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REINTEGRATIVE SHAMING IN CORPORATE SENTENCING

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INTRODUCTION

> [When it comes to sentencing corporations or white collar offenders individually,] contemporary policies . . . fail to shame or to show community disapproval to any degree.[1]
>
> Shaming punishments . . . unambiguously express moral disapprobation.[2]

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1. TONY G. POVEDA, RETHINKING WHITE-COLLAR CRIME 150 (1994).

2. Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2484 (1997).

> [S]hame [also] works wonders in leading a corporation to shape up after its wrongdoing has been exposed to public condemnation.[3]

Under the Organizational Sentencing Guidelines,[4] when a corporation is sentenced for violations of federal law, the sentencing judge may require the chief executive officer (CEO) to appear in court personally to receive the corporation's sentence.[5] This compelled court appearance apparently has three purposes: to impress upon the CEO the gravity of the corporation's wrongdoing; to signify to the community that the leadership of the corporation has accepted responsibility for the crime; and to extract some indication that the corporation intends to comply with the law in the future.

The origin of this provision—I'll call it the "corporate icon" provision—is thought to be the legacy of federal district Judge Jack E. Tanner, and is based on his conduct when he came to dispose of a case involving Pennwalt Corporation in 1989. Charged with spilling 75,000 gallons of cancer-causing chemicals into Washington's Puget Sound, Pennwalt had agreed to plead guilty to a felony and pay $1.1 million in fines.[6]

When Pennwalt's lawyers appeared before him with the plea agreement, Judge Tanner turned them away, ordering them not to return unless they brought Pennwalt's "top man" with them. "Who is the corporation? I think the public is entitled to know who's responsible," barked Tanner.[7] When the lawyers returned with three top-level local Pennwalt executives, Tanner again refused the plea. Only when CEO Edwin E. Tuttle appeared in court, flying in from across the country, did Tanner accept the company's guilty plea. He did so, however, only after questioning Tuttle carefully on how the chemical spill could have happened and how (in light of Pennwalt's imminent sale to an overseas acquirer) the people of the state of Washington could be assured that nothing so destructive could ever happen again. Tuttle, composed and courteous, responded to all of Judge Tanner's questions. Later, Tanner recalled, "the only way to get their attention [was] to make the top guy responsible."[8]

Until recently, few other federal judges have thought to employ this

3. Gilbert Geis & Joseph Demento, *Should We Prosecute Corporations and/or Individuals?*, *in* CORPORATE CRIME: CONTEMPORARY DEBATES 79 (Frank Pearce & Laureen Snider eds., 1995) (summarizing the results of a 1983 study of the impact of adverse publicity on corporate wrongdoers and their executives).

4. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1998) [hereinafter U.S.S.G.].

5. *See* U.S.S.G. § 8C2.5, commentary (n. 14).

6. *See* Timothy Egan, *Putting a Face on Corporate Crime*, N.Y. TIMES, July 14, 1989, at B8.

7. Robert G. Morvillo, *Corporate Plea Bargain*, N.Y. L. J., Feb. 6, 1990, at 3.

8. Emmett Watson, *Judge Jack Tanner Wrestled Brando and Racism*, SEATTLE TIMES, Jan. 27, 1991, at B1.

emblematic approach to the corporate hierarchy, and the exceptions to this rule have been controversial. In 1984, federal district Judge Miles Lord summoned three top executives from A.H. Robins, Inc., including the company's CEO and general counsel, to his Minneapolis courtroom to denounce the company's conduct in the Dalkon Shield case.[9] In 1992, federal district Judge H. Lee Sarokin personally castigated top executives in the tobacco industry for their "concealment and disinformation" in the course of pre-trial discovery.[10] In 1995, federal district Judge John S. Martin, Jr., confronted the Chairman of the Board of Consolidated Edison Company in his courtroom in connection with the company's failure to report environmental violations.[11]

For the most part, however, judges historically have treated corporate chief executives as separate and distinct creatures from the corporations they oversee. CEOs are thus safely immune, except in singularly egregious cases, from any thought of personal liability, or, indeed, from any need ever to appear at the courthouse. This is particularly true in the case of publicly-held companies, whose CEOs are typically shielded by their lawyers from any litigation entanglement.[12]

By employing the corporate icon provision, however, a federal sentencing judge can now insist that a CEO become more personally engaged in the company's criminal litigation. This personal engagement serves several critical law enforcement goals. First, by involving a high-level executive in the sentencing process, the corporate icon proceeding com-

9. "Your company, without warning to women, invaded their bodies by the millions and caused them injuries by the thousands," Judge Lord said in prepared remarks. "Your company in the face of overwhelming evidence denies its guilt and continues its monstrous mischief. You have taken the bottom line as your guiding beacon and the low road as your route. This is corporate irresponsibility at its meanest," Lord declared. *Judge Lambastes Company in Suit on Intrauterine Device*, N.Y. TIMES, Mar. 2, 1984, at B16. For this action, Judge Lord was threatened with censure and later was found by the Court of Appeals to have conducted himself in a "highly injudicious" manner and to have violated the executives' due process rights. *See* Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1191-92 (8th Cir. 1984). Lord's reprimand of the executives was consequently stricken from the official record. *See id.* at 1194.

10. Haines v. Liggett Group Inc., 140 F.R.D. 681, 683 (D.N.J. 1992), *vacated*, 975 F.2d 81 (3d Cir. 1992). Judge Sarokin was ultimately disqualified from the case on the grounds that his remarks had given the appearance of prejudice. *See id.* at 98.

11. *See* Don Van Natta, Jr., *Con Ed Cited in Intimidation of Employees*, N.Y. TIMES, Dec. 19, 1995, at B1.

12. In a study of juries who heard 36 cases involving corporate defendants, investigators noted that "the corporation [was] often a 'ghost' in the courtroom. In our study, the attorney was often the only representative of the business in court. In most of the cases in the sample, the CEOs stayed away. Jurors often wondered where they were." Valerie Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85, 100 (1992).

mands the attention of uppermost corporate management. The criminal proceeding is no longer a matter entrusted solely to lawyers. Second, if the company's control system has been deficient, thus permitting the criminal activity to occur, the icon proceeding may highlight the deficiencies and publicly commit the CEO to improvement. Third, if the company's top managers have been complicit in the crime or if the company has sought to thwart the government's investigation of the crime, those facts, too, may be brought to light in the icon proceeding.[13] The CEO can then be required to answer for the corporation's conduct.

In short, by requiring a CEO's presence in the courtroom at sentencing, a federal judge can both confront the corporation in a manner that is likely to result in some meaningful effort toward remediation, and, at the same time, signal to the public that a person—rather than some faceless entity—has acknowledged the company's wrongdoing.

I suggest, however, that the corporate icon provision, as it is now written, does not go far enough toward involving top-level decisionmakers in the corporate sentencing process. In devising the corporate icon provision, the Sentencing Commission underestimated its ability to command top management's attention and the importance of doing so as a means of facilitating compliance with the law.

The existing corporate icon provision is deficient in three respects. First, the corporate icon proceeding is discretionary for the sentencing judge. Second, the sentencing judge may require the CEO's presence only when the corporation has voluntarily sought a reduction in its sentence by "demonstrating recognition and affirmative acceptance of responsibility" for its crime.[14] Typically, acceptance of responsibility requires the corporation to enter a guilty plea.[15] Consequently, corporations that defend against criminal charges and later lose their cases are not subject to the corporate icon proceeding. Third, the corporate icon proceeding involves the CEO, but excludes the corporation's directors.

What follows is a simple proposal. The Organizational Sentencing Guidelines should be amended to provide that: (1) In all cases of criminal sentencing, whether or not pursuant to a claim of "acceptance of responsibility," the CEO should be required to appear in person to receive the cor-

13. Other sanctions may also apply to such circumstances. *See* U.S.S.G. § 8C2.5.

14. U.S.S.G. § 8C2.5 n.14.

15. *See infra* note 68 and accompanying text. The percentage of corporations actually receiving acceptance of responsibility credit in criminal cases since the Organizational Sentencing Guidelines were adopted has been 13% (1991-1993); 24% (1994); 22% (1995); 26% (1996); and 24% (1997). *See* U. S. SENTENCING COMM'N, 1993, 1994, 1995 1996, and 1997 ANN. REPS. (1993-1997).

poration's sentence; and (2) in appropriate cases, the sentencing judge should have the option of compelling the corporation's board of directors to appear in open court (either together with, or separately from, the CEO), to acknowledge the corporation's wrongdoing and to commit the company to future compliance with the law.

Requiring the CEO to appear in all cases, including those in which the corporation has denied responsibility, will ensure not only that every CEO whose company has been found guilty of committing a crime will be compelled to give personal attention to the behavior that gave rise to that crime, but also that the community's need for some form of retributive ceremony has been satisfied. Requiring the board of directors, as well as the CEO, to appear at a corporation's sentencing is likely to achieve two additional important results. It will personalize and thus drive home to directors the reality of their fiduciary responsibilities. This will force them to recognize that corporate misconduct is, ultimately, a reflection of their choices and actions at the board level, and not merely the choices and actions of company employees. Also, it will enhance the deterrent impact of the corporation's sentence.

The discretionary sentencing proceeding for directors—for now, I'll call it the directors' woodshed proceeding—and the mandatory corporate icon proceeding that I propose each are designed to meet the criticism of the current sentencing system that "[it] has failed to provide adequate means for ensuring that corporate defendants are sentenced in a manner directly geared to achieving internal accountability."[16]

I. OVERVIEW

This Article will unfold in seven parts. Part II begins with a brief exploration of the role of shame in corporate sentencing. Recent criminological studies have recognized that individual shame can be a powerful motivator, especially as applied to highly-placed executives, and can have a significant deterrent impact on both corporate executives and the companies they oversee.[17] Both the mandatory corporate icon proceeding and the discretionary directors' woodshed proceeding are premised, in part, on the findings embodied in those studies.

Shame can take many forms, however. Shame that merely stigmatizes or humiliates a corporate leader may not achieve the desired result.

16. BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 9 (1993).

17. *See infra* Parts II.A-B.

What must be sought instead is what criminologist John Braithwaite has called "reintegrative" shaming, a process by which a wrongdoer admits his misconduct, recognizes its social significance, pledges corrective action, and is welcomed back ("reintegrated") into the community of law-abiding citizens.[18] Reintegrative shaming is said to be particularly well-suited for use in sentencing white collar defendants.[19] I will argue that it is even more constructive in the context of corporate crime.

I will then turn to the specifics of the icon and woodshed proposals. Part III argues that, as a result of the CEO's inevitable influence over a corporation's culture and the special and symbolic public roles that CEOs typically play, the corporate icon proceeding should be mandatory in all criminal cases. Part IV discusses how a sentencing judge ought to orchestrate an icon proceeding.

Part V examines the role the board of directors plays in corporate criminality, and the processes by which directors, as distinguished from CEOs, can either stimulate or minimize criminality within the firms they oversee. The fact is, corporate directors are empowered to, and have available many tools with which to, shape the corporate culture and thereby influence the likelihood that corporate crime will occur. Where directors fail to employ those tools effectively, they may violate their fundamental duty of care. This, at least, was the conclusion of the Delaware Chancery Court in its opinion in *In re Caremark.*[20] It is therefore appropriate that directors, no less than a CEO, be required to play a role in the corporate sentencing process, or at the least be required to do so where the sentencing judge concludes it is appropriate.

Part VI describes the factors to be taken into account by the judge in determining whether a woodshed proceeding should be convened. This Part, in addition, will consider the ways in which, in the course of the proceeding, the judge can explore systemic failures and extract a board-level commitment to organizational change. Part VII considers some likely criticisms of both the mandatory corporate icon proceeding and the discretionary directors' woodshed proceeding. I will conclude with some suggested language by which both the icon proceeding and the woodshed proceeding may be implemented.

18. *See generally* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).
19. *See id.* at 72.
20. In re Caremark Int'l., Inc. Derivative Litigation, 698 A.2d 959, 970 (Del. Ch. 1996).

II. SHAME AS A DETERRENT IN THE CORPORATE SENTENCING PROCESS

The existing corporate icon proceeding is one of a number of "shaming rituals"[21] currently scattered throughout the Sentencing Guidelines.[22] Both the icon proceeding and the woodshed proceeding I propose are based on the notion that an informal sanction—such as the shame that accompanies a compelled appearance before the sentencing court—may be every bit as significant a deterrent as more formal sanctions, such as imprisonment or the imposition of monetary fines.[23] This may be an unproven assumption, but increasing evidence suggests that well-crafted shaming sanctions—especially as applied to top-level corporate executives—can serve as an effective influence on individual and corporate behavior.

A. SHAME AND THE LEADERSHIP CLASS

The population of top corporate executives in America can be characterized as living in an exclusive small town. As Edward Rock has pointed out, "the senior managers and directors of large, publicly held corporations, and the lawyers who advise them—form a surprisingly small and close-knit community. The directors of large, publicly held corporations number roughly four to five thousand."[24] In such a community, information travels, impressions are formed and hardened, loyalties are tested, and reputations are built and dismantled, extremely efficiently, often with just a few phone calls. In a rarefied community such as this, the role of reputation is significant. CEOs after all, and the directors with whom they work, are status-conscious creatures. The reason many of them

21. The concept of a shaming ritual is derived from anthropological studies. *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1906-15 (1991) (describing shaming rituals from other cultures); WILLIAM IAN MILLER, HUMILIATION AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 161-65 (1993) (describing the universal characteristics of shaming rituals).

22. The most visible of the shaming sanctions in the Organizational Sentencing Guidelines is the "publicity sanction," which permits a sentencing court to require a corporation to publish an advertisement detailing the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps to be taken to prevent the recurrence of similar offenses. *See* U.S.S.G. § 8D1.4(a). *See also* Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines,* 65 S. CAL. L. REV. 2387 (1992) (discussing the publicity sanction).

23. *See generally* GARY S. GREEN, OCCUPATIONAL CRIME 232 (1990) ("Informal sanctions can often be more feared than formally imposed conviction or punishment.").

24. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013 (1997).

seek high corporate office or serve on corporate boards in the first place often has to do with visibility and personal prestige.[25]

Successful executives typically conduct themselves so as to enhance the perception that they are wise and all-knowing, that their judgment is valued by others, and that they move in influential public circles. They serve on charitable boards, for example, and participate as distinguished speakers at university functions. Some participate in politics; others write autobiographies. Many subject themselves willingly to the hagiography of the business press.[26] Challenges to these men's and women's reputations consequently are not taken lightly—and events that cast them or their business skills in an unflattering light may have a particularly dramatic impact upon them.

For example, studies have shown that publicity about corporate criminal behavior with which executives have had no personal association may nevertheless "embarrass them and their families tremendously."[27] It may cause them to feel "tainted" among their family members and in their local communities.[28] It may also cause them to become anxious about their chances for advancement and future prestigious assignments.[29]

When the executive has played some role in the company's wrongdoing, or when the wrongdoing can be attributed to her failure as a leader, the fear of exposure and accompanying shame may take on an even greater significance. A number of recent studies have suggested that, especially for top-level managers and members of their social class, fear of being shamed before their family members and peers may even exceed the fear of criminal prosecution, exposure to civil lawsuits, or other forms of officially imposed sanctions.[30] For these individuals, "in the rational weighing

25. *See* JAY W. LORSCH & ELIZABETH MACIVER, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS 26 (1989).

26. *See, e.g.*, *The Top 25 Executives of the Year*, BUS. WK., Jan. 11, 1999, at 58.

27. GREEN, *supra* note 23, at 140.

28. *See* Geis & Demento, *supra* note 3, at 79-80 (Brent Fisse and John Braithwaite, in their interviews with American and Australian corporate executives whose companies had been criminally sanctioned, found that the executives felt personally "tainted." They recounted stories of "scorn and ostracism heaped on them and their families by their neighbours.").

29. *See* John C. Coffee, Jr., *"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 412 (1981) (noting that many people believe, perhaps incorrectly, that "managers identified publicly as having been involved in corporate misconduct will be disadvantaged in their opportunities for advancement").

30. *See, e.g.*, BRAITHWAITE, *supra* note 18, at 69 ("It would seem that sanctions imposed by relatives, friends or a personally relevant collectivity have more effect on criminal behavior than sanctions imposed by a remote legal authority."); Sally S. Simpson, *Corporate-Crime Deterrence and Corporate Control-Policies: Views from the Inside*, *in* WHITE-COLLAR CRIME RECONSIDERED 298 (Kip Schlegel & David Weisburd eds., 1992) (corporate managers regard the risk of informal sanc-

of the costs and benefits of crime, loss of respect weighs more heavily . . . than formal punishment."[31] This is why shaming rituals, such as the corporate icon proceeding or the directors' woodshed proceeding, are likely to be effective.

High status business leaders may be especially susceptible to shaming rituals. "They are the people most likely to worry about public appearances, to be vulnerable to moralistic or judgmental social groups, to defer to authority and to be relatively conventional in attitudes toward 'law and order.'"[32] They are also the people most likely to be concerned about maintaining the appearance of business competence and professional accomplishment.

Also, because they regard themselves as participants in a "culture of honor," they are especially sensitive to the opinions of their peers.[33] Dan Kahan has described the way in which corporate executives distinguish between public disgrace and disgrace in the eyes of other corporate elites:

> Consider, for example, a corporate executive who is deciding whether to bribe a public official or to dump toxic wastes. He might not care that much about what an auto mechanic in a remote part of town will think of him if he is caught and word of his offense is broadcast to the community at large. But he probably cares a lot about what his family, his colleagues, his firm's customers, his neighbors, and even the members of his health club think.[34]

Edward Rock has even further imagined the degree of an executive's distress upon seeing his conduct described in print:

> Consider how Evans, Reilly, or Wasserstein felt when reading these opinions. Consider how the members of the special committee, identified by name in the opinion, must have felt to be characterized as "torpid, if not supine" by the Delaware Supreme Court, combined with the equally strong terms used by the chancery court. Consider what it

tions as more influential in their decision making than the risk of formal sanctions).

31. BRAITHWAITE, *supra* note 18, at 70.

32. Massaro, *supra* note 21, at 1934.

33. *See* MILLER, *supra* note 21, at 117-18 ("In a culture of honor one can be shamed only if one has honor, if one is a member of a group competing for honor . . . . Shame depends on the failure to measure up to the external standard imposed by the honor group.").

34. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 643 (1996). Though Kahan's description may sound frivolous, the degree of shame one can experience in a business context should not be underestimated. Shaming sanctions work because, whether intentionally or otherwise, they tend to uncover deep seeded feelings of personal frailty. *See* Stephen G. Tibbetts, *Shame and Rational Choice in Offending Decisions*, 24 CRIM. JUST. & BEHAV. 234, 236 (1997). Shame can even give rise to "fears of abandonment" or lead to a "crippling diminishment of self-esteem." Kahan, *supra*, at 638.

> must be like to live with such a public shaming, to see in acquaintances' eyes the unasked question, "How could you have stood by and allowed this to happen?" Imagine how other managers and directors, when they read or heard about these opinions, felt about the prospect of being similarly pilloried. Anecdotal evidence confirms what we all would expect: No one, including directors and officers of Delaware corporations, Wall Street investment bankers, and Wall Street lawyers, enjoys being held up to this sort of public condemnation.[35]

In short, shaming sanctions—especially those designed to be communicated to the "small town" comprised of family members, business colleagues, and business peers—are likely to be effective in capturing the attention of high-level corporate executives.[36] As we will see in the next section, shaming sanctions are also likely to be effective in changing corporate behavior.

B. SHAME AS A PRACTICAL DETERRENT

The power of the icon and woodshed proceedings is the power to take men and women who typically think of themselves as beyond public criticism and censure, and subject them to a very discomfiting moment of public exposure in the context of a serious criminal prosecution. The result is what one commentator has called a "reputational rub-off" effect.[37] I prefer to call it the "who me?" effect. Recalling the strong reaction business executives exhibited when they first were characterized as "racketeers" under the Racketeer Influenced and Corrupt Organizations Act (RICO),[38] or when American corporate executives first were sentenced to (even brief) imprisonment,[39] it is easy to see how powerful and disturbing

35. Rock, *supra* note 24, at 1048.

36. After all, as Stephen Garvey points out, "[a]ll else being equal, however, shaming penalties are likely to be more effective in Kenosha than they are in Manhattan." Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 753 (1998).

37. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1510 (1996). Khanna doubts that such an effect really exists. *See id.* (citing *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1366 (1979)) (questioning whether, under the existing regime, the stigma of a criminal conviction would filter down to particular individuals in the corporate structure). Certainly, Fisse and Braithwaite's study of the impact of adverse corporate publicity demonstrates that the rub-off effect does exist. *See generally* BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983).

38. When RICO was first employed in an action against "legitimate" corporate executives, as opposed to traditional Mafia-connected racketeers, the executives' lawyers protested loudly that such characterizations were scurrilous and unwarranted. The Private Securities Litigation Reform Act has eliminated some of these objections. *See* Pub. L. No. 104-67, § 107, 109 Stat. 737 (1995).

39. *See generally* JOHN HERLING, THE GREAT PRICE CONSPIRACY: THE STORY OF ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY (1962); CLARENCE C. WALTON & FREDERICK W.

the experience can be when a business leader's spotless self-image becomes commingled with that of a convicted criminal. It is perhaps less easy to see how the phenomenon of shame may become translated into a meaningful change in individual (not to mention organizational) behavior.

There are at least four different ways of thinking about this issue: (1) one must consider the mechanisms by which corporate crime is believed to be interdicted; (2) one must consider the role of shaming as both a specific and general deterrent; (3) one must take into account emerging scholarship about the role of non-economic incentives in deterring crimes of all sorts; and (4) one must consider the types of behavioral change that shame is capable of generating.

As for the first approach, a number of studies indicate that both the experience of shame and the anticipation of shame in the future can serve as substantial deterrents to corporate crime.[40] Many observers agree, moreover, that aiming the courts' resources at individual leaders, as well as at the corporate entity, is the most effective way to deter corporate criminal activity.[41]

The second approach to the question of deterrence involves specific versus general deterrence.[42] The purpose of both the corporate icon and

CLEVELAND, JR., CORPORATIONS ON TRIAL: THE ELECTRICAL CASES (1964) (describing the jailing of top-level executives of General Electric Company and Westinghouse Electric Corporation for antitrust violations in the heavy electrical equipment industry).

40. *See* Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 L. & SOC'Y REV. 549, 572 (1996) (individuals' feelings of guilt and shame, and the threat of informal sanctions are "significant deterrents" to corporate crime); Lori A. Elis & Sally S. Simpson, *Informal Sanction Threats and Corporate Crime: Additive Versus Multiplicative Models*, 32 J. CRIME & DELINQ. 399, 410 (1995) (subjects' perceptions that friends, family and business associates will lose respect for them if they participate in corporate crime significantly decrease the likelihood that they will do so); FISSE & BRAITHWAITE, *supra* note 37, at 12, 283-314 (the negative impact of adverse publicity on offenders and their employees may be more effective than the threat of formal sanctions in controlling corporate crime). *See also* Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 LAW & SOC'Y REV. 467, 485 (1993) (anticipation of shame is negatively related to likelihood of committing certain crimes); Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC'Y REV. 837 (1990) (like state-imposed sanctions, self-imposed shame and socially-imposed embarrassment can also deter future criminal activity).

41. *See* Paternoster & Simpson, *supra* note 40, at 574 ("[T]he perceived costs of punishment, be they formal, informal, or based on self-imposed shame, that are directed against the individual effectively deter corporate crime.").

42. According to one formulation, specific deterrence applies only to punished offenders and general deterrence applies to members of the general public who only have indirect experience with punishment (observing or otherwise having knowledge of the punishment of others). *See* Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, J. RES. CRIME & DELINQ. 123, 124 (1993).

the directors' woodshed proceedings—like the purpose of corporate sentencing generally—is to change managerial behavior.[43] The intention behind these proceedings specifically is to change the way CEOs and their boards of directors operate—how they structure performance incentives, for example, and how they react to allegations of wrongdoing. This is the case not only for those CEOs and directors actually subjected to a shaming proceeding, but also for those in the broader business community. In other words, one hopes that these proceedings can be characterized both as a specific and a general deterrent. Shame offers both of these features.[44]

There is yet a third way in which shame can have an impact on the likelihood that corporate crime will occur. Corporate crime is widely understood to be more deterrable than violent crime, and this is true for both specific and general deterrence.[45] The basis for the deterrence may be strictly economic (in the form of monetary fines). Modern theorists argue, however, that effective deterrence (at least of individuals) can also come from non-economic sources.[46] Shaming is one such source.

Finally, to be truly effective, a sanction must ideally achieve two kinds of measurable results: behavioral changes aimed at remedying the harm that has already been done (*remedial* behavior), and behavioral changes aimed at avoiding future acts of misconduct and hence avoiding future shaming incidents (*preventive* behavior).[47] Criminologists believe that shame—or the anticipation of shame—can give rise to both of these types of behavioral changes.[48] Though we don't yet know for certain that

43. *See* Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform,* 36 ARIZ. L. REV. 407, 463 (1994) ("Federal law and the sentencing guidelines impose criminal penalties on corporations for crimes like these not because corporate managers caused or promoted the crimes, but rather to encourage managerial attention to preventing and detecting them.").

44. *See* BRAITHWAITE, *supra* note 18, at 81 ("Shame not only specifically deters the shamed offender, it also generally deters many others who also wish to avoid shame and who participate in or become aware of the incident of shaming.").

45. *See* John Braithwaite & Gilbert Geis, *Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQ. 292, 301-04 (1982).

46. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (arguing that social influence, as well as economic factors, has a significant impact on a person's willingness to commit crimes); Kahan, *supra* note 2, at 2477 (same).

47. As applied to a corporate criminal conviction, remedial behavior might include restitution to victims, product recall, or environmental clean up. Preventive behavior might include a corporate reorganization, improvement of corporate controls, the establishment of a corporate compliance program, and personnel changes.

48. *See* Tibbetts, *supra* note 34, at 235-36 (recounting research indicating that the anticipation of shame deters potential offenders from committing a crime, and may also encourage those prone to criminal activity to alter their behavior in order to avoid future experiences of shame).

this is so,[49] there is substantial reason (including considerable anecdotal evidence) to believe that the prediction is correct.

Taken all together, these diverse teachings provide the thesis upon which the remainder of this article will proceed: Shaming corporate officers and directors can be an effective way to cause the companies with which they are affiliated to remediate past crimes and also to avoid future crimes. Shaming for private officers and directors may also be an effective way to influence other companies' behavior.

C. THE CONCEPT OF REINTEGRATIVE SHAMING

As we have already discovered, "[w]ith white collar crime, as with common crime, . . . shame within tightly-knit families, communities and corporate cultures [can be] a more profound deterrent than formal punishment."[50] "[T]he nub of [this] deterrence is not the severity of the sanction but its social embeddedness; shame is more deterring when administered by persons who continue to be of importance to us."[51]

In other words, the value of the corporate icon and directors' woodshed proceedings I propose, lies not so much in the fact that the general public may learn of them, but in the fact that family members and valued peers will surely do so.[52] Stated yet another way, it is not the immediate shame of standing before a federal judge that will have the greatest deterrent impact on corporate officers and directors. Rather, it is their residual awareness that family members, colleagues, and other corporate leaders will have reason to believe they have failed in their leadership roles that will give these proceedings their transformative power.

One must still, however, consider just what kind of shaming ritual is likely to be most effective with a group comprised solely of corporate elites. Here, I rely largely on the insights of criminologist John Braithwaite, who has advocated the concept of "reintegrative shaming," particularly in the context of white-collar crime.[53] According to Braithwaite, an effective shaming ritual should not merely inflict momentary pain and humiliation on the subjects. The objective of a shaming ritual should be "reintegration"—the process by which participants in sham-

49. *See* Kahan, *supra* note 34, at 638 ("Does shame deter criminality? The short and simple answer is that we don't know. Shaming penalties have not yet been subject to rigorous empirical evaluation.").

50. BRAITHWAITE, *supra* note 18, at 138.

51. *Id.* at 55.

52. *See supra* Part II.A.

