

## Wall Street and Progressivism

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*On the margins of the partisan political divide is a groundswell of anti-corporate rhetoric conjuring images of an unbridled, unregulated, and uncontrollable corporate America. This Essay considers a casualty of this progressive imagery: serious legislative and regulatory reforms to ensure corporate accountability. Demonizing all corporations does little to promote a progressive reform agenda. More important, the absence of evidence-based policies and legislative reforms raises concerns, especially in light of the history of twentieth-century progressive thought and commitment to the role of science in law making.*

Introduction .....	37
I. Ideology That Betrays .....	41
II. The Costs of Demonizing the Largest Corporations .....	44
III. Legislation Destined to Fail .....	47
Conclusion .....	50

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## Introduction

“Let’s be clear, the business model of Wall Street is fraud.”<sup>1</sup>

In recent years, on the margins of our partisan political divide, there is a groundswell of anti-corporate rhetoric that questions the fundamental business model of Wall Street.<sup>2</sup> This rhetoric calls for the restructuring of entire industries;<sup>3</sup> for a wide range of strategies to combat the evils of corporate political influence;<sup>4</sup> and for a resurgence of a “break them up” policy for financial firms and technology companies that are simply too big and successful.<sup>5</sup> The image of an unbridled, unregulated, and uncontrollable Wall Street has become a fixation of the emerging progressive left.<sup>6</sup> The time to tame the id of Wall Street is long overdue, we are told, and the tools of criminal law and corporate criminal justice are at our disposal.

To be fair, this cathartic anti-corporate call for a new brand of progressive justice should be seen in context.<sup>7</sup> We are living through a period of box-checking regulation, where prescriptions for the reform of Wall Street are sold

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1. Bernie Sanders, *Wells Fargo’s Business Model is Fraud*, MEDIUM, (Sept. 20, 2016), <https://medium.com/senator-bernie-sanders/wells-fargos-business-model-is-fraud-d19fb6f8e0a8> [<https://perma.cc/Q7EG-Q76D>] (speaking about the fraud at Wells Fargo as an example of the more general and endemic problem on corporates). Senator Sanders’s statements also align well with those of Senator Elizabeth Warren. See The Editorial Board, *Warren and Sanders, Policy Mates*, WALL ST. J. (Oct. 15, 2019), <https://www.wsj.com/articles/warren-and-sanders-policy-mates-11571181041> [<https://perma.cc/V3WW-R3DY>] (last visited Nov. 11, 2019) (comparing Sanders’s proclamation with Warren’s portrayal of Wall Street as “looting the economy”).

2. See generally EVAN OSBORNE, *THE RISE OF THE ANTI-CORPORATE MOVEMENT: CORPORATIONS AND THE PEOPLE WHO HATE THEM* (2009).

3. See, e.g., Stop Wall Street Looting Act, H.R. 3848, 116th Cong. (2019) (restructuring the private equity industry).

4. See, e.g., Protect Democracy from Criminal Corporations Act, H.R. 3004 § 2(a)(1), 116th Cong. (2019) (prohibiting “criminal” corporations from making campaign contributions); Corporate Political Disclosure Act, H.R. 1053, 116th Cong. (2019) (amending “the Securities Exchange Act of 1934 to direct the Securities and Exchange Commission to issue regulations to require public corporations to disclose political expenditures”); see also Cydney Posner, *Is it Time for Corporate Political Spending Disclosure?*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION BLOG (Mar. 17, 2019), <https://corpgov.law.harvard.edu/2019/03/17/is-it-time-for-corporate-political-spending-disclosure> [<https://perma.cc/773V-6MDV>].

5. See, e.g., Tim Wu, *Antitrust Returns to American Politics*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/opinion/antitrust-2020-campaign.html?auth=https://perma.cc/E2SF-VJSE>; Herbert Hovenkamp, *The Warren Campaign’s Antitrust Proposals*, THE REGULATORY REVIEW (Mar. 25, 2019) <https://www.theregview.org/2019/03/25/hovenkamp-warren-campaigns-antitrust-proposals> [<https://perma.cc/7YNB-U8MA>].

6. For a discussion of the differences between and among ideological groups from the far left, center-left, progressive left, and religious left, see Yanchuan Sim et al., *Measuring Ideological Proportions in Political Speeches*, PROCEEDINGS OF THE 2013 CONFERENCE ON EMPIRICAL METHODS IN NATURAL LANGUAGE PROCESSING 91 (2013); see also William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 116-28 (2017) (describing the promise of the progressive left).

7. See Staff of Sen. Elizabeth Warren, *Rigged Justice: 2016: How Weak Enforcement Lets Corporate Offenders Off Easy* (2016), [https://www.warren.senate.gov/files/documents/Rigged\\_Justice\\_2016.pdf](https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf) [<https://perma.cc/45XL-8Z2J>] (describing frustration with the absence of corporate accountability).

to a vast army of compliance and regulatory professionals.<sup>8</sup> New and old refrains spout such ideas as the killing of any and all regulation of the private sector is invariably good; or that the ever increasing criminalization of federal laws compromises autonomy and betrays the appropriate role of the state.<sup>9</sup> We hear that businesses or businesspeople are inherently good or law-abiding,<sup>10</sup> or victims of prejudice of the same degree as immigrants and people of color and so most deserving of our sympathies.<sup>11</sup> The conventional academic wisdom is that successful self-regulation requires only the right mix of administrative incentives, which would only be distorted by the blunt and unforgiving instrument of criminal law.<sup>12</sup> Indeed, the most significant recent scholarship encourages the corporate criminal law to be less punitive and more of a “win for everyone”;<sup>13</sup> that we ought to pursue the rehabilitation of corporates<sup>14</sup> and prevention of future misconduct<sup>15</sup> to the exclusion of any truly retributive measures. For some, even agreements *not* to prosecute corporations are still too “abusive.”<sup>16</sup> As

8. For a discussion of the number and role of audit, legal, regulatory, and compliance professionals in large financial services firms, see generally William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 394 (2017).

