

## Book Review

### Whose Law Is It Anyway?

*Corporate Lawbreaking and Interactive Compliance*,  
edited by Jay A. Sigler\* and Joseph E. Murphy.\*\*  
Westport, Conn.: Quorum Books, 1991. 201 pages.

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#### Introduction

What can and should be the role of private groups in creating and maintaining law? What can and should be the relationship between law-giver and law-receiver? These fundamental questions haunt each of the essays that make up *Corporate Lawbreaking and Interactive Compliance* (hereinafter *Corporate Lawbreaking*).<sup>1</sup> These questions, though not the explicit focus of the book, are questions to which the essayists and editors of this book are speaking whether they realize it or not. Seen as a series of discussions on the role of non-state groups in creating and maintaining law, this book is provocative and worth reading. Some of the proposals in this book, if taken seriously, would radically transform our legal system and could transform our democracy. But the book does not self-consciously set out to describe the role of private groups in maintaining law or the relationship between law-giver and law-receiver. It sets out to do something else—to ground with concrete examples a theory that the editors articulated in an earlier book. Judged in light of its professed goal, the book is less successful.

Given my assessment that the book is most interesting in what it hints at rather than what it intends, I will spend more time discussing the hints rather than the message. But in fairness to the editors, Part I of this review discusses

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1. CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE: RESOLVING THE REGULATION-DEREGULATION DICHOTOMY (Jay A. Sigler & Joseph E. Murphy eds., 1991) [hereinafter by page only].

what the editors set out to do, provides some examples of where they succeed most, and includes an explanation of why I believe that they ultimately fail at their self-assigned task. Part II turns to the provocative questions the book raises: what is the appropriate role of private groups in creating and maintaining law and what is the appropriate relationship between law-giver (the government) and law-receivers (the governed)? To understand how this book suggests changing the usual relationship between the government and the governed, we need a framework to help us understand both the relationship we usually assume is present and the range of alternative relationships that are possible. Part III lays out such a framework. Part IV then uses this framework to examine more closely the implications of the various contributions in the book.

### I. *Corporate Lawbreaking* on Its Own Terms

Sigler and Murphy's *Corporate Lawbreaking* is a sequel to a book these authors wrote in 1988, *Interactive Corporate Compliance* (hereinafter *Interactive Compliance*).<sup>2</sup> In the first book, the authors attempt to reshape the regulation/deregulation debate by setting forth a third alternative—the interactive approach. This approach ties the level of government regulation to the level of a company's voluntary efforts to comply with the law. Sigler and Murphy propose that government divide companies into two categories, those that have effective internal compliance programs and those that do not.<sup>3</sup> A program would be considered effective if it met objective minimum standards designed by industry personnel and government officials in the relevant federal agencies.<sup>4</sup> For example, Occupational Safety and Health Administration (OSHA) personnel, after consulting extensively with industry representatives, would set standards for a program and determine whether it effectively ensured compliance with laws on workplace safety; Environmental Protection Agency (EPA) would do the same thing for programs to ensure compliance with environmental laws, and so on.<sup>5</sup> While the standards would include "certain

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2. JAY A. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION* (1988).

3. *Id.* at 149.

4. *See id.* at 150.

5. *See id.* Grafting such a system onto the present structure of administrative agencies raises the first problem with the idea. Presumably, it would be cost-efficient for a company to have one overarching compliance program, but designing such a program to meet the separate requirements of each agency charged with enforcing a particular set of laws might prove a daunting task. The seriousness of this objection depends on what Sigler and Murphy mean by suggesting that agencies set standards for compliance programs. In general, they seem to favor agency flexibility in reviewing compliance programs, emphasizing the need for agencies (and business) to develop professional staffs trained to develop and evaluate compliance programs and strategies. *See id.* They also emphasize the need to grant agency professionals discretion in performing their roles. *See, e.g., id.* at 172-73. Flexible standards and agents with discretion to waive requirements that are unnecessary in a particular context would make the problem of multiple agency review less serious. However, flexibility and discretion raise problems of their own, and those problems might be even more serious than the problem of pleasing multiple agencies. *See infra* text accompanying notes 103-14.

objective minimums," agencies would be flexible and ideally would work with industry personnel in setting the initial standards and in changing them in light of experience.<sup>6</sup> The government would certify companies that met these standards (flexibly applied) as having an effective compliance program.

What would certification mean? Why would a company seek it? Sigler and Murphy propose a number of incentives to encourage companies to adopt and maintain effective compliance programs and thus to be certified. For example, certified companies could be relieved of some of the reporting requirements under current law or under a consent decree entered into by the company for earlier legal transgressions. Certified companies in industries subject to rate regulation might be allowed an increase in their rate of return. Certified companies that contracted with government might be given a priority in bid contests. Certified companies might be given tax breaks.<sup>7</sup>

More radical are Sigler and Murphy's proposals for how certification should affect a company's civil or criminal liability. They propose that a certified company not be subject to criminal prosecution or conviction for the criminal acts of its agents unless it could be shown that the corporation had subverted the compliance process.<sup>8</sup> In that case the company would be liable not only for the underlying criminal violation but also for the new crime of subverting the compliance process, a crime resembling obstruction of justice and to be taken as seriously.<sup>9</sup> If the legislature still insisted on some strict liability crimes, penalties for those crimes would be less severe for certified companies than for non-certified companies.<sup>10</sup> Certification would provide similar immu-

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less serious. However, flexibility and discretion raise problems of their own, and those problems might be even more serious than the problem of pleasing multiple agencies. *See infra* text accompanying notes 103-14.

6. *See SIGLER & MURPHY, supra* note 2, at 172-73.

7. *See id.* at 151.

8. *Id.* at 152. Sigler and Murphy do not specify who would personify the corporation for purposes of determining whether the corporation had subverted the compliance process. However, it seems safe to assume that they would insist that only a high managerial agent personifies the corporation. If any agent's actions could constitute subversion of the compliance process, the certification defense would not mean much. Current case law is unclear on when, if ever, a corporation's compliance efforts will be sufficient to stop a court from imputing a corporate agent's acts and mental state to the corporation. *See, e.g., United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (approving jury instruction that would allow jury to consider company's "compliance policy in determining whether employees were acting for the benefit of the corporation"); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) (approving jury instruction that allowed jury to consider whether corporate policies affected determination that employee was acting within scope of employment and for corporation's benefit); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) ("[Corporation] could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks"). What is clear under current case law is that a judge and/or jury will decide whether the corporation's compliance efforts are sufficient to constitute a defense to the criminal charges raised against it. Under Sigler and Murphy's approach, an administrative agency would make a decision that would bind judges and juries absent a finding that the compliance process had been subverted. Prosecutorial discretion would similarly be restricted because an indictment against a certified company would presumably be defective and subject to a motion to dismiss unless it contained an allegation that the company had subverted the compliance process.

9. SIGLER & MURPHY, *supra* note 2, at 152.

10. *See id.* at 153.

nities or advantages in civil litigation. For example, certified companies would be immune from suit by “private attorneys general”:

Because the internal compliance [would have] replaced the role of the vigilante there [would] be no payment of counsel fees for those bringing civil causes of action against certified companies. The same approach [would apply to] punitive or triple damages. As is true for the private attorney-general theory, once a corporation has been certified there [would] no longer [be] the same need to provide an incentive to bring coercive litigation against such companies. . . . By its certification, society [would have] made the judgment that the corporation is devoting the appropriate energy to [compliance]. If an agency discovers that the level of effort is not sufficient, it should increase the minimum standards for certification across the board.<sup>11</sup>

Having set out this proposal in their first book, Sigler and Murphy compose *Corporate Lawbreaking* to provide “more specific examples and more detailed cases to guide business leaders and government officials”<sup>12</sup> in implementing the concept of interactive compliance. It is in light of this goal that the book falls short. To begin with, the reader is left wondering precisely what it was that Sigler and Murphy originally proposed. To find out what their concept of interactive compliance was—a concept to which this book is devoted—I had to read the first book, *Interactive Compliance*. Next, some of the essays are anything but specific or detailed.<sup>13</sup> Others are not presentations of examples or cases at all, but are instead additional arguments and proposals for changing

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11. *Id.* at 153-54.

12. P. 1.

13. The most egregious illustration of this is the chapter by Paul M. Carren and Richard B. Pazornik, *Demonstrating Ethical Responsibility: Implementing a Self-Governance Program*, pp. 71-89, which is so filled with the overly general that it is comic just when it takes itself most seriously. For example, after asserting that managers have responsibilities to the business’ owners and to other groups, the authors list these groups, complete with a bullet before each name:

- employees
- customers
- vendors/suppliers
- community/society
- government

*Id.* at 72. Just in case we miss the point, they follow this list with a chart, labeled Exhibit 3, that takes up half a page. *Id.* at 73. In the middle of the exhibit is a circle labeled “Company.” Five lines representing the five bulleted groups from the previous page are connected to this circle. Between the list and the exhibit the authors write: “The responsibilities to each group differ; yet each is significant. These specific responsibilities should be embodied within a company’s standard operating policies and procedures.” *Id.* at 72. So much for specifics.

Fairness to Carren and Pazornik, however, compels me to add that the simplistic-chart-syndrome is as common in management literature as compulsive footnoting is in legal literature. Perhaps both customs would be more honored in the breach than the observance.

the status quo.<sup>14</sup> All in all, only three of the book's twelve chapters are devoted to providing specific examples and cases.<sup>15</sup> And two of those three chapters, the chapter by Robert Abrams and the chapter by Louis S. Bezhich, describe examples that differ in critical (and largely unexamined) respects from the concept of interactive compliance that Sigler and Murphy advocate in their first book and to which they claim to adhere in this one.<sup>16</sup>

Robert Abrams, Attorney General of the State of New York, describes a three-part strategy for enhancing corporate compliance with law: (1) tough, vigorous enforcement of the law by state officials; (2) new legislation requiring companies to conduct internal audits to verify their compliance with various laws; and (3) consumer patronage of "good" companies combined with consumer pressure against "bad" companies. All three prongs of this strategy diverge significantly and at critical points from Sigler and Murphy's proposal.

