Maximal Accountability with Minimally Sufficient Punishment

John Braithwaite*

A criminal injustice system cannot rediscover its promise for justice without invigorating corporate criminal responsibility. However, maximizing corporate punishment is not a path to justice because policymakers must make choices about how much to invest in increased detection of corporate crime, warnings, persuading voluntary commitment to repair harm to victims, deferred prosecution agreements, in addition to increased prosecutions. Funding can shift from carceral punishment of crimes of the powerless to support all these forms of intervention.[1]*Ultimately, such transformation might be self-funded by improved tax compliance and reduced corporate sabotage of economic futures by the destruction of ecosystems. When all this is done as a coherent mix, corporate criminal responsibility can contribute profoundly to a good society.*

This Article develops the idea of minimally sufficient deterrence by building on Brent Fisse's accountability principle for corporate offenders—all who are responsible should be held to account—whether they are individual executives, sub-units of corporations, auditors, ratings agencies, corporations that are criminal actors, or other implicated firms upstream or downstream.[2]

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1. Justice reinvestment is a relevant advocacy movement. *See* David Brown, Chris Cunneen, Melanie Schwartz, Julie Stubbs & Courtney Young, JUSTICE REINVESTMENT: WINDING BACK IMPRISONMENT 17 (2016) (examining justice reinvestment, its origins, and the potential for its use as a mechanism for winding back imprisonment rates).

2. *See generally* BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME, AND ACCOUNTABILITY (1993) (providing an overview of the rarity of corporate accountability in criminal law and some solutions).

I. FOLLOWING FISSE'S FOOTSTEPS

Commenting on a draft of this Article, Brent Fisse generously noted that he and I are jointly responsible for the Accountability Model! He did lead on key ideas; there are reasons he was the senior author of key publications. The accountability in this work is not necessarily accountability through criminal punishment. Punishment limited to national justice systems cannot accomplish accountability on its own in a world where the most culpable upstream/downstream corporations might be offshore.[3] An intractable problem for small economies, it is occasionally true for the United States (consider Deepwater Horizon, pollution from ships in international waters, ozone, space crimes, cyberespionage). Deferred prosecutions can be reformed to lever transnational compliance reform and heal harms to offshore victims. Leverage from national regulatory threats can help secure transnational prevention. Some damaging U.S. corporate crimes might have been prevented by national corporate crime enforcement with a cosmopolitan preventive imagination more akin to the imagination of epidemiologists preventing Ebola or COVID-19.[4]

Various parts of this Article build on Fisse's foundations by moving to *Macrocriminology and Freedom*.[5] That book conceives enforced self-incapacitation as a neglected doctrine and provides the reader with empirical evidence suggesting that enforced self-incapacitation has at least as much promise as deterrence, rehabilitation, or retribution. No more than curated illustrations are proffered for the power of weaving many doctrines together with enforced self-incapacitation, combined with a theoretically-informed view on the kind of systematic empirical research needed. How might enforced self-incapacitation have helped prevent criminal cultures that brought about the Deepwater Horizon catastrophe and the Arthur Andersen contribution to Enron alongside other 2001

3. *See generally* Julie R. O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021 (2017).

4. When Ebola spread in Africa, epidemiologists from across the world pooled expertise to contain it to a limited number of African countries. That cosmopolitan ethos is needed for environmental enforcement imperatives of climate crises. *See* Alisha Haridasani Gupta, *How Global Cooperation Could be Key to Containing the Coronavirus*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/us/coronavirus-who-samantha-power-un.html [https://perma.cc/DN4N-7DNB] (interviewing former U.S. Ambassador to the United Nations, Samantha Power, about the importance of international cooperation during the 2014 Ebola crisis).

5. JOHN BRAITHWAITE, MACROCRIMINOLOGY AND FREEDOM (2022).

crashes?[6] One fair, insightful Fisse criticism of *Macrocriminology and Freedom* is that the controls it describes may be self-enabling for prevention more than self-incapacitating.

The second principle advanced is minimal sufficiency of punishment for criminal law to be effective in preventing crime. Punishment as a "last resort" has currency in jurisprudence.[7] Under the minimal sufficiency principle, punishment of crimes of the powerless must be reduced to approach minimal sufficiency.[8] Minimally sufficient punishment is that level of punishment that accomplishes sufficient prevention to maximize freedom as non-domination.[9] *Macrocriminology and Freedom* argues for increasing punishment of crimes of the powerful to attain minimal sufficiency,[10] together with improved detection and investment in accountability for all responsible. Other symposium essays point out that when detection is rare for companies averaging more than two offenses a week in financial corporations,[11] and expected punishment is low compared to expected benefits, deterrence is close to zero—i.e., minimally *insufficient*.[12]

Macrocriminology and Freedom acknowledges the contributions of many co-authors and forebears on how freedom promotes crime prevention and crime prevention promotes freedom. Brent Fisse was one. This Article focuses specifically on Fisse, though not to the total neglect of others. Fisse was my earliest, most influential corporate crime mentor, a man who thoroughly shaped my thinking about organizational responsibility. This includes his thought on reactive fault—a doctrine of fault for failing to react responsibly to detected crime within an organization, assessed by good faith and good deeds to right the wrongs.[13] A Fisse-inspired contribution does not mean he agrees with everything written here.[14]

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6. Criminal law texts tend to equate incapacitation to imprisonment, capital punishment, and physical means, such as cutting the hands of thieves. Yet incapacitation is not reducible to any specific technique. It is always partial, as thieves and murderers still steal and murder inside prisons. Debarring a reckless physician from practicing medicine is incapacitation. Incapacitation means truncation of the capacity of an actor to commit a crime. For a discussion of what corporate self-incapacitation can accomplish, see *id.* at 501–68. *See generally* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019) (providing two competing standards of incapacitation); Mihailis E. Diamantis, *Corporate Incapacitation: A Handmaid's Tale*, 72 VAND. L. REV. EN BANC 251 (2018–2019) (arguing that incapacitation should only play a secondary role).

7. For a discussion of the theory and application of the "last resort" principle, see Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207 (2004); Panu Minkkinen, *If Taken in Earnest: Criminal Law Doctrine and the Last Resort*, 45 HOW. J. CRIM. JUST. 521 (2006).

8. As Philip Pettit commented in an email to me, minimal sufficiency means "minimally sufficient punishment and nothing more," as opposed to mandating "at least" some minimum level of punishment.

9. The idea of freedom as non-domination was most influentially developed in PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997).

10. BRAITHWAITE, *supra* note 5, at 431–500.

11. Many symposium participants in their discussion referred to Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923 (2019).

12. De Sousa and Laufer said at the symposium, "it is not wrong to think we are a mere stone's throw away [from the abolition of corporate criminal punishment]." Susana Aires de Sousa & William S. Laufer, *The State's Responsibility for Corporate Criminal Justice*, 47 J. CORP. L. 1109, 1111 (2022). Diamantis and Thomas go further in their article, stating "[t]he Abolitionists won long ago . . . ." and "[w]hile 8.6% of the adult population of the United States has a felony conviction less than 0.3% of corporations do"—when many of them have a hundred thousand potentially criminal hands worldwide, one might add. Mihailis E. Diamantis & Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 991, 998 (2022).

13. *See generally* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1982); Brent Fisse, *Reactive Corporate Fault*, CULPABLE CORP. MINDS WORKSHOP (Dec. 2021) (on file with author).

14. Commenting on an earlier draft of this Article, however, Fisse insisted that we do agree.

Increased corporate criminal prosecutions can help improve detection and deliver more accountability for all who are responsible. However, putting all scarce regulatory resources into criminal cases would, of course, defeat those outcomes. Deterrence and incapacitation are important parts of reducing corporate crime, but strengthening and diversifying the regulatory mix in the tools policymakers use to control crime is even more important. If criminal law jurisprudence is to become an evidence-based tradition, it must come to terms with the current state of the evidence. There is little evidence demonstrating the efficacy of deterrent corporate punishment. There is much stronger data on the efficacy of detection of crime and deployment of a mix of regulatory strategies in response to detection—of which punishment is one important part of the mix.[15]

II. TRANSFORMING THE CRIMINAL INJUSTICE SYSTEM INTO A JUSTICE SYSTEM

It is wrong to view criminal law as a failed institution in the sweep of history from the ancient world through the Middle Ages to modernity. This is because the historical evidence suggests that criminal and tort law evolved as more principled, less violent responses to blood feuds. Formal law contributed greatly to the long-run decline in violence by providing a substitute for tyrannies of informal justice.[16]

But criminal law fails when it operates primarily as an institution of punishment, mainly punishment of the poor. As such, it fails to stimulate deep thought on structural realities of injustice and, on many occasions, facilitates those injustices. For example, criminal law came to serve ruling class interests by allowing impunity for theft of First Nations' land and then permitting an enslaved population imported from Africa to work the stolen land. It legitimated arbitrary use of the lash by white slave owners. Then the white man's law allowed them to devastate the land they stole: hunting all the buffalo, using the trees for lumber, putrefying the rivers, and overfishing. Finally, their laws of impunity left unpunished mega-fires caused by burning coal, gas, and oil—ultimately bringing ecosystems past their tipping points. Instead of effectively criminalizing these things, the law criminalized First Nations braves who defended their buffalo and land.

The frontier wars of the United States and Australia, where institutions of criminal justice routinely failed to accord equal justice to whites and non-whites, found their modern counterparts in the Afghanistan war, Abu Ghraib, and Guantanamo Bay. Today, after Democratic candidates promised to close Guantanamo during three winning elections, the United States flouts the Geneva Conventions and ancient common law traditions of Habeas Corpus. No mark of failure for the character of western justice could be more total than the evidence that the Islamic State in Iraq and Syria was founded by an inmate of a prison run by the U.S. government and its contractors (Camp Bucca). Abu Omar al-Baghdadi had been neither a combatant (and therefore not a POW) nor tried for any specific criminal

15. *See generally* Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie & Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL'Y 387 (2016) (providing such data).

