

# Clockwork Corporations: A Character Theory of Corporate Punishment

*Mihailis E. Diamantis\**

*ABSTRACT: Retribution and deterrence currently drive the politics and scholarship of corporate criminal law. Since the potential harms and private gains of corporate crime are so large, corporate punishment under these theories must be exacting. . . too exacting. In fact, it is difficult under current law to punish many corporations formally without killing them. Ironically, this fact leads to the under-punishment of corporations. Prosecutors—understandably hesitant to shutter some of the country’s largest economic engines—increasingly offer corporations deferred prosecution agreements in lieu of charges and trial.*

*This Article considers corporate punishment for the first time from the framework of a third major theory of punishment—character theory. Character theories of punishment focus first and foremost on instilling good character and civic virtue. Criminal law scholars have largely marginalized character theory because it struggles as a suitable framework for individual punishment. But the practical and moral problems character theory faces in the individual context do not arise with the same force for corporations. In fact, character theory offers the possibility of punishing corporations in a way that preserves and enhances the social value they create while removing the structural defects that lead to criminal conduct. Along the way, the Article*

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*defends some heterodox proposals, including abolishing the corporate fine and allowing sentencing judges to balance the need to punish against non-criminal aspects of a corporate defendants' "character."*

I.	INTRODUCTION.....	509
II.	THE RETRIBUTION RATCHET .....	516
III.	THE DISTORTIONS OF DETERRENCE .....	518
	A. <i>DETERRENCE THEORY DEFINED</i> .....	518
	B. <i>THEORETICAL PROBLEMS WITH DETERRENCE</i> .....	520
	1. Punishing the Innocent.....	520
	2. Pricing Crime .....	524
	3. Inevitability of Over-Punishment.....	525
IV.	PROBLEMS IN PRACTICE: DPAS AND NPAS .....	527
V.	CORPORATE CHARACTER .....	533
	A. <i>DESCRIPTIVELY INADEQUATE?</i> .....	536
	B. <i>PROBLEMATIC FOR INDIVIDUALS</i> .....	538
	C. <i>CHARACTER THEORY FOR CORPORATIONS</i> .....	539
VI.	CULTIVATING CORPORATE CHARACTER THROUGH PUNISHMENT.....	544
	A. <i>FACTORS TO CONSIDER IN WEIGHING THE NEED FOR PUNISHMENT</i> .....	545
	B. <i>PUNISHMENTS CHARACTER THEORY WOULD NOT SUPPORT</i> .....	548
	1. Fines .....	549
	2. License Revocation and Debarment.....	549
	3. Reputational Penalties .....	550
	C. <i>TECHNIQUES FOR REFORM</i> .....	551
	D. <i>SOME LIMITING PRINCIPLES</i> .....	557
	E. <i>ENTER THE JUDGES: BENEFITS OVER PROSECUTION-LED REFORM</i> .....	559
	F. <i>POTENTIAL CONCERNS</i> .....	562
	1. Cost to Innocent Third Parties.....	562
	2. Expertise of the Judiciary .....	563
VII.	CONCLUSION: SOMETHING FOR EVERYONE .....	565
	A. <i>DETERRENCE AND PREVENTION</i> .....	565
	B. <i>RETRIBUTION AND EXPRESSION</i> .....	568

*“[H]ow about this new thing they’re talking about? How about this new like treatment that gets you out of prison in no time at all and makes sure that you never get back in again?”<sup>1</sup>*

## I. INTRODUCTION

It is actually not so new. Though unpopular for the last few decades, punishing criminals by reforming them was once the predominant approach.<sup>2</sup> Anthony Burgess poignantly described one prominent concern that led to its demise: Coerced reform risks turning people into “clockwork toy[s] to be wound up by . . . the Almighty State.”<sup>3</sup> Forcefully changing character and personality is an affront to the self-defining freedom that is the root of human dignity.

While generally marginalized today, punitive reform is undergoing a resurgence for a different kind of “person”—the large, publicly traded corporate criminal. Prosecutors are at the forefront of the movement. In the deals they cut with corporate suspects, prosecutors often require programs of reform.<sup>4</sup> Implicit in how prosecutors now treat corporate defendants is the recognition that their fundamentally different nature allows for a different approach to punishment. Burgess’s complaint loses all its force in the corporate context. Corporations are not, and cannot be, free, self-defining loci of dignity.

Scholars and lawmakers are still behind the curve. While prosecutors have been experimenting with reform-as-punishment, the dominant academic and political discourses on corporate crime still focus on deterrence and retribution.<sup>5</sup> There is the seed of a third path in what prosecutors are doing. This Article seeks to uncover the implicit logic behind corporate prosecutors’ decisions. In its present form, prosecutorial practice is focused on reform and rehabilitation. Were the logic of the practice pushed and perfected as an approach the entire criminal justice system could take toward corporate punishment, an organizing theory that is different from deterrence and retribution emerges—character theory. As argued below, character theory opens new conceptual space for solving some of the most persistent problems in corporate criminal law.

1. ANTHONY BURGESS, *A CLOCKWORK ORANGE* 69 (2012).

2. See *infra* Part V.B.

3. BURGESS, *supra* note 1, at 2.

4. See Anthony S. Barkow & Rachel E. Barkow, *Introduction* to *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 1, 3 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (Using deferred prosecution agreements, “prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance.”). Some scholars, though, question whether prosecutors really care about reform. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 75 (2014) (“These data suggest that prosecutors are not taking structural reform seriously.”).

5. See *infra* Parts II–III.

One of those persistent problems is the dark and unjust underbelly to the way prosecutors handle corporate criminals—criminal justice is often softer on corporate criminals than on real people. On paper, the Department of Justice officially treats corporations as ordinary people.<sup>6</sup> Somehow, though, corporations are much less likely to see criminal charges. Less than .03% of corporations faced prosecution in the last quarter century.<sup>7</sup> To put this in perspective, 8.6% of the U.S. adult population has a felony conviction.<sup>8</sup> There are many possible explanations for this discrepancy, including overcriminalization of some forms of individual conduct<sup>9</sup> and over-enforcement against certain demographics.<sup>10</sup> Another possibility<sup>11</sup> is that the large, public corporations that are the focus of this Article receive some of the lightest treatment.<sup>12</sup>

The perception that large, public corporations routinely escape conviction is troublingly paradoxical. These corporations are among those most likely to commit crimes,<sup>13</sup> and their conduct most deeply impacts society. They have an extremely wide base of liability. Under current doctrine, they are automatically liable for almost any crime any individual employee commits on the job.<sup>14</sup> This adds up to a staggering degree of exposure for large corporations<sup>15</sup>—the 75 largest corporations in the United States employ

6. Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) ("Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment.").

7. GARRETT, *supra* note 4, at 261–62; *see also* Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1487 (2009) ("Federal prosecutors bring criminal charges against no more than a few hundred corporations each year, and a few dozen more avoid prosecution by entering into deferred-prosecution or no-prosecution agreements.").

8. Michael Suede, *What Percentage of the US Adult Population Has a Felony Conviction?*, LIBERTARIAN NEWS (June 5, 2014), <https://www.libertariannews.org/2014/06/05/what-percentage-of-us-adult-population-that-has-a-felony-conviction>.

9. *See generally* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (describing the problem of overcriminalization in the United States).

10. *See generally* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) (describing how the war on drugs and the regulation of firearms in the United States has disproportionately affected people of color).

11. Admittedly, they do not establish this possibility. It *could* be that corporations really do commit fewer crimes. Available evidence does not tell us one way or another, but, personally, I am skeptical of that proposition.

12. Among these, 2.5% have been convicted in federal court of any crime. GARRETT, *supra* note 4, at 262.

13. Cindy R. Alexander & Mark A. Cohen, *New Evidence on the Origins of Corporate Crime*, 17 MANAGERIAL & DECISION ECON. 421, 430–32 (1996) (finding that large size is the best predictor of a corporation's propensity to commit a crime).

14. That is a bit of an oversimplification. I discuss the doctrine of corporate liability—respondent superior—in more detail below. *See infra* Part V.C.

15. Prosecutors seem to agree. *See A Mammoth Guilt Trip*, ECONOMIST (Aug. 30, 2014), <http://www.economist.com/node/21614101/print> (explaining that former Deputy Attorney General Larry Thompson said: "No matter how gold-plated your corporate compliance efforts,

over 100,000 potential points of liability.<sup>16</sup> Though the de jure scope of corporate criminal liability has continued to expand<sup>17</sup> since the early 20th century,<sup>18</sup> the chance of conviction for large public corporations continues to shrink. This is particularly puzzling in an environment where the outrage of Wall Street Occupiers over corporate unaccountability<sup>19</sup> still reverberates in public sentiment.<sup>20</sup> Failure to hold corporations accountable frustrates

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no matter how upstanding your workforce, no matter how hard one tries, large corporations today are walking targets for criminal liability.”).

16. *Biggest Employers*, FORTUNE 500, <http://fortune.com/fortune500/list/filtered?sortBy=employees&first500> (last visited Nov. 10, 2017).

17. See Beale, *supra* note 7, at 1482 (“[A] comparative review reveals something that may come as a surprise: [I]n other countries, the focus in the past several decades has been on the creation of corporate criminal liability in jurisdictions in which it did not exist, and where such liability already existed the modern reforms included modifications intended to make it easier, rather than harder, to prosecute corporations criminally.”); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477 (1996) (noting the expansion of corporate criminal liability).

18. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 496 (1909) (recognizing, for the first time, the possibility of corporate criminal liability under federal law for affirmative acts).

19. Press Release, Corp. Accountability Int’l, *Occupy Wall Street Protests Bring Need for Greater Corporate Accountability into Focus* (Oct. 19, 2011), <https://www.stopcorporateabuse.org/press-statement/occupy-wall-street-protests-bring-need-greater-corporate-accountability-focus>; Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 10, 2015), <http://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408> (“Despite the public’s overwhelming support for its message . . . many faulted Occupy for its failure to produce concrete results.”).

20. See Adam Gabbatt, *Former Occupy Wall Street Protesters Rally Around Bernie Sanders Campaign*, GUARDIAN (Sept. 17, 2015, 7:49 AM), <http://www.theguardian.com/us-news/2015/sep/17/occupy-wall-street-protesters-bernie-sanders> (noting that, in his 2016 presidential campaign, Bernie Sanders emphasized the same grievances as the Occupy Wall Street movement); James Kwak, *America’s Top Prosecutors Used to Go After Top Executives. What Changed?*, N.Y. TIMES: BOOK REV. (July 5, 2017), <https://www.nytimes.com/2017/07/05/books/review/the-chickenshit-club-jesse-eisinger-.html> (“While the ‘unelected permanent governing class’ may have been willing to look the other way when highly paid bankers wrecked the economy, many of the workers who lost their jobs and families who lost their homes were not. Outside the Beltway, the fact that the Wall Street titans who blew up the financial system suffered little more than slight reductions in their bonuses only reinforced the perception that the ‘system’ is ‘rigged’—with the consequences we know only too well. Many people simply want to live in a world that is fair.”); Joe Pinsker, *Why Aren’t Any Bankers in Prison for Causing the Financial Crisis?*, ATLANTIC (Aug. 17, 2016), <https://www.theatlantic.com/business/archive/2016/08/why-arent-any-bankers-in-prison-for-causing-the-financial-crisis/496232> (“[T]here is a sense that people are particularly outraged about [white-collar] crime . . .”).

society's effort to condemn corporate criminality<sup>21</sup> and can cast a shadow on the broader legitimacy of criminal law.<sup>22</sup>

This discrepancy between the scope of corporate criminal liability and the infrequency of conviction is in part due to how prosecutors go about trying to reform corporations. For every conviction of a public corporation, and with increasing frequency,<sup>23</sup> there is at least one other case where prosecutors decline to take the corporate suspect to trial and instead enter into a specially negotiated deal<sup>24</sup>: a deferred prosecution agreement (“DPA”) or non-prosecution agreement (“NPA”).<sup>25</sup> Unlike guilty pleas, these agreements do not result in a guilty verdict;<sup>26</sup> they may not even require an admission of wrongdoing.<sup>27</sup> Corporate DPAs and NPAs are extremely controversial. They face a bevy of criticism from many perspectives: that they

21. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1334–35 (2001) (“Prosecutorial declination is a species of lawmaking with expressive effects.”); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POLY 833, 843 (2000) (“Criminal liability in turn expresses the community’s condemnation of the wrongdoer’s conduct by emphasizing the standards for appropriate behavior—that is, the standards by which persons and goods properly should be valued.”); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352 (1996) (arguing that criminal conviction “conveys society’s authoritative moral condemnation” and “reaffirms its commitment to the values that the wrongdoer’s own act denies”).

22. See generally PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT (2013) (arguing that divergence between criminal law and common morality compromises criminal law’s perceived legitimacy and its effectiveness).

23. GIBSON DUNN, 2014 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAs) AND DEFERRED PROSECUTION AGREEMENTS (DPAs) (2015), <http://www.gibsondunn.com/publications/documents/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>.

24. GARRETT, *supra* note 4, at 262.

25. Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 154, 157 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (“[P]rosecutors typically defer prosecution or agree not to prosecute if a firm will enter into an agreement.”).

26. GARRETT, *supra* note 4, at 63 (“Corporations plead guilty, and a plea agreement can include similar terms . . . . A deferred prosecution or non-prosecution agreement is even more lenient, though, because it . . . avoids both an indictment and a criminal conviction.”).

27. GARRETT *supra* note 4, at 60 (noting that 11% of DPAs and NPAs require no “acceptance of responsibility or admissions”); Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 5–7 (2006) (noting that early DPAs did not require companies to admit wrongdoing).

are too onerous,<sup>28</sup> that they are too lenient,<sup>29</sup> that they violate basic tenets of political morality,<sup>30</sup> that they fail basic norms of transparency,<sup>31</sup> and more. It is through these DPAs and NPAs that prosecutors frequently impose the reforms that interest this Article. In addition to undermining corporate convictions, this Article discusses below how poorly positioned prosecutors are to be agents of corporate reform.<sup>32</sup>

Many people blame prosecutors for the pitfalls of DPAs and NPAs,<sup>33</sup> but prosecutors are hard to fault. DPAs and NPAs are a reasonable response to the legal and practical constraints prosecutors face, including, most importantly, the effects a successful conviction can have on a large public corporation. In 2004, prosecutors learned a hard lesson—their short-lived courtroom success against Arthur Andersen, one of the largest U.S. accounting firms, turned into a long-lasting catastrophe that put the company and its 75,000 employees out of business.<sup>34</sup> For many firms, including Arthur Andersen, there are life-ending collateral consequences that automatically follow conviction, such as debarment or revocation of the privilege of doing

28. See Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1437 (2007) (discussing “[t]he abusive tendencies of [the DPA and NPA] bargaining imbalance”); Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1885 (2005) (“The corporate offender’s unique vulnerability to adverse publicity and collateral consequences . . . calls into question whether the choice to enter into deferral is really a choice at all.”); H. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed*, WASH. LAW. (Mar. 2005), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/march-2005-taking-the-stand.cfm> (“[P]rosecutors have exploited their virtually unchecked power to extract and coerce ever greater concessions.”).

29. GARRETT, *supra* note 4, at 2 (“[P]rosecutors fail to effectively punish the most serious corporate crimes.”).

30. See generally Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016) (arguing that the wide variance between the terms prosecutors impose through DPAs and NPAs violates the rule of law).

31. GARRETT, *supra* note 4, at 2 (“[P]rosecutors . . . settl[e] corporate prosecutions without much transparency.”).

32. See *infra* Part IV.

33. See generally, e.g., Arlen, *supra* note 30.

34. Barkow & Barkow, *supra* note 4, at 2 (“Andersen’s fate can never be far from the minds of prosecutors . . . .”); Vikramaditya Khanna, *Reforming the Corporate Monitor?, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 226, 227 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (“[T]he indictment of Arthur Andersen . . . and the fairly large collateral consequences propelled interest in considering alternatives to the full criminal process.” (footnote omitted)); 2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements, GIBSON DUNN (Jan. 6, 2009), <http://www.gibsondunn.com/publications/pages/2008Year-EndUpdate-CorporateDPAs.aspx> (“Prior to its indictment in 2002, Arthur Andersen was a worldwide institution with over \$9.3 billion in annual revenues and over 85,000 worldwide employees. By the time the Supreme Court unanimously reversed Arthur Andersen’s conviction in 2005, the employees were virtually all gone, partnership value had vanished, and the few remaining assets were being divvied up by litigants . . . . To mitigate some of these unintended consequences, the DOJ has relied more frequently on DPAs to resolve corporate criminal investigations.”).

business with the government.<sup>35</sup> When a successful conviction could entail massive harm to the very social welfare prosecutors are supposed to protect, DPAs and NPAs are a natural choice.<sup>36</sup>

There is a way to keep the good without the bad—to hold corporations accountable without destroying them and to reform corporations without relying on prosecutors to do all the work through DPAs and NPAs. This Article argues that the stark choice that forces prosecutors to decline corporate prosecutions in favor of DPAs and NPAs is an unnecessary feature of corporate criminal law. It draws attention for the first time to punishment theory as a potential source of problems and solutions.<sup>37</sup> The Article argues that low conviction rates and a host of other familiar problems with corporate criminal law are, in large part, a consequence of the focus on deterrence in scholarship and retribution in public political discourse. These drive prosecutors and corporations out of the courtroom.

Though prosecutors are increasingly attentive to corporate reform, scholars and lawmakers have overlooked character theory as a framework for corporate punishment. While adopting a broadly consequentialist perspective,<sup>38</sup> the Article points out that preventing corporate crime does not necessarily require deterring it. The Article does this by introducing character theory as a systematic approach for structuring corporate punishment.<sup>39</sup> Character theory would refine the sorts of reform and rehabilitation that prosecutors currently pursue and make them the *exclusive* mode of corporate punishment. Character theory would avoid the need for DPAs and NPAs, and ultimately do more to prevent corporate wrongdoing than deterrent approaches can. It could also bring corporate criminal law into better alignment with the goals of retributive theorists. While various actors already

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35. See Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reform*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 65 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

36. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 956 (2009) (“Although corporate entities are technically criminally liable for nearly all of their employees’ misconduct, the government has learned not to formally prosecute these entities due to the steep collateral consequences of indictment.”); Khanna, *supra* note 34, at 228 (“[B]oth [the government and firms] have strong incentives to settle with something like a DPA.”).

37. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (“[C]riminal law does not drive punishment. It would be closer to the truth to say that criminal punishment drives criminal law.”).

38. Some scholars think that consequentialism and character theory are incompatible. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L. REV. 1, 14–15 (2002) (arguing that consequentialists “necessarily eviscerate[] and distort[]” the values favored by character theorists). The paradigm application they have in mind is to individuals. They may be less averse to combining consequentialism and virtue ethics in the corporate context.

39. I have found just one, off-hand reference to character/virtue theory in legal literature as a possible organizing principle for corporate punishment. See Brown, *supra* note 21, at 1313–14 (“[T]he goal is to design enforcement strategies that foster social norms, corporate cultures, and market contexts in which ‘corporate virtue’ can develop and be maintained.”).



attempt to reform corporations at various stages of the criminal justice system, their efforts are piecemeal and ineffective<sup>40</sup> because they lack any coherent, coordinating theory. Poor execution and the distorting influences of deterrence and retribution continue to hamstring any chance of success. Fixing corporate character as the sole criterion for the extent and method of corporate punishment leads to some surprising, though ultimately beneficial, recommendations, such as abolishing the corporate criminal fine.

After detailing the problems retributivism<sup>41</sup> and deterrence theory<sup>42</sup> bring to corporate criminal law,<sup>43</sup> the Article introduces character theory as an alternative.<sup>44</sup> With the conceptual foundation set, the Article shows the work character theory could do improving a diverse range of problems in corporate criminal law.<sup>45</sup> The Article closes by addressing concerns that may arise from the perspective of other theories of punishment—the character approach proposed here performs well by their metrics too.<sup>46</sup>

One goal of this Article is to work so far as possible within the constraints of present legal and political realities. In theory, there may be ways to promote corporate reform and solve the problems discussed in this Article without turning to character theories of punishment. Some scholars think that scrapping corporate criminal law entirely and relying only on civil liability would improve things.<sup>47</sup> But such proposals are fanciful in the current political climate.<sup>48</sup> It is also far from clear whether the sorts of corporate reform that this Article advocates could be accomplished by using non-criminal fora.<sup>49</sup> As such, abolishing corporate criminal law and other similarly

40. See generally GARRETT, *supra* note 4, at 147–95 (discussing how prosecutors using DPAs and NPAs generally fail to reform corporate criminals).

