Working
Draft

2/1/2017

THE MISSING ACCOUNT OF PROGRESSIVE CORPORATE CRIMINAL LAW

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INTRODUCTION

This seems to be an ideal time to revisit the normative, doctrinal, and policy-laden foundations of the corporate criminal law. With renewed calls for a repeal of the most costly of corporate regulations and reforms, it is tempting to speculate about the future of corporate compliance and corporate criminal liability.[1] A host of academics continue to worry about the many hard-to-quantify direct and collateral costs of corporate criminal liability.[2] Regulators and legislators still question whether some financial institutions are too big to prosecute, take to trial, and convict.[3] The general public fears that justice for those individuals responsible for the global debt crisis will

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1 See, e.g., Tom Fox, TRUMP AND COMPLIANCE: THIS CONVERSATION IS JUST GETTING STARTED (2016) (discussing the future prospects of the Foreign Corrupt Practices Act); Robert Hahn, *Playing the Long Game on Regulation*, BROOKINGS, January 13, 2017 (available at: https://www.brookings.edu/opinions/playing-the-long-game-on-regulation/) Bill Coffin, *What's Next for Compliance Under President Trump?* COMPLIANCE WEEK, November 16, 2016 (speculating on how a Trump presidency will affect the compliance industry); Ben Dipietro, *Does Trump Spell End of 'Era of Compliance'?* WALL STREET JOURNAL, November 21, 2016; Bruce Carton, *What Does President Trump Mean for the SEC?* COMPLIANCE WEEK, November 9, 2016; Ben Rossi, *What Brexit and Trump Mean for Compliance*, INFORMATION AGE, December 6, 2016; Jacob M. Schlesinger, *Donald Trump Took Aim at Dodd-Frank on the Stump*, WALL STREET JOURNAL, November 9, 2016

2 William S. Laufer, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2008) (discussing the longstanding ambivalence of "compliance stakeholders" using the blunt instrument of the criminal law with corporations); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Andrew Weismann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1325–26 (2007); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?* 109 HARV. L. REV. 1477, 1486 (1996)

3 *See*, Committee on Financial Services, U.S. House of Representatives, TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE: REPORT PREPARED BY THE REPUBLICATION STAFF OF THE COMMITTEE ON FINANCIAL SERVICES, July 11, 2016. See also: Office of Sen. Elizabeth Warren, *Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy* (Jan. 2016), http://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf; Brandon L. Garrett, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014)

remain undistributed.[4] Entity liability, we are told by the Department of Justice, should take a back seat to individual liability unless justice may not be accomplished otherwise.[5]

These conventional intuitions, musings, and fears are found scattered in four relatively distinct ideological camps. First, there are *stalwart advocates* of both individual and entity liability for "corporate" wrongdoing. For some, corporate social controls are seen as a condition precedent to achieving justice with wayward and rogue capitalists.[6] This camp is agnostic to the idea of corporate personhood, embraces the discretionary use of parallel individual and entity liability, and is not motivated by any particular penal philosophy.[7] What matters is accountability for those responsible in the form of criminal liability.[8]

A second faction of sharply witted neoconservatives and right-of-center *corporate libertarians* regularly call on Congress to roll back the litany of federal criminal provisions and laws, including burdensome corporate regulations with criminal penalties.[9] The allergy of some committed

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[4] For a recent summary of the government's enforcements efforts, *see*: *Principal Deputy Associate Attorney General Bill Baer Delivers Remarks at Society of Corporate Compliance and Ethics Conference*, United States Attorney's Office, Southern District of New York Press Release, September 27, 2016 (available at: https://www. justice. gov/ opa/speech/principal-deputy-associate-attorney-general-bill-baer-delivers-remarks-society-corporate). For a discussion of a responsibility remainder, more generally, *see*, Amy J. Sepinwall, *Crossing the Fault Line in Corporate Criminal Law*, 40 J. CORP. L. 102 (2014)

[5] Sally Q. Yates, *Individual Accountability for Corporate Wrongdoing*, United States Department of Justice, September 9, 2015 ("Yates Memorandum"). For a post-Yates Memorandum eulogy, *see:* Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51 (2015); for a pre-Yates look at the perverse effects of pushing liability down the corporate hierarchy, *see:* William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors,* 87 IOWA L. REV. 643, 653 (2002). An early and prescient call for individual liability may be found in Brent Fisse and John Braithwaite. CORPORATIONS, CRIME AND ACCOUNTABILITY (1993). See also, Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L. J. 857 (1984) (discussing enterprise versus individual liability)

[6] *See*, more generally, Laufer, *supra* note 2; Samuel W. Buell, *The Blaming Function of Entity Criminal Liability,* 81 IND. L.J. 473, 494–497 (2006); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009)

[7] Steven Walt and William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions,* 18 AM. J. CRIM. L. 263, 278 (1991)

[8] *See,* Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468 (1988); Brent Fisse & John Braithwaite, *supra* note ; Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000)

[9] For a discussion of "corporate libertarians" *see* David C. Korten, WHEN CORPORATIONS RULE THE WORLD (2017). For a variation of this theme, *see*: John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV.

conservatives to the illogical metaphysics of a corporate criminal law is expressed with a genuine disbelief about anthropomorphizing the firm.[10] Their core concern, though, has nothing to do with complex questions of corporate ontology. It is all about unjustifiable externalities. This century-old fiction of corporate criminal liability was crafted at a time when there was no recognizable regulatory state and misfeasance in railroad travel across state lines was the pressing federal concern.[11] Today, over-criminalization is of far greater concern than ensuring threshold levels of criminalization.[12]

1329 (2009); John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 LOY. U. CHIC. L. J. 507 (2008); John Hasnas, *Up from Flatland: Business Ethics in the Age of Divergence*, 17 BUS. ETHICS Q. 399 (2007); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005). These voices join a chorus of academics raising concerns with overcriminalization. *See, e.g.,* Douglas Husak, *Overcriminalization* (2008); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995)

[10] *See*, Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, in W. S. Laufer and F. Adler, eds., ADVANCES IN CRIMINOLOGICAL RESEARCH 31 (1989)

[11] The outcome of this conservative and neoliberal position is a familiar and somewhat old abolitionist rant, see: Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21 (1957) ("Many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is… corporate criminal liability…. Nobody bred it, nobody cultivated it, nobody planted it. It just grew."); Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability,* 17 MANAGERIAL & DECISION ECON. 381 (1996). For a discussion of the interstate expansion of the railroads and early calls for federal incorporation, *see:* J. Newton Baker, *Regulation of Industrial Corporations*, 22 YALE L.J. 306 (1913); Frederick H. Cooke, *State and Federal Control of Corporations,* 23 HARV. L. REV. 456 (1910) (discussing the relative benefits of state versus federal control); Max Thelen, *Federal Incorporation of Railroads*, 5 CAL. L. REV. 273 (1917) (arguing against existing plans and proposals for a federal incorporation law); H. L. Wigus, *The Need for a National Incorporation Law*, 2 MICH. L. REV. 359 (1904) (arguing in favor of a national incorporation law); William E. Church, *The Tramp Corporation*, 5 AM. LAW. 13 (1903) (discussing the concern over issues of state sovereignty and unbridled corporate power). Not so coincidentally, turn of the century progressives were thinking of how science could inform better management, *see* W. J. Cunningham, *Scientific Management in the Operation of Railroads*, 25 THE QUARTERLY JOURNAL OF ECONOMICS, 539 (1911); H. B. Drury (1915), SCIENTIFIC MANAGEMENT: A HISTORY AND CRITICISM (1915); S. Haber, EFFICIENCY AND UPLIFT, SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1880-1920 (1964)

[12] *See,* Douglas Husak, OVERCRIMINALIZATION (2008); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2004); Lisa H. Nicholson, *Sarbanes-Oxley's Purported Over-Criminalization of Corporate Offenders*, 2 JOURNAL OF BUSINESS & TECHNOLOGY LAW 43 (2007). For some historical antecedents, see: Sanford H. Kadish, *The Crisis of Overcriminalization*, 37 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 157 (1967). For a critique of the criminalization of businesses, *see*: James V. DeLong, *The New "Criminal"*

A third group seeks justice for wrongdoing in corporations, but rejects the idea of corporate moral agency.[13] These commentators, though, set their normative sights on the attribution of moral agency to corporate functionaries who are most deserving.[14] Moral agency should not attach to any agent no matter where positioned in the corporate hierarchy. For *normative thinkers*, the criminal law reaches only high-level managers, responsible corporate officers, or blameworthy members of the board of directors.[15]

The final contingent includes a small cadre of *critical criminologists* who see important relations between the state and the private sector that compromise regulatory decision making, distort the construction of what is labeled criminal, and misattribute who, ultimately, is justly to blame for corporate wrongdoing.[16] This often maligned collection of intellectual disobedients is long on critiques of positive theories, short on practical regulatory solutions, and quite justifiably motivated by fiery rhetoric.[17]

This Article explores an overlooked and largely missing progressive account of corporate criminal liability. This account builds a bridge between some of the foundational principles of twentieth century progressivism and its varied contemporary iterations. The structure of the bridge consists of compliance principles and regulatory instruments—an artifact of how corporate criminal law is translated into regulatory practice. The central role of science, scientific management, and associated social controls define the bridge's architecture. The hope is that these connections might inspire a new generation of *modern progressives* to assume these foundational principles in

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Classes: Legal Sanctions and Business Managers, in G. Healy (ed.) GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 9 (2004)

[13] Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 45 BUSINESS ETHICS QUARTERLY 531 (2003); David Rönnegard, THE FALLACY OF CORPORATE MORAL AGENCY (2015)

[14] *See, e.g.,* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411(2012)

[15] *See, e.g.,* Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV 371 (2014)

[16] *See,* Dawn L. Rothe and David O. Friedrichs, *The State of the Criminology of Crimes of the State.* 33 SOCIAL JUSTICE 147 (2006); R. J. Michalowski and R. C. Kramer (eds.), STATE-CORPORATE CRIME: WRONGDOING AT THE INTERSECTION OF BUSINESS & GOVERNMENT (2006); Dawn L. Rothe, Jeffrey Ian Ross, Christopher W. Mullins, David Friedrichs, Raymond Michalowski, Gregg Barak, David Kauzlarich, and Ronald C. Kramer, *That Was Then, This is Now, What About Tomorrow? Future Directions in State Crime Studies*, 17 CRITICAL CRIMINOLOGY 3 (2009). For a general review of critical criminology, *see* Freda Adler, Gerhard O.W. Mueller and William S. Laufer, CRIMINOLOGY 9TH EDITION (2017)

[17] *See, e.g.,* R. C. Kramer, R. J. Michalowski, D. and Kauzlarich, *The Origins and Development of the Concept and Theory of State-Corporate Crime*, 48 CRIM. & DELIN., 263 (2002); David O. Friedrichs, *State-Corporate Crime in a Globalized World: Myth or Major Challenge?* In G. W. Potter (Ed.), CONTROVERSIES IN WHITE-COLLAR CRIME (2002)

combatting regulatory convention and taming wrongdoing corporations.[18] The construction of this bridge is, admittedly, treacherous.[19] There is wide ranging historical criticism of the ideas and positions of progressivism, and the real contours of the "progressive movement." [20] One should be cautious in looking for solid ground from the early 1900s that might support the weight of a "modern" progressivism. However, the cherished place of science, science management, social control, and the power of law to address social welfare resonate today in ways that makes this bridge so very irresistible.[21] It is also powerfully attractive because of the reticence of present-day progressives to embrace their intellectual heritage while pursuing legal, regulatory, and government reforms that would result in greater corporate responsibility and accountability.[22] Modern progressive voices on how the criminal law may tame corporate wrongdoing are rarely, if ever heard, and

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[18] Some progressives find important parallels and differences between an old and possibly new progressivism. *See, e.g.,* Paul Glastris, *Why a Second Progressive Era Is Emerging-and How Not to Blow It*, WASHINGTON MONTHLY, January/February, 2015 (available at: http://washingtonmonthly.com/magazine/janfeb-2015/why-a-second-progressive-era-is-emerging-and-how-not-to-blow-it/ ("As many observers have noted, there are arresting parallels between our age and the 1890s, the dawn of the Progressive Era.") A share of the inspiration for the more modern account of progressivism in this Article comes from Ralph Nader, Mark Green, Joel Seligman, and Christopher Stone, *See, e.g.,* Ralph Nader, THE CONSUMER AND CORPORATE ACCOUNTABILITY (1973); Ralph Nader and Mark J. Green, CORPORATE POWER IN AMERICA (1973); Ralph Nader, Mark Green, and Joel Seligman, TAMING THE GIANT CORPORATION: HOW THE LARGEST CORPORATIONS CONTROL OUR LIVES (1976); Christopher Stone, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975)

[19] *See, e.g.,* Michael McGerr, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA (2003)

[20] For some of the more pointed criticism, *see:* Daniel T. Rodgers, *In Search of Progressivism*, 10 REV. IN AMER. HIST. 113 (1982); Peter G. Filene, *An Obituary for 'The Progressive Movement'*, 22 AMER. QUARTERLY 20 (1970); John D. Buenker, *The Progressive Era: A Search for a Synthesis*, 51 MID-AMERICA 175 (1969): John D. Buenker, John C. Burnham, and Robert M. Crunden, PROGRESSIVISM (1977); Arthur S. Link, *What Happened to the Progressive Movement in the 1920s?* 64 AMERICAN HISTORICAL REVIEW 833 (1959). For a neo-progressive take, *see:* Cass R. Sunstein, *A New Progressivism*, 17 STAN. L. & POL'Y REV. 197 (2006)

[21] The essence of the progressive movement in law is well captured by Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV 149, 150 (1995). In forthcoming work, Prof. Hovenkamp offers an appropriately critical take the role of race in the old progressive movement. See, Herbert Hovenkamp, *Racism and Public Law in the Progressive Era*, unpublished paper, October, 2016.

[22] *See* Glastis, *supra* note at ("But for the most part today's left-leaning progressives are almost entirely focused on politics, economic justice, social issues, and the influence of money in politics. These are important subjects. But the vast complex of government is largely a black box to these folks."); Herbert Hovenkamp, *Appraising the Progressive State*, ___IOWA LAW REV.___ (2017)

vastly overshadowed by a coherent slate of progressive reforms to corporate governance.[23]

Part I of this Article explores the missing account of progressivism in the substance and practice of corporate criminal law. This is followed by a recognition of a remarkable convergence of corporate compliance technology, standards, measures, practices, and insights from conventional, plural, and polycentric theories of regulation. This is a convergence of informal corporate social controls that offers a significant opportunity for the adoption of progressive interests, practices, and advocacy.

Part II provides some reasons for the consideration of progressive ideals in corporate criminal law, from our collective failure to express moral indignation over corporate wrongdoing to the value of justifying this body of law in theories of desert. Next, the two pillars of twentieth century progressivism, the instrumental use of science and social control, are explored. Measures of both corporation and government control dominated progressive proposals for reform.[24] Progressive principles borrowed from the last century should support the consolidation of more rigorous compliance measures, measurement, and standards into formal regulatory policies. Progressive thinking about new models of regulatory-regulated engagement also are reviewed with an appreciation for the many challenges accompanying the coordinated delegation of regulation to firms.[25]

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[23] A range of progressive reforms are regularly offered in an effort to "crack down" on corporate crime. Virtually all progressive proposals, however, neglect a consideration of corporate criminal law, and are a grab bag of largely untested interventions. For a representative list of proposals *see, e.g.*, Oregon Progressive Party, *Nader Proposes Crackdown on Corporate Crime, Fraud and Abuse,* unpublished paper, September 24, 2010 (available at http://progparty.org/issues/market/corporate_crime). Governance reforms range from dismantling shareholder supremacy, ending Delaware's dominance, and limiting limited liability to limiting corporate intervention into political affairs. See Kent Greenfield and Daniel Greenwood, *An Incomplete List of Possible Progressive Reforms in Corporate Governance*, unpublished paper, December, 2005. *See also* Kent Greenfield, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2008); Kent Greenfield, *Saving the World with Corporate Law*, 57 EMORY L.J. 947 (2007). Cf. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997)

[24] *See*, Benjamin Parke DeWitt, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN 113-161 (1915) (discussing how progressive's view the rise and concentration of American business, along with the role of government)

[25] Inspiration for this discussion of novel informal social controls comes from the work of Grabosky, Parker, Gunningham, Kagan, Coglianese, Orts, and other leading regulatory theorists. For concerns with the delegation of regulatory discretion to private firms, *see* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State,* 56 DUKE L. J. 377, 386 (2006). *Cf.* Cass Sunstein, *Administrative Substance*, 40 DUKE L.J. 607, 627 (1991)

A "compliance conundrum," it is argued, undermines corporate commitments to compliance science, technology, cooperation, and more effective social controls. This conundrum reflects a deeply imbedded conflict in firms over how to diligently identify deviance, recognize the inevitability of a base rate of wrongdoing, honor disclosure requirements and, at the same time, avoid entity liability. This conundrum facilitates a "compliance game," a regulatory status quo where corporate and government players placate each other with compliance expenditures and an outcome that often has little to do with ensuring compliance. This game is marked by disincentives for firms to take the measurement of compliance seriously, and a regulatory lethargy to resort to and require anything resembling a compliance science. This game is profitable for many stakeholders, including an ever-burgeoning legion of compliance, regulatory, and legal risk professionals. It does, however, take casualties, including the legitimacy of formal social controls that regulate firms, particularly for corporations of scale and power. Ultimately, the most significant loss is one of justice undone, or undistributed corporate criminal justice.[26] With a glimmer of hope and small dose of optimism, this Article concludes by considering the unique position of modern progressives to promote corporate criminal justice by disrupting the compliance game and addressing the conundrum.