16. *See, e.g.*, Mark Cooney, *The Decline of Elite Homicide*, 35 CRIMINOLOGY 381 (1997); Manuel Eisner, *Long-Term Historical Trends in Violent Crime*, 30 CRIME & JUST. 83 (2003); *See generally* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011) (drawing on an autodidactically wide range of historical, psychological, economic, and scientific literature to discern a long-term decline in violence as a means of settling disputes).

offense.[17] All his initial recruitment to form Islamic State was conducted among inmates inside Camp Bucca, drawing inspiration from arbitrary imprisonment, torture, and willful disrespect for the Qur'an that—by then—were publicized facts of criminalized regimes inside Guantanamo Bay and Abu Ghraib.[18]

This way of thinking about the criminal justice system resonated with Occupy movement slogans: that the system served the "1 percent" who corruptly extract most societal wealth. It resonated even more so in Australia, where corporate criminals enjoy impunity while a majority of young First Nations citizens experience arrests and a rate of imprisonment and death in custody worse than for African Americans. Contact with the criminal legal system is not just another minor part of the oppression inflicted on First Nations Australians; it is the heartland of Australian oppression. The justice system makes it difficult for young Aboriginal survivors of the system to avoid homelessness, hold a job, or even get one in the first place.[19]

This Article argues for corporate criminal responsibility as central to any program aiming to transform criminal law from being a weapon of injustice. Maximizing detection of criminal offenses committed in the name of the system and demanding responsibility for wrongdoing remains important in the conduct of institutions like the corporatized prisons without trials that punish those on the wrong side of the war on terror. However, maximizing consistent punishment of crime and pursuing proportionate punishment of all crimes are prescriptions for expanding extant criminal law as an enemy of freedom. This is because the system is designed to be ruthless in pursuing the crimes of 'The Truly Disadvantaged'[20] and simultaneously designed to be overwhelmed by impunity for the powerful.

Why dismiss consistent punishment in favor of an accountability principle in criminal law that holds accountable all those who should be accountable? Mostly, this means non-punitive and non-criminal forms of accountability. This Article suggests a minimal sufficiency principle of punishment. Maximum justice is a better aim than maximum criminal prosecutions and requires minimal sufficiency of criminalization. Minimal sufficiency means a release of 90% of incarcerated offenders even in societies with the lowest imprisonment rates.[21] While minimal sufficiency requires reduced punishment of the poor, it demands more convictions of the powerful. Extant criminal law institutions inefficiently and unjustly over-punish the poor and under-punish the rich.[22]

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17. *See* PAUL KAMOLNICK, THE AL-QAEDA ORGANIZATION AND THE ISLAMIC STATE ORGANIZATION 98 (2017) ("Evidence now [] confirms that during imprisonment at Camp Bucca in Iraq, several persons who would later fill the highest leadership ranks of the [Islamic State] organization [including Abu Omar al-Baghdadi] were busily creating strategic blueprints, building its secret network, constituting its leadership, and forging new alliances . . . .").

18. JOHN BRAITHWAITE & BINA D'COSTA, CASCADES OF VIOLENCE: CRIME, WAR AND PEACEBUILDING ACROSS SOUTH ASIA 148–51 (2018).

19. *See* BRAITHWAITE, *supra* note 5, at 155–226, 329–500 (discussing the exploitative and unjust properties wrought by an untempered justice system).

20. *See generally* WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (2012) (analyzing the unique vulnerability of underprivileged people due to socioeconomic factors including systemic failures and institutional racism).

21. This is argued in more detail in BRAITHWAITE, *supra* note 5, at 431–500. It builds on JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUSTICE DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

22. JEFFREY REIMAN & PAUL LEIGHTON, THE RICH GET RICHER AND THE POOR GET PRISON (10th ed. 2020). This is true even though there has been a historical trajectory in many countries of gradual criminalization

At the root of this problem is a system that massively funds police that look the other way with corporate crime while poorly funding agencies that enforce the law against corporations. While corporate criminal punishment in no society is minimally sufficient to deliver the preventive purposes of criminal law, maximization of punishment of corporate offenders cannot be a worthy objective. There is evidence-based appeal in maximum detection of all forms of offending and minimization of an impunity that fails to deliver an accountability response. Put simply, policymakers might want more corporations to be inspected for compliance, more enforced demands for improved compliance, more restorative justice conferences at which corporate offenders offer voluntary undertakings to repair harm to victims, more deferred prosecution agreements, and more corporate prosecutions that result in punishment in pursuit of an optimized, sequenced mix.

III. THE ACCOUNTABILITY AND MINIMAL SUFFICIENCY PRINCIPLES

The accountability principle holds that all actors that should be accountable for a corporate crime should actually be held accountable—be they the corporation itself, an organizational subunit of the corporation, its Board, executives, or external facilitators of the crime.[23] This article does not revisit rationales for holding corporations accountable.[24] That would rehash insights that today are less controversial internationally.[25] I mean no disrespect to many who agree that "[c]riminal law is penal law. Its purpose is punishment."[26] My starting point is different, conceiving institutional failures of criminal law as failures of seeing criminal law too narrowly—that is, seeing it as being about punishment. This reform agenda envisions the replacement of consistent punishment as the preeminent purpose of criminal law with, instead, minimal sufficiency of punishment as just one of its purposes. Nor is punitive narrowing of purpose a balanced description of the

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of a wider sweep of corporate wrongdoing. *See generally* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. REV. 95 (2004) ("[C]orporations and business interests are considered some of the most important, if not the most, powerful and effective lobbyists in the country.").

23. FISSE & BRAITHWAITE, *supra* note 2. Such pluralizing of responsibility also goes to more recent 'responsibility gap' and 'responsibility deficit' analysis in the work of Philip Pettit and Christian List. These insights can only become more relevant as more of the worst crimes are executed through algorithmic corporate agency. Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 184 (2007); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY (2011); Philip Pettit, *The Conversable, Responsible Corporation*, *in* THE MORAL RESPONSIBILITY OF FIRMS 15, 15–33 (Eric W. Orts & N. Craig Smith eds., 2017); Philip Pettit, *Corporate Agency: The Lesson of the Discursive Dilemma*, *in* THE ROUTLEDGE HANDBOOK OF COLLECTIVE INTENTIONALITY 249, 249–60 (Marija Jankovic & Kirk Ludwig eds., 2017). In W. Robert Thomas's reflections on the taxonomy of sense-making for corporate criminals, he summarizes this concern as restricting attention to responsible individuals when "even a perfect enforcement system would fail to fully apportion blame for the harm done." W. Robert Thomas, *Making Sense of Corporate Criminals: A Tentative Taxonomy*, 17 GEO. J.L. & PUB. POL'Y 775, 787 (2019).

24. Other contributions to this symposium do so admirably.

25. Even as new questions have arisen, such as the "extended corporate mind" enabled by AI. Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. REV. 893 (2020); SUSANA AIRES DE SOUSA, IT WASN'T ME, IT WAS THE MACHINE: CRIME THEORY, RESPONSIBILITY AND ARTIFICIAL INTELLIGENCE 59–93 (2020).

26. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009). Hasnas develops this point in his contribution to this symposium. *See generally* John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009 (2022).

history of world criminal law systems that embrace much victim support, redress, and crime prevention by varied means. Environmental justice is the most important purpose of environmental criminal law; assisting in modest ways with preventing the extinction of our species and other species are more important purposes than consistent punishment. Embedded in a regulatory mix that includes punishment as part of the mix, corporate criminal law has an indispensable role in preserving global ecosystems. Carbon trading systems cannot achieve this on their own, given that corporations can and do engage in carbon fraud.

Holding to account all who should be accountable does not necessarily mean criminal responsibility. For example, deferred prosecution agreements and enforceable undertakings include agreements to fire, reassign, or discipline responsible executives. They can also include accountability by compensating victims of the crime or civil penalties. Jenifer Arlen[27] and John C. Coffee, Jr. developed the insight that corporate accountability—or the threat of it—is imperative for motivating corporate justice systems to hold individuals and corporate subunits to account.[28] It is particularly imperative for motivating boards to fire powerful CEOs to whom they might feel beholden, who may even be the CEO's compliant "pet rocks," in the words of one corporate leader whom Fisse and I interviewed.

The second principle is minimal sufficiency of punishment that mobilizes the purposes that justify punishment—deterrence, incapacitation, rehabilitation, and denunciation.[29] I take it as established across the vast corporate crime literature that no society has achieved minimal sufficiency of punishment for the crimes of the powerful.[30] Contributors to this symposium are counted alongside Fisse as among the influential proponents of the view that there is a corporate crime punishment deficit.[31]

Brent Fisse[32] and Philip Pettit's[33] work has forged a path to something better than a criminal injustice system by holding the rich and the poor accountable for criminal offenses

27. *See generally* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL. STUD. 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH 156, 156–99 (Tina Søreide & Abiola Makinwa eds., 2020).

28. *See* JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 123 (2020) ("[I]t is not an either-or choice between [the liability of] the corporation and its executives, and the best strategy is to pursue both in the hope that each can be induced to turn on the other.").

29. On purposes of corporate criminal punishment that bring incapacitation back into the mix, see generally W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019); Mihailis E. Diamantis, *supra* note 6. Minimal sufficiency of retribution is excluded as a principle that republican criminal justice theory contended is unneeded and dangerous because it promotes an "insatiable" criminal law that threatens freedom with an overreach of punitiveness. Such overreach defeats minimal sufficiency. Minimal sufficiency is, therefore, on the same page as Samuel W. Buell's contribution to this symposium in sidelining retribution as a rationale. *See generally* Samuel W. Buell, *A Restatement of Corporate Criminal Liability's Theory and Research Agenda*, 47 J. CORP. L. 937 (2022).

30. *See generally* Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453 (2019); COFFEE, *supra* note 28; SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL (2002); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323 (2017); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

31. This started with the empirical research of Edwin Sutherland. *See* EDWIN HARDIN SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION (1983).

32. Fisse, *supra* note 13; FISSE & BRAITHWAITE, *supra* note 2.

33. PETTIT, *supra* note 9; BRAITHWAITE & PETTIT, *supra* note 21.

in non-criminal ways. Restorative justice praxis was part of that.[34] This contention was advanced even as the justice of criminalizing certain serious wrongs underwrites the power of non-criminal alternative accountabilities—such as restorative justice for rich and poor alike. At the same time, for both the powerful and the powerless, the criminal law must be enforced criminally with sufficient frequency and in a sufficiently principled way,[35] to deliver on the promise underlying basic purposes of criminal law. Those who defy criminal law by repeated breaches or broken promises under restorative alternatives to criminal enforcement must feel a minimally sufficient force of criminal law. Smarter, more robust corporate criminal enforcement is required to arrive at that principled place.

