



Whose Corporate Governance?

Anat Admati

Stanford Graduate School of Business and ECGI

Wallenberg Lecture

Brussels | October 8, 2024

My corporate governance research
before the 2007-2009 financial crisis

Large Shareholder Activism, Risk Sharing, and Financial Market Equilibrium

Anat R Admati, Paul Pfleiderer, and Josef Zechner

Journal of Political Economy, 1994

We develop a model in which a large investor has access to a costly monitoring technology affecting securities' expected payoffs. Allocations of shares are determined through trading among risk-averse investors. Despite the free-rider problem associated with monitoring, risk-sharing considerations lead to equilibria in which monitoring takes place. Under certain conditions the equilibrium allocation is Pareto efficient and all agents hold the market portfolio of risky assets independent of the specific monitoring technology. Otherwise, distortions in risk sharing may occur, and monitoring activities that reduce the expected payoff on the market portfolio may be undertaken.

The “Wall Street Walk” and Shareholder Activism: Exit as a Form of Voice

Anat R Admati, Paul Pfleiderer

Review of Financial Studies, 2009

We examine whether a large shareholder can alleviate conflicts of interest between manager and shareholders through the credible threat of exit on the basis of private information. In our model, the threat of exit often reduces agency costs, but additional private information need not enhance the effectiveness of the mechanism. Moreover, the threat of exit can produce quite different effects depending on whether the agency problem involves desirable or undesirable actions from shareholders' perspective.

September 15, 2008...

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THE WALL STREET JOURNAL.

DOWN

TUESDAY, SEPTEMBER 16, 2008 • VOL. CCLII NO. 65

***** \$2.00

DJIA 10917.51 ▼ 504.48 -4.4% NASDAQ 2379.91 ▼ 3.6% RUSSELL 2000 12214.76 ▼ 4.0% 10-YR TREAS 4.2 3/32, yield 3.482% OIL \$95.71 ▼ \$5.47 GOLD \$793.30 ▲ \$22.00 EURO \$1.4310 YEN 104.80

AIG, Lehman Shock Hits World Markets

Focus Moves to Fate of Giant Insurer After U.S. Allows Investment Bank to Fail; Barclays in Talks to Buy Core Lehman Unit

The convulsions in the U.S. financial system sent markets across the globe tumbling, as two of Wall Street's biggest firms looked set to exit the scene and insurance titan American In-

By Suzanne Craig,
Jeffrey McCracken,
Jon Hilsenrath and
Deborah Solomon

ternational Group Inc. turned to the Federal Reserve and the state of New York for assistance.

The U.S. stock market suffered its worst daily point plunge since the first day of trading after the Sept. 11, 2001, terrorist attacks. Financial markets were rattled by the rushed sale Sunday of Merrill Lynch & Co. and the bankruptcy-court filing of Lehman Brothers Holdings Inc., which scrambled Monday to sell its most prized businesses before too many employees and customers walk out the door. (Please see related article on Page C1.)

All day Monday, top Lehman officials were huddled in Manhattan at their Seventh Avenue

ing. For much of the day, the major U.S. market indexes were down 2%, which, while a good-sized decline, was smaller than many had thought would be the case. But in the final hour of trading, a wave of selling hit, driven by concerns about the fate of AIG. The Dow Jones Industrial Average ended down 504.48 points on Monday, off 4.4%, at its daily low of 10917.51, down 38% on the year. Of the Dow Industrials' 30 components, all but one—Coca-Cola Co.—fell, led by a 60.8% plunge in AIG.

In Europe, London's FTSE 100 index dropped 3.9%. Several Asian markets, including Japan and China, were closed Monday due to holiday. By Tuesday, Tokyo shares were down 5.1% in early trading, and Hong Kong's Hang Seng index was down 6.1%.

Monday's action was the latest fallout in a widening financial crisis that began a year ago with the fall of American housing prices and is now redefining the U.S. financial system. Steps unveiled by the Federal Reserve to expand its emergency lend-



AIG Faces Cash Crisis As Stock Dives 61%

By MATTHEW KARNITZSCHNO,
LIAM FLEVEN
AND SURENA NG

American International Group Inc. was facing a severe cash crunch last night as ratings agencies cut the firm's credit ratings, forcing the giant insurer to raise \$14.5 billion to cover its obligations.

With AIG now tottering, a crisis that began with falling home prices and went on to engulf Wall Street has reached one of the world's largest insurance companies, threatening to intensify the financial storm and greatly complicate the government's efforts

THE WALL STREET JOURNAL.

DOWN

♦ ♦ ♦ ♦

WEDNESDAY, SEPTEMBER 17, 2008 • VOL. CCLII NO. 66

★★★★ \$2.56

Printed in London

DIA 11099.02 ▲ 341.51 1.3% NASDAQ 2207.90 ▲ 1.1% NIKKEI 11609.72 ▼ 5.0% DJ STOXX 50 2658.77 ▼ 1.1% 10-YR TREAS ▼ 1/32, yield 1.495% OR \$91.15 ▼ \$4.56 GOLD \$776.50 ▼ \$6.60 EURO \$1.4143 YEN 106.92

U.S. to Take Over AIG in \$85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up

Emergency Loan Effectively Gives Government Control of Insurer; Historic Move Would Cap 10 Days That Reshaped U.S. Finance

By MATTHEW KARNITZSCHING,
DEBORAH SOLOMON
AND LIAM PLEVEN

The U.S. government seized control of American International Group Inc.—one of the world's biggest insurers—in an \$85 billion deal that signaled the intensity of its concerns about the danger a collapse could pose to the financial system.

The step marks a dramatic turnaround for the federal government, which had been strongly resisting overtures from AIG for an emergency loan or some intervention that would prevent the insurer from falling into bankruptcy. Just last weekend, the government essentially pulled the plug on Lehman Brothers Holdings Inc., allowing the big investment bank to go under instead of giving it financial support. This time, the government decided AIG would not be able to fail.

Insurance businesses, giving the Fed some protection even if markets continue to sink. And if AIG rebounds, taxpayers could reap a big profit through the government's equity stake.

"This loan will facilitate a process under which AIG will sell certain of its businesses in an orderly manner, with the least possible disruption to the overall economy," the Fed said in a statement.

It puts the government in control of a private insurer—a historic development, particularly considering that AIG isn't directly regulated by the federal government. The Fed took the highly unusual step using legal authority granted in the Federal Reserve Act, which allows it to lend to non-banks under "unusual and exigent" circumstances, something it invoked when Bear Stearns Cos. was rescued in March.

As part of the deal, Treasury Secretary Henry Paulson in-

stance industries, while Wall Street has watched two of its last four big independent brokerage firms exit the scene.

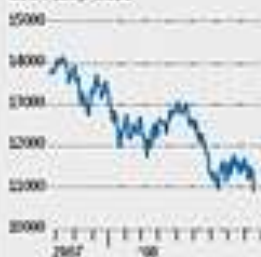
The U.S. on Sept. 8 took over mortgage-lending giants Fannie Mae and Freddie Mac as they teetered near collapse. This Sunday, the U.S. refused to bail out Wall Street pillar Lehman Brothers, which filed for bankruptcy-court protection and is now being sold off in pieces. That same day, another struggling Wall Street titan, Merrill Lynch & Co., agreed to sell itself to Bank of America Corp.

The AIG deal followed a day of high drama in Washington. The Treasury's Mr. Paulson and Federal Reserve Chairman Ben Bernanke convened in the early evening an unexpected meeting of top congressional leaders. Late in the trading day Tuesday, anticipation that the government might assist the insurer helped propel the Dow Jones In-

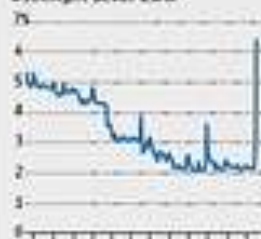
Urgent Mission

Plunging shares, soaring credit costs push the government to step in.

DIA daily close



Overnight dollar L bar



Fed chief Ben Bernanke



Lending Among Banks Freezes

By CAROLAN MULLENKAMP,
MARK WHITEHOUSE
AND NEIL SHAH

Banks abruptly stopped lending to each other or charged exorbitantly high rates Tuesday, threatening to spread the troubles of American International Group Inc. and Lehman Brothers Holdings Inc. to a broad range of financial institutions and the global economy.

The breakdown came despite efforts by central bankers to keep money flowing. Central banks in the U.S., Europe and Japan have injected cash into the financial system.

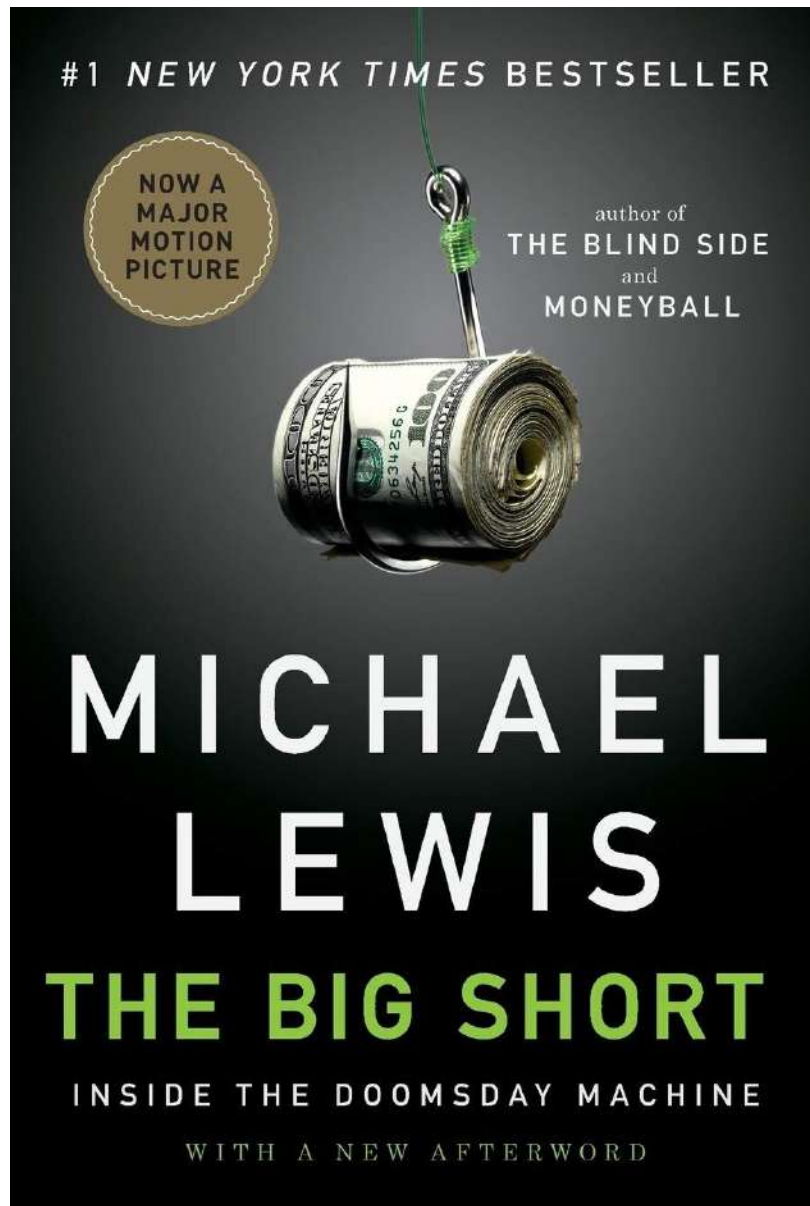




I fell into a rabbit hole of banking,

... the toxic mix of confusion and politics,

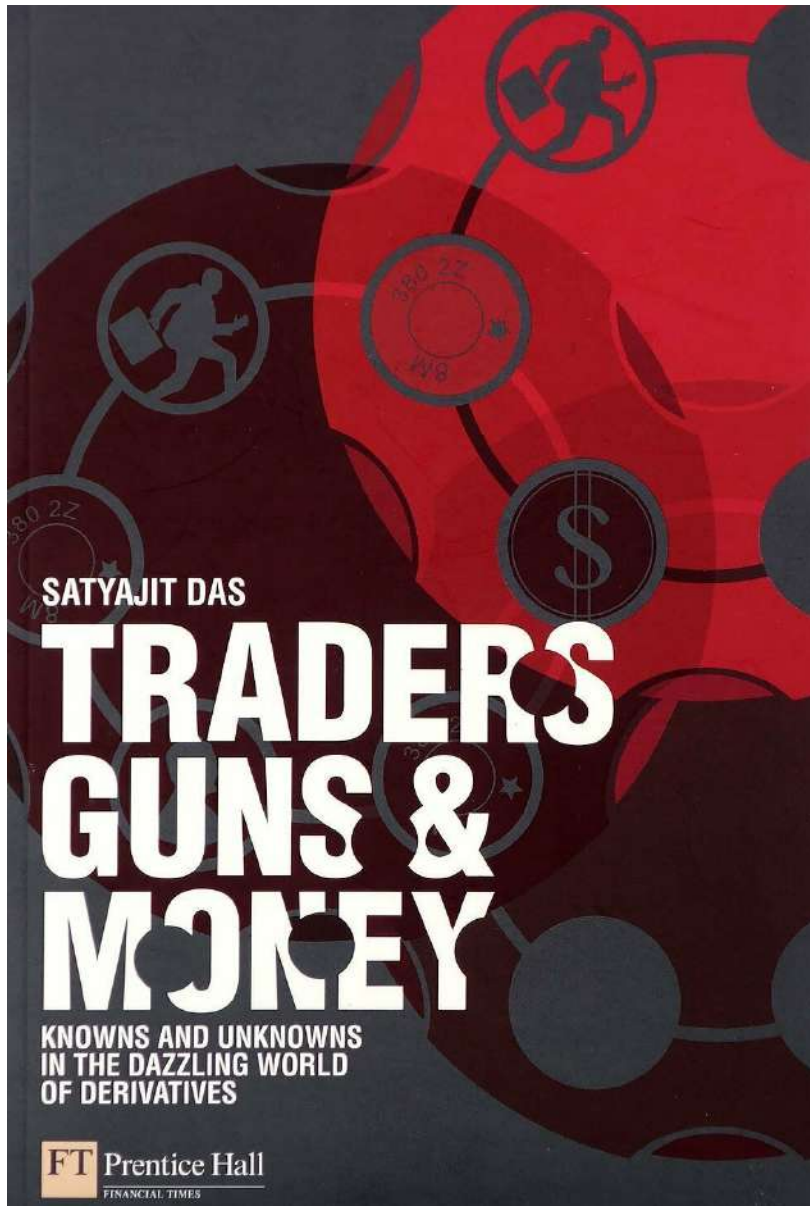
... and other governance problems that are critical for understanding reality



“From the moment in 1981 when John Gutfreund turned Solomon Brothers from a private partnership into Wall Street’s first public corporation, the Wall Street firm became a black box. The shareholders who financed the risk taking had no real understanding of what the risk takers were doing; as risk taking grew ever more complex, their understanding diminished.

The problem wasn’t that Lehman Brothers had been allowed to fail. The problem was that it had been allowed to succeed.”