41. See *infra* Part II.

42. See *infra* Part III.

43. See *infra* Part IV.

44. See *infra* Part V.

45. See *infra* Part VI.

46. See *infra* Part VII.

47. See, e.g., Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38, 47 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (“In my view, the proper course of action is to junk corporate criminal liability . . .”); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996) (“[T]he case for corporate criminal liability must rest on the need to correct some deficiency in the system of civil liability. But a close look at the cases reveals no such deficiency most of the time.”); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009) (“[Corporate criminal liability] should be explicitly overruled.”).

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

49. See Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1164 (1983) (“[T]he severity and purpose of this sanction [imposing structural changes on corporations], at least in the more serious cases, would give it a

radical options are outside this Article's methodological ambit.<sup>50</sup> It takes the basic contours of corporate criminal law as given and shows how they can function best. Character theory can do that work.

## II. THE RETRIBUTION RATCHET

Retributivism plays an important role in the popular discourse about corporate criminality. From there, it influences politics and policy. Retributivists generally think that the justifying purpose of criminal law is to give criminals what they deserve.<sup>51</sup> According to retributivism, justice requires the punishment of wrongdoers<sup>52</sup> in proportion to the seriousness of their crimes.<sup>53</sup> Corporations, by virtue of their sheer size and the centrality of their economic and social roles, are in a position to commit some of the most serious and devastating crimes.<sup>54</sup> The best estimate of the annual cost of white-collar crime in the United States, provided by the FBI, is \$300 billion to \$660 billion.<sup>55</sup> By contrast, the annual cost of every other crime committed in the United States is around \$15 billion.<sup>56</sup> While these dollar values are only approximate, the relative seriousness of the crimes corporations commit—a twenty-fold increase over the cost of street crimes—is suggestive. Retributive proportionality should call for correspondingly harsh corporate punishments.

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decidedly criminal character, and would require the use of criminal procedural safeguards.” (footnotes omitted).

50. Except to the extent I treat the prospects for abolishing corporate criminal law. *See infra* Part IV.

51. *See* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., 1999).

52. IMMANUEL KANT, THE METAPHYSICS OF MORALS § 49 E (Mary Gregor trans., 1991); IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 196 (W. Hastie trans., 1887) (“[T]he undeserved evil which any one commits on another, is to be regarded as perpetrated on himself.”); *see* Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179 (F. Schoeman ed., 1987) (“*Retributivism* is the view that punishment is justified by the moral culpability of those who receive it.”).

53. This principle has a long history in retributive thought from the ancient *lex talionis* of the Old Testament, *see, e.g., Exodus* 21:23 (“But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.”), to the modern day, *see generally, e.g.,* ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1996).

54. Beale, *supra* note 7, at 1483 (“Modern corporations not only wield virtually unprecedented power, but they do so in a fashion that often causes serious harm to both individuals and to society as a whole.”).

55. *See* RODNEY HUFF, CHRISTIAN DESILETS & JOHN KANE, THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 12 (2010), <http://www.fraudaid.com/library/2010-national-public-survey-on-white-collar-crime.pdf>.

56. *See* Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 98 (2010), <https://doi.org/10.1016/j.drugalcdep.2009.12.002>.

Retributive impulses are plain in the popular press, and fuel public pressure on political actors to respond in kind.<sup>57</sup> In recent years, Occupy Wall Street (“Occupy”) was the largest popular expression of outrage at corporate conduct and demand for reform.<sup>58</sup> While it occurred over a relatively short period, Occupy was channeling a long-standing and pervasive public sentiment that corporations need to suffer in a big way for their crimes.<sup>59</sup> Psychologists have documented how this commonplace feeling finds its way into the criminal law through juries. When people serve on juries with corporate defendants, they bring their retributive impulses toward corporations with them<sup>60</sup>—jurors respond more harshly toward corporate defendants.<sup>61</sup>

Despite its presence in the popular press, the retributivist approach to corporate punishment is relatively under-theorized, and it is a minority position among academics. Those who do embrace retributivism usually work with an expressive form of the theory according to which criminal law is a tool for expressing public moral condemnation.<sup>62</sup> Even scholars who are not retributivists acknowledge that it would be impossible to ignore the social and political forces calling for criminal law to send this message about corporate crime.<sup>63</sup> According to expressive theories, punishing corporations allows the community to communicate its stance on the balance of values criminal corporate conduct exhibits.<sup>64</sup> Insofar as the community feels strongly about

57. See Baer, *supra* note 48, at 612.

58. See Press Release, Corp. Accountability Int’l, *supra* note 19.

59. See, e.g., Michael Pearson, *The Spill: How Much Should BP Suffer?*, CNN (Nov. 28, 2012, 6:37 PM), <http://www.cnn.com/2012/11/28/us/bp-suspension>; *Volkswagen Should Suffer the Consequences of Its Cheating*, WASH. POST (Sept. 23, 2015), [https://www.washingtonpost.com/opinions/volkswagen-should-suffer-the-consequences-of-its-cheating/2015/09/23/6ff6e2c4-60a5-11e5-9757-e49273f05f65\\_story.html](https://www.washingtonpost.com/opinions/volkswagen-should-suffer-the-consequences-of-its-cheating/2015/09/23/6ff6e2c4-60a5-11e5-9757-e49273f05f65_story.html).

60. See Mark A. Cohen, *Empirical Trends in Corporate Crime and Punishment*, 3 FED. SENT’G REP. 121, 123 (1990) (“In the few [corporate crime] cases where there were multiple defendants as well as differing degrees of culpability, sanctions were generally based on the level of culpability.”).

61. While there is not much data on jury decisions in criminal contexts (part of the problem this Article addresses is that there are so few criminal cases against corporations), evidence from the civil context is telling. See generally VALERIE P. HANS, *BUSINESS ON TRIAL: THE CIVIL JURY & CORPORATE RESPONSIBILITY* (2000); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-Pockets” Hypothesis*, 30 LAW & SOC. REV. 121 (1996).

62. See Friedman, *supra* note 21, at 843 (“Criminal liability in turn expresses the community’s condemnation of the wrongdoer’s conduct by emphasizing the standards for appropriate behavior—that is, the standards by which persons and goods properly should be valued.”); Kahan & Nussbaum, *supra* note 21, at 352 (arguing that criminal punishment “conveys society’s authoritative moral condemnation”). This expressive retributivism is sometimes called “denunciation theory.” See Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L., ETHICS & PUB. POL’Y 99, 129 (1996) (Denunciation theory “regards punishment as a way for the community to express its condemnation of the offender’s crime.”).

63. See, e.g., Baer, *supra* note 48, at 581 (“[W]e punish according to deeply ingrained feelings of moral outrage.”); *id.* at 612.

64. Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–19 (1998).

corporate criminality, this expressive form of retributivism also calls for severe punishments to convey the appropriate message. As discussed in Part IV, Congress has responded in kind.

### III. THE DISTORTIONS OF DETERRENCE

As a general rule, “[c]orporate criminal law . . . operates firmly in a deterrence mode.”<sup>65</sup> In contrast to the retributive overtones of the public dialogue about corporate crime and punishment, scholars and policymakers overwhelmingly default to deterrence. The few who nod to other possible purposes, like expressive condemnation, often cash out the value of those purposes in terms of their deterrent potential.<sup>66</sup>

This faith in deterrence as the right “mode” for thinking about corporate punishment is a mistake. Many scholars have the impression that the nature of corporations as collective entities leaves no real alternative. However much sense non-deterrent purposes may make for punishing individuals, the thought goes, they are conceptually inapplicable to corporations. Part V argues to the contrary, that there are other ways to think about corporate punishment. In particular, character-based approaches to punishment, which emphasize reform, make conceptual sense, and could do much to improve corporate criminal law.

The present Part goes on the offensive and questions the conceptual foundations and pragmatic implications of deterrence for corporations. It discusses several disparate problems with corporate criminal law, and ties them to their source in deterrence theory. The argument is not a knock-down repudiation of deterrence as a framework for setting corporate punishment policy. The hope is to raise enough questions to provoke curiosity about alternatives.

#### A. DETERRENCE THEORY DEFINED

Deterrence theory is a powerful and flexible approach for designing criminal justice policies. At heart, it is an economic theory. It views both would-be and actual criminals as rational actors who are trying to maximize their utility.<sup>67</sup> The purpose of criminal punishment for deterrence theorists is

65. Brown, *supra* note 21, at 1325; *see also* Huigens, *supra* note 38, at 7 (“[T]he discussion of white collar crime is carried out in terms of deterrence.”).

66. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 500–12 (2006) (arguing that the reputational effects of criminal conviction have unique deterrent effects on corporate behavior). *But see generally* Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049 (2016); Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411 (2012).

67. *See* Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 11, 14 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (examining causes of corporate crime “through the lens of an economic model in which corporate crime is the

to alter criminals' incentives by reducing the expected utility of committing a crime.<sup>68</sup> It does this by threatening the possibility of a sanction.<sup>69</sup> The utility loss a rational actor should expect from committing a crime is the magnitude of the sanction multiplied by the probability of getting caught. This expected loss, if it exceeds the expected gains, should deter criminal conduct.

Deterrence theory can apply equally to individuals and corporations, both conceived as rational actors.<sup>70</sup> In fact, there may be reason to think deterrence works better for corporate actors.<sup>71</sup> Individuals are frequently subject to irrational impulses that are relatively insensitive to expected disutility. Deterrence theorists have little to say about crimes that result from such passions, urges, and psychoses.<sup>72</sup> These crimes are the undeterrable result of being complex, biological organisms. Corporations are complex too, but they are not biological; there is no such thing as intoxication, distorting hormonal imbalance, childhood trauma, or brain damage for them.<sup>73</sup> It is true that counter-rational pressures may affect the individuals who compose a corporation. But these individuals are situated within series of organizational checks and balances that can catch those distorting pressures before they bubble up to the corporate level.<sup>74</sup>

The fact that corporations may respond to incentives more rationally than individuals does not mean that corporations never commit horrible crimes. Sometimes an irrational (from the entity perspective) decision originating in an individual employee will work its way to the corporate level. More importantly, though, not all crimes are the product of irrationality. Sometimes the expected disutility of a criminal sanction is low enough, and the gains from crime high enough, that crime is the economically rational

outcome of decisions by rational utility-maximizing individuals who have the ability to incur criminal liability on behalf of the corporation”).

68. *Id.* at 14–15 (“Within this rational-choice ‘deterrence’ framework, individuals weigh the costs and benefits of crime-related activity against the expected sanction to maximize their private utility under the constraints of the organization in which they find themselves (or select into).”).

69. *Id.* at 11 (“The *threat of sanction* is central to the deterrence of corporate crime . . .”).

70. *Id.* at 17 (“Instead of focusing on individual actions, we can consider crime as the outcome of company-level decisions.”).

71. See Harvey M. Silets & Susan E. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 367 (1986) (“The corporation is a rational actor striving to maximize financial gain and minimize financial loss, and so can be manipulated most easily by imposing monetary penalties that affect these acts.” (footnotes omitted)).

72. See Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics* 4–5 (Univ. of Ill. Law & Econ., Working Paper No. LEO-8-035, 2008) (discussing how behavioral studies revealing systematic problems in the average person’s decision-making process undermine the basic rational-choice presupposition of general-deterrence theory).

73. See Silets & Brenner, *supra* note 71, at 355 (“[I]ndividuals commit crimes of passion, whereas corporations do not.”).

74. See generally Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL’Y 15, 24–27 (2010) (discussing the “practical personality” of corporations).

choice.<sup>75</sup> In these cases, deterrence theorists would say that the expected sanction should be higher. The task for deterrence theorists is to hit the sweet spot where sanctions are just high enough to prevent these crimes.

The appeal of deterrence theory is its simplicity and seeming neutrality. It provides a uniform unit for thinking about crimes and sanctions—utility—and offers a simple, algebraic equation for striking the right balance between the two. Its premises are value neutral.<sup>76</sup> It just requires the uncontroversial commitment to prevent crime.

### B. THEORETICAL PROBLEMS WITH DETERRENCE

This is far from the first paper to question deterrence theory. Most of the extant criticism focuses on how poorly deterrence theory works as a framework for structuring punishment of individuals.<sup>77</sup> But there are also problems for deterrence theory when it comes to corporations. Indeed, deterrence theory as applied to corporations punishes the innocent, creates a threshold price at which crime becomes efficient, and dictates over-punishment for corporations. Some versions of these problems are unique to the corporate context, and some are just more pronounced there.

#### 1. Punishing the Innocent

A corporation “has no soul to be damned, and no body to be kicked.”<sup>78</sup> For centuries, lawmakers cited this refrain from Lord Chancellor of England Baron Thurlow to bar any sort of criminal liability for corporations. Now that corporate criminal liability is firmly entrenched, many scholars still channel Thurlow to reject retributive theories of corporate punishment out-of-hand.<sup>79</sup>

75. There is data suggesting that crime generally makes economic sense for individuals, since the probability of being caught is so low. As Paul Robinson points out, this would mean that factors often ignored by deterrence theorists must explain the wide-spread compliance with the criminal law. *See generally* ROBINSON, *supra* note 22, at 176–88.

76. *But see* Jonny Anomaly, *Nietzsche's Critique of Utilitarianism*, 29 J. NIETZSCHE STUD. 1, 1 (2005) (“Nietzsche primarily attacks utilitarianism by querying its internal coherence, and by raising the possibility that utilitarians are driven by motives at odds with their overt concern with the greatest happiness of the greatest number.”). *But see generally* J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973) (outlining a system of utilitarian ethics).

77. Familiar criticisms include: (1) that it is unjust to punish an individual to benefit society through general deterrence, *see* N. Walker, *The Efficacy and Morality of Deterrents*, 1979 CRIM. L. REV. 129, 139, and (2) that deterrence is ineffective at reducing crime, *see generally* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997) (exploring the effects of criminalizing behavior); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765 (2010) (discussing deterrence through the use of sanctions).

78. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1980) (footnote omitted) (attributing the quote to Lord Chancellor Baron Thurlow).

79. *See, e.g.*, Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1392 (2009) (“[A]ttributing blame to a corporation is no more sensible than attributing blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”); John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89

Corporations have no bodies to imprison or flog, the thinking goes, so fines must be the only way to punish them.<sup>80</sup> This leads naturally to conceiving of corporate punishment in terms of deterrence, the customary purpose of fines.<sup>81</sup>

However, fine-focused theorists often neglect that, just like corporate bodily interests, corporate financial interests are ultimately fictional. True, as part of the robust legal fiction of corporate personhood, the law formally allows corporations to own property, open bank accounts, and hold cash, over which no individual has any direct rights.<sup>82</sup> Nevertheless, outside the fiction of the law, it makes little sense to speak of corporate financial interests separate from the interests of the individuals who compose the corporation<sup>83</sup> or are affected by it.<sup>84</sup> Even theorists who reify corporate “interests”<sup>85</sup> cannot deny that it is impossible to injure a corporation’s financial interests without, and except by way of, harming the financial interests of individuals. If the corporation has no discrete financial interests to frustrate, the supposed mechanism by which fines deter cannot work in a straightforward way.

There might be hope for deterrence if it were possible to fine the corporation in a way that affected only or primarily the individuals within it who are responsible for criminal conduct.<sup>86</sup> However, there are three hurdles

CORNELL L. REV. 310, 350 (2004) (“Corporations neither deserve nor attract our sympathy. . . . [A]s such they do not deserve sympathy simply because they are not human. For that reason alone, they should not be the subjects of criminal prosecution.”).

80. See 18B AM. JUR. 2d *Corporations* § 1826 (“A corporation may be punished by fine; indeed, the only punishment that can be inflicted on a corporation for a criminal offense is a fine or seizure of its property which can be levied by an execution issued by the court.” (citing *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909))); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 168 (2d Cir. 2010), *aff’d*, 569 U.S. 108 (2013) (“The only form of punishment readily imposed on a corporation is a fine . . .”).

81. See Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 73–74 (1980).

82. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1638–39; Lynn A. Stout, *The Shareholder Value Myth*, EUR. FIN. REV. (Apr. 30, 2013), <http://www.europeanfinancialreview.com/?p=883> (“[T]he legal entity [corporation] is *its own* residual claimant, meaning the entity is entitled to keep its profits and to use them as its board of directors sees fit. The board may choose to distribute some profits as dividends to shareholders. But it can also choose instead to raise employee salaries; invest in marketing or research and development; or make charitable contributions.”).

83. See Lynn A. Stout, *The Problem of Corporate Purpose*, in BROOKINGS: ISSUES IN GOVERNANCE STUDIES 1, 5, 7 (June 2012), [https://www.brookings.edu/wp-content/uploads/2016/06/Stout\\_Corporate-Issues.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Stout_Corporate-Issues.pdf).

84. See *id.* at 1, 7.

85. Some do hold a different position. See generally, e.g., CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011) (arguing that groups like corporations can be agents with various interests, including moral interests).

86. See Alexander & Cohen, *supra* note 67, at 14 (proposing “to increase the *ex ante* probability of sanction among those individuals [best equipped to prevent a crime directly or indirectly], thereby concentrating the incentive to prevent the crime among those individuals” and noting that “[t]he challenge lies in distinguishing the individuals”).

to finding a way to do this. First, the whole point of *individual* criminal law is to get the individual criminals; corporate criminal law is a clumsy tool for doing so. Second, there may not always be individual criminals when a corporation commits a crime.<sup>87</sup> Corporate misconduct can be the result of organizational defects—broken channels of communication, inadequate compliance mechanisms, and so forth—for which no individual is responsible.<sup>88</sup>

Third, and perhaps most importantly, deterrent-based corporate fines draw on general corporate coffers, so they harm individual wrongdoers and innocent parties alike.<sup>89</sup> As a result, innocent parties who do not need to be deterred bear the brunt of the burden. Shareholders are the individuals most obviously impacted by corporate fines; a reduction in the value of the corporation directly reduces the value of their interest in it. In large, public corporations, shareholders are rarely, if ever, involved in the day-to-day corporate activities where crimes are committed. In this way, they truly are innocent.

Fines also impact other innocent parties even further removed from the power or control of the corporation. For one, fines hit corporate creditors, whose corporate notes are less valuable because of the increased risk of corporate default. Employees in corporate divisions unconnected to the division that committed the crime are in no better position. Finally, as commercial entities, corporations may have some limited option of passing fines onto consumers, who could also be the victims of the crime, in the form of higher prices.

Some scholars dismiss the concern that innocent third parties bear the brunt of corporate fines. With respect to shareholders, they argue that corporate fines are just a way of divesting shareholders of increased share value they were not entitled to in the first place.<sup>90</sup> This argument overlooks two key points. First, the ownership of a corporation is in constant flux. Shareholders that benefit from a corporation's crimes may have sold their shares, thereby taking with them their portion of the increased corporate value the criminal conduct may have generated. This leaves the innocent new

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87. See *id.* at 16 (considering a scenario in which “decisions [by individual employees] can have an impact on the overall probability of a [crime]—even if it would legally be difficult to directly tie the individual decisions and related behavior to [the crime]”).

88. See generally, *e.g.*, *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987) (finding corporation violated currency transaction reporting obligations, even though no individual violated the obligations).

89. See Alschuler, *supra* note 79, at 1367 (“This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too.”).

90. See Beale, *supra* note 7, at 1484–85 (“There is nothing wrong with recognizing that it was Siemens, not simply some of its officers or employees, who should be held legally accountable . . . . The shareholders of Siemens benefitted from its success when it used bribery and kickbacks to obtain contracts that generated billions of dollars of profit.”).



share purchasers to foot the bill of later fines. Second, there is evidence that corporate crime on balance lowers share value, even before detection.<sup>91</sup> If that is right, there are generally no shareholder gains for the fines to capture. The argument that fines are just a way of divesting shareholders is especially inapt when the shareholders themselves are among the *victims* of the corporation's misconduct.

Other scholars argue on deterrence-based grounds that shareholders are, in fact, the optimal group to try to influence with corporate fines. As these scholars point out, shareholders have the theoretical power to affect the internal governance of a corporation and influence the probability that the corporation will commit a crime.<sup>92</sup> However, this power in theory rarely reflects power in fact. Shareholders are a dispersed group with divergent interests, making coordination difficult.<sup>93</sup> Even when coordinated, shareholder power to influence board member decisions or composition is limited;<sup>94</sup> their power to influence managers even more so.<sup>95</sup>

Lastly, some scholars try to mitigate the concern that corporate fines primarily affect innocent third parties by pointing out that collateral effects are an inevitable feature of all criminal punishment: “[I]t is not possible to distinguish in a meaningful way the innocent third parties in corporate cases (the shareholders, employees, creditors, and so forth) from the innocent third parties who are typically affected by the prosecution of individual defendants.”<sup>96</sup> However, there are important differences. Unlike individual punishment, there is no light between corporate punishment and some of the

91. See generally *United States v. Sun–Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (finding corporation guilty of bribery when employee, unbeknownst to corporation, funneled corporate funds to his politician friends); Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1 (1999).