53. *See* BRAITHWAITE, *supra* note 18, at 55-56.

ing rituals are encouraged to "attend to the moral claims of the criminal law"[54] and then embrace and internalize their communities' behavioral norms.[55]

Specifically, Braithwaite distinguishes between "stigmatizing" shaming rituals, which may be counterproductive, and shaming rituals emphasizing reintegration: "Reintegrative shaming is shaming which is followed by efforts to reintegrate the offender back into the community of law-abiding or respectable citizens through words or gestures of forgiveness or ceremonies to decertify the offender as deviant."[56] On the other hand, "[s]tigmatization is shaming which creates outcasts, where 'criminal' becomes a master status trait that drives out all other identities."[57]

Braithwaite emphasizes that reintegrative shaming is likely to be especially effective with white collar offenders and other corporate elites.[58]

One alternative to shaming is, of course, formal punishment. Braithwaite compares these alternatives as follows:

> [S]haming has a great advantage over formal punishment. Shaming is more pregnant with symbolic content than punishment. Punishment is a denial of confidence in the morality of the offender by reducing norm compliance to a crude cost-benefit calculation; shaming can be a reaffirmation of the morality of the offender by expressing personal disappointment that the offender should do something so out of character, and if the shaming is reintegrative, by expressing personal satisfaction in seeing the character of the offender restored.[59]

From these brief excerpts, one can see that reintegrative shaming fits quite well into a situation in which executives themselves are not personally charged with a crime, but in which the companies they manage have been found guilty of criminal activity. Indeed, the corporate icon and directors' woodshed proceedings are intended to provide precisely the type of reintegrative experience that Braithwaite prescribes. The proceedings are intended, for example, to be educative, not punitive, and to involve

54. *Id.* at 9.

55. Stephen Garvey has taken a similar approach to the use of shame as a tool of correction. Rather than stressing "reintegration," however, he stresses education. Like Braithwaite, he advocates some form of bilateral exchange between judge and defendant. His objective is for "[t]he offender [to] come[] through [the process] to recognize and understand the nature of his offense, to experience guilt for what he has done, and finally, to repent his wrongdoing and to seek to make amends." Garvey, *supra* note 36, at 765.

56. BRAITHWAITE, *supra* note 18, at 100-01.

57. John Braithwaite, *Shame and Modernity*, 33 BRIT. J. CRIMINOLOGY 1 (1993).

58. *See* BRAITHWAITE, *supra* note 18, at 72.

59. *Id.* at 72-73.

both "one-sided moralizing" by the judge[60] and some dialogue with the participants designed to elicit an indication of their contrition. The judge is expected to conduct the proceedings with dignity and respect, without characterizing the participants as "irresponsible" or "untrustworthy."[61] The participants are expected in turn to be "reasonable, of good faith, and motivated to heed [the judge's] advice."[62]

The proceedings will also be designed so as to include concrete references not only to the negative aspects of the corporation's crime, but also to the socially positive aspects of the corporation's activities.[63] The result of the proceeding should be a recognition by the CEO (in the case of the corporate icon proceeding) or the corporation's directors (in the case of the woodshed proceeding) that the corporation with which they are associated has violated important societal norms. The judge will then urge the participants to acknowledge and "internalize a commitment to the rules"[64] and will offer some sign of support and reconciliation.[65]

Though the icon and woodshed proceedings are not a perfect fit for Braithwaite's theories,[66] they adhere very closely to his vision of correctional policy. We will adopt that vision for the balance of this Article. With this theoretical framework in mind, we now turn to the specifics of the icon and woodshed proposals.

III. WHY THE CORPORATE ICON PROCEEDING SHOULD BE MANDATORY

The current corporate icon provision may be employed only where the defendant corporation seeks a sentence reduction for "acceptance of responsibility" in connection with its crime.[67] As a practical matter, this includes only those corporations that plead guilty.[68] Whether or not to

60. *Id.* at 81.

61. *Id.* at 132.

62. *Id.* at 131. Reintegrative shaming can thus been seen as consistent with the moral reform theory of punishment, which "requires that the offender be treated as a responsible, autonomous agent—as a being capable of rational address—and not an object to be manipulated through coercion and fear." Garvey, *supra* note 36, at 764.

63. *See* BRAITHWAITE *supra* note 18, at 167 ("[One key] to the art of ensuring that shaming is reintegrative rather than stigmatizing [is] . . . to leaven shame with praise.").

64. *Id.* at 139.

65. *See id.* at 55 ("These gestures of reacceptance will vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decertify the offender as [a] deviant.").

66. For example, Braithwaite advocates a passage of time between the shaming ritual and the "forgiveness and repentance ceremony . . . ." BRAITHWAITE, *supra* note 18, at 81.

67. *See supra* note 14 and accompanying text.

68. *See* Gary M. Black, *Corporate Crime and Punishment: New Guidelines for Defining and*

convene an icon proceeding is wholly discretionary with the sentencing judge.

Conditioning the availability of an icon proceeding on a guilty plea makes little sense, however. Companies that choose to plead guilty may be the very worst corporate citizens who can find no defense for their actions, or they may be the very best, who forego the gamesmanship of litigation in order to expend their resources on correction and remediation. Either way, defining the universe of those organizations that will be subject to an icon proceeding by including those that plead guilty and excluding those that do not, may be both over- and underinclusive. A more principled approach would be to distinguish those companies whose CEO's appear to be strong candidates for a corporate icon proceeding (for example, those with a high public profile or some personal role in the company's wrongdoing) from those whose CEOs are unlikely to experience much personal shame from the corporate sentencing process (for example, those who are new to the job, having been brought in to "clean house").

The problem with this approach, however, is that it inevitably will be costly and time consuming. It is also likely to result in many more false-negatives than false-positives. Furthermore, it won't address that portion of the icon proceeding that is designed to satisfy the public's retributive needs. Even the housecleaning CEO may learn something useful in an icon proceeding about the corporation whose reins she has seized. And involving such a CEO will also have some trickle-down value to employees whose tenure spans the "old" and the "new" corporate regimes.[69]

There are other compelling reasons why an icon proceeding should be convened in every case in which, by plea or by verdict, a corporation is adjudged guilty of criminal behavior. First, bringing the CEO before the sentencing judge takes specific note of the powerful influence a CEO can have on a corporation's culture.[70] Second, there is an important public

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Setting Fines for Financial Crimes, CRIM. JUST., Winter 1992, at 2, 37 ("a guilty plea is a virtual necessity [for a corporation] to establish acceptance of responsibility.")

69. In one recent non-Guidelines case—a case involving a guilty plea to 391 felony counts and in which the defendant's former CEO was under indictment—the acting CEO was ordered to attend the corporation's sentencing. He did so "and addressed the court, unequivocally admitting, and expressing regret for, [the company's] crimes. He stood as the representative of [the company] as the sentence was pronounced. In addition to counsel, he was accompanied by two executives of [the company] and two 'outside' members of its Board of Directors." United States v. C.R. Bard, Inc., 848 F. Supp. 287, 293 n.7 (1994). Undoubtedly, this performance made an impression on the company's employees.

70. The notion of a corporate culture is well established in the business literature. *See generally* Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 753-55 (1992) (citing references to the corporate culture literature). Scholars have long

message to be conveyed when a court forces a corporate leader to atone for the social and economic harm her company's misconduct has caused.

A. CEOS SERVE AS A COMPELLING MORAL VOICE

Experts agree that "top management, and in particular the chief executive officer . . . sets the corporate ethical tone."[71] "Top managers or the leaders of organizations shape and determine the behavior patterns considered acceptable in the organization."[72] These executives may set a high standard for ethical and professional behavior. They alternatively may create an atmosphere in which unethical or unlawful conduct is overlooked, implicitly condoned, or sometimes even overtly encouraged.[73] Whether positive or negative, the values of, and the role played by, the chief executive officer are important—often pivotal—in determining a corporation's receptivity to deviant or criminal behavior.[74]

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recognized that corporations over time develop not only official policies and practices, but also other well-understood norms—sometimes written, often informal—by which rewards are allocated, advancement is determined, and policy decisions are shaped.

Using her alternative term, "corporate ethos," Pamela Bucy notes:

> [E]ach corporation has a distinctive ethos or "characteristic spirit." Superficial things such as the manner of dress and the camaraderie of the employees as well as formal, written goals and policies evidence this ethos. Additionally, a corporation's ethos may be tied to one or a few individuals or it may transcend individuals . . . and even generations.

Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123 (1991).

71. MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME: THE ROLE OF MIDDLE MANAGEMENT 132 (1983). Clinard's book recounts a series of interviews with retired middle managers who were asked why some corporations are more ethical than others. More than half the responses attributed the difference to the role of top management, especially the chief executive officer. *See id.* at 55. When asked whether top management sets the ethical tone for compliance with government laws and regulations, 92.2% of the respondents said "very much" and only 6.3% said "some." *See id.* at 71.

72. CATHY A. ENZ, POWER AND SHARED VALUES IN THE CORPORATE CULTURE 43 (1986).

73. *See* HAZEL CROALL, WHITE COLLAR CRIME 64 (1992) ("Law breaking and inattention to regulations can become a 'normative' pattern within a company, with top management setting a moral tone into which middle management are socialized."). *See also* Ronald R. Sims & Margaret P. Spencer, *Understanding Corporate Misconduct: An Overview and Discussion*, *in* CORPORATE MISCONDUCT: THE LEGAL, SOCIETAL AND MANAGEMENT ISSUES 15 (Margaret P. Spencer & Ronald R. Sims eds., 1995) [hereinafter CORPORATE MISCONDUCT].

> When one looks at the underlying causes of various types of corporate misconduct . . . one sees time and time again the role of top management and a corporate culture that does not deter practices of business misconduct. Very often top management places undue pressure for performance that in turn motivates less than ethical, even illegal, behavior by those "under the gun." In the end, top management cannot escape blame for the development of a corporate culture that fosters such actions by subordinates. Top management has set the climate for such actions by insisting on and rewarding performance at all costs.

Id.

74. *See* NATIONAL COMM'N ON FRAUDULENT FIN. REPORTING, REPORT OF THE NATIONAL COMMISSION ON FRAUDULENT FINANCIAL REPORTING 249 (1987) ("The CEO, in particular, has a spe-

There are many examples of this phenomenon. For instance, when a CEO emphasizes his personal commitment to social justice, he can lead his company to great achievements, while still responding to social needs.[75] By the same token, when a CEO endorses the Ku Klux Klan and tells his employees "I don't like niggers and I do not want to see them in my stores,"[76] it is little wonder that a pattern of race discrimination develops from the top to the bottom of his firm.[77]

Some CEOs—especially those with charismatic management styles—are more likely than others to inspire their subordinates to adopt the kinds of behaviors they think the CEO would value. In companies headed by such CEOs, employees may come not only to embrace officially sanctioned procedures, but also to emulate the speech patterns, buzzwords, sports preferences, or even the manner of dress of the CEO.[78] They also

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cial role; his attitude, behavior and expectations of others strongly influence the actions of other upper-level managers.").

75. *See, e.g.*, JAMES C. WORTHY, WILLIAM C. NORRIS: PORTRAIT OF A MAVERICK (1987) (recounting the career of the CEO of Control Data Corporation, who in the 1970s built several factories in urban ghettos and Appalachian backwaters, successfully trained high-school dropouts to manufacture highly complex machinery, initiated on-site day care facilities for working parents, developed the PLATO computer-based educational and training systems that have been applied from kindergarten to college level instruction and to hospital and military training programs, and created a number of programs, all of which were profit-based, to produce job-ready workers, including individuals from "underclass" and prison settings).

76. Martin Dyckman, *Lawyers Can Be Heroes Too*, ST. PETERSBURG TIMES (Fla.), April 11, 1993, at 3D (quoting Raymond E. Danner, founder and chairman of the Shoney's, Inc. restaurant chain).

77. *See* Lynne Duke, *Cofounder of Shoney's Quits Following Racial Bias Lawsuit*, WASH. POST, Mar. 12, 1993, at A4 (describing Shoney's settlement of race bias claims for $105 million, the highest award ever paid by a company in a Title VII case).

Another case in which the CEO's personal preferences permeated the corporate culture involved Astra USA Inc., a pharmaceutical marketing company. CEO Lars Bildman was notorious for his drunken pursuit of female employees. Charges of company-wide sexual harassment practices ultimately surfaced in the national press. *See* Mark Maremont, *Abuse of Power*, BUS. WK., May 13, 1996, at 86. Bildman was later removed from office and prosecuted for fraud and tax evasion. He was said to have used corporate funds to pay for "$1,500-a-day hookers, to rent boats they used as floating bordellos, for vacations and for extensive [home] renovations." Ralph Ranalli, *Ex-biz Chief Seized in $1M Theft*, BOSTON HERALD, Mar. 13, 1997, at 1. The company itself was charged with non-payment of $11 million in federal income taxes, by claiming deductions for travel and entertainment expenses characterized by the IRS as "lavish, extravagant and personal in nature." Tony Munroe, *Astra Tackles Tax Dispute with IRS*, BOSTON HERALD, Dec. 7, 1996, at 14. The company recently settled the EEOC's "hostile environment" charges by paying $9.85 million into a settlement fund. *See* Kenneth N. Gilpin, *Firm to Pay $10 Million in Settlement of Sex Case*, N.Y. TIMES, Feb. 6, 1998, at A16.

78. Sociologist Robert Jackall has observed that, in the companies he studied, the CEO's characteristic turns of phrases often filtered down through middle management all the way to the shop floor. "In the early stages of my fieldwork at Covenant Corporation, for example, I was puzzled by the inordinately widespread usage of nautical terminology, especially in a corporation located in a landlocked site. As it happens, the CEO is devoted to sailboats and prefers that his aides call him

are likely to internalize the competitive values and behavioral practices embraced by the CEO. As a consequence, the most powerful CEOs often play a significant role in a corporation's movement toward criminality, sometimes doing so inadvertently.

If the CEO is obsessed with profits, for example, profit-seeking behavior by lower-level employees may ultimately eclipse honest business practices. This is a common scenario.[79] If the CEO is protective of employees who are caught breaking the rules, or resists sanctioning wrongdoers out of a misguided sense of loyalty, his mid-level managers are far less likely to manage "by the book" or to enforce the company's ethical guidelines. Lax environments can evolve from executive actions (or inaction). CEOs whose cultural message is to "win at all costs" often can be found presiding over tragically compromised institutions.

