# Corporate Incapacitation: A Handmaid's Tale?

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## I. INTRODUCTION

In *Incapacitating Criminal Corporations*,[2] W. Robert Thomas argues that corporate criminal law should think more creatively about incapacitation. As a general rule, I could not agree more[3] with his motivating sentiment: inflexible dominant paradigms have stifled thought about how to sanction corporations for long enough. Old problems arise and recur, unsolved because corporations are not just economic mechanisms and deterrence is not the only way to control them. It is not that deterrence is a square peg and all the criminal justice holes are round. But filtered among the square holes are circular, triangular, and star-shaped ones too. We need all the pegs we can find.

Thomas has found a peg that we have too long overlooked. "Incapacitation is not applicable in the corporate context" because corporations have no body to jail, the familiar refrain goes.[4] But Thomas tantalizingly shows what incapacitation can (and does) offer as "a means of punishing criminal corporations."[5] After showing how the law can incapacitate corporations without physically restraining them,

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2. 72 VAND. L. REV. 905 (2019).

3. Mihailis E. Diamantis & William S. Laufer, *The Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. (forthcoming 2019).

4. David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1251 (2016).

5. Thomas, *supra* note 2, at 929.

Thomas demonstrates some of the novel possibilities that corporate incapacitation raises.

He hopes to go further, arguing that incapacitation is not just a means but also should be (and currently is) what he variously calls a "justification,"[6] "rationale,"[7] "goal,"[8] or "basis"[9] for punishing corporations. Roughly speaking, Thomas hopes to earn for incapacitation a seat at the table of more familiar "freestanding"[10] justifications for corporate punishment: deterrence,[11] retribution,[12] and rehabilitation.[13] As I argue below, though, incapacitation should only have (and currently only has) a secondary role in service to the other justifications. Thomas stakes his case on divesting rehabilitation as a justification for corporate punishment and claiming the empty seat for incapacitation. In what follows, I query whether Thomas accounts for the gap between the socially destructive enterprise that incapacitation necessarily is and the socially constructive enterprise that rehabilitation aims to be.

## II. INCAPACITATION DEFINED: AS TOOL AND AS JUSTIFICATION

I should start, as Thomas does, with the definition of incapacitation. It will be important to distinguish incapacitation as a type of punishment from incapacitation as a justification for punishment. As Thomas points out, "a single [type of] punishment is often simultaneously compatible with multiple justifications."[14] "A punishment's effects are not the same as its purpose."[15] I consider first what it means for a punishment to be incapacitative and afterwards what it means for incapacitation to be a punishment's justification.

Thomas is right to set aside any simplistic identification of incapacitative punishment with imprisonment.[16] There are, as he observes, many ways to incapacitate that do not involve bricks and bars, which would be of little use against incorporeal entities like

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6. *Id.*
7. *Id.* at 909.
8. *Id.* at 912.
9. *Id.* at 913.
10. *Id.* at 934.
11. *See, e.g.*, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996).
12. *See, e.g.*, William S. Laufer, *Where Is the Moral Indignation over Corporate Crime?*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 19 (Dominik Brodowski et al. eds., 2014).
13. *See, e.g.*, Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018).
14. Thomas, *supra* note 2, at 932.
15. *Id.*
16. *Id.* at 962.

corporations. An overly narrow definition risks shortchanging the scope and promise of incapacitation.

Thomas is also sensitive to the risks that an "overinclusi[ve]" definition poses.[17] An expansive characterization risks including as benefits (or drawbacks) of incapacitation effects that are more properly seen as benefits (or drawbacks) of other modes of punishment. Avoiding overbreadth seems to give Thomas a bit more trouble. Incapacitative punishments, according to him, are those that "restrain or prevent a convicted person from acting on criminal plans or proclivities in the future."[18] Earlier in the paper, he argues that defining "incapacitation [in terms of] restraint" would be overinclusive.[19] He also notes that incapacitation is just one of at least three types of punishment that focus on prevention (the others being deterrence and rehabilitation).[20] So any definition of incapacitation in terms of prevention would be overinclusive. Since the union of two overinclusive sets (in this case restraining punishments and preventive punishments) is necessarily itself overinclusive, Thomas's definition (punishments that restrain or prevent) must be, by his own lights, overbroad. Compounding the problem, Thomas then expands his definition even further to include not just prevention and restraint, but also sanctions that "require[e] . . . affirmative actions" on the part of the criminal.[21] Taken on its face, there are few modes of punishment that would escape Thomas's final definition of incapacitation as restraint, prevention, or required action. Deterrent sanctions like fines prevent reoffense by readjusting the balance of costs and benefits for would-be criminals.[22] Rehabilitation typically requires affirmative action from the convict, whether self-reform or participation in sponsored reform programs.[23] A definition that includes all these is not about incapacitative corporate punishment so much as corporate punishment writ large.

