The State's Responsibility for Corporate Criminal Justice

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I. INTRODUCTION

There are many good reasons to contemplate an end to our century-old experiment with corporate criminal liability. The most obvious reasons generally fall into three categories: challenges to personhood and moral agency, nagging concerns over the conception of the general part of the corporate criminal law, and perennial problems with the fair administration of corporate criminal justice.[1] After briefly considering the individual and collective weight of these reasons, this Article explores two less obvious reasons, the "missing victim" problem and our tolerance for the waning power and suasion of the state. The former considers the consequences of blindness to the kind, quality, and effects of corporate wrongdoing. There is no fair accounting of the wrongdoing committed against collective interests and goods to determine culpability, liability, and punishment. Any marginal recognition is already quite limited given the "dark figure" of corporate

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We thank Prof. Christoph Burchard for the kind invitation to present a previous version of this paper at the *Dienstagsseminars* organized by the *Institut für Kriminalwissenschaften und Rechtsphilosophie* of the Goethe-Universität Frankfurt. Our appreciation to Seminar participants for their valuable comments. The idea of the state presupposed in this Article is that of a superior entity committed to an ideal of the rule of law that is materialized in the administration of criminal justice. It is a minimal but essential state. The question remains whether such an ideal of statehood can (ever) be achieved. We are mindful, as well, that the state may be immature, arbitrary, complicit, capricious, and even evil. A consideration of these kinds of weakened states, though, is for another time.

1. *See generally* 1 Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, *in* ADVANCES IN CRIMINOLOGICAL THEORY 31 (William S. Laufer & Freda Alder eds., 1988); 2 John Braithwaite & Brent Fisse, *On the Plausibility of Corporate Crime Control*, *in* ADVANCES IN CRIMINOLOGICAL THEORY 15 (William S. Laufer & Freda Adler ed., 1990); 6 Gilbert Geis, *A Review, Rebuttal, and Reconciliation of Cressey and Braithwaite and Fisse on Criminological Theory and Corporate Crime*, *in* ADVANCES IN CRIMINOLOGICAL THEORY 321 (Freda Adler & William S. Laufer eds., 1995).

accountability.[2] The latter reflects the failure of a robust public law and an enabled public sector, one that is responsive to the inequities in the administration of rules and procedures. The authority, power, and suasion of the state were wrestled away long ago, unfortunately without considering incentives of corporations to exploit failures of public enforcement of laws; failures to require the necessary measures and metrics to ensure the effectiveness of complex self-regulatory regimes.

These two more nuanced reasons, coupled with those most obvious, are grounds for thinking about a world without corporate criminal law—a world where we prize the administrative state and private law remedies for justice. This thinking about a very different world, no matter how seductive and attractive, is countered by our musings over an imperative that comes from a narrow construction of the idea and ideal of equality.[3] Our defense to abolition is grounded in an equality principle that recognizes the frailty and, yet, the primacy of substantive criminal law. Simply stated, the state is compelled to publicly condemn known criminal wrongs with processes and rules consistent with the equal application of law. Failure to adhere to the equal and thus fair treatment of corporations in the administration of justice should prompt long ago promised law reforms and remediation, not abolition.[4]

Our position rejecting abolition remains firm no matter how damning the descriptive account of corporate criminal justice, no matter how little is known about the impact of corporate wrongdoing, and no matter how imperfect, forgiving, or impotent the state's response. Corporate criminal law survives because harm to society from this and all kinds of criminal wrongdoing must be publicly acknowledged and validated in ways consistent with the ideals of justice. Criminal wrongdoing—whether human or corporate—is harm committed against the moral consensus of the community. The state responds, as Henry M. Hart, Jr. so forcefully writes, with "a formal and solemn pronouncement of the moral condemnation of the community."[5] The conviction has also "a communicative function that civil judgments do not."[6] It is not much to ask—indeed, it is the state's burden—that the pursuit of corporate criminal justice be guided by rules and procedures that ensure reasonable measures of equality.[7] Thus, in the end, we need not imagine a world without corporate criminal law for all the obvious and more nuanced reasons stated above. Rather,

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2. The Dark Figure represents the difference between the overall rate of corporate wrongdoing, as estimated in self-report surveys, and "official" rates of wrongdoing found in government prosecution, conviction, and sentencing data. For a discussion of the difficulty in determining the costs of corporate crime, see Julie R. O'Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047 (2022).

3. This Article follows a number of well-worn paths in jurisprudence, substantive law, and political theory to support several narrowly drawn arguments about the role of the state. Our discussion of the importance of equality in corporate criminal law, for example, is limited to the application of rules in the administration of criminal justice. *See infra* notes 38–63. Given space limitations, no more than representative references are offered to some uncommon refrains over this body of law.

4. *See* William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J. BUS. L. 71 (2017) [hereinafter *Progressive*] (noting the conspicuous absence of law reform in the general part of corporate criminal law).

5. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

6. Mark Dsouza, *The Corporate Agent in Criminal Law—An Argument for Comprehensive Identification*, 79 CAMBRIDGE L.J. 91, 91 (2020).

7. We conclude that the need for this reform is heightened by the adoption of corporate criminal liability across Europe and Latin America and the opportunity to share the many lessons learned over this past century with our far less-than-perfect resort to the most formal of social controls.

those still committed to the prominent place and mandate of the state in the administration of justice need only re-imagine a world with it.

Imagine, for example, reasonably constructed liability rules and standards of culpability that reflect the idea of organizational fault rather than an abused fiction of corporate criminal liability. Imagine the co-regulation of the private sector by an active and engaged public sector that recognizes, understands, and prizes effective compliance with the law rather than an empty office of a compliance counsel. Imagine the crimes of small, medium, and large firms being pursued earnestly and fairly—all without discretionary agreements, diversion, and exemptions for the most powerful, important, and protected. Contrast this with a long history of prosecuting small, privately-held businesses to conviction. Imagine a regime of corporate punishment that reaffirms to society the values and victims denied by a criminal offense. And finally, as one's imagination goes wild, consider how the very idea of abolition would be received by those genuinely concerned with how state domination supports the overcriminalization and mass processing of the disaffiliated, marginalized poor. Pursuing an abolitionist brand of decriminalization would be repugnant to anyone concerned with the many consequences of discretionary state power, status, and domination in the conventional criminal justice system[8] How could it be explained that the bluntest of all instruments of state social control applies only to the poorest of the poor; to those most disenfranchised and discriminated against?

