What Rises from the Ashes?

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I. INTRODUCTION

This symposium begins with a provocative prompt—imagine a world without corporate criminal law. This, in turn, triggers discussion of a topic that has occupied many scholars of different stripes—ranging from those who prefer less (or no) corporate criminal liability to those who wish to reinvigorate it, and virtually all points in between.[1] Instead of delving deeply into any one of these arguments, I take the prompt as given and examine two questions—what might be lost without corporate criminal law and what might arise to replace it. The first question explores whether other liability strategies might be able to cover any gaps arising from the demise of corporate criminal law and the second question examines how the absence of corporate criminal law might result in greater thought about, and perhaps novel approaches to, regulating corporate wrongdoing. On the second

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1. The literature is vast. *See, e.g.*, Jennifer H. Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (Alon Harel & Keith Hylton eds., 2012); JOHN BRAITHWAITE & BRENT FISSE, CORPORATIONS, CRIME AND ACCOUNTABILITY (1993); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); 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 (1981); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 319–49 (1996); Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477–1534 (1996); WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2008); CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY (Leonard Orland ed., 1995).

question, we can consider many options—some existing and some that might develop. The overall mix of approaches may end up being better than the current state of affairs. Although one need not celebrate the hypothesized fall of corporate criminal law, it does provide an opportunity (and perhaps the impetus) to improve the regulation of corporate wrongdoing. This paper explores that endeavor with some early thoughts but without necessarily choosing one particular approach to regulating corporate wrongdoing in the absence of corporate criminal law. Rather, the goal of this Article is to spur discussion and thought.

Part II discusses what remains if there is no corporate criminal liability. It focuses on the suite of liability regimes we would still have and how they essentially provide all that corporate criminal liability does with two potential exceptions—the blaming and message-sending functions of corporate criminal law. Part III dives more deeply into these two exceptions to note that both functions were, for most of the history of corporate criminal liability, not important considerations in its growth and application. Rather, filling enforcement gaps was the primary driver. In addition, these potential functions do not always lead to clear regulatory policy and are sometimes inadequately explored. Part IV then goes further and asks what we might *gain* if there were no corporate criminal liability. Here, the panoply of benefits might include a greater ability to gather information, reduce certain political economy concerns of the current enforcement system, free up funds to be used in enforcement actions that may carry greater deterrent effect, and the opportunity to rethink a few issues about how we might regulate corporate wrongdoing. On this last point, consider the following: greater reliance on direct *ex ante* regulation (rather than just liability *ex post*), potentially greater liability for third parties, a new civil agency dedicated to pursuing serious corporate wrongdoing, and perhaps making it more difficult for executives to obtain insurance or indemnification for sanctions relating to certain kinds of wrongs (something that is already done in limited measure). Part V concludes.

II. WHAT REMAINS IF CORPORATE CRIMINAL LIABILITY FALLS?

The first thing to note is that the hypothesized demise of corporate criminal liability does not leave us bereft of options for regulating corporate wrongdoing. We could rely on corporate civil liability (enforced by government agencies and/or private parties), individual criminal and civil liability targeted at corporate employees and executives, and criminal and civil liability on third parties. As has been argued earlier, these liability strategies essentially possess all the features of corporate criminal liability.[2] Indeed, if anything, these other liability regimes have become stronger than corporate criminal liability on many fronts over time. I briefly explore these key features here, leaving two potential exceptions—the blaming and message-sending features of corporate criminal liability—for Part III.

A. Sanctions

Because corporations are not human, one cannot impose a prison sentence on them.

2. *See generally* Khanna, *supra* note 1 (finding that corporate civil liability can capture all the advantages of corporate criminal liability while avoiding its negatives, rendering corporate criminal liability obsolete); Fischel & Sykes, *supra* note 1.

That then leaves only monetary penalties, which could, of course, be imposed using civil or criminal liability. There are surely penalties that are imposed more frequently in criminal cases against corporations, but conceptually, nothing prevents the same sanctions from being available in civil proceedings. Thus, if a criminal conviction leads to the loss of a government license to do business, then one can easily imagine a finding of liability in civil proceedings leading to the same effect.[3] Moreover, it appears that civil sanctions are generally *larger* than criminal sanctions.[4]

Of course, there is frequent reference to the argument that criminal sanctions on corporate entities generate a greater reputational penalty on the corporation and/or the employees of the firm than civil sanctions would.[5] This stems from the notion that criminal penalties carry the opprobrium of society, and that would be reflected in greater reputational damage than a civil finding of liability. Although plausible, the evidence for such a differential reputational effect for corporations is weak, and it seems difficult to predict or marshal—making it a bit more like an unguided missile (or a poorly directed one).[6]

Studies on the stock price reaction to announcements of enforcement proceedings do not suggest grand differences between the reputational effect on corporations of criminal versus civil liability.[7] Indeed, even anecdotal evidence often suggests that either the criminal label does not always garner much greater attention or that sometimes the civil sanction may be more salient. An example is the Exxon Valdez oil spill from the early 1990s, where people typically remember the $5 billion punitive damages award (later trimmed to about $1 billion) rather than the $125 million criminal settlement.[8] A simpler way to read some of the studies is that the market price reaction is driven by whatever influences market price (e.g., future sales, future enforcement actions) and that, in turn, is more likely driven by the underlying severity of the wrongdoing rather than the label—criminal or civil—placed on it.

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3. *See generally* Khanna, *supra* note 1 (discussing the rationale for corporate criminal liability and its problems).

4. Also, the fact that corporations tend to lobby more against civil liability than criminal liability suggests that the expected sanctions are thought by corporations to probably be greater in civil liability. Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004).

5. For a survey of the scholarship, see, for example, *Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979) [hereinafter *Developments*] (referencing the argument that criminal sanctions on corporate entities have a greater reputational penalty on a corporation in comparison to civil sanctions); Khanna, *supra* note 1; Khanna, *supra* note 4; Buell, *supra* note 1; Samuel W. Buell, *A Restatement of Corporate Criminal Liability's Theory and Research Agenda*, 47 J. CORP. L. 937 (2022).

6. *See* Khanna, *supra* note 1, at 1500–09 (claiming that the evidence provided for the reputational effect that criminal sanctions impose on corporations is weak and difficult to predict).