Consider some recent examples. John Gutfreund, until 1991, was CEO of the Salomon Brothers investment banking firm. Legendary for his aggression, acquisitiveness, and money lust,[80] and known in the industry for insisting on absolute control of the deals in which Salomon Brothers participated,[81] Gutfreund ended his career in disgrace after a senior Salomon official was found to have rigged federal treasury bond auctions, which ensured that the firm would be able to acquire more than the legally-mandated ceiling of thirty-five percent of any issue sold.[82] Salomon Brothers only narrowly escaped criminal indictment for these actions, and Gutfreund himself was enjoined from associating with securities firms in the future.[83]

A second example is Robert M. Fomon, another powerful CEO

'Skipper'." ROBERT JACKALL, MORAL MAZES—THE WORLD OF CORPORATE MANAGERS 22 (1988).

79. *See* Margaret P. Spencer, *A Look at Corporate Crime*, *in* CORPORATE MISCONDUCT, *supra* note 73, at 30 (quoting CHARLES H. MCCAGHY, DEVIANT BEHAVIOR: CRIME, CONFLICT AND INTEREST GROUPS 218 (1976)) ("The intense desire to maintain or increase existing profits has been deemed 'the single most compelling factor behind deviance by industry, whether it be price fixing, the destruction of competition, or the misrepresentation of a product.'").

80. *See* MICHAEL LEWIS, LIAR'S POKER 14 (1989) (describing Gutfreund's offer to play a single hand of "liar's poker" for $1 million).

81. *See* BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO 325-26 (1990) (describing Gutfreund's role in the abortive attempt to take over RJR Nabisco and his refusal to share work or credit with Drexel, Burnham, Lambert in connection with the deal).

82. *See* MARTIN MAYER, NIGHTMARE ON WALL STREET: SALOMON BROTHERS AND THE CORRUPTION OF THE MARKETPLACE 14-16 (1993).

83. *See id.* Salomon Brothers ultimately agreed to pay $290 million to settle civil claims against it by the SEC. *See* SEC v. Salomon, Inc., Litigation Release No. 13246, 1992 WL 114584. Gutfreund paid a $100,000 fine. *See* John H. Gutfreund, Exchange Act Release No. 34-31554, 1992 WL 362753.

known for his devotion to "winning at all costs."[84] Fomon was the CEO of E.F. Hutton Company, another Wall Street powerhouse. He encouraged a "'whatever it takes' culture" at E.F. Hutton,[85] and averted his eyes whenever thorny business or legal problems presented obstacles to landing new clients and ever-bigger deals. Fomon was also known for ruthlessly humiliating subordinates who failed to bring in increasing profits for their departments.[86] Before being forced out by his board of directors in 1986, Fomon presided over E.F. Hutton's indictment for, and ultimate guilty plea to, 2,000 felony bank fraud counts in a massive check-kiting scheme that netted E.F. Hutton millions at the expense of its correspondent banks.[87]

A more recent example is Daniel E. Gill of Bausch & Lomb, Inc., a manufacturer of optical products. Like Fomon, Gill insisted on herculean performance in his operating units, and belittled or fired subordinates who failed to meet their quarterly sales growth targets. Described as "tenacious, demanding, and very numbers-oriented,"[88] Gill expected his managers to meet his demands and seldom cared how they did it. "Double-digit increases were demanded every quarter, every year, regardless of local economic conditions."[89] Predictably, ethical lapses in the company became common—sales were booked before they were complete (or even existed), and unsold inventory was dumped on the black market. Eventually, claims of financial fraud surfaced, customers complained of intimidation, and Bausch & Lomb's earnings fell fifty-four percent.[90] The firm had to amend its financial statements and settle (for $68 million) several consumer class action suits.[91] Gill, like Fomon, was replaced by his board, but not until after the company had lost close to one billion dollars in market capitalization.[92] *Business Week* described Bausch & Lomb's numbers-driven business culture as a "train wreck waiting to happen."[93]

The final, and most recent, example of a culturally-influential CEO is Robert L. Scott, former CEO of Columbia/HCA Healthcare Corporation. "[O]nce celebrated as a visionary reformer of the American hospital in-

84. JAMES STERNGOLD, BURNING DOWN THE HOUSE: HOW GREED, DECEIT, AND BITTER REVENGE DESTROYED E. F. HUTTON 49 (1990).

85. *Id.* at 82.

86. *See id*. at 64-65.

87. *See id.* at 131 (describing E. F. Hutton's plea agreement).

88. Mark Maremont, *Blind Ambition*, BUS. WK., Oct. 23, 1995, at 78.

89. *Bausch & Lomb's Distorted Vision*, BUS. WK., Oct. 23, 1995, at 146.

90. *See* Maremont, *supra* note 88, at 78.

91. *See* Keith H. Hammonds, *B&L Rewrites the Books*, BUS. WK., Feb. 5, 1996, at 53; Kelley Holland, *B&L Sees the Error of Its Ways*, BUS. WK., Aug. 19, 1996, at 44.

92. *See* Mark Maremont, *Judgment Day at Bausch & Lomb*, BUS. WK., Dec. 25, 1995, at 39.

93. Mark Maremont, *supra* note 88, at 78.

dustry but more recently criticized for his aggressive tactics,"[94] Scott was forced out by his board just as the Justice Department and several state agencies were intensifying their investigations of overbilling, tax violations, and Medicare fraud at the national hospital chain. "People close to Mr. Scott characterized his downfall in terms suitable for a Greek tragedy; portraying him as a brilliant and incisive business-man who was undone by his fatal flaws. Those flaws, they said, included an arrogance and aggressiveness that permeated the company."[95] Complaints circulated that Scott had "[driven] underlings to produce 15% to 20% rates of growth. Many stressed-out hospital managers [had] quit."[96] Those who met the targets received substantial cash bonuses.[97] When the dust had settled, Scott's successor, Dr. Thomas F. Frist, Jr., called for "a complete overhaul of the aggressive culture established by Mr. Scott."[98] Noting that, as a director, he had never been informed that there were any concerns relating to the company's Medicare reimbursement submissions,[99] Frist promised to revamp the relationship between the CEO and Columbia/HCA's board.

Not every CEO, to be sure, wields the kind of cultural influence over his employees that Gutfreund, Fomon, Gill, and Scott apparently did, especially in large bureaucratic enterprises. Growth and profit-driven CEOs do not inevitably preside over calamitous corporate declines. By the same token, corporate crime may occur notwithstanding the rectitude of a company's leaders and even the assiduous efforts of those leaders to discourage criminal behavior. In other words, there is no inevitable correlation between the personal ethics or management style of a CEO and his company's tendency to organizational crime.[100] Nevertheless, personalizing a corporation's crime to its CEO—putting a face on corporate crime—offers a court the opportunity to focus on systemic behaviors that might otherwise escape official attention.

94. Kurt Eichenwald, *Two Leaders Are Out at Health Giant as Inquiry Goes On*, N.Y. TIMES, July 26, 1997, at A1.

95. *Id.* at A26.

96. *How Columbia/HCA Changed Health Care, For Better or Worse*, WALL ST. J., Aug 1, 1997, at A4.

97. *See* Kurt Eichenwald, *Hospital Giant, Under Attack, Sets Shake-Up*, N.Y. TIMES, Aug. 7, 1997, at A1 (hospital administrators and others were able to almost double their salaries through bonuses based almost entirely on meeting financial targets).

98. *Columbia's New Chief Freezes Tenet Talks*, WALL ST. J., July 28, 1997, at A3.

99. *See* Kurt Eichenwald, *Columbia/HCA Halting Merger and Capital Plans*, N.Y. TIMES, Aug. 29, 1997, at C1.

100. Similarly, there is no simple correlation between the personal spending habits of corporate CEOs and their ability to contain costs within the companies they run. *See* Jayne W. Barnard, *Sovereign Prerogatives*, 21 J. CORP. L. 307, 312 (1995).

B. CEOs Serve as a Sacrificial Goat

Even where the CEO has behaved impeccably, and cannot be said to have fostered a culture of lawlessness, the corporate icon proceeding may nevertheless play an important role in a corporation's sentencing and rehabilitation. The rationale behind this position is that a CEO plays a unique public role in a corporation's presentation of itself and may consequently be called upon to do public penance on the corporation's behalf. This approach to the corporate icon provision centers on symbolic values rather than on any specific behavior of the CEO. It also recognizes the public's desire to extract some retributive penalty when a public institution has betrayed its public trust.

The public or symbolic role of the CEO has many facets. Often, CEOs are quite deliberately cast as the embodiment of their companies, appearing in advertisements, making public appearances, and serving as spokespersons when a crisis occurs. They also appear before investment analysts and Congressional committees. As a consequence, they sometimes become media personalities or even political candidates. Indeed, some CEOs' strong identification with the companies they lead and the public roles they are called upon to play give them a nearly sovereign-like character.[101] This means that like true sovereigns, CEOs may sometimes be deposed when things go wrong within the company—even things over which they had no effective control.[102] It also means that they should expect to be called to task—at least symbolically—when their companies engage in significant criminal activity.[103]

C. The Icon Proceeding Offers an Occasion for Expressing Community Values

The most important argument in favor of mandating an icon proceeding in every case in which a corporation is found guilty of a crime is that corporate crime "violate[s] trust and undermine[s] social institu-

101. As Norman Pearlstein, Editor-in-Chief of Time Magazine, has observed, "CEO's are the closest thing to uncrowned kings that we have in this country . . . . " NICHOLAS VON HOFFMAN, CAPITALIST FOOLS: TALES OF AMERICAN BUSINESS, FROM CARNEGIE TO FORBES TO THE MILKEN GANG 19 (1992).

102. *See* Philip J. Hilts, *Top Manufacturer of Gel Implants Replaces Its Chief*, N.Y. TIMES, Feb. 11, 1992, at A1 (noting the forced resignations of John S. Ludington and Lawrence E. Reed, Chairman and CEO, respectively, of Dow-Corning Corporation following controversy about the company's breast implant products). Later investigations made clear that much of the criticism of breast implant products had been misplaced. *See generally* MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996).

103. *Cf.* Harry S. Truman ("The buck stops here.").

tions."[104] It doesn't matter whether a corporation has pleaded guilty or not—when a corporation is convicted of a crime, a social harm has been committed. It is therefore fitting that the top corporate leader be required to confront the fact of the company's wrongdoing, and be subject to some public censure on the company's behalf. This is true regardless of the CEO's personal management style, involvement (if any) in the circumstances leading up to the crime, or conduct upon being informed that an investigation of wrongdoing was underway. It is also true regardless of the CEO's public profile, or even of the company's size and prominence.

It may be said that employing a corporate icon proceeding in every case in which a corporation is found (or pleads) guilty to a crime, exemplifies the theory of "expressive sentencing."[105] Regardless of its theoretical basis, the corporate icon proceeding responds to a very legitimate communal desire to hold some individual accountable when corporate crime occurs. It also affords courts the opportunity to begin the process of reintegration at the level where change is most likely to take place.[106]

Making the corporate icon proceeding mandatory does not necessarily mean that all corporate icon proceedings will be the same, or even that all of them will be critical of the defendant's CEO. For example, the CEO of a corporation that has put in place an effective program to prevent and detect crime,[107] or one that has self-reported the crime, fully cooperated in the ensuing investigation, and demonstrated acceptance of responsibility for the crime,[108] should experience a very different type of icon proceeding than the CEO of a company that has overseen a lax operation, stonewalled throughout the government's investigation, vigorously and publicly denied the charges, shielded and indemnified key employee witnesses, and taken a public stand of defiance toward the government. In the first instance, the sentencing judge will have every incentive to laud the CEO's conduct and hold her or him up as an exemplar to the business community (in this case

104. Ronald C. Kramer, *Corporate Criminality: The Development of an Idea*, *in* CORPORATIONS AS CRIMINALS 21 (Ellen Hochstedler ed., 1984).

105. *See* Kahan, *supra* note 34, at 643 (arguing that sentencing is not merely instrumental, it also signifies the public's moral condemnation); Joel Feinberg, *The Expressive Function of Punishment, in* SENTENCING 23 (Hyman Gross & Andrew von Hirsch eds., 1981).

106. Mandating corporate icon proceedings will also protect judges who feel the need to speak directly to corporate leaders in connection with corporate misconduct. As noted above, those judges who have chosen to do so in the past have often been found to have overstepped their authority, or otherwise compromised their impartiality. *See supra* notes 9-11 and accompanying text.

107. Such conduct would entitle the corporation to a three point reduction in its culpability score. *See* U.S.S.G. § 8C2.5(f).

108. Such conduct would entitle the corporation to a five point reduction in its culpability score. *See* U.S.S.G. § 8C2.5(g).

making the CEO a true "icon"). In the latter instance, the sentencing judge will be fully justified in recapping the evidence adduced against the company, noting the impact of the crime on the community or the industry, and reminding the CEO of the obligations of corporate citizenship.

Some icon proceedings will involve small, owner-dominated companies and others will involve public behemoths with thousands of owners and hundreds of managers. Some icon proceedings may have an adversarial flavor to them (including, for example, victim-impact testimony), while others will be notably non-adversarial. There is no reason to imagine that one size will fit all in these proceedings. In addition, just as individual CEOs present a wide range of management styles, so do federal judges, and the format and length of all icon proceedings will be entirely within the discretion of the sentencing judge.

IV. HOW THE CORPORATE ICON PROCEEDING SHOULD BE ORGANIZED

Ideally, a corporate icon proceeding should include the very same elements that first surfaced in the sentencing hearing for Pennwalt Corporation:[109] an expression by the sentencing judge of the relevant community's abhorrence of the crime; an exploration with the CEO of how the crime could have occurred; a discussion with the CEO concerning the response of the corporation after learning of the crime; an assurance by the CEO that similar crimes will not recur; an acceptance by the judge of the CEO's assurance; and an admonition by the judge that the company is expected to be a good corporate citizen. At a minimum, it is essential that the CEO be required to acknowledge the fact that the crime(s) occurred, the role of corporate management both before and after the crime occurred, and the finding of guilt.

