NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 13 FALL 2016 NUMBER 1

MORTAL DEMOCRACY: WHEN CORPORATIONS BRIBE

ROBERT E. WAGNER*

The crime of bribery has been around for almost as long as the possibility of obtaining special benefits from governments has existed. Meanwhile, corporate crime has been a concern only in recent centuries, but its importance continues to grow. Ever since bribery first appeared, questions have arisen as to who should be considered a criminal, who a victim, what behavior qualifies as bribery, and how society should punish this offense. Similarly, with corporate crime there have been persistent questions about the possibility/impossibility of corporations committing crimes, the optimal ways to treat innocent participants in a corporation if only one segment of it has committed a crime, and the proper type and level of punishment for corporations in these settings. This Article investigates in detail for the first time what should happen to corporations that bribe public officials. After describing the historical arguments for and against corporate criminal liability and those related to liability for bribery generally, the Article examines the dangers and harms of corporate bribery. This Article then presents a proposal that involves vigorous pursuit by law enforcement of corporate bribery and uses of multiple types of punishments. Specifically, the Article endorses implementing a targeted type of community service for guilty members of a corporation, a mandatory official acknowledgment and publicity regarding the bribery, and a default rule requiring any corporation that commits bribery to terminate its CEO automatically.

 Assistant Professor, Baruch College Zicklin School of Business Department of Law; M.B.A., University of Chicago Booth School of Business; J.D., Cornell Law School. I would like to thank Irina Manta. I am grateful to the Baruch College Zicklin School of Business Department of Law and its staff for support during my research.

INTRODUCTION

Bribery of public officials has grown to epic proportions. In recent years, the Mexico Walmart bribery scandal involved the company giving over $24 million to public officials, which allowed Walmart to grow in that country at an unprecedented pace.[1] Just last year, a number of International Federation Association Football (FIFA) officials were accused of taking $150 million in bribes related to the issuing of media and marketing rights for soccer games in the Americas.[2] In the United States itself, the scope of incidents in the last five to ten years related to bribery of elected officials alone is alarming. For example, former Boston city councilor Chuck Turner was sentenced to three years in prison for accepting a $1000 bribe,[3] State Sena-

1. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle,* N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all.

2. Michael E. Miller & Fred Barbash, *U.S. Indicts World Soccer Officials in Alleged $150 Million FIFA Bribery Scandal*, WASH. POST (May 27, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/05/27/top-fifa-officials-arrested-in-international-soccer-corruption-investigation-according-to-reports/.

3. Andrew Ryan, *Turner Sentenced to 3 Years in Prison*, BOS. GLOBE (Jan. 26, 2011), http://www.boston.com/news/politics/articles/2011/01/26/judge_rebukes_turner_sentencing_him_to_3_years_in_prison/.

tor Ronald Caldero has been indicted for receiving $88 thousand in bribes,[4] State Senator Dianne Wilkerson was sentenced to three and a half years in prison for taking $23,500 in bribes,[5] New York Assemblyman Eric A. Stevenson was convicted of bribery and sentenced to three years in prison,[6] Representative Randy Cunningham was sentenced to eight years and four months in prison for taking $2.4 million in bribes,[7] Congressman William J. Jefferson was sentenced to thirteen years in prison for accepting hundreds of thousands of dollars in bribes,[8] City Councilman Marcelo Co was sentenced to sixty months in federal prison for accepting a $2.36 million cash bribe,[9] and New York State Senator Carl Kruger was sentenced to seven years in prison for involving himself in bribery.[10] The judge in Senator Kruger's trial, Judge Rakoff, accurately described the dangers of bribery when he characterized Mr. Kruger's actions as "extensive, long-lasting, substantial bribery schemes that frankly were like daggers in the heart of honest government."[11] As Judge Rakoff emphasized, it is "difficult to overstate the evils that are wrought when government officials succumb to bribery."[12] "We have only to look at other countries," he said, "to see that once corruption takes hold, democ-

---

4. Patrick McGreevy, *Calendar Sheds Light on Indicted Ex-Sen. Ronald Calderon's Actions*, L.A. TIMES (June 23, 2015), http://www.latimes.com/local/political/la-me-pc-calendar-sheds-light-on-indicted-ex-sen-calderon-s-actions-20150623-story.html.

5. Jonathan Saltzman, *Wilkerson Receives 3½ years in Prison*, BOS. GLOBE (Jan. 7, 2011), http://www.boston.com/news/local/massachusetts/articles/2011/01/07/wilkerson_receives_3_years_in_prison/.

6. Benjamin Weiser, *Former Bronx Assemblyman Sentenced for Corruption*, N.Y. TIMES (May 24, 2014), http://www.nytimes.com/2014/05/22/nyregion/former-bronx-assemblyman-sentenced-for-corruption.html.

7. Randal C. Archibold, *Ex-Congressman Gets 8-Year Term in Bribery Case*, N.Y. TIMES (Mar. 4, 2006), http://www.nytimes.com/2006/03/04/politics/04cunningham.html.

8. Jerry Markon, *Ex-Rep. Jefferson (D-La.) Gets 13 Years in Freezer Cash Case*, WASH. POST (Nov. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/13/AR2009111301266.html.

9. Paloma Esquivel, *Former Moreno Valley City Councilman Sentenced in Bribery Case*, L.A. TIMES (June 1, 2015), http://www.latimes.com/local/lanow/la-me-ln-former-moreno-valley-councilman-sentenced-20150601-story.html.

10. Benjamin Weiser, *Former State Senator Is Sentenced to 7 Years in Vast Bribery Case*, N.Y. TIMES (Apr. 26, 2012), http://www.nytimes.com/2012/04/27/nyregion/carl-kruger-sentenced-to-seven-years-in-corruption-case.html?_r=0.

11. *Id.*

12. *Id.*

racy itself becomes a charade, justice becomes a mere slogan camouflaging a cesspool of self-interest."[13]

At the same time that bribery has continued to grow, corporations have become the second most powerful institution in the world, outpaced only by nations.[14] The consequence is that we have one of the most powerful types of institutions in the world possibly corrupting another. This Article looks at the dangers of this situation, explores some of the limitations on criminalizing corporate behavior, and concludes with a recommendation for increasing and modifying how corporations are punished for this criminal violation.

This Article discusses the issue of criminal penalties for bribing a public official and how they should be applied to corporations that pay such bribes. The analysis begins in Part I with an overview of corporate criminal liability generally, including an exposition of its history and current application. The Article then discusses in Part II the crime of corruption, and specifically the bribery of public officials. Part III describes the traditional way in which bribery is treated in terms of criminal sentences and of how punishments apply to the corporate context. Part III discusses the disparity between bribe giver and taker in terms of the consequences that they each suffer and argues that the corporate bribe giver is in some ways more harmful to society and yet seems to be let off the hook more readily. Part III also develops a proposal advocating not only for continued prosecutions for bribery, but also for the abolition of the current trend of deferring prosecutions or engaging in other forms of avoiding a full criminal process. This Part also shows why and how to implement enhanced penalties like mandatory termination for CEOs when their corporations pay bribes, community service for the responsible individuals, and compulsory acknowledgment and publicity regarding the crime.

---

13. *Id.*

14. *See* Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 949–50 (2011).

I.
Corporate Criminal Liability

A. *The Framework of Corporate Criminal Liability*

Corporate criminal liability is the frequent subject of criticism by scholars, who refer to it as "pointless," "unprincipled," "illogical," and lacking in "empirical justification."[15] Punishing shareholders for the crimes of the corporation has even been compared with the collective punishments often used by fascist regimes.[16] Some scholars have contended that there is also no theoretical justification for corporate criminal liability.[17] For decades, many scholars have thus argued against corporate criminal liability, both for being ineffective and for running against the principles of criminal law.[18]

A number of the critiques in this context refer to the idea that the corporation has no will or is not self-conscious.[19] Due to this, many opponents of corporate criminal liability have claimed that it violates the primary purposes of criminal law, namely retribution, deterrence, and rehabilitation, and that rather than punishing the individuals responsible, it punishes shareholders and stakeholders.[20] One of the first legal objections to corporate liability was that to "punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without the due process of law."[21]

---

15. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants,* 44 Am. Crim. L. Rev. 53, 58 (2007).

16. John Hasnas, *A Context for Evaluating Department of Justice Policy on the Prosecution of Business Organizations: Is the Department of Justice Playing in the Right Ballpark?,* 51 Am. Crim. L. Rev. 7, 11 (2014).

17. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability,* 46 Am. Crim. L. Rev. 1329, 1329 (2009).

18. Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence,* 61 Stan. L. Rev. 271, 272–73 (2008).

19. Carlos Gomez-Jara Diez, *Corporate Criminal Liability in the Twenty-First Century: Are All Corporations Equally Capable of Wrongdoing?,* 41 Stetson L. Rev. 41, 50 (2011).

20. Erin Sheley, *Perceptual Harms and the Corporate Criminal,* 81 U. Cin. L. Rev. 225, 230 (2012).

21. Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations 34 (2014).