7. *See* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993) (discussing the main argument of the study that regulatory sanctions or actions are likely to have small reputational effects). For some more recent work, see Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008); Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, *in* RSCH. HANDBOOK ON CORP. CRIME & FIN. MISDEALING (2018).

8. *See* Vikramaditya S. Khanna, *An Analysis of Internal Governance and the Role of the General Counsel in Reducing Corporate Crime*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 282, 282–307 (Jennifer Arlen ed., 2018) (commenting on the public knowledge of the Exxon civil award rather than the criminal fine); Khanna, *supra* note 1, at 1508–09 (same).

On the other hand, perhaps the reputational difference is not about the *corporation's* reputation, but rather that of the *corporation's employees* who are not directly involved in the wrongdoing (those who are directly involved might presumably be sanctioned under individual liability regimes). These employees might bear a reputational loss that is more severe if the corporation's wrongdoing is labeled criminal rather than civil.[9] Here, the argument is both that employees feel less comfortable at firms labeled as "criminal" and that they may find their future job prospects hurt by the association. There is not much evidence provided for this argument,[10] but even if there were, one might be uncomfortable with it. It presumes that employees *not involved* in the wrongdoing bear the reputational loss. Why would that be a good thing?

It might be appealing if we thought that uninvolved employees would make good monitors of corporate wrongdoing.[11] However, if we thought that, perhaps it might be even better to identify such employees (or categories of employees) via regulation, liability, or something else rather than rely on the vagaries of reputational effects.[12] For instance, if these employees were supervisors, then a version of the responsible corporate officer doctrine might be worth considering.[13] Moreover, reliance on these kinds of reputational effects is fraught with challenges because it raises difficult questions such as: is the effect too large or too small; is it sufficiently targeted to the "right" people; can law enforcement really control and target it?[14]

B. Enforcement Considerations

Corporate criminal liability may have features that make it a particularly useful

9. *See Developments*, *supra* note 5, at 1365 (analyzing the effectiveness of the threat of criminal prosecution on corporate crime rates); Khanna, *supra* note 1, at 1509–11 (questioning whether imposing reputational costs on the corporate employee via criminal liability is desirable).

10. *See* Khanna, *supra* note 1, at 1510 n.181 (analyzing the feelings of employees at corporations involved in "criminal" versus "civil" cases). For more recent evidence examining the effects on managers who allegedly engaged in wrongdoing, see Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Consequences to Managers for Financial Misrepresentation*, 88 J. FIN. ECON. 193 (2008) (discussing 788 cases of financial misrepresentation between 1978 and 2006).

11. This is the "gatekeeper" argument. *See generally* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986) (analyzing when we should impose liability on third parties who could have stopped harm but did not in the corporate context); JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006).

12. *See* Khanna, *supra* note 1, at 1500 (discussing what constitutes a reputational effect and how it may not be adequate to deter behavior).

13. Khanna, *supra* note 1, at 1507. For an insightful recent discussion, see generally Miriam H. Baer, *The Information Shortfalls of Prosecuting Irresponsible Executives*, 70 DEPAUL L. REV. 191 (2021) (discussing how corporate employees not involved in criminal behavior could deter crime).

14. *See* Khanna, *supra* note 1, at 1499–1511 (discussing the "optimal" social sanction). The argument for imposing liability on responsible corporate officers (RCOs) is somewhat different from this. First, liability presumes a legal rule to impose liability as opposed to reputational side effects. Second, RCOs are probably more likely than others to be able to influence the likelihood of wrongdoing. *See Evaluating the Propriety and Adequacy of the OxyContin Criminal Settlement: Hearing Before the Comm. on the Judiciary*, 110th Cong. (2007) (written statement of Vikramaditya S. Khanna, Professor, University of Michigan Law School), https://www.govinfo.gov/content/pkg/CHRG-110shrg40884/html/CHRG-110shrg40884.htm [https://perma.cc/DH8G-NHX9]. For a general discussion of the Responsible Corporate Officer doctrine, see KATHLEEN F. BRICKEY & JENNIFER TAUB, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS ch. 2 (Aspen Publishing ed., 2017); Baer, *supra* note 13, at 204–14.

method of enforcing liability compared to corporate civil liability and the other alternatives. Indeed, as argued in Part III, the enforcement differences between corporate criminal liability and its alternatives essentially form the *raison d'etre* for its historical development and growth until the early 1900s. However, over time, the alternative liability regimes have gained enough enforcement powers to match or exceed those available under corporate criminal liability.

Initially, corporate criminal liability involved a form of public enforcement that was not easily available on the civil side.[15] That would have been sufficient justification for its existence. But for nearly a century now, the civil side also has public enforcement through a variety of federal, state, and international agencies.

One might then argue that criminal liability—known in part for its compulsory process—might provide the ability to gather greater amounts of information than civil liability. As with the public enforcement feature, this was certainly a valid justification at some point in time, but it, too, has become less persuasive over time. Now, it appears that gathering information might, arguably, be easier on the civil side.[16]

Further, the criminal justice system's much-vaunted ability to compel evidence is perhaps less valuable than it used to be in light of firms' relatively recent growth in compliance efforts. When corporations implement internal control or compliance systems that can track in detail what employees are doing while at the office, then it is unclear how much additional information the criminal (or civil) process is likely to generate.[17] One might argue, however, that these compliance programs are the result of more active criminal enforcement. This is partly true, but such systems are also encouraged by civil enforcement and other forces.[18] In any case, now that firms engage in greater compliance efforts, the information gathering advantage of compulsory criminal process appears considerably thinner.

Another consideration is that when the criminal process is used, it triggers certain

15. *See* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 397–415 (1981) (outlining the evolution of corporate liability in England and the United States); Khanna, *supra* note 1, at 1485–87 (arguing that corporate criminal liability arose out of the need for public enforcement of public nuisance cases when the Crown did not have civil enforcement powers for this wrong).