First, Sigler and Murphy's theory is that tough, vigorous enforcement of the laws should be exchanged for tough, vigorous enforcement of a company's quasi-contractual duty to live up to the compliance program it voluntarily works out with the government. Traditional tough enforcement of the laws, like that described by Abrams, should, according to Sigler and Murphy, be restricted to uncertified companies. In other words, for Sigler and Murphy, tough enforcement of the laws is more a means of convincing or coercing companies to adopt compliance programs than a means of achieving general deterrence, as it is for Abrams. This difference is not made clear in the book.<sup>17</sup>

Second, Sigler and Murphy's proposal contemplates providing companies with the opportunity "voluntarily" to adopt compliance plans in exchange for government favor. In contrast, Abrams' idea of internal audits (embodied in legislation his office proposed to the New York legislature) would *require* companies to adopt audit plans and would subject companies to spot-checks to ensure compliance with these plans.<sup>18</sup> Sigler and Murphy do acknowledge this difference but fudge over it by calling the Abrams' bill "mandatory in

14. See, e.g., John T. Scholz, *Political Education is Necessary to Foster Cooperative Regulatory Enforcement*, pp. 141-51; Thomas L. Shaffer, *Competition and Climate in Law Schools*, pp. 111-27; W. Richard Sherman, *Corporate Compliance Education: Where Are Business Schools?*, pp. 129-39.

15. Chapters 2, 4 and 5: Robert Abrams, *Three Enforcement Strategies*, pp. 17-25; Jay A. Sigler, *Leading Examples of Interactive Compliance in Action*, pp. 41-51; and Louis S. Bezhich, *A County Experiment in Interactive Compliance*, pp. 53-70. I will discuss two of these chapters—Abrams' and Bezhich's—as a means of examining how well Sigler and Murphy do at their self-assigned task. In Part IV of this review, I discuss many of the other twelve chapters.

16. "Looking backward, we adhere to all these recommendations." P. 15.

17. See Sigler and Murphy's discussion of Abrams' contribution, pp. 167-68, and Braithwaite's description of it in the Foreword, p. x. Sigler and Murphy do include in this book an argument against the "criminalization approach," pp. 154-64. They identify a number of persons as proponents of the criminalization approach and argue directly against that position, but Abrams is nowhere mentioned in their discussion. Thus, the reader is left to guess at what Sigler and Murphy think of Abrams' first prong. Would they consider it akin to the criminalization arguments of others? If not, how is it different? And, assuming Sigler and Murphy think it is different, why is Abrams' approach better or more acceptable than the others'?

18. This bill was considered by the legislature but not passed. P. 25 n.2.

tone”<sup>19</sup> and by insisting that Abrams’ idea is still like theirs in that it contemplates self-audits and “would require higher standards of accident prevention than current law requires.”<sup>20</sup> Abrams’ bill, however, was not just mandatory in tone—it would have made self-audits mandatory.

Finally, Abrams describes his third prong of consumer pressure and support as “more an observed phenomenon than a conscious strategy.”<sup>21</sup> This differs significantly from Sigler and Murphy’s idea that the government formally harness and direct consumer sentiment through certification and awards. Sigler and Murphy ignore that difference, however, and portray Abrams’ point as an enhancement of their proposal, as “potentially one of the most significant” additions to their theory.<sup>22</sup> They describe it as an enhancement because, in their first book, consumer groups were mentioned only as “adverse litigants and were not included as factors in the corporate model described.”<sup>23</sup> But this description does not show that Abrams’ idea is new or an enhancement of their ideas. It shows only that Sigler and Murphy did not adequately consider the incentives that already exist for corporate compliance or why those incentives fail where they fail and why they succeed where they succeed. My critique is not meant to suggest that Abrams’ essay is itself flawed. In fact the essay is quite interesting and well-written. My criticism is that the editors’ discussion of Abrams’ example is incomplete because they do not adequately compare and contrast Abrams’ strategy with their own ideas.

Louis S. Bezich, county administrator and treasurer for Camden County, New Jersey, wrote what I found to be the book’s most interesting chapter, *A County Experiment in Interactive Compliance*.<sup>24</sup> He describes the task he assumed—to encourage higher sanitary conditions in Camden County restaurants. Bezich describes why he sought to develop a new program called the Silver Platter Award, what the program entails, and how he set about selling this program to business and county personnel, the state government, and other interested parties. He provides concrete details that bring to life this “little” problem, as well as the business community and government of Camden County. For example, he explains how the director of the county’s Department of Health and Human Services viewed the restaurant program as a means to ensure support for the purchase of laptop computers, how a graduate student intern was integral to the initial development of the program, and how it was important to phase out the intern-outsider and turn the program over to government-insiders so that they could begin to “own” and implement the idea. For

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19. P. 168.

20. *Id.*

21. P. 23.

22. P. 168.

23. *Id.*

24. Pp. 53-70. The editors seem to share my enthusiasm for Bezich’s contribution, *see* pp. 170-71, as does John Braithwaite who ends the Foreword with a reference to Bezich’s essay, *see infra* note 35.

academics interested in a peek inside the real world of local administration, and for administrators of whatever rank looking for a model of practicality and vision to emulate, Bezich's unpretentious chapter is worth the price of this book.

In Bezich's Silver Platter program, the county government certifies restaurants that meet sanitation-related standards above those required by law. The program is thus quite close to Sigler and Murphy's original proposal. The certification is called an award, and government awards are something Sigler and Murphy advocate in their first book. They argue there that awards are more valuable to companies than dry certification notices because they can be used to attract customers.<sup>25</sup> This is precisely why Bezich opted for an award program. Bezich emphasizes that the award—the Silver Platter Award for Sanitation Excellence—was “designed and named for use in advertising.”<sup>26</sup> He explains that in his “preliminary meetings with selected industry personnel, [he] not only showed them a rendering of the award, but also provided them with a mock-up of a telephone directory ad that included the Silver Platter Award.”<sup>27</sup>

This strategy, however effective, raises a question that neither Bezich nor the editors discuss: are such governmental awards misleading when they “puff?” The question is highlighted by the concrete case that Bezich provides. The Camden certification is called an award for excellence in sanitation, but a restaurant must meet relatively low standards to receive this award. To qualify, a restaurant has to meet two standards: “First, it must send at least one employee each year to a county administered food service training class. Second, it must conduct four quarterly self-inspections and complete a checklist prescribed by the county Division of Health.”<sup>28</sup> These standards may be close enough to what a reasonable person would call “sanitation excellence” to justify using that phrase, but the question seems open to debate.<sup>29</sup> In any event, Bezich or the editors should have addressed the question of honesty in governmentally provided advertisement aids. Does or should the public expect the

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25. See SIGLER & MURPHY, *supra* note 2, at 155-56 (discussing OSHA's Star Program). See also pp. 42-46 (Sigler discussing several federal award programs with approval).

26. P. 63.

27. P. 64. Bezich includes two useful exhibits, one showing the award and the other showing the advertisement mock-ups. Pp. 64-65.

28. P. 54.

29. In fairness to Bezich, I should note that he states that in developing the program “the first task was to develop criteria [to be included in the self-inspection checklist] that gave the county a basis on which to recognize excellent performance.” P. 62. However, he also states that “the tougher standards in Silver Platter's self-inspection program are based on standards that may become mandatory in years to come. . . . Known as the Hazard Analysis Critical Control Point (HACCP), these standards currently exceed those used in annual inspections. The state of New Jersey is currently studying the possibility of extending HACCP to the New Jersey Sanitation Code.” P. 57

government to “puff” in the same way it expects private companies to “puff?”<sup>30</sup>

The main components of Bezich’s program (awards, self-inspections, and government-sponsored training programs) coincide quite closely with Sigler and Murphy’s proposal. Moreover, to the editors’ credit, Bezich connects his initiative to their theory. Although he does not clarify whether their theory led him to his program, that detail seems less important than the fact that Bezich sees his initiative as consistent with and supported by the editors’ ideas. For me this is powerful evidence of the importance of Sigler and Murphy’s original theory—of its potential to affect the real world.

Nonetheless, the connection between Bezich’s program and Sigler and Murphy’s theory is more a laurel for their first book than a fulfillment of this one’s promise. Here the editors owed their audience more. They owed their readers an honest and reflective discussion of the differences between their theory and the real-world examples provided by Abrams and Bezich.

In ascending order of importance, the differences between Bezich’s program and the editors’ proposal are that in Bezich’s program (i) the self-inspections are according to governmentally prescribed standards and not according to industry or jointly developed standards; (ii) the standards are being considered by the government as requirements for all restaurants; and (iii) restaurants are not relieved of any requirements under existing law for participating in the program. I would have liked to see a discussion of each of these differences, but the failure to address the last is particularly disturbing. While Sigler and Murphy argue that relieving industry of burdens under present law is essential to securing greater compliance with society’s norms<sup>31</sup>—a position I find difficult to accept—Bezich sees existing law as providing the restaurant owners

30. For a fascinating examination of the similarities and distinctions between accepted marketing techniques and con games, see ARTHUR LEFF, *SWINDLING AND SELLING* (1976).

31. SIGLER & MURPHY, *supra* note 2, at 152. I use the phrase “society’s norms” here instead of “law” intentionally. Otherwise, I would be forced to write that Sigler and Murphy argue that relieving industry of burdens under present law is essential to securing greater compliance with law. On its face that sentence seems tautological. Is their theory tautological? The tautology disappears when one substitutes “regulation” for “present law.” But that escape works only if one assumes that regulation is somehow other and less than law. That is a common assumption and one that underlies Sigler and Murphy’s theory as well as the contributions to this book. Nonetheless, the assumption is worth questioning. See *infra* text accompanying notes 35-38.

