CLOCKWORK CORPORATIONS:
A CHARACTER THEORY OF CORPORATE PUNISHMENT

Mihailis E. Diamantis*

Current approaches to corporate punishment are largely driven by deterrent or retributive impulses. Since the potential harms and private gains of corporate crime are so large, corporate punishment under these theories must be exacting . . . too exacting. It is difficult under current law to punish a corporation without killing it. 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. They have received comparatively little attention from criminal law scholars because they struggle in theory and practice when used to frame individual punishment. But the practical and moral problems character theories face in the individual context do not arise with the same force for corporations. In fact, character theory raises the possibility of punishing corporations in a way that preserves the social value they create while removing the structural defects that lead to criminal conduct. Along the way, the Article defends some heterodox proposals, including abolishing the corporate fine and that sentencing judges should also attend to the non-criminal aspects of a corporate defendants' "character."

---

* Associate Professor, University of Iowa, College of Law. [Acknowledgments]

> *"I most emphatically do not approve. An eye for an eye, I say. If someone hits you you hit them back, do you not. Why then should not the state, very severely hit by you brutal hooligans, not hit back also? But they new view is to say no. The new view is that we turn the bad into the good. All of which seems to me grossly unjust."*[1]

I. Introduction

The Department of Justice officially treats corporations just like individuals.[2] But here is a striking fact: Less than .03% of corporations

[1] ANTHONY BURGESS, CLOCKWORK ORANGE 70 (1962).

[2] Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dept. of Justice, to Heads of Department Components and United States Attorneys, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) ("Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment.").

faced prosecution in the last quarter century.[3] To put this in perspective, 8.6% of the U.S. adult population has a felony conviction.[4] There are any number of possible explanations for this discrepancy, including, as many have argued, over-criminalization of some forms of individual conduct and over-enforcement against targeted demographics. This article addresses the other side of the equation, why corporate convictions are so rare, focusing on the large, public corporations that are among those most likely to commit crimes[5] and whose conduct most deeply impacts society. It does this by questioning a starting premise of most discussions about corporate crime—that the driving purpose of corporate punishment must be deterrence or retribution. The article argues that low conviction rates and a host of other familiar problems with corporate criminal law are a consequence of this focus on deterrence in scholarship and retribution in public political discourse. The solution lies in turning from deterrence to character as the motivating concern behind corporate punishment. Character theory has been overlooked as a rigorous framework for structuring corporate punishment, but holds the key to many of its problems.

Restricting the numbers to just the large, public corporations at issue in this paper, the percentage convicted is still just 2.5%.[6] This number is surprisingly low considering that corporations have an extremely wide base of potential liability—under current doctrine, they are automatically liable for almost any crime any individual employee commits on the job.[7] This adds up to a staggering degree of exposure for large corporations—the seventy-five largest corporations in the United States employ over 100,000 potential points of liability.[8] But more surprising is that for every conviction

---

[3] BRANDON GARRETT, TOO BIG TO JAIL 261-62 (2014); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1482, 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.").

[4] Michael Suede, *What Percentage of the US Adult Population Has a Felony Conviction*, LIBERTARIAN NEWS (June 5, 2015), *available at* https://www.libertariannews.org/2014/06/05/what-percentage-of-us-adult-population-that-has-a-felony-conviction/.

[5] 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).

[6] GARRET, *supra* note 3, at 262.

[7] That is a bit of an oversimplification. I discuss the doctrine of corporate liability—respondeat superior—in more detail below.

[8] Wikipedia, List of Largest Employers in the United States, *available at* https://en.wikipedia.org/wiki/List_of_largest_employers_in_the_United_States.

of a public corporation, and with increasing frequency,[9] there is at least one other where prosecutors outright decline to apply the criminal law, instead entering into specially negotiated deals.[10] Though the de jure scope of corporate criminal liability has continued to expand[11] since the early twentieth century,[12] the de facto liability facing large public corporations continues to shrink due to this unique exercise of prosecutorial discretion. Indications are that this gap between fact and law will continue to grow.[13] This is particularly puzzling in an environment where the outrage of Wall Street Occupiers over corporate unaccountability[14] still reverberates in public sentiment.[15] Failure to hold corporations accountable frustrates society's effort to condemn corporate criminality[16] and can cast a shadow on the broader legitimacy of criminal law.[17]

---

[9] Gibson Dunn, *2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)* (Jan. 6, 2015), *available at* http://www.gibsondunn.com/publications/pages/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx.

[10] GARRET, *supra* note 3, at 262.

[11] *See* RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING § 1.9.2, at 52-55 (1994); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477 (1996); Beale, *supra* note 3, at 1482 ("[A] comparative review reveals something that may come as a surprise: in 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.").

[12] *N.Y. Cen. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 485 (1909) (recognizing, for the first time, the possibility of corporate criminal liability in the United States).

[13] *See* Sally Quillian Yates, Deputy Attorney General, Memorandum, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), *available at* http://www.justice.gov/dag/file/769036/download (signaling the DOJ's intent to emphasize individual liability).

[14] Corporate Accountability International, *Occupy Wall Street Protests Bring Need for Greater Corporate Accountability into Focus* (Oct. 19, 2011), *available at* https://www.stopcorporateabuse.org/press-statement/occupy-wall-street-protests-bring-need-greater-corporate-accountability-focus; Michael Levitin, *The Triumph of Occupy Wall Street*, THE ATLANTIC (June 10, 2015), *available at* 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.").

[15] *See* Adam Gabbatt, *Former Occupy Wall Street Protesters Rally Around Bernie Sanders Campaign*, THE GUARDIAN (Sept. 17, 2015), *available at* http://www.theguardian.com/us-news/2015/sep/17/occupy-wall-street-protesters-bernie-sanders.

[16] *See* 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

The special deals prosecutors make with corporations are deferred prosecution agreements (DPAs), or sometimes even non-prosecution agreements (NPAs).[18] Unlike guilty pleas, these agreements do not result in a guilty verdict; they may not even require an admission of wrongdoing. Corporate DPAs and NPAs are extremely controversial. They face a bevy of criticism from many perspectives: that they are too onerous, that they are too lenient, that they violate basic tenets of political morality,[19] that they undermine central aims of criminal law, and more.

Many point the finger of blame at prosecutors,[20] but prosecutors are hard to fault. DPAs and NPAs are a reasonable response to the practical constraints facing prosecutors, 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.[21] For many firms, including Arthur Andersen,

---

that the wrongdoer's own act denies"); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 8443 (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."); 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.").

[17] *See generally* PAUL ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT (2013).

[18] Brandon L. Garrett, *Collaborative Organizational Prosecution*, *in* PROSECUTORS IN THE BOARDROOM 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.").

[19] Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016).

[20] *See, e.g.*, Arlen, *supra* note 19.

[21] Anthony S. Barkow & Rachel E. Barkow, *Introduction*, *in* PROSECUTORS IN THE BOARDROOM 1, 2 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011) ("Andersen's fate can never be far from the minds of prosecutors . . . ."); Vikramaditya Khanna, *Reforming the Corporate Monitor*, *in* PROSECUTORS IN THE BOARDROOM 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."); Gibson, Dunn & Crutcher LLP, *2008 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Jan. 6, 2009), *available at* 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,

there are life-ending collateral consequences that automatically follow criminal conviction, such as debarment or inability to do business with the government.[22] 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.[23]

So the question arises: If prosecutors are understandably unwilling to apply the criminal law to large public corporations, would it best to scrap the effort entirely? Scholars who favor a regime that would impose only civil liability on corporations welcome this possibility.[24] But there are important social goals[25] that only well-functioning criminal law can serve, such as expressing society's condemnation of corporate acts that unduly prioritize profit over individual rights.[26] The current state of affairs is an

---

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.").

[22] *See* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reform*, *in* PROSECUTORS IN THE BOARDROOM 62, 65 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011).

[23] 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 21, at 228 ("[B]oth [the government and firms] have strong incentives to settle with something like a DPA.").

[24] *See, e.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 319 (1996) ("We argue that there is no need for corporate criminal liability in a legal system with appropriate civil remedies . . . ."); Khanna, *supra* note 11, at 1477; Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of the Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM 38, 41 (2011) ("In my view, the proper course of action is to junk corporate criminal liability . . . .").

[25] Chief among these are the expressive goals the criminal law serves. *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965) ("[Criminal] punishment is a conventional device for the expression of resentment and indignation, and of judgments of disapproval and reprobation."); 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."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 235 (1968) ("[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.").

[26] *See* Mihailis E. Diamantis, *Corporate Criminal Minds* 91 Notre Dame L. Rev. 2049, 2062-64 (2016); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1426 (2009) ("The label 'criminal' has a social significance aside from the particular punishment imposed on the offender."); Dan M. Kahan, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 609, 618-19 (1998) ("Just as crimes by natural persons denigrate societal values, so

unstable compromise, since the use of DPAs and NPAs, however necessary they may presently be, undermines these goals.[27] This Article will not rehearse the many arguments in favor of corporate criminal law; instead, it takes that area of law as a given and suggests how to improve it.

This Article argues that the stark choice leading prosecutors to decline prosecuting public corporations is an unnecessary feature of corporate criminal law. It does this by drawing attention for the first time to punishment theory as a potential source of problems and solutions for corporate prosecution decisions.[28] It pins the lion's share of the blame on the predominant deterrence-based approach that motivates lawmaking and the lion's share of legal scholarship on corporate punishment.

Without abandoning a broadly consequentialist perspective,[29] the Article points out that preventing corporate crime does not necessarily require deterring it. The Article does this by introducing character theory, and proposes it as a systematic approach for structuring corporate punishment.[30] An effort to punish corporations solely by reforming their

---

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.'"); *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.").

[27] *See also* Brown, *supra* note 16, at 1334-35 ("Prosecutorial declination is a species of lawmaking with expressive effects.").

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

[29] Some scholars think that consequentialism and virtue ethics are incompatible. *See, e.g.*, 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 virtue ethicists); *see also* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993). 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.

[30] 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 16, at 1313-14 ("A driving motivation of [the cooperative] approach is to reduce the 'psychology of resentment,' the prospect that firms and individuals confronted with inflexible commands and harsh punishments adopt a critical, non-cooperative posture toward compliance goals and enforcement personnel. . . . [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.").

character would avoid the need for DPAs and NPAs and ultimately do more to prevent corporate wrongdoing than deterrent approaches can. While some efforts to reform corporations through the criminal justice process are already underway, they are piecemeal and ineffective because they lack any coherent, coordinating theory. The distorting focus on deterrence continues to hamstrings those efforts. Fixing corporate character as the sole criterion for corporate punishment generates some surprising proposals, e.g. abolishing corporate fines, that this Article argues all concerned parties should welcome.

After detailing the problems retributivism (Part II) and deterrence theory (Parts III, IV, V) bring to corporate criminal law, the Article introduces character theory (Part VI) as an alternative. With the conceptual foundation set, the article shows the work character theory could do improving a diverse range or problems in corporate criminal law (Parts VII, VIII, IX). The article closes by assuaging concerns that may arise from the perspective of other theories of punishment; the character approach proposed here performs well by their metrics too (Part X).

II. The Retribution Ratchet

Retributivism plays an important role in the popular discourse about corporate criminality. This means it also plays an important role in politics and policy. Retributivists generally think that the justifying purpose of criminal law is to give criminals what they deserve.[31] According to retributivism, justice requires the punishment of wrongdoers,[32] in proportion to the severity of their crimes.[33] Corporations, by sheer virtue of their size and the centrality of their economic and social roles, are in a position to

---

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

[32] IMMANUEL KANT, METAPHYSICS OF MORALS § 49 E (Mary Gregor trans., 1991); IMMANUEL KANT, THE PHILOSOPHY OF LAW 196 (W. Hastie trans., 1887) ("The undeserved evil which anyone commits on another is to be regarded as perpetrated on himself."); *see* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (F. Schoeman ed., 1987) ("Retribution is the view that punishment is justified by the moral culpability of the one who receives it.").