II. COMMON REFRAINS FOR ABOLITION

It has long been said that what best characterizes corporate criminal law is, quite simply, ambivalence. This is fair, given the bluntness of this instrument. Indeed, there is so much ambivalence over corporate criminal enforcement that it is often difficult to find any stakeholder support for its application. No doubt there is much fanfare with its occasional use. There is no shortage of "faux" indignation by state representatives accompanying the rare announcements of aggressive enforcement actions.[9] There is also a smug sense of exceptionalism from criminal justice functionaries in assuaging markets and a wide swath of stakeholders that fairness, accountability, and integrity prevail.[10] But there is scant evidence of much that approximates genuine support for corporate criminal justice. It is, thus, not unreasonable to imagine a world without corporate criminal liability. In some sense, and at some moments, it is not wrong to think that we are a mere stone's throw away.

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8. John Braithwaite, *Asking the Domination Question About Justice*, *in* JUSTICE ALTERNATIVES 19 (Pat Carlen & Leandro Ayres França eds., 2019) (stating that, in pondering justice, we should ask "whether an action will reduce or increase the amount of domination in the world").

9. William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 19, 25 (Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann & Joachim Vogel eds., 2014) [hereinafter *Indignation*] ("[F]unctionaries are offering a kind of faux indignation. Their objective: Placate market stakeholders with a carefully constructed retributive text, use the prosecutorial function to skillfully deter as much misconduct as possible, and yet leave undisturbed the risk-taking behavior that drives the kind of unbridled innovation and entrepreneurship necessary to move the economy forward.").

10. William S. Laufer & Nicola Selvage, *Responsabilità Penale Degli Enti Ed Eccezionalismo Americano* [*Exceptionalism and Corporate Criminal Law*], 1 REVIST' TRIMESTRALE DI DIRITTO PENALE DELL' ECONOMIA (2019), https://www.academia.edu/40422535/Corporate_Criminal_Liability_and_American_Exceptionalism [https://perma.cc/Z2U5-T8BT].

At first glance, ambivalence with corporate criminal law seems to reflect a hesitancy to inhibit or constrain the most powerful institutions sustaining economic development.[11] It is admittedly a challenge to control the costs of the criminal law, with externalities that are, at times, a challenge to justify. Some costs directed at culpable firms may just be direct consequences. We should add, though, that most critics of corporate criminal law are taken with the idea of costs due to collateral consequences.[12] Imagine, they say, all of the innocent stakeholders adversely affected by the loss in share price or, worse, the loss of a job. Shareholders, employees, debtholders, and third parties are all suffering from the consequences of this blunt instrument of social control—an instrument that should be deployed against culpable agents, not earnest, diligent organizations.[13]

The roots of ambivalence and seeds of abolitionism, however, are not exclusively economic. Rather, abolitionist sentiments are also traceable to a long history of legal and moral consternation over corporate personhood and agency. The individualistic nature of criminal offenses made the idea of liability to a *persona ficta* seem wrong and, when applied, no more or less than a variant of strict liability. For many years, methodological individualism also constrained any reasonable consideration of social and group phenomena. Corporate wrongdoing, following *New York Central & Hudson River Railroad Co. v. United States*,[14] was derivative of the acts and intents of agents, no matter where situated in the corporate hierarchy. This did not sit well with those courts that recognized that features of biological and corporate persons differed in critically important ways. Without a soul and a will, attributing a guilty state of mind to a corporation is too far-fetched. Perhaps a corporation is a ''mere creature of law.''[15] And without a body, the act requirement of the criminal law also could not be realized. The power to commit crimes and any attribution of illegality are well outside the scope of their authority, or *ultra vires*. The capacity of a corporation, some scholars reasoned, is simply no greater than the power conferred by its corporate seal or charter.[16]

This metaphysical and conceptual muddle contributed to a doctrinal one. In the absence of any significant law reform and scant decisional law, the general part of

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11. Referring specifically to the "political economy of corporate liability for misconduct," see Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. CORP. L. 861, 870 (2022) (noting how corporations can leverage politicians' need for campaign contributions to influence federal agencies' decisions).

12. *See generally* U.S. Dep't of Just., Just. Manual § 9-28.1100 (2020) (detailing how prosecutors may consider collateral consequences when making prosecution determinations).

13. These concerns, we believe, are largely specious. No doubt there are innocents among these stakeholders who are harmed. But, given the infrequency of any resort to corporate criminal liability, any costs associated with a criminal investigation, charges, adjudication, and sanction are more than offset by the benefits of corporate wrongdoing. These benefits come from a steady and robust base rate of wrongdoing that remains, when detected, most often within the province of the corporate form. Corporate wrongdoing has a distinct value for the firm and its many stakeholders. The vast majority of corporate wrongdoing and value created by it are unknown and unacknowledged by the state—giving corporate stakeholders, including shareholders (if a public corporation), the full and long-standing benefit that comes from crime commission. More importantly, it is argued in this Article's conclusion that we are conspicuously concerned with the collateral consequences of corporate but not street offending.

14. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

15. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 635 (1819) (Marshall, C.J.).

16. *See, e.g.*, SUSANA KIM RIPKEN, CORPORATE PERSONHOOD (2019); Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 439 (2015).

corporate criminal law never matured. As a result, we live with normative categories and principles of penal theory designed for agents, but entirely ill-suited for corporate persons. This is reflected in the neglect of any reasonably constructed liability rules and standards of culpability. So, too, was there neglect of genuine fault models, such as corporate culture, corporate decisions, and constructive corporate fault.[17] And there are good reasons why; with vicarious liability as blackletter law, there was a substitution of committed compliance expenditures for evidence of organizational due diligence. Add to these notable systems failures, including the fact that so few cases of corporate criminal wrongdoing are criminally investigated and prosecuted—resulting in a robust "dark" figure; different tracks of justice depending on firm size; a diversion of small numbers of large firms to NPAs and DPAs; and a hesitancy to criminally prosecute, take to trial, convict, and punish those firms whose criminalization would create or contribute substantially to systemic economic risk.[18]