1. *Historical Progression of Corporate Criminal Liability*

The debate about both the appropriate level and the sheer existence of corporate criminal liability began over a hundred years ago.[22] Originally, criminal law was not applied to corporations. William Blackstone thought that the inapplicability of criminal law to corporations was "so obvious that it needed no elaboration."[23] The early American courts that considered the issue held that only individuals could be charged criminally.[24] This changed in the early 1900s when the United States Supreme Court established corporate criminal liability in *New York Central & Hudson River Railroad Co. v. United States*[25] and used the respondeat superior principle to determine guilt. With the exception of crimes requiring a natural person,[26] such as rape,[27] a corporation can now be held criminally liable. Nonetheless, this was not the end of the controversy surrounding corporate criminal liability. The opponents of corporate criminal liability perceive the practice "as the senseless and puerile reaction of an ignorant public, or as an inefficient relic best replaced by a civil scheme."[28]

Some commentators have noted that the sanctions in civil and criminal proceedings are often essentially the same, raising the question of why we should use criminal law at all.[29] A number of scholars have claimed that instead of criminal liability, we should just use civil liability, and possibly some form

22. Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime,* 63 HASTINGS L.J. 411, 415 (2012); *see also* V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478 n.2 (1996).

23. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 476) ("A corporation cannot commit treason, or felony, or other crime.").

24. Kathleen F. Brickey, *Perspectives on Corporate Criminal Liability*, *in* ENCYCLOPEDIA OF CRIMINOLOGY & CRIMINAL JUSTICE (2012).

25. New York Cent. & H.R.R. Co. v. United States, 212 U.S. 481, 493–95 (1909). For a discussion of the case, see Sheley, *supra* note 20, at 230–32.

26. A natural person has been defined as "[a] human being, as distinguished from an artificial person created by law." Utica Mut. Ins. Co. v. Precedent Cos., 782 N.E.2d 470, 476 (Ind. Ct. App. 2003).

27. Khanna, *supra* note 22, at 1488.

28. Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 5 (2012).

29. Khanna, *supra* note 22, at 1488.

of insurance.[30] There are, however, several differences between corporate criminal and civil liability, including that criminal liability has stronger procedural protections, more powerful enforcement devices, more severe and unique sanctions (as well as stigma), and stronger expressive ability than civil liability.[31] The government seems to think that more corporate enforcement would be appropriate, as evidenced by the fact that the Department of Justice (DOJ) has increased its focus on corporate crime.[32] Both sides of the debate admit that there has been harm from the actions of corporations in these contexts, but there is disagreement about who is responsible and who should suffer the consequences. It has been argued that criminal sanctions carry with them a moral condemnation that should only be used when the government can point to a "substantive wrong in the corporation's compliance practices, leadership, culture or internal controls."[33]

What does it mean to say, however, that a corporation has committed a wrong? One possibility is that someone with a high level of decision-making authority in the corporation has behaved inappropriately.[34] Shareholders do not usually have much control in the management of their corporation because the actual decision-making authority is with the board and the day-to-day decisions are made by other corporate officers.[35] Hence, we often hear the complaint that it is unfair to hold the entire corporation liable when in reality only a small part (perhaps even just one person) actually participated in wrongdoing.[36] The critics complain that holding everyone liable turns innocent shareholders and employees into "collat-

30. GARRETT, *supra* note 21, at 268–69.

31. Khanna, *supra* note 22, at 1492.

32. *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1309 (2013).

33. Cheryl L. Evans, *The Case for More Rational Corporate Criminal Liability: Where Do We Go From Here?*, 41 STETSON L. REV. 21, 28 (2011).

34. *See, e.g.*, Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1422 (7th Cir. 1986).

35. Carol R. Goforth, "*A Corporation Has No Soul*"*—Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 629 (2010).

36. Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 5–6 (2010).

eral" damage.[37] Indeed, the argument that one punishes innocent shareholders when one punishes the corporation was one of the main points raised by the defendants in *New York Central*.[38] The defendants further claimed that it was impossible for the corporation as an entity to commit a crime because those who are ultimately responsible for making decisions, i.e., the board, could not legally authorize criminal acts.[39] In fact, it was a long-held and firmly established belief that a corporation was not capable of possessing the moral blameworthiness necessary to perpetrate an intentional crime.[40] Yet, the Supreme Court held that since a corporation acts through its officers and agents, their purposes, motivations, and intentions are also those of the corporation.[41] The principle of respondeat superior was thus taken from tort law and placed into the context of corporate criminal law.

The use of this tort concept in the criminal law was quickly attacked, leading to many of the objections to corporate criminal liability. Many people believed, and still believe, that the use of such liability was inconsistent with the purpose of criminal law, that is, "punishment of the morally blameworthy—because it relied upon vicarious guilt rather than personal fault."[42] Using respondeat superior in the criminal law has also been criticized because it is "overly broad."[43] For example, under respondeat superior, even if an employee was specifically told not to take some action and even if the corporation itself was a victim, it is still possible for the corporation to be held liable.[44] In fact, some convictions do seem to be based upon the actions of a few individual actors and result in thousands of lost jobs and numerous difficulties for not only the employees, but also their families, others who depend upon their support, and people who counted on the services

37. Alschuler, *supra* note 23, at 1359.

38. New York Cent. & H.R.R. Co. v. United States, 212 U.S. 481 (1909).

39. *Id.* at 492.

40. *See* Pamela H. Bucy, *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF CRIME & JUSTICE 259, 259 (Joshua Dressler ed., 2d ed. 2002).

41. *New York Centr.*, 212 U.S. at 492–93.

42. Khanna, *supra* note 22, at 1485.

43. Sheley, *supra* note 20, at 228.

44. *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970 (D.C. Cir. 1998); United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985).

that the company became unable to provide.[45] In one example, all of this occurred possibly due to a few employees performing actions that resulted in a criminal conviction, which was itself later reversed, but still led to the demise of the Arthur Andersen corporation.[46]

Unfortunately, scholars today cannot agree on the exact ontological status of the corporation. They argue about whether it is real or fictional, whether it is an aggregation or an association, and whether it is a distinct entity or a nexus of contracts.[47] Some jurists conceive of corporations as mere legal fictions that refer to the people and agreements behind the organizations; these jurists believe, therefore, that liability should attach to the individuals involved.[48] Countering this view is a fact on which most scholars do agree, which is that a corporation may continue even when specific individuals are no longer a part of it.[49] Furthermore, corporations have their own cultures that are different from those of the individuals in them.[50] Yet, scholars have argued that since a corporation contains elaborate methods of individual decision making, any decision that was made in conformity with these methods can be appropriately attributed to the corporation.[51] This militates for the rejection of the argument that corporations should not be criminally prosecuted because they are "fictitious entities"; indeed, there is some support for the idea that corporations do act as persons under the law—in that they make a certain set of decisions—and that they should be treated accordingly.[52]

Many other complaints about corporate criminal liability rest on the claim that it violates the aim of criminal law to punish the morally blameworthy by using vicarious guilt rather than personal fault.[53] This vicarious liability often harms indi-

---

45. *See* Hamdani & Klement, *supra* note 18, at 273.
46. Alschuler, *supra* note 23, at 1364–66.
47. Sepinwall, *supra* note 22, at 427.
48. Gilchrist, *supra* note 28, at 15.
49. Sepinwall, *supra* note 22, at 427.
50. Gilchrist, *supra* note 28, at 16.
51. Peter French, *The Corporation as a Moral Person,* 16 AM. PHIL. Q. 207, 211 (1979).
52. Lucian E. Dervan, *Reevaluating Corporate Criminal Liability: The DOJ's Internal Moral-Culpability Standard for Corporate Criminal Liability,* 41 STETSON L. REV. 7, 10 (2011).
53. Khanna, *supra* note 22, at 1484–85.

viduals, giving fuel to another argument often used against corporate criminal liability, which is that it harms employees, suppliers, and other third parties, as most famously happened once the company Arthur Andersen was criminally convicted.[54] Arthur Andersen's conviction cost the United States 28 thousand jobs even though the conviction itself was eventually overturned by the Supreme Court.[55] Corporate convictions can often have terrible consequences against innocent people like employees, shareholders, and the public, but the failure to prosecute in such cases can also result in significant harm.[56] According to the DOJ, "[a]lmost every conviction of a corporation, like almost every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation."[57] Since the very first Supreme Court case upholding corporate criminal liability, legal minds have indicated that this form of sanction was designed to punish the innocent.[58] Nevertheless, scholars have also argued that while shareholders experience the individual deprivations, much of the harm associated with the actual stigmatization of persons is absent and hence reduces the impact that the innocent shareholders actually suffer.[59] This counterargument has yet to convince many of the critics. In fact, they continue to claim that corporate criminal liability does not fit with the traditional purposes of criminal sanctions.[60]

2. *Deterrence*

Under deterrence principles, "the ultimate purpose of organizational criminal sanctioning is to galvanize the organizations to put in place policies, and to reform organizational cul-

54. Hamdani & Klement, *supra* note 18, at 273.

55. Carrie Johnson, *U.S. Ends Prosecution of Arthur Andersen*, WASH. POST (Nov. 23, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201852.html.

56. GARRETT, *supra* note 21, at 42.

57. U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, UNITED STATES ATTORNEY'S' MANUAL §§ 9-28.000 to -28.1300, § 9-28.11000(B) (2008) [hereinafter Filip Memorandum].

58. Hasnas, *supra* note 17, at 1344.

59. Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL'Y 15, 41 (2010).