Historical illustrations of this imperative are rich.[36] To make it contemporary, consider Australia's performance in preventing 'excess' COVID-19 deaths, which was comparatively good. Australia nevertheless had almost the worst 2020 performance worldwide on the percentage of COVID-19 deaths in aged care homes. A Royal Commission on Aged Care concluded this was a result of failures to comply with legal obligations to implement infection control plans or even have such plans in place.[37] The 90% of Australian aged care homes that had zero COVID-19 deaths in 2020 complied with these obligations, while the tiny minority of homes that had substantial numbers of deaths overwhelmingly ignored duties in infection control plans. There was no Australian prosecution of an aged care firm, but, perhaps worse, Australia had no debate about the failure to have such corporate criminal prosecutions.[38] Other societies, like Australia, had no such debate as they counted corpses.[39]

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34. *See, e.g.*, Christine Parker, *Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings*, 67 MOD. L. REV. 209 (2004); *see also* Andrew B. Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357 (2015). For concerns about the restorative approach, see Wiliam S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307 (2007).

35. Here is where Fisse's principle of reactive fault has particular relevance in a mix with punishment proportional to the magnitude of the wrongdoing. Fisse, *supra* note 13.

36. They are well documented in the corporate crime literature. *See* MARSHALL B. CLINARD, PETER C. YEAGER & RUTH BLACKBURN CLINARD, CORPORATE CRIME 110–32 (1980) (compiling data on corporate crime and enforcement action).

37. ROYAL COMM'N INTO AGED CARE QUALITY AND SAFETY, FINAL REPORT: CARE, DIGNITY AND RESPECT 141 (2021), https://agedcare.royalcommission.gov.au/publications/final-report [https://perma.cc/SG4R-WEEX].

38. A late development is 58 charges laid by the Victorian health and safety regulator against the Victorian Health Department over COVID-19 deaths from ineffective infection control plans in hotel quarantine. *See* Hannah Wooten, *VIC Health Department Prosecuted Over Hotel Quarantine*, AUSTL. FIN. REV. (Sept. 29, 2021, 2:29 PM), https://www.afr.com/politics/federal/vic-health-department-prosecuted-over-hotel-quarantine-20210929-p58vrn [https://perma.cc/SAE4-M4FR]. As these criminal investigations commenced, the Minister for Health and Head of the Premier's Department were dismissed as the Premier apologized for preventable deaths.

39. New York State had some semblance of debate when an investigation reported a 50% undercounting of nursing home COVID-19 deaths and singled out non-compliance with infection control rules as an important cause of death. Employees were sometimes forced to continue working after they reported they were infected. It recommended that a COVID-19 immunity law for health care workers introduced by Governor Cuomo be revoked because it may have motivated providers to make financially motivated decisions with impunity. Press Release, N.Y. Att'y Gen. Letitia James, Nursing Home Responses to COVID-19 Pandemic (Jan. 28, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-releases-report-nursing-homes-response-covid-19 [https://perma.cc/4YLZ-PBRQ].

IV. CONSIDER TAX OFFENSES

It is a criminal offense in Australia to fail to submit an income tax return by a proscribed date. Hundreds are prosecuted for this every year.[40] Too many little people are prosecuted when their only sin is being too disorganized or depressed to comply with the mandated date. Large corporations are not prosecuted for the same behavior because their tax advisers secure deferrals. The Australian Tax Office has enough sense not to consider criminal prosecutions in most cases where the result of the tax assessment is certain to be that the Treasury will owe a refund to a tardy individual. For most taxpayers, "Pay as You Earn" has their employer deduct larger amounts of tax from their pay than is due after deductions.

It is principled for the Tax Office to be, mostly, forgiving. Most lawbreaking by individual taxpayers who fail to submit their income tax return is spared criminal prosecution because they are held accountable by a government that improves its financial circumstances as it withholds refunds due to recalcitrants. No part of the state—neither the Treasury nor any prosecutor—is interested in the argument that just deserts requires proportionate enforcement of the law against all who fail to follow it. Minimal sufficiency of criminal enforcement is especially necessary with tax law because petty offenses are so rife, even in a society that has high tax compliance compared to international norms. Data from a large corpus of studies conducted by the Centre for Tax System Integrity showed that *most* Australians, in *most* years, break at least one tax law.[41] Hence, over a lifetime, they will commit dozens of tax offenses on average—mostly petty frauds of exaggerated deductions. A state that prosecuted every one of these offenses would create a society most people would prefer not to live in.

V. AN INCREMENTALIST METHOD FOR MINIMALLY SUFFICIENT PUNISHMENT

The methodological argument of *Macrocriminology and Freedom* for discovering minimally sufficient levels of punishment is incrementalist and comparative. In essence, societies like the United States, Brazil, El Salvador, or Russia with high imprisonment and substantial crime rates should move in the policy direction of societies with comparatively low imprisonment, low crime—like Japan, Norway, Finland, Denmark, Slovenia, Germany, the Netherlands. Punishment of poor people should be reduced until it is demonstrated that rising crime is a consequence of reducing punishment. Societies that are already low-crime-low-imprisonment should continue to reduce both punishment and crime until evidence begins to appear that punishment has become so low that their historic downward trajectory in crime rates has significantly reversed. At that point, punishment has ceased being minimally sufficient in the regulatory mix for containing crime.

Policymakers in low-punishment-low-crime societies can realize, nevertheless, that while they continue to become less punitive as they reduce their crime rate, for some kinds of crime, they fail to achieve minimally sufficient punishment. Beginning in the 1960s,

40. *Tax Crime Prosecution Results*, AUSTL. TAX'N OFF. (Sept. 7, 2021), https://www.ato.gov.au/General/the-fight-against-tax-crime/news-and-results/tax-crime-prosecution-results/#Summaryoffences [https://perma.cc/LAR9-RYMJ].

41. *See* CENTRE FOR TAX SYSTEM INTEGRITY, http://ctsi.org.au/ [https://perma.cc/2RSQ-NYY3] (providing references to these studies); *see generally* VALERIE BRAITHWAITE, DEFIANCE IN TAXATION AND GOVERNANCE (2009) (analyzing the rationale of defying tax laws in Australia).

Japan began to realize that many were needlessly losing their lives to environmental pollution.[42] Japan then responded in the 1970s by escalating environmental enforcement. By lifting its regulatory mix of punishment and persuasion, Japan quickly became a society that achieved unusually rapid pollution reduction.[43] In the same period, policymakers realized that they had a more general problem of minimally insufficient punishment of white-collar crime. Japan responded. Antitrust enforcement had been risible, failing to curb rampant monopolization. Antitrust regulatory institutions and criminal enforcement were strengthened, though the early shock of convicted top executives of cartels was softened as prison sentences were usually suspended. Leniency prevailed for voluntary admissions.[44] Japan further realized that its economy and society suffered from high levels of corruption. Organized crime was corrupting business at perhaps an even more acute level than that exerted by the U.S. Mafia in the postwar period. Two decades after these reversals to a tougher regulatory mix had begun, new realizations that the regulatory state was minimally insufficient arose. In the 1980s, Japan acknowledged that an expanding ozone hole was a threat. It learned from more effective U.S. enforcement; U.S. pressure was a factor in reform. Reversal of a minimally insufficient regulatory mix worked in Japan, as it had in the United States and later in China. The Montreal Protocol is on track to save 2.3 million lives from skin cancer alone by 2100..[45]

While Japan led from the 1997 Kyoto Climate Conference in improving its environmental regulatory mix more decisively than the United States or China, it accomplished this in less punitive ways. An empirical illustration is Mikler's varieties of capitalism analysis,[46] *Greening the Car Industry*.[47] Mikler found that Japan achieved more rapid reductions in auto emissions than the United States or Europe, even though Japanese regulatory enforcement was less punitive. Japanese commitment to change was driven by a regulatory mix more heavily weighted toward incentives for auto firms that set new benchmarks of Best Available Technology (BAT), requiring other firms to license that new technology if they could not beat escalating BATs. "Administrative guidance" insisted that laggards surpass leaders.

Empirical understanding of this comparativism is still rudimentary. Regulatory research nationalism reigns. There has been no research on the comparative effectiveness of China's shift toward punitiveness that came later than Japan's but followed a similar historical arc—namely, signaling an initial crackdown by convicting corporate executives, followed by a moderation of the regulatory mix toward an emphasis on economic

42. One of my and Fisse's early research projects involved interviews with Japanese corporations and prosecutors on these matters. John Braithwaite & Brent Fisse, *Varieties of Responsibility and Organizational Crime*, 7 LAW & POL'Y 317, 318 (1985).

43. Shinji Wakamatsu, Tazuko Morikawa & Akiyoshi Ito, *Air Pollution Trends in Japan Between 1970 and 2012 and Impact of Urban Air Pollution Countermeasures*, 7 ASIAN J. ATMOS. ENV'T 177 (2013); *See generally* WORLD BANK INST., LOCAL APPROACHES TO ENVIRONMENTAL COMPLIANCE: JAPANESE CASE STUDIES AND LESSONS FOR DEVELOPING COUNTRIES (Adriana Bianchi, Wilfrido Cruz & Masahisa Nakamura eds., 2005).

44. Mel Marquis, *Firebird Suite: Cartel Suppression Reborn in Japan*, 4 J. ANTITRUST ENF'T 84, 84 (2016).

45. *See* R.E. Neale et al., *Environmental Effects of Stratospheric Ozone Depletion, UV Radiation, and Interactions with Climate Change*, 20 PHOTOCHEMICAL & PHOTOBIOLOGICAL SCIS. 1, 8 (2020)

46. *See generally* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David W. Soskice eds., 2001).