Epilogue, 2010 (reflecting on *Liar’s Poker*, 1989)

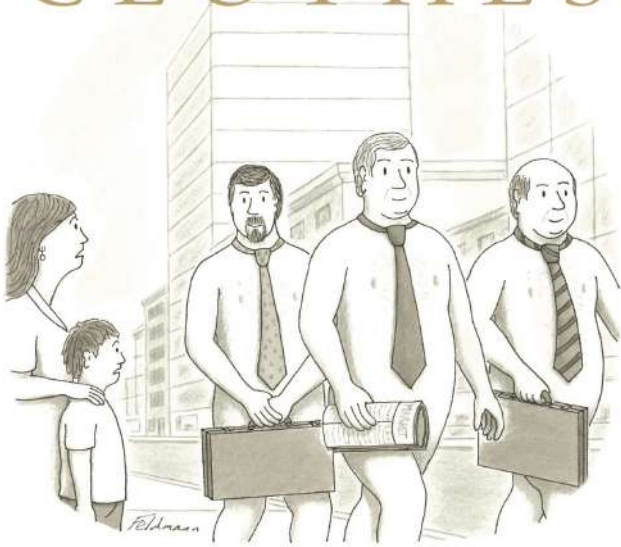


“Traders risk the bank’s capital.... If they win they get a share of the winning. If they lose, then the bank picks up the losses.... the money at risk is... other people’s money.... Traders can always play the systemic risk trump card. It is the ultimate in capitalism --- the privatization of gains, the socialization of losses.....”

“beautiful lies are the lies that we like to believe.... The salespeople lie to clients. Traders lie to sales and to risk managers, risk managers lie to those who run the place – correction, who *think* they run the place. The people who run the place lie to shareholders and regulators... Clients... lie mainly to themselves.”

Satyajit Das, *Traders, Guns and Money*, 2010

THE BANKERS' NEW CLOTHES



What's Wrong with Banking and What to Do about It

— With a new preface by the authors —

ANAT ADMATI &
MARTIN HELLWIG



“...free of technical jargon and widely accessible to all...conveys a deep understanding and stands in opposition to the self-interested forces of obscurity.”

- *Kenneth Arrow*



“...the most important book about banking in a very long time.”

- *Ken Rogoff*



“With a knack for explaining complex concepts in a very straightforward fashion...Their brilliant book has much to offer everyone, from novices to experts.”

- *Stephen Ross*



“... a must-read for concerned citizens... should be studied and memorized by lawmakers and regulators so they won't be duped by false claims in the future.”

- *Eugene Fama*

February 2013

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EIGHT

Paid to Gamble

It is difficult to get a man to understand something, when his salary depends upon his not understanding it!

Upton Sinclair, I, Candidate for Governor: And How I Got Licked (1935)

THIRTEEN

Other People’s Money

I am disappointed because many of these behaviours happened on my watch. It is my responsibility to make sure that it cannot happen again. . . . We did not have appropriate controls in place. Frankly, we misjudged the risk associated. . . . We know that a small minority have let us down. We also know that we need to rebuild bonds of trust with the society we serve.

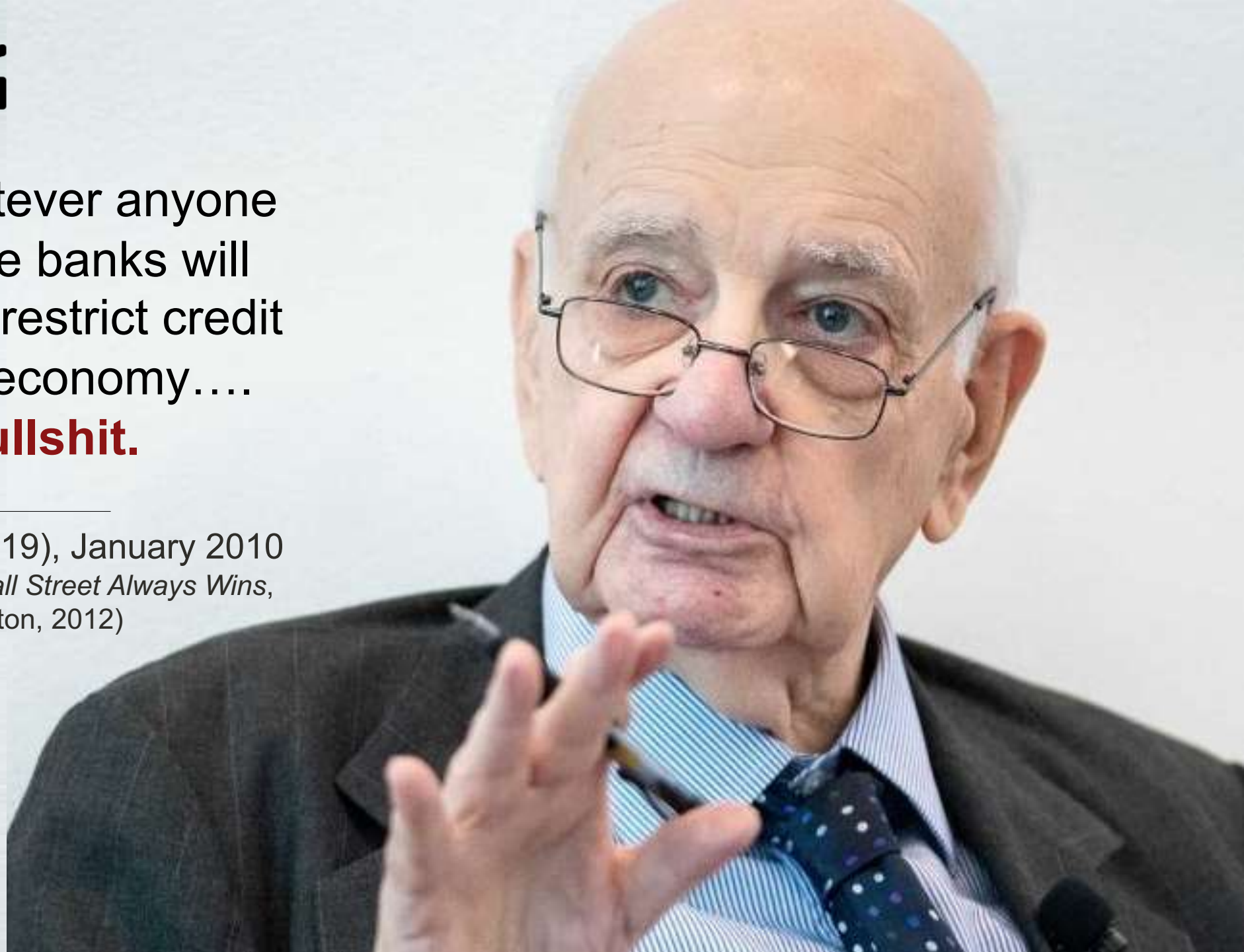
Bob Diamond, Barclays CEO, July 2, 2012

“

Just about whatever anyone
proposes... the banks will
claim that it will restrict credit
and harm the economy....

It's all bullshit.

Paul Volcker (1927-2019), January 2010
(From *The Payoff: Why Wall Street Always Wins*,
Jeff Connaughton, 2012)



“Banks are not special, except for what they are allowed to get away with....
The model is intellectually bankrupt.
The reason that this is not more widely accepted is that bankers are so influential, and the economics are so widely misunderstood.”

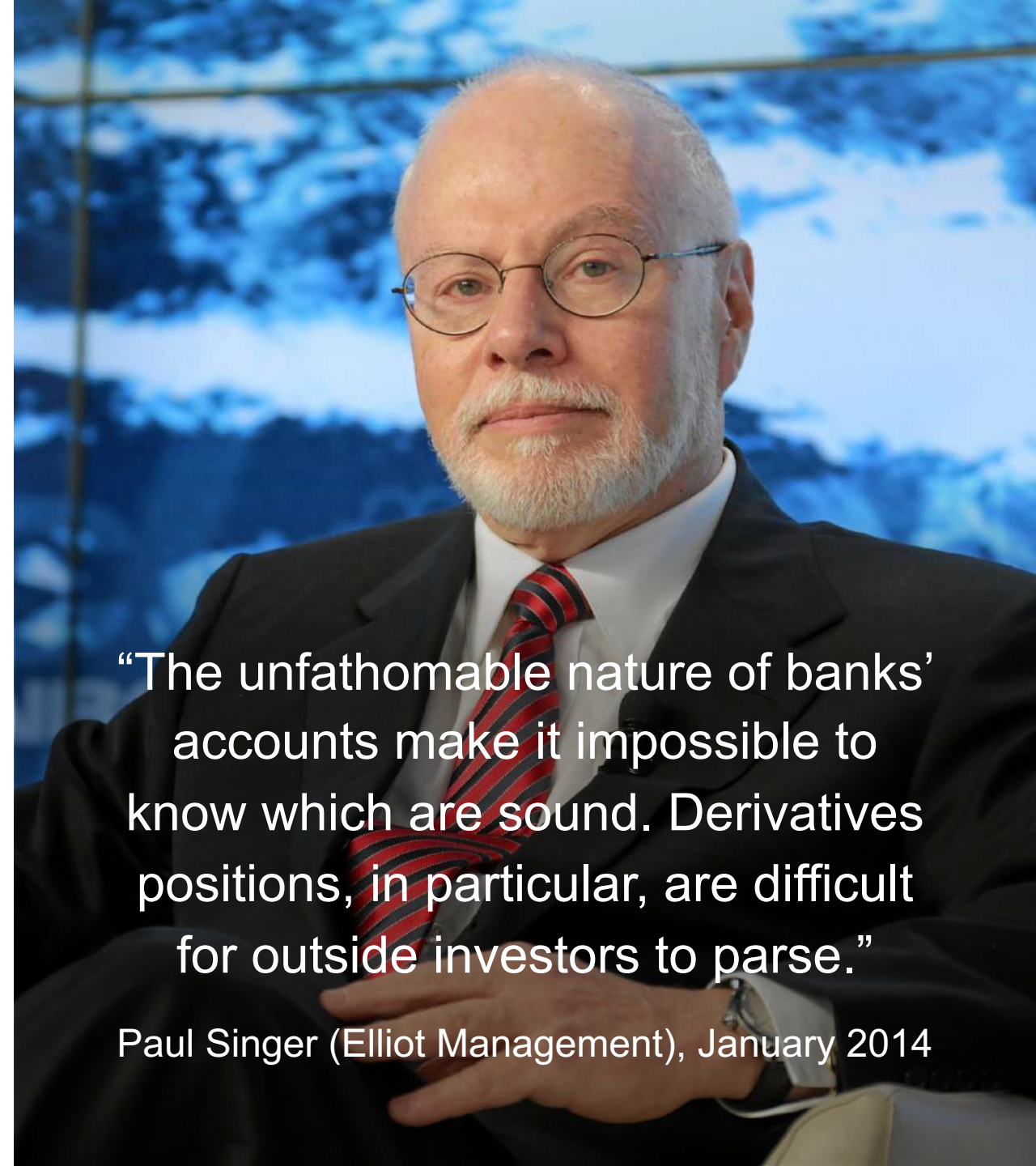
“Why Bankers are Intellectually Naked,” Martin Wolf,
Financial Times, March 17, 2013





“Investors can’t understand the nature and quality of the assets and liabilities... The disclosure obfuscates more than it informs.”

Kevin Warsh, January 2013



“The unfathomable nature of banks’ accounts make it impossible to know which are sound. Derivatives positions, in particular, are difficult for outside investors to parse.”

Paul Singer (Elliot Management), January 2014

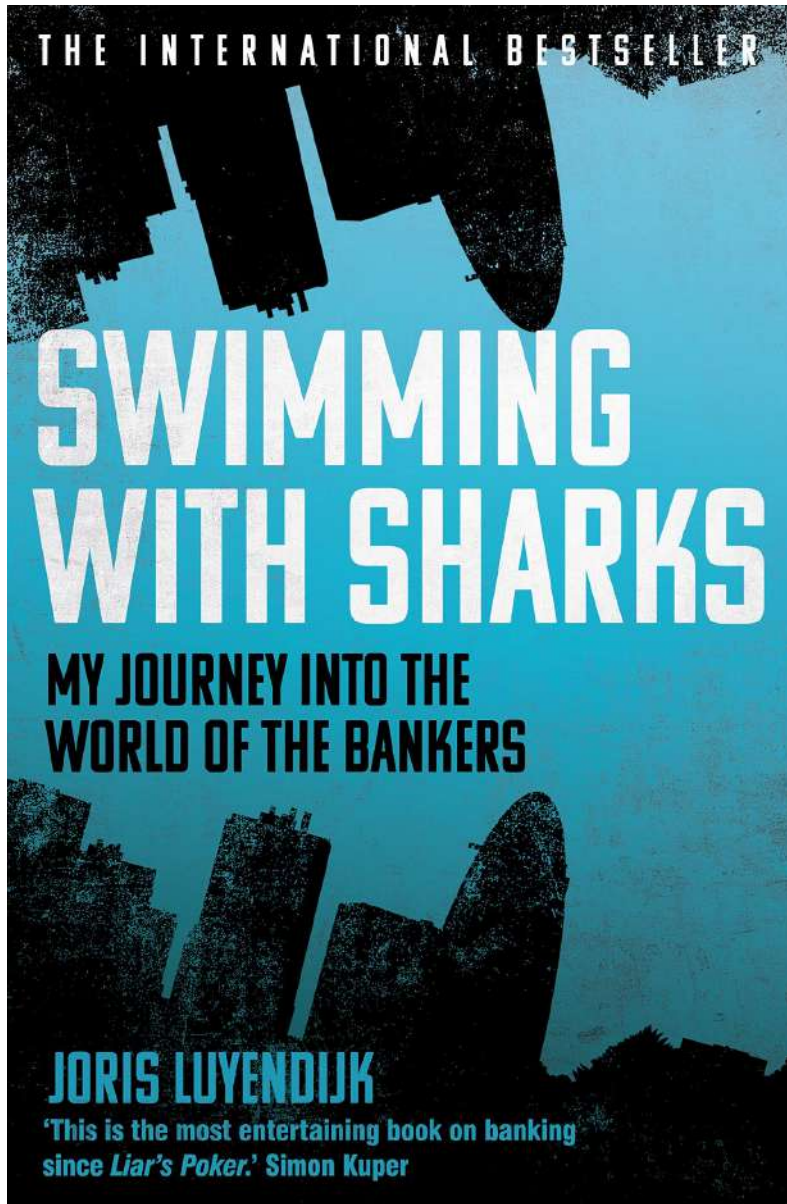


“That's not stupidity, that's fraud.”

“Tell me the difference between stupid and illegal and I'll have my wife's brother arrested”

The 2015 movie (unlike the 2010 book) ends by asking why no banker went to jail

But... much of what is described in “The Big Short” was “lawful”



How the Banks ignored the lessons of the crash

Joris Luyendijk, September 30, 2015

“Seven years after the collapse of Lehman Brothers, it is often said that nothing was learned from the crash. This is too optimistic. The big banks have surely drawn a lesson from the crash and its aftermath: that in the end there is very little they will not get away with.”

A Skeptical View of Financialized Corporate Governance

Anat R Admati

Journal of Economic Perspectives, Summer 2017 (on the modern theory of the firm)

Financialized governance may not actually work well for most shareholders, and even when it does, significant tradeoffs and inefficiencies can arise from the conflict between maximizing financialized measures and society's broader interests.... those who control and benefit most from corporations' success are often able to avoid accountability [when corporations cause harm].