The line between rehabilitation and incapacitation is a particularly important one for Thomas to keep clear. The end of the paper is a dialectic standoff between these two justifications. Thomas reminds us that incapacitation comes in many forms and degrees—from

17. *Id.* at 931.

18. *Id.* at 934.

19. *Id.* at 931.

20. *Id.* at 909.

21. *Id.* at 938.

22. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, *in* PROSECUTORS IN THE BOARDROOM 11 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

23. Anthony S. Barkow & Rachel E. Barkow, *Introduction* to PROSECUTORS IN THE BOARDROOM, *supra* note 22, at 1, 3 (using DPAs, "prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance").

execution, to imprisonment, to tracking devices, to limitations on computer access.[24] I worry, though, that his broad definition of incapacitation allows his examples to creep far into rehabilitation's domain. Among his purported list of incapacitative sanctions, Thomas includes such things as "mandat[ory] participation in substance-abuse and mental-health programs."[25] These fit his definition because they require action from the convict. However, drug and mental health treatment are classic examples of rehabilitative sanctions.[26] If there is to be any meaningful line between rehabilitation and incapacitation (as Thomas must insist there is to argue for unseating the former with the latter), incapacitation must exclude these. Another way to put the point—if incapacitation includes compulsory reform, what's left of rehabilitation?

Faced with the problem of overbreadth, Thomas might consider revisiting Bentham's more limited definition of incapacitative punishments: those that render a convict unable to commit a crime even if he would choose to commit it.[27] This definition excludes core deterrent and rehabilitative sanctions, which affect whether a convict would choose to commit crime but otherwise leave him unrestrained. Thomas fears (though he does not explain why) that Bentham's comparatively narrow definition is overinclusive. In any case, even if it has its faults, Bentham's definition should suffice for my purposes here. My argument will not turn on what Bentham's definition (perhaps improperly according to Thomas) includes, but on what it excludes. Under Bentham's definition, mandatory drug rehabilitation programs are examples of, well, rehabilitative sanctions. If successful, they affect *whether* a convict chooses to use drugs in the future without directly restraining whether he could use drugs were he to choose to do so. Imprisonment, however, is incapacitative since, even should a convict choose to use drugs, the prison walls prevent him (or at least make drug

24. Thomas, *supra* note 2, at 937.

25. *Id.* at 939.

26. PAUL H. ROBINSON ET AL., CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 82 (4th ed., 2016) ("Medical treatment, psychological counseling, and education and training programs are the most common forms of rehabilitation."); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 55 (2003) ("Some commentators have argued that rehabilitation is essentially ignored by the Guidelines. While the Federal Bureau of Prisons offers job training and drug and mental health counseling to inmates, the Guidelines do not condition whether an offender goes to prison, or the length of any prison term imposed, on an offender's need for these services."); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 2 (2006) (referencing the "reinvigorated interest in rehabilitative programs, such as drug, mental health, and domestic violence courts").

27. Thomas, *supra* note 2, at 931 (quoting 4 JEREMY BENTHAM, *Panopticon Versus New South Wales*, *in* THE WORKS OF JEREMY BENTHAM 174 (John Bowring ed., 1843)).

use much more difficult). Bentham's definition roughly seems to cut the right lines.

