

Summer 2003

## Criminal Law Sanctuaries

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### Recommended Citation

Wayne A. Logan, *Criminal Law Sanctuaries*, 38 *HARV. C. R.-C.L. L. REV.* 321 (2003),

Available at: <http://ir.law.fsu.edu/articles/189>

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# Criminal Law Sanctuaries

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*Wayne A. Logan\**

If anyone renders himself liable to the lash and flees to the church, he shall be immune from scourging.<sup>1</sup>

[A husband can] use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted . . . the law will not invade the domestic forum, or go behind the curtain.<sup>2</sup>

Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?<sup>3</sup>

## I. INTRODUCTION

During the winter months of 2002, Americans were shocked and dismayed to learn of boys having been sexually abused by Catholic priests. Soon, the reports proliferated, inspiring more victims to come forward, many of whom had suffered in silent anguish for years. That the priests had acted criminally and taken advantage of the intimate trust of their youngest and most vulnerable parishioners was bad enough. Worse still, it soon became apparent that the Catholic Church itself, rather than acting decisively to end the victimizations and facilitate prosecutions, had engaged in a systematic effort to shield predator priests dating back several decades.

The reasons and rationales underlying the Church's behavior are complex and not yet fully understood. Some apparent explanations include the Church's desire to recycle fallen priests due to personnel shortages and the obvious public relations concerns presented by pedophile priests. However, there is no mistaking another, more deeply institutional sensibility undergirding the Church's response: the idea that criminal abuse by clergy should

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<sup>1</sup> CHARLES H. RIGGS, JR., *CRIMINAL ASYLUM IN ANGLO-SAXON LAW* 6 (Univ. of Fla. Monographs, Social Sciences No. 18, 1963) (translating laws attributed to Ine, King of the West Saxons from 688 to 725).

<sup>2</sup> *State v. Black*, 60 N.C. (Win.) 262, 267 (1864).

<sup>3</sup> MERVYN A. KING, *PUBLIC POLICY AND THE CORPORATION* 1 (1977) (quoting Edward, First Baron Thurlow, who lived from 1731 to 1806).

be sanctioned by the Church internally—if at all—in accordance with canonical commands of contrition and forgiveness, and not by civil authorities.

The Church's institutional response, while surely troubling, seemed oddly out of place in a nation gripped by an ongoing "moral panic" over sex offenders,<sup>4</sup> marked by draconian prison terms, registration and community notification laws,<sup>5</sup> and even indefinite, involuntary civil commitment.<sup>6</sup> Viewed in historical context, however, the Church's behavior was not so anomalous. For many centuries, churches have served as sanctuaries from criminal liability, offering refuge to clergy and laity alike, as have other institutions over the years. As one late nineteenth-century scholar observed, the "institution of sanctuaries has its root in a sentiment common to all humanity,"<sup>7</sup> recognized through the centuries.

Indeed, two contemporary examples of sanctuary, also the focus of recent media attention, involve institutions of equal centrality to American society: families and corporations.<sup>8</sup> This Article explores the manner in which Anglo-American law has, and has not, addressed criminal activity within churches, families, and corporations. Each institution has afforded a measure of immunity from prosecution, in effect establishing criminal law sanctuaries that, under ideal circumstances, self-regulate effectively without intrusion by government, but in less benign circumstances serve as criminogenic refuges.

As will be discussed, however, over time government has become less tolerant of the sanctuaries, eroding the exceptionalism they embody and implementing legal strategies intended to punish and deter the harms they have insulated. Such efforts have been motivated by a variety of influential catalysts, most notably feminism, victims' rights, and populism. This trend, in turn, has been augmented by the historical governmental predisposition to increase its punitive reach, which in modern times has been galvanized by aggressive and increasingly omnipresent media reportage.

The evolving willingness of government to invoke the criminal law to address wrongs committed within church, family, and corporation, in

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<sup>4</sup> See generally PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998).

<sup>5</sup> See generally Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 158–67 (2000) (describing registration and notification initiatives).

<sup>6</sup> See generally Samuel J. Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Offenders in the United States*, 30 N.M. L. REV. 69, 70–76 (2000) (chronicling the resurgence of sex offender commitment laws).

<sup>7</sup> THOMAS JOHN DE' MAZZINGHI, *SANCTUARIES I* (Stafford, England, Halden & Son 1887).

<sup>8</sup> The financial abuses of Enron and WorldCom are only two of many recently reported instances of corporate wrongdoing. See, e.g., Verne Kopytoff, *Annus Horribilis: Corporate Scandals, Lingering Recession Made 2002 Truly Horrible Year*, S.F. CHRON., Dec. 29, 2002, at G1, 2002 WL 403925812 (providing chronology of corporate scandal revelations in 2002). For a recent discussion of the persistent failure of the criminal law to punish and curtail intra-familial abuse, see Deborah Sontag, *Fierce Entanglements*, N.Y. TIMES, Nov. 17, 2002, § 6 (Magazine), at 52.

the face of historic *de facto* and *de jure* shields from accountability, is a story rich in interconnections and parallels. Each institution has enjoyed preeminent social standing, allowing it to command governmental deference and discourage efforts to intervene. In turn, insularity endemic to the institutions has made them reluctant to publicly acknowledge wrongdoing occurring within their privileged realms. Taken together, these shared institutional characteristics present strikingly similar challenges to the application of the criminal law.

The Article begins with an overview of the historic criminal law sanctuaries of churches, families and corporations, exploring the social, political, and jurisprudential reasons for their existence, as well as the government's eventual efforts to address the criminal wrongs they have shielded. The discussion then turns to governmental efforts to detect, punish, and deter criminal harms in the context of families and corporations, in particular. The Article concludes that the criminal law, despite its unique expressive function in condemning misconduct, has failed to achieve unequivocal success in its campaigns against criminal abuse in the domestic and corporate contexts. Drawing lessons from social science research, it offers some insights into how the law might best be employed to combat criminal sexual abuse within the Church, a similarly closed institution with analogous incentives and capacity for obscuring criminal activity.

## II. SANCTUARIES

### A. *The Church*

#### 1. *Historic Role of Sanctuary*

Historically, churches afforded sanctuary to those seeking refuge from private vengeance for alleged wrongdoing. The Bible itself refers three times to the right of sanctuary for accidental homicides,<sup>9</sup> and endorses its use to guard against the unconstrained reciprocal blood-lettings customary at the time.<sup>10</sup> Once the individual reached a physical site of sanctuary, such as an altar<sup>11</sup> or a designated city,<sup>12</sup> his contention that the death was

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<sup>9</sup> See Moshe Greenberg, *The Biblical Conception of Asylum*, 78 J. BIBLICAL LITERATURE 125, 125 (1959).

<sup>10</sup> See, e.g., *Exodus* 21:12–14 (New Oxford rev. standard version 1977):

Whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee. But if a man willfully attacks another to kill him treacherously, you shall take him from my altar, that he may die.

*Id.*

<sup>11</sup> See IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES* 127–29 (1985).

<sup>12</sup> See *id.* at 125; see also *Numbers* 35:6–34 (commanding Moses to establish six cities

accidental was evaluated. If confirmed, the individual could avoid retribution so long as he remained at the site.<sup>13</sup> If deemed guilty of intentional homicide, he was delivered to his avenger.<sup>14</sup>

Sanctuary played a similarly central role in Grecian society. In Athens, “[a]lmost every temple afforded protection to criminals, even to those who had committed the worst crimes, and no fugitive could be molested or dragged forth.”<sup>15</sup> Sanctuary seekers were seen as suppliants and “held sacred as being under divine protection.”<sup>16</sup> The Romans, in contrast, were less predisposed to sanctuary, affording only temporary refuge until formal adjudication by civil authorities could proceed, and civil sanction could be applied.<sup>17</sup>

With the spread of Christianity during the third and fourth centuries C.E., secular authority came to expressly recognize the ecclesiastic right to sanctuary.<sup>18</sup> The early Christian Church defined the physical parameters of sanctuary,<sup>19</sup> and while government at times reserved the right to exempt certain wrongdoers (such as public debtors, murderers, and apostates),<sup>20</sup> ecclesiastic authority almost exclusively determined the availability of sanctuary. However, because Church officials often found it difficult to draw legal and moral distinctions among offenders, as a practical matter protection was afforded to almost all criminals.<sup>21</sup> According to one commentator:

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on Levitical land that were to serve as refuges).

<sup>13</sup> Individuals seeking sanctuary in a Levitical city, as opposed to a local altar, were thought to be seeking the expungement of bloodguilt, which could occur only with the death of the high priest, with its consequent expiatory value for the city-at-large. See Greenberg, *supra* note 9, at 130. With the high priest’s passing, sanctuary beneficiaries were allowed to the places from which they had taken refuge. *Id.*

<sup>14</sup> See *Exodus* 21:14; *Numbers* 35:31.

<sup>15</sup> NORMAN MACLAREN TRENHOLME, *THE RIGHT OF SANCTUARY IN ENGLAND: A STUDY IN INSTITUTIONAL HISTORY* 4 (1903).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 7 (discussing Constantine’s Edict of Toleration (313 C.E.) and the Theodosian Code (392 C.E.)).

<sup>19</sup> See 2 *THE REPORTS OF SIR JOHN SPELMAN* 335 (Publ’ns of the Selden Society Vol. 94, J.H. Baker ed., 1978) [hereinafter *SPELMAN REPORTS*] (“It was held sufficient to place any part of the body within the sanctuary, or to grasp the door-ring; this seems to be the significance of the sanctuary-knockers to be found in some churches, though it was vital to touch the ring only if there was no cemetery in front of the door.”). Although initially limited to the physical confines of the church building itself, in the fifth century sanctuary was extended to the walls of churchyards, including the residences of clergy, cloisters, courts, and graveyards. This was justified by the need to feed and house sanctuary seekers, which was not permissible in the church itself. See J. CHARLES COX, *THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIEVAL ENGLAND* 3, 5 (1911). In 511 C.E., the Synod of Orleans decreed that sanctuary was also to extend to the bishop’s residence and thirty-five paces beyond it. *Id.* at 4.

<sup>20</sup> Cox, *supra* note 19, at 4; TRENHOLME, *supra* note 15, at 8–9.

<sup>21</sup> Cox, *supra* note 19, at 4.

[While sanctuary] had been designed to extend protection to the innocent maliciously pursued, to the injured, to the oppressed, and the unfortunate, . . . [in time it] was so much extended that the most atrocious and guilty of malefactors could be found enjoying immunity within sacred walls and bidding defiance to the civil power.<sup>22</sup>

If sanctuary were successfully secured, the Church would not surrender the beneficiary unless the party seeking custody would attest that the alleged wrongdoer would remain free from immediate harm.<sup>23</sup> The Church, in short, played a foremost role as intercessor:

Churches were under the guardianship of local saints, and in the popular mind this cast an aura of supernatural protection about them. Royal protection supplemented this supernatural protection, for all churches were under the king's [authority] . . . . [A]sylum breach was a sacrilege punished by excommunication, and various penances, depending upon the case, had to be undergone before absolution could be obtained.<sup>24</sup>

Under the reign of Ine, King of the West Saxons from 688 to 725 C.E., the law spared all persons subject to the death penalty, meaning all felons, if they fled to a church and paid compensation known as "bot."<sup>25</sup> Under the bot system, alleged malefactors would make monetary payments to their victims or their agents,<sup>26</sup> which served to avoid traditional resort to bloodfeud and unconstrained vengeance.<sup>27</sup> Sanctuary seekers subject to the non-capital sanction of scourging were similarly spared blood vengeance.<sup>28</sup>

<sup>22</sup> TRENHOLME, *supra* note 15, at 9.

<sup>23</sup> COX, *supra* note 19, at 5. No such dispensation was available, however, if the sanctuary seeker was suspected of night highway robbery or otherwise guilty of grave sins within the church's physical boundaries. *Id.*

<sup>24</sup> RIGGS, *supra* note 1, at 26–27.

<sup>25</sup> *Id.*; *see also id.* at 10 (describing the system as permitting offenders to "pay damages to the injured party, and thus 'buy off' the threat of feud").

<sup>26</sup> *See id.* at 6 (quoting a law from the reign of Ine stating that "[i]f anyone is liable to the death penalty, and he flees to a church, his life shall be spared and he shall pay such compensation as he is directed [to pay] by legal decision"). Ine's laws focused almost exclusively on theft, robbery, and marauding, then the predominant concerns in the unstable agrarian economy. *Id.* at 15. To avoid death, violators were required to pay the injured party and the King's Exchequer; if unable to pay, penal enslavement ensued. *Id.* at 20. For discussion of the bot system more generally, see 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 450–51 (Cambridge Univ. Press 1968) (2d ed. 1898); Stanley Rubin, *The Bot, or Compensation in Anglo-Saxon Law: A Reassessment*, 17 J. LEGAL HIST. 144 (1996).

<sup>27</sup> RIGGS, *supra* note 1, at 10; *see also id.* at 37 n.23 ("Medieval ecclesiastical asylum rules were, above all, designed to prevent violence and bloodshed."). Anyone who committed a murder within the confines of a church, however, was "botless," and typically subject to execution. TRENHOLME, *supra* note 15, at 15.

<sup>28</sup> RIGGS, *supra* note 1, at 6.

In tenth-century England, a more powerful form of sanctuary emerged: the chartered sanctuary, formally devised by the Crown. Unlike ordinary church sanctuary, which could be secured in every consecrated church and its immediate environs, chartered sanctuaries provided more ample protections, including broader geographic scope, a greater gamut of protected offenses, and a longer period of immunity during which to secure bot.<sup>29</sup> Chartered sanctuaries were demarcated by an extended network of crosses that “showed the fugitive that he had reached a place of safety and warned his pursuers not to trespass further.”<sup>30</sup> Those wishing to violate the sacred bounds of sanctuary and seize a beneficiary risked seven gradations of penalty, which increased with proximity to the church altar.<sup>31</sup> The ultimate penalty was death.<sup>32</sup>

Beneficiaries of chartered sanctuaries, which often encompassed extensive geographic areas,<sup>33</sup> submitted to the governance of ecclesiastic authori-

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<sup>29</sup> The bot immunity period ranged from thirty days to the rest of the offender’s natural life. TRENHOLME, *supra* note 15, at 14–15. Trenholme recounts the procedures used at Beverley in the event bot could not be secured and in situations involving recidivists:

If the canons could not make peace between the sanctuary-seeker and his pursuers inside of thirty days, then he was safely conducted, by land or by water, to the borders of the county of York and then allowed to seek safety in fresh flight. If anyone came a second time for protection he was to be received and treated as before. But if for a third time he fled for his life to the church, then he was to become a perpetual servant of the church, because his life and limbs had for the third and last time been preserved to him.

*Id.* at 50–51; *see also* COX, *supra* note 19, at 134–35.

<sup>30</sup> TRENHOLME, *supra* note 15, at 47. The crosses were inscribed with the term “sanctuarium,” and “probably marked the way to a sanctuary and served to guide fugitives further.” *Id.* at 48. Trenholme describes the chartered sanctuary reception process as follows:

On arriving at a chartered sanctuary the seeker for protection had, in most cases, to go through certain formalities of admission. Usually he had to make confession of his crime to one of the sanctuary officials, in some cases to the royal coroner, to surrender all his arms, and place himself under the supervision of the religious head of the place, bishop, abbot, or prior. He then swore to observe the rules and regulations governing those dwelling in sanctuary, and a small fine or admission fee was paid to one or other of the sanctuary officials of the church or convent. His name, domicile, occupation, confession of crime, the instrument used, the name of the victim, or victims, and other particulars, were registered in the church or sanctuary register, kept for that purpose.

*Id.* at 48–49.

<sup>31</sup> Often the particular place of physical sanctuary was a “frith stol” or “chair of peace,” described by one commentator as follows: “This chair, usually of carven stone, stood beside the high altar and like *fertre* or shrine, containing the relics deposited behind the altar, it insured complete and absolute protection to the sanctuary-seeker.” *Id.* at 47–48; *see also* COX, *supra* note 19, at 128–29.

<sup>32</sup> *See* TRENHOLME, *supra* note 15, at 48 (noting that “[a]nyone who violated the sacred precincts of the altar committed an unpardonable offense, one for which no money payment could atone”); *see also* COX, *supra* note 19, at 126–27; RIGGS, *supra* note 1, at 26.

<sup>33</sup> *See* COX, *supra* note 19, at 126–27 (noting that the chartered sanctuary at Beverley “extended for about a mile and a half in every direction”).

ties and carried on with their lives.<sup>34</sup> At times, they even enjoyed immunity from secular trial if they committed further crimes outside the physical confines of the chartered sanctuary.<sup>35</sup> Safely ensconced in sanctuary, the fugitives “formed a community absolutely apart from the rest of the world, living a life of their own.”<sup>36</sup>

With the Norman Conquest, and for centuries thereafter, sanctuary maintained a close relation to secular law. In 1067, William the Conqueror, grateful for his victory over the Saxons and wishing to memorialize it, founded Battle Abbey, a sanctuary of unprecedented authority and scope. According to one historian:

[The founding charter constituted] one of the most comprehensive documents of the time. Amongst the numerous privileges and immunities granted to the monks is that of affording full and complete sanctuary to fugitives and criminals: “If any thief or murderer or person guilty of other crime, fleeing for fear of death, should reach this church, then in nothing let him be punished, but, free in every way, let him be dismissed”—so ran the words of the charter.<sup>37</sup>

In the late twelfth and early thirteenth centuries, the practice of abjuration of the realm complemented sanctuary. After having admitted wrongdoing, the sanctuary seeker, within forty days of arrival at a non-chartered sanctuary, would agree to be forever exiled from England or, with rarity, elect to face secular trial.<sup>38</sup> Abjurers were required to depart as soon as possible, and the port of embarkation, route, and time taken to reach the destination were specified in advance.<sup>39</sup> They forfeited their goods and chattel to the King, and their lands, if any, escheated to the lord from whom they were held. Further, to communicate their status to the world-at-large, abjurers’ thumbs were branded with an “A.”<sup>40</sup> In the event sanctuary seekers either refused to leave or chose to be tried by civil authorities, the Church typically refused to surrender them, requiring the King to remove the subject by force, to cut off his food supplies, or to set

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<sup>34</sup> See *id.* at 144; TRENHOLME, *supra* note 15, at 50; Isobel D. Thornley, *The Destruction of Sanctuary*, in *TUDOR STUDIES* 182, 193 (R. W. Seton-Watson ed., 1924).

<sup>35</sup> See 2 SPELMAN REPORTS, *supra* note 19, at 341.

<sup>36</sup> TRENHOLME, *supra* note 15, at 70. Once there, although strictly prohibited by sanctuary rules, sanctuary beneficiaries would at times band together and revisit the outside world, plundering and scaring residents. See *id.* at 71; see also Thornley, *supra* note 34, at 185–86.

<sup>37</sup> TRENHOLME, *supra* note 15, at 19.

<sup>38</sup> COX, *supra* note 19, at 10–21; TRENHOLME, *supra* note 15, at 22–23.

<sup>39</sup> TRENHOLME, *supra* note 15, at 37–38. The abjurer was required to carry a wooden cross and to wear a long white robe, which would distinguish him from other medieval travelers on the King’s Highway. *Id.* at 40. Abjurers were protected so long as they remained on the Highway; those who strayed were subject to death. *Id.* at 41.

<sup>40</sup> *Id.* at 24.

fire to the church.<sup>41</sup> Such confrontations, in turn, raised understandable concern among ecclesiastic authorities, who believed church grounds were sacrosanct and that the right to remove sanctuary seekers belonged exclusively to the church.<sup>42</sup>

Sanctuary commanded secular deference well into Tudor times, shielding laity and clergy alike, with the latter often being accorded special dispensation.<sup>43</sup> Eventually, however, the Crown undertook to curtail its availability. In 1467, sanctuary was denied to recidivist offenders, and only afforded to beneficiaries against the loss of life and limb, not property.<sup>44</sup> Under the reign of Henry VIII, persons suspected of high treason were denied sanctuary,<sup>45</sup> and for the first time, those granted sanctuary were required to wear a distinctive mark on their upper garments and were forbidden to carry arms or go outside at night.<sup>46</sup> In 1530, the King abolished the practice of abjuring the realm, requiring that individuals take an oath to remain in domestic sanctuary,<sup>47</sup> and specifying that abjurors committing subsequent offenses were to relinquish sanctuary and be subject to imprisonment.<sup>48</sup> In 1540, chartered sanctuaries were abolished; general sanctuary was limited to parish and cathedral churches and yards, and church-run hospitals and colleges;<sup>49</sup> and sanctuary privileges were abolished for persons suspected of committing murder, rape, highway robbery, burglary, arson or sacrilege.<sup>50</sup> In lieu of chartered sanctuaries, the Crown imbued seven or eight<sup>51</sup> specified towns with sanctuary status.<sup>52</sup> These

<sup>41</sup> *Id.* at 39.

<sup>42</sup> COX, *supra* note 19, at 20–21; DE' MAZZINGHI, *supra* note 7, at 97.

<sup>43</sup> See, e.g., COX, *supra* note 19, at 21 (describing such an instance in 1299); TRENHOLME, *supra* note 15, at 43 (noting that, during the thirteenth and fourteenth centuries, the law prohibited clergy from abjuring, instead forcing them to surrender to ecclesiastical courts for “spiritual offenses” and to secular authorities for common law crimes, where they in turn would be permitted to invoke “benefit of clergy” and escape the most severe punishments). For a discussion of benefit of clergy, see *infra* notes 60–67 and accompanying text.

<sup>44</sup> TRENHOLME, *supra* note 15, at 28.

<sup>45</sup> *Id.* at 30.

<sup>46</sup> *Id.*

<sup>47</sup> COX, *supra* note 19, at 321. Statutory law at the time suggested that the King’s decision to outlaw abjuration was prompted by concern that the abjurors in their subsequent travels would lend aid to other nations in time of war and otherwise “disclose[ ] their knowledge of the commodities and secrets of [the] realm, to no little damage and prejudice of the same.” *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 324; DE' MAZZINGHI, *supra* note 7, at 16; TRENHOLME, *supra* note 15, at 30–31. Queen Mary, in 1556, restored Westminster’s charter, which was subsequently repealed by Queen Elizabeth I. COX, *supra* note 19, at 75; Thornley, *supra* note 34, at 204 n.116. Thornley notes that “sanctuary . . . was a very tough privilege, which survived more than one legal abolition.” Thornley, *supra* note 34, at 204 n.16.

<sup>50</sup> COX, *supra* note 19, at 16.

<sup>51</sup> Trenholme reports seven towns. TRENHOLME, *supra* note 15, at 44, 71. COX and Thornley report eight. COX, *supra* note 19, at 326; Thornley, *supra* note 34, at 204.

<sup>52</sup> The towns themselves were expected to receive a maximum of twenty sanctuary seekers, who enjoyed lifelong protection, and were to be directed to another sanctuary town in the event one was filled to capacity. COX, *supra* note 19, at 326. The beneficiaries

sanctuary towns were themselves abolished in 1603, under the reign of King James I.<sup>53</sup>

Although for several centuries sanctuary had shielded an estimated one thousand individuals a year in England,<sup>54</sup> it ended there in the mid- to late seventeenth century.<sup>55</sup> Its widespread use by fraudulent debtors and political enemies of the King more generally figured prominently in its demise.<sup>56</sup> The principal cause, however, lay in the State's growing desire to exercise punitive control over criminal misbehavior, which clashed with the merciful exceptionalism of the Church.<sup>57</sup> As a product of a time when justice was rough and crude, sanctuary served the vital purpose of staving off immediate blood revenge.<sup>58</sup> With the growing capacity of the State to impose its will independent of ecclesiastic authority, and increasing faith in the fairness and effectiveness of secular law, sanctuary was curtailed. And with its decline, not surprisingly, came a concomitant dramatic rise in execution rates.<sup>59</sup>

Despite its formal demise, the spirit of sanctuary lived on for many years in the practice known as "benefit of clergy," which did not offer outright immunity, but served, when available, to mitigate the severity of secular law.<sup>60</sup> Benefit of clergy originated as a concession by the Crown to the Church in the wake of the December 1170 murder of Archbishop

"were to be mustered daily, and on not appearing for three days to lose their privilege." *Id.* The towns themselves, not unexpectedly, resisted designation and, in some instances, succeeded in their efforts to be removed from the list of eligible enclaves. *Id.* at 326–28.

<sup>53</sup> Cox, *supra* note 19, at 329. The law adopted by Parliament in the time of King James I stated: "And Be it alsoe [*sic*] enacted by the authoritie [*sic*] of this present Parliament, that no Sanctuarie [*sic*] or Privilege of Sanctuary shalbe [*sic*] hereafter admitted or allowed in any case." BAU, *supra* note 11, at 157 (quoting a law from King James I reign).

<sup>54</sup> Cox, *supra* note 19, at 33; *see also* BAU, *supra* note 11, at 157.

<sup>55</sup> Trenholme cites the date of demise as 1697. TRENHOLME, *supra* note 15, at 31. Cox, on the other hand, asserts that sanctuary was "swept away" in 1624. COX, *supra* note 19, at 329.

<sup>56</sup> TRENHOLME, *supra* note 15, at 25.

<sup>57</sup> As William Holdsworth noted, "[a]s the state grew into conscious life it was inevitable that occasions for disputes between the temporal and spiritual powers should arise." 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 584 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. 1956); *see also* Cox, *supra* note 19, at 17 (noting that sanctuary involved "a perpetual conflict between the State and the Church. The Church was merciful . . . ; but the State . . . must also be held to be within its rights in endeavouring to prevent criminals from gaining access to sanctuaries . . ."); E. W. Ives, *Crime, Sanctuary, and Royal Authority Under Henry VIII: The Exemplary Sufferings of the Savage Family*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 296, 298–99 (Morris S. Arnold et al. eds., 1981) (quoting Chief Justice of the Kings Bench, Sir John Finenx, in 1520, who noted that permanent sanctuary "is a thing so derogatory to justice and contrary to the common good of the Realm that it is not sufferable by the law").

<sup>58</sup> "Immunities," as one historian has noted, "suppose the law deficient, and the right to sanctuary was such as [*sic*] immunity." DE' MAZZINGHI, *supra* note 7, at 100.

<sup>59</sup> *See id.* at 103 (noting that the rate of execution was ninety-eight times greater "after the right to sanctuary had been greatly disturbed by legislative measures").