Effective governance **of institutions in the private and public sectors** should make it much more difficult for individuals in these institutions to get away with claiming that harm was out of their control when in reality they had encouraged or enabled harmful misconduct, and ought to have taken action to prevent it.

**WELLS
FARGO**

600

WELLS FARGO TO PAY FINES

Wells Fargo Investigates Itself

A 110 page report by law firm (at great cost) about the account opening scandal

Independent Directors of the Board of Wells Fargo & Company

Sales Practices Investigation Report

April 10, 2017

There was a **disinclination** among the Bank's senior leadership, regardless of the scope of improper behavior or the number of terminated employees, **to see the problem as systemic**. It was common to **blame employees** who violated Wells Fargo's rules **without analyzing what caused or motivated them to do so**.

Banks have paid \$321 billion in fines since the crisis

(but they've made almost \$1 trillion)

CNBC, March 17, **2017**



Sunday Business Section, *New York Times*

Sep. 16, 2018, Ten years after Lehman Brother's bankruptcy)

**Ten findings, 10 years
after Wall Street brought
the economy to the brink.**

**10. The perpetrators of
the pain have not been
brought to justice.** A com-
prehensive list of all the top bank chief
executives who served time behind
bars. PAGE 15

**10. The C.E.O.s
Of Wall Street
Sent to Jail**

Capitalism, laws, and the need for trustworthy institutions

Anat R Admati

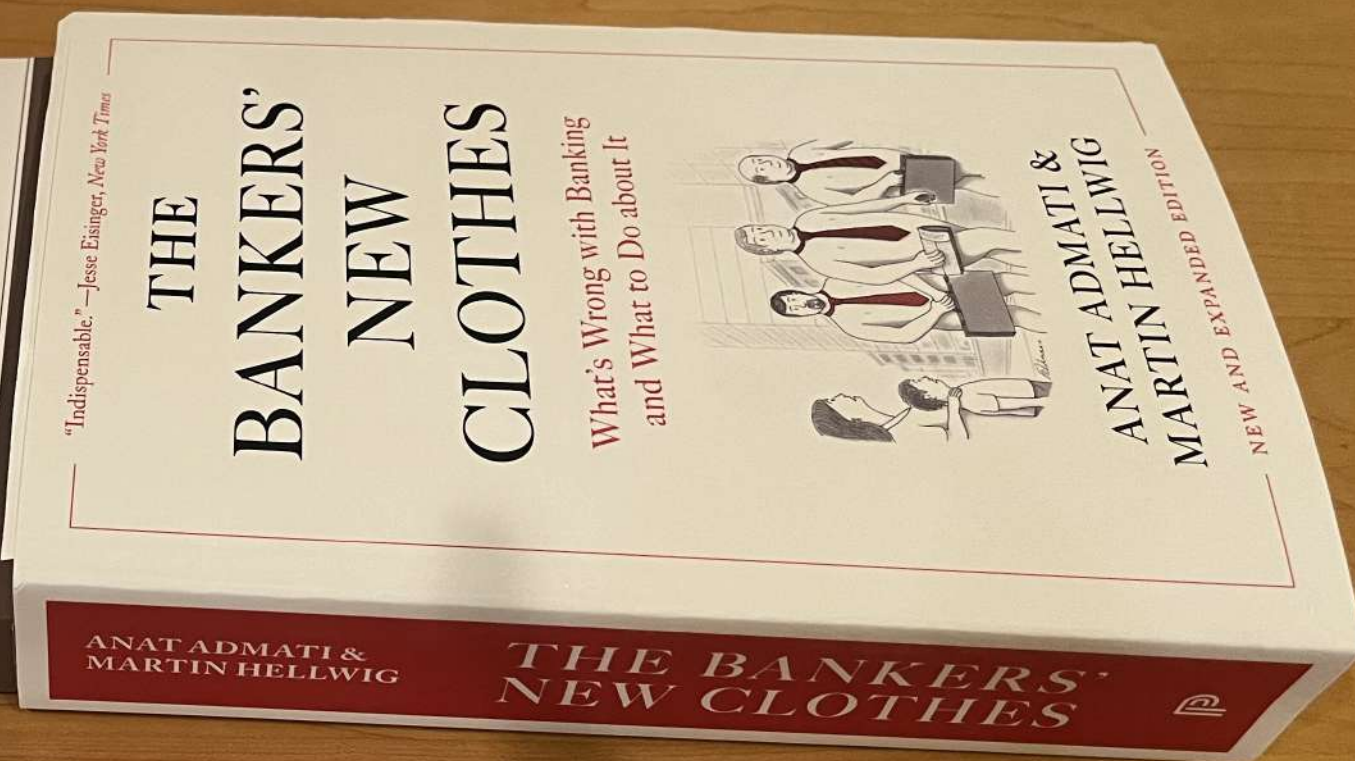
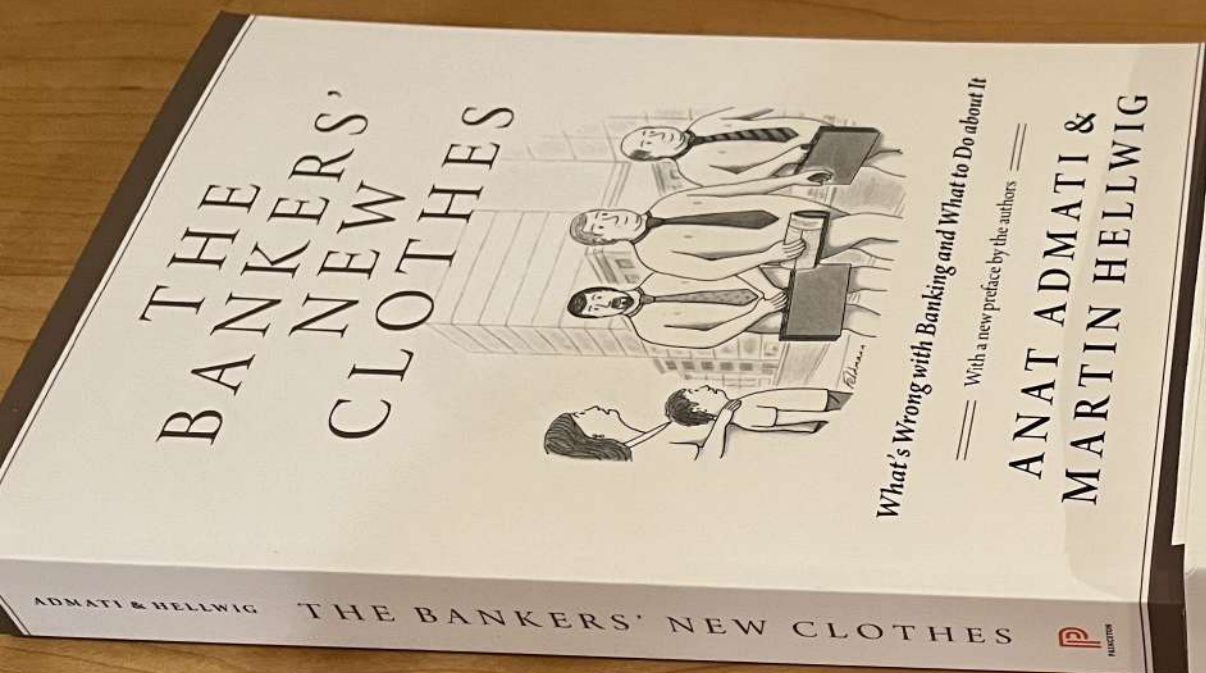
Oxford Review of Economic Policy, November 2021 Volume on Capitalism

(Response to “What has gone wrong with capitalism, what needs to change and how to fix it”)

In recent decades, the forces of ‘free-market capitalism’ have undermined and overwhelmed democratic institutions, leading to intertwined crises in both capitalism and democracy. Deception and the manipulation of beliefs often distort both markets and political systems.

2014 (paperback) vs 2024

200 additional pages



“Indispensable.”—Jesse Eisinger, *New York Times*

THE BANKERS’ NEW CLOTHES

What’s Wrong with Banking
and What to Do about It



ANAT ADMATI &
MARTIN HELLWIG

NEW AND EXPANDED EDITION

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The Parade of Bankers New Clothes Continues...



44 Flawed
Claims
Debunked
(latest version
April 8 2024)



English ▼

Economics



Nonsense and Bad Rules Persist in Banking

Apr 8, 2024 | ANAT R. ADMATI

FOURTEEN

Too Fragile Still

Without reform of the financial system, . . . , another crisis is certain, . . .

*Mervyn King, Former Governor of the Bank of England, The End of Alchemy (2016)*¹

SIXTEEN

Bailouts Forever

[A] globally active systemically important bank cannot simply be wound up according to the “too-big-to-fail” plan.

*Karin Keller-Sutter, Head of the Swiss Finance Department, March 25, 2023*¹

FIFTEEN

Bailouts and Central Banks

It was not quite a Lehman moment. But it got close.

*London Banker, September 2022*¹

SEVENTEEN

Above the Law?

[Power struggles in the economy] are not fought by people who are infinitely progress-minded, but by people who have developed sophisticated and brutal techniques of fighting for power.

*Walter Eucken, German economist (1891–1950)*¹

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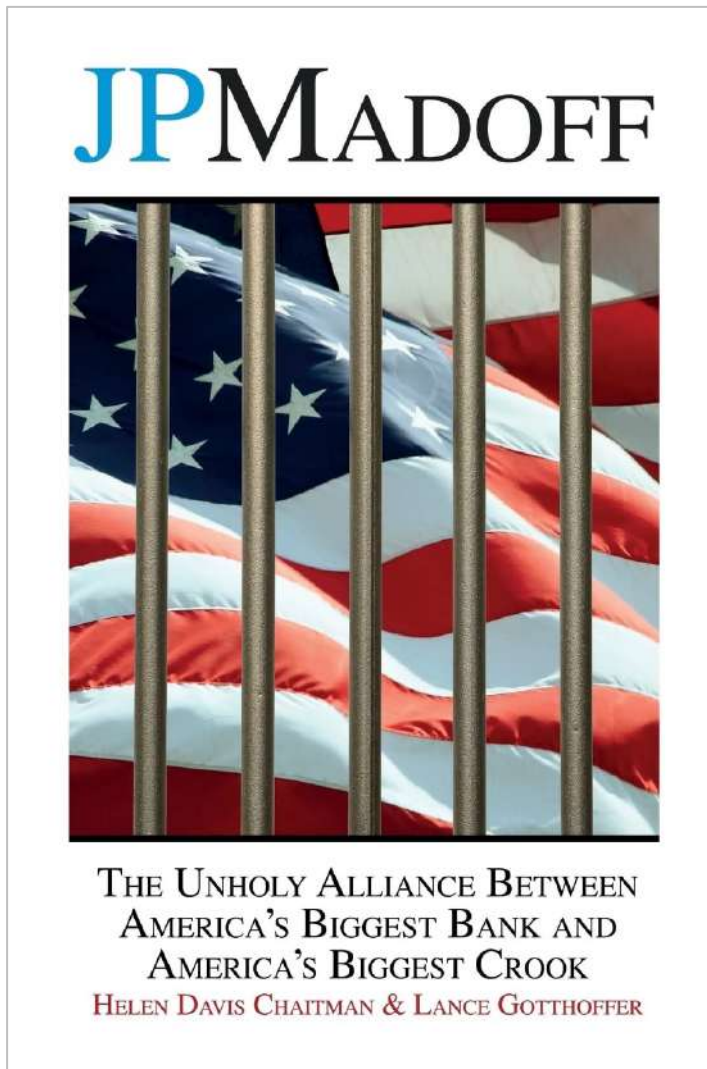
SEVENTEEN

Above the Law?

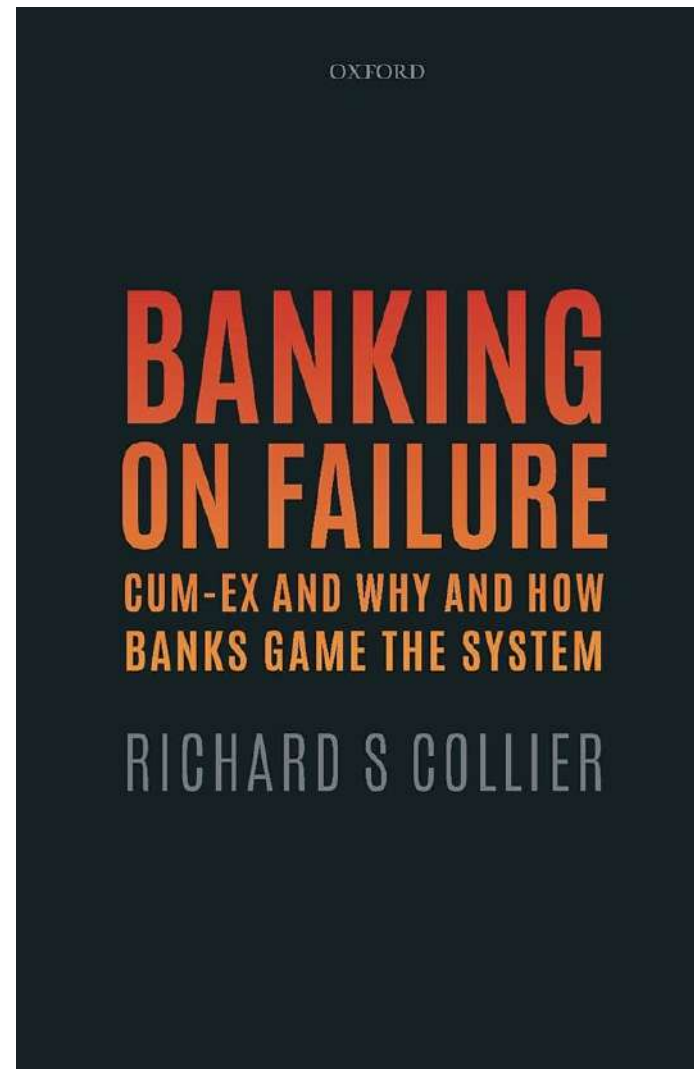
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*Walter Eucken, German economist (1891–1950)*¹

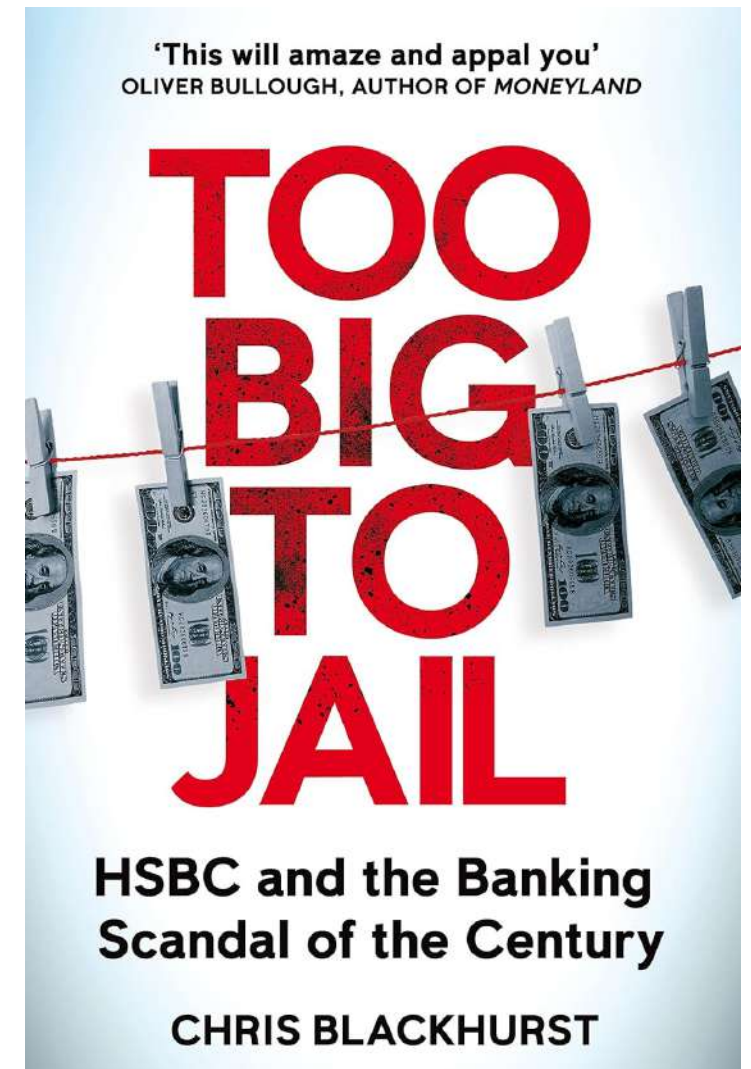
Not cited in our book but relevant...