47. JOHN MIKLER, GREENING THE CAR INDUSTRY 77–111 (2009).

incentives and persuasion—such as emissions trading schemes. One and two decades ago, many top executives in China were executed for corruption.[48] China realized that its pharmaceutical industry was uncompetitive because of its weak, corrupt regulation. In that crackdown, its Food and Drug Administration (FDA) head was executed for accepting bribes to approve poorly tested drugs.[49] This never befell corrupt leaders of the U.S. FDA or its European counterparts.[50] When China became dissatisfied with captured and corrupted environmental regulators in 2017, it shifted enforcement resources to environmental enforcement units in police departments.[51] This increased environmental arrests by 52% in 2018 to 15,015 individuals.[52] No research has evaluated whether China's more punitive approach to regulatory enforcement, gatekeeper capital punishment combined with its state "pressure mechanism,"[53] has been more or less effective than Japan's "administrative guidance" or U.S. corporate criminal law.

Many countries discovered that they could increase investment in accountability to substantially reduce specific impacts of corporate crime on their societies and the planet. Examples discussed in RegNet work at the Australian National University include first steps toward reduced corruption, reduced reliance on coal, miner deaths per ton of coal mined, death rates in international aviation, ozone healing, combating slavery, selling weapons of mass destruction and battlefield chemical/biological weapons, improving tax compliance, strengthening transparency of financial markets, increasing liberty for millions of aged care residents tied into chairs and beds with physical and chemical restraints, and reduced incidence of impure pharmaceuticals.[54] The quantum of some of these harm reductions, according to *Macrocriminology and Freedom*, has been closer to 1,000-fold than 100-fold. Equally, there are many domains where attempts to reverse minimal insufficiency of punishment and to strengthen accountability have been established failures.[55] We know enough to be confident that improving accountability

48. *See, e.g.*, *China Executes Corrupt Hangzhou and Suzhou Officials*, BBC NEWS (July 19, 2011), https://www.bbc.com/news/world-asia-pacific-14197485 [https://perma.cc/U87W-YS2U].

49. Joseph Kahn, *China Quick to Execute Drug Official*, N.Y. TIMES (July 11, 2007), https://www.nytimes.com/2007/07/11/business/worldbusiness/11execute.html [https://perma.cc/7FYU-TG2T].

50. Just seven years in prison befell the corrupt Chair of the European Community's Committee for Proprietary Medicinal Products. *See* Timothy Keates, *Poggiolini's Possessions*, 342 LANCET 919, 919–20 (1993) (outlining his crimes and convictions). To my knowledge, convictions in U.S. FDA corruption cases have not exceeded one year of prison. *See* Paul W. Valentine, *Former FDA Chemist Gets 1 Year in Generic Drug Bribery Case*, WASH. POST (Oct. 4, 1989), https://www.washingtonpost.com/archive/politics/1989/10/04/former-fda-chemist-gets-1-year-in-generic-drug-bribery-case/2855529d-0e14-4a2a-801a-6c4949dee285/ [https://perma.cc/ZSX5-G9JJ].

51. Michael Wunderlich, *Structure and Law Enforcement of Environmental Police in China*, 12 CAMBRIDGE J. CHINA STUD. 33, 36–39 (2017).

52. *China's Environmental Crime Arrests Up More Than 50 Percent in 2018: Ministry*, REUTERS (Feb. 14, 2019), https://www.reuters.com/article/us-china-environment-crime/china-environmental-crime-arrests-up-more-than-50-percent-in-2018-ministry-idUSKCN1Q30ZE [https://perma.cc/2KE7-PEYX].

53. PETER DRAHOS, SURVIVAL GOVERNANCE: ENERGY AND CLIMATE IN THE CHINESE CENTURY 52 (2021).

54. *See* BRAITHWAITE, *supra* note 5, at 329–568 (discussing the research on these various kinds of corporate offending).

55. The next section discusses how this is true for nursing home criminality beyond these accomplishments of restraint reduction after 1990. *See infra* Part VI. In most domains, Big Pharma's corporate crime beyond Good Manufacturing Practices has worsened rather than improved. *See generally* GRAHAM DUKES, JOHN BRAITHWAITE & J.P. MOLONEY, PHARMACEUTICALS, CORPORATE CRIME AND PUBLIC HEALTH (2014). Another cautionary example is compliance ritualism with whistleblower laws. *See generally* Eugene Soltes, *Paper versus Practice: A Field Investigation of Integrity Hotlines*, 58 J. ACCT. RSCH. 429 (2020).

through regulatory mixes that include sufficient punishment can improve important societal outcomes. Yet we know little about exactly how and when this is, and is not, accomplished. My conjecture is that we know so little because our regulatory imaginations are too narrowly obsessed with the jurisprudence of punishment and insufficiently engaged with the empirics of incremental refinement of regulatory mixes.

VI. MINIMAL SUFFICIENCY THAT BECOMES A MARKET IN LEMONS

Minimal sufficiency of corporate criminal punishment has limited appeal when the alternatives to punishment fail to prevent crime. The most important alternative may be promises of corporate compliance reforms by errant firms. Susanna Aires de Sousa and William S. Laufer find that today "[t]here are now more compliance, audit, legal, and risk professionals and private cops than municipal police officers in the United States."[56] This is understated: IT officers, for example, are algorithmic compliance monitors in the era of cybercrime and cyberespionage. Miriam Baer argues, nevertheless, that the compliance market is a market in lemons.[57] Compliance can be a market that "finds loopholes to circumvent obstacles" or a market in "schooling executives in cover-up rather than compliance."[58]

In Australian aged care regulation, RegNet's research team advocated growing an aged care compliance consultancy market that assisted aged care innovation toward 'continuous improvement' in the Australian regulatory regime that required quality of care 'beyond compliance' with static standards. Empirically, this innovation was found to corrode "regulatory ritualism."[59] Ritualism is a theoretically Mertonian way[60] of describing Baer's market in lemons, Parker and Gilad's compliance "window-dressing," or greenwash at Glasgow.[61] The compliance consultants arrive with ritualistic checklists that fail to demand long-term improvements in quality of care. Some short-term reforms that residents notice as improvement might be put in place. Then a slipshod piece of survey research would be administered to residents or their families to show that residents

56. De Sousa & Laufer, *supra* note 12, at 1116.

57. An important prequel was WILLIAM F. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 99–155 (2006); Miriam H. Baer, *Designing Corporate Leniency Programs*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE 351, 351–72 (Benjamin van Rooij & D. Daniel Sokol eds., 2021). When Baer coins a compliance market in lemons to describe these developments, she tracks George Akerlof on used car markets. *Id.* Buyers struggle to discern the difference between lemons and good used cars. Owners of cars in good shape drop out of the market because buyers don't trust their claims about the car and won't pay what it is worth. Thus, the market unravels to the point of market failure where only crooks who tout lemons are willing to play. Regulators suffer an information asymmetry similar to buyers of used cars, especially the many regulators that moved away from street-level inspections that kick the corporate tires in favor of desk auditing. This is why Baer insightfully diagnoses the compliance market as having unraveled from an idealistic practice of late-twentieth-century reformers with an incipient restorative justice imaginary to a market in compliance lemons. *See generally id.*; *see also* George Akerlof, *The Market for Lemons: Quality Uncertainty and The Market Mechanism*, 84 Q.J. ECON. 488, 489–90 (1970).

58. Eugene Soltes, *The Professionalization of Compliance*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE 27, 27–36 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

59. JOHN BRAITHWAITE, TONI MAKKAI & VALERIE BRAITHWAITE, REGULATING AGED CARE 6–10 (2007).

60. *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 217 (1968).

61. *See* Christine Parker & Sharon Gilad, *Internal Corporate Compliance Management Systems: Structure, Culture and Agency*, *in* EXPLAINING COMPLIANCE 170, 170–97 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011).

subjectively perceived short-term improvement in quality of care. This was compliance on the cheap, tick-box, short-term, short on integrity. Inspectors find the same problems next time they visit. This is one reason *qui tam* policies are needed to motivate insiders with a percentage of the fine to blow the whistle on cover-up[62] and regulatory ritualism.[63]

Although the general problem here is that in practice minimal sufficiency can deliver a market in corporate compliance lemons, there might be strength in convergence of weaknesses through regulatory mix[64] and enforced compliance reforms. Combined regulatory and market means can repair markets in regulatory virtue that have corroded to markets in vice. For example, when Australian aged care compliance consultants push away regulatory enforcement with flawed, poorly evaluated compliance innovation, the regulator can mandate publication of evaluation reports on the *My Aged Care* website to inform choices of aged care consumers and regulators. Then family and residents in the home can complain to the regulator that as soon as the regulator left, the so-called reform amounted to nothing; long-term compliance worsened. Even more importantly in market terms, when compliance monitoring reports are put on public websites, we know from programs like registered self-certification of software for tax compliance that competitors in the compliance market tell regulators that particular evaluations of compliance improvement are flawed.[65] Compliance consultancy professionals can approach firms that hire the lemons of compliance consultancy to suggest that the job be done more professionally by a replacement. Corporations that have hired a compliance lemon then ponder prospects that this ethical competitor in the compliance market who alerted them might communicate with regulators about their shabby compliance monitoring.

It is unusual, however, for compliance monitoring reports to be transparent on websites. A case can be made for internal compliance reports to be confidential when they relate to matters unknown to regulators. The argument is that if they were made public, firms would have less incentive to invest in detection.[66] There is no such argument in cases where a compliance report is produced pursuant to enforcement on non-compliance known to the regulator.

Voluntary self-reporting of foreign bribery has become more common during the past 50 years.[67] After corporate counsel voluntarily discloses that bribes have been paid, prosecutors must gather evidence on whether this has been a prompt and complete disclosure. One remedy to regulatory ritualism is prosecuting the firms that corrupt voluntary compliance professionalism and the firms that cover it up. Another remedy is

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62. As Samuel Buell argues in this symposium, corporate criminal liability more generally creates incentives to eschew cover-up in favor of self-investigation so long as there are rewards in reduced punishment when the fruits of self-investigation are shared with regulators and prosecutors. Buell, *supra* note 29, at 950–51.

63. *Qui tam* was another idea that Brent Fisse introduced to me. Fisse was among a tiny number of influential early advocates of this idea: BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 251 (1983).

64. For a meta-analysis of evidence that provisionally supports this conclusion, see Natalie Schell-Busey et al., *supra* note 15, at 27–31 (providing meta-analysis results on laws, punitive sections, regulatory policies, multiple types of sanctions from both individual-level and company-level).