<sup>60</sup> *See generally* GEORGE W. DALZELL, BENEFIT OF CLERGY IN AMERICA AND RELATED MATTERS (1955); LEONA C. GABEL, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES (1928); EDWARD J. WHITE, LEGAL ANTIQUITIES: A COLLECTION OF ESSAYS UPON ANCIENT LAWS AND CUSTOMS 223–43 (Fred B. Rothman & Co. 1986) (1913).

Thomas Becket in Canterbury Cathedral,<sup>61</sup> by knights dispatched by Henry II in response to the Church's resistance to civil rule.<sup>62</sup> As initially applied, the benefit extended only to the clergy, permitting them to be adjudged by more lenient ecclesiastic courts.<sup>63</sup> By the fourteenth century, however, the benefit extended to any male who could read,<sup>64</sup> and with increased literacy a greater proportion of society became eligible.<sup>65</sup> Over the ensuing centuries, governments, both in England and America, anxious over their diminished criminal jurisdiction, gradually reduced the breadth of crimes eligible for the benefit of clergy by means of legislation.<sup>66</sup> And with its demise, as with that of sanctuary, government quickly reverted to widespread use of the death penalty.<sup>67</sup>

## 2. *The Catholic Church Child Sex Abuse Scandal*

Despite the passage of centuries, and the continued evolution of State power, the modern Catholic Church's response to allegations of sexual abuse by its clergy reveals perceptible traces of medieval sanctuary. Then, as now, churches served as "the great intermediaries between criminals and those who desired vengeance, and acted as ambassadors of mercy before the throne of justice."<sup>68</sup> Although the Church's role in shielding its own

<sup>61</sup> See 2 SPELMAN REPORTS, *supra* note 19, at 327. The notorious murder was chronicled by T. S. Eliot in his classic 1935 play *Murder in the Cathedral*.

<sup>62</sup> A principal catalyst of the secular-ecclesiastic power struggle occurred in the eleventh century, when Pope Gregory VII rejected the authority of secular authorities to appoint and govern bishops, which led to the Wars of Investiture. See HAROLD JOSEPH BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 94–99 (1983). The Concordat of Worms eased tensions some fifty years later, ensuring the Church considerable autonomy while affording secular authorities some say in the selection of bishops. *Id.* at 98. The competition continued to simmer for decades thereafter, however, culminating in Becket's murder. *Id.* at 255. For more on the church-state struggle waged in medieval and early modern Europe, see generally ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957); THOMAS J. RENNA, *CHURCH AND STATE IN MEDIEVAL EUROPE, 1050–1314* (1974).

<sup>63</sup> In such courts, life in prison was the maximum sentence. Other sentences included defrocking (for clergy), brief imprisonment in a monastery, forfeiture of goods (but not of land), branding, fine, or exile for up to fourteen years. See Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. Tol. L. Rev. 511, 516 (2002).

<sup>64</sup> GABEL, *supra* note 60, at 68–78. According to Professor Langbein, women were not permitted to invoke the benefit of clergy until 1624. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 37 (1983). More generally, individuals were eligible for the benefit only once and authorities branded the thumbs of those already having benefited to serve as evidence of their future ineligibility. *Id.* at 37–38.

<sup>65</sup> DALZELL, *supra* note 60, at 11 (asserting that even when limited to clergy, the benefit "served at once as factories of crime and as instruments of mercy"). Dalzell adds: "The remarkable point is that the clergy should have been able to maintain for centuries a special privilege in crime. This is a corollary to the magnitude and power of the church, which, it must be remembered, was the sole civilizing agent throughout the period." *Id.* at 13.

<sup>66</sup> See JEROME HALL, *THEFT, LAW, AND SOCIETY* 68–87 (1935).

<sup>67</sup> Spector, *supra* note 63, at 517.

<sup>68</sup> COX, *supra* note 19, at 3. For its part, canon law continued to make reference to the

has only recently come to light, it is apparent that the Church proved remarkably effective in affording sanctuary to abusive priests since the early 1960s, and doubtless before that.<sup>69</sup> According to a recent survey conducted by the *New York Times*, over 1200 Catholic priests have allegedly molested minors over the past fifty years, implicating all but 16 of the nation's 177 dioceses.<sup>70</sup> The survey reports that just under two percent of all priests ordained between 1950 and 2001 were thought to have committed sexual abuse, a figure that is thought to significantly underestimate the prevalence of abusive priests.<sup>71</sup> The survey also documents that 4200 children reported abuse by priests and that almost half of the priests were accused of abusing more than one minor, one-third three or more, and sixteen percent five or more.<sup>72</sup> Moreover, contrary to the common belief that the overwhelming majority of victimizations involved teenagers,<sup>73</sup> forty-three percent of priests were accused of molesting children twelve years old and younger.<sup>74</sup> The survey emphasizes that in the coming years the rates will very likely increase as more victims feel emotionally and

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right until the latter part of the twentieth century. See James Hennesey, *Right of Sanctuary—Then and Now*, 125 AMERICA 482, 482 (1971) (quoting the encyclical abandoned in the 1983 Code of Canon Law stating that “a church enjoys the right of asylum so that weak criminals who flee to it are not to be removed from it, except in case of necessity, without the assent of the ordinary or the rector of the church”).

Of course, the “Sanctuary Movement” of the 1980s, which shielded politically persecuted Central American refugees who had entered the United States illegally, is further testament to the contemporary vitality of the phenomenon in religious circles. See generally ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988); ROBERT TOMSHO, *THE AMERICAN SANCTUARY MOVEMENT* (1987). For discussion of non-Western instances of religious sanctuary, including that of the Aborigines of Australia and New Guinea, Hindus on the Malibar Coast, and the Kafes of Hindukush, see CARLOS URRUTIA APARICIO, *DIPLOMATIC ASYLUM IN LATIN AMERICA* 14 (1960).

<sup>69</sup> See BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* 112 (2002) (noting that the Philadelphia Archdiocese acknowledged having “credible evidence” that thirty-five priests sexually abused about fifty children dating back to 1950); see also Juliet Williams, *Milwaukee Archdiocese: Parishioners Get Chance to Question Officials*, ST. PAUL PIONEER PRESS, June 27, 2002, at 4B, 2002 WL 7854236 (noting that the Milwaukee archdiocese would publish the names of all priests alleged to have engaged in sexual abuse since 1926); cf. A.W. RICHARD SIPE, *SEX, PRIESTS AND POWER: ANATOMY OF A CRISIS* 10 (1995) (recounting the experience of Jean-Jacques Rousseau, who experienced, at age fifteen, sexual abuse by an older boy at a retreat center preparing for confirmation and was told by Church superiors that he should not pursue the matter).

<sup>70</sup> Laurie Goodstein, *Decades of Damage: Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, § 1, at 1.

<sup>71</sup> This is because those dioceses that have divulged allegedly complete lists, either voluntarily or by court order, report significantly higher rates. See *id.* (noting that in two such dioceses, Baltimore and Manchester, New Hampshire, the rates were 6.2% and 7.7%, respectively); see also Sam Dillon, *Accounting of Abuse is Criticized*, N.Y. TIMES, Dec. 8, 2002, at A41 (discussing the frustration experienced by the Chair of the National Review Board, recently established by the Church to monitor its response to the abuse crisis, in its efforts to obtain internal records on abuse).

<sup>72</sup> Goodstein, *supra* note 70.

<sup>73</sup> See, e.g., PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* 7 (1996) (“[T]he vast majority of recorded instances of clergy ‘abuse’ or misconduct involve an interest in teenagers . . . often boys of fifteen or sixteen.”).

<sup>74</sup> Goodstein, *supra* note 70.

psychologically comfortable publicly reporting their abuse.<sup>75</sup> Finally, according to another recent survey, by the *Dallas Morning News*, roughly two-thirds of Church officials in the largest U.S. Catholic dioceses sheltered priests accused of sexual abuse, affording yet more evidence of the institutional scope of the practice.<sup>76</sup>

As troubling as the numbers are, they fail to highlight the dogged efforts of the Church to shield its clergy from civil authority. Only now, as a result of the aggressive efforts of investigative journalists and plaintiffs' counsel, are these efforts coming to light. Two notorious instances of Church protection of alleged abusers are illustrative. Despite repeated warnings to Church officials, Father John Geoghan sexually preyed on children from 1962 to 1995, only to be referred to treatment at Church-affiliated centers and moved from one parish to another until he was finally defrocked in 1998. For almost thirty-five years, Father Paul Shanley was shielded from civil authorities and repeatedly relocated to new parishes, where he continued his serial offending with impunity.<sup>77</sup> With respect to each of these suspected abusers, as with hundreds of others, the Church dealt with the criminal behavior internally and refused to notify civil authorities.<sup>78</sup>

The Church's protective efforts have come at a large, and increasing, financial cost. Because the Church demanded and entered into confidentiality agreements before official court filings,<sup>79</sup> the precise amount the Church

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<sup>75</sup> *Id.* For another, less comprehensive media survey reporting similar results, see Alan Cooperman & Lena H. Sun, *Hundreds of Priests Removed Since '60s: Survey Shows Scope Wider than Disclosed*, WASH. POST, June 9, 2002, at A1.

<sup>76</sup> See Dallas Morning News, *Catholic Bishops and Sex Abuse*, at <http://www.dallasnews.com/cgi-bin/2002/priests.cgi> (last visited Mar. 21, 2003) (providing results from a three-month investigation into records of the top leaders of the country's 178 Roman Catholic dioceses). For discussion of the international scope of the institutional predisposition, see Warren Hoge, *Irish Church to Cooperate with Abuse Inquiry*, N.Y. TIMES, Dec. 31, 2002, at A10. It bears mention, moreover, that the Church shielded laypersons affiliated with the Church from prosecution through the years. See Laurie Goodstein, *Dioceses Resist Releasing Names of Accused Priests*, N.Y. TIMES, Feb. 28, 2003, at A16 (noting that a grand jury in Cleveland has uncovered accusations against 351 laypersons dating back decades).

<sup>77</sup> For in-depth descriptions of the extended predations of these and other priests, see JASON BERRY, *LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN* (1992); FRANK BRUNI & ELINOR BURKETT, *A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE, AND THE CATHOLIC CHURCH* (1993); BOSTON GLOBE, *supra* note 69; Leslie Bennetts, *Unholy Alliances*, VANITY FAIR, Dec. 1991, at 224. There are more than 300 *known victims* of Geoghan and another priest, Father James Porter (who left the priesthood in 1973). BOSTON GLOBE, *supra* note 69, at 91. To date, twenty-four individuals have admitted being victimized by Shanley. Pam Belluck, *Cardinal Read Accusatory Letter in '85, 3 Say*, N.Y. TIMES, June 6, 2002, at A26.

<sup>78</sup> See also Pam Belluck, *Boston Church Papers Released: A Pattern of Negligence is Cited*, N.Y. TIMES, Dec. 4, 2002, at A1 (discussing the contents of two thousand pages of documents produced during civil discovery highlighting the direct role of Boston Archdiocese officials in protecting abusive priests); Robert D. McFadden, *L.I. Diocese Deceived Victims of Sexual Abuse, Grand Jury Says*, N.Y. TIMES, Feb. 11, 2003, at A1 (noting a grand jury report based in part on "secret archives" chronicling behavior of the Rockville Center, New York diocese that protected fifty-eight abusive priests dating back to the 1970s by means of an "intervention team" dedicated to discouraging public disclosures).

<sup>79</sup> BOSTON GLOBE, *supra* note 69, at 47; see also Michael Powell & Lois Romano, *Ro-*

has paid in civil settlements cannot be known at this time. However, the Church has acknowledged spending several hundred million dollars in settlements over the past twenty years,<sup>80</sup> in effect resurrecting the “bot” system of centuries past.<sup>81</sup> In practical effect, as reporters with the *Boston Globe* have written, “the process led to an unholy alliance among Church officials, victims, and attorneys,”<sup>82</sup> with each benefiting in some way from the sanctuary afforded pedophilic priests.

Even without such secret settlements, abusers often avoided criminal liability because victims and their families were reluctant to suffer public exposure<sup>83</sup> and cast the powerful Church in disrepute.<sup>84</sup> Other victims failed to come forward because they feared divine retribution,<sup>85</sup> much as in the Middle Ages,<sup>86</sup> or succumbed to pressures from Church representatives

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*man Catholic Church Shifts Legal Strategy: Aggressive Litigation Replaces Quiet Settlements*, WASH. POST, May 13, 2002, at A1 (noting that in past decades, customarily, a “bishop met an aggrieved family; there were words of comfort, and perhaps the assurance that the priest would get help. A small monetary settlement might be tendered, rarely more than few thousand dollars. Eventually, the Church began offering victims counseling.”); Daniel J. Wakin, *Albany Diocese Quietly Paid Man Who Pressed Abuse Claim*, N.Y. TIMES, Jan. 19, 2003, at A25 (noting that the Albany, New York bishop, a prominent figure in the Church’s public response to the abuse crisis, paid more than \$375,000 in nonformal legal settlements since 1994 to an abuse victim).

<sup>80</sup> See Peter Smith, *Financial Stakes High in Suits Against the Church*, COURIER-J. (Louisville), June 4, 2002, at A1, 2002 WL 20243282.

<sup>81</sup> The Church’s demand that victims keep silent (for the good of the Church) was enforced by its insistence that it could recover settlement monies if details of the abuse were ever divulged. See BOSTON GLOBE, *supra* note 69, at 47; Powell & Romano, *supra* note 79.

<sup>82</sup> BOSTON GLOBE, *supra* note 69, at 47; see also *id.* at x–xi (describing the “agreeable arrangement: the Church got to keep the ugly truth under wraps; shame-filled victims, having no clue that there were many others, were able to protect their privacy. Victims’ lawyers received a third or more of the financial settlements without ever having to test their cases in court.”).

<sup>83</sup> See, e.g., Francis X. Clines, *Nearly 100 Kentucky Men Add to Accusations Against Priests*, N.Y. TIMES, May 28, 2002, at A15 (noting the role of shame and embarrassment in deterring abuse victims from coming forward).

<sup>84</sup> See, e.g., Fox Butterfield & Jenny Hontz, *A Priest’s 2 Faces: Protector, Predator*, N.Y. TIMES, May 19, 2002, at A1 (noting the reluctance of the father of one of Shanley’s victims “to go public with a prosecution against a priest . . . . That’s how it was in those days.”). For a discussion of the deep-seated deference to the Church more generally, see BOSTON GLOBE, *supra* note 69, at 119–40; cf. T. Christian Miller, *In Latin America, Abuse by Priests Hidden in Shadows*, L.A. TIMES, July 31, 2002, at 1, 2002 WL 2493597 (discussing the strong influence of the Church in deterring accusations of clergy sexual abuse in Latin American nations); Kevin Sullivan & Mary Jordan, *Reluctant Mexican Church Begins to Question Its Own*, WASH. POST, Apr. 17, 2002, at A12 (quoting a Mexican bishop as stating that abusive priests should not be handed over to police because “[d]irty laundry is best washed at home”).

<sup>85</sup> See *Personnel Files Detail Priests’ Abuse in Boston*, WASH. POST, June 5, 2002, at A13 (noting that Father Paul Desilets, under indictment for 27 counts of sexual assault, threatened one altar boy that he would “burn in hell” if he revealed the abuse he suffered). Perhaps less divine, but surely influential, excommunication had historically loomed as a sanction for any Catholic who sought redress against the Church or a priest in civil court. See JENKINS, *supra* note 73, at 128.

<sup>86</sup> According to Trenholme, in the Middle Ages, sanctuary was fortified by “fear of Divine vengeance,” whereby:

not to pursue the matter publicly.<sup>87</sup> Inaction of civil authorities further ensured priests' immunity; when told of priestly sexual abuse, they did not pursue prosecutions.<sup>88</sup> A similar aversion predominated among the courts<sup>89</sup> and the press.<sup>90</sup>

Only recently, after insisting for years that it alone enjoyed the prerogative to decide whether allegations of abuse warranted prosecutorial attention,<sup>91</sup> has the Church hierarchy bowed to public pressure and grudgingly disclosed the names of priests accused of sexual abuse over the

the curse of a priest was more dreadful than a foeman's steel . . . . Thus when the Church said that those who sought her protection must be treated with leniency and mercy, and their lives and persons spared, no state or individual was strong enough or bold enough to refuse to comply.

TRENHOLME, *supra* note 15, at 95.

<sup>87</sup> See, e.g., BERRY, *supra* note 77, at 282–83 (describing harassing phone calls by priests to a couple that sought to have an abusive fellow priest removed); McFadden, *supra* note 78 (discussing the practice of a diocese “intervention team,” comprised by two high-ranking priests who were also lawyers, which treated abuse as “sin” and discouraged victims from contacting the police).

<sup>88</sup> See, e.g., BERRY, *supra* note 77, at 294–97 (discussing the refusal of the New Orleans District Attorney to prosecute an alleged pedophile priest, Dino Chinell, based on his acknowledged unwillingness to “embarrass Holy Mother the Church”); *id.* at 336–37, 352, 360 (discussing the dismissive attitude of a Chicago State’s Attorney toward prosecuting alleged pedophile priest Robert Lutz); Craig Whitlock & Annie Gowen, *Strong Suspicions, Years of Silence*, WASH. POST, May 25, 2002, at A1 (noting the reluctance of a Baltimore prosecutors to file charges despite an admission by a priest and repeated complaints about him over the course of several years); cf. Fox Butterfield, *Report Details Sex Abuse by Priests and Inaction by a Diocese*, N.Y. TIMES, Mar. 4, 2003 (noting suppression by a local New Hampshire police chief of priest abuse allegations); Barbara Whitaker, *Jesuits to Pay \$7.5 Million to Men Who Contended Abuse*, N.Y. TIMES, Sept. 6, 2002, at A18 (discussing the behavior of a California sheriff who permitted a local Jesuit order to relocate a priest, in lieu of his arrest).

<sup>89</sup> BOSTON GLOBE, *supra* note 69, at 125 (noting that Boston-area judges, “many of them Catholic, were complicit in the secrecy that kept the extent of the abuse hidden from public view”). In the early 1990s, for instance, a group of judges impounded all records in three pending lawsuits, reasoning in the words of one judge “that the particulars of the controversy” warranted privacy. *Id.*; see also *Judge Faults a Court in Clergy Abuse Case*, N.Y. TIMES, June 14, 2002, at A33 (describing a recent decision by a Connecticut judge condemning the judicial system for acceding to Church requests to seal incriminating records over the objections of victims).

<sup>90</sup> JENKINS, *supra* note 73, at 61–62.

<sup>91</sup> BOSTON GLOBE, *supra* note 69, at 111. This sentiment has been buttressed by the Church’s willingness to mount First Amendment non-entanglement arguments, predicated on sentiments expressed by the Supreme Court. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 709 (1976) (“[C]ivil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church . . . but must accept such decisions as binding on them.”); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 448 (1969) (stating that religious institutions are afforded the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”). The Boston Archdiocese’s recent effort to dismiss civil lawsuits on First Amendment grounds, arguing that the government lacks authority to second-guess its decisions on where to assign priests and how to discipline them, derives from this same willingness. See Adam Liptak, *Boston Archdiocese Asks for Dismissal of All Suits*, N.Y. TIMES, Dec. 24, 2002, at A16.

decades.<sup>92</sup> Equipped with this information, prosecutors are at last prosecuting abusive priests, to the extent cases are not time-barred,<sup>93</sup> and consideration is being given to prosecuting Church officials who allowed the abuse to continue, on theories of child endangerment, obstruction of justice, accessory to a crime, and conspiracy.<sup>94</sup> State legislatures, long deterred by First Amendment concerns and lobbying efforts by religious groups, are now considering expanding statutes of limitations for child sexual abuse prosecutions, and, for the first time, opting to include clergy within the ambit of mandatory reporting laws (heretofore targeting only teachers, physicians, social workers, and the like).<sup>95</sup>

It is difficult to understand, much less justify, how the Church—an institution premised on a sacred trust with parishioners and theoretically dedicated to their well-being—could have shielded pedophilic priests and facilitated their continued wrongdoing. Perhaps the most benign explanation is that the Church felt morally qualified to police its own, with internal reprobation serving as adequate penalty.<sup>96</sup> Less benignly, the Church can be said to share the motivational impetus common to any powerful institution faced with harmful information, engaging in damage control,<sup>97</sup> and shielding potentially damaging internal documents.<sup>98</sup>

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<sup>92</sup> See, e.g., BOSTON GLOBE, *supra* note 69, at 110–17, 133; Sam Dillon, *Role of Bishops is Now a Focus of Grand Juries*, N.Y. TIMES, July 12, 2002, at A1.

<sup>93</sup> See Pam Belluck, *Priest Indicted in Sex Abuse of Teenage Boy During the 80's*, N.Y. TIMES, Aug. 9, 2002, at A10 (reporting an indictment of Boston-area priest based on information recently disclosed by diocese); Daniel J. Wakin, *Priest Charged From Old File on Sex Abuse*, N.Y. TIMES, May 24, 2002, at B1 (noting that, with Church files containing forty-three abuse allegations involving twenty-five priests, prosecution was most often time-barred). *But see* Sam Dillon, *Means Found to Prosecute Decades-Old Abuse Cases*, N.Y. TIMES, Aug. 29, 2002, at A16 (noting that prosecutors in several jurisdictions have circumvented statutes of limitation by arguing that the provisions toll when priests move out of the state).

<sup>94</sup> See Dillon, *supra* note 93; Edward Walsh, *Prosecutors Examine Legal Culpability of Church Officials*, WASH. POST, May 5, 2002, at A16. One grand jury report in New York, for instance, accused the Church of “an orchestrated effort to protect abusing clergy members from investigation, arrest and prosecution,” and called for new laws making it a felony for church officials to fail to report abuse allegations. Devlin Barrett, *Grand Jury Scolds Church Over Sex Abuse*, TIMES UNION (Albany), June 19, 2002, at B3, 2002 WL 8910953.

<sup>95</sup> See Seth Stern, *More States Moving to Tighten Sex-Abuse Laws for Clergy*, CHRISTIAN SCI. MONITOR, June 10, 2002, at 4, 2002 WL 642671.

<sup>96</sup> See Thomas Keneally, *Cold Sanctuary: How the Church Lost Its Mission*, NEW YORKER, June 24, 2002, at 58, 64 (noting the observation of New York Cardinal John O’Connor that, historically, a priest caught engaging in sexual abuse “had ‘learned his lesson’ by being caught, reported and embarrassed”).

<sup>97</sup> This institutional response included retribution against priests who spoke out against their peers. See Keneally, *supra* note 96, at 64 (noting that a Massachusetts priest, after warning his bishop of the presence of an offending priest and receiving no response, informed the police, and was thereafter removed from his parish).

<sup>98</sup> See, e.g., Calvin Sims, *Los Angeles Archdiocese Tries to Shield Documents*, N.Y. TIMES, Apr. 2, 2003, at A10 (discussing efforts by the Archdiocese of Los Angeles). Consistent with this predisposition, in April 1990, one bishop at a regional Canon Law conference publicly advised attendees to consider sending “dangerous” documents to the Vatican Ambassador, thereby allowing diplomatic immunity to be invoked. BERRY, *supra* note 77, at 290.

Whatever the Church's motives, there is no mistaking the vestiges of sanctuary in the Church's response to allegations of abuse by its priests, euphemistically referred to as being "in between assignments."<sup>99</sup> Even after an internal oversight board in 1985 formally warned of widespread clergy sexual abuse and mounting settlement costs, the Church failed to institute structural changes and notify civil authorities of instances of abuse.<sup>100</sup> Rather, the Church at most banished abusers to "treatment" centers throughout the country<sup>101</sup> and then dispersed them to new parishes upon their purported recovery.<sup>102</sup>

The first manifestation of institutional change came in June 2002 when the powerful U.S. Conference of Catholic Bishops bowed to intense pressure and engaged in an unprecedented public evaluation of how it should respond to clergy sexual abuse. After heated debate, the Conference proposed adoption of several measures: implementation of a "zero tolerance" approach, requiring the removal of any priest for whom there is a "credible accusation" of child sexual abuse; rescission of the Canon statute of limitations for sexual abuse claims; mandatory reporting of all abuse accusations to civil authorities; and the creation of a national oversight board, complemented by local review boards at the diocese level, to monitor compliance with Dallas policies.<sup>103</sup> The Conference refused to address whether, and how, Church officials themselves should be sanctioned for their involvement in sheltering abusers.<sup>104</sup> Priests belonging to religious orders, such as the Jesuits, Dominicans, and Benedictines, were also excepted from the Dallas recommendations. As a result, order priests, who comprise one-third of the nation's priests, would not be subject to removal but rather would be maintained by their respective Orders.<sup>105</sup>

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<sup>99</sup> BOSTON GLOBE, *supra* note 69, at 32.

<sup>100</sup> *See id.* at 39 (discussing the rejection of a 1985 report entitled "The Problem of Sexual Molestation by Roman Catholic Clergy—Meeting the Problem in a Comprehensive and Responsible Manner," and the subsequent discipline of its primary author); BRUNT & BURKETT, *supra* note 53, at 162–65 (describing the report and the response by the Church); Bruce Schultz, *Sex Abuse By Clergy Not "Recent" Problem*, BATON ROUGE ADVOC., May 2, 2002, at 9B, 2002 WL 5032969 (same).

<sup>101</sup> *See* BOSTON GLOBE, *supra* note 69, at 172–76 (discussing centers in Maryland, Missouri, New Mexico, and Connecticut).

<sup>102</sup> *See id.* at 46–47 (discussing the rejection by the Boston archdiocese in 1993 of demands that abusive priests be removed and the Church's insistence that responsibility for investigating complaints of clergy sexual misconduct was its own).

<sup>103</sup> *See* Laurie Goodstein, *A Time to Bend: U.S. Bishops, Sure of Their Ground in the Past, Let Public Opinion Guide Them This Time*, N.Y. TIMES, June 16, 2002, at A1 (describing the policy and its controversial adoption); Laurie Goodstein & Sam Dillon, *Bishops Proceed Cautiously in Carrying Out Abuse Policy*, N.Y. TIMES, Aug. 18, 2002, at A1 (same).

<sup>104</sup> *Day of Atonement*, NEWSWEEK, June 24, 2002, at 8.