2016



2020



2023



HSBC IN HONG KONG :

DIRTY DEALINGS

& DRUG MONEY

Details about U.K. Interventions in the Dec. 2012 Settlement Emerge in July 2016.

Osborne intervened in US HSBC money-laundering probe, report says

UK chancellor was worried about effect charges would have on financial system in 2012



JPM Chase Rap Sheet

GOOD
JOBS
FIRST



Violation Tracker Current Parent Company Summary

Current Parent Company Name: JPMorgan Chase

Ownership Structure: publicly traded (ticker symbol NYSE: JPM)

Headquartered in: New York

Major Industry: financial services

Specific Industry: banking & securities

Penalty total since 2000: \$38,995,648,319

Number of records: 267

TOP 5 OFFENSE GROUPS (GROUPS DEFINED)	PENALTY TOTAL	NUMBER OF RECORDS
financial offenses	\$26,626,159,167	115
consumer-protection-related offenses	\$8,619,119,178	63
competition-related offenses	\$2,458,674,791	27
government-contracting-related offenses	\$614,000,000	1
employment-related offenses	\$522,408,672	46

JPMorgan Chase Will Pay \$13 Billion In Record Settlement

November 19, 2013 · 3:03 PM ET

By [Bill Chappell](#)



From “Statement of Facts”

(Part of the settlement)

“Prior to JPMorgan purchasing the loans, a **JPMorgan employee** who was involved in this particular loan pool acquisition told an Executive Director in charge of the due diligence and a Managing Director in trading that due to their poor quality, the loans should not be purchased and should be not be securitized. After the purchase the loan pools, **she submitted a letter** memorializing her concerns **to another Managing Director, which was distributed to other Managing Directors**. JPMorgan nonetheless securitized many of the loans. None of this was disclosed to investors.”

Ex-JPMorgan lawyer tells tale of wrongdoing

Kevin McCoy USA TODAY

Published 7:02 a.m. ET Nov. 8 2014 | Updated 4:43 p.m. ET Nov. 8, 2014

Judging by the settlement's mammoth size, the case against JPMorgan had been strong.

But neither the bank nor any of its executives faced criminal charges. That dismayed Alayne Fleischmann, a securities lawyer nearing the end of her 30s. She said she gave prosecutors detailed evidence against several JPMorgan executives, including two former bosses who'd pushed approvals of mortgage loans that were expected to be packaged into multimillion-dollar securities and sold to investors.

Fleischmann said she had been scheduled to meet with other prosecutors separately weighing potential criminal charges against the bank last December, the month after record settlement was announced. The meeting never took place, she said.



Fleischmann spoke publicly in late 2014 because the statute of limitation was approaching

A cluster of Euro banknotes, including 100, 50, and 20 Euro notes, is shown falling from the top of the frame. The notes are in various orientations, creating a sense of motion.

CUMEX FILES

A CROSS-BORDER INVESTIGATION

New York Times, January 20, 2020

It May Be the Biggest Tax Heist Ever. And Europe Wants Justice.

Stock traders are accused of siphoning \$60 billion from state coffers, in a scheme that one called “the devil’s machine.” Germany is the first country to try to get its money back.



The scheme was built around “cum-ex trading” (from the Latin for “with-without”): a monetary maneuver to avoid double taxation of investment profits that plays out like high finance’s answer to a David Copperfield stage illusion. Through careful timing, and the coordination of a dozen different transactions, cum-ex trades produced two refunds for dividend tax paid on one basket of stocks.

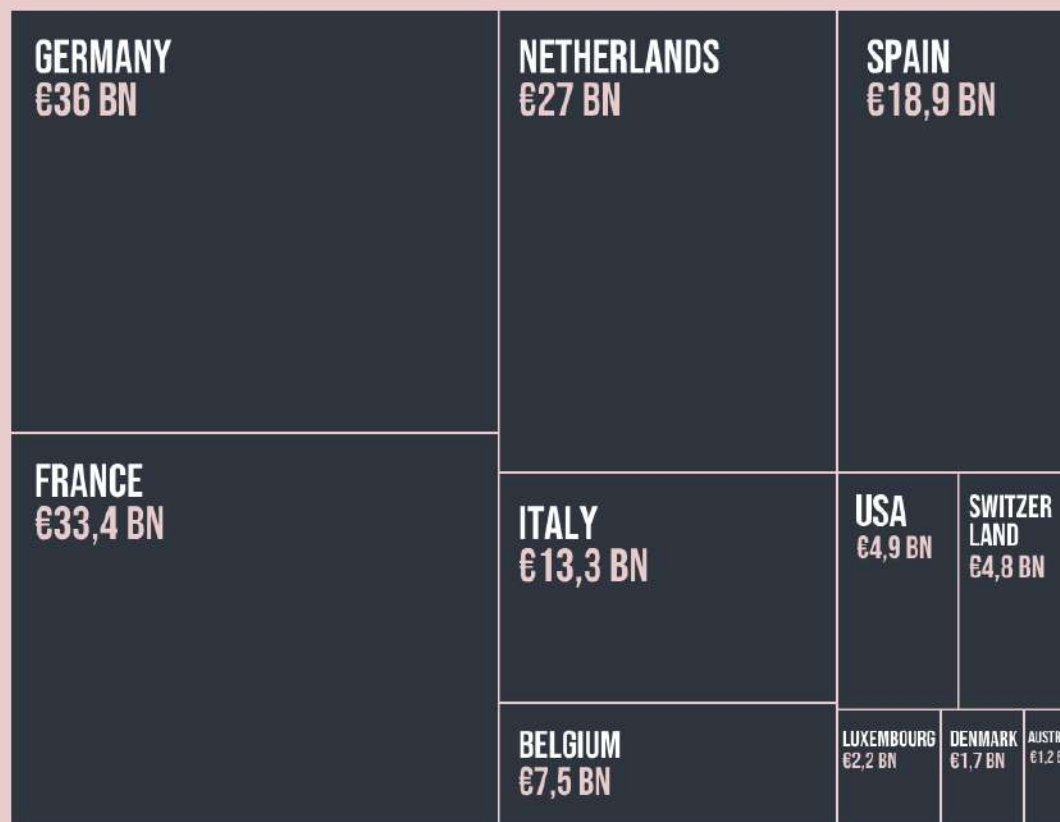
The process was repeated over and over, as word of cum-ex spread like a quiet contagion.

As one participant would later put it, taxpayer funds were an irresistible mark for a simple reason: They never ran out.

CUM-EX FRAUD

€150 BILLION

€150 billion have been stolen worldwide. This money is missing from countries' budgets for environmental protection, education, transport transformation or digitization. **Click on the graphic** to see what they could have done with the money.



German tax fraud prosecutor resigns in unexpected move

Anne Brorhilker, who led investigation into 'cum-ex' scandal, accuses judiciary of being too lenient on white-collar crime



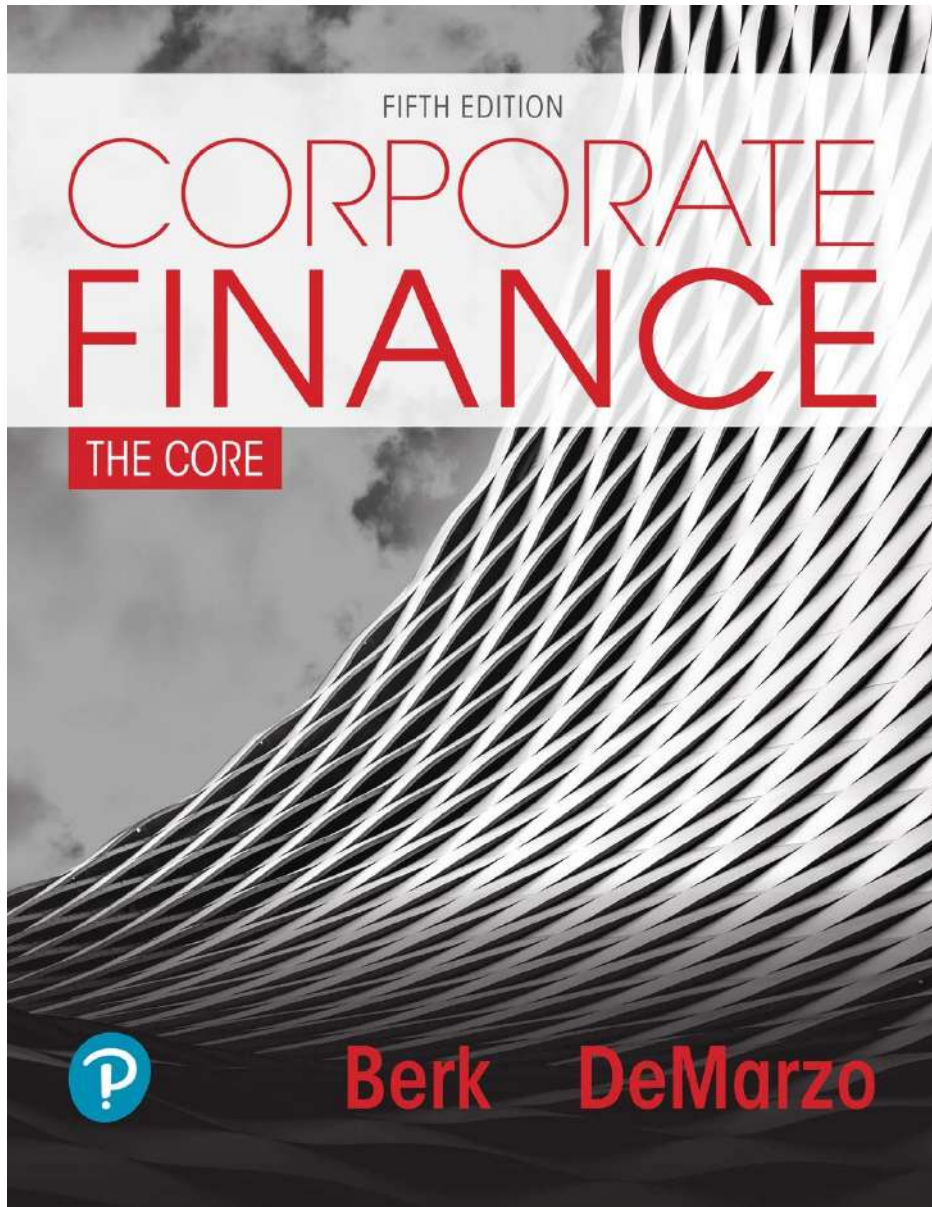
Anne Brorhilker, right, has become known for her hard-nosed investigative approach as she refused to settle cases out of court © Marius Becker/DPA/AFP/Getty Images

Olaf Storbeck in Frankfurt APRIL 22 2024



RE-EXAMINING STANDARD FOCUS AND ASSUMPTIONS..

... about corporate finance, corporate governance,
and corporate law



In theory, the goal of the firm should be determined by **the firm's owners**....
Shareholders agree they are better off if managers maximize the value of their shares.

– Corporate Finance Textbook

Standard View of Corporate Governance

Corporations “owned” by shareholders



Main challenge:

Align managers with shareholders

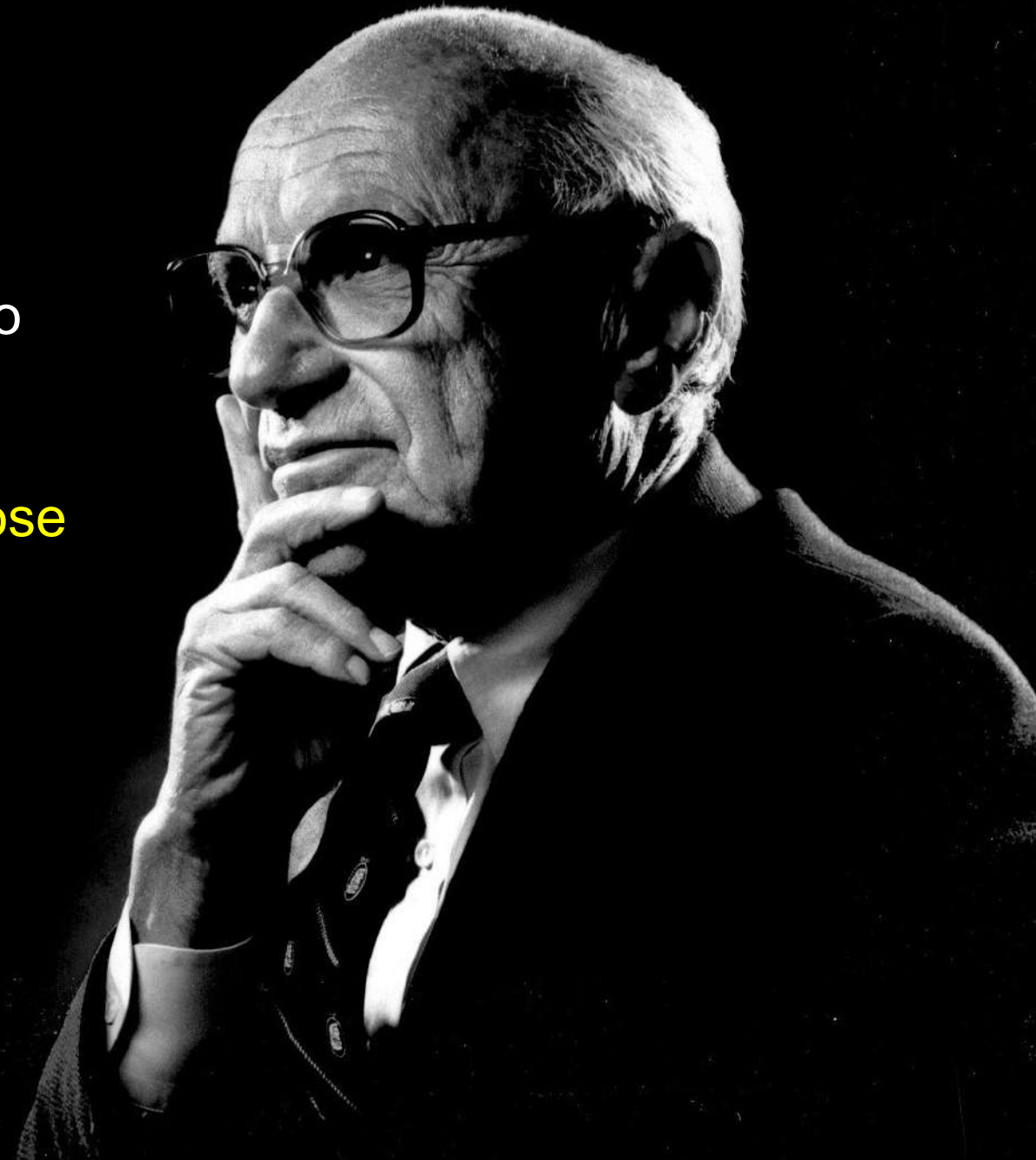
Financialized compensation

- Accounting profits
- Stock value
- Return on Equity

“The social responsibility of managers is to
make as much money as possible
while conforming to the basic rules of the
society, both those embodied in law and those
embodied in ethical custom.”