65. *See* JOHN BRAITHWAITE, MARKETS IN VICE, MARKETS IN VIRTUE 87–89 (2005) (introducing how registered software project functions in regulatory compliance as meta risk management).

66. JAY A. SIGLER & JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE 87 (1988).

67. Baer, *supra* note 57. Baer interprets the evidence as strong for this proposition, though Jennifer Arlen commented in the symposium dialogue that, for her U.S. foreign bribery data, it is less common than one-third self-reporting and also less common for large cases.

mandating evaluations to assess the effectiveness of compliance programs.[68] Such self-evaluation happened in only 55 of 255 deferred prosecution and non-prosecution agreements in Garrett's data.[69] Arlen and Kahan found that over 80% of deferred and non-prosecution agreements imposed compliance mandates on firms monitored by prosecutors, albeit transiently as prosecutors moved on to their next case.[70] With a tax case, a tax authority has more incentive and capability to critically assess the gaming of self-evaluation reports on compliance programs of tax offenders than a prosecutor does.

If all these elements of a regulatory mix are implemented, regulators can work with prosecutors to concentrate prosecutorial resources on firms that game the law, game agreements with prosecutors and regulators. More strategic use of finite resources can sharpen the sword of corporate deterrence by investing in the cases that most need deterrence because reactive fault is evident in the absence of repair, reform, self-monitoring, evaluation of monitoring, and presence of cover-up.

It is a mistake to evaluate corporate deterrence by how well it deters offenders. Corporate deterrence works best when it deters soft targets who are third parties with the power to prevent corporate offenses rather than when it seeks to deter offenders before or after their offense. *Macrocriminology and Freedom* illustrates—with Ronald Mitchell's work—the almost total ineffectiveness of the regime designed to deter shipping companies responsible for oil spills, compared to the 98% effectiveness of the regime that deterred firms that insured and "classified" those ships.[71] It was illustrated by the Australian campaign against profit shifting by multinationals that raised $1 billion in extra tax for every $1 million spent on the program by targeting major accounting firms as gatekeepers[72] more than the offending firms themselves.[73] Deterrence is repeatedly shown to work well by moving the corporate targeting away from a corporate deterrence target, like a CEO that is a tough nut, and on to a soft but strategic gatekeeper or another third-party target with the capacity to prevent. In corporate life, the capacity to prevent is overdetermined.

Moreover, it is not primarily in the hands of individual offenders. Cumming, Dennhauser, and Johan,[74] as well as Dyck, Morse, and Zingales,[75] suggest that it takes a whole village to detect financial crime—a village populated by compliance professionals, analysts, short sellers, financial journalists, exchanges, board members, and auditors.

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68. *See* Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing A Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 980–99 (2018) (discussing how hard the DOJ has found evaluating the effectiveness of compliance programs).

69. *See* GARRETT, *supra* note 30, at 45–80.

70. These were U.S. DOJ cases that excluded environmental and antitrust cases. *See* Arlen & Kahan, *supra* note 30, at 343.

71. *See generally* RONALD MITCHELL, INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE (1994). This is discussed in more detail by BRAITHWAITE, *supra* note 5, at 271–328.

72. *See generally* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53 (1986); John C. Coffee, Jr., *Understanding Enron: It's About the Gatekeepers, Stupid*, 57 BUS. LAW. 1403 (2002) (describing the use of accounting firms to catch corporate criminals).

73. BRAITHWAITE, *supra* note 65, at 89–100.

74. Douglas Cumming, Robert Dennhauser & Sofia Johan, *Reputational Effects on Non-Compliance with Financial Market Regulations*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 245, 245–76 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

75. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FINANCE 2213, 2229 (2010).

Perhaps it is wrong to call such targeting deterrence. Yet, when the International Maritime Organization regulates through a message to the insurer that it will not be authorized to issue ship insurance unless it gets ships to perform specific preventive actions, the regulator withholding licenses to insure ships is a form of insurer deterrence. Likewise, it is a kind of deterrence when the insurer tells the ship owner that if they fail to do such actions, the insurance will be voided.

The preventative relevance of Fisse's Accountability Model thinking has increased with 30 years of mounting empirical evidence that detection does contribute to corporate deterrence, but variation in the size of financial penalties may not—at least not in the absence of an apt mix of other regulatory levers.[76] The beauty of the Accountability Model is that it requires the detection of many actors with the power to prevent, with the capability to redundantly over-determine prevention. Holding ten kinds of actors accountable could mean a ten-fold detection deterrence effect. Indeed, it might be better than a ten-fold effect in a dynamic, responsive model of deterrence. For example, if repeated restorative justice conferences attended by the ten most responsible actors, including the CEO, find all ten responsible actors to be tough nuts undeterred by detection, the regulator can express disappointment at the want of responsiveness, adjourn the restorative circle, then widen the circle, holding another restorative conference that persuades the Chair to attend. If she is shocked at her CEO's cover-up, she might open the door to detection deterrence by firing the CEO, reforming compliance systems—not only in her own firm but industry-wide—and compensating victims. This is not an imagined scenario, but something I witnessed as a regulator for a case documented in the Australian literature.[77] This scheme implements the restorative justice prescription: when you fail, do not escalate to punishment immediately; widen the circle first, broaden the conversation and the engagement.

Not only is detection deterrence more reliant on reputational deterrence than sentence severity deterrence, but detection deterrence can also work with actors who have rational incentives to cheat but sometimes choose not to in an effort to do the right thing. An aggressive reading of the Accountability Model might go as far as to say that prevention works after enough attempts to find the soft target that can be moved by appeals to their ethical identity. Prevention levered by detection often works in circumstances where the punitiveness of deterrence will fail to deliver financially sufficient consequences. A balanced reading, however, suggests that while increasing penalties to strengthen the peak of an enforcement pyramid is important to a stronger regulatory mix, multiplying the actors deterred through detection is more important for deterrence and a wider vision of prevention. The theory is that the Accountability Model's ten-fold detection impact of holding ten actors accountable has less of a deterrence effect than a prevention effect driven by incapacitation of non-compliance and voluntary enablement (capacitation) of compliance.

Nevertheless, the theory contends that more than just detection deterrence is needed to underwrite a responsive mix. This extra deterrent element is delivered near the peak of an enforcement pyramid through tough punishment of deeply responsible actors who cover up their offenses. The *Macrocriminology and Freedom* revisions to responsive regulation

76. Schell-Busey et al., *supra* note 15.

77. Parker, *supra* note 34, at 214–20 (discussing this enforcement action undertaken by the Australian Competition and Consumer Commission).

emphasize incapacitation at the top of the enforcement pyramid and self-incapacitation in the middle of the pyramid but de-emphasize deterrence. Responsive regulation does not contend that sentences must be sufficient to make it rational for corporations to comply. Punishment at the pyramid's peak must provide sufficient deterrence/incapacitation to ensure that relevantly responsible actors—collective and individual, inside and outside the firm—are steered to energize preventive strategies lower down the pyramid. The theory necessitates empirical research to discover the sequenced circumstances where deferred prosecution detects sufficient softer targets for this prevention to exceed the preventive power of prosecution.

Moreover, when corporate cases do go to court, deterrence mostly works *before* sentences are imposed—because of detection consequences that precede sentence consequences. Waldman's neglected early research showed this.[78] It revealed that the most costly things convicted corporations do in response to prosecutions are done prior to trial. One reason for this is to improve the case for corporate responsibility presented at the trial. This helps us understand why the stock market impact of state enforcement tends to come with the announcement of the prosecution or the investigation, or even rumors of investigation of irregularities,[79] while "the public corporation's stock price usually goes up on the announcement of the sanction."[80] Eli Black changed corporate criminal law forever when he jumped to his death, not because of a heavy United Brands sentence, but because the media had heard that Honduran inquiries about its bribes were underway, as discussed below.

VII. TOO BIG TO FAIL; TOO BIG TO NAIL?

In early Australian enforceable undertakings, such as consumer fraud cases in remote Aboriginal communities by global insurance giants, there were outcomes tougher than criminal convictions would have imposed because the reactive fault was energized by threatened prosecution.[81] Some looming criminal convictions of individual insurance company executives for backward-looking criminal fault probably added something to this reactive fault effect. Arlen and Coffee's insight also applied; corporations were only willing to give up evidence that would convict individuals when it was clear that corporate accountability was coming.[82]

78. *See generally* DAN E. WALDMAN, ANTITRUST ACTION AND MARKET STRUCTURE (1978); FISSE & BRAITHWAITE, *supra* note 63 (confirming the Waldman result on a new set of qualitative cases).

79. Edward J. Carberry, Peter-Jan Engelen & Marc Van Essen, *Which Firms Get Punished for Unethical Behavior? Explaining Variation in Stock Market Reactions to Corporate Misconduct*, 28 BUS. ETHICS Q. 119, 135 (2018).

80. COFFEE, *supra* note 28, at 581. Karpoff et al. furthermore found "a reputational effect" of investigation rather than a sentencing effect in SEC cases. *See* Jonathan Karpoff, Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008). The loss in the present value of future cash flows due to lower sales and higher contracting costs is over 7.5 times the sum of all penalties imposed through the legal and regulatory system. *Id.* at 582; *see also* Jonathan M. Karpoff, *Does Reputation Work to Discipline Corporate Misconduct*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 361, 361–82 (Timothy G. Pollock & Michael L. Barnett eds., 2012). This reality opens the door to creative future use of restorative justice in R&D on deferred prosecution.

