Corporate Stewardship

Danielle D'Onfro*

---

* Associate Professor of Law, Washington University in St. Louis. Many thanks to Andrew Blair-Stanek, Chris Bradley, Seth Davis, Gerrit De Geest, Daniel Deacon, Daniel Epps, Garrett Epps, John Goldberg, Sharon Jacobs, Daniel Keating, Matthew Lawrence, Leah Litman, Ronald Mann, Katherine Porter, Nicholson Price, Veronica Root, Rachel Sachs, Henry Smith, Holger Spamann, Andrew Tuch, the participants at the 2018 National Business Law Scholars Conference, and the 2017 American Bankruptcy Institute Junior Scholars Conference.

I. INTRODUCTION

To secure the loyalty of remote states under his reign, Charlemagne collected sons.[1] These sons became *obsides*, hostages, given as surety of their parents' loyalty. Charlemagne often requested the noblest sons,[2] but sometimes agreed to take hostages from the *populus*.[3] The job of these *obsides* was to convince their communities to remain loyal, and to suffer the consequences if their communities failed to do so. From Genesis[4] to antiquity[5] until the practice's eventual decline in the later Middle Ages,[6] the exchange of hostages remained an essential form of guaranty when the legal and political systems otherwise proved incapable of enforcement.[7] Sometimes hostages guaranteed a specific transaction, such as the payment of ransom, but often they were meant to be permanent guarantors of "good behavior."[8] In the later Middle Ages, the trade of hostages to secure peace inspired the trade of personal sureties to settle lesser disputes.[9] Bail in criminal prosecutions evolved from "an ancient and extremely rigorous form of suretyship or hostageship which would have rendered the surety liable to suffer the punishment that was hanging over the head of the released prisoner."[10] And of course, individuals have long traded themselves and their

1. Adam J. Kosto, *Hostages in the Carolingian World (714–840)*, 11 EARLY MEDIEVAL EUR. 123, 133–34 (2003).

2. *Id.* at 134 n.50 (discussing letters indicating that Charlemagne requested "tres obsides Langobardorum iudicum filios" in 773 and "odsides ex nobilissimis eorum filiis" from the Neapolitans in 780).

3. *Id.*

4. *Genesis* 42:16–20, 37 (NRSV).

5. POLYBIUS, THE HISTORIES 18.39.5 (recounting how, when Titus Quinctius Flaminius negotiated a temporary peace with King Philip V of Macedon, Philip had to hand over his son as a hostage ("Δημήτριον τὸν υἱὸν εἰς ὁμηρείαν")); *see generally* JOEL ALLEN, HOSTAGES AND HOSTAGE-TAKING IN THE ROMAN EMPIRE (2006) (arguing that hostages were more widely used in the Roman empires than the appearance of words like "ὅμηρος" or "*obses*" would suggest).

6. ADAM J. KOSTO, HOSTAGES IN THE MIDDLE AGES 2 (2012) (excluding the exchange of daughters for marriage, which is arguably also a form of exchanging hostages).

7. *See id.*; JENNY BENHAM, PEACEMAKING IN THE MIDDLE AGES: PRINCIPLES AND PRACTICE 11 (2011) (explaining that oaths and hostages were one of five key issues in peace negotiations, the others being meeting places, symbolic acts, envoys, and treaties).

8. BENHAM, *supra* note 7, at 157 (recounting how the peace treaty between William the Lion and Henry II required William not only to provide Henry with hostages, but also required an agreement that the heirs of those hostages would replace them when necessary—an enduring symbol of political submission).

9. *Id.* at 165–66 (explaining how the vocabulary of hostage exchanges (*obses*, *hostagius*) began appearing in other settlement agreements).

10. 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 589 (Cambridge Univ. Press 1968) (1898).

families to guarantee private debt.[11] Although it takes many forms, personal assumption of risk has always been a core tool for facilitating compliance with legal obligations.

Charlemagne's task—ruling wealthy and independent-spirited states from afar[12]—is not that different from the task of modern government regulators trying to motivate companies to adhere to their legal obligations. One party is nominally much more powerful than the other but faces significant information costs and other barriers to enforcement, not the least of which is their own unwillingness to use scorched-earth tactics. And even where regulators have the information and the will to monitor and enforce regulatory requirements, issues of scale make timely enforcement difficult at best. Compare the scale and political clout of modern corporations with the resources of today's regulators. Consider Wells Fargo. In 2016, the Consumer Financial Protection Bureau (CFPB), the flagship federal regulator of consumer financial wrongs, budgeted 742 full-time equivalent employees[13] for supervision and enforcement authority over several financial institutions as large and wealthy as small cities.[14] That same year, at least 5,300 Wells Fargo employees opened 3.5 million unauthorized accounts to meet sales goals.[15] These unauthorized accounts were patently illegal, but no one with the power to prevent or stop them had sufficient incentive to do so. This is not to say that our regulators are too small compared to the institutions that they oversee; rather, it illustrates how complex regulators' jobs are. Given the complexity of their monitoring obligations, regulators need innovative tools to deter bad behavior. Like Charlemagne and his kin, they need a way to ensure that they can trust their counterparties.

Perhaps our regulators need hostages too. Of course, our regulators cannot literally hold a manager captive to ensure the good behavior of his or her employer, but they have tools for similarly focusing risk onto particular individuals. These tools make compliance obligations salient to those who can theoretically achieve compliance either through their own actions or by bending company behavior accordingly. On the literal end of the spectrum there are tools like residency and use requirements that force individual employees to face the same risks as the population whose interests they must protect. Less literal and far more common is personal liability.

The idea that the law should take hostages may seem radical, but in truth our legal

---

11. DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 127–30 (2011) (tracing the history of human bondage as collateral from the Sumerians forward).

12. Charlemagne's request for hostages was typical of rulers of the Middle Ages with imperial aspirations. Historical records reveal frequent requests for hostages as surety for loyalty on the British Isles and similar requests from Danish kings as they conquered new lands. *See* BENHAM, *supra* note 7, at 46–48, 90–91, 156–71.

13. CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 19 (2016), https://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf [hereinafter CFPB STRATEGIC PLAN].

14. The CFPB has supervisory authority over 123 other depository institutions other than Wells Fargo and enforcement authority over countless others. *Institutions Subject to CFPB Supervisory Authority*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/institutions/ (last visited Feb. 17, 2019) ; *see also* CFPB STRATEGIC PLAN, *supra* note 13, at 18.

15. Stacy Cowley, *Wells Fargo Review Finds 1.4 Million More Suspect Accounts*, N.Y. TIMES (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/business/dealbook/wells-fargo-accounts.html; James B. Stewart, *Wells Fargo Whistle-Blowers' Fate Becomes Just a Footnote*, N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/business/wells-fargo-whistle-blowers.html.

system already displays several analogs,[16] notably Sarbanes-Oxley[17] and various responsible officer doctrines.[18] But many of these third-party liability regimes create theoretical and doctrinal problems in their respective laws because they rest awkwardly on theories of *respondeat superior* or negligence.[19] Additional analogs exist in various gatekeeping regimes, such as our anti-money laundering (AML) rules that require financial institutions to file suspicious activity reports with regulators when they suspect wrongdoing.

While it would be preferable to hold liable the individuals who are actually responsible for a harm, the diffuse decision-making inherent in corporations can make identifying the responsible individual costly or even impossible. In other words, the law may better deter corporate wrongdoing by aiming liability rules and public safety regulations at people *other than* the wrongdoers. The hope is that by putting these third parties at risk, they will encourage their company to comply with the regulators' obligations.

This proposal is straightforward, but the details matter. When regulators determine that sub-optimal compliance is likely or when a company wishes to undertake a high-risk endeavor for which compliance is particularly important, regulators would require that the company appoint an individual—a steward—to be personally responsible if either specified preventative measures are not taken or, worse, specified harms occur. Stewards would consent to this liability in exchange for additional compensation from their company. In this way, stewards are internal gatekeepers—individuals tasked with monitoring and interdicting non-compliant acts—but highly motivated ones because they would face unlimited personal liability for their monitoring obligations.[20] The scope of the steward's purview would vary depending on the specific context in which he or she was appointed. It could be project-specific or risk-specific, as long as the scope was only so large as to allow the steward to actually monitor the risks.

Pre-determining the scope of the stewards' liability is essential so that they have clear notice of their obligations. The stewards' liability stems from these affirmative obligations. In this way, it is doctrinally and theoretically cleaner than the strict liability regimes that currently make managers responsible for their employees' actions.

What prevents stewardship from becoming yet another strict liability regime is the steward's obligation to report out to regulators wherever they are unable to bend company behavior to satisfy the compliance obligations for which they are responsible.[21] This obligation also avoids the "perverse incentives" that make those facing strict liability forgo efficient monitoring when that monitoring tends to generate information that increases their

16. *See infra* Part II.B.

17. Sarbanes-Oxley allows regulators to claw back executives' bonuses if the company must restate its financial reports after that manager has certified the accuracy of the reports. 15 U.S.C. § 7243(a) (2002).

18. For example, the Internal Revenue Code imposes personal liability on individuals responsible for collecting, accounting for, or paying over taxes if those taxes are not in fact paid. 26 U.S.C. § 6672 (2018).

19. *See infra* Part II.B.3.

20. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 696 (1997) (explaining that individual liability may be uniquely motivating for corporate agents).

21. Mandatory reporters, sometimes called mandatory whistleblowers already exist throughout our regulatory regime. *See infra* Part II.B.3; Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1163–72 (2010); Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 10 (2007). This proposal is a stronger and more widely applicable version of these existing rules.

expected liability.[22] To encourage stewards to remain in close dialog with regulators, this reporting out must be confidential. While this system will inevitably lead to overreporting, regulators have discretion about which reports to act on.

I call the employees bearing these oversight and reporting obligations stewards because they are other-regarding, just like stewards in literature,[23] theology,[24] and history.[25] Stewards have a personal obligation to protect the public interest by looking after the internal workings of their employers.[26] "Steward" as a title is also a convenient choice, because it is not otherwise occupied in the law. To be sure, stewards are a lot like sureties—individuals who guarantee the performance of others—but their roles are broader.[27] They are a lot like fiduciaries—holders of situation-specific obligations aimed at mitigating power and information imbalances—but not exactly because the public writ large is the intended beneficiary.[28] They are a flavor of internal gatekeeper—one that borrows attributes from several areas of law, but many actors are internal gatekeepers. In sum, stewardship is a pragmatic tool that regulators at all levels can use for improving corporate compliance.

While stewardship should reduce corporate wrongdoing, it will not eliminate it. When wrongdoing nevertheless occurs, stewardship will facilitate punishment. When one of the designated harms occurs, regulators have a clear target for enforcement. This target will not carry the baggage of enforcement against a corporation, including mismatched resources, doctrinal concerns, and political concerns. Easier prosecutions can in turn mitigate the perception of lawlessness that arises when there is no significant enforcement response to obvious wrongs. In this way, stewardship will facilitate what Joel Feinberg calls the expressive function of punishment.[29] Through this lens, stewardship becomes an attractive alternative to the widespread under-sanctioning that has become common in regulatory enforcement.

The Article proceeds in five Parts. Part II explains why stewardship is necessary. Part II.A briefly lays out the problem of persistent corporate wrongdoing notwithstanding our mature system of liability rules and public safety regulations. Part II.B then tours historical efforts to resolve wrongdoing when there is no individual wrongdoer to target. Part III is

---

22. Arlen & Kraakman, *supra* note 20, at 701 n. 32.

23. WILLIAM SHAKESPEARE, RICHARD II act 3, sc. 3 ("If we be not, show us the hand of God/ That hath dismissed us from our stewardship;/ For well we know no hand of blood and bone/ Can gripe the sacred handle of our sceptre,/ Unless he do profane, steal, or usurp.").

24. Christians often describe their duty to care for creation in terms of stewardship. *See* POPE FRANCIS, EVANGELII GAUDIUM ¶215 (2013) ("There are other weak and defenseless beings who are frequently at the mercy of economic interests or indiscriminate exploitation. I am speaking of creation as a whole. We human beings are not only the beneficiaries but also the stewards of other creatures."); Janel M. Curry-Roper, *Contemporary Christian Eschatologies and Their Relation to Environmental Stewardship*, 42 PROF. GEOGRAPHER 157 (1990) (cataloguing Protestant attitudes towards environmental stewardship).

25. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES, *19, *257 ("The court of the lord high steward of Great Britain is a court instituted for the trial of peers, indicted for treason or felony, or for misprison of either.").

26. *See, e.g.*, *Steward*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("One who manages the affairs of an estate on behalf of his employer."); *Steward*, MERRIAM-WEBSTER DICTIONARY (new ed. 2016) ("[O]ne employed in a large household or estate to manage domestic concerns (such as the supervision of servants, collection of rents, and keeping of accounts).").

27. *See infra* Part II.B.2.b.

28. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L.J. 879, 881 (1988).

29. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965).

the normative heart of the paper. It explains the basic structure of how stewardship would work from appointment, to the steward's obligations, through the steward's potential liability. Part IV provides more specific examples of how stewardship might be implemented. Part V explores the limitations and implications of stewardship in detail. In doing so, it looks beyond the economic justifications for stewardship, looking at the proposal's impact on society's perception of corporate wrongdoing and its impact on future regulation. Finally, this Part closes by expanding the lens beyond the corporation and considers how stewardship could be a powerful tool for shaping, in ways both good and bad, the behavior of various kinds of groups.

II. CORPORATE WRONGDOING

A. The Persistence of Suboptimal Compliance

Let's start with a basic question: How does society convince companies to follow the law? The answer has to be by motivating the individuals who comprise the company to follow the law. That motivation can come from several sources, but legal risk is one of the most important. This legal risk may be direct risk to the individuals or indirect risk that first passes through the company itself. That is, if a company pays a fine for some wrong, individuals may nevertheless feel the consequences, either because their bosses sanction them or because their job security or compensation depends on company performance.

This legal risk typically comes in two forms: liability rules and public safety regulations. For clarity, I use these terms as Steven Shavell defines them.[30] Liability rules require those who harm others to pay their victims for their harm.[31] They are always ex post and, usually, private. Three attributes of liability rules are key for our purposes. First, liability rules are a way to return victims to their status quo ante, to the extent that it is possible to do so.[32] Second, liability rules can facilitate corrective justice by theoretically forcing the tortfeasor to purchase a license from the victims to harm them in some way.[33] Finally, liability rules are the simplest mechanism for preventing individuals and companies from externalizing risk onto others.[34] That is, liability rules help align corporate incentives with public welfare priorities. To the extent that companies do externalize risk—for example, by putting a harmful product on the market—liability rules transfer at least some of that

30. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357 (1984).

31. *Id.* at 357; *see also* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 715 (1996).

32. Compensation is impossible in many cases. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795–99 (1993); Richard Craswell, *Incommensurability, Welfare, Economics, and the Law*, 146 U. PA. L. REV. 1419, 1419–20 (1998); Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1600 (1998); MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 115–22 (1996).

33. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 876 (N.Y. 1970) (Jasen, J., dissenting) ("In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it."); *see also* James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 446 (1995) (explaining that justice may require compensation, but acknowledging that "[w]e cannot state the justice norm in the formulaic fashion of the efficiency norm, because, unlike efficiency, justice does not have a single conventional meaning").

34. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (arguing for torts and tort-like law as a mechanism for forcing cost internalization).

risk back to the company.[35]

Unlike liability rules, public safety regulations are typically ex ante and, usually, public.[36] They are the myriad of regulations passed by government authorities and, less frequently, private regulating bodies.[37] Public safety regulations can be obvious—rules about managing toxins, or limiting the hours that resident doctors, long-haul truckers, and flight crews can work—but they also cover non-physical harms, in particular financial harms. These include rules governing mortgage servicing, imposing fiduciary obligations on financial advisors, and arguably licensing requirements.[38] Despite this dual system, many of the harms that these rules and regulations target still occur.

For perspective: in a year without a major spill, roughly 1.3 million gallons of oil is spilled into U.S. waterways[39] and the Occupational Safety and Health Administration (OSHA) reports that workplace accidents cause just over ten amputations per day,[40] a number that does not include amputations outside of OSHA's purview. Of course, raw numbers do not tell us much. It is even possible that annual spills of 1.3 million gallons of oil and daily amputation of ten limbs represent optimal or even over-compliance.[41] That said, I do not want oil on my beach. I do not want to suffer a workplace accident. I also want a legal system that ensures that companies are not above the law. Therefore, I do want compliance innovation as long as that innovation makes regulations both more effective and less costly. This cost point is key because I also want businesses to continue to innovate and raise the

35. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873–74 (1998) (arguing that "to achieve appropriate deterrence, injurers should be made to pay for the harm their conduct generates, not less, not more" and that therefore punitive damages should be awarded when "injurers sometimes escape liability for harms for which they are responsible").

36. Only a few public safety regulations arguably act ex post. These tend not to be rules, but standards which become enforceable against companies primarily when the outcomes of their actions cross certain thresholds. MICHAEL BARR ET AL., NEW AM. FOUND., BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION 6–7 (2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1028&context=other (explaining how ex-post standards could improve outcomes in consumer finance). Unfair, Deceptive, and Abusive Acts and Practices rules are arguably the most famous example of this kind of public safety rule.

37. For example, the employment disclosure rules that the ABA requires law schools to post on their websites are a kind of public safety regulation—they strive to prevent law schools from misleading students about the value of their degree. ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 509(b)(7) (2018–2019). Although the ABA interfaces with public regulators insofar as many states require law schools to bear its accreditation, it is a private organization.

38. Licensing rules are the most difficult to include among public safety rules because they are often little more than rent-seeking by entrenched actors. *See* John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 UCLA L. REV. 844, 870 (2017) (arguing that "occupational licensing turns more on interest group politics and rent seeking than rational policy concerns"); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J. L. & PUB. POL'Y 209, 235 (2016) (explaining that occupational licensing has "come full circle" where it was originally conceived of to repair market failures, but now mostly creates market failures).

39. Andrea Thompson, *FAQ: The Science and History of Oil Spills*, LIVESCIENCE (Apr. 23, 2010, 6:52 AM), https://www.livescience.com/9885-faq-science-history-oil-spills.html.

40. DAVID MICHAELS, OSHA, YEAR ONE OF OSHA'S SEVERE INJURY REPORTING PROGRAM: AN IMPACT EVALUATION (Mar. 17, 2016), https://www.osha.gov/injuryreport/2015.pdf.

41. Whether or not preventing the harm is actually a net good to society turns in part on whether there is an efficient mechanism for preventing the harm. Here, I define efficiency as the cost of the prevention not creating greater harms than those prevented. This concept of efficiency is closely related to overenforcement, which describes situations in which the sanctions for violating legal rules either exceed the harm caused by the violation or the severity needed to deter harms. *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L. J. 1743, 1745 (2005).

standard of living.

To improve compliance, it's helpful to understand some of the reasons why non-compliance persists. A full account of corporate wrongdoing is beyond the scope of this paper, but there are a few broad themes including agency costs, misaligned time-horizons, and cognitive biases. Various factors also prevent the legal system from deterring corporate wrongdoing. First, there are evidentiary problems that can give companies reasonable assurance that regulators will either not catch or be unable to prosecute certain wrongs. Within this category, is the difficulty of imputing intent to commit a wrong to non-human actors like corporations.[42]

Second, doctrinal shields often protect companies' directors from liability for corporate wrongs even though the board is theoretically responsible for monitoring for compliance failures. Although *Caremark*[43] and its progeny suggest that directors may be liable for losses stemming from compliance failures, the court will only hold them liable if they consciously disregard their oversight obligations.[44] Overseeing a weak compliance program does not, by itself, create liability. In this way, directors have strong incentives not to know too much. In many corporations, there is no other party who has the "means or the bargaining power" to interdict wrongdoing at the top of a corporation.[45]

Third, when regulators catch and prosecute a particular wrong, the available sanctions may be insufficient to deter future wrongdoing. Effective deterrence may require fines so draconian that any firm facing them would also face near-certain insolvency.[46] Because the social costs of imposing a death sentence on a company are so great, regulators may hesitate to impose the fine.[47] This problem is not unique to modern regulators. When a litany of crimes great and small were equally punishable by death in eighteenth-century England, juries often acquitted defendants notwithstanding significant evidence of guilt.[48] It's not difficult to imagine that a regulator, faced with destroying thousands of jobs and depressing whole local economies, might similarly hesitate before imposing a functional death sentence on a company. Finally, regulatory capture and other factors may tend to make regulators sympathetic to business and under-deterrent fines are all but guaranteed.

42. Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 46 (2014) (noting that most criminal laws applicable to corporate misconduct require "specific intent to commit the crime, a seemingly insurmountable standard of proof for cases related to the financial crisis") (citation omitted).

43. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960–61, 971–72 (Del. Ch. 1996).

44. Stone v. Ritter, 911 A.2d 362, 364 (Del. 2006); *see also* Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 975–78 (2009).

45. Stavros Gadinis & Amelia Miazad, The Hidden Power of Compliance (Feb. 14, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123987.

46. Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?*, 28 WORLD COMPETITION 1, 27–32 (2005).

47. *Id.*

48. WILLIAM EDWARD HARTPOLE LECKY, A HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY (New York, D. Appleton & Co. 1893); *see also* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1082 (2015).

Under these conditions, deterrence may come more from the consciences of company managers[49] and reputational concerns[50] than the legal obligations themselves.

For these reasons, compliance needs tools that can increase the likelihood that regulators will catch wrongdoing, facilitate prosecution of wrongs that regulators do catch, and reshape sanctions so that they create deterrence while minimizing the social cost to innocent third parties. One place to innovate is in the targets of liability rules and public safety regulations. While the current norm is to target individual wrongdoers and their companies,[51] these obvious choices are not necessarily the best ones. Indeed, history and even many semi-technical corners of the present regulatory state suggest that the best way to achieve optimal compliance is to impose liability on someone other than the actual wrongdoer or their corporation.

Another place to innovate is to enable more local levels of government to shoulder public safety enforcement. Doing so may enable governments to tailor companies' legal risks to their actual public safety risks. Giving local governments the kinds of robust compliance tools most commonly found among federal regulators will not be appropriate in many circumstances—particularly considering the cost to companies of complying with a patchwork of regulations. That said, where local regulators are the most efficient regulators, they should have the best tools for doing so.

And finally, to avoid overdeterrence, it is essential that compliance innovations target harms that cost-benefit-justified precautions can prevent. In medicine, these mitigable harms are called "never events,"[52] which the Centers for Medicare & Medicaid Services

49. The relevant managers here are both the C-suite and the line managers who make the front-line public-safety decisions. Upper-level management sets the tone and values of the organization, but line-level managers act on the public. Chipotle's recent struggles with norovirus outbreaks illustrate this point. At a company-wide level, the company claimed to go above-and-beyond in sustainability, which is a particularly bourgeois form of public safety. Jim Zarroli, *After Chipotle Outbreaks, Will "Food With Integrity" Still Resonate?*, NPR (Jan. 5, 2016, 2:40 PM), https://www.npr.org/sections/thesalt/2016/01/05/461925691/after-chipotle-outbreaks-will-food-with-integrity-still-resonate. Chipotle offered its employees paid sick leave, which is critical to preventing low-income employees from coming in for shifts when they have communicable diseases. But store managers valued these policies differently. Having their own costs and coverage concerns, employees were pressured not to take their sick leave. Predictably enough, employees clocked in despite being unwell and all those sustainable burritos became vectors for food-borne illness. *See* Coral Beach, *Chipotle's Burrito Bribe and Food Safety Strategy*, FOOD SAFETY NEWS (Feb. 10, 2016), http://www.foodsafetynews.com/2016/02/chipotles-burrito-bribe-and-food-safety-strategy/.

50. For many large companies, reputational concerns are likely the single greatest motivator of company choices, especially around public safety. *See* Neil A. Gunningham et al., *Motivating Management: Corporate Compliance in Environmental Protection*, 27 L. & POL'Y 289, 302 (2005); *see also* Ronald J. Mann, *Verification Institutions in Financing Transactions*, 87 GEO. L. J. 2225, 2255 (1999). But reputations only matter to the extent that customers and regulators have choices. If a company is a monopoly—such as a phone company in an apartment building wired for only one provider—reputation hardly matters as long as customers need the service. Monopoly or near-monopoly status can also undermine regulators' ability to address a company's poor treatment of customers. *See* FCC, PUB. SAFETY AND HOMELAND SEC. BUREAU, APRIL 2014 MULTISTATE 911 OUTAGE: CAUSE AND IMPACT DOCKET NO. 14-72 (2014), https://www.fcc.gov/document/april-2014-multistate-911-outage-report (click on PDF) (recommending increased enforcement to maintain 911 service reliability but acknowledging that cost-savings measures by 911 service providers would likely increase network vulnerability).

51. *See, e.g.*, Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to Assistant Attorneys Gen. & U.S. Attorneys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [hereinafter Memorandum from Sally Quillian Yates].

52. Dr. Ken Kizer, former CEO of the National Quality Forum, coined the term "never event." Alan Lembitz & Ted J. Clarke, *Clarifying "Never Events" and Introducing "Always Events,"* 3 PATIENT SAFETY SURGERY 26 (2009).

(CMS) defines as "serious and costly errors in the provision of health care services that should never happen."[53] Never events are things like wrong-site surgeries, mismatched blood transfusions, and instruments left in bodies.[54] These never events occur because humans are imperfect. But this imperfection is not a reason to stop attempting to prevent them. Rather, it is a call to identify risks and hold people accountable for mitigating those risks.

These are the challenges that innovation in compliance must overcome. Mercifully, these challenges are not new and throughout history, societies have created various legal tools for handling these challenges.

B. Sanctioning Wrongs

This Part explores past efforts to address harm caused by corporate entities with the goal of showing that our legal system has the tools to make compliance salient, but it is not deploying the right ones in the right places. Part II.B.1 addresses corporations as non-human actors and explains the difficulty of finding responsible parties within corporations. Part II.B.2 explores third-party sanctions, including collective sanctions. And finally, Part II.B.3 looks at a sample of existing examples of holding individuals responsible for the actions of others in regulatory law.

1. Sanctioning Things

"Where is Waldo?"[55] This is the question Arthur Andersen's defense attorneys put to the jury. How could a corporation be responsible for an act obviously committed by humans? On October 25, 2001 Arthur Andersen employees shredded more than a ton of paper, 25 times more than usual.[56] Executives and lawyers at the company knew a big investigation was coming.[57] Enron, one of Arthur Andersen's biggest clients, was publicly falling apart amid the revelation of a massive accounting scandal, and its cooked books could only reflect poorly on the auditing firm charged with auditing those books.[58] Amid the turmoil, Arthur Andersen's rank and file got the message and began destroying documents, arguably putting the corporation within the crosshairs of 18 U.S.C. § 1512(b) (2)(A) and (B), which "make it a crime to 'knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding.'"[59]

But who, exactly, had the corrupt intent needed to create criminal liability? Defense counsel warned the jury that convicting Arthur Andersen the corporation would destroy an

53. *Eliminating Serious, Preventable, And Costly Medical Errors - Never Events*, CTRS. FOR MEDICARE & MEDICAID SERVS. (May 18, 2006), https://www.cms.gov/newsroom/fact-sheets/eliminating-serious-preventable-and-costly-medical-errors-never-events.

54. *Id.*

55. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 29 (2014) (quoting Transcript of Trial at 369, United States v. Arthur Andersen LLP, No. H-02-121 (S.D. Tex. May 13, 2002)).

56. *Id.* at 25.

57. *Id.*

58. *See* Floyd Norris, *From Sunbeam to Enron, Andersen's Reputation Suffers*, N.Y. TIMES (Nov. 23, 2001), https://www.nytimes.com/2001/11/23/business/from-sunbeam-to-enron-andersen-s-reputation-suffers.html.

59. Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005) (alterations in original).

employer of roughly 30,000[60]—a small city—when clearly *some individual* had to be responsible for ordering the shredding. This is the classic problem of corporate liability—companies have "no soul to be damned, no body to kick."[61] And yet, sometimes the corporation itself is the most obvious target for prosecution.

The easy case is one with an obviously bad apple—the executive who circumvents corporate compliance functions to enrich himself.[62] When this happens, sophisticated corporations will hand over that individual to the authorities and dutifully make the prosecutor's job easier by turning any documents from an internal investigation over to the government. But what if the only visible individual connected to the wrong is an obvious scapegoat, or if it is an employee too junior to have any decision-making authority, or if there are too many apparently culpable individuals to prosecute?[63] Although commentators have thoroughly criticized corporate criminal liability,[64] in some situations an inanimate object must belong on the other side of the "v," or else a harm will go entirely unaddressed.

Indeed, there is a long history of holding inanimate objects liable for crimes and torts,[65] and a new frontier of doing so with the rise of robots and autonomous vehicles.[66] According to Pausanias, Draco, intent on ending blood feud in seventh-century Athens, famously put animals and inanimate objects that had played a role in a person's death on trial for murder.[67] The deodand endured in Athenian society for at least several hundred years,[68] and was an enduring feature of justice systems worldwide.[69] In Europe, for example, animals were routinely tried and sentenced to death for various crimes ranging from eating consecrated wafers to murder.[70]

Silly as they may seem, these prosecutions were not games.[71] As Paul Berman explains, these trials were "[u]ndertaken for the good of society, and if properly conducted it

60. This number includes both employees and partners. GARRETT, *supra* note 55, at 29.

61. 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).

62. *See e.g.*, Complaint, SEC v. Peterson,CV12-2033, (E.D.N.Y. 2012), (charging a Morgan Stanley employee who received at least 35 FCPA compliance reminders with FCPA violations)

63. GARRETT, *supra* note 55, at 107 (explaining that in some pharmaceutical marketing cases, prosecuting individuals would have meant prosecuting the entire sales force of the company, which neither seemed like an efficient use of prosecutorial resources nor the most direct path to the heart of the wrongdoing).

64. *See generally* Gilbert Geis & Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341 (2002) (collecting commentaries); *see also* Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 293–324 (1985) (describing the theoretical and practical problems of corporate criminal liability); *but see* Coffee, *supra* note 61 (arguing that prosecutors should focus on both individuals and corporations).

65. PLATO, THE LAWS OF PLATO bk. IX 269 (T. Pangle trans., 1980).

66. Christina Mulligan, *Revenge Against Robots*, 69 S.C. L. REV. 579 (2018).

67. PAUSANIAS, DESCRIPTION OF GREECE 6.11.6.

68. *Id.*

69. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181–82 (1972) (explaining the pervasiveness of the deodand); T. OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 142 (1956) (explaining how the Akamba compensate accidental killings by animals on the same rubric as intentional killings by humans).

70. E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 156 (1906)(recounting that "[I]n 1394, a pig was hanged at Mortaign for having sacrilegiously eaten a consecrated wafer").

71. Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 290 (1994) (arguing that trials of non-humans provide the community with the narratives necessary for the community to heal following a breach of social norms); Mulligan, *supra* note 66, at 582–83 (discussing revenge as satisfaction for victims).

was intended to bring *social benefits* to the community—benefits, that is, to human beings."[72] He posits that one reason why humans put inanimate objects and animals on trial is to "domesticate chaos by providing a consensus explanation" for what might otherwise appear to be "a frightening and uncontrollable activity."[73] Without the trial, "violence caused by insensate agents bring a deep feeling of lawlessness: not so much the fear of laws being broken, but the far worse fear that the world might not be a lawful place at all."[74] Public condemnation is essential for expressing the community's values and solidarity. And punishment, even of inanimate objects, is an ideal vehicle for expressing this condemnation. As Joel Feinberg explains, "when [the state] speaks by punishing, its message is loud, and sure of getting across."[75]

This fear of lawlessness, even if irrational, is precisely why the question of corporate liability is so important.[76] Consider the corporation—inanimate, intangible, and yet capable of serious harms even when it is impossible to attribute the wrong to particular individuals on a narrative level, much less with the precision that plaintiffs' attorneys and prosecutors need in the courtroom.

So we prosecute the corporation.[77] Samuel Buell has argued that "the existence of institutional influence on an individual offender explains *both* the impulse to blame an entity *and* why such blaming can beneficially alter group behavior to make wrongdoing in organizations less likely."[78] Indeed, if we know anything about human behavior, it is that groups are powerful in part because they are institutions.[79] And what kind of group is more ubiquitous than the corporation? Law needs a satisfying way to interact with corporations lest lawlessness and the perception of lawlessness prevail.[80] The alternative is a significant increase in individual sanctions, but widespread individual prosecutions have their own

72. Berman, *supra* note 71, at 290.

73. *Id.* at 292.

74. *Id.* at 318; *see also* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

75. Feinberg, *supra* note 29, at 408.

76. Several commentators have questioned whether the Obama administration's failure to prosecute the banks for widely perceived wrongdoing helped create the disillusionment that led to the election of Donald Trump in 2016. *See* Gretchen Morgenson, *How Letting Bankers Off the Hook May Have Tipped the Election*, N.Y. TIMES (Nov. 11, 2016), https://www.nytimes.com/2016/11/13/business/how-letting-bankers-off-the-hook-may-have-tipped-the-election.html; Matt Stoller, *Democrats Can't Win Until They Recognize How Bad Obama's Financial Policies Were*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/posteverything/wp/2017/01/12/democrats-cant-win-until-they-recognize-how-bad-obamas-financial-policies-were/.

77. To be sure, our ability to prosecute corporations under our modern legal system does not mean that prosecutors target entities with the same zeal as individuals. Prosecutors have policies in place favoring the prosecution of individuals over entities. *See infra* Part III.B.1. And data suggests that even where prosecutors do target entities, they rarely target large ones. GARRETT, *supra* note 55. A recent documentary explores how the only bank prosecuted for misdeeds in the mortgage crisis appears to have been targeted, in part, because of its size. *Frontline: Abacus: Small Enough to Jail* (PBS television broadcast Sept. 12, 2017). Tellingly, the district attorney prosecuting that case, Cyrus Vance Jr. explained "I felt that our handling of the bank was consistent with how we would have handled the bank if we were investigating a bank that serviced a South American community or the Indian community." Ben Kenigsberg, *Review: 'Abacus: Small Enough to Jail,' a Classic Underdog Tale*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/movies/abacus-small-enough-to-jail-review.html.

78. Buell, *supra* note 74.

79. *See generally* Gary Charness et al., *Individual Behavior and Group Membership*, 97 AM. ECON. REV. 1340 (2007) (explaining that group membership and the saliency of the group influences individual behavior).

80. *See* Berman, *supra* note 71, at 292.

problems.[81]

2. Third-Party Sanctions

a. Collective Sanctions

Putting aside the question of holding something intangible liable for the actions of individuals, corporate liability, whether civil or criminal, poses significant questions about punishing the innocent. There may be innocent shareholders.[82] There are almost certainly innocent employees, suppliers, and adjacent businesses.[83] Despite these concerns, there is often no better alternative. Individual wrongdoers cannot always be identified, nor can they always be convicted when identified. And targeting individuals, even several individuals, when there appears to be pervasive corporate rot may leave society's desire for blame, and for retribution, unsatisfied.[84]

But beyond satisfying baser desires for blame and retribution, there are several good reasons for punishing collectives, including innocent members of the collective, for wrongs caused by individual members of the collective. Daryl Levinson has offered a convincing argument for this approach.[85] Acknowledging that collective sanctions necessarily punish the innocent and impose guilt by association, Levinson argues that in many cases "punishing groups . . . is perfectly consistent with moral and (more generally) methodological individualism."[86] That is, "[g]roup members might be punished not because they are deemed collectively responsible for wrongdoing but simply because they are in an advantageous position to identify, monitor, and control responsible individuals, and can be motivated by the threat of sanctions to do so."[87] Groups, especially tightly knit groups,[88] are therefore in a better position to identify and sanction wrongdoers because they have better information about each other than external regulators have.[89] This information advantage allows fellow group members to use "less formal and costly, yet more accurate" adjudicative methods

---

81. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 74 (2013) (explaining how employees tend to be scapegoated to protect the corporation).

82. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 361 (2003). I am somewhat skeptical of the idea of "innocent" shareholders, as securities purchasers are knowingly assuming both upside and downside risk when they purchase shares.

83. Financial distress is often contagious. Indeed, one of the leading justifications for bailing out the U.S. automobile industry was preventing a wave of suppliers and dealers from also going bankrupt. *See* Steven Gray, *The Ripple Effect of a Potential GM Bankruptcy*, TIME (Nov. 28, 2008), content.time.com/time/business/article/0,8599,1862737,00.html. The distress at GM pushed its former subsidiary, Delphi, into bankruptcy as well. Although an independent corporation, Delphi was explicit through its reorganization that its fate turned on its relationship with GM. *See* First Amended Disclosure Statement with Respect to First Amended Joint Plan of Reorganization of Delphi Corporation and Certain Affiliates, Debtors and Debtors-In-Possession at DS-viii, *In re* Delphi Corp. Bankr. No. 05-44481 (RDD), 2008 WL 5146952 (Bankr. S.D.N.Y. Nov. 19, 2008).

84. Buell, *supra* note 74, at 491.

85. Levinson, *supra* note 82, at 361.

86. *Id.* at 348.

87. *Id.*

88. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358–65 (1997) (describing how groups use consensus and, where available, exit, to establish norms and police them with esteem as a low-cost but highly effective sanction).

89. Levinson, *supra* note 82, at 379.

for ferreting out wrongdoers.[90]

Levinson also argues that groups are often in a better position to control would-be wrongdoers than external regulators because they know where ex-ante regulation will be more effective than ex-post sanctions.[91] Moreover, where ex-post sanctions are needed, close-knit groups have uniquely efficient options, namely social sanctions.[92]

Close-knit groups may also be efficient regulators because they can engage in "continuous monitoring and verification of conduct," whereas external regulators can only intervene once a harm has occurred.[93] That is, the same inward-looking, micro-managing, and busybody tendencies that can make office life unbearable can potentially be harnessed to ensure better legal compliance, provided that the relevant group views compliance as one of its values. One way to ensure that the group views compliance as one of its values is to implement a collective sanctions regime.[94]

Collective sanctions, then, are one way that law can effectively motivate *individuals* to address or prevent harm caused by groups or other group members. But they are only one such strategy; law can use other techniques to enlist third parties to ensure others' compliance. Consider a couple of examples.

b. Surety

The idea that one individual would be accountable for the actions of others is ancient. Consider suretyship, the somewhat obscure corner of law that governs "the relation of a third person who attempts to make secure an obligation created by two other persons."[95] One of the earliest known surety contracts provides a classic example of the form.[96] The library of Sargon I, king of the Old Assyrian Empire, contains a 4000-year-old contract between a farmer who had recently been drafted into war and a neighbor who promised to look after his land while he was away.[97] The neighbor promised to care for the land and pay the farmer half of the yield.[98] A third person, a merchant, was the surety for the neighbor.[99] That is, the merchant promised to monitor and guarantee the neighbor's performance under the contract while the farmer was unable to watch his land himself.[100]

---

90. *Id.* at 381; *see also*, McAdams, *supra* note 88, at 361 (describing how groups can engage in nearly costless monitoring as monitoring occurs "as a byproduct" of other communal activities).