Another escape from tautology lies in distinguishing law from sanctions for violating law, an even more common move than distinguishing regulation from law. This allows one to reason that relieving industry of the threat of certain punishments for violating the law is essential to securing greater compliance with the law. This second escape may appear counter-intuitive, but that does not make it wrong. My biggest problem with it, however, is not that it sounds counter-intuitive or that it is untrue; I am more concerned with the move itself. Common as it is, it is worth rethinking what we mean by law when we assume that law is distinguishable from the sanctions available for enforcing it. I believe that the meaning of law—what the law is—is always in part a function of the commitment ensuring that norms are realized in action. See *infra* notes 41-44 and accompanying text. In other words, I believe that the meaning of law is never a constant that can be separated from the mechanisms for enforcing compliance. I thus avoid both escapes from the tautology and find temporary refuge in the phrase “society’s norms.”



with an incentive to participate in the Silver Platter program.<sup>32</sup> This difference is crucial: if existing law is an incentive to compliance, as both Bezich and Abrams<sup>33</sup> argue, then Sigler and Murphy's proposal is fundamentally flawed insofar as it contemplates taking away a significant portion of the threat of enforcement to induce companies to monitor themselves more closely.

The editors, along with John Braithwaite, who writes the book's Foreword, treat these distinctions as mere matters of degree and not of substance. In doing so, they imply that the examples provided in the book<sup>34</sup> bear the same relationship to Sigler and Murphy's full-blown theory as a child's first formed letters bear to an adult's cursive writing. I am not so sure. One can applaud the Camden County program or Abrams' bill while rejecting much of what Sigler and Murphy propose. A government could adopt the Camden County program or Abrams' ideas and never implement or even contemplate implementing Sigler and Murphy's proposal.

It is true that all the examples in the book demonstrate in some sense a spirit of cooperation between government and business—a spirit that Sigler and Murphy's proposal also affirms. But who could be against "cooperation," particularly if we each get to describe it as we like? I do not believe that the essays in this book are related to one another only by some amorphous notion

32. Bezich writes:

[L]egal liability is another incentive for a restaurant to do as much as possible to maintain a high level of compliance. According to the National Institute for the Foodservice Industry, the Uniform Commercial Code provides an option to people who want compensation for illness or injury resulting from unsafe food products. People suing need only prove that the food was unfit, that it caused them harm, and that in serving them unfit food the operator violated the warranty of sale.

P. 58. Bezich nowhere suggests that this legal standard be changed or that Silver Platter restaurants be subject to less frequent or less onerous sanitary inspections than those of non-participating restaurants.

33. Abrams writes:

[I]t is undeniable that the tremendous advances in ethical business conduct I mentioned earlier have come about largely because *government* has set standards, by law and by regulation, and *government* has enforced those standards. . . .

.....  
If our goal is to reinforce in the business community the notion that complying with the legal standards set by society must be a part of its ethical construct, vigorous enforcement is the first and most basic approach.

Pp. 19-20.

34. The essays by Bezich and Abrams are not the only chapters with examples. The third chapter that focuses on examples is by Jay A. Sigler and is entitled, *Leading Examples of Interactive Compliance in Action*. Pp. 41-51. In these ten pages Sigler describes with varying amounts of detail six examples of interactive compliance. While several of these examples are interesting, they all diverge substantially from the original theory and from one another. More important, none of the differences are adequately discussed. From this chapter, written by one of the book's editors, it appears that the editors are prepared to applaud any regulatory scheme that can be labeled "cooperative," in the broadest sense of that term, and to see it as an example of their theory. But surely some of these cooperative efforts are less good than others and less consistent with their theory. They fail to point out which ones, and they fail to make clear whether some of these efforts are, in fact, bad.

of cooperation too general to represent a coherent point of view. I do believe there is a stronger link worth investigating and discussing. My point in this section has been that the link is not Sigler and Murphy's specific theory. It is something else that particularizes the "cooperation" advocated in each of this book's chapters and in Sigler and Murphy's first book. It is something else that holds this book together and that links it to Sigler and Murphy's original proposal. It is to that something else that I want to turn next.

## II. The Haunting Questions

The essays in this book and Sigler and Murphy's original proposal are linked in that they all contemplate a new role for private groups in the creation and maintenance of law, at least when those private groups are businesses. The book does not suggest an impersonal relationship between law-giver and law-receiver built on objective obligations and deliverable and delivered penalties. Rather, it suggests a more personal relationship between law-giver and law-receiver: a relationship built on inducement and reward, a relationship where obedience to law is achieved in large part through the law-giver's teaching the law and the law-receiver learning it, and a relationship that blurs the distinction between law-giver and law-receiver by making them partners in the creation and enforcement of laws suited to individual needs and circumstances. Sigler and Murphy's original proposal is one variation on this theme, and the essays in this book represent others. The book appears less flawed if it is seen as devoted to exploring a variety of ways to construct a relationship like the one just described. It would then seem less incumbent upon Sigler and Murphy to explain how each essayist's vision is necessarily consistent with their proposal or to defend or modify their proposal in light of the competing visions offered. They could legitimately leave it to the reader to distinguish among the approaches and decide which is best.

Seeing the construction of a new relationship between law-giver and law-receiver as the theme that unites these essays gives the reader much to ponder as the book unfolds and more to think about when it is done. The new relationship implicitly contemplated by the book raises many fascinating and important questions. First, the book raises the question of what relationship we normally assume between law-giver and law-receiver. Some understanding of this relationship underlies all our discussions of law, but we rarely pay attention to what it is. We take the relationship for granted. This book invites the reader to concentrate on what it is we take for granted and to ask whether we should continue to do so. Second, the book suggests an alternative relationship and a variety of models for what that alternative might look like and how it might be achieved. Third, the book invites one to wonder whether the government, the official law-giver, is the appropriate institution to assume the role of

nurturing values, educating about norms, and making law personal to law-receivers. And if the government should (or must) play this role some of the time, is it a role more appropriate for smaller units of government like Camden County than it is for larger units like the federal government? Finally, the book raises the question of which law-receivers should be eligible for the new relationship with government that the editors propose. Why only business and not you and me? Before providing a framework for analyzing the range of relationships possible between law-giver and law-receiver and critiquing the suggestions presented in this book, I want to focus on the last question posed: why should this new relationship with government be available only to business?

At the end of the Foreword, John Braithwaite writes: "The philosophy behind this book is . . . to work with examples from the periphery of American polity—such as the regulation of the Camden County restaurant industry—to show those at the center [of United States regulatory policy] that better regulatory models can be constructed."<sup>35</sup> He might have said instead that the book uses examples from one area of law—the law regulating business—to suggest to those at the center of law-making, politics and legal scholarship that a better model of the relationship between law-giver and law-receiver is possible. Why he did not say that is important. It is not that the book does not contemplate the new relationship I described earlier; it does. It is that the book contemplates this new relationship only for businesses.

The book does not argue that a new relationship between law-giver and law-receiver is generally possible or desirable. The book does not suggest that individual taxpayers be given awards for paying their taxes on time or for developing reliable systems to keep track of income and expenses accurately. It does not suggest that individual taxpayers be free from the threat of an audit, the duty of paying estimated taxes, or the burden of having taxes withheld from their paychecks if they can show that they go to an accountant regularly and have a computerized system for keeping track of their financial matters. It does not suggest reducing penalties or barring criminal prosecution for tax evasion based on whether a taxpayer's record keeping systems meet guidelines set out by the Internal Revenue Service. Moreover, it does not suggest these methods as a way of discouraging doctors from committing malpractice, or drivers from speeding, or reporters from publishing libelous statements.<sup>36</sup> The book sug-

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35. P. xv.

36. Whether hospitals that have government certified safety-checking systems, as opposed to individual doctors with such systems, should be less vulnerable to malpractice suits or immune from punitive damages is not made clear in Sigler and Murphy's proposal. It is similarly unclear whether the editors or contributors to this book would advocate that newspapers, as opposed to individual reporters, be shielded from libel suits or freed from the possibility of punitive damages for libel based on whether they have a certified libel-controlling system in place. These questions are unclear because the book does not suggest what limits, if any, there should be on the kinds of laws affecting businesses that should be subject to the "interactive" approach. I would, however, hazard a guess that the editors would argue that trucking companies with

gests these methods of developing a new relationship between law-giver and law-receiver and provides examples of such methods only in the area of business regulation.

For a book about business regulation to focus exclusively on business regulation is neither surprising nor inappropriate. Nonetheless, the failure of the contributors to address the question of why only business should be the beneficiary of this new relationship or to explore why a more impersonal and hierarchical relationship between law-giver and law-receiver usually exists is a weakness. This weakness follows naturally from an insistence on calling the law that governs business "regulation," thus suggesting that it is in all important respects something other and less than law. It is a weakness not unique to this book, but one that pervades much of the literature on business regulation.

The essayists and editors apparently share the underlying assumptions of most other scholars of regulation. They assume that the law governing businesses differs from other law in that it is more technical and less reflective of moral concerns, more complex and less knowable, more sweeping and less precise, more costly and less efficient at achieving compliance. While these assumptions appear to be widely accepted, they are not assumptions I share, although I do not here argue that they are "wrong" in any empirical sense.<sup>37</sup> I do, however, argue that assumptions like these, assumptions that allow us to speak of business regulation as if it were *sui generis* as a species of law, too often blind us from seeing the nature of the problem—whether that problem is defined as too much regulation or too little compliance.<sup>38</sup> More to the point, treating the law regulating business as *sui generis* may prevent us from exploring the ramifications and wisdom of proposed solutions like those presented by the editors and contributors to this book. Rather than elaborating on what we miss in the regulation/deregulation debate by treating "regulation" as something less and other than "law," the rest of this review tries to show what we gain by remembering that regulation is a form of law.

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compliance programs on speeding should be candidates for interactive treatment because trucking companies are subject to regulation by the Interstate Commerce Commission. It seems that the editors support interactive programs at least in all areas of business regulation already in the hands of an administrative agency, but it is not clear whether they would support the creation of more administrative agencies to cover laws "regulating" business that are not currently in the hands of an administrative agency or primarily enforced by the government.

37. I do not believe that these assumptions can be empirically verified. How does one show that the law governing business is more technical than other law or that "regulation" is less reflective of moral concerns than other law? I believe that whether one accepts these assumptions or rejects them is a function of one's political and ideological beliefs, not a function of some empirical review of the "facts" at issue.

