

# But We Haven't Got Corporate Criminal Law!

Mihailis E. Diamantis\* & W. Robert Thomas\*\*

*Should the United States retain corporate criminal law? For more than a century, pearl-clutching abolitionists have decried the conceptual puzzles and supposed injustices of corporate criminal liability. Meanwhile, starry-eyed proponents of corporate criminal law have celebrated a system that they believe can deliver justice for victims and effective punishment to corporate malefactors.*

*The abolitionists won long ago—through craftiness rather than force of reason. By arguing that the United States should get rid of corporate criminal law, abolitionists staged a debate that presumes corporate criminal law in fact exists. It does not, and it never has. The greatest trick the abolitionist ever pulled was convincing everyone to think otherwise and then duping their opponents into fighting for the status quo.*

*Criminal justice has four distinctive features. It 1) utilizes uniquely demanding procedure to 2) target the worst offenders with 3) the harshest penalties in a manner that 4) expresses society's deepest moral condemnation. The United States' purported system of corporate criminal justice lacks all four features. The biggest corporate criminals routinely sidestep all criminal procedure and any possibility of conviction by cutting deals with prosecutors, trading paltry fines and empty promises of reform for government press releases praising their cooperation. The real question is not whether the United States should retain corporate criminal law, but what it would take for the United States to have a corporate criminal justice system in the first place.*

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\* Professor of Law, University of Iowa College of Law.

\*\* Assistant Professor of Business Law, University of Michigan Ross School of Business.

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“They set up two looms and pretended to weave,  
though there was nothing on the looms.”<sup>1</sup>

I. IMAGINING A WORLD WITH CORPORATE CRIMINAL LAW

This symposium instructs us to “imagine a world without corporate criminal law.” While grateful for the invitation, we cry foul. It might as well ask us whether the Beatles’ twenty-second studio album was any good, how long World War III lasted, or if the Emperor’s new robe fits him well. Famous philosophers from Bertrand Russel to Gottlob Frege have tried to explain how to understand statements about things that do not exist—so-called “improper definite descriptions.” We are not up to that theoretical task. Rather we write with child-like naivete simply to observe, “But he hasn’t got anything on!” Corporate criminal law does not exist, and it never has.

Just as we can only understand Hans Christian Anderson’s classic story once we know what “robes” are supposed to look like, our fanciful symposium assignment presumes we know what corporate criminal law is. We have an idea of what the prompt means to invoke. There is a cast of governmental and corporate characters who enact a familiar morality play. Each performance begins with an invocation from Title 18, chapter and verse. The plot is always the same: corporate villains receive their just deserts for breaching fundamental tenets of our shared social order. When the curtain closes, we are all expected to sleep soundly, freshly vindicated and assured of our safety.

But simply calling this performance “Corporate Criminal Law” will not make it so. There are other modes of legal accountability, like tort and civil regulation, and no one seriously proposes releasing corporations from their disciplinary influence. To focus on this symposium’s intended topic, we need to know what criminal law’s distinctive marks are. Rather than enter the tangles of that legal theory thicket, we proceed in an ecumenical spirit. We assume that any major philosophical view about criminal law could be right. Criminal law might be distinctive because it:

- Uses uniquely demanding procedure, or
- Punishes the worst conduct, or
- Imposes the harshest penalties, or
- Expresses distinctive moral condemnation.

The general part of criminal law, which applies to individuals, exhibits all four of these features. It rebukes and jails murderers and rapists who are found guilty beyond a reasonable doubt.<sup>2</sup> If any existing legal practice directed at corporations has just one of these four features, we would be prepared to identify it as corporate criminal law and

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1. HANS CHRISTIAN ANDERSEN, *The Emperor’s New Clothes*, in THE COMPLETE ANDERSEN (Jean Hersholt trans., 1949) (1873), [https://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes\\_e.html](https://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html) [<https://perma.cc/YS66-GJQL>].

2. This is obviously an idealized version of criminal law. In most cases against individual defendants, the plea-bargaining system steps nimbly around the “beyond a reasonable doubt” requirement. We discuss plea-bargaining further below.

proceed with the symposium's exercise.

The trouble is, we cannot find anything of the sort. We see instead a pantomime in which criminal justice functionaries and corporate interests stoop and ceremoniously carry a mantle of airy justice.<sup>3</sup> None of the participants are willing to confess that they hold nothing, for that would prove them unfit for their positions. We, by contrast, find it very easy to imagine a world without criminal law. We need only open our eyes rather than close them.

Some other scholars have also confessed to trouble recognizing corporate criminal law. Miriam Baer, for example, recently argued that corporate criminal law “diverges from traditional understandings of what criminal law is.”<sup>4</sup> In a related vein, John Coffee argued thirty years ago that the line between criminal and tort enforcement against corporations had all but disappeared.<sup>5</sup> But while the likes of Baer and Coffee are our fellow travelers, they have been traveling in the opposite direction. Where we see only a criminal law that refuses to cover corporations, they see a billowing over-abundance of it. Baer believes corporate criminal law has become “unbound” from traditional limits because prosecutors seeking to “do more” possess an unchecked authority to do too much, ignoring familiar principles of legality and culpability.<sup>6</sup> Coffee similarly believes corporate criminal law has burst its seams and cannibalized large parts of tort law. He would impose firmer “boundaries” on corporate criminal law's operation, excluding, for example, criminal enforcement of merely negligent violations.<sup>7</sup> Baer and Coffee both see a system of corporate criminal law, but one that is tumoral and unjust. Our thesis is different. We cannot see a system of corporate criminal law at all, whether to extol or to criticize.

This Article offers a starting framework for having a meaningful discussion about the true question behind the symposium topic: Could corporate criminal law be a good idea, or is it hopelessly incoherent/unjust/counter-productive? Far more is at stake than the semantics of “criminal law” (Part II). The economic and moral harms of corporate misconduct are massive. Criminal law could step in where civil and administrative enforcement fall short, but only if we know what criminal law is (Part III). We consider all four of the above-listed distinguishing features of criminal law and conclude that no existing system of corporate adjudication has a single one of them. So, we find ourselves forced to flaunt symposium etiquette. We instead try to imagine a world *with* corporate criminal law (Part IV). Once we know what corporate criminal justice requires, we can start a genuine conversation about whether the United States should try it on.

## II. THE STAKES

Even if corporate criminal law does not exist, corporate crime certainly does. By any measure, the economic impact of corporate crime is at least an order of magnitude greater

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3. William Laufer describes this as a “compliance game.” William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 79–80 (2017).

4. Miriam Baer, *Corporate Criminal Law Unbounded*, in *THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION* 475, 476 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

5. See generally John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

6. Baer, *supra* note 4, at 493.

7. Coffee, *supra* note 5, at 194.

than all other criminal offenses combined.<sup>8</sup> Recent statistics from the FBI conservatively put the multiplier at around 20x.<sup>9</sup> It is little wonder. Corporations can lie, cheat, and steal, just like the human beings that compose them. Unlike their individual employees, corporations can act on a massive scale; indeed, some crimes become worth doing (in a narrow, profit-oriented sense) only when perpetrated at scale. As the dominant force in our social and economic lives, corporations have more resources to throw toward potentially harmful ends and more points of contact with potential victims.

