Aristotelian Decency as a Corrective for Compliance-Induced Environmental Racism

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ABSTRACT

This Article addresses the phenomenon of corporate compliance decisions that systematically allocate environmental risks to low-income communities, disproportionately affecting people of color. The economic logic of financial risk management (FRM) coupled with aggressive legal strategies create a perverse incentive that generates this racially biased outcome. We examine the ethics of FRM in light of this phenomenon and develop a distinction between legal compliance and legal cooperation. We argue that justice demands that management take responsibility to avoid and redress environmental racism and adopt a more cooperative framework; we then offer guidance on how to keep application of this framework tractable. The Article discusses both corporate legal strategies and corporate social responsibilities with reference to the Aristotelian commitment to epieikeia, or decency, which Aristotle presents as a virtuous way to correct for the limitations of general law. Proceeding in three parts, the Article considers the economics of compliance, examines managerial ethical obligations with regard to law generally, and offers Aristotelian virtue ethics as a means of framing social responsibilities with regard to environmental law and justice. The Article contributes to compliance, strategy, and social responsibility literatures. More particularly, it offers a practical compliance framework suited to managers in their engagement with both public and private environmental law.

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INTRODUCTION

Corporate compliance has become a big business as there now may be more compliance professionals working for U.S. corporations than publicly-employed police.[1] Spurred by a shift in the Federal Sentencing Guidelines,[2] most major corporations employ compliance officers who scan for legal threats and propose means to mitigate legal fines, civil liabilities, and reputational costs.[3] Employing the rubric of financial risk management ("FRM"), compliance directives are justified with sole reference to projected monetized consequences of alternative

1. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016) ("Over the past decade, compliance has blossomed into a thriving industry . . . ."); *Rise of the No Men: The Past Decade Has Brought a Compliance Boom in Banking,* THE ECONOMIST (May 2, 2019), https://archive.is/FLyeJ (discussing the dramatic growth of compliance in the banking industry post-2008) [https://perma.cc/2J4F-AAR9]; William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 393, 393 n.1 (2018) (noting a "milestone" in which "[t]here soon will be as many enterprise-wide risk, audit, legal, and compliance professionals on the payroll of corporations in the United States as municipal police officers. . . ").

2. *See* Griffith, *supra* note 1, at 2084 (noting that "the present era of compliance began in 1991 with the adoption of the U.S. Sentencing Commission's Sentencing Guidelines for Organizations. . . "); *see generally* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (2021), www.ussc.gov [https://perma.cc/PMU2-CUT7] (offering both "carrot and stick" incentives for implementing a compliance program).

3. *See generally* ANDREW S. BOUTROS ET AL., THE ABA COMPLIANCE OFFICER'S DESKBOOK (2016) (offering a practitioner's guide to best practices).

actions.[4] The logic of FRM takes the law as a given, with little or no reflection on the complex set of normative compromises incumbent in law or the ethical aspirations the law seeks to advance.[5] Legal obligations are defined by economic calculations, and money is spent on internal trainings and controls until the marginal expense of such activities equals the marginal savings in regulatory costs.[6]

This Article challenges this FRM approach to corporate compliance as ethically inadequate.[7] We argue that law too often provides an insufficient economic incentive to assure that society's normative aspirations are adequately addressed.[8] When this failure directly threatens human health, safety, or dignity then the need for a corrective framework becomes manifest. In such settings, concerns for justice and fairness require managers to go beyond the economic logic of the FRM paradigm, embrace a broader view of the firm's political obligations, and

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4. *See* GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 2–3 (3d ed. 2020) (portraying financial risk management and compliance as intimately and often inextricably interwoven).

5. The idea that law expresses and promotes moral values is consistent with most jurisprudential views, including natural law, pragmatic instrumentalism, and various sociological accounts of law. *See* Daniel T. Ostas, *Deconstructing Corporate Social Responsibility*, 38 AM. BUS. L.J. 261, 271–76 (2001). It is also consistent with interpretive techniques that direct attention to legislative intent, legislative purpose, and practical reasoning. *See* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1998). Textualist approaches to interpretation might reference moral values *only* to the extent that recourse to such moralistic language illuminates the meaning of the legal text. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–24 (1997) (distinguishing between literalism and textualism properly understood and limiting statutory interpretation to a reasonable reading of statutory language).

6. *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999) (lamenting that compliance too often derives solely from FRM and ignores the firm's ethical duties of care). Laufer notes: "Many corporations simply purchase only the amount of compliance necessary to effectively shift liability away from the firm. After risk of liability and loss is transferred, the firm's incentive to maintain high levels of care decreases. *Id.* at 1350.

7. Many modern compliance programs define themselves as dealing with legal compliance and risk management, but also ethical decision making and action. The purpose of this Article is to provide a conceptual vocabulary, *see infra* Part II, with which to evaluate actual compliance programs that can "pierce the veil" of terms that corporate executives may wish to employ in naming their compliance programs. For the Cancer Alley community, *see infra* Section I.B, it is little consolation to know that corporations like DuPont actually have an "ethics program." Community members are likely to respond in the spirit of James Baldwin's observation that, "'I can't believe what you say [. . .] because I see what you do.'" James Baldwin, *A Report from Occupied Territory*, THE NATION, July 11, 1966, https://www.thenation.com/article/archive/report-occupied-territory/ [https://perma.cc/9G8K-NWJL]. The alternative framework developed in this Article offers conceptual tools to question what corporations actually do in implementing "ethics and compliance" programs.

8. Sometimes a well-intentioned law provides too blunt an instrument to adequately direct corporate activity to serve societal needs. *See* Kenneth R. Andrews, *Public Responsibility in the Private Corporation*, 20 J. INDUS. ECON. 135, 135, 137–38 (1972). At other times, the law may be sufficiently nuanced and well-designed, yet "underenforced" in an economic sense due a lack of governmental enforcement resources, effective corporate concealment, inadequate penalties, and/or aggressive corporate legal strategies that mitigate projected liabilities. *See* Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 489–508 (2009) (classifying a law as "underenforced" whenever violating that law proves economically cost effective).

cooperate with the ethical aspirations that inform the law. We advance this notion of legal cooperation with reference to the Aristotelian commitment to *epieikeia*, or decency, which Aristotle presents as a virtuous way to correct for the limitations inherent in general articulations of law.[9] The reason to draw upon Aristotle's account of decency rather than better known conceptualizations of justice (such as Rawls's *Theory of Justice*)[10] is that Aristotle's analysis articulates a principle of cooperative restraint for people to apply on a case-by-case basis (whereas, for example, Rawls's justice applies to the "basic structure" of society).[11] In Aristotle's view, legal imperfections are commonplace and the virtuous citizen must often impose a cooperative balm, and we extend Aristotle's theory to make sense of justice in corporate compliance programs.

Illustrating the need for a cooperative norm, this Article focuses on the limitations of law in allocating environmental risk. Louisiana's so called "Cancer Alley" provides an apt illustration.[12] The logic of FRM coupled with the damage calculations of tort law provides an economic incentive to place toxin-emitting industrial plants in low income communities along the Mississippi River, disproportionately affecting people of color.[13] Managers of petrochemical plants along the river have been interacting with regulatory officials for decades,[14] yet emission levels on certain alleged carcinogens remain advisory, not mandatory.[15] Absent direct regulation, legal liability falls to common law tort, which measures potential damages with reference to projected life expectancies and lost earnings. Taking the legal risk as a given, FRM reinforces a sad and unjust history of discrimination, disproportionately harming the health and dignity of the residents

9. *See infra* Part III.

10. JOHN RAWLS, A THEORY OF JUSTICE (1971).

11. The virtue ethics tradition that follows Aristotle to the Stoics and all the way up through Adam Smith and contemporary theorists hinges on the idea of moderation and self-restraint. *See infra* Sections III.A–B. To rectify the limitations with FRM, corporate compliance programs need a principle of self-restraint expressly tailored to moderate the extent to which companies capitalize on a financial incentive and apparent legal entitlement *not* to take into account the well-being of others. *See infra* Sections II. B.1–2. Aristotle develops his account of decency to answer this precise theoretical need. *See infra* Sections III.A–B.

12. *See* Courtney J. Keehan, *Lessons from Cancer Alley: How the Clean Air Act Has Failed to Protect Public Health in Southern Louisiana*, 29 COLO. NAT. RESOURCES, ENERGY & ENV'T L. REV. 341 (2018).

13. Government funded research from 2018 found that racial minorities and people below poverty level are more likely than others to live near toxic pollution, and that the racial correlation is stronger than the economic one. *See* Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status,*108(4) AM. J. PUB. HEALTH 480, 480, 481 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5844406/ [https://perma.cc/MDF5-DR3R].

14. *See* Keehan, *supra* note 12, at 359.

15. Jamiles Lartey & Oliver Laughland, *Almost every Household has Someone that has Died from Cancer*, THE GUARDIAN, May 6, 2019, https://www.theguardian.com/us-news/ng-interactive/2019/may/06/cancertown-louisana-reserve-special-report [https://perma.cc/ZU8E-XKQE].

along the river, many of whom are Black.[16] We contend that complying with perverse laws is ethically indefensible and a more cooperative approach to the organization's political obligations is required when human health, safety, or dignity are at issue.

The analysis proceeds in three parts. Part I reviews the customary compliance paradigm whereby legal risks are monetized and subsumed within a general FRM framework. While acknowledging that managing financial risk is essential to responsible management, we discuss three reasons that subsuming legal compliance within an FRM framework can generate morally unacceptable consequences. First, FRM excludes moral concerns that defy quantification. Second, the law itself may be substantively unjust thereby creating perverse economic incentives. Third, legal risk measured in pecuniary terms is a product of corporate legal strategies, including lobbying, concealment, and the exploitation of litigation tactics that benefit the corporate actor and undermine the normative purposes that inform both legal texts and common law precedents. These strategic advantages threaten to reduce compliance calculations to a simple licentious admonishment to do whatever one can get away with.

Part II offers an alternative compliance framework of general applicability that simultaneously rejects the economic foundation of FRM and grounds corporate compliance practice to a more robust ethical notion of political obligation. Pursuant to this alternative framework, managers face an ethical choice regarding law: comply, cooperate, or circumvent ("CCC"). Under the logic of the CCC framework, *compliance* denotes ethical fidelity to a professionally honest interpretation of legal materials free from any self-serving bias combined with effective corporate trainings and internal controls designed to implement that interpretation. *Cooperation* becomes morally necessary when compliance, so defined, fails to address limitations in the law in ways that threaten human life, safety, or dignity. This obligation includes living to a higher standard of care than legally mandated while working with public policy makers and civil society at large to reform the law.[17] *Circumvention*, including both direct breaches and legal dodges achieved through aggressive use of legal strategies, becomes ethically justifiable in the limited circumstances where moral principle justifies conscientious evasions. Pursuant to this CCC framework, the choice between compliance, cooperation, and circumvention depends on the moral status of the law in question. Reasonably just laws deserve compliance, laws that implicate human health, safety and dignity demand cooperation, and unjust and inane laws require or

16. Keehan, *supra* note 12, at 363, 383 n. 183 (citing Heather Rogers, *Erasing Mossville: How Pollution Killed a Louisiana Town*, INCEPTOR, Nov. 4, 2015, https://theintercept.com/2015/11/04/erasing-mossville-how-pollution-killed-a-louisiana-town/.