16. *See* James P. Holloway, *Recent Court Decision Shows Best Way to Handle Civil Investigative Demands*, BAKER DONELSON (May 22, 2019), https://www.bakerdonelson.com/recent-court-decision-shows-best-way-to-handle-civil-investigative-demands [https://perma.cc/7L2A-ZFN6] (discussing the difficulty corporations have in resisting Corporate Investigative Demands (CIDs)); Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 587–95 (1994) (discussing CIDs more generally); Khanna, *supra* note 1, at 1522–25 (discussing the favorable information gathering ability conferred through the use of CIDs); Khanna, *supra* note 8, at 295–301 (discussing the costs and incentives of gathering information within the corporation); Anthony J. McFarland, *The Civil Investigative Demand: A Constitutional Analysis and Model Proposal*, 33 VAND. L. REV. 1451, 1466 (1980) (describing the protections afforded to a business facing a CID).

17. *See generally* CAMBRIDGE UNIV. PRESS, THE CAMBRIDGE HANDBOOK OF COMPLIANCE (D. Daniel Sokol & Benjamin van Rooij eds., 2021); Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020); Veronica Root Martinez, *The Compliance Process*, 94 IND. L.J. 203 (2019); Veronica Root Martinez, *The Government's Prioritization of Information Over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS. 85 (2020) [hereinafter *Information*].

18. *See* Vikramaditya S. Khanna, *Costs and Benefits of Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 13 (D. Daniel Sokol & Benjamin van Rooij eds., 2021).

constraints on the government in the form of the procedural protections common in criminal proceedings.[19] These restrict how the government can gather information, and they do not apply in the same way when the information is gathered by private parties and shared with the government or when it is gathered by civil enforcement agencies.[20]

Taken together, these considerations suggest that there is little difference between criminal and civil enforcement powers (and information gathering), and to the extent that there are differences, they tend to indicate that civil enforcement may be a somewhat more powerful tool to gather information these days. When this is added to the increasing importance of compliance efforts to the enforcement process, one wonders whether there is much left to the enforcement arguments. Here, too, the hypothesized demise of corporate criminal liability seems less concerning.

C. Procedures

Focusing on sanctions and enforcement powers tends to look at the potential benefits of corporate criminal liability without examining the likely constraints. The procedural protections attached to criminal proceedings are thought to make it more difficult to both obtain a conviction relative to civil proceedings and to misuse the criminal process to target individuals or groups.

While this seems sensible in the context of prosecutions against individuals—who can face physical sanctions, large stigmatic losses, and violations of constitutional rights—they seem less justifiable in the context of corporate defendants who face no physical sanctions and lesser concerns about the violation of constitutional rights.[21] Indeed, in an earlier paper, I argued that the "beyond a reasonable doubt" standard of proof was difficult to justify with respect to corporate defendants, though amended versions of the other protections (e.g., double jeopardy) might be more justifiable for both criminal and civil processes involving corporate defendants.[22] In the end, I argued that the criminal-civil distinction was not useful for separating procedures for corporate defendants in different types of proceedings.

The upshot of this analysis is that even criminal procedural rules are difficult to justify for corporate defendants in our current structure. That means that the sanctioning,

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19. *See* Khanna, *supra* note 1, at 1512–20 (discussing traditional procedural protections such as the standard of proof, right to a jury trial, double jeopardy, etc.); *see generally* Vikramaditya S. Khanna, *Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis* (John M. Olin Ctr. for Law & Econ., Working Paper No. 04-015, 2004) (same).

20. *See* Khanna, *Protections of Criminal Procedure*, *supra* note 19, at 12, 33–36, 46–47 (discussing procedural protections available to corporate defendants and analyzing the ability to gather information from the corporate defendant in civil and criminal investigations). For a discussion of how criminal procedure may protect individuals ensnared in a corporate wrongdoing investigation, see Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007). *See generally* Khanna, *supra* note 1, for concerns related to coordinating enforcement efforts for corporate and individual defendants.

21. *See* Fischel & Sykes, *supra* note 1, at 331 (noting that the procedural features of the civil justice system seem more appropriate for corporate crime than those of the criminal system); *see also* Khanna, *supra* note 1, at 1516–17 (observing that the criminal standard of proof is best left to be used in criminal proceedings against individuals). For discussion of individuals' rights in the corporate context, see Buell, *supra* note 20, at 1634.

22. Khanna, *Protections of Criminal Procedure*, *supra* note 19, at 18–27. Buell's analysis of individuals within the firm is insightful. *See* Buell, *supra* note 20, at 1670 (arguing that the tripartite model of individual, organization, and state has led to a very different balancing exercise than the traditional binary model of criminal procedure).

enforcement, and procedural features of corporate criminal liability are either replicable (often more easily) in corporate civil liability (or other liability regimes) or are simply not that desirable for corporate defendants (or should not vary between civil and criminal proceedings for such defendants).

These, however, are not the only purported features of corporate criminal liability. Two features merit further discussion—the potential blaming function and the message-sending function of corporate criminal liability. It is to those that I now turn.

III. BLAMING AND MESSAGE SENDING FUNCTIONS

It has long been argued that criminal law serves certain unique functions because it can assign blame and send a message to society about what is unacceptable behavior.[23] Both of these functions appear with regularity in discussions of criminal law more generally.[24] However, when brought over to the domain of corporate wrongdoing, these considerations face both historical and conceptual headwinds.

Historically, it seems clear that the blaming and message-sending arguments did not drive the growth of corporate criminal liability.[25] The growth of the doctrine starts from humble beginnings in the 1600s in England and then makes its way over to the United States and grows largely in select pockets until the early 1900s. For the first roughly 300 years of its existence, the doctrine was applied to fill enforcement gaps rather than to blame or send messages.[26]

Early on, corporate criminal liability faced numerous conceptual and pragmatic concerns that limited its availability.[27] It started in public nuisance cases involving municipal corporations. The typical fact pattern was that someone had been injured or her property damaged while traveling over a bridge or public road.[28] The local municipality was responsible for maintaining the bridge or road, and either the disrepair or failure to remove refuse led to the injury. Courts held the municipality criminally liable because (i) liability for public nuisance in those times was criminal and (ii) if the municipality was not held liable, then no one would be because no proof was adduced (or perhaps available) to show who failed to maintain the bridge or road and even if there was proof it was still the

23. *See generally* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (outlining criminal sanctions, their effective use, and the relevant concerns); LAUFER, *supra* note 1; BRAITHWAITE & FISSE, *supra* note 1; Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988).