9. See, e.g., Tim Lynch, *Over-Criminalization of Conduct/Over-Federalization of Criminal Law*, CATO INSTITUTE (July 22, 2009), <https://www.cato.org/publications/congressional-testimony/overcriminalization-conductoverfederalization-criminal-law> [<https://perma.cc/6DTV-NRPD>]; John-Michael Seibler & Jonathan M. Zalewski, *Overcriminalization in the 115th Congress*, THE HERITAGE FOUNDATION (Mar. 1, 2019), <https://www.heritage.org/crime-and-justice/report/overcriminalization-the-115th-congress> [<https://perma.cc/SSQ6-UH75>].

10. See Steven Bittle & Jasmine Hébert, *Controlling Corporate Crimes in Times of De-Regulation and Re-Regulation*, in THE HANDBOOK OF WHITE-COLLAR CRIME 484 (Melissa L. Rorie, ed., 2019) (identifying and problematizing the general belief that corporations are inherently good and law-abiding).

11. Bret Stephens, *Bernie’s Wall Street Slander*, WALL ST. J. (Feb. 9, 2016), <https://www.wsj.com/articles/bernie-s-wall-street-slander-1454976868> [<https://perma.cc/KTW5-7SVA>] (last visited Nov 11, 2019) (Responding to Sanders’s quote (see epigraph), he deems the bankers of Wall Street “the most demonized people in America,” arguing that “[t]o insinuate that the people who make [Wall Street] work are swindlers is no less a slur than to tag immigrants as criminals and moochers” drawing a weak analogy between “Sanders’s economic prejudices” and “Donald Trump’s ethnic ones”). So-called “tragedy analogies” have long been a feature of bankers’ self-portrayal. In one case, a banker likened certain regulatory investigations to Eric Garner’s death at the hands of New York City Police-men. In another, “Blackstone founder Stephen Schwarzman . . . compared US efforts to raise taxes on private equity to the Naz[i]” invasion of Poland. In a third case, Tom Perkins, founder of venture capital firm Kleiner Perkins Caufield and Byers, penned a public letter “that compared criticism of the wealthy to Nazi persecution of the Jews.” See Brooke Masters, *Bankers Will Fail to Win Back Trust with Tragedy Analogies*, FIN. TIMES (Dec. 12, 2014), <https://www.ft.com/content/3ceb1fa6-8128-11e4-b956-00144feabdc0> [<https://perma.cc/VG7X-9JJH>] (last visited Nov. 11, 2019). In the academic world, there is still a sense that business is in need of defenders. See *infra* note 57.

12. See, e.g., Douglas Husak, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 4-11 (2007); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009).

13. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 565 (2018).

14. *Id.*; Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1420 (2009).

15. W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 914 (2019).

16. Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1436-37 (2007) (bemoaning the fact that, when (supposedly)

scholars question the idea that criminal punishment should be at all punitive,<sup>17</sup> the goals of economic efficiency and more perfect markets reign alongside philosophies of unrestrained capitalism.<sup>18</sup>

The anti-corporate reactions to these unfortunate realities do not fall into distinct camps, but rather exist on a continuum. In the extreme, it is said we should abolish the corporation or “corporate capitalism” because it is irredeemably evil; because its criminality is “inherent,”<sup>19</sup> part of its “*essence*”<sup>20</sup>, in its “DNA,”<sup>21</sup> or is its “*nature*.”<sup>22</sup> In slightly more palpable formulations, an original sin of criminality is projected on specific markets, sectors, or industries, like Wall Street<sup>23</sup> or Big Pharma.<sup>24</sup> These critiques, though, are betrayed by their generality<sup>25</sup> and lead to one of two conclusions. Either critics assume the

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“[u]nable to risk a potential indictment, the corporation is thus left at the mercy of the prosecutor” and identifying “[t]he abusive tendencies of this bargaining imbalance”).

17. See Matthew Caulfield & William S. Laufer, *The Promise of Corporate Character Theory*, 103 IOWA L. REV. BULL. 101, 106–07 (2018) (arguing one rehabilitative approach is “really no more than a clever regulatory or administrative proposal” and risks being a “mere variant of deterrence theory” with a justification of the “orthodox consequentialist variety”); John Hasnas, *Clockwork Corporations: A Valiant Effort to Do the Impossible*, 103 IOWA L. REV. BULL. 28, 29 (2018) (arguing one rehabilitative approach “is not a theory of punishment, but a theory of regulation masquerading as a theory of punishment” because “[p]reventing crime is what one does in advance of criminal activity. That is what we use regulation for. Punishing crime necessarily comes after criminal activity and is a response to it.”).

18. Sumantra Ghoshal, *Bad Management Theories Are Destroying Good Management Practices*, 4 ACADEMY OF MGMT. LEARNING & EDUC. 75 (2005); Sandra Waddock, *Foundational Memes for a New Narrative About the Role of Business in Society*, 1 HUMANISTIC MGMT. J. 91, 97 (2016) (arguing that “the currently dominant neoliberal narrative can be stated as: Businesses and economies operate best with free markets, free economies, and free trade on a global scale, that is, with as few rules and restrictions as possible”).

19. See generally Alexander Glebovskiy, *Inherent Criminogenesis in Business Organisations*, 26 J. FIN. CRIME 432 (2019).

20. STEVE TOMBS & DAVID WHYTE, *THE CORPORATE CRIMINAL: WHY CORPORATIONS MUST BE ABOLISHED* 157–58, 173, 180 (2015) (arguing that the corporation “is an essentially destructive, irresponsible phenomenon,” that it is “inherently, essentially destructive” and that “in essence the corporation is rapacious, violent, . . . and systematically criminal.”) (all emphasis original). This is despite their corollary thesis that “historically, empirically and theoretically, . . . neither corporations per se, nor corporate activities in particular, exist in any natural nor inevitable form” *Id.* at 157.

21. *Id.* at iv (stating that “criminality is part of the DNA of the modern corporation”).

22. HARRY GLASBEEK, *CAPITALISM: A CRIME STORY* 6 (2018) (“[C]orporate capitalism, in legal terms, is criminal in nature.”).