I. WHAT IS MISSING IN CORPORATE CRIMINAL LAW?

In the entrenched and divergent accounts of corporate criminal law there is a need for a reasonable counter to entity liability naysayers, an alternative to abolitionism that offers more than simple and unfounded hypotheses of how the criminal law deters corporations.[27] Also missing in these divergent accounts—from the positions of stalwart advocates to normative thinkers—is an antidote to the kind of corporate regulation that

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[26] For more on the notion of an "undistributed" justice, Laufer *supra* note

[27] It is remarkable and yet true that systematic reviews of corporate crime deterrence research reveal no systematic evidence of effectiveness. *See*, Sally S. Simpson, Melissa Rorie, Mariel Alper, Natalie Schell-Busey, William S. Laufer, and N. Craig Smith, CORPORATE CRIME DETERRENCE: A SYSTEMATIC REVIEW (2014); Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie, and Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence* 15 CRIM. & PUBLIC POL. 387 (2016); Peter C. Yeager, *The Elusive Deterrence of Corporate Crime*, 15 CRIM. & PUBLIC POL. 439 (2016). Cf. Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295 (2008). For an excellent consideration of how deterrence might be achieved with a commitment to responsive regulatory regimes, see: Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591 (2006). For a fascinating empirical consideration of the motives to commit fraud, with significant consequences for thinking about the possible power of deterrence, *see* Utpal Bhattacharya and Cassandra D. Marshall, *Do They Do it for the Money*? 18 J. OF CORP. FIN. 92 (2012)

encourages compliance expenditures to run wild and unaccounted for as untested proxies of organizational due diligence.[28] Absent is a desert-based account that captures the moral indignation that stakeholders have, or should have, with the corporate malfeasance of large and powerful private sector institutions.[29] It is also difficult to find any regulatory approach, including those taken by creative "new governance" theories, with even a marginal chance of being integrated into existing "hard law" practices.[30]

As concerning, there is no coherent justification for why criminal justice expenditures so generously support the policing, processing, and confining of people of color from urban populations of the disenfranchised and disaffiliated poor.[31] Government expenditures are decidedly tilted toward

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[28] *See, e.g.,* A. Bhimani, *Risk Management, Corporate Governance and Management Accounting: Emerging Interdependencies*, 20 MANAGEMENT ACCOUNTING RESEARCH, 2 (2009); M. L. Frigo and R J. Anderson, A Strategic Framework for Governance, Risk and Compliance," 90 STRATEGIC FINANCE, 20 (2009); N. Marks, *Defining GRC*, 67 INTERNAL AUDITOR 25 (2010); M. Rasmussen, *An Enterprise GRC framework,* 66 INTERNAL AUDITOR 61 (2009); A. G. Tarantino, GOVERNANCE, RISK, AND COMPLIANCE HANDBOOK *(2008)*; Open Compliance and Ethics Group (OCEG). 2009. GRC CAPABILITY MODEL "RED BOOK" 2.0. Retrieved from http://www.oceg.org/resource/red-book-20-basic-member-edition. Governmental prescriptions, it is argued, encourage the kind of due diligence imagery, rhetoric, and posturing that staves off the regulatory scrutiny necessary to fairly and justly oversee firm behavior. See, e.g., William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L. J. 157 (1996)

[29] *See* William S. Laufer and Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability,* 37 AM. CRIM. L. REV. 1285 (2000) (arguing for the importance of a desert-based account)

[30] Priority should be given to the correspondence between conceptions of corporate fault, as enterprise wrongdoing, and the commitment to corporate compliance expected, encouraged, and rewarded by prosecutors and regulators. *See, e.g.*, Miriam Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009) (describing "new governance" as conceptually quite different from the "hard law" approaches taken by DOJ in their discretionary use of the corporate criminal law). Cf. Peter N. Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance*, 8 GOVERNANCE 527 (1995); Cary Coglianese and David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y. REV. 691 (2003); Cary Coglianese, *Policies to Promote Systemic Environmental Management,* in C. Coglianese & J. Nash (eds.) REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS (2001); Neil Gunningham, *From Compliance to Best Practice in OHS: The Role of Specification, Performance, and System-Based Standards*, 9 AUSTRALIAN J. OF LABOR L. 221 (1996). For a discussion of the principles behind new governance approaches, *see:* Bertelsmann Stiftung, FOSTERING CORPORATE RESPONSIBILITY THROUGH SELF-AND CO-REGULATION: SECTOR SPECIFIC INITIATIVES AS COMPLEMENTS TO PUBLIC REGULATION 17 (2013)

[31] *See, e.g.*, John Hagan, WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN (2012); Pamela Irving Jackson and Leo Carroll, *Race and the War on Crime: The Sociopolitical Determinants of Municipal Police Expenditures in 90 Non-Southern US Cities*, 54 AM. SOCIOLOGICAL REV. 290 (1981); Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006);

aggressively pursuing the poor and away from giving priority to bringing institutional offenders of scale and means to justice.[32] This is not to suggest that local and municipal policing expenditures are not needed or unjustifiable. The point is simply that the scarcity of local, state, and federal resources to investigate, pursue, and combat corporate deviance, relative to street crime, requires a far more thoughtful and careful explanation. Such tilted expenditures should not go unchallenged.[33]

Beyond government expenditures, advances in urban policing strategies, supported by sophisticated mapping and extensive data from evidence-based and place-based criminology, have no equivalent in the identification, investigation, and prediction of corporate offenses and offenders.[34] The failure to learn and heed lessons from the science on intelligence-led policing street crime is conspicuous.[35] This same point may

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Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability,* 149 U. PA. L. REV. 1295 (2001); James D. Unnever, Michael L. Benson, and Francis T. Cullen, *Public Support for Getting Tough on Corporate Crime: Racial and Political Divides*, 45 J. OF RES. IN CRIM. AND DELINQUENCY 163 (2008); Jeffrey Reiman and Paul Leighton, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE (2015); Jerome G. Miller, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996)

[32] Local and state criminal justice expenditures dwarf federal expenditures across the criminal process, *see, e.g. Justice System Direct and Intergovernmental Expenditures*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2016) (available at: http:// www. albany. edu/ sourcebook /pdf /t13.pdf). Backing in and out of state and federal data yield the same result: A simply overwhelming expenditure of criminal justice resources on street crime relative to corporate crime.

[33] William J. Chambliss, POWER, POLITICS, AND CRIME (1999) (discussing class and race-based reasons for an expansion of the criminal justice bureaucracy); Jeffrey Reiman and Paul Leighton, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE (2015) (reviewing the ways in which resources are disparate)

[34] *See,* e.g., Wim Bernasco and Richard Block, *Where Offenders Choose to Attack: A Discrete Choice Model of Robberies in Chicago,* 47 CRIMINOLOGY 93 (2009); Wim Bernasco and Paul Nieuwbeerta, *How Do Residential Burglars Select Target Areas? A New Approach to the Analysis of Criminal Location Choice*, 45 BRIT. J. OF CRIMINOLOGY 296 (2005); Adam Boessen and John R, Hipp, *Close-Ups and the Scale of Ecology: Land Uses and the Geography of Social Context and Crime,* 53 CRIMINOLOGY 399 (2015); Anthony Braga and Ronald V. Clarke, *Explaining High-Risk Concentrations of Crime in the City: Social Disorganization, Crime Opportunities, and Important Next Steps*, 51 J. RES. IN CRIME AND DELINQ. 480 (2014); Paul J. Brantingham, *Crime Diversity*, 54 CRIMINOLOGY 553 (2016); David L. Weisburd, *The Law of Crime Concentration and the Criminology of Place*, 53 CRIMINOLOGY 133 (2015)

[35] Lawrence W. Sherman, EVIDENCE-BASED POLICING (1998); David Weisburd, Elizabeth R. Groff, and Sue-Ming Yang, THE CRIMINOLOGY OF PLACE: STREET SEGMENTS AND OUR UNDERSTANDING OF THE CRIME PROBLEM (2012); Paul J. Brantingham and Patricia L. Brantingham, PATTERNS IN CRIME (1984); John E. Eck, Spencer Chainey, James G. Cameron, Michael Leitner, and Ronald E. Wilson, MAPPING CRIME: UNDERSTANDING HOT SPOTS (2005)

be made about all evidence-based advances at each and every stage of the criminal process, including the successful interventions, treatments, reforms, and strategies chronicled in the Campbell Collaboration's systematic reviews of experimental research.[36]

Finally, corporate criminal law remains decidedly personal, even in its vicarious form. The substantive law, however, lags our understanding of the complexity of organizational life and organizational science. Moreover, policies associated with its use remain ill-conceived, and there is at best a half-hearted embrace of compliance science by those inside and outside of the firm, those entrusted with policing and ensuring the compliance function. Resisting the kind of compliance science that recognizes and supports the idea of an enterprise fault is at the core of what is missing in all accounts.[37] The hesitance to see advances in compliance science and technology as an opportunity to more fairly regulate, to be bound by reasonable and measured social controls, and to aspire to more creative innovations in regulation has roots in a longstanding ambivalence with the attribution of fault to corporations. This ambivalence is quite defining for each and every compliance stakeholder.[38]

Shining light on what is missing in corporate criminal law highlights limitations in doctrine, philosophy, and practice. It is not an exaggeration to say that this body of law is without a firm and coherent normative foundation.[39] The criminal law that is applied to corporations is nothing more than a patchwork of largely disregarded black letter principles of vicarious fault tacked together with an inconsistent set of prescriptive prosecutorial and sentencing guidelines.[40] The discretionary use of these guidelines by prosecutors determines charging and, thus, plea agreements, sentencing outcomes, and post-sentencing practices.[41] That prosecutorial discretion governs the entire criminal process is concerning for a host of reasons, not the least of which is that courts rarely have an opportunity to rule on substantive points of corporate criminal law, and legislatures fail to touch and

[36] *See*, Campbell Collaboration (https://campbellcollaboration.org/library.html)

[37] *See*, Peter C. Yeager, *Science, Values and Politics: An Insider's Reflections on Corporate Crime Research*, 51 CRIME, L. & SOC. CHANGE 5 (2009). For an excellent discussion of compliance theories and motivation, *see*: Julien Etienne, *Compliance Theory: A Goal Framing Approach*, 33 LAW & POLICY 305 (2011)

[38] *See*, Laufer *supra* note at to

[39] *See* Laufer, *supra* note

[40] *See, e.g.,* Laufer, *supra* note 1 at xiii ("We are left with century-old liability rules that are resurrected for reasons of prosecutorial convenience or symbolic need. The only substantive reform came in piecemeal fashion or through the back door of sentencing and prosecutorial guidelines.") For cases following *Hudson*, *see:* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance,* 52 VAND. L. REV. 1341 (1999)

[41] For a very insightful review of post-sentencing reforms, *see* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007)

mature its general part. Practitioners and academics thirst for federal and state decisional law that will begin to recognize basic fault principles. What they get instead is a corporate criminal law that is all too often conflated into canned compliance programs, practices, and functions that are played as a multi-stakeholder game.[42] When black letter law is applied, it is done so differently for firms that are small versus those of any scale whose prosecution may bring about significant collateral consequences, or even systemic risk.[43] That the playing field is still not level for small and big firms strongly should exercise both old and more modern progressives.

Unfortunately, for those looking for regulatory accountability, there are few good alternatives to wholly embracing or completely rejecting this unorthodox patchwork of criminal liability.[44] For those seeking to account for the decentered and plural nature of corporate regulation with new governance approaches, regulators offer no hint of relinquishing their formal grip on a brand of discretionary oversight and treatment of organizational actors that is often arbitrary, largely symbolic, and frequently determined by firm size and power.[45] For those looking to account for the influence of our complex political economy on the administration of corporate criminal law, there are sadly no reasonable alternatives.[46] And literally nothing is in public law for those interested in a new and more expansive regulatory architecture to accommodate the players and stakeholders of our interconnected global markets, e.g., models of private regulation, collaborative governance, and regulatory capitalism.[47] There is little choice but to hold on to the faint

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[42] *See infra* notes to

[43] Brandon L. Garrett, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (a seminal treatment of firm size and corporate criminal justice); William S. Laufer, *The Compliance Game*, In Eduardo Saad-Diniz, Dominik Brodowski, & A. Luiza (eds.), REGULAÇÃO DO ABUSO NO AMBITO CORPORATIVO: O PAPEL DO DIREITO PENAL NA CRISE FINANCEIRA (2015)

[44] *Cf.* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Theory*, 89 MINN. L. REV. 342 (2004); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goal*s, 37 L. & SOC'Y REV. 691 (2003); Christie Ford, *Towards a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757 (2005)

[45] Miriam Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009); Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1 (2002)

[46] *See*, Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. Q. 95 (2004) (arguably the first and most important treatment of this complex relationship)

[47] *See,* Sara Sun Beale and Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFFALO CRIM. L. REV. 89 (2004); Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955 (2008)

promise that regulators will coordinate with their counterparts around the world.[48]

Sadly, without obvious alternatives, regulatory and compliance costs continue to grow in ways disconnected—or not sufficiently connected—with legal requirements, regulatory risks, and actual compliance failures.[49] Conservative beltway think tanks estimate that the costs of federal regulations to the private sector exceed $1.80 trillion annually.[50] They reason that if federal regulation was its own economy, it would be the tenth largest in the world. And this excludes the regulatory administrative and policing costs that add an additional $59.5 billion.[51] For those who see regulatory compliance costs as another tax, the regulatory spending "tax" is greater than individual income and corporate income taxes combined.[52] Even assuming significant measurement error in these estimates, few dispute the enormity of the regulatory burden on businesses.[53] With a steep linear increase in compliance

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[48] *See, e.g.,* Department of Justice, Criminal Division, THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (2016) ("The Department is strengthening its coordination with foreign counterparts in the effort to hold corrupt individuals and companies accountable. Law enforcement around the globe has increasingly been working collaboratively to combat bribery schemes that cross national borders."). See also, Brandon L. Garrett, *Globalized Corporate Prosecutions*, 7 VA. L. REV. 1775 (2011)

[49] *See* Stacey English and Susanna Hammond, COSTS OF COMPLIANCE 2016 (2016) (available at: https://risk.thomsonreuters.com/content/dam/openweb/documents/pdf/ risk/ report/cost-compliance-2016.pdf). Julian R. Franks, Stephen M. Schaefer, and Michael D. Staunton, *The Direct and Compliance Costs of Financial Regulation*, 21 JOURNAL OF BANKING & FINANCE 1547 (1997); Gregory Elliehausen, *The Cost of Bank Regulation: A Review of the Evidence*, 84 FED. RES. BULL. 252 (1998); Winston Harrington, Richard D. Morgenstern, and Peter Nelson, *On the Accuracy of Regulatory Cost Estimates*, 19 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 297 (2000); James A. Millar and B. Wade Bowen, *Small and Large Firm Regulatory Costs: The Case of the Sarbanes-Oxley Act*, 11 CORPORATE GOVERNANCE 161 (2011); For a right critique of regulatory costs, *see* James L. Gattuso and Diane Katz, *Regulation: Killing Opportunity*, Backgrounder, No. 2961 (October 21, 2014)

[50] C. Wayne Crews, Jr., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2 (2016); for the official government report on federal regulatory costs, *see*: 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT (2016) (available at: https://www.whitehouse.gov/omb/inforeg_regpol_reports _congress). For an overall critique of regulatory cost estimates, *see* Robert W. Hahn and John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis,* 8 *YALE J. ON REG.* 233 (1991); James R. Chelius and Robert S. Smith, *Firm Size and Regulatory Compliance Costs: The Case of Workers' Compensation Insurance*, 8 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 193 (1987)

[51] *Id* at 16-18

[52] *Id* at 12

[53] See, e.g., Dieter Helm, *Regulatory Reform, Capture, and the Regulatory Burden*, 22 OXFORD REVIEW OF ECONOMIC POLICY 169 (2006); U.S. Government Accountability Office, REGULATORY BURDEN: MEASUREMENT CHALLENGES AND CONCERNS RAISED BY SELECTED COMPANIES (2013)

and regulatory risk staffing, particularly in the financial industry, one may ask how much responsibility the private sector should assume for self-policing and self-regulation without good compliance science?[54] Any answer to this question must attend to increasing concerns over individual liability for compliance and regulatory staff and, ultimately, the risks of an over-controlled compliance state in the private sector.[55]

II. A Compliance Convergence

This is an admittedly harsh critique of corporate criminal regulation. It would be unfair as well and quite incomplete, but for some more favorable reflection on how the corporate compliance industry has grown in response to certain regulatory reforms, threats of more aggressive corporate prosecutions, the availability of technology-driven risk and compliance applications, and the impressive marketing efforts by a large "business ethics" industry.[56] For example, the dramatic rise of both FinTech and RegTech applications and solutions lead to speculation about a transformative, if not paradigmatic shift in technology-driven compliance, e.g., the digitalization of compliance.[57] The vast disruptive potential of the

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[54] Corporate compliance staffing levels are at an historic high. For example, by 2015, JP Morgan had a compliance and regulatory staff of more than 43,000. See, PYMNTS, *Regulations, Regulators and The High Cost of Banking Compliance*, May 31, 2016 (available at: http://www.pymnts.com/news/security-and-risk/2016/banks-spend-and-hire-in-new-regulatory-environment/). For this same period, the number of JP Morgan's compliance and regulatory staff exceeded the number of officers in the U.S. Custom's and Boarder Protection, and was three times the number of agents in the Federal Bureau of Investigation.

[55] *See* Stacey English and Susanna Hammond, COSTS OF COMPLIANCE 2016 (2016) (available at: https://risk.thomsonreuters.com/content/dam/openweb/documents/pdf/ risk/ report/cost-compliance-2016.pdf) ("What is certain is that greater personal liability will become reality in 2016 in many jurisdictions.")

[56] See, e.g., Michael Thoits, ENTERPRISE RISK MANAGEMENT TECHNOLOGY SOLUTIONS (2009) (available at: https://www.rims.org/resources/ERM/Documents/ERM%20 Technology%20Solutions.pdf) (discussing the range of ERM solutions); Paul L. Walker, Paul L., William G. Shenkir, and Thomas L. Barton, *ERM in Practice: Examples of Auditing's Role in Enterprise Risk Management Efforts at Five Leading Companies Shed Light on How this New Paradigm is Impacting Audit Practitioners*, 60 INTERNAL AUDITOR 51 (2003); John Farrell, *A Broad View of Section 404: Organizations Would Do Well to Approach Sarbanes-Oxley Compliance From an ERM Perspective*, 60 INTERNAL AUDITOR 51 (2003)

[57] For a discussion of the varied technologies that support the financial and regulatory communities, s*ee, e.g.*, Philip Treleaven, *Financial Regulation of FinTech* 3 JOURNAL OF FINANCIAL PERSPECTIVES 114 (2015); Thomas Philippon, *The FinTech Opportunity*. No. w22476. NATIONAL BUREAU OF ECONOMIC RESEARCH (2016); C. Andrew Gerlach, Rebecca Simmons, and Stephen Lam, *US Regulation of FinTech-Recent Developments and Challenges,* 44 JOURNAL OF FINANCIAL TRANSFORMATION 87 (2016); Lawrence G. Baxter,

next generation of these technologies, across a wide range of business and regulatory functions, is only now coming into focus.[58] Advances in distributed ledger technology (e.g., DLT or blockchain) are producing some very promising hand-shaking experiments between and among banks with endless applications to domestic and international corporate regulation.[59] This includes the advent of increasingly sophisticated regulator-based systems, successful co-regulated systems, and even a well-integrated supra-regulator systems.[60]

Regulators are recognizing the need for new resources to oversee FinTech and RegTech technologies while, at the same time, considering how both might enhance their own examination, compliance, and enforcement capabilities.[61] The redesign and integration of compliance technologies across a wide range of business processes are more than promising.[62] Not known for hyperbole, the Securities and Exchange Commission (SEC) has publicly commented that "Fintech innovation has the potential to transform

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Adaptive Financial Regulation and RegTech: A Concept Article on Realistic Protection for Victims of Bank Failures, 66 DUKE L.J. 567 (2016)

[58] H. Chiu, *FinTech and Disruptive Business Models in Financial Products, Intermediation and Markets-Policy Implications for Financial Regulators*, JOURNAL OF TECHNOLOGY LAW AND POLICY, in press (discussing the potential disruption)

[59] DLT or Blockchain is distributed ledger technology that stores a tamper-proof, permanent ledger of transaction data. For a discussion of some creative applications, *see* Carlo R.W. de Meijer, *Blockchain and the Securities Industry: Towards a New Ecosystem*, 8 J. OF SECURITIES OPERATIONS & CUSTODY 322 (2016); Richard T. Ainsworth and Andrew Shact, *Blockchain (Distributed Ledger Technology) Solves VAT Fraud*, Unpublished Manuscript, June 20, 2016; Barclays, *Cash Cows—How Blockchain is Transforming Trade Finance*, November 1, 2016; Kim S. Nash, *IBM Pushes Blockchain into the Supply Chain*, WALL STREET JOURNAL, July 14, 2016; James Langton, *Major Banks Complete Blockchain Test*, INVESTMENT EXECUTIVE, January 21, 2016

[60] Javier S. Cermeno, *Blockchain in Financial Services: Regulatory Landscape and Future Challenges for its Commercial Application*, BBVA WORKING PAPER (2016); Laurent Probst, Laurent Frideres, Benoît Cambier, Christian Martinez-Diaz, BLOCKCHAIN APPLICATIONS AND SERVICES (2016)

[61] Michael del Castillo, *Blockchain Won't Just Change Regulation, it Could Reshape the SEC*, COINDESK, November 15, 2016 (discussing how the SEC's Distributed Ledger Technology Working Group (DLTWG) views the demands of blockchain on regulators and how this technology might contribute to regulatory capacity.) *See also*, Michael del Castillo, *How the SEC's Blockchain Lead is Defining Future Regulation*, COINDESK, November 17, 2016

[62] This includes the creation of uniform compliance risk categories; better regulatory risk identification; standardized compliance risk taxonomy; automated monitoring of compliance standards; and monitoring change and application. See: Ernst and Young, INNOVATING WITH REGTECH: TURNING REGULATORY COMPLIANCE INTO A COMPETITIVE ADVANTAGE (2016) (available at: http://www.ey.com/Publication/vwLUAssets/EY-Innovating-with-RegTech/$FILE/EY-Innovating-with-RegTech.pdf)

virtually every aspect of our nation's financial markets."[63] Of course, all of the obvious regulatory challenges accompany rapidly evolving and disruptive technologies, e.g., regulatory inertia, lack of standardization, and limited network capacity.[64]

At the same time of the Fintech and GenTech disruption, there is an increasing reliance on sophisticated governance, risk, and compliance ("GRC") solutions by firms in many sectors and markets; big data across divisions, departments, and risk areas are only now beginning to be systematically aggregated, disaggregated, and mined by GRC applications; innovative open-source GRC models and metrics are now more commonly adopted and promoted across industries; and technology from both artificial intelligence and the cognitive sciences are beginning to shape and re-shape GRC modeling.[65]

It is a fair prediction that some iteration of GRC thinking today will lead to the integration of firm, industry, and regulatory standards tomorrow.[66] The emergence of more sophisticated machine learning approaches and

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[63] Press Release, *SEC to Hold Forum to Discuss Fintech Innovation in the Financial Services Industry*, Securities and Exchange Commission, September 27, 2016. *See also* Cliff Moyce, *How Blockchain Can Revolutionize Regulatory Compliance Technology Poised to Transform Business Processes*, CORPORATE COMPLIANCE INSIGHTS, September 27, 2016 (Blockchain applications will reach "trade reporting; clearing, confirmation, validation and settlement; recordkeeping; monitoring and surveillance; risk management; audit; management and financial accounting; and regulatory compliance (including – but by no means limited to – financial crime prevention."))