<sup>105</sup> *See* Sam Dillon, *Catholic Religious Orders Let Abusive Priests Stay*, N.Y. TIMES, Aug. 10, 2002, at A8 (noting the same and quoting an Order official as characterizing "zero tolerance" as a "war slogan" inappropriate for the Orders, where an abuser is "still a member of the family"). According to one victims' group, roughly twenty-five percent of the documented cases of clergy sex abuse involved Order priests. *Id.* For a discussion of the extended history of abuse and cover-up in the world's largest Benedictine institution, see Paul

In mid-October 2002, the Vatican provided its official response, expressing deep concern over the Dallas prescriptions. The Vatican strongly disagreed with particular measures it deemed contrary to Canon law and tradition, especially the “zero tolerance” policy and repeal of the statute of limitations, which it found “difficult to reconcile” with Church notions of due process and fairness. The Vatican also questioned the proposed mandatory reporting of all sexual abuse claims to civil authorities, arguing that it jeopardized bonds of trust between bishops and priests. Finally, the Vatican considered the proposed new definition of sexual abuse, which included instances involving no physical force or direct contact, unduly expansive.<sup>106</sup> According to *New York Times* columnist Frank Bruni, who has closely tracked the Catholic clergy abuse scandal for years, the Vatican’s negative response stemmed from “[t]he way [American] bishops had . . . ceded their authority and discretion, replacing individual judgment with exacting prescriptions and opening the Roman Catholic Church to scrutiny, and censure, from laypeople outside its hierarchy.”<sup>107</sup>

In mid-November 2002, U.S. Catholic bishops met to assess what steps should be taken in the wake of the Vatican’s decision. They overwhelmingly approved a slate of reforms generated by four U.S. bishops and four Vatican officials modifying those adopted in Dallas at the June 2002 meeting. The new policy requires that bishops refer abuse allegations for investigation to sexual abuse boards created at the diocese level that are to serve as “a consultative body to the bishop/eparch in discharging his responsibilities.”<sup>108</sup> Each review board is to include at least five individuals, serving five-year terms, with a majority of laypersons, but at least one priest and one member having “particular expertise in the treatment of the sexual abuse of minors.”<sup>109</sup> When the board decides there is “sufficient evidence” of sexual abuse, it must notify the Vatican-based Congregation for the Doctrine of the Faith, which will decide whether to retain jurisdiction over the case or to refer it back to U.S.-based tribunals made up of Church clerics.<sup>110</sup> Any priest found guilty by either of the closed-door Church tribunals is to be stripped of his ministerial authority, but may continue to receive financial support and housing from the diocese.<sup>111</sup>

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McEnroe & Pam Louwagie, *Behind the Pine Curtain: Decades of Abuse and Secrecy at St. John’s Abbey*, STAR TRIB. (Minneapolis–St. Paul), Sept. 29, 2002, at 1A, 2002 WL 5383324.

<sup>106</sup> Frank Bruni, *Vatican Demands U.S. Bishops Revise Sex-Abuse Policy*, N.Y. TIMES, Oct. 19, 2002, at A1; Frank Bruni & Laurie Goodstein, *Rome Withholding Full Endorsement of U.S. Abuse Plan*, N.Y. TIMES, Oct. 18, 2002, at A1.

<sup>107</sup> Frank Bruni, *The Vatican is Rejecting an Erosion of Authority*, N.Y. TIMES, Oct. 20, 2002, at A1; see also Alan Cooperman, *In Search of Clarity, and Fairness: Vatican Worries that U.S. Sex Abuse Policy Abandons “Due Process,”* WASH. POST, Oct. 21, 2002, at A2.

<sup>108</sup> See U.S. Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons, available at* <http://www.usccb.org/bishops/norms.htm> (Dec. 17, 2002).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

With respect to the reporting requirement, the bishops adopted a more neutral stance, requiring that public authorities be advised of the alleged abuse only if the civil law in a particular jurisdiction so requires.<sup>112</sup> The bishops also expressly prohibited the transfer of any priest or deacon who “has committed an act of sexual abuse of a minor,”<sup>113</sup> but they expressly eschewed observance of “any particular definition” of sexual abuse “provided in civil law.”<sup>114</sup> Finally, the bishops also resoundingly rejected a measure to censure bishops who have shielded abusive priests through the years,<sup>115</sup> and agreed with the Vatican that the extant statute of limitations should remain intact.<sup>116</sup>

Predictably, victims’ groups criticized the modified directives, seeing them as considerably less ambitious than those proposed in Dallas. One victim observed that “[t]he charter that was designed to make bishops more accountable is going back into the secrecy of the courts run by the clergy.”<sup>117</sup> Another added that “[t]he changes they have made will increase their own discretion, their dependency on Rome and the secretiveness of the process . . . . It’s still all about power, hierarchy and secrecy, the things that have practically defined the Roman Catholic Church since the 16th century.”<sup>118</sup>

In sum, five hundred years after its heyday in medieval England, sanctuary has again infiltrated the public consciousness. And as during the time of King James I, the state—after a long acquiescence—has recoiled and taken action to end it.

### B. The Family

Like the Church, the institution of family has historically operated as a self-governing entity outside the reach of the criminal law. Indeed, aside from their coupling in the conservative vernacular, church and family share a common social history and function, prompting one colonial-era preacher to describe the family as “a little church, and a little common-

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> U.S. Conference of Catholic Bishops, *Charter for the Protection of Children and Young People*, available at <http://www.usccb.org/bishops/charter.htm> (rev. ed. Nov. 19, 2002). According to the bishops’ Charter, “[u]ltimately, it is the responsibility of the diocesan bishop/eparch, with the advice of a qualified review board, to determine the gravity of the alleged act.” *Id.*

<sup>115</sup> Laurie Goodstein, *Bishops Pass Plan to Form Tribunals in Sex Abuse Cases*, N.Y. TIMES, Nov. 14, 2002, at A1. In lieu thereof, the bishops would provide one another “fraternal support, fraternal challenge and fraternal correction.” U.S. Conference of Catholic Bishops, *A Statement of Episcopal Commitment*, available at <http://www.usccb.org/bishops/commit.htm> (Nov. 13, 2002).

<sup>116</sup> Goodstein, *supra* note 115. For more recent allegations of abuse, the period runs until ten years after the abuse victim’s eighteenth birthday. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Alan Cooperman, *Bishops Clear New Sex Abuse Policy*, WASH. POST, Nov. 14, 2002, at A1.

wealth.”<sup>119</sup> The home, much like the Church, was seen as “a bastion of peace, of repose, of orderliness.”<sup>120</sup>

History has irrefutably shown, however, that this outward image of stability and self-regulating lawfulness, and the deference it inspired, functioned to conceal horrific physical and sexual abuse, which has endured since Roman times in the shadows of governmental control. Roman civil law, invoking the concept *patria potestas*, afforded husbands (and fathers, as the case might be) plenary authority to deal with family members without governmental interference.<sup>121</sup> Patriarchs in Roman times, for instance, were empowered to kill wives caught in the act of adultery.<sup>122</sup> During the fifteenth century, the Catholic Church showed husbands similar deference by adopting the “Rules of Marriage,” which allowed husbands to adjudicate alleged wifely offenses and issue beatings.<sup>123</sup>

This unwillingness to intervene in family life, in turn, was imported to America. Although Puritans in colonial Massachusetts (1640–1680) enacted the world’s first laws prohibiting spouse and child abuse,<sup>124</sup> the law proved to have little effect. This was because, as Professor Elizabeth Pleck notes, “Puritan courts placed family preservation ahead of physical

<sup>119</sup> John Demos, *Images of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 43, 46 (Virginia Tufte & Barbara Myerhoff eds., 1979).

<sup>120</sup> *Id.* at 51; see also Linda J. Lacey, *Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1, 1 (1993) (observing that in the nineteenth century “[b]oth the church and the family provided a retreat from the competitive atmosphere of the marketplace”).

<sup>121</sup> See Nan Oppenlander, *The Evolution of Law and Wife Abuse*, 3 LAW & POL’Y Q. 382, 386 (1981); Michelle J. Nolder, Note, *The Domestic Violence Dilemma: Private Action in Ancient Rome and America*, 81 B.U. L. REV. 1119, 1122–32 (2001).

<sup>122</sup> See Nolder, *supra* note 121, at 1126 (discussing the law in effect at the time of Cato the Elder (234–149 B.C.E.)).

<sup>123</sup> See TERRY DAVIDSON, CONJUGAL CRIME: UNDERSTANDING AND CHANGING THE WIFEBEATING PATTERN 99 (1978).

<sup>124</sup> See ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 17–33 (1987). As Professor Pleck notes:

The Puritans hoped that their “city upon a hill” would set an example of religious devotion for the rest of the world. The family was vital to their endeavor; it conveyed religious values and prepared the young for a pious life . . . . An institution so necessary to the Puritan mission could not become a sanctuary for cruelty and violence; family violence was “wicked carriage”—assaultive and sinful behavior—that threatened the individual’s and the community’s standing before God. Only if the Puritans maintained their vigilance in punishing sin would God extend to them his protection . . . . Moreover, family violence threatened the social and political stability of the Puritan’s godly settlement.

*Id.* at 17. Ecclesiastic and civil courts alike heard cases involving all manner of familial abuse. The former, in particular, sought reform, not punishment, of offenders. “The goal of the hearing was not to determine innocence or guilt but to wring from the person on trial a confession of sin in the hope of securing for the wayward soul the promise of salvation.” *Id.* at 20. This coercive threat of intervention, at least for wives abusing children, was further backed by the specter of being accused of witchcraft, an accusation not then taken lightly. See *id.* at 19.

protection of victims.”<sup>125</sup> Puritan law explicitly justified “legitimate” physical force of husbands and fathers against wives and children,<sup>126</sup> and even this limit was rarely enforced, out of reluctance to interfere in the private domain of the family.<sup>127</sup> Emblematic of this reluctance was the American adoption of the common law “rule of thumb,” which authorized husbands to beat their wives with any instrument no thicker than their thumbs,<sup>128</sup> affording a marital privilege of “moderate chastisement.”<sup>129</sup> In 1824, the Supreme Court of Mississippi, for instance, expressly permitted a husband to chastise his wife “without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.”<sup>130</sup> Although the court expressed ambivalence, in the end it refused to endorse criminal intervention out of “principle”:

However abhorrent to the feelings of every member of the bench, must be the exercise of this remnant of feudal authority, to inflict pain and suffering, when all the finer feelings of the heart should be warmed into devotion, by our most affectionate regards, yet every principle of public policy and expediency . . . would seem to require, the establishment of the rule we have laid down, in order to prevent the deplorable spectacle of the exhibition of similar cases in our courts of justice.<sup>131</sup>

A similar view was advanced by the North Carolina Supreme Court in 1852. Although constrained to admit that “a slap on the cheek . . . indeed any touching of the person of another in a rude or angry manner—is in law an assault and battery,”<sup>132</sup> it concluded that “in the nature of things [the criminal law] cannot apply to persons in the marriage state.”<sup>133</sup> The court found that such application “would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.”<sup>134</sup>

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<sup>125</sup> *Id.* at 23.

<sup>126</sup> *Id.* at 25.

<sup>127</sup> *Id.* at 27–29.

<sup>128</sup> *Bradley v. State*, 1 Miss. (1 Walker) 156, 157 (1824) (citing Blackstone for the proposition that the chastisement right permits use of “a whip or rattan, no bigger than my thumb, in order to inforce [sic] the salutary restraints of domestic discipline”).

<sup>129</sup> For an overview of the evolution of the privilege, and the closely linked deference to family patriarchs and government itself, see R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 48–74 (1979).

<sup>130</sup> *Bradley*, 1 Miss. at 158.

<sup>131</sup> *Id.*

<sup>132</sup> *State v. Hussey*, 44 N.C. (Busb.) 123, 126 (1852).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* Sixteen years later, the same court dismissed a battery charge filed against a husband who gave his wife “three licks, with a switch about the size of one of his fingers.” *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 454 (1868). Again, while admitting that the violence “would without question have constituted a battery if the subject had not been the

The formal legal privilege of chastisement endured until 1871 when Alabama and Massachusetts expressly proscribed “wife beating.”<sup>135</sup> That year, Alabama’s Supreme Court proclaimed that the chastisement privilege, “ancient though it be, to beat [one’s wife] with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is now not acknowledged by our law.”<sup>136</sup> For decades thereafter, however, wife beating remained largely beyond the reach of the criminal law, and the gap between the *de jure* and the *de facto* experiences of American women remained significant.<sup>137</sup> Instead, government contented itself with, at most, efforts to repair dysfunctional, violent family situations. Further, in those instances when the criminal law was invoked, prosecutions were typically reserved for immigrants and racial minorities.<sup>138</sup>

Child abuse, by mothers and fathers alike,<sup>139</sup> similarly continued without significant intervention.<sup>140</sup> The legal recognition of child abuse, like spousal battery, did not occur until the 1870s—in the wake of the Civil War—when government involvement in citizens’ lives increased dramatically.<sup>141</sup> The governmental focus on child abuse, like the focus on spousal abuse, was largely class-centered,<sup>142</sup> and it assumed tangible form

defendant’s wife,” it was a matter best left to “family government.” *Id.* at 454, 456.

<sup>135</sup> DOBASH & DOBASH, *supra* note 129, at 63 (citing *Fulgham v. State*, 46 Ala. 143 (1871), and *Commonwealth v. McAfee*, 108 Mass. 458 (1871)).

<sup>136</sup> *Fulgham*, 46 Ala. at 146–47.

<sup>137</sup> See PLECK, *supra* note 124, at 182 (“There was virtually no public discussion of wife beating from the turn of the century until the mid-1970s.”); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 12 (1986) (“[J]udicial recognition that men were no longer legally justified in beating their wives did not readily translate into increased numbers of arrests or prosecutions for spousal assault and battery.”).

<sup>138</sup> See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2134–41 (1996).

<sup>139</sup> See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON, 1880–1960, at 173 (1988) (noting that “[p]ast and present, parents of both sexes are approximately equally represented as child abusers,” but that “fathers were *much* more likely to abuse children in proportion to how much time they spend in child care”).

<sup>140</sup> See generally 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE CRIMINAL LAW* §§ 878–91 (Boston, Little Brown, 5th ed. 1872) (discussing the chastisement right in the context of spouses and parents); Robert W. Ten Bensel et al., *Children in a World of Violence: The Roots of Child Maltreatment*, in *THE BATTERED CHILD* 3 (Mary Edna Helfer et al., 5th ed. 1997) (providing a comprehensive overview of various forms of child abuse throughout history).

The precise degree of physical abuse suffered by children is the subject of ongoing debate among historians. For a comprehensive review of the literature, supplemented by an exhaustive historical review of primary sources, see LINDA A. POLLOCK, *FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500–1900* (1983). Professor Pollock disputes the accepted historical view that unremitting, severe child battering was widespread but notes at length the endemic use of parental corporal punishment, most severe in the nineteenth century. *See id.* at 143–202.

<sup>141</sup> PLECK, *supra* note 124, at 70–76. *But see id.* at 75 (“The general concern about the suffering of children in the antebellum era was simply outweighed by the belief in the privacy of the family.”).

<sup>142</sup> GORDON, *supra* note 139, at 28 (“[Reformers] saw cruelty to children as a vice of

in the nationwide proliferation of Societies for the Prevention of Cruelty to Children.<sup>143</sup> In 1874, the first child abuse prosecution was initiated against one Mary Connolly for allegedly attacking her foster child with a pair of scissors and repeatedly beating her with a rawhide whip and cane.<sup>144</sup> Connolly was convicted and her successful prosecution catalyzed the children's aid movement.<sup>145</sup> Over the ensuing two decades, "children's guardian" boards were created, marking the first concerted governmental effort to intervene in the domestic sphere to address child abuse.

When Progressive Era government at last dedicated itself to addressing domestic harms to wives and children, it adopted a social curative approach. The government addressed spousal abuse in the ameliorative forum of family courts, which viewed battery as a non-criminal offense more amenable to mediation and counseling than to prosecution.<sup>146</sup> Child-oriented reforms, in turn, emphasized the development of the juvenile court system and sought to repair abusive domestic relations, not to prosecute parents.<sup>147</sup> As a result, the system predominantly focused on "neglect" not "abuse."<sup>148</sup>

This ambivalent approach persisted for decades. Only in 1962, after a landmark medical study reported that x-ray technology had discerned hundreds of cases of otherwise unreported child abuse, did public attention turn to the issue.<sup>149</sup> The article soberly reported that "the bones tell a story the child is too young or too frightened to tell,"<sup>150</sup> and urged that

inferior classes and cultures which needed correction and 'raising up' to an 'American standard.');

PLECK, *supra* note 124, at 70 ("[A] wealthy, urban elite was also fearful of social disorder and dismayed by the poverty, disease, and lawlessness of urban life. They blamed the immigrant, largely Catholic, poor and hoped to rescue their children from a life of pauperism, drink, and petty thievery.").

<sup>143</sup> GORDON, *supra* note 139, at 28; PLECK, *supra* note 124, at 72–74.

<sup>144</sup> PLECK, *supra* note 124, at 70–73. Significantly, the case was initiated only at the urging of the founder and president of the American Society for the Prevention of Cruelty to Animals. *Id.* at 72. According to Professor Pleck, "[a]nimal protection preceded child protection not because the public was more concerned about animals than children, but because child rescue involved interference in the fundamental unit of the family." *Id.* at 79.

<sup>145</sup> *Id.* at 69–73.

<sup>146</sup> *Id.* at 136–42. See generally Ronald D. Cohen, *Child-Saving and Progressivism, 1885–1915*, in AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 273 (Joseph M. Hawes & N. Ray Hiner eds., 1985); Hamilton Cravens, *Child Saving in Modern America, 1870–1990s*, in CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC POLICY 3 (Roberta Wollons ed., 1993).

<sup>147</sup> See THE APSAC HANDBOOK ON CHILD MALTREATMENT 310 (John E. B. Myers et al. eds., 2d ed. 2002); PLECK, *supra* note 124, at 70, 136–42. However, according to Elizabeth Pleck, "the agents of these societies often sided with cruel parents at the expense of the child's safety." PLECK, *supra* note 124, at 70.

<sup>148</sup> See PLECK, *supra* note 124, at 81–85. The system's response to allegations of incest was even more ambivalent, labeling victims "juvenile sex delinquents," casting "neglectful mothers" as culprits, consciously focusing on "street rape" by strangers as opposed to "household" rape. See GORDON, *supra* note 139, at 215–23. Nonetheless, arrests were made in fifty-seven percent of the cases reported to Boston's child protection agency during the period from 1880 to 1910. *Id.* at 217.

<sup>149</sup> See C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962).

<sup>150</sup> *Id.* at 18.

physicians take action to protect children from further and potentially lethal abuse.<sup>151</sup> By 1967, due largely to the influence of a federal model provision proposed in 1963, all states had enacted some form of mandatory child physical abuse reporting law for professionals.<sup>152</sup> In the 1980s, society awakened to child sexual abuse in particular.<sup>153</sup> Today, all U.S. jurisdictions have laws criminalizing child abuse and neglect,<sup>154</sup> and reported incidents of these crimes have skyrocketed over recent decades.<sup>155</sup>

Concern over spousal abuse lagged behind governmental willingness to intervene on behalf of children. Public discussion and recognition of battering was muted for the first seven decades of the twentieth century, with spousal abuse being euphemistically referred to as “domestic disturbance” or “family maladjustment.”<sup>156</sup> Police, the gatekeepers of the justice system, unabashedly advocated non-arrest policies, believing that interference in the private domestic realm was inappropriate. Rather than promoting arrest, the police advanced the view that, if anything, mediation was in order.<sup>157</sup> Training materials for the Oakland Police Department, for instance, instructed that:

The police role in a dispute situation [is] more often that of a mediator and peacemaker than enforcer of the law. . . . Normally, officers should adhere to the policy that arrests shall be avoided . . . but when one of the parties demands arrest, you should attempt to explain the ramifications of such action (e.g., loss of

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<sup>151</sup> *Id.* at 23–24. For an overview of initiatives and debates taking place with regard to child physical abuse in the 1960s and 1970s, see PLECK, *supra* note 124, at 164–81.

<sup>152</sup> See Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 135 (1998). See generally SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW AND POLICY (2d ed. 1999).

<sup>153</sup> See Penelope K. Trickett & Frank W. Putnam, *Developmental Consequences of Child Sexual Abuse*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 39, 39 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998) (noting a dramatic increase in attention to child sexual abuse in the 1980s and 1990s); Katherine Beckett, *Culture and Politics of Signification: The Case of Child Sexual Abuse*, 43 SOC. PROBS. 57 (1996) (same); D. Kelly Weisberg, *The “Discovery” of Sexual Abuse: Experts’ Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1, 3–6 (1984) (same).

<sup>154</sup> See Lois A. Weithorn, *Protecting Children From Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 19–23 (2001).

<sup>155</sup> See Vieth, *supra* note 152, at 135 (noting that from 1963 to 1995 the number of reported cases of abuse and neglect increased from 150,000 to three million).

<sup>156</sup> PLECK, *supra* note 124, at 182.

<sup>157</sup> See DOBASH & DOBASH, *supra* note 129, at 207–17; Morton Bard & Joseph Zacker, *The Prevention of Family Violence: Dilemmas of Community Interaction*, 33 J. MARRIAGE & FAM. 677, 677–82 (1971). See generally EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE (2d ed. 1996); DEL MARTIN, BATTERED WIVES (1981); WILLIAM STACEY & ANSON SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA (rev. ed. 1983); MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980).

wages, bail procedures, court appearances) and encourage the parties to reason with each other.<sup>158</sup>

Likewise, prosecutors generously indulged their virtually unchecked authority to abstain from prosecuting offenders.<sup>159</sup> Moreover, even when successfully prosecuted, abusers generally received only minor sentences, often getting little more than a stern lecture from the court.<sup>160</sup>

The governmental reluctance to intervene rested on a variety of justifications. Chief among these was an abiding concern over the privacy and autonomy interests of the family unit,<sup>161</sup> which to varying degrees has reflected and reinforced the underlying patriarchal power structure.<sup>162</sup> The family was seen as a private and autonomous entity, a realm in which the government was “only too happy to avoid having either to forbid or to require particular interpersonal behavior.”<sup>163</sup> Courts recoiled from the prospect of being called upon to handle “every trifling family broil,” and dreaded “the evils which would result from raising the curtain and exposing to public curiosity” family life.<sup>164</sup> Later, in the twentieth century,

<sup>158</sup> MARTIN, *supra* note 157, at 93–94 (quoting CITY OF OAKLAND POLICE SERVS., TRAINING BULLETIN III-J, TECHNIQUES OF DISPUTE INTERVENTION 2–3 (1975)); *see also* Raymond I. Parnas, *The Police Response to Domestic Disturbance*, 1967 WIS. L. REV. 914, 922–24 (describing the typical response of police prior to the 1970s and 1980s).

<sup>159</sup> *See generally* DOBASH & DOBASH, *supra* note 129, at 217–19; Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Role of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 15–16 (1999); Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 298–305 (1985).

<sup>160</sup> *See generally* DOBASH & DOBASH, *supra* note 129, at 219–22 (discussing modest judicial sanctions).

<sup>161</sup> *See* Phillippe Aries, *The Family and the City in the Old World and New*, in CHANGING IMAGES OF THE FAMILY 29, 33 (Virginia Tufte & Barbara Myerhoff eds., 1979) (noting that with increasing industrialization, the family unit came to be revered as a refuge, a “private domain, the only place where a person could legitimately escape the inquisitive stare of industrial society”); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983) (“[The] home was said to provide a haven from the anxieties of modern life—a ‘shelter for those moral and spiritual values which the commercial spirit and the critical spirit were threatening to destroy’”) (quoting W. HOUGHTON, THE VICTORIAN FRAME OF MIND, 1830–1870, at 343 (1957) (emphasis omitted)). *See generally* STEPHANIE COONTZ, THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES, 1600–1900 (1988).

<sup>162</sup> *See* R. Emerson Dobash & Russell P. Dobash, *Wives: The “Appropriate” Victims of Marital Violence*, 2 VICTIMOLOGY 426, 427 (1978) (calling wife-battering “a form of behavior which has existed for centuries as an acceptable, and, indeed, a desirable part of a patriarchal family system within a patriarchal society . . .”).

<sup>163</sup> Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1144–45 (quoting Judith Hicks Stiehm, *Government and The Family: Justice and Acceptance*, in CHANGING IMAGES OF THE FAMILY, *supra* note 161, at 361, 362); *see also* Zanita E. Fenton, *Mirrored Silence: Reflections on Judicial Complicity in Private Violence*, 78 OR. L. REV. 995 (1999) (arguing that domestic violence and other forms of private violence are reinforced by judicial inaction).

<sup>164</sup> State v. Rhodes, 61 N.C. (Phil. Law) 453, 457–59 (1868).

federal courts invoked constitutional law to shelter family privacy and autonomy,<sup>165</sup> contributing to and justifying reluctance to intervene.<sup>166</sup>

It was not until the 1970s that the “curtain” shielding spousal abuse finally lifted,<sup>167</sup> in significant part due to successful feminist efforts to make domestic abuse a public issue and successful lawsuits challenging the failure of the criminal justice system to intervene in abusive situations.<sup>168</sup> Significant developments have included: increased statutory

<sup>165</sup> See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602–03 (1979) (rejecting procedural protections limiting parental discretion to commit children to institutions for the mentally retarded, terming protections “statist” and contrary to “Western civilization concepts of the family unit with broad parental authority over minor children”); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (invalidating compulsory education for Amish children through age sixteen, noting the “values of parental direction of the religious upbringing and education” of children); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (invalidating a state law prohibiting use by married persons of contraceptives, while referring to the institution of marriage as “intimate to the degree of being sacred”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating a law prohibiting attendance at parochial schools, concluding that the law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”).

<sup>166</sup> For commentary on how the concept of marital privacy has permitted, and even encouraged, violence against women, see Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991). According to Professor Schneider:

By seeing woman-abuse as ‘private,’ we affirm it as a problem that is individual, that only involves a particular male-female relationship, and for which there is no social responsibility to remedy . . . Denial supports and legitimates [the power of patriarchy]; the concept of privacy is a key aspect of this denial.

*Id.* at 983; see also *id.* at 984–85 (“Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention.”); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2158 (1995) (suggesting that deference to privacy is a vestige of the traditional privilege of chastisement).

For a contrary view advocating privacy in familial relations, for women of color in particular, see BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 37 (1984) (asserting that family life allows black women to “experience dignity, self-worth, and a humanization that is not experienced in the outside world”); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (describing home as “a safe haven from the indignities of life in a racist society”); Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) (deeming “family liberty” a basis for promoting “full personhood”); see also Laura W. Stein, *Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1173 (1993) (identifying and advocating the benefits of privacy, including autonomy, personhood, and freedom from governmental interference).