23. See, e.g., FRANÇOIS MORIN, *A WORLD WITHOUT WALL STREET?* (2013); Sanders, *supra* note 1.

24. PETER C. GØTZSCHE, *DEADLY MEDICINES AND ORGANISED CRIME: HOW BIG PHARMA HAS CORRUPTED HEALTHCARE* (2013) (arguing that the business model of Big Pharma is literally organized crime).

25. See, e.g., Justin B. Biddle, *Review: Peter Gøtzsche, Deadly Medicines and Organised Crime: How Big Pharma Has Corrupted Healthcare*, 26 KENNEDY INST. ETHICS J. 40 (2016) (arguing it is a significant problem for any analysis to treat “‘big pharma’ as an organized monolith. ‘Big pharma’ is not an organized entity but rather a collection of corporations, and as such, ‘big pharma’ could not be considered an organized criminal enterprise. Individual pharmaceutical companies could perhaps be organized criminal operations; ‘big pharma’ cannot.”); Matthew C. Klein, “*The Business Model of Wall Street is Fraud?*” *Kind of.*, FIN. TIMES, <http://ftalphaville.ft.com/2016/02/11/2152613/the-business-model-of-wall-street-is-fraud-kind-of> [https://perma.cc/R9M5-2BU2] (last visited Nov. 11, 2019) (pointing out, in response to Sanders’s critique (see epigraph), that “widespread criminality across a range of business lines . . . isn’t the same as actually having fraud as the core of the business,” and that “the financial sector contains many parts, often with competing economic and policy interests, so it

extreme position that certain classes of corporations are criminal and thus a cancer we must excise whatever the consequences, or they have a dilettantish orientation toward critique and progress, preferring merely rhetorical criticisms to genuine reforms.<sup>26</sup>

For those somewhere in the middle of the business demonization and deification divide, it is difficult to ignore the image, on one hand, of Antifa recruits taking to the streets, signs in hand, to fend off every last contaminated bit of our capitalistic system by breaking a Starbucks window front. On the other hand, it is likewise difficult to erase the image of an old bloated Wall Street tycoon taking a twilight cruise around New York Harbor aboard one of his 125-foot Westport yachts. Once we get some perspective on this demonization and deification imagery, though, it becomes clear that there are real casualties from the incessant pull to the far left or far right. This Essay considers one such casualty from the far left: serious legislative and regulatory reforms that ensure corporate accountability for criminal wrongdoing.<sup>27</sup>

After exploring why mere caricatures of corporate America so significantly betray the heritage of progressive ideology in Part I, it is argued in Part II that this demonic imagery of corporates takes a serious toll: gratuitous political rhetoric often substitutes for serious law reforms or legislation with a chance of passage in Congress. Evidence of this toll is seen in a cursory review of some proposed legislation in Part III. The Essay concludes that the costs of demonization is paid at a time when our embrace of the potential *good* that comes from a well-governed, responsible, and sustainable private sector is more than necessary for the success of meaningful collective action strategies, progressive, libertarian, or otherwise.

Corporate accountability should be the darling of the progressive movement. Instead, by extending the indignation that is justifiably leveled against serious and chronic corporate wrongdoers toward *all* business, advocacy for accountability dissolves by way of an inherent tension.<sup>28</sup> Most everywhere the

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doesn't make much sense to talk about 'Wall Street' as a unified entity"); Thomas Donaldson, *Three Ethical Roots of the Economic Crisis*, 106 J. BUS. ETHICS 5, 5-6 (2012) (addressing those who "slam the 'greed is good' mentality of Wall Street," arguing that "no serious study has shown that greed is higher on Wall Street than in other industries, or for that matter higher in any one industry than in another"); Gwendolyn Gordon and David Zaring note the plentiful anti-banker sentiment in the United States and its "variety of methods, ranging from harangues to controlled experiments." *Ethical Bankers*, 42 J. CORP. L. 559, 566-68 (2016).

26. See Tibor R. Machan, *Business Ethics in a New Key*, 21 J. PRIVATE ENTERPRISE 1, 9 (2006) (distinguishing between reasonable critique and heedless "business-bashing").

27. There may be greater costs to the deification of Wall Street, but arguments consistent with extreme libertarian ideologies are much more familiar and already taken. See, e.g., Laufer, *supra* note 6, at 116-28.

28. David Whyte, "*Death to the Corporation*": A Modest Proposal, in *THE WORLD TURNED UPSIDE DOWN: SOCIALIST REGISTER 2019*, at 289 (Leo Panitch & Greg Albo, eds., 2018) ("Therein lies a core contradiction: when regulation (and punishment) is effective, it has the effect of stabilizing the system. When regulation is most effective, it enhances the longevity of capitalism as a system. Yet as socialists, we know that this is not in the interests of everyone. When we demand effective regulation, and when we demand justice for a criminal ruling class in such moments, we are also demanding that capitalism corrects itself. This is why demanding punishment of corporations, or of their executives, as a panacea to such crises or to the problems caused by capitalism can only ever be a strate-

far left sees a corporate, or a corporate of a certain kind, it sees a target of indignation. In projecting an intrinsic evil onto capitalistic endeavors, some cannot imagine or simply do not care that corporations could be good<sup>29</sup>—that they could be accountable with vigilant oversight and reasonable regulation.

### I. Ideology That Betrays

Buried in the scholarly literature on corporate criminal liability and corporate regulation are serious efforts to conceive of the requisite moral agency to bind an entity criminally; to identify the criteria prosecutors should rely on in considering charges against individual wrongdoers and/or blameworthy entities; to fashion liability rules and standards of culpability that connect entity wrongdoing with the substantive law; and to conceive of corporate punishments that recognize the potential for collateral consequences but ensure fair and just direct consequences.<sup>30</sup>

This body of normative and doctrinal scholarship on corporate accountability continues to evolve slowly, hampered by very limited decisional law on point, a long history of failed substantive law reform, and eviscerated or “amended away” legislation passed following notable scandals.<sup>31</sup> It is, however, a body of work that both the left and right could draw from in conceiving and proposing corporate criminal justice policies. And yet, there is scant resort to the marketplace of ideas and theories on both sides of the political stump.<sup>32</sup> The

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gy of limited or modest reform.”); Rafael Alcadipani & Cíntia Rodrigues de Oliveira Medeiros, *When Corporations Cause Harm: A Critical View of Corporate Social Irresponsibility and Corporate Crimes*, J. BUS. ETHICS (OnlineFirst 2019), <https://link.springer.com/content/pdf/10.1007%2Fs10551-019-04157-0.pdf> [<https://perma.cc/5UR6-99KF>] (arguing that “corporate crime could be perceived as producing research that does not challenge the essence of contemporary corporation profit-seeking activities that ultimately produces corporate harm” and that “corporate crime [is an] ideology that assist[s] in disguising the contradiction between producing shareholder value and the social good that is at the heart of the modern corporation system and the current economic system”).