38. There is a certain amount of irony in this point being made in a journal devoted to "regulation." So be it.

### III. A Framework for Understanding the Relationship Between Law-Giver and Law-Receiver

To claim, as I do, that *Corporate Lawbreaking* “redefines” the relationship between law-giver and law-receiver or to call the relationship contemplated by this book “new” is to assert that the relationship we assume usually exists between law-giver and law-receiver is different from the one contemplated by this book. How is it different? To answer that question, we need a framework for understanding the range of relationships possible between law-giver and law-receiver and the range of roles available to each in the creation and maintenance of a legal system. To understand the adjustments in roles contemplated by *Corporate Lawbreaking*, we need a description of the usual roles and the usual relationship because however “usual” these roles are, they are too little analyzed, too little understood, and too little contemplated to be anything like obvious.

Law has three components: rules, stories, and commitment.<sup>39</sup> We often and mistakenly equate law with rules alone, but rules demand explanation in order to have meaning. “Stories must be told to create even the semblance of a shared understanding of what the rules require.”<sup>40</sup> But rules and stories alone are not enough to constitute law. What distinguishes law from other stories with morals is commitment—a dedication of human will, an intention to live by and hold others to the norms embodied in the rules and stories.<sup>41</sup> While the state plays a central role with respect to two of these components—rules and commitment,

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39. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4-5 (1983). My analysis of the roles of the state and private groups in creating and maintaining law is based on the ideas elaborated by Professor Cover in his much-cited but little used, Foreword. The Foreword is not user-friendly. Professor Cover invents a number of terms like “jurisgenesis” and “jurispathic,” none of which fall trippingly off the tongue; and he uses sources, like the Talmud, not generally familiar to most legal scholars. On the surface, it does not seem like he is talking about “real law”—that regular stuff that occupies the attention of most lawyers and legal scholars. But he is, and his insights are of practical significance. I hope to demonstrate that here.

40. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. (forthcoming June 1992). It is only through narrative that norms, or rules, can affect the material world; narratives give meaning to norms by connecting them to possible states of affairs. Stories, on the other hand, demand their prescriptive point, their moral, their organizing principle, to be understood. Stories to be understood demand their rules, and rules to be understood demand stories. See Cover, *supra* note 39, at 5.

41. That is,

Rules and stories alone (literature, history), while essential to normative discourse, are to be distinguished from law because they do not license transformations of reality through the use of force. Law does. Law is rules and stories *and* a commitment of human will to change the world that *is* into the world that our rules and stories tell us ought to be. This commitment to realize the “ought” distinguishes law from utopian vision, literature and history. It also accounts for the connection between law and violence. Both metaphorically and literally law entails violence: to insist on one normative vision is to be willing to kill off alternative visions and, if necessary, those who adhere to those visions or who idiosyncratically fail to conform.

Koniak, *supra* note 40 (manuscript at 26-28, on file with author) (describing Professor Cover’s jurisprudential vision).

its role is not exclusive. Moreover, private groups play a central role with respect to stories.

Although we often and mistakenly equate law with the state's institutions, "the professional paraphernalia of social control,"<sup>42</sup> law understood as rules, stories, and commitment actually requires no state at all. A private group may have rules, stories, and a commitment to realize those rules and stories in action. It may, in other words, have its own law, and many private groups do. We usually call such "law" by some other name, commonly "ethics." But sometimes we honor the "ethic" of a private group by calling it law, for example, the law of the church or Jewish law. None of this is meant to deny that the state is central to the legal process. It will, however, help us see in what ways the state is central, what role private groups play in creating and maintaining the state's law, and how private groups may have their own law, or ethic, which may sometimes conflict with the law of the state. More important, understanding law in terms of rules, stories, and commitment will help us see that private groups maintain their law through a process fundamentally different from that which the state uses to maintain "official law." We will then be able to see that the most dramatic suggestion in *Corporate Lawbreaking* is that the government maintain state law more like a private group maintains its law. This suggestion has the potential to transform our democracy. Before we get to that, however, we need to analyze carefully the usual state of affairs.

In our society, the state exercises strict control over the rules that count as law. The state has a "systemic hierarchy—only partially enforced in practice, but fully operative in theory,"<sup>43</sup> that dictates where the authority to articulate various precepts lies and controls which precepts will be enforced over others.<sup>44</sup> But the narratives that give meaning to those precepts by explaining what they mean in the material world "are radically uncontrolled."<sup>45</sup> "All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance."<sup>46</sup>

The same is, of course, true of the laws regulating business. These laws occupy designated places in the state's official hierarchy of precepts,<sup>47</sup> and

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42. Cover, *supra* note 39, at 4.

43. *Id.* at 16.

44. *Id.* at 16-17. This hierarchy "conforms all precept articulation and enforcement to a pattern of nested consistency." *Id.*

45. *Id.* at 17.

46. *Id.*

47. *See, e.g.,* Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1988). The hierarchy is arranged like this: Congress may articulate precepts as long as they are tied to a constitutional precept that gives Congress power to regulate in that area, but Congress' precepts are trumped by constitutional ones. State governments may articulate precepts when not preempted by federal legislation, but those precepts are trumped by constitutional precepts, too. Administrative agencies may articulate precepts that count as law when legislative precepts permit and so long as the agencies do so in the mode prescribed by the legislature, that is, in accordance with the Administrative Procedure Act. Administrative precepts are trumped

we share the texts of the laws. But we do not share authoritative narratives regarding their significance. For example, environmental groups may share with one another one set of narratives explaining what the environmental laws and regulations of EPA mean, EPA may have another set, and corporations may have a third. These narratives may differ about what a precept requires or prohibits, about to whom a particular precept is addressed, or about whether a particular precept is valid at all. When differences in meaning become great enough, they end up in court where each of the opposing sides asks the judge to stamp its understanding official. To give the state's precepts meaning, the judge borrows narratives created in the unofficial realm and with her decision, tries to kill off opposing narratives by relegating them to the status of non-law.<sup>48</sup>

What does all this tell us about the state's usual role in creating and maintaining our legal system? In our society, the state's role is central as to only two of the three parts of law: precepts and commitment. The state articulates precepts, marks them official, and places them in a hierarchy which its judges tend. It also uses its superior ability to demonstrate commitment—its imperfect monopoly on violence—as a means of introducing order to what might otherwise be endless conflict about what norms mean and about what the law is. Notice, however, that the state does not claim *exclusive* control over either rules or commitment. For example, various state doctrines provide that precepts created by a private group will be treated as law with the caveat that the state is free to reject those precepts in extraordinary instances. The general tort principle that accepts a profession's standards as providing the standard of care in negligence cases is one instance of this.<sup>49</sup> There are other such examples.<sup>50</sup>

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by contrary legislative precepts and by constitutional precepts. Finally, courts may articulate precepts in the areas where they retain common-law power, but these precepts bend to substantive legislation in the area and to constitutional precepts.

For their precepts to count as law, each of these state institutions—not just administrative agencies—must follow the formal state rules that govern how they are allowed to articulate official precepts. When they speak without following those rules, what they say is understood as being something less than law. Consider, for example, the difference between an interpretive position that EPA or a state government puts forth as a litigant before a court and the regulatory enactments of such entities.

48. Cover writes:

It is remarkable that in myth and history, the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws. It is the multiplicity of laws . . . that creates the problem to which the court and the state are the solution. For example, in Aeschylus' literary re-creation of the mythic foundations of the Areopagus, Athena's establishment of the institutionalized law of the polis is addressed to the dilemma of the moral and legal indeterminacy created by two laws, one invoked by the Erinyes and the other by Apollo.

Cover, *supra* note 39, at 40.

49. See GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 148-50 (1990).

Standard state doctrine also allows for private groups to express commitment to their own understanding of law, even when that understanding conflicts with the understanding of the state. A law may be challenged by disobedience. One may act on the basis of one's own legal understanding no matter how clearly or how many times in the past the state has expressed a contrary understanding. If a court adopts the challenger's position in a case involving the challenger's action, no matter how much precedent it disregards or overturns to do so, the challenger will not be punished. In other words, the state acknowledges the right of people and groups to act—to show commitment to their own legal understanding—*before* that legal understanding has become official and even while it remains exiled by the state. There is a caveat: one may not challenge an injunction by disobeying it. Even if a court later accepts the challenger's legal understanding that the injunction was illegal, the challenger's commitment may be punished.<sup>51</sup> Notice, however, that state doctrine disfavors injunctive relief, preferring remedies "at law."<sup>52</sup>

That is the case for the claim that the state's role as to precepts and commitment is central but not exclusive. But what of the claim that the state does not play a similar role as to stories? First, upon reflection it should be fairly obvious that the state is not the *exclusive* creator of the narratives that give meaning to precepts:

[A] great many Americans . . . tend to think that because a majority of the justices [of the Supreme Court] have the power to bind us by their law they are also empowered to bind us by their history. Happily that is not the case. Each of us is entirely free to find his [or her] history in other places than the pages of the *United States Reports*.<sup>53</sup>

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50. For example, in *Strickland v. Washington*, 466 U.S. 668 (1984), the Court ceded to the bar a good deal of control over the standards that define ineffective assistance of counsel under the Sixth Amendment. For a discussion of the room *Strickland* provides for bar norms to define the Sixth Amendment, see Koniak, *supra* note 40 (manuscript at 127-31, on file with author). Administrative regulations that allow industries to set their own standards for complying with a particular regulation or law provide another example of the state borrowing precepts from private groups and, obviously, a particularly important instance for our purposes. That precepts do not need to originate with the state or be formally adopted by the state to be given the force of law by a court should be a self-evident point in a common-law country. That the state borrows precepts from non-state groups and treats them as law is simply a manifestation of the state's inevitable dependence on non-state groups in establishing and maintaining a legal system. See *infra* note 54.

51. See *Walker v. Birmingham*, 388 U.S. 307 (1967) (person enjoined under court order may not bypass orderly judicial review of temporary injunction before disobeying it). By issuing an injunction, a court seeks to project its understanding of law into the future by projecting its force into the future.

