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Author(s): Anne Alvesalo-Kuusi, Steven Bittle and Liisa Lähteenmäki

Source: *Justice, Power and Resistance* Volume 1, Number 1 (April 2017) pp. 24-46

Published by EG Press Limited on behalf of the European Group for the Study of Deviancy and Social Control electronically 10 October 2017

URL: <http://www.egpress.org/papers/alvesalo-kussi-et-al-corporate-criminal-liability-and-abolitionism>

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## **Corporate Criminal Liability and Abolitionism – An unholy alliance of corporate power and critical criminology?**

Anne Alvesalo-Kuusi, Steven Bittle and Liisa Lähteenmäki<sup>1</sup>

### **Abstract**

*Abolitionists have, since the 1960s, importantly denounced incarceration as ineffective, notably in terms of deterrence. It is thought to increase human suffering. Abolitionists reject the concept of crime, dismiss punitive responses to social problems and propose that they should be dealt with outside the criminal justice system. Nevertheless, these calls for social justice are time and again declared by the establishment to be unfeasible, romantic illusions. Yet, this article demonstrates that, when it comes to regulating the harmful acts of corporations, certain classic abolitionist arguments are taken seriously and conveniently co-opted by the establishment. Using unparalleled data concerning both law-making history and recent corporate fine sentences in Finland, we scrutinise the enactment and implementation of corporate criminal liability, and establish how select abolitionist arguments, often deemed impossible and demoralising in the context of individual offences, triumph when corporate interests are at stake.*

### **Introduction**

In criminology, since the 1960s, abolitionists have condemned incarceration as ineffective: it does not deter crime but only serves to escalate human suffering

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<sup>1</sup> Anne Alvesalo-Kuusi is Professor of Sociology of law at the University of Turku, Finland. She has studied extensively in the area of corporate crime control. At the moment she is the principal investigator of the research project Securitization in Finnish Legislation funded by the Finnish Academy, project no. 283553 which has supported this work. Email: anne.alvesalo-kuusi@utu.fi

Steven Bittle, Associate Professor, Department of Criminology, University of Ottawa. Steven Bittle's main research interests are in the areas of crimes of the powerful, corporate crime, corporate criminal liability and the sociology of law. His recent publications focus on the class relevance of corporate criminal liability/corporate manslaughter legislation. Email: sbittle@uottawa.ca.

Liisa Lähteenmäki is working as a Research Fellow at the University of Turku, Finland, Faculty of Law. Email: limala@utu.fi

(Mathiesen, 1974; Bianchi, as interpreted by van Swaaningen, 1997, 119; Carrier and Piché, 2015; Copson, 2016: 75-76). Abolitionists dismiss punitive responses to social problems or ‘problematic situations’ (Hulsman, 1986a: 72), and propose alternative solutions such as dispute settlement, redress, and social justice (De Haan, 1990; van Swaaningen, 1997: 116; Ruggiero, 2010: 4-6; Scott, 2013: 97-103). Furthermore, abolitionists point to the non-existence of an ontological reality of ‘crime’, and stress the power of crime statistics to reproduce existing social inequality, thus highlighting that criminal justice activities focus on crimes of the weak and underprivileged, and not on those of the powerful, namely corporate and white-collar crime (Hulsman, 1986b: 28; Alvesalo and Tombs, 2002; Hillyard and Tombs, 2004: 13). The criminal justice system constructs crime as individual free choice, simultaneously veiling the social origins of both deviant behaviour and its definitions (Hulsman, 1986b; van Swaaningen, 1997: 3; Ruggiero, 2010: 13; Copson, 2016: 86-89). The critics, in turn, denounce these views as radical and anarchistic, or belittle them as romantic illusion or utopia (see e.g. van Swaaningen, 1997: 131; Ruggiero, 2015; Scott and Bell 2016: 24).

The consequences of corporate crime – loss of life and savings, and environmental devastation – raise the very legitimate question of who is liable and how they will compensate for their harmful acts. While corporate crime continues to produce unparalleled harm, punishment of corporations is often limited to fines, if not dismissed altogether (Wells, 2001; Tombs and Whyte, 2007; Tombs, 2016). The downsizing of corporate crime control is contrary to the developments in traditional street crime, whereby the punitive turn (Garland, 2001) has gained ground even in the formerly very liberal Nordic countries (Lappi-Seppälä, 2016). The Finnish ‘rocky road’ of constructing corporations as punishable subjects via corporate criminal liability – the ultimate criminal justice solution to harmful organisations – offers an ironic example of some abolitionist arguments standing ground and becoming reality.

