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Shareholder Primacy and Corporate Compliance

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SHAREHOLDER PRIMACY AND CORPORATE COMPLIANCE

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Corporations, like the rest of us, must comply with environmental and other laws or suffer the consequences. Unfortunately, these consequences can pale in comparison to the gains to be made from non-compliance. Law-and-economics scholarship recognizes this and, by treating many laws as mere costs of doing business, encourages a certain amount of deliberate non-compliance. According to this view, corporate compliance should turn on profitability or whether compliance would otherwise benefit the firm. This Article argues that the law-and-economics scholarship is wrong on the law, wrong as a matter of economics, and does not reflect how most firms in fact behave. As for the firms that do flout applicable laws in the name of profit, the Article advances corporate law proposals and other solutions to rebalance cost-benefit analyses in favor of compliance.

I. CORPORATE COMPLIANCE AND THE PROFIT MOTIVE

Corporate law requires fiduciaries to act faithfully, loyally, and carefully, and comply with applicable laws. The first three of these precepts comprise the traditional "triads of . . . fiduciary duty—good faith, loyalty, and due care"[1]—that together address many of the legal

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1. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). In *Disney* and *Stone v. Ritter*, the Delaware Supreme Court reclassified the triad of duties into two categories: a broad duty of loyalty encompassing a duty to act attentively and

issues that arise in corporate governance.[2] The obligation to comply with the law gets far less attention, yet corporate compliance decisions can have a tremendous impact on the firm, its bottom line, and those affected by the firm's non-compliance. This Part will set out corporate fiduciaries' compliance obligations, analyze the requirement through the lens of law and economics, and posit how corporations, in fact, behave.

A. Corporate Compliance Obligations

Corporate law requires fiduciaries to take reasonable steps to ensure that the firm complies with applicable laws, and put into place an information-and-control structure to aid in this effort.[3] In addition to this monitoring obligation, corporate fiduciaries must themselves manage the firm in accordance with applicable laws.[4] A failure to do so—for example, knowing that the firm is out of compliance and failing to act to rectify the situation, or affirmatively causing the firm to break the law—would not only amount to a breach of fiduciary duty,[5] it would also fall outside the scope of the business judgment rule[6] and any director-exculpation charter provisions.[7]

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in good faith as defined in more detail in those cases, and a duty of care. *See* In re Walt Disney Co. Deriv. Litig., 906 A.2d 27, 66-67 (Del. 2006) (en banc); Stone v. Ritter, 911 A.2d 362, 369-70 (Del. 2006). Thus, the obligation to act in good faith continues to bind corporate fiduciaries, but it now resides somewhere within an expanded conception of managers' loyalty duty.

2. *Revlon* and *Unocal* duties build on the triad and apply in certain takeover contexts. *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 239-40 (Del. 2009) (noting that "*Revlon* did not create any new fiduciary duties" and analyzing the Lyondell board's compliance with its care, good faith, and loyalty obligations).

3. In re Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 971-72 (Del. Ch. 1996). According to *Stone v. Ritter*, liability for the failure to adequately monitor attaches where the board either entirely fails to implement any information-and-control structure, or has such a structure but consciously fails to oversee its operations. *See* Stone, 911 A.2d at 370.

4. *See, e.g.*, Miller v. Am. Tel. & Telegraph Co., 507 F.2d 759, 761 (3d Cir. 1974) (applying New York law); In re Massey Energy Co., No. CIV.A. 5430-VCS, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011) ("Delaware law does not charter law breakers."); Metro Commc'n Corp. BVI v. Advanced Mobilecomm. Technologies, 854 A.2d 121. 163-64 (Del. Ch. 2004); *see also* A.L.I, PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(1) (obligating corporations, "to the same extent as a natural person, to act within the boundaries set by law").

5. *See* Miller, 507 F.2d at 762 ("[I]llegal acts may amount to a breach of fiduciary duty."); Desimone v. Barrows, 924 A.2d 908, 934-35 (Del. Ch. 2007))

Importantly, this rule holds even where non-compliance, after the payment of any fines, would prove the more profitable course: "Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity."[8] Likewise under New York law, directors are liable for illegal acts "even though committed to benefit the corporation."[9]

("Delaware corporate law has long been clear on this rather obvious notion . . . that it is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully."); *Metro Commc'n*, 854 A.2d at 131.

6. *See* Miller, 507 F.2d at 762 (holding that "the business judgment rule cannot insulate the defendant directors from liability if they did in fact breach [a campaign finance law]"); Shlensky v. Wrigley, 237 N.E.2d 776, 778 (Ill. App. 1968) (excepting fraud and illegality from the protection of the business judgment rule).

7. *See* DEL. CODE ANN. tit. 8, § 102(b)(7)(ii) (2014) (permitting charter provisions that eliminate directors' personal liability for duty-of-care violations but not for "knowing violation[s] of [the] law"); A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE § 7.19 (same for "knowing and culpable violation[s] of law"). The Revised Model Business Corporation Act's director exculpation provision, by contrast, is limited to "intentional violations of *criminal* law." *See* REV. MODEL BUS. CORP. ACT § 2.02(b)(4)(D) (emphasis added). Unlawful activity is also outside the scope of a corporation's indemnification power. *See, e.g.*, DEL. CODE ANN. tit. 8, § 145(a) (no power to indemnify a person who "had . . . reasonable cause to believe that the . . . conduct was unlawful").

8. *See* Metro Commc'n, 854 A.2d at 131; *see also* Desimone, 924 A.2d at 934-35 ("The knowing use of illegal means to pursue profit for the corporation is director misconduct."); In re Massey, 2011 WL 2176479 at *20 ("Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.'"); *see also* A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 cmt. d ("The concept of profit enhancement is also qualified by the provision in § 2.01(b)(1) that obliges the corporation 'to the same extent as a natural person, to act within the boundaries set by law.'").

9. Miller, 507 F.2d at 762. New York formerly applied a "net loss" rule whereby plaintiffs had to prove that the violation of the law caused the corporation a "net loss" after offsetting any corporate benefits gained. *See* Diamond v. Oreamuno, 24 N.Y.2d 494, 498 (1969) (abandoning the rule); *see also* A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE § 7.18(c) & cmt. e; John A. Humbach, *Director Liability for Corporate Crimes: Lawyers as Safe Haven?*, 55 N.Y.L. SCH. L. REV. 437, 440-41 n.12 (2011) (arguing that the net-loss rule is at odds with social and criminal policy).