Perhaps the most damning critique of this assessment, generously offered by Samuel Buell in symposium commentary, asks for a very careful and thoughtful deconstruction of our social construction of corporate crime.[19] Why should anyone be so exercised by the apparent inconsistencies, inequities, and injustices found in these common refrains before exploring and acknowledging our construction and, moreover, the social construction of this conceptual morass? Why not accept all of these refrains for what they are—a telling reflection of society's measured embrace of the social control of corporations? Corporations may not necessarily get what they deserve, but what they get reflects something that must be understood and appreciated in context. To snipe at all that is wrong with corporate criminal justice misses an important opportunity to understand why the system is the way it is, why it resists substantive change, and why, for many, if not all, it may be well-calibrated, even perfectly so. We should be honest about our construction of corporate wrongdoing and of the wrongdoers. We should be honest about how and why cases become criminal, remain civil, or are not pursued at all. We should be honest about just how much accountability is enough, what system constraints are inevitable and why, and what markets are willing to tolerate. But all of this honesty is premised on the notion that we are talking about the same behavior—behavior that is now evaluated with boundless discretion across a wide swath of functionaries, resulting in known—and apparently accepted—inconsistencies. A tendency to certain predispositions about what all of us mean by "corporate crime" and "corporate criminal" risks building a house without a foundation. And indeed, this is a very fair concern and critique.

There are many cautionary tales about failed architecture, including that found in the long-overdue deconstruction of white collar crime. A generation or two of scholarship sought to explain white collar crime and offenders in ways consistent with assumptions

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17. *See* William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 664–68 (1994) (discussing models of "genuine" corporate fault).

18. *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Susana Aires de Sousa, *The Relevance of the Collaboration of the Corporation in Criminal Proceedings*, 89 REVUE INT'L DROIT PÉNAL 123 (2018); Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, *in* NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH 156 (Tina Søreide & Abiola Makinwa eds., 2020); Arlen, *supra* note 11.

19. In other words: to "make sense of the corporate criminal law." This task may be attempted by wrestling with theories of personhood, agency, culpability, and liability. *See, e.g.*, WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 44–67, 70–96 (2008).

about their elite status and vast differences from conventional criminal offenders. Criminologists built a house around a foundation of assumptions that ultimately touched every aspect of crime causation theory and the criminal process—all the way to assumptions about punishment severity.

A good portion of this foundation gave way when David Weisburd and his colleagues studied white-collar crime more systematically.[20] Weisburd found that white collar criminals were much more like conventional offenders than previously known. They were not the kind that Sutherland wrote about in 1940—affluent, middle-aged men of high social status and respectability. They were middle class and, remarkably, had multiple contacts with the criminal justice system. Like many street criminals, they had criminal careers.[21] From Sutherland's insight came many generations of scholarship, all supported by a foundation that gave way to empirical and then normative deconstruction. Why not expect something similar or analogous to corporate criminals? Sally S. Simpson directly addresses this question, offering a cogent critique of conventional assumptions about offending that is unaided by rigorous, evidence-based research.[22]

The importance of Buell's critique is that those slamming corporate criminal justice are essentially supporting the construction of a house on a foundation that has not yet been adequately inspected or, for our purposes, deconstructed. While the attraction and importance of this critique are undeniable, it is also clear that foundational concerns around corporate criminal justice should not displace concerns in equity that follow from the existing justice system. It was John Rawls, in his work *Two Concepts of Rules*, who brilliantly distinguished between (1) a critique or justification of a system or set of rules and (2) the critique or justification of actions and applications falling under it.[23] While it is clear that the corporate criminal justice *system* is long overdue for further critique and deconstruction, we may (and should) still maintain a stern focus on distinct concerns of fairness and equity in applying existing corporate criminal law. That the law ought to be something *else* does not insulate the practice of law *as it is* from critique on equitable grounds.

Corporations may end up facing civil or criminal liability for wholly arbitrary reasons, an artifact of who referred the case, or maybe even the politics of competing offices. Corporations that are criminally investigated, adjudicated, or in any way touch the criminal justice system may be a rarity or otherwise not representative of all wrongdoers. But the fact that—after more than a century of experimentation with corporate criminal law—we still know little about what actually makes a corporation a corporate criminal does not permit the state to ignore the equal application of legal rules and procedures.

It would be easy to conclude that there really is no corporate criminal justice system

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20. *See generally* DAVID WEISBURD, STANTON WHEELER, ELIN WARING & NANCY BODE, CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS (1991).

21. *See* DAVID WEISBURD, ELIN WARING & ELLEN F. CHAYET, WHITE-COLLAR CRIME AND CRIMINAL CAREERS (Alfred H. Blumstein & David Farrington eds., 2001) (analyzing how recent research regarding white-collar criminals reveals the question of how white-collar career criminals impact the understanding of white-collar crime).

22. *See generally* Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO ST. J. CRIM. L. 481 (2011) (providing a summary of recent evidence-based research in corporate crime along with new suggestions for research, including use of a network analysis).

23. *See* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (explaining the logical basis and significance of distinguishing between justifying a practice and justifying an action falling under it).

to abolish—that these concerns, inadequacies, and failures prove that we are already in a world without it. This position is roundly rejected after considering far less common refrains that, on reflection, contribute to an imperative on behalf of the state to respond to corporate wrongdoing with equitable rules and procedures.

III. UNCOMMON REFRAINS

A. *The Missing Victim Problem*

That there is often no direct role for the victim in the criminal process may help explain the allergy some scholars have to the victim rights movement and the study of victimology.[24] There is much lost by the general neglect associated with the many costs of corporate victimization.[25] The very idea of harm caused by organizational wrongdoing demands a recognition of the interests denied and offended. The anonymization of offended interests, whether individually or collectively owned, threatens any acknowledgment and validation of serious harms caused by corporate wrongdoing. Anonymization also threatens the necessary precondition for the criminalization of corporate behavior.

Criminalization assumes harm, and harm requires victims that must be acknowledged. Even when the process of criminalization is, for some reason, forestalled, harms are re-conceived, diverting the state's response away from the formalities of the criminal justice system. Corporate harm thus represents two compromises to protected legal interests: the re-conception of criminal wrongdoing and the absence of a responsive criminal justice system. These arguments run parallel to the paradox of what might be called *the inessential and essential victim*—and why we argue that it is nearly impossible to fairly appreciate the kind and quality of corporate wrongdoing, and resulting harm, with entirely missing victims.