This article contributes to existing discussions on abolitionism with regard to corporate offending. Of course, abolitionism recognises the differential treatment of street ‘crime’ versus corporate ‘crimes’ (see, for example, Hulsman 1986b), and some scholars have explicitly confronted the lack of accountability in the State’s abuse of power in punishing ‘crimes’ and ‘criminals’ (see, for example, Sim, 2004). However, there is a general tendency within the literature to avoid questions of what to do about, how to respond to, and how to define corporate harm and wrongdoing (see Tombs, 2016). This lacuna is important to plug, for – as we demonstrate in this paper – arguments similar to those made

by abolitionists in their critique of the criminal justice system have not only been accepted, but appropriated by the establishment when it comes to regulating corporations.

The overall goal here is not to critique abolitionism, *per se* – a literature with which we stand in solidarity against the criminalisation and punishment of society's most marginalised individuals and groups – but to critically explore how *some* abolitionist knowledge claims may be constitutive of an anti-regulatory, non-punitive 'spiral' (Snider, 2003) when it comes to the state's response to corporate harm and wrongdoing. In so doing, we do not blame abolitionists for the State's decisions regarding the regulation of corporations – there is no direct link between their work and the non-punishment or under-policing of corporations. However, we do question whether there is room within the abolitionist literature to consider more expressly, and with more distinction, questions of corporate power and its role in (re)producing a system that minimises the harms caused by corporations whilst isolating traditional street 'crimes' for state censure and control. Furthermore, we challenge abolitionists and critical criminologists to reflect on how their critiques of the criminal justice system are misused in policymaking and in legislative processes where decisions are made about the 'appropriate targets' of punitive measures.

Academic discourses (including our own) do not emerge in a vacuum; instead, they shape and are shaped by the broader social, political and economic context. As Laureen Snider (2003: 369-70) notes in her examination of feminist knowledge claims relating to women's imprisonment and State responses to violence against women, 'the reception and evaluation of knowledge claims is far from an 'equal opportunity game'. Indeed, to understand why certain claims '...“grow legs” and hop off the screens of experts on to the legislative agendas of politicians, while other claims... atrophy and die', we must re-direct our attention from what gets said to what gets heard, to interrogate 'relations of power'. What academics say is therefore susceptible to a 'boomerang effect', potentially coming back to us in unintended and unexpected ways, helping to reinforce rather than challenge the very issues or problems that constituted our original concern.

For us it is important, following Foucault (1980), to understand the relationship between power/knowledge via our examination of truth claims generated with respect to the enactment and enforcement of corporate criminal liability legislation in Finland. At the same time, however, our interest in political economy demands that we ask why some knowledge claims are heard and others are marginalised (what gives certain discourses their

‘truthfulness’ or ‘appropriateness’?), and to scrutinise the conditions that inform dominant conceptualisations of corporate criminal liability. What follows thus eschews interpretations of discourse as a catalyst of social meaning – a form of ‘discourse imperialism’ that equates language with ‘strong social constructionism’ (Fairclough, Jessop and Sayer, 2002: 4) – to consider how discourses of corporate criminal liability that rely on *select* abolitionist premises are constitutive of neoliberal capitalism (Pearce and Tombs, 1998; Dupont and Pearce, 2001; Pearce and Woodiwiss, 2001; Fairclough, Jessop and Sayer, 2002). This privileging of particular discourses by (powerful) agents or groups is not an automatic or determinative process – semiotic processes can both secure and ‘militate against’ social reproduction – but is instead an ongoing and fluid exchange of renewal and transformation of the capitalist status quo (Fairclough, Jessop and Sayer 2002: 5-6). Once this is understood, we can explore the imbrication of discourse in the (re)production of broader social relations, how discourse ‘constructs and maintains relations of power in society’ (McKenna, 2004: 15). In this sense, we explore how classic abolitionist arguments are made use of and interpreted in law reform processes aimed at disciplining powerful corporations and corporate actors.

Before presenting our empirical data and results, we will discuss the central ideas of penal abolitionism and introduce developments in corporate crime control, particularly with respect to corporate criminal liability.

### **Three classical abolitionist ideas of crime and punishment**

The following is not intended as a comprehensive account of abolitionist ideas, as many, sometimes dissenting academic and activist discourses of abolitionism are beyond the scope of this article. We are well aware of the variety of abolitionist conceptions – that there are ‘co-occurring’ forms and models of abolitionism (Carriere and Piché, 2015: 10; Bell and Scott, 2016; Mathiesen and Hjemdal, 2016: 141). For our purpose, we focus on three central abolitionist ideas: ‘crime’ as a social construction; the ineffectiveness of punishment and imprisonment; and the need to embrace alternative, non-criminal justice responses to problematic situations.<sup>2</sup>

