

# Incapacitating Criminal Corporations

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*If there is any consensus in the fractious debates over corporate punishment, it is this: a corporation cannot be imprisoned, incarcerated, jailed, or otherwise locked up. Whatever fiction the criminal law entertains about corporate personhood, having a physical “body to kick”—and, by extension, a body to throw into prison—is not one of them. The ambition of this project is not to reject this obvious point but rather to challenge the less-obvious claim it has come to represent: incapacitation, despite long being a textbook justification for punishing individuals, does not bear on the criminal law of corporations.*

*This Article argues that incapacitation both can and should serve as a justification for punishing criminal corporations. Descriptively, it interrogates how rote appeals to the impossibility of corporate imprisonment obscure more pressing, challenging questions about whether and to what extent the criminal law can vindicate an account of incapacitation that extends to corporate persons. Excavating a richer conceptual framework for incapacitation from our practices of individual punishment demonstrates that sanctions already imposed in or just outside the criminal law can be better understood as efforts to incapacitate, rather than to deter or rehabilitate, a criminal corporation. Indeed, reevaluating the law’s understanding of penal incapacitation provides reason to think that there are similar and perhaps stronger reasons for incapacitating corporate persons than there are for individuals.*

*Prescriptively, the Article leverages this comparative framework to argue that incapacitation should be recognized as a core justification for corporate punishment. Although rehabilitation has gained traction*

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*in past decades as a basis for punishing corporations, incapacitation stands as a more realistic, more administrable alternative. This is because a principle of rehabilitation has led to a practice of imposing on corporations intricately designed but dubiously effective internal compliance and governance reforms. Incapacitation, by contrast, lends itself to clear, discrete prohibitions for which the criminal law is better situated to justify, impose, and monitor.*

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## INTRODUCTION

Sometimes, corporations do bad things. Volkswagen taught cars how to cheat on emissions tests,<sup>1</sup> while Google programmed its Street View fleet to “wiretap” private wireless networks.<sup>2</sup> Siemens kept desks full of cash at offices around the world to bribe local officials.<sup>3</sup> Odebrecht’s kickback scheme has implicated more than a thousand politicians throughout Latin America and Europe.<sup>4</sup> Months before eleven workers died at the Deepwater Horizon spill, British Petroleum admitted that it had never fixed safety violations that caused fifteen deaths in a prior refinery explosion—even despite three intervening fatal accidents.<sup>5</sup> Wells Fargo did not require its employees to break federal banking law, but it did make it virtually impossible for them to keep their jobs unless they did.<sup>6</sup> And, of course, the head of an international drug cartel recently praised HSBC as “*the* place to launder money.”<sup>7</sup>

What should we do when corporations break bad? For more than a century, the United States has recognized that commercial corporations, just like individuals, can be found guilty of a crime.<sup>8</sup> On the other hand, and longevity notwithstanding, the federal criminal law of corporations has faced a constant barrage of doctrinal, practical, and especially theoretical challenges.<sup>9</sup> Yet, across decades of disagreement,

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1. Andrea Peterson & Brian Fung, *The Tech Behind How Volkswagen Tricked Emissions Tests*, WASH. POST (Sept. 22, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/09/22/the-tech-behind-how-volkswagen-tricked-emissions-tests> [<https://perma.cc/9DR7-5GGP>].

2. David Kravets, *An Intentional Mistake: The Anatomy of Google’s Wi-Fi Sniffing Debacle*, WIRED (May 12, 2012, 7:18 PM), <https://www.wired.com/2012/05/google-wifi-fcc-investigation> [<https://perma.cc/D6T5-HJBP>].

3. *Bavarian Baksheesh*, ECONOMIST (Dec. 18, 2008), <https://www.economist.com/business/2008/12/18/bavarian-baksheesh> [<https://perma.cc/7SX2-DXMN>].

4. Jonathan Watts, *Operation Car Wash: Is This the Biggest Corruption Scandal in History?*, GUARDIAN (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history> [<https://perma.cc/8GC7-NJ7X>].

5. Pierre Thomas et al., *BP’s Dismal Safety Record*, ABC NEWS (May 27, 2010), <https://abcnews.go.com/WN/bps-dismal-safety-record/story?id=10763042> [<https://perma.cc/U6W6-RQ2M>]; Erwin Seba, *BP Worker Killed at Texas City Refinery*, REUTERS (Jan. 15, 2008, 11:59 AM), <https://www.reuters.com/article/us-refinery-operations-bp-worker/bp-worker-killed-at-texas-city-refinery-idUSN1552142820080115> [<https://perma.cc/T372-F49H>].

6. Elizabeth C. Tippet, *How Wells Fargo Encouraged Employees to Commit Fraud*, CONVERSATION (Oct. 6, 2016, 9:13 PM), <http://theconversation.com/how-wells-fargo-encouraged-employees-to-commit-fraud-66615> [<https://perma.cc/9V32-Z6LG>].

7. Aruna Viswanatha & Brett Wolf, *HSBC to Pay \$1.9 Billion U.S. Fine in Money-Laundering Case*, REUTERS (Dec. 10, 2012, 11:45 PM), <https://www.reuters.com/article/us-hsbc-probe/hsbc-to-pay-1-9-billion-u-s-fine-in-money-laundering-case-idUSBRE8BA05M20121211> [<https://perma.cc/8WRL-37LL>] (emphasis added).

8. See N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

9. See, e.g., 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 (2003)

one assertion garners near-universal consensus, providing a touchstone of sorts for debates over the possibility of, and the purpose behind, corporate responsibility: *A corporation cannot be imprisoned, incarcerated, jailed, or otherwise locked up.*

It seems trivial to take the sentiment for what it is worth—the corporation has “no body to kick,” as they say.<sup>10</sup> But what is less obvious, though perhaps more surprising, is the extent to which this rote assertion has come to stand for a much broader claim that the criminal law does not—and cannot—*incapacitate* corporate criminals. Discussions of corporate criminal liability focus overwhelmingly on three traditional justifications for punishment: condemning prior bad acts,<sup>11</sup> deterring future bad actors,<sup>12</sup> and rehabilitating criminal organizations into good corporate citizens.<sup>13</sup> Incapacitation, by contrast, receives virtually no attention.<sup>14</sup>

This Article articulates and defends the idea that incapacitation, a long-standing, textbook rationale for punishing *individuals*, both can and should be extended as a rationale for punishing *corporations*.<sup>15</sup> Recognizing that the very notion of incapacitating a corporation flies in the face of received wisdom, my ambition here is not to reinvent our notions of penal incapacitation as much as it is to instead deepen our

(discussing the shift in principal objectives of American criminal law over the last century); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009) (arguing that corporate criminal liability cannot be justified within the theoretical structure of American criminal law).

10. John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

11. *E.g.*, Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006); Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (2012); David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235 (2016). For a discussion of retribution as distinct from condemnation, see *infra* Section I.C.1.

12. *E.g.*, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1486 (1996); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999); see also Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985).

13. *E.g.*, Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417 (2009).

14. For a notable exception, see Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1146–47 (1983). The last sustained discussion appears to have been a student note discussing the then-newly adopted Organizational Sentencing Guidelines. *Cf.* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1728–31 (2007) (discussing Christopher A. Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2033–34 (1992)).

15. Although incapacitation operates as a justification just outside the criminal law, see *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring), this Article focuses attention on the features and considerations that arise in the specific context of criminal punishment.

understanding of the concept that we already have. To that end, the account of corporate incapacitation developed here comports with both (1) settled understanding of incapacitation as a justification for individual punishment<sup>16</sup> and (2) the types of sanctions generally imposed on criminal corporations. Excavating such an account reveals that there are good reasons to recognize incapacitation as a justification for corporate punishment, while also revealing that prevailing arguments advocating its exclusion are surprisingly weak.

This project is equal parts descriptive and normative. Descriptively, this Article diagnoses why federal law and scholarship have uniformly—and virtually without discussion, other than to remark that a corporation has no body to put in jail—disregarded incapacitation’s role in the criminal law of corporations. This oversight reflects a broader tendency to look past the varieties and complexities of incapacitation as a justification for punishment.<sup>17</sup> Discussions of penal incapacitation uncritically employ one of two definitions—the first overly abstract, the second unduly narrow. At one end, historical accounts, like Jeremy Bentham’s classic characterization, explain that incapacitation aims for “prevention of similar offences [by] the same individual” not by influencing her “*will* to” recidivate but rather by “depriving h[er] of the *power* to do the like.”<sup>18</sup> But while conceptually useful for distinguishing incapacitation from other preventative justifications—namely, deterrence and rehabilitation—distinctions between the “*will*” to act and the “*power*” to act offer little traction to make sense of incapacitation as a recognizable social practice. At the other extreme, recent accounts treating incapacitation as coextensive with imprisonment fail to disambiguate a general *function* of punishment from a specific *type* of punishment;<sup>19</sup> in doing so, they

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16. Tracking common usage, I leverage the notion of a “justification for punishment” that is treated as coextensive with a “goal of punishment.” *E.g.*, *Graham v. Florida*, 560 U.S. 48, 71 (2010) (referring to “retribution, deterrence, incapacitation, and rehabilitation” interchangeably as “penological justifications” and “goals of penal sanctions”). For a discussion of incapacitation as a “justification” for punishment, rather than a “purpose” or “function” of punishment, see *infra* note 112.

17. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME, at v (1995) (“[Incapacitation] has received scant attention in criminology, in criminal law, or in jurisprudence.”).

18. 4 JEREMY BENTHAM, *Panopticon Versus New South Wales*, in THE WORKS OF JEREMY BENTHAM 174 (John Bowring ed., 1843) [hereinafter BENTHAM, *Panopticon*].

19. See, e.g., Jonathan Simon, *Total Incapacitation: The Penal Imaginary and the Rise of an Extreme Penal Rationale in California in the 1970s*, in INCAPACITATION: TRENDS AND NEW PERSPECTIVES 15, 18 (Marijke Malsch & Marius Duker eds., 2012) [hereinafter INCAPACITATION: TRENDS] (discussing how incapacitation can be accomplished through means other than imprisonment).

confuse reliable features of imprisonment with characteristics essential to incapacitation more broadly.

Scrutinizing how incapacitation is evoked or instantiated across a variety of individual punishments provides the foundation for excavating a richer understanding than either conceptual analysis or narrow attention to bodily constraint allows. In different ways, both accounts conflate several different modes of restraint that the criminal law imposes under the guise of incapacitation. Imprisonment exemplifies one such mode of restraint: *isolation* from the broader society. But close attention reveals two other modes of restraint. Capital punishment, for example, offers an extreme example of restriction through *disablement*; through imprisonment, a person is permanently altered in a manner that renders her incapable of committing those same crimes in the future. Supervised release, meanwhile, emphasizes restriction through *prohibition*, whereby a person can participate in a community while subject to a host of physical, legal, and technological mechanisms that externally limit her ability to act freely.

Viewing incapacitation from this broader perspective highlights that functional analogues to individual practices—even a straightforward version of corporate imprisonment<sup>20</sup>—could feature into corporate criminal practice. More to the point, close attention to actual practices reveals that such analogues *already exist*—even if not characterized as “incapacitation.” For example, forcing corporations to divest of a physical plant, refinery, or division disables them from committing future wrongs.<sup>21</sup> Several companies have been prohibited from pursuing certain lines of business or business practices, from associating with specific clients or counterparties, and even from continuing to participate in whole industries.<sup>22</sup> They have been forced to install invasive, compliance-centric “policing measures.”<sup>23</sup> They have been made to accept (and subsidize) outside monitors with sweeping oversight and veto powers over day-to-day managerial decisions.<sup>24</sup> And in extreme circumstances, they have been permanently divested of all

20. For an argument that some counterpart of individual imprisonment for corporations is conceptually possible but simply not worth pursuing for a wealth of practical and normative reasons, see *infra* Section III.A.3.

21. *E.g.*, BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 117–46 (2014) (discussing BP’s Texas City Refinery). For an excellent (and overlooked) discussion of corporate asset divestiture as incapacitative, see Steven Walt & William S. Laufer, *Corporate Criminal Liability and the Comparative Mix of Sanctions*, in *WHITE-COLLAR CRIME RECONSIDERED* 309, 320–23 (Kip Schlegel & David Weisburd eds., 1992).

22. Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013*, 70 *BUS. LAW.* 61, 94 (2014).

23. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 *N.Y.U. L. REV.* 687, 693 (1997).

24. Khanna & Dickinson, *supra* note 14, at 1723–24.

assets.<sup>25</sup> More to the point, each of these sanctions is imposed either through or adjacent to criminal punishment: at sentencing, in a deferred or nonprosecution agreement, and after sentencing, by virtue of a collateral consequence attaching automatically to the fact of conviction.<sup>26</sup> In other words, sanctions that incapacitate corporations in a manner comparable to how that justification operates in the rest of the criminal law already exist either in or just outside the criminal justice system.

Normatively, the criminal law should embrace incapacitation as both an applicable theory and worthwhile goal of corporate punishment. For starters, society should explicitly recognize corporate incapacitation simply because the criminal law already implicitly relies on it. As the examples above imply, corporations are being restrained to various degrees by sanctions that appear incapacitating in character and operation, even if these sanctions are not described or justified as such. Indeed, at least some sanctions already employed are better understood as efforts to incapacitate rather than to deter or rehabilitate a criminal corporation. The doctrinal upshot of this modest defense, then, is that merely recognizing corporate incapacitation by itself would not dramatically upend core understandings of incapacitation or the foundation for approaching corporate punishment. Indeed, uncritical assertions that corporate imprisonment is impossible may even get the comparison between individual and corporate persons backwards.<sup>27</sup> Ordinarily, incapacitation stands in tension with liberal commitments to individual responsibility that are essential to theories of criminal punishment.<sup>28</sup> Whereas these concerns constrain the propriety of incapacitation when levied against individuals in their capacity as autonomous moral agents, the same claims fail to attach to corporations insofar as a legal entity lacks the requisite normative status.<sup>29</sup> A surprising implication of this functional approach to incapacitation,

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25. *United States v. Najjar*, 300 F.3d 466, 485–86 (4th Cir. 2002); *see also* U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (U.S. SENTENCING COMM’N 2018) (stating that a court may set a fine sufficiently high to divest an organization of all net assets if it finds that the organization operated primarily for criminal purposes).

26. *See* GARRETT, *supra* note 21 (detailing the litigation and sentencing of BP after a series of safety violations and accidents at its Texas City Refinery); *see also* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

27. For a full treatment of this intellectual history, *see* W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479 (2018).

28. *See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1438 (2001) (detailing the ethical “conflicts between pursuing justice and incapacitating dangerous persons”).

29. JOHN RAWLS, *THE LAW OF PEOPLES* 23–25 (1999).

then, is that there may be stronger reasons to incapacitate corporations than individuals.

Practically, pursuing an incapacitative agenda—that is, taking incapacitation seriously not just as a possibility but as a central justification for punishment—would change our current criminal justice practices for the better. This is because incapacitation provides a better basis for corporate punishment than does rehabilitation. The criminal law’s recent embrace of corporate rehabilitation has encouraged courts and prosecutors to impose complicated reforms to a corporation’s internal governance and compliance structures as sanctions.<sup>30</sup> However, the design, implementation, and oversight of these reorganizations is a difficult task; more to the point, courts and prosecutors lack both the expertise and the institutional incentives to resolve structural defects impacting recidivist and pervasively criminal corporations.<sup>31</sup> As a result, there is little indication that criminal-compliance reforms actually rehabilitate and ample room for skepticism. Incapacitation, by contrast, lends itself to clear, bright-line prohibitions that are easier for the criminal justice system to justify, impose, and monitor. To be sure, incapacitation carries its own risks; we need to be careful not to implement restraints so severe as to create a *de facto* “corporate death penalty.”<sup>32</sup> Nevertheless, and as the framework for analyzing incapacitation developed here demonstrates, incapacitation admits of a far wider range of outcomes than termination on one hand and no consequence on the other.

This Article proceeds as follows. Part I describes current federal practices of corporate criminal law, focusing on when and how the criminal law punishes corporations. It then addresses the justifications for corporate punishment currently on offer and contrasts these to the absence of incapacitation. Part II diagnoses the shortcomings of discussions of incapacitation as a justification for punishment, advances a more comprehensive account of the root concept grounded on appeal to cases of individual punishment, and defends in principle the role that individual practices can play in informing practices of

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30. See U.S. DEP’T JUST., UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.1500 (2016) [hereinafter U.S. ATT’YS’ MANUAL] (providing guidance for prosecutors on factors to take into consideration when charging corporations and negotiating plea agreements); see also Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009) (describing modern compliance’s roots in criminal enforcement); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2133 (2016) (viewing compliance as a means of rehabilitating corporations following prosecution).

31. See generally PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (collecting essays).

32. Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 277–79 (2008).

corporate punishment. Part III extends this account of incapacitation to the corporate context, showing that the criminal law can and should take incapacitation seriously as a justification for punishing corporations. As part of this extension, Part III shows that incapacitation may already be implicit in, and thus overlooked in discussing, certain practices within corporate criminal law. Part IV defends the view that society would be better served by pursuing corporate incapacitation rather than corporate rehabilitation, sketching initial doctrinal reforms for such an incapacitative agenda. Rather than focus on designing new internal compliance and governance structures, the proposal is to move toward sanctions that would disable or prophylactically prevent future misconduct: forced divestiture of physical assets; required exit from business areas, practices, and client-counterparty relationships; and mandatory preapproval of major asset transactions, to name a few. The ambition here is to demystify corporate incapacitation while laying the groundwork for a larger empirical investigation into which incapacitative sanctions are best suited for which types of offenses and offenders—in other words, this Article proposes taking incapacitation seriously as a valuable additional justification for punishing criminal corporations.

## I. THE CURRENT STATE OF CORPORATE PUNISHMENT

Corporate criminal liability is a curious—and for many, an unfamiliar—subfield of criminal law. With that in mind, this Part briefly rehearses the relevant status quo surrounding both the doctrine and practice of corporate criminal law and punishment. This exposition makes no appeal to incapacitation except to note its absence from discussions of corporate punishment and purported absence from practice.

### *A. The Criminal Law of Corporations*

Contrary to popular belief, criminal law has long been used to prosecute and convict corporations.<sup>33</sup> That said, the practice of holding commercial corporations criminally responsible for general intent crimes as well as specific intent crimes—crimes for which there exists a proscribed action (*actus reus*) pursued concurrently with a prescribed

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33. *E.g.*, *Commonwealth v. Hancock Free Bridge Corp.*, 68 Mass. (2 Gray) 58 (1854); *People v. Corp. of Albany*, 11 Wend. 539, 542–43 (N.Y. Sup. Ct. 1834).

attitude (*mens rea*)<sup>34</sup>—took hold around the turn of the twentieth century. Congress began passing statutes that expressly criminalized corporate misconduct,<sup>35</sup> which the Supreme Court affirmed in its seminal 1909 decision in *New York Central & Hudson River Railroad Company v. United States*.<sup>36</sup> The resulting approach, embraced both then and now, treats criminal law as a unified legal domain concerned with misconduct by persons, be they corporate or individual. Of course, this presumptive similarity can break down.<sup>37</sup> Much of this Article (and scholarship on corporate crime generally) is animated by consideration of when such a breakdown occurs—that is, which differences between corporations and individuals make a *legal* difference and why.<sup>38</sup> With that in mind, it is worth noting that the criminal law presupposes persons are its object of regulation; no categorical separation exists between the criminal law of individuals and of commercial organizations.