This raises the question: which laws demand compliance and implicate these corporate fiduciary duties?[10] Should the corporate-law rules apply to all laws and regulations, just laws, just criminal laws, just criminal laws prohibiting *mala in se*,[11] or what? Corporate-law scholarship, primarily from the law-and-economics school of thought, has variously answered this question, with most commentators drawing this line somewhere between laws concerning *mala in se* and those concerning *mala prohibita*.[12] Corporate-law cases are less clear on this point but certainly take a tougher stance than the scholarship recommends. The violation in the principal casebook case involves illegal corporate campaign-finance contributions,[13] and other cases involve a wide range of criminal and

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10. *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) ("[M]anagers do not have an ethical duty to obey economic regulatory laws just because they exist. They must determine the importance of these laws.").

11. Laws prohibiting *mala in se* address wrongs that are bad in and of themselves, morally wrong, or otherwise offend the conscience, such as murder, arson, and rape. *See* BLACK'S LAW DICTIONARY 1045 (9th ed. 2009). *Mala prohibita*, by contrast, include acts that are not inherently wrong or immoral but rather unlawful merely because they have been prohibited, such as jaywalking. *See id.*

12. *See, e.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1524-25 (1984) (distinguishing between "regulatory law" and criminal laws); Easterbrook & Fischel, *supra* note 10, at 1168 n.36 ("We put to one side laws concerning violence or other acts thought to be *malum in se*."); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1578 (1995) (advocating compliance with laws that "involve[] what is by clear societal consensus a serious and substantial moral wrong."); *see also* Smith v. Nat'l Transp. Safety Bd., 981 F.2d 1326, 1328 (D.C. Cir. 1993) (Douglas Ginsburg, J.) (distinguishing, in a different context, between situations where a "regulatory rather than a moral or criminal norm is concerned"); A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE § 7.19 cmt. f (permitting director exculpation where director conduct is not "morally reprehensible under generally prevailing standards"). *But see* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1325-27 (1998) (arguing that regulatory laws, including most environmental laws, should also merit corporate compliance because they are so technically complex that they are difficult to gauge morally); *see also* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 101 (2006) ("These distinctions may not work in all situations, and at times courts will have to engage in fine line-drawing.").

13. *See* Miller, 507 F.2d at 761.

civil violations, from the mundane to the serious.[14] The scholarship, in other words, does not accurately describe the corporate law duty to comply with applicable laws and creates an issue, in the academic literature at least, where none previously existed.

B. Law and Economics

Wherever one draws this line, settled corporate law requires compliance with certain laws, and corporate decisions to deliberately flout those laws amount to a breach of fiduciary duties. This creates some tension with the "shareholder primacy" norm in American business—the conventional view that companies should aim to prioritize shareholder interests above all other considerations—insofar as corporate non-compliance may sometimes prove more profitable than adherence to the law.[15]

Economist Milton Friedman offered a straightforward resolution to this tension in his oft-quoted statement on corporate social responsibility: "[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits *so long as it stays within the rules of the game*."[16]

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14. *See, e.g.*, Scrushy v. Tucker, 70 So. 3d 289, 312-13 (Ala. 2011) (criminal fraud) (applying Delaware law); Louisiana Mun. Employees' Ret. Sys. v. Pyott, 46 A.3d 313, 317-18 (Del. Ch. 2012) (marketing Botox for off-label uses in violation of FDA regulations); In re Massey, 2011 WL 2176479 at *5-*10 (Mine Safety and Health Administration violations); Desimone, 924 A.2d at 934-35 (alleged violation SEC and IRS disclosure obligations); Davis v. Dyson, 900 N.E.2d 698, 712-16 (Ill. 2008) (violation of Illinois Condo Act's insurance requirements); Roth v. Robertson, 118 N.Y.S. 351, 353 (Sup. Ct. 1909) (violation of Sunday Blue Laws requiring business closures); *see also* A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 cmt. g(10) (using a speed-limit example to demonstrate the corporate law obligation to obey the law).

15. For a detailed examination of the shareholder primacy norm and its status in corporate law, see LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012), Judd F. Sneirson, *The Sustainable Corporation and Shareholder Profits*, 46 WAKE FOREST L. REV. 541 (2011) [hereinafter Sneirson, *The Sustainable Corporation*], and Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2008).

16. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed. 2002) (emphasis added); *see also* Thomas S. Coleman, *Corporate Social Responsibility: Friedman's View*, *available at* https://bfi.uchicago.edu/feature-story/corporate-social-responsibilty-friedmans-view, *archived at* https://perma.cc/Z4Y8-GBRJ (arguing that it is up to "the rest of us to establish a framework of laws . . . [to] push profit-maximizing firms to behave 'responsibly'").

Friedman's position thus aligns with the corporate law doctrine set out above, that firms may "pursue diverse means to make a profit, subject to a critical statutory floor, [that] corporations only pursue 'lawful business' by 'lawful acts.'"[17]

More recent law-and-economics scholarship resolves this tension differently and controversially. The more recent scholarship takes the view that not all laws demand corporate compliance. According to this scholarship, only some laws—criminal laws and other laws prohibiting violent or otherwise inherently wrongful acts—should be treated as non-negotiable obligations and merit full compliance.[18] Other laws carry no such moral imperative, says the scholarship, and so corporate and other actors may justifiably opt to violate the law and pay whatever penalties the laws prescribe.[19]

Next, when faced with a regulation in this latter category—where laws and penalties are viewed as mere prices for non-compliance—law and economics would have firms conduct a cost-benefit analysis and comply only where the benefits of compliance outweigh its costs. This way, a firm can achieve the seemingly efficient result and maximize profits and, ultimately, shareholder returns.[20]

Consider the following illustration. Suppose a manufacturing facility can save $80,000 a month by switching to a lower-grade fuel, but by making the switch the firm would likely violate the Clean Air Act[21] an average of four times a month.[22] If the assessed fine under

17. In re Massey Energy Co., 2011 WL 2176479 at *20; *see also supra* notes 4, 8-9 (citing cases).

18. *See* Cooter, *supra* note 12, at 1524-25 (treating such laws as limits); Easterbrook & Fischel, *supra* note 12, at 1168 n.36 (same); Williams, *supra* note 12, at 1269 (labeling these laws as "mandatory" as opposed to "voluntary").

19. *See* Cooter, *supra* note 12, at 1524-25 (treating these laws as prices for non-compliance); Easterbrook & Fischel, *supra* note 12, at 1168 n.36, 1177 n.57 (same).

20. *See* Williams, *supra* note 12, at 1267 (describing the "plausible view (but one that is also flawed) . . . of 'efficient investment in compliance' . . . since it would be economically inefficient to invest more in compliance that one risks in fines"); *see also* Humbach, *supra* note 9, at 440 (noting that any "'efficiency' gains are misleading . . . [in that] they ignore externalities").