92. Alexander & Cohen, *supra* note 67, at 19 (“Even if owners of firms may have no direct contact with corporate criminal behavior, they have rights to intervene in the internal governance of the corporation in ways that can affect the occurrence of crime.”).

93. Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 789 (2007) (“In a public company with widely dispersed share ownership, it is difficult and expensive for shareholders to overcome obstacles to collective action and wage a proxy battle to oust an incumbent board. Nor is success likely . . .”); see also Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1258 (2008) (“Meanwhile, even as shareholders are becoming more powerful, their interests are becoming more heterogeneous. Increasingly, the economic interests of one shareholder or shareholder group conflict with the economic interests of others. The result is that activist shareholders are using their growing influence not to improve overall firm performance, as has generally been assumed, but to profit at other shareholders’ expense.”).

94. Stout, *supra* note 93, at 789 (“[S]hareholder control [over board directors] is largely a myth in public companies today . . .”).

95. Stout, *supra* note 82 (stating that “shareholders lack the legal authority to control directors or executives” and then listing some minimal ways shareholders may influence directors without listing any ways of influencing executives).

96. Beale, *supra* note 7, at 1485–86.

collateral effects on innocent third parties. When an individual is jailed, his friends and family are affected due to the reduced role he can play in their lives. Corporations, on the other hand, are fined *by* reaching into the portfolios of shareholders. This difference reflects an even more important contrast between the collateral effects of individual and corporate punishment: There are easy ways to reduce the effects of corporate punishment on innocent parties within acceptable limits. While mitigating the collateral effects of individual punishment has proven difficult, this Article argues that character theory offers a ready way to accomplish it for corporations.<sup>97</sup>

In short, there is no way for the corporation as an entity to “feel” the pain of a financial sanction. The corporation is like a sieve with very large holes; any fines flow through to individuals. It is difficult, then, to understand just how deterrence is supposed to work for corporations. In fact, available empirical evidence suggests that it does not—higher fines do not result in increased deterrence for corporate crime.<sup>98</sup>

## 2. Pricing Crime

One common concern about individual deterrence theory is that it promotes an inappropriate image of criminal conduct.<sup>99</sup> The whole point of punishment based on deterrence theory is to raise the stakes of committing crimes in order to disincentivize criminal activity. What surprise, then, if potential criminals come to see punishment as, in effect, pricing crime—permitting it so long as the benefits outweigh the expected costs (in terms of jail time, fines, community service, reputational effects, etc.)? While this may be unproblematic for common-place, often victimless crimes—like double parking—it is an offensive lens through which to view other crimes—like theft, fraud, and homicide—that severely impact the well-being and dignity of friends, family, and neighbors.

The concern that deterrence theory implicitly prices crime is even more acute in the corporate context. Potential individual criminals arguably respond to many of the non-economic implications of punishment, like its shaming force and presumed moral authority, particularly when the punishment is not purely monetary.<sup>100</sup> However, most corporations charged with crimes are for-profit entities that operate largely on the basis of economic considerations. Deterring for-profit corporations is a matter of impacting

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97. See *infra* Part VI.

98. Alexander & Cohen, *supra* note 67, at 24 (“There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect.”).

99. See Kahan, *supra* note 64, at 619 (“[F]ines . . . connote that society is ‘pricing’ corporate crime.”).

100. Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 520 (1996) (“For the criminal, stigma has an external incentive . . . . Stigma can be either economic (for example, a lower wage) or social (for example, difficulty finding a spouse).”).

their incentives, which usually means threatening their bottom dollar. This is exactly what fines, the go-to corporate punishment for deterrence theorists, are designed to do. Fines translate the harms of the crime directly into economic terms. So, while a public narrative may exist about how punishment can deter individuals without pricing crime, no such narrative exists for corporate deterrence.

The picture of corporate crime that deterrence theory encourages is morally repulsive. Pricing corporate crime necessarily implies placing a dollar value on the non-economic interests that corporate criminal conduct often puts at stake. Consider the widespread moral outrage when the public discovered that Ford decided not to make basic safety enhancements to its vehicles because doing so would cost more than paying damages in the expected wrongful death cases.<sup>101</sup> We should be hesitant to adopt a framework for criminal punishment that offends widely-held and treasured public values.<sup>102</sup>

### 3. Inevitability of Over-Punishment

A neglected failure of deterrence theory is that its internal logic requires unacceptably severe corporate sanctions. One reason for this is straightforward—fines must be high to offset the large potential gains from corporate crime. Since public corporations are such massive economic players, their returns from criminal conduct can be tremendous. This means that the deterrent effect of the threatened fine must be correspondingly harsh. According to deterrence theory's central equation, there are two ways to raise the deterrent effect of a fine. Increasing the probability of detecting crime is one,<sup>103</sup> but that entails higher enforcement costs. The more cost-effective approach from the perspective of the public fisc is to increase the size of the fine to some significant multiple of the expected criminal gains.

Deterrence theory also requires high corporate fines because corporations can take actions that, under the logic of deterrence, mandate more severe punishment. For-profit corporations necessarily try to lower their costs, which include the potential costs of criminal fines. To do this,

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101. See Lee Strobel, *Tests of Gas Tank Indicated Hazards*, CHI. TRIB. (Oct. 13, 1979), <http://archives.chicagotribune.com/1979/10/13/page/21/article/ford-ignored-pinto-fire-peril-secret-memos-show>.

102. See Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 4-11 (2007) (contrasting intuitive moral judgments with calculation-based judgments).

103. Alexander & Cohen, *supra* note 67, at 20-21 ("Detection and sanctions are substitutes in the production of deterrence. . . . An enforcement authority can thus compensate for a tight budget (and thus lower rate of detection) by aggressively seeking higher sanctions without significant loss of general deterrence in this framework."); Brown, *supra* note 21, at 1299 ("Traditional deterrence theory focuses on formal legal sanctions as the important influence on potential offender conduct; if we increase either the certainty of conviction or severity of punishments, rational offenders should reduce their misconduct.").

corporations have two options. The option deterrence theorists *hope* corporations will choose is to reduce the probability of committing crime by investing in compliance programs. That, after all, is how deterrence is supposed to work for corporations—threaten a fine to encourage the corporation to steer clear of crime. However, what deterrence theorists often neglect is that corporations also have another option—reduce the probability of detection by investing in concealment.<sup>104</sup> All else being equal, a reduction in the probability of committing a crime and a similar reduction in the probability of detection should have equivalent economic effects for the corporation.

Deterrence theorists have a response: All else need not be equal. Fines can be tailored to individual corporate circumstances. If a corporation invests in concealment and still gets caught, courts could in theory increase the fine at issue to make up for the decreased probability of detection. If done correctly across the board, corporations should expect no net gain from concealment.

The deterrence proponents' response can only go so far, however. Fines may not be fixed, but they are capped.<sup>105</sup> If corporations had indefinitely deep pockets, deterrence theory could plug along as intended. Be that as it may, corporate assets are finite, and there is no marginal deterrent effect to increasing fines that already exceed what the corporation can pay. For individual criminals who cannot pay their fines, the state always has the option of imposing further costs in the form of jail time. This is not an option for corporations; fines are, according to most deterrence theorists, the only option. Once a corporation invests in enough concealment so that the ideally deterrent fine equals the corporation's net assets, every additional investment in concealment should result in a net expected gain to the corporation.<sup>106</sup> Thus, a rational corporation will invest in concealment because it can eventually expect positive gains. Under the logic of deterrence theory, this process necessarily drives fines to the very limit of what corporations can pay.

To make matters worse, the actual cap on corporate fines is considerably less than what the corporation can afford to pay. Because of the sorts of collateral effects on innocent parties discussed above, social and political constraints limit fines far below the level that would drive corporations out of business.<sup>107</sup> Endangering a corporation with high fines risks the jobs of

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104. Some theorists are paying attention to the fact that deterrent mechanisms may incentivize concealment. *See, e.g.*, Miriam H. Baer, *Too Vast To Succeed*, 114 MICH. L. REV. 1109, 1119 (2016); Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1361 (2006).

105. Khanna, *supra* note 34, at 231 ("Generally, the deterrent effect of cash fines is tapped out when the firm has no further assets to attach . . .").

106. Assuming low enough implementation costs.

107. Khanna, *supra* note 34, at 231 ("Generally, the deterrent effect of cash fines is tapped out . . . when the size or effect of the desired fine has become so large that it is not politically or socially acceptable.").

innocent employees and the life savings of innocent shareholders. Since the effective fine cap is lower, it is even easier for corporations to drive fines to that limit by investing in concealment, and easier for it to capture the gains from further investment. Under deterrence theory, this is what we should expect corporations to do.<sup>108</sup>

#### IV. PROBLEMS IN PRACTICE: DPAS AND NPAS

The effects of deterrence and retribution become more complicated in practice. The opposing pressures described in the previous sections—to raise sanctions higher and higher and to limit them within politically acceptable bounds—have resulted in an uneasy pragmatic balance between the legislative and executive branches. The balancing act involves legislators raising corporate punishment to the theoretical maximum, and prosecutors trying to devise ways to hold corporations accountable without subjecting them, and the innocent parties dependent on them, to that punishment. This effectively cuts the judiciary out of the adjudicatory process.

Congress has increased the severity of corporate criminal punishment over the years. When first subject to the criminal law, corporations were punished under the same rubric that applied to individuals.<sup>109</sup> If the sentence included a fine, a corporation would pay the same fine as an individual.<sup>110</sup> However, if the sentence also involved jail time, courts would ignore that portion of the sentence.<sup>111</sup> The widespread perception was that this was insufficient to deter corporate crime.<sup>112</sup> Congress responded in 1984 with the Sentencing Reform Act, which led eventually to the separate Organizational Sentencing Guidelines with significantly higher fines.<sup>113</sup>

Congress did not stop with the Sentencing Reform Act. In addition to punishment under the Sentencing Guidelines, statutes frequently mandate

108. Some would argue that this is also what corporations should be doing. *See generally* MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (arguing that corporations have a social responsibility to maximize shareholder returns).

109. *See generally*, Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205 (1993) (recounting the history of criminal sentencing laws for individuals and organizations).

110. *See* *Joplin Mercantile Co. v. United States*, 213 F. 926, 936 (8th Cir. 1914) (“The whole growth of the modern law tends to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals.”).

111. *See id.* (explaining that “if the law imposed a death penalty or personal imprisonment, a corporation could not be subjected thereto”).

112. *See* RICHARD S. GRUNER, *CORPORATE CRIME AND SENTENCING* 427–28 (1994) (discussing how the insufficiency of corporate penalties was a primary reason for the implementation of sentencing guidelines for organizations).

113. *See generally* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 and 28 U.S.C. §§ 991–98 (1988)).

that convicted corporations automatically<sup>114</sup> lose licenses or other business privileges, like contracting with the government.<sup>115</sup> In many sectors—like healthcare<sup>116</sup> and accounting<sup>117</sup>—this is the corporation’s death knell. Since these civil consequences sometimes automatically apply upon conviction, it can be impossible to punish corporations in these lines of business without killing them.<sup>118</sup> While such consequences may technically count as civil penalties, they are functionally indistinguishable from criminal punishment.<sup>119</sup>

These stark options—between keeping suspected corporate criminals out of the courtroom entirely and risking a ruinous conviction—naturally influence prosecutorial strategy.<sup>120</sup> As discussed, innocent third parties bear the brunt of corporate punishment, and the consequences for them are severe if conviction forces a corporation to close its doors. The fallout from charging and convicting Arthur Andersen taught prosecutors that lesson in 2002.<sup>121</sup> The Department of Justice’s standing orders to prosecutors are to be ever mindful of the possibility of entity-wide criminal liability.<sup>122</sup> But those orders now include a directive to consider the appropriateness of “resolv[ing] a criminal case against a corporation without a formal conviction.”<sup>123</sup>

114. Some agencies have the discretion to waive debarment. There is little empirical work on how frequently this happens, but Urska Velikonja has started to investigate the matter. *See generally* Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CALIF. L. REV. 1081 (2015).

115. 48 C.F.R. § 9.406-2(a) (2014).

116. 42 U.S.C. § 1320a-7(a) (2012).

117. 15 U.S.C. § 77t(b) (2012); 17 C.F.R. § 201.102(e)(2) (2014).

118. Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 177, 179 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (In some industries, “a conviction is equivalent to a death sentence because the company loses its eligibility to be licensed.”).

119. *See* Antony Duff, *Legal Punishment*, STAN. ENCYCLOPEDIA PHIL. (May 13, 2013), <http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> (“[L]egal punishment involves the imposition of something that is intended to be both burdensome and reprobative, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so.”); *see also generally* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670 (2008) (arguing that the distinction between the civil and criminal collateral consequences of conviction is “mythical”).

120. Epstein, *supra* note 47, at 41 (“The results of a possible trial shape all that goes before, as prosecutors and defendants bargain over settlement . . . .”). The DOJ explicitly directs prosecutors to consider “collateral consequences” when making their corporate charging decisions. Memorandum from Larry D. Thompson, *supra* note 6.

121. *See* Press Release, U.S. Dep’t of Justice, KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case (Aug. 29, 2005), [http://www.usdoj.gov/opa/pr/2005/August/05\\_ag\\_433.html](http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html) (noting that decision to decline prosecution was made out of concern for “protecting innocent workers and others from the consequences of a conviction”).

122. *See* Memorandum from Larry D. Thompson, *supra* note 6.

123. *See* Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Attorneys, Selection and Use of Monitors in Deferred

Prosecutors take this directive seriously. They routinely keep large public corporations out of the courtroom by entering into agreements that indefinitely delay (Deferred Prosecution Agreements) or terminate ab initio (Non-Prosecution Agreements) prosecution in exchange for negotiated conditions.<sup>124</sup> As a result, public corporations can foreclose any possibility of conviction, whether by trial or by plea,<sup>125</sup> and thereby avoid the devastating consequences that can automatically follow.

Scholars have extensively critiqued prosecutor's use of DPAs and NPAs on a wide variety of grounds.<sup>126</sup> By design, DPAs and NPAs are negotiated, finalized, and enforced out of public view. This secrecy compromises prosecutorial accountability and the coherence of enforcement strategy.<sup>127</sup> Unlike visible courtroom convictions and sentences, there is no public repository for these agreements.<sup>128</sup> Even when the agreements are available,

Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.

124. Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 159 (2008).

125. See Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 89 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) ("Notice that there is nothing traditionally criminal in this arrangement—no guilty plea or jury verdict, no sentencing, no punishment other than a fine.").

126. In addition to the criticism discussed next, scholars have other worries regarding DPAs and NPAs: (1) that DPAs and NPAs violate separation of powers by excluding the judiciary from the process of punishing corporations, see U.S. CONST. art. II, § 1 (giving the executive power to the President); U.S. CONST. art. III, § 1 (giving the judicial power to the courts); U.S. CONST. art. I, § 1 (giving Congress the power to legislate); and Barkow & Barkow, *supra* note 4, at 1–2 (expressing separations of powers concerns over use of DPAs and NPAs); (2) that DPAs and NPAs offend the rule of law because the DOJ has no system in place to ensure consistency in their use, see Arlen, *supra* note 35, at 62–63; (3) that DPAs and NPAs subject prosecutors to conflicts of interest, see Barkow & Barkow, *supra* note 4, at 2; and Press Release, House Judiciary Comm., Conyers and Sanchez Demand Ashcroft Testimony About \$52 Million No-Bid Contract (Jan. 30, 2008), <http://judiciary.house.gov/files/news/013008.html> (investigating potential improprieties when former prosecutor Chris Christie appointed his former boss, former Attorney General John Ashcroft, for a contract valued at \$52 million); and (4) that DPAs and NPAs are generally inadequately drafted, see generally GARRETT, *supra* note 4 (opining that DPAs and NPAs lack adequate terms to ensure corporations comply with their terms); and Drew Harwell, *Why General Motors' \$900 Million Fine for a Deadly Defect is Just a Slap on the Wrist*, WASH. POST (Sept. 17, 2015), <https://www.washingtonpost.com/news/business/wp/2015/09/17/why-general-motors-900-million-fine-for-a-deadly-defect-is-just-a-slap-on-the-wrist>.

127. Lisa Kern Griffin, *Inside-Out Enforcement*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 110, 110 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) ("DPAs are less visible than adjudication, which detracts from both the coherence of the government's enforcement strategy and the accountability of prosecutors.").

128. Private individuals, like Professor Brandon Garrett, have created impressive collections of them, see Brandon Garrett, *Corporate Prosecution Registry*, U. VA. SCH. L., <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html> (last updated Sept. 25, 2017), but some DPAs and NPAs are simply unavailable. See GARRETT, *supra* note 4, at 169 ("Almost two dozen corporate deferred prosecution or non-prosecution agreements are sealed—not by a court order, but because prosecutors agreed not to disclose them.").

the details of how corporations and prosecutors implement them almost never are.<sup>129</sup> Without this information, policymakers are missing the most significant set of data for developing strategies to improve corporate compliance. As importantly, the public misses out on the catharsis of seeing justice done in the face of corporate crime.

Scholars who raise worries over DPAs and NPAs do offer solutions, but their remedies are generally limited by the scope of their concerns. From the wider-ranging perspective taken in this Article, these approaches seem piecemeal. Those with rule of law worries concerning inconsistency in DPAs and NPAs suggest that the DOJ should develop more detailed internal guidelines for frontline prosecutors.<sup>130</sup> Scholars worried about separation of powers propose giving courts a role in approving DPAs and NPAs.<sup>131</sup> Those troubled by how corporate monitors are used, propose modifications to their powers and responsibilities.<sup>132</sup>

To fully address the problems with DPAs and NPAs, a more comprehensive and theoretically uniform approach is needed. More sweeping proposals often call for abolishing corporate criminal law whole-hog.<sup>133</sup> Samuel Buell develops one such approach that is specifically targeted at many concerns over DPAs and NPAs. For the sorts of crimes that public corporations most frequently commit, there are almost always civil regulations and a responsible administrative agency covering the same conduct.<sup>134</sup> Buell proposes scrapping corporate criminal enforcement, and replacing it with more robust<sup>135</sup> forms of civil enforcement.<sup>136</sup>

However, the underlying problem is not that the government has too many options in pursuing corporate malfeasance, but that it has too few. At present, prosecutors effectively have just two possibilities so far as many large

129. GARRETT, *supra* note 4, at 176 (“[M]onitors [overseeing implementation of DPA and NPA terms] do not make their work public or report to judges.”).

130. Arlen, *supra* note 30, at 229–30 (“[T]he DOJ should be able to improve mandates and reduce the rule of law concerns by working with regulatory agencies to encourage them to adopt rules delineating the appropriate mandates to be imposed on wrongdoers and guidelines to govern their use.”).

131. See generally, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007).

132. See generally Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2017) (offering “a number of recommendations for enhancing the potential of corporate monitors,” such as imposing new duties on them).

133. See, e.g., Fischel & Sykes, *supra* note 47, at 319; Khanna, *supra* note 17, at 1477–79.

134. Brown, *supra* note 21, at 1327–28 (“Parallel statutory regimes providing civil and criminal sanctions for essentially the same conduct exist in virtually every area of white-collar wrongdoing, including health care fraud, environmental harms, workplace safety, and securities law.” (footnotes omitted)).

135. Buell, *supra* note 125, at 90 (“[T]hree features primarily distinguish a criminal enterprise case from a civil regulatory action: it stigmatizes more, it decides more, and it requires more of the firm.”).

136. *Id.* at 95 (“A straightforward way to alter the public enforcer’s incentives is to adjust the nature of the civil proceeding so that it approximates more the criminal proceeding.”).



corporations are concerned—(1) surrender to purely civil enforcement or (2) work outside the justice system entirely through DPAs and NPAs. Pursuing criminal charges is frequently off the table; Buell’s proposal would not change that.

Additionally, reforms calling for the abolition of corporate criminal law are not feasible in the current political climate.<sup>137</sup> Much of the electorate already feels corporations are not held sufficiently accountable for their crimes.<sup>138</sup> Admittedly, a complete overhaul could, in theory, reform the civil process to impose many of the same sanctions as the criminal law. But, even assuming away any constitutional worries doing so could raise,<sup>139</sup> going the purely civil route would undermine what many think is a distinguishing social benefit of criminal law<sup>140</sup>: providing society with a means of expressing its collective condemnation of certain conduct.<sup>141</sup> In the corporate context, this may mean denouncing corporate acts that unduly prioritize profit over individual rights.<sup>142</sup> Civil sanction—which applies equally to regular tort and

137. Baer, *supra* note 48, at 612.

138. See *supra* note 19 and accompanying text.

139. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325–32 (1991).