The costs of corporate crime are not just economic. Since corporations are profit-oriented structures, most commentators associate them primarily with economic violations like wire fraud, insider trading, anti-competitive practices, and money laundering. We now know better. Scholars, prosecutors, and courts increasingly recognize that brand-name corporations also commit a broad range of “street crimes”: homicide,<sup>10</sup> arson,<sup>11</sup> drug trafficking,<sup>12</sup> dumping,<sup>13</sup> and sex offenses.<sup>14</sup> The moral and dignitary harms that victims suffer are not quantifiable in economic terms, but they are no less consequential for having been inflicted by a corporate actor. Indeed, the moral breach is likely more significant in the corporate case since all corporate misconduct is filtered through a background profit motive—whether the crime directly boosts revenue or results from cutting corners on adequate compliance. Every jurisdiction recognizes the difference between an assassination for hire and a crime of passion. Surprisingly, we still lack an adequate victimology to even speak meaningfully about the experiences of people whom corporate crime affects.<sup>15</sup> However, for the reasons discussed in the previous paragraph, the sure bet

8. See Julie O’Sullivan, *The Indefensible White-Collar Ecosystem*, 47 J. CORP. L. 1047 (2022) (comparing the cost of white collar crimes to other types of crime).

9. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 516 (2018) (“The best estimate of the annual cost of white-collar crime in the United States, provided by the FBI, is \$300 billion to \$660 billion. By contrast, the annual cost of every other crime committed in the United States is around \$15 billion.”).

10. Katherine Blunt & Peg Brickley, *PG&E Pleads Guilty to Manslaughter in Fires as It Nears Bankruptcy Exit*, WALL ST. J. (June 16, 2020, 6:53 PM), <https://www.wsj.com/articles/pg-e-to-admit-fault-in-84-fire-deaths-plead-guilty-to-manslaughter-11592321556> [<https://perma.cc/V3J6-KCLT>] (“PG&E Corp. pleaded guilty to 84 counts of manslaughter for its role in sparking California’s deadliest wildfire . . .”).

11. Hayley Smith, *PG&E Charged with Manslaughter in Shasta County Fire That Killed 4*, L.A. TIMES (Sept. 24, 2021, 12:39 PM), <https://www.latimes.com/california/story/2021-09-24/zogg-fire-charges> [<https://perma.cc/879J-8KJ9>] (noting that “the filing also includes arson charges”).

12. United States v. Rochester Drug Coop., Inc., No. 19 CRIM 290, 2019 WL 7667033, at \*6–9 (S.D.N.Y. Apr. 23, 2019).

13. *Princess Cruises Lines to Pay Largest-Ever Criminal Penalty for Deliberate Vessel Pollution*, U.S. DEP’T OF JUST. (Dec. 1, 2016), <https://www.justice.gov/opa/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution> [<https://perma.cc/2MQB-62XG>] (“Princess has agreed to . . . plead guilty to charges related to illegal dumping of oil contaminated waste from the *Caribbean Princess* cruise ship.”).

14. E.g., Corinne Ramey, *Lawsuits Accuse Big Hotel Chains of Allowing Sex Trafficking*, WALL ST. J. (Mar. 4, 2020, 5:30 AM), <https://www.wsj.com/articles/lawsuits-accuse-big-hotel-chains-of-allowing-sex-trafficking-11583317800> [<https://perma.cc/2KRN-3LSQ>] (reporting on lawsuits accusing big hotel companies of ignoring sex trafficking at their properties); see generally Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773 (2019) (stating the problems and standards involved in corporate sex crimes).

15. Susana Aires de Sousa & William S. Laufer, *Defending the State’s Responsibility for Corporate Criminal Justice*, 47 J. CORP. L. 1109 (2022); cf. William S. Laufer & Matthew Caulfield, *Wall Street and Progressivism*, 37 YALE J. ON REGUL. BULL. 36, 44–48 (2019) (warning against the costs of inadequate victimology of corporate crime).

is that the victimology, when it comes, will reveal a pressing need for action.<sup>16</sup>

To get a sense of what our options are for responding to that need, we should figure out what corporate criminal law is and whether the United States already has it. No one thinks the United States has a handle on corporate malfeasance. The best estimates of the dark figure of corporate crime suggest that only five percent of corporate crime ever comes to light.<sup>17</sup> Criminal law can step in where current law proves inadequate only if “current law” does not already include it.

The stakes for understanding what corporate criminal law is and whether we have it extend far beyond U.S. borders. Many foreign jurisdictions across Europe, Latin America, and Asia are looking to the United States as a model for implementing their own corporate criminal law.<sup>18</sup> Several U.S. scholars are already at pains to discourage countries from mimicking the federal government’s approach, either because they think our system of corporate criminal law fails to achieve its purposes<sup>19</sup> or because the particularities of the U.S. approach depend on idiosyncratic background legal conditions that are not present elsewhere.<sup>20</sup> We offer a more fundamental reason for foreign jurisdictions to look for another template: truth in advertising. The United States does not have a good or a bad system of corporate criminal law, a portable or contextually bound one. It simply does not have one at all.

### III. “THEY COULD SEE NOTHING, FOR THERE WAS NOTHING TO SEE”

Before we can ask whether U.S. corporate criminal law is coherent,<sup>21</sup> or what purpose

16. Mihailis E. Diamantis, *What Do We Owe to Victims of Corporate Crime?*, in *CORPORATE CRIME: THE FIRM AS VICTIM AND OFFENDER* (Routledge, Advances in Criminological Theory) (Miranda A. Galvin & William S. Laufer eds., forthcoming 2022).

17. See Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 454 (2019) (discussing how few corporate crimes come to light).

18. E.g., AUSTRALIA L. REFORM COMM’N, FINAL REPORT: CORPORATE CRIMINAL RESPONSIBILITY (2020), <https://www.alrc.gov.au/wp-content/uploads/2020/05/ALRC-CCR-Final-Report-websml.pdf> [<https://perma.cc/V4ZB-X28C>]; see generally Brandon Garrett, *International Corporate Prosecutions*, in *COMPARATIVE CRIMINAL PROCEDURE* (Darryl Brown, Jenia Turner & Bettina Weisse eds., 2018).

19. Ved P. Nanda, *Corporate Criminal Liability in the United States: Is a New Approach Warranted?*, 58 AM. J. COMPAR. L. 605, 628 (2010).

20. See Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 753–58 (2020) (warning that U.S. style corporate criminal law may play out very differently in countries that lack the United States’ background procedural rules—particularly rules governing evidence).