Prosecuting corporate crime is hard: cases are factually complex, defenders are well funded and well represented, and investigations are time and resource intensive.<sup>39</sup> Accordingly, the modern criminal law of corporations occurs predominantly at the federal level.<sup>40</sup> Even there, organizational prosecutions make up only a fraction of the federal government’s docket, totaling approximately 3,200 corporate criminal settlements since 2000.<sup>41</sup> While enforcement priorities change over time and across administrations, the brunt of cases reliably arise under a

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34. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.2 (3d ed. 2018).

35. *E.g.*, Sherman Antitrust Act, ch. 647, 26 Stat. 209–10 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)); Elkins Act, ch. 708, 32 Stat. 847 (1903) (codified as amended at 49 U.S.C. §§ 41–43 (1964)) (repealed 1978).

36. 212 U.S. 481 (1909).

37. *See, e.g.*, *Hale v. Henkel*, 201 U.S. 43 (1906) (denying corporations Fifth Amendment protection against self-incrimination and partially extending Fourth Amendment protections); *see also* *Braswell v. United States*, 487 U.S. 99, 105 (1988) (reaffirming the principle articulated in *Hale v. Henkel*).

38. *See infra* Section III.C.

39. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 880–81 (2007).

40. *See* Baer, *supra* note 30, at 958 (“The agency that effectively regulates ‘general’ corporate compliance, at least where criminal violations are concerned, is the DOJ.”); *see also* Griffith, *supra* note 30, at 2078, 2113 (“Moreover, government interventions in compliance come not through the traditional levers of state corporate or federal securities law, but rather through prosecutions and regulatory enforcement actions.”).

41. This approximation is based on data received from the Corporate Prosecution Registry, a joint project between Duke University School of Law and the Legal Data Lab at the University of Virginia Arthur J. Morris Law Library. *See* Brandon L. Garrett & Jon Ashley, *CORPORATE PROSECUTION REGISTRY*, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html> (last visited Dec. 20, 2018) [<https://perma.cc/4YF9-KF8X>] [hereinafter PROSECUTION REGISTRY].

handful of categories: fraud (24%), environment (24%), bribery and money laundering (9%), food and drugs (8%), and antitrust (8%).<sup>42</sup>

Like the rest of the criminal law, organizational convictions result overwhelmingly from guilty pleas.<sup>43</sup> But nonprosecution agreements (“NPAs”) and deferred prosecution agreements (“DPAs”) provide an alternative form of corporate criminal settlement. The basic mechanism of a prosecution agreement loosely resembles pretrial diversion: the government agrees not to prosecute a corporation (resulting in an NPA) or to indefinitely delay moving forward with an indictment (resulting in a DPA). In exchange, the offending corporation agrees to a host of conditions that, in practice, are mostly indistinguishable from the terms that would otherwise appear in a plea agreement.<sup>44</sup> Mostly, then, prosecution agreements allow a corporation to settle a criminal investigation while avoiding the fact of conviction and, particularly, the collateral consequences that would attach as a result.<sup>45</sup> The use of prosecution agreements by certain divisions of the Department of Justice (“DOJ”)<sup>46</sup> has received widespread attention since their rise from obscurity in 2004<sup>47</sup>—though, and coverage notwithstanding, there continues to be “far more corporate convictions, chiefly in the form of guilty pleas, than deferred and non-prosecution agreements.”<sup>48</sup> Accordingly, and consistent with the literature, this Article includes prosecution agreements alongside discussions of

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42. See *id.* A summary of my findings from this database can be found at <https://perma.cc/54CG-WS9V>.

43. *Sourcebook of Federal Sentencing Statistics*, U.S. SENT’G COMMISSION, S-133 tbl.53 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB\\_Full.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf) [<https://perma.cc/P9AL-TLBQ>] [hereinafter *Sentencing Sourcebook*] (92% of dispositions). The interactive sourcebook and archives are available at <https://www.ussc.gov/research/sourcebook-2017>.

44. Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 894 (2013).

45. See Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 198–99 (2016) (discussing the Department of Justice’s (“DOJ”) use of DPAs and NPAs in lieu of pursuing criminal convictions).

46. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1316, 1318 (2013) (“[T]he Criminal Division’s widespread use of . . . prosecution agreements sets it apart from the Environment and Natural Resources Division and the Antitrust Division.”).

47. While corporate prosecution agreements first arose in the early 1990s, Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 57 (2006), usage escalated dramatically in 2004. Garrett, *supra* note 39, at 888–89.

48. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1801 (2011).

corporate liability and punishment, distinguishing salient features when appropriate.<sup>49</sup>

Finally, it is worth delineating how corporations are made to fit the requirements of criminal law—specifically, how the criminal law attributes mens rea to a corporate person. Federal courts continue to employ the tort-style doctrine of *respondeat superior* articulated over a century ago in *New York Central* for determining what actions and attitudes may be attributed to a corporation.<sup>50</sup> Under this doctrine, “[a] corporate person may be liable for a single criminal act by a single agent acting in the scope of employment and with the intent to benefit the corporation.”<sup>51</sup> As a result, the federal doctrine embraces a sweeping approach to corporate criminal liability that is at once over- and underinclusive of genuine instances of institutional fault—that is, misconduct indicating “not just that somebody pursued faulty preferences, but that the group arranged itself badly.”<sup>52</sup>

On the other hand, settled practice diverges stridently from formal doctrine; efforts by various actors within the federal system have, over the past twenty years, sought to narrow, albeit in a second-best manner, the scope of corporate criminal liability for genuine cases of corporate wrongdoing.<sup>53</sup> First, the DOJ, beginning in 1998, unilaterally disclaimed its authority to pursue charges to the full extent afforded by law,<sup>54</sup> instead promulgating, through a series of departmental memos and later the U.S. Attorneys’ Manual, detailed guidance for how prosecutors should decide whether to prosecute a corporation.<sup>55</sup> Second, the Sentencing Commission began providing a range of punishments, the severity of which scale according to factors

49. For a discussion of prosecutorial incentives surrounding NPAs and DPAs as it bears on the question of justifications for punishment, see *infra* Section III.B.2.

50. See *United States v. A&P Trucking Co.*, 358 U.S. 121, 206 (1958) (“[I]t is elementary that such impersonal entities can be guilty of ‘knowing’ or ‘willful’ violations of regulatory statutes through the doctrine of respondent [sic] superior.”); see also *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492–95 (1909) (articulating the doctrine of *respondeat superior*). *New York Central* is not the first Supreme Court case recognizing that corporations fall within the criminal law’s ambit; that decision came three years earlier. *Hale v. Henkel*, 201 U.S. 43 (1906) (denying Fifth Amendment protection against self-incrimination to corporations).

51. Garrett, *supra* note 48, at 1789.

52. Buell, *supra* note 11, at 502. For how this regime is underinclusive of paradigmatic cases of institutional fault, see Thomas, *supra* note 27, at 527.

53. Buell, *supra* note 11, at 476; William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1310–11 (2007).

54. WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS 37 (2006).

55. U.S. ATT’YS’ MANUAL, *supra* note 30, §§ 9-28.000–.300. Compare Garrett, *supra* note 48, at 1796 (“[I]n no other area do federal prosecutors provide such detailed guidelines to explain and to limit (albeit in a non-binding way) how they exercise their discretion.”), with Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL’Y 1, 8 (2010) (“The problem, however, is that the government’s response is entirely discretionary.”).

that overlap substantially with the DOJ's prosecutorial guidelines.<sup>56</sup> These two innovations reinforce each other: both consider whether criminal misconduct occurred in the absence of or in spite of a compliance program meant to detect individual misconduct,<sup>57</sup> both consider the corporation's prior offenses as circumstantial evidence of institutional fault,<sup>58</sup> and both consider the "pervasiveness" of criminal activity throughout the corporation.<sup>59</sup> Taken together, what is a capacious legal doctrine is tempered by well-established, regimented but ultimately discretionary pre- and post-conviction efforts to constrain overbreadth in a manner more consistent with traditional criminal law principles.

### *B. Existing Sanctions for Criminal Corporations*

Consider the range of sanctions available that are commonly employed against corporations. Included here are punishments resulting from a formal conviction, settlement terms in prosecution agreements that serve as something of a quasi-punishment, and, briefly, the collateral consequences that attach automatically by operation of federal law outside the specific domain of criminal law.

#### 1. Monetary Sanctions

For most of the time that corporations have been eligible for criminal liability—effectively, prior to the adoption of DOJ's Organizational Sentencing Guidelines ("Guidelines") in 1992<sup>60</sup>—the only available punishment was a criminal fine.<sup>61</sup> Monetary sanctions remain the most common form of corporate punishment,<sup>62</sup> with detailed criteria provided for calculating them.<sup>63</sup> The Guidelines are advisory

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56. Laufer, *supra* note 12, at 1420; see Arlen & Kraakman, *supra* note 20, at 742 (describing the DOJ's sentencing guidelines as a "composite liability regime").

57. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (U.S. SENTENCING COMM'N 2018); U.S. ATT'YS' MANUAL, *supra* note 30, § 9-28.800.

58. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(c); U.S. ATT'YS' MANUAL, *supra* note 30, § 9-28.600.

59. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b); U.S. ATT'YS' MANUAL, *supra* note 30, § 9-28.500.

60. See Garrett, *supra* note 39, at 877–81 (discussing the limited appearance of nonmonetary sanctions leading up to adoption of the Guidelines).

61. See *United States v. A&P Trucking Co.*, 358 U.S. 121, 127 (1958).

62. *Sentencing Sourcebook*, *supra* note 43, at tbl.51 (observing 74.8 percent of offenders receiving a fine, with an additional 12.2 percent receiving restitution but no fine). Despite being included in the Guidelines, restitution is not punishment. U.S. SENTENCING GUIDELINES MANUAL ch. 8, pt. B, introductory cmt.

63. U.S. SENTENCING GUIDELINES MANUAL §§ 8C1.1–8C4.11.

both generally<sup>64</sup> and especially with respect to prosecution agreements that do not result in a criminal sentence.<sup>65</sup> In practice, however, they continue to carry great weight in providing a benchmark for most monetary sanctions imposed.<sup>66</sup> To that point, Cindy Alexander and Mark Cohen find that “no clear difference emerges between the monetary sanctions imposed through” prosecution agreements as compared to guilty pleas.<sup>67</sup> At the extreme, the Guidelines allow for fines large enough to forcibly terminate a criminal corporation. Specifically, where an organization is found to have “operated primarily for a criminal purpose or primarily by criminal means,” the Guidelines require a sentencing court to impose a fine calculated “to divest [an] organization of all its net assets.”<sup>68</sup>

## 2. Nonmonetary Sanctions

Since the mid-1990s, and increasingly in the past decade, monetary fines have been complemented by nonmonetary sanctions—chiefly, compliance and corporate-governance reforms imposed either as a condition of probation or as part of a settlement agreement.<sup>69</sup> Whether in the courtroom or the prosecutor’s office, the government has exercised broad authority to fashion penalties directly impacting a corporation’s internal organization and future activities.<sup>70</sup>

This Section begins by detailing the nonmonetary sanctions under the Guidelines. The Guidelines allow, and in some circumstances require, that a sentencing court impose a term of probation of up to five

64. *United States v. Booker*, 543 U.S. 220, 246 (2005).

65. Courts formally have a role with respect to DPAs, but to date that oversight power has been construed extremely narrowly. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016); *see United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017). Courts do not play a role with respect to NPAs.

66. Most, but not all. For example, the Guidelines do not apply to environmental crimes with respect to fines but do apply with respect to restitution. U.S. SENTENCING GUIDELINES MANUAL § 8C2.1 cmt. 2 (fines); *id.* § 8A1.1 (restitution); *see id.* app. B (collecting sentencing statutes, some of which supersede the Guidelines).

67. Alexander & Cohen, *supra* note 26, at 583.

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

69. Baer, *supra* note 30, at 972–75 (discussing the development of compliance as a function of criminal law). For discussions of criminal law’s impact on the compliance industry writ large, *see Griffith, supra* note 30, at 2133; and Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003 (2017).

70. As further incentive, both charging decisions and the magnitude of a Guidelines-calculated fine consider whether the defendant had an effective compliance program at the time of the alleged offense. *See supra* note 57; *see also* Miriam H. Baer, *When the Corporation Investigates Itself*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 308, 313 (Jennifer Arlen ed., 2018) (“[T]he Federal Principles all but require the publicly held corporation’s implementation of a compliance function.”).

years.<sup>71</sup> Probation is not nearly as common as fines; the Sentencing Commission reports that approximately one-third of sentences omit it.<sup>72</sup> The Guidelines identify recommended conditions of probation—most importantly, the creation of an “effective compliance and ethics program.”<sup>73</sup> Additionally, courts have open-ended authority to impose bespoke conditions of probation that “are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization.”<sup>74</sup> Buttressed by a deferential abuse of discretion standard of review, a court’s “opportunity to remedy corporate misbehavior through . . . probation is almost endless.”<sup>75</sup> That said, courts generally turn to a core set of policing measures whereby convicted corporations are routinely ordered to create a compliance program or revise a preexisting one.<sup>76</sup> With respect to these compliance-program reforms, a common set of changes recur frequently: creation of an ethics hotline or ombudsperson to facilitate internal whistleblowing, mandatory compliance training, and revisions to the defendant’s auditing procedures.<sup>77</sup>

The frequency, breadth, and specificity of policing measures are greater in prosecution agreements than in guilty pleas. The DOJ has mostly been reluctant to announce clear guidelines for structuring agreements.<sup>78</sup> Nevertheless, general patterns have been discerned. For one, the aforementioned reforms that arise as conditions of probation are also common to prosecution agreements.<sup>79</sup> For another, corporations also agree to participate in and assist in any ongoing investigation, including and especially by helping to build the prosecution’s or regulator’s case against the corporation’s own employees.<sup>80</sup>

Compared with guilty pleas, prosecution agreements reliably go further in imposing compliance changes that get closer to core issues of

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71. U.S. SENTENCING GUIDELINES MANUAL § 8D1.1(a)(6) (requiring corporate probation “to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct”).

72. *Sentencing Sourcebook*, *supra* note 43, at tbl.53.

73. U.S. SENTENCING GUIDELINES MANUAL § 8D.1.4; *see id.* § 8B2.1 (providing principles for an “effective” program). Other conditions include restitution, community service, and a “condition that the organization not commit another . . . crime during the term of probation.” *Id.* § 8D13.

74. *Id.* § 8D1.3(e).

75. Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1439 (2009).

76. *Id.*

77. Griffith, *supra* note 30, at 2089.

78. Henning, *supra* note 13, at 1433.

79. Garrett, *supra* note 39, at 894.

80. Lisa K. Griffin, *Inside-Out Enforcement*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 110–13; *see* Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. 51 (2015).

corporate governance that were traditionally the purview of corporate law.<sup>81</sup> For example, the terms of various prosecution agreements have prohibited corporations from pursuing specific lines of business, from continuing certain business practices, from associating with specific clients or counterparties, and even from participating in whole industries. One recent study finds that approximately one-third of prosecution agreements imposed explicit prohibitions on a corporation's business practices.<sup>82</sup> By way of illustration, the global auditing firm KPMG agreed to "cease its private client tax practice" as part of its DPA.<sup>83</sup> Some prosecution agreement signatories have had to "refrain from doing any new projects" with specified counterparties,<sup>84</sup> while others were forced to adopt certain practices or relationships.<sup>85</sup>

Beyond these bright-line prohibitions, further changes touch directly on other aspects of corporate governance that are traditionally left to private ordering. Some reforms focus on management by creating new officer positions with reporting authority to the corporation's board, changing compensation policies, and incorporating clawback procedures.<sup>86</sup> Other popular changes focus instead on restructuring the corporation's board of directors: removing specific directors, installing seats for new independent directors, creating compliance and audit committees, and altering election procedures.<sup>87</sup>

Finally, prosecution agreements frequently impose a corporate monitor with broad investigative and reporting powers.<sup>88</sup> The oversight and enforcement powers for any given corporate monitor vary widely across prosecution agreements; this variance is further complicated by

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81. Griffith, *supra* note 30, at 2078.

82. Kaal & Lacine, *supra* note 22, at 52; *see also* Alexander & Cohen, *supra* note 26, at 589 (finding that twelve percent of a sample of 156 NPAs and DPAs included instructions to "shut down or divest[]" a business unit, and a further twenty-eight percent required "other business changes").

83. Deferred Prosecution Agreement at 4–6, *United States v. KPMG LLP*, No. 1:05-cr-00903 (S.D.N.Y. Aug. 29, 2005), <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/kpmg.pdf> [<https://perma.cc/B4AE-WJUN>].

84. Deferred Prosecution Agreement, *United States v. Ala. Contract Sales, Inc.*, No. 2:07-cr-00222 (N.D. Ala. May 29, 2007), <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/alabamacontractsales.pdf> [<https://perma.cc/27JU-VV75>].

85. *Non-Prosecution Agreement*, U.S. DEPT JUST. 3 (Dec. 6, 2011), <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/agreements/alphanatural.pdf> [<https://perma.cc/556U-D894>] (requiring construction of safety-testing facilities).

86. Griffith, *supra* note 30, at 2089.

87. Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 336–37 (2017).

88. Memorandum from Lanny A. Breur, Assistant Att'y Gen., U.S. Dep't of Justice, to All Criminal Div. Persons, Re: Selection of Monitors in Criminal Division Matters (June 24, 2009), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf> [<https://perma.cc/95KT-QUK3>]. A few courts have recently begun to follow the lead of prosecutors in appointing monitors. *See* Alexander & Cohen, *supra* note 26, at 589–90.

the fact that many prosecution agreements do little to spell out the monitor's precise relationship and function. That said, the authority available can be quite robust; at least some corporate monitors have been granted extremely broad discretion to oversee a corporation's affairs, including by "restructuring [its] internal processes" and even by making "important and day-to-day decisions" on behalf of the corporation.<sup>89</sup>

### 3. Collateral Consequences

Beyond those directly imposed by the criminal justice system, there are serious consequences that follow from criminal proceedings: market losses and reputational harms, parallel or follow-on regulatory investigations, and private litigation, among other things.<sup>90</sup> For our purposes, the focus here will be on "formal" collateral consequences—viz., those that "attach by express operation of law" on the basis of a conviction rather than through a sentence or prosecution agreement.<sup>91</sup>

Structurally, formal consequences apply automatically to a convicted corporation, subject to any regulatory agency's discretion to waive the consequences. Substantively, these consequences usually involve disbarment from a federal program, revocation or denial of a license to do business, or exclusion from taking advantage of government benefits. For example, the Securities and Exchange Commission ("SEC") allows "well-known seasoned issuers" and certain types of offerings to proceed without satisfying the full notification and disclosure requirements ordinarily required under federal securities law;<sup>92</sup> however, "bad actors," including any person convicted of a felony, are prohibited from participating unless first securing a waiver from the agency.<sup>93</sup> Comparable consequences exist throughout the accounting, securities, and banking sectors;<sup>94</sup> for market participants in

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89. Khanna & Dickinson, *supra* note 14, at 1724.

90. See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015).

91. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013); accord Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 11 CRIM. L. & PHIL. 625, 625 (2017).

92. See, e.g., 17 C.F.R. § 227.100 (2018) (crowdfunding exemption); 17 C.F.R. § 230.405 (2018) (WKSI ineligibility); 17 C.F.R. § 230.506(b) (2018) (Regulation D exemption).