17. *See generally* Andreas G. Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective*, 32 ACAD. MGT. REV. 1096 (2007) (viewing business firms as having a political duty to communicate with and respect the concerns of affected stakeholders).

permit circumvention. Part II closes with an application of the CCC framework to the issues of justice and fairness posed by Cancer Alley.

Part III supports and extends our CCC framework with reference to the Aristotelian commitment to *epieikeia* which Aristotle presents as a virtuous way to correct for the limitations of law generally. The discussion begins by comparing the FRM framework, which follows an economic logic, with the CCC framework which subordinates economics to ethics. The CCC framework requires companies to resist self-serving interpretations of law, to obey reasonably just laws that are not effectively enforced, and to aid public officials concerned with remedying environmental injustice. Though none of these actions promote short term profitability (and hence are outside the FRM compliance framework), each is required by the Aristotelian virtues of decency, self-restraint, and temperance. Part III examines Aristotelian decency and related stoic virtues that extol self-restraint, commend cooperation with public officials, and require listening to affected communities.

This Article contributes to the environmental compliance, legal strategy, and social responsibility literatures. More particularly, it offers a practical framework suited to managers in their engagement with both public and private environmental law. A corporate compliance framework that focuses solely on financial risk misses the moral dimensions of both common law torts and regulatory law and threatens to promote social harm. We argue that the CCC framework's due deference to Aristotelian decency and corresponding embrace of legal cooperation provides a workable corrective enabling managers to dispatch their moral responsibilities with regard to law generally and environmental law in particular. We motivate and defend this thesis by showing that the CCC framework effectively addresses the environmental racism found in Cancer Alley and related injustices too often exacerbated by the economic logic of traditional compliance programs.

I. CORPORATE COMPLIANCE

Corporate compliance refers to a process by which an organization directs the activities of its employees, managers, and executive officers to respond to the regulatory rules and common law norms of the societies in which it operates.[18] This process includes developing and articulating organizational directives, establishing training programs, and implementing a system of internal controls.[19] Before

18. The study of compliance practices has emerged as an independent and growing scholarly endeavor. *See* David Orozco, *A Systems Theory of Compliance*, 22 U. PA. J. BUS. L. 244, 251–54 (2020) (discussing both prompts and impediments to the emergence of compliance as a separate field of study). *See generally* Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285 (2017) (relating compliance practices and business strategy); Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J. L. ETHICS & PUB. POL'Y 169 (2015) (discussing the growing role of a Chief Compliance Officer (CCO) and suggesting reforms to CCO liability).

19. *See generally* BOUTROS ET AL., *supra* note 3; MILLER, *supra* note 4, at 3–4.

the 1980s, compliance programs, if they existed, were informal. Formal programs flourished with the passage of the U.S. Sentencing Commission's Sentencing Guidelines for Organizations, which identified "an effective compliance and ethics program" as a mitigating factor when assessing a fine.[20] The Guidelines were enacted in 1991, and many companies have since created a compliance program.[21]

Compliance programs address regulations promulgated by a host of administrative bodies. In many industries, including petrochemicals, tort liability provides an additional concern. Firms in Cancer Alley, for example, must comply with state and federal environmental regulations, while also addressing common law duties to residents. Mass tort and class action cases often pose a greater financial risk to a firm than the paying of regulatory fines.[22] Hence, it is incumbent on compliance officers to consider both regulatory and common law duties and to provide directives, trainings, and controls designed to institute precautions that address the potential for breach.

A. THE FRM COMPLIANCE FRAMEWORK

Today, corporate compliance is customarily conceived through the prism of FRM. Indeed, leading compliance scholars look to FRM's positivism to define "'[a] socially optimal compliance program" as one that "a rational, profit-maximizing firm would establish if it faced an expected sanction equal to the social cost of the violation.'"[23] Pursuant to FRM, legal duties are viewed as projected liabilities, monetized to compute within financial risk analysis. In practice, these calculations generate an internal protocol that comes to define what it means to comply with law.[24] While the logic of FRM is both reflective of, and coded into,

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20. *See* U.S. SENTENCING COMMISSION, *supra* note 2, at 537.

21. *See* Linda K. Treviño, *Corporate Ethics and Compliance Programs, in* ENCYCLOPEDIA OF BUS. ETHICS AND SOC'Y 692, 693 (Robert W. Kolb ed., Sage, 2d ed. 2018) (on file with author) ("Over the years, more and more organizations, especially large ones in the private and public sectors, have developed such programs.").

22. *See generally* John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives,* 165 U. PA. L. REV. 1895 (2017) (discussing the threat posed by attorney financed class action tort litigation); John C. Coffee, Jr., *Class Wars: The Dilemma of Mass Tort Action*, 95 COLUM. L. REV. 1343 (1995) (examining the financial risks posed by mass tort liability).

23. Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 937–38 (2017) (quoting Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, in JENNIFER ARLEN, ED., RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 21 (2018), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533661).

24. When laws are not effectively enforced, the logic of FRM directs managers to disregard the law and risk paying the penalty. *See generally* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (applying a utility maximizing logic to explain why people violate the law); DAVID J. PYLE, THE ECONOMICS OF CRIME AND LAW ENFORCEMENT 5-6 (1983) (discussing the genesis of the economic approach to understanding criminal behavior). Some commentators argue that managers should knowingly violate regulatory laws whenever the violation advances the pecuniary interests of the firm. *See, e.g.,* Frank H. Easterbrook & Daniel R. Fischel,

the organizational structure, incentives, and culture of corporations,[25] it is beyond the scope of this Article to address the operationalization of either FRM or the CCC framework within the hierarchy of corporations. Rather, because of the status of FRM in corporations today and the far-reaching implications of its rationale, this Article focuses on the logical limitations of FRM and how these may be remedied with an alternative framework.

We find three difficulties with the FRM compliance framework. First, many values incumbent in the law, such as respect for human dignity and the right to equal treatment, defy quantification. FRM suppresses the moral dimensions of law and ignores or undercounts values, such as non-discrimination, which law seeks to include. Second, FRM does not inquire into the moral status of the law that is being assessed. Sometimes law provides the wrong economic incentives, as is arguably the case in the measure of tort damages for environmental harms in disadvantaged communities. A compliance framework, properly nuanced, must recognize the limitations in the law and offer a corrective when issues of justice and fairness are implicated. Finally, FRM takes law and legal outcomes as exogenously given. Yet, regulatory law is highly influenced by the lobbying process, and litigation advantages often inure to the benefit of the more well-healed litigant who can exploit expense, delay, and information advantages to thwart otherwise valid claims. FRM tends to ignore this corporate influence on law and legal outcomes, or perhaps more accurately, FRM incorporates the role of corporate prerogatives when conducting a marginal benefit equals marginal cost calculation upon which the FRM definition of compliance turns. The following subsections address these three limitations in turn.

Antitrust Suits by Targets of Tender Offers, 80 MICH. L. REV. 1155, 1177 n.57 (1982) (writing that "managers not only may but also should violate the [legal] rules when it is profitable to do so"). *But see* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1270 (1998) ("As members of society, we do not have the right to opt out of generally applicable laws or regulations by risking paying the penalties, though we clearly have the power.").

25. Organizational scholars have conceptualized these features using a variety of theoretical vocabularies. One compelling and pertinent approach sees the corporation as a resource allocation process within the organization shaped to respond to the demands of short-term profitability in multiple overlapping ways, including capital market pressures upon executives, quarterly reporting practices that privilege a short-term, financialized picture of corporate success, corporate culture, and other factors, including promotion and compensation norms and practices, such as allocation of employee bonuses by profit centers. *See* JOSEPH L. BOWER, MANAGING THE RESOURCE ALLOCATION PROCESS (1970) (inaugurating the resource allocation process tradition with a book-length case study of a corporation's process for making investment decisions); Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, 73 HARV. BUS. REV. 43 (1995) (seminal article explaining large corporations' failure to innovate as a function of their characteristic resource allocation process); JOSEPH L. BOWER & CLARK GILBERT, FROM RESOURCE ALLOCATION TO STRATEGY (2005) (collecting leading strategy scholars' assessments of the contributions of the resource allocation process research tradition).

1. Limitations on the Positivity of Law

The logic of FRM renders the compliance framework sensitive only to the *positivity* of law. The positivity of law refers to the way law confronts business actors solely as the threat of consequences for non-compliance. In the well-known articulation given by Oliver Wendell Holmes, Jr.:

> If you want to know the law and nothing else, you must look at it as a *bad man*, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[26]

This heuristic, Holmes thought, was necessary to "dispel a confusion between morality and law."[27] Holmes wrote: "A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money . . . ."[28] FRM's economic logic dictates that corporate compliance at its finest, and by design, corresponds to the way Holmes's bad man views and responds to legal norms.

The tradition of legal positivism that Holmes joined goes back to Thomas Hobbes, Jeremy Bentham, and John Austin and reached its most celebrated articulation in H. L. A. Hart's, *The Concept of Law*.[29] Hart backs Holmes and the other positivists to defend "the separation of law as it is and law as it ought to be,"[30] implying that a judge's (or a business actor's) fidelity to the law does not require any judgment about whether the legal rule in question "violated standards of morality" or was instead "morally desirable."[31] Lon Fuller famously argued against Hart's positivism with the contention that what makes the law *law* is not merely its form and genesis by the state, but what he calls its inner morality.[32] According to Fuller, discerning the law requires more than a prediction of the positive threat of enforcement dictated by statutory or regulatory text because it takes more than state power to make law.[33]

While we are sympathetic with the thrust of Fuller's defense of natural law, our focal question of corporate responsibility for law does not need to turn on a

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26. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (emphasis added).

27. *Id.*

28. *Id.*

29. *See* Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK. L. REV. 19, 21–22 (1997).

30. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606 (1958).

31. *Id.* at 599.

32. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

33. *Id.* at 668-71. Fuller argued that moral principles cannot help but influence both judges and legislatures and that it was disingenuous to exclude notions of individual and societal morality in any assessment of law. *See* Nim Razook, *Obeying Common Law*, 46 AM. BUS. L. J. 55, 89 n.154 (2009) (summarizing the Hart-Fuller debate).

lofty and often complicated technical debate that has been overwhelmingly concerned with the role of judges interpreting the law. Even if one accepts legal positivism as the best account of what makes law *law*, the ethical questions facing compliance officers do not end with the predicted consequences to the firm of a legal violation. The FRM paradigm falls short in Fuller's natural law sense because the social purposes that give rise to both administrative regulations and tort law are not reducible to their positivistic signaling. Even if one embraced an altogether positivist interpretation of law, social responsibility demands attention to the implications for human and environmental well-being of hewing to the sharply enforceable edges of positive law.

