or "overdeterrence from uncontrollable reputational effects" if the best argument for enforcement of the doctrine does not bear out.

Many questions merit deeper study, especially for those among us who have been sympathetic to the role of corporate criminal liability in the control of corporate crime. These questions tend to implicate empirical matters of psychology and organizational behavior beyond theoretical modeling of individual economic incentives. More study should be given to the precise manner by which enforcement processes communicate to actors at various levels within and outside of corporations enmeshed in criminal scandals and how those actors may alter behaviors in response to such processes. The black box of corporate "culture"—that is, the phenomenon of group decision-making and action in the large firm—needs to be pried open. To this author, at least, it seems more likely that such efforts will produce a better understanding of how to improve the practice of enforcing criminal law against corporations than yield the conclusion that the practice should be abandoned. What is clear is that further repetition of claims that first appeared decades ago

---

65. *But see* Julie R. O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047, 1065–69 (2022) (offering critiques on the grounds of invidious, even if unconscious, discrimination in enforcement and of other agency costs attributable to professional self-dealing).

66. For skepticism about this line of concern, see generally Coffee, *supra* note 4.

will not produce answers.