93. 17 C.F.R. § 230.506(d) (2018); Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve*, 103 CALIF. L. REV. 1081, 1090 n.45 (2015); *Process for Requesting Waivers of "Bad Actor" Disqualification Under Rule 262 of Regulation A and Rules 505 and 506 of Regulation D*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/divisions/corpin/guidance/262-505-waiver.htm> (last modified Mar. 13, 2015) [<https://perma.cc/6YTX-2BKM>].

94. Federal Deposit Insurance Act, 12 U.S.C. § 1818(a)(2) (2012); Securities Act of 1933, 15 U.S.C. § 77t(b) (2012); Securities Exchange Act of 1934, 15 U.S.C. § 78o(b) (2012); 17 C.F.R.

federal healthcare programs;<sup>95</sup> in government contracting;<sup>96</sup> and other areas.<sup>97</sup>

### C. Standard Theories of Corporate Punishment

Criminal law and theory have long recognized a host of principles that justify and constrain the government’s authority to impose harm in the form of punishment.<sup>98</sup> These traditional justifications are codified in federal law as follows: deterrence (“to afford adequate deterrence”), rehabilitation (“to provide the defendant with needed educational or vocational training”), incapacitation (“to protect the public from further crimes”), expression of communal condemnation (“to promote respect for the law”), and retribution (“to provide just punishment for the offense” that is “not greater than necessary”).<sup>99</sup>

Federal punishment is pluralistic in that no single justification need apply in all circumstances, nor must any given punishment express or vindicate every justification all at once.<sup>100</sup> However, the criminal law of corporations differs—in practice if not in law—from the rest of criminal punishment in that some of these textbook justifications are taken to be categorically inapplicable to criminal corporations. Deterrence, condemnation, and, lately, rehabilitation loom large; retribution is actively rejected, while incapacitation is effectively ignored.<sup>101</sup>

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§ 201.102(e)(2) (2018) (prohibiting convicted accounting firms from advising publicly traded companies).

95. 42 U.S.C. § 1320a-7(a) (2012) (mandatory-exclusion provision); 42 C.F.R. § 1001.101 (2018) (identifying scope of mandatory-exclusion provisions).

96. 48 C.F.R. § 9.406-2(a) (2018) (debarment); 48 C.F.R. § 9.406-1(a) (2018) (identifying factors to consider in whether to grant excusal from debarment); *see also* 33 U.S.C. § 1368(a) (2012) (mandating debarment upon a conviction under 33 U.S.C. § 1319(c) (2012)).

97. *See National Inventory of Collateral Consequences of Conviction*, COUNCIL ST. GOV’TS JUST. CTR., [https://niccc.csgjusticecenter.org/database/results/?jurisdiction=225&consequence\\_category=&narrow\\_category=&triggering\\_offense\\_category=&consequence\\_type=&duration\\_category=&page\\_number=1](https://niccc.csgjusticecenter.org/database/results/?jurisdiction=225&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1) (last visited Jan. 1, 2019) [<https://perma.cc/3Z4A-9QM8>].

98. One consideration not viewed as relevant by the criminal law is the suffering experienced by innocent, nonculpable third parties as a result of the fact of conviction and punishment of a guilty party. *See* U.S. ATT’YS’ MANUAL, *supra* note 30, § 9-28.1100 cmt. b (2015) (“Almost every conviction of a corporation, like almost every conviction of an individual, will have an impact on innocent third parties.”); Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 349 (2003).

99. 18 U.S.C. § 3553(a)(2) (2012).

100. *Tapia v. United States*, 564 U.S. 319, 326 (2011) (“[A] particular purpose may apply differently, or even not at all, depending on the kind of sentence under consideration.”).

101. *See* Uhlmann, *supra* note 46, at 1299.

## 1. Retributive Theories of Punishment

Retribution, like incapacitation, is broadly thought not to carry over from the individual context to include corporate punishment. The retributivist impulse in criminal law regards as a central feature—or at least a necessary one—that a convicted criminal receives some version of her “just deserts.”<sup>102</sup> But whereas retributivism has varied in prominence and importance for individual punishment over the decades, corporate criminal law has steadfastly maintained the “virtual elimination of retribution as an acknowledged goal of [corporate] criminal sanctioning.”<sup>103</sup>

Driving retribution’s exclusion from corporate punishment is a heavy emphasis on the moral requirements underpinning the justification—requirements not met, on most accounts, by corporations.<sup>104</sup> And to be sure, the majority consensus in law and legal scholarship is that retribution cannot and does not apply to corporate punishment. That said, the received wisdom has long been, and continues to be, hotly contested.<sup>105</sup> To illustrate, some scholars argue that corporations can in fact satisfy the stringent prerequisites for moral agency.<sup>106</sup> Others argue that the criminal law should vindicate folk judgments of collective responsibility.<sup>107</sup> And still others offer a

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102. See generally John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979) (describing nine theories of retributive justice, all of which involve elements of “just deserts”).

103. Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 121 (2010).

104. See *supra* note 9 (collecting sources); see also MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 614–17 (1997) (outlining “the criminal law’s metaphysical presupposition of what persons must be like”); Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 MIDWEST STUD. PHIL. 16, 23–29 (2006) (arguing that without “a sophisticated interpretive framework of action assessment,” corporations cannot satisfy the requirements of morally responsible agents); Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 428–30 (2012) (“There is good reason for skepticism about the corporation’s moral agency, not least of all because moral agency at least arguably requires a capacity for the moral emotion, and it is doubtful that the corporation possesses this capacity.”).

105. See PETER FRENCH, *Punishing the Criminal Corporation*, in COLLECTIVE AND CORPORATE RESPONSIBILITY 190 (1984) (noting the variety of compelling theories surrounding corporate punishment); CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 153–69 (2011).

106. E.g., Gunnar Björnsson & Kendy Hess, *Corporate Crocodile Tears? On the Reactive Attitudes of Corporate Agents*, 94 PHIL. & PHENOMOLOGICAL RES. 273, 273–74 (2017) (“[C]ontrary to what one might think, at least some collectives are [capable of its own reactive attitudes].”); Bryce Huebner, *Genuinely Collective Emotions*, 1 EUR. J. PHIL. SCI. 89, 91 (2011); David Silver, *A Strawsonian Defense of Corporate Moral Responsibility*, 42 AM. PHIL. Q. 279, 279 (2005) (arguing that “corporations can be morally responsible for what they do”).

107. See Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2079–80 (2016) (discussing psychological processes for ascribing blame and arguing those judgments should inform criminal sanctioning); see also T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* 161–62 (2008) (“[I]n order for such blame to have moral content,

deflationary account of criminal responsibility that appeals to principles in political philosophy rather than moral theory.<sup>108</sup>

It is beyond the scope of this Article to solve, or even meaningfully engage with, the substantive dispute surrounding the propriety of corporate retribution.<sup>109</sup> Nevertheless, three points warrant consideration. First, whether to exclude retribution as a justification for corporate punishment continues to be actively and substantively litigated. Second, the absence of retribution informs how other justifications of corporate punishment are defended, as described below.<sup>110</sup> And third, the absence of retribution, while not fatal to our pluralistic institution of corporate punishment, puts pressure on the desirability of accounting for incapacitation.<sup>111</sup>

## 2. Preventative Theories of Punishment

Prospective justifications—sometimes lumped unhelpfully under the single banner of “deterrence”—are united by an underlying view that punishing prior bad acts is justified by and to the extent that it prevents future bad acts from occurring.<sup>112</sup> Two prospective justifications, deterrence and rehabilitation, form the basis for nearly all discussions of prospective corporate punishment.<sup>113</sup> The third, incapacitation, is nonexistent for reasons discussed in Part III.

we need to attribute attitudes to these entities . . . to which our attitudes toward them are in turn responsive.”). *But see* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009) (arguing that a more “expressive” view of criminal sanctions aligning with folk judgments should be rejected).

108. *See* Robson, *supra* note 103, at 121; *see also* Levinson, *supra* note 98, at 346–50 (“[G]roup liability strikes many as objectionable because it seems to reflect an antiliberal embrace of communal responsibility.”).

109. For a fuller account, see W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 602, 608–17 (2017).

110. *See infra* Sections I.C.2, I.C.3.

111. *See infra* Section II.C.

112. One might object that the ultimate justification for punishment here—for incapacitation specifically, but also for *any* prospective account—is not simply prevention but is instead something more basic. On this view, deterrence, incapacitation, and rehabilitation are not distinct goals or bases for punishment as much as they are different means or functions for achieving some more fundamental shared goal—for example, preventing future harm, making virtuous people, cementing a shared ethical life, or fostering cooperative interaction. This Article leaves open the inquiry into what such an ultimate justification for the criminal law might be. Consistent with common usage, *see supra* note 16, the discussion here limits attention to incapacitation as an “intermediate justification” of punishment. My thanks to Mihailis Diamantis, Alex Sarch, and Steven Schaus for various discussions on this point. For more on the distinction between ultimate justifications and intermediate justifications, see FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONS-MAKING IN LAW AND IN LIFE* 73–86 (1991).

113. *See* Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What that Means for the Purposes of the*

As a rough approximation, prospective justifications differ from each other according to the underlying logic or mechanism by which they purport to prevent future wrongdoing. To pin down the analytic distinction partitioning theories of prevention, consider a stylized, cost-minimizing approach to corporate crime popular to corporate crime literature: a potential criminal offender (and an economically rational agent) may decide whether to commit a crime by weighing the costs and benefits—the prospective gain minus the cost of sanction discounted by the likelihood of detection—against law-abiding status quo alternatives.<sup>114</sup> Put a slightly different way, this would-be offender has available to her some discrete set of alternatives to pursue and various reasons for and against commission, which she balances in deciding what action to take.

Deterrence is concerned with how a person weighs her substantive reasons for action. That is, a deterrent operates by externally impacting how a person evaluates the actions before her without directly altering the substantive reasons actually possessed. By increasing the cost or the salience of the cost of criminality, the use of punishment purports to deter the potential offender (in the case of specific deterrence) and others (in the case of general deterrence) from future misconduct. Rehabilitation operates not by causing a person to reweigh her reasons, as with deterrence, but instead by changing her reasons. The impulse underwriting rehabilitation generally is that through appropriate punishment the state can change a convicted person into the kind of citizen who would no longer desire or choose to engage in criminal behavior. So, a successful rehabilitation may convert our would-be reoffender from a crass, Beckerian agent to an arch Kantian who finds the very idea of weighing reasons in favor of criminal activity morally abhorrent.

Deterrence is the “predominant justification for corporate criminal liability,” particularly with respect to the imposition and calculation of monetary sanctions.<sup>115</sup> The preeminence of corporate deterrence is not new; the justification has occupied this central

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*Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 43 (2014) (observing that DOJ charging policies have recognized deterrence and rehabilitation, as well as “warranted punishment,” as purposes of punishment).

114. See Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (modeling the economic cost of criminal activity); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* chs. 7, 15 (Aspen Publishers 2014) (1977) (describing the law and economics approach to issues in criminal and corporate law, respectively). This model is in the lineage of Jeremy Bentham’s work on punishment, discussed *infra* Part II. See also Shavell, *Sanctions*, *supra* note 12, at 1245 n.53.

115. Hamdani & Klement, *supra* note 32, at 273.

position since the creation of corporate criminal liability.<sup>116</sup> And the Becker-style deterrence theory described above provides an intuitive model for thinking about corporate crime inasmuch as it presupposes a level of economically rational deliberation about future plans that the corporate structure is plausibly well-suited for.<sup>117</sup>

Although deterrence looms large in the context of corporate crime, the federal government has long rejected deterrence as the sole ambition of corporate punishment.<sup>118</sup> Over the past two decades, rehabilitation has become an increasingly prominent complement to deterrence as a justification for corporate punishment. To that end, the Guidelines now justify punishment to “assist an organization in encouraging ethical conduct.”<sup>119</sup> Likewise, prosecutors report that “a central goal [of corporate criminal law] is to rehabilitate corporations, to try to help make them better and more ethical.”<sup>120</sup>

### 3. Expressive Theories of Punishment

Appeals to the condemnatory force of punishment occupy a prominent place in apologies for the criminal law of corporations.<sup>121</sup> On these accounts, imposing punishment functions as “a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation.”<sup>122</sup> Expressive theories of punishment (like expressive theories of law generally) stand apart from, but not entirely independent of, either retributive or

116. Khanna, *supra* note 12, at 1486 (noting that criminal liability for early corporations maintained an optimal level of deterrence); accord Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 423 (1982) (tracing corporate liability’s historical role as a “more effective response to problems created by corporate business activities” compared to then-available legal alternatives). *But see* Thomas, *supra* note 27, at 489–90 (identifying deontic considerations in early corporate criminal law).

117. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 (1982) (applying Beckerian analysis to identify conditions under which corporations should break the law). *See generally* LIST & PETTIT, *supra* note 105, at 81–150 (outlining quantitatively “some more demanding desiderata of good organizational design” and the effect of the desiderata on group attitude formation and processes).

118. Garrett, *supra* note 39, at 881 (“The DOJ has now firmly rejected an optimal deterrence approach to organizational punishment. . . . [T]he Sentencing Commission has already adopted Guidelines that reject optimal punishment.”).

119. U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENTENCING COMM’N 2018).

120. GARRETT, *supra* note 21, at 47.

121. *E.g.*, Buell, *supra* note 11, at 502 (“A message of institutional fault says something different than a message of individual fault . . . .”); Peter A. French, *The Hester Prynne Sanction*, 4 BUS. & PROF. ETHICS J. 19, 22–23 (1985) (noting the effects of shame within criminal sanctions); Uhlmann, *supra* note 11, at 1259–71 (outlining “the expressive function of corporate criminal prosecution”); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520–21 (2001) (tracing the growth of expressive theories of criminal law).

122. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965).

preventative theories of punishment; they are something of a halfway point between justifications for punishment.<sup>123</sup> That is, an expressive theory of punishment places “certain regulative constraints” on other theories—it tells us, for example, why we deter the thing we deter.<sup>124</sup>

Stigma provides an intuitive way to distinguish corporate punishment from civil alternatives, and there is evidence reflecting that this stigmatic distinction bears out in the market.<sup>125</sup> That said, a perennial concern with expressive accounts in application is that the content of the expression is not easily determined.<sup>126</sup> Expression, after all, is “conventional”: sorting out what a particular action is meant to convey itself requires an act of interpretation.<sup>127</sup> To that point, the conviction and punishment of a corporation has been characterized as conveying a variety of commitments that the state ostensibly purports to hold: that no one is above the law,<sup>128</sup> that “the group arranged itself badly,”<sup>129</sup> and that victims of harm will not go unacknowledged.<sup>130</sup> As a further challenge, these descriptions concern the stigma of corporate punishment generally. But different punishments can convey different attitudes. That is, actions rarely speak for themselves, nor does a person own the peremptory authority to say what attitudes are

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123. In this respect, Elizabeth Anderson and Richard Pildes describe an expressive theory as akin to “rules of grammar or logic.” Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1512 (2000).

124. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (“The expressive theory of punishment says we can’t identify criminal wrongdoing and punishment independently of *their* social meanings.”); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–19 (1998) [hereinafter Kahan, *Social Meaning*] (“Punishing corporations, just like punishing natural persons, is also understood to be the right way for society to repudiate the false valuations their crimes express.”).

125. *E.g.*, Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489 (1999); Jonathan Karpoff et al., *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008). *But see* Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 671 (2005) (“[R]eputational concerns are not a sizeable deterrent to environmental violations. Rather, the primary deterrence occurs through regulatory and legal penalties.”).

126. Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 916–18 (2018).

127. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1664–72 (2000) (noting several different focal points through which one can explain compliance with legal rules).

128. See Uhlmann, *supra* note 11, at 1259 (arguing that criminal sanctions represent the expression of community condemnation and disavowal of criminal acts); *cf.* Ramirez, *supra* note 44, at 917 (“Discretionary enforcement of law that conveys a negative message of inequality that some law-abiding citizens are less valued concurrently conveys the message that some citizens are more valued.”).

129. Buell, *supra* note 11, at 502.

130. See Henning, *supra* note 13, at 1427 (summarizing arguments that criminal punishment reassures citizens that the rule of law will be maintained).

conveyed even by her own actions.<sup>131</sup> Moreover, a single punishment can serve to express different or multiple goals, such that merely describing the effects may not answer the further question of whether the state is acting on a particular justification. Accordingly, Part II turns to an exploration of what incapacitation is, what it seeks to do, and what message it conveys.

## II. INCAPACITATION AS A JUSTIFICATION FOR PUNISHMENT

Missing from the conversation surrounding corporate punishment is any serious engagement with the role that incapacitation does or should play either as a justification for or a means of punishing criminal corporations. As a stand-in for this omission, a century's worth of courts and commentators have felt the need to remark upon the impossibility of corporate imprisonment—that a corporation cannot be imprisoned,<sup>132</sup> incarcerated,<sup>133</sup> or jailed.<sup>134</sup> Sometimes the connection is made explicit: “Incapacitation is not applicable in the corporate context[.] . . . since it involves the incarceration of defendants to protect the public from harm.”<sup>135</sup> Much of the time, however, this reminder that corporate imprisonment is impossible constitutes the entire treatment of what is ordinarily considered a core justification for criminal punishment.<sup>136</sup>

The inattention paid to penal incapacitation is not exclusive to corporate crime. Compared with other justifications for punishment, incapacitation has received surprisingly little attention as a matter of conceptual analysis,<sup>137</sup> with Jeremy Bentham's (brief) discussion of

131. See Anderson & Pildes, *supra* note 123, at 1513 (“Expressive theories of action hold people accountable for the public meanings of their actions.”).

132. *E.g.*, Brickey, *supra* note 116, at 396; Bucy, *supra* note 75, at 1439; Khanna, *supra* note 12, at 1497; Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 799 (2013); Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 499 (1996); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 938 (2005).

Early decisions recognizing corporate criminal liability frequented this observation. *E.g.*, *United States v. Union Supply Co.*, 215 U.S. 50, 55 (1909); *United States v. Alaska Packers' Ass'n*, 1 Alaska 217, 219 (D. Alaska 1901); *State v. Belle Springs Creamery Co.*, 111 P. 474 (Kan. 1910); *State v. Ice & Fuel Co.*, 81 S.E. 737, 738 (N.C. 1914) (“It is true that, when the statute imposes a penalty of a fine or imprisonment, only the fine can be placed upon a corporation.”).

133. *E.g.*, Peter C. Kostant, *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, 55 N.Y. L. SCH. L. REV. 421, 430 (2010); Orland, *supra* note 47, at 60.

134. *E.g.*, Khanna & Dickinson, *supra* note 14, at 1728; Uhlmann, *supra* note 46, at 1333.

135. Uhlmann, *supra* note 11, at 1251.

136. *E.g.*, LAFAVE, *supra* note 34, § 1.5(a)(2).

137. ZIMRING & HAWKINS, *supra* note 17, at 3–38 (surveying the intellectual history, or lack thereof, surrounding criminal incapacitation scholarship); see, e.g., Mike C. Materni, *Criminal*

incapacitation's essential characteristics doing most of the framing.<sup>138</sup> As a result, discussions of penal incapacitation tend to uncritically adopt either one of two working definitions of incapacitation: one too abstract to offer much in the way of practical guidance for this project and the other too narrowly focused on bodily confinement to capture the breadth and complexity of how criminal sanctions express and instantiate incapacitation as a goal or purpose of punishment. Part III diagnoses the shortcomings of these notions of incapacitation, advances a more comprehensive account of the root concept, and defends in principle the role that individual practices can play to inform corporate punishment.