91. Levinson, *supra* note 82, at 381–86 (explaining that groups will be more effective at imposing ex ante regulations when individual wrongdoers "fail to internalize monetary costs above the level of their ability to pay" and where "optimal risk-reduction strategies are structural and cannot be effected by individuals acting alone").

92. *Id.* at 381; *see also* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) (explaining studies showing "a strong correlation between a person's obedience and her perception of others' behavior and attitudes toward the law") (citations omitted).

93. Levinson, *supra* note 82, at 382 (citation omitted).

94. Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 677 (1968) (explaining that "[u]nder certain circumstances, collective liability is a natural and prudent way of organizing the affairs of an organization, which the members might well be expected to undertake themselves," especially where "there is already a high degree of *de facto* solidarity" since "[c]ollective responsibility not only expresses the solidarity, it also strengthens it").

95. Max Radin, *Guaranty and Suretyship*, 17 CAL. L. REV. 605, 605 (1929) (providing a detailed etymology of the term "suretyship").

96. EDWARD GRAHAM GALLAGHER, AM. BAR ASS'N TORT & INS. PRACTICE SEC., THE LAW OF SURETYSHIP 4 (2d ed. 2000).

97. Willis D. Morgan, *History and Economics of Suretyship*, 12 CORNELL L.Q. 153, 153 (1926).

98. *Id.*

99. *Id.*

100. *Id.*

Should the neighbor fail to meet his obligation, the merchant will make the farmer whole. Under modern surety law, the merchant would then have a claim for reimbursement against the neighbor. This reimbursement claim distinguishes the arrangement from insurance.[101] The basic surety agreement shifts the burden of collection from the beneficiary (Lender) to the surety,[102] thereby shifting some of the contract risk. In more complex surety arrangements, the surety will agree to provide material and sometimes even consulting support to the principal to prevent default.[103]

Surety exists in many contexts. Bail bonds are a form of surety that the accused will appear in court.[104] Betrothal agreements are often surety arrangements between two families that their youngsters will marry.[105] Hostages guaranteeing both public and private obligations[106] are a still stronger form of surety.[107] And then there are the more vanilla forms of third-party performance guarantees such as surety bonds for contractors under which a bonding company agrees to make certain parties whole should a contractor fail to meet its obligations.[108]

In all of these examples, the agreement being protected by the surety is of unusual importance or particular vulnerability. That is, the consequences of breach are intolerably high for the individual receiving the surety—near-certain poverty or war. Or, as in the case of construction performance bonds, the risk of breach is high given labor and supply contingencies, and the consequences are potentially severe if the construction project interferes with roads or other essential public facilities[109] or, on a smaller but no less important scale, if it renders a homeowner temporarily homeless. The point is, the obligation of contract—

101. Pearlman v. Reliance Ins. Co., 371 U.S. 132, 136 (1962) ("Traditionally sureties compelled to pay debts for their principal have been deemed entitled to reimbursement, even without a contractual promise such as the surety here had."); J. Harry Cross, *Suretyship Is Not Insurance*, 30 INS. COUNSEL J. 235, 237 (1963).

102. Here, Surety is entitled to be subrogated to the rights Lender against Principal. *Pearlman*, 371 U.S. at 136–37 ("And probably there are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.").

103. *See generally* James A. Black, Jr., *Miscellaneous Surety Bonds and the Restatement*, 34 WM. & MARY L. REV. 1195 (1993) (describing several kinds of surety bonds that purport to guarantee something in addition to payment).

104. Morgan, *supra* note 97, at 156.

105. Herodotus reports—almost certainly falsely—that Babylonian brides were auctioned according to their beauty with the fairest maidens commanding a price and the ugliest commanding a dowry. HERODOTUS, THE HISTORIES 1.196.3. Before any prospective groom could take home his future bride, he had to enter into a betrothal contract or pay a surety. Translations differ on this point because the relevant word, ἐγγυητὰς, can refer to both commercial sureties and betrothals. *See* Richard A. McNeal, *The Brides of Babylon: Herodotus 1.196*, 37 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 54, 58–59 (1988).

106. Kosto, *supra* note 1, at 124; *see also id.* at 128–30 (describing the use of hostages to guarantee private law contracts).

107. Hostages can take many forms. There are both explicit hostages occasionally described in medieval sources, but also wives and foster children given over to secure peace. *See id.* at 132–33; Ryan Lavelle, *The Use and Abuse of Hostages in Later Anglo-Saxon England*, 14 EARLY MEDIEVAL EUR. 269, 271–72 (2006).

108. Hosea v. Toth, 232 P.3d 576, 577 (Wash. Ct. App. 2010) (explaining that contractors must file either a surety bond or an assigned savings account with the Department of Labor and Industries before doing business in the state); *see also* Colo. Structures, Inc. v. Ins. Co. of the W., 167 P.3d 1125, 1148 (Wash. 2007) (Alexander, C.J., dissenting) (noting that "the purpose of the bond . . . is to guarantee the 'prompt and faithful' performance of the [] contract").

109. *See* Theodore H. Haas, *Corporate Surety and Public Construction Bonds*, 25 GEO. WASH. L. REV. 206, 208 (1956) (explaining how sureties in public construction contracts prevent loss by locating essential materials and labor as shortages arise).

promise—was insufficient.

Surety also appears where legal obligations by themselves confer insufficient protection on the beneficiaries of safety regulations. Consider license and permit bonds. The former is "usually conditioned on compliance with a statute or ordinance and permit[ting] the conduct and business as a whole."[110] The latter is "conditioned on satisfaction of the terms of the permit under which permission is granted to perform certain acts incidental to the conduct of a business."[111] These bonds protect the financial interests of the regulating governmental entity, while also providing a remedy to third parties that the principal may harm should it perform poorly.[112] In sum, these bonds ensure compliance.[113] And in ensuring compliance, the surety is assuming the government's burden of monitoring for compliance and where that fails, ensuring compensation for the consequences of non-compliance. This job should be comparatively easy for the surety—their business is predicated upon having significant investigation capabilities[114] while at the same time, their business should give them broad insight into compliance trends across companies. The surety mitigates at least some of the political risk of failures to monitor and enforce. As long as there is an applicable surety bond in place, there is less of a chance that there will be unpaid victims to scandalize the government's failure to enforce the law. Indeed, where the government finds itself unable to efficiently enforce its public safety regulations, it can impose surety requirements to privatize that enforcement.

c. Liability for Complicity

Similar privatizing of enforcement also appears in criminal and regulatory law. Returning for a moment to medieval England, the institution of Frankpledge made all members of a group liable for each other's crimes unless and until the group produced the wrongdoer to the relevant authorities.[115] When the institution arose in the tenth and eleventh centuries, there were few government officials available to deal with growing public-order problems.[116] Prior efforts at peacekeeping had imposed surety obligations on all men and enlisted them in tithings to perform police duties.[117] The Frankpledge merged these systems, imposing collective liability on all men over age 12 "whose status in society was not sufficient surety for their good behavior."[118] The duty of night watchmen rotated

110. Frank B. Keech et al., *Miscellaneous Bonds*, *in* HANDLING FIDELITY, SURETY AND FINANCIAL RISK CLAIMS § 10.1 (Robert F Cushman et al. eds., 2d ed. 1990); *see also* Black, *supra* note 103, at 1221 (reproducing a "License and/or Permit Bond").

111. Black, *supra* note 103, at 1196 (internal quotations removed) (quoting Keech et al., *supra* note 110, at 199).

112. *Id.*

113. For example, a license and/or permit bond may provide that the surety "shall indemnify said Obligee against all loss, costs, expenses or damage to it caused by said Principal's non-compliance with or breach of any laws, statutes, ordinances, rules or regulations pertaining to such license or permit issued to the Principal, which said breach or non-compliance shall occur during the term of this bond, then this obligation shall be void, otherwise to remain in full force and effect." *Id.* at 1221 (reproducing a "License and/or Permit Bond").

114. Haas, *supra* note 109, at 208.

115. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1195 (1999).

116. D.A. Crowleye, *The Later History of Frankpledge*, 48 HIST. RES. 1, 1 (1975); *see also* Levinson, *supra* note 82, at 357 (observing that homicide rates in the Middle Ages were double that of modern America notwithstanding the lack of firearms).

117. Crowleye, *supra* note 116, at 1.

118. *Id.*; *see also* Levinson, *supra* note 82, at 357.

among this collective. And it was the night watchman's job to arrest strangers and raise a "hue and cry" obligating neighbors to assist with the arrest when needed.[119] Should the collective fail to make the arrest, its members were jointly and severally liable for the crime.[120] Any single individual could be held liable for the crimes of another because he had a personal obligation either to prevent those crimes or turn in the wrongdoer if he failed to do so.[121]

While official policy no longer imposes collective responsibility on neighbors for each other's crimes, the law of conspiracy imposes a similar system among criminals. Criminal law holds accomplices[122] and co-conspirators[123] liable for the crimes of others.[124] Once involved in a criminal undertaking, the only way for accomplices and co-conspirators to avoid liability is to "[make] bona fide efforts to neutralize the effects of [their] prior assistance."[125] It is usually not enough to merely stop helping with a criminal undertaking.[126] The burden of stopping the collective's enterprise shifts to the individual if that individual wants to escape liability. This is a bit like our medieval English citizen who had to arrest criminals himself lest he be held liable for the criminal's acts.

3. Third-Party Sanctions Against Corporate Wrongdoing

Modern regulatory law has adopted features of collective sanctions, surety, and liability for complicity. These features are especially visible in gatekeeper liability and in the growing risk of personal liability that compliance personnel face.[127]

a. Responsible Corporate Officer Doctrine

The responsible corporate officer (RCO) doctrine assigns criminal liability to corporate executives even if they did not personally commit the acts resulting in the crime by the corporation. When the Supreme Court articulated the doctrine in 1943 in *United States v. Dotterweich*,[128] it acknowledged that the targeted executive lacked "consciousness of [the] wrongdoing" but nevertheless bore "a responsible share in the furtherance of" the criminal act.[129] Dotterweich, the president and general manager of Buffalo Pharmacal Company, Inc., had been found guilty of violating § 301(a) of the Federal Food, Drug, and Cosmetic Act, which prohibits the introduction or delivery for introduction into interstate commerce of any adulterated or misbranded drug.[130] In upholding his conviction, the Court recognized that "the only way in which a corporation can act is through the individuals who act

119. Sklansky, *supra* note 115, at 1197 (quotations omitted).
120. Levinson, *supra* note 82, at 357 n.62.
121. *Id.*
122. *See, e.g.*, People v. Perez, 113 P.3d 100, 103–04 (Cal. 2005).
123. *See generally* Pinkerton v. United States, 328 U.S. 640 (1946).
124. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §30.08[C] (7th ed. 2015).
125. *Id.* at §30.07[B].
126. *See* Eldredge v. United States, 62 F.2d 449, 451 (10th Cir. 1932) (holding that it was not enough for a co-conspirator in an embezzlement scheme to inform his associates that he would no longer participate in the scheme when continued concealment of the scheme required those associates to continue falsifying records).
127. Gadinis & Miazad, *supra* note 45, at 35–39 (tracing the rise of personal liability for compliance officers).
128. United States v. Dotterweich, 320 U.S. 277, 285 (1943).
129. *Id.* at 284.
130. *Id.* at 278.

on its behalf'"[131] while also confronting the absence of any obvious individual wrongdoer. It settled on a variant of accomplice liability, explaining that when a statute contemplates that "a corporation may commit an offense and all persons who aid and abet its commission are equally guilty."[132] To be sure, though, RCO is an expansion of traditional accomplice liability since the defendant need not "affirmatively participate" in the crime to be criminally liable.[133] This expansion has attracted many critics[134] as well as a handful of defenders.[135]

Rather than focusing on the accused's mental state, as is the norm in criminal law, the Court built RCO doctrine on the need to protect victims from corporate harm. More unusual still, the victim is the public writ large. The Court explained as much in *United States v. Park*, which involved prosecution against the chief executive officer of Acme Markets, a national food chain that shipped food found to be contaminated by rodents at its filthy warehouses. [136] There, the Court reasoned that:

> The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.[137]

Emphasizing harm to the victim while ignoring individual culpability,[138] defining the

---

131. *Id.* at 281 (citation omitted).

132. *Id.* at 284.

133. Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100, 1101 (1991).

134. Martin Petrin, *Circumscribing the 'Prosecutor's Ticket to Tag the Elite'—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 286 (2012) ("In many cases, the RCO doctrine represents an unwarranted augmentation of corporate agents' duties and runs contrary to established tort, criminal, and corporate law principles."); Ronald M. Broudy, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 KY. L.J. 1055, 1056 (1991) ("[T]he RCO doctrine is inappropriate in a case that requires proof of actual knowledge as part of the statutory definition of the crime.").

135. *See, e.g.*, Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1247 (2006) (explaining that "[t]he legitimacy of the responsible relation doctrine as a basis for imposing criminal liability in any circumstance should depend, like any other judicially created doctrine of criminal law, on whether the doctrine can be explained by reference to widely accepted principles of criminal law" and finding that RCO doctrine meets that test via liability for omissions); Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371, 406 (2014) (defending the doctrine but acknowledging that RCO has two potential dangers if government officials use it to: "(1) retaliate against those who challenge the government's authority; or (2) coerce compliance with standards that the government desires, but is without legal authority to enforce"); Susan F. Mandiberg, *Moral Issues in Environmental Crime*, 7 FORDHAM ENVTL. L.J. 881, 898–940 (1995) (justifying the doctrine under the "commission by omission" framework).

136. *See generally* United States v. Park, 421 U.S. 658 (1975).

137. *Id.* at 672.

138. *Id.* at 670 ("Moreover, the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required 'consciousness of wrongdoing,' and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.").

victim as the public, then looking at how the company's acts impact "the health and well-being" of the public sounds downright regulatory, not criminal.

Todd Aagaard argues that RCO liability is nevertheless consistent with fundamental criminal-law principles because liability is rooted in the executives' actions—or, rather, their omissions—rendering their apparent lack of culpable mental state less relevant.[139] This kind of liability for omissions is more common for statutory crimes, such as failure to file a tax return and in breach of a contractually created duty, especially a duty to protect.[140]

From a pragmatic perspective, RCO liability fails because it is neither factually true that a chief executive like Park would personally monitor the cleanliness of warehouses, nor would such monitoring be a productive use of that executive's time. Rather, public safety demands that the chief executives provide monitoring resources, whether their own time or others' time.

b. Responsible Party Liability

A similar flavor of third-party liability exists in federal tax law and some state labor laws under the "responsible officer" or "responsible party" doctrine. For example, §6672 of the Internal Revenue Code provides that

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.[141]

For the purposes of this provision, "person" "includes an officer or employee of a corporation . . . who as such officer, employee, or member, is under a duty to perform the act in respect of which the violation occurs."[142] Courts collapse the requirement that there be a person and the requirement that that person be responsible for collecting, truthfully accounting for, or paying over a tax into the concept of the "responsible person."[143] This "responsibility and authority" arises not from the generalized obligation of all citizens to comply with the law, but from those individuals' position in the corporation.[144]

Holding individuals personally liable for the corporation's statutory obligations is unusual, but this regime serves important goals. As the United States Court of Federal Claims explained in *Cook v. United States*, "[t]his definition of 'person' is meant to protect the government fisc by facilitating the collection of taxes from those who have both the responsibility and authority to avoid the default."[145]

This same concern for the public spillover effects of non-compliance also appears in

139. Aagaard, *supra* note 135, at 1254; *see also* Mandiberg, *supra* note 135, at 903–04.

140. Aagaard, *supra* note 135, at 1278. As with contract, impossibility is a defense. *Park*, 421 U.S. at 673; Aagaard, *supra* note 135, at 1290–91.

141. 26 U.S.C. § 6672 (2018).

142. 26 U.S.C. § 6671(b) (1976).

143. Jenkins v. United States, 101 Fed. Cl. 122, 131 (2011).

144. Cook v. United States, 52 Fed. Cl. 62, 68 (2002) ("[T]he determining factor in whether an employee or corporate official is a responsible person is his or her 'power to compel or prohibit the allocation of corporate funds.'") (quoting Godfrey v. United States, 748 F.2d 1568, 1576 (1984)).

145. *Id.*

state wage laws that make managers personally liable for unpaid wages. For example, the Massachusetts Wage Act[146] requires employers to pay wage earners, then "deems" "the president and treasurer of a corporation, as well as 'officers or agents having the management' of the corporation" to be "employers" for the purposes of the act.[147] The Massachusetts Supreme Judicial Court has explained that "[t]he statute was intended and designed to protect wage earners from the long-term detention of wages by unscrupulous employers as well as protect society from irresponsible employees who receive and spend lump sum wages."[148]

Targeting humans with wage laws also allows lawmakers to increase the likelihood that the government and employees receive at least some of what they are owed even if the company itself becomes insolvent.[149] This reflects a value judgment by lawmakers that wage and tax obligations are somehow more important than other obligations that an insolvent company might fail to satisfy.[150]

Unlike RCO liability, this liability is primarily civil,[151] which mitigates many of the thornier theoretical and constitutional questions that plague RCO liability. Whether the liability is civil or criminal, it theoretically deters non-compliance. And where compliance is especially important—food and drug safety, and (arguably) government funding—aiming that liability at a real, living, breathing human capable of feeling the sanction seems more likely to achieve better compliance.

c. Sarbanes-Oxley and Gatekeeper Liability

Following a wave of accounting crises, the Sarbanes-Oxley Act of 2002 marked a turning point for individual liability as a tool for ensuring corporate compliance. There, Congress sought to increase the salience of financial reporting to top managers by requiring them to personally "certify in each annual or quarterly report filed" that "based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements . . . not misleading."[152] The law further requires those who certify the accuracy of financial statements to certify that they have internal controls—essentially processes—in place that would alert

---

146. MASS. GEN. LAWS ch. 149, § 148 (2009).

147. Cook v. Patient Edu, LLC, 989 N.E.2d 847, 851 (Mass. 2013).

148. Melia v. Zenhire, Inc., 967 N.E.2d 580, 587 (Mass. 2012) (quoting Cumpata v. Blue Cross Blue Shield of Mass., Inc., 113 F. Supp. 2d 164, 167 (D. Mass. 2000)).

149. *See* Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310, 2365 (2005) (describing how business owners raid tax trust funds as a last resort when their businesses are failing).

150. This same value judgment appears in the Bankruptcy Code itself as wages and tax obligations are given higher priority than general unsecured obligations, even though employees and the government are theoretically no different than any other creditors. *See* 11 U.S.C. § 507 (2010).

151. 26 U.S.C. § 6672 (2018); United States v. McLain, 597 F. Supp. 2d 987, 990–91 (D. Minn. 2009) (explaining that civil sanctions are not a prerequisite for criminal sanctions under § 6672).

152. 15 U.S.C § 7241(a)(2) (2002); *see* 148 CONG. REC. S6748 (daily ed. July 15, 2002) (statement of Sen. Chuck Grassley) ("[A]ddressing the 'bad apples' [in corporate governance] requires additional oversight and not just of a company's external accountants but of the internal accounting function itself."); *see also* Brian Kim, *Sarbanes-Oxley Act Recent Development*, 40 HARV. J. ON LEGIS. 235, 245 (2003) ("The Sarbanes-Oxley Act seeks to increase the effectiveness of its accounting provisions by placing new obligations on corporate executives in the form of certifications.").

them to any wrongdoing.[153] The law imposes similar obligations on auditors,[154] harnessing the power of gatekeeper liability. These provisions indirectly mandate whistleblowing around accounting misdeeds;[155] the absence of a certification or auditor's opinion reveals the risk of financial irregularities.