Estimations of the harm for conventional offenses may be constructed without much more than intuition. There is an impressive stream of research on lay constructions of crime seriousness, beginning with the National Survey of Crime Severity.[26] It is a wholly different exercise to approximate the harm from complex banking frauds, clean air and water violations, certain securities offenses, and food production and animal agriculture offenses. We've learned from the sociology of genocide that wrongs committed against

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24. For a recent consideration of the role of victims in the criminal justice system, see William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, 155 (2021) ("Our collective response to sexual assaults, the most underreported of all serious criminal offenses, reveals the importance of formal and informal recognition of victims, the community affected by the wrongdoing, and the state."); Nils Christie, *Victim Movements at a Crossroad*, 12 PUNISHMENT & SOC'Y 115, 118 (2010) ("This is a road towards elevated status for the victim in direct communication with the person or system that might have hurt her or him."); FRANK WEED, CERTAINTY OF JUSTICE: REFORM IN THE CRIME VICTIM MOVEMENT 143–45 (1995).

25. *See Indignation*, *supra* note 9, at 23 ("There are, of course, other ways of asking why the victimization or possible victimization from some wrongdoing elicits deeply-held fears, while wrongdoing of another type engenders anger, frustration, but little to no moral indignation."); Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 994 (2022) ("Surprisingly, we still lack an adequate victimology to speak meaningfully about the experiences of people whom corporate crime affects."); *see generally* EDUARDO SAAD-DINIZ, VITIMOLOGIA CORPORATIVA (2019).

26. Marvin E. Wolfgang, Robert M. Figlio, Paul E. Tracy & Simon I. Singer, *The National Survey of Crime Severity*, BUREAU OF JUST. STAT. (1985), https://bjs.ojp.gov/library/publications/national-survey-crime-severity-0 [https://perma.cc/V3S8-YXYD].

very large numbers of victims easily deny belief.[27] For many, if not most, these wrongs are impossible to conceive. None of this is a plea for a greater role in the criminal process for the many primary, secondary, and tertiary victims. Rather, it simply reveals another essential fracture in the foundation of this body of law—one tied to the power and promise of the state to validate corporate wrongs that are derivative of actual victims.

B. *De-statehood: Conceding Public Law Functions to Private Law*

The history of corporate criminal law from the turn of the 20th century chronicles a progressive emptying of the state of its core and essential functions—a transition John Coffee once characterized as a move from prohibiting to pricing.[28] Indeed, over the past century, we witnessed a stark privatization of this body of public law. De-statehood influences the interpretation of substantive law and continues to affect corporate criminal justice through all stages of the criminal process. But this is not a new concern; more than thirty years ago, Marshall Clinard and Peter Yeager's work on the wrongdoing of the five hundred largest corporations in the United States revealed that most "criminal" misconduct was accounted for as civil, administrative, or regulatory.[29] Estimating corporate wrongdoing and its effect by relying on official data is a fool's errand and should not come as any surprise.

In the immediate aftermath of the Court's recognition of corporate vicarious liability in *New York Central Railroad*,[30] corporations embraced organizational due diligence to hedge against the rule's strictness. This embrace, which explicitly undercut newly articulated principles of vicarious fault, ushered in an era of due diligence investments in many ways that resemble an insurance market. Instead of attributing fault to firms vicariously, as *New York Central Railroad* would prescribe, legal risk was tenaciously managed and controlled by firms through the purchasing of compliance programs, policies, instruments, and procedures as insurance against entity liability.[31] Corporations would meet with prosecutors armed with evidence of compliance expenditures as proof of due diligence. The criminal acts of agents were transformed from those of the company to those going rogue.

A due diligence defense soon replaced the application of vicarious fault. In doing so, courts offered firms an opportunity to change the locus of defining what is criminal, from the law-maker, prosecutors, and regulators to senior management of a corporation. Companies designed their own compliance machines, often elaborate and expensive, to conduct internal investigations and process miscreants through their own disciplinary systems. This movement legitimized a retreat and release from the criminal command. By

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27. *See generally* DEBORAH LIPSTADT, BEYOND BELIEF (1986).

28. *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) (explaining how corporate criminal enforcement has moved from prohibiting certain behaviors to calculating their public and private costs).

29. MARSHALL CLINARD & PETER C. YEAGER, CORPORATE CRIME 91 (1980). Regarding the idea of de-statehood and criminal law, see Günter Heine, *La Ciencia del Derecho Penal ante las tareas del future* [*The Science of Criminal Law Before the Tasks of the Future*], *in* LA CIENCIA DEL DERECHO PENAL ANTE EL NUEVO MILENIO (1st ed. 2004).

30. *See generally* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

31. *See generally* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 54 VAND. L. REV. 1343 (1999) (discussing compliance expenditures as insurance).

essentially privatizing corporate criminal law, wrongdoing of all seriousness avoids the criminal process and is *de facto* decriminalized.

In the long shadow of *New York Central Railroad*, the state embraced the idea of self-regulation, largely unadulterated by public sector oversight. Accompanying this profound shift in policy, practice, and law was a good corporate citizenship movement—an effort to further convince stakeholders that it is good to invest in a firm's own self-regulation. The conceptual cornerstone of this government-supported movement to promote the good citizen corporation was a partnership between the public and private sectors. The rallying cry appeals to a broad spectrum of stakeholder interests: "[T]hose of you here today from the business community are in a position to do more than the bare minimum in taking a stand against crime,"[32] we were told. "You must take on the obligation to lead this effort, to be in the forefront, not only by working to ensure that your companies' employees follow the law but by embracing and placing at the very top of your companies' priorities the basic good citizenship values that make law abidance possible."[33]

In the early 1990s, this movement reflected a profound change in regulatory strategy to control corporate crime. A commitment to responsive regulation, grounded in a pyramid enforcement strategy, was increasingly becoming the norm. One of the most significant changes accompanying this commitment is the diminished reliance on the corporate criminal law as a means of formal social control. Government support of corporate self-regulation and enforced self-regulation, at least in theory, pushed the criminal law further up the pyramid of enforcement strategies. The idea of Ayres and Braithwaite was simple: "Regulatory agencies have maximum capacity to lever cooperation when they can escalate deterrence in a way that is responsive to the degree of uncooperativeness of the firm, and to the moral and political acceptability of the response."[34]

The threat of the criminal law is the ultimate lever that empowers less formal social controls, such as self-regulation, voluntary disclosure, and corporate cooperation. "Without a strong state capable of credible deterrence and incapacitation," John Braithwaite notes, "you cannot channel regulatory activity down to the base of the pyramid, where trust is nurtured."[35] There must be a formidable and credible weapon sitting in the background available for use when regulatory authority meets frustration or capture. The threat of the criminal law is the single most potent incentive for ensuring corporate cooperation, information disclosure, and evidence sharing. This is a necessary incentive given the extraordinary challenge of building cases against large, complex, and well-counseled multinational corporations.