Recall that Holmes's bad man, like FRM compliance, is not concerned with Fuller's inner morality of law.[34] For the bad man, the sole "business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."[35] In the 1960s and 1970s, the law and economics movement surged in part due to contributions to private law by Guido Calabresi who argued that tort law is about minimizing the sum of accident and accident-avoidance costs.[36] On this view, it is up to a company to decide whether to encroach upon another's physical integrity, and what matters is efficiency.[37]

Numerous scholars have criticized the Holmes-inspired law and economics interpretation of tort law for failing to recognize a moral relationship between the tortfeasor and victim.[38] As expressed by Lloyd Weinrib, a corrective justice theorist who draws upon Aristotle and Kant to understand tort, "the [law and economics] theory conceives of negligence as an offence against a maximizing scheme rather than as an injury against a particular victim, and the plaintiff's compensation is regarded not as an entitlement but as a bounty to induce his cooperation in the process of maximization."[39] Also emphasizing this relational quality, John Goldberg and Benjamin Zipursky (though challenging aspects of the corrective justice account of tort) have argued that tort is first and foremost about "civil

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34. *See* David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1561–71 (1997).

35. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 73 (Harv. Univ. Press 2009) (1881).

36. GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (Yale Univ. Press 1970) (1971); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the* Cathedral, 85 HARV. L. REV. 1089, 1094 (1972).

37. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (Harv. Univ. Press 1987); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) https://perma.cc/TT42-PGAW.

38. *See generally*, *e.g.*, Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992), [https://perma.cc/VE2C-FYCZ]; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992), [https://perma.cc/3F3S-7LMB]; George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972), [https://perma.cc/W5M7-4SES].

39. Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 44 (1983).

recourse," where the recourse in question is for the defendant's alleged "wrong" within a relational context.[40]

We are persuaded by critics of law and economics who argue that the purpose of tort law inheres in the plaintiff's interest in health, safety, and integrity that is offended by the defendant's failure to be more careful. Whether the costs of accidents are allocated efficiently through private tort law—if that is true—is of secondary concern to vindicating the plaintiff's claim to have been wronged. Of course, responsible managers must attend to financial threats facing the firm; managing risks is part of their fiduciary obligations. There is nothing inherently wrong with FRM. The problem with too many corporate compliance programs is going no further. This failing becomes apparent when one looks up from the financial projections on the FRM dashboard to consider the harms to the natural environment and to human dignity that remain after FRM protocols have been implemented. Such failings are particularly acute, as we argue next, in places like Cancer Alley where the law provides price signals that exacerbate racial inequities.

2. Substantive Imperfections in Positive Law

Ethical problems emerge when law's positive price signals fail to capture, or undercount, important ethical concerns implicated by and incumbent in law. Consider the measure of damages for negligence in Cancer Alley. Work-incapacitated plaintiffs can recover for, among other things, the loss of expected income based on expert analysis of the plaintiff's job and education level.[41] Notwithstanding a recent federal opinion questioning the constitutionality of the practice,[42] the expert testimony used in courts to evaluate compensatory damages regularly *categorizes plaintiffs by race and gender* with respect to income projections and life expectancy.[43] Because Blacks and women in the United States earn less than Whites and men, respectively, the damages Black women receive for future losses caused by wrongful death or work incapacity are lower than the damages their White male counterparts would receive.[44]

The implications for FRM are evident: the signal to avoid imposing an environmental health risk on Blacks and the poor is fractional compared to the signal to avoid imposing the same risk on affluent White communities. The law creates a perverse incentive to place industrial plants in disadvantaged communities and to spend relatively less on environmental precautions in such communities. In

40. John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TX. L. REV. 917 (2010), [https://perma.cc/4UYR-BGLQ].

41. *See* Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CAL. L. REV. 325, 330 (2018), [https://perma.cc/SZR6-FYQN].

42. G.M.M. v. Kimpson, 116 F. Supp. 3d 126 (E.D.N.Y. 2015).

43. *See* Yuracko & Avraham, *supra* note 41, at 330–31.

44. *Id*. at 330–33.

essence, FRM offers a company a fiscally responsible cost-benefit analysis, while overlooking the effect that such analysis has on existing social inequality and the systematic perpetuation of racial discrimination. The prevalence of FRM is consistent with the EPA's recent finding that a particular pollution burden in areas surrounding those who are (i) in poverty, (ii) "non-white," and especially (iii) blacks was 1.35, 1.28, and 1.54 times higher than that of the overall population, respectively.[45] We contend that a corrective to this compliance-induced racial discrimination is needed whereby managers seek to cooperate with various stakeholders, including competitors, government regulators, and affected communities, to incorporate and account for the harms to human dignity undercounted by current law.

FRM also misses the mark by its tendency to overemphasize backward-looking precedents that provide only a partial and hazy view of the health and safety risks posed by emerging and evolving business practices and technologies. In dynamic settings, an uncritical application of FRM can both harm the community and fail to minimize the financial risks to the firm. Again, a corrective is needed. Consider, for example, asbestos litigation. Before controls were placed on the use of asbestos in the United States in 1980, twenty-seven million workers were exposed from 1940 to 1980.[46] Over forty-three thousand mesothelioma and asbestosis deaths occurred in America between 1979 and 2001.[47] Exactly what sorts of precautions were required of companies in twentieth century continues to be established in twenty-first century litigation. Just last year, the Supreme Court clarified the standard of care demanded of a company that manufactures equipment that will require asbestos parts to function as intended.[48] The defendant manufacturers argued that since they did not incorporate asbestos into the equipment they had no obligation to warn purchasers.[49] The Court sided with the plaintiffs who urged that the duty to warn is triggered not only by using asbestos in the equipment sold but also if the equipment requires asbestos for the integrated product that purchasers will operate.[50]

In sum, a compliance framework steeped in FRM will systematically undercount moral concerns such as racial dignity. It will also fail to flag risks that courts have yet to clearly identify, and, in such cases, FRM both harms affected stakeholders and struggles to manage legal risks to the firm. As we discuss next,

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45. Mikati et al., *supra* note 13, at 480–81.

46. *See* Mesothelioma Hope Team, *Asbestos*, MESOTHELIOMA HOPE (Jan. 4, 2022), https://www.mesotheliomahope.com/asbestos/ [https://perma.cc/2VJ6-PPWM]; Mesothelioma Hope Team, *Asbestos Statistics*, MESOTHELIOMA CANCER NETWORK (Apr. 7, 2021), https://www.asbestos.net/asbestos/statistics/ [https://perma.cc/Z36E-M6JN] [hereinafter Mesothelioma Hope Team, *Asbestos Statistics*].

47. Mesothelioma Hope Team, *Asbestos Statistics*, *supra* note 46.

48. Air & Liquid Systems Corp. v. Devries, 586 U.S., 139 S.Ct. 986 (2019).

49. *Id.*

50. *Id.*

FRM also fails to account for the role of the firm in creating the law that FRM purports to follow.

3. Exploiting Procedural Imperfections in the Law—Tainted Legal Strategies

The rubric of FRM portrays law as an exogenously imposed given. Yet, managers have a host of legal strategies with which to influence the creation, reform, and enforcement of regulatory law.[51] Additionally, sometimes directly breaching a regulation can be cost effective to the firm.[52] Regulators may lack the resources or the political will to adequately monitor corporate activities, and companies can often conceal or obfuscate their actions.[53] In such cases, both Holmes's bad man understanding of political obligation and a FRM approach to compliance would counsel an aggressive use of a "breach and pay" strategy.[54] Of course, managers would only "pay" if the law required payment.[55] One would not expect a breach to be followed by an admission coupled with a proffered fine.[56] Once litigation starts, corporations may employ a tactic of expense and delay to encourage a favorable settlement,[57] and lawyers playing the role of advocate, may advance strained interpretations of both the law and the facts while characterizing those interpretations as valid.[58] Corporate in-house counsel may choose to narrowly respond to discovery requests to maintain an information advantage, secure seasoned expert witnesses, and employ expert litigators.[59]

Prior to litigation, firms may run public relations campaigns to create political views favorable to the corporate viewpoint, seek to influence policy makers through lobbying and campaign contributions, and affect scientific opinion

51. *See* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L. J. 1405, 1443–71 (2000) (cataloguing the various ways business actors can influence the creation and enforcement of law), [https://perma.cc/CJT2-JNVP].

52. *See generally* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1731 (2006), [https://perma.cc/E2A4-7UQ7] (examining a regulation prohibiting the hiring of undocumented workers as prime example of an underenforced law).

53. *Id*.

54. *See* Easterbrook & Fischel, *supra* note 24, at 1177 (defending the deliberate breach of "economic regulatory laws" when it is profitable to do so).

55. *See* Williams, *supra* note 24, at 1279–80.

56. Professor Williams writes: "There is probably not a single example in modern history in which a firm decided to discharge pollutants over regulated levels, for instance, and then immediately wrote a polite letter to the Environmental Protection Agency enclosing a check for the penalties due." *Id*. at 1279 (parenthetical omitted). She notes that "part of the calculation to violate law includes a calculation of the probability that the violation will go undetected; or if detected, that it will go unprosecuted for any one of a plethora of reasons; or if prosecuted, that liability will not be established." *Id*. at 1279–80.

57. *See* LoPucki & Weyrauch, *supra* note 51, at 1457–61.

58. *See id*. at 1443–49 (discussing the strategic use of disingenuous legal interpretations).

59. *See generally* JONATHAN HARR, A CIVIL ACTION (1995) (documenting the strategic use of litigation tactics to frustrate plaintiffs' attempts to maintain a class action lawsuit for harms allegedly caused by defendants' dumping toxic waste).

through funding research favorable to the corporate interests. [60] The logic of FRM would also suggest establishing a compliance program, not necessarily to reduce violations, but to render corporate violations cost-effective due to the mitigation in fines accompanying a qualifying program.[61] With a compliance program in place the decision to breach and pay may become profitable; hence, the economic logic of FRM would suggest breach. This rather crass irony suggests that compliance programs may make breaches more likely, not less. Post litigation the firm may choose to appeal any adverse finding with that choice being directed solely with reference to financial consequences to the firm.