Sarbanes-Oxley gave the SEC a second stick for ensuring that certifying managers take their obligations seriously. If a company must restate its financial reports, the CEO and CFO may have to forfeit any bonuses they received in the time following the misleading statement along with any profits they made from selling shares.[156] This clawback provision is a form of personal liability. It is limited, insofar as the clawback tracks the amount of the bonus and profit, not the scale of the wrong, but it is nevertheless a form of personal liability rarely seen for corporate officers.[157]

While Sarbanes-Oxley was and is undoubtedly burdensome for companies,[158] it seems to have done its job. As early as two years after implementation, researchers found that firms subject to Sarbanes-Oxley improved the reliability of their reported earnings and the predictive power of their earnings as compared to companies not subject to the law.[159]

---

153. 15 U.S.C. § 7241 (2002). This requirement resembles so-called "process crimes"—charges such as obstruction of justice and other offenses that "interfere with the administration of justice." Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L. J. 1435, 1439–42 (2009).

154. PUB. CO. ACCT. OVERSIGHT BD., AS 3320: ASSOCIATION WITH FINANCIAL STATEMENTS, https://pcaobus.org/standards/Auditing/Pages/As3320.aspx (last visited Jan. 19, 2019) ("The report shall either contain an expression of opinion regarding the financial statements, taken as a whole, or an assertion to the effect that an opinion cannot be expressed. . . . In all cases where an auditor's name is associated with financial statements, the report should contain a clear-cut indication of the character of the auditor's work, if any, and the degree of responsibility the auditor is taking. The objective of the preceding paragraph is to prevent misinterpretation of the degree of responsibility the accountant assumes when his name is associated with financial statements.").

155. *See* Hillary A. Sale, *Banks: The Forgotten (?) Partners in Fraud*, 73 U. CIN. L. REV. 139, 141 (2004); *see also* Tippett, *supra* note 21, at 34–45 (describing Sarbanes-Oxley as a compelled whistleblowing regime); Feldman & Lobel, *supra* note 21, at 1163–72 (discussing compelled whistleblowing regimes throughout the law).

156. 15 U.S.C. § 7241(a)(1) (2002).

157. And indeed, even the clawback provision has been rarely used, even though the Dodd-Frank Financial Reform Act extended it. *See* Kevin J. Murphy, *Executive Compensation: Where We Are, and How We Got There*, *in* 2A HANDBOOK OF THE ECONOMICS OF FINANCE 211 (George M. Constantinides et al. eds., 2013).

158. Research suggests that the compliance burdens were greatest for small and medium-sized firms, and only questionably relevant for large, big-name firms. *See* Robert P. III Bartlett, *Going Private but Staying Public: Reexamining the Effect of Sarbanes-Oxley on Firms' Going-Private Decisions*, 76 U. CHI. L. REV. 7, 7–8 (2009) (finding that the conventional wisdom that increased compliance costs drove companies into the arms of private equity was marginally true for small and medium-sized firms and decidedly not true for large firms).

159. Zvi Singer & Haifeng You, *The Effect of Section 404 of the Sarbanes-Oxley Act on Earnings Quality*, 26 J. ACCT., AUDITING & FIN. 556 (2011); *see also* Jennifer Altamuro & Anne Beatty, *How Does Internal Control Regulation Affect Financial Reporting?*, 49 J. ACCT. & ECON. 58 (2010) (finding that similar rules regarding internal controls in the Federal Depository Insurance Corporation Improvement Act improved the accuracy of financial reporting by financial institutions subject to the law as compared with control groups that were exempt from its requirements).

More recent studies confirm the same.[160] And perhaps more importantly,[161] Sarbanes-Oxley helped restore investor confidence[162] and its mandated internal controls have become important signals of firm quality.[163] Indeed, some research suggested that causing companies to shift resources to compliance also helped company performance by "improving financial management processes and capabilities," which in turn generated "better information about company operations in order to avoid making bad decisions."[164]

Another locus of innovation in compliance in recent years is AML rules. AML rules rely on gatekeeper liability. Instead of requiring gatekeeper sign-off as Sarbanes-Oxley does, they ask gatekeepers to report suspected wrongdoing to FinCEN, the division of Treasury tasked with enforcing money-laundering rules, by filing suspicious activity reports (SARs).[165] To encourage candor, these reports are confidential[166] and the filer cannot be held liable for any information they disclose on a SAR, even if that information proves incorrect.[167] This approach differs from other proposed forms of gatekeeper liability in that gatekeepers must take action on the suspicion of wrongdoing, not knowledge of wrongdoing.[168] This change in when the obligation to report accrues prevents gatekeepers from strategically avoiding knowledge about their clients' activities to avoid the obligation to report.[169]

* * *

RCOs, co-conspirators, and gatekeepers are alike in that they are individuals who bear responsibility for actions that they did not necessarily undertake themselves. In these cases, targeting the individual wrongdoer may not be the first-best option for deterring the targeted behavior.[170] Mercifully, legislators can choose where they aim their sanctions.[171] In the case of individual sanctions for collective wrongs, legislatures justify sanctioning these individuals even though they are often only indirectly culpable because they are in the best

160. Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404*, 29 CARDOZO L. REV. 703, 715–20 (2007) (cataloging studies showing that Sarbanes Oxley improved internal controls, improved investor confidence, improved corporate governance, and reduced the cost of capital).

161. *See* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 469 (2003) (arguing that in 2003 as the country emerged from the bursting of the dot-com bubble and its wave of corporate accounting scandals, "restoring confidence might be the most important thing the SEC and Congress can do, just as it was the top priority during the crisis of confidence following the 1929 stock market crash").

162. *See* Prentice, *supra* note 160, at 712–13 (arguing that American markets performed remarkably well following the passage of Sarbanes-Oxley notwithstanding downward pressure on the markets from high deficits, high gasoline prices, and natural disasters).

163. Xue Wang, *Increased Disclosure Requirements and Corporate Governance Decisions: Evidence from Chief Financial Officers in the Pre- and Post- Sarbanes-Oxley Periods*, 48 J. ACCT. RES. 885, 886 (2010) (finding that "that the mandatory internal control disclosures under SOX are a credible mechanism that effectively distinguishes good CFOs from bad ones by revealing the firm's internal control quality").

164. Stephen Wagner & Lee Dittmar, *The Unexpected Benefits of Sarbanes-Oxley*, HARV. BUS. REV. (Apr. 2006), https://hbr.org/2006/04/the-unexpected-benefits-of-sarbanes-oxley (describing how they found a small subset of executives in their study who "approached the new law with something like gratitude").

165. 12 C.F.R. § 21.11(a) (2005).

166. 12 C.F.R. § 21.11(k) (2005).

167. 12 C.F.R. § 21.11(l) (2005).

168. *See generally* Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797, 820 (2016) (describing this reporting on suspicion of wrongdoing approach as "collaborating gatekeeping").

169. *Id.*

170. *See* Levinson, *supra* note 82, at 350 (discussing policy reasons for targeting certain individuals).

171. *Id.*

position to monitor for and stop the targeted wrong. This is the motivation for mandatory reporting rules in cases of suspected child abuse[172] and in some instances of gatekeeper liability.[173] Those individuals may not be in this monitoring/enforcement position naturally, or even consent to such an arrangement, but nevertheless, *individual* sanctions for collective wrongs may be the most efficient path towards compliance.

The following Parts will argue that by pushing individual sanctions against pre-appointed individuals to their logical extreme, we can efficiently target previously difficult-to-sanction collective wrongs. This seemingly extreme approach allows us to capture the compliance incentives of individual liability while avoiding many of the theoretical and constitutional objections to RCO doctrine. At the same time, it can be much more effective than our current approach to corporate wrongdoing, which largely involves focusing prosecution efforts on mid- and low-level managers.[174]

III. THE STEWARDSHIP PROPOSAL

Generalizing and optimizing the third-party sanctions at work elsewhere in our legal system, stewardship involves making corporations pre-appoint a scapegoat—the steward—who can be held responsible if specified harms occur.

A. The Basic Model

Regulators who have identified important mandates at risk of under-compliance would require companies to appoint an individual, called a steward, who would be responsible for monitoring those compliance obligations, steering the corporation towards compliant behavior, and reporting out if non-compliance persists. Regulators would have the right to approve or deny the proposed steward to ensure that the person had sufficient status within the company to be effective,[175] that the person had sufficient assets to be sensitive to the relevant risks,[176] and that there were no other red flags in the proposed steward's past. Considering these factors, stewards would most likely be low- and middle-level managers, although they may occasionally be higher-level managers or other specialists within a company. The steward's job is to work within the company to prevent such harms before they occur.[177]

---

172. Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 513–15 (1998) (discussing the rise of mandatory reporting statutes).

173. Some states require even lawyers to report when their clients are planning crimes. *E.g.*, FLA. STAT. ANN. § 4-1.6(b)(1) (2015) ("A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary . . . to prevent a client from committing a crime.").

174. Targeting individuals wherever possible has been the official policy of the Department of Justice in recent years. *See, e.g.*, Memorandum from Sally Quillian Yates, *supra* note 51; *see also* GARRETT, *supra* note 55, at 81 (discussing the corporations decision to fracture the hierarchical organization to avoid liability) . This focus on individual liability arguably allows companies to shift compliance risk down the corporate hierarchy, thereby reducing the company's overall incentive to spend resources on compliance activities. *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1374 (1999) (discussing liability shifting in the corporate structure).

175. Regulators could use something like Sung Hui Kim's framework for evaluating gatekeepers based on their "(1) willingness to interdict, (2) willingness to monitor, (3) capacity to monitor, and (4) capacity to interdict." Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 414, 421 (2008).

176. *See infra* Part IV.

177. Stavros Gadinis and Amelia Miazad have recently argued that internal compliance officers have the

Stewards would personally face consequences if the designated event occurs. Personal liability is only one option. They could also be made to live in harm's way or use their company's products and services. Stewards would be able to mitigate their liability by alerting regulators of the risk and assisting them in their investigation. If stewards neither prevent the harm nor alert regulators in advance, they would be personally liable—civilly, and perhaps even criminally. These punished stewards would not personally have committed the wrong but would be liable under this framework.[178]

Personal liability for the wrong, rather than merely for the failure to report the wrong, incentivizes the steward to report out early, when the public safety risk has become intolerable, but ideally before the targeted harm has occurred. For example, if a steward needs a budget to effectively monitor a risk but is not receiving that budget, the steward may report that to the supervising regulator. Reporting this information would immunize the steward from liability arising from risks they could not monitor. Even if that regulator lacks—perhaps rightly so—the power to proactively mandate that a company increase its monitoring budget,[179] it may be able to influence the company to do so. After all, a company that ignored a regulator's warning about its compliance investment could hardly expect leniency from that regulator in a later enforcement action. Stewards and regulators may also be able to transcend corporate bureaucracy and convey the risk of underinvestment in monitoring to those concerned with overall corporate health, rather than division-specific metrics.[180] Finally, lenders and insurers in their own gatekeeping capacities may be entitled to review any regulator warnings and pressure companies to invest in compliance even where regulators lack the authority to do so.

If neither pressure from the steward nor from the regulators nor from other gatekeepers caused the company to adjust its practices, the steward may have no choice but to resign. This resignation would invariably become public as the company would have to find and get approval for a new steward. It's easy to imagine that the resignation of the steward, much like resignation by gatekeepers in general,[181] could be a newsworthy scandal. In this way, resignation in itself is a powerful tool for communicating risk both within the company and to those externally, most notably the market, with the power to influence company behavior.

The mere presence of a steward would not absolve the company from liability. This

---

power to change corporate behavior by pushing unfavorable information in front of their board of directors and thereby changing boards' incentives to rectify the wrongdoing, lest they be held liable in a derivative action. Gadinis & Miazad, *supra* note 45.

178. *See infra* Part III.B.

179. Even where regulators lack authority to directly regulate companies' compliance investments, once a wrong occurs, they can use the settlement negotiation process to require companies to make specific compliance investments. *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 336 (2017) (explaining that some pretrial agreements "require firms to materially increase compliance expenditures"); *see generally* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016) (explaining how prosecutors have broad discretion to use settlements to impose mandates on companies that they otherwise lack the authority to impose).

180. Gadinis & Miazad, *supra* note 45.

181. *See, e.g.*, Michael J. de la Merced & Peter Lattman, *American Apparel Shares Fall as Woes Rise*, N.Y. TIMES (Aug. 17, 2010), https://www.nytimes.com/2010/08/18/business/18apparel.html (reporting how aclothing company "received a subpoena from the United States attorney's office for the Southern District of New York and inquiries from the Securities and Exchange Commission over the resignation of Deloitte & Touche as the company's independent auditor").

proposal is about supplementing, not replacing, existing systems of liability to make them more effective. Over time stewardship may slow the creep of administratively burdensome regulation and even allow regulators to be more permissive in some cases.[182]

This proposal is somewhat similar to Stavros Gadinis and Colby Mangel's collaborative gatekeeper proposal, which borrows the mandatory reporting regime of AML rules and applies it to financial regulation more generally.[183] Specifically, they propose requiring gatekeepers to report wrongdoing to regulators when they suspect wrongdoing instead of waiting until they have proof of wrongdoing.[184] To facilitate information-sharing and collaboration between gatekeepers and regulators, they would bar gatekeepers from informing their clients that they reported out. Under their proposal, gatekeepers are immunized from client misconduct if they do report out, but subject to sanctions if they fail to do so.[185] One justification for putting gatekeepers in this role is that they are better informed than regulators and have better access to the kinds of information that regulators need to bring enforcement actions.[186]

Unlike the external gatekeepers in the AML framework, stewardship is a form of internal gatekeeping, relying on designated employees within the regulated company. Personal liability for stewards should help them avoid the capture that has challenged other kinds of internal gatekeepers, notably general counsels.[187] Moving this oversight and reporting obligation in-house puts the party with the best access to compliance data in the role of collaborating with regulators. In doing so, stewardship should increase the likelihood that regulators will detect wrongdoing and therefore increase the cost of non-compliance.[188] For this reason, stewardship can improve compliance even in cases where it is impractical to raise fines to levels sufficient to deter wrongdoing.[189] Moving this oversight and reporting obligation in-house also makes stewardship applicable to a more diverse range of regulatory obligations—from nationally-applicable public-safety regulators[190] to project-specific obligations imposed by communities in licensing, application, and variance proceedings.[191]

1. The Obligation to Report Out

For stewards, their safety hatch is reporting out when they suspect wrongdoing.[192] If

---

182. *See infra* Part V.B.

183. *See generally* Gadinis & Mangels, *supra* note 168.

184. *Id.* at 838.

185. *Id.* at 836.

186. *Id.* at 809; *see also* John C. Coates IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21 J. ECON. PERSP.. 91, 95–96 (2007).

187. JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 195 (2006); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003).

188. *See* Arlen & Kraakman, *supra* note 20, at 707 ("From the government's perspective, reporting not only ensures that detected misconduct is sanctioned, but also increases the probability and reduces the costs of detection.").

189. *See infra* Part III.B.2.

190. *See infra* Part IV.A.1.

191. For example, a zoning board may allow a developer to build unusually close to a body of water if the developer appoints a steward to monitor the preventative measures protecting that body of water.

192. Gadinis and Mangels build their model of collaborative gatekeeping around an obligation to report out upon the suspicion of wrongdoing instead of knowledge of wrongdoing. Gadinis & Mangels, *supra* note 168, at 838.

a steward fails to induce the company to take required precautions, she can avoid liability by bringing evidence of that failing to the attention of the relevant regulator and then co-operating with the regulator if an investigation ensues. Granting immunity for reporting out on the suspicion of wrongdoing encourages stewards to report problems to regulators while they can be prevented or at least mitigated. Without stewardship, it may be impossible for regulators to gain the information they would need to prevent or mitigate the harm before it is too late.

Given the awkwardness of tattling about one's employer to regulators,[193] stewards must be able to communicate with regulators confidentially in the early phases of an investigation.[194] Ensuring confidentiality would lower the bar at which stewards would be willing to report out since they would be less likely to mistakenly incur the wrath of their employer. Of course, in many cases it may prove impossible to keep reporting out confidential as an investigation unfolds. For this reason, stewards must be protected from retaliation, whether through reinstatement rights or golden parachutes.

To be effective, this obligation to report out must override countervailing obligations. For example, non-disclosure agreements would have to be unenforceable against stewards to the extent that the disclosure is to a relevant regulator. Similarly, any relevant privacy rules would need exceptions for stewards even when the information they report out is arguably a third party's private information.[195] In such cases, particularly around healthcare, regulators will need robust processes for handling confidential information that they may not have otherwise received outside of litigation.

To ensure that reporting out is the beginning of a productive regulatory investigation, not a guaranteed public relations disaster, information that the steward brings to the regulator may need to remain confidential and shielded from discovery in private litigation.[196] Carefully calibrated privilege would allow the steward to talk more freely and candidly with regulators and lower the threshold at which the steward seeks regulator input.[197] Keeping this threshold low is important because the cost to the steward for not reporting out is so high.

Finally, for reporting out to be effective, it must be confidential and must immunize the steward from related private litigation and public enforcement. Without this protection, reporting out would by itself increase the steward's risk by inviting litigation about whether the steward made some error before the report occurred. Knowing that they would have to

---

193. *See id.* at 815 (explaining why the ability to file SARs anonymously encourages candor).

194. SARs are similarly kept confidential. *See* Suspicious Activity Reports, 12 C.F.R. § 21.11.

195. Mila Sohoni, *The Power to Privilege*, 163 U. PA. L. REV. 487, 534–36 (2015) (explaining how regulators customize privilege to shield documents that they request in investigations from further disclosure).

196. *See id.* at 534–35 (explaining how regulators use privilege to encourage candid discussions with regulators but criticizing this privilege's impact on regulator accountability).

197. To ensure that the company can speak candidly with the steward, some kind of client-steward privilege may also be essential. *See* Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523, 564–67 (2014) (proposing privilege between clients and third-party monitors); *see also* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 865–66 (1994) (proposing "evidentiary privilege" that would prevent regulators from using information prepared by companies in their internal enforcement activities against those companies (but not against their agents) to "remove the distortions" created when companies own diligent investigations and recordkeeping make it more likely that a regulator will be able to convict the company of wrongdoing). This privilege would not prevent the steward from going to regulators, but may shield communications from other litigation.

beat back large-scale lawsuits, even if meritless, would discourage the steward from reporting out early doubts. In turn, this would make stewardship a less effective tool for preventing harm.

The ability to mitigate or avoid liability by reporting out effectively makes stewardship a form of mandatory reporting. Duties to report are exceptions to the principle that the law does not punish omissions that have proliferated in recent years.[198] From child abuse to environmental misdeeds to financial crimes, regulators have imposed a duty to report in cases where their monitoring costs are high—not only in financial terms, but also liberty costs—and the victims are unable to protect themselves.[199] Stewardship is different from other mandatory reporting regimes insofar as reporting out is a safe harbor from personal liability for the company's wrong rather than an obligation unto itself. Structured this way, the steward's obligation to report out is really more of an option to report out, albeit one that is highly incentivized. And in making reporting out an option rather than a hard obligation, stewardship avoids one of the hardest questions of mandatory reporting regimes: what evidence triggers the obligation.[200] Instead of there being an external line that stewards must worry about crossing, stewards choose when to report out based on their own comfort.

One risk to encouraging early reporting is that stewards may be over-incentivized to report non-issues.[201] Such over-reporting may create unnecessary headaches for their employer, overwhelm regulators, and erode trust between regulators and stewards. Three factors mitigate this risk. First, even if there is over-reporting, regulators have the discretion to not respond to every report, much in the same way that they need not respond to every civilian compliant. Second, stewards are employees. Even if protected from retaliation, companies could manufacture cause to fire a trigger-happy steward and replace him or her with one with better judgement. Regulators might even endorse such a replacement if overreporting is wasting their resources. Finally, even if it is the steward's job to report out, reporting out is not without risk. As commentators have noted, whistleblowing is often "professional suicide."[202] While we might hope that reporting out while in a mandatory reporting role carries less professional stigma than becoming a whistleblower, it's hard to imagine that there would not be some stigma, especially if a steward developed a reputation for calling regulators about non-problems.