“The Social Responsibility of Business is to
Increase its Profits”

Milton Friedman, *New York Times*, September 13, 1970





*"Yes, the planet got destroyed. But for a beautiful moment
in time we created a lot of value for shareholders."*

New York Times Magazine, July 6, 2022

How One Restaurateur Transformed America's Energy Industry

Charif Souki's longshot bet on liquid natural gas, or L.N.G., paid off handsomely — and turned the United States into a leading fossil-fuel exporter.



“As a company, I couldn’t care less about the climate. Of course I care, OK? **But my responsibility is not to care about the climate.**”

“[When we transition from fossil fuel], I’ll be dead, so it won’t matter.”

Lawful (but Awful) Conduct



How Chemical Companies Avoid Paying for Pollution

DuPont factories pumped dangerous substances into the environment. The company and its offspring have gone to great lengths to dodge responsibility.

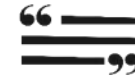
They have used public charm offensives to persuade regulators and lawmakers to back off... engineered complex corporate transactions to shield themselves from legal liability... and rolled out a conveyor belt of scantily tested substitute chemicals that can turn out to be just as dangerous as their predecessors.

“You don’t have to live near Chemours or DuPont or 3M to have exposure to these things.”



Business Round Table Statement on the Purpose of the Corporation

Aug. 2019, Signed by 181 CEOs of Large US Corporations,



We commit to:

- Delivering value to our **customers....**
- Investing in our **employees...**
- Dealing fairly and ethically with our **suppliers.**
- Supporting the **communities** in which we work.
- Generating long-term value for **shareholders**

**... for the future success of our companies, our
communities and our country.**



Davos Manifesto 2020

The Universal Purpose of a Company in the Fourth Industrial Revolution

The background of the slide is a photograph of a snowy mountain town, likely Davos, with snow-covered buildings and steep, forested mountains in the background. A large teal circle is overlaid on the left side of the image, containing the text.

“The purpose of a company is to engage all its stakeholders in shared and sustained value creation.”

Blackrock's former sustainable investing chief now thinks ESG is a **'dangerous placebo'**

AUG 24 2021

Blackrock's tells oil regulator: ignore our CEO's climate pledges

MARCH 9 2022

BlackRock joins several major banks – including Barclays, Citigroup and Wells Fargo – that have quietly downplayed their environmental commitments so they can keep doing business with deep-pocketed US states.

Corporations: Some History



17th -18th centuries

Dutch East India (VOC) (inc. 1602), English East India, French Mississippi Company



End of 19th century US

Infrastructure projects in US,
**Corporations highly
constrained by corporate law**



Privilege is now “free”
for any **lawful** purpose;
few constraints on
managers and boards

How Delaware Thrives as a Corporate Tax Haven

By LESLIE WAYNE JUNE 30, 2012



132



Corporations: Key Features and Questions

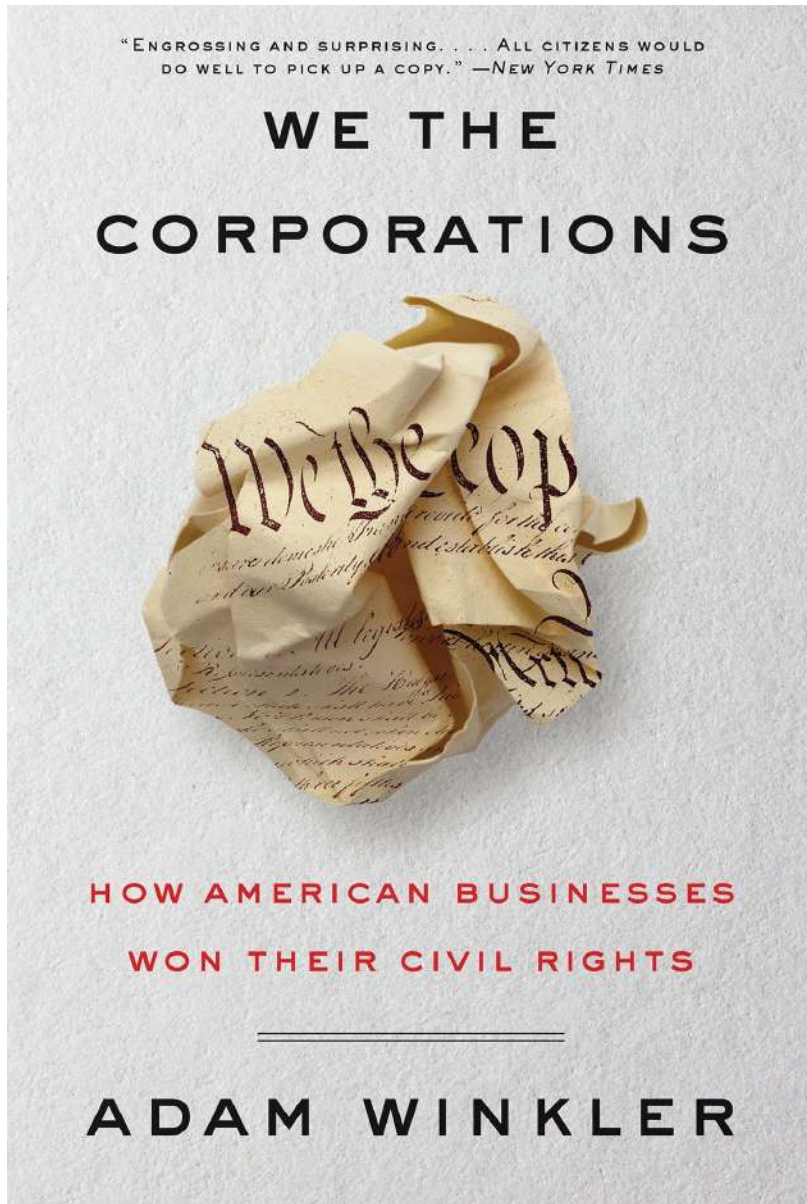
Corporations are
abstract legal persons,
separate from all
stakeholders

**NOT a nexus of
contracts; not assets
owned by shareholders**

A“concession” from the
government

**Corporations’ existence
and rights are derived
from (and protected by)
governments and legal
systems**

- + *Property rights*
- + *Locked shareholder funds*
- + *Limited liability*
- + *Political speech rights (?)*
- + *Religious rights (?)*



“... the corporate rights movement has remained largely unnoticed by the public at large...

... long before those controversial decisions [Citizens United and Hobby Lobby], corporations had taken their place among We the People.”



New FinCEN head appointed as concerns grow over stalled US company registry

The incoming director of the federal financial crimes unit faces an uphill battle to deliver reforms to thwart illicit money flows amid warnings the agency's corporate ownership database is not fit for purpose.

By **Brenda Medina**

Image: Jeenah Moon/Bloomberg via Getty Images

July 20, 2023

Corporations: Key Features and Questions

Corporations are **abstract legal persons**, separate from all stakeholders

NOT a nexus of contracts; not assets owned by shareholders

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- + *Locked shareholder funds*
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- + *Political speech rights (?)*
- + *Religious rights (?)*

Corporations have many rights and freedoms.

Who is, or should be, liable -- and how -- when corporations cause harm or break laws?

Laws Relevant for Corporate Governance (1)

Enabling corporations

- Corporate law (right to exist, internal governance rules)
- Securities law (including privacy/disclosure)
- Constitutional law (eligibility for constitutional rights)



Enabling Markets

- Property
- Contract
- Bankruptcy
- Antitrust
- Torts
- Tax

Laws Relevant for Corporate Governance (2)

Protecting Stakeholders/Society

- Labor
- Environmental
- Consumer protection
- Civil rights and anti-discrimination
- Anti-bribery
- Anti-money laundering
- Human rights
- Free speech
- Election and campaign finance



Dealing with Specific Sectors

- Banking
- Financial markets
- Utilities
- Defense
- Food, Drug and Cosmetics
- Aviation
- Mining
- Housing
- Media

Corporations Interact with Many Governments and Legal Systems. Who has Power?



ENFORCEMENT AND ADJUDICATION IS KEY

All rules, from contracts to constitutions,
require enforcement and adjudication





The UN Universal Declaration of Human Rights (1948); 30 Articles

Human rights are rights inherent to all human beings... Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more.



The Harkin-Engel Protocol, Signed 2001



A **voluntary public-private agreement to eliminate the worst forms of child labor** (defined according to the International Labor Organization (ILO)'s Convention 182, 1999) in the growth and processing of cocoa in Côte d'Ivoire and Ghana.

Signed by the 8 largest companies, two US Senators, one US congressman, the Ambassador to the Ivory Coast, and a few NGO and industry alliance representatives.

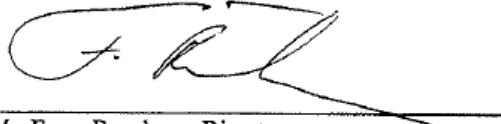
The World Cocoa Foundation and the Chocolate Manufacturers Association **committed to develop and implement standards by July 2005**.

Attachment includes **16 articles**.

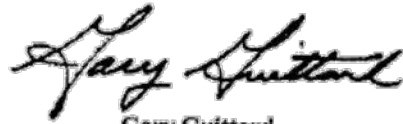
The Harkin-Engel Protocol, Signed 2001



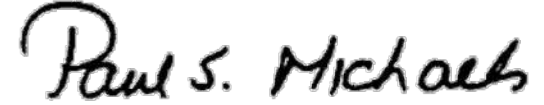
Senator Tom Harkin
US Senate – Iowa



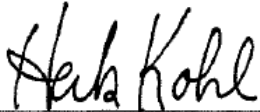
Mr. Frans Roselaers, Director
International Programme on the Elimination of Child Labour
(IPEC)
International Labor Organization



Gary Guittard
President
Guittard Chocolate Company



Paul Michaels
President
M&M / Mars, Inc.



Senator Herbert Kohl
US Senate – Wisconsin



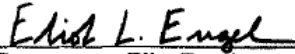
Ms. Linda Golodner
President
National Consumers League



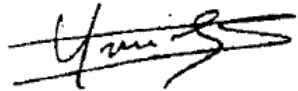
Edmond Opler, Jr.
President
World's Finest Chocolate, Inc.



G. Allen Andreas
Chairman and Chief Executive
Archer Daniels Midland Company



Congressman Eliot Engel
US Congress – New York



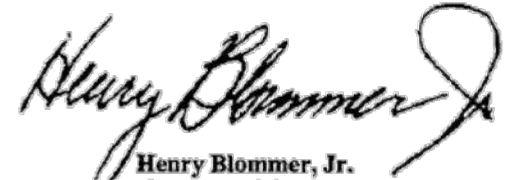
Ambassador Youssoufou Bamba
Embassy of the Ivory Coast



Chocolate Manufacturers Association



Bradley Alford
President
Nestle Chocolate & Confections USA



Henry Blommer, Jr.
Chairman of the Board
Blommer Chocolate Company



Richard H. Lenny
President and CEO
Hershey Food Corporation



Andreas Schmid
Chairman & CEO
Barry Callebaut AG

We personally support the protocol entered into by industry *Protocol for the Growing and Processing of Cocoa Beans and their Derivative products In a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* and look forward to its successful execution which we support wholeheartedly.

The Dark Side of Chocolate

A 2010 documentary



Cocoa's child laborers

Mars, Nestlé and Hershey pledged nearly two decades ago to stop using cocoa harvested by children. Yet much of the chocolate you buy still starts with child labor.



By **Peter Whoriskey** and **Rachel Siegel** Photos by **Salwan Georges** June 5, 2019

Nestle (and Cargill) vs Doe et al.

US Supreme Court ruled in 2021 (in a case filed first in 2005) that the companies are not liable to former enslaved children under the Alien Torts Act because the contact was “extra-territorial.”



The Supreme Court and the Pro Business Paradox

Elizabeth Pollman (Penn),
Harvard Law Review, 2021

With rising globalization, technological development, and complexity in business organizations, the divergence grows between the Court's characterizations or abstractions and the realities of corporations...

the Court uses ill-fitting conceptions or overbroad generalizations to empower corporations and limit their accountability.. it might not be what many shareholders and corporate participants actually want.



Unpacking Friedman's Dictum (and Standard Practices)



Friedman's claim would be valid if...

Shareholders agree that managers should focus on “making as much money as possible”

Markets are “free and competitive”

Managers don't deceive and defraud

Markets, contracts, and the “rules of society” protect everyone impacted by managerial decisions

- Shareholders
- Employees
- Customers
- Creditors
- The public

But what if instead...

Shareholders have limited impact on managerial decisions?

Governments fail to write and enforce proper rules to ensure competition and protect stakeholders?

Corporations impact the writing and enforcement of laws?

Corporations and their leaders cause harm with minimal consequences for managers?

“Making as much money as possible” involves distorting or violating the “rules of society?”

Corporate Governance

External Governance

- How to align the corporations / managers with society
- Optimal enforcement literature in law and economics
- Largely ignored in the corporate governance literature that focuses on...