29. Jason Brennan argues that we have an unnecessarily narrow, political conception of civic virtue. The civic value of for-profit business ought not be overlooked. *See generally* Jason Brennan, *For-Profit Business as Civic Virtue*, 106 J. BUS. ETHICS 313 (2012).

30. *See, e.g.*, THE MORAL RESPONSIBILITY OF FIRMS (Eric W. Orts & N. Craig Smith, eds., 2017); Mihailis E. Diamantis & William S. Laufer, *Corporate Prosecution and Punishment*, 15 ANN. REV. L. SOC. SCI. 453, 454 (2019) (describing the “funnel” of corporate criminal justice). This literature reflects many lifetimes of scholarship, from Braithwaite, Coffee, and Fisse to Aires de Sousa, Alexander, Arlen, Baer, Buell, Cohen, Diamantis, Garrett, Grabosky, Haugh, Khanna, Langevoort, Miller, Nelson, Parker, Saad-Diniz, Sepinwall, Simpson, Soltes, Thomas, and many others.

31. This marketplace is challenging because some of the best scholarship and most imaginative thinking about corporate crime by pioneers of this field are pushed to the margins, replaced by more contemporary or current work. For an example of such work, see generally MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* (1980); BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* (1993); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

32. There is also little attention paid to how extralegal initiatives at private ordering may achieve the progressive ends sought by legislation. Compare the demonstrated success of the *CPA-Zicklin Index for Corporate Accountability*, CTR. FOR POL. ACCOUNTABILITY, <https://politicalaccountability.net/index> (last visited Oct. 27, 2019), in creating transparency in corporate political contributions with the aims of the Transparency in Corporate Political Spending Act, H.R. 1176, 116th Cong. (2019).

same may be said of a rich literature on the slow march toward co-regulatory and plural regulatory systems, where regulators and the regulated will soon be connecting.<sup>33</sup> Finally, corporate accountability for the largest of multinationals requires global policies and effective international regulatory regimes. The immense challenges of accountability for the most powerful multinationals in our interdependent global economy remain largely unmet.

It seems as if pushing to the hard left or hard right encourages some who are politically inclined to disregard the policy outcomes of proposed legislation, while ignoring the analytic rigors of theory and, even worse, the power and constraints of empiricism. At a time when other advanced democratic countries are seeking and exploring evidence-based policy making, we must find what comfort we can in hearing the musings and intuitions of presidential candidates, grounded in their personal reflections on American progressivism or, from those on the right, ideas sourced from a strong though vague sense of American exceptionalism.<sup>34</sup> Politicians supporting the battle against the most affluent or those catering to the excesses of tycoons are not pushing for rigorous evaluation research and sophisticated field experimentation to determine which anti-corruption strategy works; which corporate crime deterrence policy is most effective; or which approach to corporate compliance actually reduces the likelihood of employee malfeasance. These are not the disconnected hypotheses of out-of-touch academics. With an estimated 15% to 20% of the operating costs of financial institutions going to governance, risk, and compliance (GRC) expenditures, we should know—*actually* know—if the regulatory costs assumed by the private sector are at all connected to better or more effective governance and regulation.<sup>35</sup>

Indeed, there are real costs to following archetypal imagery of pro- and anti-business to their logical ends. Most significant, buying this kind of iconic imagery may discourage investment in the kind of research that produces evidence that is as definitive as social science now permits.<sup>36</sup> Consider, as example, the impact of the Campbell Collaboration review of corporate crime deterrence policies. Criminologists scour available data for any evidence of corporate crime deterrence in existing criminal justice policies. Meta reviews of the best research available, however, reveal scarce systematic evidence, like

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33. For an excellent discussion of different and emerging governance approaches see generally BERTELSMANN STIFTUNG, FOSTERING CORPORATE RESPONSIBILITY THROUGH SELF-AND CO-REGULATION (2012); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y. REV. 691 (2003); Peter N. Grabosky, *Using Non-Governmental Resources to Foster Regulatory Compliance*, 8 GOVERNANCE 527 (1995).

34. See, e.g., PAUL CAIRNEY, THE POLITICS OF EVIDENCE-BASED POLICY MAKING (2016) (exploring the challenges of relying on evidence-based programs and policies).

35. MATTHIAS MEMMINGER, MIKE BAXTER, & EDMUND LIN, BAIN & CO., BANKING REGTECH TO THE RESCUE? 1 (2016) ("We estimate that governance, risk and compliance (GRC) costs account for 15% to 20% of the total 'run the bank' cost base of most major banks. And GRC demand drives roughly 40% of costs for 'change the bank' projects under way.")

36. Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance and Regulatory Capitalism*, 5 ANN. REV. L. SOC. SCI. 45 (2009) (an outstanding review of the promise of empirical approaches to compliance).

that which would be provided by well-designed field experimentation with randomized controlled trials.<sup>37</sup> Simply translated: no one is offering evidence that the kinds of regulatory and criminal justice policies that we invest in actually have any deterrent effect.<sup>38</sup> This represents a colossal opportunity cost: the advocacy for evidence-free policies displaces advocacy for the kind of evidence-based initiatives that are known to work, i.e., initiatives that are supported by experimental evidence.<sup>39</sup>

There are many reasons why we should care that there is little to no evidence supporting huge investments in GRC systems and programs. Starting with the most obvious, the regulatory burden on the private sector should be inextricably tied to one or more objectives of corporate crime control. Compliance expenditures, standing alone, should not be a preemptive tax or preemptive penalty for estimated and projected wrongdoing.<sup>40</sup> There is, though, a more subtle and persuasive reason for caution.