---

198. Feldman & Lobel, *supra* note 21, at 1163.

199. *See id.*

200. *See generally* Sandra Guerra Thompson, *The White-Collar Police Force: Duty to Report Statutes in Criminal Law Theory*, 11 WM. & MARY BILL RTS. J. 3 (2002) (arguing in favor of raising the evidentiary trigger for mandatory reporting obligations).

201. Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53, 60 (1986) (explaining the downsides of mandatory reporting) [hereinafter Kraakman, *Gatekeepers*]; Arlen & Kraakman, *supra* note 20, at 740 (arguing that firms that receive mitigation for reporting wrongs to the government before the government discovers them may have an incentive to over-monitor for wrongdoing and therefore waste resources).

202. James Gobert & Maurice Punch, *Whistleblowers, the Public Interest, and the Public Interest Disclosure Act 1998*, 63 MOD. L. REV. 25, 35 (2000); *see also* Feldman & Lobel, *supra* note 21, at 1159 (explaining that "[b]ecause of its inherent risks, whistle-blowing must be incentivized . . . .").

2. Why Stewards Must Be Individuals

While it can be difficult to make harms salient to companies,[203] this is less true of individuals. Individuals can be punished. The more challenging question is how to make that punishment fair.

To effectively monitor compliance, stewards must have specific, realistic, and non-overlapping responsibilities. That is, stewards must know precisely what they are responsible for; otherwise, they cannot possibly be effective monitors. Similarly, the scope of their responsibility cannot exceed what they can actually monitor.[204] In many cases, this will mean that stewards must be site- or even project-specific. In this way, stewardship is critically different from responsible corporate officer liability.[205] Finally, since large projects and large companies will likely require several stewards, it is essential that stewards have non-overlapping jurisdiction so that the stewards themselves do not become a group through which responsibility becomes diffuse and therefore less salient.

Individuals are ideal stewards because their resources are usually more limited and the political consequences of prosecuting them are lower.[206] By holding stewards personally responsible, their well-being and that of their family would depend on them personally ensuring that the identified risk prevention occurs—or alerting regulators when the company is failing to take sufficient precautions. That is, by accepting the role of steward, the steward would accept some risk of financial ruin and loss of esteem should a significant harm occur, or at least the headache of threatened litigation if the harm is relatively small.

Here, the smallness and closeness of individuals' communities is doing much of the work. Where we might think about companies as being reputation-sensitive insofar as public perception of their brand drives their profitability,[207] with individuals, scale sometimes cuts the other way. While any single employee, even an executive, might be nearly anonymous in a large company, the same is not true in their community—whether it be their country club, church, regular bar, or cul-de-sac. And while these executives might face some social opprobrium for serious wrongs committed by the companies for which they work, those effects are likely to be magnified if that person has publicly pre-committed to being responsible for that wrong.

Regulators could calibrate this social risk by imposing additional requirements on stewards, such as requiring the steward to reside in a particular place, designed to ensure that risks to the public are salient to stewards. For example, the environmental steward at a plant that processes dangerous chemicals could be made to live in the zone of risk or to drink the water at risk of contamination. She would live among the people at greatest risk of harm and have to sleep in harm's way herself. In this way, stewardship utilizes forces similar to those that make collective sanctions effective in certain situations, except here, the steward is not at risk of a sanction but of a collective harm. Ideally, this solidarity should mitigate certain disconnects between the steward and the protected public, the most

---

203. *See supra* Part II.A.

204. *See* Kraakman, *Gatekeepers*, *supra* note 201, at 79 (explaining that "[c]ircumspect duties encourage gatekeepers to detect easily visible misconduct without creating liability for wrongdoing that is costly or impossible to spot").

205. *See infra* Part II.B.3.a.

206. For example, prosecuting a steward need not force a large employer into bankruptcy or trigger debarment concerns for the company.

207. Mann, *supra* note 50, at 2252–53.

obvious of which is time-horizon concerns.

Moreover, this added layer of risk for stewards will help make risks salient to them even when those risks are well beyond their ability to pay.[208] Just like companies, stewards may insufficiently internalize risks that are above whatever threshold would knock them into bankruptcy. That is, they are risk-sensitive up to their means, but not sensitive to fluctuations in risk occurring beyond that threshold because they are functionally irrelevant. A steward at a chemical processing plant may face certain bankruptcy if particular accidents occur. Stewards would care about any safety precautions that would impact the frequency of these events. But they might not care about precautions that would impact the scope of these events if they faced bankruptcy should they occur at all. Putting the steward in harm's way may change this. A steward is more likely to care about the radius of a blast zone if his or her family lives there. These stakes are not available if corporations are stewards.

To be sure, this is not the first proposal to attempt to align executives' interests with those of a broader community.[209] Stock-based compensation packages are perhaps the most common example of this strategy.[210] But limited liability for shareholders all but ensures that stock-based compensation will fail to capture the risks faced by the beneficiaries of many public-safety regulations, even if risk and liability theoretically drive stock prices down. Purely financial losses are too convenient, especially when they are unlikely to be so great that they impose important lifestyle changes on whoever suffers the loss.

Creative sanctions notwithstanding, the bite of stewardship is most likely financial. To ensure that the stewards bear their liability as individuals, separate from the company's liability, indemnification and insurance would have to be strictly curtailed.[211] To be sure, this is a limitation on private ordering, which is not to be taken lightly. But, because stewards, unlike doctors or lawyers, need not assume that role again to have a career, they may not be motivated by future premium fluctuations or the availability of insurance. For this reason, stewards must bear the ultimate financial risk; otherwise they may be little more than transaction costs.

3. Consenting to Liability

Critically, the steward would have to consent to the position. In giving consent the steward must understand specifically which acts are under his or her purview. This consent to liability distinguishes stewardship from liability under RCO doctrine. As the court explained in *Park*, RCO doctrine attaches to executives who "voluntarily assume positions of authority in business enterprises."[212] The Court was correct that executives choose to assume the responsibilities (and rewards) of their position, and also correct that part of the

208. Another way to raise, but not eliminate, the upper boundary of risk that is relevant to stewards is to make stewardship liability non-dischargeable in bankruptcy much like fines and fees.

209. *See, e.g.,* Saul Levmore, *Puzzling Stock Options and Compensation Norms*, 149 U. PA. L. REV. 1901, 1904 (2001).

210. *Id.* at 1919; *see also* Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. LEGAL ANALYSIS 337, 338 (2016) (arguing for partial liability for directors to better align their interest with those of the company).

211. There may be constitutional limits on the extent to which such limits are possible. *See* United States v. Stein, 541 F.3d 130, 153 (2d Cir. 2008) (holding that prosecutors violated the defendant's Sixth Amendment rights when they barred the defendant's employer from honoring its longstanding practice of paying the employee's legal fees).

212. United States v. Park, 421 U.S. 658, 672 (1975).

responsibility of an executive is to ensure compliance with applicable laws. But that voluntary assumption of responsibility is different from the consent envisioned here because the former is generalized to all of the responsibilities of the executive. And while under the RCO doctrine executives, like Park, bear ultimate responsibility for non-compliance, few would argue that it was Park's job to personally lay mousetraps in the company's warehouses.[213] Stewards, by contrast, would be making a personal guarantee of their willingness and ability to set the mousetraps.

As such, regulators should adopt an informed consent approach, making sure that the person accepting an appointment as steward understands both the scope of his or her liability and that the liability is unlimited. To reduce the risk of injustice, this consent process must make clear to stewards exactly when and how they must report out to avoid personal liability when they suspect wrongdoing that they are unable to mitigate. Regulators should reject stewards who appear incapable of understanding this risk. Similarly, regulators must reject stewards whose financial condition is so fragile that they must accept the stewardship role. Individuals for whom an interruption in employment would be dire may be practically unable to report out. Giving stewards protection against retaliation does not necessarily mitigate that risk since those protections sometimes require litigation to be effective. This would give a company too much leverage over its steward if it could force the steward into foreclosure in the near-term, even if it would have to reinstate the steward later.

That said, when regulators take non-liability steps to make risks salient to stewards, such as residency requirements, the contours of the risks that these requirements create may be unknown and unknowable. In this case, the steward is consenting to the requirement, whatever its risk may be, not the specific risk.

Another obvious but important aspect of this consent is that regulators must obtain consent from the actual steward, not the company on behalf of the steward. The high-risk activities that necessitate stewardship tend to occur because they are much more profitable than lower-risk activities. While we have mostly been focused on risk shifted to the public, there is also some concern that high-level management will try to use stewardship to shift some of the risk onto lower tiers of management.[214]

Obtaining a would-be steward's consent to personal liability would also almost certainly mean paying that person a premium to undertake the risk. That premium may be a large number in real-dollar terms but may pale in comparison to the payout for even a single accident. Moreover, because the steward could avoid liability by reporting out, the premium over regular executive compensation should reflect only the additional burden of interacting with regulators, additional legal costs, and the extent to which the steward believes the company might hide wrongdoing from her.[215] In other words, companies can lower their cost of stewardship by improving their culture of compliance. Indeed, that is the whole point.

---

213. *See supra* Part II.B.3.a.

214. The fraudulent account scandal at Wells Fargo illustrates how this intra-corporate risk-shifting occurs. Upper management wanted improved returns, which increased sales pressure on division heads and every manager below. This translated into sales goals that, at least at some branches, were only obtainable through fraud. Cowley, *supra* note 15.

215. *See infra* Part IV.B.

4. When to Appoint Stewards

The efficiency of stewardship depends in large part on the context in which it is applied. Regulators should reserve stewardship for cases where (1) there is a preventable or mitigable risk that our legal system cannot effectively deter;[216] (2) there is a concern that the harm is unusually difficult to remedy with traditional damages;[217] (3) there are pre-identifiable preventative measures[218] that must occur to prevent or mitigate the risk; and (4) there is a single individual who can monitor or personally undertake those precautions. Criteria 1 and 2 ensure that stewardship is not merely redundant with our existing liability rules and public safety regulations. Depending on the regulator and the regulated area, the designated trigger event could be specific or broad. For example, a regulator could require a particular factory with an especially dangerous conveyor belt to appoint a belt-safety steward tasked with ensuring that the belt's guardrails stay in place. The same regulator might not require a belt-safety steward on less inherently dangerous conveyor belts.[219] However, since labor statistics tell us that conveyor belts are one of the most common sources of grisly workplace injuries and that these injuries tend to occur where managers have ordered or permitted safety guards to be removed or for repairs to occur while the belt is in motion,[220] that regulator might require all workplaces using conveyer belts to appoint a belt-safety steward. The steward would be personally liable both if someone actually suffered a preventable injury and if the regulator discovered violations of the ex-ante safety regulations aimed at preventing these injuries. In short, stewards, like workers and other stakeholders, would have skin in the game. The steward would effectively be the public's representative within the corporation in compliance decisions.

Criterion 3 is the greatest constraint on stewardship, limiting it to the regulatory equivalent of "never events."[221] Because stewardship imposes unlimited liability on an individual, potentially for the actions of others, fairness requires that the steward know specifically what his or her obligations are. This means that there must be specific preventative measures that the regulator wants to occur. Stewards who are unsure what they must do will face greater risk of liability and should demand significantly greater compensation as a result. In turn, the price of a project will increase, potentially deterring socially useful behavior.

Finally, criterion 4 is about the availability of stewards. To be clear, stewardship does not demand that a single individual be responsible at all times—the job can and should be split over shifts, regions, or other boundaries to ensure that the steward can actually monitor the risk. But there has to be someone. In some cases, this may mean that companies have to hire an individual to be a steward, particularly if none of the existing employees have the skills or capacity to be effective monitors. For example, if the pre-identified precaution

216. *See* Kraakman, *Gatekeepers*, *supra* note 201, at 61 (explaining when to appoint gatekeepers).

217. *See supra* Part II.A.

218. *See* Arlen & Kraakman, *supra* note 20, at 701 (defining "preventative measures" as "measures that deter misconduct by agents without increasing the probability that the firm will be sanctioned," including things like strict accounting of chemical waste, control over cash disbursements, and employee screening).

219. Here, I am envisioning construction workers as consenting parties since their job necessarily involves working around heavy equipment and no simple safety device can render human interaction with this equipment especially safe.

220. N.Y. COMM. FOR OCCUPATIONAL SAFETY & HEALTH, SAFETY FACTSHEET: HAZARDS OF CONVEYORS 1 (2007), http://nycosh.org/wp-content/uploads/2014/10/FS-Conveyors2.pdf.

221. *Id.*

is technological, the company may need to hire someone with those technology skills, even if it usually outsources its technology needs.[222]

If deployed in inappropriate circumstances, stewardship could become a weapon of naysayers and holdouts, adding cost but little benefit to an endeavor. For example, a community could require residential construction companies to appoint stewards to ensure that all homes are built to a high standard. "High standard" being a subjective metric, one can imagine that companies would either have to build all new homes to an overly high standard of quality or would have to pay their steward handsomely to compensate for the risk.[223] In this case, it's not clear what work stewardship would be doing in this example that is not already accomplished by building codes, existing surety obligations, home insurance, and private law. This means that there must be specific precautions that the regulator wants to occur. Stewardship may also deter socially beneficial behavior if companies are less likely to take risks that fall under the purview of a steward. For example, a construction company could decide it can never build inclusive housing on waterfront property because the added cost of the steward means only luxury housing is profitable on those sites. Misused stewardship will harm social welfare.

B. Liability of the Steward

Stewardship comes with two kinds of liability. The first is direct liability for failures as a steward such as lapses in monitoring, weak processes, or shoddy record-keeping. This liability is process-oriented and imposed to allow regulators to police how well stewards monitor their companies before a wrong occurs. The second is liability for the harm caused by the corporate wrongdoing. The key here is that there are two layers of complementary liability,[224] which should ultimately reinforce the public safety liabilities a company already faces.

1. Direct Liability

Let's start with the conceptually tidier part of a steward's liability. Regulators would impose specific monitoring and record-keeping requirements on stewards. These requirements could be regulator-generated or negotiated between the regulator and regulated company, depending on the regulator's level of expertise. For example, a steward might be required to maintain inspection records. These record-keeping obligations could create internal and external sanctions for the steward.

Internal sanctions would come from the company employing the steward. The company's audit functionaries could monitor the steward's records alongside those of the floor manager to receive a more complete picture of safety on the ground. Provided that the company be jointly and severally liable for any wrongs that might implicate the steward,[225] the company has an incentive to require the steward to keep careful records. Accordingly, the company may move to replace any lazy steward.

External sanctions would come from the relevant regulators and potentially also from

222. Alternatively, regulators could impose stewardship on the technology service providers.

223. *See infra* Part III.D.

224. This dual liability is loosely akin to the "composite" liability regime that Jennifer Arlen and Reiner Kraakman describe. Arlen & Kraakman, *supra* note 20.

225. *See supra* Part III.A.

tort law. The same regulator that required the company to appoint a steward could require the steward to submit various reports and records detailing his or her oversight. Failure to do so could be an independent regulatory wrong.[226]

External regulators may even prefer to monitor the steward's records versus the company's records for three reasons. First and foremost, the regulators may find having a single point of contact, especially one that is necessarily high-ranking with the firm,[227] particularly convenient.[228] Second, stewards would need to keep detailed and organized records to protect themselves, should they need to report out or defend themselves in a lawsuit. Finally, regulators and stewards would have ongoing relationships and over time would become familiar with each other's preferences and systems.

In sum, stewardship would create an additional avenue for prospective safety regulation on top of existing systems. If the purpose of stewardship is to actually prevent serious, preventable harms, then such overlapping regulation may be desirable, especially if the overlapping requirements are not inherently inconsistent with each other and also not costlier.

2. Liability for Corporate Wrongs

The more conceptually uncomfortable part of a steward's liability is his or her liability for actions taken by others within the corporation. For example, how is the steward overseeing conveyor belt guardrails liable if another employee, perhaps not even a direct report of the steward, removes the guardrail and a third employee is injured? Here, the steward faces a classic case of omission liability, which involves a culpable act arising from a duty combined with a failure to act in accordance with that duty.[229] This is the same liability that motivated the *Park* Court when it explained that the Food Drug and Cosmetic Act

226. Depending on the architecture of the legal requirements, tort law could recognize failure to meet these regulatory obligations as negligence per se. *See, e.g.*, Howard v. Zimmer, Inc., 299 P.3d 463, 467 (Okla. 2013) ("The negligence per se doctrine is employed to substitute statutory standards for parallel common law, reasonable care duties. When courts adopt statutory standards for causes of action for negligence, the statute's violation constitutes negligence per se."); *see also* Totsky v. Riteway Bus Serv., 607 N.W.2d 637, 647 (Wis. 2000) (explaining that negligence per se "is a 'draconian' measure that can lead to unduly harsh and unfair results, particularly when a statute does not even call for civil liability"). Tort law routinely recognizes evidence of breach of law or noncompliance with a regulation as evidence of negligence. *See* Ridley v. Safety Kleen Corp., 693 So. 2d 934, 943 (Fla. 1996) (stating that Florida's Standard Jury Instructions include "violation of traffic regulation as evidence of negligence").

227. *See supra* Part II.A. Gaining access to individuals with decision-making authority within a company can be difficult, especially in large organizations. Regulators and even litigants often interact with employees who have little discretionary authority and are unable to definitively answer follow-up questions or move issues into more senior executive's line of sight. This issue became sufficiently burdensome in some courts that they have amended their rules of procedure to require companies to send a representative with "full authority to settle without further consultation" to mediation. *See, e.g.*, FLA. R. CIV. P. 1.720(b)(1).

228. The added accuracy and convenience of single-point-of-contact communication was well documented in the Congressional debates around mortgage servicing rules since consumers, even those threatening legal action against their lenders, were unable to obtain information to which they were entitled since they were forced to work with a new customer service representative every time they called and few requests could be handled in a single call. *See generally The Need for National Mortgage Servicing Standards: Hearing Before the Subcomm. on Hous., Transp., and Cmty. Dev. of the S. Comm. on Banking, Hous., and Urban Affairs*, 112th Cong. (2011).

229. *See* Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2438 (2007) (arguing that "[t]he normative work thought to be done by the act requirement may be accomplished more effectively by supposing that criminal liability requires control").

"imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."[230] So too with stewardship. The steward's liability stems from his or her own wrongs, not the wrongs of others—even though the wrongful acts of others are essential predicates to the steward's wrong.[231]

This liability is also akin to gatekeeper liability. Gatekeepers have an "active duty to monitor" for particular wrongs by their charges and face liability if they fail to stop that wrong.[232] Although they may be innocent of the wrong itself, holding gatekeepers liable should the wrong occur may reduce enforcement costs and, hopefully also, the frequency of the wrongs.[233] Stewardship differs from traditional gatekeeping regimes in two ways. First, the steward is an employee of the regulated company rather than a third party in a monitoring role. Second, the steward is liable both for his or her failure as a gatekeeper and for the wrong itself. Indeed, it is because the steward is within the regulated entity and ostensibly able to prevent the harm directly or inform regulators if he or she is able to do so, that it makes sense for the steward to bear absolute responsibility for the wrong and to seek reimbursement from the company on their own time.[234]

Here, again, collective liability can provide a footing for the seemingly extreme individual liability of stewardship. Mark Reiff explains that when "assignments of alleged collective responsibility are made, however, we find that even though causal responsibility may be lacking, the assignments still draw their moral force from the acts or omissions of the individuals held responsible."[235]

a. Term of Liability

Conceiving of omissions as specific, concrete wrongs committed by stewards raises the question of what should happen once a steward leaves their post. A steward could be liable indefinitely for any omissions committed under their watch. This design would encourage stewards to police deferred maintenance even as other economic concerns turn in

230. United States v. Park, 421 U.S. 658 (1975); *see also* Kimberly Kessler Ferzan, *Probing the Depths of the Responsible Corporate Officer's Duty*, 12 CRIM. L. & PHIL. 455 (2018) ; *but see* Samuel W. Buell, *Corporate Managers and Crime*, CLS BLUE SKY BLOG (June 19, 2017), http://clsbluesky.law.columbia.edu/2017/06/19/corporate-managers-and-crime/ ("As crimes became more serious (felonies) and more intent-based (fraud, for example—the most commonly relevant crime in the financial sector), RCO would become more than a slightly embarrassing but limited and perhaps tolerable exception to principles of individual fault. It would require a sea change in Anglo-American theories of punishment.").