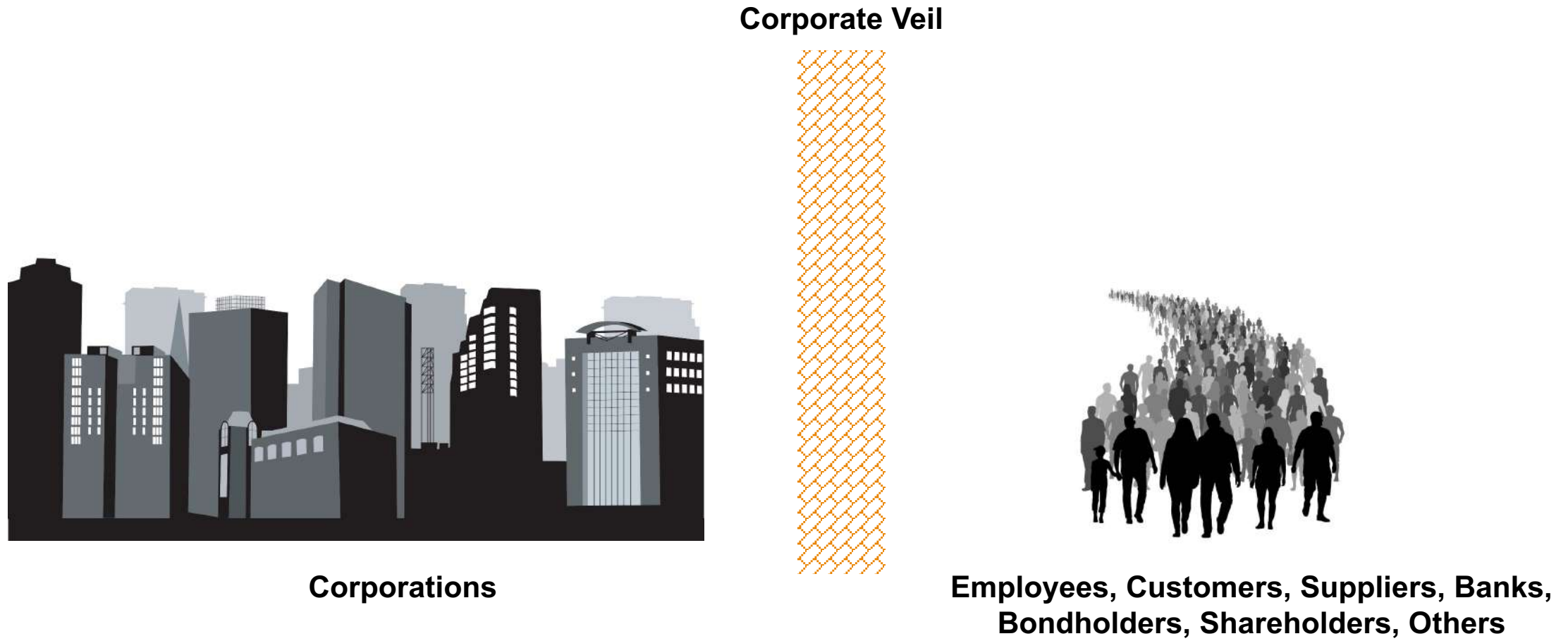


Internal Governance

- How to align the manager with the shareholders
- Separation of ownership and control
- Directors, executives, and shareholder rights and duties
- Securities laws and disclosure rules aimed at shareholders

The True Corporate Governance Challenge


Can society create and enforce appropriate rules for corporate persons and impose proper liability and accountability when corporations cause harm?



Do Profits Come from “Innovation,” “Regulatory Arbitrage” or Misconduct?



*“These new rules will fundamentally change the way
we get around them”*

A black and white portrait of Clarence Darrow, an older man with a serious expression, wearing a dark suit, white shirt, and tie. He is standing in front of a textured wall.

“A criminal is a person with predatory instincts but without sufficient capital to form a corporation.”

Clarence Darrow (lawyer, 1857-1938)

[Many today **can** form corporations, ostensibly for “productive” activities, raise funding through financial intermediaries, and then cause harm on a large scale with minimal if any consequences.]

SEVENTEEN

Above the Law?

[Power struggles in the economy] are not fought by people who are infinitely progress-minded, but by people who have developed sophisticated and brutal techniques of fighting for power.

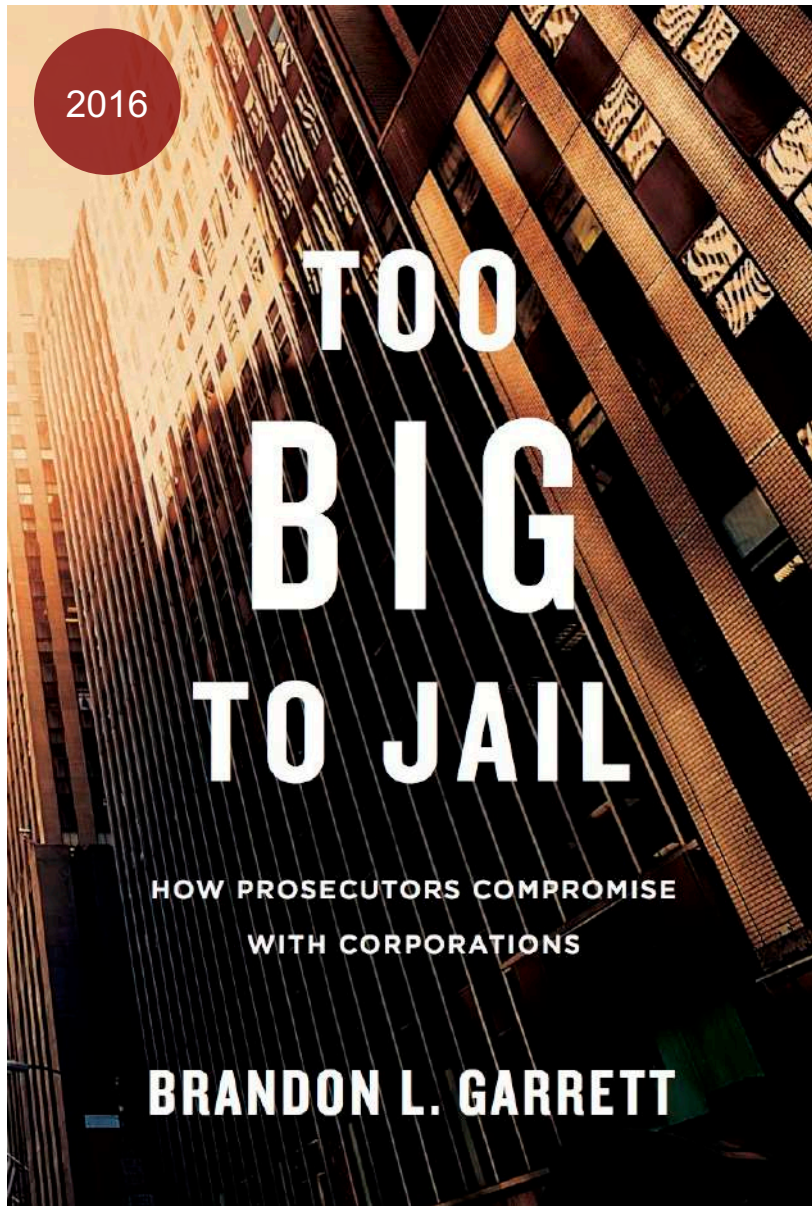
*Walter Eucken, German economist (1891–1950)*¹

The View from a Robber Baron (1794-1877)



Law! What do I care about the law? Ain't I got the power?

~ Cornelius Vanderbilt



American courts routinely hand down harsh sentences to individual convicts, but a very different standard of justice applies to corporations. Expansive statutes allow an entire firm to be held liable for a crime by a single employee.

When prosecutors target the Goliaths of the corporate world, they find themselves at a huge disadvantage [and] negotiates settlements permitting giant firms to avoid the consequences of criminal convictions.

While companies must cooperate in the investigations, high-level employees tend to get off scot-free.

The
CHICKENSHIT
CLUB



WHY *the* JUSTICE DEPARTMENT
FAILS *to* PROSECUTE
EXECUTIVES

JESSE EISINGER

Winner of
THE PULITZER PRIZE

2017

**Diagnoses, consistent
with *TBTJ***

Corporate enforcement
works poorly and does
not deter wrongdoing.

The Department of
Justice seems unable or
unwilling to prosecute
executives

JOHN C. COFFEE, JR.

**CORPORATE
CRIME
AND** The Crisis of
Underenforcement **PUNISHMENT**



2020

WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE

**AND OTHER PARADOXES OF
OUR BROKEN LEGAL SYSTEM**



JED S. RAKOFF

“In the US we imprison thousands of poor Black men for relatively modest crimes but almost never prosecute rich, white, high-level executives who commit crimes having far greater impact.”

The system too frequently convicts innocent people—often on the basis of dubious forensic science and shaky eyewitness testimony—and sometimes even coerces them into pleading guilty to crimes they never committed.

In stark contrast, business executives appear increasingly exempt from criminal prosecution, even when they commit very serious frauds.”

Judge Rakoff (Southern District of NY), February, 2021

Which Corporate Victims Receive “Justice in the Law?”

(Ongoing research (currently on hold) with Greg Buchak, Stanford GSB)



How do the outcomes of corporate harms in the U.S. (who, if any, is held accountable and how) depend on type of victim (customer, employees, government, shareholders, public), type of harm (physical, financial) or type and enforcement mechanisms of law (right to private action, agency, etc.)?

Preliminary results: shareholders (and the government) get more legal protection than other corporate victims

Consistent with “strong managers, weak owners, weaker yet others.”

Challenge to “corporate purpose” debate: If the laws provided proper protections, would we need ESG targets?



Barclay's acquittals leave Serious Fraud Office (SFO) facing the questions

Verdicts raise doubts on ability to prosecute corporate crime.

Jane Croft and Carolina Binham, *Financial Times*, February 28, 2020

Barclays: the legal fight over a company's 'controlling mind'

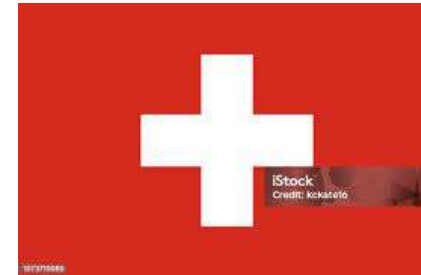
The investigation into the bank's actions has renewed calls for reform of laws over white-collar crime.

Caroline Binham and Jane Croft, *Financial Times*, March 8, 2020

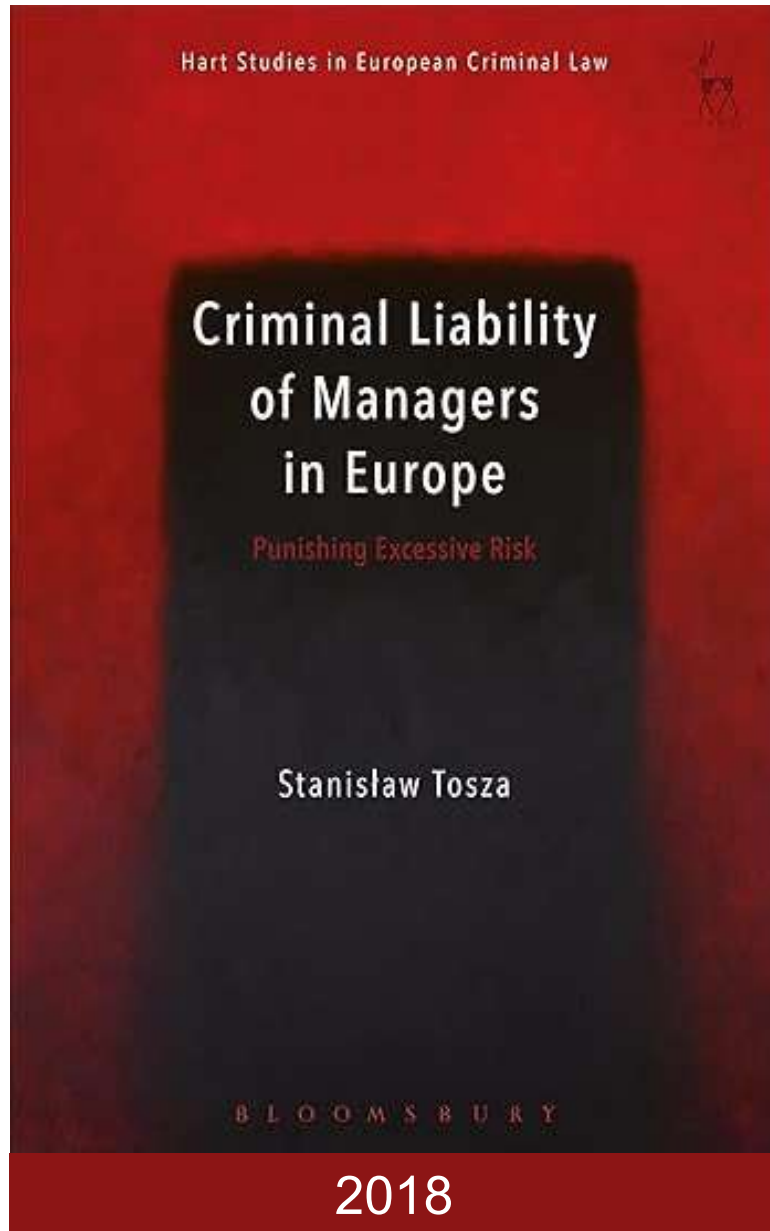
UK companies can only be charged under fraud laws if prosecutors can show that a senior executive was a "directing will and mind" behind an unlawful scheme.



In Germany, corporations cannot be held criminally liable. They can only be fined up to €10 million for misconduct or deficiencies of the compliance function. In practice, cases in which companies have been sanctioned are rare.



In Switzerland, the maximal penalty for money laundering is CHF 5 million.



The objective of this book is to examine existing criminalization of excessive risk-taking as well as to analyze whether such criminalization is desirable and if yes, under which conditions.

[Note: even if criminalization is possible and desirable, there is significant discretion to prosecutors whether to charge anyone.]

COMPLIANCE WEEK

FOR THE WELL-INFORMED CHIEF COMPLIANCE OFFICER AND AUDIT EXECUTIVE

REGULATORY POLICY

Europe handcuffed by current corporate liability laws; is change coming?

By  Neil Hodge | Thu, Feb 4, 2021 9:21 AM



(Feb. 4, 2021) European countries have begun to question whether their laws around corporate liability need to be reformed. However, change may not be as rapid as first thought.

IGNORING EXTERNAL CORPORATE GOVERNANCE IS INAPPROPRIATE

Corporate misconduct is pervasive; it goes beyond “stuff happens” in an otherwise “good” system.

Realistic frictions weaken external governance lead to important interactions with internal governance



There is no theoretical reason or empirical evidence to support the notion that all growth in the financial sector over the last 40 years has been beneficial to society.

Many financial activities tend to have a private return that is much higher than the (perceived) social return. The same is true for lawyers, especially litigation lawyers.

“Does Finance Benefit Society?” Luigi Zingales,
American Finance Association
Presidential Address, 2014

(6.5-page list of fines by financial firms 2012-14)

“

With such friends [as academics],
who needs lobbyists?

Risk manager in a major systemic institution, 2016

”



“

A key element of Sarbanes-Oxley was to create structures of accountability for professionals—executives, accountants and auditors, and **accountability for lawyers**. Congress was concerned that counsel often acted in the interests of the executives who hired them rather than the company and its shareholders to whom their duty and responsibility is owed.

