

3-2012

# Choosing Punishment

Miriam H. Baer  
miriam.baer@brooklaw.edu

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## Recommended Citation

92 B.U. L. Rev. 577 (2012)

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## CHOOSING PUNISHMENT

MIRIAM H. BAER\*

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\* Associate Professor of Law, Brooklyn Law School; J.D., Harvard Law School; A.B, Princeton University. The author gratefully thanks Jennifer Arlen, Rachel Barkow, Lisa Bernstein, Kenworthy Bilz, Aaron Bruhl, Sam Buell, Michael Cahill, Jack Chin, David Fagundes, Mary Anne Franks, Stuart Green, Adil Haque, Bernard Harcourt, Carissa Hessick, Andrew Hessick, Paul Horwitz, Kyron Huigens, Christine Hurt, Doug Husak, Orin Kerr, Nicola Lacey, Michael Mannheimer, Richard McAdams, Dan Markel, Tracey Meares, Eric Miller, Erin Murphy, Daniel Richman, Meghan Ryan, David Sklansky, Carol Steiker, Dru Stevenson, and David Zaring, as well as participants in workshops at the Yale Law School Criminal Roundtable, University of Illinois Business Colloquium (with special gratitude to the late Larry Ribstein), University of Chicago Legal Workshop class, New York City Criminal Law Colloquium, Prawfsfest VIII at Arizona State University School of Law, the Law & Society Association's Annual Meeting, and Dean Michael Gerber and President Joan Wexler of Brooklyn Law School, which generously provided summer funding for this Article. Excellent research assistance was provided by Mark Sauchelli and Andrew Schwenk.

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*This Article sets forth two propositions. First, at a policy-making level, it is easier to punish than it is to regulate. That is, it is easier to attract public and political support for state-sponsored punishment than it is to attract similar support for regulation. "Punishment," as defined in this Article, includes any retributively motivated government action or response.*

*Second, this preference for punishment may not be particularly healthy. No doubt, there are many good reasons for supporting the government when it imposes just deserts or communicates the public's moral condemnation. Moreover, it is likely impossible to eradicate retributive motivations that are hard-wired into our collective DNA. But the resources we spend on punishment are resources that might be spent elsewhere. Even worse, by overemphasizing punishment, we may undermine and crowd out the non-punitive, regulatory alternatives that are more adept at averting disastrous outcomes in the first place. Accordingly, we should worry about punishment's effect on all government institutions, and not just on the criminal justice system.*

*This Article begins that task by focusing on corporate governance regulation and policy. The Article opens by explaining why public actors choose retributive responses and theorizes how those responses are likely to affect the legal institutions that dominate corporate governance law. The Article then tackles the normative point. Although punishment offers a number of benefits, it may leave society worse off over the long term. The Article concludes with suggestions for further inquiry.*

## INTRODUCTION

Punishment has long been a preoccupation of moral philosophers and social science researchers.<sup>1</sup> For the former group, the debate is largely one about the

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<sup>1</sup> For the purposes of this Article, the term "punishment" includes all legally facilitated responses driven by moral outrage. See Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, in PUNITIVE DAMAGES 31, 32-33 (Cass R. Sunstein et al. eds., 2002). Accordingly, I use the term "punishment" primarily with regard to the retributive motivations that social science researchers have found when examining laypersons' attitudes towards sentencing and jury awards. I intend the term *not* to include sanctions designed solely to internalize costs and deter socially undesirable conduct. For a helpful discussion on the distinctions between "retributive" and other varieties of extra-compensatory sanctions, see Dan Markel, *How Should Punitive Damages Work?*, 157 U.

boundaries of state power; for the latter, the study of punishment is one that focuses on how individuals experience and respond to deprivations of wealth and liberty.<sup>2</sup>

This Article adopts a more pragmatic approach. First, it focuses on the public actors who impose punishment, as opposed to the individuals and groups who experience it. Second, it identifies those characteristics of punishment that public actors find most desirable and theorizes how punishment's desirable qualities affect legal institutions that compete for limited resources. As the title of the Article suggests, public actors have ample reason to "choose" punishment over other forms of government action as a means of attracting and maintaining public support. In the long run, however, that preference may crowd out more innovative, forward-looking regulatory responses to social problems. To explore this dynamic more carefully, the Article focuses on a particular area of public policy – corporate governance.

Many of the political advantages we associate with the criminal justice system are attributable not to the fact that a given statute enjoys the formal "criminal" label but rather to the government's stated purpose of condemning and imposing just deserts on wrongdoers. In other words, public actors draw strength not from the formal definition of what constitutes a crime but from the moral outrage laypersons experience in response to various events and crises. This moral outrage fuels public support for varying forms of publicly sponsored punishment. Punishment therefore arises not only in the context of criminal law, where scholars have long debated the purposes of imprisonment and other sanctions, but also in other areas of public life.<sup>3</sup>

Regulatory agencies can and often do behave like retributive punishers. Although imprisonment may be the most salient form of punishment, it is not the only one, particularly where business organizations and their officers are

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PA. L. REV. 1383, 1403-16 (2009).

Philosophers will rightfully argue that this is not the definition of "retribution" that various criminal theorists have erected to explain why the state can and should impose just deserts on culpable offenders. See, e.g., David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1665 n.230 (2010) (deriding the "many politicians, pundits, practitioners, and others" who are not true retributivists but use the label to justify punishments unjustifiable by "any traditional theory of punishment, including retributivism"). This Article, however, does not focus on an idealized theory of punishment, but rather on the motivations that social science researchers have identified as driving punishment, as well as on how those motivations affect public institutions.

<sup>2</sup> See *infra* notes 5, 18, 116 and accompanying text.

<sup>3</sup> See, e.g., Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853 (2012); see also Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781, 787 (2011) (arguing that goals often associated with criminal law are in fact attributable to many types of state-sponsored regulation). For an example of the traditional view, wherein criminal law is treated as an exceptional source of punishment, see Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 960 & n.4 (1999).

concerned. Accordingly, this Article distinguishes “regulation” from “punishment,” not by reference to the penalty (imprisonment or fines) or the type of law (criminal or civil) but rather by reference to the motivations and goals that fuel government action. When a public institution attempts to rehabilitate, internalize costs, or restrain undesirable conduct, it acts as a “regulator.” When the same institution seeks to deliver just deserts and communicate moral condemnation – or in lay terms, to assert blame – it acts as a “punisher.”<sup>4</sup> Punishers, in turn, experience an easier time attracting support than do regulators. This preference carries numerous implications for the public actors and the institutions they inhabit.<sup>5</sup>

Consider the Securities and Exchange Commission-as-regulator. It is fairly easy to generate objective criteria to evaluate the SEC’s welfare-enhancing goal of protecting shareholders and securities markets. If we agree that the collective goal of corporate law and securities regulation is to improve shareholder welfare and maintain market liquidity, then we can objectively test the extent to which various mechanisms accomplish their assigned tasks.<sup>6</sup> We also can challenge the SEC when its leaders assert that its regulations have achieved some concrete goal.