140. Chief among these are the expressive goals the criminal law serves. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 235 (2008) (“[Some] modern retributive theory has shifted the emphasis . . . to the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness in the offense.”); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 81–82 (1883) (“[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense.”); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965) (“[Criminal punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation.”).

141. See STEPHEN, *supra* note 140, at 81–82 (“[T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense.”); Feinberg, *supra* note 140, at 404–08; Kahan & Nussbaum, *supra* note 21, at 352 (Criminal punishment “conveys society’s authoritative moral condemnation” and “reaffirms its commitment to the values that the wrongdoer’s own act denies.”); Cass R. Sunstein, *On The Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2044–45 (1996) (“The criminal law is a prime arena for the expressive function of the law . . .”).

142. See Diamantis, *supra* note 66, at 2062–64; Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426 (2009) (“The label ‘criminal’ has social significance aside from the particular punishment imposed on the offender.”); Kahan, *supra* note 64, at 618–19 (“Just as crimes by natural persons denigrate societal values, so do corporate crimes. Members of the public show that they feel this way, for example, when they complain that corporations put profits ahead of the interests of workers, consumers, or the environment. Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations that their crimes express. Criminal liability ‘sends the message’ that people matter more than profits and reaffirms the value of those who were sacrificed to ‘corporate greed.’” (footnotes omitted)); *id.* at 621 (“To the extent that criminal liability more effectively expresses public condemnation than does civil liability, criminal punishments can be expected to be more effective in instilling aversions to crime.”).

contract claims as it would to criminal conduct under Buell's proposal—cannot carry the same expressive force.<sup>143</sup> A move to civil liability would further exacerbate the perception, discussed above, that crime is being priced rather than prohibited.<sup>144</sup> Buell himself elsewhere acknowledges the importance of criminal law's distinctive expressive force.<sup>145</sup>

Brandon Garrett offers the most detailed critique of DPAs and NPAs, and has sketched a plan for reform that, unlike Buell's approach, aims to strengthen corporate criminal law.<sup>146</sup> Many of Garrett's proposals—like more extensive use of corporate probation supervised by judicially appointed corporate monitors<sup>147</sup>—closely resemble those made below. However, without a revised conception of corporate punishment, the prospects of success are slim. Neither the judiciary nor the legislature can force prosecutors' hands when it comes to DPAs and NPAs without overstepping constitutional limits.<sup>148</sup> Further, some of the sanctions Garrett calls for—like more severe fines<sup>149</sup> and wider use of debarment<sup>150</sup>—would exacerbate the pressures that lead prosecutors and corporations to enter into DPAs and NPAs in the first place.

The strategy taken in this Article is different. Rather than criticizing prosecutors, it looks to find what they get right in DPAs and NPAs—reforming corporations. Prosecutors may not be doing it particularly well since they are

143. Friedman, *supra* note 21, at 845–46 (“Expressive theory accordingly entails a relatively ‘thin’ conception of the wrongdoer . . . an identity upon which the community’s judgment can be focused in a meaningful way.”); Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.”).

144. Kahan, *supra* note 64, at 619 (“[C]ivil damages seem to connote that society is ‘pricing’ corporate crime.”).

145. Buell, *supra* note 66, at 525 (“[C]riminal legal process[] adds unique and strong communicative force to any societal conclusion about institutional fault.”). To be fair, Buell thinks that even DPAs and NPAs have some of the expressive force of criminal law if they require the corporation to admit the facts that would satisfy the elements of a criminal charge. Buell, *supra* note 125, at 91 (“A DPA is crafted to retain some of the message effects of a criminal proceeding by requiring the firm to admit a criminal violation and the facts making out that violation.”). And he thinks he can similarly adapt the civil system to coopt that expressive potential. This author remains skeptical that DPAs and NPAs, let alone modified civil sanctions, can approximate the condemnatory potential of criminal conviction.

146. See GARRETT, *supra* note 4, at 250–88.

147. *Id.* at 283 (“Judges could also do more in plea agreements by imposing special conditions of probation, similarly making monitors’ reports transparent if not public, and stating specific reasons why probation supervision should end or continue.”). There have been other advocates for expanding the use of corporate probation in this way. See generally, e.g., Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988).

148. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 736–38 (D.C. Cir. 2016).

149. GARRETT, *supra* note 4, at 255 (calling for “more serious fines”).

150. *Id.* at 275 (“For corporate prosecutions to have real teeth, debarment and suspension should be exercised more clearly and forcefully . . .”).

not well-positioned for the task.<sup>151</sup> But if we take the project of corporate reform and develop it into a theory of corporate punishment for the entire criminal justice system, we could eliminate the need for DPAs and NPAs, while avoiding the problems that plague deterrence and retribution theory.

## V. CORPORATE CHARACTER

Theories of punishment distinguish themselves primarily by their view on the purpose of punishment.<sup>152</sup> Typically, they align with one of three comprehensive moral philosophies: consequentialism, deontology, and virtue ethics.<sup>153</sup> Retribution and deterrence theories, discussed above,<sup>154</sup> are most familiar to modern readers.<sup>155</sup> Retributivists ally themselves with deontology,<sup>156</sup> and deterrence theorists are generally consequentialists.<sup>157</sup>

Though these two theories currently enjoy the limelight, character theories<sup>158</sup> of punishment predate them by far<sup>159</sup> and maintain a marginal presence.<sup>160</sup> According to character theories, the purpose of punishment is to cultivate virtuous character traits, both in the convicted criminal and in the

151. See *infra* Part VI.F.2.

152. Some theories try to explain as a descriptive matter what the actual purpose of punishment is in some system of criminal law, and others try to give a normative account of what the organizing purpose of punishment ought to be. My focus in this Article is on the normative account, though the descriptive accounts will be relevant to the extent that it reflects popular intuitions that should inform the normative account. Blending the normative and descriptive is not uncommon. See, e.g., Ekow N. Yankah, *Liberal Virtue*, in LAW, VIRTUE AND JUSTICE 169, 169 (Amalia Amaya & Ho Hock Lai eds., 2013) (“Proponents of virtue jurisprudence . . . argue that a virtue-centered theory of law better justifies and explains important parts of law.”).

153. MARCIA W. BARON ET AL., THREE METHODS OF ETHICS: A DEBATE (1997); Huigens, *supra* note 38, at 9–10.

154. See *supra* Parts II–III.

155. See Yankah, *supra* note 152, at 169 (“[N]ormative legal philosophy has been [mostly] dominated for a generation by intricate debates between deontological and consequentialist theories.”).

156. Joshua D. Greene, *The Secret Joke of Kant’s Soul*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT 35, 70 (Walter Sinnott-Armstrong ed., 2008) (“Deontologists . . . are retributivists.”).

157. *Id.* at 50 (“Consequentialists . . . argue that punishment is justified solely by its future beneficial effects, primarily through deterrence.”).

158. The lines between the theories are sometimes blurred. See, e.g., GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 10.3.1 (1978) (offering a retributivist theory which keys the level of punishment deserved to the defendant’s character).

159. Amalia Amaya & Ho Hock Lai, *Of Law, Virtue and Justice—An Introduction* to LAW, VIRTUE AND JUSTICE 1, 1 (Amalia Amaya & Ho Hock Lai eds., 2013) (“Virtue ethics has its origins in Classical Greece and it was the dominant approach in western moral philosophy until the Enlightenment.”).

160. Nicola Lacey is optimistic that there is a resurgence of interest in virtue ethics in criminal law. See Nicola Lacey, *The Resurgence of Character: Responsibility in the Context of Criminalization*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 151 (R.A. Duff & Stuart P. Green eds., 2011). But see Duff, *supra* note 119 (mentioning virtue ethics only in passing).

community at large.<sup>161</sup> Character theorists sometimes mean different things by “character,” but the most common understanding is dispositional. On this account, a character trait is a stable<sup>162</sup> disposition to behave in some way, e.g. honesty is the disposition to tell the truth.<sup>163</sup> Working with this technical definition, only a narrow set of character traits legitimately interest the criminal justice system: those that amount to stable dispositions to commit crimes.<sup>164</sup> As Anthony Burgess’s prison wardens would say: “Kill the criminal reflex, that’s all.”<sup>165</sup> In this regard, character theorists of punishment are generally less concerned with other socially desirable character traits, like the disposition to be a good friend; deficiency in these is usually not the proper object of criminal punishment. However, these other traits may become relevant when it comes to fixing the terms and severity of criminal punishment: Character theorists would not want to undermine good character traits in their effort to stamp out the bad.<sup>166</sup> In short, character theories of punishment say the state should design punishment to reform convicted criminals of their dispositions to commit crime, to inhibit the formation of similar dispositions in society at large, and to leave good character traits of all types to flourish.

Character theorists need not deny that the justice system (broadly construed) should have objectives aside from reform of criminal character.

161. See R.A. Duff, *Virtue, Vice and the Criminal Law—A Response to Huigens and Yankah*, in *LAW, VIRTUE AND JUSTICE* 195, 196 (Amalia Amaya & Ho Hock Lai eds., 2013) (“We could . . . use criminal law and punishment as ways of directly fostering virtue and preventing vice.”); Huigens, *supra* note 38, at 19 (“The aretaic theory of punishment takes the inculcation of sound practical judgment—virtue, in its correct, technical sense—to be the principal justifying purpose of punishment.”).

162. See Gianluca Di Muzio, *Aristotle on Improving One’s Character*, 45 *PHRONESIS* 205, 210 (2000) (“[T]he notion of character is typically associated with permanence and a certain lack of flexibility.”).

163. See MICHAEL MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 548 (2010); Sendor, *supra* note 62, at 100 (“[B]ad character in this context means a settled disposition . . . to commit acts that violate the law.” (citations omitted)). Some scholars define character differently. Many of the alternate definitions could equally (though less succinctly) serve my purposes here. See, e.g., Huigens, *supra* note 38, at 13 (“Agent character is the upshot of preference formation. Stable, rationally constructed values accrete into a stable, rationally constructed value set—a character.”). The account of character I use, with its focus on dispositions to act, is more properly identified with Hume; the more purely Aristotelian account of virtue, which includes emotional and appetitive dispositions too, is a much more questionable foundation for a theory of punishment. See generally R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 *BUFF. CRIM. L. REV.* 147 (2002).

164. See R.B. Brandt, *A Motivational Theory of Excuses in the Criminal Law*, 27 *NOMOS* 165, 174 (1985); Duff, *supra* note 161, at 204 (Character theory “does not, however, take a legitimate interest in all virtues and vices, or in all aspects of its citizen’s flourishing; it is properly interested only in those aspects of ethical flourishing, only in that subset of virtues and vices, that count as ‘public’ rather than as ‘private.’”).

165. BURGESS, *supra* note 1, at 101.

166. See *infra* Part VI.D. It is in this respect that character theory differs from approaches to punishment that focus exclusively on rehabilitating criminals of their criminal character.

For example, character theorists should not oppose making victims whole through restitution.<sup>167</sup> Though coercive, such transfers of wealth to injured individuals are more akin to civil remedies rather than criminal punishments.<sup>168</sup> Philosophers still grapple for a satisfying distinction between punitive measures and other coercive exercises of state power,<sup>169</sup> as do lawyers and judges.<sup>170</sup> For purposes of this Article, a loose understanding of criminal punishment as sanctions that are dead-weight losses (like capital punishment and prison time), transfers of value to the state or community (fines and community service), or solely directed at the individual criminal (public shaming and probation) will do. This is different from the legal definition of punishment,<sup>171</sup> since it excludes restitution yet includes a host of civil collateral consequences.<sup>172</sup> However, it is the scope of sanction that should concern character theorists.

Many people find character theories intuitively appealing. This is unsurprising, given the impressive body of evidence that character-based reasoning—blaming practices that respond to character—plays a significant role in ordinary folk assessments of moral culpability.<sup>173</sup> If criminal punishment should be responsive to these ordinary moral assessments,<sup>174</sup> the approach character theory provides will be an attractive candidate.

167. See, e.g., Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663 (2012).

168. See *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (“Functionally, the Mandatory Victims Restitution Act is a tort statute.”).

169. See Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. Rev. 201, 210–12 (1996).

170. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 563, 567 (2012) (discussing whether the individual mandate counted as a tax or a penalty, i.e. a “punishment for an unlawful act or omission” (citations omitted)); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 94–95, 122–23 (2004) (arguing that courts use criminal restitution increasingly like a criminal penalty while justifying it as a civil remedy).

171. See *E.B. v. Verniero*, 119 F.3d 1077, 1093 (3d Cir. 1997); *United States v. Rusk*, 96 F.3d 777, 778–79 (5th Cir. 1996).

172. See *Rusk*, 96 F.3d at 778–79 (“This circuit has yet to address whether a debarment order issued in an administrative proceeding constitutes punishment for purposes of double jeopardy. Other circuits that have addressed the issue in related contexts have *uniformly* held that such orders do not constitute punishment. . . . As those courts have explained, debarment orders do not serve a punitive purpose but rather the remedial goal of protecting the banking industry . . . . We agree that the debarment order was remedial, not punitive.” (citations omitted)).

173. See Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 569–71 (2000); Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5, 7 (1982) (arguing that moral blame and punishment are ordinarily responsive to assessment of the character of a wrongdoer, not his acts); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 257 (2012) (“In ordinary social life, therefore, an actor’s perceived character and reasons for acting are of primary importance to the process of administering blame for that actor’s harmful action.”).

174. As many think it should. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 47 (1984) (Through criminal punishment “we are avenging . . . the outrage to morality.”); HART, *supra* note 140, at 25; ROBINSON, *supra* note 22, at 176–88 (“[T]he criminal law’s moral credibility is essential to effective crime control . . . .”); Kyron Huigens, *Motivating Intentions, Reciprocal*

A. *DESCRIPTIVELY INADEQUATE?*<sup>75</sup>

Despite their intuitive appeal, character theories of punishment are not popular among scholars. One common criticism is that they seem to be in tension with a basic tenet of criminal law: Character evidence is inadmissible to prove guilt.<sup>176</sup> The concern behind that rule of evidence is the psychological phenomenon of “motivated inculcation.”<sup>177</sup> This is the common process by which character evidence can influence fact finders to stray from strictly applying the elements defined by statute.<sup>178</sup> Jurors may, for example, be more likely to find a person guilty of theft if they also know he has an unrelated character flaw, like that he is a bad father. If character evidence is not allowed at trial, how can character theory be the right way to think about punishment?

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*Specification of Ends and the Assessment of Responsibility*, in *LAW, VIRTUE AND JUSTICE* 155, 163 (Amalia Amaya & Ho Hock Lai eds., 2013) (“The judgments of criminal law cannot depart too far from our moral judgments of wrongdoing without losing credibility.”); George Vuoso, *Background, Responsibility, and Excuse*, 96 *YALE L.J.* 1661, 1663 (1987) (“Only a criminal law that incorporated to some extent the morality of the society it was supposed to serve, could hope to endure and effectively achieve general deterrence and the other societal benefits that are thought to justify criminal punishment.”).

175. It is a short step to convert this argument against the descriptive adequacy of character theory to a criticism of its normative adequacy. The response, in either case, is the same.

176. *FED. R. EVID.* 404(a)(1) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”); *Id.* 404(b)(1) (“Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”); Nadler & McDonnell, *supra* note 173, at 256 (“It is a fundamental tenet of criminal law that we do not judge the criminality of an act based on the character of the actor.”). The exclusion of character evidence at trial applies to corporate people too, though some scholars argue the law should be otherwise. See Robert E. Wagner, *Criminal Corporate Character*, 65 *FLA. L. REV.* 1293, 1294 (2013) (“The past acts of a corporation should be admissible to add weight to the proposition that it committed the offense in question in conformity with its so-called character.”). Some virtue ethicists think that the aversion to considerations of character in liability phase of criminal law are just superficial, and that character retains a place in its deeper structure. See Huigens, *supra* note 38, at 11 (Virtue ethics “produces accounts of the principal features of [criminal law]—not only the justification of punishment, but also the nature of fault, the ground of excuses, [and] the structure and content of wrongdoing . . .” (footnotes omitted)).

177. Nadler & McDonnell, *supra* note 173, at 258.

178. *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (Character evidence raises the “risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.”); *CAL. LAW REVISION COMM’N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE* 615 (1964) (Character evidence “subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”); Alickie, *supra* note 173, at 569–71; Nadler & McDonnell, *supra* note 173, at 258 (“[W]e are more likely to find that the harmful action of a bad person satisfies the statutory elements of a crime and in turn, is worthy of criminal condemnation and punishment.”).

Few critics of character-based approaches to punishment seem to have noticed just how weak this argument is. There is little reason to presuppose that the correct theory of criminal liability, whatever it is, must be the same as the correct theory for criminal punishment.<sup>179</sup> It may very well be the case that different purposes are appropriate to these distinct phases of a criminal trial. This would fit well with the fact that there are significant procedural differences between the two phases. For example, while character evidence may not be admissible at trial, large parts of it are admissible at sentencing.<sup>180</sup> So, even if character theory is not the correct way to frame the guilt phase of trial, it may be the proper frame for sentencing. Of course, the liability and sentencing phases, whatever their purposes, should not undermine each other. But some different purpose for liability, perhaps fulfilling certain

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179. Virtue ethicists themselves make this unjustified assumption. See, e.g., Huigens, *supra* note 38, at 19–20 (“The inquiry into fault is precisely an inquiry into whether or not the agent’s wrongdoing is a product of flawed or inadequate practical reasoning, including the practical reasoning that goes into making up one’s ends. If so, and if the particular wrong done violates a legal prohibition, then punishment is both morally and legally justified.”); Huigens, *supra* note 174, at 156 (“Aristotelian punishment theory is undercut by the predominance of subjective states fault criteria.”); *id.* at 160–61 (“A crime is only one event in a life, but an evaluation of the quality of one’s practical reasoning surely would require us to consider many such events. Given that the inquiry into the quality of the defendant’s practical reasoning is so narrow, it could not possibly justify legal punishment in the way an aretaic theory contends.”). Many virtue ethicists do try to offer uniform theories of criminal liability and punishment, which may be one source of the misunderstanding. See RICHARD B. BRANDT, *ETHICAL THEORY* 465–74 (1959); FLETCHER, *supra* note 158, § 10.3.1; NICOLA LACEY, *SATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES* (1988); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 381–84, 394–96 (1981); Duff, *supra* note 161, at 196 (“The suggestion now is that vice, or lack of virtue, bears on whether someone should be liable to criminal conviction and punishment.”). The closest I have seen to a hybrid theory comes from Benjamin B. Sendor. See Sendor, *supra* note 62, at 101 (“I will suggest several reasons that support the law’s principle that a defendant’s bad character should not be a criterion of guilt but that a defendant’s good or bad character should be a criterion of punishment.”); *id.* at 120 (“[T]he determination of guilt and innocence has a different purpose from the determination of punishment.”); see also Duff, *supra* note 161, at 199 (“To say that virtue and vice are not generally relevant to the law’s definitions of offences, or to the general criteria of criminal liability, is not of course to say that they are irrelevant to the whole system of criminal justice: in particular, it is not to say that they must be irrelevant to sentencing. They could bear on sentencing either as conditioning just what the convicted defendant deserves by way of punishment . . .”). That so few scholars entertain the prospect of different theories for sentencing and punishment is surprising, especially since some are even prepared to embrace multiple theories of liability alone. See, e.g., *id.* at 148 (“[W]e should look not for a single model of criminal liability, but for a number of different models, patterns and structures that interweave (and may conflict) in various and complex ways.”).

180. See Sendor, *supra* note 62, at 99 (noting “two basic principles of modern American criminal law: (1) . . . the defendant’s character is not itself a criterion or an element of guilt[, and] (2) . . . the sentencer can consider the defendant’s bad or good character . . .”). The Sentencing Guidelines specifically mention “character” as one of the considerations relevant to sentencing. U.S. SENTENCING COMM’N, *GUIDELINES MANUAL* § 1B1.4 & cmt. (2016) [hereinafter *GUIDELINES 2016*] (Judges “may consider, without limitation, any information concerning the background, *character* and conduct of the defendant, unless otherwise prohibited by law.” (emphasis added)).

expressive aims,<sup>181</sup> could work in congenial tandem with character-focused goals of punishment.