Of course, one must guard against excessive cynicism. Most managers appear to take the political obligation to obey law seriously. However, it is important to note the circularity of compliance reasoning that adopts a Holmesian "predicted-threat" conception of law.[62] Such a view opens the door to a host of ethically tainted legal strategies. Compliance practice based solely on the threat of financial consequences to the company reduces to a shameless and intemperate admonishment to make money in any way feasible with no reference to the ethics of political obligation in a reasonably just state. Surely, the responsible exercise of a corporation's social obligations with regard to law needs a more solid ethical grounding than a myopic economic expediency.

B. FRM—THE EFFECT ON CANCER ALLEY

Cancer Alley spans eighty-five miles along the Mississippi River from Baton Rouge to New Orleans.[63] During the 1960s, local sugar plantations gave way to more than 150 chemical plants and oil and gas refineries; yet, many of the residents remained.[64] Today, these residents, most of whom are Black with ancestors who were enslaved, face the highest risk of air-pollution borne illness in the nation.[65] In a recent study, fence line residents, defined as those living within a 1.5-mile radius of a Cancer Alley chemical plant, reported strikingly

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60. *See* LoPucki & Weyrauch, *supra* note 51, at 1456–57 (examining the use of "media spin" and other out of court actions taken to influence a legal outcome).

61. *See* WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CRIMINAL LIABILITY, 106–08 (2006) (discussing the strategic use of compliance programs to reduce fines, and implicitly, to make planned violations profitable); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 501 (2009) (noting that laws become "underenforced" when fines are reduced).

62. *See* sources cited *supra* notes 26–28 and accompanying text.

63. *See* Keehan, *supra* note 12, at 344, 344 n.18 (citing Matt Black & Trymaine Lee, *Cancer Alley: Big Industry, Big Problems*, MSNBC, http://www.msnbc.com/interactives/geography-of-poverty/se.html (last visited Oct. 2, 2016), *reprinted in* Matt Black & Trymaine Lee, *Cancer Alley: Big Industry, Big Problems*, PULITZER CENTER, Aug. 10, 2015, https://legacy.pulitzercenter.org/reporting/cancer-alley-big-industry-big-problems [https://perma.cc/NKR3-HHS3].

64. *See* Keehan, *supra* note 12, at 345–46.

65. *See* Jordan Terry, *Cancer Alley: Causes and Effects of the "Chemical Corridor" in Louisiana*, TORHOERMAN LAW, LLC, (Aug. 20, 2020) https://www.torhoermanlaw.com/cancer-alley-causes-and-effects-of-chemical-corridor-in-louisiana/ (last visited Mar. 9, 2021) [https://perma.cc/73RE-WSCY].

disproportionate levels of difficulties with breathing (33%), wheezing (33%), chest pain (40%), eye irritations (nearly 50%), hoarse throat (40%), skin rashes (33%), nosebleeds (50%), fatigue (30%), and headaches (50%).[66] Residents throughout Cancer Alley also face a high risk of cancer. Out of the ten census tracts in the United States with the highest cancer risk, seven are found in Cancer Alley.[67]

Louisiana has the highest concentration of oil, natural gas, and petrochemical facilities in the Western Hemisphere.[68] It is not a coincidence that some of the highest rates of cancer in the country correspond with a concentration of these industrial operations. The question, for our study, is why corporate compliance programs fail to adequately address these human health concerns. Federal and state environmental regulations purport to balance the need for efficient industrial production with the health needs of affected communities. Both the federal Environmental Protection Agency ("EPA") and the Louisiana Department of Environmental Quality ("LDEQ") collect data, run tests, and set emission standards.[69] If these regulations fail to protect communities, then the Louisiana common law of negligence, trespass, and nuisance should stand ready to redress the harms caused when one neighbor breaches a duty of care owed to another. Presumably, corporate compliance protocols take these regulations and common law duties into account. Yet, somehow the compliance practices of corporate America permit pollution levels that offend moral sensibilities.

Part of the explanation for why corporate compliance practices fail to protect communities, we contend, resides in the impact that corporate actors have on the law with which they purport to comply.[70] About fifty years ago, the Nobel Prize winning economist George Stigler published his influential work on regulatory capture, explaining how companies can use the revolving door of regulation, corporate control of information, political campaign contributions, public relations campaigns, and the promise of job creation to strongly influence the content and enforcement of public regulations.[71] If this corporate management of the regulatory process follows the economic logic of FRM, then these regulations will tilt toward the advantage of the regulated party. Moreover, proving common law negligence in the context of industrial pollution is notoriously difficult due to the complexities of multiple causation and problems of proof generally. When both

66. *See id.*

67. Antonia Juhasz, *Louisiana's "Cancer Alley" is Getting Even More Toxic—But Residents Are Fighting Back*, ROLLING STONE, (Oct. 30, 2019), https://www.rollingstone.com/politics/politics-features/louisiana-cancer-alley-getting-more-toxic-905534/, [https://perma.cc/CZ9B-FS2G].

68. *See* Keehan, *supra* note 12, at 345.

69. *See id.* at 353–54; Lartey & Laughland, *supra* note 15 (quoting Denka spokesman).

70. *See id.* at 355 ("Cancer Alley's pollution is not adequately addressed under current regulations because industrial interests dominate the design, administration and enforcement of [environmental law] in the region.").

71. *See* George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

regulatory and common law liability risks are muted, the price signals incorporated in and driving FRM compliance protocols will fail to adequately protect the community. In short, the rubric of FRM applied to environmental compliance tends to foster environmental racism, not eliminate it.

Consider, for example, a current controversy taking place in St. John the Baptist Parish. A manufacturing facility—owned by Dupont until its 2015 sale to Denka Performance Elastomer—has been releasing the chemical byproduct chloroprene into the air of this predominantly Black parish since 1969.[72] In 2015, the EPA released a National Air Toxic Assessment that classified chloroprene as a "likely human carcinogen."[73] The agency recommended, but did not require, an emission standard of 0.2 micrograms per cubic meter, and its assessment showed that Denka's emissions were up to 776 times greater than that standard.[74] In response, Denka agreed with the LDEQ to reduce emissions by eighty-five percent.[75] Denka's method of measuring this reduction was disputed by the LDEQ in both 2018 and 2019.[76] In May 2020, the LDEQ acknowledged that Denka had reduced chloroprene emissions by eighty-five percent as promised; however, this leaves the emissions at more than fifty times the EPA recommended level.[77]

Denka is actively lobbying for a relaxation of the EPA emission recommendation. The company has argued that the EPA's cancer assessment in the Parish is overly cautious and that 31.25 micrograms per cubic meter is a more appropriate standard for chloroprene than the recommended 0.2 micrograms.[78] Lobbyists working on Denka's behalf include a former EPA employee and a partner at a firm who advised the Trump administration and endorsed Scott Pruitt to head the EPA.[79] That partner worked with Pruitt to reverse several Obama-era EPA rules.[80] The Louisiana secretary of environmental quality, a former industry

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72. *See* Sharon Lerner, *The Plant Next Door: A Louisiana Town Plagued by Pollution Shows Why Cuts to the EPA Will Be Measured in Illnesses and* Deaths, THE INTERCEPT, Mar. 24, 2017, https://theintercept.com/2017/03/24/a-louisiana-town-plagued-by-pollution-shows-why-cuts-to-the-epa-will-be-measured-in-illnesses-and-deaths [https://perma.cc/N2ZB-G8S3].

73. Julie Dermansky, *Louisiana's Cancer Alley Residents Sue Chemical Plant for Nearly 50 years of Air Pollution,* DESMOG (July 27, 2017), https://www.desmogblog.com/2017/07/27/louisiana-cancer-alley-sue-denka-dupont-chemical-plant-50-years-air-pollution [https://perma.cc/SW7F-LTEY].

74. *Id.*

75. *Id.*

76. Nick Reimann, *Did Denka Reduce Emissions by 85%? State Questions Calculation Method, Seeks* Info, NOLA.COM (Oct. 9, 2019, 2:00 PM), https://www.nola.com/news/environment/article_a50ccdca-e954-11e9-a69d-e39b3c159e58.html, [https://perma.cc/E587-68NK].

77. David Hammer, *DEQ Says St. John Parish Chemical Plant Has Reduced Chloroprene Emissions By 85 Percent*, WWLTV.COM (June 4, 2020), https://www.wwltv.com/article/news/local/st-john/deq-says-st-john-parish-chemical-plant-has-reduced-chloroprene-emissions-by-85-percent/289-1a3d42aa-d572-40f4-9e82-5781bb566b99 [https://perma.cc/2HJT-TN7S].

78. Dermansky, *supra* note 73.

79. *Id*

80. *Id.*

consultant, has stressed that the EPA standard was "just a guidance."[81] The LDEQ currently insists that there is no health emergency surrounding the plant.[82]

Undoubtedly frustrated by both the lobbying actions by Denka and the passive response by the LDEQ, thirteen fence-line residents sued Denka and DuPont for injunctive relief and damages, alleging common law negligence.[83] A report submitted by DuPont to the EPA in 1992 details health problems suffered by workers exposed to chloroprene similar to the symptoms recently reported by people living near the St. John's Plant.[84] Additionally, a confidential DuPont manual from 1956 offers a grisly warning.[85] It states that chloroprene "'may enter the body either by inhalation or by absorption through the skin'" and "'causes depression of the central nervous system and damage to vital organs.'"[86] The manual "comes from DuPont's first neoprene facility built in Kentucky in 1941 and closed in 2008 amid community outrage over the site's emissions."[87] Notwithstanding this knowledge, for decades, first Dupont and now Denka, have been releasing chloroprene into the air of St. John's Parish at levels that far exceed the current EPA recommendation.[88]

Whether the Denka lawsuit will succeed is unknown. With over fifty toxins in Cancer Alley[89] and with more than 150 petrochemical plants,[90] proving the particular cause of any illness becomes daunting. Defense counsel likely will point to the role of lifestyle choices, such as smoking and poor diet, and prior existing health conditions, including obesity, high rates of diabetes, and other illnesses correlated with race and poverty. Counsel will also likely emphasize that Denka has secured all emission permits required by the LDEQ.[91] Of course, the Denka case is hardly unique. Concerns with industrial pollution pervade Cancer Alley

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81. *Id*.

82. *Id*.

83. Taylor v. Denka Performance Elastomer LLC, No. CV 17-7668, 2018 WL 339109, at *1 (E.D. La. Jan. 9, 2018) ("[T]he plaintiffs allege Louisiana state law claims of nuisance, trespass, negligence, and strict and absolute liability; they seek injunctive relief and damages resulting from alleged exposure to chloroprene . . . .").

84. *See* Lerner, *supra* note 67 (citing Letter and Attachments from Mark H. Christman, Counsel, Du Pont, to Section 8(e) Coordinator (CAP Agreement), U.S. EPA, Off. of Pollution Prevention and Toxics, Document Processing Ctr. (Oct. 18, 1992), https://theintercept.com/document/2017/03/23/toxicity-of-chlorabutadiene/ [https://perma.cc/DTM4-LF6S]).