21. Compare Samuel W. Buell, *A Restatement of Corporate Criminal Liability’s Theory and Research Agenda*, 47 J. CORP. L. 937 (2022) (finding that the strongest case for corporate criminal liability is in its ability to bring about reputational damages), with John Hasnas, *The Forlorn Hope: A Final Attempt to Storm the Fortress of Corporate Criminal Liability*, 47 J. CORP. L. 1009 (2022) and Stephen F. Smith, *Corporate Criminal Liability, End It, Don’t Mend It*, 47 J. CORP. L. 1089 (2022) (contending that corporate criminal liability has no justification in criminal law theory or normative liberal values); see also Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1360 (2009) (comparing corporate criminal liability analogous to ancient legal practices that wrongly punished innocents in place of the actual offender); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1332–33 (2009) (arguing moral responsibility is required for criminal punishment and corporations are not subjects that can have moral responsibility); Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 415 (2012) (arguing we feel a corporation is to blame because its senior officers and directors are “necessarily blameworthy” for corporate crime).

it serves,<sup>22</sup> or imagine a world without it, we need some idea of what body of law we are talking about. If it exists, there must be some feature that distinguishes corporate *criminal* law from other modes of enforcement against corporations. Just as we know ducks by their characteristic waddle and quack, this Part asks how a system of corporate criminal law, if it were to exist, would have to walk and talk. Along the way, we observe that nothing in U.S. law seems to fit the bill.

A helpful (but not necessarily definitive) litmus test for checking whether a feature of criminal law is distinctive is to consider whether civil or regulatory enforcement exhibit that feature, too. In 1L criminal law courses, professors often observe that their subject matter is different because all the case names are “U.S. v. X” or “State v. Y.” In other words, criminal law is a system of public enforcement. In the context of the 1L torts and contracts curriculum, that fact may indeed differentiate criminal law. Eventually, though, students go on to take an administrative law course and learn that the government brings all manner of non-criminal cases against rule-breakers. So, the litmus test shows that public enforcement is not a distinctive feature of criminal law.

Since our thesis is that corporate criminal law does not exist, any feature we put forward as essential to criminal law opens us to the charge of begging the question. “If only you had picked some other feature,” the complaint would go, “you might have found a system of corporate enforcement that exhibits it.” To minimize the prospect of that logical fallacy, we consider below several possible distinguishing features drawn from prominent criminal theorists. While this approach cannot guarantee that there is not some fifth or sixth feature that would do the trick, it does start to build a strong inductive case.

The Department of Justice’s recent resolution of an inquiry into the Boeing Company will serve as a running example of the sort of pageantry that some people call “corporate criminal law” today. In 2018–19, faulty autopilot systems on Boeing 737 Max planes crashed two passenger flights in Indonesia and Ethiopia, killing all 346 people on board.<sup>23</sup> While Boeing initially tried to blame the pilots, the planes’ black boxes showed that brand-new autopilot systems, responding to defective optical sensors, tipped both planes into a nose-dive and prevented manual override.<sup>24</sup> Investigations revealed that the 737 Max’s design, especially its overhauled flight-safety system, was a rush job. Developers cut corners on safety protocols. Managers ignored warnings. Executives exerted “undue

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22. See Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861 (2022) (arguing that eliminating corporate criminal liability would lead to powerful companies manipulating civil enforcement with ease); Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1029 (2022) (arguing that corporate criminal liability has limited purpose beyond other liability schemes available); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478 (1996) (arguing that corporate civil liability makes corporate criminal liability unnecessary); see also Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996) (“At best, the case for corporate criminal liability must rest on the need to correct some deficiency in the system of civil liability.”).

23. Andrew Tangel, Andy Pasztor & Mark Maremont, *The Four-Second Catastrophe: How Boeing Doomed the 737 MAX*, WALL ST. J. (Aug. 16, 2019, 11:59 PM), <https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-11565966629> [<https://perma.cc/HCG7-DM5N>].

24. Jack Nicas, Natalie Kitroeff, David Gelles & James Glanz, *Boeing Built Deadly Assumptions into 737 Max, Blind to a Late Design Change*, N.Y. TIMES (June 1, 2019), <https://nyti.ms/2WCoTHk>; Mika Gröndahl, Keith Collins & James Glanz, *The Dangerous Flaws in Boeing’s Automated System*, N.Y. TIMES (Apr. 4, 2019), <https://nyti.ms/37KLBi1> [<https://perma.cc/E6EL-Q7X8>].

pressure” on the Federal Aviation Administration to greenlight the flight system prematurely.<sup>25</sup> Sales teams kept customers in the dark about the changes, resisting airlines’ requests to train their pilots. Many individuals at Boeing made mistakes, but corporate-level vices were a driving force: a cavalier attitude toward safety, closed channels of communications for voicing concern, and a corporate culture that set profit as its only lodestar.<sup>26</sup> These were deeply ingrained corporate defects that could not arise overnight. It may be unsurprising, then, that the DOJ inquiry was not Boeing’s first federal investigation for inadequate attention to safety. Less than three years before the first crash, the FAA had settled an investigation into Boeing over related safety concerns.<sup>27</sup> As part of that settlement, Boeing promised to improve its safety protocols. It clearly pulled the wool over authorities’ eyes.

Massive loss of life. Prior offenses. Clear corporate-wide fault. Boeing’s case is just about as bad as it gets. Here, if anywhere, one would expect corporate criminal law to be on full display, with all its silver bells, gold trim, and ivory buttons. Yet authorities’ threadbare approach to Boeing’s misconduct was cut from the usual cloth, and as such, it lacked all the trappings of criminal enforcement. The four sections that follow each discuss one distinctive feature of criminal law, the absence of that feature in the government’s response to Boeing, and the typicality of that deficit.

#### A. Utilizing Criminal Procedure

One distinctive feature of criminal law has nothing to do with the substance of its prohibitions but rather with the uniquely stringent procedures used to apply them.<sup>28</sup> For example, criminal cases must be established beyond a reasonable doubt. The rule of lenity resolves ambiguities in criminal statutes in favor of defendants. Character evidence is inadmissible. These fixtures of criminal process have little or no place in civil and administrative law.

Theorists offer different justifications for the procedural idiosyncrasies of criminal law. On one account, the main organizing principle behind them is protection of the defendant.<sup>29</sup> As discussed further below (Part III.C), defendants can face uniquely harsh penalties from the criminal justice system. While civil and administrative law also levy fines and injunctions, only criminal law has the authority to imprison and execute. Since these consequences of conviction are difficult—if not impossible—to unwind, it is

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25. STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 116TH CONG., REP. ON THE DESIGN, DEVELOPMENT & CERTIFICATION OF THE BOEING 737 MAX *passim* (Sept. 2020), <https://transportation.house.gov/imo/media/doc/2020.09.15%20FINAL%20737%20MAX%20Report%20for%20Public%20Release.pdf> [<https://perma.cc/LUX3-HEL9>].

26. David Gelles, ‘I Honestly Don’t Trust Many People at Boeing’: A Broken Culture Exposed, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2020/01/10/business/boeing-737-employees-messages.html> [<https://perma.cc/A7PE-NHRW>]; Andy Pasztor & Alison Sider, *Internal Boeing Documents Show Cavalier Attitude to Safety*, WALL ST. J. (Jan. 10, 2010, 3:47 AM), <https://www.wsj.com/articles/internal-boeing-documents-show-cavalier-attitude-to-safety-11578627206> [<https://perma.cc/XYN2-Z6AV>].