Unfortunately, the SEC adopted only one standard: the so-called “up-the-ladder” rule, requiring lawyers to report certain potential violations up the chain of management inside a corporate client, **and even this single standard has not been enforced in the nearly 20 years since it was adopted.**

“Send Lawyers, Guns and Money: (Over)-Zealous Representation by Corporate Lawyers,”
SEC Commissioner Allison Herren Lee, Practicing Lawyers Institute, March 4, 2022

inauguration speech

Why “Good” Corporate Governance is Not Always Good

(Posted soon)

Anat R. Admati

Stanford GSB

Nathan Atkinson

Wisconsin Law School

Paul Pfleiderer

Stanford GSB

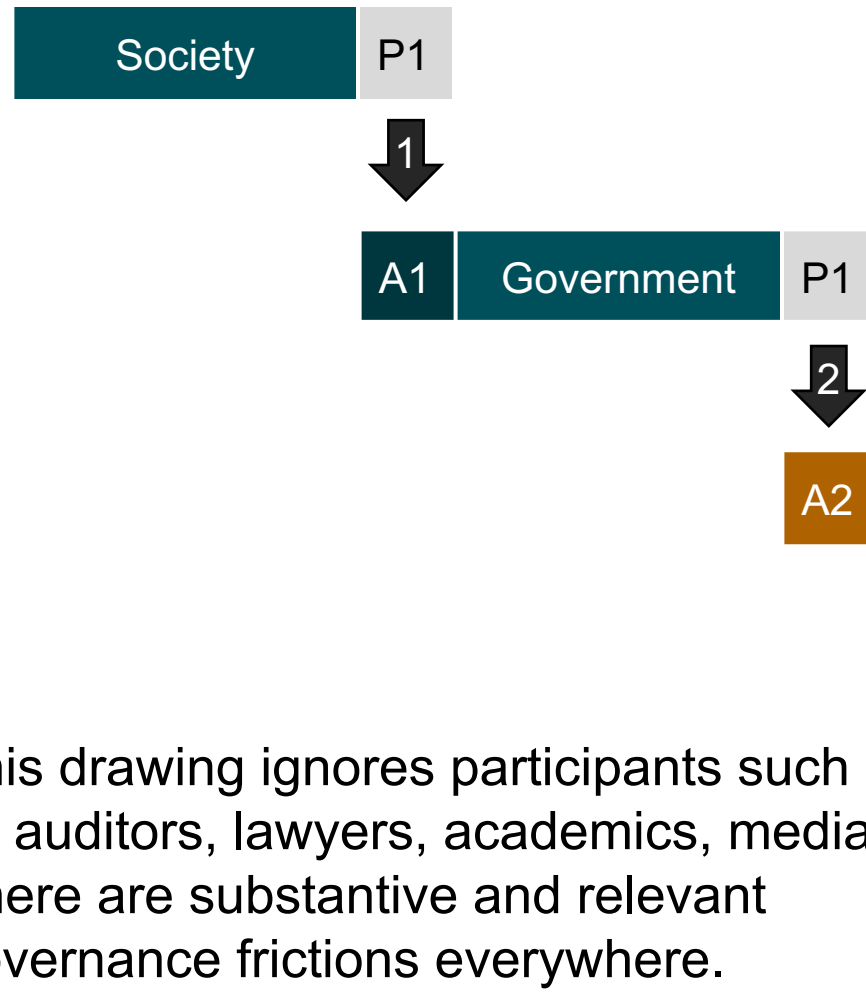
We explore the interaction between external and internal corporate governance under realistic assumptions about the rule of law in the corporate context.

We show that common internal governance mechanisms such as performance-based compensation and compliance programs can exacerbate social harm and undermine external enforcement. Our analysis highlights the pitfalls of focusing on agency conflicts within the corporation when external enforcement of the law is weak. The results suggests it is essential to strengthen external enforcement in the public interests, ensure that corporations are able to bear liability appropriately without causing collateral harm, and restrict corporations’ ability to shield executives from liability.

Governance is always about

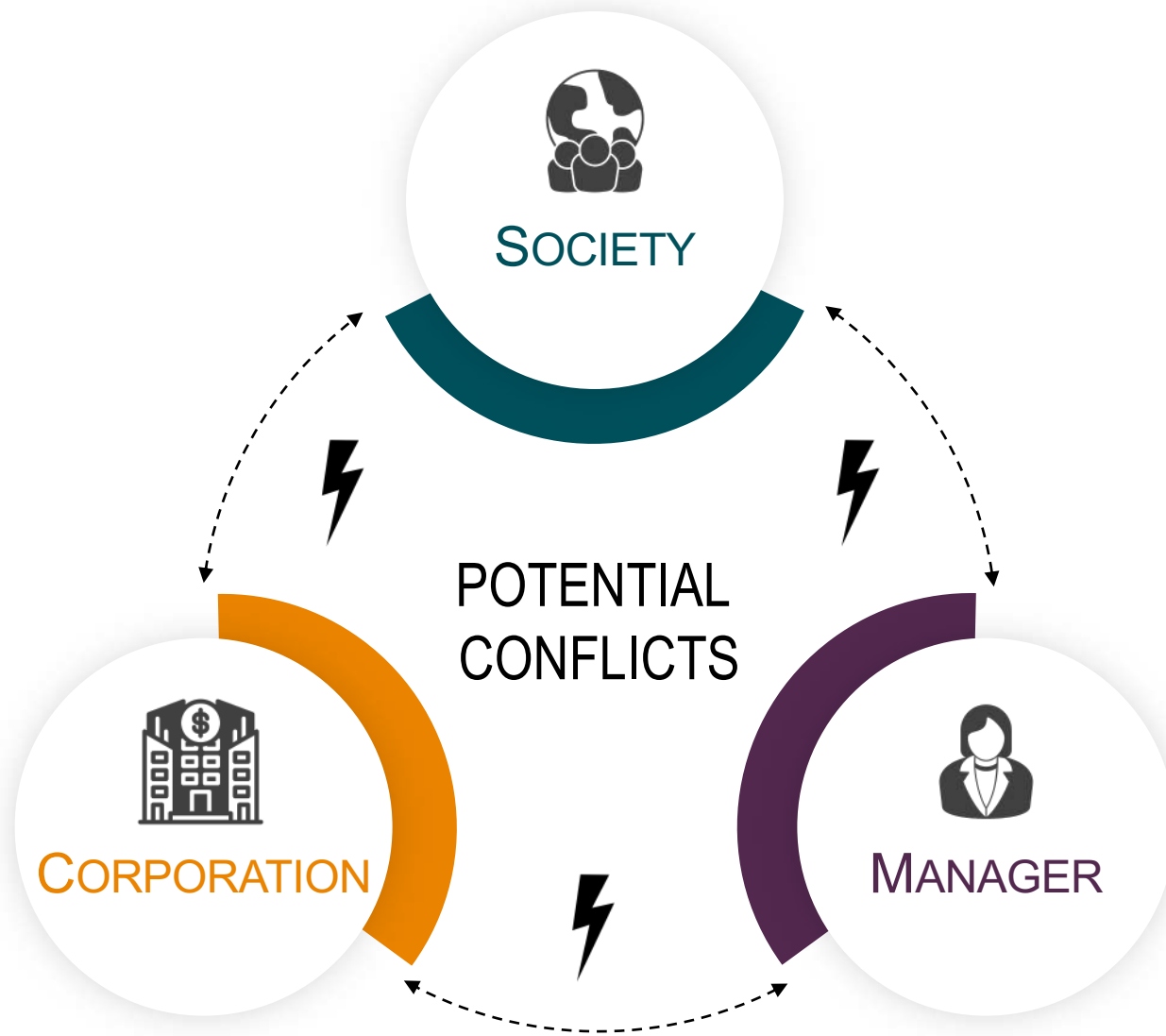
Power. Information. Incentives.

Big Picture: Layers of Delegation & Interacting Governance Frictions



Political economy frictions (agency relations 1-2) are key to external corporate governance but are ignored when focusing on internal governance (agency relations 3-4), even in context of “stakeholder governance, “ESG, etc.

This drawing ignores participants such as auditors, lawyers, academics, media. There are substantive and relevant governance frictions everywhere.

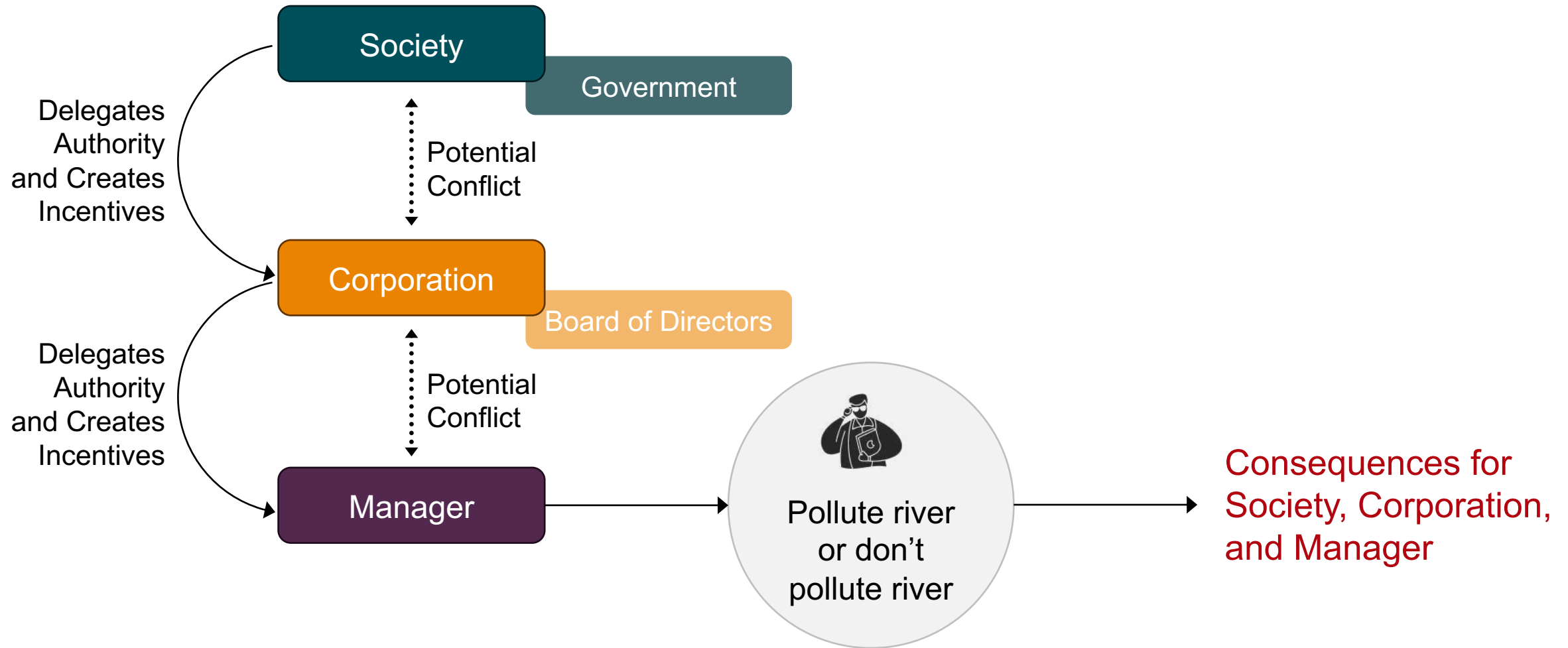


Admati-Atkinson-Pfleiderer focus on the interaction of external governance, particularly law enforcement, and internal governance, thus effectively assuming Society = Government and Corporation = Board = Shareholder.

Our starting point is that external governance is weak, far from “optimal”

A “Transitivity Argument” Justifies Focus on Internal Corporate Governance

assuming implicitly that society-corporation problem is addressed effectively



“The essence of the rule of law is that there is not one rule for the powerful and another for the powerless; one rule for the rich and another for the poor.

The Department’s first priority in corporate criminal cases is to prosecute the individuals who commit and profit from corporate malfeasance; **corporations only act through individuals.**”

*Attorney General Merrick B. Garland, March 3, 2022
(Remarks to the American Bar Association Institute on White Collar Crime)*



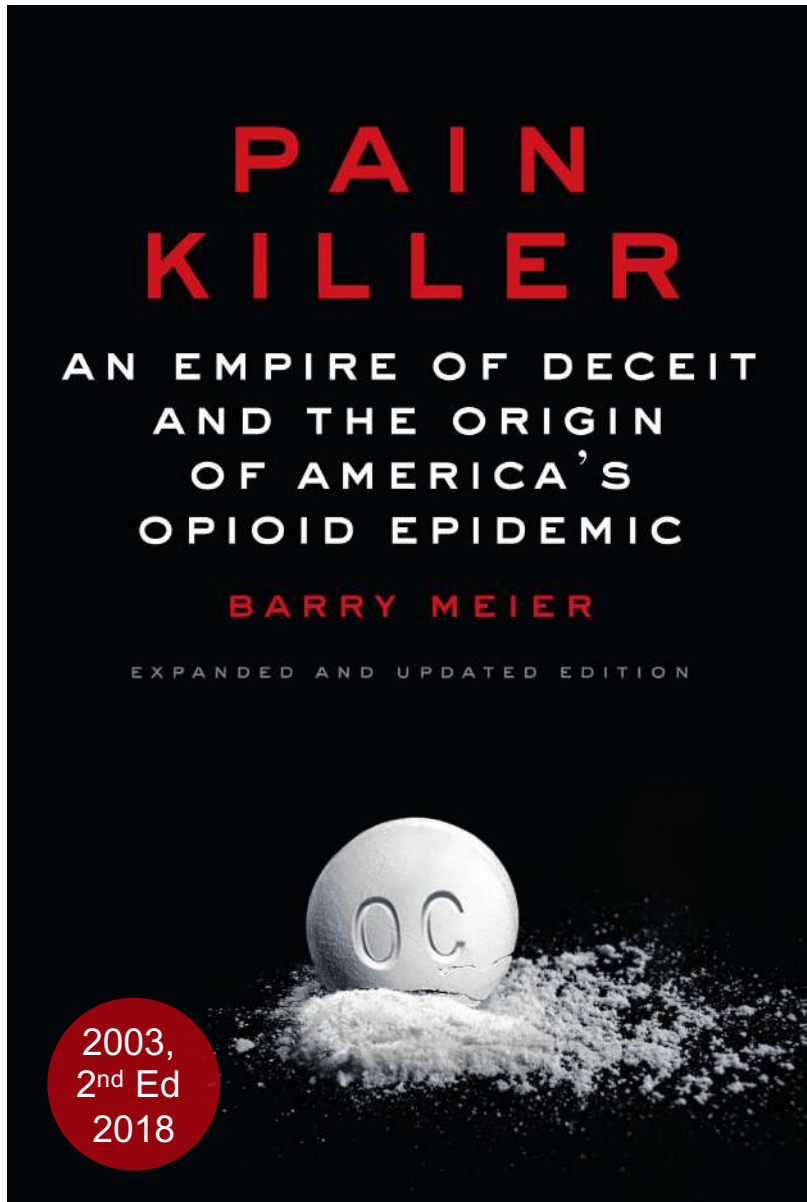


“Three actions I am taking today with respect to policies on corporate criminal enforcement. First, to be eligible for cooperation credit, companies must provide the department all non-privileged information about individuals involved in or responsible for the misconduct regardless of position, status or seniority. Second, all misconduct needs to be evaluated when it comes to decisions about the proper resolution with a company. Finally, the department is free to require the imposition of independent monitors whenever it is appropriate to do so.”