The brand of progressivism associated with some far left-leaning politics today betrays its ideological heritage. This heritage never conceived of markets as ugly forms of corporatism. Progressive dogma supports law reforms—no matter how significant—that are driven by evidence. Progressive predecessors in the early twentieth century were off the rails with certain despicable social policies,<sup>41</sup> but, to their credit, embraced at least in general terms the central role of science and proportional social controls as foundational principles in combatting wrongdoing, regulatory largess, and capture.<sup>42</sup> This heritage finds its roots in a century-long appreciation by social scientists that we needed newer, more imaginative frameworks—economic, sociological, and legal—to control the expanding powers and growing reach of corporations.<sup>43</sup> Progressivism's

37. See Sally S. Simpson et al., *Corporate Crime Deterrence: A Systematic Review*, CAMPBELL SYSTEMATIC REVIEWS (2014) (capturing all experimental research conducted to date); Natalie Schell-Busey et al., *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIM. & PUB. POL'Y 387 (2016) (revealing just how little is known about what works in deterring corporations from wrongdoing).

38. Ray Paternoster, *Deterring Corporate Crime: Evidence and Outlook*, 15 CRIMINOLOGY & PUB. POL'Y 383 (2016) (commenting on the very limited evidence found in the corporate deterrence protocol of the Campbell Collaboration).

39. See 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) (discussing the challenges of evidence-based research); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965 (2018); Danielle E. Warren, Joseph P. Gaspar, & William S. Laufer, *Is Formal Ethics Training Merely Cosmetic? A Study of Ethics Training and Ethical Organizational Culture*, 24 BUS. ETHICS Q. 85, 106-08 (2014) (exploring which factors in an integrity initiative at large bank contribute to changes in both behavior and culture).

40. See Laufer, *supra* note 8, at 398.

41. There was a very serious dark side to the old progressivism (e.g., promoting eugenics). See generally Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947 (2017).

42. A fuller account of progressive policymaking heritage can be found in Laufer, *supra* note 6, at 98-106.

43. Recent notable works include: BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (2001); Malcolm Rutherford, *Institutional Economics: Then and Now*, 15 J. ECONOMIC PERSPECTIVES 173, 174 (2001);



long embrace of the “transformative scientific state”<sup>44</sup> as both a tool and object of reform<sup>45</sup> reflects a recognition of the power and limitations of the state: its power to effect change in society, alongside its tendency to be slow to adopt modern tools of regulation and intervention. The centrality of science to the progressive agenda was not an accident. Progressives’ belief in legislative and regulatory intervention by government relied on their faith in the capacities of government officials who were suitably committed to marshal “economics, the social sciences, ethics, or other objective criteria to help define the best policy.”<sup>46</sup>

Modern progressives certainly recognize the power of the state—but often fail to see how that power is compromised without a recognition of the import of scientific evidence or theory in guiding it. The collective indifference to empirical validation of corporate criminal measures predictably leads to misguided and weak reforms that legacy progressives earnestly sought to avoid. In their wake, champions of modern progressivism should be competing fiercely for the best evidence in support of the most thoroughly tested, evaluated, and effective corporate criminal justice policies and programs. Progressivism’s ideological roots are allergic to rhetoric that does no more than stir and then capitalize on anti-corporate passions. Labeling the business model of Wall Street fraud, and ostracizing those who refuse to taunt or jeer, can only distract from the century-long progressive goal of wresting corporations into compliance with the law and good, socially beneficial governance.<sup>47</sup>

## II. The Costs of Demonizing the Largest Corporations

Ensuring any semblance of corporate accountability is already difficult enough. Employee survey data reveal a steady and robust rate of ethical infractions and actionable criminal wrongdoing in corporations, nearly all of which ultimately falls outside of the formalities of the criminal justice system.<sup>48</sup> In place of the resort to the most formal of social controls, though, the vast majority of corporate criminal wrongdoing is not formally investigated in ways that are reviewable; few internal investigations result in an actionable criminal in-

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Malcolm Rutherford, *Science and Social Control: The Institutional Movement in American Economics, 1918-1947*, 3 ERASMUS J. PHIL. & ECON. 47 (2010); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920* (2005); Thomas C. Leonard, *Progressive Era Origins of the Regulatory State and the Economist as Expert*, 47 HIST. POL. ECON. 49 (2015).

44. Leonard, *supra* note 43, at 55.

45. *Id.*

46. Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149, 149 (1995).

47. Centrists should not have exclusive claim to evidence-based legislation. See Bo Winegard, *Centrism: A Moderate Manifesto*, QUILLETTE (Aug. 29, 2017), <https://quillette.com/2017/08/29/centrism-moderate-manifesto> [<https://perma.cc/D6EN-49XB>] (arguing that “[p]olitical ideologies tend to blind people to the best policies. One should not seek a ‘conservative’ answer to poverty or a ‘liberal’ answer . . . . One should seek *the best answer.*”) (emphasis in original).

48. See Laufer, *supra* note 8, at 420.

vestigation; fewer cases are formally adjudicated, and only the tiniest of fractions go to trial or are offered one of the much heralded non-prosecution agreements, deferred prosecution agreements, or corporate integrity agreements.<sup>49</sup> Firm size and systemic importance to the global economy remain generally good predictors of prosecutorial zealotry or deference.

