FIGHTING CARTELS AND CORPORATE CORRUPTION — PUBLIC VERSUS PRIVATE ENFORCEMENT MODELS: A FALSE DICHOTOMY?

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I INTRODUCTION

Laura Guttuso set out an ambitious plan for her doctoral research. In her confirmation document Laura described her thesis as follows:

> This thesis analyses the challenges resulting from the interplay between public and private actions against cartels in a structured and novel way. It investigates how the two key goals of anti-cartel enforcement, namely, deterrence, and providing effective compensation to the victims of cartel breaches, can be more optimally brought together.[1]

Our ambition is more modest, namely, to examine the legal responses to cartel wrongdoing, drawing insights and parallels with new and emerging models of corporate responsibility applied to deal with other white-collar crimes. Our article traces how traditional legal binaries — public versus private law, and criminal versus civil law — are being increasingly challenged by legal hybridity, and the emergence of a range of new regulatory tools that meld together a wide range of purposes including prevention, deterrence, retribution, incapacitation, restorative justice, restitution and compensation. Legal hybrids, such as civil penalty and deferred prosecution agreement (DPA) schemes, aim to safeguard broader economic and societal interests, including protecting national and global markets, as well as ending the *de facto* legal impunity for multinational corporations that are 'Too Big to Fail' or 'Too Big to Jail'.[2] In our view, rather than being viewed as deviations or exceptions from the legal 'norm', regulatory hybrids should be assessed on their own terms, through the twin and interrelated lenses of legitimacy and effectiveness.

In Part II, we discuss how the concept of corporate criminal responsibility developed through criminalising the actions of individual members of the professional and business classes, before adapting and extending to organisational responsibility. Part III examines the current strategies, policies, and enforcement tools for dealing with corporate scandals, with a view to exploring whether the core assumptions behind legal compliance hold true for corporations as well as individuals. The basic thrust of our argument is that while penalties can promote the desired changes to both corporate and individual conduct, the motivation governing the making of such payments is crucial. Our conclusion is that regulation — whether based on criminal, civil or hybrid measures — must do more to harness the moral and emotional motivations of corporations, for example, by mobilising the intrinsic power of corporate culture to promote compliance for the 'right reason'.

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[1] Laura Guttuso, *In Pursuit of Cartels — a Critical Analysis of the Dynamics Between Public and Private Enforcement* (Confirmation of PhD Candidature Document, The University of Queensland, 2016).

[2] Brandon Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014) 42.

II NEW REGULATORY MODELS: FROM WHITE COLLAR CRIMINALITY TO CARTEL CRIMINALISATION

Edwin Sutherland's pioneering work in the 1940s introduced a new category of criminality to the discipline of criminology — 'white-collar crime'.[3] By exploring the criminality of the professional and business classes — the bankers, lawyers, accountants, as well as politicians and regulators — he hoped to refocus the discipline away from 'crime on the streets' to 'crime in the corporate suites'. Sutherland's theories were focused upon individual rather than corporate or organisational responsibility for crime. When he coined the term 'white collar criminality' in 1939, corporate criminal responsibility was circumscribed to a range of minor regulatory offences of strict liability.[4] His focus on individual rather than organisational forms of criminality led to his famous articulation of the 'theory of differential association', in which he rejected the notion that offenders were either 'born criminals' or 'criminal-types'. In Sutherland's view, criminal behaviour is learned, and through interaction with others who advocate crime, deviance for some individuals is normalised and encouraged. His theory was universal, in that it could traverse crime by persons of high and low status. Of course, this prompted his controversial reflection that the lack of visibility of business and professional crime, though often involving serious fraud and dishonesty, related to lack of reporting and under-enforcement of the criminal law. Highlighting a range of cases of embezzlement by senior corporate officials, which dwarfed the losses attributable to 'blue collar' crimes, Sutherland concluded that the lack of criminal enforcement related to the poor alignment of the public and private interest:

> These cases might have been referred to the criminal court but they were referred to the civil court because the injured party was more interested in securing damages than in seeing punishment inflicted.[5]

Sutherland's address, while path-breaking in many respects, did not canvass the potential prosecution of the corporation as a 'legal person' distinct from individual 'white-collar' perpetrators.[6] Fast-forward 75 years and jurisdictions across the globe have undertaken widespread reform of their laws governing corporate crime, creating a raft of new 'business' offences criminalising cartels, insider trading, foreign bribery and a range of other commercial and corporate fraud. Business regulation has extended into new areas, which has created new offence provisions in environmental law, intellectual property law, and occupational health and safety law. As well as expanding the frontiers of corporate criminality beyond activities which had previously only given rise to civil (if any) legal remedies, jurisdictions codified the principles governing criminal responsibility for 'body corporates' and legal entities more broadly.[7] No longer is

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3 Edwin Sutherland, 'White-Collar Criminality' (1940) 5(1) *American Sociological Review* 1.

4 Corporations could be easily prosecuted for offences where parliament dispensed with the requirement of *mens rea*. In the 1970s, the English courts began to attribute corporate responsibility to the 'controlling mind of the company', typically, the managing director, board of directors, or other senior officials to whom this responsibility was *fully* delegated: *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

5 Sutherland, above n 3, 6.

6 For an excellent study see Celia Wells, *Corporations and Criminal Responsibility* (Oxford University Press, 2nd ed., 2001).