27. Fed. Aviation Admin., *Boeing Agrees to Pay \$12 Million and Enhance Its Compliance Systems to Settle Enforcement Case*, U.S. DEP’T OF TRANSP. (Dec. 22, 2015), <https://www.faa.gov/newsroom/boeing-agrees-pay-12-million-and-enhance-its-compliance-systems-settle-enforcement-cases> [<https://perma.cc/9WGM-DM4N>].

28. *Addington v. Texas*, 441 U.S. 418, 428 (1979).

29. Barbara D. Underwood, *The Thumb on the Scale of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1317–18 (1977).

essential to minimize the prospect of error. Accordingly, courts require much more of criminal prosecutors than of private plaintiffs.

A different account of the uniqueness of criminal procedure focuses on the moral and social significance of criminal trial.<sup>30</sup> Just as criminal courts alone can impose certain sanctions, only they can convict defendants. Conviction is not just a precursor to punishment.<sup>31</sup> As discussed further below (Part III.D), it is also an expressive act of condemnation (of the criminal) and vindication (of any victims). It validates the shared moral fabric that the criminal act sought to tear.<sup>32</sup> Stringent criminal procedures confer gravity to conviction and the message it sends.<sup>33</sup> They convey that the judgment of a criminal court is no light matter. They exclude reasonable doubt. They stack statutory interpretation in the defendant's favor. They demand a high normative threshold that corresponds to the solemnity of conviction's expressive content.

Unlike individuals, corporations almost never find themselves subject to criminal procedure.<sup>34</sup> Corporate convictions are vanishingly rare. While 8.6% of the adult population in the United States has a felony conviction, less than .03% of corporations do.<sup>35</sup> This is not because corporations are somehow much better behaved than the individuals who compose them. Recent studies show that large corporations, on average, commit more than two incidents of major financial misconduct each week.<sup>36</sup> Nor do corporations have some secret defense super-power in the courtroom that can explain their low conviction rates. If anything, the juries who would decide their cases are more disposed to enter judgment against corporations.<sup>37</sup> Nor can low rates of uncovering corporate crime fully explain low conviction rates. The fact is, even when authorities do suspect corporate crime, they are very unlikely to prosecute, as when the DOJ diverted Boeing from criminal investigation toward a civil resolution. Federal prosecutors sought to convict (by trial or plea) only 39 corporations in 2020.<sup>38</sup> In contrast, 51% of employees in companies with more than 90,000 workers report having observed misconduct in the last twelve months.<sup>39</sup>

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30. *In re Winship*, 397 U.S. 358, 364 (1970) (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”).

31. Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, 4 (discussing the utility of conviction, without punishment, as a form of condemnation that validates the victim's endured harm).

32. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 58 (2003).

33. Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 849 (2018); see also Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 868–70 (2014) (stating that a prosecution can itself express a message); Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 312 (2018) (discussing scholarship that suggests criminal procedure acts as a moral inquiry).

34. See, e.g., JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 10, 50 (2020) (noting the decreasing rates of corporate prosecutions).

35. Diamantis, *supra* note 9, at 510.

36. Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement versus Private Reality*, 26 J. FIN. CRIME 923, 931 (2019).

37. Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 191–99 (1989).

38. See Brandon L. Garrett & Jon Ashley, *Data & Documents*, CORP. PROSECUTION REGISTRY, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html> [https://perma.cc/Z6DK-4HJX] (tabulating plea deals, convictions, and acquittals for 2020).

39. ETHICS RSCH. CTR., THE STATE OF ETHICS IN LARGE COMPANIES 4 (2015), [https://www.ethics.org/wp-content/uploads/resources/ECI\\_LargeCompaniesReport.pdf](https://www.ethics.org/wp-content/uploads/resources/ECI_LargeCompaniesReport.pdf) [https://perma.cc/3ABH-C8NG].



Paradoxically, the larger a corporation is, the *more* likely it is to commit a crime, but the *less* likely it is to be prosecuted afterward.<sup>40</sup>

The heart of the problem is that prosecutorial and corporate interests often align.<sup>41</sup> Both want to avoid trial. This is a familiar feature of criminal law more generally. For many types of crime, neither prosecutors nor suspects relish the expense and uncertainty of trial. Additionally, for corporate crime in particular, both strive to avoid the economic and political fallout of corporate conviction.<sup>42</sup> Ironically, it is the civil and regulatory consequences that seem to drive the criminal calculus: prosecutors, wary of being blamed for causing the next Arthur Andersen, have sought to stitch corporate responsibility together on the cheap.<sup>43</sup> Consequently, they usually resolve the vast majority of charges—98% of the time in 2020—through negotiated deals, effectively side-stepping the trial process.<sup>44</sup>

There are two important differences between how this dynamic plays out for individuals and for corporations. One is that, even with the high number of negotiated deals, courts still carry a robust caseload of trials against individuals. Trials serve as some recognizable tether for understanding the general part of criminal law. Conversely, only forty-three corporations went to trial in federal court for alleged crimes in the last decade.<sup>45</sup> The second difference is the type of deals available to individuals and corporations. Overwhelmingly, individuals enter into plea agreements. These require the individual to admit guilt before a court, and they culminate in public entry of judgment. The court then sentences the individual to some criminal sanction typical of the subject crime—most often some term of imprisonment. By contrast, the whole point of many deals that prosecutors offer the largest corporate criminals is to *avoid* conviction and sentencing. The deals defer prosecution indefinitely or abort it *ab initio*, thereby cutting the courts out of the process entirely.<sup>46</sup> We discuss the terms of these deals further below (Part III.C), but it bears noting here that one-fifth of them do not even require corporate suspects to publicly accept responsibility.<sup>47</sup> As Samuel Buell has observed, “there is nothing traditionally criminal in this arrangement.”<sup>48</sup>

40. Cindy R. Alexander & Mark A. Cohen, *New Evidence on the Origins of Corporate Crime*, 17 *MANAGERIAL & DECISION ECON.* 421, 430–32 (1996).

41. Laufer, *supra* note 3, at 79–80; *see also* W. Robert Thomas, *Incapacitating Corporate Criminals*, 72 *VAND. L. REV.* 905, 957–59 (2019) (noting that prosecutors do not want to be seen as levying extrajudicial punishment sans trial).

42. Diamantis, *supra* note 9, at 512–14.

43. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 19–45 (2014); *see* JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* 31–37 (2017) (discussing Arthur Andersen’s impact).

44. *See generally* Garrett & Ashley, *supra* note 38 (comparing convictions to DPAs, NPAs, and plea deals for 2020).

45. *See id.* (tabulating trial convictions and acquittals from 2010 through 2020).

46. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741–42 (D.C. Cir. 2016).