With Bentham's definition of incapacitation as a sanction in hand, I move to consider what incapacitation means as a justification. One natural way to understand the difference is in means-end terms. Sometimes incapacitation is the means, i.e., the tool, for achieving some other end, and sometimes it is the end itself. Imprisonment, as I have just said, is an incapacitative punishment. If the goal of imprisoning a convict is to restrain him from committing crimes even should he choose to commit them, then the justification in that case is also incapacitation. However, if the goal of imprisonment is to separate a convict from the sources and temptations of a drug in order to promote his rehabilitation, the sanction is incapacitative, but its goal is rehabilitation.[28] As the example illustrates, sometimes a sanction may be compatible with multiple possible goals. While distinguishing the true goals behind a sanction may not always be easy in practice, conceptually they can be distinguished with counterfactual reasoning. To the extent that sanctioning authorities would be willing to forgo an incapacitative sanction if doing so were possible without compromising some other criminal justice goal (e.g., rehabilitation), the justification is the latter rather than the former.

This means-end characterization of the contrast between incapacitation as a tool and as a justification roughly aligns with Thomas's own account. Thomas variously says that incapacitation is the justification of a sanction when the sanction "instantiates,"[29] "expresses,"[30] "vindicate[s],"[31] or "convey[s]"[32] the goal of incapacitation, or when the sanction is pursued "in order to" incapacitate.[33] Thomas says three types of evidence bare upon whether incapacitation is the goal: "what the law takes itself to be doing, what actors in the criminal justice system believe they are doing, and how those actions are understood by the broader community."[34] I will focus, as Thomas does, on the second type of evidence,[35] which should largely overlap with the

28. Deborah Becker, *Prison for Forced Addiction Treatment? A Parent's 'Last Resort' Has Consequences*, NPR (Apr. 20, 2019), https://www.npr.org/sections/health-shots/2019/04/20/712290717/prison-for-forced-addiction-treatment-a-parents-last-resort-has-consequences [https://perma.cc/2QQ9-BCJ4].

29. Thomas, *supra* note 2, at 934.

30. *Id.* at 905.

31. *Id.*

32. *Id.* at 928.

33. *Id.* at 936.

34. *Id.* at 934.

35. I am not aware of any social science data about what the broader community understands the goal of incapacitative corporate sanctions to be, and Thomas cites none. Aside from what the

counterfactual test I just proposed. Authorities probably only believe themselves to be pursuing incapacitation if they would continue incapacitating even were their other criminal justice goals already accomplished. Otherwise, they likely only see themselves as using incapacitation as a tool for pursuing another goal.

To summarize where we are to this point: I distinguished between incapacitation as a type of sanction and as a justification of punishment. Incapacitative sanctions are those that prevent a convict from reoffending by restraining his ability (but not his choice) to reoffend. A sanction has incapacitation as its justification if the legal actors imposing the sanction believe they have a freestanding goal to incapacitate its target. The legal actors believe this if they would still impose the incapacitative sanction even were they able to achieve their other criminal justice goals without it.

## III. COULD INCAPACITATION JUSTIFY?

Thomas has two primary theses about corporate incapacitation: possibility and prescription. In this Part, I focus on the former: "[C]orporate criminal law as it is practiced today could . . . pursue an agenda of incapacitating corporate criminals."[36] After distinguishing between incapacitation as a type of punishment and incapacitation as a justification for punishment, the possibility thesis is really two sub-theses: it is possible to incapacitate corporations and it is possible to have incapacitation as a justification for corporate punishment.

Thomas's argument for the first sub-thesis is straightforward—it must be possible to incapacitate corporations because we already have various corporate sanctions with incapacitative effects. He draws analogies across the range and scale of incapacitative sanctions the criminal law has for individual criminals. Courts can fine corporations out of existence,[37] which, like the death penalty for individuals, amounts to "total incapacitation."[38] Prohibitions of business practices restrict corporations' range of conduct without totally disabling, just as restraining orders or license revocation restrict individuals' movement and professional pursuits. These analogies are compelling and demonstrate that, despite the knee-jerk proclamations of some, the law does (and therefore can) incapacitate corporations.

But can incapacitation be the law's freestanding justification for a corporate sanction? Here Thomas again argues from actuality to

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legal actors and the community think is going on, it is hard to imagine what it means for the criminal justice system to take itself to be doing something.

36. Becker, *supra* note 28, at 142.

37. U.S. SENTENCING GUIDELINES MANUAL § 8C1.1.

38. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 48 (1968).

possibility. Incapacitation, he says, sometimes actually is a freestanding justification of corporate punishment, therefore it is possible for it to be. To make his case, then, he needs to show that sanctioning authorities sometimes believe that incapacitation is their stand-alone goal. That is, they must sometimes take themselves to be pursuing incapacitation for its own sake, and not for the sake of some other criminal justice goal.