### B. PROBLEMATIC FOR INDIVIDUALS

To date, scholars have applied character theory exclusively to the punishment of individuals. In that context, it faces some formidable criticisms. For example, while reforming the character defects of convicted criminals is a central concern of character theory, there is mounting evidence that adult character is not malleable in the way character theory requires. Some scholars doubt specifically whether the traditional modes of punishment, e.g. imprisonment, can reliably bring about character change.<sup>182</sup> Others doubt more generally whether it is possible at all for adults to change their character in meaningful ways.<sup>183</sup> To borrow a well-known saying, “Old habits die hard.”<sup>184</sup> Even Aristotle, to whom most character theorists trace their intellectual roots, doubted the possibility of character change after childhood—“So, too, to the unjust and to the self-indulgent man it was open at the beginning not to become men of this kind . . . but now that they have become so it is not possible for them not to be so.”<sup>185</sup>

Some of the best evidence against the possibility of character change comes from the U.S. experience with reform-focused criminal punishment. Beginning in the late 19th century, most of the states adopted measures to move from a retributive to a rehabilitative approach.<sup>186</sup> The effort continued well into the 20th century.<sup>187</sup> But by the 1970s, the law began shifting again, largely because of the overwhelming sense that rehabilitation was not

181. See generally Diamantis, *supra* note 66. Like several others, I recognize that criminal liability may have a number of purposes. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 (2003) (listing “retribution, deterrence, incapacitation, and rehabilitation” as the “textbook purposes of criminal punishment”).

182. See Russ Shafer-Landau, *Can Punishment Morally Educate?*, 10 LAW & PHIL. 189, 200 (1991) (“It remains unlikely that being put behind bars . . . will bring about moral change.”).

183. MOORE, *supra* note 163, at 569 (“One [problem for virtue ethics] is an empirical worry: do we really have much capacity to mold our characters? . . . [T]he social science on this issue gives little encouragement to thinking we have much of this power.”).

184. MICK JAGGER, *Old Habits Die Hard*, on ALFIE: MUSIC FROM THE MOTION PICTURE (Virgin Records 2004).

185. ARISTOTLE, *THE NICOMACHEAN ETHICS* 1114a (David Ross trans., 2009). Some interpreters attribute to Aristotle the view “that moral reform is possible, although difficult.” See Muzio, *supra* note 162, at 207. However, even these think that moral reform “can [only] be attained through a process that does not rely on means such as persuasion or punishment.” *Id.* at 214.

186. See Alschuler, *supra* note 181, at 2–6.

187. See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”); FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* 5 (2d ed. 2013) (reporting a poll finding 72% of people thought the primary purpose of the prison system should be rehabilitation).



working.<sup>188</sup> One sociological survey at the time found that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”<sup>189</sup> Rehabilitation is now officially off the table as a legitimate factor in setting prison terms.<sup>190</sup>

Even if penologists did discover some technology for reforming criminal character, character theory faces significant ethical concerns. The primary one relates to autonomy and dignity interests that forcing criminals to change their character may offend.<sup>191</sup> Anthony Burgess’s vivid portrayal in *A Clockwork Orange* shows better than any argument how character adjustment could violate convicts’ very humanity—“Goodness is something chosen. When a man cannot choose he ceases to be a man.”<sup>192</sup> Arguments by some character theorists that character reform is unobjectionable because it is for the “good” of the convict<sup>193</sup> have done little to move critics.

### C. CHARACTER THEORY FOR CORPORATIONS

Character theories are easily adapted to the corporate context.<sup>194</sup> Since character is just a disposition to behave in a certain way, all that is needed is a

188. See Alschuler, *supra* note 181, at 9 (“The demise of rehabilitation was attributable less to jurisprudential reflection than to apparent empirical failure.”). For a somewhat different and more detailed account of the decline of the rehabilitative ideal in punishment, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1218–45 (1998).

189. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974).

190. See 18 U.S.C. § 3582(a) (2012) (“[I]mprisonment is not an appropriate means of promoting correction and rehabilitation.”); 28 U.S.C. § 994(k) (2012) (noting “the inappropriateness of . . . imprisonment for the purpose of rehabilitating the defendant”).

191. Even scholars whose views are relatively close to virtue ethics, like Herbert Morris and his paternalistic theory, raise this concern. See Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 265 (1981) (Morris’s theory rejects “any response that sought the good of a wrongdoer in a manner that bypassed the human capacity for reflection, understanding, and revision of attitude that may result from such efforts.”); see also Huigens, *supra* note 38, at 18 (“Regardless of how one explains just punishment, it treats the offender with respect because it necessarily supposes that he is a responsible being. The treatment of pathology, in contrast, supposes the patient to be irresponsible and adopts an inherently paternalistic stance toward him.”).

192. BURGESS, *supra* note 1, at 83; see also Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 222 (1984) (“Shock treatments or lobotomies that would damage or destroy the criminal’s freedom to choose are not appropriate educative techniques.”).

193. See, e.g., Morris, *supra* note 191, at 264 (“[A] paternalistic theory of punishment will naturally claim that a principal justification for punishment and a principal justification for restrictions upon it are that the system furthers the good of potential and actual wrongdoers.”).

194. Richard Wagner has made an initial attempt to characterize corporate character using Peter French’s notion of a corporate internal decision structure. See Wagner, *supra* note 176, at 1295. I have elsewhere criticized French’s formalistic account of corporate decision making as naïvely optimistic about the stability of internal corporate decision structures. See Diamantis, *supra* note 66, at 2074. Jennifer Moore proposed a definition of corporate character in terms of an expanded list of factors a quarter-century ago. Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 767–72 (1992).

concept of corporate action. Since shortly after the Civil War, courts have relied on the doctrine of respondeat superior to determine what acts a corporation has performed, in both civil<sup>195</sup> and (later) criminal contexts.<sup>196</sup> According to that doctrine, courts will attribute to a corporation any action taken by any employee “within the scope of employment [and] with the intent to benefit the corporation.”<sup>197</sup> Working with that understanding of corporate action, corporate character is an organizational trait that disposes a corporation’s employees to behave in some way.

For this conception of corporate character to get off the ground, it is crucial to recognize the impact an organization can have on the way individuals within it behave. Organizational theorists have long recognized that corporate-level features—corporate culture, processes and procedures, compensation rubrics, etc.—influence how employees behave.<sup>198</sup> For example, a corporation that provided its employees informal or compensation-based incentives to engage in pro bono work would likely dispose its employees to do the same. This corporation would, all else being equal, count as having a charitable disposition. Organization-level features can equally affect the sorts of behaviors that employees avoid, such as committing crimes.<sup>199</sup>

Some scholars, particularly business ethicists, have discussed a related notion of “corporate character” or “corporate virtue.”<sup>200</sup> Their understanding of the concept is different from that employed here.<sup>201</sup> They see corporate

195. See JOHN W. SALMOND, *THE LAW OF TORTS* 53–57 (2d ed. 1910); Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 594–95 (1989); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence To Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 540–42 (2010); see, e.g., *The “Scotland,”* 105 U.S. 24, 30–31 (1881); *Phila., Wilmington, and Balt. R.R. Co. v. Quigley*, 62 U.S. 202, 209–10 (1859); *Phila. & Reading R.R. Co. v. Derby*, 55 U.S. 468, 486–87 (1852).

196. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–96; see also JAMES P. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 8:21 (3d ed. 2010) (“Until the twentieth century, only on rare occasion did a court hold a corporation liable for commission of a ‘true crime,’ that is, a crime in which a mens rea was an essential element.” (footnote omitted)).

197. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW INST. 2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247 (1979). This Article does not claim that this jurisprudence has settled on the optimal conception of corporate action, and readers should feel free to substitute his or her own.

198. See, e.g., FIONA HAINES, *CORPORATE REGULATION* 25 (1997) (stating that organizational theorists say “[o]rganizational culture forms the ‘touchstone’ by which individuals behave and act”).

199. Alexander & Cohen, *supra* note 67, at 18 (“[T]he corporation can influence the probability of internal detection and punishment.”).

200. Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 30, 64 (2012).

201. I have managed to find one treatment of corporate character that resembles what I propose here. See Moore, *supra* note 194, at 753 (characterizing corporate character in terms of

character as a matter limited to the corporate culture or ethos among employees.<sup>202</sup> Corporate ethos certainly can impact how employees are disposed to behave, and, hence, how corporations are disposed to behave.<sup>203</sup> However, there are many factors beyond ethos that a more inclusive treatment of corporate dispositions would include, such as compliance programs that effectively prevent some employee behavior, even if the ethos of some corporation otherwise encourages it.

A firmer understanding of corporate character opens the way for a theory of punishment aimed at improving corporate character. The following part offers many more details regarding what a character theory of corporate punishment might look like in practice. For now, character theory needs defending from challenges it has faced to date.

Many of the hurdles character theories of punishment encounter with individual defendants do not arise for corporations. For one thing, imposing changes to corporate character through punishment does not implicate the same autonomy and dignity concerns as it might for individuals. Philosophers who write about dignity focus on the case of individual human dignity;<sup>204</sup> none has applied the concept in any meaningful way to corporations.<sup>205</sup> Legal scholars have broached the topic of corporate dignity only to reject it.<sup>206</sup> The

the “goals, rules, policies and procedures that are features of the corporation as an entity”); *see also* Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 797–804 (describing corporate character as an expression of a corporation’s “internal operating system”). Moore is also focused on the sentencing phase of corporate criminal adjudication, but uses corporate character as a theory of corporate culpability, rather than as a theory of how to punish corporations. As such, her approach channels a hybrid of retributive and character-based theories at sentencing. In any case, a more open-ended, dispositional definition of corporate character (like the one offered here) would be better suited to address the infinite variation complex corporations exhibit. On the dispositional account, Moore’s factors may or may not turn out to be relevant in particular cases.

202. *See, e.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099–1101 (1991) (focusing, as a measure of liability, on whether there was a “corporate ethos [that] encouraged agents of the corporation to commit the criminal act” and ascertaining corporate ethos by looking at the corporation’s hierarchy, goals and policies, treatment of prior offenses, efforts to educate employees on compliance with the law, and compensation scheme).

203. Bucy, *supra* note 202, at 1099 (discussing how corporate ethos can “encourage” employee behavior).

204. *See* Robin S. Dillon, *Respect*, STAN. ENCYCLOPEDIA PHIL. (2015), <http://plato.stanford.edu/archives/fall2015/entries/respect> (“[M]ost philosophical discussion of [dignity] has focused on [dignity of] persons.”).

205. Though who knows where the logic of certain sorts of recognized corporate rights, e.g. respect for sincere religious beliefs, will lead. *See generally* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

206. *See, e.g.*, AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 149 (2015) (“[T]he rights of a corporation cannot be included within the [Constitutional] framework of human dignity. Corporations have no humanity.”); DAVID H. GANS & ILYA SHAPIRO, RELIGIOUS LIBERTIES FOR CORPORATIONS?: HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION 14 (2014) (“[W]hen the Supreme Court has interpreted

plaintive outburst of the protagonist in *A Clockwork Orange* would sound absurd in a corporate press release:

“Me, me, me. How about me? Where do I come into all this? Am I like just some animal or dog?” And that started them off govoreeting [talking] real loud and throwing slovos [words] at me. So I creeched [screamed] louder still, creeching: “Am I just to be like a clockwork orange?”<sup>207</sup>

Furthermore, we know it is possible to alter corporate character and have a decent sense of how to do it.<sup>208</sup> Scientists are just beginning to understand the neurological basis for individual character<sup>209</sup> and have little to no idea about how to change it forcibly. While we lack the tools to tinker with neurons, we can get a grip on the larger, human-sized pieces that generate corporate action. Indeed, that is the idea behind one of the fastest growing areas of legal practice: compliance.<sup>210</sup> By definition, compliance programs aim to alter corporate dispositions so corporations are less likely to violate the law.<sup>211</sup> In general, the sorts of techniques compliance programs employ today are commonsense: “promulgation of codes of behavior, the institution of training programs, the identification of internal compliance personnel and the creation of procedures and controls to insure company-wide compliance with legal mandates.”<sup>212</sup> Academics and policymakers commonly believe that there are reliable ways to impact corporate character, even though they do not think of what they are doing in those terms. Corporate change is part of the logic of deterrence-based theories of corporate punishment, which seek to incentivize corporations to implement programs that prevent future

other fundamental, personal rights of human dignity and conscience, it has consistently held that those protections do not extend to corporations. Thus, while business corporations have a number of rights under the Constitution, there are some—particularly ones that protect human dignity—that they don’t possess.”).

207. BURGESS, *supra* note 1, at 141.

208. Buell, *supra* note 125, at 105 (“It might be true in the context of individual punishment that, with rehabilitation, ‘nothing works.’ But we have not yet learned that to be true for corporations.”).

209. See generally CHARLES DUHIGG, *THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS* (2012) (exploring the neuroscience of habit formation).

210. Gregory J. Millman & Samuel Rubinfeld, *Compliance Officer: Dream Career?*, WALL ST. J.: BUS. (Jan. 15, 2014, 8:13 PM), <http://www.wsj.com/articles/SB10001424052702303330204579250722114538750> (“In a U.S. economy struggling to create jobs, at least one field is booming: compliance.”).

211. Baer, *supra* note 36, at 958 (“‘Compliance’ is a system of policies and controls that organizations adopt to deter violations of law . . . .” (footnote omitted)); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1345 (1999) (“An elaborate cottage industry of ethics compliance and preventive law experts lay claim to dramatically reducing the likelihood of criminal liability by maintaining an organizational commitment to ethical standards.” (footnote omitted)).

212. Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 466–67 (2008).

wrongdoing.<sup>213</sup> Much of the corporate deterrence enterprise would be in vain if no one knew which sorts of compliance programs have some prospect of success.

Despite the novelty of corporate character as a basis for punishment, aspects of corporate character are not completely foreign to courts and prosecutors. The Organizational Sentencing Guidelines provide reduced fines for convicted corporations if they can demonstrate that they have effective compliance and ethics programs.<sup>214</sup> The Guidelines also provide enhanced fines for corporate recidivists evidencing firmer criminal dispositions.<sup>215</sup> Further, prosecutors frequently pursue character reform in the terms they impose in DPAs and NPAs.<sup>216</sup> But current efforts at corporate reform are hampered by an undeveloped and inconsistent theoretical framework that uses reform as a puzzling alternative to punishment rather than as a mode of punishment itself.

Some scholars have voiced concern that efforts at corporate reform are misguided because courts, prosecutors, and even compliance professionals themselves do not know which corporate reform methods work.<sup>217</sup> Though corporate compliance technology is certainly incomplete, there is little reason to despair. Organizational theorists and business scholars already know a lot about corporate reform,<sup>218</sup> even if it has so far received too little attention by legal scholars. Additionally, there are troves of highly relevant data that are lost year after year due to the current approach to corporate punishment. The widespread use of DPAs and NPAs slows development of compliance technology because they prevent the buildup of a public repository of reforms implemented and corporate recidivism rates. Corporations and prosecutors

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213. See Pamela H. Bucy, *Why Punish?: Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287, 1288–89 (2007).

214. GUIDELINES 2016, *supra* note 180, § 8B2.1.

215. *Id.* § 8C2.5(c)(1) (providing sentencing enhancements if a corporation has engaged in “similar misconduct” within the prior decade). Jennifer Moore has argued more generally that “determination of an organization’s culpability score under the Guidelines is best understood as an assessment of the character of the organization.” Moore, *supra* note 194, at 785.

216. Garrett, *supra* note 25, at 157 (DPAs and NPAs “typically require that a firm adopt a compliance program, retain an independent monitor, admit guilt, and cooperate with any investigation or prosecution of current or former employees. The overriding goal of the agreements is the institutional reform of the target firm . . .”).

217. See William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law* 14 N.Y.U. J.L. & BUS. 71, 83 (“The substantive law, however, lags behind our understanding of the complexity of organizational life and organizational science. Moreover, policies associated with its use remain ill-conceived, and there is at best a half-hearted embrace of compliance science by those inside and outside of the firm entrusted with policing and ensuring the compliance function.”).

218. See generally *id.* at 6 (discussing the “remarkable convergence of corporate compliance technology, standards, measures, practices, and insights from conventional, plural, and polycentric theories of regulation”).

implements DPAs and NPAs secretly, giving the public no window.<sup>219</sup> As discussed below, with a turn to character as the framing concern for corporate punishment, this data about best practices will come as a natural byproduct of sentencing jurisprudence.<sup>220</sup>

Even under the current regime, there are corporate reform success stories. Siemens, an international industrial manufacturing company, pled guilty in 2008 to one of the largest foreign corruption scandals in history.<sup>221</sup> As part of its plea agreement, Siemens agreed to a massive turnover in its top leadership, a new and dramatically expanded compliance program, and an operating policy that required any business partners to have similar anti-corruption standards.<sup>222</sup> Siemens now serves as a compliance role model and an engine for industry-wide change. Character theory seeks to make such character reform and education success stories the rule, rather than the exception.

## VI. CULTIVATING CORPORATE CHARACTER THROUGH PUNISHMENT

This Part develops the details of a character-based approach to corporate punishment. The crux of the approach is that sentencing officials should sentence corporations with an eye *exclusively* to character improvement and community education. Deterrence theory simply tries to prevent crime with the threat of sanction; it does not care whether it accomplishes this by dissuading bad corporations from committing crime, or by inducing them to become good corporations.<sup>223</sup> To the extent that deterrence theorists do countenance the possibility of coerced corporate reform, it is as a pragmatic supplement to punishment. Character theory sees such reform as punishment itself, and as punishment's sole aim.<sup>224</sup>

219. See GARRETT, *supra* note 4, at 175–76 (“[C]ompliance [required in DPAs and NPAs] is usually unsupervised, and companies simply file reports with prosecutors or a separate regulatory agency. . . . As of now, we have very little information about how this important [compliance] task should be handled, as monitors [when they are used] do not make their work public or report to judges.”).

220. See *infra* Part VII.

221. Sentencing Memorandum for U.S. Department of Justice, *United States v. Siemens Aktiengesellschaft*, No. 08-cr-00367-RJL (D.D.C. Dec. 12, 2008). Brandon Garrett offers an effective treatment of the Siemens case throughout his book, *Too Big to Jail*. See generally GARRETT, *supra* note 4.

222. Sentencing Memorandum, *supra* note 221.

223. See Baer, *supra* note 48, at 586–87 (“Under a pure rational actor model, private actors should perceive no real difference between punishment and [reforming] regulation. Instead, they should refrain from undesirable conduct whenever the net costs of their conduct outweigh the net benefits.”). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1* (Gary S. Becker & William M. Landes eds., 1974) (providing an overview of the economic theories of deterrence and criminal enforcement).

224. This Article thus diverges, at least in the corporate case, from the many scholars who think that criminal punishment should serve multiple ends. See, e.g., Huigens, *supra* note 38, at 4. (There are “diverse ends of the criminal law, including deterrence, retribution, public catharsis over wrongdoing, and the public expression of essential norms.”).

Shifting to a character-first approach involves fundamental shifts in the criteria for punishing corporations, including both whether and how to punish. Many corporations that should be punished under deterrence or retribution theory would receive no punishment under character theory. However, more corporations would be convicted were character theory implemented. Furthermore, character theory calls on judges and prosecutors to abandon many of the punitive methods currently in play. Some details of character theory—like the proposal to abolish corporate fines—will sound radical to many readers. Others, like some of the techniques for implementing corporate reform, will sound familiar. Even for the familiar themes, though, character theory would call for important changes to the way they are currently carried out.

It bears noting that the law, as it presently stands, can largely accommodate the changes to corporate criminal justice that character theory recommends. Ending automatic license revocation after conviction is the only recommendation that would require legislative or administrative intervention.<sup>225</sup> Judges and prosecutors could accomplish everything else using the discretion they already have under the existing legal framework.

#### A. FACTORS TO CONSIDER IN WEIGHING THE NEED FOR PUNISHMENT

One potentially counter-intuitive feature of character theory is its recommendation that crime should sometimes go unpunished. Recall that character is a *stable* disposition to behave in some way.<sup>226</sup> Some behavior is “out of character” and does not reflect a stable disposition. If an instance of criminal misconduct is a one-time deviation, likely no reform is needed to prevent future misconduct. This may be the case for a corporate defendant if, for example, a rogue employee commits a crime—which would be attributable to the corporation via respondeat superior—and is immediately fired. The corporation who fires the rogue employee may thereby have eliminated the chance that the criminal conduct could recur. If the corporation is in no need of reform, there is no need for character-directed punishment.<sup>227</sup> It would still be an open question whether, even in these cases, there is some point to having a criminal trial and a finding of guilt; the purposes of the liability phase may be different from those of the punishment phase. But at sentencing, if the crime reflects no defect in the convict’s character, no punishment is called for. Part of the task at sentencing would be to determine whether the crime is a one-time deviation or whether it is indicative of a deeper criminal disposition.

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225. See *infra* Part VI.B.2.

226. See *supra* Part V.

227. See generally Andrew E. Lelling, *A Psychological Critique of Character-Based Theories of Criminal Excuse*, 49 SYRACUSE L. REV. 35, 46 (1998) (describing Hume’s view according to which it is appropriate to blame someone only when his acts proceed from his character).