81. Parker, *supra* note 34, at 220–23.

82. Samuel Buell has shown why, even so, individual convictions for corporate crime are difficult to accomplish and why it would be naïve to commit to a strategy that puts more weight on individual convictions

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry found that by 2019 Enforceable Undertakings negotiated by the Australian Securities and Investment Commission and the Australian Prudential Regulation Authority had been consistently soft on criminality in banking.[83] Restorative corporate justice remained attractive to many reformers, yet an inescapable conclusion seemed that corporations were "too big to fail" or nail; law enforcement was captured by concerns that big banks must survive for the stability of the financial system and Big Pharma recidivists like Pfizer must survive because they hold life-saving patents. This was evident through the contribution Pfizer-BioNTech made to developing a COVID-19 vaccine. Globally, Pfizer needed to be a "fit and proper person" to participate in state pharmaceutical benefits programs.[84] Pfizer—the most financially successful pharma firm ever to exist—had an impressive corporate crime rap sheet throughout the back half of the twentieth century. Yet, it managed to further lengthen it into this century. It negotiated one "Corporate Integrity Agreement," offended again, and negotiated a new Corporate Integrity Agreement. When senior Pfizer whistleblowers revealed further offenses, prosecutors renegotiated a third Corporate Integrity Agreement[85] and then a deferred prosecution agreement over alleged corrupt practices in eight countries.[86] Then, in 2020, the DOJ opened yet another investigation over possible new breaches of this agreement in Russia and China.[87] That renegotiation occurred in the wake of another line of litigation on behalf of U.S. service/civilian personnel killed or wounded in Iraq, alleging that corrupt payments by Pfizer to terrorists who attacked them had helped fund terrorism.[88] It is challenging, even for we restorativists, to characterize Pfizer as a bad boy who finally made good.

Arthur Andersen experienced a conviction that was overturned in relation to its auditing of Enron and other bankrupted firms during the 2001 market crash. It nevertheless collapsed in the aftermath of adverse publicity surrounding the indictment. Political leaders saw it as unfair that innocent Arthur Andersen employees had lost their jobs. Australia had a similar debate about the unfairness of thousands of Australian Arthur Andersen employees losing jobs against a background of some Arthur Andersen responsibility in the major crimes of 2001, particularly those of the jailed CEO of insurance giant, HIH. U.S. deferred prosecutions were rare before Arthur Andersen's collapse, with only 18 deferred or non-prosecution agreements in the ten years leading up to the company's demise,

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than as a helpful addition to deterrence. *See* Samuel W. Buell, *Criminally Bad Management*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALINGS 59, 59–86 (Jennifer Arlen ed., 2018).

83. *See generally* ADELE FERGUSON, BANKING BAD: WHISTLEBLOWERS, CORPORATE COVER-UPS AND ONE JOURNALIST'S FIGHT FOR THE TRUTH (2019).

84. And regulators and prosecutors always move cautiously like, for example, on allegations of reckless failures to record COVID outcomes accurately in clinical trials. *See* Paul D Thacker, *Covid-19: Researcher Blows the Whistle on Data Integrity Issues in Pfizer's Vaccine Trial*, BMJ (Nov. 2, 2021), https://www.bmj.com/content/bmj/375/bmj.n2635.full.pdf [https://perma.cc/WL52-YATH].

85. DUKES ET AL., *supra* note 55, at 339.

86. THE GLOB. COMPLIANCE & DISPUTES PRAC. GRP., PAUL HASTINGS, LESSONS LEARNED FROM PFIZER'S SETTLEMENT OF FCPA CLAIMS (2012), https://webstorage.paulhastings.com/Documents/PDFs/22422f31df6923346428811cff00004cbded.pdf [https://perma.cc/L6PE-WZ4B].

87. *Security Alerts and Update*s, FCPA PROFESSOR (Aug. 24, 2020), https://fcpaprofessor.com/scrutiny-alerts-updates-8/#more-29600 [https://perma.cc/FX8C-LZH2].

88. *Id.* The alleged terrorists were Jaysh al-Mahdi militia.

compared with 419 between 2002 and 2016.[89]

Corporate cooperation with expanded deferred prosecutions has meant that, while deferred prosecutions almost always become non-prosecutions, there is a small contribution to increasing convictions of individuals for corporate crimes (only 414 individual prosecutions across 306 deferred and non-prosecution agreements),[90] and some increased convictions in other countries with foreign corporations,[91] plus foreign law reforms that to date has leveraged no great increase in global enforcement.[92]

Changes to the Board and management are common when adverse publicity and enforcement cascades, whether as prosecutions or deferred prosecutions. Corporate monitors were appointed in 30% of U.S. deferred prosecution cases for foreign corrupt practices.[93] Chief Compliance Officers are often appointed to the top management group as part of mandates. It may be that what Brandon Garrett called structural reform deferred prosecutions that pursue "deep governance reforms" indeed can transform.[94] Garrett illustrated this transformation with the 2005 KPMG agreement, under which KPMG shut down its entire private tax practice, cooperated fully in the investigation of former employees, and retained a former SEC Chairman as an independent monitor for three years to oversee an elaborate corporate compliance program.[95]

At least when it came to bad banks and Big Pharma, offenders often remained recidivist corporations. When organizations subject to deferred prosecutions that demand deep structural reforms are systemically criminalized across more than one kind of corporate crime, governance and compliance reforms mandated by deferred prosecution agreements may shut down other kinds of crime that have nothing to do with the charged offense. This has been a longstanding insight in the corporate crime literature, at least since Adnan Khashoggi bribed foreign governments to buy Lockheed aircraft. Khashoggi was also assisted in becoming one of the wealthiest individuals in the world by embezzlement from Lockheed using the firm's slush funds.[96] It is common for the costs of cleaning up corporate crime control systems to be discounted by reduced embezzlement; it is also extremely common for a compliance improvement demanded by an environmental regulator to improve the compliance demanded by occupational health and safety regulators, and vice versa.

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89. COFFEE, *supra* note 28, at 39.

90. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1791 (2015).

91. GARRETT, *supra* note 30, at 219–21.

92. Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 699, 756–58 (2020); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1852 (2011).

93. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 201 (2016). Commenting on an earlier draft, Arlen pointed out that this was only relatively common for DOJ foreign corrupt practices cases. Of course, regulators in many countries also negotiate the appointment of corporate monitors in many different regulatory domains, from casino regulation to mine safety, environmental protection, meat processing plants, aged care, large corporate tax compliance, and prudential regulation of banks.

94. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 854–55 (2007).

95. *Id.* at 855.

96. This was an early discovery of Stanley Sporkin's voluntary disclosure program after the Lockheed bribery scandals. *See* John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1210–11 (1977) (discussing the relationship between Khashoggi and Lockheed); FISSE & BRAITHWAITE, *supra* note 63, at 144–61 (detailing Lockheed's bribery scandal).

When deferred prosecutions are more costly for firms than a prosecution itself, why do CEOs not rationally opt for prosecution? One hypothesis is that CEOs do not defend the rational interests of the firm because cooperating with the prosecutor is the best path to their personal survival. A CEO who sustains control during settlement negotiations might protect themselves and promise their Board protection from prosecution or removal by cooperating constructively—offering reform and repair to make regulators, prosecutors, and civil society critics in the media happy enough. Even if a senior individual is sure to be prosecuted, by cooperating to stay in control of events, the CEO might wield their power to ensure fall guys are Vice Presidents Responsible for Going to Jail.[97] Corporate and CEO incentives to game what William Laufer calls reverse whistleblowing is a profound challenge to the integrity of any Accountability Model.[98] Prosecutions are also expensive; some CEOs genuinely prefer to see money go into the pockets of victims rather than lawyers. CEOs may prefer negotiated settlements because they do not drag out as long as prosecutions and can end the distracting uncertainty in their lives, the market, and reputational damage. There is evidence that reputation is important to CEOs for its own sake, independent of the financial consequences or a reputational hit.[99]

Jennifer Arlen made the insightful symposium comment that all the foregoing is mostly untrue of closely held firms in the United States because owner/managers are unlikely to cooperate with deferred prosecution processes that are prone to implicate them personally.[100] They are also frequently asset constrained. This places downward pressure on penalties; if not, the owner can allow the firm to go bankrupt and then rise again.[101] Finally, closely-held firms lack the diversity of operations that put them at risk of collateral consequences, like a felony conviction for Pfizer triggering mandatory debarment from pharma sales in multiple countries, or a bribery conviction that mandates World Bank/IMF debarment worldwide. Alexander and Arlen conceive the leverage for structural reform deferred prosecutions as primarily coming from such collateral consequences.[102]

This restorative justice case at the Australian Competition and Consumer Commission (ACCC) has already been discussed: the CEO refused to cooperate with the restorative process, ACCC widened the circle to the Board Chair, who fired the CEO and then agreed to more formidable undertakings than would have been imposed by a court.[103] So regulators grasped that the rational CEO could be a cooperator who—if pressed hard enough by victims, activist NGOs, and the regulator—can give up a larger loss in an

97. JOHN BRAITHWAITE, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY 308 (1984) (discovering Big Pharma Vice-Presidents Responsible for Going to Jail in three companies). *See generally* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2006) (discussing some of the normative issues at stake with justice inside corporations).

98. In whistleblowing, employees implicate top management in corporate crime; in reverse whistleblowing top management scapegoats lower-level employees with disproportionate burdens of responsibility. LAUFER, *supra* note 57, at 137.

99. As revealed empirically by the case studies of FISSE & BRAITWAITHE, *supra* note 63.

100. Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 147, 147–48 (Keith Hylton ed., 2012).

101. *Id.* at 148.

102. Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISLEADING 87, 87–150 (Jennifer Arlen ed., 2018).

103. Parker, *supra* note 34, at 225 (noting that a CEO of one company was only willing to commit to such preventive and corrective action because they realized an enforceable undertaking was an option).

enforceable undertaking than the maximum penalties proscribed in the law.[104] Of course, that does not happen when the regulator is captured and victims and NGOs are quiescent, as predicted by responsive regulatory theory.[105] Therefore, capture and quiescence recurrently prevail.