One way Thomas could make his case would be to provide a clear-cut example where incapacitation is the only plausible, or is at least the most salient possible, goal.[39] The search is not an easy one. Curiously, at this stage of the argument, Thomas's focus switches to the incapacitative effects of the sanctions. As he earlier acknowledged, "merely describing the effects [of a sanction] may not answer the further question of whether the state is acting on a particular justification."[40] He claims, however, that the fact that "governance reforms [sometimes currently used as punishment] have an incapacitative effect offers at least some reason to appeal to incapacitation as an operating justification."[41] But governance reforms also have deterrent effects. As Thomas observes, "these [governance] reforms . . . make wrongdoing easier to detect and prosecute."[42] Improving detection and prosecution of misconduct boosts deterrence;[43] in fact, evidence shows such improvements are the best way to improve deterrence.[44] So incapacitation, while perhaps *a* plausible goal, is not the *only* plausible goal of governance reform.

Nor is incapacitation even the most salient goal of governance reform. The most salient goal is probably . . . reform. I.e., rehabilitation. As Thomas says, these reforms often amount to instituting internal policing mechanisms. Organizational transparency and internal reporting channels form part of the definition of what effective compliance is.[45] Internal policing does not prevent corporate misconduct by restraining corporate convicts from reoffending, as incapacitative sanctions must. It prevents crime by facilitating prosecution

39. Thomas, *supra* note 2, at 905 ("[A]t least some [corporate] sanctions we already employ are better understood as efforts to incapacitate.").

40. *Id.* at 929.

41. *Id.* at 952; *see also id.* at 950 ("[Prohibitions of business practices] have an obvious incapacitative . . . effect akin to conditions of probation.").

42. *Id.* at 952.

43. *See* Alexander & Cohen, *supra* note 22, at 15, 20 ("Detection and sanctions are substitutes in the production of deterrence.").

44. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199–202 (showing that probability of detection affects deterrence calculus more than severity of sanction).

45. U.S. SENTENCING GUIDELINES § 8B2.1(a)(1) (noting the importance of internally detecting misconduct); *id.* § 8B2.1(b)(2)(c) (noting the importance of internal reporting).

(deterrence) and by making it less likely that corporation convicts will choose to reoffend in the first place (rehabilitation).

Similar arguments are available for Thomas's other examples. Corporate death penalties and business practice prohibitions have incapacitative effects, but they also have clear retributive and deterrent effects. It is hard to imagine corporate sanctions more consonant with strong retributive messaging. What is more, corporations view these sanctions as *the* sanctions to be avoided,[46] so their deterrent impact is beyond dispute. Thomas's claims that since forced divestiture (a version of the corporate death penalty) only applies to corporate convicts "operated primarily for a criminal purpose or primarily by criminal means,"[47] "incapacitation [must be] the *goal*."[48] But that condition of application equally supports the claim that retribution and deterrence are the goals of forced divestiture. What sort of corporation could be more deserving of this harshest sanction? Whose corporate operations are in greater need of stiff deterrence? If the sanctions Thomas discusses are equally compatible with multiple criminal justice goals, he cannot carry the heavy burden he set for himself—to show that "incapacitation is . . . the best explanation for the goal being vindicated."[49]

Thomas also tries a second approach to show that sanctioning authorities believe incapacitation is their goal: pointing to what legal authorities say they are doing. On this point, the novelty of Thomas's project is its own undoing. Discussions of corporate criminal liability focus overwhelmingly on three traditional justifications for punishment: condemning prior bad acts, deterring future bad actors, and rehabilitating criminal organizations into good corporate citizens. Incapacitation, by contrast, receives virtually no attention.[50]

Relevant translation: legal authorities do not talk in terms of incapacitating corporate criminals. "[A]ctual practices . . . [are] not referred [to] as 'incapacitation.' "[51] This leaves Thomas in the position of having to propose a conspiracy-theory: "Although couched in the language of rehabilitation . . . incapacitation operates . . . as a goal . . . of the specific reforms reliably being imposed."[52] In other words,

46. Vikramaditya Khanna, *Reforming the Corporate Monitor?*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 22, at 226, 228 ("[B]oth [the government and firms] have strong incentives to settle with something like a DPA.").