24. *See* Kadish, *supra* note 23; GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 279 (2d ed. 1961).

25. *See generally* Brickey, *supra* note 15; Khanna, *supra* note 1.

26. For a helpful historical discussion, see James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 86–87 (1976). *See generally* Khanna, *supra* note 1 (exploring the underlying rationale for corporate criminal liability).

27. In summary, these concerns were (i) attributing acts to the legal fiction of the corporation, *see* Brickey, *supra* note 15; John C. Coffee, Jr., *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 253 (Sanford H. Kadish ed. 1983); WILLIAMS, *supra* note 24; LEONARD HERSCHEL LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 15–24 (1969); Elkins, *supra* note 26; (ii) finding blameworthiness for corporate entities; (iii) the ultra vires doctrine; and (iv) early interpretations of criminal procedure.

28. *See* Brickey *supra* note 14 at 405–10 (discussing some of these cases).

municipality's duty not the individual employee's duty.[29] Moreover, these early cases raised few difficulties with attributing acts and fault to the municipality because no individual agent was identified as responsible (so no question of direct attribution arose), and there was no issue of imputing fault because it was the municipality's duty to take care of the roads and bridges.[30]

As commercial corporations began to be responsible for public nuisance-like harms (e.g., railroads generating damage along their routes), the application of corporate criminal liability grew to cover these types of entities and situations too.[31] The key considerations were that public nuisance was a crime, and no one could be held liable for it except the corporation.[32] Thus, here, too, corporate criminal liability was filling an enforcement gap.

By the mid-1800s, corporate criminal liability had been extended to all offenses not requiring criminal intent. The impetus for this came in part from the increasing importance of corporations in daily life in the United States and the United Kingdom, but also because—once corporations could be held liable for public nuisance—there was little jurisprudential impediment in holding them liable for other acts causing harm.[33] By this time, *respondeat superior* was also well-established and allowed for the relatively easy imposition of liability on corporations. Although many of these cases involved public nuisances, some extended beyond it.[34]

Slowly but surely, corporate criminal liability began to extend to the other types of harm associated with the rise of corporations in society. Soon corporations could be held liable for certain crimes of intent. Although the pivotal case was decided in 1909 (nearly 3 centuries after corporate criminal liability had its genesis), it too was motivated by enforcement concerns, but not those associated with blaming or sending messages. In *New York Central & Hudson River Railroad Co. v. United States*,[35] the U.S. Supreme Court decided that corporations could be held criminally liable for crimes of intent where effective enforcement of the statute required it.[36] From there, the law expanded to hold corporations criminally liable in other areas, where failing to impose corporate liability would effectively neuter the law.[37]

During this period, much of the commentary did not focus on the blaming or message-sending attributes of corporate criminal liability, but rather on its enforcement role.[38] Most

29. *See id.* at 401–02.

30. *See id.* at 396; Elkind, *supra* note 26.

31. For background of the early imposition of corporate criminal liability, see Brickey, *supra* note 15, at 407; Khanna, *supra* note 1, at 1480–81.

32. *See* Brickey, *supra* note 15, at 407–09; Khanna, *supra* note 1, at 1481 ("First, no individual agent of the corporation was responsible for the corporation's omission. Second, there was no imputation of guilt from agent to principal because only the corporation was under a duty to perform the specific act in question.") (citation omitted).

33. *See* Brickey, *supra* note 15, at 404–10 (discussing the expansion of corporate criminal liability).

34. *See id.* at 410 (discussing corporate convictions for crimes such as Sabbath-breaking, charging usurious interest rates, and the unauthorized practice of medicine).

35. 212 U.S. 481 (1909).

36. *See id.* at 413–14; Coffee, *supra* note 27, at 254.

37. *See* Brickey, *supra* note 15, at 414–15.

38. *See* Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 130–34 (1916) ("[I]t is necessary to enforce adequate penalties against the source of such a crime."); LEIGH, *supra* note 27, at 15–42 (discussing the history of corporate criminal liability); Nathaniel Lindley, *On the Principles Which Govern the Criminal and Civil Responsibilities of Corporations* (1857), *in* 2 PAPERS READ BEFORE THE JURIDICAL SOCIETY

of the early instances of corporate criminal liability related to harms for which private enforcement was unavailable or unlikely, and thus public enforcement was necessary (which was largely criminal until around the 1900s), but individual liability was unlikely both because culpable individuals were difficult to identify and because they were likely to be judgment proof.[39] These developments provided a recipe for the growth of corporate liability enforced by public entities (which was largely criminal at this time)—in other words, corporate criminal liability. Public civil enforcement really grew after the Great Depression, but by that time, corporate criminal liability was already an established feature of the available enforcement arsenal.[40]

Commentary raising issues of blameworthiness, stigma, and message sending tends to arise in the later periods (after the early 1900s) and is not really connected with the first three centuries of the growth of corporate criminal liability.[41] Indeed, when such commentary arises, it is largely critical of corporate criminal liability for not meeting the requirements of blameworthiness.[42] The use of corporate criminal liability to attach blame to the corporation was thought to be problematic because a corporation is not a human person, and usually, blame attaches to the cognitive state with which a person acted. But a corporation typically does not have a cognitive state—its employees and/or shareholders might. Yet attributing the blame of employees or shareholders to the corporate person did not sit well with standard retributive thinking of the time.[43] I will not canvass the many interesting discussions on when an inanimate entity—like the corporation—can bear blame except to say that doubts remain, and those who are doubtful seem unlikely to be convinced (and those who are not doubtful seem similarly unlikely to be convinced).[44] Warm debate is likely to continue.

Of course, the fact that these concerns did not appear to animate discussion on corporate criminal liability for most of its history does not preclude discussion of these

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31, 34–35 (1863) ("Punishment, to be effectual, must fall on being who can feel.").

39. *See* Khanna, *supra* note 1, at 1486 ("However, when the culpable individual within the corporate hierarchy was judgment-proof or not easily identifiable . . . .").

40. *See id.* at 1486–87 ("Given the absence of wide-spread public civil enforcement prior to the early 1900s, corporate criminal liability appears to have been the only available option that met both the need for public enforcement and the need for corporate liability.").