Demonizing the largest corporations on Wall Street for their deviance does little to further corporate criminal justice. It does nothing to strengthen corporate self-regulation; nothing to enhance the reporting channels for corporate whistleblowers and qui tam relators; and nothing to encourage prosecutors to bring large financial institutions to justice along with those who lead them. Demonization does nothing to diminish the opacity of corporate self-regulation; disturb the multi-stakeholder compliance game; and diminish the “dark figure” of corporate crime.<sup>50</sup>

Instead, demonizing the most powerful actors on Wall Street contributes to the naive intuition that firms are all criminal, and that capitalism is innately criminogenic. Labeling all or some vague subset of firms as criminals is functionally similar to labeling none as criminals. Some of the critics in question recognize this and therefore reject the concept of “corporate crime” as a corporate-friendly ideology, since such a concept would purport to distinguish between criminal corporations and non-criminal corporations; such a distinction is untenable as all corporate activity, they say, is fundamentally at odds with social value.<sup>51</sup>

When we are told that the “[t]he business model of Wall Street is fraud,” we are not asked to reflectively consider what would make it better. Instead of encouraging progressive reform, these overtures present us with a choice between tolerating rampant wrongdoing and eliminating Wall Street altogether. This is a choice in name only. We are then most plausibly inclined to tolerate crime and embrace an ideology that exacerbates it by way of rationalization;<sup>52</sup> “business is business,” a classic example of criminogenic rationalization,<sup>53</sup> becomes “business is crime and we are businesspeople.”<sup>54</sup>

49. See Diamantis & Laufer, *supra* note 30, at 458-60.

50. The dark figure of corporate crime is the difference between wrongdoing known to or experienced by employees and reports of wrongdoing known to authorities.

51. Alcadipani & Rodrigues, *supra* note 28, at 9 (arguing that “corporate crime [is an] ideolog[y] that assist[s] in disguising the contradiction between producing shareholder value and the social good that is at the heart of the modern corporation system and the current economic system”).

52. See generally Todd Haugh, *Sox on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. REV. 835 (2014) (arguing that overcriminalization, especially in the case of white-collar offenders, is itself criminogenic insofar as it normalizes crime by way of providing *ex ante* rationalizations for would-be criminals).

53. *Id.* at 840; Donald R. Cressey, *The Respectable Criminal*, 3 CRIMINOLOGICA 13, 15 (1965).

54. In their classic treatment of “techniques of neutralization,” David Matza and Gresham Sykes argue that “social controls that serve to check or inhibit deviant motivational patterns are rendered inoperative [when] the individual is freed to engage in delinquency without serious to damage to self-image”; when successful, “the delinquent both has his cake and eats it too, for he remains committed to the dominant normative system and yet so qualifies its imperative that violation are ‘acceptable’ if not ‘right.’” *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664,

Sometimes provocative coaxing is, rightly or wrongly, used strategically. Politicians may feel they need to inflate or radicalize their claims in order to amplify them—to reach their followers’ and other legislators’ minds and hearts with passion and sweeping rhetoric rather than reason. One might suspect that many do not really believe what they are saying—that they, instead, have an eminently reasonable outlook on mitigating corporate crime. In the interest of effective social progress, they may be true progressives in practice and fiery radicals in oratory only. But if this were the case, we would see it reflected in enlightened, empirically informed legislation aimed at mitigating corporate crime. We would also witness some instrumental, political advantage to this fiery rhetoric. Instead, as we will argue in the next Section, we find legislation with similarly fiery appellations but largely hollow implications.

None of this is to excuse or diminish the serious costs of the deification of Wall Street and, more generally, corporations. Deification is transparently self-serving, often at the expense of general social welfare. The “good” that corporations are responsible for is already distorted by some companies’ instrumental use of exaggerated imagery claiming leadership in good governance, compliance with law, social responsibility and social impact.<sup>55</sup> The long and storied history of corporate greenwashing and United Nations “bluewashing” need not be repeated.<sup>56</sup> In passionately but vaguely bemoaning corporate wrongdoing, those who claim the progressive banner undermine their own standing to contradict those who otherwise claim that “business” needs its own cadres of defenders.<sup>57</sup>

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667 (1957). Identifying crime with business can have one of at least two effects; either it will tend steer the current social stigmas against crime towards reducing (specific kinds of) business activity writ-large, or it will tend to reduce stigma against crime by identifying it with the evidently acceptable practice that is business. In our view, the latter is much more likely; by calling business, a largely morally permissible (and mutually beneficial) activity, criminal, we are encouraged to think of crime as a seeming necessity of business and therefore as similarly acceptable. Criminals and would-be criminals will then have their cake and eat even more of it, since the dominant normative system will have further inoculated crime as just part of doing business. This is consistent with the ‘everyone else is doing it’ mode of criminogenic rationalization. See Joseph Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, 83 J. BUS. ETHICS 595, 603 (2008) (arguing that “there mere fact that others are breaking the law [can be] used to suggest that it is unreasonable for society to expect compliance. An appeal to the fact of widespread violation may also be used to remove the moral stigma associated with an offense. In either case, the goal is to show that the law is out of touch with social expectations, and therefore that enforcement is illegitimate”). These rationalization logics, however misguided, may be built on otherwise reasonable moral intuitions. See generally Joseph Heath, “*But Everyone Else Is Doing It*”: *Competition and Business Self-Regulation*, 49 J. SOCIAL PHIL. 516 (2018) (presenting several plausible normative principles underlying the ‘everyone else is doing it’ excuse or justification).

55. See generally ANAND GIRIDHARADAS, *WINNERS TAKE ALL: THE ELITE CHARADE OF CHANGING THE WORLD* (2018).

56. See William S. Laufer, *Social Accounting and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 255 (2003) (corporations that instrumentally claim allegiance to UN principles when their practices are non-conforming are said to be “bluewashing”).

57. See generally TYLER COWEN, *BIG BUSINESS: A LOVE LETTER TO AN AMERICAN ANTI-HERO* (2019); see also TIBOR R. MACHAN & JAMES E. CHESHER, *A PRIMER ON BUSINESS ETHICS* 37 (2002); Gregory Wolcott, *The New (Old) Case for the Ethics of Business*, 132 J. BUS. ETHICS 127, 127 (2015) (proclaiming that “[b]usiness needs defenders” given that business “students are told, in media, culture, and even some of their classrooms, that their careers are morally suspect”); Machan, *supra*

Ultimately, demonizing business sows an extraordinary distrust of all things corporate, and at a particularly unfortunate time. Unfortunate because there is a notable convergence in compliance methods, technologies, standards, and research that requires a true and trusted partnership between the regulated and regulators. Deifying and demonizing the private sector do little to support ways that firms might seize upon this convergence; little to encourage the development of co-regulatory models; and little to decrease their regulatory spend through the inevitable transition to evidence-based GRC systems.