47. U.S. SENTENCING GUIDELINES MANUAL § 8C1.1.

48. Thomas, *supra* note 2, at 947.

49. *Id.* at 949.

50. *Id.* at 909.

51. *Id.* at 911.

52. *Id.* at 951.

prosecutors self-consciously think in terms of incapacitation but secretly "relabel . . . efforts to incapacitate as efforts to rehabilitate."[53]

There are three problems with this argument. First, the odds are stacked heavily against it. While it is certainly possible that prosecutors are misleading everyone about what they are trying to do, we need good reasons not to take their surface language seriously. Thomas has a story about why prosecutors, if they were pursuing incapacitation, would want to reframe it as rehabilitation.[54] He just does not give any reason to think that prosecutors are actually pursuing incapacitation. Second, the story Thomas proposes itself is strained. He says that if prosecutors were self-consciously pursuing incapacitation through civil deferred prosecution agreements with corporations, they would want to reframe the goal as rehabilitation to avoid the appearance of "extrajudicial punishment."[55] But it's not clear why coerced extrajudicial rehabilitation is a more palatable counter-narrative than coerced extrajudicial incapacitation. Indeed, incapacitation is a standard object of civil enforcement.[56] Third and finally, even if the story shows that prosecutors are misleading us all about their incapacitative goals, it cannot explain why judges (who also punish corporations) rarely if ever talk in terms of corporate incapacitation. Nothing judges do is extrajudicial.

None of the points I have just raised actually disprove Thomas's second possibility sub-thesis: that incapacitation could be a justification for corporate punishment. My arguments only cast some doubt on the support Thomas gives for it. Even so, I am inclined to agree with him that the thesis is correct. He has shown by analogy to the individual case that the law can and does incapacitate corporate criminals (first sub-thesis). The only further point he needs is the psychological point that sanctioning authorities could also have incapacitation as a stand-alone goal (second sub-thesis). That seems a plausible enough claim, regardless of whether any prosecutors presently endorse it.

## IV. SHOULD INCAPACITATION JUSTIFY?

Having shown that it is possible to incapacitate corporations, Thomas moves on to argue that "corporate criminal law . . . should . . . pursue an agenda of incapacitating corporate criminals."[57] As before, this thesis actually has two sub-theses, one corresponding to

53. *Id.* at 958.

54. *Id.*

55. *Id.* at 958.

56. *See, e.g.*, MASS. GEN. LAWS ch. 123, § 35 (2018) (providing civil commitment for treatment of substance abuse).

57. Thomas, *supra* note 2, at 946.

incapacitation as a tool and one to incapacitation as a justification. As to the first, Thomas's discussion of what an incapacitative agenda for corporations might look like is proof enough of its creative potential. He advocates expanding the set of incapacitative tools available to judges and prosecutors to include a more diverse set of prohibitions[58] and more nuanced terms of imposition. He broaches the fascinating possibility of "corporate imprisonment" through "temporary nationalization."[59] Whether his initial proposals are likely to materialize or not, his conceptual framework is sure to inspire fresh thinking in the ossified world of corporate punishment. More creatively applied, corporate incapacitation could become a valuable tool for pursuing criminal justice goals.

The last remaining question is what those criminal justice goals should be and whether corporate incapacitation should be among them. This goes to Thomas's second prescriptive sub-thesis—that incapacitation should be a justification for corporate punishment. Thomas does not just want to show that incapacitation is a helpful way to pursue other familiar criminal justice goals. He wants to show that incapacitation deserves a seat at their table, itself a freestanding justification. Indeed, he wants to claim rehabilitation's seat.

Thomas begins his argument by essentially asking "why not?"[60] Since he "has identified multiple sanctions . . . that incapacitate corporations," he believes "there is no . . . barrier preventing criminal law from appealing to incapacitation as a justification."[61] This two-sentence argument moves too quickly. It elides the distinction between incapacitative effect and incapacitation as a justification. Imagine to what other use this argument structure could be put. "The criminal law has sanctions that have racially discriminatory effects, so there should be no barrier to using racial discrimination as a justification for punishment." Thomas would, of course, find that conclusion repulsive. Just because the law does incapacitate, does not mean the law should claim incapacitation as its justification.