47. Russel Mokhiber, *Raman Defends Deferred and Non Prosecution Agreements for Major Corporate Crime Cases*, *CORP. CRIME REP.* (May 22, 2013, 5:36 PM), <http://www.corporatecrimereporter.com/news/200/ramanhousetestimony05222013/> [<https://perma.cc/TRL4-DELJ>].

48. Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 87, 89 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

The observation that corporate suspects rarely face criminal process is nothing new, but the emphasis here is different from earlier accounts. As Jennifer Arlen has argued, the system of agreements that divert corporate cases from the courtroom frees prosecutors from many of the rule-of-law limits that characterize criminal law.<sup>49</sup> Prosecutors say what the law is, determine if it has been violated, and fix the penalty, all without any judicial review for due process or consistency. While that dynamic is indeed troubling, corporations themselves hold the ticket out of it; they can always force a plea deal or trial. We are more concerned with the people who are not party to the backroom negotiations: the victims and the public looking on. They, too, benefit from the solemn forum of the courtroom. For victims, it is an open platform for memorializing their account and having it weighed by representatives of their community.<sup>50</sup> For the public, it is an opportunity to have their say (via a representative jury) on when unacceptable business practices bleed into criminal conduct. Even where plea deals elide the need for trial, conviction still validates victims and reaffirms society's commitment to the norms that the crime breached.

### B. Punishing the Worst Corporate Conduct

A criminal justice system should be an enforcement mechanism for sanctioning the worst offenders who commit the worst kinds of offenses. With respect to individuals, jurisdictions often invest substantial attention and resources into investigating and prosecuting these cases. Even when avenues for civil enforcement exist—for example, a case of homicide may also give rise to a wrongful death lawsuit—the criminal law occupies priority of place in responding to the worst offenders.

What about corporate offenders? Does corporate criminal law today punish the worst corporate conduct? Hardly. For starters, many events that would strike even the most causally informed as especially pernicious business misconduct go unprosecuted. Boeing's prosecution agreement is an object lesson in the criminal law's tolerance of abhorrent corporate behavior.<sup>51</sup> But it is hardly an outlier. Consider recent circumstances in the banking industry: HSBC laundered money for international drug cartels, Standard Chartered Bank did business with known terrorist organizations, and Wells Fargo defrauded millions of its own customers. These companies all secured civil prosecution agreements instead of criminal convictions.<sup>52</sup>

Tech firms seem to receive even less scrutiny—for example, federal prosecutors declined to prosecute Google after its Street View team carried out the “biggest wiretap

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49. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 191 (2016).

50. Diamantis, *supra* note 31; see also William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, 155 (2021) (arguing that the state has an obligation to provide public recognition of criminal wrongdoing when just punishment is impossible).

51. Russell Mokhiber, *Columbia Law Professor John Coffee Says Boeing Deferred Prosecution Agreement One of the Worst*, CORP. CRIME REP., (Feb. 23, 2021, 4:35 PM) <https://www.corporatecrimereporter.com/news/200/columbia-law-professor-john-coffee-says-boeing-deferred-prosecution-agreement-one-of-the-worst/> [<https://perma.cc/JP5Q-4FDD>] (interviewing John Coffee, who critically described the Boeing DPA as “without precedent”).

52. Deferred Prosecution Agreement, *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, 3–6 (E.D.N.Y. July 1, 2013); Amended Deferred Prosecution Agreement, *United States v. Standard Chartered Bank*, 3–6 (D.D.C. 2019); Deferred Prosecution Agreement, *United States vs. Wells Fargo & Co.*, 6–8 (W.D.N.C. 2020).

case in U.S. history,” while SAP received a non-prosecution agreement for violating sanctions against Iran throughout much of the past decade.<sup>53</sup> Meanwhile, Facebook continues to avoid criminal justice for its acknowledged role in abetting genocidal violence in Myanmar or, more recently, for knowingly providing a recruiting platform for violent gangs and contract killers in Mexico, Ethiopia, and Vietnam.<sup>54</sup>

Lest one complain that this evidence is anecdotal, one need only look at historical trends to appreciate the negligible role corporate convictions play in our criminal justice system. For each of the last ten years, roughly 140 organizations were convicted, amounting to less than a quarter of one percent of the federal government’s overall criminal docket.<sup>55</sup> Adding in NPAs and DPAs barely impacts these numbers; on average, forty cases are resolved each year through civil prosecution agreements.<sup>56</sup>

In contrast to authorities’ response to individual wrongdoers, criminal law takes a back seat for corporate defendants while civil and regulatory enforcement mechanisms lead the way. Indeed, in extreme cases, civil and regulatory alternatives all but crowd out a criminal justice response. Take PG&E’s recent guilty plea for causing the Camp Fire, a conflagration that killed scores of individuals and leveled whole communities in California.<sup>57</sup> At a glance, admitting to 84 counts of manslaughter seems broadly responsive to the wrong done.<sup>58</sup> But upon inspection, it turns out that these charges were designed to *minimize* the impact of criminal liability. PG&E reportedly rejected a prior offer to plead guilty to a lesser crime, only one count of arson, because manslaughter guaranteed it a smaller fine. The criminal law responded, but only just enough to preserve creditor negotiations in the company’s ongoing bankruptcy proceedings.<sup>59</sup>

53. Karen Gullo, *Google Wi-Fi Roundup has Lawyers Chasing Landmark Jackpot*, BLOOMBERG (Sept. 24, 2014, 12:17 PM), <http://www.bloomberg.com/news/articles/2014-09-24/google-wi-fi-roundup-mistake-has-lawyers-eyeing-jackpot> [https://perma.cc/L74M-PE43]; see also Chris Stroh, *SAP Reaches Deal with U.S. After Violating Iran Sanctions*, BLOOMBERG (Apr. 29, 2021, 2:22 PM), <https://www.bloomberg.com/news/articles/2021-04-29/sap-reaches-deal-with-u-s-after-company-violated-iran-sanctions> [https://perma.cc/A5XT-5U25].

54. Justin Scheck, Newley Purnell & Jeff Horwitz, *Facebook Employees Flag Drug Cartels and Human Traffickers. The Company’s Response is Weak, Documents Show*, WALL ST. J. (Sept. 16, 2012), <https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953> [https://perma.cc/UHU6-H9AT]; Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html> [https://perma.cc/WRY4-YPWB].

55. Compare U.S. SENT’G COMM’N, 2020 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.O-2 (2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/FigureO2.pdf> [https://perma.cc/3CJJ-22DX] (representing organizational cases), with U.S. SENT’G COMM’N, FY 2020 OVERVIEW OF FEDERAL CRIMINAL CASES 3 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf) [https://perma.cc/96EX-WRM3] (representing overall criminal cases).

56. GIBSON DUNN LLP, 2020 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 2 (2021).

57. Ivan Penn, *PG&E Ordered to Pay \$3.5 Million Fine for Causing Deadly Fire*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/business/energy-environment/pg-e-camp-fire-sentenced.html?searchResultPosition=2> [https://perma.cc/TZ7J-HL7L].