41. *See* Laski, *supra* note 38, at 134 ("Certain men are blameworthy . . . ."); BRAITHWAITE & FISSE, *supra* note 1, at 24 ("Corporations are often regarded as blameworthy . . . ."); LAUFER, *supra* note 1, at 102–03 ("Without liability rules that fairly and justifiably construct blame . . . .").

42. *See* LAUFER, *supra* note 1, at 5 (noting that our current system allows firms to avoid blame by opting out of the criminal justice system via a form of cooperative regulation).

43. *See id.* at 18 ("[A]long with some concerns that corporate entities were the wrong recipients of blame."); Kadish, *supra* note 23, at 437 ("Without moral culpability there is in a democratic community an explicable and justifiable reluctance to affix the stigma of blame.").

44. *See, e.g.*, Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1147 (1983) ("Imposing criminal stigma on individuals is supportable on three primary bases . . . ."); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1182 (1991) ("This Article suggests that proof of intent is too essential to the nature, and power, of the criminal law to employ crude standards of vicarious liability that poorly focus on intent."); PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 41–47 (1984) ("That should not, however, rule out the possibility of their having metaphysical status, as being full-fledged actors in their own right . . . ."); Mihailis Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2060–61 (2016) ("Desert will strike some as flatly inapplicable to corporations. To an extent, they are right."); *see also* sources cited *supra* note 1.

concerns now, but if one is to understand the institutional features of corporate criminal liability (which developed in the earlier timeframe), it is important to acknowledge that they were designed primarily with enforcement considerations in mind.[45]

Having said that, specific discussion on the message-sending attributes of corporate criminal liability has been curiously thin compared to the discussion on blameworthiness. For some time, I have thought exploring that angle would be potentially fruitful.[46] However, it raises some difficult questions such as, who is the audience for sending messages? Are those messages most effectively sent through corporate criminal liability or other liability strategies (e.g., executive criminal liability)? Might imposing criminal sanctions on corporations detract from the message-sending purposes of the criminal law? All these questions and more might make for interesting research topics but have not generally occupied a great deal of scholarly real estate.[47]

IV. WHAT MIGHT BE GAINED?

The arguments thus far suggest that the other liability strategies can largely pick up any slack from the hypothesized demise of corporate criminal liability. But might the resulting system be better in some ways? In this Part, I argue that there are several reasons for thinking that it might. First, the ability to gather information is often better in the civil enforcement system. Second, there are interesting political and institutional ramifications of having only civil regulators for corporate entities. Third, without corporate criminal liability, the resources devoted to it can be repurposed toward civil enforcement (or other areas of interest), which may yield greater deterrence benefits. Fourth, taking attention away from corporate criminal liability is likely to lead to greater attention on liability regimes and regulatory approaches that may be more effective at policing corporate wrongdoing. Taken together, these considerations suggest that the hypothesized demise of corporate criminal liability might result in benefits in terms of better regulating corporate wrongdoing.

A. Information Gathering

Gathering information about wrongdoing is the lifeblood of enforcement in this area.[48] Although initially, the criminal process may have had stronger information-gathering powers (as noted earlier), it has been the case for some time that civil enforcement has developed similar, and perhaps greater, powers.

In particular, the rise of the civil investigative demand permitted government civil enforcement to have very similar powers to those in criminal proceedings.[49] Further, the

45. It is perhaps noteworthy that the blaming and message-sending justifications arose at a time (~ the early 1900s) when the enforcement justification had become weaker.

46. *See generally* Khanna, *supra* note 1.

47. There are, of course, some exceptions. *See, e.g.*, Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 24 HARV. J.L. & PUB. POL'Y 833 (2000); Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (2012); W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397 (2021).

48. For a more detailed discussion of this phenomenon, see generally Khanna, *supra* note 8; Khanna, *supra* note 18; *Information*, *supra* note 17.

49. *See generally* Holloway, *supra* note 16; Hughes, *supra* note 16; McFarland, *supra* note 16. For

rise of technology and compliance efforts (motivated by both criminal and civil enforcement concerns, amongst others) has made it easier for firms to gather information, thereby reducing the need to rely on the government (in whichever form) to gather information.[50] The key is encouraging the corporation to gather information and share it with the government. That can be achieved by large monetary sanctions on the firm (criminal or civil), which can be reduced when the firm gathers information (i.e., through a compliance program) and cooperates with law enforcement by sharing that information.[51] We have, in essence, been moving ineluctably towards a greater focus on information collection and sharing.[52]

Relatedly, the government is somewhat more constrained in using the criminal process to gather information than the civil process (in part due to the constitutional protections attached to criminal process for corporate defendants).[53] This means that even if the same amount of information can be gathered in criminal and civil processes, it is usually easier and less costly to do so through government civil processes. Further, it is often easier to share information obtained in civil enforcement with other regulators than information obtained through the criminal process. [54]

A counterpoint to this is that coordinating individual criminal sanctions and corporate civil sanctions might be more difficult because it would occur across two or more agencies (e.g., civil regulators for corporations and the DOJ for individual executive criminal liability).[55] Although this might create some interesting questions of coordination, it is noteworthy that much of the information gathering on both corporations and individuals is currently conducted through the civil agencies and then sent over (i.e., referred) to the DOJ,[56] so that the degree of coordination efforts may not require much more than at

additional discussion, see Khanna, *supra* note 1. Civil investigative demands were first authorized under FCA. 31 U.S.C. § 3733(a). *See also* John L. Brownlee, *The "New" Civil Investigative Demand: Congress Pushes for More Aggressive False Claims Act Investigations*, HOLLAND & KNIGHT (Dec. 02, 2009), https://www.hklaw.com/en/insights/publications/2009/12/the-new-civil-investigative-demand-congress-pushes [https://perma.cc/JZM2-PCWF].

50. *See generally* CAMBRIDGE HANDBOOK, *supra* note 17*;* Arlen & Buell, *supra* note 17; Khanna, *supra* note 8, Khanna, *supra* note 18; *Information*, *supra* note 17.