<sup>167</sup> As Professor Reva Siegel has observed, judicial use of the curtain metaphor was not accidental; during the nineteenth century heavily curtained windows, made available as a result of advances in textile production, increasingly came to be used in homes. Siegel, *supra* note 138, at 2168–69 & n.187.

<sup>168</sup> See generally *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993). As Professor Katharine Baker has observed, the visibility of domestic violence has been closely tied to the ebb and flow of the various historic incarnations of the women’s movement:

Thus, it was visible as an issue in the late nineteenth and early twentieth centu-

authority for police to execute warrantless arrests in the home; the enactment of mandatory arrest laws for domestic abuse; and most recently “no drop” policies, which remove the discretionary authority of prosecutors (and victims) to forgo abuse prosecutions.<sup>169</sup> Arguably, the zenith of governmental recognition of spousal abuse came in 1994, when Congress, after several years of intense lobbying, passed the Violence Against Women Act, which contained a broad array of provisions ensuring and enhancing legal remedies for abuse victims and provided incentives for states to become more aggressive in enforcing domestic abuse laws.<sup>170</sup>

Viewed in a broader historical context, it is apparent that the willingness of government to address family violence has varied considerably over time, in close relation to transformative social interests. As Linda Gordon has observed, “the very definition of what constitutes unacceptable domestic violence, and the appropriate responses to it, developed and then varied according to political moods and the force of certain political movements.”<sup>171</sup> The child-savers of the late eighteenth century achieved the most marked success in eroding governmental reluctance to intervene. Mindful of the close relationship between spousal and child abuse,<sup>172</sup> they in turn partnered with the temperance and nascent women’s movements, and later the feminist movement, to compel governmental involvement in the previously self-governing private domain of the family.

However, as discussed later, despite the increasing *de jure* recognition of family violence and the government’s increased readiness to intervene, use of criminal sanctions has demonstrably failed to stem the tide of domestic harms. Indeed, with the passage of time, the law’s inefficiency has become manifest with respect to newly recognized forms of family-based abuse, including that involving the elderly,<sup>173</sup> and lesbian,

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ries, but, with no vibrant feminist community to articulate its harms, it died out as an issue for most of the middle part of the twentieth century. It was not until the early 1970s, with the rise of the second wave of feminism, that activists and newspapers began to make the issue real again.

Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1462 (2001).

<sup>169</sup> See generally Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) (chronicling and discussing changes).

<sup>170</sup> See Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1902 (codified as amended in scattered titles and sections of U.S.C.). The Supreme Court later significantly undercut the substantive import of the law when it held that Congress exceeded its authority under the Commerce Clause and section five of the Fourteenth Amendment by creating in the Act a federal civil remedy for persons victimized by gender-motivated violence. See *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>171</sup> GORDON, *supra* note 139, at 3; see also PLECK, *supra* note 124, at 4–5 (“Reform against family violence has mainly occurred as a response to social and political conditions, rather than to worsening conditions in the home.”).

<sup>172</sup> See GORDON, *supra* note 139, at 261 (noting that “41 percent of wife-beaters were also child abusers”).

<sup>173</sup> See generally Audrey S. Garfield, *Elder Abuse and the States’ Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859 (1991); Seymour

gay, bisexual, and transgender persons.<sup>174</sup> Additionally, numerous vestiges of the historic aversion to policing family life have extended into modern times. Marital rape, as of the mid-1980s, largely remained a legal impossibility,<sup>175</sup> with the drafters of the influential Model Penal Code expressing concern over “unwarranted intrusion of the penal law into the life of the family.”<sup>176</sup> Corporal punishment of children remains a recognized prerogative of parents, such that prisoners enjoy greater protection from bodily violence than children.<sup>177</sup> Similarly, at times child abuse (but more often neglect) is condoned on the basis of religious belief, with the State deferring to the First Amendment rights of parents or religious communities.<sup>178</sup> Evidentiary law also continues to betray an age-old reluctance to interfere; the spousal privilege, for instance, prohibits the government from compelling the testimony of a battered spouse, should prosecution ensue.<sup>179</sup> As noted by one commentator, the law, by distin-

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Moskowitz, *Saving Granny From the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77 (1998).

<sup>174</sup> See generally Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Violence Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325 (1999); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990); Symposium, *Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121 (2001); cf. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 547–48 (1992) (suggesting that examination of battering in gay, lesbian, and elderly populations might illuminate dynamics operative in heterosexual relationships).

<sup>175</sup> See *People v. Liberta*, 474 N.E.2d 567, 572 (N.Y. 1984) (noting that over forty states had some form of marital rape exemption); see also Linda Jackson, Note, *Marital Rape: A Higher Standard is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 194–97 (1994) (providing an overview of states with some form of marital rape exception).

<sup>176</sup> MODEL PENAL CODE § 213.1 cmt. 8(c) (1985).

<sup>177</sup> See generally MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES (1994); Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353 (1998); David Orentlicher, *Spanking and Other Corporal Punishment of Children By Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147 (1998). According to Professor Straus, “more than 90% of American parents hit toddlers and most continue to hit their children for many years. In short, almost all American children have been hit by their parents—usually for years.” STRAUS, *supra*, at 3.

<sup>178</sup> See Shauna Van Praagh, *The Youngest Members: Harm to Children and the Role of Religious Communities*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 148, 152–55 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994). As Van Praagh states, “[e]nlarging the ‘domestic sphere’ through the addition of religious community . . . does not insulate the relationship between community and children from scrutiny. But it does mean that the law, in intervening to protect children’s interests, needs to justify its readiness to cross into that sphere and disrupt the relationship.” *Id.* at 155–56. See generally David E. Steinberg, *Children and Spiritual Healing: Having Faith in Free Exercise*, 79 NOTRE DAME L. REV. 179 (2000).

<sup>179</sup> See generally Malinda L. Seymore, *Isn’t It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032 (1996) (examining and criticizing the role of spousal immunity in the context of domestic violence). For a discussion of the numerous reasons for this reluctance, see Kathleen Waits, *The Criminal Justice System’s Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985).

guishing domestic harm from others, “send[s] an obvious message: When a man beats his wife it is not a crime that offends the state—it is simply a private matter between the two of them.”<sup>180</sup>

In sum, family abuse and violence has been met with an ambivalent response from government over time. The family, as Professor Teitelbaum has observed, has existed as “an institution simultaneously defined by, and separate from, the state.”<sup>181</sup> “By regarding the family as an entity which is left free by governmental silence, the effects of a policy permitting personal domination are obscured.”<sup>182</sup> Tragically, through the years, these “effects” have assumed the form of criminal predations, perpetrated in the shadow of public law.

### C. The Corporation

In this era of hyper-sensitization to corporate wrongdoing, it is hard to imagine a time when corporations enjoyed criminal immunity. Such a time, however, surely existed, stemming from the basic fact that corporations are artificial legal constructs,<sup>183</sup> with “no soul to be damned, and no body to be kicked.”<sup>184</sup> In the words of historian William Holdsworth, corporations “could commit neither sin nor crime; and some said no tort—truly suitable representatives for saints and churches.”<sup>185</sup> As a result of this doctrinal barrier, the corporation, excluding its individual employees and agents, stood beyond the reach of the criminal law, from the time of the first recognition of the corporation in fourteenth-century England, as

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<sup>180</sup> Seymore, *supra* note 179, at 1036. Similarly, intentional torts such as assault and battery can remain beyond the grasp of civil redress because of spousal and parental immunity. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989); Joseph J. Basgier, *Children’s Rights: A Renewed Call for the End of Parental Immunity in Alabama and Arguments for the Further Expansion of a Child’s Right to Sue*, 26 LAW & PSYCHOL. REV. 123 (2002). See generally LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE app. B (1991 & Supp. 2000) (providing a statutory overview of interspousal tort immunity).

<sup>181</sup> Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 541 [hereinafter Teitelbaum, *Family as a System*]. As Professor Teitelbaum observed elsewhere, “the practical consequence” of deference, whether based on privacy or autonomy, “is to confer or ratify the power of one family member over others.” Teitelbaum, *supra* note 163, at 1174.

<sup>182</sup> Teitelbaum, *supra* note 163, at 1178.

<sup>183</sup> See *Trustees of Dartmouth Coll. v. Woodard*, 17 U.S. (4 Wheat.) 518, 636 (1819) (describing a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law”); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (describing a corporation as “[t]hat invisible, intangible and artificial being, that mere legal entity”).

<sup>184</sup> KING, *supra* note 3, at 1; see also *Case of Sutton’s Hosp.*, 77 Eng. Rep. 960, 973 (K.B. 1613) (asserting that corporations “cannot commit treason, nor be outlawed, nor excommunicate[d], for they have no souls”).

<sup>185</sup> 3 HOLDSWORTH, *supra* note 57, at 474; see also 1 POLLOCK & MAITLAND, *supra* note 26, at 490 (“[T]he corporation is invisible, incorporeal, immortal; it cannot be assaulted, beaten or imprisoned. . . . We find it said that the corporation is but a name.”).

an ecclesiastic entity,<sup>186</sup> through centuries of its evolution as a mercantile and industrial entity.<sup>187</sup> As proclaimed by the Maine Supreme Judicial Court in 1841: “It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation should be indicted.”<sup>188</sup>

Much as with the institutions of family and church, however, government over time became more willing to impose criminal liability on corporations,<sup>189</sup> which were proliferating in number<sup>190</sup> and increasingly liberated from the individualized legislative charters that delimited their initial activities.<sup>191</sup> Early government intervention took the form of nuisance indictments of quasi-corporate entities such as municipalities for failure to maintain transportation-related infrastructure.<sup>192</sup> In 1834, for example, the City of Albany, New York, was indicted for permitting the Hudson River basin to become mired in debris.<sup>193</sup> New York’s highest court concluded:

It is well settled that when a corporation or an individual are [sic] bound to repair a public highway or navigable river, they are [sic] liable to indictment for the neglect of their [sic] duty. An indictment and an informotion [sic] are the only remedies to

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<sup>186</sup> See 3 HOLDSWORTH, *supra* note 57, at 470–74; Abram Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* 25, 33 (Edward S. Mason ed., 1959). The law thus “recognized the church and also protected it, almost as a legal infant, from those who managed it as guardians.” FRANCIS T. CULLEN ET AL., *CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND* 112 (1987).

<sup>187</sup> See Case 935, 88 Eng. Rep. 1518, 1518 (K.B. 1701) (“A corporation is not indictable, but the particular members of it are.”); 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*476 (“A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.”).

<sup>188</sup> *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41, 44 (1841).

<sup>189</sup> Indeed, early corporate immunity derived from the refusal of the Church to excommunicate corporate entities, a view embraced by the common law, which was itself greatly influenced by religious tenets. Because the corporation lacked a soul, the Church did not recognize the corporation as an entity subject to the moral opprobrium of the criminal law, making it ill-suited for excommunication. See *Sutton’s Hosp.*, 77 Eng. Rep. at 973; John C. Coffee, Jr., *Making the Punishment Fit the Corporation: The Problems of Finding an Optimal Corporation Criminal Sanction*, 1 N. ILL. U. L. REV. 3, 3 (1980) (noting that in 1250 C.E., Pope Innocent IV forbade excommunications of corporations).

<sup>190</sup> See PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 6 (1993) (noting that by 1801 there were only 317 U.S. corporations).

<sup>191</sup> See generally EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* (1954).

<sup>192</sup> See L. H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 16 (1969); Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 39 (1957). Early on in America, as in England, substantive law did not distinguish between public and private corporations. 2 JOSEPH S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 49, 75 (1917).

<sup>193</sup> *People v. Albany*, 11 Wend. 539, 541 (N.Y. 1834).

which the *public* can resort for a redress of their [sic] grievances in this respect.<sup>194</sup>

Soon, commercial corporations came to be held accountable under nuisance for failing to uphold similarly assumed public duties to maintain roads and bridges.<sup>195</sup>

Early liability was thus imposed for nonfeasance, avoiding the practical difficulty of ascribing intentional misbehavior to a fictive entity. As the Maine Supreme Judicial Court maintained, a corporation “can neither commit a crime or misdemeanor, by any positive or affirmative act, or incite others to do so, as a corporation.”<sup>196</sup> However, the law soon buckled under the strain of administering the variable misfeasance-nonfeasance distinction between harms affirmatively done and those merely permitted to occur.<sup>197</sup> In the 1850s, American courts for the first time began to eschew this distinction, and in the process tacitly recognized that corporations were legally capable of perpetrating active harms.<sup>198</sup> During the time, civil liability for intentional torts became possible.<sup>199</sup> However, criminal liability largely remained limited to nuisance, with injunctive relief in the form of abatement being the goal.<sup>200</sup> Other, intent-based crimes remained off-limits.<sup>201</sup>

It was not until the mid-1870s, at the same time that criminal law became less tolerant of familial abuse,<sup>202</sup> that corporations became sub-

<sup>194</sup> *Id.* at 544.

<sup>195</sup> *See, e.g.*, *Commonwealth v. Hancock Free Bridge Corp.*, 68 Mass. (2 Gray) 58 (1854) (failure to maintain road); *State v. Morris Canal & Banking Co.*, 22 N.J.L. 537 (1850) (failure to maintain bridge). For discussion of the central role played by eighteenth- and nineteenth-century private business in what today would be seen as governmental duties, such as building and maintaining transportation infrastructure, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 166–67, 446 (1973); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 17–18 (1970); Chayes, *supra* note 186, at vii.

The first criminal prosecution of an expressly commercial corporate entity came in 1842, when in *The Queen v. Birmingham & Gloucester Railway Co.*, 114 Eng. Rep. 492, 492 (Q.B. 1842), a railway was deemed properly indictable for failing to “make certain arches to connect lands which had been severed by the railway.”

<sup>196</sup> *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41, 43 (1841).

<sup>197</sup> *See, e.g.*, *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 346 (1854) (noting this difficulty and commenting on the “absurdity” of the distinction).

<sup>198</sup> *See, e.g.*, *State v. Morris & Essex R.R.*, 23 N.J.L. 360 (1852).

<sup>199</sup> *See, e.g.*, *Brokaw v. New Jersey R.R. & Transp. Co.*, 32 N.J.L. 328 (1867) (holding a corporation liable for the torts of assault and battery).

<sup>200</sup> *See, e.g.*, *Morris & Essex*, 23 N.J.L. at 370.

<sup>201</sup> *See, e.g.*, *State v. Ohio & Miss. R.R.*, 23 Ind. 362, 365 (1864) (“Whatever may be the rule [elsewhere], . . . in this state, under the criminal law, a corporation can not [sic] be prosecuted by information or otherwise for a misfeasance.”); *Proprietors of New Bedford Bridge*, 68 Mass. at 345 (stating that “[c]orporations cannot be indicted for offences [sic] which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects.”).

<sup>202</sup> *See supra* notes 139–145 and accompanying text.

ject to prosecutions for intent-based crimes. State courts demonstrated the initial willingness to allow the prosecution of corporations for common law crimes previously applied only to individuals.<sup>203</sup> Shortly thereafter, against a backdrop of Progressive Era legislative reforms targeting dubious corporate economic dealings,<sup>204</sup> the federal courts also began imposing liability on corporate entities for intent-based crimes.<sup>205</sup> Significantly, for the first time, corporations faced criminal liability for homicide.<sup>206</sup>

Shadowing the increasing predisposition of the civil law to hold organizations collectively liable,<sup>207</sup> turn-of-the-century courts frequently sought to neutralize their conceptual discomfort by invoking agency and tort law principles of vicarious liability. As a result, corporations were held responsible for the acts of their employees. In the seminal 1909 case of *New York Central & Hudson River Railroad v. United States*,<sup>208</sup> for instance, the Supreme Court upheld a railroad's conviction and fine under the Elkins Act for the financial misdeeds of its employees.<sup>209</sup> The Court rejected the argument that punishing the corporation for the acts of its subordinates was unconstitutional because it in effect punished shareholders, depriving them of their property without due process of law.<sup>210</sup> The Court found no valid reason "why [a] corporation which profits [from a]

<sup>203</sup> See, e.g., *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445 (Mass. 1899) (contempt); *State v. First Nat'l Bank of Clark*, 51 N.W. 587 (S.D. 1892) (charging usurious interest rates); *State v. Atchinson*, 71 Tenn. 729 (1879) (criminal libel).

<sup>204</sup> See Carl J. Meyer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 584–86 (1990) (discussing new federal laws, including the Sherman Antitrust Act, and noting that government intercession was "almost always in a sporadic manner for economic (as opposed to environmental or social) purposes"); see also Livingston Hall, *The Substantive Law of Crimes—1887–1936*, 50 HARV. L. REV. 616, 647 (1937) (noting that "the increasing volume of business carried out in corporate form" hastened the growth of corporate criminal liability).

<sup>205</sup> See, e.g., *United States v. Am. Socialist Soc'y*, 260 F. 885 (S.D.N.Y. 1919) (espionage), *aff'd* 266 F. 212 (2d Cir. 1920); *United States v. N.Y. Herald Co.*, 159 F. 296 (C.C.S.D.N.Y. 1907) (knowingly mailing obscene material); *United States v. MacAndrews & Forbes Co.*, 149 F. 823 (C.C.S.D.N.Y. 1906) (conspiracy pursuant to Sherman Antitrust Act).

<sup>206</sup> See, e.g., *United States v. Van Schaick*, 134 F. 592 (C.C.S.D.N.Y. 1904) (manslaughter); *State v. Lehigh Valley R.R.*, 103 A. 685 (N.J. 1917) (same). *But see, e.g.*, *Commonwealth v. Punksutawney St. Passenger Ry.*, 24 Pa. C. 25, 26 (1900) (concluding that manslaughter "is so far ultra vires as to contravene all accepted rules in the criminal law for making it the act of the principal").

<sup>207</sup> See Donald Black, *Compensation and the Social Structure of Misfortune*, 21 LAW & SOC'Y REV. 563 (1987) (discussing the gradual evolution during the nineteenth and twentieth centuries away from individual responsibility for civil redress toward organizational responsibility); see also Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473 (1986).

<sup>208</sup> 212 U.S. 481 (1909).

<sup>209</sup> That act made it unlawful to "offer, grant, . . . give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce . . . whereby any such property shall . . . be transported at a less rate than that named in the tariffs . . ." Elkins Act, ch. 708, 32 Stat. 847, 847 (1907) (repealed).

<sup>210</sup> *New York Central*, 212 U.S. at 494.

transaction, and can only act through its agents and officers, [cannot] be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act . . . .”<sup>211</sup> While noting that there are “some crimes, which in their nature cannot be committed by corporations,” the Court emphasized that in doctrinal terms vicarious liability permitted liability in a “large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents.”<sup>212</sup>

The Court also recognized the compelling pragmatic need for corporate criminal accountability: “If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices . . . .”<sup>213</sup> In short, the law could not “shut its eyes” to the increasingly pervasive role of corporations in American life;<sup>214</sup> the continued provision of criminal immunity “would virtually take away the only means of effectually controlling” corporate wrongdoing.<sup>215</sup> To the Court, criminal liability for individual corporate actors held out only partial hope of preventing and punishing violations of law. Concurrent criminal liability for corporations best ensured the accomplishment of legislative goals.<sup>216</sup>

At about the same time, courts became less respectful of the doctrine of *ultra vires*, which precluded corporate liability for the criminal acts of agents by dictating that corporate liabilities were delimited by corporate charters.<sup>217</sup> This shift, in turn, precluded corporations from arguing that

<sup>211</sup> *Id.* at 495.

<sup>212</sup> *Id.* at 494. The Court added that if a corporation “can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.” *Id.* at 492–93 (quoting JOEL PRENTISS BISHOP, *NEW CRIMINAL LAW* § 417 (8th ed. 1892)).

<sup>213</sup> *Id.* at 495.

<sup>214</sup> For a discussion of the increasing role played by corporations beginning in late nineteenth-century American society, see HURST, *supra* note 195; William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *STAN. L. REV.* 1471, 1487–89 (1989); Alfred D. Chandler, Jr., *The Beginnings of “Big Business” in American Industry*, 33 *BUS. HIST. REV.* 33 (1959); George G. Little, *Punishment of a Corporation—The Standard Oil Case*, 3 *U. ILL. L. REV.* 446 (1909).

<sup>215</sup> *New York Central*, 212 U.S. at 495–96; *see also* *United States v. John Kelso Co.*, 86 F. 304, 307 (N.D. Cal. 1898) (rejecting a claim of corporate immunity because the corporation “would be given a privilege denied to a natural person”).

<sup>216</sup> *New York Central*, 212 U.S. at 495.

<sup>217</sup> *See, e.g., United States v. Nearing*, 252 F. 223, 231 (S.D.N.Y. 1918). In *Nearing*, Judge Learned Hand stated:

That the criminal liability of a corporation is to be determined by the kinship of the act to the powers of the officials, who commit it is true enough, but neither the doctrine of *ultra vires*, nor the difficulty of imputing intent or motive, should be regarded any longer to determine the result.

*Id.* *See generally* Herbert Hovenkamp, *The Classical Corporation in American Legal*

they were criminally immune for injurious acts of their agents that they did not expressly authorize.<sup>218</sup>

A final important development in the early twentieth century was the enactment of laws targeting “public welfare” offenses,<sup>219</sup> which imposed strict liability regardless of intent, and obviated the need to attribute mens rea to a fictive entity. The criminal law also came to expressly include corporations within its ambit, further reducing the need to anthropomorphize. As one federal court stated early in the century, “[t]he same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not . . . bear discussion.”<sup>220</sup>

In short, by the early 1900s, legislators and judges realized that the criminal law required modification to properly account for wrongs committed by increasingly powerful and prevalent corporate collectives.<sup>221</sup> As the New Jersey Supreme Court stated in 1917, in upholding a homicide indictment against a corporation in the face of explicit statutory reference to “persons”:

We need not consider whether the modification of the common law by our decisions is to be justified by logical argument: it is confessedly a departure at least from the broad language in which the earlier definitions were stated, and a departure made necessary by changed conditions if the criminal law was not to be set at naught in many cases by contriving that the criminal act should be in law the act of a corporation.<sup>222</sup>

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*Thought*, 76 GEO. L.J. 1593, 1662–67 (1998) (surveying the gradual disavowal of the doctrine).

<sup>218</sup> See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 209.

<sup>219</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 113–16 (1993); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

<sup>220</sup> *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (C.C.S.D.N.Y. 1906).

<sup>221</sup> It is noteworthy that the courts were willing some fifty years earlier to look past the fictive quality of corporations for purposes of civil court jurisdiction, holding that a corporation may invoke federal diversity jurisdiction to sue on the basis that its shareholders are presumed to be citizens of the state of incorporation. See *Marshall v. Balt. & Ohio R.R.*, 57 U.S. (16 How.) 314, 328–29 (1853). By late in the nineteenth century, corporations were also deemed “persons” for purposes of protection under the Fourteenth Amendment. See *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886).

<sup>222</sup> *State v. Lehigh Valley R.R.*, 103 A. 685, 685 (N.J. 1917); see also *Commonwealth v. Pulaski County Agric. & Mech. Ass’n*, 17 S.W. 442, 442 (Ky. 1891) (“With the growth of corporations came the necessity for [corporate criminal liability], and its adaptability to changed circumstances is an excellence of the common law . . . . The object should be to reach and punish the real power in the matter, and thus prevent a repetition of the offense.”).

Accordingly, corporations, long the beneficiary of State protection, including the constitutional protections of a “person,” assumed the associated potential criminal liabilities.<sup>223</sup>

This shift in legal discourse was mirrored in broader American society, which for the first time focused in earnest on corporate malefactors. Writing in a time when muckraking journalists skewered the wrongdoing of robber barons and other elites, sociologist E. A. Ross, for instance, identified the “criminaloid,” who operated outside the constraints of law:

The man who picks pockets with a railway rebate, murders with an adulterant instead of a bludgeon, burglarizes with a “rake-off” instead of a jimmy, cheats with a company prospectus instead of a deck of cards, or scuttles his town instead of his ship, does not feel on his brow the brand of a malefactor.<sup>224</sup>

In the 1930s, folk singer Woody Guthrie, with characteristic populist flair, noted that “[s]ome will rob you with a six gun, [a]nd some with a fountain pen.”<sup>225</sup> In late 1939, Edwin Sutherland, widely considered the progenitor of modern criminology, coined the phrase “white collar criminal” in his presidential address to the American Sociological Society. A year later he wrote of “crime in the upper or white-collar class, composed of respectable or at least respected business and professional men . . . .”<sup>226</sup>

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<sup>223</sup> See Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 266 (1911) (“[A]lthough corporate personality is a fiction, the entity which is personified is no fiction. The union of the members is no fiction. The acting as if they were one person is no mere metaphor. In a word, although corporate personality is a fiction, . . . it is a fiction founded upon fact.”). For an earlier expression of this same sentiment, see Cicero J. Lindley, *Criminal Acts of Corporations and Their Punishment*, 7 AM. LAW. 564 (1899), stating:

From the very nature of the organization of a corporation it is apparent that nearly every crime known to the law can be committed by it. It may, and frequently does, commit the crime of murder, and the crime of manslaughter is an every day occurrence upon the part of some of the incorporated companies of the land.

*Id.* at 566. Ironically, despite municipalities and corporations sharing a common genesis in criminal law accountability, municipalities, unlike corporations, later (in the 1970s) came to enjoy immunity from criminal prosecution. See Stuart P. Green, *The Criminal Prosecution of Local Governments*, 72 N.C. L. REV. 1197, 1201–14 (1994) (tracing the gradual legal evolution). Professor Green characterizes the reasons for the demise of municipal prosecutions as “elusive,” but lends particular weight to the emerging view that municipalities were thought creatures of state government, which made “‘self-prosecution’ more prominent and the state criminal prosecution of such entities increasingly awkward.” *Id.* at 1213.

<sup>224</sup> E. A. ROSS, *SIN AND SOCIETY: AN ANALYSIS OF LATTER DAY INIQUITY* 7 (1907). For other muckraking exposés of the era, highlighting a broad range of business wrongdoing, see UPTON SINCLAIR, *THE JUNGLE* (Viking Press 1946) (1906); LINCOLN STEFFENS, *THE SHAME OF THE CITIES* (Hill & Wang 1957) (1904); IDA TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904).

<sup>225</sup> Woody Guthrie, *Pretty Boy Floyd*, in ALAN LOMAX, *FOLK SONGS OF NORTH AMERICA* 437 (1960).