Now consider the SEC-as-punisher. If one of the SEC’s goals is to impose retribution and express moral condemnation, how do we measure its accomplishment of that goal at an aggregate level? How will we know when – or more importantly, reach substantial consensus that – the SEC has, in the aggregate and over a period of time, expressed too much condemnation or too little? If it is difficult to define condemnation at the policy-making level in

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<sup>4</sup> Obviously, no organization is solely one or the other. Many institutions, including law enforcement organizations, will adopt both regulatory and punishment-oriented goals, and many will seek retributive outcomes in addition to more common regulatory pursuits such as cost internalization. See, e.g., John Braithwaite, *What’s Wrong with the Sociology of Punishment*, 7 THEORETICAL CRIMINOLOGY 5, 20-24 (2003) (explaining that prosecutors can, as Rudi Giuliani did during his tenure as the prosecutor for the Southern District of New York, act as regulators as well as punishers). For example, much of James Jacobs’ work details the way in which prosecutors used “regulatory” methods to successfully oust organized crime from New York City’s unions. See, e.g., JAMES B. JACOBS, COLLEEN FRIEL & ROBERT RADICK, *GOETHAM UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME* (1999).

<sup>5</sup> Admittedly, this analysis assumes that public actors seek to maximize power and political capital. See, e.g., Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135, 136 (2009) (arguing that the study of prosecutorial behavior “requires, at its core, understanding prosecutors as political actors embedded in a complex strategic environment, where concerns about evaluation and management loom large”). For more on bounded rationality, see generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955).

<sup>6</sup> See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1529-42 (2005) (testing empirical claims made by supporters of Sarbanes-Oxley).

concrete terms, it is also difficult to identify SEC regulators who impose too much or too little punishment. Punishment thus offers regulators substantially more slack at the same time it promises them access to increased resources.

Why is it easier for the state to cast blame than engage in other types of public action? This Article suggests three reasons. First, punishers benefit from what some have referred to as the “psychology of punishment.”<sup>7</sup> Punishment is more intuitive than regulation.<sup>8</sup> We do not engage in some complicated probability-weighting exercise when we punish; instead, we punish according to deeply ingrained feelings of moral outrage.<sup>9</sup> Moral outrage, in turn, enables public actors to thrive in a crowded regulatory field of limited resources and overcome familiar problems caused by special interest lobbying and capture.

Second, punishers draw flexibility from society’s inability to define punishment in testable, concrete terms. Even if we agree that the state should condemn only those actors who “deserve” condemnation, or that punishment ought to be proportional to the wrongdoing in question, we are without the means to translate those ideals into concrete, recognizable restrictions. As a result, public actors who punish – or more importantly, adopt public policies whose goals are imposing punishment – can more easily justify their actions than can their regulatory counterparts.

Finally, punishers benefit from punishment’s unquestioned public character.<sup>10</sup> Particularly in the corporate governance realm, regulation must justify itself as more effective than the combined power of capital, labor, and product markets.<sup>11</sup> Public actors who seek to restrain or prevent various ills must show that their prescriptions surpass or complement markets and private contractual mechanisms as a means of improving social welfare.<sup>12</sup>

By contrast, punishment encounters relatively little private competition. If punishment is defined as a sanction that expresses the community’s

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<sup>7</sup> See *infra* Part I.A.

<sup>8</sup> See *infra* notes 42–46 and accompanying text.

<sup>9</sup> See *infra* notes 21, 43, 46 and accompanying text.

<sup>10</sup> See *infra* Part I.C. Some might say that punishment bests regulation because of our collective “anti-administrative impulse.” See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005) (exploring the “unanalyzed hostility to the administrative state”).

<sup>11</sup> BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 9 (2011).

<sup>12</sup> Edward L. Glaeser, *Psychology and the Market* 19 (Harvard Inst. of Econ. Research, Discussion Paper No. 2023, 2003) (“The real case for laissez-faire is not that the individual is perfect, but that the state will do worse than the private individual, and the strength of this case has always relied more on the fallibility of the state than on the perfection of markets.”); see also Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 133–34 (2006) (arguing that the presence of error in private decision making does not necessarily justify public intervention because government actors are even more prone to error).

condemnation, then it is almost tautological that public actors are uniquely situated to deliver such punishment.<sup>13</sup> If we link punishment with the imposition of just deserts, then the state's participation is necessary to prevent vigilantism and to distinguish punishment from vengeance.<sup>14</sup> Either way, punishment retains an undisputable public character.

For the foregoing reasons, public actors who adopt retributive, condemnatory stances experience greater ease in securing and maintaining resources than those regulators who limit themselves to the unromantic goals of internalizing externalities and curing market failures.<sup>15</sup>

This account of how and why society chooses punishment enhances several related but conceptually distinct literatures. The first is the due process-based concern that the boundary between criminal and civil law has become too blurry.<sup>16</sup> The second is the critique of criminal law's expanding jurisdiction, or "overcriminalization,"<sup>17</sup> whereby criminal justice institutions allegedly have taken advantage of irrational fears of crime in order to maintain and increase

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<sup>13</sup> See *infra* 117-121 and accompanying text.

<sup>14</sup> MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 152 (1997) (arguing the need for state institutions, and not individuals, to impose punishment on those who deserve it because "[r]etributive punishment is dangerous for individual persons to carry out, dangerous to their virtue and . . . unclear in its justification").

<sup>15</sup> For more on the public's negative associations with the term "bureaucrat," see Rubin, *supra* note 10, at 2092-93.

<sup>16</sup> An excellent discussion of this erosion can be found in the 1991 *Yale Law Journal* Symposium. See, e.g., John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101 *YALE L.J.* 1875, 1875 (1991); Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795, 1797 (1991); Franklin E. Zimring, *Multiple Middlegrounds Between Civil and Criminal Law*, 101 *YALE L.J.* 1901, 1903-04 (1991).

For a later analysis of the civil-criminal distinction and its connection to punishment theory, see Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 *GEO. L.J.* 775, 778-79 (1997).

For more contemporary critiques and analyses of potential middle grounds between criminal and civil law, see generally Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 *J.L. ECON. & POL'Y* 657 (2011); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 *VA. L. REV.* 79 (2008) (questioning and contrasting procedural protections inherent in criminal prosecutions and high-stakes civil cases brought against large corporations); see also Markel, *supra* note 1, at 1383, 1437 (2009); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 *CORNELL L. REV.* 239, 241-42 (2009).