21. Clean Air Act, 42 U.S.C. §§ 7401-7515 (2012).

22. The example is adapted from WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 294 (3d ed. 2009).

the Clean Air Act would be $25,000 per violation,[23] a cost-benefit analysis would suggest that compliance is the better, economically efficient choice in that the potential fines ($25,000 times four or $100,000) outweigh the projected fuel-cost savings ($80,000).

However, if there is less than a 100% chance that the authorities will detect the Clean Air Act violations, the cost side of the equation should adjust to reflect this reality.[24] For example, if the likelihood of being caught is 90%, the average monthly cost of non-compliance drops 10% to $90,000—still more than the monthly benefits of using the lower-grade fuel,[25] but the discounts do not end there. The Environmental Protection Agency routinely settles enforcement actions at less than the face value of the fines it levies.[26] If a Clean

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23. The current maximum penalty for Clean Air Act violations is $37,500 per day per violation. *See* 40 C.F.R. § 19.4 (2014). However, the average fine the EPA assesses is quite less. *See* Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 802 (1991) (noting the average Clean Air Act violation is about 60% of the maximum amount); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 968 (2001) ("[T]he average fines imposed by the EPA tend to be well below the statutory maxima."). The $25,000 figure in the example is thus a realistic amount.

24. *See* Spence, *supra* note 23, at 968 ("EPA resource limitations hamper monitoring efforts, . . . the frequency of inspection is often less than once a year." (citing studies)); *id.* at 974 ("Firms know from experience that ["the probability of non-compliance will be detected"] is small."); *id.* at 968 n.239 (acknowledging that the "infrequency of inspections invites the inference that detected noncompliance represents a small fraction of actual noncompliance"); *see also* David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. REV. 1, 45-49 (2014) (expressing concerns about the enforcement of federal and state environmental protection programs).

25. *See* GREENFIELD, *supra* note 12, at 75 (describing the cost of illegality as "the expected penalty—the fine or other costs discounted by the chance that the corporation will be caught in its illegality"); Williams, *supra* note 12, at 1291 (noting the law-and-economics tendency to discount "penalties by the likelihood of detection and successful enforcement of violations").

26. Although the "agency's penalty policies state that the EPA will not settle a case for an amount less than the economic benefit of noncompliance," Spence, *supra* note 23, at 921, settlements tend to be much lower than the statutory prescriptions. *See, e.g.*, Administrative Settlement Agreement, No. 12-8009, between the U.S. Environmental Protection Agency and Suzuki Motor Corporation (settling 25,000 separate Clean Air Act violations for $885,000 or $35.40 each), *available at* http://www2.epa.gov/sites/production/files/documents/suzuki-agr.pdf, *archived at* http://perma.cc/V4GQ-5U6L. For the full, searchable list EPA

Air Act violation can be settled for 90% of the total amount of the fines,[27] the $90,000 drops another 10% to $81,000. Alternatively, if the firm wishes to contest its liability and there is a 10% chance it would not be held liable,[28] we are again down to $81,000—still more than the expected savings of non-compliance, but not by much.

Now for one final discount: if the firm has to pay the $81,000 in Clean Air Act fines following an eventual settlement or judgment, the time-value of money must also be deducted. That is, to meaningfully compare the immediate $80,000 in fuel-cost savings with the future expected obligation to pay $81,000, the fines must be stated in present-value terms. Applying a conservative 5% discount rate, and assuming the fines are to be paid one year from the date of the violation, the present-value of the fines becomes $77,142—less than the present-value of the benefits of non-compliance.[29]

As the illustration demonstrates, these discounts can add up and can tip the scales in favor of non-compliance. To make matters worse, managers do not run these cost-benefit analyses perfectly; they tend to "underestimate the chances of getting caught in [the] illegal act, overestimate the potential benefits of breaking the law, and underestimate the potential penalties."[30] Thus, firms adhering to

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settlements, see U.S. EPA, *Civil Cases and Settlements*, http://cfpub.epa.gov/enforcement/cases/, *archived at* http://perma.cc/A7AY-WZSR.

27. In light of the previous footnote, the 90% settlement discount used in the example is probably very conservative.

28. *See* Williams, *supra* note 12, at 1291. For simplicity's sake, the example does not consider the firm's costs incurred in settling or litigating the violation. Even with such an adjustment, the point remains the same: that settling or litigating will typically result in the payment of an amount less than the face value of the violation.

29. Present value is calculated using the formula: PV=FV/1+r, "where PV is the present value, FV is the amount that will be paid at the conclusion of one year, and r is the annual discount rate." ALLEN ET AL., *supra* note 22, at 121. The Clean Air Act does not provide for prejudgment interest, which would counteract this discount, although the fine calculations are meant to disgorge any benefits gained from non-compliance. *See* Clean Air Act, 42 U.S.C. § 7413(e)(1) (2012) (considering the "economic benefit of noncompliance" among other penalty assessment criteria); 40 C.F.R. § 94.1106 ("In determining the amount of any civil penalty . . . the Administrator shall take into account . . . the economic benefit or savings (if any) resulting from the violation").

30. GREENFIELD, *supra* note 12, at 87 & n.46 ("The evaluation of risk is notoriously faulty."); *see also* Timothy F. Malloy, *Regulating by Incentives: Myths,*

this law-and-economics view of optional corporate compliance and profit maximization will sometimes fail to comply with applicable laws when a proper cost-benefit analysis would recommend compliance.

This cost-benefit analysis approach, however, completely ignores the fundamental economics concept of externalities.[31] An externality is "the effect of a transaction . . . on a third party who has not consented to or played any role in carrying out of that transaction."[32] *Negative* externalities in the business context represent *costs* of doing business that are not borne by the firm and instead shifted onto others.[33] For example, a business that pollutes imposes the health and clean-up costs of that pollution on the environment and the firm's neighbors,[34] just as a firm that fails to guard against workplace hazards imposes the costs of any eventual injuries on its employees and the health-care system. Notably, this holds true even where the firm complies with all applicable regulations, only polluting at allowable levels and meeting minimum workplace safety standards. Even there, any allowable pollution or workplace hazards constitute costs of production not borne by the company and imposed onto others.[35]

Negative externalities pose several problems. First, they paint an incomplete and thus inaccurate picture of a company's operations

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Models, and Micromarkets, 80 TEX. L. REV. 531, 536 (2002) (suggesting inefficiencies within firms can, depending on the firm, lead to unexpected, seemingly irrational decisionmaking).

31. British economist Arthur Cecil Pigou developed the concept in 1920. *See* ARTHUR CECIL PIGOU, THE ECONOMICS OF WELFARE (1920). His proposed solution—a so-called "Pigovian" tax to internalize these avoided costs and restore market efficiency—has regained currency as an approach to address climate change. *See, e.g.*, N. Gregory Mankiw, *Smart Taxes: An Open Invitation to Join the Pigou Club*, 35 EASTERN ECON. J. 14, 16 (2009) (tracing the origins of current carbon-tax proposals to Pigou).

32. JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 61 (2004) (quoting Milton Friedman); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 72 (9th ed. 2014) (defining negative externalities as costs external to a firm's decisionmaking process).

33. *See* BAKAN, *supra* note 32, at 61 (citing Friedman).

34. Pigou uses a pollution example, as well, noting that Manchester factories imposed measurable laundry cost increases on area residents not present in cleaner towns. *See* PIGOU, *supra* note 31, at 185 n.18.

35. *See* BAKAN, *supra* note 32, at 61 (noting that externalities both save the firm expenses and impose those expenses on involuntary third parties).

and finances. As a result, a firm will produce and price its goods and services at non-optimal, inefficient levels, understandably taking advantage of the costs not incurred.[36] This troubles economists, who tend to value efficiency,[37] and calls into question the value of some cost-benefit analyses suggesting the payment of fines in lieu of compliance. Second, misplacing the costs of production like this is doubly unfair: not only do producing firms evade costs they should be incurring, but unwitting, unwilling third parties absorb them instead.[38] And third, those third parties absorb the externalized costs involuntarily; economists tend to prefer voluntary transactions in which both parties become better off.[39]

The economics solution to this problem is to have firms internalize their externalities, for example by compensating third parties for the costs imposed on them, paying for environmental remediation, and so on.[40] Alternatively, one can impose a tax on firms to approximate

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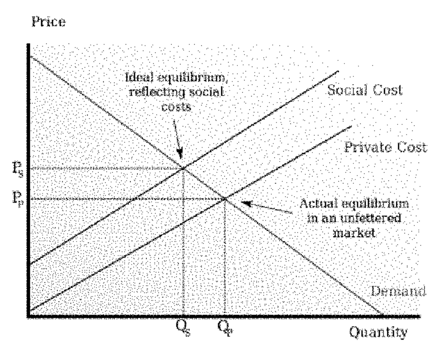
36. On the chart below, when the full (including social) costs of production are considered, the firm produces and sells a smaller quantity of goods (Q_s) at a higher price (P_s).



Source: http://en.wikipedia.org/wiki/externality.

37. *See, e.g.*, PIGOU, *supra* note 31, at 172; Mankiw, *supra* note 31, at 16-19 (considering externalities a "market failure" and noting that where there are externalities "Adam Smith's invisible hand will fail to lead to an efficient outcome").

38. *Cf.* Caprice L. *Roberts, Restitutionary Disgorgement as a Moral Compass of Breach of Contract*, 77 U. CIN. L. REV. 991, 1000 & n.39 (2009) (citing Fuller, Purdue, and Aristotle: "'the restitution interest involving a combination of unjust impoverishment with unjust gain' presents the strongest case for relief' if our goal is Aristotle's justice where we keep an 'equilibrium of goods among members of society'"); *see also* Humbach, *supra* note 9, at 440 ("[A]ny attempt to boost profits by foisting costs on others is essentially the same as stealing.").

39. *See* POSNER, *supra* note 32, at 6, 12, 16-17.

40. *See, e.g.*, Pigou, *supra* note 31, at 192-96. *But see* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1, 2 (1960) (challenging Pigou's view that

these expenses so that the firm's production levels and costs attain optimal, efficient levels, even if third parties are not made whole.[41] This approach has many adherents in economics and policy circles,[42] because it solves externality problems and addresses environmental harm, and does so efficiently, elegantly, and without undue governmental intervention.[43]

C. The Reality of Corporate Compliance

Exactly how widespread is this problem of corporate non-compliance? Anecdotal evidence suggests that most firms comply with applicable laws,[44] or at least they try to do so,[45] because the firms' decision-makers view compliance as the "right thing to do," because they have internalized the laws' goals and "believe they are

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externalities should always be internalized). For an innovative application of Pigou's thesis, see Andrew Johnston, *Facing Up to Social Cost: The Real Meaning of Corporate Social Responsibility*, 20 GRIFFITH L. REV. 221, 221-23 (2011) (defining corporate social responsibility as the voluntary internalization of a firm's externalities).

41. Of course, the taxes collected could be used to ameliorate environmental harms, though they could also be used for other purposes. *See* Janet Milne, *Environmental Taxation: Why Theory Matters*, *in* 1 CRITICAL ISSUES IN ENVIRONMENTAL TAXATION 1, 5-12 (Janet Milne et al. eds., 2003) (describing the "polluter pays" principle and a "double dividend" approach where environmental taxes offset other tax burdens); *see also* Mankiw, *supra* note 31, at 16.

42. These adherents call themselves the "Pigou Club." *See The Pigou Club Manifesto*, GREG MANKIW'S BLOG, http://gregmankiw.blogspot.com/2006/10/pigou-club-manifesto.html, *archived at* http://perma.cc/2ZXK-Q5LA (describing the Club's membership as "an elite group of pundits and policy wonks with the good sense to advocate higher Pigovian taxes").

43. *See, e.g.*, Mankiw, *supra* note 31, at 14-23. Even Milton Friedman seems to have been in support of, or at least tolerated, internalizing externalities. *See* Coleman, *supra* note 16, at 20 (opining that Milton Friedman would support the idea of internalizing externalities whereby the "firm still maximizes profits, but the profits account for the pollution costs now included in the cost of doing business").

44. *See* Stacy Watson May, Holland & Knight, Presentation at the 15th Northeast Florida Environmental Summit, Florida Coastal School of Law (Feb. 27, 2014) (stating that firms want to comply with environmental regulations, and that more sophisticated ones do).

45. *See* Spence, *supra* note 23, at 968 ("[O]ne wonders why firms are trying so hard to comply . . . and why they can't come close to perfect compliance, given the levels of effort they expend.").

important," or "because they see themselves as law-abiding."[46] And to the extent firms find themselves out of compliance, it seems to be more a function of not understanding often-complex laws than a conscious choice to flout the law in order to maximize profits.[47] There are certainly instances of deliberate corporate non-compliance in the business world—and in the headlines[48]—but the practice seems to be less pervasive than the law-and-economics scholarship recommends.

II. CORPORATE LAW SOLUTIONS

The law-and-economics view that compliance obligations should be treated as optional costs of doing business is thus wrong as a matter of corporate law, wrong as a matter of law and economics, and not in fact how most firms behave. As for the firms that do flout applicable laws in the name of profit, the next two Parts suggest corporate-law proposals and other solutions to rebalance and tilt the cost-benefit analyses in favor of compliance.

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46. *See id.* at 970-71 (citing literature and also suggesting that firms' decisionmakers favor compliance even where non-compliance would be more profitable because the decisionmakers themselves do not stand to gain—and may in fact stand to lose—from the non-compliance).

