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Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand

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COMMENT

ANCIENT LAW AND THE PUNISHMENT OF CORPORATIONS: OF FRANKPLEDGE AND DEODAND

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I.

Professor Coffee's Article[1] reminds us of the difference between pricing and prohibiting, and Professor Cohen's Article[2] causes us to wonder whether we accomplish either in sanctioning corporate crime. Professor Cohen's study reveals that, despite recent increases in the penalties imposed on convicted corporations, total financial penalties often fall short of the harm inflicted. If one assumes that corporate crime frequently goes undetected, this finding suggests that crime pays.

Cohen's study emphasizes, however, that we cannot fairly draw this conclusion without more information. The total sanction that a court imposes following conviction is often a small part of the financial burden that a corporation bears as a result of its wrongdoing. In addition to the sanction imposed by a court, the corporation may incur heavy legal expenses, cleanup costs, the burden of recalling defective products, the costs of advertising to restore its damaged reputation, the costs of compensating civil litigants who sue in the wake of the criminal conviction, and more. Although these additional burdens are designed primarily to serve purposes other than deterrence and retribution, they further these public goals as well. Whether the law's object is to price or prohibit, these burdens merit consideration in determining how much criminal punishment is appropriate.

Moreover, because corporations have no hands, corporate crimes are committed by individual wrongdoers.[3] When these wrongdoers are punished, the reasons for imposing vicarious liability on an artificial entity sometimes fade and disappear. For example, when Alice, the majority shareholder and

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[1] Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193 (1991).

[2] Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U.L. REV. 247 (1991).

[3] Crimes of omission involving the failure to perform a duty imposed directly on a business entity can, if one likes, be regarded as exceptions.

president of a close corporation, commits a crime that Bob and Carl, the minority shareholders, did not know about and could not have prevented, the burden of criminal punishment should fall primarily on Alice. The law might reasonably require the innocent shareholders to disgorge any profit that Alice's wrongful conduct conferred on them, but a corporate fine should not exceed the profit that the corporation derived from Alice's illegal act.

Professor Cohen's descriptions of individual cases suggest judicial sensitivity to the many difficult-to-quantify considerations that appropriately influence corporate sentences. His case descriptions tend to dispel the concern generated by his aggregated measurements that corporate sanctions often may be too lenient. Nevertheless, as Cohen emphasizes, we lack information about the relationship between corporate and individual sanctions and about the full costs that criminal convictions ultimately impose on business entities.

In my view, Cohen's findings justify a framework for assessing corporate sanctions somewhat like the one the United States Sentencing Commission proposed last year, yet these findings also suggest the need for substantial sentencing discretion. Sentencing guidelines should authorize fines grounded in the loss to the victim or the gain to the corporation, whichever is greater.[4] Then these fines should be increased by a multiplier that reflects the likelihood of nondetection.

The guidelines, however, should also invite courts to consider downward departure: (1) when a corporation's misconduct has resulted or seems likely to result in substantial financial burdens other than those imposed by the court; (2) when individual officers have been convicted and punished for the corporation's crime; (3) when the burdens of a fine are likely to fall largely on innocent people—for example, workers who would lose their jobs if the firm became bankrupt; and (4) when the crime occurred despite appropriate internal monitoring designed to prevent it. The guidelines, in other words,

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[4] Law and economics scholars sometimes argue that gain to the corporation should be disregarded; only loss to the victim should count. *See, e.g.,* Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395 (1991); Arlen, *Why the Commission's Proposal is Not Good Economics*, 3 Fed. Sentencing Rep. 138 (1990); Parker, *The Current Corporate Sentencing Proposals: History and Critique*, 3 Fed. Sentencing Rep. 133, 135 (1990).