60. Hasnas, *supra* note 16, at 8.

tures, such that future criminal harms will be avoided."[61] Deterrence traditionally has two categories, general and specific deterrence, the former of which focuses on incentivizing people to avoid the consequences that they observe others endure, and the latter of which tries to change the future behavior of the individual wrongdoer by having her suffer consequences herself.[62] Arguably, corporate criminal liability can increase both types of deterrence by internalizing the public cost of wrongdoing by putting corporate assets at risk, which can particularly help with specific deterrence if and when the agent who committed the wrongdoing is judgment-proof.[63]

The United States endorses the deterrence rationale for corporate criminal liability. For instance, the DOJ's stated reasons for indicting corporations include the belief that other members of that corporation's industry will learn from the incident and not commit similar crimes (i.e., general deterrence), and that an indicted corporation may be influenced to change its behavior in the future (i.e., specific deterrence).[64] Furthermore, "[t]he possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity."[65]

Over-deterrence is another issue that scholars have considered in this context because corporate criminal liability leads to corporations spending more money avoiding crime than they should.[66] For example, if a corporation spent $100 thousand to avoid a criminal environmental sanction for an act that would have caused $1000 worth of damage, that would be over-deterrence.

---

61. Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines,* 1 OHIO ST. J. CRIM. L. 487, 512 (2004).

62. Marcia Narine, *Whistleblowers and Rogues: An Urgent Call for an Affirmative Defense to Corporate Criminal Liability*, 62 CATH. U. L. REV. 41, 54 (2012).

63. Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215, 1224 (2003).

64. Filip Memorandum, *supra* note 57.

65. *Id.*

66. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321–22 (1996).

However, many commentators and judges still treat deterrence as the main goal of both criminal and civil liability,[67] and given the importance of this aspect of criminal prosecution, this Section describes deterrence in the corporate setting before looking at the actual implementation and the guidelines used to prosecute corporations. Deterrence is not necessarily or always achieved with the possibility of harsh corporate penalties.[68] "Using the threat of going out of business as a deterrent may be unwise. Harsh corporate penalties might distort firms' incentives to monitor for misconduct, and undermine deterrence of professional firms' members."[69] Too harsh a sentence may lead to corporate collapse, and a punishment that can only be applied once may not be optimal.[70]

Critics also argue that traditional deterrence does not warrant "the imposition of punishment on those without fault whenever doing so may reduce the overall level of criminal activity," which is what they claim corporate criminal liability may do.[71] Professor Bucy perhaps best laid out some of the arguments for and against corporate liability when she said:

> Why prosecute something that "has no soul to damn" and "no body to kick?" The major argument in favor of prosecuting corporations is as follows: corporations are major actors in today's world; the criminal law is the most effective method of influencing behavior by rational actors; therefore, criminal prosecution is the most effective way to influence corporate actors. The major argument against corporate criminal liability is that it makes no sense. The distinguishing feature of the criminal law, as contrasted to civil law, is its focus on intent, and no matter what fiction we employ, a corporation has no intent.[72]

The claim that corporations have "no intent" stems from the idea that corporations do not act; their agents do,[73] and since the corporations are not themselves agents, they do not

67. Khanna, *supra* note 22, at 1494–95.
68. Hamdani & Klement, *supra* note 18, at 273–74.
69. *Id.* at 308.
70. *Id.* at 276.
71. Hasnas, *supra* note 16, at 9.
72. Pamela H. Bucy, *Why Punish? Trends in Corporate Criminal Prosecutions,* 44 AM. CRIM. L. REV. 1287, 1288 (2007).
73. Khanna, *supra* note 63, at 1223.

have the ability to be morally responsible.[74] Due to the claim that corporations are "mindless legal entities," some law professors have called corporate criminal liability a mistake like the ancient practice of punishing an animal or inanimate object that has killed a person.[75]

3. *Retribution*

Scholars have also defended the imposition of corporate criminal liability on retributivist grounds, stating that it is the means by which we can properly apply blame upon the corporation's officials,[76] and that it functions well in that regard.[77] At the same time, the appropriateness of criminal sanctions is even further complicated by the availability of civil corrective measures. Corporate misconduct might be controllable strictly through civil enforcement, but it is also possible that this would be ineffective because civil fines cannot replicate the reputational harm of criminal sanctions.[78] Professor Hart said "what distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition."[79] The expressive function of criminal law cannot be replicated in any other way. Furthermore, the condemnatory function of punishment is also very important in shaping how people feel about the law and their likelihood of following it.[80] Corporate criminal liability allows the community to express its moral judgment.[81] The criminal justice system itself may be weakened due to appearances of favoritism and unequal application of the law, which could arise if we did not hold corporations criminally liable when people think we should.[82] The fact that people reportedly experience "*greater* moral indignation toward corporations than toward

74. *See, e.g.*, Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (2003).

75. GARRETT, *supra* note 21, at 268.

76. Sepinwall, *supra* note 22, at 417.

77. GARRETT, *supra* note 21, at 168.

78. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 512–16 (2006).

79. GARRETT, *supra* note 21, at 274.

80. Sheley, *supra* note 20, at 237.

81. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009).

82. Gilchrist, *supra* note 28, at 51.

natural persons for the same crimes"[83] could enhance this effect. This may be a double-edged sword in that one problem with the expressive function of criminal law is the possibility that finding a fictional entity criminally liable may be viewed as farcical by some of the public and actually decrease public support for criminal law generally.[84]

Given the amount of power that a corporation can accumulate, it is no surprise that corporations have also caused many types of disasters.[85] It is not only their power, but also their size and complexity that can at times allow corporations to commit crimes far beyond what individuals can accomplish.[86] The "collective qualities" of corporations contribute to this increased harm. By "collective qualities," this Article means their "geographic, structural, and temporal complexities" that end up amplifying the potential harm caused.[87] Conversely, another reason for corporate criminal liability is that it can protect innocent corporations. Indeed, corporations that follow the law may be at a competitive disadvantage compared to corporations that disregard the law.[88] These law-abiding corporations might be placed at an even greater disadvantage if we did not have criminal sanctions.

B. *The Purpose and Means of Corporate Criminal Liability*

The debate about the appropriateness of corporate criminal liability will continue for a while, but for now, we do have such liability and it is not likely to go away any time soon. The more immediate question is how it should be used. As pointed out above and as other scholars have commented, "legal entities do not commit crimes; individuals do. Ideally, the legal

---

83. *Id.* (emphasis added); *see also* Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 792 ("People often search for group rather than individual-level causes for extremely negative events.").

84. Khanna, *supra* note 22, at 1531.

85. Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 119 (2009).

86. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1484 (2009).

87. Sheley, *supra* note 20, at 228.

88. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942–43 (2005).

system would target only culpable individuals within organizations. But a system of pure personal liability would likely fail to produce adequate deterrence."[89] Even though corporations cannot be put in jail, they can be forced to pay both the state and the victims that they harmed.[90] Corporations can be forced to pay huge fines, suffer harm to their reputations, and possibly lose their licenses and hence ability to operate, among other consequences.[91]

Next, this Article will turn to how this is achieved in the criminal law, i.e., what does this form of liability look like in the United States? In other countries, corporate liability is established through the acts of the people in the higher levels of corporate organizations.[92] In situations in which the corporation has repeatedly committed criminal acts, many would argue that it may be that the top management has failed to establish an ethical corporate culture[93] and hence deserves criminal prosecution. Under our system, upper management involvement will not affect whether a corporation is liable (but it can affect to what extent the corporation will be held liable,[94] in that some laws add punitive damages when upper management is involved[95]). In the United States, a corporation is criminally liable as long as any member of it commits a crime while acting within the scope of his employment and intended at least some part of the action to benefit the corporation.[96] It is particularly irritating to opponents of corporate criminal liability that even a menial employee can subject a gigantic corporation to liability,[97] and many commentators are concerned with the possibility that a rogue employee can subject an essentially law-abiding corporation to significant harm.[98]

---

89. Hamdani & Klement, *supra* note 18, at 282.

90. GARRETT, *supra* note 21, at 68.

91. *Id.* at 4.

92. Bruce Carolan, *Criminalizing Corporate Killing: The Irish Approach,* 41 STETSON L. REV. 157, 161 (2011).

93. Ramirez, *supra* note 88, at 940.

94. Khanna, *supra* note 63, at 1220.

95. *Id.* at 1221.

96. Bharara, *supra* note 15, at 57.

97. *Id.* at 63.

98. *See generally* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense,* 44 AM. CRIM. L. REV. 1537 (2007).

Controlling powerful corporations is as important (and maybe more so) today as it was over a hundred years ago when the Supreme Court initially implemented the corporate liability standard.[99] Following the decision in *New York Central*,[100] courts used respondeat superior to determine liability without any significant additional analysis,[101] and even though judges do not always agree with or even understand respondeat superior, corporate criminal liability clearly can be established through the acts of the corporation's agents committed in the scope of employment.[102] In *New York Central*, the statute explicitly said that a corporation could be held criminally liable.[103] Yet, after that case, many courts began reading other criminal statutes as though they too were meant to be applied to corporations even when there was little to no indication that the legislature had intended to have that happen.[104]

Under the respondeat superior standard, there are three necessary elements for a corporation to be held criminally liable: (1) an agent of the corporation acted with the requisite mental state, (2) the agent acted within the scope of his employment, and (3) the agent intended to benefit the corporation.[105] Many opponents have come up with scenarios, such as that involving a low-level employee who violates company policy while committing a crime, that question the underlying fairness of the modern corporate liability standard.[106] It has been claimed that once there is evidence of any low-level employee engaging in the relevant type of criminal activity, a criminal case against the employing corporation is virtually bulletproof.[107] This is true even though the range of criminal behavior in a corporation is incredibly broad and covers

---

99. Geraldine Szott Moohr, *Why Punish? Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation,* 44 AM. CRIM. L. REV. 1343, 1357 (2007).

