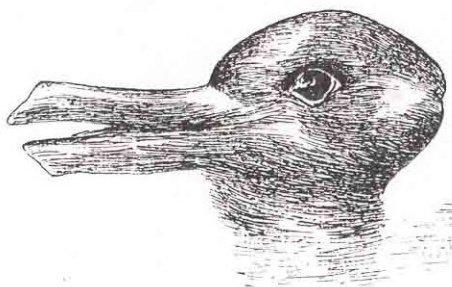


Duck-Rabbit: A Reply to Professor Hasnas

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Two colleagues needed some art to hang on a shared wall. One said to the other: “It should be a picture of a duck! That noble bird has such stamina to fly half-way round the world. Each year. Twice!” The other said to the one: “It should be a rabbit! No creature can match the rabbit for speed and fecundity!” They agreed to disagree until they reached the art dealer. Walking together along the shop’s walls, both suddenly reached out and grabbed the same painting. “Let’s get this one!” they said in unison. Each was happy, sure in his heart of hearts that he had persuaded the other.



I am grateful to Professor John Hasnas for his Response² to *Clockwork Corporations*,³ in which I propose that the sole punishment for criminal corporations should be coercive reform of criminal disposition.⁴ With his customary wit and entertaining manner, he has zeroed in on what disagreement there must be between us . . . if disagreement there must be. He looks at the character theory I propose for structuring corporate sentencing and sees a regulatory mechanism of the sort he prefers. I look at

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1. See Joseph Jastrow, *The Mind's Eye*, 54 POPULAR SCI. MONTHLY 299, 312 fig. 20 (1899), <https://www.biodiversitylibrary.org/item/17757#page/315/mode/1up>.

2. John Hasnas, *Clockwork Corporations: A Valiant Effort to Do the Impossible*, 103 IOWA L. REV. ONLINE 28 (2018).

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

4. See *id.* at 509, 514–15.

it and see a system of corporate punishment of the sort I prefer. Must one of us be wrong?⁵

It is unclear whether Professor Hasnas thinks so. At points, he observes that his “objections are all semantic.”⁶ At others, he seems to insist that if you pull up the curtain, you’ll find that character theory is *really* “a theory of regulation masquerading as a theory of punishment.”⁷ Aside from this labeling matter—is it “regulation” or “punishment”—Professor Hasnas seems more or less to be on board with character theory. Whatever character theory is, it is not the “morally improper and practically counter-productive” sort of corporate punishment to which he has long objected.⁸

I probably should stop there, fortunate to have one other person tentatively behind character theory, even one inclined to think it a theory of regulation. But Professor Hasnas may mean to go further, to persuade me and others that we too must view character theory as a theory of regulation. It is here that I want to draw a stubborn line in the sand.

The stakes are not high, since Professor Hasnas and I seem to agree on substance. There are stakes nonetheless, having to do with the extent to which character theory can speak to a broader audience. Though Professor Hasnas forcefully argues that corporations are not appropriate objects of punishment, he has yet to carry the day. Many scholars argue just as forcefully that corporations should be punished for their crimes.⁹ If character theory is going to speak to them too, I need to show how its proposals can be seen as a way, perhaps the *only* way, to punish corporations. More importantly, if I am right that (as I argue in the Article) the American public wants to see corporations punished, my recommendations need to satisfy them to have any chance of being adopted.¹⁰ What I say below I address just to the retributivists

5. Professor Hasnas also questions whether I have offered a coherent definition of corporate character as opposed to the character of individuals acting on behalf of the corporation. Hasnas, *supra* note 2, at 37 (“[What Professor Diamantis defines as corporate character] is not character; it is something that influences the formation of employees’ character in the same way that parents influence the formation of their children’s character or laws influence the formation of citizens’ character.”). He is right that I have not said enough to persuasively define corporate character . . . yet. To be continued in future work!

6. *Id.* at 35.

7. *Id.* at 29.

8. *Id.* at 30. See John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1333 (2009); John Hasnas, *The Phantom Menace of the Responsibility Deficit*, in THE MORAL RESPONSIBILITY OF FIRMS 89 (Eric W. Orts & N. Craig Smith eds., 2017).

9. See, e.g., William S. Laufer, *Where Is the Moral Indignation over Corporate Crime?*, in REGULATING CORPORATE CRIMINAL LIABILITY 20 (Dominik Brodowski et al. eds., 2017); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 194–98 (2007). See generally THE MORAL RESPONSIBILITY OF FIRMS (Eric W. Orts & N. Craig Smith eds., 2017) (including essays by several proponents of corporate punishment).

10. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 612 (2012) (“The public has increasingly registered greater moral outrage in response to corporate governance scandals.

in the room, scholars and laypeople alike. I don't need to persuade Professor Hasnas. In fact, it is probably better not to; I wouldn't want him withdrawing any of his support.

So, is character theory a theory of punishment? Professor Hasnas has three arguments that it cannot be. First, he contends that because character theory is oriented toward preventing corporate crime, it cannot be punitive.¹¹ But this claim is odd. One central theory of punishment—deterrence—is aimed precisely at “the prevention of criminal behavior.”¹² In its general and specific forms, it is no less a theory of punishment because of its future-looking orientation. Even most retributivists, who disagree vehemently with deterrence theorists, concede that their opponents are still talking (albeit unjustly or misguidedly) about how to punish criminals.¹³ If aiming at prevention does not disqualify deterrence, nor should it disqualify character theory.