7 *Criminal Code* (Cth) ss 12.1–12.6, discussed in Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 4th ed, 2017) 191–193.

corporate criminal liability restricted to offences punishable by fine alone.[8] All offences, including fatal and non-fatal offences against the person, are, in theory, amenable to commission by corporations.[9]

The intensified national and global focus on corporate integrity and governance post-Global Financial Crisis has brought new attention upon the criminalisation of corporate and organisational fraud and dishonesty. 'Crimes against the market'[10] are a longstanding feature of the criminal law. As Peter Alldridge points out, the public wrongs of offering and receiving bribes, and misuse of public office date back to the thirteenth and fourteenth centuries.[11] Historical studies reveal criminalisation and prosecution of business-related crime intensify in the wake of national and global scandals,[12] although it remains the case that legal enforcement remains predominantly *non-criminal* in nature. In Australia, as elsewhere, the bulk of regulatory attention is directed to the enforcement of civil and administrative penalties against corporate wrongdoing.[13] The rise of civil and administrative penalties claims to have the same educative and punitive outcomes as prosecution and punishment under the criminal law, but without incurring the enforcement costs or process hurdles of criminal litigation. Today, breaches of the more serious offence provisions of the *Corporations Act 2001* (Cth) rarely result in criminal prosecution; it is more common for administrative and civil penalties to be applied to such cases.[14] There are differences between administrative and civil penalties: administrative penalties are determined and imposed upon offenders by regulatory agencies without any judicial involvement,[15] while civil penalty proceedings, though subject to judicial adjudication, derogate from the conventional criminal justice safeguards, for example, applying the lower civil standard of proof.[16]

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8 The common law held that a corporation could not be guilty of an offence for which the only penalty is imprisonment: *R v ICR Haulage Ltd* [1944] KB 551, 556. The common law position has been reversed in many jurisdictions, see for example, s 161(2) of the *Legislation Act 2001* (ACT) which states: '[a] provision of law that creates an offence can apply to a corporation even though contravention of the provision is punishable by imprisonment (with or without another penalty)'.

9 This has even extended to homicide offences, with the creation of industrial manslaughter offences: see, for example, *Crimes (Industrial Manslaughter) Amendment Act 2003* (ACT), discussed in Rick Sarre, 'Penalising Corporate "Culture": The Key to Safer Corporate Activity?' in James Gobert and Ana-Marie Pascal (eds), *European Developments in Corporate Criminal Liability* (Routledge, 2011) 84, 89-90.

10 The term 'crimes against the market' was coined in Peter Alldridge, *Relocating Criminal Law* (Ashgate, 2000) 166.

11 Ibid 178.

12 Sarah Wilson, *The Origins of Modern Financial Crime: Historical Foundations and Current Problems in Britain* (Routledge, 2014).

13 Jasper Hedges et al, 'The Policy and Practice of Enforcement of Directors' Duties by Statutory Agencies in Australia: An Empirical Analysis' (2017) 40(3) *Melbourne University Law Review* 905.

14 Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35 (5) *Companies and Securities Law Journal* 289.

15 See, for example, the use of enforceable undertakings, under *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA and 93A.

16 *Corporations Act 2001* (Cth) s 1317L.

III RESPONSIVE REGULATION: ENFORCEMENT PYRAMIDS AND CONTESTING RATIONAL ASSUMPTIONS

Much of the academic and policy debate about the regulation of corporate crime is siloed, rarely traversing different regulatory domains. There is a smorgasbord of strategies, policies, and enforcement tools for dealing with cartels, consumer protection, directors' duties, environmental protection, foreign bribery and corruption, money-laundering, and tax evasion, which differ according to the regulatory domain and enforcement agency involved. The type of strategy favoured depends on the cycle of scandals affecting the particular domain, and the underlying philosophy and assumptions held by the CEO of the relevant regulatory agency.

A recent example of the latter is Greg Medcraft, the former Chairman of the Australian Securities and Investments Commission (ASIC), who publicly bemoaned the limited range of penalties available to the agency and called for urgent reforms to 'lift the fear and suppress the greed'.[17] Medcraft's views are predicated on assumptions of corporate rationality, and that consistently applied exemplary penalties have both general and specific deterrence on corporate misbehaviour.[18] But these assumptions, while having considerable political and popular appeal, are problematic. As Sutherland observed above, there remains an inescapable tension between the public and private interests in relation to criminal law enforcement — in the longer term, it is not always in the interests of those adversely affected — the shareholders, markets, industry and the wider community — to pursue criminal action. Indeed, the agency or government also may take the view that the 'public interest' or indeed the 'national interest' is *not* served by criminal investigation, prosecution and punishment of the corporation.[19] The fear that investigation and prosecution of multinational corporations may precipitate corporate collapse and market meltdown (whether these claims are founded or not) encouraged regulatory uptake of DPA schemes in the US, UK, and Australia.[20]

A *Building Enforcement Pyramids*

The modern legal regulatory field for corporations is a complex mix of public, private, civil, and criminal and administrative laws, supplemented by 'enforced' self-regulation through voluntary industry codes of practice. Rather than regard the choice of regulatory response as a discretionary matter for each agency, regulatory theorists have demanded a more coordinated, integrated and principled approach. Ian Ayres and John Braithwaite, the architects of responsive regulation, melded insights from across the disciplines of criminology, economics, psychology and sociology to articulate an

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[17] On 20 April 2018, the Federal Government made a commitment to increase ASIC's powers and penalties in civil and criminal cases: Treasurer Scott Morrison and Kelly O'Dwyer MP, *Boosting Penalties to Protect Australian Consumers from Corporate and Financial Misconduct* (20 April 2018) <www.kmo.ministers.treasury.gov.au/media-release/039-2018/>.

[18] In October 2014, during a 'Q&A', Greg Medcraft 'observed the need to "lift the fear and suppress the greed" in order to deter white-collar criminals, and suggested the threat of going to jail could help achieve this': Commonwealth, Senate Economics Reference Committee, *'Lifting the Fear and Suppressing the Greed': Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia* (2017) 5 [1.18].

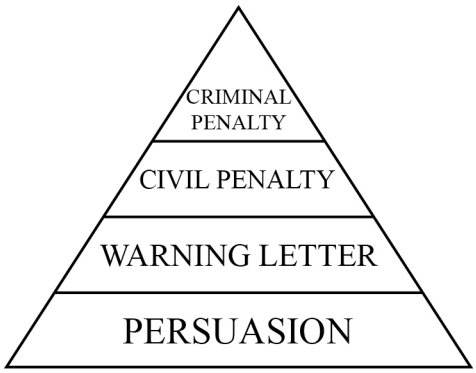
[19] Philip C Stenning, 'Discretion, Politics, and the Public Interest in "High-Profile" Criminal Investigations and Prosecutions' (2009) 24(3) *Canadian Journal of Law and Society* 337.