*Deputy Attorney General Lisa O. Monaco, October 28, 2021
(Keynote, American Bar Association National
Institute on White Collar Crime)*

Purdue (and Others): Massive Harm, Little Accountability

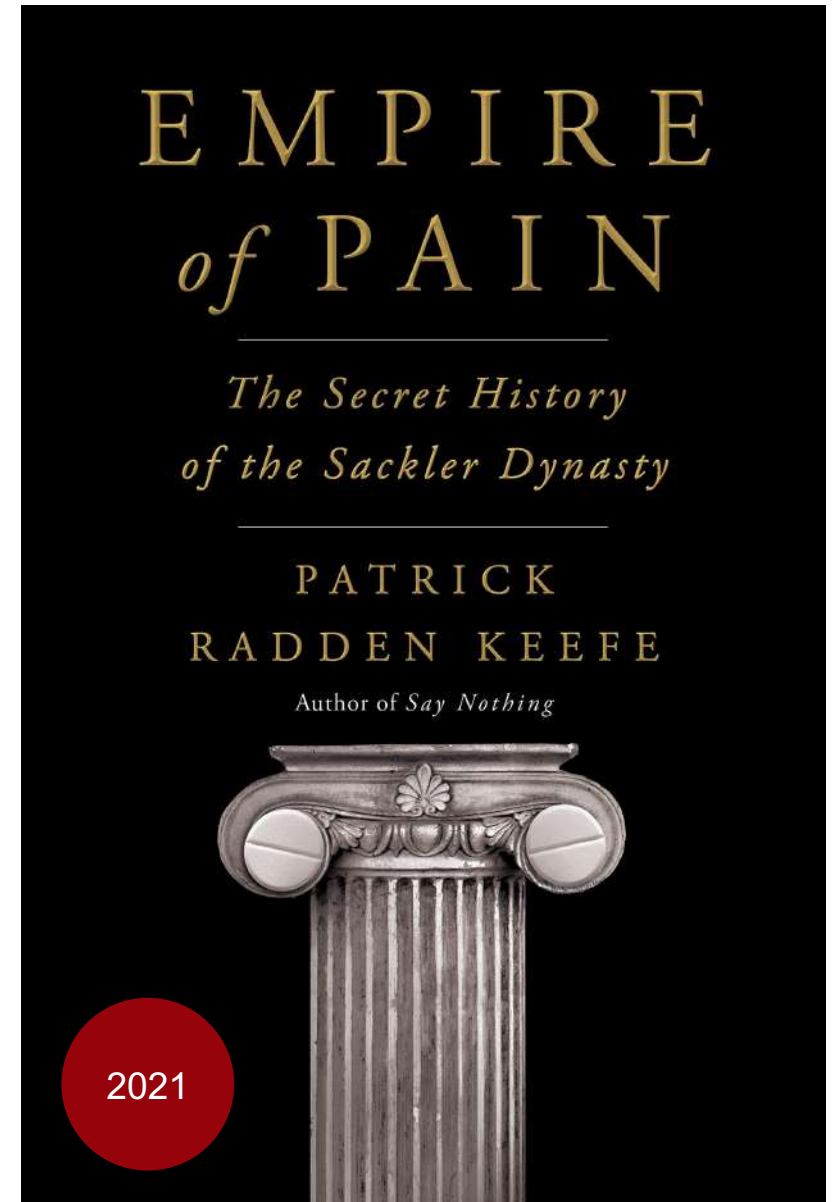




How did Purdue executives and the Sacklers get away with it?

Persuasion strategy: aggressive and deceptive marketing to doctors and FDA, shift blame to doctors and victims; public relations and charitable donations; legal strategies.

Many enablers/participants distributors, pharmacies, regulators, nonprofits, lawyers



In Guilty Plea, OxyContin Maker to Pay \$600 million



From left, Howard R. Udell, the top lawyer for Purdue Pharma; Dr. Paul D. Goldenheim, the company's former medical director; and Michael Friedman, Purdue's president. Photographs by Don Petersen for The New York Times

By Barry Meier, **May 10, 2007**

BINGDON, Va., May 10 — The company that makes the narcotic painkiller OxyContin and three current and former executives pleaded guilty today in federal court here to criminal charges that they misled regulators, doctors and patients about the drug's risk of addiction and its potential to be abused.

NOTE: The executives pleaded guilty to misdemeanor charges under the strict liability "Responsible Corporate Officer" doctrine, and served no jail time. Some continued working for the company. According to later revelations, prosecutors considered but failed to pursue other criminal charges.

THE WALL STREET JOURNAL.

Purdue's \$4.5 Billion Opioid Settlement Got Thrown Out.

Wednesday, December 22, 2021



Unsecured creditors included the US federal government, insurance companies, numerous states, municipalities, individuals and survivors harmed by Purdue's marketing of opioids.

Bankruptcy settlement thrown out because it included a release from liability for Sackler family members.

Northern California's Investor-Owned Utility





NEWS | BAY AREA & STATE

San Bruno fire levels neighborhood – gas explosion

At least 1 dead as PG&E line explodes, fire levels San Bruno neighborhood

By **Marisa Lagos**, **Kevin Fagan**, **Michael Cabanatuan**, **Justin Berton**, *Chronicle Staff Writers*

Sep 10, 2010



Fireman on Claremont Drive in San Bruno tried to fight a fire which had burned down the neighborhood. A blast believed to be caused by a natural gas explosion destroyed a San Bruno, Calif. neighborhood Thursday September 9, 2010.



Back in January, 2017

PG&E Fined \$3 Million, Ending San Bruno Explosion Case

Utility ordered to complete community service, serve probation in connection with 2010 pipeline blast that killed eight people



A federal judge ordered PG&E Corp.'s utility to pay a \$3 million fine, complete 10,000 hours of community service and serve **5 years of probation.**

The disaster was caused by an aging, poorly maintained pipeline with faulty welding work that dated back to the 1950s. PG&E was convicted of five felony counts of failing to inspect and test its pipelines for potential defects despite being aware that federal regulations required it. PG&E also was convicted of one count of obstructing the federal government's investigation of the explosion.

No PG&E employees were charged.



Since 2017

Tubbs Fire 2017,
Camp Fire 2018

Bankruptcy,
Jan 2019 - June 2020

Many more fires,
e.g., Kinkate, Dixie

THE WALL STREET JOURNAL.

PG&E Pleads Guilty to Manslaughter in Fires as It Nears Bankruptcy Exit

June 16, 2020



FORTUNE

PG&E dodges 90 years in jail for fire because it's not a person

June 18, 2020



PG&E Corp. dodged a 90-year state prison sentence for a 2018 fire that killed 84 people because it's not a person. Instead, the corporation was ordered to pay the maximum penalty under California law of **\$4 million** [\$3.5M fine & \$500K for cost of investigation].

State Judge Michael Deems said he recognized the constraints prosecutors faced under the law, but the sentence didn't fit the enormity of the crime.

"The court's **sentencing options in this case are limited**," Deems said, adding an individual in a similar case would likely get nine decades for the "callous disregard for the citizens of Butte county."

Hedge Funds Cash Out Billions in PG&E Stock. Fire Survivors Suffer and Wait

[Lily Jamali](#) | Oct 11, 2021

The company is mired in debt.
Electricity rates are skyrocketing.
Tens of thousands of survivors of fires
sparked by the utility's equipment are
waiting for promised compensation.

Amid all this pain, there's one group
that's simply walking away: Wall
Street hedge funds.



The USDA Forest Service Law Enforcement & Investigations team was deployed for support after the Camp Fire swept through Paradise, California, on Nov. 18, 2018. Three years later, the vast majority of fire survivors are still waiting for compensation. *(Forest Service photo by Tanner Hembree)*



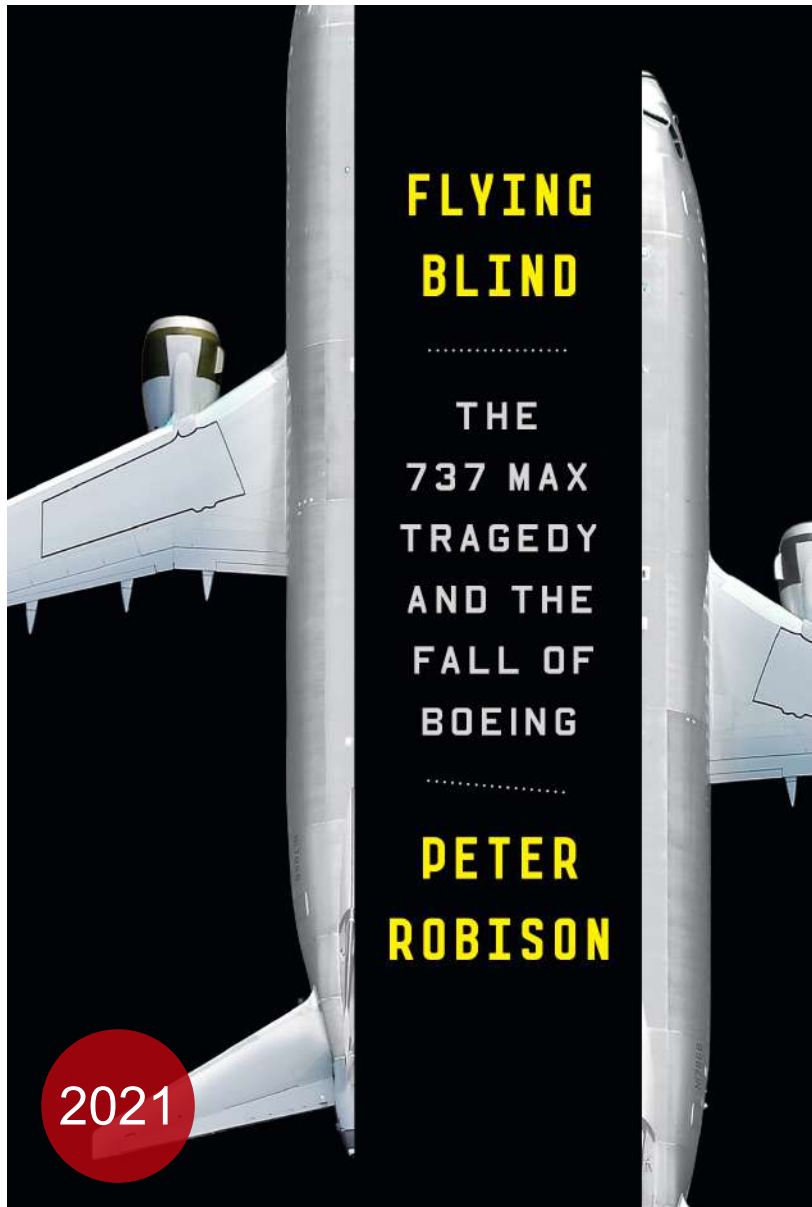
PG&E Probation for San Bruno Blast Ending Amid Ongoing Safety Worries Due to Wildfires

January 24, 2022

Pacific Gas & Electric is poised to emerge from five years of criminal probation.

“In these five years, PG&E has gone on a crime spree and will emerge from probation as a continuing menace to California,” U.S. District Judge William Alsup wrote in a report reviewing his oversight of the utility. “We have tried hard to rehabilitate PG&E. As the supervising district judge, however, I must acknowledge failure.”

“We know there is more to do,” PG&E’s lawyers told Alsup in their final probationary report.



“In the race to beat the competition and reward top executives, Boeing skimped on testing, pressured employees to meet unrealistic deadlines, and convinced regulators to put planes into service without properly equipping them or their pilots for flight. It became obsessed with the bottom line, putting shareholders over customers, employees, and communities.”

Department of Justice

Office of Public Affairs



FOR IMMEDIATE RELEASE

Thursday, January 7, 2021

Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over \$2.5 Billion

The department ultimately determined that an **independent compliance monitor was unnecessary** based on the following factors, amount others: (i) **the misconduct was neither pervasive across the organization, nor undertaken by a large number of employees, nor facilitated by senior management**; (ii) although two of Boeing's 737 MAX Flight Technical Pilots deceived the FAA AEG about MCAS by way of misleading statements, half-truths, and omissions, others in Boeing disclosed MCAS's expanded operational scope in different FAA personnel who were responsible for determining whether the 737 MAX met U.S. federal airworthiness standards; (iii) the state of Boeing's remedial improvements to its compliance program and internal controls; and (iv) Boeings agreement to enhanced compliance program reporting requirements as described above.

Settlement releases senior management from criminal liability;
It does not require a monitor and trusts Boeing's promises of better compliance



Boeing board agrees to \$237.5 million settlement of 737 MAX shareholder lawsuit

November 5, 2021



David Calhoun, Boeing CEO since January 2020, previously director and chair

A shareholder lawsuit [led by institutional investors] against Boeing's board settled **with no admission of wrongdoing**, included allegations that Calhoun made misleading statements to the press about the board's efforts to oversee the safety of the 737 MAX.

The insurers of the board and top executives will pay the settlement amount less the attorneys' fees and expenses, to Boeing.

Jury finds former Boeing test pilot not guilty in fatal 737 MAX crashes case

Wed 23 Mar 2022



Boeing helped DoJ indict Mark Forkner, a low level (ex) employee.
What would be his motive? Was no higher up responsible for incentives?

Boeing agrees to plead guilty and pay a nearly quarter-billion dollar fine

JULY 8, 2024 · 2:18 AM ET

This deal follows an earlier agreement between the DOJ and Boeing in 2021, when the company promised to make safety changes after the two overseas Max crashes. But prosecutors say Boeing did not hold up its end of the deal.

In [a separate filing](#) Sunday, attorneys for the families say they plan to ask a judge to reject this deal because it “unfairly makes concessions to Boeing that other criminal defendants would never receive and fails to hold Boeing accountable for the deaths of 346 persons.”

(Hearing now scheduled for October 11, 2024.)



#Dieselgate

Volkswagen Emission Fraud:

- Fraud (cheat device; claimed falsely “clean diesel”) started by 2009, helped sell millions of cars around the world
- Detected almost coincidentally in the US in 2014
- Large fines on VW in US and Canada
- Minimal consequences for VW in Germany
- Limited action against individuals in US (no extradition)
- VW settled some criminal charges against executives in Germany
- CEO trial in Germany suspended till 2025 due to ill health

Key Insights of Admati-Atkinson-Pfleiderer (2024)



In the interaction between Internal and external corporate governance

- “Good” internal governance may be bad for society and exacerbate social harm when external enforcement is ineffective
- Corporations may undermine external enforcement applied to individuals (e.g., protecting executives, damning some employees)
- Reliance on incentives in the form of reduced fines to induce voluntary corporate compliance programs, self-investigation, and information on employees may backfire and fail to achieve enforcement goals. Better to mandate specific steps and conduct independent public investigations.
- Effective governance requires more public resources and legislation to reduce external enforcement frictions, including whistleblower protection, transparency, “gatekeepers” rules, and enhanced individual accountability

Concluding Observations



The political economy of legislation and enforcement often undermines **societal** corporate governance and basic principles of justice.



Current approaches to external and internal governance are ineffective and can backfire if misconduct is profitable and enforcement is weak.



Focus on internal governance while ignoring external governance is misguided. Holistic perspectives offer vast research agenda.



Rich research agenda when taking a holistic approach to corporate governance. Frictions and issues would depend on specific (other) laws.