47. *See id.* at 974-75 ("[P]erfect compliance is almost impossible to achieve even for sophisticated and conscientious firms . . . and many violations result from sincere disagreements or differing interpretations of what EPA regulations mean."); *see also* Cynthia Giles, *Next Generation Compliance*, 2013 ENVTL FORUM 22, 24 ("[The EPA has] learned over years of hard experience is that compliance is better when the rules are simple and clear.").

48. The BP oil spill and Massey coal-mining explosion are two recent high-profile examples. *See, e.g.*, Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983 (2011) (casting the 2010 BP oil spill in the Gulf of Mexico as a failure of corporate law and shareholder wealth maximization); Kris Maher, *Feds Blame Owner of West Virginia Mine*, WALL ST. J., Dec. 7, 2011, http://www.wsj.com/articles/SB10001424052970204770404577082341518182150 , *archived at* http://perma.cc/E32K-V2KH ("The deadliest mining disaster in 40 years was the result of a workplace culture that valued production over safety, federal regulators said . . . .").

A. Environmental Laws as Limits

One response to the law-and-economics argument that some laws are mandatory and other laws are voluntary is to move more laws into the mandatory "law as limit" category. Cynthia Williams took this tack, among others, in her 1998 law review article on corporate compliance.[49] She argued, in part, that the *mala in se*/*malum prohibitum* distinction is difficult to apply to complex rules that are the product of regulatory expertise by administrative agencies.[50] The critique is particularly apt in the environmental context: does pollution beyond an agency-determined allowable amount "involve[] what is by clear societal consensus a serious and substantial moral wrong"?[51]

> Who knows, but in our society we have empowered a technically expert administrative agency . . . to study the issue, to consider the economic and health effects of permitting discharges at various levels . . . , and to make a binding decision. It is precisely because 'most of us would not have an immediate answer' about 'whether or not it is wrong to discharge .060 grams of ammonia per liter of water effluent' that we need a rule developed by experts . . . . [B]y denying the mandatory nature of regulatory law, the law-as-price view denies us law precisely where we need it most: in the regulatory arena, where there is not a societal consensus, where there is not an obvious moral component to the standards the law sets, and where humanistic concerns and economic self-interest collide most acutely.[52]

Alternatively and more simply, one could answer the hypothetical in the affirmative: yes, intentionally contaminating the air we breathe and the water we drink *is* morally wrong, as is endangering the health and safety of one's workers, to take another example. Williams's

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49. *See* Williams, *supra* note 12, at 1265.

50. *See id.* at 1325. Williams also challenged the theory, logic, and premises behind the "law as price" position. *See, e.g.*, *id.* at 1324-25.

51. *See id.* at 1299 (paraphrasing the *mala in se* standard in Pepper, *supra* note 12, at 1578).

52. *Id.* at 1326-27.

argument calls into question the usefulness of the *mala in se*/*malum prohibitum* distinction (and similar formulations) and would shift entire swaths of administrative regulation, including environmental laws, into the law-and-economics category of mandatory limits that merit compliance.

B. *Ultra Vires* Doctrine

A second corporate-law approach to corporate compliance invokes the *ultra vires* doctrine to in effect increase the penalties associated with illegal corporate activity. Kent Greenfield first advanced this theory in a 2001 law review article, breathing new life into the vestigial corporate law doctrine.[53]

Ultra vires or "beyond [the] powers"[54] describes actions corporations are unauthorized to take, either because of limitations placed on them in state corporate codes or because of limitations written into their charters.[55] If a corporation exceeds its powers or purposes, such acts are *ultra vires*, illegal, null, and void. A firm could thus not be held to *ultra vires* contracts, and the corporate directors or officers responsible for *ultra vires* acts could be held personally liable to the corporation for any resulting losses.[56] The *ultra vires* doctrine thus stands for the proposition that "the corporation [is] a legal entity of enumerated powers, beyond which the firm could not go."[57]

But corporate statutes have evolved to become more "enabling" than regulatory, and, consequently, today's corporate codes place few

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53. *See* Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001); *see also* GREENFIELD, *supra* note 12, at 73-105 (reprising his earlier article); Adam J. Sulkowski & Kent Greenfield, *A Bridle, A Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929 (2005).

54. BLACK'S LAW DICTIONARY 1662 (9th ed. 2009).

55. For Delaware's list of corporate powers, see DEL. CODE ANN. tit. 8, §§ 121-23 (2014). *See also* REV. MODEL BUS. CORP. ACT § 3.02 (enumerating general corporate powers).

56. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW & ECONOMICS 58 (2002); GREENFIELD, *supra* note 12, at 78.

57. GREENFIELD, *supra* note 12, at 78.

restrictions on corporate activity.[58] In addition, states no longer grant corporate charters sparingly and for narrowly defined purposes, as they once did.[59] Rather, forming a corporation today is a "straightforward process," and states and corporate charters currently need not, and do not, limit corporate purposes.[60] Indeed, those companies that state a corporate purpose in their charters use broad, generic language along the lines of "the purpose of the corporation is to engage in any lawful act."[61] As a result, there is little unauthorized corporate action left for the *ultra vires* doctrine to police.[62]

What is left, Greenfield recognized, is the power to engage in unlawful activity.[63] Decisions to break the law exceed corporations' admittedly broad powers and continue to be *ultra vires*. Invoking the *ultra vires* doctrine, shareholders may thus hold decision-makers accountable to the corporation for any resulting fines and seek injunctive relief, as well.[64] What is more, Greenfield argues that shareholders have incentives to bring such actions: shareholders would not want executives to break the law as a general proposition

58. *See* Liggett v. Lee, 288 U.S. 517, 542-60 (1933) (Brandeis, J., concurring) (chronicling the decline in corporate regulation); BAINBRIDGE, *supra* note 56, at 39-40 ("Until fairly recently, governments regarded business corporations with considerable suspicion and therefore closely regulated them."); GREENFIELD, *supra* note 12, at 77 (noting also that the doctrine limited corporations' "economic power and influence" and protected "shareholders from managerial overreaching").

59. *See* BAINBRIDGE, *supra* note 56, at 39-40, 58; GREENFIELD, *supra* note 12, at 79-80.

60. *See* BAINBRIDGE, *supra* note 56, at 39-40, 58; GREENFIELD, *supra* note 12, at 79 (noting that states and shareholders both "came to recognize that their interests . . . would be served by a weakening of the doctrine").

61. *See* DEL. CODE ANN. tit. 8, § 102(a)(3) (2014) (explaining that this language is a sufficient statement of the corporation's purpose). Delaware requires corporate charters to include such a statement, *see id.*; most other states do not, *see, e.g.*, REV. MODEL BUS. CORP. ACT § 2.02, and presume a "purpose of engaging in any lawful business." *Id.* § 3.01.