These scholars seem to focus on only one of two appropriate principles. First, criminals should be required to internalize the costs that their criminal conduct has inflicted on others. The second principle—the one that the economists ignore or reject—is less instrumental: a criminal (and gratuitous intended beneficiaries of the criminal's conduct—including innocent shareholders) should not be allowed to profit from the crime. Implementing both principles departs from Kaldor-Hicks efficiency—the principle that a wrong is not a wrong so long as the wrongdoer can pay the costs inflicted on others and still turn a profit. But permitting a corporation to profit from a criminal act because its crime was "efficient" and therefore desirable seems inconsistent with calling the act a crime.

should invite departure in many cases—perhaps even in all—using the gain, loss and multiplier to establish only a starting point or baseline.

The guidelines might indicate the extent of the appropriate departure in some circumstances, but efforts to achieve great precision would not be worth the candle. For example, a court might credit past and anticipated payments for restitution and civil damages against the otherwise appropriate fine. Dollar-for-dollar credit, however, would encourage unduly generous payments to claimants. Giving money to customers or other claimants would almost always generate more goodwill and reciprocal kindness than paying the same money to the government. Moreover, dollar-for-dollar credit would be inappropriate unless the convicted firm agreed to forego the tax deductions to which it otherwise might be entitled. Even more clearly, dollar-for-dollar credit would be unjustified for criminal and civil legal expenses; such credit would reduce the incentive to monitor legal costs and would encourage questionable accounting—for example, the attribution of multi-purpose legal expenses to the criminal prosecution. Finally, dollar-for-dollar credit would be even less appropriate for an advertising campaign designed to explain how a wrong had occurred and what steps the corporation had taken to redress it.

Relying on the "situation sense"[5] of judges to assess the significance of these expenditures seems preferable to attempting to develop formulas for partial credit or co-payment. Moreover, a judge could assess the extent of a firm's pre-crime compliance efforts and the extent to which the burdens of a fine would be borne by innocent parties only in the context of a specific case.

Throughout the federal criminal justice system, we are experiencing the whirlwind of ill-considered sentencing guidelines based on flawed aggregations of past sentencing practices.[6] These guidelines have proven to be, not guidelines, but chains. Perhaps, as the Commission considers corporate punishment, it will take advantage of the flexibility that the Sentencing Reform Act affords it in devising financial sanctions[7] and will provide federal judges the discretion needed to do justice.

II.

Professor Coffee's paper focuses primarily upon substantive criminal law. This distinctive body of law achieves its goals through prohibiting, not pricing. Criminal sanctions are designed to express and reinforce the commu-

[5] *See* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are Construed*, 3 VAND. L. REV. 395, 399, 401 (1950).

[6] *See* Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

[7] *Compare* 18 U.S.C. §§ 3571-3572 (1988) (authorized fines) *and* 28 U.S.C. § 994 (a)(1)(B) (requiring guidelines concerning "the appropriate amount of a fine") *with* 28 U.S.C. § 994(b) (stating that whenever a term of imprisonment is authorized, "the maximum of the [sentencing] range . . . shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months").

nity's condemnation of blameworthy conduct. Criminal penalties should not merely require wrongdoers to internalize the costs that their conduct has inflicted on others. These sanctions should confront offenders with sharp, discontinuous increases in costs that the offenders and others will recognize as punishment.

Coffee maintains that we have increasingly lost sight of this distinction between criminal and civil law. As a result, both legislators and judges have overextended the reach of the criminal sanction, especially in the area of white collar crime. To these observations, I say amen. Coffee's analysis of the functions of the criminal sanction, of the ways in which we misuse it, and of the pressures that have produced our overuse is penetrating, original, and essentially correct.

Coffee's efforts to apply his insight to the issues of this conference, however, seem strained for two reasons. The first concerns Coffee's "realpolitik" analysis of sentencing, the sort of analysis for which we academics are notably ill-suited. Coffee argues that we cannot expect federal legislators, judges or prosecutors to confine the criminal law to its appropriate sphere. "In my judgment," he writes, "this leaves one agency with an incentive to undertake systematically the task of determining when to price and when to prohibit a particular type of misconduct: the United States Sentencing Commission."[8]

Yet even if legislators, judges and prosecutors are as hopeless as Professor Coffee contends, he offers no reason to suspect that the Commission is better. From the beginning, this Commission has championed a behaviorist view of the criminal sanction—one that Richard Posner and his followers have endorsed,[9] but that William Blackstone,[10] Henry Hart,[11] Herbert Packer[12] and, today, John Coffee, have condemned.