[64] *Id. See also*, Peter Yeoh, *Innovations in Financial Services: Regulatory Implications*, 37 BUSINESS LAW REVIEW 190 (2016). For a recent report by the EU on the challenges posed by blockchain, *see* European Union Agency for Network And Information Security, DISTRIBUTED LEDGER TECHNOLOGY & CYBERSECURITY IMPROVING INFORMATION SECURITY IN THE FINANCIAL SECTOR (2016) (available at: http://www.the-blockchain.com/docs/European%20Union%20Agency%20for%20Network%20and%20Information%20Security%20-%20Distributed%20Ledger%20Technology%20And%20Cybersecurity.pdf)

[65] Estimates regarding the size and growth of the GRC market vary widely. Industry forecasts, however, remain very positive. *See, e.g., The GRC Market is Expanding at an Exponential Rate,* June 29, 2015 (available at: https://www.lockpath.com/blog/the-grc-market-is-expanding-at-an-exponential-rate/) ("With over 600 GRC solutions on the market currently, it seems that predictions show that the GRC market would hit $31.77 billion by the year 2020 with global compliance market spend reaching $2.6 billion in 2015 alone"); John Verver, *Big Data and GRC*, CORPORATE COMPLIANCE INSIGHTS, June 21, 2013. For a wise critique of the GRC movement, one that promotes a more active role for regulators in crafting the GRC model, *see* Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age,* 88 TEX. L. REV. 669, 677 (2009). Next generation GRC models focus on increasingly open frameworks, more fluid implementation, and systems integration of additional stakeholders. See, Michael Volkov, THE IMPACT OF NEW TECHNOLOGIES IN CORPORATE GOVERNANCE, RISK MANAGEMENT AND COMPLIANCE PROGRAMS (2013)

[66] *See infra* notes to

Cognitive GRC models hold particular promise as an enterprise, cross-functional platform for real-time monitoring of regulatory changes, minimizing operational risks, and managing risks from both vendors and multiple tier supply-chain partners.[67] Combining institutional frameworks with agent-based simulations (institutional agent-based models) and pairing AI robots with key compliance professionals offer a window into the complex dynamics of regulation that was unimaginable until only recently.[68] Augmented and virtual reality extensions to compliance offerings also offer new ways of delivering risk management practices, and new revenue streams for accountancies, consultancies, and law firms.[69]

Contemporaneous with FinTech, RegTech, and advances in GRC is a recognition that social science research on compliance may offer value in developing effective corporate crime policy.[70] While evidence-based research on corporate criminal regulation is still exceedingly difficult to find, there is an impressive stream of scholarship by psychologists, sociologists, and criminologists on the many motives that encourage or discourage compliance inside and outside of complex organizations.[71] In spite of long-

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[67] *See* e.g., C. L. Dunis, P. W. Middleton, A. Karathanasopolous, & K. A. Theofilatos (eds.) ARTIFICIAL INTELLIGENCE IN FINANCIAL MARKETS: CUTTING EDGE APPLICATIONS FOR RISK MANAGEMENT, PORTFOLIO OPTIMIZATION AND ECONOMICS (2017); Heiko Thimm, *ICT Support of Environmental Compliance—Approaches and Future Perspectives*, in V. Wohlgemuth, F. Fuchs-Kittowski, and J. Wittmann (eds.) ADVANCES AND NEW TRENDS IN ENVIRONMENTAL INFORMATICS (2017); Carole Switzer, *Accelerating the Evolution of GRC*, COMPLIANCE WEEK 74 (2016) (exploring the transformative power of cognitive GRC). Cf. S. Lyons, *Corporate Defense: Are Stakeholders Interests Adequately Defended?* 1 J. OF OPERATIONAL RISK 67 (2006)

[68] *See, e.g.,* Tina Balke, Marina De Vos, and Julian Padget, *I-ABM: Combining Institutional Frameworks and Agent Based Modelling for the Design of Enforcement Policies*, 21 ARTIFICIAL. INTELL. L. 371 (2013); Samson Esayas and Tobias Mahler, *Modeling Compliance Risk: A Structured Approach*, 23 ARTIFICIAL. INTELL. L. 271 (2015); *see also* Anant Kale, *Artificial Intelligence: The New Super Power for Compliance*, CORPORATE COMPLIANCE INSIGHTS, August 31, 2016.

[69] *See, e.g.,* Emilia Duarte, Francisco Rebelo, and Michael S. Wogalter, *Virtual Reality and its Potential for Evaluating Warning Compliance,* 20 HUMAN FACTORS AND ERGONOMICS IN MANUFACTURING & SERVICE INDUSTRIES 526 (2010)

[70] Cf. Parker and Nielsen, *supra* note . These authors seriously question the application of compliance research. They write that: "There is considerable disagreement as to whether a wide range of corporations would ever have the motivation and capacity to implement effective compliance systems and whether such systems could be effective even if corporations were willing and able to implement them." *Id* at 189.

[71] David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317 (2016). *See also,* Parker and Nielsen *supra* note for research on motives from Kagan, Gunningham, Thornton, Simpson, Rorie, and Tyler. *See, e.g.,* Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267 (2014); Marie A. McKendall and John A. Wagner III, *Motive, Opportunity, Choice, and Corporate Illegality*,

standing and near insurmountable challenges with access to good white collar and corporate crime data, there is also an emerging literature on the internal and external characteristics of firms that are most associated with law abidance.[72] A separate but related body of work, even more developed, explores organizational responses to innovations in regulation.[73] Some of the better quantitative research on environmental compliance, for example, is framed around a groundswell of new governance and new regulatory models that push plural and decentered concepts.[74] From systems-based regulation and principled-based regulation to smart regulation, meta-regulation, and regulatory excellence (RegX), the important role of third parties and non-

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8 ORGANIZATION SCIENCE 624 (1997); Lynne M. Vieraitis, Nicole Leeper Piquero, Alex R. Piquero, Stephen G. Tibbetts, and Michael Blankenship, *Do Women and Men Differ in Their Neutralizations of Corporate Crime?* 37 CRIMINAL JUSTICE REVIEW 478 (2012); Wayne B. Gray and Ronald J. Shadbegian, *When and Why Do Plants Comply? Paper Mills in the 1980s*, 27 LAW & POLICY 238 (2005); Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOCIAL INQUIRY 307 (2004)

[72] For an excellent discussion of the difficulties of securing white collar crime research data, *see:* Sally S. Simpson and Peter Cleary Yeager, BUILDING A COMPREHENSIVE WHITE-COLLAR VIOLATIONS DATA SYSTEM (2015); Marshall Clinard and Peter Yeager, CORPORATE CRIME 97 (1980) (discussing data limitations). The literature on organizational capabilities and characteristics assembled by Parker and Nielsen, *supra* note , reflects the diversity of scholarship. It is worth highlighting Parker and Gilad contribution on structure, culture and agency. This is perhaps the best writing on the complex prospects of regulator-mandated compliance systems. *See also*, Lori S. Bennear, *Are Management-Based Regulations Effective? Evidence from State Pollution Prevention Programs*, 26 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 327 (2007); Gary R. Weaver, Gary and Linda Klebe Treviño. *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior,* 9 BUS. ETHICS Q. 315 (1999). Researchers are increasingly looking at changes in actual behavior of agents following the initiation of, or changes in, an integrity initiative, *see* Danielle E. Warren, Joseph P. Gaspar, and William S. Laufer, *Is Formal Ethics Training Merely Cosmetic? A Study of Ethics Training and Ethical Organizational Culture*, 24 Bus. Ethics Q. 85 (2014) (In a study of bank employees, two years after a single ethics training session, there were sustained positive effects on indicators of an ethical organizational culture.)

[73]For a general treatment, *see:* Christine Parker, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002). For the most notable industry and subject matter specific research, *see:* John Braithwaite, TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY (1985); Valerie Braithwaite, DEFIANCE IN TAXATION AND GOVERNANCE: RESISTING AND DISMISSING AUTHORITY IN A DEMOCRACY (2009); John Braithwaite, Toni Makkai, and Valerie A. Braithwaite. REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID (2007); John Braithwaite, CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY (2013)

[74] C. Sabel and W. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEORGETOWN L. J. 53 (2011); Neil Gunningham and Cameron Holley, *Next-Generation Environmental Regulation: Law, Regulation, and Governance*, 12 ANN. REV. OF L. & SOC. SCI 1.1 (2016)

state actors have helped reconceive thinking about conventional regulator-regulated relationships.[75]

When you add together recently introduced international enterprise-wide governance, risk, and compliance standards to this mix, such as those from the International Organization for Standardization (e.g., ISO19600, ISO31000, and ISO38500), and the Enterprise Risk Management standards from the Committee of Sponsoring Organizations of the Treadway Commission (COSO ERM), there is an impressive convergence. There is, quite simply, a gestalt of models, measures, metrics, data, standards, committed compliance professionals, relevant compliance scholarship, and vast firm resources dedicated to promote compliance and good governance while minimizing enterprise risk and liability.[76] This is an opportunistic convergence of formal and informal social controls across the entire firm—from corporate strategy, organizational processes, and available technology to culture, leadership, and people. It is, in some ways, a challenge for a new, transformative promise of the scientific state. If there is any progress made accessing a vast array of white collar crime and organizational crime data from federal and state agencies, this also may be a critical turning point in the scientific study of corporate crime.[77]

How architects of the corporate criminal law should embrace this convergence in ways that recognize the importance of private and public sector social control is a central challenge to the development of a progressive

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[75] For an excellent collection of some of the best research on regulatory policy making, enforcement, responses to regulation, and next generation thinking about regulation, *see*: Cary Coglianese and Robert A. Kagan (ed.), REGULATION AND REGULATORY PROCESSES (2007). For recent extension of Cary Coglianese's work, *see* LISTENING, LEARNING, LEADING: A FRAMEWORK FOR REGULATORY EXCELLENCE (2015); Cary Coglianese (ed.) ACHIEVING REGULATORY EXCELLENCE (2017) (a series of outstanding contributions the conception, applications, and limitations of regulatory excellence)

[76] *See, e.g.,* Robert R. Moeller, COSO ENTERPRISE RISK MANAGEMENT: ESTABLISHING EFFECTIVE GOVERNANCE, RISK, AND COMPLIANCE PROCESSES (2nd Edition) (2011); ISO, International Standard ISO 19600, COMPLIANCE MANAGEMENT SYSTEMS —GUIDELINES (2014); Sylvie Bleker and Dick Hortensius, ISO 19600: *The Development of a Global Standard on Compliance Management*, 2 BUSINESS COMPLIANCE ___ (2014); ISO, INTERNATIONAL STANDARD ISO 31000. RISK MANAGEMENT—PRINCIPLES AND GUIDELINES ON IMPLEMENTATION (2009); ISO, INTERNATIONAL STANDARD 38500. CORPORATE GOVERNANCE OF INFORMATION TECHNOLOGY (2008); Hesham Bin-Abbas and Saad Haj Bakry, *Assessment of IT Governance in Organizations: A Simple Integrated Approach,* 32 COMPUTERS IN HUMAN BEHAVIOR 261 (2014).

[77] Simpson and Yeager, *supra* note at 3 ("Despite its voluminous collections of data on conventional crimes and the legal responses to them, the Nation has long lacked systematic data on white-collar offenses and the sanctions employed against them."); see also, Marshall Clinard and Peter Yeager, *Corporate Crime: Issues in Research*, 16 CRIMINOLOGY 255 (1978) (reviewing the dearth of corporate crime research)

account.[78] This challenge would be "insurmountable" if conceived narrowly as a task for the state to assume the role of the new age experimentalists and decipher which specific variables, proxies, or metrics are part of a general prescription that should be offered to the private sector as effective compliance or organizational due diligence.[79] Instead, the burden must be shared across all compliance stakeholders to meet the challenges of this compliance convergence with a far more developed capacity that addresses regulatory needs, capabilities, and requirements. This is actually a co-regulatory challenge that will inevitably require different exchanges, revised instruments, and increasingly lower costs through the cross-enterprise integration of regulatory technology. It is also a challenge that will benefit from the lessons learned in maturing other regulatory settings, such as the many successful self-regulatory organizations (e.g., Financial Industry Regulatory Authority (FINRA); Municipal Securities Rulemaking Board (MSRB), and American Arbitration Association (AAA)), along with sector-specific co-regulation of environmental protection, health and product safety, and climate protection.[80] Finally, much can be learned from the many noteworthy co-regulatory successes in combating cybercrime, and ensuring cybersecurity and national security.[81]

This convergence in compliance thinking, standards, and metrics is certainly not provincial. The development and sharing of increasingly sophisticated and elaborate compliance models across Europe and Australia, for example, suggest that there is an emerging convention in regulatory technology and models in jurisdictions with *and* without the same threats

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[78] As Daniel Richman astutely noted in his brief response to Brandon Garrett's work on structural reforms, "I suppose that in theory, one could envision the Justice Department presiding over a lovely experimentalist regime in which the "informal exchange of information amongst independent monitors, prosecutors, regulators, and industry experts will, over time, create a narrow set of accepted best remedial practices." Figuring out what "works"—that is, how to measure compliance—is not just a technical challenge here, however. It is a fundamental confounding problem in the whole area of white collar enforcement." Daniel Richman, *Institutional Competence and Organizational Prosecutions*, 93 VA. L. REV. IN BRIEF 115 (2007).

[79] Daniel Richman, *Institutional Competence and Organizational Prosecutions*, 93 VA. L. REV. In Brief 115 (2007) ("Finding appropriate performance metrics is hard enough for those engaged in (or opposing) structural reform in prisons, schools, or other such institutions. In the white collar area, the challenge may be insurmountable.") *Cf.* Laufer *supra* note 28

[80] *See, e.g.,* Bertelsmann Stiftung, FOSTERING CORPORATE RESPONSIBILITY THROUGH SELF-AND CO-REGULATION (2013); Cameron Holley, Neil Gunningham, and Clifford Shearing. THE NEW ENVIRONMENTAL GOVERNANCE (2013). What little is known about exchange-based conceptions of compliance will help as well. *See* Weaver and Trevino, supra note . *See also*, Gary R. Weaver, *Ethics Programs in Global Businesses: Culture's Role in Managing Ethics*, 30 JOURNAL OF BUSINESS ETHICS 3 (2001); Laufer, *supra note 3*

[81] See, e.g., Tatiana Tropina and Cormac Callanan, SELF- AND CO-REGULATION IN CYBERCRIME, CYBERSECURITY AND NATIONAL SECURITY (2015)

from command and control approaches to entity liability.[82] Many of our old concerns still define foreign civil, administrative, and criminal regulation of corporates, including "paper compliance" programs, piecemeal and unpredictable changes to government guidance that tease the regulated with incentives and disincentives, and an absence of contemporaneous decisional and statutory laws to provide and interpret clearly-stated principles.[83] Notably, many of the most significant concerns with advancing financial and regulatory technology were raised first by regulatory bodies and non-governmental organizations outside the United States.[84]

In countries with a less developed rule of law, there are also lessons to be learned from successful public, private, and non-state regulation and enforcement.[85] The challenges of bringing leading compliance solutions to companies and government agencies at different strata in the economic pyramid are discussed. Seldom do we think about how governance, risk, and compliance solutions might apply, for example, to municipalities or state owned enterprises in developing countries. The fair melding of private and public interests in a diverse set of enterprises across cultures would be of great interest to progressives, so long as the outcome is more corporate criminal justice.

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[82] *See, e.g.*, Anotonio Fiorella, CORPORATE CRIMINAL LIABILITY AND COMPLIANCE PROGRAMS: TOWARD A COMMON MODEL IN THE EUROPEAN UNION (2012); Ulrich Sieber and Marc Engelhart, COMPLIANCE PROGRAMS FOR THE PREVENTION OF ECONOMIC CRIMES: AN EMPIRICAL SURVEY OF GERMAN COMPANIES (2014); James Gobert and Ana-Maria Pascal (eds.), EUROPEAN DEVELOPMENTS IN CORPORATE CRIMINAL LIABILITY (2011); Luis Arroyo Zapatero and Antonio Fiorella (eds.), CORPORATE CRIMINAL LIABILITY AND COMPLIANCE (2012); Dennis Bock, CRIMINAL COMPLIANCE (2011); Vibeke L. Nielsen and Christine Parker, THE ACC ENFORCEMENT AND COMPLIANCE SURVEY: REPORT OF PRELIMINARY FINDINGS (2005)

[83] *See, e.g.,* Adan Nieto Martin, *Use and Lack of Precision in Compliance Programmes: Any Solution?* 3 EUCRIM 124 (2012); Eduardo Saad-Diniz, INIMIGO E PESSOA NO DIREITO PENAL. (2012); Marc Engelhart, *Corporate Criminal Liability from a Comparative Perspective*, REGULATING CORPORATE CRIMINAL LIABILITY 53-76 (2014)

[84] See Douglas W. Arner, Janos Nathan Barberis, and Ross P. Buckley, *FinTech, RegTech and the Reconceptualization of Financial Regulation*, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, in press

[85] H. Weeke, S. Parker, and E. Malesky, *The Dynamics of Vietnam's Business Environment: Complying with Obligations Abroad and Competing at Home*, 12 DEVELOPING ALTERNATIVES 1 (2009); A. A. King, and M. J. Lenox, *Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. OF MANAGEMENT J., 698 (2000). One of the most important lessons, for example, is that cooperation between regulators and the regulated in the design of instruments significantly improves law abidance. *See,* Markus David Taussig and Edmund Malesky, *The Danger of Not Listening: How Broad-Based Business Participation in Government Design of Regulations Can Increase Compliance and Benefit Society*, Unpublished Paper (2016)

III. WHY A PROGRESSIVE ACCOUNT?

In some ways, not much has changed from the time of the progressive party platform of 1912.[86] Concerns over concentrated wealth are well over a hundred years old. Monopolies were said to be fueled by inordinate greed, unbridled corporate power, and seemingly limitless growth.[87] Like today, progressives a century ago were concerned with the functioning and fairness of institutions of corporate social control, and how much regulatory discretion is left to the boundless imagination of the private sector. Modern progressives also recognize the ascendant power and place of corporations, and the limitations of the market to produce fair and just outcomes. Like their ideological predecessors, they seek some semblance of responsibility, some accountability, and some long overdue legal reforms.[88] In playing off the Wall Street/Main Street dichotomy today, progressives' remain exercised by concentrated wealth extremes, unfair business tax provisions, and a wide range of unattended to social, environmental, economic, and racial injustices.[89] They want to undermine corporate hegemony, break the corporate stranglehold on Capitol Hill, and abolish the idea of corporate personhood. Progressive also want more corporate wrongdoers debarred from government contracts; limited from exploiting offshore tax loopholes; subjected to expanded transparency and disclosure requirements about environmental, human rights, and worker safety records; and forced to reign in executive compensation.[90]

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[86] For the text of the platform, *see:* Ronald J. Pestritto and William J. Atto (eds.), AMERICAN PROGRESSIVISM 273-287 (2008)

[87] These concerns were long-lasting. *See*, Ellis Wayne Hawley, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (2015)

[88] Recent efforts to infuse the 2016 Democratic Party Platform with progressive ideology turn on improved corporate citizenship, enhanced shareholder activism, increased executive accountability, and more institutional commitment to sustainability (available at: https://www.demconvention.com/platform/)

[89] *See,* Nikiforos T. Laopodis and Bansi L. Sawhney, *Dynamic Interactions Between Main Street and Wall Street*, 42 THE QUARTERLY REVIEW OF ECONOMICS AND FINANCE 803 (2002); Anna Lamin and Srilata Zaheer, *Wall Street vs. Main Street: Firm Strategies for Defending Legitimacy and Their Impact on Different Stakeholders* 23 ORGANIZATIONAL SCIENCE 47 (2012); Kevin M. DeLuca, Sean Lawson, and Ye Sun, *Occupy Wall Street on the Public Screens of Social Media: The Many Framings of the Birth of a Protest Movement*, 5 COMMUNICATION, CULTURE & CRITIQUE 483 (2012). For a treatment of this dichotomy in the popular press, *see:* Neil Barofsky, BAILOUT: HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET (2013); Andrew Ross Sorkin, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM--AND THEMSELVES (2010)

[90] *See* Oregon Progressive Party, *Nader Proposes Crackdown on Corporate Crime, Fraud and Abuse,* unpublished paper, September 24, 2010 (available at http://progparty.org/issues/market/corporate_crime).