Corporate compliance soon became associated with the avoidance of corporate liability. The reason for this change is that evidence of due diligence, as a proxy for corporate integrity, was increasingly used by prosecutors as a threshold criterion for initiating a criminal investigation, filing an indictment, or proceeding to trial. Evidence of due diligence was considered so critical to regulators and criminal prosecutors that it may result in leniency, amnesty, or immunity. Of course, the fact that there is vast prosecutorial

32. U.S. SENT'G COMM'N, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION 10 (1995).

33. *Id.*

34. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 25 (Oxford Univ. Press 1992).

35. John Braithwaite, *Institutionalizing Distrust, Enculturating Trust*, *in* TRUST AND GOVERNANCE 343, 356 (Valerie Braithwaite et al. eds., 1989).

discretion to pursue criminal enforcement of the law is not new, but there is indirect evidence that we are at record levels.

Today, the state's deference to corporate self-regulation reaches an almost hard-to-imagine goal. There are now more compliance, audit, legal, and risk professionals and private cops than municipal police officers in the United States.[36] One of us has argued elsewhere that, along with this remarkable rise in private policing, there are regular increases in the price of firm due diligence that might accurately estimate the cost of the base rates of undetected organizational deviance. This allows prosecutors to capture upfront their estimated value of penalties and sanctions that would have been realized if they had effectively invested in the private sector oversight.[37] These expenditures may be called a preemptive compliance penalty, or simply a "price," as Professor Coffee might put it.[38]

Thinking of compliance expenditures as a preemptive price or penalty further reveals the motives of the players in the compliance game. From the firm's perspective, the costs of compliance are paid as ever-increasing insurance premiums against liability. The idea of a preemptive penalty helps explain why concerns with the moral hazard problem here were largely ignored. "From the regulator's line of sight, the complexity and near impenetrability of the corporate form would leave significant undistributed justice but for the collection of an upfront or preemptive compliance penalty."[39] Alas, this is penultimate evidence of de-statehood.

The vast discretion associated with this diversion undermines the state's authority to honor both trust and confidence in protecting the most basic rights and the legality principle (*nullum crimen sine lege*; *nulla poena sine lege*).[40] This history reveals a form of capture of the state as a gatekeeper of the rule of law. The descriptive part of the abolitionist's account shows us a transformation of regulatory discretion to accept corporate wrongdoing. The exploitation of the limits of the law welcomes discretion that transforms misconduct into ambiguities, erasing its prohibition, transforming illegal behavior into behavior that is to be tolerated. The game promotes an exercise in self-serving line drawing.

Of course, the exploitation of the limits of the law is not new. Foucault, for example, uses the concept of "illegalism" to illustrate how the law and its application may be manageable for those who are socially dominant.[41] Discretion favors ambiguity, and ambiguity favors those who have the power to influence how criminal justice is being served. The exploitation of the limits of corporate criminal law seems, however, different, i.e., taking the "illegalism" out of criminal law and making it a private matter.

Ultimately what remains is a state that tolerates private sector exploitation of the limits

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36. William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 399 (2018) [hereinafter *Milestone*].

37. *Id.* at 420–22.

38. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 196 (1991) (discussing pricing methodologies for "preventing the crime to the principal").

39. *See Milestone*, *supra* note 36, at 422.

40. *Nullum crimen sine lege* is Latin for "no crime without law." A person should only face criminal punishment for acts that, when committed, were prohibited as crimes. *Nulla poena sine lege* is Latin for "no penalty without law."

41. For a description of Foucault's theory, see Alex J. Feldman, *Foucault's Concept of Illegalism*, 28 EUR. J. PHILOSOPHY 445 (2020).

of the most formal of social controls. Corporate crimes are transformed into legal ambiguities (*nullum crimen sine lege*), erasing the pre-existent legal prohibition and turning illegal behavior—at times very serious criminal wrongdoing—into priced behavior deserving of sanction, not punishment (*nulla poena sine lege*). A compliance game is played, pushing the public line of a prohibition so far that, at times, it disappears. And when it disappears, the violation of legal interests (harms) and the complete absence of any moral condemnation resembling punishment is stark. In this game, the legislator-state, authorized and legitimized by the Constitution, is captured by a non-enforcing state as well as a private "corporate-legislator" with the discretion to negate criminalization. It is as if there are no constitutional or normative boundaries to a *de facto* decriminalization of corporate criminal wrongdoing.

What do we lose with the de-statehood of corporate criminal law? Posing the question leads us to shift our gaze from the mere analysis of responsibility for caused harms to a collective level of accountability. Criminal responsibility must not rest with the attributions of responsibility for individual criminal acts. It must address the collective responsibility of the criminal law itself,[42] and how law accommodates the state's most basic duty of preserving fundamental rights and values. In addressing this question, we should have in mind the reasons why criminal law and the *ius puniendi* became, ultimately, a monopoly of the state.

Two related intuitions are offered. First, in a democratic system with a compromised rule of law, criminal justice finds its legitimacy in a public duty that protects shared basic rights and values, capable of generating faith in others, and as Albrecht writes, in a "system of social control that is operating in a predictable and impartial way."[43] The exercise of power is permissible by the criminal law only because it pursues something greater than the criminal law itself, something that compensates for the harm and suffering caused by the administration of justice.[44] Acting in the "common good" and declaring common interests and values are essential for society.[45] Second, delegating the criminal justice system to the state and its public institutions is accompanied by an implicit guarantee: those who submit to state authority will be treated fairly. Ideally, all power is deployed by an impartial and autonomous authority, one that holds forth the perseverance of rules and conditions that support equality and reject domination.

This reasoning brings us to two basic conditions that lay at the core of criminal justice as public law: first, the law must be aimed at the common good, and second, it should be equally applied. The first condition justifies the existence of criminal law; the second reflects the confidence that society, victims, and defendants place in the public institutions of the criminal justice system. These conditions suggest that we should expect much more from the state. But alas, the state is failing. Imperfections coalesce around the common

42. Alice Ristroph, *Responsibility for Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 107, 109 (Antony Duff & Stuart P. Green eds., 2011).