<sup>17</sup> For discussions of excessive criminalization, see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); Stuart P. Green, *Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 *EMORY L.J.* 1533 (1997); Erik Luna, *The Overcriminalization Phenomenon*, 54 *AM. U. L. REV.* 703 (2005).

power.<sup>18</sup> The third is the use by regulators and prosecutors of quasi-prosecutorial actions as a means of promulgating regulation, thereby avoiding more transparent and deliberative procedures such as notice-and-comment rulemaking.<sup>19</sup>

The choosing punishment dynamic suggests that these debates are incomplete.<sup>20</sup> For example, to the extent there exists too much punishment, the issue is not merely one of statutory or procedural blurriness between criminal and civil law, but rather a reflection of a deeper, intuition-driven response to moral outrage.<sup>21</sup> Accordingly, the resulting problem is not simply a defendant's rights or due process issue (often the central claim of older civil/criminal critiques<sup>22</sup>) but, more broadly, a threat to social welfare and efficiency.

Having identified and explained this dynamic, the Article then sketches a framework of how corporate punishers and regulators fare in the competition for legal, financial, and human resources.<sup>23</sup> In doing so, it considers several institutions that have made their marks on corporate governance through actual and rhetorical uses of punishment: the SEC, State Attorneys General, and more traditional punishers such as the Department of Justice and United States Attorneys' Offices.

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<sup>18</sup> JONATHAN SIMON, GOVERNING THROUGH CRIME 5 (2007) (critiquing the extent to which institutions use crime and fear of crime "to promote governance by legitimizing and/or providing content for the exercise of power").

<sup>19</sup> For multiple discussions of various aspects of this phenomenon, see PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow & Rachel E. Barkow eds., 2011). For an earlier account, see ROBERTA S. KARMEL, REGULATION BY PROSECUTION 15 (1982). For related analyses, see Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 364 (2008), and Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1461 (2009).

<sup>20</sup> It further suggests that analyses of the relative strengths of the executive branch versus the judicial and legislative branches are also incomplete. For example, in the corporate context, Jonathan Macey has argued that the executive branch can move more swiftly than courts or the legislature in responding to public outrage over various corporate scandals. See Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2418 (2006). The choosing punishment dynamic adds an additional gloss on Macey's account in that it indicates the units or departments that are most likely to capture the public's support and compete effectively for limited resources.

<sup>21</sup> Cf. Neil Vidmar & Dale T. Miller, *Socialpsychological Processes Underlying Attitudes Toward Legal Punishment*, 14 LAW & SOC'Y REV. 565, 565 (1980) (contending that punishment "defines social boundaries, vindicates norms, and provides an outlet for the psychological tensions aroused by deviant acts"). For a seminal discussion of the sociology of criminal punishment outside the corporate context, see DAVID GARLAND, *THE CULTURE OF CONTROL AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002).

<sup>22</sup> See, e.g., Mann, *supra* note 16, at 1812.

<sup>23</sup> See *infra* note 73 and accompanying text.



Given the Article's focus on corporate governance, some readers may wonder whether corporate governance regulators are in fact "choosing punishment" at all, given the recent chorus of "where are the prosecutions?" complaints that have been lobbed at public officials in the wake of the recent financial crisis.<sup>24</sup> The very critique, however, begs the question. The financial crisis and recession that followed are complex events caused by a number of market and regulatory failures, some of which had far more to do with excessive risk-taking than core criminal conduct such as fraud.<sup>25</sup> That the public nevertheless would yearn so keenly for punishment without even knowing, much less understanding, what corporate executives knew, said, or did suggests not a shortage of punishment but rather the psychological underpinnings of the very dynamic this Article describes.

By the same token, regulatory critics will likely shake their heads at the notion that regulation has lost steam in recent years, given the proliferation of numerous agencies, regulations, and statutes, and particularly in light of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)<sup>26</sup> and the more recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>27</sup> These critics are, to a point, correct: the Article does not deny the

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<sup>24</sup> See, e.g., Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 MARQ. L. REV. 971, 972 (2010); Andrew Ross Sorkin, *Pulling Back the Curtain on Fraud Inquiries*, N.Y. TIMES, Dec. 6, 2010, <http://dealbook.nytimes.com/2010/12/06/pulling-back-the-curtain-on-fraud-inquiries/?ref=todayspaper> ("[I]n the two years since the peak of the financial crisis, the government has not brought one criminal case against a big-time corporate official of any sort.").

<sup>25</sup> See, e.g., RICHARD A. POSNER, *A FAILURE OF CAPITALISM*, at xiii-xiv (2010). The fact that such risk was interconnected or systemic undoubtedly played a large role as well. See generally Steven Schwartz, *Systemic Risk*, 97 GEO. L.J. 193 (2008). For an argument that, outside of financial institutions, corporate governance was *not* a significant cause of the financial crisis, see Brian R. Cheffins, *Did Corporate Governance "Fail" During the 2008 Stock Market Meltdown? The Case of the S&P 500*, 65 BUS. LAW. 1, 3-4 (2009).

<sup>26</sup> Pub. L. No. 107-204, 116 Stat. 745.

<sup>27</sup> Pub. L. No. 111-203, H.R. 4173. Although Dodd-Frank ostensibly was intended to respond to weaknesses in the regulation of financial institutions, Congress included a number of corporate governance provisions (say-on-pay and proxy access, for example) that apply more generally to all publicly held companies.

For a general criticism of overregulation of corporate governance, see A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1093 (2005) (critiquing the "deluge" of statutes and regulations in response to accounting fraud scandals); Stephen M. Bainbridge, *Corporate Governance and U.S. Capital Market Competitiveness*, (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1696303](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1696303) (criticizing overregulation of corporate governance as the primary cause of the United States' competitive decline in international capital markets). For an account of how Dodd-Frank and its regulatory progeny have fueled a mini-legal industry, see Eric Dash, *Feasting on Paperwork*, N.Y. TIMES, Sept. 8, 2011, at B1 (describing the ways in which corporate and financial regulation have spawned whole new industries to help corporations meet regulatory and statutory requirements).

overwhelming scope and power of the administrative state.<sup>28</sup> The story does not end there, however, particularly when we recognize that statutes, regulations, and enforcement regimes can include retributive responses as well as regulatory ones.