[20] The evidence substantiating this fear, based on lessons from the collapse of global accounting firm Arthur Anderson, is disputed: see Federico Mazzacuva, 'Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice' (2014) 78(3) *Journal of Criminal Law* 249, 250.

'enforcement pyramid'.[21] Drahos and Krygier summarised this responsive model as follows:

> Responsive regulation advanced the idea that regulators should understand the context and motivations of those whose conduct they were regulating and then choose a response based on that contextual understanding… [A] range of possible responses is arranged in sequential order, with dialogue and persuasion appearing at the base of the pyramid. As one travels up the pyramid, options carrying a greater degree of coerciveness become available to the regulator.[22]

There are many versions of the enforcement pyramid, though typically they share the following features:



Under the theory of responsive regulation, it was anticipated that agencies 'will be more able to speak softly when they carry big sticks'.[23] As we explore below, although policy-makers and regulatory agencies appear to embrace responsive regulation, the use of the criminal law in Australia has not been confined to the most serious and culpable forms of corporate conduct at the apex of the pyramid. Upon closer empirical scrutiny, prosecution is often directed to the lower (and less visible) tier of summary justice, where the process dispatches offenders efficiently and sentencing penalties are much lower. It should be noted that the downgrading of offence-severity may be the outcome of negotiation between the regulators and the corporations. Although negotiation is a pervasive feature of many criminal justice systems,[24] there are significant jurisdictional differences between processes of negotiation relating to choice of charges, and plea bargaining that involve judges 'sealing the deal' agreed upon by the parties, in which the defendant pleads guilty in exchange for agreed and lesser penalties. While judicial involvement in plea bargaining is accepted in the United States, it is rejected in the United Kingdom and Australia: it is a fundamental tenet that negotiations between the

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21 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

22 Peter Drahos and Martin Krygier, 'Regulation, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory — Foundations and Applications* (ANU Press, 2017) 1, 5.

23 John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2 *Current Issues in Criminal Justice* 59, 59. For a range of examples of the pyramid see Peter Mascini, 'Why Was the Enforcement Pyramid so Influential? And What Price Was Paid?' (2013) 7(1) *Regulation and Governance* 48.

24 For a recent study of the diverse practices in related common law jurisdictions see Carol Brook et al, 'A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States' (2016) 57(4) *William and Mary Law Review* 1147.

prosecution and defence cannot seek to fetter by prior agreement the independence of the sentencing court's discretion.[25]

In the middle of the pyramid, a wide range of administrative and civil penalties are available to regulators. These legal hybrids, which operate in the shadow of the criminal law, are commonly used to combat minor traffic violations, public nuisance and simple drug possession charges. The increasing resort to administrative processes that divert strict liability offences away from courts has been criticised as a form of 'technocratic justice',[26] which prioritises cost-effectiveness and efficiency over fairness, and risks de-moralisation of the criminal law;[27] fines and penalties for mere regulatory breaches that lack serious moral stigma may be viewed as simply the 'cost of doing business'.

Although 'next gen' cartel offences introduced in the UK and Australia may be viewed as an example of 'responsive regulation', equipping competition authorities with a more complete set of regulatory tools, the focus of competition law has been on toughening the apex of the pyramid, rather than developing 'hybrid' enforcement methods. This trend towards the criminalisation of cartel activity diverges from other fields of corporate regulation, such as foreign bribery, where the trend is firmly away from criminal prosecution in favour of diversionary administrative processes (such as DPAs) and civil settlements.[28] The lack of coherence between regulatory domains, even within the same jurisdiction, is difficult to explain or justify, since the underlying assumptions — namely, what motivates corporate legal compliance — are similar. In the next section, we contest some of the assumptions, commonly relied upon, that are used to justify corporate criminalisation, prosecution and punishment.

B *What Motivates Corporate Compliance: Contesting Rational Assumptions*

Criminalisation, prosecution and punishment of cartels have a strong moral signalling function, which the imposition of administrative and civil penalties necessarily lacks.[29] Since cartels by their nature are often difficult to detect, it is claimed that the consistent application of proportionate sanctions promotes deterrence, both general and specific. Effective and consistent enforcement is also necessary to shape the public's opinion and to increase support for the use of criminal sanctions, as well as to encourage offenders (individual and corporate) to report criminal misconduct.[30] Conversely, where under-enforcement or non-enforcement of cartel offences is prevalent, the regulator sends 'mixed messages' to potential rule-breakers: where the law is not enforced in serious cases, deterrence fails, and criminalisation loses its moral legitimacy.

Concern has been expressed by some economists that using fines alone to punish corporations for cartel conduct is inadequate from both utilitarian and normative

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[25] See *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58, 76 [47]; *R v Innospec Ltd* [2010] EW Misc 7 (EWCC).

[26] Pat O'Malley, 'Technocratic Justice in Australia' (1984) 2 *Law in Context* 31.

[27] See further Bronitt and McSherry, above n 7, 49–51, discussing the work of O'Malley, above n 26, on cannabis infringement notices.

[28] Mike Koehler, 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49(2) *University of California Davis Law Review* 497.

[29] For a study indicating that the public perceives fines as inappropriate methods of 'denouncing' unwanted conduct, see Voula Marinos, 'Equivalency and Interchangeability: The Unexamined Complexities of Reforming the Fine' (1997) 39(1) *Canadian Journal of Criminology* 27.