<sup>226</sup> Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 1 (1940). Suth-

Although diverse in form, the crimes shared a “violation of delegated or implied trust.”<sup>227</sup> Ten years later, Sutherland published his monumental study of the criminal activity of seventy major U.S. corporations, chronicling widespread and persistent corporate wrongdoing.<sup>228</sup>

This increasing social and legal recognition of corporate criminality, however, failed to spark significant prosecutorial resolve over the ensuing decades.<sup>229</sup> The situation prompted one commentator to observe in the pages of the *Harvard Business Review* that the “systematic immunity” of corporations qualified as the “profound political problem of all capitalist nations in our century.”<sup>230</sup> The commentator added that while “[i]n theory [corporations] are creatures of the law; in practice they are beyond it.”<sup>231</sup> In 1967, the President’s Commission on Law Enforcement and Administration of Justice reported that “the public tends to be indifferent to business crime or even to sympathize with the offenders when they have been caught.”<sup>232</sup> In 1975, Christopher Stone published *Where the Law Ends: The Social Control of Corporate Behavior*, questioning, “[e]xactly what is it about corporations, and exactly what is it about the institutions we have available to control them, that so often seems to leave the one so frustratingly outside the grasp of the other?”<sup>233</sup>

In 1978, however, a single event triggered a radical change in Americans’ tolerance for corporate wrongdoing. Much as Father Paul Shanley catalyzed action against pedophile priests in 2002, and Mary

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erland’s class- or status-based definition, it bears mention, has been the subject of widespread criticism. For an overview of such critiques, including the observed distinction between “occupational” and “organizational” crime, see Stanton Wheeler et al., *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, 345–47 (1988). For some history of the attacks on Sutherland’s ideas, as well as shifts in the understanding of white-collar crime more generally, see DAVID WEISBURD ET AL., *THE CRIMES OF THE MIDDLE CLASSES: WHITE COLLAR OFFENDERS IN THE FEDERAL COURTS* 6–9 (1991).

<sup>227</sup> Sutherland, *supra* note 226, at 3.

<sup>228</sup> EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME* (1949).

<sup>229</sup> This reality was pointed out by Judge Richard Posner in one of his earlier works, in which he noted that between 1890 and 1969, the ratio of civil to criminal cases brought by the U.S. Department of Justice for antitrust violations increased from roughly one-to-one to almost three-to-one. Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 385 (1970). One important exception to this neglect came in 1956 when the American Law Institute, for the first time, acknowledged—albeit in decidedly neutral language—the “utility” of corporate criminal liability. See Kathleen Brickey, *Rethinking Corporate Criminal Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988).

<sup>230</sup> John F. A. Taylor, *Is the Corporation Above the Law?*, HARV. BUS. REV., Mar.-Apr. 1965, at 119, 128.

<sup>231</sup> *Id.* at 128–29.

<sup>232</sup> PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 158 (1968); see also Vilhelm Aubert, *White-Collar Crime and Social Structure*, 58 AM. J. SOC. 265, 265 (1952).

<sup>233</sup> CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* xii (1975); cf. Harvey Katz, *The White Collar Criminal*, WASHINGTONIAN, May 1970, at 40, 65 (quoting a District of Columbia trial judge as saying he would “not penalize a businessman trying to make a living when there are felons out on the street”).

Connelly against abusive parents in 1870, the fiery deaths in August 1978 of three teenage girls in their Ford Pinto propelled corporate wrongdoing to center stage.<sup>234</sup> Ford marketed the Pinto knowing that the vehicle's gas tank was susceptible to rupture and explosion when hit from behind,<sup>235</sup> reasoning that the civil verdicts likely resulting would not outweigh the expected cost-savings associated with continued use of the flawed design.<sup>236</sup> As a result of Ford's decision, five hundred people burned to death in Pintos.<sup>237</sup> The deaths of the three Indiana teenagers prompted a rural prosecutor to seek an indictment for reckless homicide and, for the first time in American history, a grand jury returned an indictment against a corporation for a non-negligent killing.<sup>238</sup>

Although Ford faced a maximum \$30,000 fine, the prospect of a criminal conviction prompted it to undertake an aggressive, hugely expensive defense, replete with distinguished experts and outside counsel assembled from throughout the nation.<sup>239</sup> Ultimately, Ford was acquitted after a ten-week trial, requiring twenty-five jury ballots, after managing to suppress all but a small fraction of the damning arsenal of documentary evidence secured by the prosecution.<sup>240</sup> Despite the outcome, the gruesome facts of the case and Ford's callous decision to put profits ahead of safety galvanized public concern over corporate misdeeds and inspired other prosecutions for corporate killings in the late 1970s and 1980s.<sup>241</sup> Corporate misfeasance in the workplace, resulting in workers' deaths and serious injuries, likewise inspired increased prosecutorial attention during the time.<sup>242</sup> In addition, nonfatal corporate wrongs pro-

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<sup>234</sup> For a discussion of how particular events serve to catalyze criminal justice responses, in particular, see KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY POLITICS* (1997); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. REV. 1227 (2000); Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

<sup>235</sup> Donald J. Meister, *Criminal Liability for Corporations That Kill*, 64 TUL. L. REV. 919, 928 (1990) (citing Mark Dowie, *Pinto Madness*, MOTHER JONES, Sept.-Oct. 1977, at 20, 24).

<sup>236</sup> *Id.* In 1965, consumer advocate Ralph Nader had chronicled a similar bottom-line callousness by General Motors, which marketed its Corvair with knowledge of serious safety flaws that could have been remedied with the inclusion of an inexpensive design change. See RALPH NADER, *UNSAFE AT ANY SPEED* (1965).

<sup>237</sup> Dowie, *supra* note 235, reprinted in CORPORATE VIOLENCE 13, 14 (Stuart L. Hills ed. 1987).

<sup>238</sup> See CULLEN ET AL., *supra* note 186, at 178.

<sup>239</sup> See *id.* at 245–57 (describing Ford's legal defense team, including renowned jury expert Professor Hans Zeisel of the University of Chicago).

<sup>240</sup> *Id.* at 292–93.

<sup>241</sup> See Meister, *supra* note 235, at 929–30; David J. Reilly, *Murder, Inc.: The Criminal Liability of Corporations for Homicide*, 18 SETON HALL L. REV. 378, 389–96 (1988).

<sup>242</sup> See CULLEN ET AL., *supra* note 186, at 313–16 (citing and discussing corporate homicide criminal prosecutions in the 1980s); David von Ebers, *The Application of Criminal Homicide Statutes to Work-Related Deaths: Mens Rea and Deterrence*, 1986 U. ILL. L. REV. 969; Peter T. Edelman, *Corporate Criminal Liability for Homicide: The Need to Punish Both the Corporate Entity and Its Officers*, 92 DICK. L. REV. 193 (1987). Perhaps the most infamous instance of corporate homicide involved the successful prosecution of

vided grist for numerous high-profile prosecutions in the 1980s, including against Exxon for its environmentally disastrous oil spill in Alaskan waters.<sup>243</sup>

This attention to corporate wrongdoing was not limited to prosecutors and the public. In the late 1980s, recognizing widespread corporate impunity<sup>244</sup> and the otherwise scant<sup>245</sup> or disparate<sup>246</sup> punishments meted out to corporations and agents alike, Congress undertook a major reexamination of white-collar criminal sanctions, including corporate and organizational liability.<sup>247</sup> The hearings, however, triggered a firestorm of controversy from interest groups,<sup>248</sup> which discouraged inclusion of corporate sanctions in the U.S. Sentencing Guidelines, which took effect in 1987.<sup>249</sup>

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Film Recovery Systems for involuntary manslaughter, and three managers for murder, as a result of an employee's death from cyanide poisoning. See Jay C. Magnuson & Gareth C. Leviton, *Policy Considerations in Corporate Criminal Prosecutions After People v. Film Recovery Systems, Inc.*, 62 NOTRE DAME L. REV. 913 (1987).

<sup>243</sup> In 1991, Exxon Corporation and Exxon Shipping pled guilty to federal criminal charges and paid a \$150 million criminal fine in connection with the massive spill. RUSSELL MOKHIBER & ROBERT WEISSMAN, *CORPORATE PREDATORS* 136 (1999). See generally Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993) ("Beginning in the mid-1970s . . . the federal government began targeting white collar crime as a high-priority prosecutorial area.").

<sup>244</sup> See NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, *ILLEGAL CORPORATE BEHAVIOR* xxv (1979) ("[A]pproximately two-thirds of large corporations violated the law, some of them many times."); Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 252 (1991) (noting that between 1984 and 1987, only forty-one publicly traded firms nationwide were prosecuted for federal crimes).

<sup>245</sup> See JOHN E. CONKLIN, "ILLEGAL BUT NOT CRIMINAL": BUSINESS CRIME IN AMERICA 100-29 (1977); Mark A. Cohen, *Corporate Crime and Punishment: A Study of Social Harms and Sentencing Practice in Federal Courts, 1984-1987*, 26 AM. CRIM. L. REV. 605, 618 (1989). According to one Congressional study, fines were so modest that they could readily "be written off as a cost of doing business." See S. Rep. No. 98-225, at 76 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3259. In 1985, sixty-five percent of Americans polled viewed sentences for white-collar defendants as too lenient. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SOURCE BOOK ON CRIMINAL JUSTICE STATISTICS* tbl. 2.23, at 162 (1985).

<sup>246</sup> This disparity existed with respect to sentences for similar crimes and between individual and organizational offenders. See Illene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982).

<sup>247</sup> See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1353 n.43 (1999).

<sup>248</sup> See Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 316-17 (1991) (noting that the Sentencing Commission's proposals "for organizational sanctions . . . [were] politically oriented, rather than policy oriented. Indeed, if nothing else, the process of establishing sentencing guidelines has made it clear that the work of the Sentencing Commission has entered the realm of special-interest politics"). See generally John P. Heinz et al., *Legislative Politics and the Criminal Law*, 64 NW. U. L. REV. 277 (1969).

<sup>249</sup> An additional factor leading to this inaction was the fact that the Sentencing Reform Act of 1984, which authorized promulgation of the Guidelines, contained no specific directive with regard to organizations. The sole exception involved sentencing of organiza-

In 1991, after considering proposals from three advisory bodies composed of distinct interest groups,<sup>250</sup> Congress at last adopted the Sentencing Guidelines for Organizations. The Guidelines were designed “so that sanctions imposed upon organizations and their agents, taken together, would provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.”<sup>251</sup> The Guidelines themselves are marked by an avowedly pragmatic “carrot and stick” approach. According to the Chair of Sentencing Commission, U.S. Circuit Judge Diana Murphy, “[p]unishment is thus not the ultimate purpose of the organizational guidelines . . . . Rather, their ultimate purpose is the promotion of good corporate citizenship through encouraging implementation of effective compliance programs, which—it is hoped, will prevent crime.”<sup>252</sup> To this end, the Guidelines contain an intricate array of sanctions, including significantly increased fines, restitution, community service, public notices to effectuate “shaming,” and probation terms. The sanctions, in turn, are complemented by incentives for corporations to institute internal compliance programs that can allow for reduced culpability in the event criminal activity is detected.<sup>253</sup>

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tions for antitrust violations. See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 699 n.6 (2002).

<sup>250</sup> See *id.* at 701 n.19.

<sup>251</sup> U.S. SENTENCING GUIDELINES MANUAL ch.8, introductory cmt. (2002); see also *id.* § 1A(4)(d) (“Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes . . . that in the Commission’s view are ‘serious.’”); *Mistretta v. United States*, 488 U.S. 361, 376 (1989) (noting that the Guidelines sought to rectify the “too lenient” treatment of “major white-collar criminals”).

<sup>252</sup> Murphy, *supra* note 249, at 706. For representative provisions concerning the role of corporate entity compliance programs, see U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2002) (providing for mitigation if an offense occurred “despite an effective program to prevent and detect violations of law”); *id.* § 8C2.5(g) (providing for mitigation if an entity reported an offense prior to the immediate threat of revelation or government intervention); *id.* § 8A1.2 cmt. n.3(c) (stating that the effectiveness of a compliance program depends on whether the entity exercised “due diligence in seeking to prevent and detect criminal conduct by its employees and other agents . . . .”); *id.* § 8C2.5(f) (stating that no mitigation is available if “an individual within high-level personnel of the organization” participated in or was willfully ignorant of the occurrence of the offense). See generally Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252 (1996); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605 (1995). These same values are reflected in the Justice Department’s internal guidelines regarding the charging of corporations, which advise prosecutors to consider *inter alia* the seriousness of the offense, the corporation’s history of similar conduct, the existence and adequacy of the corporation’s compliance programs, the corporation’s cooperation and voluntary disclosure, and the corporation’s remedial actions, if any. See Memorandum from U.S. Deputy Attorney General, to all Component Heads and U.S. Attorneys, *Bringing Criminal Charges against Corporations* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

<sup>253</sup> For an overview of available sanctions in the corporate sentencing guidelines, see

Still, despite the principled and practical reasons driving increased governmental willingness to impose corporate criminal liability, liability has remained controversial.<sup>254</sup> Writing in 1957, for instance, one commentator concluded that corporate criminal liability “has proceeded without rationale whatsoever . . . . It simply rests on an assumption that such liability is a necessary and useful thing.”<sup>255</sup> Professor Albert Alschuler has likened corporate liability to the ancient practice of deodand,<sup>256</sup> arguing that “[a]ttributing intention and blame to an artificial

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Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407 (1994); Illene 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 (1993). For a discussion of corporate liability with respect to environmental-based criminal harms in particular, see Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054 (1992); Timothy F. Malloy, *Regulating By Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531 (2002); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

<sup>254</sup> See, e.g., George F. Canfield, *Corporate Responsibility for Crime*, 14 COLUM. L. REV. 469 (1914); Joseph F. Francis, *Criminal Responsibility of the Corporation*, 18 U. ILL. L. REV. 305 (1924); Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1 (1928).

<sup>255</sup> Gerhard Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 23 (1957). For more recent arguments in this same vein, see Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999); John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 131 (Warren J. Samuels & Arthur S. Miller eds., 1987); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647 (1994).

<sup>256</sup> See BLACK'S LAW DICTIONARY 436 (6th ed. 1990) (defining deodand as “any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was to be forfeited to the crown to be applied to pious uses”). Holmes provided as an example of “deodand” a fallen tree that crushed a person, requiring that the tree itself be “delivered to the relatives, or chopped to pieces for the gratification of a real or simulated passion.” OLIVER W. HOLMES, JR., *THE COMMON LAW* 11 (Boston, Little Brown & Co. 1990) (1881). For a fuller discussion of the historical origins and practice of deodand, see Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1977); Marilyn A. Katz, *Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice and Judicial Process*, 4 YALE J.L. & HUMAN. 249 (1992). Of course, traditional admiralty law, and forfeitures today, owe much to deodand principles and practice. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

The targeting of corporations, in addition to their agents, also resembles the ancient practice of criminal prosecutions of nonhuman objects—animate and inanimate—for harms caused to humans. See Paul S. Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994). According to Berman, such trials helped foster the notion that the world was rational, unified, and subject to accountability. *Id.* at 290–93. “Cultures have ascribed guilt even where there is no real belief that the object could manifest intent or malice. Grafting a notion of moral blame onto random misfortunes is a symbolic way of understanding and conceptualizing pain.” *Id.* at 294; cf. Anita Bernstein, *How Can a Prod-*

person is no wiser than attributing intention and blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”<sup>257</sup> According to Alschuler, “[o]ur efforts to stigmatize aggregations of people, most of whom are blameless, are unjustified in principle and may be less effective in practice than civil alternatives would be.”<sup>258</sup>

The substantive criminal law has surmounted this basic ontological barrier by borrowing from tort principles of vicarious liability, using two basic strategies to impute liability to corporations.<sup>259</sup> While both require that the corporation benefit to some degree as a result of the illegal act, they differ in terms of the employee-wrongdoer’s position in the corporation. The most popular approach is based on *respondeat superior* doctrine, which imputes liability for harms caused by the criminal act of an employee, acting within the scope of her employment (or with apparent authority), regardless of the employee’s position in the corporation and of whether the act is contrary to express corporate directive.<sup>260</sup> The alternative, more conservative approach, adopted by the *Model Penal Code*, makes a corporate entity liable only if the illegal act is “authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.”<sup>261</sup> More recently,

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*uct Be Liable?*, 45 DUKE L.J. 1 (1995) (reasoning that “product dynamism” accounts for the vernacular tendency of law to impute tort liability to a harmful product, as opposed to the manufacturer, seller, or supplier). Professor Bernstein traces the modern evolution of the idea of product as wrongdoer to the French concept of *fait de la chose*, recognized in 1897, translated as the “act of the thing.” Bernstein, *supra*, at 40. Originated at a time when commercial products were increasingly available due to rapid industrialization, the legal trope shares a kindred lineage with corporate criminal liability, a legal innovation necessitated by increased industrialization.

<sup>257</sup> Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 312–13 (1991).

<sup>258</sup> *Id.* at 311–12; *see also* Glanville Williams, SALMOND ON JURISPRUDENCE § 119, at 366–68 (11th ed. 1957). *But see* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 841–42 (1927):

[A]ny distinction between acts which can, and acts which cannot, be done vicariously, is illogical; logically, everything or nothing can be done vicariously . . . . While corporations are not apt to commit rape, there is no inherent difficulty about it . . . . It is submitted that there is no crime which corporations should be regarded as incapable of committing, unless one created by a statute which is clearly aimed at human beings only.

<sup>259</sup> As at common law, individual agents of corporations can be held criminally liable in their personal capacities. *See, e.g.*, MODEL PENAL CODE § 2.07(6)(a) (1985) (“A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation . . . or in its behalf to the same extent as if it were performed in his own name or behalf.”).

<sup>260</sup> *See, e.g.*, *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972) (conviction of a corporation for an antitrust violation based on an agent’s illegal behavior that was contrary to policy); *The President Coolidge*, 101 F.2d 638 (9th Cir. 1939) (conviction of a corporation for water pollution based on illegal dumping by kitchen worker).

<sup>261</sup> MODEL PENAL CODE § 2.07(1)(c) (1985).

courts and commentators have advanced other doctrines to facilitate imputation of corporate mens rea, by means of “corporate ethos”<sup>262</sup> and “collective entity.”<sup>263</sup>

Notwithstanding these advances in substantive criminal law, basic ideological differences persist over the threshold normative matter of criminal liability itself. Calamities such as the 1984 mass poisoning in Bhopal, India by Union Carbide;<sup>264</sup> Morton-Thiokol’s involvement in the Challenger space shuttle explosion in 1986;<sup>265</sup> Imperial Food’s involvement in the 1991 burning deaths of workers in a chicken processing plant in Hamlet, North Carolina;<sup>266</sup> and the role of SabreTech in the 1996 ValuJet air crash in Florida<sup>267</sup> each involved conscious risk resulting in the loss of life. However, to this day, commentators disagree over whether the fatal wrongdoing was best redressed by civil or criminal means.<sup>268</sup> Ambivalence is even apparent among law-and-order conservatives, who while otherwise lauding aggressive prosecution of criminal wrongdoing,

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<sup>262</sup> See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991). According to Professor Bucy, corporations have an ethos: the “abstract, and intangible, character of a corporation separate from the substance of what it actually does, whether manufacturing, retailing, finance or other activity.” *Id.* at 1123. Ethos evolves by formal and informal means and is unique to each organization, “identifiable, observable and malleable.” *Id.* at 1127. Ethos can thus inform and encourage conduct by employee-agents, serving as a basis to impute liability. *Id.* For an earlier yet similar characterization, see CHARLES C. ABBOTT, *THE RISE OF THE BUSINESS CORPORATION* 2 (1936) (“[A] corporation has a personality of its own distinct from the personalities which compose it, a ‘group personality’ different from and greater than its constituent individualities. . . . [T]he whole is greater than the sum of the parts.”).

<sup>263</sup> See *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987). Under this view, corporations are not permitted to escape liability on the basis of “subdividing the elements of specific duties and operations into smaller components.” *Id.* at 856. Rather, the corporation is presumed to have acquired the “collective knowledge” of its employees and is held responsible for their failure to heed the law. *Id.*

<sup>264</sup> See Cathy Trost, *Bhopal Disaster Spurs Debate Over Usefulness of Criminal Sanctions in Industrial Accidents*, WALL ST. J., Jan. 7, 1985, at 6.

<sup>265</sup> See Russell Boisjoly et al., *The Challenger Disaster: Organizational Demands and Personal Ethics*, in *CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* 207 (M. David Ermann et al. eds., 5th ed. 1996).

<sup>266</sup> See Judy Root Aulette & Raymond Michalowski, *Fire in Hamlet: A Case Study of State-Corporate Crime*, in *WHITE-COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS* 166 (Gilbert Geis et al. eds., 3d ed. 1995).

<sup>267</sup> See Catherine Wilson, *Firm Convicted in ValuJet Crash: Maintenance Company Mishandled Canisters*, DENVER POST, Dec. 7, 1999, at A3, 1999 WL 27564307.

<sup>268</sup> For discussions of how social construction of corporation-caused harms as criminal serves to blur the traditional bounds of civil and criminal liability, see Pamela H. Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383 (1994); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991). On the process of social construction of corporate criminality more generally, see John P. Wright et al., *The Social Construction of Corporate Violence: Media Coverage of the Imperial Food Products Fire*, 41 CRIME & DELINQ. 20 (1995). For a list of particularly notable criminal misdeeds in recent times, see Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, at <http://www.corporatepredators.org/top100.html> (last visited Mar. 21, 2003).

express reservations when it comes to corporations—creating what one commentator has aptly labeled “the white collar paradox.”<sup>269</sup>

Moreover, as discussed at greater length below, there remain basic empirical questions over the efficacy of the criminal law as a deterrent force vis-à-vis corporations. According to the Vice Chair of the U.S. Sentencing Commission:

There apparently [are] no empirical data that comprehensively chart changes in organizational crime rates over time. . . . Consequently, for this and other reasons, it is not possible to assess directly the success, or lack thereof, of the organizational guidelines in altering the rates at which organizations commit crimes.<sup>270</sup>

In a recent book, criminologist Sally S. Simpson at once decried the “woeful lack of research on corporate deterrence”<sup>271</sup> and observed that the little work done provides scant support for use of the criminal sanction.<sup>272</sup> According to Simpson, “[p]unitiveness, as a strategy for corporate crime control, is not well grounded in the empirical literature,”<sup>273</sup> and in fact criminal sanctions, rather than deterring corporate misconduct, perhaps actually engender resistance to law.<sup>274</sup> Simpson advocates a mix of interventions including compliance programs, in lieu of strict criminal pun-

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<sup>269</sup> J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1203 (1999); see also Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002) (noting and discussing the “new rule of lenity” embraced by conservative justices in their interpretation of “regulatory laws,” which the Guidelines punish more harshly while providing less discretion to sentencing judges).

<sup>270</sup> John R. Steer, *Changing Organizational Behavior: The Federal Sentencing Guidelines Experiment Begins to Bear Fruit*, in 1 PRACTICING LAW INSTITUTE, CORPORATE COMPLIANCE 113, 123 (PLI Corp. Law & Practice Course, Handbook Series No. B0-01A2, 2002). Vice Chairman Steer adds that “[e]ven if data showing changes in the absolute number of organizational crimes over time were available, a multitude of potentially confounding variables would necessarily have to be disentangled.” *Id.* at 123 n.12. One such factor is the empirical reality that the overwhelming majority of the 1089 cases in which the Guidelines have been applied targeted small, closely held companies. *Id.* at 130–31. As Steer notes:

These small businesses are less likely to have become aware of the sentencing guidelines, or to have acted on any awareness they may have gained, by allocating resources to develop a compliance program. Moreover, because such organizational offenders often, by their nature, involve high level management participation in the offense, they are precluded under the terms of guidelines from receiving sentencing credit for any compliance program that may have been developed.

*Id.* at 131.

<sup>271</sup> SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL ix (2002).

<sup>272</sup> *Id.* at 159.

<sup>273</sup> *Id.* at 6.

<sup>274</sup> *Id.* at 45–60, 98.

ishments alone,<sup>275</sup> and emphasizes that “[i]t is important that crime control policies be influenced by science rather than political expediency.”<sup>276</sup>

Nevertheless, outrage over the recent corporate misdeeds associated with Enron, WorldCom, ImClone, and Global Crossing has reawakened the public to corporate wrongdoing. This time around the alleged wrongdoing did not result in physical harms, but rather huge financial losses and consequent lost investor faith. The public mood, however, is decidedly averse to the traditional rationalization that such irregularities were “merely business.”<sup>277</sup> Rather, the public is demanding criminal liability,<sup>278</sup> with its uniquely expressive moral stigma,<sup>279</sup> despite the awkward fit of

<sup>275</sup> *Id.* at 155.

<sup>276</sup> *Id.* at 161; *see also id.* at 159 (citing the lack of supporting data for “‘pure’ criminalization” and asserting that “criminalization is uninformed by the empirical literature. It is ‘bad science’ and therefore ‘bad policy.’”); *id.* at 153 (“Policy failures often stem from implementation problems, bad science, and bad politics. . . . There is much suggestive evidence that ‘strict’ criminalization fits this characterization.”). For a similar expression of this sentiment, see Gilbert Geis & Joseph F. C. Dimento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 374 (2002):

The development of the doctrine of corporate criminal liability has been the result almost exclusively of expediency rather than of empirical information. This is not to say that what has resulted is necessarily wrong, only that it has not received the social scientific attention that could resolve so many nagging, and very important issues. Or, put another way, what now exists in law could prove to be wrong in terms of what it seeks to achieve.

*Id.*; *see also* 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, 448 (1981) (“[The] study of corporate criminal responsibility too long has been led astray by commentators seeking to fashion retributive justifications and anthropomorphic analogies. Such an approach . . . blinds us to the real issue of how to make deterrence work.”).

<sup>277</sup> *See, e.g.*, John Gibeaut, *Fear and Loathing in Corporate America*, A.B.A. J., Jan. 2003, at 50 (citing a survey reporting high levels of distrust of corporations and anger at corporate wrongdoing); Adam Nagourney, *Corporate Abuses Cause Bipartisan Indignation*, N.Y. TIMES, July 29, 2002, at A16 (noting widespread public anger over recent corporate abuses).

<sup>278</sup> This punitive orientation is reflected in the popularity of “perp walks” for corporate executives who, shackled in handcuffs, are purposefully transported by police in the full glare of the media. *See* Benjamin Weiser, *Same Walk, Nicer Shoes*, N.Y. TIMES, Nov. 26, 2002, at B1 (describing recent public displays of arrested executives from Adelphia Communications and WorldCom).