Accordingly, one of the lessons of the choosing punishment dynamic is that we should supplement quantitative analyses of regulation and enforcement with more qualitative research. If we want to measure regulation's strength relative to punishment, then we need to look beyond an agency's size, annual budget, and jurisdiction.<sup>29</sup> We also have to do more than measure the number of statutes and regulations on the books. Instead, we have to look at what a particular agency *does* and consider whether its most supported agenda items are those that we associate most commonly with regulation or those that are in fact geared more toward expressing condemnation and imposing just deserts.<sup>30</sup>

The Article unfolds in three Parts. Part I explains why we are attracted to punishment. Part II considers how that attraction plays out in the corporate governance context and explores the important role moral outrage plays in the competition between regulation and punishment. Part III sketches a normative analysis of the benefits and drawbacks of choosing punishment and concludes that, over the long term, punishment's drawbacks may well outweigh its benefits.

### I. EXPLAINING THE CHOICE OF PUNISHMENT

At first blush, the preference for punishment over regulation may seem counter-intuitive. To the extent one equates punishment solely with "criminal law" and "jail," one might reasonably conclude that this rather limited sub-category of punishment is far more difficult to impose than regulation. For example, public actors might shy away from punishment insofar as it implies greater legal protection and, consequently, greater due process.<sup>31</sup> Readers

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<sup>28</sup> See Rubin, *supra* note 10, at 2094 ("[A]dministrative agencies make the majority of our rules and carry out the majority of our adjudications. They constitute the basic, operational structure of modern government, and this role necessarily involves a considerable amount of policymaking.").

<sup>29</sup> Cf. John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 258 (2007) (observing that enforcement intensity is difficult to measure by inputs because objective data can be misleading in either direction).

<sup>30</sup> For this reason, the series of studies that have attempted to track the size and intensity of public and private securities enforcement in the United States and elsewhere, although informative on numerous counts, do not illuminate whether public actors are inclined to choose punishment or regulation in response to corporate governance failures. For more discussion of the measurement of public and private securities enforcement intensity, see *id.* at 309.

<sup>31</sup> The standard claim is that criminal prosecutions offer defendants greater protection than civil or administrative penalties. See Steiker, *supra* note 16, at 777-78. For an argument that strongly challenges this claim in the corporate context, see Hurt, *supra* note

might be even more surprised by the claim that private entities themselves prefer punishment. After all, nobody wishes to be the source of moral opprobrium, and certainly no rational person wants to go to jail. We therefore might assume that well-funded private individuals and groups (i.e., the very people who populate corporations) would respond to punishment initiatives more vigorously than to regulatory intervention.<sup>32</sup> Many of these insights caused Ian Ayres and John Braithwaite to claim, nearly twenty years ago, that “punishment is expensive; persuasion is cheap.”<sup>33</sup>

Were we to stop here, we might sensibly conclude that punishment – particularly criminal punishment – is a last or second-best resort for public actors, particularly where corporate wrongdoers are concerned.<sup>34</sup> But in fact, *at the policymaking level*, where agencies and divisions compete for power and money, punishment carries with it a number of characteristics that make it preferable to regulation, regardless of whether the ultimate sanction is categorized as “criminal” or “civil.” I discuss these advantages in depth below.

#### A. *Punishment’s Psychology*

Under a pure rational actor model, private actors should perceive no real difference between punishment and regulation. Instead, they should refrain from undesirable conduct whenever the net costs of their conduct outweigh the

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19, at 403-14.

<sup>32</sup> See Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 97 (2004) (citing a similar assumption with regard to corporate crime legislation).

<sup>33</sup> IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 26 (1992). Braithwaite argued elsewhere that regulators should adopt persuasion “as a strategy of first choice” for dealing with corporate wrongdoers. See JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: THE ENFORCEMENT OF COAL MINE SAFETY* 109 (1985). Braithwaite’s analysis, however, focused on the optimal mix of persuasion and punishment for society, without regard for the notion that public actors, and the public they served, might derive particular benefits – psychological or otherwise – from choosing punishment over regulation.

<sup>34</sup> For further theoretical accounts consistent with this view, see Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2211-15 (2003) (observing that “[r]emedial statutes are interpreted liberally [and] penal statutes are interpreted narrowly” under standard interpretive canons and theorizing a model of “statutory inflation” whereby agencies seek expansive interpretation of civil remedies, which then lead to more expansive interpretations of parallel criminal statutes); see also SIMON, *supra* note 18, at 14; Brown, *supra* note 16, at 682; J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 55 & n.48 (2007) (“[W]hen the grounds for criminalization are suspect, the government should instead rely upon civil or administrative remedies.” (citing Luna, *supra* note 17, at 714)).

net benefits.<sup>35</sup> Under this model, public actors should choose the combinations of sanctions and detection systems that most efficiently deter costly conduct.<sup>36</sup> The signal may differ, but the purpose of punishment and regulation is virtually indistinguishable: the public seeks to eliminate costly conduct efficiently.<sup>37</sup> Accordingly, under the economic model, fines, punitive damages, and criminal sanctions are justifiable only to the extent they balance out low probabilities of detection and force wrongdoers to internalize their harms.<sup>38</sup>

According to behavioral psychologists, the rational actor model is unrealistic, not only with regard to those punished<sup>39</sup> but also with regard to

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<sup>35</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 172-80 (1968); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 1-2.

<sup>36</sup> Scholars have made much of the difference between systems that proscribe all conduct (so-called “complete deterrence”) and those that seek only “optimal deterrence” through internalization of the conduct’s harm. See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?* Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 199 (1991); Markel, *supra* note 16, at 242 (citing Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L. J. 421, 421 (1998)). It is not clear that this distinction matters under a rational actor model. If public actors are rational, then they will seek complete deterrence only when absolute cessation of the underlying conduct is optimal. See Fred S. McChesney, *Desperately Shunning Science*, 71 B.U. L. REV. 281, 284-85 (1991) (explaining that criminal sanctions represent the legislature’s determination that the conduct in question provides little or no social benefit).

<sup>37</sup> Allen & Laudan, *supra* note 3, at 787 (“[The] ‘law’ is a collection of thick overlapping webs of regulation, with its various justifications for action. What conventionally passes for the criminal law is nothing but a few places on various continua of these regulatory efforts.”).

<sup>38</sup> See Richard Craswell, *Deterrence and Damages: The Multiplier Effect and Its Alternatives*, 97 MICH. L. REV. 2185, 2186 (1999).

<sup>39</sup> Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 174 (2004) (“[E]ven if they know the legal rules and perceive a cost-benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or chemical influences.”). For an overview of behavioral economics’ implications for deterrence, see generally Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics*, in 3 ENCYCLOPEDIA OF LAW & ECONOMICS: CRIMINAL LAW AND ECONOMICS 403 (Nuno Garoupa ed., 2d ed. 2009).