100. New York Cent. & H.R.R. Co. v. United States, 212 U.S. 481 (1909).

101. Alschuler, *supra* note 23, at 1364.

102. GARRETT, *supra* note 21, at 167.

103. *New York Central*, 212 U.S. at 491.

104. *See, e.g.*, United States v. Union Supply Co., 215 U.S. 50, 54–55 (1909); London v. Everett H. Dunbar Corp., 179 F. 506, 510 (1st Cir. 1910); People v. Star Co., 120 N.Y.S. 498, 500 (N.Y. App. Div. 1909); State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914).

105. Khanna, *supra* note 22, at 1489–90.

106. Evans, *supra* note 33, at 25.

107. Dervan, *supra* note 52, at 8–9.

agents basically working at the behest or with the approval of management as well as rogue agents working without approval or knowledge, for either some internal reward (such as a raise or promotion) or external reward in cases like insider trading.[108] Scholars point out that there is literally nothing a corporation can do to guarantee that it will not commit a crime[109] and have expressed concern over the way that corporations are treated in our criminal system, with criminal liability having significantly increased while available corporate defenses have decreased.[110]

Also upsetting to many opponents of corporate criminal liability is the doctrine of collective knowledge, which enables a corporation to be prosecuted when there is literally no single person that knew everything about the criminal activity and no single person that intended to commit a crime.[111] Under the collective knowledge theory, no one had the required mens rea, but the corporation is still deemed to have had it, which results in corporate liability even though no culpable individual could be identified.[112] An example of collective mens rea would be: "if agent *Y* dumps material into a river without knowledge of its hazardousness, but agent *X* knows of its hazardousness, yet does not engage in dumping, then the corporation is liable under [collective mens rea] for knowingly dumping hazardous material into a river."[113] Given the collective knowledge doctrine, finding a corporate mens rea will be considerably easier in many situations than finding an individual one. Furthermore, many of the elements of criminal corporate liability are fairly easily met for several reasons. For example, the requirement that an agent act within the scope of his employment can be satisfied even though the agent had been clearly and possibly repeatedly told not to commit the wrongful conduct. It is also relatively easy to show that an agent "benefited the corporation." Even if the agent was not solely motivated by and in fact did not end up benefiting the

108. Narine, *supra* note 62, at 43–44.
109. Hasnas, *supra* note 17, at 1343.
110. Bharara, *supra* note 15, at 55.
111. *Id.* at 64.
112. Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 Am. Bus. L.J. 489, 501 (1996).
113. V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. Rev. 355, 408 (1999).

corporation at all, the "benefiting the corporation" element can still be satisfied.[114]

In part due to the view that this ease of prosecution is inappropriate, there has been an increasing amount of support for limiting corporate liability to those cases in which the government could establish the corporation's failure to prevent a crime; only then, the argument goes, should courts attribute the conduct of an employee to the corporation.[115] Professor Podgor proposes a good-faith defense for corporations so that when they have an effective compliance program, they are not subject to prosecution even though one or more agents committed a crime in the course of their employment.[116] Meanwhile, some foreign countries explicitly provide a defense to corporations in criminal settings when the corporations can show that they had "adequate procedures" in place to prevent the crime.[117]

Nevertheless, some have argued that even potentially excessive prosecution of corporations, which result in punishment for employees' actions that are clearly against publicized corporate policies, can help to deter wrongdoing and encourage corporations to implement effective measures rather than empty policy declarations.[118] This makes it less likely that a corporation could impose a facially rigorous compliance program that never actually affects the culture or desire to comply with the law.[119] Due to this possibility, courts usually do not acknowledge even extensive compliance programs as a defense to the illegal conduct, including if only one employee committed the crime.[120] Naturally, avoiding criminal behavior is highly desirable, but excessive penalties can cause over-deterrence and lead to an inappropriate increase in the level of corporate resources devoted to enforcement.[121] Further, as

---

114. Khanna, *supra* note 22, at 1490. Practically speaking, prosecutors do consider whether or not it was a "rogue" employee who committed the crime or if the culture of the corporation contributed to the offense. *See* Baer, *supra* note 36, at 7 (internal quotation marks omitted).

115. Evans, *supra* note 33, at 34–35.

116. Podgor, *supra* note 98, at 1538.

117. Evans, *supra* note 33, at 35.

118. *See* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 55–56 & n.6 (1986).

119. Ramirez, *supra* note 88, at 965.

120. Brickey, *supra* note 24, at 604.

121. Fischel & Sykes, *supra* note 66, at 325–26.

several scholars have pointed out, it is possible for a corporate criminal indictment to lead to the demise of a corporation, and thus defending against said indictment may effectively result in corporate suicide.[122] Therefore, it is crucial to examine how we implement criminal prosecutions and what guidelines are in place before an indictment is even issued.

C. *The Implementation of Corporate Criminal Liability*

Over the last decade, there has not been an increase in the number of cases initiated against corporations, but there has been an increase in the size and importance of the prosecutions that have been brought.[123] After the most recent financial scandals, many have asked if the government is doing enough to curb corporate crime,[124] and scholars have argued that we do not hold corporations sufficiently accountable, and that, even worse, we do not know how to hold complex corporations accountable.[125] Nonetheless, as mentioned in the previous Section, when considering corporate criminal liability, lawmakers have to take into account the cost to all corporate players and consider the near-certain fact that some innocent participants will be hurt.[126] There are an increasingly large number of issues concerning where the lines of criminal culpability should be drawn.[127] Due to what happened with Arthur Andersen, prosecutors are more careful when they target corporations.[128] The DOJ was criticized for its prosecution of Arthur Andersen, with some calling it the equivalent of a "corporate death penalty."[129] Corporate prosecutions, perhaps more so than other types of prosecutions, are subject to external influences based upon their importance to the economy, their somewhat unique legal status, and their relationship with stakeholders, among other reasons.[130]

---

122. Bharara, *supra* note 15, at 73.
123. GARRETT, *supra* note 21, at 5.
124. *Id.* at 12.
125. *Id.* at 2.
126. Evans, *supra* note 33, at 24–25.
127. Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 548 (2015).
128. Bucy, *supra* note 72, at 1287.
129. Uhlmann, *supra* note 32, at 1310–11.
130. Bharara, *supra* note 15, at 73.

"The prosecution of corporate crime is a high priority for the Department of Justice,"[131] and the DOJ lists several reasons for the importance of corporate prosecutions, a few of which are protecting the integrity of our free economic and capital markets; safeguarding consumers, investors, and business entities that compete only through lawful means; and keeping Americans from environmental damage.[132] The DOJ must weigh the importance of deterrence as seen in those reasons, with the knowledge that maximizing a punishment may not maximize deterrence and the external interests of all those involved with the corporation. How can the government accomplish that? The DOJ attempts to reconcile these interests as indicated by an internal memorandum that explains how to evaluate corporate crime. The memo begins its analysis by stating that the DOJ is supposed to apply the same factors in determining which corporations should be prosecuted as it does to decide which individuals should be.[133] Following this general acknowledgement is a set of factors explaining more specifically how prosecutors should evaluate a corporate criminal case, stating that prosecutors should take into account:

1. The nature and seriousness of the offense, including the risk of harm to the public . . . ;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
3. The corporation's history of similar misconduct . . . ;
4. The corporation's timely and voluntary disclosure of wrongdoing . . . ;
5. The existence and effectiveness of the corporation's pre-existing compliance program;
6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitu-

131. Filip Memorandum, *supra* note 57, at § 9-28.010.
132. *Id.*
133. *Id.*

tion, and to cooperate with the relevant government agencies;

7. Collateral consequences, including whether there is a disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. The adequacy of remedies such as civil or regulatory enforcement actions.[134]

Other factors that the DOJ considers before prosecuting a corporation are the sufficiency of the evidence and the likelihood of success at trial.[135] Of the corporations that are charged with a crime, only eight percent even go to trial because most plead guilty and accept some form of deal.[136]

Given the potential grave consequences of a criminal prosecution, the government has been trying new methods of dealing with corporations beyond just increased numbers of criminal laws and sanctions, such as the use of deferred prosecutions and non-prosecutions.[137] The deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) of recent years have established a middle ground between declining to prosecute completely and engaging in a full-blown prosecution.[138] The idea of a deferred prosecution is to file a case, and then put it on hold to give the corporation a chance to stay clean and, if it does, ask the judge to dismiss the case.[139] NPAs are not filed with the court, and many agreements are not made publicly available.[140] Recently, NPAs have been used more and more frequently, even when the corporate misconduct has resulted in multiple deaths.[141] NPAs and DPAs are more appropriate when the conditions are designed to pro-