<sup>279</sup> *See* Lawrence Friedman, Essay, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL’Y 833, 854 (2000) (“Only criminal liability is understood against the background of social norms, codified by the criminal law, as conveying the particular moral condemnation that expressive retribution contemplates.”); *id.* at 858 (asserting that exempting corporations from criminal liability “would tend to undermine the condemnatory effect on individuals in respect to similar conduct—and, ultimately, to diminish the moral authority of the criminal law as a guide to rational behavior.”). For discussions of the unique stigma thought to be associated with the criminal sanction, see JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98–101 (1970); IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 138–41 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

the criminal law to the corporate form.<sup>280</sup> Congress, with the 2002 elections looming, aggressively responded to the public outrage with high-profile hearings and proposals for dramatically heightened penalties and more aggressive prosecution.<sup>281</sup>

#### D. *The Evolving Governmental Aversion to Sanctuaries*

As the preceding discussion suggests, the Church, family, and corporation have served as effective sanctuaries through the centuries, albeit with distinct sustaining influences. Church sanctuary was sustained by the potent institutional influence of the Church, backed by its pragmatic role in mitigating the unrelentingly harsh justice otherwise meted out by civil authorities. In more contemporary times, sanctuary has been reserved for clergy, who benefit from the Church's same insularity and intimidating influence, today buttressed by the protective sheath of the First Amendment. Family-based criminal immunity derived from enduring patriarchal tendencies and was viewed as necessary to ensure the privacy and autonomy central to stable domestic relations. Finally, for corporations, immunity endured as a result of the awkward fit of the criminal law—with its largely retributive, individualistic bent—to the corporate form, as well as the prominent role played by corporations in American society.

Over time, however, the government became less willing to permit the institutions to self-regulate and operate beyond the reach of the criminal law. Once perceived as benign refuges, the institutions came to be seen as havens that potentially cloak, and thus perpetuate, wrongdoing and associated harms. Intervention into the Church, in particular, occurred as a result of a complex mix of social and political factors that at once weakened its intimidating influence and impelled the government to

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<sup>280</sup> See Alschuler, *supra* note 257, at 313:

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

*Id.*; cf. Teitelbaum, *supra* note 163, at 1176 (stating that “[i]n relation to autonomy or privacy, the family is a ‘false concrete’ or anthropomorphism that we invoke to talk in terms that do not literally apply . . . . Anthropomorphisms tend to be used when the body of accepted principles does not adequately explain some phenomenon.”); Teitelbaum, *Family as a System*, *supra* note 181, at 542 (“[I]n ordinary discourse, we talk in terms that seem to attribute personhood to families, as we attribute personhood to corporations.”).

<sup>281</sup> See, e.g., David Stout, *For Candidates, Crimes Are Now Wearing White*, N.Y. TIMES, Sept. 5, 2002, at A19 (observing that the issue of crime in upcoming political campaigns will likely “be personified by an executive in a thousand-dollar suit rather than a scowling Willie Horton lookalike”). The hearings culminated in late July with passage of the Sarbanes-Oxley Act of 2002, approved by votes of 99-0 in the Senate and 423-3 in the House. Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Might Just Work)*, 35 CONN. L. REV. n.2 (forthcoming 2003).

act. Emboldened victims of priest sexual abuse came forward and, for the first time, their allegations of abuse were heard and acted upon by government officials. Reporters for the *Boston Globe*, a paper that took a leading role in bringing the abuse to light, described the evolution in the Boston Archdiocese in particular as follows:

The children, grandchildren, and great-grandchildren of immigrants who would never dream of challenging anything a priest did now demanded not just answers from their Church leaders but accountability . . . Cardinal Law could rightly say that by hiding the sexual abuse of priests from public view, he was doing no more than what his predecessors did. But that no longer cut him any slack with prosecutors and politicians, whose outrage at the Church's conduct was rising as their deference waned.<sup>282</sup>

By contrast, criminal accountability in the corporate and family realms has been complicated by ambivalence over the behaviors they have sheltered. For example, within the family, although child sexual abuse was criminal (albeit infrequently detected or prosecuted), physical beatings of wives and children were not; nor was sexual abuse of one's spouse. Likewise, despite the undisputed social harms associated with corporate misbehavior, there has long been a spirited debate over whether the harms should be cast as civil or criminal.<sup>283</sup> The harms occurring within families and corporations, however, drew governmental attention and concern through a complex, extended process of social construction, prompted by revelations of abuse.<sup>284</sup> Ultimately, with respect to both, it has taken the willingness of courts and legislatures to modify the substantive law to reflect changing public sentiments,<sup>285</sup> and the willingness of prosecutors to undertake the equally political job of holding corporate and familial wrongdoers accountable.<sup>286</sup>

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<sup>282</sup> BOSTON GLOBE, *supra* note 69, at 120–21.

<sup>283</sup> See *supra* notes 264–269 and accompanying text; see also CONKLIN, *supra* note 245 (noting the prevailing historic view that corporate crimes are “illegal but not criminal”); Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 511, 511 (1980) (“Corporate crime is seen as nothing more than aggressive capitalism—a virtue, not a vice, in a capitalistic system which espouses profit maximization as morally sound.”).

<sup>284</sup> See generally THEODORE R. SARBIN & JOHN I. KITSUSE, *CONSTRUCTING THE SOCIAL* (1987); MALCOLM SPECTOR & JOHN I. KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* (2001).

<sup>285</sup> See Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1294 (1998) (“Criminal law choices are controvertible, fundamentally political, and thus best left to the political departments.”); see also Jerome Hall, *The Substantive Law of Crimes, 1887–1936*, 50 HARV. L. REV. 616, 616 (1937) (“[T]he evolution of the criminal law has been in response to deep-seated economic and social wants.”).

<sup>286</sup> It bears mention that criminalization of corporate misconduct in the United States was fueled by something more than the mere numerical increase in corporations over time and the attendant harms they caused. European countries, in which corporations also pre-

Beyond these distinctions, however, there is no mistaking the similar forces accompanying the increased governmental willingness to use the criminal law to address wrongdoing in the formerly self-regulating domains. To a considerable degree, this evolution with respect to family and Church, in particular, confirms the astute observation Donald Black made over a quarter century ago, that “[l]aw is stronger where other social control is weaker”; that “[l]aw varies inversely with other social control.”<sup>287</sup> In other words, as the institutions have loosened their authoritative grip over constituents, allowing the revelation of wrongdoing, the government has correspondingly become more willing to intervene.<sup>288</sup> Similarly, although corporate entities have become no less authoritarian over time, the public perceives them to be less law-abiding and ethical.<sup>289</sup> This public perception in turn has prompted governmental intervention.<sup>290</sup>

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dominate, have taken a decidedly less aggressive approach to imputing corporate criminal liability. For discussion of a recent proposal by the Home Office in England to expand corporate liability for involuntary manslaughter (“corporate killing”), prompted by a series of fatal train and ferry catastrophes, see P. R. Glazebrook, *A Better Way of Convicting Businesses of Avoidable Deaths and Injuries?*, 61 *CAMBRIDGE L.J.* 405 (2002); James Gobert & Emilia Mugnai, *Coping With Corporate Criminality—Some Lessons from Italy*, 2002 *CRIM. L. REV.* 619. Italy, in 2001, enacted a comprehensive statute that is applicable to organizational entities. See Gobert & Mugnai, *supra*, at 623–29. For a discussion of why civil law countries have been slow to impose criminal liability on corporations, see Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 *CRIMINOLOGY* 3, 13–14 (1984).

<sup>287</sup> DONALD BLACK, *THE BEHAVIOR OF LAW* 107 (1976).

<sup>288</sup> Writing of the family in particular, Black observes that in “modern societies such as America . . . family control is weaker than in more traditional societies. With modernization it has weakened everywhere, and everywhere law has correspondingly increased.” *Id.* at 108; see also *id.* at 109 (“[Law] varies with every other kind of social control. Thus, it varies across the centuries, growing as every kind of social control dies away—not only in the family but in the village, church, workplace, and neighborhood.”); cf. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. PA. L. REV.* 1349 (1982) (discussing decreasing legal distinctions between public and private spheres, and consequent “blurring of institutional lines,” including those affecting family, church, and corporation).

<sup>289</sup> See Michael Orey & Milo Geyelin, *Lawyers Find Jury Pools Polluted by Antibusiness Biases*, *WALL ST. J.*, Aug. 12, 2002, at B1 (noting same). The sentiment was reflected in a speech delivered by President Bush before a Wall Street audience in the wake of the recent corporate scandals:

At this moment, America’s greatest economic need is higher ethical standards . . . . The lure of heady profits of the late 1990s spawned abuses and excesses. With strict enforcement and higher ethical standards, we must usher in a new era of integrity in corporate America . . . . The 1990s was a decade of tremendous economic growth. As we’re now learning, it was also a decade when the promise of rapid profits allowed the seeds of scandal to spring up. A lot of money was made, but too often standards were tossed aside . . . . Now comes the urgent work of enforcement and reform, driven by a new ethic of responsibility.

President George W. Bush, Remarks by the President on Corporate Responsibility (July 9, 2002), available at 2002 WL 1461845.

<sup>290</sup> This extension of criminal law into previously self-regulated realms has been paralleled by extensions of civil law, often facilitated by legislative and judicial efforts to dismantle immunities traditionally enjoyed by governments, spouses, parents, charities,

Social movements have also played a critical role in reducing governmental deference to the respective institutions. The women's and child welfare movements succeeded in pulling back the curtain on family life, revealing the sinister consequences of state protection of privacy and autonomy in that domain. Similarly, Americans became more apt to press for corporate liability, in part, because of Progressive Era sensitization to corporate misdeeds; diminished deference to institutions after Watergate and the Vietnam War;<sup>291</sup> and the consumer movement's drive for corporate accountability.<sup>292</sup> For the Church, flagging governmental deference to its institutional authority, along with public outrage over child abuse,<sup>293</sup> at last triggered criminal law intervention.<sup>294</sup> Finally, with respect to each, an emboldened victims' rights movement—a newcomer to the social movements scene—played a key role in pressuring government to intervene.<sup>295</sup>

A less obvious but no less important influence has been the recurrent governmental need to expand the reach of its criminal law. While it might be true, as Montesquieu observed, that decreases in the severity of the penal law accompany advances in governmental accessions to liberty,<sup>296</sup> it is also true that government is typically intolerant of self-regulating domains beyond its reach. The eventual governmental crackdowns on Church sanctuary and benefit of clergy qualify as obvious examples of this tendency. More recently, one can point to the U.S. government's ongoing efforts, starting in the late nineteenth century, to eradicate bigamy and polygamy in the West.<sup>297</sup> Less well-known, in the late nineteenth and

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and various individuals. See DAN B. DOBBS, *THE LAW OF TORTS* §§ 260–83 (2000).

<sup>291</sup> See CULLEN ET AL., *supra* note 186, at 10, 150–52, 176, 334–36; DAVID R. SIMON & D. STANLEY EITZEN, *ELITE DEVIANCE* 1–9 (1982).

<sup>292</sup> See CONKLIN, *supra* note 245, at 116–20, 129.

<sup>293</sup> As noted by one commentator, “[c]hild sexual abuse has become the master narrative of our culture.” Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 227 (2001).

<sup>294</sup> See *supra* notes 91–95 and accompanying text.

<sup>295</sup> See generally Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999).

<sup>296</sup> See 1 CHARLES MONTESQUIEU, *THE SPIRIT OF THE LAWS* 81 (Thomas Nugent trans., Hafner Pub'g Co. 1949) (1748) (“It would be an easy matter to prove that in all or almost all the governments of Europe, penalties have increased or diminished in proportion as those governments favoured or discouraged liberty.”). For a convincing argument to the contrary, based on America's mass resort to incarceration and capital punishment in recent years, see David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455 (2001).

<sup>297</sup> See generally Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854–1887*, 13 YALE J.L. & FEMINISM 29 (2001). Of course, despite the efforts of government, plural marriage remains an accepted, seemingly ineradicable practice in several remote areas of Arizona and Utah. See Michael Janofsky, *Mormon Leader is Survived by 33 Sons and a Void*, N.Y. TIMES, Sept. 15, 2002, at A22; Adam Lip-tak, *Polygamist's Custody Fight Raises Many Issues*, N.Y. TIMES, June 16, 2002, at A14. For discussion of the general tenet that constitutional principles of religious accommodation will not countenance criminal activity, see *United States v. Lee*, 455 U.S. 252 (1982).

early twentieth centuries several U.S. cities, including St. Louis, New Orleans, Houston, and St. Paul, condoned prostitution, despite its express criminalization by state authorities.<sup>298</sup> These “anomalous zones,” too, were eventually stamped out due to their “subversive potential.”<sup>299</sup>

More recent evidence of this governmental impulse is found in the U.S. government’s imposition of harsh criminal justice initiatives on state and local governments. These include efforts to countermand state and local laws permitting the medical use of marijuana;<sup>300</sup> the dramatic expansion of federal statutory criminal law in areas historically the terrain of state governments;<sup>301</sup> and laws to compel states to abide by more exacting federal criminal justice mandates under threat of forfeiting grant money.<sup>302</sup> The states, as well, are loath to allow localities to deviate from their criminal law script.<sup>303</sup> Finally, at the international level, multilateral treaties are now being drafted<sup>304</sup> to fill the legal lacuna that has long im-

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<sup>298</sup> See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1449 (2001).

<sup>299</sup> Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1226 (1996). According to Professor Neuman, such a zone is “a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended.” *Id.* at 1201.

<sup>300</sup> See generally Alistair E. Newbern, Comment, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575 (2000).

<sup>301</sup> See generally Sara Sun Beale, *What’s Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995).

<sup>302</sup> Among other examples, the federal “Megan’s Law” conditions receipt of federal law enforcement funds on state compliance with federal regulations and laws concerning sex offender registration and community notification. See Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172–74 (1999).

<sup>303</sup> See, e.g., *City of Portland v. Jackson*, 850 P.2d 1093, 1094 (Or. 1993) (asserting that localities are barred from “creating a ‘safe haven’ for outlaws by legalizing, within the boundaries of the city, that which the legislature has made criminal statewide”). States, however, do tolerate local efforts to *broaden* the reach of state substantive criminal law. Logan, *supra* note 298, at 1421–38, 1449–51. Of course, the infamous “Black Codes” instituted throughout the South in the wake of the Civil War also vividly illustrate governmental tolerance for diversity of more punitive criminal provisions. See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 366–71, 375 (1979) (discussing the Black Codes).

<sup>304</sup> For example, the United Nations Convention Against Transnational Organized Crime had to overcome legal barriers in nations that do not recognize corporate criminal liability, as well as the powerful economic and political interests discouraging governmental willingness to impose criminal liability. See *Developments in the Law—Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2031–32 [hereinafter *Developments*] (discussing the United Nations Convention Against Transnational Organized Crime, and political, economic, and legal obstacles faced); see also Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1369–72 (2001) (noting powerful interests discouraging intervention).

munized multinational corporations from criminal prosecutions for a broad range of abuses.<sup>305</sup>

At the same time, however, sanctuaries persist,<sup>306</sup> and to the minds of some serve a positive purpose. Herman Bianchi, for instance, argues that sanctuary can serve as a “new system of crime control,”<sup>307</sup> and points to several secular examples. For instance, “free towns” existed in the Netherlands between 1580 and 1795 for debtors and slayers,<sup>308</sup> and thousands enjoyed sanctuary in one Denmark town until 1827.<sup>309</sup> As Bianchi notes, the “idea and institution of sanctuary were not in agreement with the new legal ideas of a state monopoly of crime control” and “new ideas on criminal legislation.”<sup>310</sup> Bianchi also notes that the procedural law to this day at times prohibits arrest by police during worship services.<sup>311</sup> “In principle,” he notes, “a congregation that starts a religious service but never concludes it would by such an act create a legal place of sanctuary.”<sup>312</sup>

Bianchi urges greater use of sanctuaries, established and regulated by statutory law, and operated in the open with knowledge of civil authorities.<sup>313</sup> Drawing on the diplomatic immunity afforded modern embassies,

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<sup>305</sup> See *Developments*, *supra* note 304, at 2031 (surveying changes and noting that “international law views corporations as possessing certain human rights but it generally does not recognize corporations as bearers of legal obligations under international criminal law”). Significantly, U.S. courts now permit aliens to bring civil suit against corporations for human rights abuses committed in the United States or abroad, pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). *Id.* at 2026.

<sup>306</sup> For discussion of the centuries-old practice of affording diplomats immunity from criminal prosecution in host countries, see CHUCK ASHMAN & PAMELA TRESKOTT, *DIPLOMATIC CRIME* (1987); LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* (1999); James E. Hickey, Jr. & Annette Fisch, *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*, 41 *HASTINGS L.J.* 351 (1990); see also, e.g., Green, *supra* note 223, at 1199 (observing that “[m]unicipal governments now regularly authorize conduct that, if engaged in by private individuals or corporations, would violate criminal law”).

<sup>307</sup> See HERMAN BIANCHI, *JUSTICE AS SANCTUARY: TOWARD A NEW SYSTEM OF CRIME CONTROL* (1994).

<sup>308</sup> *Id.* at 144. In England, the County Palatine of Chester also served as a secular sanctuary for debtors for some time after formal abolition of Church-based sanctuary, with London’s sanctuary eliminated by legislation in 1727. Cox, *supra* note 19, at 335–36.

<sup>309</sup> BIANCHI, *supra* note 307, at 145.

<sup>310</sup> *Id.* at 144, 145.

<sup>311</sup> *Id.* at 147. For specific examples of this prohibition, see IND. CODE § 34-29-2-2 (1998) (“A person shall not be arrested in any place of worship during service, except in cases of emergency.”); OHIO REV. CODE ANN. § 2331.11(A)(5) (West Supp. 2003) (extending privilege from arrest to persons attending worship services, and when traveling to or from services).

<sup>312</sup> BIANCHI, *supra* note 307, at 147; cf. Bob Dart, *FBI Given Greater Scope in Domestic Spying*, ATLANTA J.-CONST., May 31, 2002, at 1A, LEXIS, News Library, Atljnl File (discussing the new authority of federal agents to conduct surveillance in religious institutions, rescinding a prohibition in place since the 1970s); Craig Whitlock, *A Sanctuary Under Siege: Palestinian Fighters Were Not Unexpected at Nativity Church*, WASH. POST, Apr. 20, 2002, at A1 (discussing the extended siege of the Church of the Nativity in Bethlehem, in which Palestinian fighters sought strategic refuge in the Church, knowing that the Israeli army would not intrude).

<sup>313</sup> BIANCHI, *supra* note 307, at 152, 154; see also *id.* at 152–53 (“There is good reason

Bianchi suggests that law enforcement should closely monitor the comings and goings of those inside the sanctuary.<sup>314</sup> Sanctuary would harbor only violent wrongdoers, who would at once be held accountable for their wrongs and be required to seek negotiated settlements with their victims, consistent with his “eunomic,” non-punitive model of social control predicated on conflict resolution.<sup>315</sup> While the existing criminal prosecution apparatus would remain an alternative, victim and victimizer would have:

[An] inalienable right to demand that their conflict be resolved by negotiation instead of punishment. The state prosecution would no longer have the monopoly of crime control if a better solution can be found . . . . If the two parties in a crime conflict have established a reasonable and fair agreement on the resolution of their conflict, the public prosecution renounces its right of further indictment . . . . If after prolonged negotiations the parties still fail to agree, the sanctuary will have to decide the case. The fugitive may be required either to stay much longer in the sanctuary and perhaps work at a useful job inside or to enter into negotiations with the district attorney.<sup>316</sup>

In short, Bianchi argues that sanctuary, although ancient, is not only familiar to modern legal systems, but has a proper role to play in contemporary society.<sup>317</sup>

Bianchi’s advocacy of sanctuary, however, runs decidedly against the tide of history, as governments have increasingly extended the reach of criminal law accountability. As one commentator has observed with respect to familial abuse, “private violence is [now] a matter of public obligation,”<sup>318</sup> not a matter left to self-governance. Likewise, the increased willingness to hold corporations criminally accountable has been said to “reflect . . . the maturity of the state and the autonomy of the legal order.”<sup>319</sup> The sexual abuse of children by clergy, as well, has now met with public outrage and calls for aggressive state intervention, including prosecution of the Church and its officials. The next Part addresses the tangible outcomes of the governmental willingness to invoke the criminal law

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to maintain an open attitude toward civil authorities. Any sanctuary must endure suspicion, and it will only get worse if the sanctuary withholds information about what is going on inside.”).

<sup>314</sup> *Id.* at 153.

<sup>315</sup> *Id.* at 149, 171.

<sup>316</sup> *Id.* at 153.

<sup>317</sup> *Id.* at 156.

<sup>318</sup> Jane Maslow Cohen, *Private Violence and Public Obligation: The Fulcrum of Reason*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE*, *supra* note 178, at 349, 349; *see also* PLECK, *supra* note 124, at 9 (“Reform against family violence is an implicit critique of each element of the Family Ideal. It inevitably asserts that family violence is a public matter, not a private issue.”).

<sup>319</sup> CULLEN ET AL., *supra* note 186, at 134–35.

in the realms of family and corporation, and attempts to draw some lessons for its possible application to the effort to combat sexual abuse within the Church.

### III. THE LIMITS OF THE LAW

While most observers believe the extension of the criminal law to families and corporations to be a triumph of *fin-de-siècle* progress, it nonetheless remains a truism that its use does not necessarily translate into social solutions or relief for victims.<sup>320</sup> This Part examines the several decades-long efforts to detect, deter, and punish harms committed within families and corporations, and offers some thoughts on how the law might best be brought to bear on criminal sexual abuse within the Church.<sup>321</sup>

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<sup>320</sup> As noted by U.S. Congressman Fisher Ames in another context, “[i]f any man supposes that a mere law can turn the taste of a people from ardent spirits to malt liquors, he has a most romantic notion of legislative power.” HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* 28 (1950) (quoting U.S. Representative Fisher Ames).

<sup>321</sup> Although the focus here has been on the Catholic Church, it should be noted that sexual abuse is sheltered by other religious institutions as well, such as the Jehovah’s Witness Church. See Christine Clarridge, “*Silentlams*” *Speak Out about Sex Abuse*, SEATTLE TIMES, Sept. 6, 2002, at B5, 2002 WL 3912482 (noting that five thousand members of the six million-member Jehovah’s Witness Church claim to have been sexually abused). Unlike the Catholic Church scandal, most Jehovah’s victims appear to have been girls and young women, and the alleged abuse was committed by Church elders and members of the congregation alike. See Laurie Goldstein, *Ousted Members Say Jehovah’s Witness’ Policy on Abuse Hides Offenses*, N.Y. TIMES, Aug. 11, 2002, at A20. The abuse allegations are handled by an all-male panel of church elders, meeting in private, who dispense justice based on “biblical standards.” *Id.* According to a church spokesman, the judicial hearings are designed to “save a person’s soul. In these cases we are not going to be vindictive because these are our brothers, and we would hope that they would change.” *Id.*

Over the years, numerous abuse victims tried without success to have their claims acted upon, but were told that they should defer to Church authority, and were excommunicated when they pushed for accountability. *Id.*; see also Kathleen Burge, *Suit Charges Church Coverup: Jehovah’s Witness Group is Blamed in Abuse of Girl*, BOSTON GLOBE, Jan. 1, 2003, at B1 (recounting the abuse of a ten-year-old girl by her Bible study leader and the effort by Church authorities to keep the allegation from being disclosed, while “reproving” the abuser); Julie Scelfo, *Witness to Shame*, NEWSWEEK, June 24, 2002, at 81 (noting cases of women in California and Maryland who were raped by congregation members and informed Church officials, who failed to notify law enforcement and told the women not to report the abuse to authorities); cf. Diana Jean Schemo, *Silently Shifting Teachers in Sex Abuse Cases*, N.Y. TIMES, June 18, 2002, at A19 (noting how school districts “pass the trash,” i.e., rid themselves of sexually abusive teachers by remaining quiet if the teacher agrees to leave, at times with financial inducement, in order to “avoid[ ] the difficulties of criminal prosecution or protracted disciplinary proceedings”).

*A. The Family*

Despite the now universal recognition of its applicability, the criminal law is regarded as having only modest transformative force on abuse in the domestic realm. Physical and sexual abuse within families remains alarmingly common. Annually, an estimated 4.8 million women suffer intimate partner physical or sexual abuse, and approximately 2.9 million men suffer physical assaults at the hands of intimates.<sup>322</sup> According to the U.S. Surgeon General, battering by an intimate is the nation's single greatest cause of injury to women.<sup>323</sup> In 1999, 542 women were killed by their husbands, and 432 were killed by their boyfriends.<sup>324</sup> The incidence of reported child abuse, while declining in recent years, remains shockingly high. In 1998, an estimated 103,600 children endured sexual abuse,<sup>325</sup> and more than one million experienced maltreatment.<sup>326</sup> Each day in the United States an estimated three children die as a result of abuse.<sup>327</sup> Spousal and child abuse, moreover, often occur in tandem: children of battered women are fifteen times more likely to be abused than children of women who were not abused.<sup>328</sup> Available data also suggest that battered mothers are more likely than other mothers to abuse their children.<sup>329</sup>

As troubling as they are, the numbers likely significantly understate the incidence of abuse, given the common reluctance of victims to contact police.<sup>330</sup> Research also underscores that, beyond causing tangible physical harms, abuse has negative effects on family function<sup>331</sup> and often

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<sup>322</sup> PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (2000).

<sup>323</sup> S. REP. NO. 103-138, pt. 3, at 41-42 (1993).

<sup>324</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2000, tbl. 3.141, at 310-11 (2002).

<sup>325</sup> Lisa Jones & David Finkelhor, *The Decline in Child Sexual Abuse Cases*, JUV. JUST. BULL. (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), Jan. 2001, at 2, available at <http://www.ncjrs.org/pdffiles1/ojjdp/184741.pdf>.

<sup>326</sup> *Id.* at 4.

<sup>327</sup> Admin. on Children, Youth, & Families, U.S. Dep't of Health & Human Servs., *National Child Abuse and Neglect Data System (NCANDS): Summary of Key Findings From Calendar Year 2000*, at 1, at <http://www.calib.com/nccanch/prevmnth/scope/ncands.cfm> (Apr. 2002).

<sup>328</sup> Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect: A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287, 288 (1998); see also Jeffrey L. Edelson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999).

<sup>329</sup> Daigle, *supra* note 328, at 293.