The social norms literature has also demonstrated the important difference between punishment and regulation insofar as punishment expresses an additional moral “signal,” which in turn spurs second-order community sanctions (shaming, banishment) and third-order internal sanctions such as conscience restraints. For more on the value (and limitations) of such norms, see Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603-04 (2000).

those who do the actual punishing.<sup>40</sup> We do not punish on the basis of deliberative probability analysis.<sup>41</sup> Rather, we punish in response to visceral, deeply held, and sometimes difficult-to-explain intuitions.<sup>42</sup> Moreover, the degree of sanction is driven by moral outrage<sup>43</sup> and various cognitive biases, not by scientific calculations of optimal deterrence.<sup>44</sup> Deterrence may well be invoked as a justification for punishment,<sup>45</sup> but lay intuitions about culpability and moral outrage appear to outweigh the factors that ought to matter most under a deterrence-based scheme.<sup>46</sup>

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<sup>40</sup> Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 423 (2003) (highlighting an “emerging consensus that people’s punishment judgments are guided to a large degree by harm-based retributive psychology”).

<sup>41</sup> See Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 173-75 (2003) (“[P]eople are intuitive retributivists. Their moral intuitions are inconsistent with the economic theory of deterrence. Those intuitions are grounded in outrage.”); see also Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 944 (2007) (arguing that the way in which individuals respond to morally problematic situations “involves automatic non-conscious cognitive and emotional reactions rather than conscious deliberation”). Regan goes on to explain that moral intuitions drive moral reasoning. See *id.* (“[W]e do not engage in moral reasoning in order to arrive at a conclusion. Instead, we do so in order to justify a conclusion that we have already reached.”); Vidmar & Miller, *supra* note 21, at 570 (“In many instances the punishment reaction itself may be the primary response, which is followed, not preceded, by the attribution of responsibility.”).

<sup>42</sup> Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 1 (2007) (suggesting, based on social science evidence, that intuitive judgments, rather than deliberative reasoning, drive punishment decisions). Scholars and researchers disagree on whether our intuitions about moral culpability are stable and widely held or fluid, divergent, and culturally-based. Compare Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007) (“[A]vailable evidence suggests that human intuitions of justice about core wrongdoing . . . are deep, predictable, and widely shared.”), with Donald Braman, David A. Hoffman & Dan M. Kahan, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1603-04 (2010) (attacking claims that punishment intuitions are widely shared throughout society and arguing instead that intuitions vary and are affected by “immense cultural heterogeneity”).

<sup>43</sup> Kahneman, Schkade & Sunstein, *supra* note 1, at 32 (“We propose a descriptive theory of the psychology of punitive awards, called the *outrage model*. The essential claim is that the moral transgressions of others evoke an attitude of outrage, which combines an emotional evaluation and a response tendency.” (citations omitted)).

<sup>44</sup> Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1164-65 (2002) (“[P]unitive damages are an expression of indignation or outrage on a scale of dollars.”).

<sup>45</sup> See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 497 (1999).

<sup>46</sup> Sunstein and others have found that subjects asked to impose punitive damages often

Although intuitions, moral outrage, and cognitive biases influence punishment, they do not produce a consistent, agreed-upon menu of sanctions. We may agree that murder should receive a harsher sanction than robbery, but we do not agree on the absolute sanctions either offender should receive.<sup>47</sup> Moreover, how moral outrage itself arises is not clear. Moral outrage supports punishment, but public actors cannot simply generate it at will.<sup>48</sup> For the sake of argument and for the remainder of this Article, I assume that moral outrage is at least partially *exogenous* – a phenomenon that arises from events and factors outside politicians' complete control.

In addition to being intuitive, punishment carries with it a "rhetorical advantage."<sup>49</sup> That is, when groups deliberate and consider the appropriate amount of punishment to assign culpable conduct, those members calling for greater punishment tend to drown out those in favor of moderation.<sup>50</sup> What triggers this advantage is not clear, and it appears to vary by context. However it arises, this rhetorical advantage benefits those inclined toward harsh sanctions, since they are likely to experience little difficulty attracting

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fail to consider the probability that the wrongdoer will be caught and punished, a key component of damages under a deterrence scheme. Instead, lay punishers focus solely on their view of the "wrongness" of the actor's conduct. See, e.g., Sunstein, *supra* note 41, at 174. Although Sunstein's piece focuses on jury-awarded punitive damages, he observes that the psychological findings have implications for criminal and administrative enforcement actions. See *id.* at 172-73. In a later study, Jeffrey Rachlinski and Forest Jourden confirm that laypersons' views of wrongfulness alter their feelings on the appropriate length of criminal sentences for a crime, depending on how that crime is contrasted with other crimes. See Jeffrey J. Rachlinski & Forest Jourden, *The Cognitive Components of Punishment*, 88 CORNELL L. REV. 457, 485 (2003).

<sup>47</sup> For experimental evidence regarding criminal punishments, see Joseph E. Jacoby & Francis T. Cullen, *The Structure of Punishment Norms: Applying the Rossi-Berk Model*, 89 J. CRIM. L. & CRIMINOLOGY 245, 296 (1998). After surveying their data, the authors conclude, "Within the broad principle that more serious crimes ought to be punished more severely, for most offenses a broad range of punishments receives support. *Almost any specific punishment will find some supporters and many opponents.*" *Id.* at 305 (emphasis added); see also Kahneman, Schkade & Sunstein, *supra* note 1, at 36-39 (finding that punitive damage awards are unpredictable even when "shared outrage" is present across jurors).

<sup>48</sup> Dan Kahan calls this the "sticky norms problem." See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (explaining how social norms can undermine legislative efforts to increase punishment). This limitation partially explains why punishment is a choice for actors seeking public support and resources, but not the *only* choice.

<sup>49</sup> See Cass Sunstein, *Outrage*, 2002 UTAH L. REV. 717, 726.

<sup>50</sup> *Id.*; see also Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 119-20 & n.41 (2010) (citing studies demonstrating that "when groups deliberate and an initial disagreement exists, group members tend not to move toward a 'middle' position, but actually become even more extreme in the direction of their original leanings").

supporters.<sup>51</sup> A quick review of policies for street<sup>52</sup> and corporate crime reflect this advantage as well. Notwithstanding recent reform initiatives fueled by state budget crises, criminal sentences and civil and criminal fines have moved generally in one direction: up.<sup>53</sup>

Thus, we punish according to intuitions and in extremes, we privilege moral outrage over probabilities of detection, and we experience difficulty translating our intuitions into stable, agreed-upon sanctions.<sup>54</sup>

In addition, we are attracted to punishment's false promises of certainty and security. Individuals interpret factual situations in order to reduce ambiguity.<sup>55</sup> Punishment deconstructs complex factual situations into easily digested narratives<sup>56</sup> by soothing the public's psyche with reassurances that matters are relatively simple, attributable to identifiable actors, and best of all, avoidable in the future.<sup>57</sup>

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<sup>51</sup> Overcriminalization is a prominent theme in criminal law scholarship. Darryl Brown helpfully collects the literature analyzing the political economy of criminal law in *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 nn.1-2 (2007) (challenging the overcriminalization thesis with empirical evidence that states have decriminalized a number of vice and related crimes).