Each of these items is subject to elaboration. For example, in expressing the community's negative reaction to the crime, the judge may refer to letters received from the public and affected special interest groups, to comments made by policy makers and government regulators, and to newspaper editorials, among other sources. The purpose of this phase of the icon proceeding is simple: to articulate condemnation.

The next phases of the icon proceeding should be designed to make sure that the CEO answers specifically for the elements of the crime and its aftermath. For example, the judge may wish to go through each count

109. *See supra* notes 6-8 and accompanying text.

of the complaint, or go through the allegations of harms to the public, requesting the CEO's acknowledgment of each one seriatim. He may wish to ask specifically about the corporate practices and procedures that permitted the crime to escape detection.[110]

Where the company has engaged in egregious misconduct, or has been a repeat offender, the judge's questions may become more pointed. The judge may demand to know the details of the company's compensation practices, compliance program(s), indemnification policy, and policies regarding internal investigations. When a company has resisted the government's investigation, that behavior is also fair game for discussion. Often, the sentencing judge will have direct experience with the company's non-cooperation as a result of the pre-trial and trial proceedings. In those cases, the judge can explore with the CEO why the company felt compelled to be intransigent. The sentencing judge can also explore what specific actions the company has taken to avoid future criminal exposure. The judge may even insist that responsible individuals be identified and their employment status be disclosed.

Most importantly, any corporate icon proceeding should include the judge's extraction of "the pledge." The CEO should be required to express some personal remorse for the company's crime, and should make a personal commitment that such misconduct will not recur. To the extent specific improvements in corporate practices have been identified in the course of the proceeding, the sentencing judge may want to request that the CEO re-commit herself to those improvements.

Should the sentencing judge choose to adhere to the reintegrative shaming model (which is desirable but not essential to the icon proceeding), the remainder of the corporate icon proceeding will be addressed to absolution and benediction. The judge should identify the praiseworthy activities of the company and discuss them with the CEO. The purpose of this colloquy is to remind those in attendance of the contributions the company has made to the public, notwithstanding its recent criminal behavior. The judge should then release the CEO with an admonition to channel the behavior of the company and its employees to constructive, responsible ends. The judge should also offer an expression of confidence in the CEO's promise to do so.

V. WHY THE BOARD OF DIRECTORS, AS WELL AS THE CEO,

110. This inquiry can include a general examination of the company's compliance procedures and might certainly include Judge Sporkin's famous question: "Where were the lawyers?" *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D. D.C. 1990).

SHOULD BE INVOLVED IN THE
CORPORATE SENTENCING PROCESS

One premise of this Article is that, not only should a CEO routinely become involved in a corporation's criminal sentencing process, but also, in some cases, the board of directors should become involved by means of a directors' woodshed proceeding. Underlying this premise is the proposition that, far from being "potted plants," or mere "parsley on the corporation's fish," corporate directors represent the conscience of the company, the ultimate arbiters of acceptable conduct and, collectively, the company's chief law enforcement officer. This special role presents an opportunity to influence the corporate culture and to set the tone for corporate activities that is every bit as powerful as the role of the CEO.

This idea of personalizing corporate crime to a company's board of directors is certainly heretical. I hope to make the case, however, that a woodshed proceeding, under appropriate circumstances, may often be desirable and a cost-effective adjunct to the corporate icon proceeding.

One might argue that when corporate crime occurs, the company's directors should always be as involved in the sentencing proceedings as is the CEO, and for the same reasons—to command their attention, to provide some public sense of closure, and to extract some promise of organizational reform. Such a position, however, would be unmindful of the distinction between an on-the-premises manager and a fiduciary part-timer.[111] Thus, rather than crafting a mandatory corporate icon provision that would include directors as well as the CEO in a corporation's sentencing in all cases, I suggest an alternative: In any case in which a corporation is found guilty of a federal crime, the trial judge should have the discretion to convene the corporation's board of directors to address systemic failures of the corporation's governance structure and also to receive the sentence of the court.

The arguments in support of a woodshed proceeding are threefold: (1) responding to claims of unlawful behavior is an essential element of directorial responsibility; (2) shaping the corporate culture—and providing the resources for preventive behavior—is also an element of the corporate directors' role; and (3) involving directors in the sentencing process will

111. *See* Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945 (1990). Eisenberg notes that a typical corporate board does not "manage" the corporation, nor does it make business policy: "In a complex organization concerned with complex choices, policy cannot be developed on a part-time basis." *Id*. at 949-50.

add to the deterrent impact of the corporation's sentence.

A. DIRECTORS' FIDUCIARY DUTIES REQUIRE THEM TO ENSURE THAT AN EFFECTIVE INFORMATION AND REPORTING SYSTEM IS IN PLACE

Experts have long agreed that corporate directors have some obligation to ensure that their companies conduct their businesses ethically and comply with applicable laws.[112] What has been less obvious is just how extensive that obligation is, what directorial behavior is sufficient to satisfy the obligation, and what role, if any, a board of directors should play in crafting the specifics of a corporate compliance policy. Opinions on these questions have evolved in recent years and, like other aspects of directors' fiduciary duties, there remain some open questions as to the dimensions and form of a corporate director's role.

For many years, the conventional wisdom was that, in the absence of some "red flag" alerting them to the likelihood that corporate misconduct was going on within the company, a corporation's board of directors had no duty to create (or compel the creation of) a program to detect that misconduct or to insert themselves into the processes of ensuring legal compliance. The language often cited is that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists."[113] This was the position of the Delaware Supreme Court, and was widely understood to be the state of the law generally in jurisdictions throughout the country.[114] Then, the adoption of the Organizational Sen-

112. *See Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1610 (1978) ("The corporate director should be concerned that the corporation has programs looking toward compliance with applicable laws and regulations, both foreign and domestic, that it circulates (as appropriate) policy statements to this effect to its employees, and that it maintains procedures for monitoring such compliance."); *Corporate Directors' Guidebook 1994 Edition*, 49 BUS. LAW. 1247, 1249 (1994) (directors' responsibilities include, "adopting policies of corporate conduct, including compliance with applicable laws and regulations . . . . "). Both the American Law Institute Principles of Corporate Governance and the Model Business Corporation Act suggest that directors should be concerned about the existence and adequacy of compliance programs. *See* Edward Brodsky, *Directors' Liability —The Importance of Compliance Procedures*, DEL. CORP. LITIG. REP., Mar. 17, 1997, nn. 22-27 and accompanying text. The National Association of Corporate Directors recommends that boards of directors "ensur[e] ethical behavior and compliance with laws and regulations . . . . " NATIONAL ASS'N OF CORP. DIRS., REPORT OF THE NACD BLUE RIBBON COMMISSION ON DIRECTOR PROFESSIONALISM 2 (1996).

113. Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963).

114. *See, e.g.*, Joy v. North, 692 F.2d, 880, 896 (2d Cir. 1982) (utilizing Connecticut law); Wilshire Oil Co. v. Riffe, 409 F.2d 1277, 1285-86 (10th Cir. 1969); Resolution Trust Corp. v. Dern, 854 F. Supp. 626, 636 (D. Ariz. 1994); Resolution Trust Corp. v. Norris, 830 F. Supp. 351, 357 (S.D. Tex.

tencing Guidelines in 1991 created significant incentives for corporations to establish an "effective program to prevent and detect violations of the law."[115] As a result, commentators began to suggest that the old *Allis-Chalmers* rule might warrant revisitation.[116]

In 1996, the Delaware Chancery Court issued its opinion in *In re Caremark,*[117] suggesting that, indeed, *Allis-Chalmers* is probably no longer good law. *Caremark* was a decision assessing the fairness of the proposed settlement in a shareholders' derivative action arising out of Caremark's criminal indictment on multiple felony counts of Medicare and Medicaid fraud. As the result of the criminal and related litigation, the company had to pay out approximately $250 million in restitution and civil and criminal fines. The shareholders alleged that, by failing to detect rampant misconduct within the company, Caremark's board had violated its fiduciary obligations and should be held liable for damages to the shareholders. This assertion placed squarely into question the viability of the *Allis-Chalmers* decision.

In reviewing the proposed settlement, Chancellor Allen addressed the specific question "what is the board's responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purpose?"[118] Noting particularly the "powerful incentives" provided by the Sentencing Guidelines,[119] and arguing that "any rational person attempting in good faith to meet an organizational governance responsibility" must take those incentives into account,[120] Chancellor Allen suggested that directors of Delaware corporations should:

> [assure] themselves that information and reporting systems exist in the

1993); Massey v. Disc Mfg., Inc, 601 So.2d 449, 456 (Ala. 1992).

115. U.S.S.G. § 8C2.5(f).

116. *See* Thomas M. Schehr, Note, *An Analysis of a Corporate Director's Duty to Ferret Out Wrongdoing: Have the Federal Sentencing Guidelines Effectively Overruled* Graham v. Allis-Chalmers?, 42 WAYNE L. REV. 1617 (1996) (arguing that failure to establish a compliance program is a breach of the duty of care, or at least should not be afforded the protection of the business judgment rule). *See also* Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance*, 66 WASH. L. REV. 413 (1991) (questioning the validity of *Allis-Chalmers*, and suggesting that corporate governance norms ought to include a requirement that directors supervise corporate activities so as to ensure compliance with the law by all corporate actors, with enforcement by means of shareholders' derivative suits).

117. 698 A.2d 959 (Del. Ch. 1996).

118. *Id.* at 968-69.

119. *Id.* at 969.

120. *Id.* at 970.

> organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.
>
> Obviously, the level of detail that is appropriate for such an information system is a question of business judgment. And obviously, too, no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled, or otherwise fail reasonably to detect acts material to the corporation's compliance with the law. But it is important that the board exercise a good faith judgment that the corporation's information and reporting system is, in concept and design, adequate to insure that appropriate information will come to the board's attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.[121]

Though Chancellor Allen's decision was not appealed and, therefore, his dictum on the role of the board in creating information and reporting programs has not been endorsed by the Delaware Supreme Court,[122] the *Caremark* opinion has been closely followed and widely discussed.[123] As a consequence, materials on corporate compliance programs—aimed at directors as well as top-level administrators—have recently been circulated to a variety of audiences.[124] Whole books are now available on how to build a successful compliance program, often with special emphasis on the

121. *Id.*

122. The Chief Justice of that court, Norman Veasey, has cautioned that, although Chancellor Allen's ruling is "a thoughtful decision . . . it is not a statute or rule, not a holding of the Supreme Court, not on appeal, not scary and not necessarily right or wrong." *Corporate Compliance Issues After Caremark*, CORP. OFF. & DIR. LIABILITY LIT. REP., June 11, 1997.

123. *See, e.g., Board Members, Senior Company Managers Should Consider Compliance Programs in Light of Recent Delaware Opinion,* BNA CORP. CSL. DAILY., Aug. 20, 1997 at 8 (describing the program at the ABA annual meeting) [hereinafter *Board Members*]; *Impact of Caremark Ruling on Corporate Compliance is Debated in NYC Seminar*, CORP. OFF. & DIR. LIABILITY LIT. REP., June 11, 1997 (describing panel discussions at the PLI continuing legal education program).

124. *See, e.g.*, NATIONAL ASS'N OF CORP. DIRS., DIRECTOR'S MONTHLY, June 1997 (issue devoted to compliance issues); Joseph A. Drain, *Compliance 101: What a Director Needs to Know*, ABA BANK COMPLIANCE, May/June 1997; Harvey L. Pitt, Karl A. Groskaufmanis & Vasiliki B. Tsaganos, *Director Duties to Uncover and Respond to Management Misconduct*, CORP. GOVERNANCE ADVISOR, May/June 1997 at 18 (describing in detail several components of a corporate compliance program that should be considered by the board of directors) [hereinafter *Director Duties*]. *See also* Harvey L. Pitt & Karl A. Groskaufmanis, *Doing the Right Thing: Structuring Board Oversight of Corporate Compliance Programs*, CORP. GOVERNANCE ADVISOR, June/July 1993 at 14 (a pre-*Caremark* article suggesting how a board audit committee might interact with the internal compliance function) [hereinafter *Doing the Right Thing*].

role of the board of directors.[125]

The directors' oversight duties discussed in the *Caremark* opinion need not rest solely on the foundation of the Organizational Sentencing Guidelines. Several federal statutes, including the Foreign Corrupt Practices Act of 1977 (FCPA),[126] the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA),[127] and the Private Securities Litigation Reform Act of 1995 (PSLRA),[128] also impose obligations on companies to have in place data gathering and reporting programs aimed at specific forms of misconduct.[129] Several federal agencies in recent years also have issued policy statements that offer significant incentives to companies that establish systems to ensure that their operations are in compliance with the agencies' regulatory goals.[130] These agencies regularly consider the quality and effectiveness of a regulated company's compliance mechanisms, when considering whether to initiate civil or criminal proceedings.[131] And when these agencies settle enforcement proceedings, they often require boards to become involved in corrective efforts.[132]

The need for board involvement in compliance program oversight is most compelling in public companies. The Securities and Exchange Commission has officially censured at least one public company's board of directors for failure to take appropriate corrective actions upon learning of apparent wrongdoing by the company's executives.[133] It also has brought

125. *See* JEFFREY M. KAPLAN, JOSEPH E. MURPHY & WINTHROP M. SWENSON, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES: PREVENTING CRIMINAL AND CIVIL LIABILITY ch. 8A (1996); PRACTISING LAW INST., CORPORATE COMPLIANCE: AFTER *CAREMARK* (1997); PRACTISING LAW INST., CORPORATE COMPLIANCE: HOW TO BE A GOOD CITIZEN CORPORATION THROUGH SELF-POLICING 139-40 (1996).

126. 15 U.S.C. §§ 78m, 78dd-1 & 2, 78ff (1988 & Supp. V 1993).

127. Pub. L. No. 100-704, 102 Stat. 4677 (1988) (codified in scattered sections of 15 U.S.C.).

128. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

129. *See* Schehr, *supra* note 116, at 1645-48 (discussing the board oversight provisions of the Federal Corrupt Practices Act and ITSFEA); Pitt et al., *Director Duties*, *supra* note 124, at 18 (discussing the board oversight implications of PSLRA).