His argument that corporate incapacitation raises fewer "normative and practical concerns . . . [than incapacitation of] individual moral agents" similarly falls short of his desired conclusion.[62] It again tries to move from an observation about incapacitation as a type of sanction to incapacitation as a justification. Thomas thinks incapacitative punishments "do violence to . . . normative commitments

58. *Id.* at 946–56.
59. *Id.* at 955.
60. *Id.* at 956 ("[T]here is no clear reason not to.").
61. *Id.*
62. *Id.* at 912.

to [individual] moral autonomy"[63] and may be ineffective for many individual criminals.[64] He may be right. But the fact that these concerns are "less relevant or onerous" for corporations is hardly a resounding recommendation for taking corporate incapacitation as a justification.

Perhaps Thomas's claim that "there is no decisive countervailing reason to exclude" incapacitation as a justification is playing an important role.[65] Regardless of whether that claim amounts to even a weak reason to *include* incapacitation as a justification, one might wonder whether the claim is true. On this point, it may be worth revisiting Thomas's discussion of the rhetoric sanctioning authorities use when punishing corporations. As discussed above, Thomas notes that judges and prosecutors rarely, if ever, describe or justify corporate punishment in the language of incapacitation. Thomas explains this by appealing to a conspiracy among authorities to hide their true incapacitative intentions behind a rehabilitative mantel. A more charitable interpretation would take authorities' language at face value. Perhaps they really are trying to rehabilitate corporations rather than incapacitate them and believe they have decisive reason for doing so.

What might that reason be? Thomas suggests the response: corporate incapacitation is socially destructive.[66] "[D]e jure suspension [of a corporation] means de facto death."[67] A corporation restrained from plying its trade necessarily dies. While incapacitating an individual risks violating her personal autonomy, incapacitating a corporation risks the livelihood of potentially thousands of innocent employees.[68] This concern remains whether we are talking about suspension of all corporate activities (Arthur Anderson)[69] or just suspending the activities of a single corporate division (KPMG).[70] Corporate death and corporate atrophy both mean jobs lost and innocent corporate stakeholders injured.

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63. *Id.* at 959.

64. *Id.*; *see also id.* at 961 ("Imprisonment . . . simply changes who [a criminal's] victims are.").

65. *Id.* at 957.

66. *Id.* at 971 ("The major downside of prohibitive sanctions is that they risk over-punishment by causing the entity to collapse.").

67. *Id.* at 948.

68. *See* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009); 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 [https://perma.cc/U4NM-SRLG] (noting that decision to decline prosecution was made out of concern for "protecting innocent workers and others from the consequences of a conviction").

69. Thomas, *supra* note 1, at 948.

70. *Id.* at 921, 950.

Thomas proposes strategies for sparing this social destruction. He devotes a lengthy discussion to his imagined form of corporate imprisonment that places corporate convicts in "robust receiverships or temporar[ily] nationalizes" them.[71] He is spitballing here, trying to show that some sort of analogue to corporate imprisonment is possible, even if not likely or appealing. Still, the example he offers is a surprising turn for Thomas, who otherwise doubts sanctioning authorities' "expertise and institutional incentives" when it comes to corporate operations.[72] The need for such a "fanciful"[73] workaround serves to highlight rather than minimize the "decisive reasons" sanctioning authorities have against incapacitation as a freestanding justification.

Thomas does not just rely on "why not?" arguments for recognizing incapacitation as a justification. He also offers a positive argument: incapacitation can beat rehabilitation at its own game. Thomas takes a two-pronged approach. First, "incapacitation captures the same core benefits [as] rehabilitation."[74] Second, incapacitation can do this without the "shortcomings of rehabilitation."[75]

As to the second prong, Thomas is right that "courts and prosecutors simply lack the expertise necessary to design structural solutions" for rehabilitating corporations.[76] Rehabilitation theorists have acknowledged this institutional incompetence.[77] Thomas concedes the wisdom (if not the likelihood) of rehabilitation theorists' proposed solution: better coordination between courts, law enforcement, regulators, and private parties.[78] What Thomas overlooks, though, is that any workable system of corporate incapacitation would also need such coordination. There is no reason to think that the same inexpert courts and prosecutors who struggle with a rehabilitative agenda would be better able to identify when "a corporation . . . is structurally suited to recidivate."[79] As Thomas says, designing terms of corporate incapacitation "will be a challenging, case-specific, empirical inquiry."[80]

Even if incapacitative sanctions are no easier to design, Thomas may be right that they are easier "to impose and monitor" than

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71. *Id.* at 955.