<sup>52</sup> Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1277 (2005) ("The politics of sentencing over the past three decades have consistently produced longer prison terms and an escalation in tough-on-crime rhetoric, regardless of whether crime rates have been going up or down.").

<sup>53</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("[A]ll change in criminal law seems to push in the same direction – toward more liability."). For a visual depiction of incarceration's upward trajectory in the United States, see NICOLA LACEY, *THE PRISONERS' DILEMMA* 171 (2008); Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1832 (2005) (documenting the rise in the incarceration rate from 1980 through 2002). Although the current recession has deeply affected state budgets, it is far from clear that the recession will affect the federal law enforcement and regulatory institutions most concerned with corporate governance. See Barkow, *supra* note 52, at 1301-02.

<sup>54</sup> Cass Sunstein argues that a similar problem pervades the punitive damages context. See Sunstein, *supra* note 49, at 720 (describing difficulties for jurors who must "map" moral judgments "onto dollars").

<sup>55</sup> See Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1573 (2000) (explaining that individuals naturally tend to be overly confident in the inferences they draw to avoid "doubt and uncertainty," in part because doubt and uncertainty can be "paralyzing").

<sup>56</sup> On the public's desire for narratives that accord with desires for vindication, see generally WILLIAM FLESH, *COMEUPPANCE: COSTLY SIGNALING, ALTRUISTIC PUNISHMENT, AND OTHER BIOLOGICAL COMPONENTS OF FICTIONS* (2009) (explaining why readers prefer vindication narratives in fiction).

<sup>57</sup> Tom Tyler suggests that this is one of the reasons the public enjoys law enforcement oriented television shows such as *CSI*. The programs provide a form of closure and certainty insofar as the wrongdoers are always apprehended and punished. See Tom R.

Although much of this discussion pertains to laypersons, the same considerations affect public actors as well. First, public actors are human and therefore share the same emotions and intuitions as laypersons. Second, public actors maintain self-interested motives to enact policies that garner public support.<sup>58</sup> Even for unelected public officials, public support translates into prestige, power, and financial resources. Punishment is therefore valuable.

Keen observers may question whether the psychology of punishment is unique to retributive public action. Surely, emotions<sup>59</sup> such as outrage and fear motivate multiple varieties of public responses, particularly where corporate governance is concerned.<sup>60</sup> That is, after all, the crux of the recent critiques of Sarbanes-Oxley and Dodd-Frank: they were generated by fear and hostility more than reasoned public debate.<sup>61</sup> What makes punishment so different from regulation?

The greatest difference is that when it comes to punishment, our legal institutions are more inclined to embrace retributive motivations and intuitions.<sup>62</sup> Admittedly, on a case-by-case level, within criminal trials

Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1065 (2006). For a critique of the use of the term “closure” in popular death penalty discourse, see Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 1-4 (2009).

<sup>58</sup> Cf. Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL’Y 639, 639-41 (2010) (explaining how political pressures influence the SEC’s decision to pursue high-profile salient cases).

<sup>59</sup> One should keep in mind the distinction between the law and emotions literature and the behavioral and cognitive psychology literature, which examines biases and heuristics that distort rational decision making in predictable ways. See Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2018-20 (2010). This distinction is blurred somewhat by research on the “affect heuristic,” which measures the extent to which certain emotions replace rational decision making. See, e.g., Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 769-72 (2003). The emotions and heuristics literatures, in turn, overlap but differ somewhat from the psychological research portraying punishment as an automatic, intuition-driven response rather than a deliberative, calculative one. See, e.g., John M. Darley, *Citizens’ Assignments of Punishments for Moral Transgressions: A Case Study in the Psychology of Punishment*, 8 OHIO ST. J. CRIM. L. 101, 104-08 (2010) (explaining two-track processes – intuition- and reason-based – that guide decision making in differing contexts).

<sup>60</sup> See Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 26-27 (2003) (arguing that combination of availability heuristic and “the political impulse to ‘do something’” in responses to crises often results in overregulation); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1639 (2009).

<sup>61</sup> Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1821 (2011); Larry E. Ribstein, Commentary, *Bubble Laws*, 40 HOUS. L. REV. 77, 77-78 (2003); Romano, *supra* note 6, at 1528.

<sup>62</sup> Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 673 (1989) (“Under a retributive system, the effort to



(themselves increasingly rare) and formal administrative proceedings, evidentiary and legal rules may reduce emotion-laden inquiries and mask intuition-driven hunches.<sup>63</sup> At the policy-making level, however, intuition and emotion reign.<sup>64</sup> Politicians, prosecutors, and regulatory enforcers routinely invoke moral outrage when calling for the punishment of various corporate individuals and organizations.<sup>65</sup> Scholars, meanwhile, argue that we should arrange our criminal justice institutions to take advantage of the public's collective intuitions.<sup>66</sup>

In contrast, lawmakers and scholars have long argued that the *ex ante* rule-making divisions of regulatory agencies should be steeped in a deliberative, expertise-driven, and fact-informed decision-making process.<sup>67</sup> However

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suppress all varieties of decisionmaking anger or sympathy is neither morally justified, nor practically feasible. Emotional reactions to penal issues are part of basic human nature.”). Emotions, indeed, may explain inclinations to punish even when punishment is itself costly to the punisher. See Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137, 139 (2002).

<sup>63</sup> See, e.g., FED. R. EVID. 403. On the failure of trial procedures to eliminate intuition-based punishment, see William Bowers et al., *Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of Evidence*, 46 CRIM. L. BULL. 1147, 1149-51 (2010) (demonstrating through an extensive survey that many jurors in capital trials reach sentencing decisions during the guilt phase of trial, despite admonitions not to do so).

<sup>64</sup> I do not mean to suggest a caricature that pits “emotional” punishers against “rational” regulators. As I indicate throughout the piece, many public actors are likely to perform different functions within the same job. See Braithwaite, *supra* note 4, at 23 (observing the “hybridity” of punishment and regulation). Nor do I deny that emotions drive legal decision making in numerous contexts. See, e.g., Susan A. Bandes, *Emotions, Values, and the Construction of Risk*, 156 U. PA. L. REV. 421, 430-33 (2008); Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1612-13 (2007). My point, however, is that we seem far more willing to accept the emotional components of punishment than we are to accept emotion's place in the formulation and implementation of other forms of public action.