134. *Id.* at § 9-28.300.
135. *Id.*
136. GARRETT, *supra* note 21, at 162.
137. Uhlmann, *supra* note 32, at 1307–08.
138. *Id.* at 1315.
139. GARRETT , *supra* note 21, at 13.
140. *Id.* at 63–64.
141. Uhlmann, *supra* note 32, at 1300.

mote compliance with the law and prevent recidivism.[142] Today, prosecutors using DPAs and NPAs try to change the way a corporation is managed by putting systems in place to detect and prevent crime.[143] As part of a DPA, a monitor is often installed, who can at times request the board to terminate specific employees, including the CEO.[144] Yet, typically the job done by the monitor is not divulged to the public.[145]

DPAs have steadily increased in the years since the Arthur Andersen case, from only a few per year to now an average of thirty per year.[146] DPAs are both praised and condemned by various scholars; the criticisms range from a complaint that they give too much power to prosecutors to the claim that they amount to a "slap on the wrist" for corporations.[147] There are also claims that DPAs have completely failed at preventing corporate recidivism.[148] While small corporations are still prosecuted, many large corporations are not, and instead receive these DPAs or NPAs, in part due to the perceived fear of a "corporate death penalty,"[149] as seen with Arthur Andersen. At least one researcher has pointed out, however, that it is possible that Arthur Andersen was an exceptional case and that typical criminal convictions will not result in the "death" of a corporation.[150] When prosecuting corporations, a recurring question is whether any of the penalties actually reach the top executives rather than only lower-level employees.[151] In approximately two thirds of the cases resulting in a DPA or NPA, the corporation is punished, but no employees are prosecuted at all.[152] With this preliminary understanding of how corporate prosecutions occur, this Article will now focus on the specific offense of bribery.

---

142. Filip Memorandum, *supra* note 57.
143. GARRETT, *supra* note 21, at 7.
144. *Id.* at 15.
145. *Id.*
146. Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century,* 15 U. PA. J. BUS. L. 797, 807 (2013).
147. *Id.* at 800–01.
148. *Id.* at 801.
149. *Id.* at 800.
150. *Id.* at 822–23.
151. GARRETT, *supra* note 21, at 3.
152. *Id.* at 13.

II.
BRIBERY

All politicians say that they are opposed to corruption; in fact, it is almost as clichéd at this point as saying that one likes "mom and apple pie."[153] By one definition, corruption is not just bribes but rather includes all situations in which politicians or public servants serve their own interests at the public's expense.[154] But to what does this opposition to corruption amount? Theodore Roosevelt said that bribery/corruption "strikes at the foundation of all law,"[155] but the question remains what precisely bribery is. As Professor Lowenstein stated several decades ago, bribery is "identifying as immoral or criminal a subset of transactions and relationships within a set that, generally speaking, is fundamentally beneficial to mankind, both functionally and intrinsically."[156] Arguably, bribery has no clear line differentiating it from acceptable activity.[157] It can be a very well-financed endeavor, with some reported incidents of bribery worldwide involving upwards of one billion dollars for one corporation,[158] or it can be a simple-sounding promise. So even if bribery is the quintessential example of corruption,[159] and the worst and clearest form of corruption,[160] as has been claimed, there is still a wide variety of behavior that may qualify.

In fact, the Supreme Court has stated that the law of bribery focuses on the most blatant attempt to influence governmental action by those with money.[161] In addition to the Supreme Court's, many other formulations of definitions of bribery have been offered, such as "paying for better than fair

153. *See* Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 794–95 (2001).

154. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 2 (2014).

155. *Id.* at 185.

156. *Id.* at 17.

157. *Id.* at 166.

158. GARRETT, *supra* note 21, at 1.

159. George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model,* 74 TUL. L. REV. 747, 752 (2000).

160. Henning, *supra* note 153, at 801.

161. Buckley v. Valeo, 424 U.S. 1, 28 (1976).

treatment"[162] or a "corrupt benefit given or received to influence official action."[163] Another way to phrase it is that bribery is the word we use when a promise turns criminal.[164] There are many different definitions of bribery/corruption, ranging from anything that varies from accepted norms to actual exchanges of money for the purpose of influencing an official to break the law.[165] Bribery is just one manifestation of public corruption,[166] and on the other end of the spectrum, corruption could be "any criminal offense(s) committed by governmental officials related to, or growing out of, their governmental duties."[167] The Supreme Court has said that in some circumstances, the *appearance* of corruption can be as important as corruption itself,[168] and Americans have a longstanding mistrust of "the influence of private power in the public sphere."[169] At the same time, too much use of the criminal law can weaken its moral legitimacy and reduce its power to stigmatize and/or concentrate public blame,[170] and therefore, rather than discussing the entirety of corruption law (which is arguably too broad), this Article will focus on bribery, and specifically corporate bribery of politicians.

Bribery can be a difficult crime to pursue for many reasons, not the least of which is the fact that it can lie on a hazy boundary between criminal conduct and behavior that is valuable or even necessary in a democracy.[171] The behavior of interest for purposes of this Article, however, is not in the gray area, but is rather the more blatant variety in which a "quid

---

162. Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery,* 74 DENV. U. L. REV. 1231, 1234 (1997).

163. James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction,* 141 U. PA. L. REV. 1695, 1696 (1993).

164. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act,* 35 UCLA L. REV. 815, 909 (1988).

165. John Hogarth, *Developments in Criminal Law and Criminal Justice: Bribery of Officials in Pursuit of Corporate Aims*, 6 CRIM. L.F. 557, 558 (1995).

166. Henning, *supra* note 153, at 793.

167. Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 LOY. U. CHI. L.J. 207, 211 (2011).

168. TEACHOUT, *supra* note 154, at 167 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

169. Brown, *supra* note 159, at 755.

170. *Id.* at 759.

171. Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 813 (1985).

pro quo" requirement is present, meaning that something specific is given in exchange for an official act.[172] If there is no direct exchange, there may be a lesser offense like gratuity,[173] which is also offensive, criminal, and problematic, but different and ultimately less harmful.

Professor Lowenstein defined political bribery as the bribery of a policy-making official, especially of an elected official as opposed to anything like the bribery of a police officer to get out of a ticket.[174] There are many criminal and administrative laws and regulations that govern the receipt of "gifts" by public officials,[175] and every nation has criminalized bribing government officials.[176] Yet, even limiting the discussion to this context, the types and levels of bribery are diverse, including not only legislatures taking a bribe to pass a law,[177] but also very common forms of local bribery, like a building inspector taking a bribe connected with a building that he is reviewing.[178] Another way to define political bribery is that it is the use of resources from outside the political market to alter a governmental decision,[179] or, put another way, bribery involves "an abuse of public office by officials for private gain."[180] Corruption and bribery can occur in the legislative, executive, or judicial branches in ways that share some features but not others.[181] Accepting a bribe is a breach of a public official's fiduciary duty,[182] but how does one get from the wrongful breach of a fiduciary duty to a criminal act?

Concern about corruption and bribery has led to many laws being passed, including constitutional amendments.[183]

---

172. Brennan T. Hughes, *The Crucial "Corrupt Intent" Element in Federal Bribery Laws*, 51 CAL. W. L. REV. 25, 40 (2014).

173. *Id.* at 40.

174. Lowenstein, *supra* note 171, at 785 n.2.

175. United States v. Sun-Diamond, 526 U.S. 398, 410 (1999).

176. Henning, *supra* note 153, at 793.

177. Abrams, *supra* note 167, at 223–24.

178. *Id.* at 222.

179. Brown, *supra* note 159, at 752–53.

180. Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 RUTGERS L. REV. 507, 534 (1998).

181. *See* Abrams, *supra* note 167, at 212–13.

182. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1374 (2008).

183. TEACHOUT, *supra* note 154, at 4–5.

Early political bribery laws focused on paying for votes to get elected rather than paying an official to get a law passed.[184] One of the first bribery laws that did deal with legislatures was passed in the State of Georgia in 1816, providing a five-year sentence for the attempt to influence an officer of the state.[185] Corruption laws in the United States are scattered across the federal and state codes and represent a "hodgepodge" of numerous laws.[186] Multiple federal statutes have been used to prosecute bribery for decades, including the Hobbs Act, the Travel Act, RICO, the statute criminalizing theft or bribery concerning programs receiving federal funds, and mail and wire fraud statutes.[187] Depending upon which law prosecutors choose to use to pursue a bribery case, the penalty can range from five to twenty years in prison per offense.[188] In addition to the fact that prosecutors have at their disposal a vast number of laws in this setting, many of these laws are easy to violate.[189] This concern is exacerbated by prosecutors' knowledge that they can get public acclaim and crucial political power by prosecuting elected officials for bribery.[190]

A large problem when dealing with political bribery is how to differentiate it from standard and acceptable politics and business.[191] Many have argued that the laws regarding bribery must be interpreted narrowly, lest they impede the way that our democratic system works.[192] Some others argue that America has not found a good way to differentiate between corruption and ordinary politics.[193] This is part of the reason why—while avoiding corruption or even the appearance of corruption is an important consideration according to com-