62. *See* BAINBRIDGE, *supra* note 56, at 58-60 (calling the *ultra vires* doctrine "largely a dead letter"); GREENFIELD, *supra* note 12, at 81 ("[*Ultra vires*] has been called statutory 'dead wood' . . . .").

63. *See* GREENFIELD, *supra* note 12, at 94 ("[A] remaining sliver of the [*ultra vires*] doctrine seeks to ensure that corporations stay within legal bounds.").

64. *See id.* at 94-97 ("Any loss to the corporation from illegality—including fines, judgments or losses in stock value because of reputational harm—would be recoverable from the individuals responsible for having the corporation act beyond its authority."). Attorneys general can also bring suits to enforce the *ultra vires* doctrine. *See id.* at 97-98.

because such law-breaking often comes at shareholders' expense,[65] and illegal acts tend to injure firms' reputations and long-term interests.[66] Firms' other stakeholders—the state, the firms' creditors, and its managers and employees—would likewise not want the corporation to break the law.[67] Best of all, the *ultra vires* doctrine remains good law;[68] no legislative action need be taken to invoke the doctrine to keep corporations operating within the law.[69]

C. (Better) Disclose Environmental Compliance

A third corporate-law approach to improve corporate compliance relies on corporate disclosures and "shaming" firms that are out of compliance. Disclosing firms' compliance policies and track records, either as a securities-law matter or as a function of environmental or labor law and policy, would likely "affect corporate conduct"[70] in that firms would not want to publicize policies and facts "that

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65. *See id.* at 84-85 (noting that "the kinds of illegal acts that corporate executives would likely commit [like fraud and self-dealing] . . . often hurt shareholders").

66. *See id.* at 85.

67. *See id.* at 81-94.

68. In every state except in North Dakota, strangely. *See* Sulkowski & Greenfield, *supra* note 53, at 945.

69. *See* GREENFIELD, *supra* note 12, at 105. Greenfield additionally argues that the *ultra vires* doctrine could be used to enforce international laws, *see id.* at 102-05, and a recent case pursuing this strategy has met with initial success. *See* Louisiana Mun. Police Employees' Ret. Sys. v. Hershey Co., No. 7996-ML (Del. Ch. Mar. 18, 2014) (denying Hershey's motion to dismiss plaintiffs' books-and-records action seeking documents to support a separate action to hold Hershey managers to task for using cocoa suppliers that violate international child-labor laws).

70. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1210-11 (1999) (noting that Congress intended the securities laws' disclosure requirements to "affect corporate conduct"); *see also* Cynthia Giles, *Next Generation Compliance*, 30 ENVTL. FORUM 22, 24 (2013) ("[T]here is powerful evidence that publishing information about company performance drives better behavior, as pressure is applied by customers, neighbors, investors, and insurers."); Markell & Glicksman, *supra* note 24, at 70-71 (touting "the promise of transparency as a tool to improve compliance" and noting the EPA's suggestion "that public pressure and greater regulated party self-awareness can both motivate better performance").

shareholders could interpret as negative."[71] Firms would likewise not want to publicize policies and practices that regulators would hold against them in determining environmental and other fines,[72] or that would turn off consumers. On the positive side, disclosure can "draw[] attention to problems and bring[] senior-level focus to bear on fixing them," as well as show "companies how their peers perform, and . . . that better performance is possible."[73]

Generally speaking, the federal securities laws do not require companies to make such disclosures unless the potential financial consequences would have a material impact on the company.[74] The Environmental Protection Agency fills some of this gap, publishing

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71. Williams, *supra* note 70, at 1295 (noting that "there would be a 'shrinking quality' to actions that managers would be willing to take in relative secrecy, but would not want to disclose to their shareholders or to have published on the published on the front page of the *New York Times*"); *see also* Felix Frankfurter, *The Federal Securities Act: II*, FORTUNE, Aug. 1933, at 55 ("[P]ublicity is potent . . . to force knowledge of [excessive commissions and salaries] into the open is largely to restrain their happening. Many practices safely pursued in private lose their justification in public."); David A. Skeel Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). This assumes that shareholders would view non-compliance negatively, which Greenfield posits would be the case. *See supra* note 65 and accompanying text (noting Greenfield's argument that shareholders should favor compliance over non-compliance purported to maximize profits).

72. Clean Air Act fines, for example, are higher for repeat offenders. *See* Clean Air Act, 42 U.S.C. § 7413(e)(1) (2012) (considering "the violator's full compliance history and good faith efforts to comply" in determining penalties); 40 C.F.R. § 94.1106 (2014) (same); U.S. EPA, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENT: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES 3-4, 21-22 (Feb. 16, 1984) [hereinafter EPA PENALTY FRAMEWORK], *available at* http://www2.epa.gov/enforcement/policy-civil-penalties-epa-general-enforcement-policy-gm-21, *archived at* http://perma.cc/HX7Y-3LFA (considering a firm's history of non-compliance and its degree of willfulness in calculating penalty amounts).

73. Giles, *supra* note 47, at 25.

74. *See* Williams, *supra* note 70, at 1208 (noting the securities laws' "materiality filter" and further noting Regulation S-K, Item 103's helpful "materiality benchmark of 10% of the current assets of the issuer, except in an environmental proceeding against a government entity, in which case proceedings with the possibility of a $100,000 fine must be disclosed" (referencing 17 C.F.R. § 229.103 (2015) & instructions 2 & 5, which presume that such a fine is *per se* material)). That said, many U.S. firms voluntarily make environmental and social responsibility disclosures. *See* Sneirson, *The Sustainable Corporation*, *supra* note 15, at 558 & n.81 (reporting on this trend).

information about its compliance and enforcement actions on its websites.[75] These websites are great but could be better and better-utilized. For example, the enforcement information of these sites is limited to recently concluded actions, and searchable but awkwardly so and in limited ways.[76] Consequently, firms that violate environmental laws do not garner nearly the amount of negative publicity that they otherwise might.