52. For a general explanation, see OWEN M. FISS, *INJUNCTIONS* 9-52 (1st ed. 1972). For a fascinating article questioning whether courts always do or should disfavor injunctions, see Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

53. M. HOWE, *THE GARDEN AND THE WILDERNESS* 7-8 (1965), *quoted in Cover, supra* note 39, at 18.



This principle so fundamental to our society is embodied in the First Amendment. But to say that officialdom does not have an exclusive role does not quite show that its role is not controlling.<sup>54</sup> In other words, we need to see whether the state claims a privileged position for the narratives it uses in the same way that it claims a privileged position as to precepts and commitment.<sup>55</sup>

Let's return to the First Amendment for a moment. The First Amendment embodies more than the principle that others may create narratives. According to standard state doctrine, it means that the state has no right to insist that its stories are privileged or that they be believed, accepted, revered, or repeated.<sup>56</sup> In other words, the state itself repudiates any claim that its stories are privileged. While the state claims the right to designate precepts and the right to insist on its will, it does not insist that people accept the meaning the state tries to attach to its precepts or its exercise of force.<sup>57</sup> Indeed, even if the state

54. For our purposes, it is sufficient to make out the claim that the state's role as to stories is not controlling in our society. The argument is, however, even stronger. The state's role as to the stories that give meaning to law is and must be secondary (not primary and not equal) to the role of non-state groups, and this claim holds for any society. The *nomos*, the world of normative meaning, not only flourishes despite the presence of the state and its stories, it precedes the state. A state could not be built were there not already a community that shared stories explaining where it had come from and where it was going, that shared a sense of history and destiny, and that shared a sense, however illusory, that these shared myths meant that the community shared a sense of right and wrong. On this point, that some normative understanding must precede the formation of a formal legal structure, Professor Dworkin's account of law, RONALD DWORKIN, *LAW'S EMPIRE* 65-66 (1986), corresponds to Professor Cover's account in Cover, *supra* note 39, at 11-16, as Professor Paul W. Kahn suggests in *Community in Contemporary Constitutional Theory*, 99 *YALE L.J.* 1, 66 n.292 (1989).

55. Notice that the question in the text is whether the state claims a privileged position for its stories, not whether legal theorists claim that the stories judges tell in their opinions count more than the stories others, not including legal theorists, tell.

56. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 413-17 (1989). In that case, the Supreme Court stated:

[T]he state's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. . . . According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . .

. . . . [N]othing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. . . .

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message . . . . [If we were to accept Texas' argument, we] would be permitting a State to "prescribe what shall be orthodox" . . . .

We never before have held that the Government may ensure that a symbol [or anything else] be used to express only one view of that symbol or its referents. . . .

. . . . To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. (citations omitted).

57. See Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1607 n.17 (1986).

insisted on its meaning, it is uncertain how successful it could be in eliminating alternate meanings. This is the problem facing all totalitarian societies.<sup>58</sup>

This description explains how responsibility for rules, stories, and commitment is shared between the state and non-official groups in our legal system, our *nomos*. But the definition of law used here supposes multiple normative worlds, those of the various non-official groups and that of the state. Seen as separate normative worlds, instead of as one shared *nomos*, it is clear that each normative world must combine precepts, stories, and commitment to have law. Non-official groups do this in one way, the state in another. Professor Cover describes two patterns for combining rules, stories, and commitment to form a *nomos*.<sup>59</sup> The first is the pattern that most approximates how non-official groups do it; the second is the pattern that most approximates how the state does it.<sup>60</sup> What unites the various essays in *Corporate Lawbreaking* is that they all suggest altering these patterns by having the state maintain law more like non-official groups do and by having corporations maintain law more like the state does.

Non-official groups operate largely in what Professor Cover calls the "paideic" pattern.<sup>61</sup> Because the word "paideic" is unfamiliar and the phenomenon it describes is so rarely analyzed, it may be helpful to keep in mind the example of a religious community, or the Boy Scouts, or some other private group that maintains "an ethic." In the paideic pattern, law is pedagogic.<sup>62</sup> There is a "common and personal way of being educated into" the rules and stories that make up the community's *nomos*.<sup>63</sup> Law is neither forced upon, nor enforced against, members of the group.<sup>64</sup> Instead, law is taught, understood, and consequently obeyed. Talk of law in such a world is creative, "celebratory, expressive and performative, rather than critical and analytic."<sup>65</sup> In other words, when the group talks of its own law, the talk is not about loopholes or stepping over the line; rather it is about doing one's utmost to fulfill the law's meaning. When one talks of law in such a world, it is as a means of understanding how to live and what to do and of explaining to others

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58. Torture is one potent method of destroying meaning. *Id.* at 1602 (discussing ELAINE SCARRY, *THE BODY IN PAIN* 4, 29 (1985)). The connection between torture and meaning explains why torture is a familiar feature of totalitarian societies. Of course, even torture or the likelihood of torture is no guarantee that the state can destroy non-conforming meanings. There is always the possibility of martyrdom. "[The] triumph [of martyrs]—which may well be partly imaginary—is the imagined triumph of the[ir] normative universe, [their meaning] . . . over the material world of death and pain." Cover, *supra* note 57, at 1604-05.

59. See Cover, *supra* note 39, at 12-14.

60. I say "most approximates" because "no normative world has ever been created or maintained" exclusively in one of the two patterns. *Id.* at 14. The most one can say of a normative world is that one pattern dominates the other.

61. *Id.* at 12.

62. See *id.* at 13.

63. *Id.*

64. "Obedience is correlative to understanding." *Id.*

65. *Id.*

why something is right. In the paideic world, talk creates law by explication and elaboration, by the search for understanding and the desire to know. Moreover, just as the law-receiver's acceptance and understanding of the law is personal in the paideic world, the law's acceptance and understanding of the individual is also personal.<sup>66</sup> In the paideic world, law is not treated as an object, as something concrete against which conduct can be measured. It is always in the process of becoming. This makes the paideic *nomos* radically unstable and explains why no purely paideic *nomos* can survive. It would lose all identifiable shape. In common parlance, the word used to characterize law created and maintained primarily in the paideic pattern is "ethics."<sup>67</sup>

Professor Cover calls the second pattern "imperial."<sup>68</sup> The imperial pattern most approximates how the state combines rules, stories, and commitment. A central virtue of the imperial pattern is that it is designed to create a legal system that is fair and impartial. "In [the imperial] model, norms are universal and enforced by institutions. They need not be taught at all, as long as they are effective."<sup>69</sup> Talk of law in this world does not itself create law. Talk merely analyzes actions against some objective thing that is law. "Discourse is premised on objectivity—upon that which is external to the discourse itself."<sup>70</sup> In the imperial world, "[i]nterpersonal commitments are weak."<sup>71</sup> The law owes us and we owe each other only the opportunity to settle our disputes peacefully and free of coercion in a forum in which some impartial and neutral observer will treat us as it would any other similarly situated member of the community.<sup>72</sup> We owe each other and the law owes us not personal justice, but fair and impartial justice. The law knows us not as individuals, and we as individuals need not know it to be bound by it. We are bound by impersonal

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66. Accepting the law as one's own entails the law's understanding that it must respond to the individual as she is. It is a relationship of trust and mutual regard.

67. See Koniak, *supra* note 40, for a description of the ethics of the legal profession as the profession's law and an explanation of how that law conflicts and competes with the state's law.

68. Cover, *supra* note 39, at 13. On the choice of this term, Professor Cover explains that he means to suggest:

an organization of distinct nomic entities, just as an empire presupposes subunits that have a degree of juridical and cultural autonomy. Pluralism is obviously very close to what I am trying to convey. But a pluralism may be one of interests and objectives. It does not necessarily entail or even suggest a pluralism of legal meaning, which is my particular concern here. It is also the case that the slightly negative connotation of "imperial," its association with violence, is intended. I mean to give the [imperial] virtues . . . their due, but I also mean to suggest the price that is paid in the often coercive constraints imposed on the autonomous realization of normative meanings.

*Id.* at n.36.

69. Cover, *supra* note 39, at 13.

70. *Id.*

71. *Id.*

72. Members of the community owe each other, the larger community, and the law only the "minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms." *Id.*

forces, a form of “social contract” that guarantees only that others will be similarly bound. In common parlance, when people say “law” they mean to refer to norms maintained primarily in the imperial pattern. The problem with that usage is that the “imperial pattern” alone is incapable of generating the strong stories necessary to give meaning to the precepts and commitment which it can generate. Moreover, the “imperial pattern” cannot stop the law-creating power of paideic communities to generate stories that elaborate and sometimes diverge from the “official” stories the state adopts. A purely imperial system is as impossible as a purely paideic one. However much we identify law with the imperial pattern, law is more than that pattern suggests.

#### IV. *Corporate Lawbreaking’s* New Ideas for Creating and Maintaining Law

The analysis above helps us see that what unites the essays in the book is more than some general notion of increased cooperation between business and government. Each essay contemplates changing the typical patterns that government and corporations use to maintain law. For some authors who contribute to the book, “interactive compliance” appears to mean enhancing the paideic pattern in the state’s law. For all the authors, it appears to mean enhancing the imperial pattern in the legal world maintained by private groups, here corporations, although the authors differ as to how this might be done. And for some of the authors, it seems to mean both things—a new *nomie* equilibrium. The differences are important, and the framework helps to explain why. The framework also suggests a different way of thinking about the other phrase in the book’s title—“corporate lawbreaking.” Is “corporate lawbreaking” better understood as corporations maintaining legal visions that diverge significantly from the legal vision expressed by the state? Is the “lawbreaking” that the book addresses conduct that violates the corporate community’s sense of right and wrong as well as the law of the state, or is it conduct that the corporate world believes is normatively justified, however “technically” illegal? The prevalence of the kind of “crime” that this book is concerned with strongly suggests that members of the corporate community often see the “illegal” conduct which they engage in as “justified” by some normative understanding, however imperfectly realized or informally maintained that normative understanding might be.

In their first book, Sigler and Murphy wrote: “In the real world corporate managers must choose whether to resist, defy, tolerate, fight or cooperate with regulatory agencies.”<sup>73</sup> If managers choose “to resist, defy, tolerate, fight, or cooperate with” state law based on their own normative understanding of what is “right” to do, then the corporate world is acting according to its own law rather than the state’s. This divergent normative understanding may be built on

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73. SIGLER & MURPHY, *supra* note 2, at ix.

something as simple as the belief that the corporation's obligations to its shareholders are higher in the hierarchy of norms than state law recognizes or on the general notion that the nearly unrestrained pursuit of profit is the best thing for America.<sup>74</sup> Economic reasons are normative when they provide the basis for choosing how to respond to state law. If "corporate lawbreaking" is to any significant degree a manifestation of corporate actors following a divergent normative understanding, then decreasing the state's imperial role might only perpetuate that divergent understanding.