<sup>65</sup> This “emotional benefit” may also be attributable to the fact that public actors impose punishment primarily through litigation. See, e.g., Macey, *supra* note 20, at 2440 (observing that the executive branch's most effective weapon, in comparison to Congress, is “its ability to litigate”). Litigation, in turn, may permit public actors to act more quickly, appear more decisive, and therefore generate greater public support. Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 48 (1998) (“Congress gets plenty of credit when it appears to react decisively to crime, but the marginal benefit it gets from addressing crime problems in a considered and thoroughgoing fashion is essentially nil.”). Kahan's observation fueled his larger argument that binding authority to interpret broad federal criminal statutes ought to rest with officials in the Department of Justice (whom Kahan portrayed as clear-eyed regulators), rather than with the “cowboy” prosecutors in local United States Attorneys' offices. See *id.*

<sup>66</sup> Robinson & Darley, *supra* note 42, at 18-31.

<sup>67</sup> Cf. Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in*

incomplete it may be, the Administrative Procedure Act attempts, in part, to prevent intuition-driven regulation through multiple processes of rulemaking and adjudication.<sup>68</sup> Institutional structures, such as the executive branch's Office of Internal Regulatory Affairs (OIRA),<sup>69</sup> as well as statutory requirements<sup>70</sup> that agencies document the economic effects of their regulations, further attempt to reduce the risk that biases and heuristics will infect regulation.<sup>71</sup> No doubt, scholars have criticized these innovations for generating their own pathologies, most notably agency capture and the

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*Agency Rulemaking*, 88 TEX. L. REV. 441, 448-49 (2010) (proposing fiduciary agency model that obligates agencies to make both deliberate and deliberative decisions); Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 115 (2011) (describing a mode of "prescriptive reasoning" whereby agencies make decisions "by weighing evidence, utilizing technical expertise, and making policy choices").

<sup>68</sup> See 5 U.S.C. §§ 551-559, 701-706 (2006); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner . . ." (citations omitted)). "[W]hatever else the [APA] set out to achieve, it aspired to strengthen administrative procedures and judicial review to prevent arbitrary agency action." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 473 (2003); see also Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1337 (2008) (describing administrative law's "core ideas of predictable processes, reasoned decisionmaking, and judicial review").

<sup>69</sup> OIRA exists within the Office of Management and Budget and "reviews all collections of information by the Federal Government. OIRA also develops and oversees the implementation of government-wide policies in several areas, including information quality and statistical standards. In addition, OIRA reviews draft regulations under Executive Order 12866." *About OIRA*, OFF. OF MGMT. & BUDGET, [http://www.whitehouse.gov/omb/inforeg\\_administrator](http://www.whitehouse.gov/omb/inforeg_administrator) (last visited Nov. 6, 2011) (explaining the role of OIRA).

<sup>70</sup> Although not subject to OIRA review, the SEC maintains a unique obligation to consider the effect of a new rule upon "efficiency, competition, and capital formation." 15 U.S.C. §§ 78c(f), 80a-2(c) (2006); see also 18 U.S.C. § 78w(a)(2) (2006). The SEC's "failure to 'apprise itself - and hence the public and the Congress - of the economic consequences of a proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005)).

<sup>71</sup> See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, in COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES 223, 224 (Matthew D. Adler & Eric A. Posner eds., 2000) ("My basic suggestion is that cost-benefit analysis is best defended as a means of overcoming predictable problems in individual and social cognition."). Sunstein writes elsewhere, "By drawing attention to costs and benefits, it should be possible to spur the most obviously desirable regulations, to deter the most obviously undesirable ones, to encourage a broader view of consequences, and to promote a search for least-cost methods of achieving regulatory goals." CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 6-7 (2002).

perpetuation of an anti-regulation ideology.<sup>72</sup> Nevertheless, the regulatory world rejects in spirit, if not in fact, moral outrage and intuition as proper bases for governance.<sup>73</sup> Accordingly, the psychology of punishment is useful primarily when public actors commence litigation, impose sanctions, and set enforcement policy; it is far less useful when they promulgate rules and regulations.<sup>74</sup>

### B. *Punishment's Philosophy*

Punishers benefit not only from punishment's psychology but also from its philosophy. Criminal philosophy's venerable attempt to define and justify criminal punishment is instructive of both just how open-ended the terms punishment and retribution can become and how helpful open-ended

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<sup>72</sup> RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 21 (2008) ("At every stage in the development of cost-benefit analysis, commentators and decisionmakers committed to deregulation have faithfully pursued the goals of placing cost-benefit analysis at the center of the administrative state and shaping it towards their agenda.").

Capture occurs when special interest groups use money and power to influence and persuade administrative agencies not to act in ways that further the public's overall welfare.

The combination of elected legislators who require economic resources to maintain their positions, on the one hand, and regulatory agencies that enjoy considerable regulatory power but depend on the legislature for political and budgetary resources, on the other, provides a recipe for a regulatory state that works to advantage well-organized yet narrowly focused political interest groups . . . .

STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 9 (2008); see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284-92 (2006) (contending that regulatory capture results in deregulation); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18, 42-64 (2010) (proposing institutional mechanisms more likely to reduce agency capture by well-funded and tightly organized industry groups).

<sup>73</sup> A number of academics agree that the purpose of regulatory reform "is to make regulation more effective and productive – to counter the influence of narrow interest groups in bending rules to their selfish advantage, to avoid policies that are wasteful or counterproductive, and to get more environmental bang for the policy buck." Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 880 (2010); see also REVESZ & LIVERMORE, *supra* note 72, at 3 ("There is a temptation to rely on gut-level decisionmaking in order to avoid economic analysis, which, to many, is a foreign language on top of seeming cold and unsympathetic. For government to make good decisions, however, it cannot abandon reasoned analysis.").

<sup>74</sup> Thus, the psychology of punishment may provide an alternate, or at least complementary, explanation for Jonathan Macey's observation that the SEC Enforcement Division attracts outsized attention compared to other divisions within the agency. See Macey, *supra* note 58, at 643-44.

definitions can be to the public actors who routinely invoke and rely upon them as justification for public policy.