One way to accomplish greater disclosure of corporate non-compliance is to simply improve and better publicize the EPA's, and other agencies', websites to heighten the negative publicity associated with violating environmental and other laws.[77] Alternatively and less realistically, the securities laws could be amended to require firms to more fully disclose their compliance policies and practices, even where those policies and practices do not necessarily cross the materiality threshold.[78] Firms wishing to avoid such publicity, and the reputational and other costs that bad press brings, would have this extra incentive to comply with the law.[79]

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75. *See* U.S. EPA, *Civil Cases and Settlements*, EPA.GOV, http://cfpub.epa.gov/enforcement/cases/, *archived at* http://perma.cc/HX7Y; U.S. EPA, *Toxics Release Inventory*, EPA.GOV, *archived at* http://perma.cc/H87Y http://www2.epa.gov/toxics-release-inventory-tri-program; U.S. EPA, *Enforcement and Compliance History Online*, EPA.GOV, http://echo.epa.gov, *archived at* http://perma.cc/ARTG; *see also* Giles, *supra* note 47, at 25 (crediting the Toxics Release Inventory with "a significant drop in emissions"). There is a similar website for OSHA violations. *See* U.S. Dep't of Labor, *OSHA's Statistics & Data Page*, https://www.osha.gov/oshstats/index.html, *archived at* http://perma.cc/CCU5-6LSY (offering limited OSHA complaint and violation data).

76. As a result, while the Toxics Release Inventory names a locality's worst offenders, it is difficult to obtain an area's most penalized polluters.

77. *See* Giles, *supra* note 47, at 24 ("Public disclosure is [an] underutilized tool: there is powerful evidence that publishing information about company performance drives better behavior, as pressure is applied by customers, neighbors, investors, and insurers"); Markell & Glicksman, *supra* note 24, at 20-21 (noting environmental statutes' reporting requirements and their impact on compliance).

78. Such disclosure requirements may be coming, if indirectly. The European Union Council Directive 2014/95/EU, published in late 2014, will require covered businesses, including those based in the United States but having a significant enough presence in an EU member state, to make social, environmental, and governance disclosures. Enforcement of the provision will begin in 2017.

79. In cost-benefit analysis terms, the bad press would increase the costs of non-compliance, perhaps tipping the scale in favor of compliance. *See supra* Part I.B; *infra* Part III.C.

III. OTHER SOLUTIONS

Other approaches to improving corporate compliance involve working within the cost-benefit analysis and discounting some firms' conduct in determining whether to abide by applicable laws. Specifically, the recommendations below either make corporate compliance with legal requirements more attractive, or make corporate non-compliance less attractive. Examples include improving enforcement, enhancing the penalties associated with environmental and other violations, and otherwise manipulating the costs and benefits of compliance so as to tilt the scale in favor of compliance. What is more, these approaches, if successful, will both improve corporate compliance and also make environmental and other statutes more effective in achieving, or at least advancing, their goals.[80]

A. Improve Enforcement

Environmental laws are poorly enforced,[81] perhaps deliberately so.[82] Consequently, businesses that fail to comply with environmental laws and other regulations are less likely to get caught and therefore less likely to have to pay any resulting fines. Factoring this reality into a cost-benefit analysis means discounting any possible penalties, thereby decreasing the "cost" side of the non-compliance equation.[83] Improving enforcement would lessen the impact of this discount

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80. *See* Daniel H. Cole & Peter Z. Grossman, *When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WISC. L. REV. 887, 910 ("The main goal of the Clean Air Act of 1970 (and still its main goal today) was the attainment, 100% of the time, of national ambient air quality standards . . . .").

81. *See* Giles, *supra* note 47, at 22-23 ("[A] small number of federal and state enforcers cannot effectively police millions of regulated facilities."); Markell & Glicksman, *supra* note 24, at 29-36.

82. *See id.* at 50-51 ("Environmental group spokespersons have characterized EPA budget cuts as an indirect way to weaken environmental regulations, likening the situation to a 'death by a thousand cuts.'"); *see also* David Barstow, *When Workers Die*, N.Y. TIMES, Dec. 21-23, 2003 (demonstrating that U.S. workplace safety rules are weak and dramatically under-enforced).

83. *See supra* Part I.B.

while of course helping the environmental laws achieve, or at least advance, their stated goals.[84]

The enforcement trend right now seems to be going in the other direction, however, with fewer resources being allocated to environmental protection generally and enforcement efforts in particular.[85] What is worse, these declining resources have coincided with increases in environmental regulators' responsibilities, further hampering effective enforcement.[86] Improving enforcement may be difficult or impractical in the current political environment, but it represents one obvious, effective approach to improve the problem of corporate compliance.

B. Enhance Penalties

Another means of improving corporate compliance is to enhance the penalties charged for statutory violations. One goal in setting the amount of environmental fines is to remove any financial benefits gained from polluting in violation of the law.[87] When firms discount these statutory penalties to account for the likelihood of getting

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84. Better enforcement would also raise additional funds by virtue of additional fines levied and collected.

85. *See* Markell & Glicksman, *supra* note 24, at 50 ("[F]unding freezes or declines have affected the[] capacity to conduct activities such as permitting, inspections, and monitoring, all of which are critical to effective enforcement."). *But see id.* at 52 (noting "innovative enforcement approaches that use new monitoring and reporting technologies" that may alleviate some budgetary pressures).

86. *See id.* at 55-56 (noting "increase[s] in the number of regulated entities; increases in regulatory responsibilities and mandates for agencies and regulated entities alike; implementation of programs that depend on making difficult causal connections between regulated activities and environmental harms; a movement in some contexts away from uniform regulatory treatment toward differentiated responsibility . . . ; and a commitment to target significant violations by smaller sources that have not traditionally been the focus of enforcement attention and activity").

87. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(e)(1) (considering the "economic benefit of noncompliance" among other penalty assessment criteria); 40 C.F.R. § 94.1106 (2014) ("In determining the amount of any civil penalty . . . the Administrator shall take into account . . . the economic benefit or savings (if any) resulting from the violation"); EPA PENALTY FRAMEWORK, *supra* note 72, at 6 (establishing "deterrence as an important goal of penalty assessment" and specifying "that any penalty should, *at a minimum*, remove any significant benefits resulting from noncompliance" (emphasis in original)).

caught, the likelihood of having to pay the full amount of the fine, and the time value of money, however, the fines fall short of this goal and lose much of their deterrent value.[88] Regulators can anticipate and counteract this discounting by increasing statutory penalties so that the penalties for deliberate non-compliance, even when discounted, still reflect the intended statutory amounts.

Imposing civil liability on individual corporate actors provides additional, powerful incentives for corporate compliance with applicable laws. As noted above, corporate decisionmakers may already be held personally responsible for their decisions to violate applicable laws under corporate-law theories;[89] some environmental laws hold individual corporate officers and employees civilly accountable, as well, provided they are sufficiently involved in the firm's polluting or compliance decisions.[90]

Criminal liability for corporate non-compliance can be a powerful incentive, as well; as two commentators aptly put it, corporate actors "can sometimes better 'focus' corporate attention on environmental compliance if [they] understand that they place their personal wealth and liberty at risk for knowing violations of the law."[91] Environmental and other laws already deploy the criminal law, both at the corporate level[92] and at the individual level against responsible

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88. *See supra* Part I.B.