[33] This principle has long history in retributive thought from the ancient lex talonis 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, e.g.*, ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993).

commit some of the most serious and devastating crimes.[34] And they do. Though it is only the roughest proxy (none better is available), the FBI estimates that the annual cost of white-collar crime in the United States is $300 billion to $660 billion.[35] By contrast, the annual cost of every other crime committed in the United States is around $15 billion.[36] While these dollar values only approximate the relative seriousness of the crimes corporations commit, the twenty-fold increase over the cost of street crimes is suggestive. Retributive proportionality should call for correspondingly harsh corporate punishments.

Retributive sentiments are plain in the popular press, and fuel public pressure on political actors to respond in kind.[37] In recent years, Occupy Wall Street was the largest popular expression of outrage at corporate conduct and demand for reform.[38] But Occupy was channeling a long-standing and pervasive public sentiment that corporations need to suffer in a big way for their crimes.[39] This common 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[40]—jurors respond much more harshly toward corporate defendants.[41]

---

[34] Beale, *supra* note 3, 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.").

[35] *See* RODNER HUFF, ET AL., THE 2010 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 21, *available at* http://www.fraudaid.com/library/2010-national-public-survey-on-white-collar-crime.pdf.

[36] *See* KATHRYN E. MCCOLLISTER, ET AL., THE COST OF CRIME TO SOCIETY: NEW CRIME-SPECIFIC ESTIMATES FOR POLICY AND PROGRAM EVALUATION (Apr. 1, 2010), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835847/.

[37] *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.").

[38] *See* Corporate Accountability International, *Occupy Wall Street Protests Bring Need for Greater Corporate Accountability into Focus* (Oct. 19, 2011), *available at* https://www.stopcorporateabuse.org/press-statement/occupy-wall-street-protests-bring-need-greater-corporate-accountability-focus.

[39] *See, e.g.*, Michael Pearson, *The Spill: How Much Should BP Suffer*, CNN (Nov. 28, 2012), *available at* http://www.cnn.com/2012/11/28/us/bp-suspension/; Editorial Board, WASH. POST, *Volkswagen Should Suffer the Consequences of Its Cheating*, Business Insider (Sept. 24, 2015), *available at* http://www.businessinsider.com/volkswagen-should-suffer-the-consequences-of-its-cheating-2015-9.

[40] *See* Mark A. Cohen, *Empirical Trends in Corporate Crime and Punishment*, 3 FED. SENT'G REP. 1, 5 (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.").

The retributivist approach to corporate punishment is relatively under-theorized. Despite its prominence in popular and political discourse, 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 the public moral condemnation.[42] Even scholars who are not retributivists acknowledge the impossibility of ignoring the social and political forces that embrace the capacity of criminal law to send this message about corporate crime.[43] According to these expressive theories, punishing corporations allows the community to communicate its stance on conflicts between, e.g., profit-seeking and fundamental individual and social rights.[44] Insofar as the community feels strongly about the high-dollar-value crimes that corporations commit, this expressive form of retributivism also calls for severe punishments as the vehicle for conveying the appropriate message.

---

[41] 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* Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries*, 20 L. & SOC. REV. 121 (1996).

[42] *See* Kahan & Nussbaum, *supra* note 16, at 352 (arguing that criminal punishment "conveys society's authoritative moral condemnation"); Friedman, *supra* note 16, 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."). 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 conduct.").

[43] *See, e.g.*, Baer, *supra* note 37, at 581 ("[W]e punish according to deeply ingrained feelings of moral outrage."); *id.* at 612 ("[C]orporate punishment is not likely to yield to corporate regulation any time soon. 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.").

[44] Kahan, *supra* note 26, 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.'"); *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.").

III. The Distortions of Deterrence

As a general rule, "[c]orporate criminal law . . . operates firmly in a deterrence mode."[45] In contrast to the retributive overtones of the public dialogue about corporate crime and punishment, scholars and policymakers overwhelmingly default to an unquestioning quest for deterrence. Those few who nod to other possible purposes, like expressive condemnation, often cash out the value of those in terms of their deterrent potential.[46]

This faith in deterrence as the right "mode" for thinking about corporate punishment is a mistake. Part of the motivation for many scholars is the impression that there is no other real alternative given the nature of corporations as collective entities. However much sense non-deterrent purposes may make for punishing individuals, the thought goes, they are conceptually inapplicable to corporations. The next Part, argues to the contrary, that there are other ways to think about corporate punishment. In particular, character-based approaches to punishment, with their emphasis on 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, for the first time, ties them jointly to their true source in deterrence theory. The argument is not intended as a knock-down repudiation of deterrence as a framework for setting corporate punishment policy. The hope is, at a minimum, 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 criminals (would-be and actual) as rational actors who are trying to maximize their utility.[47] The purpose of criminal punishment for deterrence

---

[45] Brown, *supra* note 16, at 1325; Huigens, *supra* note 29, at 5 ("[T]he discussion of white collar crime is carried out in terms of deterrence.").

[46] 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* Diamantis, *supra* note 26; Amy Sepinwall, *Guilty By Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411 (2012).

[47] *See* Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, *in* PROSECUTORS IN THE BOARDROOM 11, 14 (Anthony S. Barkow

theorists is to alter criminals' incentives by reducing the expected utility of committing a crime.[48] It does this by threatening the possibility of a sanction.[49] 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.[50] This expected loss, if it exceeds the expected gains, should deter criminal conduct.

The theory can apply equally to individuals, conceived as rational actors, and to corporations, also so conceived.[51] There may even be reason to think deterrence works better for corporate actors. Individuals are frequently subject to irrational drives that are relatively insensitive to expected disutility. Deterrence theorists have little helpful to say about crimes that result from such passions, urges, and psychoses. These 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. 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.[52]

The fact that corporations may respond to incentives more rationally than individuals does not mean that corporations never commit horrible crimes. Sometimes an irrational 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 are low enough, the gains from crime high enough, that crime is the economically rational

---

& Rachel E. Barkow, eds., 2011) (describing "the lens of an economic model in which corporate crime is the outcome of decisions of utility-maximizing individuals who have the ability to incur criminal liability on behalf of the corporation.").

[48] *Id.* at 11 ("The *threat of sanction* is central to the deterrence of corporate crime . . . .").

[49] *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.").

[50] *Id.* at 20-21 ("Detection and sanctions are substitutes in the production of deterrence. . . . An enforcement authority can thus compensation for a tight budget (and thus lower rate of detection) by aggressively seeking higher sanctions without significant loss of general deterrence in this framework.").

[51] *Id.* at 20-21 ("Instead of focusing on individual actions, we can consider crime as the outcome of company-level decisions.").

[52] Meir Dan-Cohen, *Sanctioning Corporations*, 19 J.L. & POL'Y 15, 24-27 (2010) (discussing the "practical personality" of corporations).

choice.[53] In these cases, deterrence theorists would say that the expected sanction should be higher. The task for deterrence theorists is to hit on 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 hitting on the right balance between the two. Its premises are value neutral. 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. But there are also problems for deterrence theory when it comes to corporations. Some of these are unique to the corporate context, and some are just more pronounced there.

1. Punishing the Innocent

A corporation "has no soul to damn, no body to kick."[54] 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.[55] Corporations have no bodies to imprison or flog, the thinking

---

[53] There is data suggesting that crime generally is 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 17, at 176-188 (2013).

[54] JOHN MICKELTHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY 33 (2003) (quoting Baron Thurlow, Lord Chancelor of England, 1792).

[55] *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 CORNELL L. REV. 310, 350 (2003) ("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.").

goes, so fines must be the only way to punish them.[56] And this leads naturally to conceiving of corporate punishment in terms of deterrence, the customary purpose of fines.

But what fine-focused theorists often neglect is 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. But 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 or are affected by it. Even theorists who reify corporate 'interests'[57] 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 of furthering the deterrent enterprise if it were possible to fine the corporation in a way that affected only or primarily the individuals within it responsible for criminal conduct.[58] But three problems present themselves. First, the whole point of *individual* criminal law is to get the individual criminals; corporate criminal law seems like a clumsy tool to try to do this. Second, there may not always be individual criminals when a corporation commits a crime.[59] 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.[60]

---

[56] *See* 18B AM. JUR. 2d *Corporations* § 1845 (citing *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909)) ("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.").

[57] Some do hold a different position. *See, e.g.*, [Pettit].

[58] *See* Alexander & Cohen, *supra* note 47, at 14(Anthony S. Barkow & Rachel E. Barkow, eds., 2011) (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 crime among those individuals. . . . The challenge remains in distinguishing [them].").

[59] *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 be legally difficult to directly tie the individual decisions and related behavior to [the crime].").

[60] *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1984) (finding corporation violated currency transaction reporting obligations, even though no individual violated the obligations).

Third, corporate fines, the presumptive deterrent tool, draw on general corporate coffers, so they harm individual wrongdoers (when they exist) and innocent parties alike.[61] 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. So they truly are innocent.

Fines impact other innocent parties too, even more removed than shareholders from any kind of power to control the corporation. Corporate creditors for one, whose corporate notes are less valuable because of the increased risk of corporate default. Employees in corporate divisions remote from the division that committed the crime are in no better position. Lastly, as commercial entities, corporations may have the option of passing the brunt of 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.[62] But this 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 realizing the ill-gotten gains. This leaves the innocent new share purchasers to foot the bill of later fines. Second, there is evidence that corporate crime on balance lowers share value, even before detection.[63] If that is right, there are 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 the *victims* of the corporation's crime.

---

[61] *See* Alschuler, *supra* note 55, at 1366-67 ("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.").

[62] *See* Beale, *supra* note 3, at 1484-5 ("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.").

[63] 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). *See, e.g.*, *United States v. Sun Diamond Growers of California*, 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).

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.[64] But this power in theory rarely reflects power in fact. Shareholders are a dispersed group with divergent interests, making coordination difficult. Even when coordinated, shareholder power to influence board member decisions or composition is limited; their power to influence managers even more so.

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: "It 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."[65] But there are important differences. Unlike individual punishment, there is no light between the corporate punishment and at least some of the collateral effects on innocent third parties. When an individual is jailed, his friends and family are affected as a result of the reduced role he can play in their lives. But corporations are fined *just by* reaching into portfolios of shareholders. This difference masks 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 below that character theory offers a ready way to accomplish it for corporations.

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.[66]

---

[64] Alexander & Cohen, *supra* note 47, at 18 ("Even if owners may have no direct contact with criminal behavior, they have rights to intervene in the internal governance of the corporation in ways that can affect the occurrence of crime.").

[65] Beale, *supra* note 3, at 1485-86.

[66] Alexander & Cohen, *supra* note 47, at 24 ("There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect . . . .").

2. Pricing Crime

One common concern about deterrence theory as applied to individuals is that it encourages an unacceptable picture of criminal conduct.[67] The whole point of punishment on deterrence theory is to raise the stakes of committing crimes in order to disincentivize would-be criminals. 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 commonplace, 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. Individuals 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. But 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 their incentives, i.e. threatening their bottom dollar. This is exactly what fines, the go-to corporate punishment for deterrence theorists, are designed to do. Fines translate the cost of the crime directly into economic terms. So, while a public narrative exists 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 price on the non-economic interests that corporate criminal conduct often puts at stake. Consider the widespread moral outrage when the public discovered that Ford, on the basis of economic calculations, 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. We should be hesitant to adopt a framework for criminal punishment that the public broadly rejects.[68]

---

[67] *See* Kahan, *supra* note 26, at 619 ("[F]ines . . . connote that society is 'pricing' corporate crime.").