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<sup>2</sup> For an in-depth account of abolitionism, see the Foundational Volume of this journal, special issue on Non-Penal Real Utopias (2016), and the abolitionism special issue of *Champ Pénal/Penal Field* 2015, vol. 13. Other major works on abolitionism include: *Abolitionism: Towards a non-repressive approach to crime* (Herman Bianchi & René van Swaaningen eds., 1986); Herman Bianchi (1994), *Justice as sanctuary: Toward a new system of crime control*; Nils Christie (1981), *Limits to pain*; Willem De Haan (1990), *The Politics of Redress: Crime*,

*Crime is a problematic definition*

According to abolitionists, we should be wary of attaching the label of 'crime' to social phenomena. The vast majority of situations defined as 'crimes' are minor, and criminalisation of these situations only draws attention away from more serious social problems such as poverty and homelessness, which are at the root of deviant and problematic outcomes (Hillyard and Tombs 2004, 12). In addition, criminal justice is a poor solution to social problems often caused by poverty, neglect and inadequate possibilities for education, livelihood and a meaningful life (De Haan 2003, 381; Golash 2005, 153-154). Labelling someone as a 'criminal' also removes them from the sphere of the normal and posits them in the realm of exception, something that is not 'us' (Hulsman 1986b, 25).

What is more, unequal power relations and legal technicalities, which have nothing to do with the negativity of the situations they are supposed to be reacting to, are responsible for influencing primary processes of criminalisation (Hulsman, 1986a: 69). Attempts to introduce currently marginal concerns in criminal justice – offences by states and corporations – raise enormous theoretical and practical tensions (Tombs and Hillyard, 2004: 30-31). Rendering some social phenomena and actors targets for formal and punitive control while leaving other, equally harmful actions in the shadows and their victims without a socially acknowledged right to an apology, compensation or repair, is thus a question of power (Hulsman, 1986b: 28-29; Muncie, 2000).

In criminal justice, it is essential to define 'crime' and the responses to it. The system itself thus represents a way of constructing social reality, which needs demystifying (Hulsman, 1986a; 1986b). A clear example of this is the discussion separating malicious 'crime' from prohibited actions (*mala in se* vs. *mala prohibita*, see e.g. Davis, 2006) and its powerful dividing and justifying effect.

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*punishment and penal abolition*; Thomas Mathiesen (1974), *The Politics of Abolition*; Thomas Mathiesen (1990), *Prison on Trial: A critical assessment*; Vincenzo Ruggiero (2010), *Penal Abolition*; Diedre Golash (2005), *The Case Against Punishment: Retribution, Crime Prevention, and the Law*; Louk Hulsman (1986), 'Critical Criminology and the Concept of Crime', *Contemporary Crises* 63: 10; Nils Christie (1977), 'Conflicts as Property', *Brit. J. Criminology* 17: 1; Special issue on abolitionism, *Contemporary crises* (1986) 10:1.

*Punishment inflicts pain and does not deliver solutions*

Abolitionists argue that criminalisation and punishment inflict pain and are harmful to victims, perpetrators and their communities (Christie 2007). The processes of criminalisation deliver suffering upon identifying a crime and a criminal. Punishment creates social harms such as homelessness, unemployment and loss of family relations (Hillyard and Tombs, 2004: 16; Scott and Gosling, 2016: 170). All punishment but prison in particular does not deter nor does it rehabilitate (Duff and Garland, 1994: 25; Golash, 2005: 29; Mathiesen, 2006: 53-65; Ruggiero, 2010: 82-85), and it certainly does not offer true compensation for harm. Instead, prison separates and excludes offenders from society without offering any means to make an honourable re-entry or repair. In sum, the criminal justice system does not work according to its own objectives.

Abolitionist ideas stress that the answer to crime is not punishment but treatment, education and equal life opportunities. Treatment is not to be understood as an instrument of law enforcement but as a welfare institution (Hulsman 1986a). Compensation, healing, mediation, restoration, solidarity, empathy, responsibility, and empowerment are the key concepts that offer an alternative justice that can be used to invalidate the idea of responding to various problems through retributive, distressing sanctions (Golash 2005, 153; Carrier and Piché 2015). According to Bianchi, all 'crime' needs to be defined as tort and dispute, and dealt with by a system that is less concerned with controlling and punishing, and more concerned with enabling, empowering and restoring (Bianchi, 1986: 152-156).

*Dispute and harm should be dealt with outside the criminal justice system*

For Christie (1977; 1982; see also De Haan, 1990; van Swaaningen, 1997: 131), the problem with the criminal justice system is that it takes social conflicts away from the realm of the individuals and their meaning-making. The system is prioritised over 'the real world' (Bernat de Celis, 1989: 11), as professionals of law monopolise the conflicts (Christie, 1977: 4-7). Victims and offenders are represented by lawyers, who define what is important and worthy of discussion while silencing the involved parties. According to Christie, the important opportunity for norm-clarification is then lost, as the involved parties do not meet and discuss the aspects, feelings, anxieties, and understandings of what happened and how to repair the damage (ibid. 8-9).