A modest outline of progressive corporate criminal law is offered below as a catalyst to combat the regulatory status quo and, far less ambitious, to build capacity into the modern progressive account. This outline is a blend of old progressive principles, set in today's compliance environment, with an appreciation of the concerns of modern progressives. Part of the inspiration for a progressive account comes from the failure of the state to recognize the convergence of new enterprise-wide standards, metrics, new regulatory models, and asymmetric private sector investment in compliance products and services. Inspiration for this account also may be traced to how the moral reprehensibility of corporate crime is so often washed clean, and profound concerns with the ways in which corporate criminal justice system is successfully gamed.[91]

A. PROGRESSIVE THINKING

The recent history of the progressive movement defies simple description.[92] Indeed, it is difficult to assemble the diverse political and social factions of modern progressivism.[93] Those who claim to represent the progressive vision, issues, beliefs, and values of today often capture only a share of the significant variance in prevailing theory and dogma.[94] At times, progressive accounts of law also fail to neatly converge.[95] That said, progressive ideology coalesces around issues of social justice, environmental sustainability, fair wages, and equitable workplace regulations. Even more prominent, and relevant here, are concerns with the concentration of wealth

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[91] *See,* William S. Laufer, *Social Accounting and Corporate Greenwashing*, 43 J. OF BUS. ETHICS 253 (2003) (discussing ways in which reputations of firms are laundered)

[92] See, e.g., Yonathan Amselem, *The Formlessness of Progressivism*, Miles, December 30, 2015 (available at https://mises.org/library/formlessness-progressivism) ("Progressives are often good people with good intentions. However, modern Progressivism has evolved into something so shapeless and amorphous as to amount to little more than a belief in "things that sound nice."); *see also* Glastris *supra* note at ("As many observers have noted, there are arresting parallels between our age and the 1890s, the dawn of the Progressive Era.")

[93] It is much easier to distinguish old and modern progressives, and modern and post-modern progressives. For a right of center critique of the latter, s*ee*, Kim R. Holmes, THE CLOSING OF THE LIBERAL MIND (2016)

[94] *See, e.g.*, Al Yates and Anne Bartley, A SYNTHESIS OF AMERICAN PROGRESSIVE VALUES, BELIEFS, AND POSITIONS (2012); Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. LJ 1281 (2011)

[95] *See* Kent Greenfield, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2006); Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002) (exploring the connection between progressivism and corporate social responsibility); Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV 149, 153 (1995)

and power in the hands of a corporate oligarchy.[96] Progressives are united behind the idea that our democracy and democratic institutions are compromised by elites and powerful interest groups who think and act in ways that are disconnected from the reality of non-elites.[97]

In recent years the ideology of progressivism, like liberalism and socialism, also became a regular target of dismissive political barbs. The modern welfare state may be the greatest achievement of the progressive movement, but subscribing to welfare-state politics does, indeed, embolden foes and exact costs.[98] Some progressives, we are told, employ a thinly veiled guise for promoting a radical and, arguably, unjustifiable expansion of the role of government in our lives. In other cases, there is no veil, as with the stated desire to break up the big banks, along with the free-thinking demonization of Wall Street and its resident institutions. Other progressives are said to be "boutique liberals" who depart from the shared understanding of our Founders about the text of the constitution, and are committed to communitarianism, or something worse.[99] Progressives are cast, fairly or not, as an unruly band of politically left ideologues. We have clearly come a long way from Rousseau and Hegel, Wilson and Roosevelt.[100]

The kind of progressive corporate criminal law presented below is not a fair reflection of these positions or a reasonable target of this critique. The boundaries around this body of law are inspired by the brand of progressivism and institutionalism that marked a distinct shift from laissez-faire policies to a very limited and directed government engagement in the early 1900s.[101] In 1904, it was Thorstein Veblen's call for new thinking about institutional economics that coalesced academic writing about the changing nature of the

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[96] Bernie Sanders, *Democracy or Oligarchy*, THE PROGRESSIVE, August 7, 2014 (available at: http://www.progressive.org/news/2014/08/187809/democracy-or-oligarchy) ("The major issue of our time is whether the United States of America retains its democratic foundation or whether we devolve into an oligarchic form of society where a handful of billionaires have almost absolute control over the political and economic life of the nation.")

[97] For a fascinating discussion of concentrated wealth and political orientation, *see* Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,* 12 PERSPECTIVES ON POLITICS 564 (2014). *See also*, David Vogel, *The Power of Business in America: A Re-appraisal,* 13 BRITISH JOURNAL OF POLITICAL SCIENCE 19 (1983)

[98] *See, e.g.,* Hovenkamp supra note

[99] *See, e.g.,* Hovenkamp supra note

[100] *Id*

[101] *See*, Kent Greenfield, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2008); Dalia Tsuk, *Corporations Without labor: The Politics of Progressive Corporate Law,* 151 U. OF PENN. L. REV. 1861 (2003); David Kairys, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (1998).

business firm, its growth, scale, and power.[102] Soon thereafter, J. M. Clark extended turn-of-the-century social control theory to the business firm, offering a path for new institutions to complement the power and suasion of the market—new institutions that would guide the social direction of a maturing administrative state.[103] Progressives and institutionalists, economists and sociologists, stepped in where "existing legal and social institutions…were outmoded and inadequate to the task of the social control of modern large-scale industry."[104] This disconnect between functioning institutions of social control and corporations of scale and power should be the hard target of modern-day progressives. Disparate groups and factions in the larger progressive collective should target the emasculation and gaming of the corporate criminal law in regulatory practice.

The ingredients of twentieth century theories of institutional economics are largely pragmatic and policy-driven, with strong commitments to controlling the growth of big business and curbing corruption.[105] At the same time, both movements share important theoretical foundations. Institutions are not only central to the ordering of an economy, but dynamic, changing, and in need of appropriately gauged social controls that benefit from scientific and, in particular, experimental scrutiny.[106] The institutionalist creed, according to historians, is to construct institutions and related policies responsive to the challenges of social control. And this response must come from more than simple anecdotes, naïve theorizing, or political expediency.[107] For institutionalists, a positivist account requires that science mold and meld with the very institutional arrangements that orders

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[102] Stephen Edgell and Rick Tilman, *The Intellectual Antecedents of Thorstein Veblen: A Reappraisal*, 23 JOURNAL OF ECONOMIC ISSUES 1003 (1989); John A. Hobson, *The Economics of Thorstein Veblen*, 52 POLITICAL SCIENCE QUARTERLY 139 (1937)

[103] John M. Clark, SOCIAL CONTROL OF BUSINESS (1939). Cf. Don S. Kirschner, *The Ambiguous Legacy: Social Justice and Social Control in the Progressive Era*, 2 HISTORICAL REFLECTIONS/RÉFLEXIONS HISTORIQUES 69 (1975)

[104] Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 J. ECON. PERSPECTIVES 173, 174 (2001)

[105] Michael McGerr, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920, 147-181 (2003) (discussing, in some depth, the reaction of progressives to the emergence of powerful large-scale enterprises). For the text of the 1912 Progressive Party Platform relating to business enterprises, *see*: http://www.presidency.ucsb.edu/ws/index.php?pid=29617

[106] Malcolm Rutherford, *Science and Social Control: The Institutionalist Movement in American Economics, 1981-1947*, 3 ERASMUS J. FOR PHIL. AND ECON 47 (2010); Edward A. Ross, *The Sociological Frontiers of Economics,* 8 J. OF ECON. 386 (1899)

[107] For a detailed and careful history of the emergence of social science in the progressive period, *see* Dorothy Ross, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991)

and governs markets.[108] The legacy of Ross's social realism and Taylor's call for science management have found a new life.[109]

The brand of progressivism promoted here takes the shape of a positivist account that looks to replace intuitions and politically-driven ideologies in crafting enterprise compliance and governance prescriptions with measured and just government *and* corporate controls.[110] To achieve this ideal, progressives look to the formality of social controls (along a continuum from informal to formal); the level of controls (across agent, firm, industry, and public sector levels); the responsibility for social controls (exploring the increasing privatization of regulation); and the locus of control (recognizing how social controls differ in effect in private, state-owned, government entities).[111] To make the construction of this century-old bridge a bit more realistic, this brand of progressivism should recognize the generally narrow motivations of the private sector to fend off anything but informal social controls, and the limited capacity of government functionaries to assume responsibility and for defining, crafting, and escalating these controls.

The history and heritage of this positive account lead to some zealously guarded positions. For example, neoconservatives make much of the regulatory burden as an unjustifiable incursion on the private sector.[112] Modern progressives would likewise bemoan current spending levels on defensive corporate self-regulation or preventive law, but do so because there is simply so little evidence that current compliance expenditures make firms and their agents more compliant. Corporate Libertarians would dismantle and abolish entity liability if permitted. Modern progressives would likely see corporate wrongdoing as reducible to individual fault. At the same time,

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[108] As Leonard *supra* note at 66 observed: "Progressives enthusiastically and rapidly seized on industrial efficiency as an exemplar, imagining that scientific management could increase efficiency not just on the shop floors of factories but in all corners of an industrial society plagued by waste, conflict and injustice."

[109] *See*, S, Weinberg supra note at 68; Sigmund Wagner-Tsukamoto, *An Institutional Economic Reconstruction of Scientific Management: On the Lost Theoretical Logic of Taylorism*, 32 ACADEMY OF MANAGEMENT REVIEW 105 (2007) ("This paper points toward a high contemporary relevance of scientific management—and of institutional economics. They can well advise us on organizational problems, especially in "modern" interaction contexts that are defined by diversity and pluralism.")

[110] For a lengthy discussion of progressivism in relation to both corporation and government control, *see* Benjamin P. DeWitt, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS 113-161 (1915)

[111] *See* William S. Laufer and Diana C. Robertson, *Corporate Ethics Initiatives as Social Control*, 16 JOURNAL OF BUSINESS ETHICS 1029 (1997)

[112] *See, e.g.*, James L. Gattuso and Diane Katz, *Red Tape Rising 2016: Obama Regs Top $100 Billion Annually*, BACKGROUNDER, May, 23, 2016 (available at: http://www.heritage. org/ research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually)

though, they should concede that organizational fault is a fair proxy for some corporate wrongdoing, in some cases, and look to how an enterprise-wide regulatory architecture might house the ingredients of fair and just corporate social controls.[113]

Recent moves constraining the discretion of federal prosecutors to individual rather than entity liability, modern progressives might add, risk greater undistributed justice where evidence of individual agent culpability is lacking or is difficult if not impossible to secure. Moreover, shifts in formal policies about discretionary determinations of fault should be accompanied by more thoughtful and measured compliance standards that accommodate regulatory policy changes and embrace new technology.

Politicians and criminal justice functionaries pontificate about the need for corporate entities to adhere to prescriptive compliance and governance routines. Modern progressives would say, though, that regulators are long on moral rhetoric and short on due diligence expectations grounded in planning, process, and outcome factors that are measurable, e.g., using combinations of management-based, performance-based, or technology-based measures and metrics.[114]

Modern progressives should marvel at the stalemate between the government's failure to embrace evidence of compliance effectiveness as "due diligence," and the private sector's reluctance to make those kind of compliance investments that will inevitably result in the need to "voluntarily" disclose non-compliance. Finally, modern progressives should spend significant political capital looking for ways to level the regulatory playing field for small firms and their more powerful counterparts.[115] That there are multiple tracks of adjudication associated with firm size requires more than a passing reference to collateral consequences or systemic risks.[116]

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[113] For the historical debate between and among progressives on entity liability, *see* Hager, *supra* note

[114] For a brief discussion of collaborative associations between government and business in progressive history, *see:* McGerr *supra* note at 315. Alternatively, as noted later, co-regulatory or collaborative systems should be proposed. Specific diligence expectations are "owed" regulated firms because certain legislative reforms and discretionary guidelines simply require companies to have such programs, policies, and practices. Further, prosecutors and regulators push incentives that drive firm compliance expenditures and investment, often without restraint, and rarely with any comparable government expenditures that builds regulatory capacity.

[115] Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV 149, 153 (1995) ("Progressives did though coalesce around the idea that the market was squarely to blame for noncompetitive business practices and an unfair transfer of wealth toward the rich. The focus centers around the limitations of the market and its remedy, the administrative state, and a playing field for big and small firms that lacked fairness and rules.")

[116] *See* Laufer *supra* note 43 (discussing the compliance game)

This roughly-conceived, modern account of progressivism highlights the failure of any significant corporate criminal law reform during a remarkable century of progress from our emerging interstate economy at the turn of one century, to a truly global marketplace at the turn of this century.[117] The conspicuous absence of legislative reform, including long abandoned federal recodification efforts, should be of particular concern for modern progressives.[118]

Perhaps most important, progressivism recognizes the "transformative promise of the scientific state" so that government will be both an instrument and object of reform.[119] Unfortunately, one is hard-pressed to find a constituency with the motivation and capacity for this transformative process. Inside the modern progressive community, voices of discontent about corporate fault are seldom raised and rarely heard. Of course, Wall Street abuses are an integral part of the progressive rallying cry. But with the stated desire to abolish corporate personhood, little to nothing is said about why liability rules and standards of culpability are not fashioned around corporate persons, around the enterprise as an enterprise.[120] Even less is said about how the construct of corporate compliance is so narrowly conceived, and related expenditures are too often seen as a good or best available proxy for compliance.

The fact that conceptions of entity liability today are moved to the margins with little fanfare and with so few objections is easily explained. Elsewhere, I argue that corporate criminal liability is a failure not because of confusing metaphysics; not because evidence of criminal wrongdoing is so well-guarded that is difficult to obtain; and not because of the obvious externalities of this blunt instrument of social control. The present regime of corporate criminal liability fails because there is no bounded constituency

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[117] Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as Case Study*, 96 J. OF CRIM. LAW AND CRIMINOLOGY 643 (2006); Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFFALO CRIM. L. REV. 89, 97–98 (2004)

[118] For a discussion of the failure of federal criminal law reform, *see:* Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1 (1977); Barbara Ann Stolz, *Interest Groups and Criminal Law: The Case of Federal Criminal Law Revision,* 30 CRIME & DELINQ. 91 (1984); NATIONAL COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION OF REFORM OF FEDERAL CRIMINAL LAWS (1971); The National Commission on the Reform of the Federal Criminal Code, known as the Brown Commission, completed its work in 1969. *See*, STAFF MEMORANDA ON RESPONSIBILITY FOR CRIMES INVOLVING CORPORATIONS AND OTHER ARTIFICIAL ENTITIES 172 (1969). S*ee also* Note, *Corporate Criminal Liability*, 68 N.W. U. L. REV. 870 (1973)

[119] Thomas C. Leonard, *Progressive Era Origins of the Regulatory State and the Economist as Expert*, 47 HIST. OF POL. ECONOMY 49 (2015)

[120] *See infra* notes to

backing a general and specific part of corporate criminal law who is willing to address the inauthenticity of both the regulated and regulators as they play a game over compliance and compliance expenditures.[121]

Modern progressives, as a constituency, need not take on that role.[122] But it is one that progressives may rightly and quite effectively assume. It would take a strong embrace of the remarkable convergence in compliance thinking, advancing technology, emerging methods, and consensus building standards. This is a strategic embrace to bring about a commensurate engagement by prosecutors and regulators. It would take a reluctant acceptance of corporate personhood for the purposes of facilitating attributions of criminal liability not only to blameworthy individuals, but to entities as well.

Modern progressives would have to muster enough moral indignation over corporate crime, enough outrage to make the case that corporate persons, large and small, also deserve their fair share of accountability.[123] There would have to be a call for a reallocation of criminal justice expenditures to ensure that the administration of justice is fairly and justly distributed to all persons, human and corporate. Alas, this is not too tall an order for a movement once wholly committed to scientism in the name of measured informal and formal social controls.[124]

B. MORAL INDIGNATION AND DESERT

The ideological core of a corporate criminal law progressivism reflects a more formal orientation, one that sits comfortably with new governance theories and to the political left of other theories of criminal justice that unabashedly promote comprehensive consequentialist ends. This includes, for example, the Republican Idea of Justice, brilliantly fashioned

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[121] *See* Laufer, *supra* note

[122] For an inspiration as to how much change may result, *see* Clayton. M. Christensen, Heiner Baumann, Rudy Ruggles, and Thomas M. Sadtler, *Disruptive Innovation for Social Change*, 84 HARV. BUS. REV. 94 (2006)

[123] One might say that modern progressives need to be driven by "a fierce discontent." *See,* Michael McGerr, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA (2003) (quoting Theodore Roosevelt "So far as this movement of agitation throughout the country takes the form of a fierce discontent with evil, of a firm determination to punish the authors of evil, whether in industry or politics, the feeling is to be heartily welcomed as a sign of healthy life."). For a discussion of how indignation might fuel changes in law, *see* Jack Katz, *The Social Movement Against White-Collar Crime*, in E. Bittner & S. L. Messinger, CRIMINOLOGY REVIEW YEARBOOK 161 (1980)

[124] Given the antecedents of racism in the history of progressive thought and dogma, one might be snide and say that this is their destiny. *See* Hovenkamp *supra* note

with well-dressed utilitarian desiderata.[125] Unlike some rival neoclassical approaches and models, progressive corporate criminal law champions a brand of economic arrangements and regulatory practices that are "ethically defensible."[126] The ultimate question for twentieth century progressives, according to Professor Clark, was a moral one.[127] At minimum, economic activity should be consistent and not at odds with the public interest. The invisible hand, according to older progressives, becomes noticeably visible with corporates of significant scale and power.[128]

The limited and oddly shaped conception of orthodox economics was the target of progressives nearly a century ago. It remains so today. An economics of irresponsibility is a simple product of the primacy of excessive "individualism," "private interest," and a commitment to "laisse-faire."[129] "All industry and trade," old and modern progressives would argue, "is primarily affected with a public interest."[130] Criminal violations by businesses compromise this public interest and breach this trust. This breach, by both organizations and individuals, reflects an actionable immorality.[131] Corporate wrongdoing engenders the kind of collective repugnance associated with offenders who have moral agency.[132] Corporate criminals are deserving of blame and any wrongdoer left behind represents undistributed justice, part of an unpaid debt to society.[133] Modern progressives look to the promise of deterrence in responsive regulation, supporting the suasion of informal social controls. This progressive reincarnation, however, comes from a desert-based deontological world, where fault ultimately determines liability and a punishment proportional to wrongdoing ensures that justice is done.[134]

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[125] *See, e.g.,* John Braithwaite and Phillip Pettit, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1992)

[126] Thomas C. Leonard, *Progressive Era Origins of the Regulatory State and the Economist as Expert*, 47 HIST. OF POL. ECON. 49, 70 (2015)

[127] Clark, *supra* note at 72)

[128] As Rutherford notes, early theorists were concerned with corporate abuses of the day. *See*, Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 J. ECON. PERSPECTIVES 173, 175 (2001)

[129] Dell P. Champlin and Janet T. Knedler, *J.M. Clark and the Economics of Responsibility*, 38 J. ECON. ISSUES 545 (2004)

[130] See Leonard, *supra* note

[131] William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?* In Brodowski, D., Espinoza de los Monteros de la Parr, M., Tiedemann, K., Vogel, J. (Eds.) REGULATING CORPORATE CRIMINAL LIABILITY (2014) (The construct of moral indignation reflects, at least in part, a deeply-felt emotion one has over the commission of an immoral act.)

[132] David Copp, *On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy,"* 30 MIDWEST STUDIES IN PHILOSOPHY 194 (2006)

[133] Laufer and Strudler, *supra* note 29

[134] *See*, Kip Schlegel, JUST DESERTS FOR CORPORATE CRIMINALS (1990)

The genius behind neo-conservative accounts of corporate liability is the promise of justice without resort to the force of a "criminal" justice. Administrative and civil regulatory regimes, it is argued, will do justice. We are told that the direct and collateral consequences of corporate criminal liability are injustices to a wide range of innocents, from shareholders and debtholders to employees. Beyond the failed metaphysics of a corporate criminal law, this is an antiquated formal social control with nearly impossible to measure externalities. Those promoting the use of corporate criminal law are simply corporate bashing.[135] Modern progressives would respond that this promise of justice done without the criminal law is simply illusory. Even if you put the idea of a "benign big gun" aside, assuming effective regulation without any formal responsive threat is a grand, if not magnanimous concession to corporatism.[136] It is also a disturbing mismeasure of moral indignation for corporate wrongdoing.[137]

Criminal justice functionaries use condemnatory rhetoric about corporate malfeasance offering compelling but inauthentic outrage on behalf of the state.[138] And beneath the dismissive and patronizing arrogance about justice done is a clearly conceived deference to big business, markets, risk-taking, entrepreneurship, and unbridled capitalism.[139] After all, even the most serious corporate offenders are condemned by muted plea agreements that do little more than impose additional compliance costs. Corporations spend more and more compliance dollars, and are "monitored" until called to arms, once again, as the steady and obedient servants of economic growth.