58. *Id.*

59. Katherine Blunt, *PG&E to Plead Guilty to Involuntary Manslaughter Charges in Deadly California Wildfire*, WALL ST. J. (Mar. 23, 2020, 5:37 PM), <https://www.wsj.com/articles/pg-e-to-plead-guilty-to>

*C. Imposing the Harshes Penalties*

Like regal couture, criminal sanctions are, by design, particularly uncomfortable. While civil, regulatory, and criminal enforcement all have the power to lighten defendants' purses, only the latter can restrain defendants through imprisonment or execution. Because life and liberty can hang in the balance, one defining feature of criminal law is its authority to impose uniquely severe punishments. These harsh sanctions are supposed to correlate to the greater evil of criminal conduct: to give due punishment, to secure more certain deterrence, and to communicate prohibition rather than pricing. Yet prosecutors investigating corporations rarely reach too deep into the trunk of available sanctions; they prefer a justice held together by gossamer threats.

Tailoring criminal sanctions' characteristic severity to the corporate context takes a bit of work. Corporations do not enjoy life and liberty in the ordinary sense. Consequently, the prison guard and the executioner have little role in meting out their punishment.<sup>60</sup> The corporate lictor is more actuarial. While corporations have no bodies to imprison or kill, they do have bank accounts. The fine is the fixture of the corporate criminal sanction. Accordingly, U.S. Sentencing Guidelines instruct judges to sentence corporations by calculating culpability scores that correspond to fine ranges.<sup>61</sup>

Since criminal punishment is supposed to be uniquely severe, one would imagine its fines to be especially large and its interference with business interests to be especially pronounced. Indeed, large enough criminal sanctions can functionally "kill" corporations. The Guidelines explicitly authorize judges to divest "criminal purpose organizations" of all their assets.<sup>62</sup> Also, in many regulated industries, the financial effects of collateral consequences of conviction—such as debarment from contracting with the government or loss of license—can terminate corporate operations.<sup>63</sup>

The penal reality that corporations face is very different. When an individual defendant cannot pay a high enough fine, criminal law imprisons him; when a corporation cannot, U.S. prosecutors offer to reduce the fine. They make every effort to keep the largest corporate offenders out of the courtroom and to help them avoid conviction. Prosecutors' principal tool for this is pre-trial diversion, through which they negotiate bespoke deals with corporate suspects that rarely even require explicitly admitting guilt. We know the reason for this quizzical dynamic—prosecutors understandably want to avoid the economic and social fallout of driving large corporate employers out of business.<sup>64</sup> But prosecutors also scrupulously avoid severe, non-lethal penalties. The concessions that prosecutors levy through pre-trial diversion are paltry, whether reckoned as a percentage of market capitalization (on average, <0.04%),<sup>65</sup> of annual corporate revenue (on average, <1% for

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involuntary-manslaughter-charges-in-deadly-california-wildfire-11584962649 [https://perma.cc/N35W-2LHP].

60. *But see* Thomas, *supra* note 41, at 946–56 (arguing corporate criminal punishment should further incapacitate criminal corporations).

61. U.S. SENT'G GUIDELINES MANUAL, ch. 8 (U.S. SENT'G COMM'N 2018).

62. *Id.* § 8C1.1.

63. Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM 177 (Anthony S. Barkow & Rachel Barkow eds., 2011).

64. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006).

65. GARRETT, *supra* note 43, at 70.

large corporations),<sup>66</sup> or of the total sanction for any instance of misconduct (on average, 14%).<sup>67</sup> Half of pre-trial diversion agreements impose no fine at all!<sup>68</sup>

In addition to fines, pretrial diversion agreements can impose a period of probation-like supervision and mandated compliance reform.<sup>69</sup> These can hardly be the agreements' criminal justice hook. Brandon Garrett has compared such provisions to reform-oriented civil remedies;<sup>70</sup> John Braithwaite to administratively imposed self-regulation.<sup>71</sup> In any case, even supervised reform is the exception rather than the rule (imposed in well under 50% of agreements).<sup>72</sup>

Once again, Boeing's case is illustrative. Boeing and the DOJ negotiated a pretrial diversion agreement that required Boeing to pay "a total criminal monetary amount" of \$2.5 billion.<sup>73</sup> Of that, \$244 million was a "criminal monetary penalty," and the balance was compensation for victims and customers. Worse, the lion's share of those billions was earmarked for Boeing's corporate customers—the airlines who bought Boeing's products—rather than for families of the deceased; apparently, prosecutors decided that "the families are not crime victims under federal law."<sup>74</sup> While the "b" word may impress laypeople, what the DOJ's press release left out is that the total payment amounted to 3.3% of Boeing's pre-crash annual revenue and just 12.7% of its pre-crash annual profits. Nor did the agreement place Boeing under any kind of supervision. Rather, the DOJ simply observed that "Boeing has agreed to strengthen its compliance program" and "to submit yearly reports." It is hard to see how this agreement fits within a conception of criminal law as an institution that levies the harshest available punishments. To put Boeing's penalty for killing 346 people on the scale of the median working American, it equates to a \$4,315 fine and a promise to do better—a promise, remember, that Boeing had already made and broken three years beforehand.

#### D. Expressing Moral Condemnation

That criminal law can convey moral condemnation is a feature of our conventions: the

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66. Dorothy S. Lund & Natasha Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis* 36 (Fac. Scholarship at Penn L. 2147, 2020), [https://scholarship.law.upenn.edu/faculty\\_scholarship/2147/](https://scholarship.law.upenn.edu/faculty_scholarship/2147/) [<https://perma.cc/48GL-6CL5>].

67. GARRETT, *supra* note 43, 70.

68. *Id.*

69. See Mihailis E. Diamantis, *An Academic Perspective*, in *THE GUIDE TO MONITORSHIPS* 75, 79 (Anthony S. Barkow, Neil M. Barofsky, & Thomas J. Perrelli eds., Glob. Investigations Rev. 2d. ed., 2019) ("Compliance programmes are another feature at organization level that influences the occurrence (and recurrence) of crime within a corporation.").

70. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 860 (2007).

71. Jon Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1469–70 (1982).

72. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 588 (2015).

73. *Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay Over \$2.5 Billion*, DEP'T OF JUST. (Jan. 7, 2021), <https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion> [<https://perma.cc/KG4Z-YGD6>].