[68] *See also* 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).

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. Deterrence theory is grounded in a single, simple equation—the size of the fine times the probability of detection should be greater than the benefit the criminal expects from committing the 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 way,[69] 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.

A second reason deterrence theory requires high corporate fines is more complex, but no less avoidable given the theory's commitments. For-profit corporations necessarily try to lower their costs, including the potential costs of fines. To do this, 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. But what deterrence theorists often neglect is that corporations also have another option—reduce the probability of detection by investing in concealment. 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.

Of course, 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 individual fine to make up for the decreased probability

---

[69] Alexander & Cohen, *supra* note 47, at 20-21 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011) ("Detection and sanctions are substitutes in the production of deterrence. . . . An enforcement authority can thus compensation 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 16, 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 the severity of punishment, rational offenders should reduce their misconduct.").

of detection. If done right, corporations should expect no net gain from concealment.

But the response can only go so far. Fines may not be fixed, but they are capped.[70] If corporations had indefinitely deep pockets, deterrence theory could plug along as intended. But 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 assets, every additional investment in concealment shoudl result in a net expected gain to the corporation.[71] 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 discussed in the previous section, social and political constraints limit fines far below a level that would drive corporations out of business.[72] Endangering a corporation with high fines risks the jobs of innocent employees and the life savings of innocent shareholders. Since the effective fine cap is lower, it is 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.

IV. Problems in Practice: DPAs and NPAs

Things always get more complicated when theory is put into practice. The opposing pressures described in the previous sections—to raise fines 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

---

[70] Khanna, *supra* note 21, at 231 ("Generally, the deterrent effect of cash fines is tapped out when the firm has no further assets to attach . . . .").

[71] Assuming small enough implementation costs.

[72] Khanna, *supra* note 21, 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 . . . .").

trying to devise ways to hold corporations accountable without subjecting them to that punishment. This effectively cuts the judiciary out of the adjudicatory process.

The criminal punishment corporations face has increased over the years. When first subject to the criminal law, corporations were punished under the same rubric that applied to individuals. If the sentence included a fine, a corporation would pay the same fine as an individual. However, if the sentence also involved jail time, courts would ignore that portion of the sentence for corporations. The widespread perception was that this was insufficient to deter corporate crime. Even assuming the punishments were properly calibrated to deter individuals, without the jail time and without accounting for the increased profit-potential of corporate crime, the critics had to be right. Congress responded in 1984 with the Sentencing Reform Act, which resulted in separate Organizational Sentencing Guidelines with significantly higher fines.

But Congress did not stop there. In addition to punishment under the sentencing guidelines, civil statutes frequently mandate that convicted corporations automatically lose licenses or other business privileges, like contracting with the government. In many sectors—like healthcare, accounting, and financial services—this can mean financial death. Since these civil consequences follow automatically upon conviction, it is impossible to punish corporations in these lines of business without killing them.[73] While these consequences may technically be civil, they are functionally indistinguishable from criminal punishment.[74]

These stark options—between keeping suspected corporate criminals out of the courtroom entirely and risking a ruinous conviction—naturally influence prosecutorial strategy.[75] As discussed, innocent third parties bear the brunt of corporate punishment, and the consequences for

---

[73] Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM 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.").

[74] *See* Antony Duff, *Legal Punishment*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2013), *available at* 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.").

[75] Epstein, *supra* note 24, 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. Thompson, *supra* note 2.

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.[76] The Department of Justice's standing orders to prosecutors are to be ever mindful of the possibility of entity-wide criminal liability.[77] But those orders now include a directive to consider the appropriateness of "resolv[ing] a criminal case against a corporation without a formal conviction."[78]

Prosecutors take this directive seriously. They now routinely keep large public corporations out of the courtroom entirely by entering into agreements, which delay (Deferred Prosecution Agreements) or completely suspend (Non-Prosecution Agreements) prosecution in exchange for negotiated conditions. As a result, public corporations can foreclose any possibility of conviction, whether by trial or by plea,[79] and thereby avoid the devastating consequences that automatically follow.

Scholars have extensively critiqued the use of DPAs and NPAs on a wide variety of grounds:

- DPAs and NPAs are not as visible as courtroom convictions. Unlike sentences entered by a court, there is no public repository for these agreements. Private individuals, like Professor Brandon Garrett, have created impressive collections of them,[80] but some DPAs and NPAs are simply unavailable.

---

[76] *See, e.g.*, 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 (noting that decision to decline prosecution was made out of concern for "protecting innocent workers and others from the consequences of conviction.").

[77] *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Just, to Heads of Dep't Components and U.S. Attorneys on Principles of Fed. Prosecution of Bus. Orgs. (Jan. 20, 2003).

[78] *See* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components and U.S. Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), *available at* https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

[79] *See* Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM 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.").

[80] *Federal Organizational Plea Agreements*, *available at* http://lib.law.virginia.edu/Garrett/plea_agreements/home.php.

This kind of secrecy compromises prosecutorial accountability and the coherence of enforcement strategy.[81]

- The constitutionally limited role of prosecutors is to help the President "take care that the laws shall be faithfully executed."[82] The power to decide cases is vested with the courts,[83] and the legislative power to set sentencing policy lies with Congress.[84] DPAs and NPAs cut the judiciary and legislature out of the process by trying and punishing large public corporations on terms set entirely by the executive. This raises separation of powers concerns.[85]
- DPAs and NPAs are complex agreements negotiated on a case-by-case basis with corporations. In addition to fines, they can include a range of structural[86] and reporting obligations. Though there is a lot of room for individual tailoring and variation, there is very little coordination between prosecutors, horizontally or vertically, to ensure some consistency of approach. The uncertainty and potentially differential treatment corporations face as a result raises rule-of-law problems.[87]
- Prosecutors are not totally disinterested parties in negotiations over DPAs and NPAs. For example, the DOJ may receive a share of fines imposed under the agreements[88] and prosecutors can force corporations to appoint their friends to plush positions for implementing the agreement.[89] This potential for self-dealing

---

[81] Lisa Kern Griffin, *Inside-Out Enforcement*, *in* PROSECUTORS IN THE BOARDROOM 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.").

[82] U.S. Const. Art. II, sec. 3.

[83] U.S. Const. Art. III, sec. 1.

[84] U.S. Const. Art. I, sec. 1.

[85] Barkow & Barkow, *supra* note 21, at 1-2 (expressing separations of powers concerns over use of DPAs and NPAs).

[86] *See* Barkow & Barkow, *supra* note 21, at 3 ("Using DPAs,] prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance.").

[87] Arlen, *supra* note 19.

[88] *Id.*

[89] *See, e.g.*, Press Release, House Judiciary Committee, Conyers and Sanchez Demand Ashcroft Testimony about $52 Million No-Bid Contract (Jan. 30, 2008), *available at* http://judiciary.house.gov/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).

is especially problematic given that prosecutors wield a heavy hammer—the threat of a conviction that guarantees ruin.

- Lastly, many people critique details of the terms used in DPAs and NPAs. Some suggest, for example, that the fines imposed under the agreements are too low,[90] that the structural reforms required are too onerous, or that there is too little official oversight of required reforms.

These bullets are just the roughest sketch of some of the practical problems DPAs and NPAs raise. The point is not to repeat the detailed criticisms of other scholars, but to catalogue some of the various difficulties that reforms to the current system should address.

V. Solutions Already on the Table

The scholars who raise the concerns with DPAs and NPAs listed in the previous section do offer solutions. For the most part, their focus is limited by the scope of their concerns. From the wider-ranging perspective taken in this article, their approach seems piecemeal. Jennifer Arlen, in response to the rule of law concerns, suggests that the DOJ should develop more detailed guidelines to harmonize prosecutors' approaches to DPAs and NPAs. Scholars worried about separation of powers propose giving courts a role in approving DPAs and NPAs. And those troubled by the infrequent use of corporate monitors simply propose wider use.

A more comprehensive and theoretically uniform approach is preferable. The second half of this article offers one such strategy. It is not the first to make the attempt. More sweeping proposals have advocated for the whole-hog abolition of corporate criminal law.[91] Samuel Buell offers an 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.[92] Buell proposes

---

[90] *See, e.g.*, Drew Harwell, *Why General Motors' $900 Million Fine for a Deadly Defect is Just a Slap on the Wrist*, Washington Post (Sept. 17, 2015), *available at* 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/.

[91] *See, e.g.*, Fischel & Sykes, *supra* note 24, at 319 ("We argue that there is no need for corporate criminal liability in a legal system with appropriate civil remedies . . . ."); Khanna, *supra* note 11.

[92] Brown, *supra* note 16, at 1327-29 ("Parallel statutory regimes providing civil and criminal sanction for essentially the same conduct exist in virtually every area of white-collar

scrapping corporate criminal enforcement, and replacing it with more robust[93] forms of civil enforcement.[94]

But 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 really only have two—surrender to purely civil enforcement or work outside the justice system entirely through DPAs and NPAs. Pursuing criminal charges is off the table; Buell's proposal would not change that.

Nor is abolishing corporate criminal law even feasible as a practical matter in the current political climate.[95] Much of the electorate already feels corporations are not held sufficiently accountable for their crimes. Admittedly, a complete overhaul could, in theory, arm up the civil process so it could impose many of the same sanctions as are available under the criminal law. But, even assuming away any constitutional worries doing so could raise,[96] going the purely civil route would undermine what many think is the distinguishing purpose of criminal law: to provide society with a means of expressing its collective condemnation of certain conduct.[97] Civil sanction—which applies equally to regular tort and contract claims as it would to criminal conduct under Buell's proposal—cannot carry the same

---

wrongdoing, including health care fraud, environmental harms, workplace safety, and securities law.").

[93] Buell, *supra* note 79, at 90 ("[T]hese 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.").

[94] *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.").

[95] Baer, *supra* note 37, at 612 ("[C]orporate punishment is not likely to yield to corporate regulation any time soon. 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.").

[96] *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 (1991) [quote].

[97] *See* Feinberg, *supra* note 25; Cass R. Sunstein, *The Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024, 2044-45(1996) ("The criminal law is a prime arena for the expressive function of the law . . . ."); Kahan & Nussbaum, *supra* note 16, at 352 ("[Criminal punishment] conveys society's authoritative moral condemnation" and "reaffirms its commitment to the values that the wrongdoer's own act denies."); STEPHEN, *supra* note 25, 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.").

expressive force.[98] A move to civil liability would further exacerbate the perception, discussed above, that crime is being priced rather than prohibited.[99] Buell himself elsewhere acknowledges the importance of criminal law's distinctive expressive force.[100]

Another comprehensive solution is possible—character theory. This alternative offers the prospect of solving the problems discussed above without undermining the important goals a well-functioning corporate criminal law should serve. Before going into details, some conceptual groundwork is needed.

VI. Corporate Character

Theories of punishment, which define themselves in large part by their view on the purpose of punishment,[101] are typically built around one of three comprehensive moral philosophies.[102] Retribution and deterrence

---

[98] Henry M. Hart, *The Aims of Criminal Law*, 23 L. & 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."); Friedman, *supra* note 16, at 846 ("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.").

[99] Kahan, *supra* note 26, at 619 ("[C]ivil damages seem to connote that society is 'pricing' corporate crime.").

[100] Buell, *supra* note 46, 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 79, 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.

[101] 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.*, Ekown Yankah, *Liberal Virtue, in Law, Virtue and Justice, in* LAW, VIRTUE AND JUSTICE 169, 169 (Ho Hock & Amalia Amaya, eds., 2012) ("Proponents of virtue jurisprudence . . . argue that a virtue-centered theory of law better justifies and explains important parts of law.").