The system thus needs to be changed so that the 'owners of the conflict' take centre stage; it needs to be victim and norm-clarification oriented, and the

process of understanding, healing and repair should weigh more than the punitive outcome (Christie, 1977; Hulsman, 1986a; Casper, Tyler and Fischer, 1988). In other words, conflicts should be solved outside the criminal justice system, and the primary agents in solving the conflicts should be the involved parties, while professionals of criminal law and justice should retain only an assisting role (van Swaaningen, 1997: 132; Braithwaite, 1999: 1727-43;).

Once again, we acknowledge that the portrayal above represents a somewhat stylistic account of abolitionism, and is based on the central arguments brought forward by the 'founding fathers' of the abolitionist movement. Some contemporary scholars, particularly those writing in the wake of the emergence of the prison industrial complex, emphasise the importance of confronting issues of gender, race, class, or the 'underlying social inequalities leading to social harm' (Scott and Bell, 2016: 15) as a necessary condition for abolishing prisons (see also Davis and Mendieta, 2005; Sudbury, 2014; Carrier and Piché, 2015). Others focus on issues of accountability with regards to the institutional violence associated with the State's response to 'crime' (see, for example, Sim, 2004) or stress social harm over state defined 'crime' (Hillyard et al., 2004). However, as we shall see, it is the stylised version, the classic arguments of abolitionism that 'grow legs' in the context of corporate crime law reform. Before demonstrating this, we turn briefly to the developments in criminalising corporate offences.

### **Punishing corporations**

#### *The non-criminal status of corporations*

It is widely accepted amongst critical legal scholars, criminologists (including some abolitionists), and other social scientists that corporate crimes are treated much less punitively than traditional street crimes which are routinely caught-up in various law-and-order rhetoric and related control strategies (Slapper and Tombs, 1999: 86; Garland, 2001; Wacquant, 2009). With few exceptions, corporate crime is excluded from the category of 'crime', and inadequately recognised within mainstream or critical criminology (e.g. Box, 1983, Tombs, 2010; 2016; Barak, 2015: 1). It is impossible today to account for the non-criminal status of corporate harm and wrongdoing without recognising neoliberalism's dominance (see e.g. Harvey, 2005; Resnick and Wolff, 2006; Soederberg, 2010), and the ways it led to the virtual disappearance of corporate crime (Snider, 2000), increased the legitimacy of corporations, and, indeed,

cemented the moral authority of capital across a wide swathe of the Global North (Tombs, 2016; Whyte and Wiegratz, 2016).

Beginning in the early 1970s, as western states faced growing fears of stagflation and increased global competition, neoliberal economic reasoning began to dominate the political and economic landscape, hastening the death of state socialism (Harvey, 2005). Corporate leaders successfully seized the opportunity to argue that laws governing the economic realm were unnecessary, even redundant, because competition through ‘free’ markets was the best way to separate out irresponsible employers and corrupt practices (Tombs and Whyte, 2015). De-regulation of the economic realm thus became the dominant mantra of the 1980s and 90s, fuelling visions of bureaucratic ‘red tape’ and the ‘regulatory burden’ imposed on business (Tombs and Whyte, 2007: 158).

Neoliberalism’s full impact on western capitalism was (and is) varied and uneven (Harvey, 2005), with countries like Finland taking longer to shed their social-democratic roots than other, more pro-capital states (Patomäki, 2007). However, what is now abundantly clear is neoliberalism’s success at re-engineering the moral authority of corporate capital, or what Steve Tombs (2016: 11) refers to as the dominance of neoliberalism’s ‘ideological, cultural and moral elements’. As recent scholarship challenging neoliberal values (Sayer, 2016; Tombs, 2016; Whyte and Wiegratz, 2016) points out, neoliberalism is not just an economic and political phenomenon but a hegemonic project aimed at fundamentally transforming the ways in which we, as citizens, view capitalism. The moral authority of the corporation is one element that makes it possible for powerful actors to selectively hear abolitionist (or other) arguments which serve to minimise control efforts when it comes to contemplating measures aimed at disciplining private enterprise.

Of course the differential treatment accorded to corporate crime is not to say that it enjoys absolute immunity from the law (Bittle, 2015: 358). Societies have witnessed claims-making, social movements, and support for tough regulations and effective enforcement of certain forms of corporate crime (Katz, 1980; Savelsberg, 1994; Alvesalo, 2003: 140; Bittle, 2014; Alvesalo, Bittle and Lähteenmäki, 2017). Nevertheless, actions against corporate crime typically diminish over time, with such control activity tending to emerge only to decline, in a cyclical fashion (Bernstein, 1955; Glasbeek, 2002 and 2013; Alvesalo, 2003; Snider, 2015; Tombs, 2015). Even where moral outrage finds specific targets and corporate folk-devils such as immoral bankers, the control measures have ultimately, on the quiet, disappeared (Levi, 2009: 51).