### A. *What is Incapacitation? Two Unsatisfying Answers*

The concept of incapacitation is curiously undertheorized. This is not to say that courts and scholars have ignored the acute moral and practical challenges surrounding whether and to what extent the law should incapacitate convicted criminals, especially when it comes to depriving individuals of their liberty—they have not.<sup>139</sup> Conventionally, federal criminal law characterizes incapacitation as a goal to “protect the public” from a defendant—specifically, from the risk that she might pose a danger in the future.<sup>140</sup> From this starting point, the literature on penal incapacitation centers around two overlapping inquiries:<sup>141</sup> (1) whether and on what grounds preventative detention can be reconciled with liberal commitments proscribing anticipatory punishment,<sup>142</sup> and (2) how effectively the state can predict recidivism and whether doing so requires taking into account inputs—race,

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*Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEG. STUD. 263, 294 (2013) (“On . . . incapacitation—I don’t think there is much to be said.”).

138. BENTHAM, *Panopticon*, *supra* note 18, at 173–76 (defining incapacitation as the “prevention of similar offences on the part of the same individual, by depriving him of the *power* to do the like”). See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970) (1789).

139. For an exhaustive literature review up through the mid-1990s of the topics identified here, see ZIMRING & HAWKINS, *supra* note 17, at 3–59. See also INCAPACITATION: TRENDS, *supra* note 19.

140. 18 U.S.C. § 3553(a)(2) (2012); see also Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 998 n.268 (2013) (citing S. REP. NO. 98-225, at 125 (1983)).

141. ANTHONY ELLIS, THE PHILOSOPHY OF PUNISHMENT 151 (2012).

142. *E.g.*, Robinson, *supra* note 28, at 1429–35; see also Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973); Norval Morris, ‘Dangerousness’ and Incapacitation, in A READER ON PUNISHMENT 238 (R.A. Duff & David Garland eds., 1994) (discussing the difficulties and limitations of predicting the future dangerousness of criminals).

gender, age, socioeconomic status—that might themselves be normatively or constitutionally problematic.<sup>143</sup>

Instead, that incapacitation is undertheorized means something more basic. As it turns out, discussions of the moral and practical challenges surrounding penal incapacitation pay little attention to what incapacitation actually is—or put another way, to what sorts of punishments “count” as instances of incapacitation and why. In doing so, discussions concerning incapacitation uncritically invoke, and often vacillate between, one of two descriptions of incapacitation: incapacitation as a restraint and incapacitation as imprisonment.

### 1. Incapacitation as Restraint

Abstractly, incapacitation, like deterrence and rehabilitation, offers a preventative basis for punishment—recall that the government is justified in punishing a convicted person in order to prevent her or others from committing similar crimes in the future. But whereas deterrence and rehabilitation seek to affect a person’s reasons for committing a crime, incapacitation seeks to restrain or otherwise prevent the person from acting on those reasons. On this account, an individual that has been incapacitated is one who “would choose to commit crime but is unable to do so,” and instead is deterred or rehabilitated if she “is able to commit crime but chooses not to.”<sup>144</sup> Or, on Bentham’s classic characterization, incapacitation aims for “prevention of similar offenses [by] the same individual” not by influencing her “*will*” to recidivate but rather by “depriving h[er] of the *power* to do the like.”<sup>145</sup>

This stylized account of incapacitation offers a useful starting point, but the fine-grained, reasons-based distinctions it draws provide little traction for making sense of incapacitation as a recognizable social practice. Viewed in abstraction, this notion of incapacitation is underspecified in a manner that risks overinclusion; sanctions that should not count as incapacitation might nevertheless qualify under

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143. Compare PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION (1982) (analyzing “individual offense patterns across states”), and Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536 (2006) (evaluating the effect of incapacitation rates on recidivism), with PRINCIPLED SENTENCING (Andrew von Hirsch & Andrew Ashworth eds., 1992) (collecting essays on the practical and ethical challenges of utilizing rehabilitationism as an aim of criminal sanctions), and Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in THE FUTURES OF CRIMINOLOGY 187–88 (David Nelkin ed., 1994) (arguing that the “traditional symbol” of “Justice as a blindfolded woman holding scales” is undone by the use of systems theory in criminology).

144. Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 552 (2009).

145. BENTHAM, *Panopticon*, *supra* note 18, at 174.

this capacious and open-ended definition. Philosophers and criminal theorists describe this general problem of indeterminacy as a “closeness problem”: insofar as an act (or set of actions) can be described in multiple ways, defending a theory of the basis of any description risks privileging the description that supports the theory in the first place.<sup>146</sup> Closeness problems, then, concern begging the question. For several reasons, concerns about question begging loom large when discussing theories of punishment.<sup>147</sup> For one, a single punishment is often simultaneously compatible with multiple justifications, such that merely describing the effects may not answer whether the state is acting on any particular justification. For another, which justification is implicated may depend on factors other than how the punishment affects the convicted person. Imprisonment, for example, can be understood to instantiate any of the core justifications for punishment. Incapacitation, then, may be salient in discussing recidivist-oriented “three strikes” statutes but less so in discussing criminal sentences imposed on a child.<sup>148</sup>

Theories of punishment do not exist in a vacuum; an account of incapacitation may start with a few high-level, abstract principles, but it certainly cannot stop there. More generally, the concept to be unpacked should not be considered a free-floating, timeless abstraction when history and practice may ground the specific dispute by providing necessary context and boundaries to what would otherwise be an unmoored theoretical dispute.<sup>149</sup> This reflects the specific observation that a punishment’s effects are not the same as its purpose; punishment that has an incapacitating impact should not be taken as conclusive proof that incapacitation is working as a justification.<sup>150</sup> In expressive terms, more is needed to determine whether the state is conveying a

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146. See generally John Martin Fischer, Mark Ravizza & David Copp, *Quinn on Double Effect: The Problem of “Closeness,”* 103 ETHICS 707, 707–09 (1993); see also W. Robert Thomas, Note, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World*, 110 MICH. L. REV. 647, 663–66 & n.99 (2012) (discussing closeness problems in the criminal law).

147. See H.L.A. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY 113, 123 (1968) (providing an analogy to the closeness problem through the Catholic doctrine of double effect, which determines when ending a life is morally acceptable and when it is not).

148. ZIMRING & HAWKINS, *supra* note 17, at 35–43 (identifying the centrality of incapacitation to jurisprudence surrounding habitual offenders).

149. See, e.g., ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 2–7 (2010) (defending nonideal theory in political philosophy). See generally DONALD J. HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATIONS IN POLITICAL THEORY* 161–217 (1985) (arguing for a theoretical “alternative to foundationalism”).

150. John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 676 (2000) (noting retributivist impulses dominate incapacitative ones as a basis for imprisonment).

message not just of criminal condemnation generally but of offender dangerousness and recidivism specifically.<sup>151</sup>

## 2. Incapacitation as Imprisonment

Contrasting the stylized, underspecified account of incapacitation as restraint is an overly grounded one: incapacitation means imprisonment.<sup>152</sup> That is, many discussions of incapacitation take for granted that what is unquestionably a “paradigmatic affirmative disability or restraint”<sup>153</sup> is thereby the only form of incapacitation—or, perhaps, the only form meriting attention.<sup>154</sup> To be sure, it makes sense to scrutinize imprisonment. Practically, imprisonment has become the most common, or at least most salient, form of penal incapacitation. And conceptually, a distinct benefit of incapacitation as a goal of punishment is that it lends itself clearly and straightforwardly to an implementation strategy<sup>155</sup>—glibly (but not inaccurately), “[w]e lock up people in prisons so that they cannot commit any more crimes because they are locked up.”<sup>156</sup> Imprisonment thus provides an uncommonly close relationship between justification and punishment. The goal of deterrence, for comparison, does not privilege or recommend any particular means of deterring behavior.<sup>157</sup>

Nevertheless, there are two problems with conflating the familiar and the essential. First, treating incapacitation as imprisonment conflates the justification for punishment with the punishment itself. The point here is not that there are other ways to incapacitate beyond imprisonment; rather, it is a category error to treat

151. Leipold, *supra* note 143, at 555 (“[I]ncapacitation, like other punishment rationales, cannot be considered in a vacuum . . .”).

152. *E.g.*, Simon, *supra* note 19, at 18 (identifying incarceration as the only form of incapacitation recognized under “total incapacitation” models of punishment).

153. *Smith v. Doe*, 538 U.S. 84, 100 (2003); *accord Hudson v. United States*, 522 U.S. 93, 104 (1997); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

154. Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 332 (2014) (arguing that nonphysical forms of restraint “tend to be both undervalued and undertheorized”). Representative of this phenomenon, William Spelman adopts the assumption that “offenders are only incapacitated while they are serving terms in jail or prison” for nearly all of his book-length investigation into criminal incapacitation. WILLIAM SPELMAN, *CRIMINAL INCAPACITATION* 4 (1994).

155. ZIMRING & HAWKINS, *supra* note 17, at 15.

156. Darley et al., *supra* note 150, at 660.

157. Leipold, *supra* note 143, at 542 (“[I]ncapacitation also has the virtue of avoiding many of the contentious questions that surround other punishment rationales.”). *But see* Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 26 (1992) (acknowledging the popular understanding as “doing to the offender, as punishment, what the offender did to his victim” (emphasis omitted)).

incapacitation and imprisonment as interchangeable.<sup>158</sup> Incapacitation is a freestanding justification for punishment, according to which the government is licensed to use punishment in order to restrain or prevent a convicted person from acting on criminal plans or proclivities in the future. Imprisonment, by contrast, is merely one way that the government instantiates or expresses this justification. Applied to the inquiry at issue, it may well be true that a corporation cannot be imprisoned, but this fact standing alone tells us precious little about whether the justification for incapacitating a criminal corporation can or should attach.

Second, myopic attention to imprisonment has a stultifying effect on inquiring into the breadth and variety that incapacitation as a basis for punishment admits in actual practice. For one thing, imprisonment focuses attention on a single mode of restraint—namely, *isolation* from a broader society.<sup>159</sup> For another, imprisonment creates the impression that incapacitation is binary: either a person has been isolated from the broader community or she has not. Finally, imprisonment unduly fixates attention on certain physical mechanisms of constraint like walls and prisons—or, more generally, what Bentham referred to as “body operating upon body.”<sup>160</sup>

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How do the shortcomings of these two accounts bear on corporate incapacitation? First, making sense of incapacitation’s role in the criminal law cannot be limited to pure theorizing or a sterile description of punishment’s effects. We need to further consider 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. Second, an account of incapacitation must accommodate imprisonment, but not exclusively so; imprisonment is merely one type of punishment capable of expressing the state’s goal to incapacitate an offender. Third, and more generally, not only do multiple punishments instantiate a goal of incapacitation but in doing so they highlight a broader concept than these two accounts suggest. To produce this concept requires interrogating actual practices. Accordingly, the next Section turns to where incapacitation already operates within the

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158. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 6–8 (1955) (distinguishing the justification of a practice from the justifications for actions under the practice).

159. *Ewing v. California*, 538 U.S. 11, 24 (2003) (“[Recidivists] must be isolated from society in order to protect the public safety.”); Steven Shavell, *A Model of Optimal Incapacitation*, 77 AM. ECON. REV. 107, 107 (1987).

160. BENTHAM, *Panopticon*, *supra* note 18, at 185–86.

criminal law. Though virtually absent from discussions of corporate punishment, incapacitation plays a prominent role in individual punishment—not just in the case of imprisonment but also across a range of punishments.

### *B. Excavating a Richer Theory of Penal Incapacitation*

This Section considers how different punishments—particularly execution, incarceration, and supervised release—express or vindicate incapacitation as a goal of, or justification for, punishing individuals. The list of punishments is meant to be representative rather than exhaustive; incapacitation figures into many other punishments, to say nothing of its role in civil and pretrial contexts. Nevertheless, these examples provide a foothold from which to excavate a richer account of incapacitation, at least as it concerns criminal punishment, than focusing on either a bare conceptual analysis or bodily confinement affords.

Three takeaways are worth previewing here. First, there are different modes of restraint. That is, it is not just that multiple punishments express or vindicate a goal of restraining a person from acting on the recidivist reasons she (ostensibly) has, but more generally that different punishments can be distinguished according to how they restrain. Second, incapacitation is not just a “body operating upon a body”; the criminal law incapacitates through physical, legal, and technological mechanisms. And third, incapacitation is scalar; different punishments restrain to varying degrees. These takeaways lay the groundwork for making sense of corporate counterparts to the core instances of incapacitation, discussion of which is reserved for Part III.

#### 1. Restraint as Disablement: Lessons from Capital Punishment

Punishment can incapacitate absolutely. This notion of restraint through disablement differs from isolation in that it does not remove an individual from her community; rather, it works a change to the person that makes her incapable of recidivating. Capital punishment represents the archetypal restraint through disablement: execution renders a person permanently, irreversibly unable to commit any crime.<sup>161</sup> Insofar as its impact on an individual is both permanent and

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161. *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting) (“Capital punishment by definition does not rehabilitate. It does, of course, incapacitate the offender.”).

maximal in scope, scholars have tended to characterize capital punishment as the only instance of “total . . . incapacitation.”<sup>162</sup>

While characteristic of capital punishment, sanctions need not disable completely in order to incapacitate, nor is disablement operationalized purely through physical means. On the former, chemical castration and sterilization represent a long, dark lineage of punishments that incapacitate through mutilation, the stated purpose of which is to prevent the individual from carrying out certain types of crimes.<sup>163</sup> On the latter, legal and technological restraints can render an individual incapable of committing certain crimes. For example, some crimes can be committed only by public officials; impeachment and removal, in this respect, disable (at least temporarily) a former official’s ability to commit these crimes.<sup>164</sup> Analogously, in discussing pretrial restraints, Jennifer Daskal identifies a host of financial restraints applied so comprehensively that they render an individual incapable of “partak[ing] in a single financial transaction without government approval.”<sup>165</sup>

## 2. Restraint as Isolation: Lessons from Incarceration

Whereas disablement renders a convicted person incapable of committing some or all future crimes, isolation removes that person from the larger community, thus denying her access to the targets of future criminality.<sup>166</sup> Imprisonment—and especially incarceration in a prison or jail<sup>167</sup>—is a paradigmatic instance of isolation and the “primary means of incapacitating persons found guilty of committing criminal offenses.”<sup>168</sup>

As the discussion of disablement as a restraint demonstrates, punishment can incapacitate entirely. By contrast, isolation through

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

163. See Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2227–28 (2018) (describing sterilization practices for incarcerated women); John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 561–63 (2006) (exploring chemical castration laws for certain sex offenders).

164. IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 19–20 (1997); Marijke Malsch et al., *Disqualification from a Profession or an Office: Nature and Actual Practice*, in *INCAPACITATION: TRENDS*, *supra* note 19, at 172–76.

165. Daskal, *supra* note 154, at 361.

166. *Ewing v. California*, 538 U.S. 11, 24 (2003) (noting that recidivists “must be isolated from society in order to protect the public safety”); Shavell, *supra* note 159, at 107.

167. Here the term “incarceration” is used strictly to describe the confinement of an individual to jail or prison. Otherwise, “imprisonment” is used as a broad catch all for a range of activities coming under the criminal law, which includes but is not limited to incarceration.

168. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1323 (2008).

imprisonment incapacitates only partially in at least two respects.<sup>169</sup> First, imprisonment serves to incapacitate only for the period of isolation; the restraining effect of prison attaches only to the extent that the person is actively confined.<sup>170</sup> Second, imprisonment protects the broader population from future wrongdoing by ostensibly dangerous persons. This protection, however, does not extend to the prison population—prisoners are of course still able to commit crimes while in prison.<sup>171</sup> Indeed, imprisonment not only fails to perfectly incapacitate but also has “something like a capacitating effect.”<sup>172</sup> Certain activities are criminalized only in the context of incarceration: escape, for example, is a criminal offense that can be committed only by the incarcerated.<sup>173</sup> Incarceration thus serves partially to prevent and partially to relocate prospective criminal activity.<sup>174</sup>

Isolation admits of more variety than just incarceration in a state facility.<sup>175</sup> House arrest, for example, is considered neither incarceration nor imprisonment for purposes of federal sentencing.<sup>176</sup> Even still, isolating someone from the population clearly serves as a justification for imposing house arrest.<sup>177</sup> To that point, several courts have held that, outside of the sentencing context, forms of state-ordered confinement other than incarceration—including house arrest, confinement in a facility, and detention in an immigration center—are all tantamount to imprisonment.<sup>178</sup> Meanwhile, even isolation from society is not an exclusively physical affair. Radio frequency identification, GPS tracking, cellular network monitoring, and video

169. See generally Kevin Bennardo, *Incarceration’s Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1 (2014).

170. Darley et al., *supra* note 150, at 660.

171. JACK P. GIBBS, *CRIME, PUNISHMENT AND DETERRENCE* 58 (1975) (“All manner of crimes against persons occur in prisons, and few crimes against property are literally impossible in prison; so incapacitation is largely a matter of degree.”).

172. TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS REVISITED* 76 (5th ed. 2006) (emphasis omitted).

173. Bennardo, *supra* note 169, at 12.

174. For further discussion, see *infra* notes 279–286 and accompanying text.

175. Indeed, Bentham’s discussion of incapacitation arises in the context of his defending the imprisonment against the then-prevalent trend of “transporting” criminals to Australia. BENTHAM, *Panopticon*, *supra* note 18, at 185–86.

176. *United States v. Marks*, 864 F.3d 575, 581 (7th Cir. 2017) (“[S]entences served in community treatment centers, halfway houses, home detention . . . are not imprisonment for guideline purposes.”); U.S. SENTENCING GUIDELINES MANUAL § 5F1.2 (U.S. SENTENCING COMM’N 2018) (“Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.”); *id.* § 4A1.2(b)(1) (“The term ‘sentence of imprisonment’ means a sentence of incarceration . . .”).

177. 18 U.S.C. § 3583(c) (2012).

178. *E.g.*, *Ilchuk v. Att’y Gen.*, 434 F.3d 618, 623 (3d Cir. 2006); *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995).

surveillance are common tools through which the government achieves isolation outside of a prison or facility.<sup>179</sup>

### 3. Restraint as Prohibition: Lessons from Supervised Release

Finally, punishments can incapacitate by prophylactically prohibiting an individual from acting through the use of external barriers that neither disable nor alter the individual herself nor isolate her from the larger community.<sup>180</sup> In this sense, punishments restrict either directly, by prohibiting an individual from engaging in otherwise lawful activity, or else indirectly, by requiring her to take affirmative actions without regard for her desire to do so.<sup>181</sup>

Fruitful for comparisons to the corporate context is the extent to which supervised release has come to serve an incapacitating function with respect to criminal punishment. Supervised release serves as a replacement of and an analogue to the system of parole once used by the federal government and still used by many states.<sup>182</sup> It allows persons having already completed a term of incarceration back into their communities while affording the federal government broad, open-ended authority to impose incapacitating and potentially quite onerous conditions on release. Peter van der Laan describes this sort of punishment as “part-time incapacitation.”<sup>183</sup> And indeed, although supervised release was initially proscribed from serving an incapacitative function,<sup>184</sup> Congress explicitly reversed course three years later.<sup>185</sup> To that point, commentators have since concluded that “it makes sense to analyze the system [of supervised release] as a crime-

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179. SPELMAN, *supra* note 154, at 305; Murphy, *supra*, note 168, at 1328–45, 1393 (cataloguing “technological means of control”); Peter van der Laan, *Part-Time Incapacitation: Probation Supervision and Electronic Monitoring*, in INCAPACITATION: TRENDS, *supra* note 19, at 109–10.