The Commission has declared the personal characteristics of offenders "ordinarily" irrelevant to sentencing. For example, it has announced a stance of "no mercy" for Jean Valjean, declaring that economic hardship is no warrant for a decrease in sentence.[13] Under the guidelines, sentences depend mostly on the harm inflicted. Judges must count the dollars, weigh the drugs, and forget about more important things. The guidelines, however, do occasionally follow the admonition of Richard Posner and like behaviorists to adjust sentences to account for the varying odds of detection.[14] For example, they punish tax evaders more severely than thieves

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[8] Coffee, *supra* note 1, at 241.

[9] *See, e.g.*, Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

[10] 4 W. BLACKSTONE, COMMENTARIES *27.

[11] Hart, *The Aims of the Criminal Law*, LAW & CONTEMP. PROBS., Winter 1958, at 401, 404.

[12] H.L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 1-15 (1968).

[13] U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5K2.12 (1990).

[14] *See, e.g.*, Posner, *supra* note 9, at 1203.

because the Commission has concluded tax evaders are less likely to get caught.[15]

Despite the Commission's instrumentalist approach to punishment, I do not predict that it will be unreceptive to Professor Coffee's specific proposals—for example, his proposal to treat management's efforts to prevent crime as a mitigating factor in sentencing.[16] From a behaviorist perspective as well as from the moralistic perspective favored by Professor Coffee, it makes sense to withhold punishment when the desired behavior has occurred, and the principal goal of corporate punishment is to induce the sort of monitoring that Coffee would reward. Coffee's proposal should appeal to behaviorists as much as to anyone else, and Coffee seems not to have noticed that something like his proposal was in fact included in the Sentencing Reform Act of 1984.[17]

Coffee's analysis of corporate sentencing seems strained for a second and more important reason. The punishment of corporate entities is itself incompatible with the moral-educative mission of the criminal law. Coffee reveals how the Hobbs Act and Mail Fraud Statute have been bent, interpreted and revised so that they now threaten to criminalize nearly every breach of confidence and every breach of contract.[18] These developments have been prompted in part by economic change that has rendered our traditional thing-minded view of theft anachronistic. Unprincipled expansion of the criminal sanction has occurred in other periods of economic change as well.

One notable misuse of the criminal law occurred in 1909 when the Supreme Court upheld the imposition of criminal responsibility on a corporation.[19] Rejecting the wisdom of Blackstone on this subject and ignoring the sorts of issues raised by Professor Coffee concerning the character of the criminal sanction, the Court uttered something vague about "public policy" and the power of the corporation in "modern times."[20] It then upheld criminal punishment that could not truly be borne by a fictional entity but only by human beings whose guilt remained unproven.

On the European continent, where the moralistic goals of the criminal law are better appreciated than they are here, corporations are still not subject to criminal punishment. My guess is that the imposition of civil sanctions through less burdensome judicial and administrative procedures in Europe results not only in greater fairness but also in more effective regulation. Our efforts to stigmatize aggregations of people, most of whom are blameless, are

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[15] *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2T. *Compare id.* at § 2B1.1 *with* § 2T4.1 (tax table).

[16] Coffee, *supra* note 1, at 244-45.

[17] *See* 18 U.S.C. § 3572(a)(4) (1988).

[18] Coffee, *supra* note 1, at 202-10.

[19] New York Cent. & H.R.R.R. v. United States, 212 U.S. 481 (1909).

[20] *Id.* at 495.

unjustified in principle and may be less effective in practice than civil alternatives would be.

Roughly speaking, the claimed justification for punishing corporations as criminals is that innocent managers, anxious to avoid the punishment of innocent shareholders, will act as patrol officers. Everyone will police everyone else and will have appropriate incentives to create a law-observing corporate culture. To suppose that minor variations on the theme of threatening to punish blameless shareholders can infuse the criminal law with its moral mission once again is unreal. The necessity of punishing the innocent along with the guilty is the unavoidable embarrassment of all of our discussions at this conference.