*Corporate criminal liability*

Corporate criminal liability has been criticised since the concept's jurisprudential birth. From the point of view of traditional penal doctrine, one of the most extreme means with which to curtail corporate crime and acknowledge its seriousness is corporate criminal liability legislation (CCL), as it involves the juridical construction of corporations as criminals and punishable subjects. After all, criminal liability has historically been built on the idea of individual guilt. Many countries have strongly opposed the idea of punishing collective entities, claiming that accountability should rest firmly on the principle of individual liability (Stessens, 1994: 496).

Recurrent reasons for opposing corporate criminal liability are analogous to those presented as abolitionist deliberation to oppose punishment: that corporations are *not criminal*, but rather motors of economic and social growth: non-compliance committed in the operation of a corporation *should thus be viewed as a failure or malfunction*, that is, *malum prohibitum*, rather than *malum in se*. Furthermore, *innocent bystanders* such as shareholders, employees or consumers, are adversely affected when a corporation is punished, and anyhow, non-criminal responses such as education and persuasion will deliver far better results than punishment. According to powerful voices of industry, commerce, law and right-wing politicians, the best way to deal with corporate wrongdoing is thus beyond the criminal justice system (for this debate, see e.g. Braithwaite and Geis, 1982; Glasbeek, 1984; Fisse and Braithwaite, 1988; Wells, 2001: 35-36; Gray, 2006: 877; Alschuler, 2009; Bittle, 2014: 372-375; Alvesalo and Lähteenmäki, 2016).

The law reform processes of corporate criminal liability have in many cases been laborious and lengthy, and involved intense political debate. In the UK, for example, it took 13 years to introduce the Corporate Homicide and Manslaughter Act (2007), and the Canadian government spent six years contemplating the Westray Bill, finally enacted in 2004.<sup>3</sup> Despite these legal instruments, there is ample evidence that corporations are seldom convicted for their malfeasances, and if convicted, punishments tend to be lenient (Tombs and Whyte, 2007; Bittle, 2012; Alvesalo-Kuusi and Lähteenmäki, 2016, Alvesalo, Bittle and Lähteenmäki, 2017).

The Nordic countries started to review their penal codes during the 1970s to enable corporate criminal liability. Sweden imposed a system of corporate fines

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<sup>3</sup> See, Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, Statutes of Canada: 2003, c. 21 and HE 95/1993, Government proposal for Corporate criminal liability, Finlex.

already in 1986 (Nuutila, 2012: 357); Norway and Iceland introduced corporate criminal liability during the 1990s (Donaldson and Watters, 2008). In Finland, corporate criminal liability (CCL) legislation was enacted in 1994 and came into effect in 1995 (Alvesalo and Lähteenmäki, 2016). The legislative process took 22 years as it started in 1973 when two commissions contemplating a reform of the entire penal code proposed the enactment of CCL. The commissions justified the need for CCL with unclear, unjust relations of accountability and liability, and claimed that the problem relating to corporate offences is the fact that the culprit is often a collective, even though the actual act is committed by an individual or a group of individuals.<sup>4</sup>

As the law was being drafted, CCL was justified by the fact that the operational and strategic management of corporations had become more differentiated, and as criminal actions in the operations of a corporation could no longer be associated with particular, identifiable persons, *individual liability did not work as a deterrent* (HE 95/1993). Furthermore, explained the government, individual punishments that reflected the gravity of the offence would, in the end, become *excessive*. Therefore, the reprimand should be directed at those quarters in an organisation whose actions have the most to do with the undesirable outcome. According to legislative documents, the aim and purpose of a corporate fine is to express society's reprimand for the crime, and to influence the future actions of the corporation (HE 95/1993). The punishment should, according to the legislator, be in just proportion to the seriousness and dangerousness of the crime and to the guilt of the offender, manifested by the crime.

At first, the law applied to only a handful of offences against the proper functioning of the free market: bribing, insider trading, benefit fraud, marketing offences, and industrial espionage. Environmental crimes were also included in the purview of the new statute. Since 1995, the law's purview has expanded, and today altogether 25 chapters and 90 criminal offences in the Finnish penal code allow the application of CCL, including crimes against occupational safety.

Next, we will present our empirical data and methods, and start to dissect both the foundations and the outcomes of corporate criminal liability in Finland.

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<sup>4</sup> For a more thorough description of the legislative process, see Alvesalo-Kuusi & Lähteenmäki, 2016.

## An unholy alliance? The case of Finland

### *Data and methods*

In order to scrutinise the arguments used against corporate criminal liability throughout the legislative process, we gathered all the essential official documents pertaining to the 22-year process of the enactment of corporate criminal liability: this included four committee memorandums and 179 written opinions submitted during the process by NGOs, ministries, unions, industry, and other interested parties. We analysed these documents using qualitative content analysis.