Similarly, one way to think about the relationship between corporate crime and corporate character is to distinguish crime resulting from an organizational defect and crime resulting from a temporary circumstance.<sup>228</sup> If the criminal conduct is a product of circumstance, it may not reflect bad corporate character. In those cases,<sup>229</sup> criminal punishment serves no purpose at the corporate level—there is no organizational defect to fix and little chance of recurrence.<sup>230</sup> However, if the crime reflects something more programmatic or a corporate organizational vulnerability, it is more likely to reflect a stable, criminal disposition in need of reform.

The criminal justice system currently allows prosecutors to consider several factors relevant to the issue of corporate character. For example, the DOJ guidance on charging decisions refers to: (1) “the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management”; (2) “the corporation’s history of similar conduct”; (3) “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents”; (4) “the existence and adequacy of the corporation’s compliance program”; and (5) “the corporation’s remedial actions, including any efforts . . . to replace responsible management, to discipline or terminate wrongdoers.”<sup>231</sup> Each of these factors bears on the likelihood the corporation’s criminal conduct was a product of structural features of the corporate organization, procedures, policies, ethos, or hierarchy.

Though these are the sorts of considerations character theorists would weigh, their appearance in the DOJ guidelines is inadequate in several

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228. This aligns with how character theorists think about the relationship between action and character. See MOORE, *supra* note 163, at 572–73 (“A greedy action, on this view, is in character for a person only if that action was caused by that person’s greedy character. . . . Some act A will evidence some trait C if and only if not only C causes A, but also states of type C typically cause events of type A. Effects are evidence of their causes only when there is some general connection between the *class* of events that includes the effect and the *class* of events that includes the cause.”); Brandt, *supra* note 164, at 165 (“[P]ersons who have unjustifiably broken valid law should be exempt from punishment unless their behavior is a result of some defect of standing motivation (one might say ‘character’ instead) . . . .”); Vuoso, *supra* note 174, at 1672 (“To say that an action is determined by one’s character is to say that one’s having that character is the causal factor that would figure most prominently in an accurate explanation of how the action came about.”).

229. There will be such occasions, no matter how well-run the corporation, because there is no way to monitor thousands of employees perfectly. See Irwin Schwartz, *Toward Improving the Law and Policy of Corporate Criminal Liability and Sanctions*, 51 AM. CRIM. L. REV. 99, 112 (2014) (“No organization—private or government—can prevent all misconduct by all employees, all the time.”).

230. Brandt, *supra* note 164, at 191 (“If a person has broken the law but with no defect of motivation, no benefit is gained from punishing him, as far as his own future behavior is concerned. To allow him to circulate in society is no more dangerous than in the case of those who have not broken the law.”). Though there will often be work for criminal law to do at the level of the individual employees.

231. Memorandum from Larry D. Thompson, *supra* note 6.



respects. To begin, in the guidelines, these factors relate to corporate charging and liability rather than punishment.<sup>232</sup> Moreover, consideration of the character-directed factors is merely discretionary, meaning prosecutors could disregard them in any given case.<sup>233</sup> Their significance is further undermined because they appear among other factors largely irrelevant to character. These other factors—like “sufficiency of the evidence,” “seriousness of the offense,” and “collateral consequences”<sup>234</sup>—suggest the DOJ aimed its guidance at a much wider-ranging, unpredictable pragmatism. Lastly, and as discussed further below, it is far from clear that prosecutors are the most competent participant in the criminal justice system to assess, oversee, and reform corporate character.<sup>235</sup>

Under character theory, judges could take the lead from prosecutors in evaluating corporate character and determining the appropriate punishment.<sup>236</sup> As discussed in the next Subpart, the types of punishment character theory calls for would lower many of the barriers that currently compel prosecutors to keep corporations out of court. For a variety of reasons discussed below, judges are better situated to design and oversee the reform of corporate criminals.<sup>237</sup> Tasking judges with assessing corporate character would have the further benefit of harmonizing the way criminal law treats corporate and individual defendants. Judges have long been in the business of assessing individual character at sentencing; as things stand, they assess corporate character much less frequently.<sup>238</sup>

Shifting the assessment and reform of corporate character from prosecutors to judges would be a significant departure from present practice, but it would not require significant changes to the law. The law already makes room for judges to play this role.<sup>239</sup> The Organizational Sentencing

232. See *id.* (discussing guidelines for prosecutors to consider when seeking charges against a business corporation).

233. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.1500, <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (“These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.”); *id.* § 9-28.200 cmt. (“Prosecutors have *substantial latitude* in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that *discretion*, prosecutors should consider the following statements of principles . . . .” (emphasis added)).

234. Memorandum from Larry D. Thompson, *supra* note 6.

235. See *infra* Part VI.F.2.

236. See *infra* Part VI.F.2. Brandon Garrett also calls for judges to be much more involved designing and implementing programs of reform for corporate criminals. See generally GARRETT, *supra* note 4.

237. See *infra* Part VI.F.2.

238. See *supra* Part V.A.

239. I would disagree with scholars who think the Sentencing Guidelines do not allow judges to engage in the practices described below. See, e.g., Buell, *supra* note 125, at 92 (“Current DPA

Guidelines list relevant factors for judges to consider in sentencing that overlap with the DOJ guidance to prosecutors. In calculating the size of the fine for a convicted corporation, the Guidelines direct judges to consider whether higher-ranking personnel tolerated or condoned the criminal conduct,<sup>240</sup> whether the corporation has a prior history of the same criminal conduct,<sup>241</sup> whether the corporation has an effective compliance program,<sup>242</sup> and whether the corporation self-reported, cooperated, and accepted responsibility.<sup>243</sup> Once again, these are exactly some of the factors judges should consider at sentencing according to character theory.<sup>244</sup> Ultimately, though, the Sentencing Guidelines reflect a focus on deterrence or retribution.<sup>245</sup> The use to which the Guidelines put the factors—calculating the size of the fine the corporation will pay<sup>246</sup>—shows this clearly enough.<sup>247</sup> As discussed next, character theory calls for something different.

#### B. PUNISHMENTS CHARACTER THEORY WOULD NOT SUPPORT

Under a character-based approach to punishment, judges will sentence with an eye primarily toward reforming convicted corporations and promoting good corporate character. Since the current system was designed primarily with deterrence and retribution in mind, it utilizes punishments tailored to those ends. Some of the punishments and consequences these theories rely on are orthogonal to the projects of reform and education, and some even inhibit them. These punishments include fines, license revocation, and reputational penalties. As such, character-focused courts would use these sanctions only in rare cases where the general observations below do not stand.

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practice goes beyond the Guidelines in requiring changes in firm practices and governance. A typical DPA will require a firm to agree to alter or halt specific business lines or practices, to adopt or strengthen mechanisms for detecting and responding to agent wrongdoing, to accept intervention of an outside monitor with broad power to measure and report on the firm's compliance, and to afford managers and employees additional resources for reporting violations and learning how to avoid them.”).

240. GUIDELINES 2016, *supra* note 180, § 8C2.5(b).

241. *Id.* § 8C2.5(c).

242. *Id.* § 8C2.5(f).

243. *Id.* § 8C2.5(g).

244. *See supra* Part VI.A.

245. GUIDELINES 2016, *supra* note 180, ch. 8, introductory cmt. (“This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate *deterrence*, and *incentives* for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” (emphasis added)).

246. *Id.* § 8A1.2(b).

247. *See Moore, supra* note 194, at 795.

### 1. Fines

Fines remain an entrenched feature of the current approach to corporate punishment. Negotiations over DPAs and NPAs take place against the background of the Organizational Sentencing Guidelines, which set up a complex system for judges to calculate corporate fine ranges.<sup>248</sup> Most DPAs and NPAs provide for fines.<sup>249</sup> The problem from the perspective of punishment theory is not necessarily that the fines imposed are too high or too low, but that innocent parties—shareholders, employees, creditors—end up bearing the brunt of financial sanctions.<sup>250</sup> This should concern deterrence theorists. If fines are to have their intended deterrent effect, they must pose a credible threat to the individuals making decisions relevant to the commission of corporate crime. However, a corporate fine is too coarse a tool to accomplish this since its effects are, at best, evenly distributed across innocent and responsible individuals alike.<sup>251</sup> Indeed, available empirical data suggests that corporate fines have little deterrent value.<sup>252</sup>

Additionally, because fines harm innocent parties, they cannot spur the sort of reforms that character theory prescribes as the object of punishment. Without a serious prospect of inducing reform, the collateral effects of the fines on innocent parties are unjustifiable from a character-based perspective. Unlike deterrence theory, though, character theorists have other types of sanctions at their disposal. Fines are, after all, a roundabout way to get at the root of the problem—defective corporate character. As discussed above, fines may even push corporations in the wrong direction as corporate actors invest in mechanisms to conceal, rather than prevent, future crimes.<sup>253</sup> There are much more direct ways of ensuring corporate reform.

### 2. License Revocation and Debarment

License revocation and debarment are deadly and automatic collateral consequences of criminal conviction in many sectors. Under deterrence and retribution theories, such a drastic measure may be justified because of the sheer magnitude of some corporate crimes. In practice, the prospect of license revocation places prosecutors in an uneasy place—it is at once a heavy hammer for prosecutors to wield in negotiations, but also a collar preventing prosecutors from credibly threatening to take cases to trial.

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248. See GUIDELINES 2016, *supra* note 180, ch. 8.

249. See Alexander & Cohen, *supra* note 67, at 12–13 (“[M]ore than three-quarters of the prosecution agreements were accompanied by monetary sanctions of more than \$1 million [between 2004 and 2007].”).

250. See *supra* Part III.B.1.

251. See *supra* Part III.B.1.

252. Alexander & Cohen, *supra* note 67, at 24 (“There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect . . .”).

253. See *supra* Part III.B.3.

Under character theory, license revocation and other corporate death sentences will rarely have a role. Shuttering a corporation forecloses any possibility of reform; thus, it is antithetical to the goals of character theory. Admittedly, there may be some rare instances where the criminal disposition so thoroughly pervades a corporation that reform is impossible. The Sentencing Guidelines already permit judges to fine so-called “criminal purpose organizations” out of existence,<sup>254</sup> and character theory would embrace this approach. However, absent the rare case of the unreformable corporation, license revocation should be off the table.

### 3. Reputational Penalties

Though not part of the criminal justice system, the reputational penalties that affect a corporation after conviction can be just as severe as any formal sanction.<sup>255</sup> Injury to a corporation’s reputation can undermine its earnings, as marketplace participants such as customers and creditors require a premium for continued business.<sup>256</sup> Some academics celebrate this collateral effect of corporate criminal law and suggest that these reputational penalties are an effective deterrent that only criminal law can leverage.<sup>257</sup>

However, reputational effects on corporations are problematic from multiple perspectives. Like fines, reputational effects mostly impact innocent parties by reducing overall corporate value and competitiveness.<sup>258</sup> Reputational effects also lack the predictability needed to serve as an effective punitive tool because they vary widely depending on the sort of violation. For example, market data demonstrates that the reputational effects following fraud-based convictions are sizeable, but they are minimal for environmental offenses.<sup>259</sup> Even for a fixed sort of violation, the market response to any

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254. GUIDELINES 2016, *supra* note 180, § 8C1.1 (“If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.”).

255. Buell, *supra* note 66, at 500–12 (discussing how the reputational effects of conviction affect corporations).

256. Alexander & Cohen, *supra* note 67, at 23 (“[N]ews of a corporate crime can cause the company’s customers, investors, or other stakeholders to lower their estimation of the quality of the company’s management, goods, or services and thereby downgrade the terms under which they are willing to do business with the corporation.”).

257. Buell, *supra* note 66, at 537 (arguing that blaming corporations through criminal liability, when “channeled through the legal system, can yield beneficial effects by altering organizational behavior”).

258. See Khanna, *supra* note 17, at 1503–04.

259. Compare Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993) (discussing the drastic reputational harm criminal fraud creates), with Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653 (2005) (discussing the less significant reputational harm environmental violations create).

particular offense is impossible to predict *ex ante*.<sup>260</sup> This should concern even deterrence theorists.<sup>261</sup> Once again, though, it is not clear that deterrence theory has an effective way of getting around this problem.

A well-functioning, character-focused sentencing regime would minimize concerns about reputational effects. If criminal sanctions were effective at reforming character, a formerly criminal corporation could emerge from the criminal justice system with little reputational fallout.<sup>262</sup> It could credibly convey to marketplace participants that it is now a trustworthy business partner. Evidence indicates that transparent corporate reform can reduce the reputational costs of conviction.<sup>263</sup> A character-focused approach to corporate punishment would formalize the process of reform and lend the government's imprimatur to the result. Reducing the reputational effects of conviction cuts down on the unpredictability they produce and mitigates their collateral impact. To the extent corporations currently feel these reputational effects before conviction and sentencing, a character-based approach to punishment shifts the narrative of the criminal process—corporate criminal adjudication becomes an opportunity for improvement rather than merely the exposure of defect.

### C. TECHNIQUES FOR REFORM

Under a character-focused approach to corporate punishment, judges could once again resume their constitutionally designated role in trying and sentencing corporate criminals. The most problematic sanctions—license revocation and fines—would be off the table, and along with them the main barriers prosecutors face to bringing corporations to court. According to character theory, reform is the primary point of punishment, not the alternative or supplement it seems to be in the current system of corporate criminal justice.<sup>264</sup> The current U.S. Sentencing Guidelines contemplate much more than mere fines for corporate defendants, including orders of

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260. See Khanna, *supra* note 17, at 1503–04 (discussing the difficulty of determining market effects *ex ante*).

261. V.S. Khanna, who raises these concerns, is a deterrence theorist. *Id.* at 1479 (“[C]orporate criminal liability should be replaced with a corporate liability strategy that achieves deterrence at lower cost.”).

262. BURGESS, *supra* note 1, at 123 (“Tomorrow we send him with confidence out into the world again, as decent a lad as you would meet on a May morning, unvicious, unviolent, if anything—as you will observe—inclined to the kindly word and the helpful act.”).

263. Alexander & Cohen, *supra* note 67, at 24 (“[C]orporations may reduce their costs of reputation loss through initiatives to improve their internal governance, in a way that is transparent to outsiders at the crime news date. [Sanctions] that improve monitoring efforts within a company and thus prevent recurrence of crime can have this effect.”).

264. See *supra* Part V.

restitution,<sup>265</sup> remedial orders,<sup>266</sup> community service,<sup>267</sup> notice to victims,<sup>268</sup> publicity of the offense,<sup>269</sup> and, most importantly for present purposes, probation.<sup>270</sup> Fine-focused approaches to punishment artificially limit the range of state response to corporate misconduct. Character theory provides a framework for drawing on a fuller array of sentencing options, all in the service of corporate reform.

As mentioned, prosecutors often try to force corporate reform, along with other goals, through DPAs and NPAs.<sup>271</sup> For various reasons, implementation by prosecutors is controversial, and not particularly effective.<sup>272</sup> But there are some things prosecutors seem to get right, at least in spirit. Courts designing corporate reform programs should take note. For example, DPAs and NPAs often specify reforms a corporation must make to keep up its end of the bargain;<sup>273</sup> they also frequently require that the corporation, in cooperation with the prosecutor, select a monitor to oversee the reforms.<sup>274</sup> The terms of the monitorship are usually quite detailed on some points, specifying compensation, the duration of the appointment, the

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265. GUIDELINES 2016, *supra* note 180, § 8B1.1.

266. *Id.* § 8B1.2.

267. *Id.* § 8B1.3.

268. *Id.* § 8B1.4.

269. *Id.* § 8D1.4. *See generally* Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992) (discussing provisions of the sentencing guidelines allowing judges to order convicted corporations to publicize their offenses).

270. GUIDELINES 2016, *supra* note 180, § 8D1.1. *See generally* Gruner, *supra* note 147 (discussing the addition of corporate probation as a sentencing option).

271. *See* GARRETT, *supra* note 4, at 7 (“Prosecutors now try to rehabilitate a company . . .”); Buell, *supra* note 125, at 92–93 (“[T]he aim [of DPA practice] is clear: . . . to change firms to make future harm and wrongdoing by firm’s agents less likely. . . . Criminal DPAs now routinely require firms to reorganize business operations, adopt compliance measures, submit to enhanced monitoring for legal violations, and create systems to encourage and protect whistle-blowers.”); Griffin, *supra* note 127, at 122 (“[B]y requiring solid ethics and compliance programs, the agreements encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal regulatory mandates.” (quoting Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., to John Conyers, Jr., Chairman, House Comm. on the Judiciary (May 15, 2008))); Memorandum from Craig S. Morford, *supra* note 123.

272. *See supra* Part IV. *See generally* GARRETT, *supra* note 4 (discussing issues with prosecutor implementation).

273. Griffin, *supra* note 127, at 119 (“Most DPAs mandate remedial measures, including prosecutor-designed compliance programs and, in some cases, personnel changes and structural reforms.”).

274. *Id.* (“About half of all DPAs also include monitoring provisions that effectively install government representatives within corporations to review and evaluate internal controls.”); Khanna, *supra* note 34, at 237 (“[T]he monitor’s primary task should be to ensure compliance and reduce the chances of future wrong-doing.”).

monitor's powers, and the frequency and type of reports the monitor is to provide to the prosecutor.<sup>275</sup>

Like prosecutors, judges could also specify the required reforms and appoint a monitor to oversee them. However, on the occasion that judges currently do sentence corporations, they approach probation from a deterrence-based perspective. As a result, probation is under-utilized.<sup>276</sup> Typically, the lone requirement on the corporation during the probationary term is not to commit any other crimes.<sup>277</sup> This has the sole effect of raising the stakes of future offenses—the corporation will be on the hook for the new crime *and* for violating its probation.<sup>278</sup> While that may have the effect of inducing the corporation to reform its propensity to reoffend, it can accomplish this only indirectly. It may also just induce the corporation to be better at concealing future misconduct.

The open-ended provisions for probation in the Sentencing Guidelines allow judges to do much more than raise the stakes for future offenses. They authorize judges to use probation to ensure “steps will be taken within the organization to reduce the likelihood of future criminal conduct.”<sup>279</sup> Therefore, the text of the Guidelines is amenable to a character-focused approach to corporate sentencing. They even require probation in a wide range of circumstances that ordinarily would indicate that a defect of corporate character caused the offense, e.g. the organization lacks an effective compliance program,<sup>280</sup> the organization is a repeat offender,<sup>281</sup> a high-level person within the corporation participated in the crime,<sup>282</sup> or when needed generally to rehabilitate the defendant.<sup>283</sup>

Once a court determines that probation is appropriate for a corporation, the Guidelines provide a non-exhaustive list of terms the court can impose.<sup>284</sup> Chief among these is the implementation of an effective compliance and ethics program.<sup>285</sup> Just as prosecutors often require with DPAs and NPAs, the Guidelines envision that a probation officer or court-appointed expert will oversee implementation of the program.<sup>286</sup> In cases where the corporation

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275. Khanna & Dickinson, *supra* note 132, at 1723–27.

276. “The guidelines have been amended to encourage probation to do more. But these new powers are not commonly used.” GARRETT, *supra* note 4, at 164.

277. *Id.*

278. GUIDELINES 2016, *supra* note 180, § 8C2.5(d).

279. *Id.* at ch. 8, introductory cmt.

280. *Id.* § 8D1.1(a)(3).

281. *Id.* § 8D1.1(a)(4).

282. *Id.* § 8D1.1(a)(5).

283. *Id.* § 8D1.1(a)(8); 18 U.S.C. § 3353(a)(2)(D) (2012).

284. GUIDELINES 2016, *supra* note 180, § 8D1.4.

285. *Id.* § 8D1.4(b)(1)–(2).

286. *Id.* § 8D1.4(b)(3)–(4).

needs a heavier guiding hand, the court may also appoint a special master or trustee.<sup>287</sup>

The wide latitude courts have for designing the terms of corporate probation raises the question of what the terms should be. From the perspective of character theory, punishment is only appropriate if there was some organizational vulnerability that disposed the corporate defendant to criminal conduct.<sup>288</sup> Any probationary measure that would remove this vulnerability would be a candidate under character theory. Compliance experts and organizational psychologists are still working on what internal measures are most effective at ensuring corporations, and thus, their employees, keep within the bounds of the law. Character theory is open to incorporating new reform techniques as this technology advances. It has, admittedly, advanced too slowly to date. As discussed below, that is partly due to the current lack of transparency in the administration of corporate criminal justice, a problem character theory would go a long way to alleviating.<sup>289</sup>

There are, of course, clear reform candidates on the table. They include reforming compliance procedures, adding extra levels of due diligence, and implementing regular audits. There is little need to catalogue these here.<sup>290</sup> Other sorts of reforms may be more surprising.