Professor Cover's framework lets us see how radical Sigler and Murphy's reconceptualization of the relationship between government and governed is. I will use Sigler and Murphy's original proposal<sup>75</sup> as the touchstone because *Corporate Lawbreaking* is designed to further that proposal. By beginning with their proposal, we can better assess the differences between Sigler and Murphy's approach and that of the other essayists.

First, Sigler and Murphy argue for an enhancement of the paideic relationship between the state and the corporate world. By talking to one another, training together, even taking on one another's roles, agency and industry personnel together would develop standards (rules), models (stories), and methods (ways of demonstrating commitment) for compliance programs. In short, agency and industry personnel together would create law.<sup>76</sup> And the law they would develop would resemble law created in the paideic pattern. It would be characterized by the "discriminating use of waivers, based upon variations in the operating environment of a particular company."<sup>77</sup> It would be, in Professor Cover's terms, law built on "reciprocal acknowledgement," a person-

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74. Of course, neither of these "rules" dictate only one interpretation any more than any precept dictates one interpretation. The community would have stories that justify the precepts, suggest limits on them, and suggest where other precepts stand in relation to them. But the point in the text is that the corporate world has its own understanding of law if the normative portrait that appears from these rules and stories is used to justify a manager's decision to resist, defy, tolerate, fight *or* cooperate with state law. Even a decision to tolerate or cooperate, if justified by the corporation's own normative understanding, is evidence of the power of the group's own law because it implicitly suggests that that law could justify a decision not to tolerate or cooperate with state law.

75. For a summary of their proposal, see *supra* notes 2-10 and accompanying text.

76. The paideic themes are evident throughout Sigler and Murphy's description of the relationship between agency personnel and their industry counterparts. For example, agency personnel visiting the corporate site "are not to behave as inspectors looking for technical violations. Instead, their aim is to build upon the capacity of the company to develop procedures and practices consonant with FTC rules." SIGLER & MURPHY, *supra* note 2, at 172. "[U]nderstanding [between agency and industry personnel] will be fostered by brief exchanges of positions between FTC staff and private compliance officers . . . . This kind of role reversal will go a long way to build mutual understanding by breaking down barriers of mistrust and creating fresh perspectives for both government and industry." *Id.* "Corporate and government compliance officers will develop a common parlance or lingo to improve communications. . . . For non-technical employees the new Esperanto of regulation should be easily understood and easily translated into action." *Id.* at 147.

These quotes express the characteristics and spirit of every paideic community: strong common bonds among members, the sharing of tasks and perspectives, a group language, a belief that the *nomos* can be made transparent to those within it (norms "easily translated into action") and a personal law, developed by and responsive to the needs of those within the community.

77. *Id.* at 173.

ally accepted and personally tailored law. Moreover, although the authors do not make this point clear, the law developed would be more than just a law of compliance. It would also be substantive law. In practice, it could work no other way. To take their example of interactive compliance in the antitrust area,<sup>78</sup> even if we assume that agency personnel and industry officials begin their paideic relationship with the explicit understanding that “compliance” means compliance with the existing meaning of the antitrust laws, they will soon encounter situations in which the meaning of compliance is unclear because the decided cases are subject to more than one interpretation.<sup>79</sup> To ensure “compliance,” they will have to supply meaning to that law.<sup>80</sup> However, law created in paideic fashion is radically unstable; in a world where talk creates law and law is supposed to be personally responsive, new stories proliferate and new meaning is constantly created. How would order and some semblance of coherence be maintained? In Sigler and Murphy’s terms, how would the remaining areas of “uncertainty” about what law meant be resolved?

Sigler and Murphy advocate two changes to stabilize the law created by this paideic relationship. First, they recommend strengthening the corporation’s imperial structures so that private entities can play a greater role in maintaining state norms. This is the part of their proposal that seems to have widespread support among the contributors to *Corporate Lawbreaking*. The second change is much more radical and is not openly endorsed by any other contributors. Sigler and Murphy propose that the imperial function now performed by the courts be transferred in considerable part to administrative agencies. Let’s begin with their proposal to strengthen the corporation’s imperial structures.

All of the contributors to *Corporate Lawbreaking* appear to agree on at least one thing: the state’s imperial role needs to be supported by strengthened

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78. *Id.* at 180-87.

79. In working through their antitrust example, Sigler and Murphy avoid the persistent problem of the “meaning” of law by postulating “a violation” that both the corporate officials and presumably agency officials would identify as such. Their footnote explains: “For purposes of the hypothetical case, it is not necessary to analyze the nature of this violation. It has elements of commercial bribery, a conspiracy to restrain trade under the Sherman Act Section 1, and an attempt to monopolize under Sherman Act Section 2.” *Id.* at 187 n.1.

80. Sigler and Murphy could have included a procedure for bringing such questions of meaning to courts. They do not, and on their terms, rightly so. Meaning is always essentially contested. More than one story is always possible. Thus, to have suggested court resolution of these differences would have defeated their aim of shifting the regulatory process from an “adversarial” model to a “cooperative” one. Instead of leaving the courts with the job of deciding among competing meanings, Sigler and Murphy apparently foresee most such questions being worked out in the paideic relationship, built as it would be on the illusion of a shared *nomos*. Sigler and Murphy see this as possible because they believe current disagreements are a function more of uncertainty about law than of the multiplicity of meaning. However, even with their faith in the power of the paideia to resolve differences, they recognize that some differences may still emerge, although they conceive of these differences as true moments of “uncertainty” rather than as moments of “difference.” Their method of coping with this “uncertainty” is discussed *infra* notes 85-90 and accompanying text.

imperial structures within corporations.<sup>81</sup> All corporations function partially in the imperial pattern, holding employees to objective standards of behavior and using force to ensure that the corporation's meaning is the dominant meaning within the organization.<sup>82</sup> Thus, when *Corporate Lawbreaking's* contributors urge corporations to develop institutional structures that use objective standards to impose order on normative meaning, they have something particular in mind. They mean structures that would be designed to impose the *same* order on meaning that the state would impose.<sup>83</sup> They also intend to encourage corporations to devote enough energy to this task so that members of the corporate community and others understand that the corporation is strongly committed to maintaining the state's *nomos*. Two particularly useful chapters in *Corporate Lawbreaking* describe how the imperial pattern within corporations might be strengthened to reflect more accurately the state's meaning and the corporation's commitment to that meaning.<sup>84</sup> Surprisingly, none of the contributors address the potential costs to corporate life that this imperial shift might entail. For example, would an internal shift toward more impersonal norm-maintenance estrange corporate employees from the norms and goals of the corporation and from each other? Perhaps the contributors imagine corporate employees as sufficiently alienated from one another and their organizations that they cannot imagine the problem getting worse, although I am not sure that this is true.

Sigler and Murphy and the other essayists in the book all agree that, although the imperial pattern within the corporation should be strengthened, it must ultimately be dependent on some external imperial pattern vested in the state from which the corporation can draw the order that it imposes on the intra-corporate *paideia*. Where the contributors differ is on the location of the state's imperial pattern.

Sigler and Murphy would shift much of the state's imperial role from the courts to the administrative agencies—now transformed by the new *paideic* relationship the agencies would have created with industry. To give the law created by this *paideia* (and imposed by corporations on their members) some

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81. Most, if not all, of the contributors also seem to agree that the state's *paideic* role should be enhanced. However, the varying opinions on how and to what degree this should be done, and differing beliefs on what limits on imperial law would result from this *paideia*, are great enough that it pays to consider them as alternatives rather than as a common scheme.

82. When I say that the corporation uses "force" to ensure that its meaning is the dominant meaning within the organization, I mean that it uses its power to sanction employees. For example, the corporation invokes its power to fire, demote, or otherwise penalize employees who do "wrong."

83. This assumes that the meaning is discernible, a point to which we will return.

84. Harvey L. Pitt & Karl A. Groskaufmanis, *Corporate Codes of Conduct and Corporate Self-Regulation*, pp. 27-39, and Joseph E. Murphy, *Corporate Counsel's Role in Interactive Compliance*, pp. 91-109. Pitt and Groskaufmanis published a longer version of their chapter as a law review article, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990). Those trained in law will find the article a useful elaboration of the ideas presented in their chapter.

stability, Sigler and Murphy would "require the government to be bound by the advice of its agents."<sup>85</sup> In other words, Sigler and Murphy propose that whenever a representative of an administrative agency tells a corporation that a certain activity is or is not legal, that judgment would prevent the government from claiming otherwise in a court of law. In effect, this makes such "advice" the law, at least as to disputes between any part of the government and the corporation that received the advice. Private parties could challenge these "binding" interpretations in suits against the corporation, but keep in mind that Sigler and Murphy urge that neither attorney's fees nor multiple or punitive damages be available in private suits against certified corporations. Consequently, the likelihood that these interpretations would be subject to challenge by private groups and thus to imperial ordering by a court is severely diminished. Moreover, in lieu of private civil actions, Sigler and Murphy would allow private groups to present their different interpretations to an agency official, who could issue an official interpretation that would then bind those private parties.<sup>86</sup>

In their first book, Sigler and Murphy were quite passionate about the need to vest more imperial power in agencies.<sup>87</sup> They asserted: "There cannot be any real doubt that it is in the interest of society to have citizens consulting the government to discover the meaning of the rules. That is a logical step given that the government is the source and enforcer of those rules."<sup>88</sup> However, the thesis of this review is that there *is* real doubt about society's interest in having the government attempt to become the sole provider of legal meaning. There *is* real doubt about the wisdom of transferring the state's imperial function from courts to less public and more paideic institutions like the re-shaped administrative agencies Sigler and Murphy would create. And however counter-intuitive

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85. SIGLER & MURPHY, *supra* note 2, at 164.

86. As Sigler and Murphy put it:

Of course, such advice would not have a binding effect against private individuals, who would be able to seek whatever remedies were available under law. On the other hand, two private parties with conflicting views of the law could take their dispute to the agency for determination and be bound by that opinion.