Finland passes approximately 30 corporate criminal liability sentences each year. Today, the majority of the sentences, 80–90 per cent, are meted out for safety crimes (Alvesalo-Kuusi and Lähteenmäki, 2016b). In order to examine the enforcement of CCL in Finland, we examined all the safety crime sentences with corporate fines from 2010–2014 (N=154). The identification numbers for all sentences imposing a corporate fine were acquired from the Finnish Legal Register Centre. All judicial decisions concerning safety crimes were then retrieved from each court, comprising every case in the district courts, Courts of Appeal and the High Court in Finland.<sup>5</sup> The decisions were coded and entered into a matrix. Coding covered the entire decision from the very smallest detail to the essential features of the conviction. The method of analysis of the sentences was quantitative and qualitative content analysis.

### *The process: Corporations voicing abolitionist reasoning*

Considerable controversy followed the reports as well as draft laws that initially proposed corporate criminal liability. Employers of industry and commerce especially opposed CCL during the 22-year process, as did the legal profession. The employers' main arguments adopted two stances: rejecting and restricting the concept of crime, and stressing the negative effects of punishment. For instance, employers in the construction industry (opinion, 8th February 1974) used very strict language for describing how the proposals were 'anti-employer as they *criminalised entrepreneurship*'. The employers even appealed to the United Nations' agreement on human rights, stating that 'in light of the UN's agreement of human rights, corporate criminal liability is *discriminatory and unfair*, as it is targeted at employers only'. According to the employers, the whole idea of corporate criminal liability 'means radical deviation from the

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<sup>5</sup> Majority of the cases (74%) are from district courts (N=114). From Courts of Appeal, there are 38 cases (25%), and from the High Court, 2 cases (1%).

essential principles of criminal law (*mens rea*) and is to be abandoned' (Luukkainen 1974; Joint opinion of the Employers' federal commissions, 24th January 1974).

The background to the employers' submission was a memorandum written by a professor of criminal law, Reino Ellilä, who strongly criticised CCL. He justified his opposition by highlighting the fact that *other means, such as confiscation or penalty payment had not proven inefficient, especially if individual liability was further improved* (see also e.g. Opinion of Employers for automobile transport, 2nd January 1974). Ellilä also underlined, usurping abolitionist justifications of limiting pain, that *the detrimental effects of punishing corporations would increase unemployment*, because companies would close down, and *raise product prices*, as companies would seek to compensate for their losses (Statement of Professor Ellilä, 12th April 1973). Among jurists, Ellilä was not alone in opposing CCL: rather, the majority of jurists opposed the law, basing their argument on the strict, and as they saw it, unalterable idea of liability: individual guilt (e.g. opinion of the Association of Finnish Lawyers; opinions of the Courts of Appeal in Turku and Vaasa).

The employers also tried to blur the definition of crime by using the prefix 'so-called' when referring to occupational safety crimes, as did the employers of the wood processing industry (opinion, 13th February 1974). They stated that 'the larger an industrial plant is, the bigger is the chance that *a so-called work offence* will take place. To treat these incidents as evidence of a felony is utterly *excessive*.' The employers of the metal industry (opinion, 11th January 1974), further reminded legislators that matters such as violations of collective agreements or safety measures *did not belong in the realm of penal code* at all, but were rather a matter of labour market negotiations or civil law procedures. The employers further stressed the difference between criminals and respectable entrepreneurs, stating that '*real criminals and professional criminals are not targeted* enough, as the *proposal aims at criminalising decent entrepreneurs*' (Joint opinion of the Employers' federal commissions, 24th January 1974).

The message of the employers' federations and industry lobbyists did not change during the 1980s, as a rewritten proposal was circulated for opinions. Time and again, the employers tried to prevent the legislative process from proceeding by referring to the same argumentation presented during the first rounds of opinions. On top of repeating the old arguments, the employers further stressed the negative effects of CCL: *innocent bystanders* would ultimately bear the burden of one rotten apple's misconduct. The federations

also reminded legislators that *people and communities should first and foremost be guided by other means than punishment* (opinion, 7th April 1988).

*The Outcome: Restricting punishment effectively*

Despite strong opposition, corporate criminal liability legislation also had its supporters, not least in the committees that guided the reform of the penal code. The legislative process proceeded in 1989 to the phase of a draft law, and presented it to Parliament in 1993. While legal technical matters formed a minority among the comments and criticism presented during the process, there was some debate about the idea of imposing CCL as discretionary; that is, leaving it to the courts to decide whether or not to sentence the corporation. This was justified with the idea of flexibility of regulation. According to the proposal, with a discretionary system it would be easier to avoid unnecessary, laborious hearing in cases in which there really was no reason to impose a corporate fine. Underpinned by beliefs in the non-criminal status of the corporation, the committee was willing to 'hear' select arguments, notably that *excessive fining should be avoided*. What is more, corporate criminal liability was *to be applied only to a few, serious crimes*, which further underlined the necessity of discretion.