51. *See* Khanna, *supra* note 8. For greater discussion of self-policing efforts, see generally Jennifer H. Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (discussing the trade-off firms face when they self-police without some method of either privileging the information they uncover (thereby reducing their liability risks) or reducing sanctions due to these efforts); Jennifer H. Arlen & Reinier H. Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (arguing that a so-called "mixed-regime" of internal and external controls is best for regulating corporate behavior).

52. *See generally Information*, *supra* note 17.

53. *See generally* Khanna, *Protections of Criminal Procedure*, *supra* note 19.

54. *See generally* Khanna, *supra* note 1 (arguing that the civil process is a superior means to accomplish the same ends that pro-corporate-criminal law scholars seek). One could try to obtain these advantages of the civil process in the criminal process through various contortions and other moves, but it will still be cumbersome, costly, and not very elegant.

55. *See Developments*, *supra* note 5, at 1244, 1320.

56. *See* MICHAEL L. SEIGEL, WHITE COLLAR CRIME: LAW, PROCEDURE, THEORY, AND PRACTICE 443–59 (2011); Lucian E. Dervan & Ellen S. Podgor, *Investigating and Prosecuting White-Collar Criminals*, *in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME (Shanna R Van Slyke, Michael L. Benson & Francis T. Cullen, eds., 2016); Khanna, *supra* note 4, at 101 n.25 (stating "that it was only in the late 1800s that agencies developed civil enforcement and information gathering powers"); Daniel C. Richman, *Prosecutors and Their Agents, Agents*

present.[57]

B. Political and Institutional Ramifications?

At the most basic level, the DOJ is not a specialized agency targeting corporate wrongdoing. It focuses on the entire corpus of federal criminal law, including many areas not directly related to corporate wrongdoing (e.g., terrorism, drug trafficking). Many have also been concerned about the DOJ's enforcement priorities.[58] Further, to the extent that there are policies and approaches that run across the DOJ, they are likely to reflect considerations beyond those usually thought relevant for corporate wrongdoing.[59] For instance, the stress on notions of culpability or blameworthiness is stronger in the context of DOJ deliberations than at civil agencies. Moreover, whatever political pressures or constraints apply to the DOJ may well manifest themselves differently than those applying to civil agencies.[60]

In light of this, moving away from corporate criminal enforcement has interesting ramifications. At one level, it means that an arm of the government that is less focused on corporate wrongdoing (the DOJ) would no longer have as significant an impact on it. Instead, government civil agencies with greater attention devoted to corporate wrongs would direct enforcement, which in turn might generate the benefits typically associated with *specializing* in enforcing certain kinds of wrongs. These might include greater familiarity with certain types of wrongs, when wrongs are likely, the kinds of evidence that are likely and how to obtain it, how best to assess compliance and cooperation efforts, and so forth.

However, that also means that enforcement will be carried out by civil agencies that tend to regulate specific sectors (e.g., securities markets) and may have closer ties to the constituents of those sectors, thereby raising potentially greater concerns of agency capture (or the closely related concern of "revolving doors"). In earlier work, I discussed this issue in the context of whether corporate defendants should receive the protections of criminal procedure in criminal proceedings.[61] There, I argued that because sector-specific civil agencies had a greater likelihood of capture (compared to the less-sector-specific DOJ), those criminal procedural protections targeted to constraining capture and abuse-of-enforcement power should apply more to government corporate *civil* enforcement than to government corporate criminal enforcement.[62] That would be the opposite of the typical breakdown of procedural protections (i.e., criminal proceedings having stronger

and Their Prosecutors, 103 COLUM. L. REV. 749, 776 (2003) (discussing intelligence gathering and criminal investigations).

57. Coordination and cooperation within an entity as large as the Federal government and even within large entities within the Federal Government (such as the DOJ) is a topic that merits much fuller inquiry than can be provided here. *See* Richman, *supra* note 56. The incentives, information flows, and agency issues merit closer scrutiny because institutional design is likely to be an important driver of behavior and outcomes. *See* Khanna, *supra* note 8.

58. *See* JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020); Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887 (2022).

59. *See* U.S. Dep't of Just., Just. Manual § 9-28.000 (2018); Baer, *supra* note 58; Julie R. O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047 (2022).

60. *Cf.* Khanna, *supra* note 4; Baer, *supra* note 58; O'Sullivan, *supra* note 59.

61. Khanna, *Protections of Criminal Procedure*, *supra* note 19.

62. *Id.*

protections).

This suggests that the demise of the DOJ's corporate criminal enforcement and its replacement with sector-specific government civil enforcement presents us with a trade-off—potentially greater agency capture due to sector-specific government civil enforcement versus greater specialization (due to sector-specific knowledge) relative to the criminal side. Although this presents a knotty problem, the concern with potential agency capture might be addressed by having a new civil enforcement agency that targets serious corporate wrongdoing across multiple areas of law so that the agency is not beholden to any one sector—as certain sector-specific civil regulators might be—and also is not tied down with considerations that are more appropriate for other kinds of criminal enforcement (e.g., individual criminal liability, national security)—as might be the case with the current DOJ.[63]

Indeed, the development of a civil regulator with this broader mandate on serious corporate wrongdoing may be particularly useful on other dimensions. It would provide a forum in which one could compare across types of wrongdoing for patterns and behaviors that would enhance compliance and reduce the chances of wrongdoing going forward.[64] For instance, there are likely to be commonalities across sectors for what makes a good compliance program (and surely some differences as well). In some measure, the DOJ has been taking steps in this direction,[65] but with a civil regulator dedicated to these issues, those developments are likely to occur more efficaciously.

However, there may also be interesting effects on lobbying in this space. In prior work, I argued that corporations rarely lobby against extensions of criminal liability and instead focus their lobbying on civil liability and the budgets of civil enforcement agencies.[66] This is likely because the expected costs of civil liability exceed those of criminal liability for corporate entities.[67] Moving away from criminal enforcement to civil enforcement may only intensify this lobbying activity. However, if there is a civil regulator that addresses serious corporate wrongdoing *across multiple sectors*, some of that lobbying effort might be contained in the sense that individual sectors may not have as much sway as they would with a regulator targeting their sector alone.[68] Of course, witnessing greater lobbying would indicate that corporations are taking the risk of this liability more seriously.