74. David Schaper, *Families of 737 Max Crash Victims Want DOJ to Rescind Boeing's Settlement Agreement*, NPR (Feb. 11, 2022, 5:09 AM), <https://www.npr.org/2022/02/11/1080049312/families-of-737-max-crash-victims-want-doj-to-rescind-boeings-immunity-de> [<https://perma.cc/8P7C-JE8Q>].

heightened procedures, the focus on severe wrongs, and the uniquely harsh sanctions all weave together to form the social fabric from which the state cuts its expression of condemnation.<sup>75</sup> But corporate criminal law again falls short. Corporations are so rarely prosecuted that, in our experience, laypeople (and even many law professors!) are often surprised to discover that corporations themselves—as opposed to, say, just their officers or directors—can face criminal charges. When corporations are prosecuted, the procedural hallmarks of the criminal law are absent: corporate pretrial diversion is a negotiated affair that more closely resembles administrative enforcement. Cooperative corporations are praised for identifying individuals to scapegoat—a worrisome practice, save for the fact that cases against the scapegoats are rarely actually brought.<sup>76</sup>

Punishment, in particular, plays a central role in expressing condemnation of a quality and to a degree not reproducible by tort or civil regulation.<sup>77</sup> This expression is not an automatic function of exposing the convicted to hard treatment; after all, depending on the circumstances, the non-penal consequences of having one's wrongdoing discovered may outstrip any state sanction.<sup>78</sup> Criminal law's condemnation derives from shared norms and social conventions that give meaning to the state's sanction: we recognize that imposing a lengthy prison sentence signals someone's blameworthiness, and we recognize their blameworthiness because lengthy prison sentences are the sort of punishment reserved for only the worst offenders.

Against this backdrop, corporate punishment falls notably short. The punishments we impose against corporations do not amount to hard treatment, either in absolute terms or when judged against the existing social conventions. People see monetary fines as an ambivalent form of punishment, just as likely a means for the privileged offender to pay her way out of full accountability.<sup>79</sup> While it may be possible to design monetary sanctions in such a way as to overcome this expressive ambiguity,<sup>80</sup> Part III.C already details the ways in which corporate fines are ill-suited to surmount their own mixed messaging. To that point, there is no greater indictment of the current regime of corporate penalties than the fact that firms in many industries would prefer to face a criminal sentence over a civil penalty.<sup>81</sup>

Beyond financial penalties, corporate criminal punishment sometimes includes probation-like supervision and mandated compliance reforms. It is an open question

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75. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 501 (2006); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1333 (2013); see generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 PENN. L. REV. 1503, 1504 (2000).

76. W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It's Too Narrow*, 53 ARIZ. ST. L. REV. 199, 253–59 (2021).

77. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 416–17 (1965); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

78. See generally FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (1866) (exploring the psychology of Rodion Romanovich Raskolnikov, who is tormented by the murder he has committed). For a less romantic observation of the same phenomenon, see Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 416 (1980) (exploring the “stigma” associated with punishment).

79. W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 602, 609–17 (2017).

80. See *infra* Part IV.

81. See Khanna, *What Rises from the Ashes?*, *supra* note 22, at 1041 n.65; Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 108 (2004).

whether a practice of governance-as-punishment is sound in theory (we agree it is, albeit for distinct, if overlapping, reasons) or whether current approaches to corporate criminal governance are beneficial in practice (we share doubts). But regardless of any other penological benefits, it remains the case that this form of probation—be it corporate or otherwise—is simply not hard treatment in any socially recognizable sense.<sup>82</sup> Similar to fines, probation is more generally understood as a way of *avoiding* serious punishment, the kind of sanction imposed on high-profile celebrities and...well, white-collar criminals.<sup>83</sup>

The fact that corporate punishment is not embroidered with the stigma reflects a broader phenomenon: corporate criminal law just isn't conventionally stigmatizing in the way that the general criminal law is. We don't tend to call corporations "killers" when they kill, "thieves" when they steal, "arsonists," "sex traffickers," or any of the other vibrantly stigmatic epithets that surround the criminal law.<sup>84</sup> Perhaps the criminal law as a whole would be better off with fewer of these conventional trappings of stigma and condemnation, if even it is possible to do away with them. Until then, these deeply rooted trappings of the criminal law remain curiously invisible when it comes to corporate criminals.

#### IV. STARTING A REAL DISCUSSION ABOUT CORPORATE CRIMINAL JUSTICE

Corporate criminal law does not exist, but this does not necessarily mean that it is a bad idea. Having shown how easy it is to "imagine a world without corporate criminal law"—just look around you—we close by imagining what a world with corporate criminal *justice* might look like. Our ambition is not to endorse the world below: adopting a meaningful system of corporate criminal justice comes with serious costs as well as benefits. We do not pretend to balance the books here. Instead, our hope is to restage debates about corporate criminal law around a project worth fighting about—namely, what it would take to have, and whether we should adopt, a system of corporate criminal justice.

##### *A. Better Procedures, Actually Applied*

What would an institution dedicated to pursuing corporate criminal justice look like? As noted, corporate criminal law today is nowhere to be found.<sup>85</sup> Standard features of criminal procedure rarely enter into everyday practice. White-collar statutes are only glancingly aimed at punishing corporate misconduct. And foundational doctrines for fixing legal liability to corporations remain undertheorized and underdeveloped.

Adequate procedures matter, as do better substantive statutes. So too do trans-substantive doctrines particularly relevant to corporate settings, like those used to determine what actions and what attitudes can be attributed to a corporate entity. Efforts to tie corporate criminal responsibility more closely to a coherent notion of corporate

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82. See Mihailis E. Diamantis, *The Corporate Insanity Defense*, 111 J. CRIM. L. & CRIMINOLOGY 1 (2021) (comparing corporate probation to medical treatment that follows *acquittal* of the insane criminal defendants).

83. W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 410–11 (2021).

84. W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 1 STETSON BUS. L. REV. (forthcoming 2022).

<sup>85</sup> See *supra* Part III.

responsibility, then, are welcome additions.<sup>86</sup> We do not insist here on any particular attribution rule—nearly any attempt to tie the attribution of corporate criminal liability to a more coherent account of organizational responsibility would be preferable to the status quo—other than to commend proposals that take cognizance of increasingly well-settled prescriptions from organizational psychology and cognitive science.<sup>87</sup>

Many scholars take for granted that a better institution of corporate criminal law is necessarily a more bounded one; on this view, reforms that promote corporate criminal justice do so largely by reining in the state's jurisdiction.<sup>88</sup> But we suspect that many doctrinal and procedural reforms are just as likely to expand the reach of corporate criminal justice as they are to shrink it.<sup>89</sup> As we and others have noticed, the status quo approach to assigning criminal liability to corporations is not only overly broad, but also overly narrow in selecting instances of corporate wrongdoing.<sup>90</sup> Meanwhile, the encroachment of artificial intelligence into the business environment gives rise to new types of algorithmic misconduct, for which the corporation is an especially apt target for criminal responsibility.<sup>91</sup> As such, we expect that a system of corporate criminal justice is equally compatible with a world where more misconduct, rather than less, may be subject to criminal regulation. Regardless, the aspiration here is not an instrumental one—a system of corporate criminal justice should not be reverse-engineered to deliver some predetermined quantity of cases. What matters here is whether the criminal justice system is equipped (closely as practicable) to prosecute all and only those instances of wrongdoing that are distinctly corporate in character.

### *B. The Worst Offenders, Not Just the Smallest Ones*

An institution of justice is useless if it is not used. Corporate criminal justice requires prosecuting, convicting, and punishing the worst offenders for their misconduct, something that—as Part III details—rarely happens these days. In this respect, we believe that any system of corporate criminal justice would require significantly more enforcement than presently occurs.