As progressives know all too well, outrage, fear, anger, and genuine indignation abound for street criminals.[140] "Bad guys" are seen as the justifiable targets of aggressive and concentrated law enforcement and, once processed, mass punishment.[141] Our race- and class-based images of who are

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[135] Martin H. Redish and Peter B. Siegal, *Constitutional Adjudication, Free Expression and the Fashionable Art of Corporation-Bashing*, 91TEXAS L. REV. 12 (2012)

[136] *See* Ralph Nader, GETTING STEAMED TO OVERCOME CORPORATISM: BUILD IT TOGETHER TO WIN (2011)

[137] *See,* Laufer *supra* note 131 at

[138] *Id* at 24 ("Functionaries use moral rhetoric to convey a definite outrage at the temerity of such privileged wrongdoing. The message that justice must be done is conveyed with a pretense and sense of righteousness that mimics the emotions felt over an immoral act.")

[139] *Id* at 25

[140] Research reveals that indignation is often mediated by complex heuristics, framing effects, social dynamics, and other psychological factors e.g., the "outrage heuristic," "moral framing," and "rhetorical asymmetry. See, Cass R. Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002); McCaffery, Edward J., Daniel J. Kahneman, and Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards,* 81 VA. L. REV. 1341(1995); Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 33 VT. L. REV. 405 (2008)

[141] Laufer, *supra* note

"bad" are as obvious as they are indelible.[142] When we think of innovative law enforcement strategies, for example, our minds turn to "hot spots" and place-based policing in disenfranchised poor neighborhoods; aggressive stop and frisk policies that target people of color; and the increasing militarization of municipal police resources.[143] Who first thinks of innovations in state-of-the-art forensic accounting methods; the ingredients of successful experiments in private regulation; and the mining of employee, customer, and client large data?

When we think about how the debt owed to society from street crime may be repaid, we accept the idea of incarceration with reflection. We unabashedly use mass incarceration, ignoring the simple function of race, ethnicity, gender, age and education.[144] Who thinks of innovations in the design, content, and implementation of "corporate punishment"?[145] It should not be so trite to say that corporate punishment must resemble a true message of moral condemnation, rather than an itemized cost, optimal penalty, or additional revenue stream for a league of corporate gatekeepers.[146]

Modern progressives should ask why corporate wrongdoing does not engender the kind of moral outrage and indignation that would support a fair regime of corporate criminal justice when lay perceptions of corporate crime seriousness rival serious street crime.[147] In the absence of affective outrage, anger, disapproval, and indignation, government functionaries successfully placate stakeholders with scripted retributive text, and yet leave in place the risk-taking, innovation, and entrepreneurship associated with moving the economy forward. All along, firms are positioned in equally inauthentic ways, placating and pandering to regulators with an apparent moral outrage

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[142] Research on the salience of race as a heuristic for determining the blameworthiness of the defendant and the perniciousness of the crime is as telling and remarkable, as it is shocking. See, e.g., J. L. Eberhardt, P.G. Davies, V. J. Purdie-Vaughns, and S. L. Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*. 17 PSYCH. SCI 388 (2006); Darryl K. Brown, *supra* note

[143] *See* Freda Adler, Gerhard O. W. Mueller, and William S. Laufer, CRIMINOLOGY 9TH EDITION 182-200 (2017)

[144] For a recent review of the problem of mass incarceration, see Malitta Engstrom, Alexandra Wimberly, and Nancy Franke, *Mass Incarceration: What's at Stake and What to Do,* in J. L. Jackson (ed.) SOCIAL POLICY AND SOCIAL JUSTICE (2017)

[145] Steven D. Walt and William S. Laufer, *Corporate Criminal Liability and the Comparative Mix of Sanctions*, in K. Schlegel & D. Weisburd (Eds.) WHITE COLLAR CRIME RECONSIDERED (1992) (discussing the many sentencing alternatives to criminal fines)

[146] Id

[147] *See*: Cedric Michel, John K. Cochran, and Kathleen M. Heide, *Public Knowledge About White-Collar Crime: An Exploratory Study*, 65 CRIME, LAW AND SOCIAL CHANGE 67 (2016). Cf. John Hagan, WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN (2012); William S. Laufer, *Review: Who Are the Criminals: The Politics of Crime Policy*, 42 CONTEMPORARY SOCIOLOGY 679 (2013)

over an agent's "rogue behavior."[148] In both cases, this is fairly called "faux" indignation, and it should boil the blood of modern progressives.[149]

Without hesitation, modern progressives must look elsewhere for justice. They may find moral fault in organizational wrongdoing and justify their left-leaning rhetoric as a matter of desert. Liability rules that focus exclusively on vicarious liability disregard blameworthy features of the corporate form and those characteristics and attributes that should, in certain cases, absolve the entity from liability. Overlooking evidence of corporate intentionality also risks a compromise of desert principles.[150] And modern progressives should worry that far too much justice is already undistributed with a regulatory status quo that is comfortably, efficiently, and deftly gamed by stakeholders.

C. THE COMPLIANCE GAME

Game theoretic models of compliance practices inspire some thinking about how firms and government functionaries strategically position themselves. Researchers, for example, have used game theory to explore the endogeneity of honesty in tax compliance, i.e., those factors that explain why taxpayers pay in full. Perceptions about the fairness of the tax code and whether others taxpayers are somehow better able to "play the system" are explanatory. Taxpayer reactions to government activities, policies, and personnel are also important.[151]

Others look at the tax compliance game by exploring the relative decision making strategies of all tax stakeholders, e.g., taxpayers, elected government officials, appointed tax authorities, and tax accountants. These strategies are grounded in a wide range of economic and psychological factors. Tax payments depend, in part, on policies being seen as legitimate; free riders must be eliminated; and the non-cooperative must be brought back into the fold with threats of command and control regulation.[152] Finally, there

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[148] Laufer, *supra* note

[149] *See,* William S. Laufer, *Corporate Inauthenticity and the Finding of Fault*, In F. Centronze & M. Mantovani (eds.) La RESPONSABILITA PENALE DELGLI ENTI 23 (2016) ("What makes this indignation faux? The text is calculated and crafted in ways that reveal an inauthenticity. The moral emotions and affect that capture indignation are missing. The anger and fear that combine in a very real way with street crime are simply not there. Faux indignation is, plain and simple, a convenient moral placeholder. And holding a place for moral indignation, as we shall see, is indispensable for regulatory equilibrium.")

[150] *See* Laufer and Strudler, *supra* note 29 (arguing for the place of corporate intentionality in a conception of corporate deservedness)

[151] Brian Erard and Jonathan S. Feinstein, *Honesty and Evasion in the Tax Compliance Game,* 25 THE RAND JOURNAL OF ECONOMICS 1 (1994)

[152] James Alm, Erich Kirchler, and Stephan Muehlbacher, *Combining Psychology and Economics in the Analysis of Compliance: From Enforcement to Cooperation*, 42 ECONOMIC

is a significant potential for firms to free-ride in intra-industry collective action settings, i.e., individual firms may benefit from the compliance of others without regard to their own behavior. The result of this problem may be an obstacle to successful self-regulation. Game theory research reveals that overcoming free-riding problems turns on compliance motives as well as other strategic interactions.[153]

As mentioned earlier in this Article, there is a very active regulatory game played around corporate criminal compliance. To appreciate the premise of the game, though, it is necessary to go back in time. In the immediate aftermath of the passage of the Sentencing Guidelines for Organizations in 1991, a cottage industry of business ethicists, consultancies, accountancies, along with a significant number of white collar defense lawyers, coalesced around the marketing of corporate compliance programs and services.[154] The market was pitched with a coordinated campaign to ensure that companies were "in compliance" with the Guidelines.[155] By 1994, the boundaries of the field of corporate compliance were already set.[156] From state-of-the-art compliance training techniques, and checklists for effective compliance programs, to compliance program methodology and a nascent compliance science, an industry was born that catered to every conceivable private regulatory need.[157]

Remarkably, "custom" and even "proprietary" compliance products, programs, and solutions bought and sold until very recently were virtually indistinguishable as commodities.[158] This commodification of compliance, coupled with the failure of regulators to develop any significant capacity to evaluate compliance programs and practices, supported a complex brew of

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ANALYSIS AND POLICY 133, 134 (2012) ("It is thus necessary to apply strategies based on both economic and psychological arguments to promote mutual trust and cooperation.")

[153] *See* Simon Ashby, Swee-Hoon Chuah, and Robert Hoffmann, *Industry Self-Regulation: A Game-Theoretic Typology of Strategic Voluntary Compliance*, 11 INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS 91 (2004);

[154] ALI-ABA Course Study Materials ORGANIZING FOR CORPORATE COMPLIANCE: THE NEXT STEPS (1994)

[155] *See*, Laufer *supra* note

[156] For a discussion of the emergence of the ethics industry, see Stuart Auerbach, *Company Lawyers in Shadows at Seminar on Crime,* WASHINGTON POST, October 16, 1977, p. A4; George P. Stamas and Joanne F. Catanese, *Compliance Programs Create a Shield from Corporate Wrongs*, 37 LEGAL TIMES (February 24, 1997). *See also* William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L.J. 157 (1996)

[157] William S. Laufer, *Illusions of Compliance and Governance*, 6 CORPORATE GOVERNANCE 239 (2006) (reviewing the compliance industry)

[158] William S. Laufer, *Compliance and Evidence: Some Optimism from a Perennial Pessimist*, In K. Tiedemann, U. Sieber, H. Satzger, C. Burchard, & D. Brodowski (eds.), DIE VERFASSUNG MODERNER STRAFRECHTSPFLEGE: ERINNERUNG AN JOACHIM VOGEL (2016)

incentives and disincentives that supports a multi-stakeholder compliance game.[159] The ultimate objective of this game, however, is not economic corporate criminal justice. The incentives and disincentives are not designed to change corporate behavior, improve corporate culture, and facilitate corporate decision making.[160]

This compliance game is really a match of institutional appearances with some distinct characteristics, including the fact that the largest firms are spared prosecution due to perceived or at least expressed systemic risk; firms of any size and scale, whose prosecution does not pose a risk, are offered a crafted plea agreement; symbolic prosecutions of high profile defendants are sought, episodically, to assuage concerns over market fairness; and small firms, those with limited access to counsel, are far, far more likely to be prosecuted to conviction. Ultimately, stakeholders in this game seek to protect and enhance their positions without disturbing the equilibrium and, remarkably, without concern for whether their efforts actually affect rates of offending behavior.

This is a game that seeks optimal compliance expenditures to minimize liability risks; gives all players moral and legal cover; placates constituencies with the appearance of legitimacy; and offers beautifully crafted images of leadership and governance with integrity. This game is aligned with a regulatory system that has very limited capacity for determining the effectiveness and genuineness of compliance, and even less commitment to aggressively using the corporate criminal law.[161] This game encourages a mindless numbing of documentation, from due diligence forms, internal audits and training attendance records, to integrity affidavits.[162] The more content in this documentation regime, the more paper, the less liability exposure for the firm. The quality of the representations in this regime is largely untested, by design.

Perhaps most important, this game is the centerpiece of a highly profitable and growing compliance and business ethics industry. Shining a much less-than-favorable light, it is also an industry with a potentially exploitive value proposition. At its core, the rules of the game assume that neither firms nor regulators have or want to have evidence of compliance effectiveness. The game further assumes that there is no interest in exploring whether the compliance machine actually affects behavior, organizational

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[159] *See,* Laufer *supra* note 43

[160] *Id*

[161] There is no shortage of commentary on compliance essentials, *see* Richard M. Steinberg, THE GAME CHANGES: 10 ESSENTIAL ELEMENTS FOR TRULY EFFECTIVE COMPLIANCE PROGRAMS (2012)

[162] *See, e.g.,* Richard Medina and Joe Fenner, *Controlling Your Documents*, 39 INFORMATION MANAGEMENT 20 (2005)

decision making, planning, programming, and corporate culture.[163] Both parties seem inextricably captured by their opponent.

Prosecutors and regulators speak about the expectations of firm disclosures and cooperation but know about all the obvious conflicts.[164] Prosecutors speak about their guidelines, but discretion is too constrained by limited resources, limits in the priority given to the investigation of corporate fraud, and significant challenges in obtaining evidence of serious corporate wrongdoing at the officer or board level, even with incentives for whistleblowers. The result: With countless billions spent with some of the most impressive accountancies, consultancies, and law firms, it is practically impossible for regulators to make meaningful distinctions between and among ethical leaders and laggers, as well as compliant and non-compliant firms.[165] And if you look at the history of this game, you will see that it pushes compliance spending forward in extreme and, at times, perverse ways.

Modern progressives must think about how this game may be disrupted; how the rules governing the regulatory status quo may be changed. The promise of progressivism is great, because this game turns on the relative power and suasion of informal social controls. This is a game about *governance,* where boards and senior management are kept too far apart, and the former know far too little about day-to-day compliance issues and challenges; *culture and values*, where the tone of corporate leadership is incredible to mid-level managers and employees; *risk management*, where the idea of risk is reduced to protecting the firm from its own employees; *policies and procedures*, where policies and codes are perfunctory and disconnected from operations; *communication and training*, where training programs are decontextualized, if not vacuous; *monitoring and reporting*, where firms are over controlled and reporting channels are limited; *escalation, investigation, and discipline*, where fear of retaliation is met with the reality of retaliation; *issues management*, where matters raised with compliance and audit are routinely neglected, and *on-going improvements*, where investment in the appearance of compliance and risk management highlight the compliance function.[166]

Modern progressives must be mindful that the path out of the compliance game, inevitable as it appears to be, will likely cross with another

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[163] For an interesting take on corporate culture and corporate crime, *see* John Conley, and William M. O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW AND CONTEMPORARY PROBLEMS 5 (1997)

[164] *See, e.g*., Ronald H. Levine, *Government Contests Assertion of Attorney-Client Privilege in Assessing Cooperation*, WHITE COLLAR POSTS, January 5, 2017.

[165] *See* William S. Laufer, *Corporate Culpability and the Limits of Law*, 6 BUSINESS ETHICS QUARTERLY 311 (1996)

[166] *See* Richard M. Steinberg, THE GAME CHANGES: 10 ESSENTIAL ELEMENTS FOR TRULY EFFECTIVE COMPLIANCE PROGRAMS (2012)

inevitability: The inauthenticity of organizational and regulatory action.[167] Corporate inauthenticity may be benign where the words from public affairs slightly outpace reality.[168] Inside and outside of the compliance game, though, inauthenticity may be non-trivial. The problem of inauthenticity is most concerning where significant regulatory responsibility is delegated and then shared with the firm, or where independent assessments of certain corporate representations are unavailable to both guardians and gatekeepers.[169]

Just as the ethics industry markets compliance as commodities, the ingredients of both corporate pretense and posture are also bought and sold in a profitable consultant's marketplace. Ethical intangibles are sold as tangibles in a world that increasingly looks for evidence of a good return on values, broadly defined.[170] The selling of this instrumental brand of responsibility moves some stakeholders to invest in ways that result in a muddle of inauthenticity. Simply put, this muddle complicates and often confounds the very idea of self-regulation and co-regulation. And, to be fair, lack of authenticity may frustrate genuine efforts by government functionaries to be both measured and just.

In leading a constituency for greater corporate accountability, modern progressives should also assume the responsibility of inspiring firms to align their behavior, and the value they offer stakeholders, with who it is that they say they are.[171] Countless examples of both misfeasance and malfeasance over the past century reveal the difference between a genuine commitment to ethics, integrity, and compliance, and the appearance, rhetoric, and spin of ethicality.[172] This spin masks corporate efforts to avoid detection, deflect the

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167 Corporations may be said to fall along a behavioral continuum from opacity (i.e., where firms are characteristically obscure, elusive, and dense) to transparency (i.e., organizations that are open with communications, frank, candid, and forthcoming), sincerity (i.e., firms that act, as a means to an end, without pretense and dissimulation), and finally authenticity (i.e., companies that, as an end in itself, align their decisions, policies, and actions with actual desires, motivations, and intentions), *see* Laufer, *supra* note

168 Laufer, *supra* note at 26 ("Lurking behind the corporate scandals that now seem common place on Wall Street is an inauthenticity, a disconnect between what corporations say they do and what they actually do, that leads to public displays by top management of naıve surprise when the public hears the news of a criminal investigation or indictment.")

169 Laufer *supra* note 149

170 Chris Kelly, Paul Kocourek, Nancy McGaw, and Judith Samuelson, DERIVING VALUES FROM CORPORATE VALUES (2005) (discussing the concept of return on values (ROV))

171 *See, e.g.*, R. Edward Freeman and Ellen R. Auster, BRIDGING THE VALUES GAP: HOW AUTHENTIC ORGANIZATIONS BRING VALUES TO LIFE (2015); S. H. Cady, J. V. Wheeler, J. DeWolf, & M. Brodke, *Mission, Vision, and Values: What Do They Say?* 29 ORGANIZATION DEVELOPMENT JOURNAL 63 (2011); Timothy L. Fort, *Steps for Building Ethics Programs*, 1 HASTINGS BUS. L.J. 194 (2005)

172 *Id*

need for more formal regulation, minimize compliance and governance costs and, at times, facilitate the laundering of questionable corporate decisions. In the end, the prospects of a modern progressive agenda disrupting and changing the rules of the compliance game may be challenged by something as simply conniving as a corporation's inauthenticity.

IV. THE PROMISE OF A PROGRESSIVE CORPORATE CRIMINAL LAW

Critics would be fair to say that there may be something instrumental in the resort to a progressive account of corporate criminal law. Having a modern progressive account at the table with the conventional guard, stalwart advocates, corporate libertarians, and normative thinkers is long overdue. The modern progressive case is much more than a call for empiricism or resort to the latest LegalTech or RegTech solutions to support the convergent growth and unprecedented investment in the compliance industry. It is also more than a vision of government regulation as both an "instrument" and "object" of reform. The conspicuous intransigence in this neglected body of law, marked by failure of any constituency to step forward to disrupt the compliance game, results in a certain kind of injustice. Seeking recognition for this compromise of desert principles motivate a call to modern progressivism. Simply stated, the scales of justice must be balanced between corporate wrongdoing and our measured indignation.

Progressives today are well-suited to answer such a call as they are asked to resolve questions about the perennial tensions between regulatory power and increasing corporate power; the social control of business and the turn-of-the-twentieth-century notion of excessive individualism; and the economics of responsibility versus deference to the business community and its markets. How to regulate corporations fairly, justly, and without the specter of regulatory overreaching is a trite, old, but exceedingly important *progressive* question. That this question still defines the ongoing dissonance over how to conceive, practice, and enforce corporate criminal law is a powerful argument for modern progressives to come forward and make their case.