Next, Professor Hasnas rightly argues that a hallmark of punishment is that it come after and be in response to misconduct.¹⁴ So it would be a strike against a character theory of punishment if it applied to would-be corporate criminals and not just corporate convicts, as Professor Hasnas suggests it should.¹⁵ But the character theory I propose does not follow him there. It is an approach to sentencing, which necessarily comes after, and not before, a corporation's misconduct has been proved. Professor Hasnas is right that there is very good reason to regulate corporations in advance of crime too. But this would necessarily be something different. The form those regulations take are general requirements on all corporations, rather than the tailored, case-specific, and invasive measures character theory envisions.

Lastly, Professor Hasnas argues that character theory cannot be a theory of punishment because its recommendations are not “painful” enough.¹⁶ But gone are the days when people thought punishment necessarily called for

Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.”).

11. Hasnas, *supra* note 2, at 32 (“If the purpose of character theory is to prevent crime, then it is an odd candidate for a theory of punishment.”).

12. *Deterrence*, BLACK'S LAW DICTIONARY (10th ed. 2014). Professor Hasnas would not quibble with this definition. Hasnas, *supra* note 2, at 33 (“Deterrence theory advocates imposing punishment on those who are guilty of a crime to deter others from acting in a similar matter.”).

13. See, e.g., MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 84 (2010) (arguing in favor of retributivism but saying things like, “general deterrence aims at the prevention of crime by punishing the offender”).

14. Hasnas, *supra* note 2, at 32 (“Preventing crime is what one does in advance of criminal activity. That is what we use regulation for.”).

15. *Id.* (“Professor Diamantis' character theory is designed to reduce the amount of crime committed by corporate employees. If so, then what sense does it make to restrict its operation to those corporations in which employees have already committed crimes?”).

16. *Id.* at 35 (“Unless the inculcation of virtuous character traits is painful, where is the punishment?”).

suffering, marking, maiming, and death.¹⁷ As Professor Hasnas seems to acknowledge later, punishment is more a matter of targeted coercion by authority in response to wrongdoing.¹⁸ “Pain” in punishment is a relative rarity today. Many fixtures of modern sentencing—fines,¹⁹ community service,²⁰ terms of probation²¹—are inconvenient, but not, in any straightforward sense, painful. They are no less punishment because of it.²²

The sort of sanction that character theory envisions—coercive and invasive reform targeted to the criminal conduct of which the corporate defendant was convicted—checks all the boxes of Professor Hasnas’s definition of punishment: “Punishment is the coercive imposition of a harm upon a party in response to that party’s failure to behave as required by some binding code of conduct.”²³ A character-based sanction is levied in response to a corporation’s failure to abide by the criminal law. It is coercive. And it is the sort of thing that corporations regard as “harmful”—no corporations volunteer for government interference. Corporations themselves seem to agree that interference is worse than the leading punitive alternative: the fine.²⁴ My bet (though we lack empirical data to settle the point) is that lay people would also find the sort of reform that character theory envisions to be more retributively satisfying. While fines can appear to be a mere cost of

17. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975) (describing and theorizing the historical shift to prisons from violent modes of punishment).

18. Hasnas, *supra* note 2, at 33 (“What distinguishes punishment from the ordinary application of coercion is that the harm imposed by punishment is deserved.”).

19. U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (U.S. SENTENCING COMM’N 2016) (setting forth provisions for fining individual defendants).

20. *Id.* § 5F1.3 (setting forth community service as a sentencing option). See generally DOUGLAS CORRY McDONALD, *PUNISHMENT WITHOUT WALLS: COMMUNITY SERVICE SENTENCES IN NEW YORK CITY* (1989) (discussing New York City’s use of community service sanctions).

21. U.S. SENTENCING GUIDELINES MANUAL § 5B1.1 (setting forth probation as a sentencing option).

22. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 605 (1996) (“Other reforms have succeeded in enriching the menu of punishment options: ‘boot camps,’ ‘intensive probation supervision,’ ‘house arrest,’ and other new sanctions now complement the traditional array.”). See generally NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990) (advocating for the use of a range of criminal punishments short of imprisonment).

23. Hasnas, *supra* note 2, at 33.

24. Vikramaditya Khanna, *Reforming the Corporate Monitor*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 226, 231 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (“[R]elying on a monitor as sanction may prove desirable when the deterrent effects of cash fines are exhausted and we desire more deterrence.”); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1155 (1983) (“A recent discussion of the potential use of probation as a sanction against corporations pointed out that probationary orders requiring corporations to rectify defective standard operating procedures or to make other structural changes within the organization may have a significant deterrent effect as well as rehabilitative effects because such intervention detracts from managerial autonomy.”).

doing business, the message conveyed by coercive reform is unambiguous: “No more victims.”

These considerations are unlikely to move Professor Hasnas to see character theory as punitive. So long as they persuade some people who want to see corporations punished that character theory can do the job, then I’ll count this Reply a success. The ironic thing is that Professor Hasnas is rooting for me. His concluding thoughts are that “there is nothing wrong with tricking [retributivists] into believing that corporations are being punished [under character theory] when they are not. In fact, it is ethically appropriate to do so.”²⁵ It has been my pleasure to oblige.

What I also hope to have accomplished is to interject some uncertainty as to who is tricking whom. One possibility is that we may all be tricking each other. Character theory could be our duck-rabbit. So long as Professor Hasnas is content to give character theory a tentative place on our wall, I couldn’t be happier.

25. Hasnas, *supra* note 2, at 40.