184. *Id.* at 109.
185. *Id.* 114.
186. Henning, *supra* note 153, at 798.
187. Michael W. Carey, Larry R. Ellis & Joseph F. Savage, Jr., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One,* 94 W. VA. L. REV. 301, 324 (1992).
188. Lindgren, *supra* note 164, at 816.
189. Hughes, *supra* note 172, at 26.
190. TEACHOUT, *supra* note 154, at 195.
191. Buell, *supra* note 127, at 566.
192. Segal, *supra* note 180, at 539–40.
193. Buell, *supra* note 127, at 566.

mentators and courts[194]—the Supreme Court has also instructed that corruption statutes be interpreted narrowly to avoid prosecuting benign activity.[195] In addition to this concern, the fact that a bribery conviction carries a heavy stigma, including society's moral condemnation,[196] also argues for the proper level of caution in these settings. In practice, bribery is usually enforced more narrowly than the statutes would permit; for example, many courts impose a quid pro quo requirement on laws that do not specifically contain one.[197] Furthermore, bribery is often held to require an "evil intent to violate the law," and is not considered to have been established when there is mere criminal negligence.[198] As mentioned, there are many different definitions and laws dealing with bribery. For the sake of clarity, this Article will simply refer to the Supreme Court's description of bribery when it was interpreting 18 U.S.C. § 201(b)(1), which deals with the bribery of public officials and witnesses:

> Requiring a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, inter alia, "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient).[199]

Breaking bribery down into its elements, it could be defined as consisting of these five:

1. A public official
2. A corrupt intent by the defendant
3. Something of value given to the public official
4. Some connection between the thing of value and an official act

194. Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe For Democracy,* 73 GEO. WASH. L. REV. 1036, 1036 (2005).
195. Hughes, *supra* note 172, at 26–27.
196. Segal, *supra* note 180, at 545–46.
197. *Id.* at 536.
198. Hughes, *supra* note 172, at 36.
199. United States v. Sun-Diamond, 526 U.S. 398, 404 (1999).

5. An intent to influence the official in the carrying out of his/her duties.[200]

Furthermore, the type of bribery on which this Article focuses should involve a "quid pro quo" or a "specific intent to give or receive something of value in exchange for an official act,"[201] and one should keep in mind that both parties involved in bribery, the giver and the receiver, are considered responsible.[202]

A. *The History of Bribery*

Acts of bribery and prosecutions for bribery are not rare and have not been rare for a very long time.[203] Bribery is considered wrong in both democracies and non-democracies.[204] In fact, laws and moral judgments dealing with bribery have been around for centuries, but have gone through significant changes over the years. The initial moral judgments of bribery were very harsh, but focused primarily on the bribe receiver; for example, Plato believed that someone who took a bribe should die.[205] In the early history of bribery, the focus was much more on the person taking the bribe, such as a king-appointed judge who accepted money improperly.[206] Indeed, it was originally only judges and witnesses that could be bribed criminally.[207] Bribing judges was criminalized well before bribing legislatures.[208] Originally, "briber" referred to the person receiving the bribe, and not the giver as it is usually termed

---

200. Lowenstein, *supra* note 171, at 796 (citing 18 U.S.C. § 201 (1986)). Section 201 states:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent
>
> (1) to influence any official act
>
> (2) to influence such public official . . . to commit . . . any fraud . . . on the United States; or
>
> (3) to induce such public official. . . to do or omit to do any act in violation of his lawful duty, . . . shall be fined, imprisoned or both.

201. United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999).
202. Lindgren, *supra* note 163, at 1699.
203. Lowenstein, *supra* note 171, at 786.
204. Thompson, *supra* note 194, at 1040.
205. TEACHOUT, *supra* note 154, at 21.
206. Lindgren, *supra* note 164, at 838.
207. *Id.* at 860.
208. *See* TEACHOUT, *supra* note 154, at 103.

today.[209] The early concern with bribery appears to have focused on the greedy official as opposed to the bribe payer that was distorting government.[210] While today some statutes punish the bribe payer and receiver, historically a few actually viewed the bribe payer as a victim.[211] This old idea has fortunately faded over the years, and now we recognize that if we did not prosecute the bribe payer, he could continue to cheat the public by bribing other officials.[212]

Bribery was viewed as problematic in the United States well before it was acknowledged as an issue in Europe or the rest of the world.[213] After the ratification of the Constitution, bribery of customs officers and judges was one of the first federal criminal statutes.[214] Bribery was discussed by the Founding Fathers more frequently than issues such as factions, instability, and even violence.[215] Not only did the United States recognize the harms of bribery early, but the evolution of bribery laws continued. For example, early court decisions showed a reluctance to enforce any corruption laws other than the "quid pro quo" variety.[216] Today, there are many laws which do not have this requirement.[217] Enhanced federal law enforcement in this area really began in the early 1970s and has continued ever since.[218] Investigating and prosecuting corruption/bribery has been labeled by the federal government as an "important federal mission."[219] That said, people have argued about who should prosecute bribery.[220] The federal government investigates and prosecutes local bribery/corruption cases fairly frequently, but there does not seem to be much of a pattern as to which cases the federal government chooses to pursue.[221]

---

209. Lindgren, *supra* note 164, at 874.
210. Lindgren, *supra* note 163, at 1705.
211. Carey, Ellis & Savage,, *supra* note 187, at 353.
212. *See* Lindgren, *supra* note 163, at 1700.
213. TEACHOUT, *supra* note 154, at 1.
214. Henning, *supra* note 153, at 829.
215. TEACHOUT, *supra* note 154, at 57.
216. *Id.* at 7.
217. For example, "gratuity" is a form of corruption/bribery that does not have this requirement. *See* 18 U.S.C. § 201(c)(1)(A) (1962).
218. George D. Brown, *Stealth Statute—Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666,* 73 NOTRE DAME L. REV. 247, 253 (1998).
219. Abrams, *supra* note 167, at 246.
220. *See generally* Brown, *supra* note 218.
221. Abrams, *supra* note 167, at 244.

Public corruption is one of the hardest crimes to investigate and prosecute.[222] It is often hard to prosecute bribery crimes in part because neither the bribe payer nor the bribed complains.[223] In addition, bribery often produces difficult questions of individual culpability.[224] Last, it is not like murder or even theft where the injured party is readily and immediately apparent. For these and numerous other reasons, ranging from states' limited resources to the level of political connections that influence states' behavior, bribery cases are often pursued at the federal rather than state or local level.[225] The crime of bribery has been described by scholars and courts as "worse" than other crimes, "akin to treason," and "despicable."[226] While it is true that bribery is objectionable from both a deontological perspective and a consequentialist one,[227] this Article will especially focus on the latter—in short, it will analyze the harms that bribery causes.

B. *The Harms Associated with Bribery*

Theodore Roosevelt said that bribe payers are worse than thieves because "the thief robs the individual, while the corrupt official plunders an entire city or state. He is worse than a murderer because a murderer takes one life while the corrupt official and the man who corrupts the official alike aim at the assassination of the commonwealth itself."[228] As described by President Roosevelt, the harm of bribery is far-reaching and affects many people. Harm from bribery has two aspects, namely harm from the original action itself, and harm from subsequent bad substantive decisions.[229] Scholars have argued that the criminal law should only be used when there is a public harm (i.e., a harm that damages a collective social interest) and not just a purely private harm.[230] Bribery is often viewed as

222. Henning, *supra* note 153, at 804.
223. TEACHOUT, *supra* note 154, at 121.
224. Buell, *supra* note 78, at 518.
225. Carey, Ellis & Savage, *supra* note 187, at 304–05.
226. Lowenstein, *supra* note 171, at 806.
227. Daniel H. Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain,* 1995 U. CHI. LEGAL F. 163, 181 (1995).
228. TEACHOUT, *supra* note 154, at 185.
229. Lowenstein, *supra* note 171, at 843.
230. Hasnas, *supra* note 17, at 1337.

a crime against public justice rather than against a person.[231] "Those who bribe seek undeserved favors for themselves, and those who are bribed violate the public trust."[232] This violation of trust is the lens through which the abstract harm can be seen. Commentators have pointed out that government corruption at any level threatens public confidence at all levels.[233] Political corruption is a special kind of threat to a government, and said government has the authority and duty to prevent it.[234] Bribery specifically and corruption in general cause the destruction of democratic institutions, and leads to fatalism, moral decay, hopelessness, and inaction.[235] One of the main concerns with bribery is the risk of subversion of the democratic electoral process.[236] "Bribery is undemocratic . . . . A public official who fails to act in the larger public interest because of a bribe payment has disrupted democracy and political participation."[237] Beyond the harms caused by the deterioration of "public confidence" in the government,[238] there are also more tangible harms.