180. Alana Barton, *Incapacitation Theory*, in ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 463 (Mary Bosworth ed., 2005) (“Less severe forms of incapacitation are often concerned with *restricting* rather than completely *disabling* [or isolating] offenders from reoffending.”).

181. Murphy, *supra*, note 168, at 1388 (discussing the cumulative effects of technological restraints to “wholly decimate the experience of ‘negative freedom’” (referencing ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969))).

182. 18 U.S.C. § 3583 (2012); *United States v. Johnson*, 529 U.S. 53, 56–58 (2000) (discussing the relationship between imprisonment and supervised release). Supervised release is not parole; there is no such thing as federal parole (at least not applicable to crimes committed after November 1, 1987). Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 1837, 2027, 2031.

183. van der Laan, *supra* note 179, at 109.

184. Mica Moore, Note, *Escaping from Release: Is Supervised Release Custodial Under 18 USC § 751(a)?*, 83 U. CHI. L. REV. 2257, 2265–66 (2016) (citing 18 U.S.C. § 3583 (2012)).

185. Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKLEY J. CRIM. L. 180, 191 (2013).

control mechanism of deterrence and incapacitation,”<sup>186</sup> noting that the criminal justice system’s practices suggest “the primary purpose of supervised release has been to protect the community from an offender presumed to be dangerous.”<sup>187</sup>

Supervised release makes possible prohibitions that can severely restrict a defendant’s ability to exist in and interact with her broader community. Consider conditions enumerated in the Guidelines: A court can restrict a defendant’s movement.<sup>188</sup> It can exercise fine-grained control over a defendant’s professional life, requiring the defendant to work but prohibiting her from pursuing certain jobs and industries.<sup>189</sup> It can limit a defendant’s freedom of association.<sup>190</sup> It can mandate participation in substance abuse and mental health treatment programs, even if that means periodic confinement in a community center.<sup>191</sup> It can empower probation officers to conduct random drug tests, to search an offender and her home at any time without notice, and to seize contraband (which includes property that ordinary citizens may legally possess) without process.<sup>192</sup>

Further, courts may fashion their own conditions of supervised release, provided only that a bespoke condition is “reasonably related” to the penological objectives and “involves no greater deprivation of liberty than is reasonably necessary.”<sup>193</sup> Fueled partially by a lenient standard of review, courts have interpreted this power capaciously. For example, some courts have required defendants to grant their probation officers unfettered, continuous access to all financial accounts even in cases of nonfinancial crimes.<sup>194</sup> Conditions of supervised release have

186. Doherty, *supra* note 140, at 1020.

187. Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT’G REP. 204, 205 (1994).

188. U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(c)(1) (U.S. SENTENCING COMM’N 2018) (geographic limitations); *id.* § 5D1.3(e)(5) (curfew).

189. *E.g.*, *id.* § 5D1.3(c)(7) (“[D]efendant shall work full time . . . at a lawful type of employment . . . .”); *id.* § 5D1.3(e)(4) (“Occupational restrictions may be imposed as a condition of supervised release.”); *see* United States v. McKissic, 428 F.3d 719, 725 (7th Cir. 2005) (describing a requirement to “maintain[] steady employment” as incapacitative).

190. *See* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(c)(8) (prohibiting contact with anyone “engaged in criminal activity” or “convicted of a felony”); *see also* United States v. Love, 593 F.3d 1, 13 (D.C. Cir. 2010) (upholding the setting of a condition prohibiting a sex offender from contact with known sex offenders as consistent with Guidelines).

191. U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(e)(1).

192. *Id.* § 5D1.3(c)(6) (“[D]efendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant’s supervision that he or she observes in plain view.”); *id.* § 5D1.3(a)(4) (mandating periodic drug testing for all defendants on supervised release).

193. 18 U.S.C. § 3583(d)(1)–(2) (2012).

194. *E.g.*, United States v. Gaynor, 530 F. App’x 536, 541 (6th Cir. 2013).

become especially severe for sex offenders. Courts have indefinitely barred offenders from, for example, owning or accessing computers (subject to relaxation by the probation officer),<sup>195</sup> accessing the internet,<sup>196</sup> and even possessing internet-accessible smart phones.<sup>197</sup> And while not punishments at law,<sup>198</sup> a raft of state-level collateral consequences further restrict offenders. Geographic restraints on where offenders can work and live, for example, are so prolific that it has led to effective “banishment from a number of towns and cities.”<sup>199</sup>

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Consideration of how incapacitation is evoked or instantiated across a variety of individual punishments affords a richer understanding than either a basic conceptual analysis or narrow attention to bodily constraint allows. It remains the case that, at its most abstract, incapacitation as a basis for punishment aims to prevent a person’s future misconduct by restraining her from acting on future criminal inclinations that she ostensibly entertains. But it is further the case that incapacitation admits of degree with respect to scope, severity, and duration. Moreover, a single punishment may incapacitate to widely varying degrees. Further, we can draw useful, if not hard-and-fast, distinctions among different modes of restraint: debilitation, isolation, and prohibition. And finally, while bodily confinement provides a straightforward mechanism for carrying out a goal to incapacitate, federal law also relies on legal and technological methods to do so.

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195. *E.g.*, *United States v. Lay*, 583 F.3d 436, 449–50 (6th Cir. 2009); *United States v. Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009); *United States v. Bender*, 566 F.3d 748, 751–52 (8th Cir. 2009); *United States v. Alvarez*, 478 F.3d 864, 866–68 (8th Cir. 2007); *United States v. Johnson*, 446 F.3d 272, 281–83 (2d Cir. 2006); *United States v. Sullivan*, 451 F.3d 884, 895–96 (D.C. Cir. 2006); *United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999).

196. *United States v. Rearden*, 349 F.3d 608, 620–21 (9th Cir. 2003) (collecting citations).

197. *See United States v. Mizwa*, 574 F. App’x 220, 222–23 (3d Cir. 2014) (upholding a fifteen-month sentence against a defendant for violating his conditions of supervised release by, *inter alia*, obtaining “a cellular phone with internet access”); *accord United States v. Wood*, No. 1:11-CR-0210-SEB-TAB, 2014 WL 4053925, at \*1–2 (S.D. Ind. Aug. 15, 2014) (imposing supervised release that included the restriction and monitoring of smart phones).

198. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 703–04 (2008).

199. Daskal, *supra* note 154, at 330.

*C. Why Individual Punishment Matters for Corporate Crime*

Drawing on this richer understanding of how incapacitation is expressed as a goal of criminal punishment, Parts IV and V will consider the extent to which this traditional justification could, and should, be expressed through corporate punishment as well. That is, is it sensible to talk about restraining a criminal corporation from the ability to recidivate in a manner that functions comparably to, say, the archetypal means of incapacitating punishments that feature in the individual context?

Before turning to this comparative enterprise, this Section defends in principle the methodology underwriting this Article's conception of corporate incapacitation in two ways. First is a defense of the premise that individual practices can bear on corporate criminal law—in other words, that we can analogize from individual punishment to corporate punishment. Second is a defense of the particular form of the analogy on offer. Comparisons to individuals should be evaluated functionally rather than focusing on the obvious, albeit anachronistic, difference between individual bodies and corporate bodies (or the lack thereof).

### 1. Why Treat Corporations and Individuals Similarly?

Appealing to individual practices is meant to isolate the important features of incapacitation. This is accomplished by recognizing that social practices constrain and clarify which sanctions that restrain are properly understood to express a specific goal—put another way, which of the restraints that *could* count as incapacitation do count and why. Crucially, to say that a punishment incapacitates is not to endorse the practice. The argument here is not that the way federal law incapacitates individuals is so exemplary that we should extend the same treatment to corporations. For my part, I am inclined to take the opposite view: we have decisive moral and practical reasons to drastically reduce our reliance on at least imprisonment as a method of punishment.<sup>200</sup> Regardless, this Article appeals to individual punishment in order to canvass what the criminal law takes to be apt instances of incapacitation.

But still, why appeal to individual punishment at all? Reliance on comparisons to individuals in criminal law reflects a fundamental commitment of corporate criminal law as a legal institution. Operating

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200. See generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); THE CASE FOR PENAL ABOLITION (E. Gordon West & Ruth Morris eds., 2000) (collecting discussions).

within the background of the criminal law is a principle of presumptive similarity, which stands for a defeasible commitment to treat corporate persons the same as individual persons within the domain of criminal law and punishment. This principle is not new; it featured prominently in the reasoning of courts that first decided to treat corporations as persons for purposes of criminal liability.<sup>201</sup> Nor is it unique to the criminal law; other domains taking corporations to be legal persons for purposes of rights and responsibilities share some version of this presumption.<sup>202</sup>

In describing this presumption of similarity as a central feature of how the criminal law holds corporations responsible, this Article is not making a claim that a commitment to similarity is fundamental in any deep metaphysical sense, just that it is fundamental to the institution we happen to have.<sup>203</sup> Extending legal personhood to corporations for the purpose of criminal liability does not mean that corporations “really are” persons, whatever work that equivocation is supposed to be doing.<sup>204</sup> Our enforcement regime could have been otherwise: corporate criminal liability need not have been invented at all, or a separate, parallel domain of criminal law could have been created.<sup>205</sup> Whether, on first principles, corporations should be eligible for criminal responsibility is an inquiry beyond the scope of this Article. My interest is considerably more modest: given that we have an institution of corporate criminal law operating on certain underlying principles, we should want that institution to function well. Relevant here, the *prima facie* dissimilarity with respect to incapacitation at least calls out for explanation.

But second, similarity is not self-defining. There are all sorts of obvious and nonobvious ways in which corporate persons are different from individual persons—or, to remove a step of complexity, in which corporations are different from individuals. An important facet of the

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201. *E.g.*, *United States v. Alaska Packers' Ass'n*, 1 Alaska 217, 222–23 (1901); *S. Express Co. v. State*, 58 S.E. 67, 69 (Ga. 1907); *Tel. Newspaper Co. v. Commonwealth*, 52 N.E. 445, 446 (Mass. 1899); *State v. Passaic Cty. Agric. Soc'y*, 23 A. 680, 681 (N.J. 1892); *People v. Rochester Ry. & Light Co.*, 88 N.E. 22, 22–24 (N.Y. 1909); *State v. E. Coal Co.*, 70 A. 1, 7 (R.I. 1908); *State v. First Nat'l Bank*, 51 N.W. 587, 587 (S.D. 1892).

202. *E.g.*, Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 2, 29 (2008) (antitrust); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (contract; property).

203. Rawls, *supra* note 158, at 6–8.

204. *See generally* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926) (articulating a pragmatic approach to analyzing corporate personhood).

205. *Cf.* Crane, *supra* note 202, at 30–37 (decrying the embrace of a tort crime model of antitrust over a corporate regulatory model); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 602–03 (2003) (discussing failed attempts to federalize incorporation as a means of reining in corporate misconduct).

criminal law of corporations concerns the extent to which corporations and individuals are treated similarly by the criminal law—and conversely, what sorts of reasons should “count” as bases to diverge from the presumption of similarity. After all, a presumption of similarity is merely that—a presumption. What matters for our purposes is not *that* corporations and individuals are different. What matters is which differences make a legal difference, and why.

## 2. Why Take a Functional Approach to Similarity?

This Article started by noting the prevalence of the assertion that a corporation cannot go to prison. Implicit here is a straightforward view about the similarities and differences between individual and corporate persons: corporations differ from individuals in that they lack a single body, and this difference should be reflected in our practices of punishment. What is wrong with this view? Why go to the trouble of identifying functional analogues between individual and corporate persons in order to take an account of incapacitation and argue for its extension to corporations?

Part III considers several interpretations of what this rhetorical appeal to the impossibility of corporate imprisonment might represent. But, for a moment, the argument is worth taking literally as a foil for contrasting the sorts of similarity relationships the criminal law of corporations might take seriously. The functional approach to similarity adopted in this Article should be contrasted with quite a different approach that is the original sin of arguments: that corporate imprisonment is impossible and that this impossibility should have any bearing on how we approach the criminal law of corporations.

First, both my account and the impossibility argument embrace some underlying similarity relationship. Second, both accept that impossibility is, in general, a reason for diverging from that principle. In its general schema: if it is impossible for the criminal law to treat corporate persons and individual persons similarly for purposes of *X*, then the law has decisive reason to treat them dissimilarly for purposes of *X*. Bigamy, as an illustration, is a distinctly human crime. Third, the argument from impossibility treats a person’s essential, biological component—viz., having a single body—not just as a difference between corporations and individuals but as a difference warranting a legal distinction. In the language of the similarity principle, this essentialist difference is a countervailing reason to diverge from treating persons similarly—namely, by rejecting the traditional justification of incapacitation as applicable to corporations (like we did with retribution). In opposition, this Article’s preferred approach is

functional: it focuses questions of personhood on whether the entity in question has “the capacity to perform as a person,” which, in the legal context, means that it can “be party to a system of accepted conventions, such as a system of law, under which one contracts obligations to others and . . . derives entitlements from the reciprocal obligations of others.”<sup>206</sup> Assessment of personhood, on this view, turns on whether an entity has demonstrated its capacity to satisfy admittedly stringent conditions of effective performance—not on whether the agent possesses particular intrinsic, flesh-and-blood properties.<sup>207</sup>

This fight between essentialist and functional approaches to attributing personhood is not new, nor is it exclusive to corporations. Which is to say, it is not as if we are approaching this issue fresh; the criminal law has had ample time and opportunity to grapple with the question of what makes corporations persons for purposes of the criminal law. By and large, those distinctions are functional, not biological. True, corporations do not have physical “bodies to kick” or minds that can intend, but these constitutive appeals to biology do not preclude the application of criminal law to corporations; we can make sense of mens rea and actus reus in other ways. Or, more accurately, these appeals *no longer* preclude corporate criminal liability. Throughout early corporate history, courts took seriously the legal relevance of a corporation’s missing tongue,<sup>208</sup> hand,<sup>209</sup> body,<sup>210</sup> mind,<sup>211</sup> and soul.<sup>212</sup> However, as I have argued elsewhere, it matters not that these sorts of arguments once held sway; instead, it is normatively and conceptually important that they once did and that they do not now.<sup>213</sup> Nor was this rejection an exclusively criminal law affair. Courts across

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206. LIST & PETTIT, *supra* note 105, at 170–73; accord STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 23 (2006).

207. See LIST & PETTIT, *supra* note 105, at 173; SCANLON, *supra* note 107, at 162 (identifying a narrow sense in which collective agents can be held responsible). See generally MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD (2015).

208. Bank of U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 92 (1827) (Marshall, C.J., dissenting); Childs v. Bank of Mo., 17 Mo. 213, 215 (1852) (discussing conditions under which corporations manifest assent to a contract).

209. See Copley v. Grover & Baker Sewing-Mach. Co., 6 F. Cas. 517, 519 (C.C.S.D. Ala. 1875) (No. 3213), cited with approval in Salt Lake City v. Hollister, 118 U.S. 256, 262 (1886).

210. See United States v. John Kelso Co., 86 F. 304, 305–06 (N.D. Cal. 1898); Bank of Ithaca v. King, 12 Wend. 390, 390 (N.Y. Sup. Ct. 1834).

211. McDermott v. Evening Journal Ass’n, 43 N.J.L. 488, 490 (1881).

212. Case of Sutton’s Hosp., 77 Eng. Rep. 960, 973 (K.B. 1612) (Coke, J.).

213. Thomas, *supra* note 27, at 438. Briefly, my view is that courts adopted a functional conception of personhood—one that replaced constitutive biological appeals with functional, external observations as the basis for making attributions surrounding actus reus and mens rea. See JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 50–65 (1970); Morton J. Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. VA. L. REV. 173, 208 (1985).

the country, when asked to make sense of the extension of some legal domain to include corporations, consistently rejected this sort of “technical[ ]” reasoning<sup>214</sup> that required first looking to a corporate tongue, hand, body, mind, and soul in order to determine what the law would allow (or not allow) a corporation to do or what the law could do to a corporation.<sup>215</sup> We see this trend, for example, in tort law and in contract law, both of which proved a conceptual prior for the eventual creation of corporate criminal law.<sup>216</sup>

With respect to criminal law, courts eventually came to the view that it did not matter whether a person had a single mind with which to intend; what mattered was what a reasonable observer (especially twelve of them) could infer about a person’s reasons for acting on the basis of her prior acts.<sup>217</sup> Put simply, courts embraced the idea of analyzing corporate misconduct in the same way they analyzed individual misconduct—by observing. And while the Supreme Court sidestepped the issue in *New York Central*,<sup>218</sup> the states’ functional turn has been vindicated. Specifically, and comparable to those early state courts seeking to develop a genuine sense of corporate mens rea, sentencing courts and prosecutors have created a practice of corporate criminal liability that eschews vicarious liability and prioritizes efforts to ascertain institutional fault.<sup>219</sup>

But corporate incapacitation might nevertheless be special. Corporate criminal law might be broadly functional in its approach to corporate personhood generally while also taking corporate bodies to still matter. Without arguing that essentialist differences might never be legally relevant, serious skepticism is warranted concerning their invocation in the criminal law. Put another way, the criminal law—to

214. *Jordan v. Ala. Great S. R.R. Co.*, 74 Ala. 85, 88 (1883).

215. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 780–82 (2005); Stephen J. Leacock, *The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience over Logic*, 5 DEPAUL BUS. & COM. L.J. 67, 76–78 (2006).

216. Thomas, *supra* note 27, at 506–14 (collecting citations in tort and criminal law).

217. See JOEL PRENTISS BISHOP, *NEW COMMENTARIES OF THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION* 256 (1892) (describing trends in corporate criminal law); Dewey, *supra* note 204, at 663 (arguing that the criminal law can identify “the absence or presence of [corporate] ‘intent’ . . . by discrimination among concrete consequences, precisely as we determine ‘neglect’ ” for individuals).

218. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909). Embracing *respondet superior* allowed the Court to skirt the tricky conceptual question by addressing only whether any employee intended to commit a crime in the interest of the corporation. Cf. Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 39 (1957) (“[B]y ignoring the problem, they have solved it.”).

219. Thomas, *supra* note 27, at 526–29; see *supra* Section I.A.

say nothing of other legal domains—has long been comfortable dealing with corporate actions directly rather than indirectly by first appealing to corporate bodies. Preserving the legal relevance of corporate bodies just for the purpose of criminal incapacitation, then, comes across as anachronistic at best and ad hoc at worst. This is particularly true when other approaches to corporate attribution and personhood are available to the law. Inasmuch as a workable alternative model already plays a central role in the criminal law, it is worth instead engaging a functional, pragmatic account of what it would mean to incapacitate a corporation through criminal punishment.

### III. INCAPACITATION AS A JUSTIFICATION FOR CORPORATE PUNISHMENT

This Part brings together what have until now been distinct inquiries: corporate sanctions in Part I and incapacitation in Part II. Given a richer understanding of how incapacitation is expressed as a goal of criminal punishment, this Part considers the extent to which this justification could, and should, be expressed through corporate punishment. Leveraging our robust understanding of penal incapacitation, this Part demonstrates that corporate criminal law as it is practiced today could—and plausibly already does, but regardless should—pursue an agenda of incapacitating criminal corporations. Far from an impossibility, incapacitation proves a viable justification for corporate punishment.