[102] Huigens, *supra* note 29, at 9-10; MARCIA W. BARON, ET AL., THREE METHODS OF ETHICS: A DEBATE (1997).

theories are most familiar to modern readers.[103] Retributivists, which ally themselves with deontological moral theories, typically say that the purpose of punishment is to give a criminal what he deserves. And deterrence theorists, coming from the perspective of consequentialist moral theories, say the purpose is to deter future crimes.

Though these two theories currently enjoy the limelight, character theories of punishment[104] (also commonly called "virtue ethical" or "aretaic" theories) predate them by far[105] and maintain a marginal presence.[106] According to character theory, the purpose of punishment is to cultivate virtuous character traits, both in the convict and the community.[107] Character theorists sometimes mean different things by "character," but the most common understanding is dispositional. On this account, a character trait is a stable[108] disposition to behave in some way, e.g. honesty is the disposition to tell the truth.[109] Working with this technical definition,

---

[103] *See* Yankah, *supra* note 101, at 169 ("[N]ormative legal philosophy has been [mostly] dominated for a generation by intricate debates between deontological and consequentialist theories.").

[104] 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 measures keys the level of punishment deserved to the defendant's character).

[105] Amalia Amaya & Ho Hock Lai, *Of Law, Virtue and Justice – An Introduction*, *in*, *in* LAW, VIRTUE AND JUSTICE 1, 1 (Ho Hock & Amalia Amaya, eds., 2012) ("Virtue Ethics ahs its origins in Classical Greece and it was the dominant approach in western moral philosophy until the Enlightenment.").

[106] 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 Green, eds., 2011). *But see* Duff, *supra* note 74 (mentioning virtue ethics only in passing).

[107] *See* R.A. Duff, *Virtue, Vice and the Criminal Law – A Response to Huigens and Yankah*, *in* LAW, VIRTUE AND JUSTICE 195, 196 (Ho Hock & Amalia Amaya, eds., 2012) ("We could . . . use criminal law and punishment as ways of directly fostering virtue and preventing vice."); Huigens, *supra* note 29, at 19 ("[T]he 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."). The account of character theory that I offer is broadly Aristotelian, but the world of character theory is far from limited to that. *See* Amaya & Lai, *supra* note 105, at 6.

[108] *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.").

[109] *See* Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 42-44 (1989); Sendor, *supra* note 42, at 100 ("[B]ad character in this context means a settled disposition . . . to commit acts that violate the law." (internal quotation marks and 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*

character theorists of criminal punishment see a very narrow set of character traits as appropriate to triggering the involvement of the criminal justice system: the dispositions relevant to criminal behavior.[110] In this regard, they are generally less concerned with other socially desirable character traits, like the disposition to be a good friend; deficiency in these 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 undermine good character traits in their effort to stamp out the bad.[111] In short, character theories of punishment say the state should design punishment so as to rid 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.

Many people find character theories intuitively appealing. Even setting aside philosophical arguments in their favor aside, this is unsurprising. For one thing, there is an 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.[112] If criminal punishment should be responsive to these ordinary moral

---

note 29, at 12 ("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; 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 BUFFALO CRIM. L. REV. 147 (2002).

[110] *See* Duff, *supra* note 107, at 204 ("It 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.'"); R.B. Brandt, *A Motivational Theory of Excuses in the Criminal Law*, 27 NOMOS 165, 174 (1985).

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

[112] *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 in the process of administering blame for that actor's harmful action.").

assessments,[113] the character theoretic approaches to punishment should be attractive candidates.

A. Descriptively[114] Inadequate?

Despite their intuitive appeal, character theories are not widely accepted among scholars. One common criticism character theory faces is that it seems to be in tension with a basic tenet of criminal law: character evidence is inadmissible to prove guilt.[115] The concern behind that rule of evidence is the psychological phenomenon of "motivated inculpation." This is the common process by which character evidence can influence fact finders to stray away from strictly applying the elements defined by statute.[116]

---

[113] 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."); ROBINSON, *supra* note 17, at 176-188 ("[T]he criminal law's moral credibility is essential to effective crime control . . . ."); Kyron Huigens, *Motivating Intentions, Reciprocal Specification of Ends and the Assessment of Responsibility*, *in* LAW, VIRTUE AND JUSTICE 155, 163 (Ho Hock & Amalia Amaya, eds., 2012) ("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 social benefits that are thought to justify criminal punishment."); Hart, *supra* note 25, at 25.

[114] 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.

[115] 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."); Fed. R. Evid. 404(b) ("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 112, 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."). 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 29, at 11 (2002) ("[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)).

[116] *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, REC. & STUDIES 615 (1964) ("[Character evidence] subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."); Nadler & McDonnell, *supra* note 112, at 258 ("We are more likely to find that the harmful action of a bad person

They may be, for example, 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?

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.[117] 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, and of particular relevance to virtue ethics, while character evidence may not be admissible at trial, large parts of it are admissible at sentencing.[118] So

---

satisfies the statutory elements of a crime and in turn, is worthy of criminal condemnation and punishment."); Alicke, *supra* note 112, at 569-71.

[117] Virtue ethicists themselves make this unjustified assumption. *See, e.g.*, Huigens, *supra* note 29, at 1 (2002) ("[C]onsequentialist punishment theory of any kind has a significant drawback" it has no plausible conception of criminal fault."); Huigens, *supra* note 113, 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, which may be one source of the misunderstanding. *See* FLETCHER, *supra* note 104, § 10.3.1 (1978); RICHARD B. BRANDT, ETHICAL THEORY 465-74 (1959); NICOLA LACEY, SATE PUNISHMENT (1988); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 381-84, 394-96 (1981); Duff, *supra* note 107, at 196 ("The suggestion 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, *supra* note 42, 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 or innocence has a different purpose from the determination of punishment."); and Duff, *supra* note 107, at 204 ("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.").

[118] *See* Sendor, *supra* note 42, at 99 (noting "two basic principles of modern American criminal law: (1) . . . the defendant's character is not an element of guilt[, and] (2) . . . the

even if character theory is not the correct way to characterize the purposes of trial, it may be the right way to characterize the purposes of punishment. Of course, the liability and sentencing phases, whatever their purposes, should not undermine each other. But some different purpose for liability, perhaps fulfilling certain expressive aims,[119] could work in congenial tandem with a character-focused purpose for punishment.

B. Problematic for Individuals

The normative challenges to character theory are more concerning. To date, scholars have applied character theory exclusively to the punishment of individuals, and, in that context, it faces some formidable challenges.

Reforming the character defects of convicted criminals is one central concern of character theory. But there is a mounting body of evidence that adult character is not amenable to reform 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.[120] Others doubt more generally whether it is possible at all for adults to change their character in meaningful ways.[121] To borrow a well-known proverb,

---

sentence can consider the defendant's bad or good character . . . ."). The Sentencing Guidelines specifically mention "character" as one of the considerations relevant to sentencing. U.C.S.G. § 1B1.3 & cmt. ("[Judges may] consider, without limitation, any information concerning the background, *character* and conduct of the defendant, unless otherwise prohibited by law." (emphasis added)).

[119] *See* Diamantis, *supra* note 26. 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"); C.L. Ten, *Positive Retribution*, 7 SOC. PHIL. & POLICY 195, 200 (1990) ("Condemnation can be expressed by a system of purely symbolic punishment. In any case, the verdict of the court already expresses condemnation.").

[120] *See* Russ Shafer-Landau, *Can Punishment Morally Educate?*, 10 L. & PHIL. 189, 200 (1991) ("It remains unlikely that being put behind bars . . . will bring about moral change."); Ten, *supra* note 119, at 195 ("[A criminal may be] unrepentant, and it [could be] unlikely that punishment will change him. This might, as we shall see, create a problem for those who think that the justifying aim of punishment is the moral reform of the offender."); *id.* at 203 ("[T]he choice of imprisonment is in itself no guarantee of genuine repentance . . . .").

[121] Moore, *supra* note 109, at 45 ("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.").

"Old habits die hard."[122] 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."[123]

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 nineteenth century, the states adopted several measures to move from a retributive to a rehabilitative approach to law enforcement.[124] The effort continued well into the twentieth century.[125] But by the 1970s, the law began shifting again, largely because of the overwhelming sense that rehabilitation was not working.[126] One sociological survey at the time found that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have no appreciable effect on recidivism."[127] Rehabilitation is now officially off the table as a legitimate factor in setting prison terms.[128]

Even if penologists did discover some technology for reforming criminal character, character theory faces significant ethical concerns. Primary among those is that forcing criminal to change their character would offend their fundamental dignity and autonomy interests.[129] Anthony

---

[122] *Mick Jagger, Old Habits Die Hard* (Interscope 2004).

[123] ARISTOTLE, NICOMACHEAN ETHICS 1114 a ll. 12-21 (David Ross, trans., 2009). Some interpreters attribute to Aristotle the view that "moral reform is possible, although difficult." *See* Muzio, *supra* note 108, 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.

[124] *See* Alshuler, *supra* note 119, at 2-6.

[125] *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals."); FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 8 (1982) (reporting a poll finding seventy-two percent of people thought the primary purpose of the prison system should be rehabilitation).

[126] *See* Alshuler, *supra* note 119, at 10 ("The demise of rehabilitation was attributable less to jurisprudential reflection than to apparent empirical failure."). Some 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 Center Court Movement*, 76 WASH. U. L.Q. 1205, 1218-45 (1998).

[127] Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22, 25 (1974).

[128] *See* 18 USC 3582(a) ("[I]mprisonment is not an appropriate means of promoting correction and rehabilitation."); 28 USC 994(k); 18 USC 3582(a).

[129] 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' theory rejects] any response that

Burgess' 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."[130] Arguments by some character theorists that character reform is unobjectionable because it is for the "good" of the convict[131] have not found much purchase with critics.

C. Corporate Character

The notion of character is easily adapted to the corporate case. Since character is just a disposition to behave in a certain way, all that is needed is a concept of corporate action. Since shortly after the Civil War, U.S. courts have relied on the doctrine of respondeat superior to determine what acts a corporation has performed, in both civil[132] and (later) criminal contexts.[133] According to that doctrine, courts will attribute to a corporation any action that any employee does "within the scope of employment [and] with the intent to benefit the corporation."[134] Working with 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."); Huigens, *supra* note 29, 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.").

[130] ANTHONY BURGESS, A CLOCKWORK ORANGE (1962). *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 to choose are not appropriate educative techniques.").

[131] *See, e.g.*, Morris, *supra* note 129, at 264 ("[A] paternalistic theory of punishment will naturally claim that a principal justification for punishment and a principal justification for restrictions up on it are that the system furthers the good of potential and actual wrongdoers.").

[132] *See* 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); Mark M. Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory*, 50 U. PITT. L. REV. 575, 594-95 (1989); JOHN W. SALMOND, THE LAW OF TORTS 57-58 (3d ed. 1912); *see, e.g., Philadelphia, Wilmington, and Baltimore R.R. Co. v. Quigley*, 21 How., 62 U.S. 202, 209-10 (1859); *Philadelphia & Reading R.R. Co. v. Derby*, 55 U.S. 468, 486-87 (1852); *The Scotland*, 105 U.S. 24, 30-31 (1881).

[133] *See, e.g., Hudson River R.R.*, 212 U.S. at 494-96; *see* COX & HAZEN, *supra* note **Error! Bookmark not defined.**, § 8:21 ("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.").