130. *See* Kirk S. Jordan & Joseph E. Murphy, *Compliance Programs: What the Government Really Wants*, in PRACTICING LAW INST., CORPORATE COMPLIANCE: AFTER *CAREMARK*, *supra* note 125, at 739. The Department of Health and Human Services, the Environmental Protection Agency, the Department of Defense and the Department of Justice all now have programs offering incentives to create corporate compliance programs.

131. *See, e.g.*, U. S. DEP'T OF JUST., FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (1991), *in* RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING app. F (1994); Gruner, *supra* note 43, at 431.

132. *See* Jordan & Murphy, *supra* note 130 at 739 (enumerating several recent consent decrees that included specific provisions regarding the role of directors).

133. *See* Cooper Companies, Inc., Exchange Act Release No. 34-35082 (1994) (finding that Cooper's board had failed to take "immediate and decisive corrective action.").

enforcement proceedings against boards of directors that fail to ensure that top-level executives are properly disclosing corporate information.[134] Collectively, these statutory provisions and regulatory actions, taken together with the Organizational Sentencing Guidelines, form the foundation for a board of directors' duty to ensure that an appropriate system of compliance programs is in place.

How directors exercise that duty, of course, may differ across organizations. Those corporations in fraud-prone industries,[135] for example, and those with criminogenic profiles,[136] may require aggressive and sustained attention from the board. Those in more compliant industries, and those individual companies with a well-established and proven compliance record, may require substantially less effort. At a minimum though, experts say that any corporate board would be well advised to be briefed regularly

134. *See* Report of Investigation of the Conduct of Certain Former Officers and Directors of W.R. Grace & Co., Exchange Act Release No. 34-39157 (1997).

135. "There is considerable evidence that illegal activities spread from one organization in an industry to another." James William Coleman, *The Theory of White Collar Crime*, *in* WHITE COLLAR CRIME RECONSIDERED 68 (Kip Schlegel & David Weisburd eds., 1992). Currently, "the industries most in need of corporate compliance programs—high risk industries—are financial services, companies with substantial overseas operations, companies with significant environmental exposure, health services, and any industry that is known to be under special scrutiny by regulators." *Board Members*, *supra* note 123, at 7.

136. As a general rule, firms with weak or declining profits are more likely to break the law than economically successful firms. *See* Coleman, *supra* note 135, at 65. *See also* Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 326 (1991).

Firms with decentralized decision making structures are at greater risk than those with tight command and control structures. *See* Coleman, *supra* note 135, at 68-69. *See also* Steve Tombs, *Corporate Crime and New Organizational Forms*, *in* CORPORATE CRIME: CONTEMPORARY DEBATES 132, 134-44 (Frank Pearce & Lauren Snider eds., 1995) ("flat," fragmented and internally competitive organizations are more likely to engage in crime than more traditional structures); KATHLEEN M. JAMIESON, THE ORGANIZATION OF CORPORATE CRIME 13 (1994) ("specialization, decentralization, and delegation are often cited as conducive to corporate crime"); Ryan, *supra* note 116, at 431 ("informational isolation" between operating units may lead to unlawful conduct); Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 341, 359-60 (1991) (suggesting that lower-level employees in diversified, impersonally-managed firms may be more likely to engage in criminal activity than employees in more intimate settings). Firms managed by lateral hires are probably more susceptible to lawbreaking than firms that emphasize promotion from within. *See* DAVID R. SIMON & STANLEY EITZEN, ELITE DEVIANCE 242 (2d ed. 1986).

A corporation's ownership profile may also impact on its criminality. That is, firms with a small number of shareholders in which management holds a significant percentage of the shares, is more likely to engage in crime than firms that are widely held where management's percentage of the total shares is inconsequential. *See* Macey, *supra*, at 323. Similarly, "small firms," in terms of the number of employees, "comprise the vast majority of the firms engaged in criminal activity." *Id.* at 324. Finally, firms engaged in "complex transactions" are at greater risk of deviance than are firms that are engaged in more garden variety types of business dealings. DIANE VAUGHAN**,** CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR: SOCIAL STRUCTURE AND CORPORATE MISCONDUCT 111 (1983).

on the status of all compliance practices designed to satisfy the Organizational Sentencing Guidelines, especially those involving the discipline of employees accused of misconduct and management's response to specific complaints.[137] The board should also regularly review the company's ethics code and the structure of any compliance program(s), to ensure that they reflect current industry practices, new legislation, and the company's own experience.[138] The board (through its audit committee) should work carefully with outside auditors to make sure that they know the board's expectations regarding prompt reporting of evidence of misconduct.[139] "There [also] should exist a mechanism to ensure that directors learn sooner (rather than later) about allegations of significant illegality by corporate officers or directors."[140]

The upshot of all of this is simple: Corporate boards—especially those of public companies—bear the serious burden of ensuring that their companies comply with the requirements of the law. Their efforts need not be foolproof, but directors are expected to be seriously engaged with issues of legal (and ethical) compliance. When their efforts fail, and a criminal conviction results, it is entirely reasonable that they be required to participate in the corporate sentencing process.

B. DIRECTORS' ACTIONS—AS WELL AS THE CEO'S—COMMUNICATE IMPORTANT ORGANIZATIONAL CULTURAL VALUES

Another reason directors—as well as a company's CEO—should be involved in the corporate sentencing process is that directors play an essential role in establishing a company's core values. Through the priorities they set and the reward structures they put in place, directors can do much to define a corporation's culture.[141]

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137. *See* Pitt et al., *Director Duties*, *supra* note 124, at 18. *See also* JED S. RAKOFF, LINDA R. BLUMKIN, RICHARD A. SAUBER & KARL GROSKAUFMANIS, CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION § 5.06[3] (1993).

> The audit committee (or any other committee of the board of directors that the board seeks to vest with this responsibility) should undertake a regular and periodic review of what problems have arisen and how management has dealt with those problems. Among other things, significant breaches of corporate codes of conduct, and the punishments meted out to redress those breaches, are matters the audit committee should review on a regular basis.

Id.

138. *See* Pitt & Groskaufmanis, *Doing the Right Thing*, *supra* note 124, at 14.

139. *See* Richard A. Rosen, *Corporate Governance in the 1990s, Part Two: Institutionalizing Policies and Procedures to Minimize Risk*, DIRECTORS MONTHLY, June 1997, at 6.

140. Pitt, et al., *Director Duties*, *supra* note 124, at 19. In addition, the board should ensure that their company's compliance officer "receives adequate resources and support from within the company and is otherwise adequately empowered." KAPLAN ET AL., *supra* note 125, at § 8A:12.

141. *See* Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 LAW &

Indeed, directors are uniquely situated to influence the corporate culture, both by direct and indirect methods. Simply by performing routine directorial tasks—selecting (and replacing) top-level executives, approving executive compensation policies that reward the behaviors the directors think most important,[142] responding to external challenges and engaging in management oversight generally—directors can convey a powerful set of messages. One of the simplest ways a board can shape a company is to seize control of its agenda.

1. *The Strategic Use of Board-Level Committees*

One of the simplest ways a board can communicate its values is to create board-level committees that represent those values. Many corporate boards, for example, have established board-level committees to deal with environmental and safety matters.[143] Other corporate boards have established committees dealing with employee and human resource issues,[144] nuclear safety issues,[145] social responsibility issues,[146] ethics issues gener-

CONTEMP. PROBS. 39, 41 (1997) ("[D]irectors are ultimately accountable for the corporation's culture.").

142. For example, it is possible to base a portion of an executive's compensation on such items as increase in revenue, increase in market share, increase in stock price, or hitting specific targets of particular interest to the board (in sales, customer satisfaction, or employee diversity). The many ways in which executive compensation may be determined is beyond the scope of this Article.

143. This list includes: Anheuser Busch Cos. (Environmental Policy Committee); Atlantic Richfield Co. (Environmental, Health and Safety Committee); Battle Mountain Gold Co. (Environmental Affairs and Ethics Committee); CMS Energy Corp. (Environmental and Corporate Responsibility Committee); Consolidated Edison of New York, Inc. (Environmental Committee); Dexter Corp. (Environmental and Safety Committee); Dow Chemical Co. (Environmental, Health & Safety Committee); E.I. duPont de Nemours & Co. (Environmental Policy Committee); Homestake Mining Co. (Environment, Health and Safety Committee); Johns Manville Corp. (Health, Safety and Environment Committee); Knight Ridder Inc. (Environmental Affairs Committee); Nalco Chemical Co. (Environmental Compliance Committee); Occidental Petroleum Corp. (Environmental Committee); Northwest Natural Gas Co. (Environmental Policy Committee); Phelps Dodge Corp. (Environmental, Health & Safety Committee); Quaker State Corp. (Environmental and Ethics Committee); Safety Kleen Corp. (Environmental Committee); Salomon Inc. (Environmental Committee); Union Carbide Corp. (Health, Safety & Environmental Affairs Committee); Vulcan Materials Co. (Safety, Health and Environmental Affairs Committee).

144. This list includes: Central Reserve Life Corp. (Employee Relations Committee); Rohr Inc. (Employee Benefits Oversight Committee); U.S. Airways Group, Inc. (Safety Committee); Westcoast Energy Inc. (Environment and Employees' Health and Safety Committee).

145. This list includes: Boston Edison Co. (Nuclear Oversight Committee); Delmarva Power & Light Co. (Nuclear Oversight Committee); DTE Energy Co. (Nuclear Review Committee); Entergy Corp. (Nuclear Committee); Kansas City Power & Light Co. (Nuclear Affairs Committee); Niagara Mohawk Power Corp. (Nuclear Oversight Committee); Ohio Edison Co. (Nuclear Committee); Wisconsin Energy Corp. (Nuclear Oversight Committee).

146. This list includes: Allied Signal Inc. (Corporate Responsibility Committee); Armco Inc. (same); Becton Dickinson & Co. (same); Browning Ferris Industries Inc. (same); Dayton Hudson Corp. (same); Goodyear Tire & Rubber Co. (Committee on Corporate Responsibility); ITT Industries

ally,[147] and issues related to community relations and public affairs.[148] A number of banks have created board-level committees that monitor compliance with the Community Reinvestment Act.[149] Some banks, in addition, have created committees to oversee compliance with regulatory orders aimed at ensuring their continued solvency.[150] A handful of companies, often those recovering from a crisis (and sometimes under government compulsion), have created board-level committees simply to ensure that the legal requirements applicable to the companies' operations are being observed.[151] Several other companies—presumably including

Inc. (Corporate Responsibility Committee); Kellogg Co. (Committee on Social Responsibility); Kroger Co. (Social Responsibility Committee); McDonnell Douglas Corp. (same); The Mead Corporation (same); Monsanto Co. (same); Olin Corp. (same); Philip Morris Co. (Public Affairs and Social Responsibility Committee); Pitney Bowes Inc. (Corporate Responsibility Committee); Rohm & Haas Co. (same); Unisys Corp. (same); Varian Associates Inc. (same); Weirton Steel Corp. (same).

147. This list includes: Baker Hughes Inc. (Audit/Ethics Committee); Consolidated Natural Gas Co. (Ethics Committee); Essex Corp. (Ethics Committee); Harris Corp. (Ethics Committee); Home Federal Corp. (Ethics Committee); Lockheed Martin Corp. (Audit & Ethics Committee); Pittston Co. (Ethics Committee); Rohr Inc. (Audit & Ethics Committee); Sovereign Bancorp Inc. (Ethics Committee); Unocal Corp. (Accounting, Auditing & Ethics Committee).

148. This list includes: AT&T Corp. (Public Policy Committee); Armstrong World Industries, Inc. (same); Atlantic Richfield Co. (same); Bankamerica Corp. (same); Baxter International Inc. (same); Chevron Corp. (same); Eastman Kodak Co. (same); FMC Corp. (same); Federated Department Stores Inc. (same); General Motors Corp. (same); Great Western Financial Corp. (same); Paine Webber Group Inc. (same); Phillips Petroleum Co. (same); Procter & Gamble Co. (same); TRW Inc. (same); Union Carbide Corp. (same); USX Corp. (same); U.S. West Inc. (same).

149. This list includes: Abington Bancorp Inc. (Community Reinvestment Act Committee); Assumption Bancshares, Inc. (CRA/Compliance Committee); Boston Private Bancorp Inc. (CRA Committee); First Citizens Bancshares, Inc. (same); First Community Bancorp. Inc. (Compliance/CRA Committee); First Financial Corp. Rhode Island (CRA/Compliance Committee); Hawaii National Bancshares, Inc. (CRA Committee); Wells Fargo & Co. (same).

150. Three examples include: Baltimore Bancorp (Compliance Committee monitors compliance with agreements entered into with the FDIC, Federal Reserve Bank of Richmond, and the Maryland Bank Commissioner); Shawmut National Corp. (Compliance Committee monitors compliance with agreements entered into with the Office of the Comptroller of the Currency); and National City Corp. (same).

151. This list includes: C.R. Bard, Inc. (as a result of a settlement of criminal charges, the company's board now includes a Regulatory Affairs Committee that will "function with respect to regulatory matters in a manner analogous to the way a Board Audit Committee functions with respect to financial matters"); Grumman Corp. (as a result of a consent decree with the Department of Justice, the duties of the board Audit Committee are expanded to include "oversight of corporate self-governance policies and procedures relating to business ethics and compliance"); NME, Inc. (as a result of a consent agreement with the Department of Justice and the Department of Health and Human Services, NME's board now includes a Ethics and Quality Assurance Committee which is "ultimately responsible for supervising . . . the company's Corporate Integrity Program, maintaining and updating the Standards of Conduct, and validating NME's compliance with [the consent] agreement"); Northrop Corp. (as a result of the settlement of a shareholders' derivative action, the board's executive committee will expand its responsibilities to include compliance with federal law and regulations); Prudential Securities, Inc. (as a result of a consent agreement with the Securities and Exchange Commission, the board has added a Compliance Committee, with the "ultimate responsibility for all com-

some that are attempting to adopt "best practices"—have recently created board-level committees to ensure that their employees are adhering to internal or industry codes of conduct or various other regulatory requirements.[152]

The decision to establish committees such as these, and the accompanying public proclamation that the subjects of these committees' deliberations are significant enough to command board-level attention, are important elements of a company's ethical profile. Decisions to create such committees—and to convene them regularly—are very much a part of the shaping of a corporate culture.