*Id.* Given that Sigler and Murphy's proposal would severely limit the legal remedies available to private parties, their "of course," assumes an ironic ring and their "other hand" alternative for private parties becomes a likely strategy.

87. For example, they write:

It is difficult to read the Merrill case [Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) (government not bound by interpretation of law given by administrative agents)] without a sense of revulsion. Why in a civilized society would someone be penalized for relying on the government? This is particularly striking when contrasted with legal standards applicable to dealings between private parties, where such conduct would not be countenanced.

SIGLER & MURPHY, *supra* note 2, at 164.

88. *Id.* at 161.



it might seem, the government may be the source and enforcer of rules without being the exclusive or even the controlling source of legal meaning. Sigler and Murphy avoid the more totalitarian aspects of their recommendation by focusing almost exclusively on how their recommended change would bind the government, largely ignoring what I take to be implicit in their proposal: that the corporation would be similarly "bound."<sup>89</sup> Perhaps Sigler and Murphy would defend the fairness of binding a certified company to a legal interpretation that it requested by reminding us that the company's involvement in interactive compliance was voluntary. But I cannot help but wonder why a certified company would seek such a binding interpretation if there were any risk that it would be adverse to what the corporation perceived to be its best interests. Moreover, Sigler and Murphy do not suggest any procedure for bringing different interpretations to the attention of agencies other than by the corporation's voluntary request. These omissions reflect Sigler and Murphy's tendency to underplay the potential for differences about what law means.

Even if we concentrate solely on Sigler and Murphy's desire to bind the government by the word of its agents and ignore the questions about binding the corporation, their proposal is quite radical in the degree of imperial control over the meaning of law that it transfers from courts to administrative agencies.<sup>90</sup> The outer limits of the Supreme Court's willingness to cede imperial power to agencies are found in the doctrine of agency deference articulated in *Chevron, U.S.A. v. Natural Resources Defense Council*,<sup>91</sup> which held that courts must accept as binding an agency's interpretation of statutory terms as long as that interpretation is reasonable. The caveat that the interpretation be reasonable leaves the courts with the last say on which of alternate legal meanings to affirm, but the general rule operates to tip the scales in favor of the agency's interpretation. Note that the agency interpretations entitled to *Chevron* deference are official agency interpretations like those embodied in

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89. In fact, their only allusion to the agency's power to bind the law-receiver with its interpretation as opposed to its power to bind the rest of the government refers to two private parties who come to the agency with different stories about what the law means. *Id.* at 164. The failure to make explicit the fact that corporations would be bound to accept the agency's interpretation and apply it in their internal compliance program suggests the possibility that they do not intend this. However, it does not seem plausible that Sigler and Murphy intended corporations to be virtually unhindered in their legal interpretations as long as they entered into a paideic relationship with government and institutionalized some imperial structure internally. Conceivably, Sigler and Murphy could have meant that certified companies would be free to challenge agency interpretations in court before accepting them, although the government would not be similarly free. If so, they should have made it clear, particularly since it runs against their general theme of keeping the courts as uninvolved as possible. Allowing corporations to challenge these "binding" interpretations would significantly alter the paideic relationship they describe.

Hence, recognizing that there is room for doubt, I assume that Sigler and Murphy intended these interpretations to bind the corporations as well as the government. I base that assumption on two things. First, this reading is generally more consistent with the spirit of their proposal. Second, they acknowledge the power of these interpretations to bind private parties when they bring their different interpretations to an agency for a resolution.

90. See SIGLER & MURPHY, *supra* note 2, at 127-41.

91. 467 U.S. 837 (1984).

regulations, that is, interpretations adopted in imperial fashion.<sup>92</sup> The Court has never suggested that *Chevron* deference be accorded the advice that agency staff give to particular individuals or entities on what the law means in a particular context but which the agency refuses to adopt officially. A different line of cases governing these informal interpretations suggests that the government, if ever bound by the advice of its agents, is bound in the rarest of circumstances only.<sup>93</sup> Sigler and Murphy recognize that their position is at odds with the Court's jurisprudence.<sup>94</sup> They argue that the Court should reverse itself. Failing that, legislation to achieve the same effect should be introduced.<sup>95</sup> What they do not recognize is how far-reaching the implications of their proposed change are. What they fail to see is how radical a change in our

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92. The Court in *Chevron* said:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

*Chevron*, 467 U.S. at 843-44.

93. The modern line of cases on this issue runs from *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), to *Office of Personnel Management v. Richmond*, 110 S. Ct. 2465 (1990). To understand how radical a transfer of imperial power Sigler and Murphy's proposal contemplates, one need only consider the Court's latest affirmation of the general principle that the government is not bound by the advice of its agents. In *Richmond*, the problem that occupied the Court was how to affirm its strong commitment to the general principle that the government "is neither bound nor estopped by the acts of its . . . agents . . . to do or cause to be done what the law [as interpreted by a court] does not sanction or permit," 110 S. Ct. at 2469 (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917)), without foreclosing the possibility that in some extreme case a court could use its equity powers to bind the government to the words of its agents. According to the *Richmond* Court, the genesis of this problem stemmed from some "dicta" first articulated in *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961), and referred to in some later Supreme Court cases (although never actually followed) that suggested that in some circumstances the government might be estopped by the word of its agents. The *Richmond* Court stated:

In sum, courts of appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims.

110 S. Ct. at 2470.

Although the Court in *Richmond* refused to adopt the government's proposed rule that estoppel never be available against it, 110 S. Ct. at 2471, the Court did preclude estoppel in any case involving a government agent's disposition of government funds appropriated by Congress. *Id.* at 2471-75. The Court also made clear its general position that if estoppel is available in any other cases at all, it is extremely rare: "Whether there are any *extreme circumstances* that might support estoppel in a case not involving payment from the Treasury is a matter we need not address." *Id.* at 2476 (emphasis added).

Even the dissenters in *Richmond* were miles away from the transfer of imperial power contemplated by Sigler and Murphy. The dissent's position was that a court should have the power to hold the government to a position that the court was not willing to affirm as a general rule of law when to do otherwise would be "fundamentally unjust" to the private party in that particular case. The dissent specifically rejected the "indiscriminate use" of estoppel and clearly contemplated that courts would retain their usual role in the imperial scheme, final arbiters of which interpretations should be backed with state force. *Id.* at 2481 (Marshall, J., dissenting).

94. See SIGLER & MURPHY, *supra* note 2, at 160-65.

95. See *id.* at 165.

legal structures and our democracy would be achieved by vesting in administrative staff personnel the final power to say what law means in a particular context.

Under Sigler and Murphy's proposal, courts would retain something close to their usual imperial function as to corporations that refused or failed to be certified. Those corporations would be the focus of the state's enforcement efforts. When state agents perceived those corporations deviating from the agents' understanding of law or when other groups in society made a claim that this was happening, the state agents or other groups would be encouraged to bring those corporations into court.<sup>96</sup> The courts would then decide whether to affirm the corporation's meaning, the state agent's meaning, or the other group's meaning. Although this resembles the usual imperial role of courts, it is different.

The difference is that the court's imperial role is vestigial in this scheme. The point of encouraging suits against defiant corporations is *not* to allow courts to impose some order on legal meaning by backing an interpretation with state force. The court's imposition of order on legal meaning is merely incidental. Instead, the point of encouraging suits against defiant corporations is to coerce those corporations into a paideic relationship with agency officials—a relationship that generates law maintained primarily by imperial forces located in the agencies and the corporations themselves, not in the courts. Thus, the imperial powers Sigler and Murphy vest in agencies and corporations would take over much of the courts' present function of imposing order on the proliferation of legal meaning. Ideally, all corporations would be certified, and the court's usual imperial role would all but cease.<sup>97</sup> In this ideal world, the courts' primary role as to corporations would be to punish corporations that "subverted" the compliance process,<sup>98</sup> that is, those corporations that betrayed the paideic relationship and defied the imperial power of state agencies. This would provide courts with some opportunity, even in the ideal world where all companies were certified, to impose order on meaning, particularly since Sigler and

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96. *See id.* at 151: "In this bifurcated system of certified and uncertified companies, it would then be expected that government would turn its enforcement focus to uncertified corporations. Public interest groups and others playing the private attorney general role would also direct their energies toward this non-cooperative segment." Non-state groups would be discouraged from suing certified corporations and encouraged to sue uncertified ones by changes in the private attorney general statutes. Attorney's fees and treble or punitive damages would not be available against certified companies. *Id.* at 153.

97. Apparently, however, it would not disappear completely. According to Sigler and Murphy's proposal, even in this ideal world courts would retain an imperial role as to criminal offenses committed by *individuals* in corporate positions, while losing this role as to corporations themselves. *See id.* at 152. They are less clear about civil suits against individuals, but they do allow for civil suits against corporations for "actual damages." *Id.* at 154. Without any prospect of recovering attorney's fees or punitive or multiple damages, we can safely assume the number of such suits would be relatively small. But the fact remains that in criminal cases against individuals and civil suits for actual damages, courts would continue to provide some order to the meaning of laws that bind corporations. How that meaning would be ordered in relation to the meaning developed in the paideic relationships between government and business is, however, unclear.

98. *Id.* at 150.

Murphy would allow courts to punish (and therefore help define) not merely the subversion but also the “underlying violation.” Thus, according to Sigler and Murphy’s proposal, whether we struggle along in the unredeemed world of certified and uncertified companies or reach the ideal world, the courts retain some imperial power. But that power is limited; furthermore, it is designed to function as a backup to the imperial structures of corporations and the imperial power of agencies, not as a primary method of imposing order on meaning.

Sigler and Murphy’s entire proposal presumes a need to get corporations to improve their internal imperial structures to better reflect state norms and the order imposed on meaning by the state’s imperial structures. This is their express goal and one that unites the contributions to *Corporate Lawbreaking*. But to achieve this goal, do we need to enhance the paideic relationship between agencies and corporations? Do we need to rearrange the state’s imperial structure? And if either or both of these changes are necessary to the first goal, is that goal worth the fallout from these other changes?