[134] *Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction,* 92 HARV. L. REV. 1243, 1247 (1979); RESTATEMENT (THIRD) OF

understanding of corporate action, corporate character is an organizational trait that disposes a corporation's employees to behave in some way.[135]

For this conception of corporate character to get off the ground, it is crucial to recognize the important significant, sometimes determinative, impact that an organization can have on the way individuals (regardless of their individual character) within it behave. Organizational theorists have long recognized that corporate-level features—corporate culture, process and procedures, compensation rubrics, etc.—influence how employees behave.[136] For example, a corporation that provided its employees incentives, whether informal recognition or compensation based, to engage in pro bono work would probably, thereby, dispose its employees to do the same. This corporation would count as having a charitable disposition. Organization-level features can also impact the sorts of behaviors that employees avoid, e.g. the likelihood that they will commit crimes.[137]

Some scholars, particularly business ethicists, have discussed a related notion of "corporate character" or "corporate virtue." But their understanding of the concept is importantly different from that employed here. They see corporate character as a matter limited the corporate culture or ethos among employees.[138] Corporate ethos certainly can impact

---

AGENCY § 2.04 ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment."). This article does not claim that this jurisprudence has settled on the optimal conception of corporate action, and readers should feel free to substitute their own.

[135] Alternative conceptions of corporate action would lead to somewhat different definitions of corporate character, and this article means to be neutral between them. So long as we have some understanding of corporate action, a dispositional account of corporate action can get off the ground. The disposition of most immediate concern in this article is the disposition to violate a criminal law.

[136] *See, e.g.*, FIONA HAINES, CORPORATE REGULATION 25 (1997) (Organizational theorists say "[o]rganizational culture forms the 'touchstone' by which individuals behave and act.").

[137] Alexander & Cohen, *supra* note 47, at 18 ("[T]he corporation can influence the probability of internal detection and punishment.").

[138] *See, e.g., Crim. Code. Act of 1995* (Cth) 12.3(2)(c) (Austl.) (allowing for the satisfaction of intentional or reckless mens rea elements if "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision"). Pamela Bucy's notion of corporate ethos perhaps comes closest to the notion of corporate character used in this paper. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099-101 (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). Corporate character, however, could be impacted by factors that are not on Bucy's short list.

how employees are disposed to behave, and, hence, how corporations are disposed to behave.[139] But 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 corporate ethos otherwise encourages it.

With an understanding of corporate character in place, the conceptual space opens up for a theory of punishment that aims at improving corporate character. The following part offers many more details for what a character theory of corporate punishment might look like in practice. For now, the conceptual space needs some defending from the challenges character theory has faced to date.

Many of the hurdles character theories of punishment encounter in the context of individuals 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;[140] none has applied the concept in any meaningful way to corporations.[141] Legal scholars have broached the topic of corporate dignity only to reject it.[142]

Furthermore, we know it is possible to alter corporate character, and have a decent sense of how to do it.[143] Scientists are just beginning to

---

[139] Bucy, *supra* note 138, at 1099 (discussing how corporate ethos can "encourage" employee behavior).

[140] *See* Robin S. Dillon, *Respect*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., 2015), Edward N. Zalta (ed.), *available at* http://plato.stanford.edu/archives/fall2015/entries/respect/ ("Most philosophical discussion of [dignity] has focused on [dignity of] persons.").

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

[142] *See, e.g.*, AAHRON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 140 (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 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.").

[143] Buell, *supra* note 79, 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.").

understand the neurological basis for individual character[144] and have little to no idea about whether and 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. That is the idea behind one of the fastest growing areas of legal practice: compliance.[145] By definition, compliance programs seek to prevent corporations from violating the law.[146] In general, the sorts of techniques they employ 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."[147] And it is mostly common ground among academics and policymakers talking about corporate punishment that there are reliable ways to impact corporate character. It is part of the very logic of deterrence-based theories of corporate punishment, which seek to incentivize corporations, through the threat of economic penalties, to implement programs to prevent future wrongdoing. The whole deterrence enterprise would be in vain if no one knew which sorts of compliance programs have some prospect of success.

Aspects of corporate character (though not by that name, nor systematically theorized) are not totally foreign to courts and prosecutors. The Organizational Sentencing Guidelines provide reduced fines for corporations convicted of crimes if they can demonstrate that they have effective compliance and ethics programs.[148] They also provide enhanced fines for corporate recidivists evidencing firmer criminal dispositions.[149] Further, at least on one interpretation, part of what prosecutors are trying to accomplish through the terms they impose in DPAs and NPAs is to correct

---

[144] *See generally* CHARLES DUHIGG, THE NEUROSCIENCE OF HABITS: HOW THEY FORM AND HOW TO CHANGE THEM (2012).

[145] Gregory J. Millman, *Compliance Officer: Dream Career*, WALL STREET J. (Jan. 15, 2014), *available at* http://www.wsj.com/articles/SB10001424052702303330204579250722114538750 ("In a U.S. economy struggling to create jobs, at least one field is booming: compliance.").

[146] Baer, *supra* note 23, at 956 ("'Compliance' is a system of policies and controls that organizations adopt to deter violations of law . . . ."); 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.").

[147] Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 467 (2008)

[148] U.S. SENTENCING GUIDELINES MANUAL §8B2.1.

[149] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(c)(1) (providing sentencing enhancements if a corporation has engaged in "similar conduct" within the prior decade).

corporate character.[150] As discussed below, there are many reasons to think that prosecutors are not in the best position to implement these reforms.[151] In any case, the current reform efforts, such as they exist, are hampered by an undeveloped and ultimately inconsistent theoretical framework that tries to fit in reform as a puzzling alternative to punishment (understood in terms of deterrence).

Some scholars have voiced the concern that efforts at corporate reform are misguided because courts, prosecutors, and even compliance professionals themselves do not know enough about what works and what is wasted effort. While corporate compliance technology is certainly incomplete, there is little reason to despair yet. The widespread use of DPAs and NPAs is one factor slowing the development of such technology because the prevent the build up of the most obvious source of data—a public repository of reforms implemented and corporate recidivism rates. As discussed below,[152] with a turn from deterrence to character as the framing concern for corporate punishment, just such data about best practices will come as a natural byproduct of sentencing jurisprudence.

VII. Cultivating Corporate Character Through Punishment

This Part develops the details of character-based approach to corporate punishment. The gist is that sentencing officials should be sentencing corporations with an eye *exclusively* to character improvement. 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.[153] 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's sole aim.[154]

---

[150] Garret, *supra* note 18, at 157 ("[DPAs and NPAs] typically require that a firm adopt a compliance program, retain an independent monitor, admit guilt, and cooperate with an investigation or prosecution of current or former employees. The overriding goal of the agreements is the institutional reform of the target firm . . . .").

[151] *See infra* Part VIII.

[152] *See infra* Part VIII.

[153] *See* Baer, *supra* note 37, 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* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 172-80 (1968).

[154] This Article thus diverges, at least in the corporate case, from the many scholars who think that criminal law should serve multiple ends. *See, e.g.*, Huigens, *supra* note 29, at 4.

Shifting to a character-first approach entails some fundamental shifts in the criteria for punishing corporations, both whether and how to punish. Many corporations that should be punished under deterrence or retribution theory would receive none under character theory. Furthermore, character theory calls on judges and prosecutors to abandon many of the punitive methods currently in play. Some of the 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 (discussed below) is the only recommendation that would require legislative intervention. 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 corporate crime should sometimes go unpunished. Recall that character is a *stable* disposition to behave in a certain way. Not all behavior reflects stable dispositions of the actor. Some behavior is "out of character." 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 example, if a rogue employee commits a crime (attributable to the corporation via respondeat superior) and is immediately fired. The corporation who fires the rogue may thereby have eliminated the chance that the criminal conduct would recur. If the corporation is in no need of reform, there is nothing for character-directed punishment to do. 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 tied to a deeper disposition.

(describing the "diverse ends of criminal law, including deterrence, retribution, public catharsis over wrongdoing, and the public expression of essential norms").

One way to think about the relationship between corporate crime and corporate character is to ask whether the occurrence of the crime is best explained as the work of an organizational defect or the product of some temporary circumstance.[155] If a product of circumstance, then the criminal conduct may not reflect bad corporate character. In those circumstances,[156] there is nothing for criminal law to do at the corporate level since there is no organizational defect to fix and little chance of the crime recurring.[157] However, if the crime is better understood in terms of something more programmatic or a corporate organizational vulnerability, it is more likely to indicate a stable, criminal disposition in need of reform.

The criminal justice system does currently allow prosecutors to consider several factors relevant to the issue of corporate character. For example, the DOJ guidance on charging decisions refers to[158]:

- "[T]he pervasiveness of the wrongdoing within the corporation, including complicity in, or condonation of, the wrongdoing by corporate management"
- "[T]he corporation's history of similar conduct"
- "[T]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents"

---

[155] This aligns with how character theorists think about the relationship between action and character. *See* Moore, *supra* note 109, at 47-48 ("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 110, 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 113, 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.").

[156] 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.").

[157] Brandt, *supra* note 110, 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.

[158] Thompson, *supra* note 2.

- "[T]he existence and adequacy of the corporation's compliance program"
- "[T]he corporation's remedial actions, including any efforts . . . replace responsible management, to discipline or terminate wrongdoers"

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, or hierarchy.[159]

Though these are exactly the sorts of considerations character theorists would weigh, their appearance in the DOJ guidelines is inadequate in several respects. To begin, consideration of the character-directed factors are merely discretionary, meaning prosecutors could decide in any given case to disregard them entirely. Their significance is further undermined by the fact that they appear among many other factors that are largely irrelevant to character. These other factors—like "sufficiency of the evidence," "seriousness of the offense," and "collateral consequences"[160]—suggests the DOJ aimed its guidance at a much wider-ranging, and hence 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 design and oversee the sort of reform character theory calls for.

Under character theory, judges rather than prosecutors could take the lead in assessing corporate character and the necessity and type of punishment.[161] As discussed in the next Section, the types of punishment character theory does and does not call for would lower many of the barriers that currently force prosecutors 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. Tasking judges with assessing corporate character would have the further benefit of harmonizing the way criminal law treats corporate and individual defendants. As already discussed, judges have long been in the business of assessing individual character at sentencing; as things stand, they rarely have the opportunity to assess corporate character.

Shifting the assessment and reform of corporate character from prosecutors to judges would be a significant departure from present

---

[159] *See also* Khanna, *supra* note 21, at 239 ("For some time now, Delaware jurisprudence has required directors to make efforts toward compliance, so an absence of compliance efforts suggests that the firm has a fairly cavalier attitude toward compliance and may well be a likely repeat offender.").

[160] Thompson, *supra* note 2.

[161] *See infra* Part VIII.

practice, but it would not require significant changes to the law. The law already makes room for judges to play this role.[162] The Organizational Sentencing Guidelines, which advise judges on how to sentence corporations, contains a list of relevant factors that overlaps those the DOJ tells its prosecutors to consider. 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,[163] whether the corporation has a prior history of the same criminal conduct,[164] whether the corporation has an effective compliance program,[165] and whether the corporation self-reported, cooperated, and accepted responsibility.[166] Once again, these are exactly some of the factors judges should consider at sentencing according to character theory. Ultimately, though, the Sentencing Guidelines reflect a focus on deterrence.[167] The use to which the Guidelines put the factors—calculating the size of the fine the corporation will pay—shows this clearly enough. As discussed next, character theory calls for something different.

B. Punishments the Criminal Justice System Will Not Use

Under a character-based approach to punishment, judges will sentence with an eye primarily to reforming convicted corporations and promoting good corporate character more broadly. Since the current system was designed primarily to accomplish deterrence, it utilizes punishments tailored to that end. Some of the punishments and consequences deterrence theory relies on are orthogonal to reform, and some even inhibit it. These include fines, license revocation, and reputational penalties. As such, character-focused courts would use these

---

[162] 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 79, at 92 ("Current DPA 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.").

[163] U.S.S.G. 8C2.5(b).