The legal profession criticised the proposal for discretion as it formed a clear exception in the Finnish legislation, based on the idea of mandatory sentencing if found guilty (mitigation aside). Discretionary sentencing was removed from the final draft, but as the draft law was finally presented to Parliament in 1993, sentencing was once again made discretionary. (HE 95/1993, p. 16.) The law, then, stated that *a legal entity may be sentenced* to a corporate fine in a case in which a *person or persons*, acting on behalf of or for the corporation, commit a crime or an omission (Penal Code 1995, Ch. 9 §2). This stance was emphasised with the explicit formulation in the government's proposal, which stated that *'corporations do not, in the same sense as natural persons, commit crimes'* (HE 95/1993, p. 16). Moreover, there were only 16 offences on the list of crimes punishable under the Act of CLL, of which several were at only varying levels of seriousness of the same offence. The signal was, evidently, that corporate malfeasance was not a serious matter worthy of criminal justice intervention, and that even in cases of evident malpractice, careful consideration should be applied before assigning the label of crime and punishing corporations accordingly.

*Enforcement: Securing impunity*

As the debate and political decision-making finally resulted in a watered-down version of corporate criminal liability, the law itself was seldom enforced. Discretionary sentencing in particular resulted in considerable uncertainty in the initial years following the law's enactment. The formulation of the law itself acted as a disincentive to enforcement and during 1995–2000, the prosecuting authorities made only nine claims of corporate criminal liability and passed only five sentences.

In 2003, discretionary sentencing was replaced with mandatory sentencing, and indeed, the annual amount of conviction subsequently rose to an average of 35 annual CCL convictions (OSF, 2016). It would thus seem that corporations, in the end, lost the struggle, and were not able to avoid the stigma of crime. But a closer look at statistics and the actual sentences tell another story, as punishing a corporation is an anomaly, an exception, rather than a rule. To begin, the police file over 1000 incidents pertaining to omissions of occupational safety every year, yet only three per cent of these cases ever result in a corporate fine. Furthermore, corporate fines are dealt out in only every fourth prosecuted occupational safety crime case (Alvesalo and Lähteenmäki 2016b).

During 2010–2014, the average corporate fine was 10 700 euros and the most frequent fine was 5000 euros. The single highest fine was 180 000 euros, although the penal scale extends to 850 000 euros. A fine of € 5000 is a slap on the wrist, not reflecting retribution or punishment, as the majority of the corporations that were sentenced had turnovers of more than 10 million euros. In the 154 cases under scrutiny, in addition to 161 corporations, 288 individuals were convicted. The individuals who bear the burden are mainly middle and supervisory management (71% of the sentenced individuals). Moreover, the fines imposed on individuals in the cases under scrutiny were 35 times higher than those of the corporations.

What is more, a corporation may very well be a repeat offender. Altogether, eight corporations were sentenced twice or more often during 2010–2014. The worst case was that of a large food company that was sentenced four times during the five-year period. Regardless of the recurrence, the courts did not take up the matter of repeat offending, and the repetition did not seem to affect the amount of the corporate fine. Rather, the courts more often reasoned that negligence was an isolated event that *did not express general disregard* for safety regulations. Consequently, they did not consider this as blameworthy, while other, legally binding responsibilities were brought to the fore as testimony of corporate respectability. In addition, the long duration of the

crime, an aggravating circumstance that indeed affects the sentences of private individuals, had no effect on the sentencing of corporations: even in cases of an occupational safety crime *that took place over several years*, this was not even contemplated by the court, nor mentioned as a factor influencing the sentence. The corporations were thus not punished for risking the lives of their employees, but merely reminded to be compliant in the future (also see Alvesalo, Lähteenmäki and Koistinen, 2016).

In a situation that can only be described as the privileged power of corporations, abolitionist imperatives such as accountability and social justice were ignored, whilst justifications denouncing punishment helped to ensure the virtually non-existent net sum of corporate fines. So, corporate power, using select abolitionist ideas, allowed for the realisation of a shield of reduced punishments for corporations, whereas these same arguments outside of the business context do not hold the same promise: hence more severe punishments for ‘real criminals’ (i.e. individuals).

### **Conclusions and discussion**

Our analysis of the legislative process of corporate criminal liability and the enforcement of the law in cases of occupational safety crimes in Finland reveals how the representatives of corporate power successfully hacked select abolitionist discourses against (over)criminalising corporations and, at the same time, perpetuated the myth of crime. Calls for denouncing punishment and the concept of crime, defining corporate harm as non-criminal, restricting and limiting punishment, and the appeal to leave a considerable amount of cases outside the criminal justice system, were paradoxically taken seriously in legislation and legal praxis when it came to the crimes of the powerful.