2. *Other Actions a Board May Take to Influence the Corporate Culture*

Other practices are also available to directors by which they can communicate to employees, customers, and the public the importance they place on various cultural values. Some of these practices, like insisting that the company has a clearly drafted code of ethics, or that management implement a coherent and aggressive compliance program such as that suggested in *Caremark*, are obvious. There are consultants who can assist in the design of such programs. Indeed, the shaping of compliance programs is now a vigorous growth industry.

There are still other ways, however, in which directors individually, and collectively, can influence a corporation's culture. First, directors can build into the criteria by which they evaluate senior management performance in the area of legal compliance.[153] Second, they may condition ex-

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pliance functions at PSI"); Salomon, Inc. (following adverse rulings by the SEC, the board created a Compliance Committee which "establishes and reviews policies and their administration with respect to the compliance of the Company and its subsidiaries with regulatory and internal procedures") (The foregoing documents are on file with the author.)

152. This list includes: American Wagering Inc. (Compliance Committee); Broadway Financial Corp. (same); Fairchild Corp. (Corporate Ethics and Compliance Committee); Guidant Corp. (Compliance Committee); Iomega Corp. (Ethics and Compliance Committee); Ivax Corp. (Regulatory Compliance Committee); Maxxam Inc. (Conflicts and Compliance Committee); Nalco Chemical Co. (Environmental Compliance Committee); Renal Treatment Centers Inc. (Compliance Committee); Ringer Corp. (same); Shaw Industries Inc. (Listing and Legal Compliance Committee); Theragenics Corp. (same); Thiokol Corp. (same).

153. *See* Joseph E. Murphy, *Corporate Counsel's Role in Interactive Compliance*, *in* CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE 91, 95 (Jay A. Sigler & Joseph E. Murphy eds., 1991).

> While not every element of compliance can be quantified, some—for instance, pollution levels and worker safety—clearly are easily quantified. Others—such as commitment to fair competition principles—will require more subjective analysis and greater creativity. Surveys of a manager's subordinates to test their training in and understanding of the relevant compliance rules may be a starting point.

Id.

ecutives' access to stock options or indemnification rights on the executives' cooperation in internal investigations.[154] Third, they may wish to consider a consistent policy of cooperation with investigatory agencies, and when the occasion for self-reporting arises, insist on prompt action, even when management would prefer a more combative stance.[155] Fourth, they may choose to participate personally in in-house ethics and compliance training programs. All these actions, especially if they are announced publicly and made visible to all employees, would send a powerful signal regarding the corporation's commitment to legal compliance, ethical business practices, and personal responsibility in pursuit of the company's objectives. And all of these actions also fit easily within the traditional boundaries of directorial concerns.

The point of this discussion is twofold: (1) It illustrates the wide range of resources available to directors by which corporate criminality can effectively be discouraged; and (2) it provides a snapshot of the kinds of issues that might be explored at a directors' woodshed proceeding. A federal judge armed with a modicum of information about a corporate board's governance practices can effectively examine where board performance has fallen short of best practices and also suggest practical avenues for organizational reform.

C. Involving Directors in the Sentencing Process Will Add to the Deterrent Impact of the Corporation's Sentence

Directors who are subject to a woodshed proceeding can fairly expect the following to occur: The proceeding will disrupt their personal routines and require them to convene in an unfamiliar—perhaps inconvenient—courtroom setting; it will reconfigure—at least temporarily—the directors' traditional patterns of deference to the CEO[156] and cause them to defer instead to a powerful sentencing judge; it will force the directors to familiarize themselves with, and examine in some detail, the practices and poli-

154. *See* Pitt et al., *Director Duties*, *supra* note 124, at 20.

155. *See* Jeffrey W. Nunes, Comment, *Organizational Sentencing Guidelines: The Conundrum of Compliance Programs and Self-Reporting*, 27 ARIZ. ST. L.J. 1039, 1055 (1995) ("[A] director's failure to establish an effective compliance program may constitute gross negligence. A director's failure to self-report may result in the same liability when the director could have saved the corporation thousands of dollars in fines by reporting to the authorities in a timely fashion.").

156. *See* LORSCH & MACIVER, *supra* note 25, at 93 (noting that "[t]he informal rules for directors are well defined. Directors are expected, above all, to treat the CEO with respect which means not embarrassing him or her in a board meeting"), 95 (stating that "our evidence indicates that in many boardrooms important issues aren't discussed openly, nor in a timely fashion . . . . The biggest taboo is against open criticism of the CEO's activities.").

cies of the corporation that led to the crime at issue, management's failure to prevent or detect the crime, and management's response upon learning that a crime had occurred; and it will cause the directors, rather than some hired litigator, to witness and actually listen to the sentencing judge's comments, particularly as regards harm to the community, impact on victims, and the need for improved management oversight.

All of these effects are likely to be strongly felt and long-remembered, not only by the persons who are the subject of the proceeding, but also by others in similar environments who can imagine themselves standing in the "woodsheddees'" shoes.

1. *Woodshedding Will Reinforce the Teachings of* Caremark

Under the current regime, corporate criminal convictions have no discernible impact on a corporate directors.[157] Criminal convictions, even for shocking corporate crimes, seldom bring about changes in board composition, for example. One does not find a reduction in directorial compensation following a guilty verdict. Though occasionally a CEO may be sacrificed,[158] outside directors are seldom, if ever, involved in such purges. Indeed, until Chancellor Allen's decision in the *Caremark* case, corporate directors could safely assume that their companies' criminality had little, if any, connection with their work.

The woodshed proceeding will serve to alter this practice of virtual immunity for directors when corporate crime occurs. Requiring directors to appear in court to receive a company's sentence will serve as a reminder of their fiduciary obligations. This reminder is important because the likelihood of a damage award under *Caremark* is remote—only the most irresponsible directorial behavior poses a financial risk to directors. So, the woodshed proceeding can serve as a low-cost surrogate for a damage award—one which burdens directors but not too heavily.

2. *Woodshedding Will Facilitate the Transmission of Moral Messages*

Edward Rock has recently written on the informal mechanisms by which corporate norms are transmitted.[159] These include the narrative stories told in the opinions of the Delaware courts, speeches and out-of-court

157. *See* FISSE & BRAITHWAITE, *supra* note 16, at 14 ("The way in which legal liability is structured today often confers a de facto immunity on corporate managers, who are typically shielded by a corporate entity which takes the rap. This is a fundamental difficulty of the deepest social significance.").

158. *See supra* note 102 and accompanying text.

159. *See* Rock, *supra* note 24.

comments made by Delaware judges, media coverage examining the misbehavior of corporate executives, and gossip. Focusing on the role of the courts, Rock asserts that Delaware judges engage in the practice of delivering "corporate law sermons"[160] and that "we come much closer to understanding the role of courts in corporate law if we think of judges more as preachers than as policemen."[161] The same line of thinking applies to judges in criminal cases as in corporate law cases—part of their task is to send messages to distant listeners setting forth the boundaries of acceptable organizational behavior. The directors' woodshed proceeding is just one way in which these messages may be widely disseminated.

VI. HOW WOODSHEDDING WILL WORK

The determination as to whether to require the board's participation in a woodshed proceeding will rest with the sentencing judge. The court's determination as to whether such a proceeding should be convened in a particular case should take into account the following factors:

— the gravity of the crime;

— whether the crime indicated a pervasive disregard for the law, or was an isolated incident within the corporation;

— whether the corporation accepted responsibility for the crime;

— whether high-level executives were involved in the crime;

— whether high-level executives participated in, condoned, or were willfully ignorant of the conduct giving rise to the crime;

— whether the corporation's top-level executives took appropriate action in response to the discovery of the crime (including personnel decisions and the initiation of an internal investigation);

— whether the corporation's top-level management self-reported the crime and cooperated in the investigation;

— whether members of the board were involved in the crime;

— whether board members participated in, condoned, or were willfully ignorant of the conduct giving rise to the crime;

— whether the corporation had in place an effective program to prevent and detect violations of the law;[162]

160. *Id.* at 1016.
161. *Id.*
162. As a practical matter, corporations in which a compliance program does not exist, or is fun-

— the specific steps taken by the board to ensure that corporate misconduct would be brought to its attention;

— the role of the board, if any, in responding to allegations that criminal activity had occurred (including actions to remove wrongdoers, decisions about indemnification and payment of employees' legal expenses, and actions authorizing cooperation with the investigation);

— the role of the board, if any, in deciding whether to self-report the crime;

— the role of the board, if any, in determining whether the corporation should take responsibility for its crime and seek a sentence reduction under the Sentencing Guidelines;

— the composition of the board (insiders v. outsiders);

— the public profile of individual board members (prestigious figureheads v. publicly obscure directors); and

— the collateral effects of the corporation's criminal activities (including civil suits by victims of the crime, and the pendency of shareholders' derivative suits against the board of directors or others).

The shorthand formula for sentencing judges should be this: In those (infrequent) cases where there is evidence that the board "participated in, condoned, or was willfully ignorant of" the conduct at issue, the prosecution could of course invoke those provisions of the Sentencing Guidelines that permit an enhancement of the corporation's sentence.[163] In all such cases, the sentencing court should also order a directors' woodshed proceeding. In those (more common) cases where the board has had no direct knowledge of the crime and did nothing specific to condone it (or willfully ignore it), the sentencing judge may still wish to order a woodshed proceeding, depending on the circumstances surrounding the crime and the board's public profile. And even where the corporation's directors have done everything in their power to minimize the likelihood of corporate crime in the ways suggested in Part V.B., the sentencing judge may nev-

damentally flawed, are more likely to be subject to a woodshed proceeding than corporations that have made a genuine effort to ensure that their employees comply with the law. However, the existence of a compliance program—even one that has been determined to be "effective" under the Sentencing Guidelines—should not excuse directors from a court-imposed woodshed proceeding if the court determines that one is otherwise appropriate.

163. U.S.S.G. § 8C2.5(b). Fischel and Sykes state, "[Board involvement in corporate crime] is unlikely to occur very often in practice . . . . Involvement of . . . the full board of directors [in a crime] only increases the probability of detection." Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEG. STUD. 319, 324 (1996).

ertheless decide to convene a directors' woodshed proceeding, depending on the gravity of the case and other factors enumerated in this section. Regardless of the circumstances giving rise to the woodshed proceeding, it should be conducted along the lines of those set forth for the conduct of the icon proceeding,[164] and should incorporate similar reintegrative themes.

Woodshed proceedings are likely to be quite rare. Most corporate defendants are closely-held businesses,[165] in which (if there is a board) the board's participation in a woodshed proceeding would have little, if any, general deterrent value. But for those companies, especially public companies, in which serious criminal conduct has occurred, there may be a strong symbolic value in requiring a directors' woodshed proceeding in connection with the companies' sentencing. As one critic has observed, though ostensibly about truth-seeking, a judicial proceeding is in fact "a drama that the public attends and from which it assimilates behavioral messages."[166] A woodshed proceeding, like other forms of symbolic punishments, would simply be a variation on this theme.

VII. PREDICTABLE CRITIQUES AND A RESPONSE

A mandatory corporate icon proceeding and the proposed directors' woodshed proceeding both give rise to several predictable criticisms: They may be unconstitutional; they are merely "retributive spectacles"; they may discourage risk taking; overuse may give rise to "shaming overload," thus undermining their deterrent power; other options may be more cost-effective; and neither provision is likely to have a measurable impact on lower- to mid-level employees where deterrence would really count. There are several responses to these arguments, which I will sketch out, albeit briefly, in the following section.

A. Constitutional Considerations

In thinking about the constitutionality of both the mandatory corporate icon proceeding and the discretionary directors' woodshed proceeding, one might first turn to those cases in which corporate executives have in-

164. *See supra* Part IV.

165. Over ninety percent of the corporate defendants sentenced under the Guidelines fall into this category. *See* David P. Bancroft, *Some Current Issues in Organizational Sentencing Under the Guidelines*, *in* SIXTH ANNUAL NATIONAL SEMINAR ON THE FEDERAL SENTENCING GUIDELINES 1 (1997).

166. Charles R. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1360 (1985). Edward Rock analogizes the trial process to "a morality play." Rock, *supra* note 24, at 1047.

voked the fiduciary shield doctrine.[167] These executives have argued that extending personal jurisdiction over them in civil cases for conduct undertaken solely on behalf of the corporations with which they are affiliated would violate their personal due process rights. The consistent response to this argument has been that the fiduciary shield doctrine does not assume constitutional proportions.[168] Indeed, it has been abandoned in many states. Moreover, the fiduciary shield cases involve the potential for personal liability for the executive, whereas submission to an icon or woodshed proceeding risks nothing more than a transient reputational injury. At best, being summoned to appear in a sentencing proceeding can be likened to receiving a subpoena to testify at trial.

A more plausible constitutional argument is the one raised by the CEO, general counsel, and a senior corporate executive at A.H. Robins Co. when Judge Miles W. Lord used a settlement hearing in a civil case as an occasion to publicly castigate those executives for their complicity in the company's manufacture of the Dalkon Shield.[169] These executives, seeking to have his comments expunged from the record, argued successfully that Judge Lord had, in effect, issued factual findings regarding their wrongdoing without giving them notice and an opportunity to be heard. The Court of Appeals held that Judge Lord's critical comments toward the executives had implicated the executives' liberty interests, and that their due process rights had been infringed.[170]

Four circumstances distinguish the icon and woodshed proceedings from the harsh rhetoric delivered by Judge Lord. First, unlike the ambush in the A.H. Robins case, notice will be given of the nature and purpose of the proceedings well in advance of their occurrence. Second, the icon and woodshed proceedings will follow either a guilty plea or a guilty verdict at the close of a trial in a criminal case, so that the elements of the crime were either admitted or proven beyond a reasonable doubt. This is quite different from the A.H. Robins situation which occurred when the case was settled in mid-discovery when no evidence had yet been heard by the court.