<sup>330</sup> See generally Am. Psychological Ass'n, *Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family, Executive Summary*, available at <http://www.apa.org/pi/pii/viol&fam.html> (last visited Mar. 21, 2003).

<sup>331</sup> See S. REP. NO. 103-138, pt. 3, at 41 (1993) (noting millions of dollars in lost wages and hospitalizations resulting from abuse, as well as the need for foster care).

has intergenerational effects on children, contributing to a “cycle of violence” that puts them at greater risk of becoming abusers later in life.<sup>332</sup>

The justice system has responded by adopting increasingly aggressive and controversial strategies in recent years. Foremost among these are mandatory arrest and no-drop prosecution, each designed to remedy the historically weak response of the criminal justice system to spousal abuse.<sup>333</sup> Mandatory arrest policies emerged in the mid-1980s in response to the chronic failure of police to arrest abusers.<sup>334</sup> The policies require that police arrest offenders when there is probable cause to suspect commission of a domestic assault or battery, regardless of the wishes of the victim or officer.<sup>335</sup> Most U.S. jurisdictions now have some form of mandatory arrest policy in effect,<sup>336</sup> complemented by increased statutory authority of police to execute warrantless arrests.<sup>337</sup> No-drop prosecution policies, which emerged in the late 1980s and early 1990s, require that prosecutors proceed with a domestic violence charge, regardless of their wishes or those of the victim.<sup>338</sup> Today, sixty-six percent of prosecutors’

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<sup>332</sup> See generally ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN (Einat Peled et al. eds., 1995); Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 267 (1987); Alfred DeMaris & Jann K. Jackson, *Batterers' Reports of Recidivism after Counseling*, 68 SOC. CASEWORK 458, 463 (1987).

<sup>333</sup> See generally SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* (1982); Machaela M. Hctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643 (1997). For discussion of mandatory reporting laws (initiated in the late 1960s with respect to abused children, and later with respect to adults) and the debate over their effectiveness, see RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* 153–67 (1996) (regarding child abuse reporting); Michael A. Rodriguez et al., *Mandatory Reporting of Intimate Partner Violence to Police: Views of Physicians in California*, 89 AM. J. PUB. HEALTH 575 (1999) (regarding abused adult reporting).

<sup>334</sup> See GORDON, *supra* note 139, at 280–81; Zorza, *supra* note 169, at 47–48.

<sup>335</sup> The approach had its genesis in the 1984 landmark study of Professors Sherman and Berk, based on their analysis of Minneapolis police interventions in incidents of domestic violence, which concluded that arrest was the most effective means of reducing the likelihood of renewed intimate partner violence. See Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). For a comprehensive overview of mandatory arrest, see LAWRENCE W. SHERMAN ET AL., *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* (1992).

<sup>336</sup> See Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1518–19 (1998). In turn, the federal government has required eligible state grantees to certify that their laws or policies “encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed.” 42 U.S.C. § 3796hh(c)(1)(A) (2000).

<sup>337</sup> See Zorza, *supra* note 169, at 61–63.

<sup>338</sup> See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996). Professor Hanna identifies two varieties of no-drop policies: “soft” and “hard.” *Id.* at 1863. The former encourages victim cooperation in prosecution but does not require that victims be subpoenaed or charged with contempt for failure to appear. At the victim’s request, charges may be dropped if the victim agrees to see a counselor or informs the court of the reasons she wants charges dropped. With hard-drop policies, victims may be subpoenaed to testify, with contempt looming if they fail to appear, and charges cannot be dropped under any

offices in major urban areas have adopted no-drop policies.<sup>339</sup> Together, the approaches seek to limit the discretionary authority historically wielded by police and prosecutors to minimize or ignore incidents of domestic violence, in effect forcing justice system actors to instantiate substantive legal reforms eradicating immunity.<sup>340</sup> They also send the uncompromising signal, to potential abusers and the public at large, that domestic abuse is unacceptable and warrants criminal prosecution.<sup>341</sup>

The mandatory policies represent hard-won political gains for advocates and attest to the seriousness with which domestic abuse is now taken by the government. At long last, advocates stressed, state actors, although compelled to do so, would treat domestic assaults and batteries in the same manner as other crimes.<sup>342</sup> The policies benefited from strong political cachet; although a “women’s issue,” they combined the appeal of the “tough on crime” sensibility with a precept that liberals and conservatives alike could subscribe to: “Beating women is wrong.”<sup>343</sup>

circumstances. According to Hanna, “[b]atterers will be less likely to intimidate women throughout the process . . . if they know that the state is serious about pursuing its domestic violence cases.” *Id.* at 1892.

<sup>339</sup> See Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in *DO ARRESTS AND RESTRAINING ORDERS WORK?* 176, 182–83 (Eve S. Buzawa & Carl G. Buzawa eds., 1996). For a statutory illustration, see FLA. STAT. ch. 741.2901(2) (2002) (“It is the intent of the Legislature that domestic violence be treated as a criminal act rather than a private matter . . . . The filing, nonfiling, or diversion of criminal charges [will] be determined by . . . specialized prosecutors over the objection of the victim, if necessary.”).

<sup>340</sup> In several jurisdictions, the reforms have been backed by mandatory sentencing provisions for domestic abuse convictions. See Hanna, *supra* note 336, at 1578 n.302. Moreover, states are increasingly authorizing or mandating significantly enhanced criminal penalties for domestic violence committed in the presence of children. See Weithorn, *supra* note 154, at 16–17.

<sup>341</sup> For more on this expressivist function of more aggressive criminal interventions in the domestic sphere, see Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 874 (1994); Hanna, *supra* note 338, at 1889–1900; Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 *J. CRIM. L. & CRIMINOLOGY* 217, 224–25 (1992); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But is it Enough?*, 1996 *U. ILL. L. REV.* 533, 554. As with mandatory arrest, the federal government has sought to encourage state action, authorizing distribution of funds to states that adopt “aggressive and vertical prosecution policies” as part of the Violence Against Women Act. See 42 U.S.C. § 10410(a)(2)(E) (2000).

<sup>342</sup> However, as Professor Elizabeth Schneider has noted, feminists were initially wary of state criminal law intervention, and in lieu thereof concentrated on developing safe houses, shelters and alternate institutions. See ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 182 (2000). This stance changed over time, however, as the criminal law and its aggressive enforcement became a prime weapon in the campaign against domestic violence. See *id.* at 182–88 (discussing the emergence of no-drop prosecution and mandatory arrest policies and their rationales and motivations).

<sup>343</sup> Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 *HAMLIN L. REV.* 115, 124 (1991); see also Hanna, *supra* note 336, at 1514 (observing that “the criminalization of domestic violence has made for some strange bedfellows,” including feminists, victims’ advocates, and social conservatives).

Social science research, however, suggests that the results of the mandatory approaches are mixed. Studies regarding mandatory arrest indicate that it provides uncertain specific deterrence, often depending on the offenders' background, and may even increase the likelihood of future violence.<sup>344</sup> Studies also fail to demonstrate a clear general deterrent effect.<sup>345</sup> Finally, mandatory arrest—which can include a “dual arrest” policy<sup>346</sup>—increases the collateral risk that women will be unduly arrested, harming their ability to secure child custody.<sup>347</sup> The results of no-drop prosecution are similarly ambiguous, with research yielding uncertainty as to whether the approach exercises a general or specific deterrent influence on domestic abuse.<sup>348</sup>

The data have prompted some advocates to seriously rethink mandatory policies. Professor Linda Mills, for instance, has criticized the approaches, drawing attention to the “violence of state intervention.”<sup>349</sup> She asserts that mandatory arrest and prosecution “can themselves be forms of abuse. . . . [I]ronically, the very state interventions designed to eradicate the intimate abuse . . . all too often reproduce the emotional abuse of the battering relationship.”<sup>350</sup> Mandatory policies thus render battered women “less, rather than more, safe from violence,” and can serve to disrupt family stability and economic security.<sup>351</sup> Ultimately, Mills cautions, mandatory policies risk threatening or disregarding “a battered woman’s interests for a larger political cause. Whether a misogynist police officer or a feminist prosecutor implements the policy is irrelevant.”<sup>352</sup> By mandating criminal processes in which the victim might not

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<sup>344</sup> See Richard A. Berk et al., *The Differential Deterrent Effect of Arrest in Incidents of Domestic Violence: A Bayesian Analysis of Four Field Experiments*, 57 AM. SOC. REV. 698 (1992); J. David Hirschel et al., *The Failure of Arrest to Deter Spouse Abuse*, 29 J. RES. CRIME & DELINQ. 7 (1992); Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992).

<sup>345</sup> See Richard A. Berk, *What the Scientific Evidence Shows: On the Average, We Can Do Better Than Arrest*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 323 (Richard J. Gelles & Donileen R. Loseke eds., 1993); Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201 (1992).

<sup>346</sup> See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 831–34 (2001).

<sup>347</sup> *Id.* at 832.

<sup>348</sup> See generally Linda G. Mills, *Mandatory Arrest and Prosecution Policies for Domestic Violence: A Critical Literature Review and the Case for More Research to Test Victim Empowerment Approaches*, 25 CRIM. JUST. & BEHAV. 306 (1998) (summarizing studies and urging more research on the relationship between no-drop prosecution policies and recidivism).

<sup>349</sup> See Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

<sup>350</sup> *Id.* at 554.

<sup>351</sup> *Id.* at 555.

<sup>352</sup> *Id.* at 568; see also *id.* at 565 n.72 (“Some advocates are willing to sacrifice individual women for the political interest of the gender as a whole.”). For an alternate view, see Hanna, *supra* note 338, at 1870 (“Although removing a woman’s right to choose whether to prosecute may undermine her autonomy, such an infringement on her liberty is

be willing or prepared to participate, the policies may encourage women to identify with their abusers and lead them to regard the government as the antagonist.<sup>353</sup> Similarly, echoing a concern that dates back to the first efforts to hold abusers criminally accountable,<sup>354</sup> commentators have expressed concern that aggressive intervention disproportionately disadvantages racial minorities, immigrants, and persons of lower socioeconomic status.<sup>355</sup> The harsh consequences triggered by a call to the police, in short, not only might inadvertently disserve the interests of abuse victims, but also might discourage them from coming forward, perpetuating the underreporting of abuse and driving it further into the hidden recesses of the family.<sup>356</sup>

More controversially, Professor Deborah Epstein, building upon the work of social psychologist Tom Tyler,<sup>357</sup> criticizes mandatory policies for their lack of perceived “procedural justice” for abusers.<sup>358</sup> Because the discretionless policies seek to eliminate the capacity of justice system actors to consider individual circumstances, they “reduce[ ] the likelihood that defendants will voice their version of events, perceive they are being treated with respect, and feel that state authorities are attempting to

necessary to protect women overall.”).

<sup>353</sup> Mills, *supra* note 349, at 595.

<sup>354</sup> See Siegel, *supra* note 138, at 2137–39 (noting that in the late 1800s, when the criminal law first penetrated domestic life, punishment—whippings, in particular—largely targeted blacks and immigrants, the “dangerous classes”).

<sup>355</sup> See Coker, *supra* note 346, at 807; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1320–21 (1991); Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER SOC. POL’Y & L. 171 (1994). As Professor Coker observes, the punitive response to domestic violence is not unlike the hyper-aggressive urban police response in the “war on drugs,” which also has a disproportionate effect on minority communities. See Coker, *supra* note 346, at 852–53.

<sup>356</sup> See Richard B. Felson et al., *Reasons for Reporting and Not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY 617, 621 (2002); Susan L. Miller, *Unintended Side Effects of Pro-Arrest Policies and Their Race and Class Implications for Battered Women: A Cautionary Note*, 3 CRIM. JUST. POL’Y REV. 299 (1989); Anita K. Blair, *Should Victims Be Forced to Testify Against Their Will?*, A.B.A. J., May 1996, at 76, 77; Sontag, *supra* note 8.

<sup>357</sup> See, e.g., TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 176 (1997) (asserting that “people who experience procedural justice when they deal with authorities are more likely to view those authorities as legitimate, accept their decisions, and to obey social rules”); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 108 (1990) (“If people feel they are unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence disobey the law frequently in their everyday lives.”); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 989 (2000) (asserting that “the key to the effectiveness of legal authorities lies in creating and maintaining the public view that the authorities are functioning fairly”).

<sup>358</sup> See Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002).

be fair.”<sup>359</sup> As a consequence, abusers’ compliance with legal directives can be undermined, increasing the prospects for battering.<sup>360</sup>

In sum, mandatory policies can be said to achieve at least two positive goals. First, by removing discretion from the daily work of justice system actors, they help ensure responsiveness on the part of government. Second, they embody and promote the valuable expressive goal that domestic violence be taken seriously and treated as the crime it is. However, the debate continues over whether the criminal law is the end-all,<sup>361</sup> calling into question whether harsh, discretionless approaches are the best strategy in the campaign against domestic abuse.<sup>362</sup>

### B. *The Corporation*

Similarly, the aggressive use of criminal law has proved controversial in the corporate realm. To a considerable extent this can be attributed to the sustained political battle waged since the early 1900s against corporate criminal accountability in general. However, the shift is also testament to the unique challenges presented by corporations, which lack an identifiable soul to morally condemn or physical body to punish. At the same time, corporations are susceptible to a complex array of conflicting organizational incentives and moral hazards that strain the capacity of the criminal law to deter misconduct.<sup>363</sup> Thus, the theoretical foundations gird-

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<sup>359</sup> *Id.* at 1846.

<sup>360</sup> *Id.* at 1847. For a similar analysis and discussion, see Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163 (1997) (finding lower recidivism rates for abusers who received what they considered greater procedural fairness from the justice system).

<sup>361</sup> See Hanna, *supra* note 336, at 1552 (noting the “practical dilemmas when a jurisdiction pursues an aggressive strategy” to combat domestic violence); cf. Jones & Finkelhor, *supra* note 325, at 7 (speculating that the recent decrease in reported child sexual abuse is attributable to a “child abuse backlash,” not diminished incidence of abuse); Julie Stubbs, “Communitarian” Conferencing and Violence Against Women: A Cautionary Note, in WIFE ASSAULT AND THE CANADIAN CRIMINAL JUSTICE SYSTEM: ISSUES AND POLICIES 260, 262 (Mariana Valverde et al. eds., 1995) (“The outcome of policing, and of criminal justice intervention more generally is likely to be varied, perhaps contradictory, and in part determined by context.”).

<sup>362</sup> For discussions of what alternatives might be available, see COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FOR DULUTH AND BEYOND (Ellen L. Pence & Melanie F. Shepard eds., 1999) (discussing a variety of community-based intervention strategies); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1051–52 (2000) (advocating establishment of domestic violence citizen review panels dedicated to reviewing police responses to domestic abuse calls); Mills, *supra* note 349, at 596–610 (advocating a “Survivor-Centered Model” of intervention dedicated to empowering abuse victims by means of a variety of programmatic efforts).

<sup>363</sup> As Professor Deborah DeMott has observed, “[t]he moral personality of the corporation, like that of other organizations, has long posed a number of theoretical and practical challenges. . . . [O]rganizations frustrate the strategies of law enforcement in ways that natural persons do not.” Deborah A. DeMott, *Organizational Incentives to Care About the*

ing governmental intervention rely more on law and economics and organizational theory than on criminology and penology.<sup>364</sup>

As a result, in contrast to the control of crime in the streets, with its dominant emphasis on retribution, crime in the suites is now thought best addressed by a highly nuanced system of social control. As one commentator put it, there has been a shift toward “a regulatory mix of punishment and persuasion.”<sup>365</sup> The approach is most pronounced in the U.S. Sentencing Guidelines for Corporations, which, as discussed above, employ a “carrot and stick” approach.<sup>366</sup> According to the Chair of the Sentencing Commission:

Punishment is thus not the ultimate purpose of the organizational guidelines. If imposition of a fine would preclude an organization from making restitution or otherwise remedying the harm it caused, the fine is to be waived. Rather, their ultimate purpose is the promotion of good corporate citizenship through encouraging implementation of effective compliance programs, which—it is hoped—will prevent crime.<sup>367</sup>

This emphasis on deterrence and compliance, in turn, has led to the creation of an entirely new corporate vocation—the Ethics and Compliance Officer—and given rise to an “elaborate cottage industry of ethics compliance and preventive law experts.”<sup>368</sup> In effect, firms are expected to self-police,<sup>369</sup> and they are rewarded for both pre- and post-offense efforts to comply with the law.<sup>370</sup> Available data suggest that such incentives have

*Law*, 60 *LAW & CONTEMP. PROBS.* 39, 39 (1997). For a helpful overview of the complex array of factors contributing to this complexity, see SIMPSON, *supra* note 271, at 45–60.

<sup>364</sup> For examples of this extensive literature, see Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 *B.U. L. REV.* 341 (1991); Anthony J. Daboub et al., *Top Management Team Characteristics and Corporate Illegal Activity*, 20 *ACAD. MGMT. REV.* 138 (1995); Diane Vaughn, *Toward Understanding Unlawful Organizational Behavior*, 80 *MICH. L. REV.* 1377 (1982).

<sup>365</sup> FIONA HAINES, *CORPORATE REGULATION: BEYOND “PUNISH OR PERSUADE”* 9 (1997); see also Laufer, *supra* note 247, at 1352 (“Arguments turn on matters such as cost internalization, incentive maintenance, inducing policing measures, and reducing sanction costs. The objective is singular: resolve which liability regime maximizes or enhances social welfare by minimizing the net social costs of law violation and its prevention.”).

<sup>366</sup> See generally Win Swenson, *The Organizational Guidelines’ “Carrot and Stick” Philosophy, and Their Focus on “Effective” Compliance, in CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION* 27, 34 (U.S. Sentencing Comm’n ed., 1995).

<sup>367</sup> Murphy, *supra* note 249, at 706; see also U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (2002) (“[R]esources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.”).

<sup>368</sup> Laufer, *supra* note 247, at 1345.

<sup>369</sup> See Jay P. Kesan, *Encouraging Firms to Police Themselves: Strategic Prescriptions to Promote Corporate Self-Auditing*, 2000 *U. ILL. L. REV.* 155.

<sup>370</sup> See William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 *IOWA L. REV.* 643 (2002).

positive effect, with significant numbers of corporate ethics officers reporting that the Guidelines prompted initiation of or improvement in compliance efforts.<sup>371</sup>

Over time the governmental approach has thus increasingly assumed an unmistakable civil-regulatory mien. Criminal liability, as Professor V. S. Khanna has observed, entails “stronger procedural protections; more powerful enforcement devices; [and] more severe and, arguably, unique sanctions. . . .”<sup>372</sup> However, according to Khanna, “[m]ost, if not all, of the advantages of corporate criminal liability can be achieved by various forms of corporate civil liability at lower cost to the government and society.”<sup>373</sup> Among the purported costs of corporate criminal liability is the marked tendency of corporations, when faced with harsh criminal sanctions, to impede or prevent the flow of relevant information to public officials; such information is imperative to fact-finding and, in many instances, to the healing process of victims.<sup>374</sup> As noted by Professor William Laufer:

To free the hand of regulators and prosecutors and minimize the costs of compliance, reciprocity and negotiated forbearance are now preferred strategies. Substantial assistance departures and mitigation credits, as well as voluntary disclosure, leniency, and amnesty programs, dot the enforcement and regulatory landscape.<sup>375</sup>

In lieu of strict application of the criminal law, “cases of corporate crime are adjudicated by a brand of negotiated compliance. Corporate cooperation that facilitates the flow of evidence to authorities is the critical feature of this regulatory strategy.”<sup>376</sup> Corporate cooperation, importantly, depends on “regulatory discretion . . . where firms earn reputations for being good and thus deserving of reasonable, more discretionary enforce-

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<sup>371</sup> Murphy, *supra* note 249, at 710–11; Steer, *supra* note 270, at 124 (citing studies).

<sup>372</sup> V. S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1492 (1995).

<sup>373</sup> V. S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1275–76 (2000); see also Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996) (“At best, the case for corporate criminal liability must rest on the need to correct some deficiency in the system of civil liability. But a close look at the cases reveals no such deficiency most of the time.”); Khanna, *supra*, at 1282 (arguing that “[a] drop in corporate criminal prosecutions with an increase in corporate civil cases is an advantage not a disadvantage, because society now obtains similar sanctions for cheaper enforcement costs”).

<sup>374</sup> For example, such a concern was raised by the precedent-setting decision of a Florida prosecutor to file homicide charges against the aviation maintenance company that improperly stored oxygen canisters in a ValuJet airplane, resulting in its crash into the Everglades in 1996 and the death of 110 passengers. See Matthew L. Wald, *Murder Charges Filed By Florida in ValuJet Crash*, N.Y. TIMES, July 14, 1999, at A1.

<sup>375</sup> Laufer, *supra* note 370, at 646–47.

<sup>376</sup> *Id.* at 647.

ment. Bad firms, those which are uncooperative, are 'subjected to harsher and more legalistic enforcement appropriate for hardened criminals.'<sup>377</sup>

In short, in the name of achieving optimal compliance, corporate criminal misconduct is now predominantly self-regulated and priced,<sup>378</sup> rather than policed and punished.<sup>379</sup> This reliance on self-regulation has emerged despite both the acknowledged reality that corporate crime imposes a far greater toll on American society than street crime,<sup>380</sup> and the desert-based expressive desire to impose retribution that has permeated corporate criminal liability from its origin.<sup>381</sup> To its advocates, the self-regulatory approach does more than simply avoid the age-old deontological barrier against imputing blame to, and imposing punishment upon, a mere juristic entity. It actually best serves the consequentialist goal of reducing the economic and social carnage of corporate wrongdoing.<sup>382</sup> According to Professor Khanna, if we choose a retributive approach, we must recog-

<sup>377</sup> *Id.* at 663 (quoting John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POL'Y 385, 388 (1984)).

<sup>378</sup> See DAVID O. FRIEDRICH, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 297 (1996) ("The notion of self-regulation, or private policing directed at one's own company or professional peers, is something that generally distinguishes white collar crime from conventional crime; that is, conventional criminals are not typically expected to police or regulate their own illegal conduct."). The cooperative, self-regulatory approach owes a major intellectual debt to Australian criminologist John Braithwaite. See, e.g., JOHN BRAITHWAITE, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY (1985); see also *infra* notes 415–417 and accompanying text (discussing Braithwaite's self-regulatory approach).

Self-regulation of course is also commonplace in the control of professionals, such as lawyers and doctors. See, e.g., MODEL RULES OF PROF'L CONDUCT (2002) (regulating lawyers); AM. MED. ASS'N, CODE OF MEDICAL ETHICS (2001) (regulating physicians).

<sup>379</sup> See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992) (noting increasing resort to corporate civil liability as opposed to criminal liability); Joseph F. Savage & Stephanie A. Martz, *How Corporations Spell Relief: Substituting Civil Sanctions for Criminal Prosecution*, 11 CRIM. JUST. 10 (1996) (same); see also Shayne Kennedy, Note, *Probation and Failure to Optimally Deter Corporate Misconduct*, 71 S. CAL. L. REV. 1075, 1084–91 (1998) (discussing the influence of optimal penalty theory, first advanced by Professor Gary Becker in 1968, and the asserted preferable nature of monetary sanctions).

<sup>380</sup> See David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 637 (1999) (stating that "corporate financial crime costs \$200–\$565 billion" a year); Emmitt H. Miller, *Federal Sentencing Guidelines for Organizational Defendants*, 46 VAND. L. REV. 197, 198–99 (1993) ("[I]n terms of the numbers of human lives and amounts of property involved, the social harm caused by organizations greatly exceeds the harm that individuals cause.").

<sup>381</sup> See *supra* notes 203–223 and accompanying text; see also Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

<sup>382</sup> For arguments to this effect, see Jennifer Arlen & Reiner Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 718–41 (1997); Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 400–06 (1991); Bridget M. Hutter, *Structure Model: Reforming Regulation*, in DEBATING CORPORATE CRIME 197, 197–209 (William S. Lofquist et al. eds., 1997); Khanna, *supra* note 373, at 1277–82.

nize “what we are giving up to opt for a ‘morally’ sound criminal justice system—more crime. If we think the trade off is worth it then we may go ahead and make it, but that should (indeed must) be an informed choice.”<sup>383</sup> Ultimately, however, Khanna contends that “the large costs of corporate wrongdoing should counsel society to eschew reliance on desert-based theories if they are likely to lead to an increase in corporate wrongdoing.”<sup>384</sup>

While the civil-regulatory approach is surely not free of controversy,<sup>385</sup> criminal law scholars have of late considered its potential application in non-corporate contexts. In a provocative recent article, Professor Darryl Brown invoked the approach to argue against reflexive resort to the customary retributive, desert-based approach to dealing with street crime.<sup>386</sup> According to Brown, the “[c]riminal law’s expressive and retributive functions sometimes conflict because punitive approaches alienate offenders, reduce cooperation toward compliance, and may damage the legitimacy of law that is important for deterrence. Even when morally justified, retributivist sanctions can harm prevention efforts and reduce voluntary compliance.”<sup>387</sup> Brown condemns what he calls the “unproductive retributivism in street crime law” and urges adoption of a mix of civil remedies, regulatory strategies, and criminal sanctions, similar to those found in the white-collar context.<sup>388</sup> In short, instead of embracing

<sup>383</sup> Khanna, *supra* note 373, at 1283 n.270.

<sup>384</sup> *Id.* at 1282–83.

<sup>385</sup> See, e.g., FRIEDRICHS, *supra* note 378, at 341 (“[T]he criminal law in particular, must continue to be one central feature to the response to white collar crime. It is the only mechanism of social control that can adequately express appropriate moral outrage . . . .”); Lauren Snider, *Regulating Corporate Behavior*, in CORPORATE CRIME: CONTEMPORARY DEBATES 199, 199–203 (Frank Pearce et al. eds., 1995) (surveying the limits of the cooperative regulatory approach); James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 1, 3–8 (1997) (questioning whether corporate misconduct can be deterred by fines and adequately priced); Laufer, *supra* note 370, at 667 (“In the end, the expressive nature of the criminal law is the best hope to control the immense power of corporations.”).

<sup>386</sup> See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001).

<sup>387</sup> *Id.* at 1297; see also *id.* at 1304 (discussing instances of failed aggressive criminal intervention against corporate wrongdoing and asserting that “punitive enforcement engendered resistance from target groups and their communities, creating a reduced incentive to cooperate with regulators to sustain compliance”).