[164] U.S.S.G. 8C2.5(c).

[165] U.S.S.G. 8C2.5(f).

[166] U.S.S.G. 8C2.5(g).

[167] U.S.S.G., intro. 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)).

sanctions only in the rare case where the general observations below do not stand.

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.[168] Oftentimes, the agreements contain a section setting forth what the Sentencing Guidelines fine range would be upon conviction. Then, in its first pages, most DPAs and NPAs include a fine within that range.[169]

The problem with these fines from the perspective of punishment theory is not that they are too high or too low. The primary problem is that innocent parties—shareholders, employees, creditors—end up bearing the brunt of financial sanctions. This should concern deterrence theorists. If fines are to have their intended deterrent effect, they have to pose a credible threat to the individuals making decisions relevant to the commission of corporate fine. But 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. Indeed, available empirical data suggests that corporate fines have little deterrent value.[170] Deterrence theorists are stuck with fines, however, since their conceptual repertoire does not make room for fundamentally different types of sanction.

For the same reason (that they fall primarily on innocent parties), fines cannot spur the sort of reform 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 very indirect way to get at the root of the problem—defective corporate character. As discussed above,[171] fines may even push corporations in the wrong direction, a deterioration of corporate character, as corporate actors

---

[168] *See* U.S. SENTENCING GUIDELINES ch. 8 (2001).

[169] *See* Alexander & Cohen, *supra* note 47, at 13 ("[M]ore than three-quarters of the prosecution agreements were accompanied by monetary sanctions of more than $1 million [between 2004 and 2007].").

[170] Alexander & Cohen, *supra* note 47, at 24 ("There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect . . . .").

[171] *See supra* Part III.B.3.

invest in mechanisms to conceal, rather than prevent, future crimes. There are much more direct ways of ensuring corporate reform.

2. License Revocation

License revocation is a deadly and automatic collateral consequence of criminal conviction in many industries. Under deterrence and retribution theories, such a drastic measure may be justified because of the sheer magnitude (in terms of private gains and social costs) of some corporate crimes. In practice, the prospect of license revocation places the prosecutors chasing corporate criminals 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.

Under character theory, license revocation and other corporate death sentences will rarely have a role. Shuttering a corporation forecloses any possibility of reform; that 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,[172] and character theory would embrace this approach. 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. Injury to a corporation's reputation undermine its bottom dollar by affecting its position in the marketplace, as other participants such as customers and creditors charge a premium for continued business.[173] 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.

---

[172] U.S. SENTENCING GUIDELINES § 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.").

[173] Alexander & Cohen, *supra* note 47, 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.").

But reputational effects on corporations are problematic from multiple perspectives. Like fines, they are yet another penalty that mostly impacts innocent parties. Reputational effects also lack the predictability they would need to serve as an effective punitive tool. 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.[174] Even for a fixed sort of violation, the market response to any particular offense by any particular firm is impossible to predict ex ante. This should concern even deterrence theorists. 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. It could credibly convey to marketplace participants that, while it once may not have been, it now is a trustworthy business partner. Evidence indicates that transparent corporate reform can reduce the reputational costs of conviction.[175] 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 introduce to the criminal justice system and mitigates their collateral impact on innocent third parties.

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 taking 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

---

[174] *Contrast* Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993), *with* Jonathan M. Karpoff, et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653 (2005).

[175] Alexander & Cohen, *supra* note 47, 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 effects within a company and thus prevent recurrence of crime can have this effect.")

system of corporate criminal justice. The U.S. Sentencing Guidelines contemplate so much more than mere fines for corporate defendants, including orders of restitution,[176] remedial orders,[177] community service,[178] notice to victims,[179] publicity of the offense,[180] and, most importantly for present purposes, probation.[181]

The character theory of corporate punishment facilitates a court-directed process of corporate reform. Government-directed corporate reform is not foreign to the criminal justice system. As mentioned, prosecutors often seek corporate reform, along with other goals, through DPAs and NPAs.[182] For various reasons, implementation by prosecutors is controversial, and not particularly effective.[183] Still, this does not mean that there are no lessons to draw from prosecutors' experience with corporate reform. Deferred prosecution agreements and NPAs often specify reforms a corporation must make to keep up its end of the bargain;[184] they also frequently require the that the corporation, in cooperation with the prosecutor, select a monitor to oversee the reforms.[185] The terms of the

---

[176] U.S. SENTENCING GUIDELINES MANUAL § 8B1.1.
[177] *Id.* § 8B1.2.
[178] *Id.* § 8B1.3.
[179] *Id.* § 8B1.4.
[180] *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).
[181] U.S. SENTENCING GUIDELINES MANUAL § 8D1; *see generally* Richard Gruner, *To Let the Punishment Fit the Organization: Sanctioning Corporate Offenders Through Corporate Probation*, 16 AM. J. CRIM. L. 1 (1988).
[182] *See* Morford, supra note 78; Buell, *supra* note 79, at 92-93 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011) ("[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."); Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to John Conyers, Jr., Chairman, House Committee on the Judiciary (May 15, 2008) ("[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.").
[183] *See infra* VIII; *supra* IV.
[184] Griffin, *supra* note 81, at 119 ("Most DPAs mandate remedial measures, including prosecutor-designed compliance programs and, in some cases, personnel changes and structural reforms.").
[185] *Id.* at 119 ("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 21, at 237 ("[T]he monitor's primary task should be to ensure compliance and reduce the chances of future wrong-doing.").

monitorship are usually quite detailed, specifying compensation, the duration of the appointment, the monitor's powers, and the frequency and type of reports the monitor is to provide to the prosecutor.[186]

Judges could do much the same—specify the required reforms and appoint a monitor to oversee them. This is the sort of sentencing approach character theorists prefer for individual defendants.[187] The legal authorization for judges to do this is already in place.[188] The Sentencing Guidelines already provide judges with broad discretion to design terms of corporate probation "to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct."[189]

On the rare occasion that judges currently do sentence corporations, they approach probation from a deterrence-based perspective. As a result, they end up under-utilizing it. Typically, the lone requirement on the corporation during the probationary term is not to commit any other crimes. 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.[190] 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 for so much more. The commentary to the Sentencing Guidelines for Organizations authorized probation for a very broad purpose—to ensure that "steps will be taken within the organization to reduce the likelihood of future criminal conduct."[191] The text of Guidelines is very amenable to a character-focused approach to corporate sentencing. They 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,[192] the organization is

---

[186] Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1723-27 (2007).

[187] Duff, *supra* note 107, at 195 ("An ambitious role of this kind would use criminal punishment as an instrument of moral improvement: the, or at least a, proper aim of punishment is to promote virtue and to remedy vice. . . . This most obviously favors such sentences as probation.").

[188] Khanna, *supra* note 21, at 230 ("[C]ourts have relied on a variety of supervisors, including trustees in bankruptcy, corporate probation officers and special masters.").

[189] U.S. SENTENCING GUIDELINES 8D1.1(a)(6).

[190] U.S.S.G. 8C2.5(d).

[191] U.S.S.G. ch. 8, intro. cmt.

[192] U.S.S.G. 8D1.1(a)(3).

a repeat offender,[193] a high-level person within the corporation participated in the crime,[194] or when needed generally to rehabilitate the defendant.[195]

Once a court determines that probation is appropriate for a corporation, the Guidelines provide a non-exclusive list of terms the court can impose.[196] Chief among these is the implementation of an effective compliance and ethics program.[197] Just as prosecutors often require with DPAs and NPAs, the Guidelines envisions that a probation officer or court-appointed expert will oversee implementation of the program.[198] In cases where the corporation needs a heavier guiding hand, the court may also appoint a special master or trustee.[199]

The Guidelines afford courts wide latitude in designing the specific terms of probation. This raises the question of what those 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. 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 (which is to say, 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 slowly to date. As discussed below, that may be largely due to the current state of corporate criminal law, a problem character theory would go a long way to alleviating.[200]

There are, of course, the obvious candidate reforms already on the table, like reforming compliance procedures, adding additional levels of due diligence, implementing regular audits.[201] There is little need to catalogue these here. Others (just a handful of which are discussed below) may be more surprising.

---

[193] U.S.S.G. 8D1.1(a)(4).
[194] U.S.S.G. 8D1.1(a)(5).
[195] U.S.S.G. 8D1.1(a)(8), 18 U.S.C. 3353(a)(2)(D).
[196] U.S.S.G. 8D1.4.
[197] U.S.S.G. 8D1.4(b)(1)-(2).
[198] U.S.S.G. 8D1.4(b)(3)-(4).
[199] U.S.S.G. 8F1.1, cmt. 1.
[200] *See infra* Part VIII.
[201] This is not at all intended to undercut the relevance of the obvious solutions. These are effective too! Alexander & Cohen, *supra* note 47, 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.

For example, there is some evidence that one effective reform technique may be to give corporate managers some stock-based compensation. The proposal begins with the obvious observation that one clear way to impact what corporations do is to alter the incentives those leading the corporation. The predominant approach to accomplishing this has been to subject management to individual criminal liability.[202] But that approach has historically proven ineffective for a host of largely evidentiary reasons. In response, some scholars have proposed the obvious workaround, tying management compensation to metrics that track supervisee compliance as well as productivity.[203] This requires finding an effective metric for employee compliance that corporations can effectively track, which effectively reduces to the problem of designing effective compliance. And that is something we do not yet know how to do well.

More recent evidence suggests a way for influencing management incentives without facing evidentiary hurdles or relying on non-existent performance metrics. Data now suggest that criminal conduct within a corporation generally ends up harming shareholders more than helping them.[204] 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.[205] The classic way of doing this is turn managers into shareholder by giving them stock-based compensation. If corporate crime generally decreases share value, and managers were themselves shareholders, managers would have a stock-based incentive to prevent criminal conduct.

Another reform technique that has been underutilized (perhaps because of some prominent opposition)[206] is changeover in management personnel. Evidence indicates that the example and tone set by management can be a significant factor disposing a corporation to

---

[202] *See, e.g.*, Yates, *supra* note 13.

[203] E. Szwajkowski, *Organizational Illegality: Theoretical Integration and Illustrative Application*, 10 ACAD. MGMT. REV. 558 (1985).

[204] Alexander & Cohen, *supra* note 63.

[205] Alexander & Cohen, *supra* note 47, at 18 ("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 (1993).

[206] *See, e.g.*, Epstein, *supra* note 24, 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.").

misconduct.[207] This evidence comports with the opinions of corporate insiders, most of whom say top management is the most significant factor affecting corporate compliance.[208] If individual managers are (whether inadvertently or not) fostering a criminogenic workplace environment through their personalities and management styles, character-focused courts could order corporations on probation to replace them. This already is a technique widely used by corporations seeking to reform themselves when evidence of crime surfaces.[209]

In terms of conceptualizing the sorts of reforms that may be appropriate, character theory could countenance broader 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 Virtues," according to which a person cannot be virtuous in any respect without being virtuous in all respects.[210] Many commentators, even many character theorists, dismiss the thesis as fanciful. 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, corporate officers who have accounts with Ashley Madison (which specialized facilitating adulterous relationships) are significantly more likely to engage in fraudulent behavior.[211] For corporations, the unity of the virtues may mean considering the possibility that the best way to fix a corporate compliance deficiency is not to charge straight to the obvious causal source and to patch it up. Perhaps there are deficits of character elsewhere in the corporation which, if remedied, would better address the defect that brought about criminal conduct.

---

[207] Alexander & Cohen, *supra* note 47, at 33-34 (citing "tone at the top" as a significant variable predicting corporate misconduct).

[208] *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 corporation).