89. *See supra* notes 5-7 and 64 (discussing breach of fiduciary duty and *ultra vires* theories) and accompanying text.

90. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 66-67 (1998) (interpreting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to impose liability on those who "manage, direct, or conduct operations specifically related to pollution . . . or decisions about compliance with environmental regulations"). *But see* James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 333 (1992) ("[I]t is exceedingly rare for [the] EPA in a civil action to sue corporate personnel in their capacity as individuals.").

91. Miskiewicz & Rudd, *supra* note 90, at 373; *see also* Spence, *supra* note 23, at 923 ("[T]he environmental criminal enforcement system is designed to complement the civil enforcement system and to strengthen the disincentives to noncompliance facing rational polluters.").

92. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1105 (7th ed. 2013) ("The Justice Department has taken the position that a corporation can be held criminally liable for the unlawful acts of its employees if the acts were done to benefit the corporation and related to the employee's duties, whether or not the acts violated the corporation's policies or employee's duties, and whether or not the

corporate officers and employees,[93] although there is some debate about the propriety of holding "responsible" but otherwise uninvolved individuals criminally liable.[94] Enhancing civil and criminal penalties for deliberate noncompliance with applicable laws would no doubt increase compliance efforts and results; the likelihood of such increases, as noted above, will depend on political forces that currently seem to be trending in the other direction.

C. *Rebalance Costs and Benefits*

Increasing the benefits of compliance and other costs of non-compliance will likewise encourage firms to conclude that compliance is the better course. Compliance with environmental regulations already offers firms a host of financial and other benefits. In addition to avoiding fines and associated legal expenses, environmental compliance can improve workers' health, healthcare costs, and productivity; make the firm better prepared and more competitive if and when stricter environmental regulations go into effect; and improve the company's image with the public including potential buyers of the firm's goods and services, employees, and

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offending employees had any managerial authority."); *see also* Spence, *supra* note 23, at 922 n.20 (citing environmental statutes). Violations of state law require more involvement. *See* Jed S. Rakoff, Justice Deferred Is Justice Denied, *New York Review of Books*, Feb. 19, 2015, http://www.nybooks.com/articles/archives/2015/feb/19/justice-deferred-justice-denied/, *archived at* http://perma.cc/E7C4-72FT ("[M]ost of the fifty states . . . restrict the criminal prosecution of companies to cases where, in the words of the Model Penal Code . . . 'the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.'").

93. This is not commonly done, however. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 83 (2014) ("I was surprised to find that individual officers and employees were often not prosecuted when the company was. This was particularly true in the more significant cases involving deferred prosecution agreements and public companies.").

94. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7602(e), 7413(c)(6) (2012) (defining "person" to include "any responsible corporate officer"); Clean Water Act, 33 U.S.C. §§ 1319(c), 1362, 1321(b)(5) (2012) (same); Spence, *supra* note 23, at 947-51 (noting a *mens rea* issue where a corporate officer is held criminally liable for having, "by reason of his position in the corporation, responsibility and authority either to prevent . . . or promptly to correct, the violation . . . and . . . failed to do so" (quoting U.S. v. Park, 421 U.S. 277 (1975)).

regulators.[95] Adding these benefits to the compliance side of the equation could make compliance with the law a more attractive option than illegality.

On the other side of the scale, shaming violators can in effect supplement existing statutory penalties for non-compliance, as many consumers and prospective employees would prefer not to conduct business with firms with bad environmental or labor track records.[96] Reworking governmental websites to make firms' non-compliance details more visible to the public, the media, and activists would heighten these effects and make shaming a more formidable factor to perhaps tip the scales in favor of corporate compliance.[97]

D. *Private Compliance*

A final possibility for improving corporate compliance is through private ordering. Many firms today contractually regulate and monitor the environmental and labor practices of their suppliers, insureds, and borrowers, in part to ensure their compliance with applicable laws, and sometimes to require a level of corporate social responsibility beyond mere compliance with the law.[98] Failing to

95. The government is one such party that prefers contracting with law-abiding businesses. *See* Christine Bader, *Obama's Executive Order Helps Better Employers Win Government Contracts*, THE GUARDIAN, Aug. 1, 2014, http://www.theguardian.com/sustainable-business/2014/aug/01/obama-executive-order-fair-pay-safe-workplaces-blackwater-lehman-barclays-bp-oil, *archived at* http://perma.cc/X85E-BSKD (reporting on a new requirement that firms applying for federal contracts disclose labor law violations).

96. *See supra* Part II.C; *see, e.g.*, Simon Birch, *How Activism Forced Nike to Change its Ethical Game*, THE GUARDIAN, July 6, 2012, http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike, *archived at* http://perma.cc/3FKK-3TTS ("[T]he 1990s . . . global boycott campaign of Nike was so successful that it has now become an object lesson in how giant corporations can be brought to account by ordinary consumers.").

97. *See supra* Part II.C.

98. *See* Scott Killingsworth, *The Privatization of Compliance*, *in* TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARDS, MANAGEMENT, COMPLIANCE OFFICERS, AND GOVERNMENT 33, 34 (2014), *available at* http://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF322/RAND_CF322.pdf, *archived at* http://perma.cc/S4L9-XSJN ("From Apple to Zoetis, major corporations are requiring their business associates to commit to third-party codes of conduct . . . and related contract clauses." This trend signals a growing appreciation that enterprises across the value chain share one another's reputational

adhere to these contractual requirements may mean being dropped from a supply chain, losing a client, or defaulting on a loan or other contract.[99] These consequences can be tremendous and may perhaps deter non-compliance more effectively than public laws ever could.

CONCLUSION

The idea that firms should deliberately violate the law in the name of profit is troubling. In fact, it is far more troubling than the usual application of the shareholder primacy model of corporate governance, that firms should prioritize profits above non-shareholder considerations in choosing among whatever legal alternatives. As the first half of this Article has shown, further applying shareholder primacy to compliance decisions goes against corporate fiduciary duties, law-and-economics principles, and it seems most firms reject the proposition. To the extent it is a real problem, there are corporate-law and other solutions to address it, even in a world where environmental law enforcement and penalties lag. Many of these boil down to firms' cost-benefit analyses. By heightening the benefits to be gained from compliance as well as the costs of non-compliance we can change decision-making for the better and hopefully bring even the most profit-oriented firms back into compliance.

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and compliance risks . . . ."); Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 U.C.L.A. L. REV. 913, 913 (2007) ("[M]ore than half of the largest firms in eight retail and industrial sectors impose environmental requirements on their domestic and foreign suppliers.").

99. *See* Killingsworth, *supra* note 98, at 7-8 (describing common remedies for breaching these contractual "codes of conduct").