The essays in *Corporate Lawbreaking* suggest that neither of these changes may be necessary to achieve the first goal of strengthening the corporation’s own structures for maintaining state law. Attorney General Abrams’ proposed legislation suggests that corporate imperial structures could be strengthened and brought into line with the state’s understanding of law by requiring corporations to perform specific tasks, such as conducting periodic audits, and by providing for government spot-checks to ensure that the tasks are performed. Harvey L. Pitt and Karl A. Groskaufmanis suggest that corporate imperial structures could be strengthened and reformed if courts or legislatures would adopt a modified due diligence defense to corporate liability.<sup>99</sup> They suggest standards by which a court would judge whether the corporation’s control over its internal *nomos* was strong enough to justify a finding that a particular violation of law by a corporate agent was beyond the corporation’s control.<sup>100</sup> Jeffrey M. Kaplan suggests that corporate compliance might be improved simply by making the criminal sanctions imposed by the state more real to individuals within corporations.<sup>101</sup> He discusses a Scared Straight program being developed by the Business Ethics Study Teams, Inc. (BEST), a non-profit group affiliated with New York University’s Stern School of Business. The BEST program recognizes that bringing white-collar masterminds into schools and corporations might inadvertently make lawbreaking seem a bit sexy. It therefore brings in lesser-known folk—those who helped their superiors commit crimes and were imprisoned for their trouble. Hearing these relatively unglamorous but scary stories might convince listeners that failing to take the state’s power seriously can be a mistake.

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99. See pp. 34-39.

100. See pp. 35-37.

101. Jeffrey M. Kaplan, *Corporate Lawbreakers as Sources of Interactive Training*, pp. 105-09.

This last example, touching on the stories that are told within corporations, brings up another important point. For corporate compliance to improve, the imperial structures within corporations must do more than set norms in accordance with state rules and monitor compliance. If those structures are to be effective at reinforcing the state's imperial structures, which have trouble reaching within and actively ordering the paideic worlds that flourish within such relatively closed and powerful organizations as corporations, the corporation must also pay attention to the paideic flourishing of stories within the organization. A number of the essays in *Corporate Lawbreaking* touch on this theme, mostly by emphasizing the importance of the corporation's internal efforts to educate employees on state law. While some of the authors describe what makes a strong internal compliance program, none of them adequately address the need for the corporation to retain some control over the ordering of stories that explain what the corporation's rules mean. All of the authors place too much emphasis on the writing of clear internal rules and not enough emphasis on the corporation's internal publication of stories that demonstrate what compliance with a rule means in a specific context and what violation of a rule means. Like courts, which exercise the state's imperial function, corporations need to make a continual effort to kill off stories that do not count as law and to adopt those that do. Rules by themselves never dictate a single course of action.

One method of affecting the stories that make up the corporate paideia is by influencing the stories that people bring with them when they enter the corporate world. Two essays in *Corporate Lawbreaking* speak to this point. One by W. Richard Sherman addresses the role that business schools might play in influencing these stories, and another, by Thomas L. Schaffer, addresses the role that law schools might play. Both essays contain interesting insights on what these professional schools do wrong, but are somewhat disappointing in prescribing what should be done instead. I agree with Sherman that ethics courses as generally taught in business schools have little to do with compliance with law. Indeed, I would venture further to say that they may actually contribute to non-compliance. The ethics materials used in business schools for the most part are case studies of corporate conduct written by business school professors. These case studies invariably involve matters upon which there are state norms and upon which courts have spoken, but the legal issues are largely ignored. Instead, the material is presented and discussed as if individuals were free to decide in accordance with their own vision of what is right without the fear of state power. This desensitizes business students to the state's *nomos*. Law school courses in ethics also neglect the state's law. They traditionally include little case law on the law governing lawyers, and Schaffer's essay, like Sherman's, does not address this omission.

Of course, I agree with Sherman that to be compliant is not necessarily to be ethical. That the state backs its version of what is right with force does not necessarily make that version right. Nonetheless, I still want to know what the state and other communities say, so I may understand what my commitments could potentially cost me and so I may consider what it is I am committed to in light of possible alternatives. Therefore, I would suggest that all business ethics classes, as well as legal ethics courses,<sup>102</sup> include material on the state's version of what is right—material on the state's law. Moreover, I believe a business school course in white-collar crime taught from court cases would do more to ensure that the stories brought into the corporate paideia were sensitive to the state's concerns than any other single change in the business school's curriculum.

### Conclusion

Several authors in *Corporate Lawbreaking* seem to share Sigler and Murphy's enthusiasm for enhancing the paideic relationship between corporations and administrative agencies. This seems to me a more questionable goal than strengthening the imperial structure within organizations. The official institutions in the United States that are responsible for law are generally structured to embody the relationship between law-giver and law-receiver that is embedded in the imperial pattern, not the relationship embedded in the paideic pattern. In other words, our legal institutions emphasize objectivity and impartiality. There are, of course, exceptions. Institutions such as prosecutorial discretion, jury nullification, the executive pardon, and judicial sentencing contemplate a more paideic relationship between law-giver and law-receiver. Perhaps the most persuasive way to demonstrate the dominance of the imperial pattern in our legal institutions (and by implication how distrustful we are as a society of government institutions that embody the paideic mode) is to point out how we seek to restrain the paideic exceptions by making them more imperial—how we seek to tame them, if you will. Thus, prosecutorial discretion is checked by imperial devices such as self-imposed prosecutorial guidelines,<sup>103</sup> the abuse doctrine,<sup>104</sup> statutory provisions like those in the Equal Access to Justice

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102. See generally HAZARD & KONIAK, *THE LAW AND ETHICS OF LAWYERING*, *supra* note 49.

103. See, e.g., NATIONAL DISTRICT ATTORNEY'S ASS'N, *NATIONAL PROSECUTION STANDARDS* (2d ed. 1991); AMERICAN BAR ASS'N *STANDING COMM. ON ASS'N STANDARDS FOR CRIMINAL JUSTICE*, AMERICAN BAR ASS'N *STANDARDS FOR CRIMINAL JUSTICE* (2d ed. 1980).

104. See, e.g., *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979) ("[A] prosecutor's discretion is not 'unfettered.' Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (decision to prosecute may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'") (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Cf. *Wayte v. United States*, 470 U.S. 598 (1985) (rejecting selective prosecution claim).

Act,<sup>105</sup> and ultimately constitutional guarantees of due process<sup>106</sup> and equal protection under the laws.<sup>107</sup> We not only prohibit instructing juries on their power to nullify “objective norms,”<sup>108</sup> we pay meticulous attention to the form and content of jury instructions on the law—as if by doing so we could deny the possibility that jury verdicts could be contrary to “objective norms.” Executives issue pardoning standards to govern the exercise of their discretion in such matters.<sup>109</sup> Finally, the new federal sentencing guidelines bear witness to the trend toward controlling the paideic elements in the sentencing process.<sup>110</sup>

Administrative agencies have some paideic features. For example, they generally assume more responsibility than other government institutions for educating those regulated on what the law requires. Nonetheless, their general structure, like that of most government institutions, reflects imperial themes rather than paideic ones. Witness the Administrative Procedure Act<sup>111</sup> with its emphasis on notice, publication, and a fair chance for all to be heard before regulations are promulgated. There are, of course, questions about whether in practice administrative agencies are more paideic than the formal structure suggests, but these questions are raised most often by those critical of such paideic tendencies. I am referring here to the substantial literature on what economists call “agency capture.”<sup>112</sup>

Government institutions are shaped in the imperial pattern for good reason. Why should those not privileged to be part of the paideic relationship that

105. Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325 (codified as amended at 5 U.S.C. § 504 (1982)).

106. U.S. CONST. amend. XIV.

107. *Id.*

108. The United States Court of Appeals for the District of Columbia Circuit’s opinion in *United States v. Dougherty*, 473 F.2d 1113, 1136 (1972), reflects the majority view in both the federal and state court systems: “The fact that there is widespread existence of the jury’s prerogative [to disregard instructions of the court, even as to matters of law] does not establish as an imperative that the jury must be informed by the judge of that power.”

109. For example, the standards issued under President Reagan and currently used by the Bush Administration state that no petition for pardon may be filed until at least five years after the offender’s release from confinement, and in the case of “serious” crimes, such as those involving violence or narcotics, not until seven years after release. 28 C.F.R. § 1.2 (1983). Moreover, applications for commutation, the form of clemency that would actually remit ongoing punishment in cases of unfortunate guilt, may be made “only if no other form of relief is available . . . or if unusual circumstances exist, such as critical illness, severity of sentence, ineligibility for parole, or meritorious service rendered by the petitioner.” 28 C.F.R. § 1.3 (1989).

110. *See* Sentencing Reform Act of 1988, 18 U.S.C. § 3551 (1984); *see also*, UNITED STATES SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL (West Publishing Co. 1992).

111. *See supra* note 47.

112. For a sample of general treatments written from various perspectives, see WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT, 36-42 (1971); Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U. L. REV. 1 (1986); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); and George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

Sigler and Murphy envision between agencies and corporations trust that the law created therein will be sensitive to their concerns? Why should business' legal obligations be contingent on how well and how clearly the government has instructed the business community on what the law requires, and why should those obligations be tailored to fit each corporation's personal needs, while the rest of us have to struggle along as best we can? Moreover, even if we each could have a paideic relationship with government, would it be worth the cost—losing the sense of fair and impartial justice that the imperial pattern provides through its institutional procedures and its impersonal standards? The imperial pattern knows no favorites; “[p]rocedure is the blindfold of Justice.”<sup>113</sup> It is the blindfold we need precisely at the point that strong bonds cease to bind us to each other and to one collective normative vision. To effectively close courts to the narratives of consumer and other non-business groups, to encourage administrative agencies and officials to bond with business in the common project of creating a more flexible, responsive, and personal law to govern the conduct of corporate America, to transfer to these transformed administrative agencies a substantial part of the courts' power to interpret law—these may all be ways of achieving more corporate compliance with law. But whose law would it be?

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113. ROBERT M. COVER ET AL., *PROCEDURE* 1232 (1988) (quoting an unpublished manuscript by Robert Cover in which he discusses the possible meaning of the blindfold on the Statue of Justice).