Third, the icon and woodshed proceedings could easily be designed so as not to prejudice other related litigation, such as the many other Dalkon Shield cases that were pending at the time Judge Lord issued his "find-

167. *See, e.g.*, Tristrata Tech., Inc. v. Noetreric Cosmetics, Inc., 961 F.Supp. 686, 690 (D. Del. 1997) (describing the doctrine).

168. *See, e.g.*, Advantage Lift Sys. v. O.M.E.R., 1997 U.S. Dist. LEXIS 11355 n.2 (S.D. Cal.).

169. *See supra* note 9.

170. *See* Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1193-94 (8th Cir. 1984).

ings" against A.H. Robins' leaders. For example, where civil suits or shareholders' derivative actions are pending, the icon and woodshed proceedings might be confined to matters related to remediation. Where the corporation's executives remain targets of a criminal investigation, they may, of course, invoke the Fifth Amendment.

Finally, the icon and woodshed proceedings should certainly avoid some of the more intemperate attacks that characterized Judge Lord's remarks. Recall that the object of the icon and woodshed proceedings is not merely to sermonize, as Judge Lord did, but to draw specific attention to a defendant's obligation to remediate his crime, to stimulate repair of the organizational shortcomings that gave rise to the crime *ab initio*, and to elicit some promise of more compliant corporate behavior in the future. In short, the object is to reintegrate top executives into a culture of legal compliance and to improve managerial behavior. That task presents a very different scenario than the kind of "stigmatizing shaming" that Judge Lord's performance imposed upon the A.H. Robins executives.

B. Concerns About "Retributive Spectacle"

A more significant critique of the corporate icon and directors' woodshed proceedings comes from Toni Massaro, who has characterized some shaming rituals as meaningless "retributive spectacle[s]."[171] Massaro focuses on the more humiliating of the shaming rituals—judicially ordered sign wearing and the posting of public apologies. However, the corporate icon and directors' woodshed proceedings differ from those forms of shaming censure in several important ways.

First, these proceedings will be confined to the courtroom and will not require any public displays of self-abasement. There is likely to be some publicity about many icon and most woodshed proceedings but being lectured to briefly in a courtroom by a judge does not equate to parading one's misdeeds in a public place among strangers, or for a protracted period of time. In addition, neither the icon proceeding nor the woodshed proceeding—unlike some other shaming rituals—is likely to create much of a "spillover effect."[172] Thus, innocent bystanders, such as spouses and children, should not be made to feel too personally stigmatized or shamed.

Second, there is little likelihood that either the icon proceeding or the

171. Massaro, *supra* note 21, at 1884. Another critic has described shaming sanctions as "troubling," "ugly," and a "species of lynch justice." James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1058-59 (1998).

172. Massaro, *supra* note 21, at 1938.

woodshed proceeding will raise issues of unequal or discriminatory application.[173] Both proceedings will be conducted by judges whose cultural experiences, by and large, will have been similar to those of the men and women appearing before them. Though the power imbalance at the moment of shaming will be obvious, there is little risk that the process will be (or will be perceived as being) a product of class bias or racial animus.

Finally, the directors' woodshed proceeding is especially defensible if the concern is that a shaming ritual is merely a vehicle for imposing humiliation. That is because it will be a shared sanction. Individual directors (as distinguished from some CEOs) will seldom be singled out for particularized criticism or shame.

C. CONCERNS ABOUT A CHILLING EFFECT

A third concern, specious in my view, is that implementation of a mandatory corporate icon proceeding or a discretionary directors' woodshed proceeding would disrupt executives' expectations of autonomy and tend to overdeter them. One might argue, for example, that the specter of such a proceeding might discourage CEOs from serving in companies with a high risk of criminal exposure, or would discourage directorial service in such companies.[174] Alternatively, one might argue that the existence of icon and woodshed proceedings would stifle innovation and cause CEOs and their directors to become excessively risk-averse.[175] Neither of these claims outweighs the potential deterrent value of the proposed proceedings, in my view, and neither is supported by any evidence. It is highly unlikely that the possibility of a corporate icon proceeding (as compared to, say, the risk of being fired for poor performance or the burdens of defending multiple lawsuits) will drive good CEOs out of office. And the remote possibility of a proceeding such as that envisioned by the directors'

173. Massaro points out that discretionary sanctions such as those involving shaming may be prone to manipulation by judges, as a result of a judges' own prejudices and class biases. *See id.* at 1941.

174. This argument has been made in the past, as critics claimed that constant threats of fiduciary duty lawsuits would drive competent directors out of the boardrooms. This concern led to the enactment of dozens of "liability cap" provisions, a tightening up of demand requirements for plaintiffs, and an artful recasting of the notions of fiduciary duties in general. In fact, however, fear of lawsuits is seldom a factor in directors' decisions to accept or reject a board position. *See* LORSCH & MACIVER, *supra* note 25, at 24-26 (Of all reasons cited by interviewees for refusing offers to serve on corporate boards, "personal liability" was cited the least often. Cited far more often were such reasons as "lack of time," "conflicts of interest," and "no interest in [the] firm's industry.").

175. *See* Macey, *supra* note 136, at 319 (articulating the concern that undue anxiety about corporate criminal liability "can exacerbate [directors'] proclivity toward excessive risk avoidance, in turn, stifling innovation and creativity and leading to a general decline in social wealth.")

woodshed proposal is hardly so Draconian as to move corporate directors toward excessive business timidity, let alone toward resignation from their posts.

D. Concerns About "Shaming Overload"

A pragmatic concern is that if too many icon or woodshed proceedings are conducted, each additional proceeding may become devalued and those persons (primarily business colleagues) at whom these proceedings are directed, will cease paying attention to them and will no longer be deterred. Professor Massaro refers to this scenario as "shaming overload."[176]

This concern assumes that corporate icon and directors' woodshed proceedings will become commonplace, and that the fact patterns presented will be indistinguishable from defendant to defendant. It further assumes that individual judges' approaches to the interchange with the CEOs or corporate directors appearing before them will quickly become boilerplate, thus rendering the judges' comments unremarkable. I doubt that either outcome will prove to be the case.

First, unless corporate crime increases dramatically, the number of icon and woodshed proceedings will be small. At present, across the country, the average rate of corporate sentencing proceedings is just around four per week,[177] or less than one for each active federal judge per year.[178] Most of these cases involve closely-held corporations[179] for which woodshed proceedings will seldom be necessary. And many of these cases involve defunct corporations where even the icon proceedings might be dispensed with. The geographic distribution of the remaining cases, the nature of the crimes committed, the array of industries involved, the range of harms, and the personalities and organizational structures that gave rise to the corporations' sentences, should all keep icon and woodshed proceedings from becoming too routine.

In addition, one must consider the role of the business press in disseminating information about icon and woodshed proceedings. Only a few such proceedings will receive widespread attention. Otherwise, word of such proceedings will be confined geographically, within industries, and

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176. Massaro, *supra* note 21, at 1930.

177. *See* U.S. SENTENCING COMM'N, 1997 ANN. REP. 40 (last modified Aug. 12, 1998) <http://www.ussc.gov/annrpt/1997/ch5ar97.pdf> (reporting that 220 corporations were sentenced under the Guidelines during that fiscal year).

178. *See* Administrative Office of the U.S. Courts (indicating there are currently 610 active federal district judges).

179. *See supra* note 165 and accompanying text.

within limited social circles. Concerns that significant shaming proceedings will be lost in the noise of competing proceedings thus seem, if anything, unduly optimistic.

E. CONCERNS ABOUT COST-EFFECTIVENESS

V.S. Khanna has argued that shaming sanctions are expensive, in the sense that they are more costly to administer than the simple imposition of a monetary fine.[180] He consequently suggests that, rather than be subjected to a shaming sanction, top managers of convicted corporations should be ordered to pay a fine based on some theory of strict liability.[181] Fining would be "socially cheaper," and also "more accurate" than any shaming sanction is likely to be.[182]

Dan Kahan and Eric Posner respond that (apart from any constitutional infirmities inherent in Khanna's proposal), focusing on bookkeeping type criticisms such as these without also factoring in the "expressive utility" of shaming sanctions is "a bad idea."[183] In other words, they argue, shaming sanctions have an independent value beyond that available from the use of financial penalties—they satisfy the public's demand for expression of moral condemnation.[184]

A more straightforward way to respond to the concern about cost is to note that the "cost" side of the cost-effectiveness equation as applied to shaming sanctions involves very low costs both for the courts and for the parties. Shaming sanctions need not command much in the way of judicial resources, and they would be less intrusive—and certainly less costly to the defendant—than court-ordered "community service,"[185] "corporate probation,"[186] or a court-supervised compliance program[187] would be. It also would be less publicly humiliating to the corporation (and thus less harmful to the corporation's shareholders) than a formal "publicity sanc-

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180. *See* Khanna, *supra* note 37, at 1505.

181. *See id.* at 1510.

182. *Id*.

183. Dan M. Kahan & Eric A. Posner, Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines (unpublished manuscript on file with the author).

184. *See* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1385 (1998) ("Law, in a democracy, is more than a price tag.").

185. U.S.S.G. § 8B1.3; Brent Fisse, *Community Service as a Sanction Against Corporations*, 1981 WIS. L. REV. 970.

186. Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2028 (1992) (describing the breadth of the probation option); Shayne Kennedy, Note, *Probation and the Failure to Optimally Deter Corporate Misconduct*, 71 S. CAL. L. REV. 1075 (1998) (questioning the efficiency of corporate probation).

187. *See* U.S.S.G. §§ 8D1.1(a)(3), 8D1.4(c).

tion" would be.[188] Finally, a shaming sanction would not involve the vast sums of money that would be required to defend against a shareholders' derivative action (though submission to an icon or woodshed proceeding would not be a defense to such an action). Looking strictly at costs, the icon and woodshed proceedings look like a bargain. The "effectiveness" side of the cost-effectiveness equation is the subject of the following section.

F. BUT WILL IT WORK?

A final criticism of both the mandatory corporate icon proceeding and the discretionary directors' woodshed proceeding has to do with the actual effectiveness of these proceedings. If it is true that most crime occurs somewhere near the middle-management level,[189] then focusing the court's attention on the CEO and board of directors arguably may represent misplaced energy. In fact, however, directing the court's attention to the top of the corporate pyramid is a singularly efficient method of conveying the message of the sentencing court to absent mid-level managers.

As noted above, the CEO is the single most potent force for change within an organization and corporate directors, although more distant, can also make substantial contributions toward improving an organization's culture. More importantly, mid-level managers are very attuned to the shame that is heaped upon their bosses. In a seminal study of the human responses within organizations that had been caught in serious wrongdoing,[190] Brent Fisse and John Braithwaite found that, when the spotlight was turned on the company or its top executives, employee morale suffered and the problems revealed became a "relentless topic of conversation" in the workplace.[191]

More important, however, was the finding that shame generated organizational reforms. In case study after case study, companies improved in many areas after significant shaming incidents. Some improved their compliance programs[192] and internal auditing functions.[193] Others re-

188. Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993) (describing the significant declines in stock value experienced by corporations convicted of fraudulent acts).

189. *See* KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS 25-26 (1990); Coffee, *supra* note 29, at 397 ("[T]he locus of corporate crime is predominantly at the lower to middle management level.").

190. *See* FISSE & BRAITHWAITE, *supra* note 37.

191. *See id.* at 35.

192. *See id.* at 72, 142 (describing the improved programs at Allied Chemical Co. and G.D. Searle & Co.).

vamped their compensation plans and other incentive schemes.[194] Still others revised company procedures to ensure that the kinds of problems that had given rise to the scandal would not recur,[195] and that information about misconduct would more effectively make its way to the top.[196] In many companies, sanctions were put in place to deal with employees who violated internal policies,[197] and several improved their employee education programs.[198] Finally, in some situations, particularly those involving egregious misconduct, companies were entirely reorganized.[199] In short, in virtually every case Fisse and Braithwaite examined, public shaming resulted in measurable reforms from the top to the bottom of the corporate hierarchy. Thus, "adverse publicity played a significant role in prodding the company into change."[200]

In light of these findings, it is fair to predict that the mandatory corporate icon proceeding and the discretionary directors' woodshed proceeding will similarly stimulate useful corporate reforms. To the question, "but will it work," the answer is that it should. Let us try it and see what happens.

CONCLUSION

The Organizational Sentencing Guidelines were intended to be an organic document to be altered as experience suggests additional ways in which sentencing procedures could be more effective in minimizing criminal activities.[201] This Article proposes an amendment to the Guidelines, designed (1) to increase the likelihood of corporate self-reporting of crimes and cooperation with investigators in determining the scope and extent of a corporation's crime, and (2) to increase the likelihood that corporations—especially public ones—will be more attentive to legal compliance values, and more assiduous in establishing internal compliance programs. Both of these objectives are salutary and achievable.

193. *See id.* at 155-56 (describing the beefing up of the internal audit group at Lockheed Aircraft Corp.).

194. *See id*. at 73, 141 (describing revised programs at Allied Chemical and G. D. Searle & Co.).

195. *See id*. at 36 (describing General Motors' new procedures for handling internal reports of product defects to ensure that "loop closing" occurred).

196. *See id.* at 234 (enumerating companies).

197. *See id.* at 176 (describing range of sanctions initiated—and imposed—at Exxon Corp.).

198. *See id.* at 234 (enumerating companies).

199. *See id.* at 141 (G. D. Searle & Co.).

200. *Id.* at 233.

201. *See* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 251-52 (1993).

The "corporate icon" provision currently contained within the Guidelines needs merely to be revised to make it mandatory in all situations in which a finding of organizational guilt is entered. For example:

> At the sentencing hearing conducted pursuant to Federal Rule of Criminal Procedure 32(c), the court shall require the chief executive officer or highest ranking employee of the defendant organization to appear in person to receive the organization's sentence.

As for the directors' woodshed proceeding, the language might read something like this:

> In addition, the court may determine that the organization's board of directors or its equivalent, as represented by a majority of its members, should appear at the sentencing hearing.

If embraced by the U.S. Sentencing Commission, these proceedings will directly support what the Sentencing Guidelines in theory seek to achieve—to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct."[202] They will also reinforce the teachings of basic corporate law: that officers and corporate directors should, on some occasions, be held accountable as individuals for the corporate wrongdoings that occur on their watch.

202. U.S.S.G. ch. 8, introductory cmt.