Departures from Professor Coffee's view of the criminal sanction and from mine occurred even before 1909—centuries before in fact. The institution of Frankpledge in medieval England held all members of a group responsible for a crime committed by one of them. (Unlike the modern corporation, however, the group could avoid punishment by capturing the flesh-and-blood wrongdoer and delivering him or her to the authorities.) In punishing corporations, we may be recreating Frankpledge and regulating for instrumental ends; we are only nominally imposing criminal punishment.

Professor Coffee, however, implicitly may have identified corporate punishment with the wrong institution of primitive law. In 1991, the penal philosophy of many Americans is simple: "We like to snarl."[21] We resent crime, and in our rush to express our indignation, we may truly personify and hate the corporation. We may hate the mahogany paneling, the Lear jet, the smokestack, the glass tower, and *all* of the people inside. They—the mahogany and all of them—are responsible for the oil spill, the price-fixing and the illegal campaign contributions. To superstitious people, villains need not breathe; they may include Exxon and the phone company.

The corporation thus becomes for some of us, not Frankpledge, but deodand. Just as primitive people hated and punished the wheel of a cart that had run someone over, or the horse that had thrown its rider, or the sword that a murderer had used, some of us truly manage to hate the corporate entity. Coffee, for example, proposes examining whether the "corporate defendant . . . pressured its agents into criminal misconduct."[22] By "the

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[21] Some educated and sophisticated law students seem to manifest this philosophy in their responses to questions about sentencing policy. When asked if an offender's mental retardation should be regarded as a mitigating circumstance, these students often answer no; the extent of the victim's suffering was undiminished by the offender's mental disability. When asked, however, if the offender's prior record or association with organized crime should be regarded as aggravating circumstances, the same students often answer yes. With the question phrased in terms of aggravation rather than mitigation, they appear unmoved by the fact that the victim would have suffered equally if the criminal had been a first-offender or had acted on his or her own. These responses bespeak no inconsistency: the students like to snarl.

[22] Coffee, *supra* note 1, at 196.

corporate defendant," however, Coffee means the corporation's "senior management." Indeed, in determining whether to price or prohibit, Coffee would treat any "senior corporate official" as "the corporation."[23] "Above all," Coffee writes, "any indication that senior management had advance knowledge, or even a reckless awareness of a substantial possibility, of the crime should lead to a judicial conclusion that the crime was 'intended' by the corporation or, in other words, that corporate liability should not be considered 'vicarious,' but intentional (and, therefore, the misbehavior should be prohibited and not priced)."[24]

Neither "senior management" nor a "senior corporate official," however, is "the corporation." Contrary to Coffee's suggestion, the punishment of shareholders (and sometimes of creditors, workers and customers) is "vicarious." Professor Coffee himself recognized this fact in 1981. He wrote:

> The study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications and anthropomorphic analogies. Such an approach not only compounds the legal fiction of corporate personality with the legal fiction of corporate *mens rea*, but worse yet, it blinds us to the real issue of how to make deterrence work when the offender is an organization.[25]

It is too late to reconsider the error that the Supreme Court made in 1909; corporate criminal responsibility is here to stay. Nevertheless, we should recognize the beast for what it is—not criminal punishment as we customarily understand punishment—but a form of instrumental regulation with which ordinary principles of culpability do not fit.

As Professor Coffee noted in effect a decade ago, viewing corporate criminal punishment as Frankpledge is less silly than viewing it as deodand. Holding the members of a group vicariously responsible for other members' crimes for instrumental reasons is not as strange as hating a fictional entity and imagining that this entity deserves punishment. In this unfortunate corner of the criminal law, we are always concerned with pricing rather than prohibiting. Attributing intention and blame to an artificial person is no wiser than attributing intention and blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.

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23 *Id.* at 230.

24 *Id.* at 229–30.

25 Coffee, *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 448 (1981).