72. *Id.* at 913.

73. *Id.* at 955.

74. *Id.* at 962.

75. *Id.*

76. *Id.* at 966.

77. Diamantis, *supra* note 12, at 563–65.

78. Thomas, *supra* note 2, at 919; Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT, *supra* note 22, 177, 191–95.

79. Thomas, *supra* note 2, at 961.

80. *Id.* at 970.

rehabilitative sanctions.[81] Could that be a distinct advantage of incapacitation? Checking that a corporation has shuttered all or some of its operations is more straightforward than checking that it is pursuing those same operations in a responsible manner. But this ease of implementation is not necessarily a strike in favor of incapacitation, especially given how socially destructive incapacitative sanctions are. If anything, the ease of administering incapacitative sanctions is further cause for caution. The hangman's task is always easier than the social worker's.

Thomas might still have a strong affirmative argument for recognizing incapacitation as a justification of corporate punishment if he could succeed on the first prong by showing that incapacitation can beat rehabilitation at its own game. Thomas limits his discussion to what he calls "*the* . . . core benefits" of rehabilitation:[82] that it rejects corporate crime as a cost of doing business and that it shores up under-deterrence.[83] Like successful rehabilitation (but unlike deterrence), successful incapacitation stops criminal conduct in its tracks. Both also send the message that crime will not be tolerated, regardless of whether a would-be criminal is prepared to pay the penalty. On this point, I think Thomas is right. Again, though, being right here is not enough to make his case. Claiming that incapacitation has some of the same benefits as rehabilitation cannot tip the balance for incapacitation, especially given the social costs (to employees, to shareholders, to customers, to the economy) that the latter inevitably entails.

What Thomas misses on his two-item list of the "core benefits" is rehabilitation's foremost benefit: it preserves, to whatever extent lawfully possible, socially and economically productive corporate operations. Incapacitation theorists think about corporations as carvers think of stone blocks: what to away chip away. Each flake is a lost job, a poorer shareholder, or a disappointed creditor. Rehabilitation theorists think like ceramicists: what will they change, move, add, or repurpose. Ideally, no clay is wasted.

To advance his argument, Thomas needs to show that there is something incapacitation can do that rehabilitation cannot accomplish alone. His discussion of current incapacitative corporate sanctions succeeds on this point. Setting aside for now permanent corporate disablement, [84] most of Thomas's examples are sanctions imposed through corporate probation and pretrial-diversion agreements.[85] He is

81. *Id.* at 968.
82. *Id.* at 962 (emphasis added).
83. *Id.* at 963–65.
84. *Id.* at 947 ("Forced divestiture is imposed sparingly.").
85. *Id.* at 916.

right that these sanctions often have incapacitative effects and that these incapacitative effects are sometimes crucial for achieving criminal justice goals. But it is equally clear that in the vast majority of cases, probation and pretrial diversion use incapacitation to achieve *other* criminal justice goals.

The introductory commentary to the U.S. Sentencing Guidelines, for example, states that "probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."[86] Significantly, the only "[]other" sanction explicitly referenced by the commentary is rehabilitative. Later, the Guidelines list eight circumstances under which a court "shall" impose a term of probation. Half of these pertain to circumstances showing the corporate convict had an ineffective compliance program in need of reform.[87] Three pertain to fines and community service.[88] Incapacitation appears nowhere on the list, except perhaps implicitly in the final catch-all referencing "the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)."[89] The Guidelines' recommended conditions of probation also emphasize compliance reform.[90] Similar remarks extend to the corporate sanctions that prosecutors leverage extrajudicially. As is widely recognized, the primary function of these is (1) improving corporate compliance[91] (i.e., rehabilitation) and (2) *avoiding* incapacitation.[92]

The internal logic of corporate probation and pre-trial diversion agreements confirms that incapacitation cannot be their justification. Probation[93] and pretrial diversion[94] agreements are necessarily limited

86. U.S. SENTENCING GUIDELINES MANUAL, introductory cmt. (U.S. SENTENCING COMM'N 2018).

87. *Id.* § 8D1.1(a)(3)-(6).