But not just more enforcement—corporate criminal justice requires *better* enforcement. As discussed, what little enforcement exists today slants disproportionately towards small business organizations and away from large, public corporations like

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86. See John Braithwaite, *Maximal Accountability with Minimally Sufficient Punishment*, 47 J. CORP. L. 911 (2022); Amy Sepinwall, *Corporate Coverture*, 47 J. CORP. L. 1071 (2022).

87. See generally Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049 (2016); Thomas, *supra* note 76; WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS* (2006).

88. Baer, *supra* note 4, at 476–77.

89. *But cf.* Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887 (2022) (noting that criminal justice reforms are likely to shrink the influence of corporate criminal law); accord Miriam H. Baer, *Law Enforcement's Lochner*, 105 MINN. L. REV. 1667 (2021).

90. Mihailis E. Diamantis, *The Body Corporate*, 83 LAW & CONTEMP. PROBS. 133, 151–57 (2020); see generally Thomas, *supra* note 76.

91. Thomas, *supra* note 76, at 246–49; see generally Mihailis E. Diamantis, *Algorithms Acting Badly: A Solution from Corporate Law*, 89 GEO. WASH. L. REV. 801 (2020); Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. REV. 893 (2020); see also Ryan Abbott & Alex Sarch, *Punishing Artificial Intelligence: Legal Fiction or Science Fiction*, 53 U.C. DAVIS L. REV. 323, 327–28 (2019) (discussing analogies between punishing AI and punishing corporations).



Boeing.<sup>92</sup> Benign explanations for this trend point the finger at other defects plaguing corporate criminal law,<sup>93</sup> while less sympathetic accounts point to the malign exercise of raw political power.<sup>94</sup> But excusable or not, these trends are unjustifiable. A fair system of corporate criminal justice should not bias in favor of one size of organization or another, and—to the extent it might—we suspect that the bias should naturally tip in the other direction. After all, if the target is organizational wrongdoing—the sort of misdeeds not reducible or attributable to a discrete set of actors—then it is reasonable to suspect that distinctly corporate wrongs are more likely to arise in larger, more sophisticated organizations.<sup>95</sup>

Better enforcement is not merely a matter of political will; for all our complaints about prevailing enforcement trends, we are largely sympathetic to the difficult hand that prosecutors have been dealt. As Brandon Garrett has recently argued, the absence of sustained institutional knowledge has made it difficult to maintain a consistent practice of corporate enforcement.<sup>96</sup> Institutional reform would require more investment in corporate enforcement.<sup>97</sup> Investigating and prosecuting cases against large public companies can be significantly more time-consuming, challenging, and expensive than going after mom-and-pop shops. Corporate criminal justice isn't free.

### *C. Better Sanctions, Not (Just) Harsher Sanctions*

One of the primary problems with today's corporate criminal law is the lack of meaningful sanctions to give the process weight. What would corporate punishment look like in a world committed to corporate criminal justice?

For starters, an institution of corporate criminal justice would, in several respects, be considerably harsher than the status quo. The punishments used today are ill-suited to the task, but there are several ways that corporate punishment might gain real force. Corporate criminal justice would incorporate more substantial sanctions—a topic that both of us have considered previously. For one, better corporate punishments might take the form of either larger monetary fines or fines designed so that key decision-makers more acutely feel their impact, rather than non-culpable shareholders, low-level employees, and consumers.<sup>98</sup> For

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92. Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 458–59 (2019).

93. See Thomas, *supra* note 73, at 250–59 (2021) (arguing that slanted enforcement is a byproduct of respondeat superior).

94. E.g., William S. Laufer, *Illusions of Compliance and Governance*, 6 CORP. GOVERNANCE 239, 241 (2006) (explaining that “corporate power and especially top management control of the governance process remains dominant relative to other stakeholders”).

95. See Alexander & Cohen, *supra* note 40, at 421 (studying the relationship between prior performance and corporate crimes).

96. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 139–43 (2020); see also O'Sullivan, *supra* note 8 (detailing implicit biases within federal enforcement).

97. In recent months, the Department of Justice has publicly signaled its intentions to take corporate crime more seriously than did the prior administration. See Memorandum from Lisa O. Monaco, Deputy Att’y Gen., U.S. Dept. of Just., on Corporate Crime Advisory Group and Initial Revisions to Corporate Criminal Enforcement Policies to all U.S. Att’ys (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download> [<https://perma.cc/6A4H-VY5A>]. Color us skeptical (but hopeful!) that these pronouncements will translate into a dramatic improvement within corporate criminal law.

98. E.g., John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 47

another, by leveraging the ways in which corporate persons are morally and constitutively distinct from individual persons, courts should feel freer to use a heavy hand in coercing corporations to reform. A wide array of sanctions targeting internal governance reforms could rehabilitate wayward corporations or incapacitate them from causing future harm.<sup>99</sup> Today's corporate criminal law is at once too weak, too transactional, and too dispersed from traditional criminal law practices to tap into well-settled conventions around the meaning of punishment.<sup>100</sup> Creating an institution of corporate criminal justice requires tapping into those conventions, or else cultivating new ones.<sup>101</sup>

In some respects, corporate criminal justice also requires doing less to corporations. Prosecutors often say they resort to civil prosecution agreements to prevent the regulatory collateral consequences of convicting a corporation. But a praiseworthy true criminal justice system not only imposes due punishment; it also strives to restrict extra-penal harms. Simply put, there is little benefit served—civil, criminal, or otherwise—in having thousands of collateral consequences attach to the fact of conviction with little, if any, consideration of the nature or seriousness of the offense, the propensities or character of the offender, or the conduct being protected.<sup>102</sup> This is true for corporations and individuals alike. As the present state of affairs attests, a system of corporate criminal justice cannot function in a world where the conviction of even minor offenses automatically triggers existential harms. For corporate criminal justice to thrive, it may be necessary either to do away with these regulatory consequences entirely or else to provide courts and prosecutors more power to control (and thereby prevent) their imposition.

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For all its costs and challenges, moving towards a world of corporate criminal justice may well be a good idea—but first, we'd need to know what it looks like. For now, however, we find ourselves curious, confused, and perhaps a bit embarrassed to look out at the supposed practice of corporate criminal law that this symposium invites us to inspect and find ... nothing at all to see.

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J. CORP. L. 963 (2022); John C. Coffee, Jr., “*No Soul to Damn: No Body to Kick*”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 387–88 (1981) (explaining that “moderate fines do not deter, while severe penalties flow through the corporate shell and fall on the relatively blameless”); Thomas, *supra* note 79, at 645–53; Mihailis E. Diamantis, *supra* note 86, at 2064–66 (2016).

99. Diamantis, *supra* note 9, at 542–44 (discussing rehabilitation); Thomas, *supra* note 41, at 965–69 (discussing incapacitation).

100. See generally Thomas, *supra* note 3.

101. See Thomas & Diamantis, *supra* note 83.

102. See generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 PENN. L. REV. 1789 (2020) (discussing the reemergence of civil death within the United States).