[30] See Gregory J Werden, Scott D Hammond and Belinda A Barnett 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions' [2011] 56(2) *The Antitrust Bulletin* 207, 215.

perspectives.[31] Fines often leave a 'deterrence gap', which occurs when the level of the penalty needed to produce effective deterrence is simply too high. As Wils estimates, 'the minimum level of fines required generally to deter price cartels and other antitrust offences of comparable profitability and ease of concealment would be of the order of 150 per cent of annual turnover in the products concerned by the violation'.[32] For most firms, such a level of fine would be impossible to meet, and would likely precipitate insolvency. While imposing a *de facto* corporate 'death sentence' may satisfy the urge of the zealous regulator to signal community condemnation of the offending behaviour, it may visit severe collateral economic and social costs upon innocent parties such as shareholders, employees and consumers.

Furthermore, the 'deterrence gap' arises because the target of the fine is organisational rather than individual. Assuming that the level of fine is sufficiently high to deter corporations, it does not follow that corporate leaders will always be able to control employees' behaviour, especially within large complex multinational corporate entities. Delrahim claims that individual corporate officials must be punishable, because they have selfish reasons for joining cartels, in terms of career advancement and financial gains reaped in the form of bonuses linked to increased corporate profitability;[33] in the *Graphite Electrodes* cartel, for instance, individuals 'pocketed millions of dollars as a direct result of their criminal activity'.[34] The prosecution and punishment of individuals complements rather than substitutes the penalties imposed upon corporations. Indeed, one promising strategy is to 'reverse-engineer' vicarious liability for corporate criminality: in cases where the corporation is found guilty of an offence, directors, boards and other senior executives who either 'authorised' or 'failed to prevent' the corporation's offence will be strictly liable unless they can establish a due diligence defence. Another approach is to criminalise a corporate 'failure to prevent' offence, an approach introduced by the *Bribery Act 2010* (UK) in relation to foreign bribery by employees or associated persons.[35] In both cases, the criminal law — both directed to the corporation and individual officeholders — is used to signal that corporate cultures that fail to take reasonable steps to prevent organisational criminality will be held criminally responsible.

Calling for zero tolerance of serious cartel activity and longer prison terms for individual offenders seeks to close the 'deterrence gap' by altering the cost-benefit calculation made by putative law-breakers. The prospect of prison for high status 'white-collar' criminals is said to have a more powerful effect than for other offenders:

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31 Wouter P J Wils, 'Is Criminalization of EU Competition Law the Answer?' in Katalin J Cseres, Maarten Pieter Schinkel, and Floris O W Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar, 2006) 60, 78. See also Werden, Hammond, and Barnett, above n 30.

32 Wils, above n 31, 78. In Australia, the ACCC has recently attributed the failure of penalties to act as a deterrent to the low penalties awarded by judges in comparison to other developed nations: Naaman Zhou, 'ACCC Says Corporate Fines Too Low and It Will Pursue Penalties in the "Hundreds of Millions"' *The Guardian* (online), 26 March 2018 <www.theguardian.com/australia-news/2018/mar/26/accc-says-corporate-fines-too-low-and-it-will-pursue-penalties-in-the-hundreds-of-millions?CMP=Share_iOSApp_Other>. See also OECD Working Group on Bribery in International Business Transactions, *Implementing the OECD Anti-Bribery Convention: Phase 4 Report: Australia* (2017).

33 Makan Delrahim, 'The Basics of a Successful Anti-Cartel Enforcement Program' (Speech delivered at the Seoul Competition Forum, Seoul, 20 April 2004).

34 Ibid.

35 In Australia, the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (currently before Parliament) proposes to introduce a 'failure to prevent foreign bribery' offence, modelled on the UK equivalent.

> For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman (sic), however, prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail.[36]

But are such common assumptions, which draw upon both the rational *and* emotional effects of punishment, correct? As Drahos and Krygier perceptively observed:

> Implicitly or explicitly, the use of regulatory tools and strategies by a regulator to alter the behaviour of regulatees is dominated by the assumption of rationality. The relevant binary is thought to be rational/irrational rather than rational/emotional.[37]

While researchers cast doubt on the legal, economic and regulatory assumptions about corporate rationality, upon which deterrence models are based, politically speaking, punishment remains the main (if not only) regulatory 'game in town'.

In the next section, we review whether the assumptions about economic rationality hold true for corporations as well as individuals, and whether we can better harness the regulatory potential of *emotional* strategies for motivating corporate compliance.

IV NAVIGATING NORMATIVE COMPLIANCE: REFORMING REGULATORY AND CORPORATE CULTURE

The foregoing discussion about regulation and compliance may be reduced to two propositions:

1. Compliance occurs because the benefits of complying outweigh the costs of non-compliance for the Individual and Corporation — the so-called 'rational actor' model.[38]
2. Compliance incurs costs outweighed by the benefits that accrue to the Individual and Corporation, but nevertheless compliance occurs because it is the 'right thing' to do — the so-called 'virtuous actor' model.

In relation to Proposition Two, Tom Tyler famously advanced his 'Theory of Procedural Justice' to explain why people obeyed the law. Drawing insights from social psychology, Tyler offered the following conclusion:

> People are more likely to obey rules if those rules accord with two important values: legitimacy and morality. Perhaps most centrally, people obey rules when they view those rules as being more legitimate. Further they obey them when the rules accord with their personal views about what is right and wrong.[39]

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[36] Donald I Baker et al, 'The Paper Label Sentences: Critique' (1977) 86 (4) *Yale Law Journal* 619, 630–31.

[37] Drahos and Krygier, above n 22, 9.

[38] Compliance is beneficial when the potential costs of non-compliance, in terms of punishment, outweigh the benefits; see discussion in Part III.

[39] Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990) 274; Kristina Murphy, 'Procedural Justice and its Role in Promoting Voluntary Compliance' in Peter Drahos (ed.), *Regulatory Theory — Foundations and Applications* (ANU Press, 2017) 43.