231. In this way, stewardship liability is not a form of *respondeat superior*. It is not about imputing the actions and mental state of the wrongdoer to someone higher in the corporate structure.

232. Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 889 (1984) [hereinafter Kraakman, *Corporate Liability Strategies*].

233. *Id.*

234. In this way, stewards might appear to provide companies with a layer of insurance against liability for non-compliance. *See* Gadinis & Mangels, *supra* note 168, at 831 (explaining how strict liability for gatekeepers turns gatekeepers into insurers). But this insurance offers little benefit to companies because the presence of a steward does not relieve a company from enterprise liability for its regulatory obligations, nor does it relieve higher-ranking executives to the extent that they may be personally liable as well.

235. Mark R. Reiff, *Terrorism, Retribution, and Collective Responsibility*, 34 SOC. THEORY & PRAC. 215, 215 (explaining that "pure" collective liability "has only two conditions: that there be an underlying wrong, and that the individual held responsible be a member of the group to which the actual wrongdoer belong" such that all members of the group—even children—are responsible for any action committed by another member of the group).

favor of deferring upgrades and renovations. But this approach creates messy apportionment litigation between stewards. More troubling, a new steward may decide not to take action against deferred maintenance as long as they believe that a prior steward will bear enough of the risk so as to not make reporting worth the hassle.

One way to avoid these pathologies is to end stewards' liability at the end of their term, but this approach creates incentives that counter the goals of the stewardship model. Namely, since reporting out is inconvenient—there may be hearings, discovery, and other legal headaches—and necessarily involves reputational risk and perhaps even long-term career consequences, stewards would quit rather than report out if quitting ended their legal liability. Moreover, one of the strengths of stewardship is forcing someone with the power to achieve compliance—whether internally or through enforcement—into a similar position as a potential victim so that the targeted harm is salient to them. Ending liability at the end of their term as steward would give stewards an exit that potential victims lack. That said, one advantage to this framework is that it would encourage incoming stewards to investigate potential risks like deferred maintenance. If no steward would assume these legacy risks, the inability to appoint a new steward would itself be important information both for markets and regulators. Fortunately, there is another path for getting this advantage.

The best approach to managing stewards' liability after their term is a hybrid: stewards remain fully liable for a company's actions until a new steward consents to the role. The new steward would then be responsible for all existing risks and those risks that occur under her watch. This hybrid approach preserves stewards' incentives to report out since they would remain personally liable if no incoming steward is willing to assume the risks occurring on their watch. This approach would also preserve the search for a new steward as an information-forcing function.

b. Criminal Liability for Stewards

Having considered when the steward should be liable, we have arrived at the most difficult question of this proposal: whether stewards can or should face criminal liability in addition to their civil liability. It turns on whether one can or should be able to consent to be vicariously criminally responsible for the actions of others. Although courts have been troubled by statutes imposing vicarious criminal liability,[236] it is possible that the presence of consent would ameliorate some fairness and constitutional concerns. While stewards might be judgment proof against the most extreme fines or actively judgment-proof themselves against civil liability, they cannot do the same for criminal liability.

Separate from the question of whether criminal liability for the steward would be just is the question of whether it is essential to make the proposal effective. Wouter Wils has argued that criminalization of antitrust violations is necessary to achieve compliance for several reasons, three of which are relevant to stewards.[237] First, to deter wrongdoing, many fines would have to be so high that they would impose significant social costs on

236. *See, e.g.*, State v. Guminga, 395 N.W.2d 344, 344–45 (Minn. 1986) (holding that a statute imposing strict, vicarious criminal liability on employers whose employees serve alcohol to minors violated the due process clauses of the Minnesota and U.S. Constitutions); Davis v. City of Peachtree City, 304 S.E.2d 701, 702 (Ga. 1983) (finding criminal sanctions unjustified for vicarious liability in a case involving the sale of alcohol to a minor).

237. Wils, *supra* note 46, at 28–36.

innocent parties,[238] not the least of which being bankruptcy of the targeted firm.[239] Reiner Kraakman calls this phenomenon sanction insufficiency and suggests that imposing "absolute liability"—liability that cannot be contractually shifted—is one solution.[240] Criminal liability is perhaps the most extreme form of absolute liability. Second, fines cannot necessarily target the individuals responsible for compliance, particularly when those individuals may leave the firm before regulators discover the wrong.[241] Third, although there is limited evidence that imprisonment is an effective deterrent for many crimes,[242] there is empirical evidence that it deters white-collar crime.[243] Finally, imprisonment "carries a uniquely strong moral message" and therefore creates a normative commitment to compliance with the law.[244] While this Article does not definitively defend criminal liability for stewards, in at least some cases, criminal sanctions are likely to be an effective tool.

C. Ambassadorial Duties

Another function of stewardship is to give a company a public face for publicly addressing designated risks. It ties the steward's personal reputation to company compliance, much like Sarbanes-Oxley ties executives' and auditors' reputations to companies' financial disclosures.[245] Since regulating entities can design a stewardship arrangement to meet context-specific regulatory goals, they may require that the steward be available, at least occasionally, for public scrutiny. There are many formats that this availability could take, but town halls or questioning by local lawmakers seem most fruitful.

The goal is that the steward periodically sees and hears the potential victims firsthand, and in a meaningful way. Commentators have documented how blue-collar families no longer live or mingle with white-collar families, and how the wealthy live even more cloistered lives.[246] And when the average executive does face victims, it's often after hostilities have set in and defenses are up. An available steward could help, but not completely solve, some of the failures of empathy that enable companies to de-prioritize compliance. Depending on the risk, a steward may need to work locally and be available to answer questions. Unlike the junior executives often dispatched to meet with local authorities under our current system, stewards must have some capacity to shape corporate compliance.

In this way, stewards could be like ambassadors from foreign states. Their role would be to foster dialogue and understanding between people with often competing interests. And, as explained below,[247] stewards would offer the community a target for its anger, if and when a harm occurs. Just as a nation-state can haul another country's ambassador in

238. Coffee, *supra* note 61, at 401–02; *see also* Kraakman, *Corporate Liability Strategies*, *supra* note 232, at 886.

239. Wils, *supra* note 46, at 28–31.

240. Kraakman, *Corporate Liability Strategies*, *supra* note 232, at 881.

241. Wils, *supra* note 46, at 32.

242. *See* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence*, *in* 38 ADVANCES IN ECONOMETRICS: REGRESSION DISCONTINUITY DESIGNS 73, 87–103 (Cattaneo et al. eds., 2017) (finding that longer prison sentences have a very small deterrent effect).

243. Wils, *supra* note 46, at 34–35.

244. *Id.* at 35.

245. Gadinis & Mangels, *supra* note 168, at 826.

246. *See, e.g.*, Thomas B. Edsall, *How the Other Fifth Lives*, N.Y. TIMES (Apr. 27, 2016), https://www.nytimes.com/2016/04/27/opinion/campaign-stops/how-the-other-fifth-lives.html (explaining that the wealthiest fifth of Americans have geographically separated themselves from other Americans).

247. *See infra* Part V.

for a dressing-down, so too can community leaders haul in a company's steward.

D. Who Would Want This Job?

There is, to be sure, significant personal risk in being a steward. That is the whole point of the arrangement. Who would put the stability of their families, perhaps even their own freedom, up as pledges to the public? Who would willingly accept this mantle? The answer is someone compensated for the risk who reasonably trusts that their company is not going to set them up for failure. The need to price in liability makes knowing and cabining the scope of liability essential. The goal here is not to create another deep pocket. No one would agree to play that role. Rationally, no one should accept the position unless his or her compensation exceeds their expected liability. Accordingly, the underlying risk that creates the need for a steward should drive a large part of the steward's compensation.

Rather, the goal is to make someone accountable for specific safety regulations. For this reason, regulators may find stewards unworkable unless they are willing and able to immunize stewards from some of the frivolous litigation that the post may attract. Regulatory regimes enabling stewardship will need to carefully calibrate private causes of action because potential stewards may be hesitant to subject themselves to the whims of a jury. Where local regulators use contracts and contract-like arrangements to impose stewards, those will need careful wording to ensure that they do not expose the steward to nuisance litigation.

The other key component of a steward's compensation will have to be esteem.[248] Professional esteem might be easy to come by. Accepting the stewardship post involves publicly affirming one's loyalty to and greatest confidence in the corporate endeavor. As discussed above, the steward would be the company's ambassador on a particular issue that is important and salient to the public. Regulators can put on as much pomp and circumstance as needed for stewards to become visible pillars for the community. On a more basic level, don't we all fancy ourselves the kind of people who would do the right thing if faced with the choice between individual profit or public safety?[249] Stewards, with their liability, would be publicly pre-committing to be this kind of person. They are pre-committing to a moral high ground that most of us can only dream about.

Stigma, the flip side of esteem, could also motivate individuals to become stewards.[250] If an executive is asking the public to tolerate a risk or inconvenience by allowing her company to operate, but won't personally assume responsibility for that risk or inconvenience, her acts might appear to be motivated by greed, self-dealing, or other unattractive traits. In this way, assuming the role of steward could become a way to signal good character and accrue social status.

248. *See* McAdams, *supra* note 88, at 355–72 (explaining that esteem motivates individuals to obey social norms).

249. *See* Kevin L. Blankenship et al., *Circumventing Resistance: Using Values to Indirectly Change Attitudes*, 103 J. PERSONALITY & SOC. PSYCHOL. 606, 607 (2012) (describing the importance of values to both attitudes and behaviors).

250. *Cf.* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491, 496–98 (2001) (questioning the assumption that reputational concerns are less motivating for securities issuers than for gatekeepers).

IV. IMPLEMENTING STEWARDSHIP

What stewardship will look like, and how well it will work, will vary quite a bit by context. This Part offers some thoughts about, and examples of, how stewardship could work in practice. Part III.A considers contexts where stewardship would be particularly easy to implement. Part III.B examines some harder cases where implementing stewardship would be more complicated and not necessarily better than existing compliance tools. Finally, Part III.C discusses where stewardship is likely to be unsuccessful as a regulatory model.

A. Easier Cases

Sometimes, implementing stewardship will be relatively simple and straightforward. To help illustrate how stewardship could work, this Part offers a couple of such examples.

1. OSHA

Workplace safety is a context where stewardship could efficiently improve compliance. If OSHA were to determine that levels of compliance with a particular workplace safety precaution are sub-optimal, it could require each workplace to appoint a steward to oversee that precaution. Consider the table saw. Table saws are a staple of the carpentry and construction industries. This simple technology has been around for generations. And it works as well on fingers as it does wood. Indeed, ten people lose fingers, hands, or more to table saws every day.[251] More than ten years ago, an inventor created technology to stop saws when they sensed skin and therefore stop it from removing fingers,[252] but licensing the technology adds about $1000 to the price of a saw, which more than doubles the cost of hobby-grade saws but is a mere fraction of the price of some professional models. Unsurprisingly, only some carpentry shops have adopted this technology on their own, even though $1000 is likely small compared to the total cost of an accident.[253] To prevent these injuries in the workplace, OSHA could require all workplaces where saws are in use to use saws with finger-sensing technology. But, what about all of the saws already in existence? How will OSHA ensure that companies actually replace or retrofit them, especially if their workforce lacks the foresight, or, more likely, bargaining power to insist on the change? In this case, OSHA could require companies using table saws to appoint a steward of saw safety. Stewards would face personal liability at three touchpoints. First, if OSHA observed in its regular inspections that the workplace had saws without the relevant finger guards, the steward would face direct liability for their failure to either effect change or report out. Second, if any employee was injured by a saw lacking the appropriate guard, OSHA could

251. Chris Arnold, *Despite Proven Technology, Attempts to Make Table Saws Safer Drag On*, NPR (Aug.10, 2017), http://www.npr.org/2017/08/10/542474093/despite-proven-technology-attempts-to-make-table-saws-safer-drag-on.

252. Chris Arnold, *Table-Saw Technology Aims to Save Fingers*, NPR (Dec. 7, 2004), http://www.npr.org/templates/story/story.php?storyId=4182602.

253. When the Consumer Products Safety Commission considered requiring this technology on saws, a popular power tools blog explained the fiscal downside to the rule, but concedes: "It's not enough to say 'I don't want to potentially have to pay more for a table saw.' Quite frankly, I'm having trouble thinking of a good angle by which to oppose this." Stuart, *CPSC Proposed Rulemaking on Table Saws and Active Injury-Avoidance Tech*, TOOLGUYD (May 15, 2017), http://toolguyd.com/cspc-proposed-rulemaking-on-table-saws-and-active-injury-avoidance-tech/.

sue if the guard was missing. And finally, the employee could potentially sue the steward for damages not covered by their workers' compensation claim.

This example illustrates the importance of careful implementation. The regulator's end-goal is probably something like preventing loss of life and limb. But, it would be wrong to make the steward liable whenever there is any loss of life or limb without reference to a specific safety obligation. Some of those accidents may be genuinely unpreventable—a sneeze at precisely the wrong moment—or unpreventable at too high a social cost—imagine safety technology that makes saws so expensive that overall construction costs double.

Finally, stewards should not be liable for harm caused by the victim's own malfeasance. So, if a cowboy carpenter takes the guard off of saws for the thrill of it, it would be unjust to make the steward liable if that carpenter loses fingers.[254]

2. Mortgage Servicing

Another area ripe for stewardship is mortgage servicing—the collection of homeowners' mortgage payments and application of those payments to their debt (and in some cases also their property taxes and homeowners' insurance). Like most forms of payment processing, mortgage servicing is largely automated. But that automation requires constant vigilance because the governing laws are continuously in flux[255] and, more importantly, because many borrowers, for reasons both within and beyond their control, need some kind of exception—a temporary change to the normal payment processing rules—over the course of their mortgage. The range of potential exceptions is so vast as to make exceptions the norm: a borrower's automated payment fails and the servicer's customer service agent agrees to apply a slightly late payment as if it were on time; the borrower forgets to put the account number on the timely check and the lender applies the check to the wrong account; there is a natural disaster that prevents borrowers from sending in their payments on time; there is a natural disaster that prevents the lender from accepting payments on time; an update to the servicer's computers causes all payments made in a 20-minute window on a particular date to post incorrectly; the borrower is on active duty service and is deployed somewhere remote when her account needs attention; the borrower loses his job and requests a forbearance; the housing market softens and the borrower requests a loan modification. While some of these exceptions will themselves be automated, many will not be, especially when the borrower is at the vanguard of a new calamity. The stakes can be very high for borrowers; if exceptions are handled incorrectly and the borrower is pushed down

254. *See infra* Part IV.C.2.

255. Mortgages are subject to overlapping state and federal regulations. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 52–58, 68–69 (2011). Depending on the mortgage, there may be additional rules imposed by Fannie Mae, which while not a federal regulator, often acts like one. *Id.* at 66–67. In times of crisis, federal and state legislatures may pass additional relief for borrowers. *See generally* Laura M. Greco & Lauren E. Campisi, *Understanding CFPB's Final Mortgage Servicing Rules and Their Impact on Foreclosures and Bankruptcies*, 131 BANKING L.J. 165 (2014) (detailing changes to mortgage servicing rules in response to the foreclosure crisis). As with any law, variations in court interpretation can destroy uniformity in how the law must be implemented. Levitin & Twomey, *supra*, at 52–69. When borrowers file for bankruptcy, the mortgage becomes subject to federal bankruptcy rules, including jurisdiction-specific local rules, and any rules imposed by court order in an individual borrower's case. *See generally* Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008) (studying mortgage servicing in bankruptcy).

the foreclosure pipeline, financial disaster can result.[256] But the incentives to get these exceptions correct on the company side can be low, especially for investors in mortgage portfolios—payment problems generate fees, foreclosure can be profitable, and the borrowers and their community bear most of the costs.[257]

Stewardship could force servicers to internalize the costs of servicing mistakes. State regulators could require servicers to appoint a steward answerable for certain significant servicing errors—for example, misreporting of information to the credit bureaus, wrongful denial of loss-mitigation, or erroneous foreclosures. Given the level of detail involved, larger states may require servicers to appoint several stewards, each covering a particular region, kind of mortgage, or number of borrowers to ensure that each steward is capable of providing meaningful oversight. This example highlights how customizable stewardship is to each particular risk.

Regulators could also require that the steward use the product. That is, that the steward would have to put his or her own credit score at risk. To make this work, regulators would also have to require that the stewards not be flagged to receive special care in any internal systems. This may well cancel out a much-appreciated perk of some of these jobs in the financial sector: access to better products and better customer service than is typically available. The purpose of this rule is to ensure that the stewards experience the same level of convenience or inconvenience as the public at large. After all, our current legal system is equipped to deal with the direct financial consequences of mistakes. What it deals with poorly is the inconvenience, the consequential damages, of these mistakes.

In requiring servicers to appoint a steward, states can tailor the steward's duties and potential liability to maximize the state's desired outcome. For example, if a state's goal is to protect and encourage investments in housing, when a servicer erroneously applies a payment or moves a borrower closer to foreclosure, the state could fine the steward on a recurring basis until the servicer fixes the problem or defends its actions. And if a borrower does wrongly lose his or her house, the steward could be made responsible for purchasing the borrower a comparable or better home in the same neighborhood. In this way, the steward has to shoulder some of the big inconveniences of the error, partially relieving the borrower from these burdens and aligning the steward's interest with the borrower's.

Requiring stewards to take specific actions here, and in other cases, may be more effective (and no less of a deterrent) than simply imposing civil sanctions. These sanctions are effectively fines on the steward's time. They are most appropriate in cases like mortgage servicing where remedying the situation is going to cost the borrower a lot of time regardless of any monetary relief,[258] and where there are secondary consequences from the error that the steward may be unable to fix, but that could limit the victim's ability to remedy their situation. In the case of mortgage servicing problems, the negative credit reporting arising from those problems creates barriers to the borrowers' ability to refinance their

---

256. Matthew Goldstein et al., *How Housing's New Players Spiraled Into Banks' Old Mistakes*, N.Y. TIMES: DEALBOOK (Jun. 26, 2016), https://www.nytimes.com/2016/06/27/business/dealbook/private-equity-housing-missteps.html (recounting how a servicing mistake led a veteran to homelessness).

257. *Id.*; Levitin & Twomey, *supra* note 255, at 69–90. *See also* CHRISTOPHER K. ODINET, FORECLOSED: MORTGAGE SERVICING AND THE HIDDEN ARCHITECTURE OF HOMEOWNERSHIP IN AMERICA (Cambridge University Press 2019) (providing a detailed history of the mortgage servicing industry).