The progressive sentiment that corporations are more than simple profit engines for shareholders is promoted with a realization that the social control of businesses is increasingly plural, decentered, and the responsibility of both state and non-state actors. Markets reflect a growing complexity, well-captured by Braithwaite's notion of "regulatory capitalism."[173] This complexity is more than a rudimentary migration away from command and

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[173] John Braithwaite, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER (2008); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*. 598 THE ANNALS OF THE AM. ACAD. OF POLIT. AND SOC. SCI. 12 (2005)

control regulation in the developed world.[174] Instead, commentators argue that with regulatory capitalism "a new division of labor between state and society (e.g., privatization) is accompanied by an increase in delegation, proliferation of new technologies of regulation, formalization of inter-institutional and intra-institutional relations, and the proliferation of mechanisms of self-regulation in the shadow of the state."[175]

This division promotes some creative thinking about new ways of regulating, and about some possible modern progressive positions.[176] After all, the role of science in new governance theory, dogma, and practice should be at the core of their case. So, too, is the commitment of governance theorists to a new institutional design, one that "relies on information-based and information-forcing techniques: specifically, reason-giving, transparent processes, benchmarking and outcome analysis, and shared information." [177] But these kinds of idealized regulatory ingredients and designs are challenged by a fixed institutional architecture and the deeply embedded interests reflected in the existing oversight and administration of the corporate criminal law.[178] There is no simple solution here.[179]

Thinking about how science and the accelerated advance of regulatory technology may inform policies and practices is no longer what it once was. Plural and decentered conceptions of all variants of informal and

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[174] J. Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Postregulatory" World,* 54 CURR. LEGAL PROBL. 103 (2001)

[175] *Id* at 13

[176] Consider, for example, the move toward a shared or collaborative approach to regulation with the work of Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998)

[177] For an outstanding exposition of the new governance approach, and the obvious challenges for extant regulatory practice, see: Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WISC. L. REV. 441 (2010)

[178] Baer, *supra* note

[179] Responsive and reflexive regulatory structures attempt to take into account business incentives and internal business incentives, along with decision making processes. *See*, Neil Gunningham, *Strategizing Compliance and Enforcement: Responsive Regulation and Beyond* in C. Parker and V. L. Nielsen (eds.) EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION (2011); Eric Orts, *Reflexive Environmental Law*, 89 NORTHWESTERN U. L. Rev. 1227 (1995); Paul R. Kleindorfer, and Eric W. Orts, *Informational Regulation of Environmental Risks*, 18 RISK ANALYSIS 155 (1998); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983): *See also,* Christine Parker, *Twenty Years of Responsive Regulation: An Appreciation and Appraisal*, 7 REG. & GOVERN. 2 (2013); *cf.* Peter J. May and Robert S. Wood, *At the Regulatory Front Lines: Inspectors' Enforcement Styles and Regulatory Compliance*, 13 J. of PUBLIC ADMIN. RES. AND THEORY 117 (2003). For a discussion of Smart Regulation, see: Neil Gunningham, Peter N. Grabosky, and Darren Sinclair. SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY (1998). For an interesting extension of Smart Regulation, *see:* Peter Van Gossum, Bas Arts, and Kris Verheyen. *From "Smart Regulation" to "Regulatory Arrangements,"* 43 POLICY SCIENCES 245 (2010).

formal constraint should move modern progressives to, for example, rethink how to conceptualize, operationalize, and measure compliance and what motivates compliance. Should compliance be conceived and measured as a complex enterprise problem between and among state and non-state regulatory stakeholders? If so, what kind of social controls will accommodate and fairly reflect the complexity of global business regulation in countries with and without a mature rule of law? The complexity of global business and markets would challenge the imagination of twentieth century progressive thinkers.[180] A modern account of the progressive corporate criminal law must at least begin to capture this complexity and respond in measured ways.

With the benefits of contemporary knowledge, century-old progressives would likely embrace research on how corporate structure, agency, and culture informs any theory of "meta-regulation."[181] Formal compliance systems would be evaluated for their content and structure, but in the larger context of the strategies, perceptions, and motivations of agents; the position of agents; and the overall culture of the firm.[182] Reference would be made to the nodes that Parker identified as critical for corporations to successfully respond to regulatory demands: top management attention and response; development of professional compliance management; and employees' internalization of compliance and communication.[183]

Modern progressives would also address other challenges in regulating corporations.[184] There are significant concerns over the risks and costs of regulatory delegation to private firms and, in particular, how firms might misuse this discretion.[185] The idea of enforced self-regulation raises

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[180] John Braithwaite & Peter Drahos GLOBAL BUSINESS REGULATION (2000)
[181] Christine Parker, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002)
[182] Dick Hobbs, *The Firm. Organizational Logic and Criminal Culture on a Shifting Terrain*, 41 BRITISH JOURNAL OF CRIMINOLOGY 549 (2001); Linda Trevino, *A Cultural Perspective on Changing and Developing Organizational Ethics*, 4 RES. ORGANIZATIONAL CHANGE & DEV. 195 (1990); Linda Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601 (1986); Bart Victor and John B. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 ADMIN. SCI. Q. 101 (1988).
[183] *See* Christine Parker, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002)
[184] These considerations are an extrapolation of progressive dogma. *See,* Allan G. Cruchy, *Government Intervention and the Social Control of Business: The Neoinstitutionalist Position*, 8 J. ECON. ISSUES 235, 238 (1974) ("Effective social control of business must take account of the efficiency, the power, and the value aspects of the problem of how to fit private business into the advanced industrial society if the issue is to be dealt with adequately.")
[185] Kenneth A. Bamberger, Regulation as Delegation: Private Firms, *Decisionmaking, and Accountability in the Administrative State,* 56 DUKE L. J. 377 (2006)

concerns over privatizing a public function.[186] In fact, it raises another conundrum worthy of progressive contemplation. As Bamberger writes, there is a need to rely on the private sector for risk assessment and management.[187] Failures of assessment and management, however, carry significant costs to both regulators and the regulated—and neither are well-equipped to minimize those costs.[188]

Modern progressives would, nevertheless, embrace compliance science and technology so that firms, regulators, and prosecutors move, as one, toward the objective of assessing organizational diligence and adjudicating non-compliance. At the same time, they would work toward the social control of corporates by state and non-state actors in measured and proportional ways. Progressives also would recognize the immense and unique power of the giants of industry, within and across all borders, to serve both private and public interests.[189] And, finally, they would seek to maintain the trust and legitimacy of the criminal process, the *sine qua non* of regulatory regimes, by fairly allocating criminal justice resources toward all offenders, human and corporate.[190] These reincarnate considerations, organized around some of the challenges posed by compliance science and social controls, are reflected below in thinking about a progressive corporate criminal law.

A. ROLE OF SCIENCE AND MARCH OF TECHNOLOGY

How science is situated in historical thinking about progressivism is defining.[191] Economic institutions, policies, and practices—our economic order—should be founded on a scientific order that requires systematic

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[186] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370–71 (2003). *Cf.* John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1981). For an excellent exploration of self-regulatory practices in securities firms, *see*: David P. McCaffrey and David W. Hart, WALL STREET POLICES ITSELF: HOW SECURITIES FIRMS MANAGE THE LEGAL HAZARDS OF COMPETITIVE PRACTICES (1998)

[187] *Ibid*

[188] *Ibid* at 366

[189] See, e.g., William S. Laufer, *The Importance of Cynicism and Humility: Anti-Corruption Partnerships and the Private Sector*, 8 DEVELOPMENT OUTREACH 18 (2006)

[190] This is a trend that is not only unjustifiable, but misses an opportunity for the United States to serve as an example to a host of countries that look for guidance during periods of law reform. *See*, Raymond J. Michalowski and Ronald C. Kramer, *The Space Between Laws: The Problem of Corporate Crime in a Transnational Context*, 34 SOCIAL PROBLEMS 34 (1987)

[191] *See*, Malcolm Rutherford, *Science and Social Control: The Institutionalist Movement in American Economics, 1918-1947*, 3 ERASMUS JOURNAL FOR PHILOSOPHY AND ECONOMICS 47, 49 (2010) ("The concern with proper scientific methods was a concern to make economics more empirical and investigational, and to avoid the speculative and untestable nature of much orthodox theorizing.")

observation and measurement. There is a carefully documented history that the scientific aspirations of progressives and institutionalists were also inextricably connected to the social control of business. The institutional arrangements that exert constraint on the economic order must not be based solely on expediency, symbolism, ideology and politics. Science and the scientific method are coextensive with sound regulatory policies and practices.[192]

It is with this historical background that we ask how science informs, influences, and molds corporate criminal law relative to the regulatory investment in compliance. This is every bit a rhetorical question, because so much more compliance science is necessary to support and, at the same time, justify the costs of corporate social controls, from the least formal (e.g., corporate codes of conduct and corporate culture) to the most formal (e.g., criminal law)?[193] This includes research on holistic and plural models of business compliance. It includes moving from conceptual and experimental models of machine learning applications to regulation, and the promised value, more generally, of LegalTech and RegTech. It also includes research that explores descriptive and inferential questions that, according to Parker and Nielsen, span four levels of analysis: (a) motives of agents (e.g., economic, social, and normative motives in support of an agent's or firm's decision or decision making), (b) organizational capacities, characteristics, and responses to regulation (e.g. internal firm resources, knowledge, leadership, and available technology), (c) how regulatory enforcement strategies and styles move organizations and their agents to respond (e.g., how regulatory institutions affect firm compliance), and (d) the effects of the external environment (i.e., social, political, and economic environment) on both regulators and the regulated.[194]

The advent of enterprise models of compliance also invites compliance research across the entire organization. A rigorous internal (company) and external (government) management-based system of regulation should generate a large, impressive, and long-overdue body of research on corporate compliance that is both endogenous (i.e., exploring the construction and meaning of compliance as independent and dependent variable) and exogenous (i.e., using pre-existing, pre-defined constructions and meanings of compliance to address specific descriptive and causal

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192 See, e.g., Rutherford, *supra* note and Clark, *supra* note at 221

193 These questions could be asked more broadly of all regulatory efforts with corporations, *see* Laufer and Robertson, *supra* note 111 at 1030

194 Christine Parker and Vibeke L. Nielsen, *The Challenge of Empirical Research on Business Compliance and Regulatory Capitalism*, 5 ANNUAL REV. LAW SOC. SCI. 45 (2009) (these authors further classify exogenous research as operationalizing compliance by reference to attitudes and motivations; by reference to policy goals; as compliance behavior; and by observation of regulatory compliance behavior).

research questions).[195] Both kinds of research directly address concerns over the metrics used for measuring effectiveness across a wide range of regulatory approaches.[196]

Perhaps most important, as seasoned compliance officers know all too well, successful implementation of formal compliance systems will require more than evidence of effective metrics and measures.[197] The recipe for successful compliance programs, research reveals, will hinge on "top management attention and motivation to implement a compliance system; the existence and strategies of specialized or professional compliance managers; and the way in which compliance systems are communicated to and experienced by the teams and individual workers that make up the organization."[198] Perceptions, motivations, and actions of compliance stakeholders do, indeed, matter.[199] So, too, do the expectations of society and external stakeholders.[200]

Conceptual models of corporate compliance that span individual, organizational, regulatory, and institutional levels reveal the complexity of the research enterprise—and how much more scholarship is needed.[201] In particular, there is a great need to develop and test theories of regulation or

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[195] *Id*

[196] These metrics are the ingredients of meta-regulation, attempts to operationalize self-regulation, *see:* Christine Parker, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002); Christine Parker and Vibeke L. Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?* 41 ADMIN. & SOC. 3 (2008)

[197] In addition to corporate cultures that resist compliance programming, there are concerns with "avoidance, resistance, ritualism and creative compliance." *See,* Christine Parker and Sharon Gilad, *Internal Corporate Compliance Management Systems: Structure, Culture and Agency*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 175 (2011)

[198] *Id* at 172-173 (2011)

[199] *Id* at 173. *See, e.g.,* Tom R. Tyler, *Procedural Fairness and Compliance with the Law*, 133 SWISS J. ECON. & STAT. 219, 220–22 (1997); Neil Gunningham, Neil, Dorothy Thornton, and Robert A. Kagan, *Motivating Management: Corporate Compliance in Environmental Protection*, 27 L. & POLICY 289 (2005); Søren C. Winter and Peter J. May, *Motivation for Compliance with Environmental Regulations*, 20 J. OF POLICY ANALYSIS AND MANAGEMENT 675 (2001); Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 L. & SOC'Y REV. 41 (2004); Toni Makkai and John Braithwaite, *Praise, Pride and Corporate Compliance*, 21 *INT'L J. OF THE SOC. OF L.* 73 (1993); Peter J. May, *Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities,* 27 LAW & POLICY 317 (2005); Leigh Raymond and Timothy N. Cason, *Can Affirmative Motivations Improve Compliance in Emissions Trading Programs?* 39 POLICY STUDIES J. 39, 659 (2011); Alexander, Cindy R., and Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost,* 5 JOURNAL OF CORPORATE FINANCE 1 (1999)

[200] Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Social License and Environment Protection: Why Businesses Go Beyond Compliance*, 29 L. AND SOC. INQUIRY 307 (2004)

[201] *See, e.g.,* Parker and Nielsen's model, supra note at 5

components of theories. This is, admittedly, a challenge for a wide range of reasons, including the lack of data and the complexity of regulatory instruments.[202] While modern progressives would strongly support meeting these challenges, they would, at the same time, look beyond the conventional challenges and explanations for what is known and not known about compliance.

Systematic evaluation research on corporate crime deterrence, what little there is of it, suggests the possible perils of making regulatory policies, no less confident hypotheses, without well-executed randomized controlled experiments, good longitudinal data, time series analyses, and case studies that provide rich qualitative data. In the only meta-review of corporate regulation, it seems as if regulatory policies produce as much defiance as compliance. And the more rigorous the method and design of the research project, the less of a deterrent effect obtained. Notably, those firms who adhered to multiple legal interventions (i.e., enforcement, monitoring, and inspections) were more likely to be deterred, whereas firms experiencing single intervention strategies were less likely.[203]

All conclusions found in this meta-review were cast as quite tentative, though, because of limited data and scarcity of rigorous research. The authors were more confident in concluding that there is simply insufficient evidence that law actually deters corporate offending.[204] One commentator writing about the meta-review hoped that this analysis would be "…a loud wake-up call for corporate crime researchers to start getting their methodological, conceptual, and analytical house in order."[205] Another commentator was equally as grim in calling for better impact assessment research with replications. Studies are needed across institutional and organizational

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202 Some of the challenges and difficulties posed by empirical research on compliance are addressed by Parker and Nielsen, *supra* note at 6 (challenges and difficulties include access to data; complexity, range, and interrelatedness of compliance constructs; and the impracticality of testing grand theories). *See also*, Sally Simpson, *White-Collar Crime: A Review of Recent Developments and Promising Directions for Future Research*, 39 ANN. REV. OF SOCIOLOGY 1 (2013)

203 Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie, and Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence* 15 Crim. & Pub. Pol. 387, 410 (2016)

204 *Id* at 410 ("We need to undertake more focused and high-quality (particularly randomized experiments or quasi-experiments) focused on program-specific interventions (with replications). Until then, the answer to the question of what works, what doesn't, and what's promising in the area of corporate deterrence will remain elusive.")

205 Ray Paternoster, *Deterring Corporate Crime: Evidence and Outlook*, 15 CRIM. & PUB. POL. 383, 384 (2016); John Braithwaite, *In Search of Donald Campbell: Mix and Multimethods*, 15 CRIM. & PUB. POL. 417 (2016) (discussing some reasonable expectations of corporate criminology)

contexts. The status quo, commentators note, is literally regulating in the dark.[206]

B. BEYOND THE COMPLIANCE CONUNDRUM

Judging the effectiveness of compliance efforts on organizations is said to be one of the more elusive if not daunting regulatory challenges.[207] This challenge is certainly recognized by the modern progressive account. As noted earlier, this embrace of empirics is confounded by increasing concerns in the private sector that a more careful, technology-driven and, indeed, scientific consideration of compliance would result in expectations of "voluntary" disclosures to regulators and prosecutors. This is I call a true *compliance conundrum*.[208]

That there is such a conundrum should not come as a surprise to regulators and prosecutors. The standard refrain continues to be: In the absence of clear guidance from government functionaries as to what are, in fact, effective compliance systems and compliance programs, generating and applying a science of compliance will be shunned by those general counsel, corporate counsel, and white collar criminal defense counsel who are even minimally risk-adverse.[209] Shunned even though all stakeholders know that ever-increasing compliance costs, to be justified, must be supported by well-conceived internal plans that meet or exceed regulatory criteria and expectations. Shunned, even though regulators and prosecutors admit that their proxies for compliance effectiveness are most often no better than intuitive and experiential—that their confidence in a firm actually exercising

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[206] The idea of regulating in the dark was first discussed by Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25 (2014); Roberto Romano, *Regulating in the Dark*, in C. Coglianese (ed.) REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 86 (2012). For an incisive critique of corporate crime research, *see* Peter Cleary Yeager, *The Elusive Deterrence of Corporate Crime,* 15 CRIM. & PUB. POL. 439 (2016)

[207] *See, e.g.,* Vibeke L. Nielsen and Christine Parker. *Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance*. 34 LAW & POLICY 428 (2012). Adan Nieto *supra* note . paints a nuanced portrait of the complications associated with ensuring against cosmetic compliance (e.g., lack of legal certainty for regulated firms and lack of trust of compliance programs by regulators). Nieto then offers a critique of the remedies against cosmetic compliance, including certification and standardization.

[208] *See, e.g.,* Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J. L. ETHICS & PUB. POL'Y 169 (2015)

[209] Even more than shunned, there is a distinct risk that regulation will be gamed. See, e.g., Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State,* 56 DUKE L. J. 377 (2006). *See also,* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms),* 146 U. PA. L. REV. 101 (1997)

due diligence, good governance, and reasonable risk management is, in fact, faith-filled. Simply stated, the choice is not so difficult if it is between disclosure and cooperation with law enforcement, or handling the matter internally.

Regulatory and administrative law scholars would find this conundrum to be part of a larger problem of the delegation of regulatory discretion.[210] This delegation, some conclude, often makes a mess of compliance norms, expectations, and incentives. There is simply insufficient guidance for the regulated, combined with a lack of recognition of sound compliance programs that reveal non-compliance. Add to this the reticence of prosecutors to get into the business of making nuanced judgments about the effectiveness and completeness of integrity, ethics, and compliance efforts. One is hard pressed to find a genuine desire for regulatory capacity building in government agencies and departments, at least one even remotely comparable to the convergence of investments by private sector compliance stakeholders.

The recent announcement of a compliance counsel appointed to the Fraud Section of the Criminal Division of the Department of Justice is a surprising admission that expertise in compliance metrics were until only recently missing in the discretionary calculus of federal prosecutors. Unless modern progressives seize this opportunity that this convergence provides, it is fair to conclude that intuition and experiential evidence will continue to guide prosecutorial discretion. Prosecutors are simply not compliance professionals, as we are told by the Department of Justice, and the best that can be done is to ask a seasoned Main Justice compliance professional for a "reality check."[211] This reality check will be determined by such a professional with reference to some very familiar due diligence factors. These include the need to be reasonably proactive and reactive, the importance of organizational climate, and communication and enforcement of standards, among others.[212]

Due diligence factors broadly offer guidance but, without more, are intuitions and hypotheses about the behavior of persons and organizations

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[210] *See* Bamberger, *Id* at 388

[211] *See*, Leslie R. Caldwell, *Remarks*, SIFMA Compliance and Legal Society, New York Regional Seminar (November 2, 2015) ("Our goal is to have someone who can provide what I'll call a "reality check.") (Available at: https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-sifma-compliance-and-legal-society)

[212] These factors are derived from the pillars of diligence first announced in the Defense Industry Initiative (DII), subsequently enshrined in Chapter Eight of the Sentencing Guidelines for Organizations, and ultimately spun off into a series of iterative memoranda from the Department of Justice, i.e., the Holder, McNulty, Thompson, and Filip Memoranda.

that leave firms conflicted about pursuing systematic evaluations.[213] In the end, these factors are an invitation to make additional investments in a wide range of compliance solutions that, most often, are critically evaluated for their efficacy only when there is a notable event of non-compliance that inadvertently or advertently comes to the attention of regulators or prosecutors.[214]

Modest suggestions for addressing the conundrum should acknowledge the complexity of compliance regimes in large institutions, including the iterative process of determining a regulator's discretionary expectations for corporate compliance; the regulatory challenges of monitoring firm compliance over time; the challenge of training employees to conform to articulated legal risks; and the increasing suasion of self-regulatory associations.[215] All suggestions should also address how this conundrum, along with any trading of regulator/regulated favors, fit in the long-awaited for partnership between the government and corporations.[216] First conceived as the "good corporate citizen" movement more than two decades ago, this partnership was designed to reasonably share regulatory burdens by firms and criminal justice functionaries. For this partnership to be successful, regulators would shoulder the burden of providing clear guidance as to the kind and quality of compliance metrics required for the ethical and legal risks assumed by the firms they regulate, i.e., going beyond the simple prescription that firms must invest in sophisticated risk assessments; maintain clear policies, standards, and procedures; engage in effective training and communication; regularly test compliance monitoring and auditing; perform thorough internal and external investigations; and promote a culture of compliance.[217]

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[213] For a discussion of the history of compliance beginning with the Defense Industry Initiative (DII), see Laufer, *supra* note 2 at .