How do Tyler's insights about legitimacy and morality map onto corporate as opposed to individual compliance? Procedural justice researchers have found that higher levels of compliance are achieved when individuals are accorded fair treatment and respect, even where they disagree with the outcome of that process. Although procedural justice research is voluminous, the bulk of studies has focused on *individual* rather than corporate compliance, with researchers only recently turning attention to the corporate context.[40] A key implication of the latest research on corporate compliance upon cartel policy, and white-collar crime generally, is that legal and administrative processes that maximise fairness and respect for due process, especially where directed at the interactions with mid-ranking corporate officials, may have significant regulatory benefits.

The other facet of Tyler's theory is that compliance with legal rules is also motivated by the individual's moral attitude towards the particular legal rule or power. But is there such a thing as *corporate* morality that impinges upon *corporate* compliance? After all, it has long been observed that the corporation has 'neither a 'soul to damn, nor body to kick'.[41] Rather than determine corporate morality by aggregating the moral beliefs of individuals engaged with the corporation, theorists and business leaders have embraced the idea of 'Corporate Social Responsibility' (CSR), which has radically altered debates about corporate governance and the duty to respect human rights and promote social justice in the wider community.[42]

It is important however to recognise that the criminalisation process that labels certain corporate conduct as 'serious crime' has a generative impact upon corporate morality and the evolving scope of CSR. International and national policy efforts to label cartel activity by corporations or individuals as 'criminal', and not merely unlawful under the civil law, has a powerful normative effect that bears upon compliance. As Andreas Reindl argues, 'criminal law and criminal sanctions can have an "educational impact" by sending messages to members of society, which help to shape social norms'.[43] Such norm-shaping efforts promote voluntary compliance over the long term, which further reinforces and complements regulatory strategies based on deterrence. However, normative compliance has the advantage that 'desistance from crime' occurs not because individual and corporate citizens fear the pains of conviction (shame, stigma, loss of liberty and property), but because they independently believe that compliance with the law is the 'right thing to do'.[44]

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40 Procedural justice researchers, drawing on Tom Tyler's foundational research in psychology, have just begun to turn their attention to what motivates corporate, as opposed to individual compliance: see Melissa L Rorie et al, 'Examining Procedural Justice and Legitimacy in Corporate Offending and Beyond — Compliance Behavior: The Efficacy of Direct and Indirect Regulatory Interactions' (2018) 40(2) *Law and Policy* <https://doi-org.ezproxy.library.uq.edu.au/10.1111/lapo.12100>.

41 This observation is attributed to the eighteenth-century Baron Thurlow: John C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386.

42 Tom Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 529.

43 Andreas P Reindl, 'How Strong is the Case for Criminal Sanctions in Cartel Cases?' in Katalin J Cseres, Maarten Pieter Schinkel and Floris O W Vogelaar (eds), *Criminalisation of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar, 2006) 110, 116; 'Because of normative influences, people may voluntarily act against their self-interest. In other words, sufficiently strong normative influences create a "non-market space" within which people are not primarily motivated by … cost-benefit considerations': at 117.

44 Ibid 116.

In the next section, we identify a range of risks that compromise the legitimacy of the legal processes used to judge the legality of cartel activity, drawing insights from allied (but *not* aligned) fields of anti-corruption law.

A *Eroding Fairness: The Rise of Strict and Absolute Liability and Diminishing Due Process*

Criminal law theorists, superior court judges, and even legislative guidance on using criminal offences and penalties propose that no-fault liability — strict or absolute offences which dispense with the prosecution obligation to prove a fault element — should not be used for serious offences.[45] The unfairness of criminalising without proof of fault is often tempered by inclusion of defences, based on reasonable mistake of fact, or some version of due diligence. The regulatory temptation is to downgrade serious corporate crime to crimes of strict liability — dispensing with the obligation to prove, beyond reasonable doubt, knowledge or recklessness or dishonesty on the part of the controlling mind of the corporations, or inferring it from the much-vaunted, but little used, Australian 'corporate culture' provision.[46] The key advantage is that strict liability shifts the evidential burden to the defendant to prove, on the balance of probability, that rule breaking was not blameworthy.

This trend toward circumventing or diluting corporate fault is apparent in recent UK reforms to cartel offences — for conduct after 1 April 2014, the requirement of establishing dishonesty for the cartel offence was abolished, effectively creating a strict liability cartel offence.[47] Although this reform is expected to facilitate the task of prosecution, in our view the removal of dishonesty for reasons of efficacy may weaken regulatory efforts in the longer term.[48]

The introduction of the cartel offence in the UK, through the *Enterprise Act 2002* (UK), made it an offence for a person to dishonestly agree with one or more other persons to make or implement an anticompetitive agreement.[49] A landmark prosecution using the cartel offence, known as the *Marine Hoses* case,[50] was instituted in 2007, leading to the first criminal sanctions being applied to violations of competition law in the UK. The three executives, who pleaded guilty, received sentences varying between twenty and thirty months — though all three had previously pleaded guilty to these offences in the US. None of the subsequent prosecutions which went to jury trial, however, resulted in a guilty verdict.[51] This prosecution track-record provided support for those who doubt the value of cartel criminalisation, leading Jones and Williams to conclude:

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45 *He Kaw Teh v The Queen* (1985) 157 CLR 523. For legislative guidance, see Attorney-General's Department (Cth), 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 23; see also discussion in Bronitt and McSherry, above n 7, 224–228.

46 *Criminal Code Act 1995* (Cth) ss 12.3(2)(c) and (d).

47 *Enterprise and Regulatory Reform Act 2013* (UK) s 47.

48 A recent study of the policies of the Security Exchange Commission and the Department of Justice towards corporate misconduct reveals an over-reliance upon regulatory offences and failures to prosecute for offences proportionate to the moral wrongdoing of companies, which has led to a waning public confidence in corporate regulation generally: see Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon and Schuster, 2017).

49 *Enterprise Act 2002* (UK) s 188(1).

50 *R v Whittle & Others* [2008] EWCA Crim 2560.