From an Australian restorative perspective, Deepwater Horizon and Arthur Andersen are instructive because cosmopolitan restorative regulation in Australia might have prevented catastrophe before it struck the United States. The Timor Sea oil spill was uncappable for 75 days a year before the 86-day Deepwater Horizon spill. It was uncappable for exactly the same reasons at the hands of exactly the same cement base contractor, Halliburton. This should have produced a cosmopolitan response for justice for future victims. Australian environmentalists should have demanded that the regulator or courts require corporate monitoring reports of oil rig cementing worldwide as a Halliburton remedy. The evidence is clear that this would have revealed a worldwide pattern of catastrophic deep water well risks that required fixing. Instead, Australian prosecutors were content with a corporate conviction and fine. In the late 1990s, Australian regulators were detecting a criminal transformation of Arthur Andersen that might have motivated demands for change to its global compliance culture.[106]

One reading is that the U.S. movement for more deferred prosecution agreements and more corporate prosecutions took off from Stanley Sporkin at the SEC; Sporkin's tenure began with United Brands Chairman Eli Black jumping from the 44th floor of the PanAm building; Black's turmoil, in turn, started with civil society unrest over bribes he authorized to the President of Honduras to break ranks with Central American states increasing banana taxes across the region. According to my 1980 Central American interviews and 1981 interviews with Brent Fisse that included Stanley Sporkin, anti-corruption activism in Honduran civil society started the cascade that led to the fall of Black and Honduran President Arellano and his government and culminated with a Commission of inquiry and accountability for other bribe recipients in Honduras, as well as the rise of Sporkin as a globally germinal innovator of corporate crime enforcement. After Sporkin was unable to catalyze the kind of criminal conviction of United Brands he wanted (ultimately a $15,000 corporate penalty),[107] he crafted the strategy that targeted Lockheed as its highest-profile scalp many months later. Some writing implies that Black committed suicide because of the SEC investigation. Eugene Soltes is closer to the truth when he says that Sporkin called several of his attorneys into his office after hearing of Eli Black's death and said "Guys don't die like this, don't drop out of windows for no reason. I want you to call up and find

104. Alexander and Arlen concluded that convictions do not increase reputational damage beyond that imposed by deferred prosecution agreements so long as the conviction does not reveal extra information about the firm's riskiness; *see* Alexander & Arlen, *supra* note 102, at 87–150. This is true, among other reasons, because reputational damage does not depend on a guilty plea. Large payouts to victims, a restorative justice of corporate apology and contrition, and media revelations can do reputational damage. These factors can also do reintegration through reform, just as well or better than guilt conferred in the dock.

105. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 54–101(1992) (arguing that "that features of regulatory encounters that foster the evolution of cooperation also encourage the evolution of capture and corruption").

106. John Braithwaite, *Restorative Justice for Banks Through Negative Licensing*, BRIT. J. CRIMINOLOGY 439, 445–46 (2009) (detailing how two members of an Australian tax committee encountered questionable practices by Arthur Andersen during the late 1990s).

107. PETER CHAPMAN, BANANAS! HOW THE UNITED FRUIT COMPANY SHAPED THE WORLD 171, 186 (2007).

out what's going on."[108] They found that rumors had spread from Honduras to the U.S. media that United Brands had bribed Honduran leaders.[109] At the back of Sporkin's mind was shock at recently becoming aware that slush funds were rife across the Fortune 500 and that United Brands was the kind of company that had used them to foment more than one coup in Central America.[110]

Macrocriminology and Freedom is a cascade theory of crime and its prevention,[111] as in interpreting civil society activism in Honduras to call their corrupt President to account, to end United Brands domination of local politics, to catalyze a cascade of accountability. The idea is that Campesino activists in tiny Honduras catalyzed a cascade to a four-year prison sentence of the Prime Minister of Japan for accepting Lockheed payments and that this cascade might have transformed corporate criminal law in the united States. While it is uncontroversial to contend that Sporkin's enforcement strategies cascaded to change governments and laws in various countries, the more controversial thought that Campesinos in Honduras catalyzed these transformations is more inveigling and inspiring because it means grasping the insight that cultures of cosmopolitanism in social movement politics and regulatory praxis everywhere—even at the periphery of the world system—is not without promise for corporate crime control. We see this possibility from the first cosmopolitan movement grown globally by churchgoers across the Atlantic who curtailed the world's worst wave of corporate crime—the slave trade to the Americas by Spanish, Portuguese, British and French shippers.[112] In this case, enforcement was not delivered by courts but by a combination of social movement politics and the British navy blowing Portuguese slaving ships out of the water in Rio harbor.

If the Sporkin legacy will have a future, much depends on how tough regulators and prosecutors are in deferred prosecution negotiations. That will shift with the political winds, with character and quality in regulatory leadership, and with corporate cultures of responsibility. The interactions among corporate sanctions, CEO sanctions, and lower-level sanctions that may target executive scapegoats are complex, as are interactions between deterrence and preventive incapacitation. This is no warrant for nihilism. It justifies carefully monitored dynamic responsiveness, more genuinely restorative and responsive participation of third parties (particularly victim representatives) in the sanction negotiations, rather than state-corporate deals behind closed doors. It requires unrelenting social movement vigilance against regulatory capture.

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108. EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 33–34 (2016).

109. CHAPMAN, *supra* note 107, at 171.

110. United Brands, followed by United Fruit, disliked the Guatemalan government's attempts to end exploitative labor practices and land reforms benefitting landless Campesinos. United Fruit also supplied the ships for the Bay of Pigs Cuba invasion. *Id.*; *see* John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES (Mar. 11, 1999), https://www.nytimes.com/1999/03/11/world/clinton-offers-his-apologies-to-guatemala.html [https://perma.cc/2P66-NCD5] (discussing former President Clinton's apology for supporting the Guatemalan government).

111. John Braithwaite, *Crime as a Cascade Phenomenon*, 44 INT'L. J. COMPAR. & APPLIED CRIM. JUST. 137, 148 (2020).

112. Drahos and I discuss this at length while also arguing that much about corporate colonialism in the 1600s and 1700s, the democratic principles in the Charter of the Virginia Company, for example, institutionalized germinal republican influences on Jefferson and Madison on their journey toward helping draft a republican constitution. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 147, 222–25 (2000).

It also justifies consideration of strengthening enforcement with *qui tam*, as Julie O'Sullivan argues,[113] and John C. Coffee, Jr.'s ideas on partial privatization of corporate criminal enforcement and equity fines, perhaps informed by a more restorative and responsive philosophy of prevention.[114] Coffee is surely right that access to potent equity fines would strengthen negotiating clout against corporate power in deferred prosecution negotiations. Baer may also be right that the challenge of prosecuting most guilty corporate criminals to fix realities of "too big to fail, too big to jail" is a mission "too vast to prevail."[115] Increased funding for corporate prosecutors is desirable, but funding more street-level regulatory inspectors, fraud examiners, environmental NGOs, and activists in networks like Citizens for Tax Justice may be higher priorities. Theoretically, according to *Macrocriminology and Freedom*, the collective efficacy, i.e., the bridging and linking of social capital of a society against corporate crime, may be what matters most.

VIII. FROM CORPORATE TO ORGANIZATIONAL ACCOUNTABILITY AS LEVERS

When a corporation is investigated, the corporation sometimes decides that it should cease protecting criminally culpable individual executives in order to protect the corporation. Frequently it does this by offering up scapegoats. These benefits and risks are difficult for regulators and prosecutors to manage.[116] We see the same reality with police departments that commit crime. Unless public excoriation of police is unusually withering, if the jobs of the chief and the chief's political masters are not at risk, they tend to defend criminal officers to protect themselves. When the leadership is at risk, preferences shift to focusing all responsibility on a sacrificed junior officer. Corrupt police chiefs and chiefs who enculturate excessive use of force contribute little to prison overcrowding. It makes limited sense for the community to attempt to punish itself by fining police departments that rely on the community's taxes. Police departments may be too big, too politically connected to fail, and too street smart to nail.

While there is much to learn from failures of corporate criminal responsibility, there are enough positives to inquire whether the corporate crime approach has merit for leveraging improved individual responsibility for police crime, some level of compensation to victims, and institutional transformation toward more law-abiding justice. Likewise, we might learn from histories of crimes against humanity by militaries that the most valuable outcome of transitional justice is accountability pressure on military leaderships for institutional transformation toward military cultures that respect international law.[117] Militaries can and are held to account as organizations through more

113. Julie O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047, 1069 (2022).

114. John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47 J. CORP. L. 963, 970–73, 977 (2022); *See generally* COFFEE, *supra* note 28.

115. *See generally* Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109 (2016) (assessing the strength of the argument in GARRETT, *supra* note 30).

116. Fisse and I have things to say about how to guard against scapegoating by CEOs, how to hold CEOs individually accountable in appropriate ways while granting credit for cooperation, and reactive acquittal of their fault. *See generally* FISSE & BRAITHWAITE, *supra* note 2. CEO accountability is almost always required as a remedy under the Accountability Model, at least as managerial fault for failing operating procedures in a corporation they lead. Fisse, *Reconstructing Corporate Criminal Law*, *supra* note 13, at 1158.

117. The Indonesian military is a good example because of the crimes against humanity it perpetrated in Timor-Leste, but also where transitional justice did result in some institutional transformation of the military.

mundane organizational prosecutions, as in the recent Australian occupational health and safety conviction of the Department of Defence for a reckless training exercise that cost a life.[118]

Militaries and police departments are like other public sector organizations such as universities in that their leaders care about their reputation for its own sake—independent of any financial implications. There are glimmers of encouragement in Chappell's findings that consent decrees settled with 23 agencies subject to DOJ litigation for police misconduct produced a 23–36% reduction in subsequent filings for new alleged civil rights violations.[119] It is hard to say whether this is an effect of deterrence mediated by police leaders' concern for their reputations. Based on Sherman's research on police scandals and reform, an apt conjecture is that reform may be a self-incapacitation effect negotiated through a consent decree. Internal police integrity testing was particularly important in the corruption scandal and reform cycles studied by Sherman.[120] Theoretically, criminology might view criminal police and militaries through an organizational crime lens.

Aleksandar Marsavelski[121] explores an emergent European tradition in international criminal law to build an incipient theory and practice of organizational criminal accountability of political parties.[122] This has older roots: the Nazi Party was convicted criminally at Nuremberg.[123] Promising remedies are seizures of party assets and suspension of candidates from contesting electorates in an election. The mechanisms that give them promise can learn from deft deployment of corporate criminal responsibility. Organizational accountability might be used to clean out corrupt candidates and party bosses, as well as strengthen party compliance with electoral law.

The corporate responsibility imaginary might be translated to the laws of war as in former Yugoslavian cases where criminal law has been deployed against political parties that sometimes waged war in ways international courts found genocidal. Political parties,

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Both Timor-Leste and Indonesia conducted national criminal trials and transitional justice processes concerning the war. What was most innovative in reforming tendencies for rights abuse by the Indonesian military, however, was a bilateral Truth and Friendship Commission with equal numbers of Indonesian Commissioners (that included a respected retired general) and Timor-Leste Commissioners. *See generally* JOHN BRAITHEWAITE, HILARY CHARLESWORTH & ADÉRITO SOARES, NETWORKED GOVERNANCE OF FREEDOM AND TYRANNY (2012) (discussing shortcomings of political leaders in disregarding the power of hope and patience in politics).