[209] Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 514 (1999) (finding that 83% of corporations featured in news reports of potential fraud-based crime subsequently announced turnover in management); Jonathan M. Karpoff, et al., *The Consequences to Managers for Financial Misrepresentation*, 88 J. FIN. ECON. 193 (2008) (finding significant management turnover after news of corporate violations).

[210] *See* Elizabeth Tefler, *Unity of the Moral Virtues in Aristotle's 'Nicomachean Ethics'*, 90 PROCEEDINGS ARISTOTLE SOC. 35 (1989).

[211] Robert H. Davidson, et al., *Executives Off-the-Job Behavior, Corporate Culture and Financial Reporting Risk*, 117 J. FIN. ECON. 5 (2015); Lee Biggerstaff, et al., *Suspect CEOs, Unethical Culture, and Corporate Misbehavior*, 117 J. FIN. ECON. 98 (2015).

We do not know yet whether or to what extent some form of the unity of the virtues is true for corporations, i.e. 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, perhaps more effective that additional formal compliance procedures. They disagree about how best to promote ethical culture. Some proposals, like encouraging or mandating charitable work by employees, are alluring from the perspective of the unity of the virtues. 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 as part of criminal punishment is currently anathema among scholars[212] and the DOJ ever since then U.S. Attorney Chris Christie insisted on a DPA term forcing a corporation to endow an ethics chair at his alma mater, Seton Hall.[213] Character theories of punishment would be cautiously open to reconsidering such provisions as possible terms of probation, preferably with out Christie's self-serving motives. Any such terms would need substantially more evidentiary support before judges should consider it appropriate to require them.

D. Some Limiting Principles

One thing should be acknowledged about most any corporate reform a court could order—it will be intrusive.[214] While this may not threaten the same sorts of dignity or autonomy interests that are at stake with analogous reforms for individuals, it does not mean government-ordered reforms are wholly unconcerning and should be totally unrestrained. For one thing, they are not costless. For another, they interfere with the operations of a private business, which, presumably, the officers in charge understand better in many respects. Imposing reforms on corporate criminals, regardless of cost and disruption to regular business operations, can end up generating net social losses, even if the reforms successfully change the corporation. A theory of punishment that solely

---

[212] That is the underlying tone in Anthony S. Barkow & Rachel E. Barkow, *Conclusion*, *in* PROSECUTORS IN THE BOARDROOM 249, 252 (2011) ("[Any] term should be related to the alleged violation and aimed at achieving future compliance with the law.").

[213] *Se* David Kocieniewski, *In Testy Exchange in Congress, Chris Christie Defends His Record as a Prosecutor*, N.Y. TIMES (June 26, 2009), *available at* http://www.nytimes.com/2009/06/26/nyregion/26christie.html.

[214] Barkow, *supra* note 73, at 179-85 (maligning DPAs and NPAs that "go beyond bans on illegal conduct or the removal or negligent or criminal personnel and dictate changes in business practices and governance.").

focused on rehabilitating corporate defects lacks the tools to avoid this result. Character theory, however, has some internal principles that can aid judges in striking the right balance between reforming a corporation and embracing the social goods the corporation already generates.

The first limiting principle is that 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 impediment to current reform efforts, such as they are, 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. They seem to focus on sticker price rather than genuine reform. 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.

Character theory offers a second reason for rejecting the imposition of reforms that are unjustified by their costs. Most criminal corporations have good character traits as well as bad; that is to say, they also have some dispositions that reliably produce social goods.[215] The corporation may provide a valuable service to consumers, offer good jobs for employees, contribute to or work with charities, etc. 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 an uncertain reform initiative. 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 it may be best to compel a corporation to reform its bad character in a way that "is good" enough, in order to preserve resources for realizing the good character traits that are already in place.[216]

---

[215] 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.

[216] Other scholars have proposed that prosecutors should employ a similar balancing test. *See* Barkow & Barkow, *supra* note 212, 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 vague gesture to general consequentialist considerations.

The talk of "balancing tests" and reforms that are "good enough" is vague. This is more an acknowledgement of the unavoidable complexities of sentencing, rather than a weakness of character theory. Finding the right result in any particular case requires the exercise of informed judgment. As discussed below, judges have mechanisms for acquiring the best available information.[217] By drawing on the expertise of the prosecution, relevant regulators, industry experts, and the corporate defendant itself, judges should be in a position to best exercise their institutional role—steering an objective and wise course between various competing claims and proposals. It also bears emphasizing that this is an exceptionally familiar role for judges. 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 the exercise of his socially desirable character traits. The proposal here is to subject corporate criminals to the same treatment, with all its attendant benefits and burdens.

VIII. Enter the Judges: Benefits over Prosecution-Led Reform

So far, this Article has focused on how criminal sentences under a character-theoretic approach is superior to those available under retributive and deterrence theories. This still leaves open the question of who should be designing and overseeing the reform-directed sentences. Currently, to the extent that direct reform of criminal corporations is on the agenda, prosecutors lead the way. Another of the chief benefits of character theory is that by cutting fines and license revocation out of the picture, it removes the necessity of DPAs and NPAs, and thereby opens a role for a superior party to design corporate punishment: judges.

Because of the present reliance on DPAs and NPAs, judges are not involved in corporate punishment. As a matter of practice, prosecutors have had a decades-long practice of not seeking judicial approval of DPAs and NPAs.[218] That practice is now enshrined in law. In a recent D.C. Circuit case, a district court judge tried to thwart a cushy DPA prosecutors signed with a U.S. corporation for violated aerospace export controls against Iran, Sudan, and Burma.[219] On appeal, the D.C. Court of Appeals held that the district court erred when it refused to approve a DPA; the terms of a DPA

---

[217] *See infra* IX.B.

[218] Barkow, *supra* note 73, at 196 ("The regulations in DPAs, NPAs, and other settlement agreements reached with prosecutors are generally not subject to judicial review."); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 922-29 (2007).

[219] *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 736-38 (2016).

are solely up to the Executive, so long as minimal procedural limits are satisfied.[220]

As mentioned above, scholars have levelled several critiques against giving prosecutors what in practice amounts to the exclusive authority to punish large corporations. Rather than transferring this role to judges, some scholars have suggested shoring up the shortcomings of prosecutors or transferring the role to some beefed-up version of industry regulators.[221] One advantage of going with courts is that they are already in a position, legally speaking, to carry out this role with aplomb. Remedying the problems with prosecutor-designed DPAs and NPAs listed in Part IV would entail a substantial overhaul of the DOJ. Relying on regulators would require a dramatic expansion of their injunctive authority.[222] Judges could just utilize the powers already available to them to design terms of probation.

Even before considering the institutional advantages judges have in designing corporate punishment, there are several benefits to transferring this role to them. First, it would immediately resolves the separation-of-powers concerns some scholars have raised, according to which the heavy use of DPAs and NPAs unconstitutionally expands the power of the executive into the judicial and legislative territory.[223] Bringing judges back into the picture tempers executive power, by allowing the courts to apply the law to corporate cases.

Bringing corporations before judges also resolves 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,[224] but this undermines the public's interest in

---

[220] *Fokker*, 818 F.3d at 746.

[221] *See, e.g.*, Buell, *supra* note 79, at 105-06 ("An enhanced SEC enforcement process of the type I suggest would be superior at least because it would combine all three possible actors."); Alshuler, *supra* note 119, 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."); Khanna, *supra* note 21, 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.").

[222] Buell, *supra* note 79, 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 third party. But unlike a DPA, such a settlement would require the approval of a federal judge and could, through reporting requirements, include oversight and the monitoring and compliance process by the federal court.").

[223] Barkow & Barkow, *supra* note 21, at 1-2 (expressing separations of powers concerns over use of DPAs and NPAs).

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

officially expressing its disapproval of misconduct as they do through conviction of individuals. When corporations appear before judges, there arises the possibility of an expressive moment that is currently off the table—a corporate conviction.[225]

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 lead in the past to charges of prosecutorial self-dealing in negotiating DPA and NPA terms.[226] As importantly, the work courts do is publicly visible. This has several advantages over the back-room setting in which DPAs and NPAs are negotiated. When courts sentence corporations, the sentences including terms of probation are presumptively public record, and courts could designate that monitor reports filed with the court would be public too (if suitable redacted to protect business secrets). This public record would be invaluable for improving the state of corporate reform and helping the criminal law fulfill its role educating the public about what good and bad corporate character (perhaps best and worst compliance practices) looks like.

The DOJ has shown itself to be incapable developing institutional knowledge about previous efforts at corporate reform and their results. 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."[227] The lack of a public record when

---

[225] Hampton, *supra* note 130, 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.").

[226] *See, e.g.*, Griffin, *supra* note 81, 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."). This concern persists even if prosecutors, relative to regulators, are insulated form outside influences. Baer, *supra* note 23, at 1004-05 ("Federal prosecutors are not as likely to fall prey to capture as their counterparts in administrative agencies because, unlike policymakers at the SEC and similar agencies, prosecutors are judged primarily by their criminal convictions. Prosecutors become famous and sought-after in the private sector for convicting and incarcerating CEOs, not for declining to prosecute them. Finally, prosecutors are less prone to capture than other administrative actors in part because they work in an explicitly adversarial atmosphere that encourages them to be aggressive.").

[227] U.S. Gen. Accountability Office, GAO 10-110, *DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* 20-24 (2009), *available at* http://www.gao.gov/new.items/d10110.pdf.

prosecutors enter into and implement DPAs and NPAs is problematic for two reasons. Without institutional knowledge about punishment practices, prosecutors cannot help but treating even similarly situated corporations differently. This raises obvious rule of law concerns.[228] 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—corporate punishment terms and reports on what effect they had—is unavailable under the current, prosecutor-directed system.[229]

IX. Potential Concerns

Character theory is significantly different from the approaches currently available for thinking about corporate punishment. It will likely provoke various concerns among those with more orthodox positions. This Part responds to two that are likely to arise.

A. 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 fines. 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.[230] The corporation must bear these expenses under character theory; and, as with fines, this means that innocent third parties, like shareholders, will bear the expenses. Is this not the same old problem in new character-theory garb?

---

[228] *See* Buell, *supra* note 79, at 106 ("An objection to the DPA regime . . . has been that individual prosecutors' offices . . . have been inconsistent in crafting and application of DPA settlements . . . ."); Khanna, *supra* note 21, 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.").

[229] Khanna, *supra* note 21, at 244 ("[D]isclosure of the monitor's 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.").

[230] Alexander & Cohen, *supra* note 47, at 18 ("The costs of internal monitoring and enforcement can be substantial and are likely to be higher for larger and more complex firms . . . .").

In short, no, it is not. The problem with fines is not just that they are costs born by innocent third parties, but that they are costs unjustifiably born by them. According to retributivism, fining a corporation gives it 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 hit 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 born if the corporation is to operate within the bounds of the law, and the most sensible parties to bear it are the constituents (broadly conceived) of the corporation itself. They are no different than the costs the constituents of law-abiding corporations bear when they pay for compliance programs and or forgo potentially lucrative criminal opportunities. Furthermore, if there is anything to data suggesting that legally compliant corporation is, in the long term, value-enhancing, shareholders will have an economic interest in paying for corporate reform. In that case corporate punishment serves as the solution to a sort of coordination problem where dispersed shareholders lack the power to alter criminogenic dynamics that more influential, rent-seeking parties in the corporation may find profitable.[231]

B. Institutional Competence of Judiciary

As argued above, the logic of retribution and deterrence theory necessitate a regime in which prosecutors (rather than courts) punish corporations, including the imposition of any corporate reforms. A character theoretic approach opens the possibility of court-directed punishment, and the previous Part discussed various benefits of turning punishment over to judges. But judges must be competent to play this role if the transfer of the power to punish to them is to count as an improvement. Though they may not be experts in corporate compliance, judges have exactly the sort of institutional competence they would need to design effective corporate reforms.