51 *R v George and others* [2010] EWCA Crim 1148; Case reference: CE/9623/12 *Supply of galvanised steel tanks for water storage*.

> the [UK] Government has not engaged sufficiently with the question of why criminalization is necessary and appropriate at all for individual cartel behaviour. Further, that the Government has underestimated the substantive and practical problems arising from criminalization...[52]

One of the main perceived hurdles to successful prosecution was proving dishonesty; the statutory inclusion of dishonesty in the *Enterprise Act* had been intended to signal the gravity of the offence to perpetrators, the general public and the courts,[53] and herald the imposition of more severe penalties. But the use of dishonesty rarely if ever found its way into the jury room to provide the moral benchmark for assessing the criminality of cartel conduct — the English standard of dishonesty was notoriously hard to establish as the behaviour had to be dishonest according to the 'ordinary standards of reasonable and honest people', which is also *known* to be dishonest by the defendant.[54] Although dishonesty is no longer relevant to the cartel offence in the UK, it should be noted that the UK Supreme Court subsequently in *Ivey* simplified the general test of dishonesty; under the common law, the defendant need only satisfy the objective standard — a test which is much simpler for both juries and prosecutors to apply, and is consistent with the test of dishonesty applied in the civil law context.[55]

While this record may be demoralising for regulators and academics, the remedy should not be to further 'de-moralise' the cartel offence by lowering the prosecution burden by abolishing the fault element of dishonesty and placing the burden on the defence to prove the defendant's lack of blameworthiness. While introduced to facilitate prosecution, this strategy of de-moralisation of cartel criminality, *whether directed at both the individual and corporation*, weakens the moral force of any conviction obtained. There is no doubt that linking cartel conduct to dishonesty — defined as a departure from the wider community standards of honesty — signals that cartel conduct is not merely a breach of 'technical' regulations.

The choice between fault-based and strict liability for cartel activity is not mutually exclusive. Lessons may be drawn from the field of foreign bribery, where the primary offences in the UK and Australia require the prosecution to establish fault (intention or recklessness).[56] However, the primary offence is supplemented by an ancillary precursor offence of 'failure to prevent bribery of foreign public officials'.[57] In line with the enforcement pyramid described above, adopting this hierarchy of related offences, with graded penalties, provides prosecutors and regulators with an expanded range of legal options (in effect 'bargaining chips'), which may be relevant to charging and plea negotiation. This leads to a final point about bargaining in the shadow of the law, for all

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52 Alison Jones and Rebecca Williams, 'The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?' (2014) 2(1) *Journal of Antitrust Enforcement* 100, 108. According to the OFT365 report however, sixteen prosecutions per year were expected: Sir Anthony Hammond KCA QC and Roy Penrose OBE QPM, *Proposed Criminalisation of Cartels in the UK* (OFT 365, 2001) [3.6].

53 Hammond and Penrose, above n 52.

54 *R v Ghosh* [1982] QB 1053. The two-limb test of dishonesty in English law was not followed by the High Court of Australia, which held that under the common law, dishonesty was an objective fault element determined by the standards of reasonable and honest people: *Peters v The Queen* (1998) 192 CLR 493. The UK Supreme Court has recently refused to follow *Ghosh*, applying a single objective test of dishonesty: *Ivey v Genting Casinos* [2017] UKSC 67.

55 *Ivey v Genting Casinos* [2017] UKSC 67 [63].

56 *Bribery Act 2010* (UK) s 6; *Criminal Code Act 1995* (Cth) s 70.2.

57 Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) cl 70.5A (currently before the Australian Parliament). This proposed offence is modelled on the *Bribery Act 2010* (UK) s 7.

the reasons outlined above relating to legitimacy, that bargains struck over prosecution and penalty be transparent, fair and accountable.

B *To Prosecute or Not to Prosecute? Questioning Unjust Bargains in the Public Interest*

Decisions to prosecute individuals or corporations are determined by two considerations: sufficiency of evidence (leading to a reasonable prospect of conviction) and whether the prosecution is in the public interest. The prosecutor thus has a discretion not to prosecute, notwithstanding the sufficiency of evidence. The factors relevant to the public interest are detailed in the administrative guidance published by the DPP or equivalent enforcement agency.[58]

The guidance provided varies according to the type of corporate crime. For foreign bribery offences in the UK, there is offence-specific guidance, issued by the Serious Fraud Office and Crown Prosecution Service, outlining how the public interest will be assessed.[59] There is also guidance on the application of the public interest governing the decision to negotiate and approve a DPA. The DPA scheme was introduced in the UK by legislation in 2013, which defines the process and relevant public interest criteria relating to the negotiation and approval of a DPA.[60] There is also published guidance addressed to corporations to promote self-reporting of corporate crime: under the DPA scheme, the corporation is encouraged to self-report and cooperate with the agency, including to assist with prosecution of individual offenders, in exchange for the deferral of prosecution; under the leniency scheme, the individual or corporation is encouraged to self-report and cooperate with the agency, in exchange for immunity or a less severe penalty.[61] In relation to cartel policy, granting leniency in some cases is considered to be an essential aspect of the regulatory system.[62]

Under the responsive regulatory model above, the decision not to prosecute, to grant leniency or to negotiate a DPA must be strategically selective and serve the public interest. To counter claims of 'impunity for sale', the regulatory agency must prioritise

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58 For the CDPP in Australia, see the Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process,* 5–6 [2.10] <www.cdpp.gov.au/sites/g/files/net2061/f/Prosecution-Policy-of-the-Commonwealth_0.pdf>. In the UK, these principles are set out in the Crown Prosecution Service (CPS), *Code for Crown Prosecutors* (January 2013) <www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf>. The way in which the CMA applies the Code to cartel conduct is described in Competition and Markets Authority, *Cartel Offence Prosecution Guidance'* (CMA9) (March 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9__Cartel_Offence_Prosecution_Guidance.pdf>.