Section III.A demonstrates that the criminal law can or could incapacitate a criminal corporation. It is sensible to discuss restraining a criminal corporation from its ability to recidivate in a manner that functions comparably to the archetypal modes of incapacitating punishments that feature in the individual context. Section III.B grapples with the why: If corporate incapacitation is not just possible but practically straightforward, what explains its near-total absence from discussions of corporate punishment? Section III.B identifies some reasons why we might not acknowledge corporate incapacitation, but ultimately concludes that none suffice to justify our current, categorical exclusion. Section III.C considers the possibility that penal incapacitation as developed here might actually be better suited for corporations than for individuals.

#### *A. How to Incapacitate a Corporation*

Appeals to the impossibility of imprisonment notwithstanding, it is both possible and perfectly ordinary for corporate sanctions to

incapacitate corporations in a manner consonant with the concept of incapacitation this Article derives. To ground this discussion, the focus here will be on counterparts to individual incapacitation; this is meant to tease out and situate various modes of restraint that are imposed on criminal corporations. Moreover, at least some sanctions already employed are better understood as efforts to incapacitate, rather than to deter or rehabilitate, a criminal corporation.

### 1. Disabling Through Corporate Death Penalties

Corporate criminal sanctions can be imposed to permanently and completely disable a corporation in a manner that functions like capital punishment. Indeed, practitioners not infrequently refer to this range of sanctions as a “corporate death penalty.”<sup>220</sup> First, recall that Section 8C1.1 of the Guidelines allows a sentencing court to impose a fine expressly calculated to “to divest the organization of all its net assets.”<sup>221</sup> Like the death penalty to which it is analogized, forced termination is the ultimate sanction for corporations. Forced termination permanently and absolutely incapacitates the corporation from committing future crimes by disabling it from pursuing any future activities. Qua corporation, forced termination is thus a uniquely harsh and irreversible sanction. But it is not just that the *effect* of this sanction is to incapacitate the corporate entity by forcibly divesting it of all assets. Looking at the narrow conditions under which forced divestiture may be imposed, it is clear that incapacitation is the *goal* of the punishment. The prerequisites for sentencing an entity to forced divestiture—a court may impose it only against an entity “operated primarily for a criminal purpose or primarily by criminal means”<sup>222</sup>—virtually rule out rehabilitation or deterrence as justifications. The animating impulse is that some enterprises are so pervasively corrupt that they cannot be expected to be abstain or reform.<sup>223</sup> At the very least, it seems deeply implausible that a desire to disable pervasively criminal corporations plays *no* role in authorizing this extreme sanction.

Forced divestiture is imposed sparingly; to my knowledge, it has been used only a handful of times.<sup>224</sup> More salient among scholars and

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220. Hamdani & Klement, *supra* note 32, at 278–79.

221. U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (U.S. SENTENCING COMM’N 2018).

222. *Id.*

223. This point applies to general deterrence as well as specific deterrence. While termination ostensibly warns third parties, the conceit is that Section 8C1.1 applies only to the undeterrable.

224. *E.g.*, United States v. Najjar, 300 F.3d 466, 486 (4th Cir. 2002); *see also* GARRETT, *supra* note 21, at 156–57 (collecting cases).

practitioners is the potentially existential threat posed by certain collateral consequences that attach automatically upon the fact of conviction. There is a somewhat muddled debate over whether the presence of regulatory consequences means that a corporate conviction—or, for some, even just an indictment—thereby collapses into a de facto death penalty.<sup>225</sup> To my mind, at least some of the disagreement reflects a failure to disambiguate. On the one hand, most collateral consequences that attach to a corporate conviction, while individually costly to the enterprise, pose no catastrophic harm.<sup>226</sup> A quick review of, for example, the SEC’s database cataloguing waivers granted for various securities-based consequences confirms as much: many current, well-known public companies were either denied some waivers or did not seek them for all consequences in the first place.<sup>227</sup>

On the other hand, there is a small category of consequences that, for certain firms or industries, really do merit the moniker of corporate death penalties: Medicare exclusion rules for hospitals and drug manufacturers, Regulation D for hedge funds and major financial institutions, and debarment from government projects for defense contractors.<sup>228</sup> These consequences have a similarly comprehensive incapacitative effect, as does forced divestiture. The common thread is that these existential consequences, rather than divest the entity of the assets it already holds, instead render the entity unable to access its predominant source of funding or revenue going forward. Here, Arthur Andersen remains the paradigmatic warning case:<sup>229</sup> the accounting firm’s overnight collapse into bankruptcy is credited not to the formal punishment imposed (a \$500,000 fine) but rather to Andersen’s automatic loss of its license to provide accounting services to public

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225. Compare Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 38, 45 (describing an “ideal world” in which “corporate criminal responsibility would give way to the exclusive use of civil sanctions”), with Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481 (2009) (contrasting with the notion that the imposition of criminal liability on corporations is sensible), Kaal & Lacine, *supra* note 22, at 70 (noting recent large-scale plea deals “call into question the ‘death penalty’ theory”), and Uhlmann, *supra* note 46, at 1321–22 (recognizing the conceivability of “collateral consequences short of the corporate death penalty that could harm employees or shareholders”).

226. At least not in isolation. The cumulative impact of collateral consequences is a further question, relevant to corporations and individuals alike. See generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

227. *Division of Corporation Finance No-Action, Interpretive and Exemptive Letters*, SEC. EXCHANGE COMMISSION, <https://www.sec.gov/divisions/corpfin/cf-noaction.shtml> (last modified Dec. 19, 2018) [<https://perma.cc/ZCP5-NMUN>].

228. See *supra* notes 92–97 and accompanying text.

229. Technically, Arthur Andersen was a partnership, but for our purposes, the lesson holds.

companies.<sup>230</sup> As a result, and because it was not granted a waiver by the SEC, the firm was disabled from continuing as a going affair.

In short, whether through a fine imposed directly as punishment or a suspension imposed indirectly as a collateral consequence, conviction of a criminal corporation can wholly disable the enterprise in a manner evocative of capital punishment. To be sure, we should not take the metaphor too seriously: execution of an individual person is unquestionably a more serious affair than is dissolution of a legal entity.<sup>231</sup> Among other things, employees, officers, and directors can join another enterprise, and shareholders are out an investment rather than their lives or their freedom.<sup>232</sup> In theory, one can even imagine attempts to recreate the corporation just terminated.<sup>233</sup> But neither should we dismiss the dissolution of a legal entity as a mere paper worry; forced termination need not reach the moral dimension of capital punishment to be especially severe. Continuing the example, Andersen's collapse cost thousands of jobs, cancelled a broad swath of contracts and business relationships with a host of third parties, and reorganized the collection of major domestic accounting firms.<sup>234</sup> Part IV revisits these concerns when discussing doctrinal reforms. But for present purposes, it is enough to acknowledge that there are corporate criminal sanctions capable of incapacitating through disablement. Moreover, an appeal to incapacitation arguably provides the best explanation for the goal being vindicated by the criminal law when it imposes at least some of these sanctions.

## 2. Prohibiting Through Corporate Probation and NPAs/DPAs

Corporate probation has emerged as an odd amalgamation of ordinary probation and supervised release. Meanwhile, prosecution agreements are increasingly being used to impose probation-like conditions, including conditions that interfere more aggressively with the corporation's internal structure and daily affairs than have conditions of probation. Regardless, the effects function similarly to supervised release in restricting the entity's ability to pursue activities it otherwise has reason to pursue. Consider three different types of

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230. GARRETT, *supra* note 21, at 150.

231. To that point, many states reserve open-ended authority to revoke a corporate charter with little cause or process. See Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1152 (2012) (discussing powers over corporate charters still reserved to states).

232. Mueller, *supra* note 218, at 39–40, 47.

233. *But see* Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. REG. 1, 3–5 (2019) (discussing the impact of successor liability on corporate reorganizations).

234. GARRETT, *supra* note 21, at 40–44.

conditions that have an incapacitative character: limitations on specific business activities, corporate monitors, and compliance reforms.

*a. Prohibition of Business Practices*

Corporate criminal settlements, particularly prosecution agreements, increasingly require corporations to abandon lines of business and to stop working with certain third parties and begin working with others instead.<sup>235</sup> On the one hand, the effects of these prohibitions are not so severe as permanent disablement; indeed, these prohibitions are presumably designed to avoid such an outcome.<sup>236</sup> On the other hand, they have an obvious incapacitative, albeit more narrowly tailored, effect akin to conditions of probation constraining individual freedom of association and employment opportunities.<sup>237</sup>

Moreover, similarly to forced divestiture, prohibitions on entering certain sectors, pursuing certain lines of business, and interacting with certain counterparties suggest that incapacitation may well provide the basis for and not merely represent a consequence of corporate punishment. Particularly instructive here is KPMG's agreement in its 2008 DPA to exit the high-end tax business.<sup>238</sup> KPMG agreed to a host of "permanent restrictions" on its tax practice, including exiting entirely from its private client tax and compensation and benefits tax practices.<sup>239</sup> It is not that outright prohibitions are immune from appeals to deterrence or rehabilitation; the conceptual niceties among theories of punishment cannot be neatly cleaved at the joint when we get down to actual practice, particularly when multiple justifications can attach simultaneously.<sup>240</sup> However, it seems contrived to say that prosecutors sought to rehabilitate KPMG into the kind of entity that could engage lawfully in this otherwise legitimate business by prohibiting KPMG from ever taking part in that business again.<sup>241</sup> The upshot here is not that incapacitation alone grounds this sanction

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235. See *supra* notes 78–85 and accompanying text.

236. See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–22 (2007) (connecting the rise of DPAs to "the public opprobrium that followed the Arthur Andersen case").

237. See *supra* Section II.B.3.

238. Deferred Prosecution Agreement, *supra* note 83, at 4–6. As with Arthur Andersen, see *supra* note 229, the fact that KPMG is a partnership does not impact the analysis.

239. *Id.* at 4–5.

240. See *supra* notes 144–148.

241. *But see* Press Release, U.S. Dep't of Justice, KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case (Aug. 29, 2005), [https://www.justice.gov/archive/opa/pr/2005/August/05\\_ag\\_433.html](https://www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html) [https://perma.cc/ZE38-TE7C] (expressing hope that KPMG would continue to reform other practices).

but merely that excluding incapacitation as a basis for this punishment fails to fully account for the facts on the ground.

### *b. Corporate Monitors*

Corporate monitors, too, can serve an incapacitative function. This is clearest in circumstances where monitors are given veto authority and sign-off approval, which thereby prevents the corporation from acting without first securing outside approval to do so.<sup>242</sup> Indeed, Vikramaditya Khanna and Timothy Dickinson have noted in passing that installing a monitor could be understood as “a way to incapacitate a corporation from committing future wrongdoing,” even if monitors are not actually justified on these grounds.<sup>243</sup>

But even without explicit sign-off control over day-to-day decisionmaking, the corporate monitor, like a probation officer, routinely possesses broad authority to oversee a corporation’s activities, including those outside the narrow inquiry into whether the corporation is complying with its prosecution agreement. Beyond the monitor itself, there are specific governance and compliance reforms being imposed on a criminal corporation’s structure to consider. Although couched in the language of rehabilitation, here, too, incapacitation operates both as a goal and as a consequence of the specific reforms reliably being imposed.

### *c. Policing Measures and Compliance Reforms*

The panoply of invasive, compliance-centric reforms at least have the effect of preventing or restricting the corporation’s ability to act on its reasons without necessarily altering those reasons. These compliance and governance reforms are “policing measures” intended to root out and detect future wrongdoing.<sup>244</sup> In doing so, the government rearranges a criminal corporation’s internal structure and composition—by, for example, erecting new reporting lines, departments, removing some managers, and taking away the responsibilities of others.<sup>245</sup> Almost by definition, these changes are against the corporation’s self-perceived interests; outside of criminal

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242. See Khanna & Dickinson, *supra* note 14, at 1731 (stating that monitors can serve the function of incapacitating corporations as well).

243. *Id.*

244. Arlen & Kraakman, *supra* note 56, at 691; see also Arlen & Kahan, *supra* note 87, at 353 (arguing that “PDA mandates may be appropriate when, and only when, these more traditional liability regimes cannot be relied on to induce optimal policing”).

245. See Griffith, *supra* note 30, at 2133 (“A great leap is not required to go from prosecuting corporations as though they were real people to seeking to ‘rehabilitate’ them through compliance.”).

law, corporate law provides a corporation wide latitude to order its internal affairs.<sup>246</sup> Nor are the changes expected to be profitable—quite the contrary, they frequently require costly investments in reorganization, staffing, and monitoring at the expense of other business opportunities.<sup>247</sup>

Cumbersome mandatory reporting systems inserted into a corporation's preexisting internal decisionmaking structure may have all sorts of penological benefits in the form of improved deterrence or an eventually reformed corporate culture.<sup>248</sup> But at least one consequence is to impede the corporation from acting on its reasons. Further, at least some of the imposed compliance-centric policing measures are better understood by appealing to an implicit goal to incapacitate rather than the proffered goal to rehabilitate. For one, the mere fact that these governance reforms have an incapacitative effect offers at least some reason to appeal to incapacitation as an operating justification.

For another, many policing measures do not actually seem to vindicate their purported goal of rehabilitation. The focus of these reforms has overwhelmingly been on installing or improving policing measures designed to make future wrongdoing easier to detect and prosecute.<sup>249</sup> Looking at policing measures as a whole, Lisa Kearns Griffin argues that corporate criminal settlements are being used to design institutions that reflect a prosecutorial mindset toward compliance.<sup>250</sup> At an extreme, they weaponize the compliance function into a “snitching machine.”<sup>251</sup> In this respect, governance reforms have focused on making courts' and prosecutors' jobs easier, not on resolving the underlying cause of criminality in the first place.

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246. See James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 260 (2015) (describing the “nexus of contracts” paradigm of corporate law and its limitations); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 673–76 (2005) (describing the strength of the Delaware system in promoting the discretion of corporate management).

247. See Griffith, *supra* note 30, at 2135 (explaining that it may be possible to create a more cost-effective compliance regime by aligning corporate actions with government incentives); Root, *supra* note 69, at 1003–05 (describing the regulatory burden of compliance systems).

248. *But see infra* Part IV.

249. See Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 177 (comparing prosecutors' roles in corporate oversight to those of other traditional regulatory bodies); see also Khanna & Dickinson, *supra* note 14, at 1722 (describing the corporate monitor's role as a type of policing measure).

250. Griffin, *supra* note 80, at 110–13.

251. See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 72 (2007) (describing the mechanisms by which government entities can coerce corporate collaboration); Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship,”* 76 ST. JOHN'S L. REV. 979, 980–982 (2002) (describing the conflicts of interest inherent in corporate collaboration with government prosecution).

Even in principle, however, policing is not a substitute for good institutional culture. The model of crime here seems to be that corporate wrongdoing is discrete and against the rules, such that a system of monitoring will suffice to stop the criminals.<sup>252</sup> But this model is not universally correct; as Samuel Buell notes, many crimes done in the corporate context are not instances of “self-interested agent misconduct” but of “*benefit* organizations and are committed for that reason.”<sup>253</sup> This is true for instances of pervasive institutional fault.<sup>254</sup> The model of certain ridesharing businesses, for example, is to flagrantly and repeatedly violate municipal licensing regulations with the hope of ultimately avoiding sanctions through legal reform and popular support against a previously captured taxi industry.<sup>255</sup> Further, we have no illusions elsewhere that policing is a panacea for ending criminal wrongdoing; other institutional factors are at play.<sup>256</sup> Without doing anything to correct the institutional forces pushing individuals (and groups of individuals) toward criminal activity, we should expect only modest results from policing. The lack of attention paid to actual governance reforms designed with the goal of fixing the roots of organizational misconduct bolsters the suspicion that appeals to rehabilitation are less genuine than might seem.<sup>257</sup>

### 3. Isolating Through Corporate Imprisonment

This Article has thus far sidestepped the main assertion in the argument against corporate incapacitation—namely, that a corporation cannot be imprisoned. As previously discussed, incapacitation is a broader phenomenon than imprisonment. With respect to a holistic understanding of the concept, this Article identifies several means through which the criminal law could, and plausibly already does, incapacitate criminal corporations. Still, the skepticism toward

252. See Arlen & Kahan, *supra* note 87, at 330 (describing the system of corporate criminal liability in the United States).

253. Buell, *supra* note 11, at 496.

254. See Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 711 (2018) (noting the increasing frequency of corporate lawbreaking).

255. See Benjamin Edelman, *Uber Can't Be Fixed—It's Time for Regulators to Shut It Down*, HARV. BUS. REV. (June 21, 2017) <https://hbr.org/2017/06/uber-cant-be-fixed-its-time-for-regulators-to-shut-it-down> [<https://perma.cc/MSX6-C3QZ>] (arguing that Uber's competitive advantage was intentional illegality); Eric Newcomer, *Uber Pushed the Limits of the Law. Now Comes the Reckoning*, BLOOMBERG (Oct. 11, 2017), <https://www.bloomberg.com/news/features/2017-10-11/uber-pushed-the-limits-of-the-law-now-comes-the-reckoning> [<https://perma.cc/5W97-RKEJ>] (describing Uber executives' unique temperament toward legal restrictions).

256. See generally MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK AND HOW WE CAN DO BETTER (2014).

257. See *infra* notes 306–310.

corporate punishment's ability to incapacitate to the same degree as imprisonment—the paradigmatic form of individual punishment—merits consideration. The concern here is whether there exist—or even could exist—analogues to imprisonment, whereby the criminal law incapacitates an individual by temporarily isolating her from a general, nonprison community. Consider two responses. First, criminal corporations could be isolated in a manner functionally similar to individual imprisonment. Second, the fact that this is not done suggests a new, more promising basis for diverging from the criminal law's presumption of similarity between individuals and corporations.

With respect to the proper form of a corporate analogue to individual imprisonment, incarcerating individual members of the corporation would not fit the bill. Even if there were a formal, extended sense in which incarcerating individuals might count as punishing the corporation,<sup>258</sup> doing so would not thereby count as isolating it; the corporation could still go about its day-to-day business, could replace the incarcerated members, etc. Something that isolates the corporate entity itself from pursuing the business for which it is incorporated is required.

But this description expresses collateral consequences. Those existential consequences that constitute a de facto death penalty do so by imposing a de jure exclusion from the corporation's industry, funding sources, or clientele. In other words, they operate to temporarily isolate the criminal corporation from its ordinary business community. And with respect to criminal punishment specifically, one could imagine a court securing a comparable result by seizing a corporation's charter for a fixed term, thereby suspending access either to the corporate form itself or to the collective goal motivating the corporation's existence in the first place.<sup>259</sup> Indeed, not much imagination is required: prior to the passage of the Guidelines, one district court sought to impose a term of imprisonment on a corporation by putting the corporation's assets "in the custody of the United States Marshal."<sup>260</sup> While summarily reversed at the time, the breadth of authority since vested in courts to fashion

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258. Cf. *Criminal Fines*, *supra* note 109, at 642 (distinguishing the imposition of collective punishment from the distribution of individual harm).

259. Analogously, many states reserve the right to revoke a corporate charter for serious criminal violations. DEL. CODE ANN. tit 8, § 284(a) (2016). That power, however, is effectively a dead letter. See Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 607 (2011) ("The integrity of the law is challenged when a state's own creation flaunts the very system that created it.").