43. Hans-Jörg Albrecht, *Legitimacy and Criminal Justice: Inequality and Discrimination in the German Criminal-Justice System*, *in* LEGITIMACY AND CRIMINAL JUSTICE 302, 303 (Tom R. Tyler ed., 2007).

44. As Malcolm Thorburn writes, "to make sense of an institution that causes as much hardship as our system of criminal justice, it is perfectly natural to ask what good we mean to bring about through all this suffering." Malcolm Thorburn, *Criminal Law as Public Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 21, 21 (Antony Duff & Stuart P. Green eds., 2011).

45. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CALIF. L. REV. 687, 690 (2000).

refrains noted above, among others: scant substantive law reform in over a century; incoherent laws and regulations; poor investment in public sector regulatory systems; too big to prosecute, take to trial, convict, punish; and the failure to focus on corporate justice remains.

Although the state's imperfections are not exclusive to corporate criminal law, the system clearly fails when addressing a specific kind of corporate wrongdoing: offenses of big and powerful corporations. Sources of disparate treatment by firm size point to a state as an ensemble of powerful actors, mediating and organizing institutional relationships in ways confounded by games and the séquelles of state corporate crime.

There is a continuum from an idealized perfect state to the state's complicity with other stakeholders in diminishing the fair distribution of formal social control, such as we see with compliance games.[46] At one extreme, there is state corporate crime. With state corporate crime and its many variants, corporate and state wrongdoing become one and, sometimes, the same. Determining the range of this continuum may be traced back to the end of the eighteenth century, and the recognition of the state monopoly of criminal law "would transform the problem of determining justice into a problem of administering justice."[47] The way justice was served became a form of justice itself. In this sense, the core of a perfect state appears grounded in a principle of equality; and, more specifically, in an equal administration of rules as a foundation for serving justice. It is a duty of the state, grounded in notions of legitimacy and confidence, to resist the kind of official power, constraint, and coercion that overcomes justice. This was at the core of the transformation of criminal law into public law. The exercise of punitive power by the state—a third and superior entity—had the enormous advantage of limiting arbitrary and excessive applications, reconfiguring private interests and tendencies to seek revenge or favoritism into a state action in service of a common good.

Connecting the exercise of criminal law with the state as a superior entity reveals a form of justice that rejects acts and decisions reflecting arbitrariness or favoritism. Equality is a significant reason for the transformation of criminal law into public law**.** This brings us to another and much more demanding consideration about the meaning, function, and vulnerability of equality.

c. The Unequal Share/Distribution of Responsibility for Corporate Harms

The inequalities that support the abolitionist case reflect unequal shares of responsibility for harms statutorily considered criminal. In fact, the idea of equality deserves more attention in considering the state's response to corporate misconduct, as some scholars have already noted. Coffee concludes that the leniency-driven model that dominates corporate misconduct comes with a cost to society: a loss in accountability and a "serious injury to the ideal of legal equality (because those most senior in the corporate hierarchy escape justice)."[48] Braithwaite and Pettit also refer to public policy concerns with structural inequality based on power, contrasting "blue collar crime" with "white collar

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46. For a general discussion of corporate compliance games, see *Progressive*, *supra* note 4, at 110–16.

47. Massimo Meccarelli, *Criminal Law: Before a State Monopoly*, *in* THE OXFORD HANDBOOK OF EUROPEAN LEGAL HISTORY 632 (Heikki Pihlajamäki, Markus D. Dubber & Mark Godfrey eds., 2018).

48. JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 152–53 (2020).

crime."[49]

But equality is a tricky concept that needs far more attention, especially in arguing, as we do, that the abolition of corporate criminal law would represent a further failure of state function in protecting the common good and recognizing harms and victims.[50] The classical Aristotelian proposition of equality states that things that are alike should be treated alike; things that are unlike should be treated unlike in proportion to their unlikeness. With this simple formulation, equality becomes tautological, polysemic, and dependent on the content of the propositions used in the equality equation and, in comparison, judgments.[51] The moral or legal value that supports the equality judgment in its comparative nature or function cannot be defined by equality itself. However, fuzziness does not mean that the concept is without meaning.[52] Saint Augustine's remarks about the definition of time suggest that logically time does not exist: "If, therefore, the present is time only by reason of the fact that it moves on to become the past, how can we say that even the present *is*, when the reason why it *is* is that it is *not to be*?"[53] Yet, we experience time every moment, every day, every month, and every year. There is something comparable with the concept of equality.

Putting aside for now the many meanings and functions ascribed to equality, we highlight a very narrow dimension of equality, one that seeks the fair administration of rules and a less unequal share of responsibility for equal violations of social and collective goods. To borrow from Rawls, the "basic structure of a society of equals" relies on the selection and imposition of rules independent of one's position in society.[54] Rules selected must be equally administered, applied equally, and, thus, fairly. Substantive criminal law strongly reflects this Rawlsian notion in many of its most basic principles: consider, for example, the meaning of the rule against retroactivity, which prohibits the imposition of *ex post facto* laws to assure there is no arbitrary prosecution specifically directed to an agent. No behavior can be found criminal unless it is previously prescribed by law as a crime.

Borrowing from Hart, once again, the rules coming from substantive criminal law make it known what shall not be done, setting standards of behavior, encouraging types of conduct, and discouraging others. And this is important, as Hart concludes, to make some sense of the criminal law.[55] Punishment for wrongdoing, for example, must be distinguished from the payment of a fine or tax.[56] In serving criminal justice, the state as

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49. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 200 (1990).

50. For a discussion of the controversies over the precise notion of equality, see Stefan Gosepath, *Equality*, STAN. ENCYCLOPEDIA PHIL. (Apr. 26, 2021), https://plato.stanford.edu/entries/equality/ [https://perma.cc/6AFX-4QTS].

51. For a comparison of the ideal of equality in punishment (post-conviction equality) with equality in investigation and prosecution (pre-conviction equality), see James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. LEGAL ANALYSIS 119 (2009).

52. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (challenging conventional interpretations of equality).

53. SAINT AUGUSTINE, CONFESSIONS 264 (Penguin Books ed., R. S. Pine-Coffin trans., 1961) (emphasis added).

54. John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 160–61 (1977) ("Each person has an equal right to the most extensive of equal basic liberties compatible with a similar scheme of liberties for all.").