59 See Ministry of Justice (UK), *Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions* (2011).

60 *Crime and Courts Act 2013* (UK) Schedule 17. See Serious Fraud Office/Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (2013) <https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf>.

61 For the Australian guidelines on 'self-reporting' and factors relevant to the 'public interest', see the AFP and CDPP 'Best Practice Guidelines: Self-Reporting of Foreign Bribery and Related Offending by Corporations' (8 December 2017) 5 <https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf>.

62 In 2008, then Chairman of the ACCC, Graeme Samuel, described the immunity policy as 'absolutely vital' to its enforcement efforts: Elisabeth Sexton, 'To Catch a Cartel' *The Sydney Morning Herald* (online), 21 March 2008 <https://www.smh.com.au/business/to-catch-a-cartel-20080320-20r0.html>.

for prosecution the most egregious breaches of the criminal law (in terms of gravity of harm and culpability) rather than simply pursue less serious matters in which it is easier to secure guilty pleas. While focusing on 'low hanging fruit' allows easy wins for regulators and is important for increasing public awareness, over time it may lead to unwarranted diversion or downgrading of charges. This prosecution strategy denies the importance of the apex of the enforcement pyramid. A related example is the director disqualification order for cartel offences in the UK. The Competition and Markets Authority (CMA) has had the power to seek the disqualification of an individual from acting as a company director since 2003.[63] It used this power for the first time in December 2016, disqualifying Daniel Aston, managing director of the online poster supplier Trod Ltd, to act as a director of any UK company for 5 years.[64] This was an arguably minor case, but the CMA used it to prove that it is willing and able to employ this remedy when needed. The Executive Director for Enforcement at the CMA emphasised that 'the business community should be clear that the CMA will continue to look at the conduct of directors of companies that have broken competition law, and, where appropriate, we are absolutely prepared to use this power again'.[65] A similar tendency towards selective anti-corruption prosecutions in the US led one commentator recently to label government enforcement agencies 'The Chickenshit Club' because of the competitive culture of lawyers drawn from the elite law schools, who fear bringing high stakes cases that risk blemishing their enforcement record.[66] The impunity granted to large multinational corporations may also arise from the 'regulatory capture', a phenomenon where professionals working for regulatory agencies *and* regulated entities (sharing similar backgrounds, values and interests) form cosy 'working' relationships to facilitate negotiation. With increased professional mobility from public sector positions to highly paid corporate advising roles, there is a risk that private and personal interests may distort how the public interest is assessed.[67]

As Tyler established above, the legitimacy of legal rules and the process of enforcement is vitally important for compliance, and must not be squandered.[68] Legitimacy can be promoted through ensuring transparency in decision-making, particularly in relation to pivotal decisions such as the decision to pursue civil measures or settlements rather than criminal action. Public confidence in the process requires that the relevant public interest factors are published, in either administrative or statutory form, and that there is an independent person (such as a judge or retired judge) who assesses whether the public interest threshold is satisfied. This 'checks and balances' approach has been applied in the UK and Australian (proposed) DPA schemes. In the

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63 *Enterprise Act 2002* (UK) s 204.

64 Competition and Markets Authority, *Online Sales of Posters and Frames: Director Disqualifications* (1 December 2016) Competition and Markets Authority Cases <www.gov.uk/cma-cases/online-sales-of-posters-and-frames-director-disqualification>.

65 Competition and Markets Authority, *CMA secures director disqualification for competition law breach* (1 December 2016) Competition Act and Cartels <www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach>.

66 Eisinger, above n 48.

67 For this reason, the UK DPA scheme requires that the public interest warranting negotiation and approval is subject to *independent* assessment by a judge. A similar approach has been proposed for the DPA scheme in Australia, though for constitutional reasons relating to separation of powers, the approving officer is a retired judge. By contrast the United States DPA scheme is not subject to any independent judicial approval.

68 Under-enforcement and over-enforcement 'raise questions about the fairness of antitrust enforcement and create doubts about its political legitimacy': William E Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from US Experience' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart, 2011), 55.

UK, there have been four DPAs granted, and the terms of the three agreements resolved are now publicly available.[69]

In relation to cartel enforcement in the UK, by contrast, there is much less transparency in decision-making. For instance, the CMA investigated suspected cartel activity in the supply of precast concrete drainage products under section 188(1) of the *Enterprise Act 2002* (UK). On 15 September 2017, having pleaded guilty to one count under section 188, Barry Kenneth Cooper was sentenced to 2 years' imprisonment, suspended for 2 years and was disqualified from acting as a company director for 7 years. What is striking is that the CMA did not explain why criminal, and not civil, enforcement was warranted. Furthermore, Cooper was the only individual prosecuted; the CMA did not state that he was particularly blameworthy; it appears that there was simply more evidence against him,[70] and after his guilty plea, the value of further prosecutions, in terms of deterrent messaging, had decreased. The pursuit of Cooper is emblematic of the UK's failure to embrace 'responsive regulation' in relation to cartels, and explains why there are on-going legitimacy concerns expressed in relation to cartel criminalisation and the powers of the OFT/CMA. As one recent commentator concluded:

> [i]t appears clear that the OFT became overly concerned, perhaps blinded, with demonstrating the severity of sanction to achieve general deterrence, and lost sight of the need to ensure the fairness, and appropriateness of the sanctions sought in each and every case.[71]

Our final point relates to how the decision to withhold (otherwise warranted) prosecution or punishment (through DPA or leniency schemes) should not overlook the emotional aspects that motivate compliance. It is vitally important that through the process of negotiating a DPA, civil penalty or settlement, corporations take responsibility for wrongdoing, and promise to make amends for the harms caused and to change behaviour in the future. While penalties and compensation speak to denouncing and redressing harm — whether caused to the state, public and victims — these processes must cultivate a sense of *corporate* shame. In this respect, criminology has drawn distinctions between different types of shame: discrediting the power of negative shame (stigmatising/status-degrading) and promoting the power of positive shame (reintegrative/restorative). The latter form of shame has reshaped a wide range of diversionary process in criminal justice systems over the past 30 years. There is good reason to think that harnessing shame in this way has significant potential for shaping corporate culture — indeed, it should be recalled that Braithwaite's formative work in the late 1980s on shaming drew insights from studying responses to wrongdoing, including corporate crime, in Japan. This theory has several implications for criminality within corporations. As Braithwaite observed:

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69 Serious Fraud Office (UK), *Deferred Prosecution Agreements* (2018) <www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.