85. *See* Lartey & Laughland, *supra* note 14 (citing G.J. SCHAAF & C.W. JOULE, TECHNICAL MANUAL FOR POLYCHLOROBUTADIENE MANUFACTURE (Aug. 15, 1956), https://www.scribd.com/embeds/408327445/content?start_page=1&view_mode=scroll&access_key=key-USDfQIqSjPEjXnFy9SZs&show_recommendations=true [https://perma.cc/K8Y8-FAD7]).

86. *See id*.

87. Lartey & Laughland, *supra* note 14.

88. *See id*.

89. *See id*.

90. Keehan, *supra* note 12, at 345.

91. The company has stated that it "operates its facility safely and within all permits written by the Louisiana department of environmental quality in accordance with existing standards designed to protect public health and the environment." Lartey & Laughland, *supra* note 14.

and similarly situated communities. The Denka lawsuit reminds us that notwithstanding customary compliance practices, corporate social obligations should not be measured with sole reference to the financial risks of the company. When human health, safety, and dignity are at issue, moral concerns dictate a more cooperative and altruistic orientation.

II. THE COMPLY, COOPERATE, OR CIRCUMVENT FRAMEWORK[92]

In many instances, compliance practice in accord with FRM simultaneously serves the firm's legal, economic, and moral aspirations. This will be true when the law is clear, effectively enforced, and makes moral sense. Fortunately, this is often the case. Consider, for example, an EPA rule that bans the release of a specified chemical compound into the aquifer. The language of the prohibition offers a singular interpretation; regulatory officials effectively monitor and severely punish violators, and health professionals unanimously condemn release of the compound into groundwater as unreasonably dangerous. Management complies with this law by communicating the ban to responsible parties within the organization and by implementing an effective system of internal controls. This compliance practice addresses the firm's legal and moral obligations, while simultaneously serving its economic goals by reducing fines and protecting the firm's business reputation.

Situations where legal, economic, and moral incentives reinforce one another provide a useful benchmark for understanding and assessing compliance protocols. Yet, compliance practice is not always so tidy. First, public regulations are often conflicted, gap-riddled, ambiguous, or vague, and translating common law precedents into compliance directives requires social construction. Alternative legal interpretations generate diverse moral implications and economic consequences. Second, laws are not always effectively enforced either because detection of breach is rare, or the penalties for breach are low. Underenforced laws place a lever between economic and moral incentives creating a perverse situation where evasion pays, and legal obedience, if it occurs, requires voluntary self-restraint.[93] Third, FRM portrays law as morally homogenous. Yet not all laws enjoy the same moral status—some laws may be unjust or inane—and business actors appropriately use moral judgment when deciding how to respond to a

92. The CCC framework builds on prior work. *See generally* Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regards to Law*, 41 AM. BUS. L.J. 559 (2004). The current work: (1) offers a revised a view of "compliance" that emphasizes the ethics of legal interpretation; (2) modifies prior discussions of "evasion" to include both direct breaches and circumventions through the use of tainted legal strategies, and (3) explains the nuances of "cooperation" by employing the lens of Aristotelian Decency. *See infra* Sections II.A–C, III. Both the prior and the current work emphasize managerial choice in designing compliance programs and highlight the moral status of the law in question as the singular determinant of that choice. *See infra* Section II.A; Ostas, *supra*, at 561–93.

93. *See* Andrews, *supra* note 8, at 135 (emphasizing the need for "voluntary restraint of short-term profit maximization" when addressing unintended legal prerogatives from a position of advantage).

diverse set of laws. Finally, the language of compliance tends to portray law as exogenously given, suppressing the role that firms play in the creation, implementation, reform of legal rules. Firms, of course, play an active role in creating and reforming law through lobbying and related activities.

Given the above nuances, we argue that the customary FRM framework for understanding compliance practices provides insufficient guidance in any domain of law. Responsible management requires a more nuanced approach. In the following three sections, we offer an alternative framework that guides the choice between legal compliance, legal cooperation, and legal circumvention. We explain these distinctions while examining the interplay between legal, economic, and moral incentives incumbent in the tripartite framework. We then illustrate the applicability of the framework with reference to issues of justice and fairness in Cancer Alley. While this exposition of the CCC framework is developed with application to the case of environmental racism and Cancer Alley in particular, the framework is intendedly of general applicability for corporate compliance.

A. COMPLYING WITH REASONABLY JUST LAWS

Within the CCC framework, the notion of compliance rests on a bedrock of political obligation. Compliance proceeds on the assumption that a corporation has an ethical obligation to obey reasonably just laws promulgated by the societies in which it operates.[94] To comply with the law, the company must first translate applicable legal rules, standards, and norms into directives and protocols communicated within and enforced by the organization.[95] Sometimes, this translation is straightforward, drawing directly from the plain meaning of a legal text. At other times, interpreting legal texts and related court precedents involves significant choice. This becomes particularly true when legal materials contain conflicts, gaps, ambiguities, and/or vagueness.

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94. Although political and legal theorists disagree about the basis and scope of a moral duty to obey law, few average citizens have doubted that such a duty exists. John Rawls has written, "I shall assume, as requiring no argument, that there is, at least in a society such as ours, a moral obligation to obey the law, although it may, of course, be overridden in certain cases by other more stringent obligations." John Rawls, *Legal Obligation and the Duty of Fair Play, in* LAW AND PHILOSOPHY 3, 3 (Sidney Hook ed., 1964); *see also* George C. Christie, *On the Moral Obligation to Obey the Law*, 1990 DUKE L.J. 1311, 1312 (1990) ("Almost all the participants [in the debate over political obligation] have started from the observation that the average person in the Western world accepts that one has a general moral obligation to obey the law . . . .").

95. The requisite translation of legal rules is complicated considerably beyond the corporation's domestic jurisdiction and given this Article's focus on environmental racism in the United States, the complications of multinational deployment of the CCC framework is expressly set aside for future research.

Consider, for example, the conflicts and vagaries found in the Clean Air Act ("CAA").[96] The CAA directs the EPA to establish emission standards for a set of listed air pollutants.[97] Pursuant to section 109, these standards must protect the public health with an "adequate margin of safety."[98] Section 109 makes no reference to implementation costs, and the U.S. Supreme Court has interpreted this omission as precluding cost considerations in the EPA's assessment of public health needs.[99] Other sections of the CAA, however, require the EPA to consider financial costs when setting implementation standards. The version of Section 110 from 2001, for example, permitted the EPA to waive a compliance deadline if sufficient control measures were unavailable and continued industrial production was "essential . . . to the public health or welfare."[100] Section 111 from 2001 required the EPA to set implementation standards that were economically feasible given technologies that were currently in practice.[101] In short, the CAA denies the role of costs in the definition of clean air while requiring the EPA to incorporate financial cost and technological feasibility when approving implementation techniques and setting performance schedules.

The conflicts and vagaries in the CAA generate discretion for mangers both in setting internal protocols and in seeking emission permits issued by state and local authorities. Interpreting common law duties may be even more problematic, as factually nuanced precedents often appear conflicted, vague, and gap riddled. The question becomes: how should a company respond to the discretion incumbent in legal interpretation? Two orientations suggest themselves. First, the company could take an aggressive posture and assert that interpretation of law that best furthers its financial goals. Alternatively, the firm could hold itself to a professionally honest interpretation of what the law seeks to attain and/or express, with little or no reference to the economic consequences to the firm.

Compliance protocols and permit applications are drafted by the firm's lawyers. When playing the role of an advocate, the Model Rules of Professional Conduct require lawyers to zealously argue the construction of law and version

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96. For background information about the CAA, see generally *Summary of the Clean Air Act,* U.S. ENV'T PROTECTION AGENCY, https://www.epa.gov/laws-regulations/summary-clean-air-act (last visited Feb. 16, 2021).

97. *Id.*

98. 42 U.S.C. § 7409(b)(1) (2012).

99. Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 471, 490 (2001).

100. *Id.* at 466–67 (citing CAA § 110(f)(1)).

101. *Id.* at 467 (citing CAA § 111(a)(1)). The current version of this section of the CAA does not change the substance of the 2011 language used in *Whitman*; it reads:

> The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Id.; *see Whitman*, 531 U.S. at 457–58, 466–67.

of facts that best suits their client's needs.[102] Yet, in compliance settings, lawyers are not advocates, they are *advisors*. Pursuant to the Model Rule 2.1, advisory settings call for an interpretation of legal obligations derived from an application of legal reasoning techniques free from any client-serving bias.[103] When advising, the lawyer essentially takes on the role of an ideal judge seeking a professionally honest interpretation of applicable legal materials.[104] This interpretation gives due deference to the plain meaning of a statute or regulation, but balances that meaning with reference to legislative intent, general public policies, prior interpretations, and maxims of construction.[105]

Within the CCC framework, responsible compliance practice begins with a professionally honest articulation of the firm's legal obligations. Often this articulation suffices, and compliance officers can properly direct attention to training sessions and internal controls designed to implement the corresponding protocols. At other times, the officer knows that the current state of the law does not adequately address the needs of justice and fairness. In such settings, compliance protocols as we discuss in the next section, must be recalibrated to exceed legal requirements to address these concerns.

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102. MODEL RULES OF PRO. CONDUCT Preamble & Scope, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [https://perma.cc/XH82-NQF8] ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); *see generally Model Rules of Professional Conduct—Table of Contents*, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [https://perma.cc/QBY7-EJ5W].

103. *See* MODEL RULES OF PRO. CONDUCT r. 2.1, AM. BAR ASS'N, (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/ [https://perma.cc/E3M5-MKQR]. Under the caption "Advisor," Rule 2.1 states: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* The Comment explains: "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* at cmt. 2, AM. BAR ASS'N, (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor/ [https://perma.cc/D86M-SMGZ]. *See generally Model Rules of Professional Conduct—Table of Contents*, AM. BAR ASS'N (2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [https://perma.cc/QBY7-EJ5W].

104. *See generally* Bruce A. Green & Russell G. Pearce, "*Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1215 (2009) (characterizing lawyers who encourage the client to exploit legal loopholes as teaching "a different conception" of civil obligation from those who advise the client to comply with the imperfectly expressed spirit or purpose of the law); William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 953 (2005) (calling for an ethic of "public responsibility" among practicing lawyers and criticizing interpretations that rely solely on the letter of the law while ignoring the law's readily apparent spirt).

105. *See* Ostas, *supra* note 8, at 515–17 (discussing alternative approaches to legal interpretation and the potential exploitation of "legal loopholes").