88. *Id.* § 8D1.1(a)(1)-(2), (7).

89. *Id.* § 8D1.1(a)(8).

90. *Id.* § 8D1.4(b).

91. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007) ("This new settlement approach avoids the collateral consequences of an indictment, while using the prosecution as a "spur for institutional reform.").

92. 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 46, at 227 ("[T]he indictment of Arthur Andersen . . . and the fairly large collateral consequences propelled interest in considering alternatives to the full criminal process." (footnote omitted)).

93. U.S. SENTENCING GUIDELINES MANUAL § 8D1.2 (limiting the term of corporate probation to five years).

94. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 322 (2007) ("Prosecutors [entering into pretrial diversion with a corporate

in duration. Time limits make no sense from the perspective of incapacitation. If incapacitation reflects, as Thomas argues, the conclusion that a convict is dangerous,[95] incapacitation standing alone should always be permanent. It is only when incapacitation is used as a tool to achieve another purpose of corporate punishment that its limited duration makes any sense. If incapacitation is used retributively, the "pain" of corporate incapacitation eventually satisfies the demands of justice. If incapacitation is used to deter, the mounting financial costs are sufficient after a time to warn would-be criminals. If incapacitation is used to rehabilitate, reform only takes so long to implement.

Thomas hoped to show that incapacitation deserves a seat at the table of justifications for corporate punishment. His examples persuasively show that incapacitation is a useful agent, perhaps even an essential agent, of criminal justice. It is also a destructive agent that necessarily brings social loss in its wake. This should make us, as it has made judges and prosecutors, cautious to pursue it for its own sake. Sometimes calling on the agent may be worth the waste it brings, as when it permits us to pursue other compelling criminal justice goals like deterrence or rehabilitation. Thomas has done us a service by helping us to see past current rhetoric to the uses of incapacitation in the corporate context. That is more than enough to recommend *Incapacitating Corporate Criminals* and to anticipate the next installment with eagerness. His argument, though, comes at the cost of firmly lodging incapacitation in a service role, on hand for the meal but not seated at it.

## V. CONCESSIVE CONCLUSION: INCAPACITATION, PULL UP A CHAIR

Or does it . . . Among the examples of corporate incapacitation, Thomas has one narrow class of cases where incapacitation sits at the head of the table. In what, to my mind, is one of the most important sentences of the article, Thomas writes: "The animating impulse [behind forced divestiture] is that some enterprises are so pervasively corrupt that they cannot be expected to abstain or reform."[96]

Forced divestiture, recall, is basically the corporate death penalty, a fine so large that it drains the corporation lifeless. When could such an extreme sanction be appropriate? As a last resort. The Sentencing Guidelines say it is only for corporations "operated

suspect] agree not to pursue the charges and to dismiss them after a period of time (generally between one and two years) if the corporation honors all of the terms of the agreement.").

95. Thomas, *supra* note 2, at 935, 939.

96. *Id.* at 947.

primarily for a criminal purpose or primarily by criminal means."[97] Thomas adds, sensibly enough, corporations that, because they are beyond reform, will continue to pose a danger to society.

In such cases, the three familiar justifications of corporate punishment are unattainable. The corporate convict, by hypothesis, cannot be rehabilitated. Such corporations are undeterrable since their entire business operates by attempting to subvert the law. They deserve no compassion and are beyond the possibility of retributive atonement. Incapacitation alone remains as the most effective agent of justice and the only viable justification. When the criminal law can achieve nothing else, incapacitation's otherwise fearful destruction is its chief advantage.[98] We should hope to call on her sparingly.

97. U.S. SENTENCING GUIDELINES MANUAL § 8C1.1.

98. Similar reasoning could apply to incapacitation as applied to corrupt and unreformable divisions situated within otherwise salvageable corporations. The only sensible punishment may be to prohibit the division's line of business, killing the part to save the whole.