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63. This offers the "best of both worlds," or perhaps, the least-bad of all worlds. Arlen argues in this volume that the less-sector-specific aspects of the DOJ work to reduce the risk of capture, which parallels the argument above and in Khanna, *supra* note 19. *See* Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861 (2022). However, the argument in this paper suggests that going for a civil regulator focused on corporate wrongdoing may address capture concerns and do considerably more as well compared to the DOJ.

64. *See* CAMBRIDGE HANDBOOK, *supra* note 17.

65. *See id.* Note that one could label this civil agency as "criminal" if that nomenclature seemed preferable (although it appears to be a bit of a stretch). I have taken the conference prompt as a given (i.e., there is no corporate criminal law) and thus have referred to this entity as a civil agency.

66. *See* Khanna, *supra* note 4, at 106 (explaining that given a choice, corporations "might prefer corporate crime legislation [over civil liabilities] because its enforcement is less frequent and its penalties are often lower . . . .").

67. *See id.* (stating that "the monetary penalties in the civil context are usually greater than those in the criminal context").

68. *See* Khanna, *supra* note 18.

C. Release of Resources

If corporate criminal liability were no more, then the resources currently devoted to it could be repurposed. For instance, there would be more funding for the civil agencies to pursue enforcement (or for the DOJ to pursue other criminal cases).

If these funds were used for civil enforcement, then we might see larger and more frequently imposed penalties on corporations.[69] In addition, once corporate criminal liability is off the table, the DOJ could focus more on individual criminal liability. Of course, there have been numerous attempts to enhance the focus on individual actors, but these attempts are typically not that successful because there is usually scant evidence that executives had sufficient *mens rea* to be held liable under typical criminal law standards.[70] Additional resources would not change these standards per se, but the greater availability of resources may, at the margin, make it more likely that prosecutors would be able to obtain a conviction.

D. An Impetus to Re-Think Regulation of Corporate Wrongdoing?

Another important potential gain connected to the hypothesized demise of corporate criminal liability is that it might provide the impetus to rethink how we regulate corporate wrongdoing. For years many commentators have lamented the rather confusing state of regulation for corporate wrongdoing.[71] Without corporate criminal liability, we might find greater attention focused on the overall structure of regulation and liability for corporate wrongdoing. With this in mind, there are at least three items that might be worth re-examining in some detail. First, we might focus on how to sanction individuals within corporations. This could include exploring other parties (i.e., "gatekeepers") upon whom we might consider imposing liability. Second, we might consider focusing more on *ex ante* regulation in addition to *ex post* liability. Third, we might consider enhancing the incentives for whistleblowers to come forward. The goal here is not to pick a particular strategy, but to highlight that re-examining our emphasis and the tools we are willing to use may be quite valuable.

A frequent criticism of the current system is that it does not adequately target and sanction individual executives.[72] With corporate criminal liability off the table, there are more resources available to exert greater focus and energy on targeting individuals. This

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69. These are, of course, hypotheses on what might happen in a counterfactual, and they assume no change in funding levels should these changes arise.

70. *See* Memorandum from Sally Yates, Deputy Att'y Gen., U.S. Dep't of Just., on Individual Accountability for Corporate Wrongdoing, to All U.S. Att'ys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/ZW7D-54PZ] (discussing the challenges of pursuing individuals for corporate misdeeds); Memorandum from Lisa Monaco, Deputy Att'y Gen, U.S. Dep't 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/P7PD-B4BS]; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/RQ3P-CCYB].

71. The literature here is vast. *See, e.g.*, Arlen, *supra* note 1, BRAITHWAITE & FISSE, *supra* note 1; Buell, *supra* note 1; COFFEE, *supra* note 58; Khanna, *supra* note 1; LAUFER, s*upra* note 1.

72. *See generally* Rakoff, *supra* note 70; COFFEE, *supra* note 58; Khanna, *supra* note 8; Khanna, *supra* note 1; LAUFER, s*upra* note 1; and many of the papers in this volume.

may, as noted above, have some effect at the margin on obtaining successful individual convictions. However, perhaps it is worth asking: Should we also consider increasing the impact or size of *civil* sanctions on individuals?

A key concern is that executives will usually have insurance and indemnification that softens the impact of civil monetary sanctions.[73] This can be addressed by banning insurance and indemnification for certain kinds of wrongs (as we essentially do with indemnification for FCPA violations).[74] This seems worthy of greater consideration and application. Moreover, bans on future employment may also be worth considering in greater detail. One anticipates that most executives commit fraud either to financially benefit their firms or themselves, so larger effective civil sanctions seem like they would be useful to have too.[75]

Of course, larger civil sanctions or limiting the protective effects of insurance, indemnification, and bankruptcy for certain wrongs will have limits. If executives are simply unlikely to have the resources to pay for the harm caused, then imposing monetary sanctions on them will probably not be sufficient. [76] Here, in addition to individual criminal liability, we might consider expanding liability to third parties that have a role in influencing wrongdoing. Although incentivizing such "gatekeepers" to play a more active role is a standard strategy in certain areas (e.g., securities laws), we might consider expanding it to other areas.[77] For instance, we might consider creditors, professionals, supervising managers, and the like as potential gatekeepers.[78] Although none of these are without challenges, exploring the prospects for deputizing additional enforcers seems

73. *See, e.g.*, Buell, *supra* note 20.

74. *See, e.g.*, 15 U.S.C. § 78ff(c)(3) (discussing the use of insurance in relation to monetary sanctions).

75. *See, e.g.*, Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (1992) (examining vicarious liability and fraud on the market); EUGENE F. SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL (2016) (detailing the motivation behind white-collar crime through a series of interviews with convicted offenders); Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1 (1999) (examining ownership structure and corporate crime). One might counter that those individuals will then bargain for higher salaries. They might (although that may not be that easy to do), but that does force them to consider the social costs of their activities in greater detail.

76. *See* Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 857 (1984) (discussing the interactions between corporate and individual liability); Steven M. Shavell & A. Mitchell Polinsky, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993).

77. *See* Kraakman, *supra* note 11; COFFEE, *supra* note 11.