55 *Cf.* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 8 (2008).

56. *Cf. id.* at 6.

the owner of criminal law should be attentive to wrongful actions (and harms) labeled as criminal offenses, not to a specific agent or to power relations. The state, as a public gatekeeper of a common good in the administration of criminal justice, must support, in symbolic and genuine ways, a just and fair administration.[57] The state "legal authority"[58] ensures that rules and the values and interests they protect are equally enforced.[59] Once validated, rules and any subsequent liability for harms must prompt a response from the state that is consistent, one that comports with a generalization principle.[60]

There may be cases where rules are not applied for substantive reasons. But the non-application of a rule must be justified. Where rules are not applied in equal or similar ways, the idea of fair justice may be questioned.[61] We may go one step further in arguing that an unequal administration of rules, depending on who the agent is, may be presumptively unjust. Thus, differential treatment of corporations due to firm size or expected economic risk from prosecution or punishment is itself offensive, both to an equal application of criminal rules and the interests they protect. Simply stated, equality principles validate an impartial administration of justice and, even more, demand that criminal violations of law be cast as criminal. Otherwise, protected legal interests and victims may be injured and ignored twice—canceled first as a result of criminal conduct and then canceled again by the absence of any formal acknowledgment of the wrongdoing.

Abolishing corporate liability for corporate harms further distorts the distribution of responsibility for those harms. In fact, the absence of the state would increase inequality in the protection of interests and victims of crimes committed by corporations. This would mean that the state is not responsive when serious harms are caused by a certain kind of agent, a corporate agent. This may encourage questions of trust, confidence, and legitimacy. For those committed to an equal and fair application of the most formal of social control, the impact is potentially enormous. The result is a harm that has no victim, agent, and recognition. The seriousness of corporate wrongdoing and harm is incompatible with a private negotiation and reconciliation—certainly not one with a corporate agent who retains the discretion to redefine the criminal offense and the criminal rule that supports it. Even if the harm can be preemptively priced, as argued earlier, the absence of any criminal

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57. Barkow distinguishes criminal cases from administrative law cases and notes that the exercise of government criminal power rests on a different constitutional foundation than administrative power. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1011 (2006).

58. Referring to Max Weber's concept of "legal authority" enacted by a proper and objective procedure, *see The Types of Legitimate Domination*, ECONOMY AND SOCIETY 215 (1978); *see also* Roger Cotterrel, *Legality and Legitimacy: The Sociology of Max Weber*, *in* LAW'S COMMUNITY 134 (1997).

59. In this comparative dimension between different cases and facts that meet under the same rule, equality goes beyond and "outside" the substance of the rule itself, acquiring an autonomous value useful in measuring fairness in serving justice. Peter Westen argues that the consistency in applying the rule cannot be measured by considering only the rule itself. *See generally* Westen, *supra* note 52. And as Steven Burton highlights, rules are also discovered in the process of determining the similarity or differences between and among cases. *See* Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1143 (1982).

60. Marcus G. Singer, *Generalization in Ethics*, 64 MIND 361, 362–72 (1955).

61. Tax crimes are a very good example of the unfair advantage of freeloaders who evade tax. *See* JOEL FEINBERG, HARM TO OTHERS 226 (1984). As Julie R. O' Sullivan states, "tax cheats make the law-abiding feel like suckers in paying their fair share; insider traders cause average investors to shun a financial marketplace perceived to be rigged by the unfairly enlightened . . . ." O'Sullivan, *supra* note 2, at 1053.

recognition of those harmful actions and events cannot be measured.[62]

How can a different response from the state be justified depending only on the ontological status of the agent? What does this status have to do with the justified imposition of criminal law? And how can a private response to collective injuries be fair, particularly when a state assumes the monopoly of criminal justice? The representative and owner of the state's response cannot act as one with a private and arbitrary sharing of responsibility, much of which is defined and controlled by an agency outside of the state's control.

Abolishing corporate criminal liability invites the state to disregard its most basic duty of pursuing the common good, through criminal law, in ways that are equal and just. The state's omission fails to "positively inculcate societal values and signal that those who transgress those values will suffer accordingly."[63] The meaning and purpose of substantive criminal law are reduced to mere punishment.[64]

At the same time, it is important to recognize how the criminal law, in more conventional ways, may be employed (or over-employed) as an instrument of oppression. The likelihood of this possibility increases when the state's most formal responses are reserved for the disenfranchised poor and abolished for the most powerful, influential, and affluent. As Braithwaite and Pettit conclude, "inequality based on chance should be less a concern to public policy than inequality based on power or class."[65] These inequalities "depending on (human) convention,"[66] to borrow from Rousseau, demand not the retreat of the state but the state's recognition. Otherwise, the state has failed.

IV. PERENNIAL QUESTIONS

The idea of a "good citizen" corporation in the United States is much as it was nearly three decades ago. It was and still is a clever idea sold to a large group of interested stakeholders that regulation starts with the integrity of one's own business; that incentives within firms to be law-abiding must be in place; that corporate culture and leadership are powerful correlates of citizenship; and that, ultimately, the state is in an enviable position to police the private sector. Win Swenson of the United States Sentencing Commission once opined, "[i]n very simple terms, you might say that the prevailing system was characterized by 'speed trap enforcement' and a 'circle the wagons' corporate response."[67] Enforcing the criminal law with corporations is like the state police patrolling our nation's highways. With millions of miles of open road, patrol cars can only do what they can do. When fortunate enough to catch a speeding car (or fraudulent corporate scheme), everyone knows that there were many more offenders and offenses that ultimately defied detection.

This "speed trap enforcement" analogy to the government's approach to corporate criminal law enforcement prompted a realization of the vitality of the private sector's partnership. The resulting "carrot and stick" approach, at least in theory, pried the private

62. *See generally* WEISBURD ET AL., *supra* note 20.

63. O'Sullivan, *supra* note 2, at 1055.

64. *Cf.* Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1029 (2022) (exploring the idea of building something else than criminal law to address corporate wrongdoing).

65. BRAITHWAITE & PETTIT, *supra* note 49, at 199–200.

66. ROUSSEAU, Jean-Jacques, DISCOURS SUR L'ORIGINE ET LES FONDEMENTS DE L'INEGALITÉ PARMI LES HOMMES 167 (GF Flammarion ed., 1992).