[214] Miriam Baer captures the process well in writing that extant practice "…is at best an illusory delegation of responsibility whereby the government commands firms *ex ante* to implement "effective" compliance programs, but offers little practical guidance for determining effectiveness, and intentionally leaves them very little room for discretion in the event that such programs uncover violations of law." Baer, *supra* note at 954

[215] *See*, Parker and Nielsen *supra* note at 49); see also, Matthew Potoski and Aseem Prakash, *Regulatory Convergence in Nongovernmental Regimes? Cross-National Adoption of ISO 14001 Certifications,* 66 J. OF POLITICS 885 (2004).

[216] PROCEEDINGS OF THE SECOND SYMPOSIUM OF CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION (Sept. 7-8, 1995). For a critical take on this movement, *see, e.g.,* Laufer *supra* note 28; Laufer, *supra* note 157

[217] Of these, creating an ethical corporate culture is most challenging. *See, e.g.,* Amber L. Seligson and Laurie Choi, CRITICAL ELEMENTS OF AN ORGANIZATIONAL ETHICAL CULTURE 7-8 (2006) (Ethical culture may be captured by 18 factors)

What these suggestions miss, however, are the distinct limitations of seeing compliance exclusively in performance terms with specific outcome metrics. In fact, any focus on performance metrics alone fuels the compliance conundrum, exploiting the lack of a systematic compliance science and data, and neglecting the fact that a firm's compliance with law is often not entirely reducible to any narrow construction of compliance performance at a single level of analysis. As Parker writes, it is wrong to assume that changes in behavior are necessarily the product of new or changing compliance systems.[218]

Researchers must control for other structural, agency, and cultural co-variates.[219] Researchers must also look to successful efforts to "regulate from the inside" using environmental management systems and other technologies that support self-regulatory efforts.[220] Much research highlights the value of management-based regulation as a complement to technology-based (i.e., firms must adopt specific technologies or methods to comply), performance-based (i.e., firm must achieve specific level of compliance), and other conventional and market-based instruments.[221] Advances in the regulation of environmental pollution, food safety, and industrial safety using management-based regulation are notable.[222] Environmental management systems and other flexible and light-handed regulatory approaches offer a least cost solution with incentives to meet, and in some cases exceed, that which is required by law.[223]

Proponents still ponder, though, just how prescriptive they should be about the plan and its implementation, how to monitor a firm's compliance, the consequences for non-compliance, and how this kind of regulation should be subject to the latest evaluation science. Long overdue answers to these

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[218] *See*,. Warren, Gaspar, and Laufer, *supra* note 72 (Bank employees were surveyed before and after the introduction of formal ethics training—an important component of formal ethics programs—to examine the effects of training on ethical organizational culture.)

[219] *See*, Neal Shover and Andy Hochstetler, *Cultural Explanation and Organizational Crime*, 37 CRIME, LAW & SOC. CHANGE 1 (2002)

[220] For a discussion of the successes and challenges of these management systems, *see* Cary Coglianese and Jennifer Nash (eds.), REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? (2001)

[221] Cary Coglianese and David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals,* 37 L. & SOC'Y REV. 691, 698 (2003)

[222] *See, e.g.,* Cary Coglianese and Jennifer Nash, LEVERAGING THE PRIVATE SECTOR: MANAGEMENT-BASED STRATEGIES FOR IMPROVING ENVIRONMENTAL PERFORMANCE (2006); For a discussion of the limitations of management-based regulatory approaches, see Neil Gunningham and Darren Sinclair, *Organizational Trust and the Limits of Management-Based Regulation*, 43 L. & SOC'Y REV. 865 (2009)

[223] *See, e.g.,* Cary Coglianese and Jennifer Nash, *Environmental Management Systems and the New Policy Agenda*, in C. Coglianese & Jennifer Nash (eds.) REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? (2001)

questions are needed to combat the compliance conundrum and integrate new approaches into the broader progressive agenda.[224] And, alas, the fast-paced movement of regulatory and legal technology holds out much promise.

V. REVISITING THE MODERN PROGRESSIVE AGENDA

The modern progressive agenda is often broadly defined by the pursuit of individual freedom; freedom from undue government interference; the opportunity to work toward economic and civic success; taking personal responsibility, and a sense of responsibility to others.[225] Modern progressive issues revolve around jobs and the economy; taxes and deficits; health care, social security and Medicare; education; immigration; environmental, climate and energy policy; reproductive rights and health; money in politics; and gay rights and marriage equality.[226]

Matters of corporate responsibility, accountability, and justice are the subject of vociferous advocacy over what it means to break up the big banks; separate commercial and investment banking by bringing back a replica of the Glass–Steagall Act (Banking Act of 1933); enact financial speculation taxes; limit executive compensation; and use principles and practices of collective civil disobedience to "occupy" Wall Street.[227] This advocacy attaches to the core progressive idea of "taming the giant corporation" that dominated progressive dogma in the 1970s and 1980s. Calls from Ralph Nader for federal incorporation laws, and Christopher Stone for general and special public directors, inspired a small share of a new progressive agenda.[228]

In recognition of the harm flowing from serious wrongdoing of the largest businesses, progressives see corporations as artificial entities whose domination and unconstrained power has now creeped into every aspect of life. This power has a damaging hold on the political process. We live in a near corporate state, modern progressives say, where our most significant

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[224] For early calls for corporate monitoring from a special seat on the board, *see*: Christopher Stone, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 174-183 (1975)

[225] *See*, Zack Beauchamp, PROGRESSIVE THINKING: A SYNTHESIS OF PROGRESSIVE VALUES, BELIEFS, AND POSITIONS (2015)

[226] *See,* John Nichols, *Elizabeth Warren Offers Democrats More Than a 2016 Candidacy—She Offers a 2014 Agenda*, *The Nation*, July 19, 2014 ("We believe that Wall Street needs stronger rules and tougher enforcement, and we're willing to fight for it.") (available at: https://www.thenation.com/article/elizabeth-warren-offers-democrats-more-2016-candidacy-she-offers-2014-agenda/)

[227] *Id*

[228] *See,* Nader *supra* note and Stone *supra* note . For an older progressive take, *see* Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 *The American Journal of Legal History* 160 (1982)

issue should be how to best constrain, disable, and disassemble the largest private institutions that have so successfully aggregated corporate power. Something must be done to address the disconnect between the wholly selfish interests of Wall Street and a law-abiding, honorable if not selfless Main Street.

If this generation of progressives will be the constituency supporting a measured and just corporate criminal law, they will have to know where to best direct government and corporate controls. This means balancing the value of abolishing corporate personhood with the importance of personhood for the attribution of criminal liability. This also means sharing the power of informal social controls between regulators and the regulated, as co-regulators, using leading enterprise technology; accepting the increasing delegation and, thus, privatization of public regulation with increasingly plural and decentered models of regulation; and recognizing how a progressive corporate criminal law will apply to enterprises of all sizes and ownership status.

It also means thinking about how modern progressive advocacy is affected by criminal justice strategies that, according to some, make black lives all but incidental.[229] Neoconservative policing strategies characterized by containment, surveillance, pacification, and deception may meet law enforcement objectives but, at the same time, risk racial injustice.[230] Aggressive urban police policies and practices, modern progressives might argue, target precious criminal justice resources, a reasonable percentage of which could and should be used to combat corporate wrongdoing by companies of all sizes. Our malevolent portrait of street criminals, the "badness" of street-level wrongdoing, contribute to a concentration of criminal justice attention and resources away from more aggressive investigation and prosecution of corporates.[231] These and other challenges to the modern progressive agenda are briefly detailed below, concluding with a reflection on how the rules of the compliance game would change with a little nudge from modern progressives.

A. THE BRIDGE FROM OLD TO NEW

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[229] *See*, Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS (2010); Marie Gottschalk, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2014)

[230] Alex S. Vitale and Brian J. Jefferson, *The Emergence of Command and Control Policing in Neoliberal New York*, in POLICING THE PLANET: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER 157-172 (J. Camp & C. Heatherton, eds.) (2016)

[231] See, e.g., Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831(2005)

Casting a dark shadow on the ethics and integrity of big business may successfully connect old and new ideologies.[232] It is a very satisfying rant for all of the obvious reasons. At the same time, assuming that evil comes from all businesses is a lazy and distorted caricature. Progressives of old did much to unpack the value that different forms of constraint have on creating and successfully sustaining order within firms. Asking how social controls promote prosocial corporate behavior falls within the province of modern progressives as well..[233]

It is possible to trace social control theory from Comte to Durkheim, through the turn of the twentieth century to Edward A. Ross and Charles H. Cooley, each of whom represented a very broad progressive construction of social control.[234] For Ross, social control comes from complex social relations. As personal or intimate relations are replaced by impersonal, contractual relations, self-interest prevails, and the natural bonds uniting a small neighborhood or village community are insufficient.[235] Instinctive and informal social controls, like empathy, sociability, a sense of equity and solidarity, are insufficient to control and curb self-interest. Thus, as natural communities mature into "artificial" societies, the regulation of conduct to quell temptation demands a means of control that is more formal and systematic.[236] These control mechanisms, the most effective of which is social instruction, allow for an accommodation of natural and artificial order with the objective of reaching an ideal balance between informal and formal social control.

Thus, in post-industrial societies with complex economic transactions, social order is maintained by accommodating the natural order with necessary and sufficient artificial constraints. This is needed to counter a "commercialization" of business practices and the practices of "rapacious" businessmen.[237] A host of control processes and mechanisms must operate

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[232] Alfred D. Chandler, *The Beginnings of "Big Business" in American Industry*, 33 BUSINESS HISTORY REVIEW 1 (1959)

[233] So, too, is charting a progressive course of corporate social responsibility. *See* Greenfield, *supra* note

[234] Edward A. Ross, FOUNDATIONS OF SOCIOLOGY (1905); Edward A. Ross, THE PRINCIPLES OF SOCIOLOGY (1920)

[235] Julius Weinberg, EDWARD ALSWORTH ROSS AND THE SOCIOLOGY OF PROGRESSIVISM 80 (1972) ("Social control rests on the commonly held assumption that Western society has evolved from a state of "natural order" to one of "social order" and that as a result of this transformation the innate goodness of man must be buttressed by a variety of agents of control in order to ensure a stable and tranquil social order.")

[236] Jack P. Gibbs, CONTROL: SOCIOLOGY'S CENTRAL NOTION (1989); Morris Janowitz, *Sociological Theory and Social Control*, 82 AMERICAN JOURNAL OF SOCIOLOGY 108 (1975)

[237] Weinberg *supra* note at 128 (""Commercialization" was Ross's term for the evils industrialism and capitalism had brought to American life. Defined by Ross as "*the increasing subjection of a calling to the profit motive.*" It affected men and women,

from within the corporation to influence and constrain employee behavior. These processes and mechanisms interact with a series of formal organizational systems, like the corporation's cultural milieu, leadership style, structure, reward systems, and decision making processes.[238]

The premise of more modern iterations of social control theory is that individuals voluntarily enter into certain social relations with a rational calculation that these relations are beneficial and gratifying. There is an exchange of benefits associated with these relations, along with corresponding obligations. These relations are maintained in ways that conform to norms, conventions, and expectations. Social and moral order are kept by social control. Finally, progressives maintain that the natural order, often seen in terms of informal social control, may be more effective in ensuring norm conformity than more structured artificial order, or formal social control—but the benign big gun is, nevertheless, an invaluable lever.

Corporate ethics initiatives, such as ethics training programs and ethics codes, exert social control by imposing a kind of artificial order entirely consistent with early social control theories.[239] Compliance and regulatory technology products, services, and initiatives formalize and codify minimally acceptable business practices, some of which reflect corporate norms, customs, and etiquette. Other compliance efforts make legal requirements more explicit or relevant. All are predicated on the simple proposition that different degrees of artificial order also reflect some meaningful normative content, such as ethics and integrity.

Progressives today have a significant stake in how compliance requirements are conceived, integrated into organizations, and evaluated for their efficacy and effectiveness. Their failure to be true to their history, by actively exploring the disconnect between functioning institutions of social control and powerful corporations, diminishes the legitimacy of their calls for dismantling large financial institutions. Modern progressives should be leading this convergence of compliance solutions to reduce corporate deviance, and to disrupt the perennial game of compliance. Modern progressives also should be studying how this convergence may, at times, produce overly controlled and rigid workplaces.[240] And modern progressives should be exploring how the use of both informal and formal social controls may more meaningfully connect to the characterization of corporations as moral agents and as persons.

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institutions and human relationships, politics, and morality. The commercial impulse resulted from the proliferation and intensification of corporate ownership, sharper social and economic stratification, and growing impersonality between producer and the consumer.")

[238] *See* Laufer and Robertson *supra* note 111

[239] Id

[240] *See* Laufer and Robertson, *supra* note 111

1. PERSONHOOD

In an effort to undue the grant of corporate constitutional rights, modern progressives regularly and consistently attack the very idea of personhood.[241] Corporate personhood unfairly transforms the concept of property and unjustly limits liability. The idea of corporate personhood is inextricably tied to the evils associated with globalization, the dominance of corporate power, unjust wealth concentration, and an all-encompassing neoliberal disingenuity.[242] Modern progressives also worry about how large corporations epitomize corruption in modern form.[243] Modern progressives join populists, and others to the left, in recoiling at our corporate economy and corporate society.[244] Some go so far as to think that we are inching toward fascism with the rise of corporate control over the legislative and now executive branch, significantly diminishing civic power.

The deeply-held views of modern progressives on personhood in this post-*Citizen's United* period complicate any substantive reform of corporate criminal law.[245] So, too, does the defining role of personhood in reproductive rights, more generally. Personhood statutes and initiatives are weapons of abortion foes.[246] All of these invectives beg the question: How corporate personhood could be abolished as a matter of progressive principles, while accepting that part of the criminal law that generally looks to, if not requires, the very qualities and characteristics associated with personhood.[247] With the narrow exception of strict liability offenses, the fault requirements of federal

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[241] Matthew Rothschild, *Corporations Aren't Persons*, THE PROGRESSIVE, April 2, 2010 (available at: http://www.progressive.org/mrapril10.html) ("We need to slay the dragon of corporate personhood once and for all.") For a wonderful discussion of the history of these rights, *see* Blair, Margaret M., and Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights,* 56 WILLIAM & MARY LAW REV. 1653 (2015)

[242] This extends to the evils of corporate political influence in this post-Citizens United era. *See, e.g.,* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 924-28 (2013); and Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593 (2014); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship* 44 U. CONN. L. REV. 575 (2012).

[243] William S. Laufer, *Modern Forms of Corruption and Moral Stains*, 12 GEO. J. L. & PUB. POL'Y 373 (2014)

[244] For a discussion of big business and "Corporate" America, *see* McGerr *supra* note at 147-181

[245] *See* Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012)

[246] Lee Rubin Collins and Susan L. Crockin, *Fighting 'Personhood' Initiatives in the United States*, 24 REPRODUCTIVE BIOMEDICINE ONLINE 689 (2012)

[247] *See* Walt and Laufer, *supra* note 7

and state criminal codes extend a distinct human form and logic to the *persona ficta* of a corporation.[248] The corporate person is, in essence, more than a simple construction or empty metaphor.[249] For progressives it is a facilitative legal fiction that allows criminal law principles to be attributed to culpable and, thus, deserving entities. Abolishing personhood may be the perfect revenge for corporate evils. At the same time, though, undermining this fiction would likely diminish the role and suasion of the most formal of social controls to address this evil.[250]

Modern progressives face a difficult dilemma. Take away the person, and principles of corporate criminal law must be formally recast. Abolish personhood and one might have to reconstruct any responsive regulatory architecture, straining to find a place for the benign big gun.[251] The analytic challenge is exceptionally difficult if one is committed to a consistent conception of personhood across the criminal law.[252] How should modern progressives inherit the old progressive's consternation over organizational personhood? Practically, there is no need to ask whether the progressive call for strengthening the regulatory system may be satisfied while at the same time abolishing the fictional form that allows for liability. Modern progressives benefit from parallel fault standards that allow for prosecutions of either human or corporate persons, or both.[253] The Yates Memorandum

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[248] *See, e.g.,* Stone *supra* note at 3

[249] *See, e.g., See*, Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, in W. S. Laufer and F. Adler, eds., ADVANCES IN CRIMINOLOGICAL RESEARCH 31 (1989)

[250] *For a comparable argument, see* Kent Greenfield, *Let Us Now Praise Corporate Persons*, WASHINGTON MONTHLY, January/February, 2015 (available at: http://washingtonmonthly .com/magazine/janfeb-2015/let-us-now-praise-corporate-persons/); ("But the attack on corporate personhood is a mistake. And it may, ironically, be playing into the hands of the financial and managerial elite. What's the best way to control corporate power? More corporate personhood, not less.")

[251] In fairness, while some courts find personhood to be incidental, most corporate criminal prosecutions assume certain relational properties commonly associated with personhood. For example, *see State v. Knutson* (537 NW 2d 420, 196 Wis. 2d 86 (1995) ("…it is not in virtue of being a person that criminal liability attaches. It is in virtue of possessing the complex relational property of causing harm-voluntarily-with a wrongful state of mind-without excuse.") *See also,* Walt and Laufer, *supra* note 7

[252] This raises the more general question of why the "personhood" epithet must be employed consistently. Perhaps different parts of the criminal law might apply to corporations differently because the interests at stake are different? Why create a useful heuristic (personhood) and then use it many different contexts where it may not be useful? Both are good questions that are not answered by the tendency of courts and legislatures to reflexively resort to personhood heuristics or person-based analogies.

[253] *See, e.g.*, John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658 (1926) ("[B]efore anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person.") The strategic use of parallel civil and criminal proceedings has been discussed

distracts attention from well-settled principles that, recognizing the corporation as an entity subject to criminal law, prosecutors have the discretion to proceed in parallel or proceed separately.[254] Strategic considerations account for variations in prosecutorial behavior, with a distinct preference for individual cases well before Yates.[255]

2. THE GENERAL PART

Changes to the general part of the corporate criminal law over the past century are nearly impossible to find. In place of successful corporate criminal law reform, a legion of strange bedfellows have battled over corporate metaphysics, moral agency, what it means to for a company to have a "soul" and be culpable or liable.[256] These battles are undeniably engaging, and so very longstanding.[257] With no metrics for progress made, and no inspired law reform to show, however, statutory and decisional law rests in a state of doctrinal decay.

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at length, see: *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions,* 92 HARV. L. REV. 1227, 1333-40 (1979).

[254] See, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS 2 (2008) (available at: https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf) ("Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.") It is interesting to note that outside of the United States, there is an ongoing debate over the implications of *ne bis in idem* in proceeding against both "legal" and human persons, *see*: Dominik Brodowski, *Minimum Procedural Rights for Corporations in Corporate Criminal Procedure*, in Brodowski, D., Espinoza de los Monteros de la Parr, M.,Tiedemann, K., Vogel, J. (Eds.) REGULATING CORPORATE CRIMINAL LIABILITY 211-225 (2014)

[255] Id at 5. The Yates Memo signals that liability risk for firms should be conceived in terms of an individual agent's non-compliance. No prosecution of a corporation will result unless there is prima facie evidence of an agent's fault. The result for compliance officers is simple: Focusing resources on organizational fault is unresponsive to this regulatory prescription. To be responsive, firms should focus attention on the acts and omissions of individual agents. The compliance function is justifiably tied to regulatory prescriptions. Elsewhere, it was argued that changes in requirement of the general part of the corporate criminal law, invite congruence or consistency problems. *See*, William S. Laufer and Alan Strudler, *Corporate Crime and Making Amends,* 44 AM. CRIM. L. REV. 1307 (2007)

[256] *See,* Eric Orts and Craig Smith (eds.), THE MORAL RESPONSIBILITY OF FIRMS (2017); Peter A. French, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984); Margaret Gilbert, *Sociality and Responsibility* (2000); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171 (2007); Susan Wolf, *The Legal and Moral Responsibility of Organizations*, *in* CRIMINAL JUSTICE: NOMOS XXVII 267, 268 (J. Roland Pennock & John W. Chapman eds., 1985)

[257] *See,* Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932); for a recent treatment on agency questions, *see* Eric Orts and Craig Smith (eds.), THE MORAL RESPONSIBILITY OF FIRMS (2017)

It is also true that a wide range of proposed entity fault standards were left on the table that show promise for more meaningful and genuine determinations of fault. These determinations turn on connections between the decisions, actions, and inactions of agents, and the quality and characteristics of the firm.[258] More relevant to the progressive case, these "genuine" fault standards tend to facilitate reasonable attributions of fault.