78. *See, e.g.*, Lucian A. Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996) (re-examining the longstanding principle of bankruptcy law that secured claims are entitled to be paid in full before unsecured claims receive any payment); Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53 (2003) (detailing the gatekeepers to prevent corporate fraud); Stavros Gadinis & Colby Mangels, *Collaborative Gatekeepers*, 73 WASH. & LEE L. REV. 797 (2016) (examining the anti-money-laundering law); Andrew F. Tuch, *The Limits of Gatekeeper Liability*, 73 WASH. & LEE L. REV. 619 (2017) (examining the concerns that afflict gatekeeper liability); Michael Ohlrogge, Bankruptcy Claim Dischargeability and Public Externalities: Evidence from a Natural Experiment (Feb. 14, 2020) (unpublished manuscript), https://ssrn.com/abstract=3273486 [https://perma.cc/95SY-HCTR] (examining the effects of *U.S. v. Apex Oil*, where the court held that bankruptcy did not discharge certain injunctions mandating that firms clean up already released toxic chemicals, which in turn meant that these obligations needed to be better satisfied before other creditors could be paid by the firm implicitly making these creditors quasi-gatekeepers that monitor firms for the release of such toxic chemicals).

particularly valuable for many large corporate harms. Pursuing such a strategy may also include moves to enhance regulation in certain respects, too—especially regulation that might bring in or emphasize gatekeepers more.

This last point raises an interesting question: with corporate criminal liability removed as a backstop, perhaps we might consider whether *liability* is the best—or primary—way to influence corporate wrongdoing? Often, the concern is that the corporation may not possess sufficient assets to pay for the harm caused.[79] In such a case, focusing on *ex ante* regulation may merit greater attention.[80] However, when criminal sanctions against corporations were an option, the push to target greater regulation might have been weaker. Without such sanctions, one might anticipate greater attention targeted toward *ex ante* regulation, which might be desirable. For instance, one could imagine that a tighter system of *ex ante* regulation—combined with more effective *ex post* liability—may have assisted in reducing the magnitude of the harm caused by the opioid epidemic and in deterring wrongdoing.[81]

Another area to explore is how to gather information from other parties, such as whistleblowers. Over the last two or three decades, the rewards available to whistleblowers increased significantly,[82] and the practice of representing whistleblowers seeking bounties grew markedly.[83] Moreover, studies find that whistleblowers are a key source of information for law enforcement for certain kinds of fraud.[84] More focus on how to incentivize whistleblowers seems warranted. However, designing bounty or reward programs is notoriously difficult and raises many thorny issues.[85] When should a bounty

79. *See* Kraakman, *supra* note 76, at 869; Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1240 (1984).

80. *See* Steven M. Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 279–80 (1993) (explaining the importance of "prevention or act-based sanctions").

81. For a sampling of this literature, see Patrick Radden Keefe, *The Sackler Family's Plan to Keep Its Billions*, NEW YORKER (Oct. 4, 2020), https://www.newyorker.com/news/news-desk/the-sackler-familys-plan-to-keep-its-billions [https://perma.cc/3TU8-FWK2]; Mariano-Florentino Cuéllar & Keith N. Humphreys, *The Political Economy of the Opioid Epidemic*, 38 YALE L. & POL'Y REV. 1, 4–7 (2019) (showing how legislative loopholes allowed for continued incentives for drug marketing); Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. (forthcoming 2022) (manuscript at 26–29), https://ssrn.com/abstract=3851339 [https://perma.cc/GK7R-4T9K] (providing an example of this using the bankruptcy of Purdue Pharma); Rebecca Delfino, *The Prescription Abuse Prevention Act: A New Federal Statute to Criminalize Overprescribing Opioids*, 39 YALE L. & POL'Y REV. 347, 355–57 (2021); Adam M. Gershowitz, *The Opioid Doctors: Is Losing Your License a Sufficient Penalty for Dealing Drugs?*, 72 HASTINGS L.J. 871, 885 (2019).

82. *See, e.g.*, David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605, 606–07 (2014) (discussing the use of "whistleblower reward schemes that pay individuals a cash 'bounty' for surfacing information about illegal conduct").

83. *See, e.g.*, *About Us*, PHILLIPS & COHEN, https://www.phillipsandcohen.com/about-us [https://perma.cc/7PFU-5UNJ].

84. An important source of information in matters related to corporate wrongdoing is the information provided by whistleblowers. *See* I. J. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FINANCE 2213, 2225–26 (2010). However, the incentives for this do not seem affected by the presence of corporate criminal liability relative to corporate civil liability.

85. *See* Engstrom, *supra* note 82, at 613–20 (explaining the challenges associated with bounty regimes); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 107–08 (1980) (summarizing the issues with reward programs).

be awarded? Must the information presented be new (or the presenter be the first person to provide it)? What about the size of the bounty? Should it apply to certain kinds of violations more (or less) often—such as violations that are more precisely written? Less attention on corporate criminal liability may enable regulators and legislators to devote more thought to such questions.[86]

V. CONCLUSION

The prompt for this conference raises the opportunity to rethink how we might influence corporate wrongdoing if there were no corporate criminal law. Taking that prompt as a given, this paper asks two questions: what do we lose from the demise of corporate criminal law, and second, whether there may be some gains arising from its hypothesized demise? On the first question, it appears that other liability strategies are well placed to pick up any shortfall from the demise of corporate criminal law and indeed may provide advantages along certain dimensions. On the second question, forcing ourselves to reconsider our approach to corporate wrongdoing may generate potential benefits and different methods of addressing our key concerns. For instance, we might consider forming a new civil agency to pursue enforcement for serious corporate wrongdoing, limiting the amount of protection individuals receive in some circumstances from insurance, indemnification, and bankruptcy, examining additional gatekeepers, pushing a bit more on regulation (along with liability), and expanding the focus on whistleblowing as a source of information. In addition, gathering information is likely to be less constrained under civil liability regimes, and without corporate criminal enforcement, there may be resources freed up to use in pursuing some of these options. Other options can be explored as well. Indeed, the inquiry in this paper is not designed to settle the issue of *what* might replace corporate criminal law if the prompt is taken as true, but rather to encourage discussion of alternative approaches that might prove fruitful.

86. It is interesting to note that much of the development of whistleblower rewards and leniency programs in recent years has been in Europe, where, until recently, there was a narrower scope for corporate criminal liability.