B. COOPERATING WITH THE CREATION AND REFORM OF PUBLIC POLICY

Sometimes, complying with a law proves ethically insufficient to address human health, safety, or dignity concerns purportedly addressed by that law. Consider, for example, the ethical duty to obey a well-intentioned, but inadequate, workplace safety regulation. If the employer knows that precautions not required by the regulation would significantly protect workers at a reasonable cost, then these additional precautions should be, and hopefully are, taken on ethical grounds, even though the regulations do not require them. Laws that directly implicate human health, safety, and dignity address *malum in se,* that is, they address matters that are wrong even if the law does not prohibit them. Knowingly subjecting a worker to an easily preventable and severe safety risk is wrongful even if the law permits it. With matters that are *malum in se,* if the legal rule proves inadequate to meet one's ethical obligation, then one should inform the government of the inadequate nature of the regulation while living to the higher standard.

Concerns with environmental racism implicate this more cooperative norm. Current law apparently provides insufficient health protections for fence line residents. Perhaps this reflects FRM and an overly aggressive use of corporate legal strategies that enable self-interested firms to circumvent current laws. It also suggests a poorly designed regulatory system, inadequate standards, and poorly enforced common law norms. In any case, corrective action is needed. Holding one's own business to a higher health standard than legally or economically required provides a socially desirable starting point, but also potentially places the firm at a competitive disadvantage. To even the playing field, the responsible firm needs to cooperate with regulatory authorities to usher in changes in public policy.[106]

The corporate obligation to cooperate with the creation and reform of public policy, though introduced in the early social responsibility literature, has never been fully explored.[107] The more customary language of compliance suggests a hierarchy where the subordinate (businessperson) complies with the dictates of her or his superiors (government regulators). Cooperation, by contrast, connotes a relation between equals who work toward a common purpose.[108] At a minimum, a cooperative norm requires companies: (1) to comply with a professionally honest as opposed to a self-serving interpretation of reasonably just laws, (2) to obey reasonably just laws even if those laws are not effectively enforced, and (3) to go beyond compliance when human health, safety, and dignity are in play. Before applying this cooperative standard to Cancer Alley, we first

106. *See* Allen Buchanan, *Imperfect Duties: Collective Action to Create Moral Obligations*, 6 BUS. ETHICS. Q. 27 (1996).

107. *See* Ostas, *supra* note 92, at 562–65 (reviewing scholarly discussions of corporate social responsibilities with regard to law).

108. *See id*. at 566.

complete our CCC framework by examining compliance issues posed by unjust or inane laws.

C. CIRCUMVENTING UNJUST OR INANE LAWS

Although both legal compliance and legal cooperation rest on a foundation of political obligation, ethical reflection always leaves room for justified civil disobedience, broadly defined as an intentional breach of law for reasons of conscience and moral principle.[109] In the classic case, illegal acts are performed openly with hope of changing the law. Both Mahatma Gandhi and Martin Luther King, Jr. used civil disobedience as part of campaign to prompt legal reform. Yet, neither political motive nor openness are necessary moral prerequisites for justifiable disobedience.[110] Employing secrecy, Harriet Tubman illegally hid her underground railroad, and according to Scripture, Hebrew midwives silently disobeyed the Pharaoh's lethal decree to kill newborn boys. Moses survived only because of an act of civil disobedience done in secrecy.

Sometimes companies openly evade a law in hopes of affecting legal change. Hobby Lobby's refusal to finance abortion based on a strong moral abhorrence to the procedure may provide an example.[111] More commonly, corporate reluctance to comply with a professionally honest interpretation of law comes not from a perception that the law in question is directly immoral; but rather, inane due to obsolescence, insufficient purpose, or proven ineffectiveness. Complying with an inane law is wasteful and wasting resources in a world of scarcity is arguably unconscionable, as those resources could be used to ease human suffering. This suggests that if compliance with an inane regulation produces significant waste, such as a costly environmental ban on an innocuous emission, then contentious legal circumvention, including steps to conceal one's offense, may be justified.

Anytime a law seems unjust or inane, the potential for conscientious evasion appears. In such a scenario, the responsible businessperson must compare the political obligation to obey law with the social harm or economic waste caused by compliance. This moral assessment largely depends on how harmful or wasteful complying with the law appears. As a practical matter, when a law is perceived to be unjust or inane, and aggressive corporate strategies enable legal circumvention with beneficial economic consequence to the firm, then there is little likelihood of compliance. Ethically speaking, if a businessperson makes this decision to

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109. *See* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 15 (2003) (defining civil disobedience as "the intentional violation of a law for reasons of principle, conscience or social change").

110. Rawls reserves the term "civil disobedience" to describe actions taken openly to promote legal change). RAWLS, *supra* note 10, at 368 (noting that this relatively restrictive use of the term is not customary). Rawls refers to secretive acts of justified defiance, such as Tubman's Underground Railroad, as "conscientious evasion." *Id.* at 369 (attributing the term conscientious evasion to Burton Debron).

111. Burnell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

circumvent based on an honest and reasonable belief that the law is unjust or inane, there would be little or no reason to condemn such a choice.

Deciding that a law is unjust or inane largely eliminates a manager's political obligation to comply. What comes next depends on the nature of the legal malady. To illustrate, consider an obsolete regulation that sets an emission standard at 100 parts per million (ppm) while current scientific consensus supports 30 ppm. Here, management should adopt a cooperative stance, disregard the obsolete 100 ppm standard, seek ways to reform the law in light of the new science, and reduce the company's emissions to a level lower than legally required.

Consider now the same regulation, but current scientific consensus holds that the emission is perfectly safe. Here, the compliance officer may justifiably consider circumventing this inane law. With circumvention, the logic of FRM comes back into play. If the regulation is strictly enforced and backed with heavy fines, then the company will likely choose to waste money on needless technologies and live to letter of the law. However, if a breach and pay strategy proves cost effective, then management has both an economic incentive and an ethical prerogative to allow emissions well beyond the legally required 100 ppm and simply risk paying a fine. Given that this law is inane, the company may also justly assert self-serving interpretations that exploit legal loopholes and legal ambiguities. If fines are levied or civil litigation commenced, then the company can justifiably use its resources to hire counsel and expert witnesses to establish the inane nature of the law and the purity of the corporate motive.

Of course, care must be taken in implementing strategic circumventions. Management must always be aware of the potential for a self-serving bias when assessing the moral status of a given law.[112] Yet, moral assessment is at the heart of corporate compliance practice, and it cannot be avoided. Managers need to be cognizant of the ethical judgments involved in interpreting legal obligations and in choosing a compliant, a cooperative, or a circumventive posture. In most cases, legal, ethical, and economic incentives align, and compliance practice is relatively straightforward. But when these incentives diverge, management needs a practical and nuanced framework to guide compliance practices.

D. APPLYING THE CCC FRAMEWORK TO CANCER ALLEY

The CCC framework begins with a survey of legal issues facing the firm. In Cancer Alley, this survey starts with regulations promulgated by the EPA and the LDEQ. The EPA administers various programs regulating air pollution, including the following: National Ambient Air Quality Standards ("NAAQS") and the

112. The tendency to interpret ambiguous information in a self-serving fashion is one of a number of biases identified by cognitive psychology. *See* Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 143–80 (2000) (discussing a self-serving bias among a list of more than a dozen of biases and heuristics that channel thought).

National Emissions Standards for Hazardous Air Pollutants ("NESHAP").[113] The former program lists six categories of air pollutants: ozone, particulate matter, carbon monoxide, sulfur dioxide, nitrogen oxide, and lead.[114] The latter currently regulates 187 pollutants[115] "known or suspected to cause cancer or other serious health effects, such as reproductive effects or birth defects, or adverse environmental effects."[116] For each program, the EPA sets emission standards, monitors compliance, and periodically assesses health risks with an eye toward regulatory reforms.[117] The EPA requires all major and some minor sources of pollutants to hold an operating permit.[118] In Cancer Alley, the LDEQ reviews permit applications and issues permits.[119]

These air quality programs directly implicate human health; hence, our CCC framework requires a cooperative posture. Cooperation begins with a professionally honest interpretation of legal requirements free from any self-serving bias. To illustrate, consider a regulation that limits emissions of toxins X and Y to 10 ppm. A company currently exceeds this level for each toxin and meeting the standard will be quite costly. However, it is relatively inexpensive to transform toxins X and Y into toxin XY, which is just as dangerous as either toxin standing alone, but XY is not on the list of regulated air pollutants. After accounting for potential fines, civil liabilities, possible harms to the firm's reputation, and other costs to social capital, managers discover that emitting XY is cost effective both in the short run and in the long run. Under the economic logic of the FRM framework, management sets its compliance directives with reference to positive price signals set by the law. Adopting the FRM view of political obligation, the company exploits the legal loophole and emits XY. Under the cooperative norm of the CCC framework, by contrast, management interprets the law with reference to the law's moral aspirations, resists the temptation to exploit the loophole, and proactively informs the EPA of the loophole in the regulatory system.

Interpretive issues also manifest themselves with regard to common law concerns. Recalling Denka's emission of neoprene, note that neoprene is not on the NESHAP list of 187 airborne carcinogens. Hence, Denka's primary legal

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113. *Regulatory and Guidance Information by Topic: Air*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-air [https://perma.cc/KVR2-E7Q3] (last visited Oct. 23, 2021).

114. *NAAQS Table,* U.S. ENV'T PROT. AGENCY, https://www.epa.gov/criteria-air-pollutants/naaqs-table [https://perma.cc/7LWB-BYKC] (last visited Oct. 23, 2021).

115. *See What are Hazardous Air Pollutants?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/haps/what-are-hazardous-air-pollutants [https://perma.cc/HC5R-FDKH] (last visited Oct. 24, 2021).

116. *See National Emission Standards for Hazardous Air Pollutants Compliance Monitoring,* U.S. ENV'T PROT. AGENCY, https://www.epa.gov/compliance/national-emission-standards-hazardous-air-pollutants-compliance-monitoring [https://perma.cc/H8FG-MJJG] (last visited Oct. 24, 2021).

117. Keehan, *supra* note 12, at 353–54.

118. *Who Has to Obtain a Title V Permit?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/title-v-operating-permits/who-has-obtain-title-v-permit [https://perma.cc/38EX-JUZG] (last visited Oct. 24, 2021).

119. *See* Lartey & Laughland, *supra* note 15 (quoting Denka spokesman).

exposure comes from a potential class-action common law tort action. Fence line residents report serious health effects but identifying the cause of the effects will likely prove difficult. The lower region along the Mississippi River is home to six oil refineries, and more than twenty major oil companies are present, including Chevron, ConocoPhillips, Exxon, Mobil, Marathon Petroleum, Shell, and Valero.[120] In addition, 300 major petrochemical plants are located in the state, exporting 4.5 billion pounds of plastic products annually.[121] Interpreting its common law duties, Denka could deny liability to local residents, citing the multiple sources as potential cause. Given the problems of proof, a modest settlement may very well be forthcoming, and the FRM framework will search for and endorse this tactic.