118. Prior to conviction, the Department of Defence apologized for workplace safety failings that it promised to fix. Jacqueline Breen, *Department of Defence Fined $1 Million Over Death of Soldier Jason Challis in Live-Fire Training Exercise*, ABC (Aug. 31, 2021), https://www.abc.net.au/news/2021-09-01/jason-challis-death-training-exercise-defence-department-fined/100424318 [https://perma.cc/EW2H-Z898].

119. Allison T. Chappell, *Consent Decrees and Police Reform: A Piece of the Puzzle or a Puzzling Policy*, 16 CRIMINOLOGY & PUB. POL'Y 571, 571–72 (2017).

120. *See generally* LAWRENCE W. SHERMAN, SCANDAL AND REFORM: CONTROLLING POLICE CORRUPTION (1978).

121. Aleksandar Maršavelski, *Responsibility of Political Parties for Criminal Offences*, *in* MAPPING THE CRIMINOLOGICAL LANDSCAPE OF THE BALKANS, 499, 499–514 (Anna-Maria Getoš Kalac, Hans-Jörg Albrecht, & Michael Kilchling eds., 2014); ALEKSANDAR MARŠAVELSKI, RESPONSIBILITY OF POLITICAL PARTIES FOR CRIMINAL OFFENSES: TRANSITIONAL JUSTICE AND BEYOND (Forthcoming 2022) (on file with author).

122. Maršavelski also points out that the assassination of Archduke Ferdinand of Austria, the spark that lit World War I, was organized by a political party—Young Bosnia. *See* Maršavelski, *supra* note 121, at 502.

123. Various Nazi organizations were prosecuted at Nuremberg: The Secret State Police (Gestapo); SS (Protection Squad); Reich Cabinet; Stormtroopers, Security Service; and General Staff and High Command of the Armed Forces. Maršavelski's work identifies two basic models to address the liability of political parties: corporate and organized crime models. The Nuremberg model of "criminal organizations" was unclear, according to Maršavelski—a hybrid allowing both interpretations. Maršavelski, *supra* note 121, at 506–08.

militaries, and police departments can be deterred, rehabilitated, incapacitated, persuaded to prevent, and required by law to be responsible as organizational actors for disciplining individual members. Hence there is a case for mutual learning by broadening the corporate crime prevention imagination to an organizational crime imagination.

Diamantis and Thomas lament that 98% of U.S. charges against corporations were resolved through negotiated deals in 2020.[124] The restorative justice theorist might respond: moving up from 2% of charges to two percent of detected serious offenses being prosecuted may well approach minimally sufficient punishment; now, reform of traditional criminal justice for street crime must be accomplished to drag it down towards that two percent. In saying that, restorativists might believe that 2% who do proceed to conviction is imperative to achieving the symbolic aims of criminal law, and educating citizens in the curriculum of crimes with some help from filmic and communal recounting of stories of greed not being good.[125] Moreover, restorative theorists forlornly yet fondly push for a world in which 2% of powerful war criminals are convicted.[126] In all three arenas, the principled restorative justice theorist says that they want to see a significant proportion of 98% of initially restorative justice cases reviewed by the courts for their respect for rights, procedural fairness, and the bounded fairness of outcomes under a restorative rule of law.

IX. FOR A MACROCRIMINOLOGY OF ORGANIZATIONAL ACCOUNTABILITY

The glass half full is a history of growing multiple pathways to holding accountable more actors, institutions, and the standard operating procedures responsible for organizational crime. This multiplies the form of detection that is most potent—detection deterrence—and allows iterated targeting of many tough targets until a soft target who genuinely cares about compliance is motivated to prevent recurrence and repair the harm. While our careers are littered with reform failures, failure only seems total if success is measured by how many are imprisoned. Accomplishments of corporate criminal law include successes of enforced self-incapacitation and self-renewal of corporations resulting from pressure from criminal law, regulatory law, and social movement activism.[127]

Self-incapacitation analyses go to macro prevention as more pivotal than individual accountability. With police killings, for example, preventive deferred prosecution negotiations by police inspectorates or criminal justice inspectorates—like those that exist in Britain—might ask hard questions: Is a reason that police in the United States kill over 1000 citizens most years, while in Britain it is always under 10, that British police are routinely unarmed? Mostly they were unarmed at the height of the IRA and subsequent

124. Mihailis Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 999 (2022).

125. JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION (1989).

126. In all three arenas, according to restorative justice theory, criminal law jurisprudence has unjust answers to the 'the missing victim' problem. *See generally* de Sousa & Laufer, *supra* note 12. According to restorative justice theory, victims should not enjoy any equality of justice with defendants but should enjoy equal consideration of their justice claims.

127. BRAITHWAITE, *supra* note 5, at 501–68 (making this case by revising responsive regulatory theory to prioritize corporate self-incapacitation lower in the hierarchy of regulatory pyramids than most forms of state incapacitation and state deterrence).

Islamist and rightist terror.[128] Whatever organizational accountability analyzes British police face over excessive use of force in years to come, perhaps one conclusion might be that they resist incipient pressures to become more of an armed constabulary. Individual accountability can neglect structural questions about the root causes of organizational violence. One way organizational criminal responsibility is important is that it raises questions of this kind even at commanding geopolitical heights, such as Nuremberg.

A danger of the Fisse and Braithwaite accountability principle is that it could give legal foxes excessive control over the risk-prevention henhouse. That goes to an important lesson from the way aviation safety has been so effective in making it many times safer to fly through the air than cross ground or sea.[129] Root cause analysis methodologies following audit failures are needed that track system failures and their cover-up; these matter more than individual or corporate punishment.[130] This is about the insight that system failures are preventatively more important than failures of actors; hence the restorative justice insight of putting the problem in the center of the circle rather than on the defendant until caring targets of detection deterrence step up to take responsibility for fixing the problem. Then the lawyers are brought in to punish those who persisted in cover-ups of the deepest responsibility—bearing in mind Jennifer Arlen's contribution that criminal prosecutors may be less prone to capture by these toughest nuts compared to civil enforcers.[131] The Accountability Model must frequently be satisfied with the accountability of executives who opt to report failings, apologize, and repair harm, thence eliciting forgiving Accountability Model responses. This is a lesson from the empirical literature on prevention from both restorative justice and aviation safety.[132] Nuclear safety also learned that if lawyers excessively dominate regulatory strategy, a risk is rule-following, box-ticking, automatons, rather than prudent leaders with systemic wisdom of safety systems. Since Three Mile Island, systemically wise managers have succeeded in lowering risks more than a hundred-fold, a level of accomplishment quantitatively beyond punishment strategies.[133]

The principal conclusion is that while maximizing any form of punishment is a danger to freedom, maximizing accountability is a principled path that can grow freedom. Increasing corporate punishment to minimal sufficiency remains imperative, however,

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128. These included bombings aimed at the Prime Minister and her party convention that did kill a different minister, and another murder of a close relative of the Queen. The discussion of differential rates of police killing cross-nationally is developed in detail in BRAITHWAITE, *supra* note 5, at 35–78.

129. Paul Stephen Dempsey, *Independence of Aviation Safety Investigation Authorities: Keeping Foxes from The Henhouse*, 75 J. AIR L. & COM. 223, n. 30 (2010); *see also* CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOUR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS 326–29 (2015); Rachel Wilf-Miron, I. Lewenhoff, Z. Benyamini & A. Aviram, *From Aviation to Medicine: Applying Concepts of Aviation Safety to Risk Management in Ambulatory Care*, 12 QUAL. & SAFETY HEALTH CARE 35, 35 (2003).

130. Wendy Goot, *Root Cause Analysis – What Do We Know?*, 95 MAANDBLAD VOOR ACCOUNTANCY EN BEDRIJFSECONOMIE 87, 90–91 (2021). Emphasizing individual failures to the neglect of system failures also goes to the limitation of reducing the philosophy of corporate responsibility to an aggregation of individual responsibilities; systems are more consequential than now dead hands that might have designed them. *See* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 414 (2011).

131. Arlen, *supra* note 27, at 864.

132. *See* BRAITHWAITE, *supra* note 5, at 501–68.

133. JOSEPH REES, HOSTAGES OF EACH OTHER: THE TRANSFORMATION OF NUCLEAR SAFETY SINCE THREE MILE ISLAND 123 (2009).

when punishment is so perilously close to zero. A practical conclusion from maximal accountability and minimal sufficiency of punishment is that deferred prosecutions have unrealized promise for transcending markets in compliance lemons. They can catalyze astute strategy mixes that strengthen crime prevention. This might be refuted in the future by systematic studies that show consistent prosecution outperforms deferred prosecutions that only escalate when deferral fails. Deferred prosecutions have insufficiently realized promise for strengthening individual accountability inside corporations or armies, though that may require heavier use of independent counsel monitored by regulatory agencies to avert scapegoating. Deferred prosecutions have largely unrealized potential for crafting more cosmopolitan corporate law. This means effective regulation under one country's law can help prevent ecosystem collapse or financial system collapse in other countries.

Theoretically, the unrealized promise of deferred prosecutions is about preventive healing and justice potential in regulatory mix—restorative justice mixed into responsive regulation. A large impediment to this potential is minimal insufficiency of corporate convictions. In responsive terms, sufficiently sharp peaks to enforcement pyramids are lacking. With a sharp peak, regulatory pyramids can squeeze not lemons but structural corporate transformation to reduce domination.[134] Reformers might draw a politics of hope from criminal cases that occasionally do bring about needed corporate capital punishment through bankrupting criminal aged care providers, or effective closure of firms like Purdue Pharmaceutical after dispersing billions to victims.[135]

134. Garrett, *supra* note 94.

135. *See generally* Keith Humphreys, *Avoiding Globalisation of The Prescription Opioid Epidemic*, 390 LANCET 437 (2017); Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay $4.5 Billion To Settle Opioid Claims*, N.Y. TIMES, (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html [https://perma.cc/5XUB-VJFF].