258. I am sensitive to costs to the victim's time because they can become an independent source of harm to the victim. For example, if an hourly employee must miss work, he also suffers lost wages. If absences from work diminish a victim's standing at work, wage losses may accrue much as promotions and raises can be delayed.

mortgage or purchase a new home. Because the credit ratings agencies are separate, private companies, the servicer has limited ability to persuade the ratings agency to fix the harm to the consumer.[259]

B. Harder Cases

Implementing stewardship and appropriately calibrating incentives will not always be easy. This Part considers some instances where optimal design of stewardship is particularly challenging.

1. Oil

"We have always said it's not if but when pipelines leak."[260] This was a fear expressed throughout the protests opposing the Dakota Access Pipeline's path through sensitive lands.[261] And it was not an unfounded fear. The pipeline, built by EnergyTransfer Partners, leaked before it was even complete.[262] The nearby Keystone XL pipeline stained a field with 210,000 gallons of oil just six months later.[263] If spills are truly inevitable, and if the damage has the potential to be both massive and irreparable, could stewardship have a meaningful role here? Or, instead, would it serve merely to punish the innocent for harms that could not have been avoided? These cases are difficult because it is difficult to describe exactly what preventative measures should occur, but at the same time, it is obvious that some kind of preventative measures must occur.

If appropriately designed, stewardship could still play a meaningful role in this context. Before a spill, the stewardship model could ensure stricter compliance with the public safety regulations governing oil and gas. While strategic non-compliance may be a less troublesome strategy in some industries, when the stakes are as catastrophic and irreversible as they are with oil spills, there is a very strong case for strict compliance. After all, legislatures can change regulations that become unworkable much more easily than they can remove oil from a field once a spill has occurred.

For example, North Dakota could require Energy Transfer Partners to put a steward on the construction site at all times and require that steward to live in the community affected by the pipeline, not in the nearby population centers that the pipeline avoids. This kind of residency requirement makes the steward available to the people, who may have information that the steward needs to ensure the safety of the project, and who deserve answers to their questions given the risks they are incurring. The point is also to put the steward, and possibly also her family, in harm's way so that at least some of the risks are

---

259. Although it is possible to regulate credit rating agencies in some respects, First Amendment concerns appear to limit the reach of such regulation. *See* Compuware Corp. v. Moody's Inv'rs Servs., Inc., 499 F.3d 520, 528–29, 533 (6th Cir. 2007) (finding that credit ratings are communications protected by the First Amendment).

260. Monique Judge, *#NoDAPL: Dakota Access Pipeline Has Already Had a Leak Before it's Even Fully Operational*, THE ROOT (May 11, 2017, 11:24 PM), https://www.theroot.com/nodapl-dakota-access-pipeline-has-already-had-a-leak-1795151334 (quoting Joye Braun, a Cheyenne River Sioux Citizen).

261. *Id.*; Mitch Smith & Julie Bosman, *Keystone Pipeline Leaks 210,000 Gallons of Oil in South Dakota*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/us/keystone-pipeline-leaks-south-dakota.html (quoting Kelly Martin of the Sierra Club: "[w]e've always said it's not a question of whether a pipeline will spill, but when").

262. Judge, *supra* note 260.

263. Smith & Bosman, *supra* note 261.

salient to her.[264] This requirement alone could drive up the compensation required by the steward depending on how much of a hardship the relocation entailed.

Should the steward be liable in these cases where there was no "lapse" but merely insufficient planning? If the answer is no, then stewardship would function much as it does in the OSHA example above.[265] But if the answer is yes, then regulators must identify what outcomes should be avoided, and if an undesirable outcome occurs, whether the steward consented to liability. For these kinds of inherent dangers, stewardship will help companies internalize the risk of undertaking or continuing the project and motivate them to keep safety innovation on pace with their risk.

Of course, no individual steward could be expected to have the assets to make the community whole either. But where a company, as an inanimate object, cannot really feel the "harsh treatment" of punishment, the steward as an individual can.[266] The question for the steward will be, "Can I tolerate this risk of needing to file a Chapter 7 bankruptcy, and all the change that would bring to my life?" This risk, financial ruin and bankruptcy, is mostly the same risk borne by community members in harm's way.[267] And if no steward is willing to bear that risk, perhaps the project should not move forward.

2. Money Laundering

Another tricky application of stewardship attempts to layer it over existing gatekeepers. In the AML context, stewardship would impose another layer of personal liability on gatekeepers who fail to stop intentionally criminal behavior, as compared to preventing negligence. To prevent money laundering, financial institutions, acting as gatekeepers, must comply with know-your-customer (KYC) rules and file SARs when they suspect their clients are engaged in wrongdoing.[268] The downside to these regulations is that they can limit access to essential financial services for legitimate businesses.[269]

In theory, stewardship could be used to prevent money laundering without increasing the access tradeoffs that arise from tightening KYC burdens or broad personal liability for

---

264. To be sure, the steward may be able to resign and move after an accident, but the steward would have to deal with the inconvenience and disruption of the move. This inconvenience may pale in comparison to the devastation faced by less fortunate individuals, but it at least imposes some salient cost for non-compliance.

265. *See supra* Part IV.A.1 (showing referenced OSHA example).

266. *See infra* Part V.A; *see also* Feinberg, *supra* note 29, at 397 (describing the mechanism of punishment as "hard treatment").

267. *See* Katy Reckdahl, *Five Years After the Deepwater Horizon Oil Spill*, *BP's Most Vulnerable Victims Are Still Struggling*, NATION (Apr. 15, 2015), https://www.thenation.com/article/five-years-after-deepwater-horizon-oil-spill-bps-most-vulnerable-victims-are-still-st/ (explaining how BP's resistance to paying "business economic losses" put business owners impacted by the Macondo well disaster at risk of foreclosure). Even this threat of bankruptcy is not the same for the wealthy as it is for the working class since many kinds of assets are exempt from bankruptcy proceedings, meaning that the wealthy can exit even Chapter 7 with considerable assets, whereas the working class tend to own little of value when they receive their discharge. *See* Exemptions, 11 U.S.C. § 522 (2016) (listing exemptions—property not made available to creditors in bankruptcy—including some tax exempt retirement funds, homes, and wedding rings). At the very least, bankruptcy would let the steward feel some of the soul-crushing inconvenience imposed on victims of environmental disasters.

268. Christina Parajon Skinner, *Executive Liability for Anti-Money-Laundering Controls*, 116 COLUM. L. REV. ONLINE 1, 3 (2016) (describing the web of AML rules).

269. Thorsten Beck & Augusto de la Torre, *The Basic Analytics of Access to Financial Services*, 16 FIN. MKTS., INSTITUTIONS & INSTRUMENTS 79, 92 (2007).

executives.[270] Rather than avoiding categories of business deemed too high-risk, stewardship would allow financial institutions to engage in more nuanced gatekeeping. For example, a financial institution could continue to decline to do business in high-risk areas, unless the steward approves an exception and assumes liability for that exception. The vetting costs and risk to the steward may make these exceptions rare, but nevertheless valuable. Importantly, the steward would be highly incentivized to report suspicious activity to regulators early—perhaps earlier than the financial institution itself given the financial institution's interest in maintaining its relationships with clients.

In practice, though, the cost of this added layer of compliance bureaucracy might outweigh the benefit. At best, stewardship would motivate gatekeepers to exercise better judgment and permit legitimate transactions that are currently blocked by the existing AML rules. But even if it could make regulators or bank compliance programs comfortable with increased risk, it's not clear why any steward would in fact permit any such transactions. Moreover, given the sophistication of some money laundering regimes, anyone agreeing to be a steward over AML transactions will require both a significant salary and a significant budget for monitoring. In sum, stewardship is unlikely to work as a complement to existing gatekeeper regimes.

C. Where Stewardship Will Fail

Stewardship is no panacea. In order to explore the practical limitations of the stewardship proposal, this Part identifies when stewardship will fail,. In doing so, this Section highlights how critical design details work. It also suggests how enforcement priorities would have to be calibrated to maximize the impact of stewardship.

1. False Stewards

The single greatest risk to this model is the steward who is unafraid of the liability because she reasonably believes that she can avoid it. As discussed above, stewardship works because of individuals' fear of ruin and social approbation. A steward who has inoculated herself from these fears would have little motivation to monitor compliance. And if, as expected, compensation and social esteem associated with the position were high, she might have very strong incentives to stay in the position as long as possible. I call this category of stewards "false stewards," because although they occupy the office and reap its rewards, they do not actually bear any risk.[271]

False stewards have two main ways of skirting responsibility: judgment- proofing and becoming a fugitive. Judgment-proofing for higher-income individuals is not dissimilar to corporate judgment-proofing. Wealthy individuals can create trusts, make investments of dubious authenticity, shift assets to separate but related parties—especially spouses—and otherwise move their assets beyond the reach of the U.S. collection system. Decades of

---

270. Benjamin Lawsky, former superintendent of New York State's Department of Financial Services, proposed increasing executive's personal liability for AML violations. Skinner, *supra* note 268, at 1–2 (endorsing personal liability but noting that it may "encourage institutions to take more than an optimal level of care, reducing access to banking services in certain communities or infringing on other privacy interests in the process").

271. They are very much like Kraakman's corrupt gatekeepers. Kraakman, *Gatekeepers*, *supra* note 201, at 69–72.

scandals[272] and scholarship[273] have proven that strategically moving assets beyond the reach of creditors and governments is easy.

Indeed, for a particularly captivating example, consider the case of Sarah Pursglove and her entrepreneur ex-husband, Robert Oesterlund, as juicily recounted by the *New York Times Magazine*.[274] As their marriage disintegrated, Mr. Oesterlund allegedly "offshored" hundreds of millions of dollars to ensure that his soon-to-be-ex-wife would not receive it. As the *Times* describes it, the money was "vanishing into an almost impenetrable array of shell companies, bank accounts and trusts, part of a worldwide financial system catering exclusively to the very wealthy."[275] If our stewards are high-ranking executives by design, some of them, especially those in large companies, will have access to the world of offshore accounts and may therefore have the ability to creditor-proof their assets with ease. And even if the laws prohibit them from making such transfers and our mainstream financial institutions and other gatekeepers are prohibited from facilitating these transfers, it's not difficult to imagine them finding a way to do so. After all, you are not supposed to hide assets from your spouse, the taxing authorities, and other creditors, and yet offshoring is widespread.

Thus, there is legitimate reason to fear that some stewards might adopt the same strategy. To the extent that such strategic behavior veered into money laundering or other financial wrongs, the presence of other stewards tasked with policing those actions might limit the effectiveness of the strategy.

A determined false steward will find paths to avoid the oversight of other stewards.[276] Since there would be a limited number of stewards, all of whom are publicly identified, our existing gatekeepers[277]—lawyers, banks, even accountants—may further limit a false steward's options for judgement-proofing. Specifically, these gatekeepers can flag them as high-risk individuals with whom to do business.[278] Likewise, if stewards are high-risk in-

272. Reid K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93, 93 (2016) (describing offshore trusts as "legal to create but notoriously susceptible to abuse by wrongdoers seeking to hide assets from the peering eyes of tax collectors and creditors"); Patricia Cohen, *Need to Hide Some Income? You Don't Have to Go to Panama*, N.Y. TIMES (Apr. 7, 2016), https://www.nytimes.com/2016/04/08/business/need-to-hide-some-income-you-dont-have-to-go-to-panama.html.

273. Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 STAN. L. REV. 147 (1998) (describing various methods for rendering assets unavailable to creditors).

274. Nicholas Confessore, *How to Hide $400 Million*, N.Y. TIMES MAG. (Nov. 30, 2016), https://www.nytimes.com/2016/11/30/magazine/how-to-hide-400-million.html.

275. *Id.*

276. Changes in the know-your-customer rules aimed at preventing money laundering bear this out. Since banks and other financial institutions have significant regulatory burdens aimed at preventing them from doing business with high-risk individuals, those high-risk individuals have moved their business to unregulated channels. *See* Scott Sultzer, Note, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 189–92 (1995) (explaining how bad actors can use non-bank financial institutions to circumvent KYC rules).

277. I define gatekeepers as Professor Assaf Hamdani does: gatekeeper "refer[s] to parties who sell a product or provide a service that is necessary for clients wishing to enter a particular market or engage in certain activities." Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 58 (2003).

278. In the wake of the Enron scandal, commentators proposed that changes to gatekeeper liability could aid in preventing future scandals. *See* John C. Coffee, Jr., *Understanding Enron: It's About the Gatekeepers, Stupid*, 57 BUS. LAW. 1403, 1409–12 (2002) (arguing that reductions in gatekeeper liability in the years before the Enron scandal had facilitated the fraud); *see also* Coffee, *supra* note 187, at 1297 ("The gatekeeper's relative credibility

dividuals for money laundering purposes, one can imagine the existing know-your-customer framework—which strives to prevent financial institutions from aiding illegal transactions—picking up and preventing at least some efforts by ill-intending stewards to hide their assets. That is, effective stewardship may require the kind of "interacting network of gatekeepers" that Reiner Kraakman explained a generation ago.[279] To be sure, such additional scrutiny will impose costs on stewards and potentially make the position less attractive, but higher pay could compensate them for those inconveniences.

Regulators can monitor stewards to watch for judgment-proofing behavior more easily than they can monitor the average person. This is because stewards are limited in number and are known to regulators ex ante. The laws requiring stewards can mandate that they submit to regular auditing while also requiring companies to certify that their stewards still meet all requirements for being the stewards. Regulators can police failures to meet these obligations under the framework described in Part II.B.

2. Weak Stewards

Another risk arises when the steward is kept in the dark, or, in extreme cases, lied to, by management. That is, malevolent actors within a company may undermine stewardship just as they might undermine regulatory oversight. In theory, stewards will be managers with the clout to be effective monitors. But there is always the risk that the bad actors outrank the steward and are therefore potentially able to hide their true colors from the steward until it is too late. When this is true, the steward will be too weak to be effective and the risk of committing a serious injustice by punishing the steward is high.

One recent example from Silicon Valley illustrates this point. Uber, the infamous ride-hailing app, revolutionized the taxi industry by violating hack-licensing regulations (both in spirit and in letter), gaining popularity, then demanding that regulators change their laws to accommodate the popular service. As it sought legitimacy, or at least, fought off enforcement, after expanding into a new city, the company deployed an algorithm, Greyball, to evade the wrath of the regulators whose approval it needed. This algorithm effectively blocked designated regulators from the service so that, to those individuals, Uber would not appear to be operating in the city. An investigation by the Portland Bureau of Transportation found that:

> [W]hen Uber illegally entered the Portland market in December 2014, the company tagged 17 individual rider accounts, 16 of which have been identified as government officials using its Greyball software tool. Uber used Greyball software to intentionally evade PBOT's officers from December 5 to December 19, 2014 and deny 29 separate ride requests by PBOT enforcement officers.[280]

It is not difficult to imagine a similar script being used to evade the watchful eye of a steward. An effective steward at a software company would need both access to all of the company's code and the ability to understand it. Any steward other than the founder or

---

derives in part from its lesser incentive to lie or dissemble, but even more so from the fact that the gatekeeper in effect pledges reputational capital that it has built up over many years and many clients to secure its representations about the particular client or transaction.").

279. Kraakman, *Corporate Liability Strategies*, *supra* note 232, at 894.

280. PORTLAND BUREAU OF TRANSPORTATION, GREYBALL AUDIT REPORT (2017).

other lead engineer may be too weak to be effective.[281]

In cases where the company handicaps the steward, prosecutorial discretion may be essential to avoiding injustice. Although stewards could have an affirmative defense in cases where the company intentionally obstructs their oversight, I am hesitant to include such a safe harbor in the proposal because it could easily become the exception that swallows the rule.

These concerns notwithstanding, stewardship may discourage companies from attempting to disempower their steward because angering their steward would have dire consequences. A steward who believes that he or she is being set up has an easy path for revenge: reporting out. Donald Baker describes the desire for revenge as "picturesque, but it is still very much present," where "disgruntled current employees, fired employees, former trade association officials, and even ex-spouses and ex-lovers may be anxious to finger the individuals who they think have done them in."[282] It is difficult to imagine a more disgruntled employee than a steward who understands that he is being hung out to dry, particularly if that steward faces financial ruin or incarceration. His motivation to report out and report out thoroughly will be high if he can transfer those consequences onto those who put him at risk in the first place.[283]

3. Weak Enforcement

Finally, stewardship will make no difference if the laws on the books go unenforced. Regulators are only as effective as their budget allows them to be. While stewardship should reduce regulators' information costs overall, it does impose some costs on regulators. They must vet and approve potential stewards then have systems in place to handle information that they receive from stewards who decide to report out.[284] Moreover, regulators must still have the means to complete investigations and bring enforcement actions for stewardship to improve overall compliance.

Jesse Eisinger has argued convincingly that prosecutors are too afraid of losing cases to charge CEOs and large companies for even obvious wrongs.[285] He argues that this fear is the product of missteps and losses in the early 2000s, particularly relating to the fallout from putting Arthur Andersen out of business with a case that was overturned on appeal.[286] Business has successfully lobbied prosecutors into submission.[287] And, if anything, pros-

281. To the extent that the only effective steward would be the founder, CEO, or other high-ranking executive, the steward would tend to look like a responsible corporate officer. *See supra* Part III.A.

282. Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 708 (2001).

283. *Id.* at 708–09.

284. *See* Gadinis & Mangels, *supra* note 168, at 888 (explaining how gatekeeper arrangements impose costs on regulators even as they reduce information costs overall).

285. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, THE ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/.

286. EISINGER, *supra* note 285, at 25.

287. *See, e.g.*, Bill Whitaker, *Ex-DEA Agent: Opioid Crisis Fueled by Drug Industry and Congress*, CBS NEWS: 60 MINUTES (Jun. 17, 2018), https://www.cbsnews.com/news/60-minutes-ex-dea-agent-opioid-crisis-fueled-by-drug-industry-and-congress/ (reporting a whistleblower's account of how industry push-back caused supervisors at the DEA to back off of cases against opioid distributors); *see also* Sepinwall, *supra* note 135, at

ecutorial temerity will only increase if regulators become cozier with business. Nevertheless, my hope is that giving regulators and prosecutors a predetermined individual to target will encourage them to seek sanctions where they are due. The cases will be cleaner since the issue of who knew what when will be mostly absent. That said, stewards may be more likely to vigorously litigate cases than companies since they may be more focused on clearing their name and avoiding life-changing liability. If prosecutors are truly afraid of losing a trial, they may hesitate to bring enforcement actions against stewards.[288]

V. FURTHER IMPLICATIONS

Having explained and defended the idea of stewardship, and having considered the circumstances under which stewardship will succeed or fail, this Part pulls the lens back further and considers additional implications of the stewardship proposal. Part V.A considers the value of stewardship in precisely those cases where stewardship has failed and someone must be punished. Part V.B discusses how stewardship can actually lower the regulatory burden on companies by enabling them to focus on end goals rather than having internal processes closely monitored. Critically, these additional benefits cannot be achieved as efficiently through our existing liability structures, notably entity liability, fines, and gatekeeper liability.

Finally, Section C considers how the idea of stewardship could be a useful model beyond the corporation for other groups capable of wrongdoing. In doing so, it reveals why stewardship works when the steward is an employee of the regulated company, but would fail if stewardship were imposed on the employees of regulators to incentivize them to be strong enforcers of the law.

A. The Steward as Object of Punishment

If a steward fails and the event that he or she was obligated to prevent comes to pass, the steward will likely face liability. This liability has several potential purposes. First and foremost, it can compensate victims. It can deter future stewards from allowing such lapses. It can also punish. Stewards are a convenient and ethical place for the state to express vengeance, retribution, and condemnation. Expressions of vengeance, retribution, and condemnation may be especially clear where the state brings the force of criminal law against the steward, but even civil sanctions can express these sentiments if properly calibrated and communicated to the public.