For example, there is evidence that giving corporate managers stock-based compensation could be an effective reform. The proposal begins with the obvious observation that one clear way to impact what corporations do is to alter the incentives of those leading the corporation. The predominant approach to accomplishing this has been to subject management to individual criminal liability.<sup>291</sup> However, that approach has proven ineffective for a host of largely evidentiary reasons.<sup>292</sup> In response, some scholars have proposed

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287. *Id.* § 8F1.1 cmt. 1.

288. *See supra* Part VI.A.

289. *See infra* Part VII.

290. This is not at all intended to undercut the relevance of the obvious solutions. These are effective too. Alexander & Cohen, *supra* note 67, at 33–34 (“Although the literature is still very sparse, the existing theory and evidence point to a relation between corporate crime and factors that include . . . the internal governance, including degree of internal controls, within a company.”). They are just in less need of reiteration here.

291. *See, e.g.*, Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to the Assistant Attorney Gens. (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download>.

292. *See* Memorandum from Eric Holder, Deputy Attorney Gen., to All Component Heads and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/chargingcorps.PDF>.

It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable



the obvious workaround, tying management compensation partially to metrics that reflect the compliance of those who work beneath them.<sup>293</sup> This requires finding a workable way to measure employee compliance, something we do not yet know how to do well.<sup>294</sup>

More recent evidence suggests a workaround that avoids evidentiary hurdles or relying on non-existent performance metrics. Data indicate that criminal conduct within a corporation generally ends up harming shareholders more than helping them.<sup>295</sup> This is counter-intuitive; we generally think of crime as benefitting a corporation, and thereby its shareholders. But if true, another way to incentivizing managers to prioritize compliance may be to align their interests with those of shareholders.<sup>296</sup> The classic way of doing this is to turn managers into shareholders by giving them stock-based compensation.<sup>297</sup> If corporate crime generally decreases share value, and managers are themselves shareholders, managers will have a personal, stock-based incentive to prevent criminal conduct.

Another reform technique that has been underutilized, perhaps because of some prominent opposition, is changing management personnel.<sup>298</sup> Evidence indicates that the example and tone set by management can be a significant factor disposing a corporation to misconduct.<sup>299</sup> This evidence comports with the opinions of corporate insiders, most of whom say top management is the most significant factor affecting corporate compliance.<sup>300</sup> If individual managers are fostering a criminogenic workplace environment through their personalities and management styles, character-focused courts could order corporations on probation to replace them. Corporations that

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personnel may have been promoted, transferred, or fired, or they may have quit or retired.

*Id.*

293. See generally Eugene Szajkowski, *Organizational Illegality: Theoretical Integration and Illustrative Application*, 10 ACAD. MGMT. REV. 558 (1985).

294. Laufer, *supra* note 211, at 1344-50.

295. Alexander & Cohen, *supra* note 91, at 27.

296. Alexander & Cohen, *supra* note 67, at 26 ("This suggests that governance reforms that better align the interests of management and shareholders will tend to reduce the occurrence of crime."); Charles W.L. Hill et al., *An Empirical Examination of the Causes of Corporate Wrongdoing in the United States*, 45 HUM. REL. 1055 (1992).

297. Sharon Hannes, *Compensating for Executive Compensation: The Case for Gatekeeper Incentive Pay*, 98 CALIF. L. REV. 385, 386-89 (2010) (summarizing the development and growth of stock-based compensation).

298. See, e.g., Epstein, *supra* note 47, at 53 ("It is also troublesome when, as a condition of settlement, a criminal prosecutor demands that various employees (from the chairman of the board on down) be required to resign from the firm.")

299. See Alexander & Cohen, *supra* note 67, at 33-34 (citing "tone at the top" as a significant variable predicting corporate misconduct).

300. See MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME: THE ROLE OF MIDDLE MANAGEMENT 54 (1983) (finding that more than 50% of Fortune 500 middle management identify top management behavior as the most significant factor affecting culture of ethical behavior in their corporations).

voluntarily reform themselves when evidence of crime surfaces frequently do this already.<sup>301</sup> Others may need the nudge of a well-worded probationary requirement.

Further, character theory could countenance broader reform possibilities than the formulaic rehabilitative provisions that appear in some DPAs and NPAs. One ancient thesis associated with character theory is the so-called “unity of the moral virtues,” according to which a person cannot be virtuous in any respect without being virtuous in all respects.<sup>302</sup> Many commentators, even many character theorists, dismiss the thesis.<sup>303</sup> But it remains a live part of the tradition, and encourages creative thought about how to get at character defects indirectly. Some recent data about corporate officers is suggestive. For example, data show that corporate officers’ out-of-office behavior can reflect their propensity to engage in misconduct while on the job.<sup>304</sup> One study shows that officers who have accounts with Ashley Madison (a website for extra-marital relationships) are significantly more likely to engage in fraudulent workplace behavior.<sup>305</sup> For corporations, the unity of the virtues may mean considering the possibility that the best way to fix a corporate compliance deficiency is not always the most obvious one. There may be deficits of character elsewhere in the corporation that, if remedied, could address the defect that brought about criminal conduct. A provocative and likely fanciful implication of the Ashley Madison data is that corporate compliance could improve if upper-level employment criteria somehow filtered out adulterers.

We do not yet know whether some form of the unity of the virtues is true for corporations, for example, when fostering other sorts of good character in a corporation could indirectly improve bad criminal character. Business ethicists have long thought that fostering an ethical culture among the employees of a corporation is effective at preventing corporate crime.<sup>306</sup>

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301. Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 512 (1999) (finding that 83% of corporations featured in news reports of potential fraud-based crime subsequently announced turnover in employees or management); Jonathan M. Karpoff et al., *The Consequences to Managers for Financial Misrepresentation*, 88 J. FIN. ECON. 193, 194 (2008) (finding significant management turnover after news of corporate violations).

302. See Elizabeth Tefler, *The Unity of the Moral Virtues in Aristotle’s Nicomachean Ethics*, 90 PROC. ARISTOTELIAN SOC’Y 35, 36 (1989).

303. See generally Bonnie Kent, *Moral Growth and the Unity of the Virtues*, in VIRTUE ETHICS AND MORAL EDUCATION 109 (David Carr & Jan Steutel eds., 2012).

304. See generally Lee Biggerstaff et al., *Suspect CEOs, Unethical Culture, and Corporate Misbehavior*, 117 J. FIN. ECON. 98 (2015); Robert Davidson et al., *Executives’ “Off-the-Job” Behavior, Corporate Culture, and Financial Reporting Risk*, 117 J. FIN. ECON. 5 (2015).

305. Justin Lahart, *The Ashley Madison Effect on Companies*, WALL ST. J. (Mar. 6, 2016, 4:00 PM), <https://blogs.wsj.com/moneybeat/2016/03/06/the-ashley-madison-effect-on-companies>.

306. See generally, e.g., Linda K. Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131 (1999).

perhaps more effective than additional formal compliance procedures.<sup>307</sup> However, they disagree about how best to promote ethical culture.<sup>308</sup> Some proposals are alluring from the perspective of the unity of the virtues, for example, encouraging or mandating charitable work by employees.<sup>309</sup> It may be that fostering a corporate disposition to engage in charitable works could have the indirect effect of shoring up corporate compliance. Mandating corporate charity is currently anathema among punishment scholars<sup>310</sup> and the DOJ.<sup>311</sup> This has been true ever since former U.S. Attorney Chris Christie insisted on a DPA term that forced a corporate defendant to endow an ethics chair at his alma mater, Seton Hall.<sup>312</sup> Character theory could be cautiously open to reconsidering such provisions as possible terms of probation, preferably without Christie's self-serving motives. Any such terms would, of course, need substantially more evidentiary support before judges should consider it appropriate to impose them.

#### D. SOME LIMITING PRINCIPLES

One thing should be acknowledged about almost any corporate reform a court could order—it will be intrusive.<sup>313</sup> Indeed, reforms generate new costs for the firm and interfere with the firm's operations.<sup>314</sup> They have the potential to generate net social losses even if they are successful in changing corporate character. For a theory of punishment that focused single-mindedly

307. See Lynn S. Paine, *Managing for Organizational Integrity*, 72 HARV. BUS. REV. 106, 109–12 (1994).

308. *Id.*

309. See, e.g., Shele Bannon et. al., *Understanding Millennials in the Workplace*, 85 CPA J. 61, 64 (2011) (explaining the importance of charitable work for millennials and the impact that this has on corporate culture and philanthropic image); Gruner, *supra* note 147, at 16–18, 24–25, 38–39 (discussing the use and benefits of imposing community service on criminal corporations at sentencing).

310. That is the underlying tone in Anthony S. Barkow & Rachel E. Barkow, *Conclusion to PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 249, 252 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (“[Any] term should be related to the alleged violation and aimed at achieving future compliance with the law.”).

311. Memorandum from Mark Filip to Holders of the U.S. Attorneys' Manual (May 14, 2008) (“[P]lea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.”).

312. See David Kocieniewski, *In Testy Exchange in Congress, Christie Defends His Record as a Prosecutor*, N.Y. TIMES (June 26, 2009), <http://www.nytimes.com/2009/06/26/nyregion/26christie.html>.

313. Barkow, *supra* note 118, at 179–85 (disapproving of DPAs and NPAs that “go beyond bans on illegal conduct or the removal of negligent or criminal personnel and dictate affirmative changes in business practices and governance”).

314. *The GRC Market is Expanding at an Exponential Rate* (June 29, 2015), <https://www.lockpath.com/blog/general/grc-market-expanding-exponential-rate> (“[P]redictions show that the GRC [governance, risk, and compliance] market would hit \$31.77 billion by the year 2020 with global compliance market spend reaching \$2.6 billion in 2015 alone.”).

on rehabilitating corporate defects, this result would be unavoidable. Character theory, however, has some internal limiting principles that can aid judges in striking the right balance between reforming a corporation and embracing the social goods the corporation already generates.

First, any reforms required as a term of probation should be backed by the best available evidence. That sounds obvious and uncontroversial enough, but it does not appear to be a significant feature of current reform efforts in DPAs and NPAs. As William Laufer has emphasized, prosecutors insist on all manner of costly reforms and compliance procedures, with very little evidence of their efficacy.<sup>315</sup> They seem to focus on sticker price rather than genuine reform.<sup>316</sup> This is unfair to the shareholders who ultimately end up paying for the reforms. It also undermines the legitimacy of the criminal justice system insofar as it calls for waste.

Second, any imposed reforms should account for the mixed character of corporations. Most criminal corporations have good character traits as well as bad; and thus, produce social goods as well as criminal social ills.<sup>317</sup> For example, a corporation may provide a valuable service to consumers, offer good jobs for employees, contribute to or work with charities, or promote environmentally friendly products. A character-focused judge would be wary of sentencing a corporation in a way that undermines whatever good character traits it has without a comparable improvement in the bad character traits that led to criminal conduct. This would rule out imposing reforms that the best available evidence does not support. Imposing unsupported reforms would have the effect of transferring resources away from realizing the corporation's good character, and squandering them on uncertain reform initiatives. The balance between reforming bad and embracing good character at sentencing would also rule out inordinately expensive reforms, even if their success is guaranteed. Sometimes this balance could mean compelling a corporation to reform its bad character in a way that is merely "good enough," in order to preserve resources for realizing the good character traits that are already in place.<sup>318</sup>

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315. See Laufer, *supra* note 211, at 46 (discussing how prosecutors rely on "intuition and experien[ce]" when imposing reform on corporations, rather than on actual evidence).

316. Laufer, *supra* note 217, at 79 ("The result is that all stakeholders [in the corporate "compliance game"] placate each other with compliance expenditures that are largely incidental to ensuring compliance.").

317. If they do not, they are likely "criminal purpose organizations," and there is nothing worth reforming. The Sentencing Guidelines already authorize judges to fine these corporations out of existence. GUIDELINES 2016, *supra* note 180, ch. 8, introductory cmt.

318. Other scholars have proposed that prosecutors should employ a similar balancing test. See Barkow & Barkow, *supra* note 310, at 254 ("[P]rosecutors should assess in some measure the costs and benefits of proposed reforms and consider alternative measures as a matter of good internal governance."). However, they provide no justification for the suggestion, other than a general gesture toward consequentialist considerations. *Id.*

Talk of “balancing tests” and reforms that are “good enough” is vague. This is a product of the unavoidable complexities of sentencing rather than a weakness specific to character theory. When sentencing individual defendants, judges are authorized to conduct a sweeping inquiry into the character of the defendant, balancing the need for punishment against the risk of undermining his socially desirable character traits. The proposal here is to subject corporate criminals to the same treatment, with all its attendant benefits and burdens. Each case will require individualized judgment to realize the proper result. As discussed below, judges have mechanisms for acquiring the best available information.<sup>319</sup>

*E. ENTER THE JUDGES: BENEFITS OVER PROSECUTION-LED REFORM*

So far, this Article has focused on how sentencing corporations under a character-theoretic approach would be an improvement over current sentencing policy rooted in retribution and deterrence. This still leaves open the question of who should be designing and overseeing reform-directed sentences. Currently, to the extent that direct reform of criminal corporations is on the agenda, prosecutors lead the way. However, this could change. By cutting fines and license revocation out of the picture, a character-theoretic approach to sentencing would remove the need for DPAs and NPAs, and thereby clear the path for a superior party to design and oversee corporate punishment: judges.

The current reliance on DPAs and NPAs frequently cuts judges out of the process of punishing corporations. Prosecutors have for decades refused to seek any substantive judicial approval of DPAs and NPAs.<sup>320</sup> That practice is now backed by constitutional law. In a recent D.C. Circuit case, a district court judge tried to reject a cushy DPA prosecutors had signed with a U.S. corporation that violated aerospace export controls against Iran, Sudan, and Burma.<sup>321</sup> On appeal, the D.C. Court of Appeals held that the district court erred when it refused to approve the DPA on substantive grounds. The court held the terms of a DPA are solely up to the Executive, so long as minimal procedural requirements are satisfied.<sup>322</sup> Even more recently, the Second Circuit placed similar limits on a district court judges’ ability to second-guess the contents of DPAs and NPAs.<sup>323</sup>

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319. See *infra* Part VI.F.2.

320. Barkow, *supra* note 118, at 196 (“The regulations in DPAs, NPAs, and other settlement agreements reached with prosecutors are generally not subject to judicial review.”); Garrett, *supra* note 131, at 922–31.

321. United States v. Fokker Servs. B.V., 818 F.3d 733, 736–38 (D.C. Cir. 2016).

322. *Id.* at 746.

323. United States v. HSBC Bank USA, 863 F.3d 125, 129 (2017) (agreeing with the government’s position that “the district court ran afoul of separation of powers principles by involving itself in the implementation of the DPA”).

As mentioned above, scholars have leveled several critiques against giving prosecutors the exclusive authority to punish large corporations.<sup>324</sup> Rather than transferring this role to judges, some scholars have suggested patching the shortcomings of prosecutors or having industry regulators do the job.<sup>325</sup> But implementing these changes would not be easy. Solving the problems with prosecutor-designed DPAs and NPAs would require a substantial overhaul of how the DOJ operates. Similarly, relying on regulators would require a dramatic expansion of their injunctive authority.<sup>326</sup> Meanwhile, judges would just need powers already available to them to design terms of probation.

Bringing corporations before judges for trial and sentencing would resolve the perversity in criminal law with which this Article began—that large corporations are very rarely convicted of the crimes they commit. The whole point of DPAs and NPAs is to avoid a conviction,<sup>327</sup> but this undermines the public's interest in condemning corporate misconduct. By lowering the barriers to bringing corporations to court, society can reclaim the public expressive potential of the corporate conviction in many cases where it is currently unavailable.<sup>328</sup>

The institutional characteristics of the judiciary also make it a superior agent for structuring corporate punishment. By design, courts are insulated from the pressures and opportunities that have led in the past to charges of prosecutorial self-dealing in negotiating DPA and NPA terms.<sup>329</sup> Prosecutors work for the executive branch, and are therefore subject to the distortions of the political process. Since the targets at issue in these cases are the largest

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324. See *supra* Part IV.

325. See, e.g., Barkow & Barkow, *supra* note 310, at 253 (“[P]rosecutors should implement procedures for soliciting comments and consulting with other subject matter experts before proceeding on what will, in effect, become new codes and regulations for industry.”); Buell, *supra* note 125, at 106 (“An enhanced SEC enforcement process of the type I suggest would be superior . . .”); Khanna, *supra* note 34, at 241 (“[O]ne might anticipate that, with time, the DOJ may be able to provide industry-specific (or wrongdoing specific) guidelines on a monitor’s tasks.”).

326. Buell, *supra* note 125, at 106 (“[T]he SEC could, like the DOJ, require a firm to make changes, and it could delegate some or most of the monitoring function to a private third party. But unlike a DPA, such a settlement would require the approval of a federal judge and could, through reporting requirements, include oversight of the monitoring and compliance process by the federal court.”).

327. *Fokker*, 818 F.3d at 746 (“[T]he entire object of a DPA is to enable the defendant to avoid criminal conviction and sentence . . .”).

328. Hampton, *supra* note 192, at 216. (“[W]hen the state punishes it is important that these communications be public, so that other members of society will hear the same moral message.”).

329. See, e.g., Griffin, *supra* note 127, at 120 (“[M]onitors raise their own set of self-dealing concerns. The appointments can be highly profitable, and many DPAs specify the monitors that corporations must hire. . . . When prosecutors direct sole-source contracts to former colleagues in the private sector, questions about conflicts of interest arise.”).

corporations with the most powerful political lobbyists, there is a real risk of under-enforcement.<sup>330</sup>

As importantly, the work courts do is publicly visible. This is in stark contrast to the back-room negotiations that lead to DPAs and NPAs. Even if many DPAs and NPAs may be publicly available thanks to the efforts of Brandon Garrett, they are often hopelessly vague on the issue of corporate reform, often just requiring something like “effective compliance.”<sup>331</sup> The valuable details about how prosecutor-appointed monitors carry out these generalized mandates, and how well their efforts worked, are typically secret.<sup>332</sup> Whether because of this or other institutional reasons, the DOJ has shown itself to be incapable of collecting information about and assessing its own efforts to reform corporations. Shockingly, after decades of DPA and NPAs, the Government Accountability Office recently concluded that the “DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs . . . contribute to the department’s efforts to combat corporate crime because it has no measures to assess their effectiveness.”<sup>333</sup>

The lack of a public record when prosecutors enter into DPAs and NPAs is problematic for two reasons. First, without institutional knowledge about punishment practices, prosecutors cannot help but treat similarly situated corporations differently. This raises obvious rule of law concerns.<sup>334</sup> Second, and equally concerning, is the fact that the best potential repository of data about what works and what does not in terms of catalyzing corporate reform—mandated changes to compliance and reports on what effect they had—is unavailable under the current, prosecutor-directed system.<sup>335</sup>

Courts offer a new possibility when it comes to corporate sentencing. When courts punish corporations, the sentences, including detailed terms of probation, could be presumptively public record. Courts can also designate that monitor reports be public too, if suitably redacted to protect business secrets. This public record would have some precedential effect, which would

330. Barkow, *supra* note 118, at 189 (“The biggest accountability danger in the federal context, then, is . . . the risk of under-regulation relative to public preference. Neither the president nor a senator is likely to want prosecutors to regulate corporations too aggressively because they are powerful lobbyists and campaign contributors, and politicians might also be concerned about job losses and a decline in shareholder value.”).

331. See GARRETT, *supra* note 4, at 72.

332. See *id.* at 175.

333. U.S. GOV’T ACCOUNTABILITY OFFICE, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20–24 (2009), <http://www.gao.gov/new.items/d10110.pdf>.

334. See Buell, *supra* note 125, at 106 (“An objection to the DPA regime . . . has been that individual prosecutors’ offices . . . have been inconsistent in their crafting and application of DPA settlements . . .”).

335. Khanna, *supra* note 34, at 244 (“[D]isclosure of the monitors’ reports is the preferred course of action because it serves to provide information both about firm wrongdoing (thereby alerting victims and potentially helping to reduce the severity of their losses) and also about ways to reduce this kind of wrongdoing.”).

help address rule of law concerns that arise with prosecutors at the helm. Furthermore, the public record would provide invaluable insights into what reforms are effective. This would help the criminal justice system design more effective programs for corporate reform, and educate the public and other corporations about what good and bad corporate character look like.

#### F. POTENTIAL CONCERNS

Character theory may initially raise some of the same concerns as more orthodox theories of corporate punishment. One of these is that the sort of punishments character theory recommends would still entail non-negligible costs to innocent third parties, like shareholders. Another is whether the people character theory would enable to take the leading role in reforming corporations—the judges—are competent to do so. This Subpart responds to both concerns.