### III. Legislation Destined to Fail

It is sad but true that current progressive rhetoric, though motivated by social welfare and corporate accountability, fails to be true to its own motivating goals. We should have confidence that those with the strongest voices against corporate fraud and for progressive solutions propose legislation that fairly and justly hold corporations accountable. Sadly, there is no impressive pipeline of new, innovative, evidence-based legislation pending before Congress that embraces the promise of effective corporate regulation.

The legislation associated with leading progressive voices are routinely drafted with slim hopes of passage. Even the best is a mixed bag of old progressive reforms and extant state law remedies. The Accountable Capitalism Act (ACA), for example, expands corporate obligations to stakeholders beyond shareholders in ways comparable to “constituency statutes,”<sup>58</sup> and proposes federal chartering for corporations of a certain size.<sup>59</sup> Both ideas are notable and characteristically progressive, but most states have already adopted constituency statutes, a majority of states offer benefit corporation status, and even the conservative Business Roundtable now at least formally recognizes a progressive variant of stakeholder capitalism.<sup>60</sup> The value of enacting a federal law is unclear given our history of corporate law reforms and existing state law.

Notably, a wide range of federal corporate chartering laws were proposed over the past century,<sup>61</sup> all unsuccessful.<sup>62</sup> The Act’s proposed charter revoca-

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note 26, at 4 (lamenting that “business itself, as a profession, is something that is mostly distrusted and denigrated”).

58. For an early treatment of constituency statutes see generally Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

59. The Act requires corporations with more than \$1 billion in revenue to obtain a federal charter as a United States Corporation. See Accountable Capitalism Act, S. 3348, § 2(A)(iii), 115th Cong. (2018).

60. See *Business Roundtable Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans,”* BUSINESS ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/VS3S-6Y8Y].

61. See J. Newton Baker, *Regulation of Industrial Corporations*, 22 YALE L.J. 306, 330 (1913) (“Thus, after reviewing the evils of special privilege and being fully convinced that some kind of governmental regulation is necessary to cure the damages caused by the ill-used unlimited power authorized by States, we are of the opinion that a Federal Incorporation Law would be in order for large corporations.”); H. L. Wigus, *The Need of a National Incorporation Law*, 2 MICH. L. REV. 358 (1904) (arguing in favor of a national incorporation law); Melvin I. Urofsky, *Proposed Federal Incorporation*

tion provisions for corporations that engage in repeated and egregious illegal conduct seem powerfully progressive, but state attorneys general already have charter revocation powers under state law. And states routinely revoke charters, most often for failure to pay business taxes or for a persistent course of fraudulent acts. More important, the Act invites cases that are “too big” to indict and prosecute, especially with the looming prospects of corporate capital punishment for United States corporations.<sup>63</sup>

Other early stage efforts at progressive legislation are said to undermine the value proposition of an entire industry. For example, the Stop Wall Street Looting Act of 2019 takes direct aim with a near death blow at the generally unregulated private equity market by allowing for joint and several liability for controlling private funds, and making it void against public policy to indemnify a private fund.<sup>64</sup> No matter how consistent with a broad progressive vision of “economic patriotism,” opponents will inevitably line up against this Act, casting it as the destruction of an industry, and making it impossible to pass both houses of Congress.

More often, proposed legislation appears consistent with powerful political slogans (e.g., “too powerful to prosecute” and “too-big-to-jail”<sup>65</sup>) but is little more than fluff, substantively. Consider the likely fate of the Corporate Executive Accountability Act of 2019,<sup>66</sup> which resurrects the Responsible Corporate Officer Doctrine in proposing that corporate executives be held crim-

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*in the Progressive Era*, 26 AM. J. LEGAL HIST. 160 (1982); Comment, *An Historical Survey of Federal Incorporation*, 1 DEL. J. CORP. L. 370 (1976).

62. It is not surprising that the usual suspects will line up against this Act with predictable objections. See Lee Edwards, *The Accountable Capitalism Act: Socialist and Unconstitutional*, THE HERITAGE FOUNDATION (Sept. 24, 2018), <https://www.heritage.org/progressivism/commentary/the-accountable-capitalism-act-socialist-and-unconstitutiona> [<https://perma.cc/N687-DYEG>]. More interesting, though, is whether proponents of the Act will be able to defend: (a) its reach to only the largest of corporations—rather than to all corporations; (b) where the threshold should be reasonably placed; (c) who shall make the determination about what constitutes “repeated and egregious illegal corporate conduct”; and (d) what intermediate sanctions might be available between keeping a corporate charter and its revocation. If this Act is fueled by a deterrence rationale, it would be helpful to know that there is some quantitative evidence of its deterrence effect. If revocation is seen as a desert-based remedy, how can lawmakers justify a simple threshold revenue minimum? Are firms with annual revenue below this threshold not deserving of revocation? These are but a few obvious questions raised by the Act. Less obvious, and more profound, are questions about where we should vest discretion to determine corporate culpability, liability, and sanctions. The heavy pendulum moved from courts in the aftermath of the United States Sentencing Commission’s Chapter Eight Guidelines to prosecutors with different iterations of the Federal Principles of Business Prosecution. With this Act, where will discretion vest?

63. This is the case even with the one-year grace period for appeals. There are some reasonably progressive parts of the Act, no matter how likely their passage, including employee participation in director selection for corporations that exceed \$1 billion in annual revenue, a practice followed in a number of developed countries; and requiring shareholder and board approval for corporate political expenditures.

64. Stop Wall Street Looting Act, H.R. 3848, 116th Cong. (2019) (requiring the “Securities and Exchange Commission to issue rules requiring private funds to publicly disclose certain information”).