There are many direct and indirect costs of corruption, including an increase in the costs to taxpayers from noncompetitive bidding, nonproductive use of money for bribes, loss of tax income, erosion of the free market, costs associated with investigation and prosecution.[239] The corrupt payment unfairly disrupts the official decision-making process[240] and, for instance, can lead to improper infrastructure that can even result in the destruction of multiple buildings in times of natural disasters.[241] In such dramatic and tragic instances, bribery can result in lower-quality goods that kill dozens, hundreds, or

231. Lindgren, *supra* note 164, at 862.
232. Thompson, *supra* note 194, at 1040.
233. Brown, *supra* note 218, at 259.
234. Abrams, *supra* note 167, at 212.
235. Duane Windsor & Kathleen Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values,* 33 CORNELL INT'L L.J. 731, 757 (2000).
236. Segal, *supra* note 180, at 521.
237. Windsor & Getz, *supra* note 235, at 756–57.
238. Sheley, *supra* note 20, at 247.
239. Hogarth, *supra* note 165, at 559.
240. Lindgren, *supra* note 163, at 1699.
241. Windsor & Getz, *supra* note 235, at 757.

even thousands of individuals.[242] Another harm can be observed when bribed politicians are able to give licenses or contracts to people who have not met the qualification usually required, as has happened with unlicensed medical doctors.[243] Perhaps less dramatically but still very importantly, bribery can result in large costs to the community, such as how in the 1990s, twenty percent of the extraordinary inflation seen in Russia was attributable to bribes.[244] Even the perception or possibility of bribery can cause harm; for example, if a judge takes bribes in some cases, people in other cases may think that he was overly harsh to them to make it appear as if he was a strict judge.[245] It should be pointed out that while some legal economists have pointed out that bribery can have beneficial consequences, such as reducing the uncertainty of investments,[246] it seems clear that the vast amount of harm will outweigh these benefits. The criminal prosecution of bribery is needed to punish those who strike at the "roots of fairness and democracy" when they use their public trust for private advantage or solicit others to do so.[247] As George Mason said, "[I]f we do not provide against corruption, our government will soon be at an end."[248]

III.
Corporate Bribery

A. *Applying the Bribery Concept to Corporations*

Even though others have argued that corporate criminalization is itself over-criminalization,[249] and in non-bribery settings it has been suggested that some corporations should face reduced penalties,[250] the level of harm involved in bribery renders that argument harder to make there. Many early examples of corporate criminal liability resulted from public harms

242. Sheley, *supra* note 20, at 249 (citing Philip M. Nichols, *The Myth of Anti-bribery Laws as Transnational Intrusion,* 33 Cornell Int'l L.J. 627, 627 (2000)).
243. Carey, Ellis & Savage, *supra* note 187, at 311.
244. Hogarth, *supra* note 165, at 566.
245. Ayres, *supra* note 162, at 1247.
246. Mills & Weisberg, *supra* note 182, at 1379.
247. Lowenstein, *supra* note 171, at 806.
248. Teachout, *supra* note 154, at 38.
249. Gomez-Jara Diez, *supra* note 19, at 43–44.
250. *Id.* at 41.

that lawmakers wanted corporations to internalize rather than have society bear the often large cost.[251] There are some companies that engage in wide-scale bribery,[252] but bribery is not the crime committed most frequently by corporations (those would be fraud, environmental offenses, antitrust activity, and food and drug violations).[253] But bribery is more problematic in several ways.

Traditional arguments that tort law, regulatory law, and other civil remedies are superior to corporate criminal liability are much weaker in the context of bribery compared to other corporate crimes. Even though many scholars have argued that criminal sanctions are not needed in the corporate setting and we should just use tort law, regulatory law, and other civil remedies,[254] for the most part, this is just not possible for bribery. There is no bribe tort (with the possible exception of something like fraud in some situations) and there is no "BPA" (Bribery Protection Agency) like there is an agency for environmental violations. In many if not most situations, if a corporation has bribed an official, the only realistic alternative is the criminal law. Furthermore, bribery is particularly problematic for corporations. Scholars have argued that criminal law is not able to deter bribery because of corporate institutional factors that support it.[255] Several of the inherent attributes of a corporation that may support bribery include the separation of owners and controllers (increasing the difficulties surrounding accountability), the central goal of profit maximization, a frequent ethos of moral neutrality, the necessity to continually grow, constant competition, and the lack of both internal and external visibility.[256] Some scholars have also argued that the harms caused by corporations are magnified by the "geographic, structural, and temporal complexities of its operations."[257] There is often a sense that other corporations are engaged in bribery, and if a given corporation does not participate in it as well, it will be at a competitive disadvantage.[258]

---

251. Khanna, *supra* note 22, at 1485–86.
252. Narine, *supra* note 62, at 74.
253. GARRETT, *supra* note 21, at 36.
254. *See id.* at 268–69; Khanna, *supra* note 22, at 1488.
255. Hogarth, *supra* note 165, at 572.
256. *Id.* at 560.
257. Sheley, *supra* note 20, at 228.
258. Hogarth, *supra* note 165, at 562.

Systematic problems within corporations that result in bribery demand systematic solutions. Individuals alone may in fact not be perpetrating or at least orchestrating the criminal behavior, and instead it may be a corporation's standard operating procedure or a part of its business strategy that is creating the criminal behavior.[259] Corporations' cultures and customs can affect an individuals' attitudes and behaviors.[260] "Corporate culture can encourage agents to act unlawfully."[261] If we attribute the criminal behavior of corporations to the individual alone, we may disregard the institutional processes occurring within the organization, which may have at least contributed to, if not in fact caused, the criminal behavior.[262] There are many relevant ways that corporate culture and organizational structure can influence individual decision making.[263] Indeed, the policies of corporations can actually encourage criminal behavior.[264] A well-known example of wrongdoing intimately tied to the character and culture of the corporations involved was the tobacco companies' longstanding pattern of fraudulently misleading regulators and the public about the health risks related to smoking.[265] In these types of situations, the right question to ask is: "What was going on in that organization that made people act that way?"[266] In the bribery setting, part of what is happening is that there is a reduced incentive for the corporation to discover the misconduct[267] combined with a large amount of money involved (in excess of one billion dollars in some high-stakes situations).[268]

---

259. *See* Beale, *supra* note 86, at 1484 (citing the engineering giant Siemens's systemic use of bribes as one example).

260. Ripken, *supra* note 85, at 103.

261. Moohr, *supra* note 99, at 1358.

262. Charles R.P. Pouncy, *Reevaluating Corporate Criminal Responsibility: It's All About Power*, 41 STETSON L. REV. 97, 110 (2011).

263. *See* Goforth, *supra* note 35, at 634 (identifying increased risk taking, the desire to engage in team playing at the expense of good judgment, and the decision to cut corners).

264. *See* MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 58 (2006).

265. *See generally* Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387 (1999).

266. Goforth, *supra* note 35, at 648.

267. Narine, *supra* note 62, at 44.

268. Sheley, *supra* note 20, at 254.

Given these motivations on the part of corporations, it is not surprising that they are often repeat offenders, and even though recidivism is a generally acknowledged problem and specifically mentioned in the U.S. Federal Sentencing Guidelines, it is not clear that prosecutors take it all that seriously in the corporate criminal context.[269] Corporations exist to make a profit, so if the primary mechanism for dealing with criminal activity is a fine, the corporation will evaluate whether the crime is worth the cost[270] and potentially carry on with business as usual. So what can be done about that?

B. *Making Punishments Fit the Corporate Bribery Crime*

Typically, if convicted of bribery[271] (either giving or receiving) an individual could be sentenced to fifteen years in prison and a $250 thousand fine, and a corporation could receive a $500 thousand fine or triple the value of the bribe.[272] Only a few CEOs or other high-level officers are held accountable in many corporate crimes, in part because it can be difficult to hold an individual responsible in a complex case in which lots of people made decisions.[273] Furthermore, corporate structure makes it very hard to prosecute senior managers and owners for liability; indeed, tracing the chain of responsibility is difficult because the line officers are separated from the upper-level managers, and the owners are separated from the managers.[274] Unfortunately, in at least one survey of corporate ethics, "superiors" were classified as the most important contributing factor to criminal or unethical decision making.[275] In view of this, criminal liability should encourage the optimal level of effort on the parts of owners and managers when they guide their various agents to comply with the law.[276]

---

269. GARRETT, *supra* note 21, at 166.

270. Ramirez, *supra* note 88, at 963.

271. This is one example, since as this Article pointed out earlier, there are many options of laws to use, but the penalties for the most part change in size rather than type.

272. *See* 18 U.S.C §§ 201(b), 3571(b)(3)–(c)(3) (2000).

273. GARRETT, *supra* note 21, at 14.

274. Hogarth, *supra* note 165, at 567.

275. CLINARD & YEAGER, *supra* note 264, at 59.

276. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972).

To analyze when corporate criminal liability should be imposed, we need to "compare the net benefits of imposing corporate criminal liability with the net benefits of imposing alternative liability strategies . . . [like] imposing civil liability on a corporation, imposing civil liability on a manager, and imposing criminal or civil liability on a third party."[277] In conducting this analysis, one should also take into account the possible sanctions used for each offense. Occasionally, the reason for criminal activity in a corporation is that the informal sanctions within the corporation are weak, giving little motivation to the agents of the corporation to follow them, in which case imposing external sanctions can help to correct this error.[278] At the same time, criminal responsibility must always take into account practical considerations to achieve proper application.[279] Scholars have pointed out that some types of liability can either increase or decrease self-policing depending upon the costs and benefits.[280]

Therefore, simply imposing a standard strict liability for all bribery cases may not work. The problem with this approach was demonstrated by Professor Khanna:

> Assume that a corporation wants to reduce the amount of employee wrongdoing by instituting a new internal oversight system that keeps detailed records of what employees do and promises to report suspected instances of wrongdoing to the authorities. Under strict liability, an employee may not believe that the corporation will report employee wrongdoing to the authorities or keep detailed records because doing so would increase the likelihood of bearing a sanction. Strict liability results in the corporation being sanctioned even if it had reported its employees' wrongdoing to authorities. Thus, strict liability makes the firm's threat to "rat out" the employee less credible because the corporation would be increasing the chances of facing a sanction itself. If the measures do not deter employees, then the corporation, anticipating this reaction, probably will not

277. Khanna, *supra* note 22, at 1492.
278. Khanna, *supra* note 63, at 1247–48.
279. Hasnas, *supra* note 17, at 1334.
280. Khanna, *supra* note 63, at 1229.