70 Competition and Markets Authority, *Supply of Precast Concrete Drainage Products: Criminal Investigation* (7 March 2016) <www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry>.

71 Jonathan Galloway, 'Securing the Legitimacy of Individual Sanctions in UK Competition Law' (2017) 40 (1) *World Competition Law and Economics Review* 121, 143.

> When an individual is shamed in Japan, the shame is often born by the collectivity to which the individual belongs as well - the family, the company, the school - particularly by the titular head of the collectivity.[72]

The antithesis of restorative shame is shame used to stigmatise the individual 'rotten apple', in other words, stigmatic shame, which operates in fact to insulate the collectivity from responsibility. But according to the theory above, shame can be diffused across the corporation, its management and corporate culture. The positive model of shame operates at two levels to effect social control. First, it deters criminal behaviour because social approval of significant others is something we do not like to lose. Second, and more importantly, both shaming and repentance build consciences, which internally deter criminal behaviour even in the absence of any external shaming associated with an offense.[73]

In light of this insight, regulation — whether based on criminal or civil measures — should be focused on mobilising an intrinsic sense of corporate shame, rather than simply engaging in utilitarian modelling exercises that seek to determine the extrinsic optimum penalty most likely to deter rule-breaking, or the reward most likely to promote rule-observance. There is some evidence to support this view: a systematic review of available empirical research found that legal interventions (such as penalties) had only a 'small deterrent effect' on corporate behaviour.[74] Although more research was needed to understand why corporations obey the law, it seems that other factors, including opinions of corporate peers, play a significant role in attitudes toward wrongdoing. The likelihood of detection, prosecution and severity of punishment for breaches of cartel laws may be part of the picture, but they are not the only forces operating to motivate corporate compliance. [75]

At present, leniency policies are directed towards promoting efficient outcomes for investigations — incentivising the institutional self-interest of corporations and senior executives to 'dob in' their fellow cartel conspirators. Like whistle-blowers and employees who bring relator actions (known as *Qui Tam* actions), there may be some who are virtuous — the private individuals, who are minded in the public interest, to rooting out illegal and unethical conduct within their organisations. Then there are other individuals, who earlier may have been complicit in the illegality, who have simply identified another means of enriching themselves. The same is true of corporations seeking 'leniency' for cartel conduct — some will be motivated to move more quickly than co-conspirators by the prospect of significant penalty mitigation and avoid the direct and indirect costs that flow from being caught! Being a cooperative leniency applicant is more likely to be a pragmatic and strategic corporate decision, than a genuine act of contrition or the result of a changed moral outlook. It is important to rethink

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72 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 63. This version of shame can be distinguished from shame strategies applied to white-collar criminals in the US, which often take the form of status degradation ceremonies. These involve highly publicised arrests involving large teams of police handcuffing defendants, who appear subsequently in legal proceedings in Gitmo-orange prison jumpsuits. See John Braithwaite and Peter Drahos, 'Zero Tolerance, Naming and Shaming: Is There a Case for it with Crimes of the Powerful?' (2002) 35(3) *Australian and New Zealand Journal of Criminology* 269.

73 Braithwaite, above n 72, 75.

74 Sally Simpson et al, *Corporate Crime Deterrence* (The Campbell Collaboration, 1 May 2014) <www.campbellcollaboration.org/library/corporate-crime-deterrence-systematic-review.html >.

75 Surveys have found that moral evaluations are taken into consideration when weighing the cost and benefit of corporate crime: see Raymond Paternoster and Sally Simpson, 'Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime' (1996) 30(3) *Law and Society Review* 549.

leniency schemes so that they promote and reward changed moral outlooks, and include conditions which require individuals and corporations to undertake education programs about the harms caused by cartels.

V CONCLUSION

Penalties — whether characterised as civil, criminal or administrative — can either promote or hinder desired changes to the conduct of corporations and individuals. But the motivation behind making these payments is crucial: penalties paid simply to protect the 'bottom-line' or 'shareholder value' may produce the wrong type of utilitarian calculation — if the reward is big enough, corporations will run the risk of detection, knowing that any costs imposed by regulators can be contained, distributed and absorbed across segmented markets. Damage to investor confidence is often short term, and corporate balance sheets can and often do bounce-back quickly, even after 'unprecedented' penalties and compensation settlements for their gross and persistent breaches of competition, corporations and environmental laws.[76]

This article has critically examined a wide variety of regulatory tools and strategies applied to motivate compliance, both individual and corporate. While a nuanced and contextual approach to different regulatory domains may be needed, there are general insights, drawn from responsive regulation, which can apply across these fields. Moving beyond policy demands for zero tolerance and no-fault liability for 'crimes of the powerful' is vital (whether perpetrated by individuals or corporations). As procedural justice research reveals, legitimacy rests upon the moral and emotional dimensions of legal compliance. While it is important to retain criminalisation and punishment for the most *serious* cartel offences, the discretion not to prosecute and punish needs careful and transparent articulation — determining where the public interest precisely lies — balancing corporate responsibility against corporate impunity — and will remain the key future challenge for regulators, judges and legal policymakers.

[76] Volkswagen's successful restructuring following the Dieselgate emissions scandal in September 2015 is one example. Although it was predicted that the scandal would have a dire impact on global trade and national economies, the settlement led to major reform at VW and improved profits the following year: Patrick McGee, 'VW shakes off diesel scandal to hit sales record in 2017' *Financial Times* (18 January 2018).