67. *See* U.S. SENT'G COMM'N, *supra* note 32, at 26 (discussing corporate governance and crime).

sector's door open, moving and then shifting policing power down the corporate hierarchy. Over time, this concession obviated the need for an active public sector role and investment, all the time assuming private cops (compliance, legal, audit, risk, and accounting professionals) would pick up the slack. But with the creeping failure of the state came a private sector more than willing to simply pay the price of compliance—regardless of any change in behavior or care levels—often calibrated to the extent of their wrongdoing. In short, there is a widespread accommodation to both a public/private failure. The state has graciously privatized the "enforcement problem," delegating regulation to the regulated. There are now roads without speed limits, private patrol cars without flashing lights and loud sirens, and cars are going at record speeds. And unarmed officers are simply handing out tickets that best estimate the speed at which cars most likely traveled.

The very idea of our public and private sector enforcement failures—including musings over the fairness of abolitionism—comes as quite a surprise to functionaries in jurisdictions around the world seeking best practices from, admittedly, an "exceptional" nation. American corporate criminal justice appears attractive enough that sister jurisdictions changed course to match ours, even those traditionally opposed to the idea of collective or organizational responsibility. By the end of the twentieth century, some semblance of corporate criminal law was widely accepted in both common law and civil law countries.[68] Encouraged in part by the bravado of America's confessed sense of legal exceptionalism, European countries fell in line.[69] Portuguese criminal law adopted criminal liability of corporations in 1984, French criminal law in 1994, and Belgian law in 1999.

In recent years, countries traditionally averse to criminal liability of corporations embraced corporate criminal liability, such as Spain in 2010.[70] In addition to the legal systems already mentioned, corporate criminal liability appears now in Austria, Denmark, Estonia, Slovenia, Slovakia, the Netherlands, Finland, Hungary, Ireland, Luxembourg, and Switzerland. The fidelity to *societas delinquere non potest*, at least formally, remains in some countries, such as Bulgaria, Greece, Italy, Lithuania, or Germany.[71] Remarkably, though, there exists an ongoing dialogue in Germany (one of the latest bulwarks in reserving the most formal of social controls—criminal law—to physical persons) about introducing corporate criminal liability. Recently, the German Minister of Justice announced a draft bill to fight corporate crime, followed by an improved draft of the new Act to strengthen the integrity of German companies, especially the largest corporations.[72] It seems corporate criminal liability found legitimacy, at least on a political level. What

68. *See generally* Markus D. Dubber, *The Comparative History and Theory of Corporate Criminal Liability*, 16 NEW CRIM. L. REV. 203 (2012) (providing a comparative analysis of the history and theory of corporate criminal liability in common law and civil law systems).

69. *See* Jeffrey S. Parker, *Corporate Crime, Overcriminalization, and the Failure of American Public Morality*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 407, 407 (F.H. Buckley ed., 2013).

70. *See* NORBERTO JAVIER DE LA MATA BARRANCO, JACOBO DOPICO GÓMEZ-ALLER, JUAN ANTONIO LASCURAÍN SÁNCHEZ & ADÁN NIETO MARTÍN, DERECHO PENAL ECONÓMICO Y DE LA EMPRESA [ECONOMIC AND BUSINESS CRIMINAL LAW] 49 (2018).

71. *Cf.* SUSANA AIRES DE SOUSA, QUESTÕES FUNDAMENTAIS DE DIREITO PENAL DA EMPRESA 82 (2019).

72. *See Gesetz zur Stärkung der Integrität in der Wirtschaft* [*Business Integrity Strengthening Act*], BUNDESMINISTERIUM DER JUSTIZ [FEDERAL MINISTRY OF JUSTICE], https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Staerkung_Integritaet_Wirtschaft.html [https://perma.cc/Q23J-CDZN].

message does the world receive through our flirtation with—and possible concession to—state failure?

Sister jurisdictions may not know that much of the descriptive account of the corporate criminal law's imperfections is old and stale. After more than a century of experimentation, perennial questions remain largely unaddressed about how to deploy this important instrument of the state. In this Article, we conclude with some critical observations about these perennial questions.

First, nothing has contributed more to the corruption of corporate criminal liability than blind beliefs in the power and authority of the substantive law. Subscribing to the state's obvious domination in the administration of corporate criminal justice is a concession that appearance matters more than influence and effectiveness—that the appearance of indignation over organizational wrongdoing is a reasonable substitute for a measured delivery of social control. We hear all too regularly about the evils of greenwashing by companies, evidence of a kind of inauthenticity that is exclusively associated with the private sector. The public sector's inauthentic façade demands more attention.

Second, there really is no villain in the kinds of games played by regulators and the regulated. Rather, it is the absence of government leadership, a genuine public partner in corporate crime control, that matters. No stakeholders extended beyond their limited self-interests to make the regulated/regulator roles effective and efficient. No one is out front defending the necessary conditions that ensure an equal application of rules. Sniping at stakeholders is tempting, if not seductive, but, ultimately, unproductive.

And finally, it is perilous hoping for equality in a hopelessly unequal world. The very thought of abolishing corporate criminal law because of inequities raises the question: Would we ever consider the same with the state's failures in bringing violent and property offenders to justice? Abolish the state's role with the most powerful "persons" and keep the disaffiliated poor from clogging our courts, jails, and prisons? To abolish corporate criminal liability sends a very disturbing message about who in society is cast as "bad" and deserving of the kind of moral disapprobation that the criminal law envisions.[73]

This very message about who is good and bad has already been sent but in more muted tones. Consider, for example, the many voices raising concerns over the collateral consequences of entity liability. Without controversy, prosecutorial guidelines urge functionaries to consider how the criminalization of corporate entities could possibly affect all interested stakeholders. Should we care about the potential losses to employees, investors, pensioners, and customers with criminal liability—those who benefit most from corporate wrongdoing? The Yates Memorandum reinforces this widely shared concern of unfair and unjust externalities of all sorts.[74] Where, though, is there any comparable concern over the many collateral consequences for those accused of state criminal law violations? Alas, this is not a symposium about what the world would be like without the criminal law—for reasons we should graciously and humbly own.

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73. Simply put, resources should not disproportionately target the powerless—those poor and historically disadvantaged. *See* O' Sullivan, *supra* note 2, at 1058–59.

74. Memorandum from Sally Q. 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/dag/file/769036/download [https://perma.cc/4BSQ-BTMV].