65. See generally, e.g., BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

66. Corporate Executive Accountability Act, S. 1010, 116th Cong. (establishing “criminal liability for negligent executive officers of major corporations”).

inally liable for negligently permitting or failing to prevent a crime.<sup>67</sup> First offenders are fined and/or subject to incarceration for up to one year. This Act imposes a form of strict liability on agents in ways comparable to the strict attribution of fault to a corporate entity with vicarious liability. Curiously, it is the strictness of vicarious fault and its harsh collateral consequences that so limit its embrace by prosecutors and courts.<sup>68</sup> It seems to make little sense to impose the same strictness and consequences on corporate agents—even those whose position places them in responsible roles.

More important, this Act is proffered as a way to right the wrongs of corporate offending. Finding negligent corporate officers does little to respond to an organizational offense. It would be infinitely better for Congress to explore legislation that captures one or more constructs of genuine corporate fault, e.g., organizational culture, constructive fault, decision making, or character.<sup>69</sup> Legislation is desperately needed to close the conceptual gap between century-old conceptions of vicarious liability and fault that may be reasonably attributed to an entity. And, more practically, this Act applies to corporations already convicted or in negotiated settlements. Thus, it reaches the smallest fraction of cases, so small that it defies reason to think that this brings corporations to justice.

At the centerpiece of the Ending Too Big to Jail Act<sup>70</sup> is a requirement that a senior officer sign a due diligence certification that there was no criminal conduct or civil fraud on their watch.<sup>71</sup> How does this certification achieve the objective of ending too big to jail? Remarkably, lawmakers seem to assume that this provision will deter a good deal of fraudulent representations. But when the inevitable happens and fraud occurs, what does that Act offer? There still is a too-big problem.

The balance of the Act proposes an extension of the Special Inspector General for the Troubled Assets Relief Program as an “enforcement agency dedicated solely to investigating fraud committed by financial institutions and insiders at financial institutions . . . .”<sup>72</sup> The notion that the too big problem would be addressed by centralizing prosecutorial capacity is, at best, an interesting hypothesis. The Criminal Division of the Department of Justice already calls the final shots with respect to the decision making surrounding Foreign Corrupt Practices Act prosecutions and other discretionary prosecutorial determinations. A competing and, arguably, more attractive hypothesis is that there

67. Cf. Amy J. Sepinwall, *Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability*, 2014 COLUM. BUS. L. REV. 371.

68. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 54 VAND. L. REV. 1343 (1999) (discussing the strictness of vicarious fault); see also Diamantis, *supra* note 13, at 527-33.

69. See, e.g., William S. Laufer, *Corporate Bodies and Guilty Minds*, 79 EMORY L.J. 647, 664-68 (1994).

70. Ending Too Big to Jail Act, S. 2544, 115th Cong. (2018).

71. *Id.*; see also Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1 (2002).

72. S. 2544, § 2(a)(3) (2018).

are some concerns in building silos of functionary capacity in ways that may be vulnerable to political whim i.e., decentralizing prosecutorial capacity minimizes the prospects of overreach and capture. Moreover, as was demonstrated in the federal corruption prosecution of the European electronics conglomerate Siemens some years ago, not all too-big challenges to prosecution come from cases brought against financial institutions.<sup>73</sup>

The too big to investigate, prosecute, convict, and punish problems are not adequately addressed by suggesting a certification and a dedicated group of prosecutors in DOJ.<sup>74</sup> Lawmakers must face the challenge of having to pass on prosecuting to the fullest extent of the law some of the largest corporations because they are simply too big, too important to our global economy, and too systemically important to ours. This Act, unfortunately, does not directly or indirectly offer criminal justice functionaries a genuine solution.<sup>75</sup>

### Conclusion

It would be a fair and poignant response to say that progressives' sense of indignation over all things corporate may actually hold some promise for achieving unfinished substantive law reforms. The longstanding ambivalence with the idea of corporate criminal liability in the United States is traceable, at least in part, to the general public's lack of affect over organizational offending.<sup>76</sup> The expressive aspects of morality—blame, resentment, and anger among them—shape our moral relationships with businesses more generally.<sup>77</sup> Progressives are justly fueled by the kind of indignation over corporate wrongdoers that is so very absent and needed today. The challenge is to channel this indignation and take seriously the idea of passing progressive corporate crime legislation that is fair, measured, and evidence-based. It is but a small step for progressives to distinguish the worst of corporate wrongdoers from *all* corporations—to levy indignation towards specific wrongdoers.<sup>78</sup>

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73. See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *FORDHAM L. REV.* 775 (2011) (discussing the challenges associated with the Siemens prosecution); see also Brandon L. Garratt, *Globalized Corporate Prosecutions*, 97 *VA. L. REV.* 1776 (2011).

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

75. Two prime examples of recent legislation destined to fail in Congress include: Protect Democracy from Criminal Corporations Act, H.R. 3004, 116th Cong. (2019) (limiting “criminal” corporations from making campaign contributions by amending the Federal Election Campaign Act of 1971), and A Bill to Break Up Large Financial Entities, S. 3542, 115th Cong. (2018) (creating a class of “too big to exist” institutions by assets that must be immediately restructured).

76. See William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?*, in *REGULATING CORPORATE CRIMINAL LIABILITY* 19 (D. Brodowski et al., eds., 2014).

77. See Matthew Caulfield, *Expressive Business Ethics*, in *BUSINESS ETHICS* 123-53 (*BUS. & SOC'Y* 360, VOL. 4) (2019).

78. Indeed, ethics requires thoughtful reflection on the objects and conditions of blame. See generally Vikram R. Bhargava, *Firm Responses to Mass Outrage: Technology, Blame, and Employment*, *J. BUS. ETHICS* (OnlineFirst 2018) <https://link.springer.com/content/pdf/10.1007%2Fs10551-018-4043-7.pdf> [<https://perma.cc/9E6V-9MQF>] (criticizing the excessive blame that is often collectively aimed at wrongdoers); Kendy Hess, *Who's Responsible? (It's Complicated.): Assigning Blame in the Wake of the Financial Crisis*, 42

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MIDWEST STUD. PHI. 133 (2018) (identifying the complexities introduced in assigning retrospective blame when group or corporate agents exists alongside, or are constituted by, individual agents).