What is more, our analysis exposed the role of power and the peculiarity of political processes in primary criminalisation and enforcement. First, it was the targets of corporate criminal liability who had the most leverage in defining the content of the law – that is, ‘the moral capital of capital’ (Tombs, 2016: 33) helped to militate against (but not prevent) corporate criminal liability. The employers’ lobby, with its close connections to political decision-making, managed to restrict the scope and depth of criminal definitions as well as hinder the actual sentences at the beginning. The employers also successfully rejected the label of crime and criminality, thus preserving, at least to some degree, the ownership of the conflict. The law then served to cement the exclusion of corporations from the ranks of ‘real criminals’, resulting ultimately in minimal

enforcement and ineffective consequences. As culpability is not perceived to cohere with corporate conduct, the purpose of the law – wider accountability than the former legislation was able to deliver – never materialised. It is still individuals who bear the liability, as corporations are either not prosecuted, or when prosecuted, sentenced with what amounts to a slap on a wrist.

It is easy to state that fines of a few thousand euros for killing or injuring workers demonstrate effective avoidance of punishment. The fact that further punishment – such as corporate probation for a malicious corporate offence – was not even contemplated by the legislator further underlines the lenient, forgiving attitude towards corporate crime. Harm and pain is confined to the victims, and corporations are left to continue ‘business as usual’, even in cases of severe offending.

The broader take-away from this paper revolves around the ways in which abolitionist arguments are heard in the context of corporate harm and wrongdoing while neglected in others. Ironically, abolitionist justifications for less criminalisation, less punishment and more legal ‘fairness’ were co-opted by the powerful, resulting in merely reinforcing the traditional concepts of crime and of the criminal, while not truly challenging their ideological underpinnings. The ability of powerful corporate actors to use abolitionist arguments stands as a stark reminder that academic knowledge claims do not exist in a vacuum. And while there is no controlling for how our claims get heard, we can, as Snider (2006: 338) argues, make ‘our messages harder to mishear’. In this respect, whilst we concur with abolitionist critiques of the criminal justice system, we submit that their arguments might be heard more clearly via a more complete account of what to do about corporate harm and wrongdoing – to fill a void in the abolitionist literature in order to resist the co-optation of their arguments by powerful actors and interests. Doing so would perhaps entail some recognition that, unlike traditional street ‘criminals’, corporations are not ‘normal’ political citizens – they are legally and structurally designed as a device to maximise profit for their owners and investors (Glasbeek 2002). Thus, it is rational for it, at times, to behave as an amoral calculator when faced with laws that add to the costs of production (Pearce and Tombs, 1998).

Corporations are therefore not victims of poor social conditions or abuse, as their offences involve rational planning, even callous calculation. Misbehaving corporations may therefore not readily fall into the category of ‘problematic situations’ but instead be considered as ‘dangerous’ and thus deserving of greater state intervention and the stigma of crime. In this way abolitionist arguments need to challenge neoliberalism’s ‘ideological, cultural and moral’

(Tombs, 2016: 11) foundations by considering how corporate harm and wrongdoing is a unique situation that demands a different response than what has historically been the case with traditional 'crimes'. At the very least, the forms of punishment and other consequences of corporate criminalisation are in desperate need of elaboration.

In response to dominant claims that corporations are inherently good and law-abiding with the capacity to self-regulate outside of the formal legal system, some critical corporate crime scholars have, indeed, advocated for greater state intervention in the corporate realm.<sup>6</sup> (Pearce, 1990: 424; Pearce and Tombs, 1997: 90; Alvesalo and Tombs 2002, also see Glasbeek, 2002 and 2017; Tombs and Whyte 2015). Taking this position does not entail a prison-first punishment strategy. Instead, it is part and parcel of broader ideological struggles over the meaning of corporate harm and wrongdoing and how it should be controlled, and the recognition that some deterrence-based strategies have the *potential* to work with corporate offenders in ways that have proven ineffective in the context of traditional street crimes (see Tombs, 2016). At the very least it is an acknowledgement that the State, despite its ongoing commitments to neoliberal capitalism, currently remains the only countervailing force capable of confronting corporate 'crime' (Pearce and Tombs, 1998) and, as such, should be challenged to live up to its democratically-appointed responsibilities in this regard.

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<sup>6</sup> It is worth noting here that most corporate and white-collar scholars take the opposite position, advocating for compliance strategies that closely mirror the already-present forms of neoliberal-inspired regulation (see Hawkins, 1990; 1991 versus Pearce and Tombs, 1990; 1991 for a debate on the relative merits of compliance versus punishment of corporations).

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