The CCC framework, by contrast, would ask this manufacturer to go beyond the commands of positive law and coordinate with the multitude of other firms operating along the Mississippi to affirmatively eliminate environmental racism. This coordination must include the sharing of best practices and active collaboration on the latest research in clean technologies. Most, if not all, leading companies maintain budgets for social initiatives.[122] These funds should be used to support medical research in affected communities. The funds may also be used for purchasing fence line properties at an above market price. Louisiana law makes it difficult to transfer land absent proof of ownership.[123] Given the vestiges of slavery and Jim Crow, current residents may find it impossible to provide documentation. Mediation between a homeowner group and a well-intentioned industrial consortium may produce a solution. Ultimately, environmental racism is a blight, and public policy makers can only go so far without industrial cooperation. The CCC framework calls for such a partnership.

III. ARISTOTELIAN DECENCY AND THE CCC FRAMEWORK

The FRM and CCC frameworks offer competing visions of a corporation's political obligations. FRM frames political obligations as a positive command of a sovereign and then operationalizes compliance practice with predictions of economic consequences to the firm of alternative actions. In Part I, we highlighted the moral shortcomings of FRM with reference to Cancer Alley. We argued that

120. Keehan, *supra* note 12, at 347.

121. *Id.*

122. *See generally* Thomas W. Dunfee, *Do Firms with Unique Capacities for Rescuing Victims of Human Catastrophes Have Special Obligations? Corporate Responsibility and the AIDS Catastrophe in Sub-Saharan Africa*, 16 BUS. ETHICS Q. 185, 198 (2006) ("The idea that financial interests should prohibit all social initiatives has been rejected both in both law and ethics in regard to corporations generally."); David N. Hess, Nikolai Rogovsky, & Thomas W. Dunfee, *The Next Wave of Corporate Community Involvement: Corporate Social Initiatives*, 44 CAL. MGMT. REV. 110 (2002) (documenting the growing prevalence of philanthropically operated budgets within large corporate settings).

123. *See* Keehan, *supra* note 12, at 346 ("Because most properties in the area had been passed down through former slave families for generations, proof of ownership was not always available. Therefore, most of the historic African-American homes in the area could not be bought by the industry.").

FRM: (1) uncritically accepts substantive imperfections in the law; (2) encourages overly aggressive legal strategies that enable legal circumventions; and (3) fails to provide a necessary external moral check on the effects of corporate compliance practices. In Part II, we offered the CCC framework as a practical corrective to these shortcomings generally, and specifically, for the compliance-induced racial discrimination in Cancer Alley. Pursuant to our CCC framework, industrial plants in Cancer Alley must cooperate with competing firms, with government regulators, and with affected communities to mitigate, and ultimately eliminate, environmental racism. Under the CCC framework, cooperation requires economic self-restraint from positions of advantage and necessitates a moral examination of the effects of corporate compliance practices that transcends compliance with positive law.

In the following sections, we draw upon Aristotle's defense of *epieikeia*, or decency, as an account of why moral virtue is needed to correct for the conception of corporate compliance supported by FRM.[124] Our discussion begins with Aristotle's account of decency as a necessary corrective to shortcomings in "legal justice."[125] We then demonstrate the practical application of this virtue in an environmental context. Pursuant to decency, the CCC framework motivates self-restraint and elevates principles over profits in Cancer Alley, and elsewhere, in three critical ways: (1) by correcting for the inequitable valuation of human life in positive law; (2) by correcting for FRM's tendency to abuse political power to weaken the law's concern for human well-being; and (3) by stimulating proactive deliberation with stakeholders that promotes the moral legitimacy of business and law.

A. ARISTOTLE ON THE MORAL VIRTUE OF DECENCY

In his discussion of the virtue of justice in *Nicomachean Ethics*, Aristotle anticipates and answers those who claim that corporate compliance *should be* about responding to the positive command of the sovereign coupled with the likely economic consequences to the firm and nothing more because *that* is what morality requires.[126] In Aristotle's jargon, the FRM practitioner, the Holmesian positivist, and the law and economics scholar all commit the same mistake of equating the virtue of "justice" with a positivistic reading of "legal justice."[127] Aristotle contends that in practice this positive understanding of justice as legal justice requires a corrective virtue that he characterizes in terms of decency.

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124. *See* ARISTOTLE, NICOMACHEAN ETHICS 98–99 (Terence Irwin trans., Hackett Publishing 3d ed. 2019). *See generally* Trevor J. Saunders, *Epieikeia: Plato and the Controversial Virtue of the Greeks*, *in* PLATO'S LAWS AND ITS HISTORICAL SIGNIFICANCE 65, 80–93 (Francisco L. Lisi ed., 1998) (analogizing the role played by decency in aid of legal justice to the one played by equity in tempering law).

125. ARISTOTLE, *supra* note 124, at 98.

126. *Id*. at 98–99.

127. *Id*. at 99.

Aristotle starts his conceptual analysis by considering what the multitude tend to mean when they speak about the concept of *justice* which they confound with positive law: "The puzzle arises because what is decent is just, but is not what is *legally* just."[128] Aristotle contends that a moral virtue of decency "rectifies" legal justice.[129] The rectification responds to legal regulation's inherent generality, or universality. Aristotle writes:

> [A]ll law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the universal rule that is usually correct, well aware of the error being made. And the law is no less correct on this account; for the source of the error is not the law or the legislator, but the nature of the object itself, since that is what the subject matter of actions is bound to be like.[130]

Notice that Aristotle neither impugns the regulators who set forth rules with inherent shortcomings, nor does he impute injustice to the objects of positive law, which by nature are bound to come up short in application to cases.

For Aristotle, the limitation of legal regulation is not ontological—a function of the facticity of law—but rather political.[131] The mistake is in the institutional division of labor between lawgiver and legal subject, after the object of law takes positive form.[132] In other words, Aristotle rejects the idea that good managers should lean on the positive edge of legal regulation to chase financial gains. His rejoinder from decency would be that the justice of law comes from the purpose of law—its *raison d'être*—not merely its positivistic rendering and sting, and therefore, that if "good" law (well-founded and legitimate) is indeed to be good and serve as a fount of justice, moral virtue entails decency from legal subjects to dig beneath the verbal veneer of law to consult its wherefor. He writes:

> [T]he decent is just, and better than a certain way of being just—not better than the just without qualification, but better than the error that results from the omission of any qualification in the rule [of law]. And this is the nature of the decent—rectification of law insofar as the universality of law makes it deficient.[133]

The difficulty applying Aristotle's account of decency and justice to corporate responsibility is the same difficulty with applying any of his virtue ethics. Aristotle's inquiry is not into moral rights and duties that take the form of law, but rather ethics, which is the study of the good life, including how one treats

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128. *Id.* (emphasis added).
129. *Id.*
130. *Id.*
131. *Id.* and accompanying quote.
132. *Id.*
133. *Id.*

others, but fundamentally how one lives and treats oneself.[134] How does one then figure out what decency actually requires? The answer Aristotle gives for any of the virtues of character is to imagine how the *phronimos*, or practically wise person, will act since, by conceptual definition, the practically wise person displays all the moral virtues of character.[135] For Aristotle, moderation and stoic self-restraint play a central role.[136]

B. OPERATIONALIZING "LEGAL COOPERATION"

In corporate compliance settings, where executives and compliance officers have role responsibilities to discharge, the virtue of decency simultaneously helps (1) to realize the justice of legal regulation (rather than a one-dimensional sense of "legal justice") and (2) to promote respect for the moral integrity of all members of the corporation's regulatory community. Though Aristotle does not set forth any concrete rules for acting with decency, he does characterize what decency, and its absence, look like:

> It is also evident from this who the decent person is. For he is one who decides on and does such actions, not an exact stickler for justice in the bad way, but by taking less than he might even though he has the law on his side.[137]

Here, Aristotle is expressing the need for stoic self-restraint that cuts an overly entitled sense of legal prerogative down to size.[138] The virtue of decency requires the "stickler" to avoid taking undue advantage of substantive error manifest in laws that directly impact the life, health, and dignity of affected parties.

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134. *See* Gertrude Elizabeth Margaret Anscombe, *Modern Moral Philosophy,* 33 PHIL. 1, 1 (1958) (noting that "the term 'moral' itself, which we have by direct inheritance from Aristotle, just doesn't seem to fit, in its modern sense, into an account of Aristotelian ethics").

135. ROSALIND HURSTHOUSE & GLEN PETTIGROVE, Virtue Ethics, THE STAN. ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2018) [https://perma.cc/4YVC-MSBG], https://plato.stanford.edu/archives/win2018/entries/ethics-virtue/; LINDA TRINKAUS ZAGZEBSKI, DIVINE MOTIVATION THEORY 159–60 (2004) (ebook).

136. The Aristotelian virtue of self-restraint "is to be practiced not for the sake of ensuring financial success – nay, financial success is properly defined by what is necessary to support a virtuous life." George Bragues, *Seek the Good Life, Not Money: The Aristotelian Approach to Business Ethics*, 67 J. BUS. ETHICS 341, 346–47 (2006).

137. ARISTOTLE, *supra* note 124, at 99.

138. In spelling out how the CCC framework coupled with Aristotelian decency operationalizes compliance practice to respond to the injustice of environmental racism, we extend Kenneth Andrews's rejection of Milton Friedman's well-known wealth maximization view of social responsibility. *See* Andrews, *supra* note 8, at 135 (defining corporate social responsibility as "voluntary restraint of short-term profit maximization"). Andrews's leading objection to Friedman's positivistic reading of the "artificial responsibilities" of the corporation tracks with Aristotle's account. Andrews emphasizes that "regulation by government, while to some degree essential under imperfect competition, is not sufficiently knowledgeable, subtle, or effective to reconcile the self-interest of corporate entrepreneurship and the needs of a society." *Id*. Despite calling for voluntary self-restraint in the implementation of corporate legal strategy, Andrews never articulated a clear implementation framework. *See id.* The CCC framework answers that need.

1. Recognizing Imperfections in Positive Law

The deficiency of damages law in the United States proves especially confounding for corporate compliance because of the discriminatory nature of the calculations.[139] Tort scholar Gregory Keating notes that the "methods for calculating both 'economic and noneconomic damages attributable to past and future harm' incorporate the effects of objectionable racial and gender discrimination and carry their effects forward."[140] He emphasizes that these calculations undercut the law's "own commitment to equality of right by computing damages in ways that reflect not only income and wealth but also race and gender."[141] The confounding consideration is that corporate compliance programs legitimately need to take stock of FRM by anticipating and dodging financial risks. What is not accounted for by FRM, and this is where decency steps in, is the perverse incentive for executives and compliance officers involved in corporate compliance programs that go no further than FRM to localize environmental damages upon people whose damages are a fraction of those that would be owed to injure a wealthy, White man.