Modern progressives should seize the opportunity for greater corporate accountability and push for the adoption of culpability and liability standards that conceive of fault as an entity's acts and intentionality; a function of an agent's status in the corporate hierarchy; a collection of intentions; or the nature of an agent's relationship to the principal. Constructive corporate fault, corporate character and culture theory, and proactive/reactive fault are also candidates for liability and culpability standards that are organizational in nature.[259]

Progressives might, for example, adopt a corporate liability standard that conceives of fault as an entity's acts and intentionality or perhaps a function of an agent's relationship to the principal. This approach is consistent with a constructive corporate liability.[260] A constructive corporate liability and culpability exists where there is proof of: (1) an illegal corporate act, and (2) a concurrent corporate criminal state of mind. The former requirement may be satisfied by evidence of a primary act—an act that is owned or authored by the corporation. Primary action may be identified through an objective test where it is determined that given the size, complexity, formality, functionality, decisionmaking process, and structure of the corporate organization, it is reasonable to conclude that the agents' acts are the actions of the corporation. This reasonableness test is a threshold assessment that serves to separate those cases in which primary corporate acts have occurred, from those appropriately considered as individual non-corporate acts (or secondary acts). Constructive corporate fault replaces vicarious liability with a constructive test of primary corporate action.

Any reasonable departure from corporate vicarious liability, it seems, would be preferred by modern progressives. Principles of vicarious fault are simply too difficult and costly to apply to agents of large and powerful corporations. The larger the organization, the more likely that the agent's acts

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[258] *See infra* notes to

[259] William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648 (1994) (detailing different conceptions of "genuine corporate fault"). *See also*, See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Ann Foerschler, *Comment, Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287 (1990). For a fascinating take on corporate culpability and cognitive science, *see* Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. __(2016).

[260] *See* Laufer, *supra* note 2

and intents are attenuated; the more likely that there are relevant policies, procedures, and training that further disconnect the wrongdoing from the corporation's diligence; the more likely that corporations would engage in "reverse whistleblowing," and the more likely that for reasons of sheer size and steady base-rates of deviance, vicarious fault would apply to far too many agents to be both reasonable and practical.[261]

B. TAMING THE GIANT CORPORATION?

Targeting and taming giant corporations excite progressives of old and new stripes. There are many good reasons to attend to iconic companies of great scale, from their market and political power, to the lasting effects of their ethical and legal violations.[262] The largest private sector actors powerfully influence both regulation and any attribution of criminal responsibility.[263] Corporations are deft at undermining legislative efforts to limit industry self-regulation and firm self-governance. What remains of corporate crime reforms often have as much to do with the use of corporate power as the congressional intent behind the legislation.[264] Corporate political influence is a longstanding and sustained concern of progressives.[265]

Classic research by Marshall Clinard and Peter Yeager in 1979 revealed that wrongdoing is generously distributed in the largest companies.[266] Many years of employee surveys from large firms confirm high base rates, much of which is washed through non-reporting or management inertia, if not inaction.[267] Giant corporations also benefit significantly by a multi-tier system of corporate criminal justice, one in which only small companies, where owners had direct knowledge of the illegalities,

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[261] *See* Laufer *supra* note 5 for a discussion of corporate scapegoating (called "reverse whistleblowing") by deflecting blame to low-level employees.

[262] *See,* Nader, *supra* note at 7. There is a long history to the progressive's concern with big business. *See, e.g.,* McGerr supra note at 151 ("The rise of large-scale corporations was unsettling, even frightening. Big business, as one newspaper warned, could well "lead to one of the greatest upheavals that has been witnessed in modern history.""). *See also*, Charles A. Moore, *Taming the Giant Corporation? Some Cautionary Remarks on the Deterrability of Corporate Crime*, 33 CRIME & DELINQUENCY 379 (1987)

[263] Thomas M. Jones, *Corporate Governance: Who Controls the Large Corporation,* 30 HASTINGS LJ 1261 (1978)

[264] *See* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. Q. 95 (2004); Laufer, *supra* note 2

[265] *See, e.g.,* Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 *Iowa L. Rev.* 153 (1995)

[266] Clinard and Yeager, *supra* note

[267] Laufer, *supra* note 2

are generally prosecuted to conviction.[268] Larger corporations are often diverted from the criminal process into deferred prosecution agreements, non-prosecution agreements, and corporate integrity agreements.[269] A small number of the largest corporations, those that offer something quite important or strategic—or whose existence is systemically important—are simply too big to indict, prosecute, take to trial, and convict.[270] Nowhere is this more apparent than in the torpor to bring criminal cases against the largest financial institutions for wrongdoing during the subprime crisis.[271]

There is an obvious and justifiable attraction to think of business crimes and organizational wrongdoing as the province of giant corporations. Part of the lure comes from very real concerns over concentrated resources, the simple power and scale to do wrong, boundless capabilities to deflect and defend any accusation, access to extant regulatory strategy, and the difficulty of obtaining inculpatory evidence given the complexity of the corporate form. The other part of the lure is the sheer scale of their economies in comparison to other, different kinds of economies.

There is some risk, though, in uncritically accepting archetypal images of the largest private sector institutions, especially when conceiving corporate crime policy. At times, too little reflection is given to the variety of iconic images of corporations that do wrong. It is not only that there are many different types of corporations, many different kinds of corporate cultures, and sustained base rates of deviance in all.[272] It is not that big businesses who do wrong are less deserving of blame. The real risk is that such images make too convincing a case that regulatory attention should focus only on giant corporations and that all giant corporations are, in progressive terminology, evil. It is unfortunate that old and modern progressives are guilty of seducing and being seduced by symbolic imagery, as much as big business and government functionaries.

The near-exclusive focus by progressives on the giants of industry is also not justified by any evidence of greater rates of deviance in the largest corporations. On the contrary, in small to medium sized enterprises

[268] *See,* Brandon L. Garrett, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014)

[269] *Id* at

[270] *See,* Committee on Financial Services, U.S. House of Representatives, TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE: REPORT PREPARED BY THE REPUBLICATION STAFF OF THE COMMITTEE ON FINANCIAL SERVICES, July 11, 2016

[271] Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law,* 34 REV. BANKING & FIN. L. 655 (2015)

[272] For a fascinating exploration of base rates of misconduct, *see* Mark Egan, Gregor Matvos, and Amit Seru, *The Market for Financial Advisor Misconduct*, unpublished manuscript (2016)

("SMEs"), those with few resources to commit to compliance policies and programs, the rates of wrongdoing are likely as high, if not higher.[273] Certainly, regulatory disclosure requirements decrease appreciably in SMEs, in particular in the nearly 30 million small businesses in the United States.[274]

Images that target and tame giant corporate wrongdoing, on occasion, carry the neoconservative and neoliberal baggage of over-criminalization.[275] The time is long overdue for modern progressives to reposition the policing of all corporate crimes as a problem of under-criminalization and under-enforcement.[276] After all, the use of the criminal law with corporations remains a very rare event in the criminal justice system—with large *and* small corporations.

Modern progressives are left with several avenues for justice, and one can hope that this movement will transcend objections and follow in the footsteps of both history and tradition. Progressive proposals for federal chartering of the largest and most powerful corporations suggest that this transcendence is possible.[277] The case for federal chartering is premised on the failure of individual accountability; the unparalleled impact of big businesses on markets; the failure of state chartering laws to reign in corporate abuses; marked failures of corporate disclosures; and market concentration that protects against fair competition.[278] The chartering proposals, while unsuccessful, offered modern progressives a powerful vector for a more ambitious reform agenda.

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[273] *See,* Donald F. Kuratko, Jeffrey S. Hornsby, Douglas W. Naffziger, and Richard M. Hodgetts, *Crime and Small Business: An Exploratory Study of Cost and Prevention Issues in US Firms*, 38 JOURNAL OF SMALL BUSINESS MANAGEMENT 1 (2000): M. Ettredge, K. Johnstone, M. Stone, & Q. Wang, *The Effects of Firm Size, Corporate Governance Quality, and Bad News on Disclosure Compliance*, 16 *REVIEW OF ACCOUNTING STUDIES*, 866 (2011); Giampaolo Gabbi, Paola Musile Tanzi, and Loris Nadotti, *Firm Size and Compliance Costs Asymmetries in the Investment Services,* 19 JOURNAL OF FINANCIAL REGULATION AND COMPLIANCE 58 (2011)Darryl Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521 (2003)

[274] For a fascinating discussion of the challenges of self-regulation and wrongdoing in small businesses, *see*: Robyn Fairman and Charlotte Yapp, *Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement*, 27 LAW & POLICY 491 (2005)

[275] *See* Erik Luna, *Overextending the Criminal Law* in G. Healy (ed.) GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (2004)

[276] Richard A. Bierschbach and Alex Stein, *Overenforcement*, 93 GEO. L. J. 105 (2005); Stuart Green, *Is There Too Much Criminal Law?* 6 OHIO ST. J. CRIM. L. 737 (2009); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization,* 54 AM. U. L. REV. 747 (2005)

[277] Ralph Nader, Mark Green, and Joel Seligman, TAMING THE GIANT CORPORATION: HOW THE LARGEST CORPORATIONS CONTROL OUR LIVES (1976) (discussing the design and prospects of federal chartering)

[278] *Id*

C. SHARING REGULATORY AUTHORITY

The history of progressivism is often defined by a recognition of the state's authority to make public law and regulate. Such authority is paired with an overall distrust of the market and associated claims of efficiency. The prospects of sharing regulatory systems, no matter how modest (i.e., exchange of information) or grand (i.e., co-regulatory systems using cutting edge RegTech solutions), are a modern extension of progressive thought. Emerging models of regulatory sharing diminish the disincentives to disclose found in the compliance conundrum; change the strategic direction of the compliance game; facilitate more efficient responsive regulation; and open the door to networked enterprise systems with other state and non-state regulators. The bridge that came from the distrust of markets and comfort with the public sector's place in regulation, now extends to a strong sentiment that private and public compliance efforts must be co-dependent and, ideally, equally facilitative.[279]

It is more than intriguing to think about the value of extending LegalTech and RegTech solutions, along with more conventional enterprise models. Government Blockchain and GRC initiatives that serve information technology needs and audit responsibilities remain in their infancy. As they mature, though, the integration of enterprise technology solutions will likely reveal a host of co-regulatory possibilities. Next generation private and public sector enterprise solutions will include the integration and aggregation of performance-based, technology-based, and management-based regulatory instruments.[280] The push is for enterprise risk management solutions that serve multiple functions.[281]

GRC models, for example, aggregate descriptive, normative, and explanatory factors that contribute, independently and interactively, to assessing the behavior of the entire enterprise and for delivering principled

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[279] For an excellent exploration into the complexity of regulator-regulated relations, *see* Julien Etienne, *Ambiguity and Relational Signals in Regulator–Regulatee Relationships*, 7 REGULATION & GOVERNANCE 30 (2013)

[280] *Id* at 8 ("Regulators and law enforcement agencies will be looking for correlation between the compliance risk analysis, the risk register and the measures and key performance indicators that are being used to monitor those risks and compliance performance.")

[281] *See, e.g.,* Brian W. Nocco and René M. Stulz, *Enterprise Risk Management: Theory and Practice*, 18 J. OF APPLIED CORP. FIN. 8 (2006); Andre P. Liebenberg and Robert E. Hoyt, *The Determinants of Enterprise Risk Management: Evidence from the Appointment of Chief Risk Officers*, 6 RISK MANAGEMENT AND INSURANCE REVIEW 37 (2003); James Lam, ENTERPRISE RISK MANAGEMENT: FROM INCENTIVES TO CONTROLS (2014); Mark Beasley, Al Chen, Karen Nunez, and Lorraine Wright, *Working Hand in Hand: Balanced Scorecards and Enterprise Risk Management*, 87 STRATEGIC FINANCE 49 (2006)

performance.[282] With leading GRC models, multiple dependent variables are supported by specific measurable elements. Assessment is facilitated by governance actions and controls (e.g., the external direction, evaluation, and control of both processes and resources); management actions and controls (e.g., the internal direction, evaluation, and control of both processes and resources); and assurance actions and controls (e.g., an independent direction, evaluation, and control of both processes and resources). Additional proactive, detective, and responsive actions and controls complete a dynamic system of principled performance. The OECG GRC model offers an appealing architecture that melds performance with technology and management-based guidelines. Left to the discretion of both firms and regulators, however, is the matter of assurance, validation, and even possible certification.[283]

Building on the successful introduction of GRC, eGRC rebrands legacy GRC models by standardizing and then managing GRC firm-wide strategic and operational risks. This includes all GRC elements, from risks, controls, and policies, to action plans, audit missions, scenarios, and assessments.[284] With the promise of some next generation RegTech solutions, however, firms should be able to employ enterprise risk-based systems to monitor, measure, respond, resolve, inform, integrate, detect, discern, prevent, promote, assess, align, organize, and oversee, all within a corporate culture of compliance, all with an open window to the government in ways that facilitate the internal and external measurement of a firm's diligence.[285]

This ideal compliance orthodoxy will engender a strategic commitment to scientific thinking about measuring compliance risks and weighing disclosure obligations in a broader context of a combined or collaborative corporate-government strategy.[286] As discussed earlier, one

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[282] The OECG Model of GRC prescribes the following eight independent variables (integrated components) that will best predict eight dependent variables (or universal outcomes). Universal outcomes include enhancing corporate culture, and increasing stakeholder confidence. The independent variables, familiar aspects of organizational due diligence, are now tied to a multi-stakeholder view of the organization. And the emerging conception of GRC is decidedly scientific—observable, measurable, and verifiable.

[283] Jason Mefford, *The GRC Audit Quandary,* COMPLIANCE WEEK, January, 2016, p. 42

[284] Mark L. Frigo and Richard J. Anderson, *A Strategic Framework for Governance, Risk, and Compliance,* 90 STRATEGIC FINANCE 20 (2009)

[285]Bhimani, Alnoor, *Risk Management, Corporate Governance and Management Accounting: Emerging Interdependencies*, 20 MANAGEMENT ACCOUNTING RESEARCH 2 (2009); Mark L. Frigo and Richard J. Anderson, *10 Strategic GRC: Steps to Implementation: A Structured, Informed Approach to Governance, Risk, and Compliance Efforts Can Help Leverage Cross-Functional Synergies and Increase Organizational Efficiency*, 66 INTERNAL AUDITOR 33 (2009)

[286] But is it enough to ensure good governance, minimize risk, and maximize compliance? The short and long answer is "no." The task is to integrate science into organizations in ways

may also imagine a time when next generation regulatory systems will be partially or wholly integrated with a host of foreign regulatory systems.[287] Sharing evidence, facilitating adjudication, and ensuring proportional punishment are all obvious objectives in constructing an integrated international regulatory regime.[288]

A significant challenge, raised by the idea of any co-regulated model is with the integrity of the "partnership" between and among those connected to this enterprise solution. With actively monitored data, corporations, who now have much more systematic evidence of compliance, non-compliance, and more serious wrongdoing, will likely seek a new relationship with regulators and prosecutors. This relationship will be one where at least some credit for active efforts will be given to firms to counter the inevitable increase in reported non-compliance or wrongdoing.

How government functionaries use their discretion to make this "partnership" a sustainable one remains to be seen. It is fair to speculate that regulators and prosecutors will have to take the lead in suggesting that firms must not only monitor but actively measure metrics to receive due diligence credit or to satisfy any remedial mandate.[289] Progressives are needed to move this partnership forward, to ensure it fairness, and to make sure that a new and more nuanced compliance game is not inevitable.

CONCLUSION

that accommodate what makes organizations so distinctly human—from leadership to the basic principles that define, or should define, the mission of the private sector.

[287] *See* Ortwin Renn and Katherine D. Walker, GLOBAL RISK GOVERNANCE: CONCEPT AND PRACTICE USING THE IRGC FRAMEWORK (2008)

[288] The effort by the Vice Presidency of Institutional Integrity of the World Bank to harmonize sanctions (e.g., debarment) across all regional banks is an excellent illustration of the possibility of such an international regime. See, The World Bank Group, INTERNATIONAL FINANCIAL INSTITUTIONS ANTI-CORRUPTION TASK FORCE (2006)

[289] The regulatory embrace of LegalTech and RegTech is certainly very promising. It is interesting to watch how GRC systems and solutions fare in the midst of other disruption technology. *See* Anthony Tarantino, GOVERNANCE, RISK, AND COMPLIANCE HANDBOOK: TECHNOLOGY, FINANCE, ENVIRONMENTAL, AND INTERNATIONAL GUIDANCE AND BEST PRACTICES (2008) Notably, standards, such as ISO 19600 and COSO ERM, may be the impetus for successful adoption of GRC by providing specific guidance for the integration of compliance into both management and government systems. These standards will allow for certification and, in combination with other standards (e.g., ISO 31000), may be an integral part of a cooperative enterprise risk management solution. Both ISO and COSO place a significant premium on real-time evaluation of compliance effectiveness.

If the century-old-history of corporate criminal law is any guide, our regulatory destiny is bounded by a repeated episodic pattern.[290] Start with a period of regulatory laxity, followed by a period of "unprecedented" corporate scandals, heightened regulatory scrutiny, then legislative reforms, followed by targeted lobbying and legislative amendments, ending, once again, with an uncertain time of regulatory laxity. That there is no modern progressive account of corporate criminal law is a missed opportunity to disrupt the regularity of this century old pattern of recurring scandals and reforms.[291] This disruption might ensure the integrity and longevity of corporate crime reforms, move the priority given to corporate criminal law enforcement and prosecution, push lawmakers toward greater accountability for corporate wrongdoing and, all along, promote the proper measure of social controls with a commitment to science.

Modern progressives inherit the tradition of using science to fashion a fair and just sociology of social control. Raising a progressive voice at a time of a convergence in compliance science, disruptive technology, methods, and standards would countenance the founding ideas of progressivism. There is also immeasurable value in hearing a loud progressive voice when the politics of the moment place much of the regulatory reforms of the past two decades at risk.

This is a time when the voices of modern progressives should compete with the stalwart advocates, corporate libertarians, and those of other ideologies in defining compliance constructs and principles. The days of faint speech at the margins should be over. Entering a more robust debate over corporate accountability is no short order given the highly bounded nature of disciplinary methods, journals, and intellectual exchanges. To have impact on the content and contours of corporate criminal law, proponents must speak in ways that engage policy makers as active partners in this competition.[292]

The good news is that modern progressives know that there is an inevitability to the development of increasingly integrated regulatory instruments; an inevitability to more sophisticated enterprise wide systems; an inevitability to the widespread adoption of plural and decentered, non-state regulatory solutions, and an inevitability to some kind of fair and just international regulatory regime. And modern progressives are uniquely

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[290] Laufer *supra* note 2. See also, Sally S. Simpson, *Cycles of Illegality: Antitrust Violations in Corporate America*, 65 SOCIAL FORCES 943 (1986) (suggesting some comparable patterns)

[291] Laufer, *supra* note 2 at

[292] Daniel S. Nagin and Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 1 (2017) (reviewing the translation of research on compliance); Robert J. Sampson, Christopher Winship, and Carly Knight, *Overview of: "Translating Causal Claims: Principles and Strategies for Policy-Relevant Criminology*, 12 CRIMINOLOGY & PUBLIC POLICY 585 (2013)

positioned to understand what the inevitability of progress might mean for the future of corporate criminal justice.[293]

[293] The "science" of corporate criminal justice was discussed at the National Academy of Sciences, *see* Committee on Law and Justice and Zicklin Center of the Wharton School, PLANNING MEETING ON CORPORATE CRIMINAL JUSTICE (2015). Claims about the inevitability of the progress of science are made with an appreciation for positions other than that of the inevitabilist. *See, e.g.,* Ian Hacking, *How Inevitable are the Results of Successful Science?* 67 PHILOSOPHY OF SCIENCE 89 (2000); Katherina Kinzel, *State of the field: Are the Results of Science Contingent or Inevitable?* 52 STUDIES IN HISTORY AND PHILOSOPHY OF SCIENCE 55 (2015); Lena Soler, *Are the Results of Our Science Contingent of Inevitable?* 39 STUDIES IN THE HISTORY AND PHILOSOPHY OF SCIENCE 221 (2008); Lena Soler, *Revealing the Analytical Structure and Some Intrinsic Major Difficulties of the Contingentist/Inevitabilist Issue,* 39 STUDIES IN THE HISTORY AND PHILOSOPHY OF SCIENCE 230 (2008); Howard Sankey, *Scientific Realism and the Inevitability of Science*, 39 STUDIES IN HISTORY AND PHILOSOPHY OF SCIENCE *259* (2008)