260. *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856, 861 (E.D. Va. 1988), *aff'd in part, rev'd in part*, 870 F.2d 655 (4th Cir. 1989). *But see* *United States v. Harford*, No. 88-5139, 1989 WL 21563, at \*3 (4th Cir. Jan. 11, 1989) (holding that a corporation may not be sent to jail).

conditions of probation may put a repeat performance on legally defensible footing.<sup>261</sup>

To reiterate, *de jure* suspension means *de facto* death. No business can wait around for five years without operating; employees will leave and third parties and customers will take their business elsewhere. Consider this a further refinement of the argument from impossibility: rather than understanding corporate incapacitation to be a conceptual impossibility, the claim is instead that it is practically impossible to *only* imprison a corporation—that is, to temporarily isolate a corporation in a way that does not invariably lead to its termination.

But even this presentation cannot withstand scrutiny. Individual punishment is subject to the same tragic dynamic: confining a person in isolation would be fatal except for the fact that the state reliably acts (if not as well as it should) on its affirmative duty to care for a person in its custody. In this respect, to compare our institutions of individual imprisonment and corporate collateral consequences is to compare apples to oranges. A more apt—and more plausible—comparison is that a corporation isolated from its broader community even temporarily cannot survive *absent state intervention to ensure its survival*. True, the current institution does not function to sustain a corporation while it serves out a term of confinement-like isolation. But arguably it could. A robust receivership, or even temporary nationalization, might come close.<sup>262</sup> One could even conceive of a system that paid employees not to abandon the enterprise during a period of suspension.<sup>263</sup>

This increasingly fanciful discussion warrants a few clarifications. On the one hand, there is little reason to take seriously the above reconstructions as policy ideas; they would require a major investment in new institutions that would almost certainly be too expensive and too unwieldy to merit entertaining for any purpose other than a fetishistic commitment to treating individuals and corporations similarly. On the other hand, that is the point: the ambition of this project, and of corporate punishment generally, is not to recreate corporate versions of individual punishments for their own sake.

261. David Debold, *Sentencing of Organizations*, in PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES § 17.01 n.3 (2019) (arguing the district courts' vindication after the adoption of the Guidelines).

262. See Fisse, *supra* note 14, at 1163 n.96 (describing “nationalization, receivership, dissolution, divestiture, and trading bans” as “rehabilitative or incapacitative tools of last resort”); see also Donald R. Richberg, *The Imprisonment of Criminal Corporations*, 19 GREEN BAG 156, 156–58 (1907) (discussing nationalization).

263. Mary Ramirez has suggested something comparable under the guise of a corporate dissolution. Ramirez, *supra* note 132, at 974–76.

Individuals and corporations are different from each other in ways that our legal practices should reflect. As Section II.C argued, and as this dialectic bolsters, reliance on theories underlying individual bodies detracts from an understanding of which differences should be legally relevant and why. What is left is a narrowed, largely banal argument of impossibility—that is, it is not obviously cost effective, given viable alternatives, for the state to create an institution to carry out corporate punishments functionally equivalent to individual imprisonment. Arguments stemming from the impossibility of corporate imprisonment, in other words, have very little to say about corporate incapacitation.

### *B. The Case for Acknowledging Corporate Criminal Incapacitation*

Given the functional account of corporate incapacitation just described, should we continue to exclude incapacitation, the traditional justification for punishment, from applying to corporate persons even as it plays an increasingly prominent role in individual cases? Arguably, there is no good reason to continue doing so. The prior Section lends itself toward two modest arguments in favor of elevating incapacitation into, or ending its exclusion from, the panoply of justifications available when considering the punishment of criminal corporations.

#### 1. The Exclusion of Incapacitation is Arbitrary and Ad Hoc

Incapacitation should be extended to criminal corporations because there is no clear reason not to. This Article has identified multiple sanctions either within or just outside the criminal justice system—specific prohibitions on business practices, veto-capable corporate monitors, and existential fines being the clearest analogues—that incapacitate corporations in a manner consonant with a robust understanding of that justification.<sup>264</sup> Thus, there is no conceptual or practical barrier preventing the criminal law from appealing to incapacitation as a justification for these punishments, nor under the auspices of our federal system would appealing to incapacitation crowd out other penal rationales that might attach.<sup>265</sup> Put another way, there is a straightforward sense in which incapacitation applies to

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264. *See supra* Section III.A.

265. *See* 18 U.S.C. § 3553(a)(1) (2012) (stating that “the nature and circumstances of the offense and the history and characteristics of the defendant” shall be relevant for purposes of sentencing); *Tapia v. United States*, 564 U.S. 319, 326 (2011) (stating that sentencing rationales “may apply differently, or even not at all, depending on the kind of sentence under consideration”).

corporations, and, at least thus far, arguments for a categorical exclusion have proved unavailing. On this line, we should include incapacitation because there is no decisive countervailing reason to exclude it.

Of course, this particular argument might strike some as merely a semantic point; if we can already impose these punishments without having incapacitation available as a justification, then why bother recognizing it? But if appealing to incapacitation is merely a semantic point—and as Part IV makes clear, it is not—then it is one that cuts in favor of recognizing penal incapacitation, not rejecting it. After all, the presumption is in favor of a single institution of criminal law, not one with arbitrary bifurcations drawn between the treatment of individuals and corporations.<sup>266</sup> While that presumptive similarity is defeasible, we should demand a reason for deviation, not the other way around.

## 2. The Exclusion of Incapacitation Misrepresents Our Practices

Incapacitation appears to already be operating in the background to motivate and explain some practices as a justification for those punishments. To the extent it is, the criminal justice system should make clear whether and how it justifies the use of its limited authority to intentionally harm persons on behalf of the public's interest.

In suggesting that incapacitation is operating *sub silencio* as a basis for corporate punishment, what is on offer is an appeal to the best explanation: certain corporate sanctions can be better understood as efforts to incapacitate, rather than to deter or rehabilitate, a criminal corporation. As demonstrated, this is most obviously the case with debilitating, existential sanctions.<sup>267</sup> But the point also applies to less severe prohibitions on continuing certain business practices or relationships. It even plausibly applies to compliance-centric policing reforms, in part because the stated rationale of rehabilitation seems a dubious explanation of actual practices—a point Part IV revisits and expands.

This admittedly revisionist description of corporate criminal law practices raises the obvious response: Why think that corporate criminal law is being used to incapacitate when courts and prosecutors are adamant that any such sanctions are rehabilitative in character? To start, expression is a public activity; neither courts nor prosecutors

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266. See *supra* Section II.C.

267. See *supra* notes 220–227 and accompanying text.

have peremptory authority to decide what any particular action conveys.<sup>268</sup> The purpose that courts and prosecutors communicate matters, but it is not all that matters. This is particularly true given the widely shared, if specious, belief that incapacitation cannot sensibly apply to corporations; under these circumstances, silence is not only more understandable but also less persuasive.

But, without psychologizing individual decisionmakers, there are good institutional reasons why at least prosecutors—who are leading the charge in trumpeting rehabilitation—might be wary of appealing to incapacitation even if they understood themselves to be relying on it. Prosecution agreements, after all, are civil agreements, and while this Article has discussed the ways in which they resemble punishment, prosecutors have a countervailing interest in not appearing to impose extrajudicial punishment without a trial and conviction.<sup>269</sup> Jessica Eaglin identifies a similar dynamic at play when arguing that recent advocacy for “neorehabilitation” is broadly indistinguishable from total incapacitation.<sup>270</sup> There, as here, actors in the criminal justice system have institutional incentives to relabel—or, probably more accurately, to mislabel—efforts to incapacitate as efforts to rehabilitate.<sup>271</sup> Taken together, there is a confluence of reasons why incapacitation may not figure explicitly into justifications of corporate punishment, even if incapacitation is in reality operating as such a justification.

Admittedly, the defense of corporate incapacitation offered in this Section is a modest one. Merely expanding the set of justifications to include incapacitation—that is, ending its exclusion—would likely be of little consequence beyond affording expressive clarity about what a given punishment is meant to convey. But even this result would be noteworthy. The fact that including incapacitation as a justification would not meaningfully disrupt the practice of corporate criminal law further undermines the settled wisdom that incapacitation of corporations is impossible. In this respect, doctrinal stability is a feature, not a bug, of this Article’s functional account of corporate imprisonment.

Part IV defends a more aggressive agenda of replacing rehabilitation with incapacitation as a critical function of corporate punishment. But first: the status quo takes as given that penal incapacitation makes sense as applied to individuals but not to

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268. Anderson & Pildes, *supra* note 123, at 1519–22.

269. My thanks to Miriam Baer for pressing me on this point.

270. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 222 (2013).

271. *See id.* at 199–210 (describing a series of “emergency reforms” that have created such incentives).

corporations. The next Section explores whether the opposite might be true.

### *C. Are Corporations More Fit for Incapacitation than Individuals?*

Given the functional account of incapacitation developed in Parts II and III, it is first worth considering reasons in favor of a more startling, counterintuitive conclusion: that incapacitation is better suited as a goal of corporate punishment than as a goal of individual punishment. Part II identified both normative and practical concerns that occupy most discussions of penal incapacitation for individuals. But as it turns out, these obstacles may be less relevant or onerous when we switch from considering individual moral agents to corporate legal entities.

#### 1. The Moral Case

At a fundamental level, incapacitation stands in tension with liberal commitments to individual responsibility that are core to our practices of criminal punishment. One need not be a thoroughgoing retributivist to see as a foundational commitment of criminal law that it punish someone only for crimes they actually commit. But incapacitation, even more than other preventative justifications for punishment, imposes harm because of the crimes that the criminal justice system anticipates a person will commit.<sup>272</sup> That is, the central presupposition of incapacitation is that an offender will, or very likely will, recidivate. Incapacitation cuts out the messiness of free will and a fair trial to stop these hypothetical crimes—and, in doing so, does violence to the countervailing normative commitments to moral autonomy and individual responsibility that animate retributivist instincts in the criminal law.<sup>273</sup>

No such ethical concerns attend to the corporation qua corporation, however, because the criminal law has rejected the view that corporations are objects of moral consideration. Accepting this view does not require adopting some deep metaethical commitments in favor of what philosophers call “normative individualism”—meaning, roughly, that individuals but not groups should make up “the ultimate

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272. See Robinson, *supra* note 28, at 1432 (“[P]unishment can only exist in relation to a past wrong. . . . [D]angerousness describes a threat of future harm. One can ‘restrain,’ ‘detain,’ or ‘incapacitate’ a dangerous person, but one cannot logically ‘punish’ dangerousness.”).

273. *Cf.* Graham v. Florida, 560 U.S. 48, 73 (2010) (“Incapacitation cannot override all other considerations . . .”).

point of reference of moral obligations.”<sup>274</sup> Rather, the claim made here is the flipside of corporations being deemed ineligible candidates of retribution.<sup>275</sup> If the corporation is not an objection of moral concern in its own right for purposes of retribution, neither should it be for purposes of penal justifications like incapacitation.<sup>276</sup> Deep moral considerations inform the propriety of incapacitation as applied to individuals but fail to attach to corporations as such.

This normative distinction should not be read to imply that the government is thereby free to incapacitate corporations indiscriminately. Just because a particular ethical concern salient in the individual context fails in the corporate context does not mean that no practical concerns attach or that we might not be concerned for the individual moral agents who make up the corporation.<sup>277</sup> That the criminal law takes individuals, not corporations, to be ends in and of themselves provides substantive content to the otherwise banal assertion that corporations should not be imprisoned. This should be the real takeaway from the rejection of corporate imprisonment. The practice is not conceptually impossible, technically infeasible, or legally unattainable.<sup>278</sup> Rather, pursuing corporate imprisonment reflects a certain normative confusion over what institutions of corporate punishment are meant for. This is why corporate imprisonment, while not impossible, would be fetishistic. Absent some independent basis for creating such a practice, doing so would reflect a reflexive adherence to similar treatment of individuals and corporations for similarity’s own sake.

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274. Dietmar von der Pfordten, *Five Elements of Normative Ethics - A General Theory of Normative Individualism*, 15 *ETHICAL THEORY & MORAL PRAC.* 449, 452 (2012); see Thomas W. Pogge, *Rawls on International Justice*, 51 *PHIL. Q.* 246, 247 (2001) (discussing the view that individuals are the sole objects of moral consideration, whereas groups are valuable only instrumentally and not for their own sake (citing JOHN RAWLS, *THE LAW OF PEOPLES* (1999))).

275. See *supra* Section I.C.1.

276. The same logic applies to corporate rehabilitation. Diamantis, *supra* note 13, at 542–44. Briefly, rehabilitating individuals implicates paternalistic concerns about state invasions of an individual’s autonomy and identity in a way that other punishments do not—namely, by seeking to change a person into whatever version of a good citizen the state would prefer her to be. VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 355 (2011).

277. See Alschuler, *supra* note 9, at 18 (“When withholding criminal punishment would leave the giving-receiving ratio out of balance and make selfish action more likely, society has good reason to punish.”). *But see* Buell, *supra* note 11, at 522–23 (“Legal imposition of entity blame inflicts costs that may undercut any benefits it carries.”); French, *supra* note 121, at 21–22; Thomas, *supra* note 109, at 617–24 (describing the unique impacts and costs of punishing corporations under traditional rationales).

278. See *supra* Section III.A.

## 2. The Practical Case

Setting aside moral considerations, there are reasons to think that incapacitation, as a practical matter, may be a justification for punishment better suited for corporations than individuals.

First, for reasons discussed in Part II, “incapacitation and recidivism are two sides of the same coin.”<sup>279</sup> But predicting individual recidivism is a fraught enterprise—not just morally but empirically. Despite a long trend toward incarceration, there is limited, mixed evidence that it is successful; more importantly, identifying reliable variables to predict future misconduct is and remains an inordinately difficult task.<sup>280</sup> By comparison, there is reason to think that at least the empirical difficulties are lessened in the corporate context as compared to individuals. The animating investigative task central to the practice (but not the doctrine) of corporate criminal law is to distinguish cases of individual wrongdoing from institutional fault.<sup>281</sup> As a result, preconditions for recidivism are baked into this determination; showing that a corporation is guilty involves showing it is structurally suited to recidivate (and may have already done so).<sup>282</sup>

Second, given the broader understanding of incapacitation, it bears mentioning that imprisonment may not actually be that great at incapacitating individuals. Imprisonment’s defining feature is isolation; it removes an offender from the general population, thereby preventing her from committing future crimes against that population. But putting aside circumstances like solitary confinement, isolation does not incapacitate in the way we have come to understand that concept as much as it relocates.<sup>283</sup> Imprisonment does not necessarily prevent an individual from committing future crimes; it simply changes who her victims are—other inmates.<sup>284</sup> One might worry that imprisonment is operating less to incapacitate individuals from the prospect of future criminality than it is to relocate these future crimes from civilian society to a prison society.

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279. Liepold, *supra* note 143, at 543.

280. *Id.* at 543–50 (surveying empirical findings); *see also supra* notes 143–144.

281. *See supra* Section I.A.

282. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(c) (U.S. SENTENCING COMM’N 2018) (explaining how prior history of similar offense adds to the overall culpability score); U.S. ATT’YS’ MANUAL, *supra* note 30, § 9-28.600 (“Prosecutors may consider a corporation’s history of similar conduct . . . in determining whether to bring criminal charges and how best to resolve cases.”).

283. Bennardo, *supra* note 169, at 12.

284. GIBBS, *supra* note 171, at 58.

Even if incapacitation is a mixed basis for imprisonment, imprisonment may appeal to other justifications for punishment.<sup>285</sup> But while this might be true, incapacitation provides the primary justification for many cases of imprisonment: three strikes laws, life sentences, the Armed Career Criminal Act, etc.<sup>286</sup> Taking seriously concerns about the shortcomings of incapacitation as a justification for individual punishment should mean questioning the viability of extremely long terms of imprisonment as a practice, particularly given the massive toll in human suffering they impart. And, as concerns corporations, the functional account developed to this point highlights that arguments from impossibility are not only legally irrelevant but possibly normatively pernicious. Rather than thinking about how to imprison corporations, we should understand the ability to incapacitate them as further evidencing that we should imprison individuals less.

#### IV. INCAPACITATION AS A REPLACEMENT FOR CORPORATE REHABILITATION

Merely recognizing the possibility of corporate incapacitation would do little to disrupt the status quo, because actions already taken through or adjacent to established criminal processes are consistent with incapacitation as a possible basis for corporate punishment. By contrast, pursuing an incapacitative agenda—that is, taking incapacitation seriously not just as a possibility but as a central justification for punishment—would improve current practices. This is because incapacitation provides a better basis for corporate punishment than does rehabilitation.

Section IV.A demonstrates that an incapacitative agenda provides a suitable replacement for the role that rehabilitation currently plays. That is, incapacitation captures the same core benefits that rehabilitation, which has been promoted as a supplement or alternative to bare economic deterrence, is meant to provide. Section IV.B argues that incapacitation is superior to rehabilitation as a basis for corporate punishment. In particular, there are shortcomings of corporate rehabilitation as it is practiced today that are endemic to both the institution of criminal law and the underlying logic of rehabilitation in ways that corporate incapacitation is likely to circumvent. Taken together, corporate incapacitation captures the

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285. *But see* Bennardo, *supra* note 169, at 11 (rehabilitation); Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (retributivism); Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111 (2017) (deterrence).

286. Robinson, *supra* note 28, at 1435. *See generally* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 167–207 (2001).

promises, while avoiding the pitfalls, of corporate rehabilitation. Section IV.C sketches worthwhile doctrinal changes if pursuing a corporate incapacitation agenda.

### *A. Incapacitation Can Achieve the Promises of Rehabilitation*

Over the past two decades, rehabilitation has emerged as a complement to, or competitor of, the fines-centric, cost-minimizing focus on economic deterrence that traditionally dominated corporate punishment's rationale. These reform-minded, nonmonetary sanctions are defended for solving two concerns with a pure deterrence regime: that corporate fines pervert criminal wrongdoing into another line item expense and that a focus solely on fines encourages systematic underdeterrence. However, appealing to rehabilitation is not necessary to answer these concerns; incapacitation as a justification for punishment is equally well-situated to answer the expressive worry while shoring up specific concerns of underdeterrence.

#### 1. Rejecting Corporate Crime as a Cost of Doing Business

Deterrence standing alone is, for many, a brittle foundation on which to justify criminal punishment over a comparable civil or regulatory sanction.<sup>287</sup> Animating this position is a commitment to criminal law's condemnatory function. On this view, the government's choice of criminal over civil enforcement is meant to convey a deeper sense of stigma than is captured by civil or regulatory enforcement.<sup>288</sup> To the extent it imposes purely monetary sanctions that are themselves indistinguishable from civil fines, however, the government blunts its own condemnatory message.<sup>289</sup> Worse, it actually encourages the already prevalent, pernicious impression that, for corporations, criminal misconduct is to be treated as merely a "cost of doing business."<sup>290</sup> It is for this reason that Mihailis Diamantis argues succinctly that "[t]he picture of corporate crime that [pure] deterrence theory encourages is morally repulsive."<sup>291</sup> Representative of the worry,

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287. Gilchrist, *supra* note 11, at 6 ("[C]arrots and sticks are not sufficient justification for the imposition of criminal liability on corporations.").

288. See *supra* notes 121–131 and accompanying text.

289. Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 87, 93–96; Thomas, *supra* note 109, at 617 ("[T]he expressive problem with corporate-criminal fines is that there is nothing uniquely criminal about corporate fines.").