<sup>388</sup> *Id.* at 1298. Brown urges that street crime doctrine borrow the heightened emphasis of corporate criminal law on social context:

[T]he doctrine of corporate liability is a unique acknowledgement of the relevance of social norms and influence on individuals’ criminal conduct. It implies that, to prevent crime, we need to direct liability not only at the individual actor, but at the social context in which she acts—the social context that shares responsibility for her criminal conduct. Once a crime is committed, the expression of social disapproval is justly directed at those contributing to the social context as well as the individual . . . .

Our most troubled and stressed communities, particularly in inner cities, are surely as criminogenic as the worst firms that incur corporate liability. Yet, we do

“the long-standing argument that corporate crime’s tremendous harms require treating it more seriously, we should instead treat street crime more like white-collar crime.”<sup>389</sup> According to Brown:

[S]treet crime enforcement *could* take strides toward preventive, compliance-oriented, less punitive, regulatory strategies that we have devised for white-collar wrongdoing. It could take advantage of, rather than ignore and contradict, knowledge about social influence; it could more fully assess and minimize the social costs of punishment. Street crime policy could follow corporate regulatory policy by making criminal law an ancillary tool for prevention. This would be one means among several for confronting the most culpable wrongdoing, while a mix of less punitive strategies dominates policy.<sup>390</sup>

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not give the same weight to social influence on street offenders as corporate criminal offenders.

*Id.* at 1319. While such street conditions themselves of course do not warrant liability, as in the analogous corporate realm, Brown urges that their negative influence be taken into account in assessing the culpability of street crime offenders, much as compliance efforts can now serve to mitigate corporate culpability. *Id.* at 1320–23. Brown asserts that:

By positioning white-collar crime within a special space of criminal law that accepts social influence premises, corporate liability supports ideas about both the nature of offenders and of the crime that move white-collar practice away from the most punitive forms of criminal justice practice and toward a more civil, regulatory model of addressing wrongdoing and social harms.

*Id.* at 1323.

<sup>389</sup> *Id.* at 1298; *see also id.* at 1360 (“Within its universe of regulatory tools and sanctions, corporate regulation is relatively stingy with criminal judgments. For distributive equity and more effective policy, we should also look to that model for regulation of street crime.”).

Professor Joseph Kennedy recently made a similar argument in the context of mens rea provisions of federal criminal law, which the Supreme Court has most often read quite narrowly when the defendant faces imprisonment (not probation) under the Sentencing Guidelines. *See* Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002). Endorsing the “new lenity” manifested, Kennedy concludes:

Ultimately, those who advocate less severity for the poor and those of color will not be well-served by advocating for more severity for the middle class and white. Severity breeds severity. Let leniency take root where the soil is (unfortunately) more fertile and with any luck it may creep back into places where it is harder to grow but w[h]ere it is needed all the more.

*Id.* at 875 n.501; *cf.* John Braithwaite, *Inequality and Republican Criminology*, in CRIME AND INEQUALITY 277, 280 (John Hagan & Ruth D. Peterson eds., 1995) (arguing that desert-based doctrine ultimately imposes harsher penalties on rich and poor alike and that an approach that makes punishment “as low as we can [make] it without clear emerging evidence that crime has increased as a result” turns out to be more equitable).

<sup>390</sup> Brown, *supra* note 386, at 1345. By way of illustration, Brown notes how several current criminal justice initiatives—community policing, drug treatment courts, and thera-

While noteworthy for its originality, Brown's perspective bears added significance for its convergence with other current scholarship critical of aggressive use of the criminal sanction, such as in the domestic realm. In an intriguing turn of events, shifting pragmatic and philosophical interests have converged to cast doubt on the preeminence of the criminal law in the corporate and domestic spheres,<sup>391</sup> much as is now occurring with respect to illicit drugs<sup>392</sup> and even trade secrets.<sup>393</sup> Perhaps more intriguing, as Professor Brown's work suggests, the softening of corporate criminal liability is being harnessed in an attempt to reverse, or at least mitigate, the current draconian punitive response to street crime. In the next Section, we discuss how these views might be applied within the context of the Church.

### C. Lessons To Be Learned

As suggested above, despite hard-won legal and ideological victories hastening application of the criminal law in the corporate and domestic contexts, disagreement exists over whether the law's traditional desert-based orientation is best suited to address wrongs occurring therein. This controversy largely stems from the perceived negative collateral consequences associated with the aggressive use of the criminal law, notwithstanding its acknowledged expressive benefits. While harsh policies might "feel good," they do not necessarily reduce crime or alleviate its associated harms.

As society grapples with clergy sexual abuse, the lessons learned in the campaigns against corporate and domestic wrongdoing warrant consideration, especially given the similarities among the three contexts. All

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peutic/restorative justice—already reflect such an orientation. *See id.* at 1346–58; *see also* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1526 (2002) (“[I]t is when the state penalizes criminal wrongdoing severely that individuals are most likely to be inhibited from cooperating out of guilt or fear of being branded a collaborator.”).

<sup>391</sup> Symptomatic of this shift is Brown's comment that “[Edwin] Sutherland urged that we respond to white-collar wrongdoing with more criminal law. That idea may have had some merit half a century ago.” Brown, *supra* note 386, at 1359.

<sup>392</sup> *See* Gregory H. Williams & Sara C. Williams, *America's Drug Policy: Who Are the Addicts?*, 75 IOWA L. REV. 1119, 1130 (1990).

Similar arguments are now being made with respect to application of the exclusionary rule for Fourth Amendment violations, which carries many negative collateral consequences such as encouraging police “testilying.” For reevaluations of how such negative consequences might be ameliorated by application of less punitive approaches, *see* Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275 (2000); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

<sup>393</sup> *See* Geraldine Szott Moohr, *The Problematic Role of Criminal Law in Regulating Use of Information: The Case of the Economic Espionage Act*, 80 N.C. L. REV. 853 (2002).

share an institutional predisposition to secrecy and resistance to outside scrutiny, which the threatened use of the criminal law might only fuel. Churches, like corporations and families, are reflexively disinclined to draw public attention to their moral failings<sup>394</sup> and exercise powerful institutional influences against disclosure.<sup>395</sup> The Church's use of sealed private settlements,<sup>396</sup> its hiding or destruction of legally damaging documents,<sup>397</sup> and its scorched earth litigation tactics,<sup>398</sup> are obstructionist techniques common to the reaction of corporate entities in particular, and provide compelling testament to the Church's secretive predilections.<sup>399</sup>

Given these similarities, implementation of aggressive policies within the institution might prove counterproductive, similar to harsh approaches applied in the domestic and corporate realms. In lieu thereof, more proactive, structural changes deserve consideration. For instance, insofar as sexual abuse is rightfully thought of as an "occupational crime" based on the clergy's access to children,<sup>400</sup> the Church should adopt a rule preventing unaccompanied clergy from being in the presence of mi-

<sup>394</sup> Speaking to the parallel between Church and family in particular, journalist Jason Berry has invoked the analogy of "church-as-dysfunctional family," and noted that "Catholicism is steeped in familial imagery—Holy Mother the Church, priests as fathers of a parish. Harboring child molesters is akin to the dynamics of an incestuous family." BERRY, *supra* note 77, at 277.

<sup>395</sup> See *supra* notes 82–90 and accompanying text; see also Alan Cooperman & Lena H. Sun, *Hundreds of Priests Removed Since '60s*, WASH. POST, June 9, 2002, at A1 (noting that nearly one half of dioceses surveyed refused to provide information on the extent of abuse allegations made in their dioceses); Anthony DePalma, *Bishop Looking into Claims Priests Protected Abuser*, N.Y. TIMES, Aug. 30, 2002, at B5 (noting how two priests in the Bridgeport, Connecticut, diocese for nine years kept secret their knowledge of the whereabouts of a fellow priest accused of sexual abuse of minors, and that the diocese knew of such abuse since 1964).

<sup>396</sup> See *supra* notes 79–82 and accompanying text.

<sup>397</sup> See *supra* note 98 and accompanying text.

<sup>398</sup> See Pam Belluck, *Diocese is Said to Depose Abuse Therapists*, N.Y. TIMES, Jan. 17, 2003, at A18 (noting that lawyers for the Boston Archdiocese have targeted victims' therapists for depositions and have subpoenaed records of therapy sessions); Belluck, *supra* note 98 (noting that Church lawyers are "conducting aggressive litigation" in defense of abuse civil suits); Robert D. McFadden, *supra* note 78 (describing a diocese "intervention team" dedicated to neutralizing revelations of abuse and extracting low monetary settlements); Michael Powell & Lois Romano, *Roman Catholic Church Shifts Legal Strategy*, WASH. POST, May 13, 2002, at A1 (noting that, while once the Church "tried to quietly settle cases," it is now "pursuing an aggressive litigation strategy" including use of private detectives, harsh deposition tactics, efforts to keep documents secret based on canon law, invocation of First Amendment arguments to preclude litigation, and tactics to minimize settlements).

<sup>399</sup> As Max Weber pointed out, the organizational rubric of the Catholic Church in particular has served historically as a model for bureaucratic organizations. See Max Weber, *Wirtschaft und Gesellschaft, Studienausgabe*, cited in Franz-Xaver Kaufmann, *The Church as a Religious Organization*, in *THE CHURCH AS INSTITUTION* 70, 75 (Gregory Baum & Andrew Greeley eds., 1974).

<sup>400</sup> Cf. FRIEDRICH, *supra* note 378, at 113 (noting that "[m]inisters, priests, rabbis, and other religious leaders or clergy may commit crimes such as sexual molestation of children partly because of the special opportunities provided by their occupation").

nors.<sup>401</sup> Moreover, newly created local review boards, which now serve merely an advisory function in evaluating claims of abuse, could play a more significant role in the actual adjudication of allegations; this could replace the closed-door, cleric-run procedure recently adopted by U.S. Catholic bishops.<sup>402</sup> Also, in the interest of greater transparency, an independent party or entity might appoint local diocesan board members, instead of permitting bishops to make such appointments.<sup>403</sup> If local boards, rather than the National Review Board created by the Conference of Bishops, were to exercise plenary authority over whether bishops who ignore or abet crimes should be sanctioned,<sup>404</sup> the prospect for structural change will be even more significant.

More generally, reform should be guided by the recognition that abuse may best be deterred by a mix of formal (legal) and informal (norms) influences. Research regarding domestic abuse in particular suggests that optimal deterrence of violence turns on the reciprocal influence of formal and informal costs, including prison and jail time, and intangible adverse consequences like loss of community standing.<sup>405</sup> Social norms are also thought to promote positive corporate self-governance. Two prominent advocates of this view are Professors Edward Rock and Michael Wachter, who have noted the interdependent role of laws and norms.<sup>406</sup> Rock and Wachter characterize corporate norms as “non-legally enforceable rules or standards” (NLERS).<sup>407</sup> NLERS, they contend, originate both from management and workers and exist throughout the organization. The job of management is to cultivate positive norms, while seeking to extirpate and counteract their negative counterparts.

Borrowing from this literature, efforts should be dedicated to heightening the internal social costs that clergy suffer for committing sexual abuse, superiors suffer for failing to prevent it, and the institution suffers

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<sup>401</sup> It would appear that such a policy and practice would be well within the discretionary authority of the Church’s new Office of Child and Youth Protection, inaugurated by the U.S. Conference of Catholic Bishops at the June 2002 meeting in Dallas as part of its “Charter for the Protection of Children and Young People.” See U.S. Conference of Catholic Bishops, *supra* note 114.

<sup>402</sup> See *supra* notes 108–116 and accompanying text.

<sup>403</sup> See Pam Louwagie et al., *Abbey Promises Change*, STAR TRIB. (Minneapolis-St. Paul), Oct. 2, 2002, at 1A, 2002 WL 5383548 (describing non-monetary settlement obligations agreed to by Minnesota abbey, including equal role of laity in naming members of local review board).

<sup>404</sup> See Jane Lampman, *Catholic Reform Panel: Does It Have Teeth?*, CHRISTIAN SCI. MONITOR, Aug. 1, 2002, at 3.

<sup>405</sup> See Kirk R. Williams & Richard Hawkins, *Controlling Male Aggression in Intimate Relationships*, 23 LAW & SOC’Y REV. 591 (1989); Kirk R. Williams & Richard Hawkins, *The Meaning of Arrest for Wife Assault*, 27 CRIMINOLOGY 163 (1989).

<sup>406</sup> See, e.g., Edward Rock & Michael Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001) [hereinafter Rock & Wachter, *Islands*]; Edward B. Rock & Michael L. Wachter, *Corporate Law as a Facilitator of Self Governance*, 34 GA. L. REV. 529 (2000).

<sup>407</sup> See Rock & Wachter, *Islands*, *supra* note 406, at 1623.

for tolerating and perhaps condoning it.<sup>408</sup> Church officials, acting as “norm entrepreneurs,”<sup>409</sup> must take it upon themselves to foster a positive, communal sense of the moral imperative for clergy to refrain from abuse, and should be mindful of the broader institutional benefits to the Church resulting from its demonstrated capacity to ensure that its personnel operate within the confines of the law.

The reaction of Church officials to allegations of abuse attests to this need for cultural transformation.<sup>410</sup> Many officials regarded abuse allegations as unworthy of attention because they did not involve “true pedophilia,” but rather “ephebophilia” (attraction to adolescent males, not pre-teens), thought to be less opprobrious.<sup>411</sup> Aside from being empirically incorrect,<sup>412</sup> such a sentiment suggests the existence of a perverse institutional misapprehension, or perhaps rationalization, that is at odds with reality and the criminal law. In order to combat the unhealthy culture giving rise to the sexual violations, Church leaders should make clear statements to rank-and-file clergy that such sexual contact with minors, whatever their age, is criminal and unacceptable. Likewise, Church officials would exercise a positive transformative influence if they unconditionally rejected the recurring expressed sentiment that somehow the young victims or their parents were responsible for the sexual abuse.<sup>413</sup>

Finally, similar to corporate regulatory mechanisms, a carrot and stick approach might be employed to detect and deter wrongdoing within the reflexively closed institution.<sup>414</sup> Given the catastrophic toll on the Church

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<sup>408</sup> Describing the NASA institutional culture leading up to the Challenger disaster, sociologist Diane Vaughn referred to this phenomenon as the “normalization of technical deviation.” DIANE VAUGHN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* 150–52 (1996).

<sup>409</sup> See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (arguing that individual actors, “norm entrepreneurs,” can effectuate changes in shared social meaning and expectations, and that a “norm cascade” can occur with respect to changed norms); *id.* at 929 (“People often act in accordance with norms that they wish were otherwise or even despise.”); cf. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358–64 (1997) (arguing that “esteem-based” norms can influence change because they encourage actors to follow the consensus in order to secure esteem).

<sup>410</sup> Cf. Linda Klebe Trevino, *A Cultural Perspective on Changing and Developing Organizational Ethics*, 4 RES. ORG. CHANGE & DEV. 195 (1990).

<sup>411</sup> See BERRY, *supra* note 77, at 281, 361; Sandra G. Boodman, “Why” Is Tough to Answer in Priest Abuse Cases: Uncertainties Fuel Debate About Offenders’ Treatment and Its Aftermath, WASH. POST, June 1, 2002, at A1; Jim Yardley, *Zero Tolerance Takes Big Toll in a Texas Diocese*, N.Y. TIMES, Aug. 24, 2002, at A1.

<sup>412</sup> See *supra* note 74 and accompanying text (noting that almost half of reported incidents involved pre-teen victims).

<sup>413</sup> See Powell & Romano, *supra* note 398.

<sup>414</sup> The shared and unique experience of clergy might make this infiltration especially difficult. As noted by one commentator, this experience strongly militates against opening up to outsiders: “Occupations characterized by shared experiences of prolonged or difficult preparation and intense confrontations with life-and-death events naturally close ranks.” Peter Steinfelds, *The Church’s Sex-Abuse Crisis: What’s Old, What’s New, What’s Needed—and Why*, COMMONWEAL, Apr. 19, 2002, at 13, 19.

as a result of its failure to act decisively by bringing abusive priests to justice, self-interest should now logically impel the Church to self-police. This predisposition, in turn, could be backed by *enforced* self-regulation, which (as discussed above) plays a central role in modern corporate crime control. Self-regulation is ideally based on “rules tailored to the unique set of contingencies” facing the entity, with input from other interested parties, backed by the sanctioning capacity of the state.<sup>415</sup> Among other advantages, the approach facilitates a sense of ownership, which is hopefully enhanced when the entity has a primary role in writing and enforcing its own code of conduct.<sup>416</sup>

To ensure internal compliance with such rules, Professor John Braithwaite advocates that a designated corporate compliance director be required to report to a specified regulatory entity and face criminal liability for failing to do so.<sup>417</sup> Braithwaite’s prescription is evidenced in the current use of corporate compliance officers<sup>418</sup> and also the recent requirement by Congress that corporate heads certify the financial accuracy and verity of balance sheets.<sup>419</sup>

The approach is also taking nascent form in the Catholic Church. Although the Vatican rejected several core components of the plan adopted by the Conference of Bishops in Dallas, such as the zero tolerance policy,<sup>420</sup> it left intact an internal auditing procedure whereby dioceses will be monitored for progress in stamping out clergy sex abuse and be subject to an annual public report.<sup>421</sup> The report will publicly specify those dioceses deemed “out of compliance” with the educative and safety-related measures of the Church’s *Charter for the Protection of Children and Young People*.<sup>422</sup>

Additional strategic possibilities may follow from a recent landmark criminal plea agreement between the Diocese of Manchester, New Hampshire, and the State Attorney General, resulting from an investigation into how the Diocese handled the cases of sixty priests accused of abuse over the past forty years. The Attorney General found sufficient evidence that the Diocese endangered the welfare of children as a result

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<sup>415</sup> John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1470–71 (1982).

<sup>416</sup> *Id.* at 1478; *see also id.* at 1479 (“When the company writes the laws it is more difficult for it to rationalize illegality by reference to the law’s being an ass.”). Moreover, to the extent First Amendment Free Exercise concerns are prompted by governmental intrusion into religious institutions, such concerns are mitigated by the Church’s active involvement in the promulgation and enforcement of its governing policies and rules.

<sup>417</sup> *See* John Braithwaite & Brent Fisse, *Self-Regulation and the Control of Corporate Crime*, in PRIVATE POLICING 221, 227–28 (Clifford Shearing & Peter Stenning eds., 1987).

<sup>418</sup> *See supra* note 368 and accompanying text.

<sup>419</sup> *See* Paul Beckett, *Executives Face Harsh Sanctions in Corporate-Governance Law*, WALL ST. J., July 31, 2002, at C7 (discussing the requirements of the Sarbanes-Oxley Act).

<sup>420</sup> *See supra* note 103 and accompanying text.

<sup>421</sup> *See* U.S. Conference of Catholic Bishops, *supra* note 114.

<sup>422</sup> *Id.*

of knowingly failing to remove them from the reach of abusive priests. On the verge of going before a grand jury, the Attorney General secured a comprehensive plea agreement in early December 2002.<sup>423</sup> According to the news release accompanying the agreement, the State decided not to pursue the indictments for two reasons:

First, the Diocese has acknowledged that certain of its decisions concerning the assignment to ministry of priests who had abused minors in the past resulted in other minors being victimized. Second, the Diocese has agreed to comply with several conditions that will safeguard children, ensure transparency of both its prior and future conduct, and create a system of accountability.<sup>424</sup>

The agreed-to plea conditions include *inter alia*:

- submission by the Diocese to the Attorney General of annual external audits on how the Diocese has responded to abuse allegations, and permitting the Attorney General to review and comment on relevant policies and procedures;
- enhanced mandatory reporting requirements relating to the sexual abuse of minors, as well as written acknowledgment by all Diocesan personnel that they know and understand the requirements;
- training of Diocesan personnel on issues of child sexual abuse;
- establishment of a centralized office to handle abuse allegations, to establish appropriate policies and procedures, and to maintain all pertinent records; and
- public disclosure of all records possessed by the Diocese relating to priests accused of sexual abuse.<sup>425</sup>

The national Church leadership, unfortunately, has tried to distance itself from the agreement, with U.S. Conference of Bishops head Bishop William Gregory stating that he “understand[s] the pressures under which the Diocese acted,” and that the agreement is “specific to the facts in the Diocese of Manchester and to the laws of the State of New Hampshire.”<sup>426</sup>

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<sup>423</sup> See Plea Agreement, *In re* Grand Jury Proceedings, No. 02-S-1154 (N.H. Super. Ct. Dec. 9, 2002), available at <http://www.state.nh.us/nhdoj/Press%20Release/Diocese%20Final%20Agreement.pdf>. By agreement of the parties, the conditions of the plea agreement will be reviewed in five years. *Id.*

<sup>424</sup> See Press Release, N.H. Attorney General Phillip T. McLaughlin, Investigation of the Diocese of Manchester (Dec. 10, 2002), available at <http://www.state.nh.us/nhdoj/Press%20Release/121002manchesterdiocese.html>.

<sup>425</sup> *Id.*

<sup>426</sup> Press Release, U.S. Conference of Catholic Bishops, Bishops’ President Issues Statement on Manchester Agreement (Dec. 10, 2002), available at <http://www.usccb.org/>

Gregory added that the agreement “does not in any way indicate agreement on the part of any other diocese or of the United States Conference of Catholic Bishops in the legal analysis on which the office of the Attorney General of New Hampshire has acted.”<sup>427</sup>

Ideally, in the future, such defensive sentiments will be neither felt nor voiced, and advances toward greater Church transparency and accountability will not have to result from the dire resort to enterprise criminal liability. Rather, as with strategies now being advanced to combat urban street crime, proactive measures that draw upon and reinforce the indigenous capacity of the Church to self-police should be undertaken.<sup>428</sup> For this to materialize, major institutional reform must take place to ensure that both the rank-and-file personnel and the leaders of the Church become, in effect, co-partners with government in preventing, detecting, and reporting sexually abusive behaviors within the Church. By doing so, Church leaders will greatly enhance the chances for pervasive institutional change, and, concomitantly, reduce the systemic costs to government associated with enforcement in the secretive confines of the Church.<sup>429</sup>

Given the public mood, however, whether such measures will come to fruition remains very much in doubt. Public revulsion over the Church’s use of civil settlements, especially when sealed,<sup>430</sup> suggests that the retributive impulse and expressivism remain vital in this context as elsewhere.<sup>431</sup> In the end, the question is not whether individual priests who

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comm/archives/2002/02-253.htm.

<sup>427</sup> *Id.*

<sup>428</sup> See generally Tracey L. Meares & Dan M. Kahan, *Laws and (Norms of) Order in the Inner City*, 32 *LAW & SOC’Y REV.* 805 (1998) (arguing for law enforcement measures based on and reinforced by social norms in inner cities); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 *AM. CRIM. L. REV.* 191 (1998) (advocating community-level solutions to drug and violence problems rather than measures targeted at individual offenders); cf. Anthony V. Alfieri, *Community Prosecutors*, 90 *CAL. L. REV.* 1465 (2002) (discussing community prosecution programs within a multicultural community that place a premium on citizen participation and local accountability).

<sup>429</sup> See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 *INT’L REV. L. & ECON.* 369, 369–70 (1999) (noting that norms are cost-effective because they do not require costly governmental monitoring and enforcement).

<sup>430</sup> For discussion of various options for increasing the role of victims in vindicating their harms through the legal system and the implications for criminal prosecutions, see Bruce L. Benson, *The Lost Victim and Other Failures of the Public Law Experiment*, 9 *HARV. J.L. & PUB. POL’Y* 399, 424–27 (1986); William H.J. Hubbard, *Civil Settlement During Rape Prosecutions*, 66 *U. CHI. L. REV.* 1231 (1999); Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 *HASTINGS CONST. L.Q.* 665 (1997); James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 *B.U. L. REV.* 29 (1996).

<sup>431</sup> For discussion of the resurgence since the 1970s in the dominance of retributivism as the primary rationale of punishment, see Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 *NW. U. L. REV.* 843, 845–47 (2002); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *AM. CRIM. L. REV.* 1313, 1326–27 (2000).

sexually offend should be prosecuted; such prosecutions must be vigorously pursued.<sup>432</sup> Rather, the question is what approach optimizes the prospects for institutional cooperation and assistance by the Church in preventing clergy sexual abuse, smothering it out from within the Church should it occur, and minimizing the likelihood of its continued perpetration. If lessons from the realms of family and corporation have transferable value, society might be best advised to think twice before resorting to aggressive use of criminal sanctions.

#### IV. CONCLUSION

One unmistakable hallmark of modern America is its partiality for the criminal law and its enforcement.<sup>433</sup> This Article has focused upon three institutions—the Church, family, and corporation—that over time have afforded varying degrees of sanctuary from this aggressive criminalization. Only recently has the government invoked the criminal law in response to reported incidents of clergy child sexual abuse, much as it did with regard to child and spousal abuse in the late 1800s and corporate wrongdoing in the early 1900s. The ancient traditions and sanctions of the Church, as the institution itself became painfully aware, were simply not a proper substitute.

The application of the criminal law to Church-based harms, as with corporations and families, however, is not necessarily the ultimate solution. While sexually abusive clergy of course must be prosecuted to the full extent of the law, it remains an open question whether aggressive use of the criminal law—for example, prosecution of church officials and even the Church—holds the most promise for eradicating abuse within the Church. Indeed, experience in the domains of family and corporation might support a more nuanced approach to addressing what by all appearances has endured as an institution-wide problem. Although by no

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<sup>432</sup> Such prosecutions should go unhindered by what Dan Kahan has called the “sticky norms” phenomenon. See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000). The problem arises when laws are enacted to discourage behaviors that were not previously the subject of universal moral opprobrium, such as drunk driving and date rape, but come to be subject to harsh sanctions. *Id.* at 607–08. According to Professor Kahan, because prevailing social views are not yet in line with legislation, justice system actors resist their application and enforcement. *Id.* As a result, when norms are “sticky,” Kahan asserts, greater success will be achieved by means of “gentle nudges,” non-criminal and quasi-criminal sanctions. *Id.* at 609. Criminal laws prohibiting the sexual abuse of minors, needless to say, are not “sticky.” What is necessary is that abuse allegations be brought to the attention of police and prosecutors, and that prosecutions be pursued.

<sup>433</sup> For discussion of the legislative influences accounting for the proliferation of criminal laws, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). For discussion of the nation’s ongoing resort to mass imprisonment, see MARC MAUER, *RACE TO INCARCERATE* (1999); Bert Useem et al., *Popular Support for the Prison Build-up*, 5 PUNISHMENT & SOC’Y 5 (2003).

means a perfect fit, the similarly closed realms of family and corporation hold promise for yielding instructive insights in the effort to combat sexual abuse by clergy.