##### 1. Cost to Innocent Third Parties

One of the primary concerns with which this Article began is that deterrent and retributive approaches to punishing corporations rely heavily on fines, and innocent third parties, like shareholders, ultimately shoulder the weight of these sanctions. Character theory proposes replacing fines with the exclusive use of reform-oriented sanctions. The sorts of reforms character-focused courts might order are not costless; indeed, for the large corporations at issue in this Article, the reforms can be every expensive.<sup>336</sup> The corporation must bear these expenses under character theory; and, as with fines, these costs would pass through to innocent third parties, like shareholders. Is this not the same old problem in a new character-theoretic bottle?

In short, no, it is not. The problem with fines is not just that they are costs borne by innocent third parties, but that they are dead-weight costs unjustifiably borne by them. According to retributivism, fines give a corporation its just dessert; but the only people impacted are the largely innocent third parties who deserve no punishment. According to deterrence theory, fining a corporation should disincentivize it from committing crime; but, once again, the fines ultimately hit the wrong parties.

Things are different with reform-oriented sanctions. Though these have costs, the cash outlay is an investment in the corporation itself rather than a transfer to the public fisc. What is more, this is a cost that must be borne if the corporation is to operate within the bounds of the law, and the most sensible parties to bear it are the constituents of the corporation itself. Indeed, these costs are no different than the costs that constituents of law-abiding corporations already bear to implement effective compliance programs or forgo potentially lucrative criminal opportunities. Furthermore, data

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336. Alexander & Cohen, *supra* note 67, at 18 (“The costs of internal monitoring and enforcement can be substantial and are likely to be higher for larger and more complex firms . . .”).



indicates that corporate reform is good for share value in the long run.<sup>337</sup> Character-focused punishment may be just the tool that dispersed shareholders need to alter criminogenic dynamics that more influential, rent-seeking parties in the corporation may find profitable.<sup>338</sup>

## 2. Expertise of the Judiciary

As argued above, the logic of retribution and deterrence theory necessitates a regime in which prosecutors, rather than courts, are responsible for punishing corporations and imposing corporate reforms. A character theoretic approach opens the possibility of court-directed punishment, and the previous Subpart discussed various benefits of turning punishment over to judges. For this to constitute an improvement, judges must be competent to play this role. Though they may not be experts in corporate compliance, judges have the tools to call on the expertise of various other stakeholders in designing plans for reform. While judges may not be perfect for the role (likely no party is), they are better situated than the alternatives: prosecutors and regulators.

For a variety of reasons, prosecutors are particularly inept at designing corporate punishments.<sup>339</sup> To begin, prosecutors lack the necessary expertise,<sup>340</sup> which is reflected in the open-ended nature of the reforms they require in DPAs and NPAs.<sup>341</sup> Instead, prosecutors give carte blanche to monitors, chosen in cooperation with the corporation, to design and oversee improvements in corporate procedures and policies.<sup>342</sup> Though the monitors are supposed to file reports with prosecutors, the latter lack the experience to

337. See generally Alexander & Cohen, *supra* note 91 (reporting that corporate criminal conduct tends to reduce share value over the long-run).

338. See generally Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323 (2017) (arguing that reform should be mandated in DPAs only when a corporation's managers personally benefit from deficient internal policing of corporate misconduct).

339. While there are some voices that favor the prosecution-led punishment, see, e.g., Mariano-Florentino Cuéllar, *The Institutional Logic of Preventive Crime*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 132, 134 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (Prosecutors "are more readily identified with popular missions that are relatively more salient to the public than most regulatory agencies."); *id.* at 135 ("[L]aw enforcement entities tend to reflect characteristics making it easier for them to build and maintain organizational autonomy . . ."), most scholars agree that prosecutors are not the ideal party to take on this role.

340. See Baer, *supra* note 36, at 953 ("Despite the fact that the DOJ has intoned an interest in generating a more ethical 'corporate culture,' its prosecutors have little expertise in bringing about this development . . .").

341. See GARRETT, *supra* note 4, at 72 ("[C]ompliance programs [required in DPAs] are often described in fairly general terms. They refer to 'appropriate due diligence' and 'effective compliance' without defining it.")

342. See also Griffin, *supra* note 127, at 120 ("DPAs . . . fail to make clear the scope of the monitor's responsibilities.")

evaluate them properly.<sup>343</sup> Given that the monitor has been hired to improve compliance within the corporation, the progress reports effectively function as self-graded report cards. It should come as no surprise that the DOJ has only once ever found a corporation out of compliance with a DPA.<sup>344</sup>

One alternative repository of expertise could be the relevant industry regulators. Regulators certainly have more expertise than prosecutors when it comes to corporate compliance. But regulatory agencies are subject to their own weaknesses. Their expertise is far from complete, and often relies heavily on input from the parties they are supposed to be regulating.<sup>345</sup> The connection between regulatory and private players in the regulated industries does not stop there. As is well-known, regulators are subject to industry capture because leadership roles within agencies are often filled by industry elites.<sup>346</sup> This once again raises the specter of compromised expertise and softball efforts at reform as industry participants, under a regulator-led regime, would effectively be designing punishment terms for themselves.<sup>347</sup>

If prosecutors and regulators are off the table, that leaves the courts as the leading alternative.<sup>348</sup> The judicial system is constitutionally designed to be insulated from the political and private party influences that plague prosecutors and regulators. The most salient shortcoming of the courts is their lack of industry and business expertise; however, this is easily remedied. Thoughtful prosecutors negotiating DPAs and NPAs sometimes patch the gaps in their knowledge by informally consulting industry regulators.<sup>349</sup>

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343. See Baer, *supra* note 36, at 977 (“[P]rosecutors do not review compliance plans prior to their implementation, test compliance processes over time, pool information learned from disparate firms, consult on a regular basis with compliance officers on key issues or concerns, or address procedural shortcomings as they discover them.”).

344. GARRETT, *supra* note 4, at 78 (“Only once have prosecutors declared a company in breach of a deferred prosecution agreement, resulting in a guilty plea.”).

345. See *id.* at 195 (“[E]ven if an attorney general’s office were to contact the SEC before fashioning a new rule for investment banks, the SEC itself may not know how best to proceed without feedback from the industry and other interested groups.”).

346. For a discussion of one example, see John C. Coffee Jr., *A Course of Inaction*, LEGAL AFFAIRS (Mar.–Apr. 2004), [https://www.legalaffairs.org/issues/March-April-2004/review\\_coffee\\_marapro4.msp](https://www.legalaffairs.org/issues/March-April-2004/review_coffee_marapro4.msp) (discussing the “rapidly revolving door between the SEC and private legal practice”).

347. See Barkow, *supra* note 118, at 193 (“Regulatory agencies, despite their substantive knowledge, may not be in the best position to offer advice because their guidance could be driven by capture as much as expertise.”); Buell, *supra* note 125, at 94 (“I failed to discover evidence of a single instance in which the SEC has sought redress for a firm’s inadequate compliance with so-called undertakings in an injunctive settlement (judicial or administrative) requiring reform measures by the firm.”); Cuéllar, *supra* note 339, at 139 (“[O]rganized interests . . . may have multiple ways of dissuading regulators from severe enforcement activity and [their] own members and staffs may end up running traditional regulatory agencies.”).

348. See Gruner, *supra* note 147, at 74–82 (discussing the institutional competence of the judiciary to design and implement terms of corporate probation).

349. Barkow, *supra* note 118, at 192 (“[C]onsultation [by prosecutors] with expert agencies is fairly commonplace even if it is not formally institutionalized.”); Garrett, *supra* note 25, at

Judges could do the same, and with the benefit of formal procedures. The Sentencing Guidelines direct judges to “consider the views of any governmental regulatory body that oversees conduct of the organization” when designing the terms of probation.<sup>350</sup> The Guidelines also tell courts to consider the defendant’s input about possible steps for reform<sup>351</sup> and empower them to appoint any other necessary experts.<sup>352</sup> Courts are thus a natural gathering point for all relevant expertise. They will no doubt find themselves faced with conflicting perspectives, but balancing discordant channels of information channels is what courts were designed to do.<sup>353</sup>

## VII. CONCLUSION: SOMETHING FOR EVERYONE

A turn to character theory at corporate sentencing could be one of those few proposals that is a win for everyone. People interested in seeing criminal justice administered more regularly against corporations should be happy that character theory would likely result in more corporate convictions. The underlying reason—that large fines and license revocation would no longer be potential sanctions—should provoke a sigh of relief from the other side, the constituents of corporate defendants. Finally, both sides would enjoy the various positive externalities of transferring corporate punishment to its proper home—the judiciary—such as an expanded repository of data about best practices for corporate compliance.

Character theory also has a silver lining for theorists with different views of the purposes of criminal law.

### A. DETERRENCE AND PREVENTION

It may seem that deterrence theorists lose out entirely under character theory. Their preferred method for punishing corporations—the fine—

158–59 (“[F]ederal prosecutors usually work arm in arm with regulators when pursuing organizational prosecutions.”). At least as regards big-picture questions, the Financial Fraud Enforcement Task Force may be one formal mechanism for bringing industry regulators and the DOJ together. *See* Exec. Order No. 13,519, 74 Fed. Reg. 60,123 (Nov. 17, 2009) (stating that the Financial Fraud Enforcement Task Force is designed to “provide advice to the Attorney General for the investigation and prosecution of cases of [financial fraud]”).

350. GUIDELINES 2016, *supra* note 180, § 8D1.4 cmt. 1.

351. *Id.* § 8D1.4(b)(1) (“The organization shall develop and submit to the court an effective compliance and ethics program . . .”).

352. *Id.* § 8D1.4 cmt. 1 (“To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program.”).

353. Courts have a record in other contexts of successfully assessing information from various sources to design programs for structural change. Barkow & Barkow, *supra* note 4, at 3 (Using DPAs, “prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance. . . . They resemble, in significant respects, the structural injunctions courts have imposed in areas like prison and school reform and the regulations promulgated by administrative agencies.”).

would be off the table. Furthermore, the system of corporate criminal justice would be oriented away from tinkering with the ex ante incentives of potential corporate criminals and toward prospective reform. However, deterrence theorists are generally consequence-minded and ultimately care about optimal crime prevention. On this front, they should be open to character theory since there is good reason to think it would do a better job of reducing corporate crime.<sup>354</sup>

To begin, the sorts of sentences that character-focused judges would hand out have their own strong deterrent value. Corporate reform is not costless. So far as financial disincentives are concerned, it should not matter to deterrence theorists whether the additional expenditures go to paying fines or to implementing court-ordered reforms. Furthermore, as other scholars have suggested, there may be extra deterrent force to compelled reforms when courts also appoint monitors to oversee them.<sup>355</sup> Presumably this is because corporations, and more likely, their managers, are particularly averse to the intervention of outside parties.<sup>356</sup> Court-ordered reform can accomplish what corporate fines could not—hitting the incentives of the corporate insiders who are best positioned to influence corporate conduct.

Character theory will also prevent corporate crime by way of mechanisms that have nothing to do with deterrence. Perhaps most obviously, the reform-oriented sanctions that character theory recommends will, if successful, prevent corporate criminals from reoffending. As discussed above, merely fining a corporation does not seem to be a strong stimulus to reform; it may just prompt the corporation to conceal its future crimes. This is not a possibility with reform-oriented sanctions, since they would directly address the criminogenic features of the corporate defendant.

Looking beyond individual corporate criminals, character theory should have more general preventative effects. To a large extent, preventing corporate crime is a matter of preventing individual employee crime. However, prosecutors have found it difficult to get at individual employees. Oftentimes, the DOJ must rely on corporations to report employee misconduct, but corporations have weak incentives to do so and quite strong incentives against.<sup>357</sup> Self-reporting against the background of both

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354. See RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* 220 (1970) (“Rehabilitation is also the one clear way that criminal justice processes can significantly reduce crime.”).

355. Khanna, *supra* note 34, at 231 (“[R]elying on a monitor as a sanction may prove desirable when the deterrent effects of cash fines are exhausted and we desire more deterrence.”).

356. Fisse, *supra* note 49, at 1155 (“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 as well as rehabilitative effect because such intervention detracts from managerial autonomy.”).

357. Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 325 (2012) (“[T]he Organizational Guidelines do not provide firms with sufficient

respondent superior and deterrence-driven sanctions is a hazardous prospect for corporations.<sup>358</sup> Even where the DOJ has a good clue about individuals in a criminal corporation, pursuing them has proven difficult for a host of other evidentiary reasons.<sup>359</sup> This may be why 2015 DOJ instructions that line prosecutors emphasize the liability of individuals within corporations<sup>360</sup> have produced no uptick in prosecutions against individuals.<sup>361</sup> It is not for want of trying.<sup>362</sup>

In terms of preventing crimes by individuals within corporations, character theory has some improvements to offer. Character theory addresses some of the disincentives to corporate self-reporting. It opens the possibility that corporations could report the crimes of individual employees and, at least where the crimes do not reflect character defects of the corporation itself, not face any criminal punishment. The corporation may still be guilty of a crime under respondent superior, but there would be no appropriate sanction.<sup>363</sup> Self-reporting could even be one effective way for corporations to signal that the criminal conduct was unrelated to a corporate character defect. Increased corporate self-reporting should make individual criminals within corporations wary that their activities will be discovered. By creating more communication about crime between corporations and the government,

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mitigation to ensure that firms face lower expected sanctions if they undertake effective corporate policing when corporate policing substantially increases the probability that the government can detect and sanction the wrong.”).

358. *Id.* at 324 (“[C]orporate efforts to help the government could hurt the firm by increasing its probability of being held criminally liable.”).

359. See Memorandum from Eric Holder, *supra* note 292.

360. See generally Memorandum from Sally Quillian Yates, *supra* note 291 (emphasizing the effectiveness of seeking individual accountability to prosecute corporate misconduct).

361. Miriam Baer, *The Stick That Never Was: Parsing the Yates Memo and the Revised Principles of Federal Prosecution of Business Organizations*, COMPLIANCE & ENFORCEMENT (Aug. 31, 2016), [https://wp.nyu.edu/compliance\\_enforcement/2016/08/31/the-stick-that-never-was-parsing-the-yates-memo-and-the-revised-principles-of-federal-prosecution-of-business-organizations](https://wp.nyu.edu/compliance_enforcement/2016/08/31/the-stick-that-never-was-parsing-the-yates-memo-and-the-revised-principles-of-federal-prosecution-of-business-organizations) (“As skeptics have already pointed out, it remains an open question how much the Yates Memo has altered practice among prosecutors and corporate investigators. We have yet to witness a tsunami of individual prosecutions.”).

362. Even before the Yates memo, prosecutors were keen to prosecute individual employees involved in corporate crime, but faced structural obstacles to doing so. See, e.g., Nathan Bomey & Kevin McCoy, *GM Agrees to a \$900M Criminal Settlement over Ignition-Switch Defect*, USA TODAY (Sept. 17, 2015, 6:37 PM), <https://www.usatoday.com/story/money/cars/2015/09/17/gm-justice-department-ignition-switch-defect-settlement/32545959> (“U.S. Attorney Preet Bharara left the door open to prosecuting specific GM employees. But he said it’s difficult to pin blame on an individual who may have had only partial knowledge of a backward bureaucratic process that led to tragedy. . . . ‘If there is a way to bring a case like that, we will bring it.’”); see also GARRETT, *supra* note 4, at 103 (describing similar situation in Barclays’ prosecution, where no individuals were prosecuted).

363. In 2009, Deputy Attorney General Larry D. Thompson proposed something similar, a complete defense to corporate liability under respondent superior if the corporation demonstrated that the individual criminal evaded an otherwise effective compliance program. See generally Larry D. Thompson, *The Blameless Corporation*, AM. CRIM. L. REV. 1323 (2009).

character theory could set the stage for the sort of private-public cooperation for addressing individual crime that many scholars think would be effective.<sup>364</sup>

Character theory can also help in the cases where there is strong evidence that corporate crime resulted from individual misconduct, but corporate opacity prevents the government from building an individual criminal case. Corporate fines cannot reach these individuals, since the effects of the fines are distributed among all the corporate stakeholders. Where the individual misconduct is significant enough to affect the character of the corporation, as when, for example, an upper-level manager instigates or tolerates misconduct, character theory has a solution. The sentencing court could require as a term of probation that the corporation change over personnel responsible for the corporate-level vulnerabilities.

This would have the effect of improving the compliance of the sentenced corporation, but also the more general effect of making personnel think twice before committing or instigating crime. Rather than some infinitesimally small share of a general corporate fine, personnel could lose their position should a court find the likelihood of their misconduct and its effect on the corporation significant enough. This would be an informal recognition of the role of the individual employee in the criminal conduct, and such informal sanctions are known to be effective deterrents for corporate elites.<sup>365</sup> Admittedly, this may not be the ideal way to address individual misconduct. A well-functioning system for individual white-collar criminal justice would be preferable. But when the ideal has proven elusive despite decades of effort, second-best may be the best we can do.

#### B. RETRIBUTION AND EXPRESSION

Unlike retributive theory, character theory assigns no inherent value to punishing criminals for its own sake. Still, there are several reasons retributivists should view character theory as an improvement over the current approach to corporate punishment. All retributivists, whether of the traditional (criminals deserve punishment) or the expressive (punishment

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364. Brown, *supra* note 21, at 1305 (“Efforts to reinvent regulation in a more cooperative and collaborative form by supplanting command-and-control regulation aim to increase the social infrastructure—the attitudes within firms and industries and the relations between firms and enforcement officials—thereby decreasing wrongdoing without resorting to the deterrence of punitive sanctions.” (footnote omitted)); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 101 (1992).

365. See BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* 227–45 (1983) (finding that negative publicity had a greater deterrent effect on managers than formal sanctions); Alexander & Cohen, *supra* note 67, at 12 (“Reforms to governance at the top of the corporation have thus emerged as a potentially effective substitute for higher monetary sanctions in deterring corporate crime.”); Sally S. Simpson, *Corporate Crime Deterrence and Corporate Control Policies: Views from the Inside*, in *WHITE COLLAR CRIME RECONSIDERED* 289, 302–03 (1992) (finding that informal sanctions had a greater deterrent effect on managers than formal sanctions).

expresses moral condemnation) variety should see in character theory a way of genuinely punishing corporations. One central problem with corporate punishment is to devise a way to target the organization rather than its largely innocent constituents. Fines, recall, impact a corporation by burdening its shareholders. But if corporate punishment were to focus exclusively on organizational reform, there is a very palpable sense in which the organization is the target and the collateral effects to shareholders really are *collateral*.

As mentioned above, using character theory to frame corporate punishment corporations would also likely lead to more corporate convictions. This should be particularly attractive to retributivists who emphasize the importance of criminal law's expressive goals. But what is more, many people find character theories of punishment retributively satisfying. There is an impressive body of evidence that character-based reasoning—blaming practices that respond to character—plays a significant role in how people assess moral culpability.<sup>366</sup> Retributivists should want criminal punishment to mirror these ordinary moral assessments.<sup>367</sup> There is also a strong chance that the public would find character-directed punishment more appropriate for criminal corporations than the fines that other theories emphasize. Fines are too easily dismissed as a cost of doing business, while invasive, court-ordered reform could seem a more retributively fitting sanction.

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“[Character theory] is a genuine alternative to the two prevailing theories that stress deterrence and retribution.”<sup>368</sup> There is no reason to limit reflection on corporate punishment to the two theories that currently dominate the discourse. Character theory deserves a seat at the table. It can open new conceptual space for thinking about some of the most intractable problems in corporate criminal law—how to punish an organization without punishing its individuals, how to encourage prosecutors to bring corporations before judges, and how to ensure corporate reform. We may even find that treating criminal corporations like clockwork toys holds the key to some of the solutions.

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366. See Alicke, *supra* note 173, at 569–71; Bayles, *supra* note 173, at 7 (arguing that moral blame and punishment are ordinarily responsive to assessment of the character of a wrongdoer, not his acts); Nadler & McDonnell, *supra* note 173, at 257.

367. As many think it should. See DURKHEIM, *supra* note 174, at 47 (Through criminal punishment “we are avenging . . . the outrage to morality.”); HART, *supra* note 140, at 25; ROBINSON, *supra* note 22, at 176–88 (“[T]he criminal law’s moral credibility is essential to effective crime control . . . .”); Huigens, *supra* note 174, at 163; Vuoso, *supra* note 174, at 1663 (“Only a criminal law that incorporated to some extent the morality of the society it was supposed to serve, could hope to endure and effectively achieve general deterrence and the other social benefits that are thought to justify criminal punishment.”).

368. Huigens, *supra* note 38, at 5.