> implement them or will employ "window dressing" measures—for example, announcing that they will implement the measures and then not actually doing so. Thus, certain enforcement measures will probably unravel under strict liability.[281]

Arguably, the best-case scenario for a corporation in that context is to have a compliance program that appears to comply with the law and encourage agents to comply, but in fact does not actually deter wrongful conduct.[282] Whatever strategy is employed needs to avoid this "cosmetic compliance"[283] whereby a corporation has very ethical-sounding policies, but does not follow them. My proposal may avoid both the "cosmetic compliance" possibility and the chance of reduced policing, because the CEO's job could be at risk. While it may be argued that over-deterrence can result with such a high personal stake for the CEO, this is not a large concern in the case of bribery.

If upper-level managers are involved, typical corporate sanctions may not be effective.[284] Fortunately, there are many different ways to combat corporate crime: the corporation itself can be prosecuted, the officers may be prosecuted in some situations, DPAs and NPAs can force compliance measures upon corporations, and numerous types of regulatory and civil laws can impose many different types of fines upon corporations.[285] The key is to take Professor Lowenstein's observation, that "[s]elf interest should be channeled and tamed, but not condemned,"[286] to heart and figure out how to implement it.

There have been many calls to reform corporate criminal liability, which range from small changes to massive overhauls of the entire system.[287] My proposal is limited to bribery scenarios and attempts to channel self-interest into avenues that also serve the public interest. Corruption and bribery scandals often prompt a typical American reaction of passing laws and toughening enforcement.[288] While the proposal in this Article

281. *Id.* at 1230–31.
282. Narine, *supra* note 62, at 45.
283. GARRETT, *supra* note 21, at 74.
284. Hasnas, *supra* note 16, at 18.
285. Markoff, *supra* note 146, at 799.
286. Lowenstein, *supra* note 227, at 191.
287. Bharara, *supra* note 15, at 58–59.
288. Brown, *supra* note 159, at 752.

does that in some ways, it seeks to improve on the inconsistently successful methods of simply increasing fines and/or jail time. A problem with the existing punishment options that primarily consist of some version of a fine is the fact that the public may view it as a corporation buying its way out of a criminal prosecution.[289] Scholars have pointed out the desirability of not allowing corporations to appear to be doing that.[290] The proposal in this Article increases penalties, but not in a way that creates this impression.

An aspect of showing the appropriateness of corporate criminal liability is establishing that such liability is both needed and efficacious.[291] A number of punishments should be explored in this context. One could involve community service, with specific types of socially beneficial service to be performed and possibly a requirement as to who exactly will provide it.[292] Another option that has been considered in different settings is a so-called adverse publicity order, which requires the corporation to publicly acknowledge the crime that was committed.[293] Both these alternatives have advantages missing from traditional fines. By providing community service, the harm is in some ways redressed more directly, and as long as the corporation must do the work itself, there is no appearance of a corporate buyout. The public acknowledgement could have the increased benefit of not only shaming the corporation, meaning specifically shaming the management, but it would also likely have an impact on the value of the firm (in terms of lost customers and/or stock depreciation). This would result in a less direct fine of sorts, but without the appearance of the corporation buying its way out, and perhaps more importantly, the publicity would decrease the likelihood of repeat offenses. If the general public is aware that a corporation has bribed an official in the past, that corporation will be watched much more carefully than others. In addition, if political officials know that this corporation is being watched, they will not want to engage in any shady dealings with the corporation. As Justice Brandeis famously said, "Publicity is

289. Carolan, *supra* note 92, at 170.
290. Uhlmann, *supra* note 32, at 1301.
291. Dan-Cohen, *supra* note 59, at 27.
292. Carolan, *supra* note 92, at 172–73.
293. *Id.* at 173.

justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[294]

These two suggestions are meant to be less punitive and more rehabilitative, which fits with the DOJ's preference of structural reforms over the more traditional punitive goals associated with the criminal law.[295] Getting the corporation as a whole to avoid bribery is largely accomplished if the upper management fully supports the position. "Corporate compliance is enhanced when management commits to ethical conduct and integrates that commitment into employee performance evaluation."[296]

Some scholars believe that it may in some ways be easier to rehabilitate a corporate offender than an individual, and that this can in part be accomplished by removing the person who is responsible for the situation.[297] That brings this Article to the key part of its proposal, which is to terminate CEOs when their corporation engages in bribery. Specifically, this Article proposes that a default be established as part of any conviction, DPA, or NPA, that the CEO immediately leave her position. In some criminal settings, corporations have already fired the CEO and occasionally all of its top leadership.[298] This would in some ways be an action taken by the corporation, but effectively it would be mandated. The government already imposes requirements on upper-level executives like the CEO and CFO.[299] Clearly, this will be easier to accomplish with DPAs and NPAs. The DOJ has stated that the current deferred prosecutions and non-prosecutions are used in an effort to "avoid collateral consequences."[300] This is so because rather than the shareholders suffering the injury via some kind of fine, the person who is ultimately responsible suffers the consequences. Scholars have argued that corporate managers deserve the blame for a corporation's crimes regardless of their

294. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).
295. Uhlmann, *supra* note 32, at 1323.
296. Ramirez, *supra* note 88, at 958.
297. Carolan, *supra* note 92, at 170.
298. GARRETT, *supra* note 21, at 103, 173.
299. Bucy, *supra* note 72, at 1291.
300. Uhlmann, *supra* note 32, at 1320.

individual participation in the crime.[301] This blame is based on the idea that whether managers committed the crime personally or not, they are responsible for everything that happens under their direction. A number of NPAs and DPAs have already required personnel changes.[302] Some other DPAs have included the requirement of a monitor being installed, and this monitor has on occasion required the board to fire the CEO and other corporate officers.[303]

In settings in which there is no DPA or NPA, the corporation could still be forced to terminate the CEO. In other situations, scholars have recommended that the upper-level managers be forced to leave or that the corporation be forced into dissolution.[304] The mechanisms to force the corporations to undertake certain actions are already in place. The Sentencing Guidelines contain options that if imposed would result in the death of most corporations, and in extreme situations (if the corporation exists for a criminal purpose) the Guidelines explicitly authorize fines large enough to take all the assets of the corporation.[305] Even in situations in which this would not be appropriate, there are other avenues that could be followed that would result in the termination of the corporation. Corporations can be barred from their industry or have their various licenses revoked, states can repeal corporate charters, and several other actions can be taken that would result in the end of the corporation.[306] For example, a healthcare corporation can be barred from any kind of participation in a federal healthcare program, which would effectively cause the demise of a corporation working in that field.[307]

To be clear, this Article is not endorsing the actual termination of a corporation for all instances of bribery, but rather pointing out that we have leverage to force corporations to terminate CEOs whenever bribery occurs. Use of this option would have multiple beneficial effects. First, there would be no sense of a corporation buying its way out of a crime; second, the public would see that upper-level management is not im-

301. Sepinwall, *supra* note 22, at 436.
302. Narine, *supra* note 62, at 60.
303. GARRETT, *supra* note 21, at 183.
304. Ramirez, *supra* note 88, at 942.
305. *Id.* at 943–45.
306. *Id.* at 950–51.
307. *Id.* at 949.

mune from consequences when illegalities happen; and most importantly, it would be an effective means of reducing instances of bribery. If the CEO knows that she will lose her job or career if her corporation engages in bribery, there are few if any instances in which she would allow it. Hence, effective and not just cosmetic measures would be in place to virtually guarantee that such conduct does not occur.

Conclusion

There is much debate about whether a corporation should be prosecuted for the crimes committed on its behalf, and if so, how. There is little debate that bribery should be a crime, however, at least in the forms presented in this Article. The argument here shows that in the bribery setting, many of the arguments against corporate liability are either eliminated or significantly reduced. Further, this Article demonstrates that the harm involved in bribery can be magnified in the case of corporations. Therefore, unlike many crimes that still have a debatable place in the corporate criminal sanction sphere, corporate bribery must be prosecuted and at least reduced if not eliminated.

Little can be done to reduce human greed, but opportunities for its exploitation can be reduced,[308] and consequences can be increased significantly. When speaking about a crime like bribery that is very hard to catch, has huge possible incentives, and large harmful consequences, more targeted approaches become necessary. Simply increasing fines will not work, as there will always be a setting where the payoff is larger. Subjecting the individuals that actually participate in the bribery to punishment is also no panacea, because the people involved are hard to catch and often will view the potential reward as worth the risk. The solution is to focus the penalties better by requiring corporate personnel to engage in community service, mandating public acknowledgement of inappropriate actions, and, most importantly, forcing CEO termination.

308. Hogarth, *supra* note 165, at 567.