This brings us back to our earlier discussion of deodands.[289] While the prior section takes an optimistic view of stewardship—that actually connecting humans with authority within corporations with humans in the path of corporations will reduce harms caused by corporations—this section is about the role of the steward when that optimism is misplaced. When that happens, the steward is an ideal target for punishment.[290] The steward solves

374–76 (exploring the lack of prosecutions across the business world despite accidents, product recalls, and widespread impacts of their wrongdoing).

288. *But see* Sepinwall, *supra* note 135, at 406 (explaining that RCO doctrine has the potential to "coerce compliance with standards that the government desires, but is without legal authority to enforce").

289. *See supra* note 69 and accompanying text.

290. Here, it is important to separate actual punishment from the threat of punishment. Part III.A explains why the steward is an ideal individual to threaten with punishment because I believe that threat will incentivize more desirable behavior. In this section, I am discussing the unpleasant act of actually punishing the steward.

the "no soul to be damned, no body to kick"[291] problem that has plagued corporate responsibility—both civil and criminal—for harm. Sometimes harms are so large—consider the Deepwater Horizon Disaster, the 2008 Financial Crisis—and impossible to remedy, that the public needs to punish someone or something to regain some sense of order. That this need for punishment reflects the need for vengeance and retribution doesn't make it any less real. Punishing the steward can be a satisfying, and consensual, outlet for public anger, not unlike flogging a bronze statue.[292]

Joel Feinberg has written extensively about "the expressive function of punishment."[293] Feinberg defines "resentment" as "the various vengeful attitudes" and "reprobation" as "stern judgment of disapproval" then explains that the condemnation delivered through punishment is a "kind of fusing of resentment and reprobation."[294] This condemnation, he explains, has important purposes beyond deterrence and reform, even if those two typically dominate conversations about why we punish.[295] And if criminal liability better conveys condemnation than civil liability,[296] this may be an argument in favor of imposing criminal liability on stewards.

Feinberg calls the first of these expressive functions "authoritative disavowal."[297] When a perceived wrong goes unpunished, the authority—whether it be a nation, an employer, or a parent—effectively "claim[s] responsibility" for the wrong, and it is as if the wrong becomes incorporated into official policy.[298] One motivation for this proposal is precisely that somewhere along the way, tolerating corporate wrongdoing appears to have become part of the official policy, especially at the federal level. Indeed, part of the discontent in the United States some ten years after the Great Recession and its wave of foreclosures began is undoubtedly that no one was punished even as stories about small but life-changing mortgage servicing mistakes mounted.[299] Instead, regulators entered into various consent orders with mortgage services. These orders follow a pattern—they express that the servicer mistreated customers, promise upgrades to the servicers' compliance programs, then declare some large dollar value of "relief" that the servicer agrees to provide customers.[300] Of course, the actual relief for any given consumer was typically small relative to the actual costs, stress, hours on the phone, and collateral consequences of the

291. Coffee, *supra* note 61, at 386.

292. *See, e.g.*, OFFICE SPACE (20th Century Fox 1999) (flogging a fax machine).

293. *See generally* Feinberg, *supra* note 29.

294. *Id.* at 403.

295. *Id.* at 404.

296. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.").

297. Feinberg, *supra* note 29, at 404–05.

298. *Id.* at 405.

299. *See* Sarah Bloom Raskin, Governor, Fed. Reserve Bd. of Governors, Problems in the Mortgage Servicing Industry: speech at the National Consumer Law Center's Consumer Rights Litigation ConferenceProblems in the Mortgage Servicing Industry, Boston, Massachusetts (Nov. 12, 2010) (transcript available at https://www.federalreserve.gov/newsevents/ speech/raskin20101112a.htm); *see also* Andrew Martin, *In a Sign of Foreclosure Flaws, Suits Claim Break-Ins by Banks*, N.Y. TIMES (Dec. 21, 2010), http://www.nytimes.com/2010/12/22/business/22lockout.html (covering how a woman lost the ashes of her husband, along with all of her possessions, when a bank foreclosed on the wrong home).

300. *Joint State-Federal National Mortgage Servicing Settlements*, NAT'L MORT. SETTLEMENT, http://www.nationalmortgagesettlement.com/ (last visited Feb. 18, 2019); Jessica Silver-Greenberg, *Regulators and 13 Banks Complete $9.3 Billion Deal for Foreclosure Relief*, N.Y. TIMES: DEALBOOK (Feb. 28, 2013),

wrong. There was no authoritative disavowal of the wrongs—nearly all of the servicers got to continue servicing mortgages, executives kept their jobs, and shareholders received dividends. Indeed, we know that these sanctions were never meant to "hurt" the banks because at the same time, the government was bailing them out.[301]

Stewardship is a solution to this political problem because targeting the steward for enforcement lacks the second-order effects of targeting a company. Targeting a steward does not create systemic economic ripples, debarment concerns, or revenue concerns from local taxing authorities. After Arthur Andersen, these ripple effects are often a compelling reason not to forcefully punish gatekeepers when they were responsible for preventing a wrong.[302] At the same time, punishing a steward may be more satisfying than punishing another gatekeeper since the steward is actually an employee of the company. And of course, the real goal of the proposal is that the steward would report wrongdoing to regulators, and potentially also to the public, so that it could be stopped before significant enforcement became necessary.

To be sure, there will always be something awkward about holding an individual personally liable for the wrongs of others.[303] But when the alternative is not punishing, and thereby tacitly condoning wrongdoing, it may be the least-bad alternative. Moreover, stewardship's foundation on ex-ante consent to liability and liability for omissions (rather than vicarious liability) mitigates at least some of the awkwardness that usually accompanies executive liability for corporate misdeeds.

B. Facilitating De-Regulation

Another benefit of stewardship is that it may facilitate deregulation. This benefit is possible because stewardship allows regulators to focus companies' attention on particular, context-specific risks. There is a balance between regulating modes of behavior and enforcing rules designed to accomplish the same safety concerns. As Shavell hypothesized, regulating modes of behavior tends to be more administratively costly than enforcing safety rules, but safety rules impose administrative costs on good actors who might have superior means of controlling their risk.[304] Stewardship theoretically reduces the number of people whose modes of behaviors states must monitor and instead shifts that monitoring burden onto the steward. Since the steward is paid by the regulated entity, that entity must then internalize the cost of its own monitoring. Assuming a powerful steward, these costs will fluctuate with how closely the steward feels she must control her charge, that is, with her level of trust.

---

https://dealbook.nytimes.com/2013/02/28/regulators-and-13-banks-complete-9-3-billion-deal-for-foreclosure-relief/. Of course, a lot of that "relief" went to pay the consultants who administered the relief programs, Francine McKenna, *Settling The Foreclosure Reviews: Winners and Losers*, FORBES (Jan. 8, 2013), https://www.forbes.com/sites/francinemckenna/2013/01/08/settling-the-foreclosure-reviews-winners-and-losers/#145a275843ae. When, incredibly, no consumer can be found to cash a relief check, those funds escheat back to the government. *See Correcting Foreclosure Practices*, OFF. COMPTROLLER CURRENCY (Jan. 31, 2017), https://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html.

301. Matt Taibbi, *Secret and Lies of the Bailout*, ROLLING STONE (Jan. 4, 2013), https://www.rollingstone.com/politics/politics-news/secrets-and-lies-of-the-bailout-113270/.

302. *See* Coffee, Jr., *supra* note 61, at 401–02 (explaining how steep penalties against companies tend to have overspill effects onto innocent parties).

303. *See supra* Part II.B.3.

304. Shavell, *supra* note 30, at 368–69.

Stewardship could also reduce information costs for regulators by signaling a commitment to compliance. The mechanism here is very much analogous to Ronald Gilson and Reiner Kraakman's description of the role of investment bankers.[305] They argue that potential securities investors cannot easily determine the quality of the information about issuers' securities ex ante unless the issuer has previously invested in its reputation and the would-be investor trusts that these reputation investments were made in good faith.[306] Investment bankers, they argue, help issuers and investors overcome this informational hurdle by acting as "reputational intermerdiar[ies]" who effectively rent their reputation to securities issuers.[307] By renting their reputation, bankers reduce the cost of information about particular securities and make the market's response more efficient.[308] Similarly, stewards, particularly well-known stewards, can be reputational intermediaries between companies and regulators. To the extent that a regulator trusts a proposed steward, they may be able to avoid some of the costs of investigating a project before issuing a permit or, even on ongoing supervision. This is especially true where the company and steward have significantly greater expertise about their business than a regulator. This is not to say that regulators need not understand what companies are doing under their watch, but rather that they can outsource some of the informational burden onto the company by way of the steward. And, if they want more information from the company, they can always call upon the steward.[309]

These shifts should allow regulators to focus on their end-goals instead of process and documentation requirements. In turn, businesses—with the consent of their steward—could better customize their compliance processes to suit their needs.

C. Stewardship Beyond the Corporation

This Article has focused on stewardship as a model for ensuring compliance by corporations, but the idea generalizes beyond corporations to various other groups that are capable of causing serious harm. In other contexts, we already see arrangements that have features resembling stewardship. While a full account of the value of stewardship outside the corporation is not possible here, what follows are a few examples that show both stewardship's generative promise and where it is the wrong tool for the job.

1. The Military

Military commanders are often held responsible for the failings of their subordinates. In international criminal law, the doctrine of command responsibility holds "military and civilian leaders to be held liable for the criminal acts of their subordinates."[310] Leaders are directly liable for crimes if they order them, but more often, they face "indirect" or "passive" liability for "culpable omissions."[311] That is, commanders have an obligation to deter

305. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 618–21 (1984).

306. *Id.* at 619–20.

307. *Id.* at 620.

308. *Id.* at 620–21.

309. *See supra* Part III.C.

310. Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 120 (2005).

311. *Id.* at 120–21. The ICC statute has two formulations of this liability: both military leaders who "knew or, owing to the circumstances at the time, should have known" and civilian leaders who "knew, or consciously

their subordinates from wrongdoing,[312] but are not typically held strictly liable for their subordinates' acts.[313] Just like RCO doctrine,[314] command liability faces criticism for its departure from traditional criminal law norms.[315]

Sometimes, they are held responsible simply for overall business unit performance, but in other instances, commanders are evaluated based on how they address specialized responsibilities, such as handling claims of sexual misconduct.[316] Stewardship is one way to impose command liability that at once makes the responsibility for deterring harm more salient to the relevant commander[317] and grounds that commander's liability in his or her consent to the obligation.[318] Of course, this model only works if the steward actually consents to the job, rather than being assigned to it by a superior officer. Imposing stewardship might be particularly effective in areas where abrupt culture change is needed, notably handling of allegations of sexual misconduct.

Applying the proposal to the military also illustrates how, in some cases, authorizing private suits against the steward is essential. This is true when regulators find it politically impossible to bring enforcement actions against their charges, or when an organization is largely self-regulated, as the military is. Congress and the Department of Defense have limited oversight roles over the military, but they often can't or won't take up meaningful policing of sexual misconduct on the individual scale.[319] This task largely falls to the branches of the military themselves. Allowing private causes of action against the steward would ensure that this self-regulation actually occurs. Private causes of action need careful calibration; otherwise, it would be untenable for any sane person to consent to the position. One way to set boundaries on private suits while maintaining their deterrent effect is to limit them to the direct beneficiaries of the steward's protection. For example, perhaps only alleged victims of sexual misconduct themselves could bring suit if the steward buried their complaint without investigation. Optimally calibrating the pool of private individuals to

---

disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes." U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, U.N. Doc. A/Conf. 183/13 (Vol. I) (1998), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf.

312. *See* Danner & Martinez, *supra* note 310, at 121; Arthur T. O'Reilly, *Command Responsibility: A Call to Realign the Doctrine With Principles of Individual Accountability and Retributive Justice*, 40 GONZ. L. REV. 127, 127 (2004).

313. *See* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, n.2 (1973) (explaining that prosecutors at the Nuremburg Tribunals argued unsuccessfully for strict liability for commanders and that the same debate occurred in the aftermath of the Vietnam War); O'Reilly, *supra* note 312, at 127–28 ("The modern formulation of this doctrine permits criminal liability to be based upon a minimum *mens rea* of negligence and an *actus reus* of omission."(emphasis added)).

314. *See supra* Part II.B.III.

315. *See* O'Reilly, *supra* note 312, at 128 (arguing that command responsibility "persists as a utilitarian tool of victor's justice favoring deterrence of crimes and the punishment of superiors over the principle of individualized fault").

316. *See* Craig Whitlock, *How the Military Handles Sexual Assault Cases Behind Closed Doors*, WASH. POST (Sept. 30, 2017), https://www.washingtonpost.com/investigations/how-the-military-handles-sexual-assault-cases-behind-closed-doors/2017/09/30/a9df0682-672a-11e7-a1d7-9a32c91c6f40_story.html (recounting how one leader was disciplined for failure to properly handle reports of sexual misconduct).

317. *See supra* Part II.B.3.a (discussing how RCO liability may be too diffused to make the particular obligations salient to managers).

318. *See supra* Part III.A.3.

319. Rebecca Kheel, *Gillibrand: Military Sexual Assault 'As Pervasive as Ever,'* THE HILL (Sept. 7, 2017), http://thehill.com/policy/defense/349672-dem-senator-military-sexual-assault-as-pervasive-as-ever.

whom the steward is liable would require significant subject-matter expertise and input from the relevant stakeholders.

2. Fraternities

In a similar vein, university-imposed stewardship could help break the persistent culture of underage drinking and hazing in fraternities. Universities could require fraternities to nominate one member to be the steward over new pledges. That student would face suspension, expulsion, or some other sanction[320] if hazing that threatens life, limb, or health occurs and the steward fails to report it when he learns of it. To ensure that young adults are not forced to choose between getting their friend expelled or being expelled themselves, the reporting safe harbor could be expanded to include those involved in the reported behavior. The purpose of using stewardship in this context is to prevent bad outcomes and educate maturing students, not to facilitate punishment.

Choosing the right steward will be the key to the success of this proposal. The university could require that the student with the highest GPA or other prestigious credential become the steward. The goal is to find a student who expects to graduate and benefit from the degree.[321] One can imagine a Dean of Students' office certifying that some slate of high-performing students was eligible for the role of steward and then allowing the fraternity to choose from that list. Ideally, the position of fraternity steward could itself become a coveted resume credential not unlike being on a school's honor council.

Since this stewardship would be university-imposed, the steward would not face additional legal liability from the state. Stewardship would not create additional private causes of action against the steward. But, just as with corporate stewardship, this model need not replace other kinds of liability for bad actors. Criminal sanctions, including sanctions under hazing-specific laws, would still exist where needed. The purpose of implementing stewardship is to improve monitoring to prevent the harm even where behavior is stubbornly resistant to deterrence.

3. Child Protective Services

Having studied where stewardship may improve outcomes without creating significant doubts about fairness, we can see more clearly where stewardship-like arrangements create significant potential for unfairness. This potential unfairness is acute when the steward did not directly consent to the role, is not compensated for the risk, or inherently lacks the power to mitigate the risk should it occur. An example of misguided stewardship arguably occurs in departments of child and family services.[322] There, case workers can face charges for child abuse and neglect if one of their clients is abused—usually murdered—and the caseworker arguably failed to stop the abuse.[323] But while it is an attractive idea to

320. Monetary sanctions are likely a poor fit here since undergraduate students are often broke or sponsored by their parents. The threat of leaving their parents with a bill may be motivating for some, but less motivating for others.

321. By way of example, appointing Zac Efron's character, Teddy Sanders, from the movie Neighbors as steward would accomplish little. NEIGHBORS (Universal Pictures 2014); *see also* Gregory S. Parks & Tiffany F. Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQ. L. REV. 1, 49 (2013) (studying attributes correlated with fraternity hazing).

322. Here, tort—not regulatory law—creates the liability, but the effect is mostly the same.

323. Melissa Etehad & Richard Winton, *4 L.A. County Social Workers to Face Trial in Horrific Death of 8-*

think of social workers as stewards of the children in their care,[324] there are so many other flaws in the child protection system that imposing personal liability on social workers likely adds little more than further strain on the system. While stewardship can nudge companies to spend money where it is needed, it cannot have the same effect on public budgeting. Moreover, caseworkers have limited options for reporting out given privacy obligations that cannot easily be changed given the involuntariness of the relationship between caseworker and child and the sensitivity of the subject matter. Where compliance failures occur in deeply underfunded public agencies like departments of children's services,[325] or arguably even the Department of Veterans' Affairs, stewardship cannot magically change the funding problems. It might scandalize them and inspire political change if a series of stewards resigns in disgust, but it cannot do more than that. Indeed, these financial challenges may make stewardship a poor fit in much of the public sector in general.

The preceding examples are only a few instances where stewardship might have purchase and where it might compound injustice. No doubt there are many additional examples of both cases.

VI. CONCLUSION

This Article has argued that regulators should make corporations hand over hostages when those corporations have insufficient incentive to comply with public-safety regulations given the seriousness of the risks that they undertake. While such a regime might seem at first to be foreign to our legal norms and inconsistent with our ideas of individual responsibility, stewardship finds deep roots in our legal traditions and can be justified under traditional theories of moral responsibility. Most importantly, though, stewardship holds great promise as an effective and low-cost means for improving compliance and minimizing the negative impacts of corporations on public welfare.

This proposal is particularly promising for local governments or other small regulators who may otherwise lack the power to make their regulatory priorities salient to companies.

Year-Old Boy, L.A. TIMES (Mar. 20, 2017, 5:40 PM), http://www.latimes.com/local/lanow/la-me-ln-social-worker-charges-20170320-story.html.

324. Indeed, in a well-funded system of child protective services, stewardship may be an appropriate model for ensuring that case workers do not shirk their duties. These case workers would consent to the specific liability as a condition of employment, be compensated for the risk, and have a total caseload that provided them with the opportunity to manage that risk.

325. For example, in recent years, several instances of overworked caseworkers falsifying records or closing cases without sufficient investigation have come to light, sometimes with grave consequences. Rene Stutzman, *More than 70 Caseworkers Lied About Efforts to Protect Children*, ORLANDO SENTINEL (July 12, 2009), http://www.orlandosentinel.com/news/orl-florida-child-welfare-workers-lied-071209-story.html (describing social workers feeling pressured to fabricate records to appear to keep up with impossible case loads); Andrea Ball & Eric Dexheimer, *Dozens of CPS Caseworkers Caught Lying, Falsifying Documents*, AUSTIN AM.-STATESMAN (Jan. 13, 2015), http://projects.statesman.com/news/cps-missed-signs/wrongdoing.html (describing cases of social workers fabricating records); Patricia Wen, *The Short, Unhappy Life of Jeremiah Oliver, Failed by All*, BOSTON GLOBE (May 25, 2014), https://www.bostonglobe.com/metro/2014/05/24/the-short-unhappy-life-jeremiah-oliver-failed-all/WTQcjXthTi3ruSwb7BuInO/story.html (describing how social workers skipped mandatory visits to the family of five-year-old Jeremiah Oliver, who was found dead in a suitcase on the side of a highway); *see also* Jo Craven McGinty, *Sobering Report Describes Trends in Deaths of Abused and Neglected Children*, N.Y. TIMES (Jan. 20, 2012), http://www.nytimes.com/2012/01/21/nyregion/report-describes-trends-in-deaths-of-abused-and-neglected-children.html (detailing lapses in the Administration for Children's Services monitoring in New York City).

In many instances, permitting and variance processes are opportunities to incorporate stewardship without changes to existing law. Community benefit agreements and similar devices offer opportunities to implement stewardship by contract. Indeed, for local governments with priorities that run counter to those of their state, or even the relevant federal regulator, the ability to implement stewardship without changing the substantive law may be its most powerful feature.