290. Henning, *supra* note 13, at 1426; Kahan, *Social Meaning*, *supra* note 124, at 616–21.

291. Diamantis, *supra* note 13, at 525.

Vikramaditya Khanna identifies circumstances where economically rational firms should prefer a criminal sanction to a civil one.<sup>292</sup>

Embracing incapacitation as a core justification of punishment provides an intuitively attractive response to concerns that pure deterrence, standing alone, is an insufficient response to corporate crime. Incapacitation sends a clear message more conducive to criminal punishment: the government is protecting the public from a corporation that it cannot otherwise trust not to recidivate. Elsewhere, I have argued that to overcome corporate crime's "cost of doing business" problem, the criminal law must either adopt a radically different type of monetary sanction than is used in civil settings or else turn to nonmonetary sanctions less amenable to the sort of pricing calculus reflected in our Beckerian model of corporate crime.<sup>293</sup> As advocates of corporate rehabilitation have noticed, many of the prohibitions described in Part II fit the bill. Incapacitation lends itself to sanctions that are not easily susceptible to the economic calculus informing the sentiment that corporate crime be treated as a cost of business. And insofar as this strategy can be generally spelled out under a banner of incapacitation the same as rehabilitation (subject to doctrinal modifications considered in Section IV.C), this ostensible benefit to rehabilitation as a justification for corporate punishment accrues equally to a regime that elevates incapacitation.

## 2. Shoring up Underdeterrence

Even those more sanguine about the centrality of economic deterrence to corporate punishment recognize that deterrence runs out in systematically predictable ways. After all, principle-agent problems pervade the law and theory of corporate governance;<sup>294</sup> it is not clear why criminal punishment would overcome a general class of problems endemic to the corporate form.<sup>295</sup>

Even if maximal deterrence were the ambition, monetary sanctions are liable to fall short of vindicating this goal in predictable ways.<sup>296</sup> To this point, John Coffee has long identified that the nature

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292. Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004).

293. Thomas, *supra* note 109, at 616–17.

294. See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

295. Baer, *supra* note 55, at 7; accord David Ciepley, *Can Corporations Be Held to the Public Interest, or Even to the Law?*, J. BUS. ETHICS 1, 36 (2018).

296. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 11, 24 ("There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect.").

of corporate crime—its complexity, difficulty to detect, and costliness to investigate and prosecute—creates conditions for reliable underdeterrence.<sup>297</sup> Jennifer Arlen and Marcel Kahan argue that nonmonetary policing sanctions are needed when “managers with direct or indirect authority over policing benefit personally either from tolerating wrongdoing or from deficient policing.”<sup>298</sup> Khanna and Dickinson have defended the use of corporate monitors as punishment in order to prevent future wrongdoing done by insolvent or otherwise judgment-proof firms.<sup>299</sup>

Again, incapacitation can overcome this problem. On Khanna and Dickinson’s view, incapacitation provides a complementary basis for corporate punishment to economic deterrence that can shore up the institution in these predictable circumstances. Prohibitions can be imposed on judgment-proof firms or those with uncontrollable agents.

### *B. Incapacitation Can Avoid the Pitfalls of Rehabilitation*

The ambition of corporate rehabilitation is to reform, through structural punishments, the institutional and cultural defects that give rise to cases of organizational wrongdoing. Advocates see corporations as particularly well-situated to be rehabilitated for reasons dialectically similar to those discussed in Section III.C—namely, that focusing on corporate persons rather than individual moral agents avoids thorny normative and practical challenges that face the justification when instantiated in the individual context.<sup>300</sup>

Translating the principle that corporations are receptive objects of rehabilitation into a practice of successfully rehabilitating them through punishment, however, is a long way off. Moral, institutional, and implementation challenges still exist for corporate rehabilitation—all of which incapacitation can avoid, ameliorate, or otherwise improve upon.

#### 1. The Criminal Law and Corporate-Governance Reform

Start with the obvious challenge for rehabilitation: the criminal bar lacks both the expertise and the institutional incentives to resolve structural defects affecting criminal corporations in a manner that

297. Coffee, *supra* note 10, at 387–90; accord Ciepley, *supra* note 295, at 21–24.

298. Arlen & Kahan, *supra* note 87, at 353; see also Lawrence Summers, *Companies on Trial: Are They ‘Too Big to Jail?’*, FIN. TIMES (Nov. 21, 2014), <https://www.ft.com/content/e3bf9954-7009-11e4-90af-00144feabdc0> [https://perma.cc/ZCD7-Q6FT].

299. Khanna & Dickinson, *supra* note 14, at 1731.

300. See *supra* note 276.

“reforms” them into good corporate citizens. Modern commercial corporations are complex, sophisticated organizations. It is hard to identify and prosecute instances of organizational wrongdoing. It is harder still to diagnose, and then design away, the structural and cultural defects giving rise to this wrongdoing. And it is harder even still to implement and oversee that solution.

Unfortunately, the criminal bar is situated to carry out only the first investigative task—and even doing that requires a major investment in time and resources.<sup>301</sup> For the remaining tasks, courts and prosecutors simply lack the expertise necessary to design structural solutions.<sup>302</sup> This is not a criticism as much as it is an observation: nothing about legal training suggests that these issues of corporate governance and business management fall anywhere in the competence of actors in the criminal justice system.<sup>303</sup> This might matter less if the criminal justice system were being used not for its expertise but rather as a focal point for coordinating policy design among law enforcement officials, regulatory agencies, and private parties.<sup>304</sup> As Veronica Root recently demonstrated in reviewing the state of corporate compliance, however, prosecutors have not proved particularly adept at marshaling together interested parties in more than a single case.<sup>305</sup> Particularly without a proven track record of successful, longitudinal collaboration across cases, it is hard to imagine how a one-off encounter with the criminal justice system provides sufficient information to diagnose and design impactful governance reforms.

That courts and prosecutors lack the expertise to rehabilitate a criminal corporation’s internal governance structure is reflected in the “questionable governance provisions” they actually impose.<sup>306</sup> This Article has already questioned whether policing measures should be characterized as reformist.<sup>307</sup> But even putting that worry aside, in practice there is a well-documented disconnect between the rhetoric of

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301. See *supra* Section I.A.

302. Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1055 (2008) (collecting authorities).

303. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM, *supra* note 31, at 62; Baer, *supra* note 302, at 1057.

304. Barkow, *supra* note 249, at 191–95.

305. Root, *supra* note 69, at 1010–18.

306. Baer, *supra* note 55, at 10.

307. See *supra* notes 244–256 and accompanying text.

reform and the policies of “cosmetic compliance” imposed.<sup>308</sup> Bill Laufer, canvassing the recent history of compliance efforts through the criminal law, is scathing in his criticism of what has become a “compliance game” whose “incentives and disincentives are not designed to change corporate behavior, improve corporate culture, or facilitate corporate decisionmaking.”<sup>309</sup> Moreover, prosecutors imposing reforms have shown little interest in determining whether those changes are succeeding in their stated purpose.<sup>310</sup> Taken together, there is little reason to think that the policing reforms actually implemented will have a rehabilitative benefit.

For my part, I remain sympathetic to the general intuition that corporate-governance reform is a profitable path for resolving issues of degraded corporate culture. But it is worth looking to the literature on corporate-governance reform to illustrate the gap between the promise and the reality of efforts within the criminal law. A rich vein of corporate scholarship focuses on reforming structural problems stemming from the corporate form:<sup>311</sup> constraining norms that permit, or outright encourage, corporations to act illegally;<sup>312</sup> deprioritizing shareholder wealth maximization, which otherwise crowds out civic-minded uses of corporate resources;<sup>313</sup> and incorporating employees into core mechanisms of governance through codetermination or corporate democracy, thereby disabling their sustained mistreatment.<sup>314</sup> Whether these reforms would accomplish their goals of corporate reform—either in general or if repurposed into corporate punishment—is a further empirical question. But the gap highlights how far removed our current

308. Vikramaditya S. Khanna, *Should the Behavior of Top Management Matter?*, 91 GEO. L.J. 1215, 1231 (2003). See generally Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

309. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 112 (2017); accord William S. Laufer, *Illusions of Compliance and Governance*, 6 CORP. GOVERNANCE 239 (2006).

310. Garrett, *supra* note 48, at 1847.

311. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 13–40 (2006) (collecting and evaluating reform proposals).

312. Cf. Easterbrook & Fischel, *supra* note 117, at 1177 (describing managers’ duty to break the law).

313. LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 24–32 (2012); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1025–34 (2013); Elizabeth Warren, *Companies Shouldn’t Be Accountable Only to Shareholders*, WALL ST. J. (Aug. 14, 2018, 7:01 PM), <https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687> [https://perma.cc/PVY8-QKZY].

314. See, e.g., Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334 (2008); Marleen A. O’Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 936–65 (1993).

penal practices are from addressing substantive issues of corporate governance that experts in the field think underwrite institutional misconduct.

For all of these reasons, mechanisms of incapacitation are easier to design and enforce. This is particularly true for the sorts of incapacitative corporate punishments we've discussed that involve clear, bright-line prohibitions.<sup>315</sup> But incapacitation generally lends itself to clear, discrete sanctions that are easier to impose and monitor. To be sure, incapacitative sanctions are not without their own risks; courts and prosecutors need to be careful not to adopt restraints so severe as to constitute a de facto "corporate death penalty."<sup>316</sup> Nevertheless, and as the framework developed here demonstrates, incapacitation admits of a far wider range of outcomes than termination or nothing. More to the point, these are sanctions that actors within the criminal law are particularly capable of carrying out.

## 2. Institutional Propriety and the Virtues of Pessimism

The prior Section could be construed as holding prosecutors and courts to an ungenerously high standard. But the better argument is that fault lies in relying on rehabilitation as an unduly sunny rationale for punishment; incapacitation, by comparison, offers an appropriately realistic view of what sorts of prevention the criminal law can be expected to achieve. In short, whereas rehabilitation looks to make criminals "better" than they were before, incapacitation is content with merely preventing them from engaging in further harm.

Underwriting rehabilitation is an optimism both about a person's ability to change for the better and specifically about state sanctions motivating that change.<sup>317</sup> In their defense, advocates of corporate rehabilitation are probably correct that, practically, it is easier to achieve rehabilitation for corporations than individuals—though this is a large bar if we consider that much of the basis for this claim rests on the fact that cognitive science is (and will be for a while) in its infancy.<sup>318</sup> Regardless, it remains the case that rehabilitation as a justification for punishment seeks to deliver a particular type of social value that—tabling the moral concerns present at least in the

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315. *See supra* Section III.A.2.

316. *See supra* Sections I.B, III.A (discussing collateral consequences).

317. *See* Victoria McGeer & Friederike Funk, *Are 'Optimistic' Theories of Criminal Justice Psychologically Feasible? The Probative Case of Civic Republicanism*, 11 CRIM. L. & PHIL. 523, 524 (2017) ("These more optimistic theories generally presuppose that people are sensitive, not just to the push and pull of cost and benefit—not just to the conditioning effects of penalty and reward—but also to the overtures and persuasions of their fellows.").

318. *Id.*

individual context—sets a high bar for determining whether a given punishment is successful qua punishment. And moreover, it is not clear that corporate rehabilitation’s comparative moral and practical advantages over its individual counterpart are all that robust. That is because the rehabilitative turn seeks to make corporations act ethically, not to make them actually become ethical agents. But it is highly controversial as a matter of both criminal law and moral psychology whether a constitutively amoral agent can reliably act ethically for prudential reasons.<sup>319</sup> In short, corporate rehabilitation avoids one longstanding moral and practical conundrum in criminal law only to implicate a different one.

Incapacitation, by comparison, represents a more pessimistic view of prevention.<sup>320</sup> Whereas an act succeeds as rehabilitation only if it makes the criminal “better” than she was before, incapacitation succeeds merely if it prevents further harm from occurring. The success conditions thus impliedly favor incapacitation in two respects. First, incapacitation is more tolerant of the possibility of harm. For better or worse, incapacitation is not appealed to as producing a benefit to the offender herself; as an upshot, that punishment (unproductively) harms the offender’s interest is less an object to incapacitation than it is to rehabilitation.

Second, incapacitation better aligns institutional competencies. This is not to suggest that optimism about corporate-governance reform is generally mistaken, just that it is misplaced to the extent that the criminal law is being held up as the proper legal domain for pursuing structural reform. Unique to the corporate context, the law already has an entire domain—namely, corporate law—dedicated to this enterprise.<sup>321</sup> To be sure, there may be widespread disagreement over how successful corporate law can be in this enterprise. But if there is a place to search for deep rehabilitative reforms to corporate governance, “we should probably look beyond the confines of corporate criminal liability, to corporate law itself.”<sup>322</sup>

319. See Michael J. Vitacco et al., *Holding Psychopaths Morally and Criminally Culpable*, 5 *EMOTION REV.* 423 (2013) (collecting authorities).

320. Darley et al., *supra* note 150, at 660 (describing “the incapacitation perspective” as a “pessimistic” view of prevention).

321. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *GEO. L.J.* 439, 441 (2001) (“All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole . . . .”); cf. Johnson, *supra* note 231, at 1151 (“[C]orporations have been permitted to advance private interests and corporate law itself has been deregulatory, but only because that particular approach was thought to be socially beneficial.”).

322. Baer, *supra* note 55, at 14; accord Ciepley, *supra* note 295, at 35–37.

### *C. Identifying Doctrinal Reforms for an Incapacitation Agenda*

Incapacitation can serve as a basis for meaningful improvements to how we punish corporations. While it is beyond the scope of this Article to propose detailed enactments, the framework developed here offers a roadmap for how best to leverage a shift away from a rehabilitation mindset and toward an incapacitation mindset.

#### 1. Emphasize Corporate Criminal Prohibitions

What doctrinal and practical consequences should follow from elevating incapacitation to be a core justification for punishment, particularly at the expense of rehabilitation? First, the criminal law should focus attention on expanding the set of prohibitions that could be imposed against criminal corporations. This Article has already identified several such candidates: targeted asset forfeiture, exit from certain lines of business or business practices, termination of client and counterparty relationships, entering into preapproval arrangements, etc.<sup>323</sup> Which sanctions to leverage and when to leverage them will be a challenging, case-specific, empirical inquiry. But at least as a next step, reformers should investigate these and similar bright-line prohibitions as viable complements and alternatives to some of criminal law's current efforts at nonmonetary sanctions.

Clear prohibitions have the advantage over complex governance reforms of being easier for the criminal law to impose, monitor, and enforce either directly or under the supervision of a monitor. Meanwhile, the past decade of prosecution agreements provides evidence that punishments vindicating incapacitation in this manner need not, and often do not, reliably result in *de facto* termination. More narrowly targeted prohibitions may turn out to be more sustainable as punishment and less wasteful than costly compliance reforms of dubious efficacy. As a first step, more needs to be done to investigate the efficacy of business constraints being imposed, mostly through prosecution agreements. These sanctions have been less severe than collateral consequences, which are quite broad in their scope. The use of targeted prohibitions suggests a model for reform to supplement deterrence—particularly in cases where adequate deterrence would require fines too costly to impose.

Second, courts and prosecutors should mostly retreat from their strategy of reforming a corporation's internal compliance and

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323. See *supra* notes 82–89 (discussing prohibitions on business activities); see Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 197–203 (2011).

governance structures. While some core sets of reforms might remain, the federal government should, at the very least, get out of the business of designing intricate, bespoke changes to criminal corporations. As a corollary, this would further require (or benefit from) either relaxing the attention to “effective compliance” in charging and sentencing decisions or else, more likely, providing a clearer statement of what requirements a minimally effective compliance program must satisfy.

Third, courts and prosecutors may not be experts at governance reforms, but they can still improve performance with respect to recidivism. The criminal bar should do more to track and monitor corporate wrongdoing across time and enforcement actions. Prosecutors lack the expertise and incentives to reorganize a corporate structure, but they certainly have resources to help identify instances of intrafirm recidivism and patterns of misconduct over time.<sup>324</sup> Doing so would assist in identifying reasonable prohibitions to apply to a given criminal corporation.

## 2. Diversify Control over Collateral Consequences

The major downside of prohibitive sanctions is that they risk overpunishment by causing the entity to collapse. At the moment, however, the practical threat of this outcome comes from specific, wide-scoping collateral consequences, the impact of which falls outside the control of the criminal justice system. Regardless of whether the general concerns over collateral consequences are overblown in discussions of corporate punishment, some consequences do pose existential threats to specific industries. It is a much larger question whether and under what circumstances these sorts of collateral consequences should exist at all. This question is even more pressing with respect to the dense web of consequences that impact individuals, which have lately become so oppressive as to have been described as a form of “civil death.”<sup>325</sup> But at least as a first correction, courts should be given more authority over the attachment of automatic regulatory collateral consequences.

For purposes of this Article, a next step would be to maintain the status quo but give courts veto power over the attachment of automatic collateral consequences. This authority need not be exclusive to courts; regulators should have their review authority expanded to include courts rather than shifted to courts. On this point, recent amendments to Regulation D under the Securities Act, one of the existential

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324. Root, *supra* note 69, at 1010–18.

325. Chin, *supra* note 226, at 1790.

consequences, is instructive. Although the SEC has long been authorized to waive automatic exclusion from Regulation D offerings upon “a showing of good cause,”<sup>326</sup> in 2013 Congress expanded this waiver authority to allow “the court . . . that entered the relevant order, judgment or decree” to decide that “disqualification . . . should not arise as a consequence.”<sup>327</sup> This provision should provide a model for regulatory collateral consequences, particularly if the criminal law is to engage meaningfully with functionally similar, but less destructive, methods for incapacitating criminal corporations.

### CONCLUSION

Incapacitation is a textbook justification for criminal punishment. If true for individuals, it should be true for corporations as well. Specious appeals to “corporate bodies” not to the contrary, the idea of incapacitating a corporation need not be conceptually strange or mysterious. Incapacitation is about restraining a person from acting in the future in a manner that gave rise to past criminality; our ordinary experiences and settled legal practices have long made sense of both the idea of a corporation acting and the law being used to stop a corporation from acting. And this is not merely a conceptual point. Looking at actual practices, the goal, and not just the incidental effect, of at least some already imposed sanctions appears to be corporate incapacitation. The criminal law, then, already implicitly relies on incapacitation as a justification for corporate punishment.

While recognizing incapacitation as a justification for corporate punishment might appear to threaten a major break from the criminal law of corporations as currently understood, in practice, the upshot is that taking incapacitation seriously need not dramatically upend current practices. Indeed, well-settled moral considerations constraining the propriety of incapacitation when levied against individuals suggest that we may in fact have stronger reason to incapacitate corporations than we do individuals.

Moreover, incapacitating criminal corporations is not just possible, it is desirable. Incapacitation plausibly represents a more useful complement to deterrence than does corporate rehabilitation. Elevating incapacitation over rehabilitation creates space for concrete changes to current practices of corporate punishment that better align with the criminal law’s competencies and avoid entangling the federal

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326. 17 C.F.R. § 230.506(d)(2)(ii) (2019).

327. *Id.* § 230.506(d)(2)(iii); see Emily Flitter, *Settlements for 3 Wall Street Banks Hold a Silver Lining*, N.Y. TIMES (Feb. 1, 2018), <https://nyti.ms/2FBeXSg> [<https://perma.cc/4G7B-LAPZ>].

government in dubious governance reforms to private companies. This gives reason to take incapacitation seriously as a justification for corporate punishment.