Before discussing just how judges can play this role competently, it is worth clarifying what the burden on character theory is. Character theory need not show itself capable of producing some theoretical ideal of corporate reform; likely no system can achieve that. Rather, character

[231] *See* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 U. CHICAGO L. REV. (forthcoming 2017) (arguing reform mandated in DPAs only when a corporation's managers personally benefit from deficient policing).

theory need only show that it is a significant improvement over the current prosecution-led approach that relies on deterrence theory and retribution. And that is quite a low bar.

For a variety of reasons, prosecutors are particularly inept at designing corporate punishments.[232] To begin, prosecutors lack the necessary expertise,[233] which is reflected in the open-ended nature of the reforms they require in DPAs and NPAs. Instead, prosecutors give carte blanche to monitors, chosen in cooperation with the corporation, to design and oversee the implementation of improvements.[234] Though the monitors are supposed to file reports with prosecutors, the latter lack the experience to evaluate them properly. Given that the monitor has been hired to improve compliance within the corporation, the progress reports effectively function as self-graded report cards.

Even if prosecutors had the relevant expertise, their institutional role may compromise their ability to put it to good use. Prosecutors work for the executive, which is a political branch subject to all of the distortions of the political process. Since the targets at issue in these cases are the largest corporations with the most powerful political lobbyists, there is a real risk of under-regulation.[235]

One alternative repository of expertise that naturally suggests itself are the relevant industry regulators. These are certainly more expert than prosecutors when it comes to the compliance of corporations operating in

---

[232] 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 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.

[233] *See* Baer, *supra* note 23, 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 . . . .").

[234] *See also* Griffin, *supra* note 81, at 120 ("DPAs . . . fail to make clear the scope of the monitor's responsibilities."). This is not the only moment in the course of a corporate criminal case where prosecutors, due to lack of expertise and resources, must rely on private parties. *Id.* at 111 ("Prosecutors turn to private-sector partners because they simply do not have the resources to go it alone conducting complex, expensive corporate investigations.").

[235] Barkow, *supra* note 73, at 189 ("The biggest accountability danger in the federal context, then, is . . . the risk of underregualtion 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.").

the industry they regulate. 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.[236] 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 leaders.[237] This once again raises the specter of soft-ball efforts at reform as industries, under a regulator-led regime, would effectively be designing punishments for their own members.[238] Evidence justifies the concern.[239]

If prosecutors and regulators are off the table, that leaves the courts as the leading alternative.[240] 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. But this is easily remedied. Prosecutors also often lack the expertise necessary to design effective DPAs and NPAs. Though there are no formal mechanisms in place, prosecutors fill the knowledge gap to the extent possible by consulting with industry regulators.[241] Judges could do the same, and with the benefit of formal

---

[236] *See* Barkow, *supra* note 73, 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.").

[237] For a discussion of one example, see John C. Coffee, Jr., *A Course of Inaction*, LEGAL AFFAIRS 46 (Apr. 2004) (discussing the "rapidly revolving door between the SEC and private legal practice").

[238] *See* Barkow, *supra* note 73, at 193 ("Regulatory agencies, despite their substantive knowledge, may not be in the best position to offer advice because their guidance may be driven by capture as much as expertise."); Cuéllar, *supra* note 232, at 139 ("[Organized interests] may have multiple ways of dissuading regulators from severe enforcement activity and whose own members and staffs may end up running traditional regulatory agencies.").

[239] *See* Buell, *supra* note 79, 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.").

[240] *See* Buell, *supra* note 79, at 105-06 ("That leaves the question of who ought to be doing the rehabilitation. . . . Three choices remain: the executive branch enforcer, a court, or a private third party.").

[241] Barkow, *supra* note 73, at 192 ("[C]onsultation [by prosecutors] with expert agencies is fairly commonplace even if it is not formally institutionalized."); Garret, *supra* note 18, at 158-59 ("[F]ederal prosecutors usually work arm in arm with regulators when pursuing organizational prosecutions."). At least at 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 (July 9, 2002), *available at* https://www.gpo.gov/fdsys/pkg/FR-2009-11-19/pdf/E9-28022.pdf

procedures. The Sentencing Guidelines direct judges to "consider the views of any governmental regulatory body that oversees the conduct of the organization" when designing the terms of probation.[242] They go further too, directing that the court to consider the views of the defendant about how best to reform itself[243] and empowering the court to appoint any necessary experts.[244] So there are already mechanisms in place that judges can use to gain the necessary expertise. Balancing these sorts differing conflicting perspectives is what courts do. And courts have a record in other contexts of successfully assessing information from various sources to design programs for structural change.[245]

X. Conclusion: Something for Everyone

Exclusive reliance on character theory for corporate sentencing is one of those few proposals about which every interested party, on both sides of the aisle, should be able to find something to like. This is certainly true of the people on the ground. Those interested in seeing criminal justice administered more regularly against corporations would be happy that applying 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. And both sides benefit from the various institutional upgrades 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.

(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].").

[242] U.S.S.G. 8D1.4 cmt. 1.

[243] U.S.S.G. 8D1.4(b)(1) ("The organization shall develop and submit to the court an effective compliance and ethics program . . . .").

[244] U.S.S.G. 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.").

[245] Barkow & Barkow, *supra* note 21, 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.").

A. Deterrence and Prevention

It may seem that deterrence theorists lose out entirely under character theory. Their preferred punitive instrument, the fine, would be off the table. Furthermore, the system of corporate criminal justice would be oriented away from the ex ante incentives of potential corporate criminals and toward prospective reform. But deterrence theorists are consequence-minded folk, and very likely they view their own approach to criminal law as instrumental to some further end—crime prevention. If that is true, deterrence theorists should celebrate character theory; there is reason to think it would reduce the incidence of corporate crime.[246]

To begin, the sorts of sentences that character-focused judges would hand out have their own strong deterrent value. For one thing, corporate reform is not costless. As far as the incentives deterrence theorists care about are concerned, it does not matter to a corporate defendant's bottom dollar whether the additional expenditures go to paying fines or to implementing court-ordered reforms. For another, as other scholars have suggested, there may be extra deterrent force to compelled reforms when courts also appoint monitors to oversee them.[247] Presumably this is because corporations (or more likely their managers) are averse to the intervention of outside parties. Deterrence theorists are not ignorant of the deterrent value of monitors, but they are a non-ideal tool from the perspective of deterrence theory because, unlike cash fines, their impact on corporate incentives is hard to calibrate. For present purposes, though, it is enough that the deterrent effect is there, even if there is no way to quantify it.

Character theory will also result in robust preventive effects 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.[248] As discussed above, merely fining a corporation may not induce reform; it may just prompt the corporation to better conceal its future crimes. This is not an option with reform-oriented sanctions, since they directly address the criminogenic features of the corporate defendant.

---

[246] *See* Attorney General 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.").

[247] Khanna, *supra* note 21, at 231 ("[R]elying on a monitor as sanction may prove desirable when the deterrent effects of cash fines are exhausted and we desire more deterrence.").

[248] Sendor, *supra* note 42, at 127 (1996) ("If a review of the defendant's record shows that he is an inveterate recidivist . . . then that fact shows that previous intervention has not deterred him . . . and more severe punishment is warranted in order to deter him from future criminal conduct.")

Broadening out from individual corporate criminals, character theory should have general preventative effects. To a large extent, preventing corporate crime is a matter of preventing individual employee crime. But getting at individual employees has proven difficult under the largely deterrence-focused approach to corporate criminal law. Oftentimes, the DOJ must rely on corporations to self-report the criminal conduct of individual, but corporations have weak incentives to report and quite strong incentives not to. Self-reporting against the background of both respondeat superior and deterrence-driven sanctions is a hazardous prospect for corporations. Even where the DOJ has a good clue about individual criminals in a corporation, pursuing them has proven difficult for a host of evidentiary reasons.[249] This is the case even despite DOJ guidance in 2015 directing prosecutors them to emphasize individual prosecutions.[250] Since the guidance, there has been no uptick in individual prosecutions, and not for want of trying.

In terms of preventing crimes by individuals, 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 at the level of the corporation itself, not face any criminal punishment. The corporation may still be guilty of a crime under respondeat superior, but there would be no appropriate sanction.[251] It is impossible to know what percentage of corporate crime falls into this category. Still, under a character-focused system of punishment, there should be an uptick in corporate self-reporting. Both because character theory removes the corporate sanction for that sort of individual crime, and because self-reporting could be one effective way for corporations to signal that the criminal conduct was unrelated to a

---

[249] *See* Memorandum from Eric Holder, Deputy Att'y Gen., to All Component Heads and U.S. Att'ys, *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 conducts. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired.").

[250] Yates, *supra* note 13.

[251] In 2009, Deputy Attorney General Larry D. Thompson proposed something similar, a complete defense to corporate liability under respondeat superior if the corporation demonstrated that the individual criminal evaded otherwise effective compliance programs. *See* Larry Thompson, THE BLAMELESS CORPORATION, *Address at the Georgetown University Law Center Corporate Symposium* (Apr. 21, 2009).

corporate character defect. Increased self-reporting should make individual criminals within corporations wary. Furthermore, with increased communication abut crime between corporations and the government, character theory could result in the sort of private-public cooperation in addressing individual crime that many scholars think is effective.[252]

Character theory can also help in the cases where there is good evidence that corporate crime resulted from individual personnel misconduct, but where the opacity of the corporation 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. But where the individual misconduct is significant enough to affect the character of the corporation (as it might be in the case of an upper-level manager instigating 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 going forward, 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 crime, personnel might have their jobs on the line 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, more in the nature of a collateral effect rather than formal criminal punishment, but such informal sanctions are known to be effective deterrents for corporate elites.[253] Admittedly, this may not the ideal way to address individual misconduct. A well-functioning system for individual white-coller criminal justice would be preferable. But

---

[252] Brown, *supra* note 16, 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—attitudes within firms and industries and the relations between firms and law enforcement officials—thereby decreasing wrongdoing without resorting to the deterrence of punitive sanctions."); *see* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101 (1988).

[253] *See* Alexander & Cohen, *supra* note 47, 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."); 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); 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).

when the ideal has proven elusive despite decades of effort, second-bests 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 welcome 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 expresses moral condemnation) variety should see in character theory a way of genuinely punishing corporations. The problem with the central role fines play in current corporate sentencing is that it is hard to see how these target the organization rather than its largely innocent constituents. But when punishment focuses exclusively on organizational reform, there is a very palpable sense in which the organization is the sole target and the collateral effects really are *collateral*.

By lowering the barriers to bringing large corporations before judges, character theory would result in more corporate convictions. This should be particularly to retributivists who emphasize the importance of criminal law's expressive significance. When prosecutors settle criminal cases with corporations through DPAs and NPAs, there is no formal entry of a guilty verdict, and oftentimes not even an admission of guilt. This shortchanges the public's interest in expressing its condemnation of the corporation's conduct. When guilty corporations come before judges, whether their cases get resolved by trial or plea, the court has the opportunity on behalf of the public to declare the corporation's conduct criminal. By enabling this result, character theory goes some way toward addressing the puzzling imbalance between corporate and individual criminal justice with which this Article began.

* * *

"[Character theory] is a genuine alternative to the two prevailing theories that stress deterrence and retribution."[254] There is no reason to limit theorizing about corporate punishment to the two that dominate the discourse. Character theory deserves a seat at the table. At a minimum, it can open new conceptual space for thinking about the some of the most intractable problems in corporate criminal law—how to punish an organization without punishing its individuals, how to encourage

[254] Huigens, *supra* note 29, at 5.

prosecutors to bring corporations before judges, how to ensure corporate reform, etc. We may even be surprised to find that it holds some of the solutions.