In contrast to FRM, the CCC framework highlights three *modes* of corporate compliance—compliance, cooperation, and circumvention—each stemming from a distinct assessment of the moral status of the legal regulation in question. With issues of human health, safety, and dignity, the posture of the compliance practice required by CCC is *cooperative*, and the spirit of cooperation is well captured by Aristotle's companion discussion of *epieikeia* in the *Rhetoric*, where decency "bids us be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant."[142] To cooperate with the meaning of negligence law in light of the limitations of human institutions requires a corporate compliance program at the very threshold to keep a keen eye on the well-being of everyone who could be injured as a side-effect of corporate strategy.

The law of tort damages as applied to Cancer Alley illustrates the unfairness of treating people in unequal positions equally. Compensating each injured party for the loss of future income may initially seem fair, but, the method of measuring future income gives rise to environmental racism. Compliance officers need not intend racially biased outcomes for it to happen. The legacy of slavery and Jim

139. *See* Yuracko & Avraham, *supra* note 41, at 325 (demonstrating that current positive law "results in damage awards that are significantly lower for black victims than for white victims and creates an incentive for potential tortfeasors to allocate risk disproportionately to minority communities").

140. Gregory C. Keating, *Torts and the Paradox of Conservative Justice: A Response to Avraham and Yuracko*, 78 OHIO ST. L.J. FURTHERMORE 29, 29 (2017) (quoting Ronen Avraham & Kim Yuracko, *Torts and Discrimination*, 78 OHIO ST. L. J. 661, 665–66 (2017)).

141. *Id*. at 35.

142. ARISTOTLE, *Rhetorica (Rhetoric) (Books I and II complete; Book III, chapters 1, 13-19 [Chapters 2-12 omitted])*, *in* THE BASIC WORKS OF ARISTOTLE 1325, 1372 (Richard McKeon ed., 1st ed. 1941).

Crow persists, racial prejudice continues, and "neutral" metrics of damages that ignore these truths make matters worse. In this setting, responsible compliance requires corporate officers to embrace the virtue of decency, visualize the value of human life and dignity, and take stock of past injuries inflicted by the vestiges of racism exacerbated by past and current corporate practices. This may require the firm to increase the undervaluation of some under FRM or to decrease the overvaluation of others.[143] In other words, decency requires an adjustment to the cost-benefit analysis of human life.[144] Even if one disagrees with the cost-benefit approach reportedly used by Ford Motor Company with respect to the Pinto fire case, at least Ford's calculations did not discriminate on the basis of race or gender.[145] Corporate compliance programs must completely eradicate the use of numbers that systematically shift an environmental "externality from a White man to a Black woman [to] reduce the expected liability of a tortfeasor by about fifty percent."[146]

2. Implementing a Corrective—Deliberative Engagement with Stakeholders[147]

Self-restraint in compliance practices can cost the virtuous firm profits and place it at a competitive disadvantage. One solution is for the firm to instigate and promote corrective reforms of ill-suited laws to level the playing field. Adopting a public-oriented reform strategy entails costs; hence, the firm must exercise another sort of self-restraint, namely managers must resist the temptation to sit out the public policy process. This proactive posture displays the virtue of decency insomuch as the corporation "takes less than [it] might even though [it] has the law on [its] side."[148] The positive law does not demand on pain of penalty that the corporation invest in public policy and norm-making initiatives that involve the corporation in democratic and discursive mechanisms of civic will formation. Aristotelian decency, however, specifically imposes an imperative on citizens to act as surrogates of legislators in the regulatory voids created by new and evolving business practices. Aristotle writes that "it is correct to rectify the

143. *See* Kenneth W. Simons, *The Logic of Egalitarian Norms*, 80 B.U. L. REV. 693, 715–20, 722 (2000) (reviewing legal contexts where "leveling up" versus "leveling down" is required and contexts where either will do).

144. The principle of equal protection written into the U.S. Constitution is also joined. *See* JOHN C. P. GOLDBERG, ET AL., TORT LAW 478 (2d ed. 2008) (questioning the constitutionality of race and gender differentiated damages when they reproduce the effects of past discrimination); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 778 OHIO ST. L.J. 661, 685 (2017) (noting that notwithstanding constitutional challenges, race and gender based data are still routinely introduced in tort trials without objection); McMillan v. City of New York, 253 F.R.D. 247, 250 (E.D.N.Y. 2008) (criticizing race-based expectancy tables).

145. Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379, 381 (1992).

146. Goran Dominioni, *Biased Damages Awards: Gender and Race Discrimination in Tort Trials*, 1 INT'L COMPAR., POL'Y & ETHICS L. REV. 269, 272 (2017).

147. *See* Scherer & Palazzo, *supra* note 17, at 1106 (discussing the term "deliberative democracy").

148. ARISTOTLE, *supra* note 124, at 99.

deficiency [in laws]; this is what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in his legislation."[149]

Industrial organizations in Cancer Alley have the ear of local public policy makers. These organizations provide data on emissions and technological possibilities. They also provide jobs and tax revenue, two factors that provide corporate actors influence on state and local regulatory decisions. This influence, of course, can be abused. While direct evidence of abuse is often hard to find, Louisiana state officials, governmental organizations, and industrial entities tend to downplay the extent to which industrial pollution affects cancer rates and other matters of public health concern.[150] The American Cancer Society's website outlines contributing factors to cancer, including obesity, smoking, and genetics, but does not list industrial pollution.[151] Similarly, the Center for Disease Control's "Comprehensive Cancer Control Plan for Louisiana 2011-2015" excludes "environmental toxins" as a source of increased cancer risk.[152] It recommends decreasing obesity, minimizing tobacco use, and avoiding excessive sun exposure.[153] Local hospitals do not take pollution into account when considering the cause of a patient's diagnosis. A spokesperson from Lake Charles Memorial Health system stated that the hospital avoided the topic of industrial pollution because "it's something controversial."[154] A preeminent cancer research center in Houston, M.D. Anderson, does not study pollutants.[155] All of this suggests that industrial interests may be overshadowing public health.

The corporate influence on public policy may tempt managers to shape environmental policy with sole reference to the financial returns to the company. Yet, corporate influence also provides managers an opportunity to promote the common good through development of public health data, dialogue with affected stakeholders, and cooperation with public officials with an aim to improve rules that affect public health. Within the business ethics literature, the importance of stakeholder dialogue for the moral legitimacy of corporate strategy has been addressed under a variety of rubrics, including stakeholder learning dialogues,[156] stakeholder dialogues,[157]

149. *Id.*

150. *See* Keehan, *supra* note 12, at 358–68.

151. *See* Heather Rogers, *Erasing Mossville: How Pollution Killed a Louisiana Town*, THE INTERCEPT (Nov. 4, 2015), https://theintercept.com/2015/11/04/erasing-mossville-how-pollution-killed-a-louisiana-town/ [https://perma.cc/Y4X4-DT36].

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* Jerry M. Calton, *Ties That Bind: A Social Contracts Approach to Business Ethics*, 40 BUS. & SOC'Y 220, 222 (2001).

157. *See* Linda O'Riordan & Jenny Fairbrass, *Corporate Social Responsibility (CSR): Models and Theories in Stakeholder Dialogue*, 83 J. BUS. ETHICS 745 (2008).

political CSR,[158] and multi-stakeholder initiatives.[159] Within the environmental literature, one finds the "precautionary principle" that calls upon deliberative engagement with all those potentially affected by negative externalities.[160] Our appeal to Aristotelian decency supports and extends these approaches by emphasizing that an industrial organization has an ethical obligation to rectify the inevitable gaps and missteps in positive environmental law. The CCC approach draws attention to the need for legal cooperation and provides a means of keeping that perspective tractable.

CONCLUSION

This Article contrasts competing approaches to compliance practices. The FRM approach frames legal obligations as positive commands of the sovereign and directs compliance protocols with reference to the predicted financial outcomes of alternative corporate actions. Our alternative approach—CCC—frames legal obligations with reference to the moral status of the law in question and requires an accounting of the moral consequences of alternative corporate actions on affected stakeholders. When imperfections in positive law, combined with FRM practices, leads to unacceptable harms to human health, safety, or dignity, a duty to rectify the firm's compliance protocols emerges. This duty to rectify corresponds to the virtue of decency which Aristotle offers as a corrective to limitations in general articulations of law.

We illustrate the importance of our CCC framework infused with the virtue of decency with reference to the health crisis posed in Cancer Alley, a stretch of land along the Mississippi River with multitudes of industrial plants and strikingly high rates of respiratory illness and cancer among its disproportionately

158. *See* Guido Palazzo & Andreas Georg Scherer, *Corporate Legitimacy as Deliberation: A Communicative Framework*, 66 J. BUS. ETHICS 71 (2006); Andreas Georg Scherer & Guido Palazzo, *Toward a Political Conception of Corporate Responsibility: Business and Society Seen From a Habermasian Perspective*, 32 ACAD. MGMT. REV. 1096 (2007).

159. Sébastien Mena & Guido Palazzo, *Input and Output Legitimacy of Multi-Stakeholder Initiatives*, 22 BUS. ETHICS Q. 527 (2012). The implementation of multistakeholder initiatives has seen innovative strategies used to level power differentials between corporations and other constituencies. In the case of ISO 26000 (a transnational CSR standard that is considered to have broad legitimacy), the ISO deliberation process featured power-flattening working group members who served as mediators to manage the discussion and facilitate communication and consensus. *See* Rüdiger Hahn & Christian Weidtmann, *Transnational Governance, Deliberative Democracy, and the Legitimacy of ISO 26000: Analyzing the Case of a Global Multistakeholder Process*, 55 BUS. & SOC. 90, 103–08 (2016) (finding that "the vast majority [of participants] still agreed that the process was inclusive (86%), fair (83%), and democratic (81%)" despite the possibility that "an asymmetric distribution of power within such a multistakeholder discourse could destabilize the entire process").

160. *See* Roberto Andorno, *The Precautionary Principle: A New Legal Standard for a Technological Age*, 1 J. INT'L BIOTECHNOLOGY L. 11, 13, 17 (2004) (citing the European Commission's appeal to the precautionary principle that is triggered where the possibility of harmful effects on health or the environment has been identified and preliminary scientific evaluation, based on the available data, proves inconclusive for assessing the level or risk and linking Aristotle's account of practical wisdom with the precautionary principle).

Black residents. We argue that simply applying the calculations of FRM will not address the tragic and unjust harms suffered by the residents. The FRM approach provides no incentive to affirmatively improve the law, nor does it offer a corrective for measures of tort damages that discriminate on the basis of race and gender. By contrast, The CCC framework inspired by Aristotelian decency directs companies to reflect upon the affirmative harms caused by "cost-effective" emissions and to work with local residents, competing firms, and governmental regulators to rectify the gaps and imperfections in environmental law that perpetuate the social injustices in places like Cancer Alley.