For centuries, philosophers have vigorously debated the theoretical justifications for criminal punishment.<sup>75</sup> Punishment is, for many observers, abstract and difficult to define.<sup>76</sup> Accordingly, in the real world, a sort of eclecticism reigns. Consider, for example, the well-rehearsed statutory justifications for criminal punishment.<sup>77</sup> The federal statute that delegates sentencing authority to federal judges explicitly directs sentencing courts to consider deterrence, retribution, and rehabilitation, in no particular order.<sup>78</sup> The *Model Penal Code*, upon which a number of state sentencing statutes are based, also offers a number of purposes for punishment, although it does not explicitly include retribution among them.<sup>79</sup> The wealth of meanings accordingly provides public actors a fair amount of legal cover whenever they voice their intention to “punish” wrongdoers.

Focusing on retribution (which is currently scholars’ most favored punishment justification<sup>80</sup>) does not improve the situation. The crux of the retributive justification for punishment is that a person who violates society’s rules “deserves” to be punished because he is “blameworthy.”<sup>81</sup> But decades of philosophical debate on the topic of desert have yet to yield concrete

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<sup>75</sup> A “theory” of punishment “seeks to tell us what punishment is [and] what the necessary and sufficient conditions for something to be punishment are” whereas a justification for punishment “seeks to tell us when it is morally (or politically or in any other normative way) legitimate to inflict punishment.” LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 7 (2006).

<sup>76</sup> See Alice Ristroph, *How (Not) to Think like a Punisher*, 61 FLA. L. REV. 727, 738-39 (2009).

<sup>77</sup> See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005) (“Sentences can serve many purposes, and these purposes are often in conflict.”).

<sup>78</sup> See 18 U.S.C. § 3553(a)(2) (2006); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 417 (1992). The two purposes of sentencing that tend to garner the most attention are retribution and deterrence.

<sup>79</sup> Matthew Haist, Comment, *Deterrence in a Sea of “Just Deserts”: Are Utilitarian Goals Achievable in a World of “Limiting Retributivism”?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 799 (2009). The American Law Institute has been revising the *Model Penal Code*’s sentencing provisions. For an account of the *Model Penal Code*’s revised approach toward retribution, as well as a critique of its embrace of limited retributivism, see Ristroph, *supra* note 76, at 731-32.

<sup>80</sup> Haist, *supra* note 79, at 799. Certainly, not all scholars embrace the retributive justification. See, e.g., Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 975-76 (2002).

<sup>81</sup> See MOORE, *supra* note 14, at 83, 91. For a useful overview of several strands of retributive theory, see ZAIBERT, *supra* note 75, at 96-126; Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25, 28-31, 36-38 (Mark D. White ed., 2011).

guidance for policy makers.<sup>82</sup> The debate has produced much criticism of criminal law, and it has spawned numerous principles which various theorists advocate as guides for formulating criminal legal policy.<sup>83</sup> So, for example, scholars may contend that punishment has been over-imposed on risk-making activities<sup>84</sup> or argue that desert should be better tied to “culpable actions.”<sup>85</sup> But criminal philosophy has yet to distill, in a concrete and usable fashion,<sup>86</sup> an objective means for identifying the quantum and nature of conduct that “deserves” punishment.<sup>87</sup> Indeed, lack of consensus in the theoretical sphere has led some scholars to focus more intently on society’s *subjective* intuitions regarding when and how to punish.<sup>88</sup>

The disconnect between theory and practice becomes even more apparent when we talk about the amount of punishment that should be imposed. Most theorists (and laypersons) cluster around some proportionality<sup>89</sup> norm, whereby

<sup>82</sup> The literature is far too dense to provide an adequate account here. For a sampling of some of the twentieth century treatments of desert, see JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 7 (1989); JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 56 (1970); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 374-75 (1981); Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 111, 124-43 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 406-11 (1958). For later discussions of retribution and other justifications for punishment, see generally *CRIMINAL LAW CONVERSATIONS* (Paul H. Robinson et al. eds., 2009).

<sup>83</sup> An example is the famous “harm principle” enunciated by John Stuart Mill and later amplified by Joel Feinberg. See JOEL FEINBERG, *HARM TO OTHERS* 11 (1984); JOHN STUART MILL, *ON LIBERTY* 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

<sup>84</sup> See, e.g., HUSAK, *supra* note 17, at 159-77 (criticizing risk-based statutes as failing to accord with a retributive theory of criminalization).

<sup>85</sup> See, e.g., Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 *U. ILL. L. REV.* 363, 365 (pinning responsibility on action and not results).

<sup>86</sup> Allen & Laudan, *supra* note 3, at 788 (“[T]he usual commentary on the criminal law is uniformly normative. It comprises normative critique after normative critique, but . . . the critiques are almost oblivious to the actual structure of the law and applied instead to a stripped-down, idealized version.”).

<sup>87</sup> See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 303 (2002) (“[T]he theory does not include a definition of what constitutes wrongful behavior deserving punishment.”); Dennis J. Baker, *The Impossibility of a Critically Objective Criminal Law*, 56 *MCGILL L.J.* 349, 349 (2011) (arguing that objective standards of moral wrong “are impossible to identify”).

<sup>88</sup> The study of subjective intuitions regarding punishment is often referred to as “empirical desert.” For an overview of empirical desert and its critics, see sources cited *supra* note 42.

<sup>89</sup> From an extensive 1987 survey of attitudes on the punishment of street crimes in the United States (known as the National Punishment Survey), Joseph Jacoby and Francis Cullen concluded, “[P]eople want, more than anything else, for punishment to fit crimes. When given a precisely defined punishment-selection task, people choose a punishment that

the punishment should fit the crime. Unfortunately, the same groups disagree on what that actually means.<sup>90</sup> Some focus on absolute proportionality, which envisions a match between the wrongdoing and the punishment; others focus on relative proportionality, which envisions comparative treatment of similarly situated offenders.<sup>91</sup> Neither group offers much guidance to punishers on how much of a match (or how much of a divergence) is preferable or permitted.

At the sentencing level, the debate breaks down even further. What factors should we include when we compare offenders: the offense only, their respective victims, or their respective situations? Should the focus turn on the relative ordering of *offenders* or relative ordering of *offenses*?<sup>92</sup> None of these issues has been resolved definitively,<sup>93</sup> and the Supreme Court, although

is proportional to the perceived seriousness of the crime.” Jacoby & Cullen, *supra* note 47, at 301 (footnote omitted). The proportionality principle extends as far back as the Bible:

The clearest and simplest version of the proportionality principle is *lex talionis*, the Biblical maxim of “an eye for an eye.” *Lex talionis* entails both the view that punishment should be in kind (a view not often endorsed by modern retributivists) and that the magnitude of the punishment (in whatever form) should in some sense be equal to the wrongfulness of the act.

KAPLOW & SHAVELL, *supra* note 87, at 302 (footnote omitted).

<sup>90</sup> Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1613 (2007) (“[P]roportionality is a requirement across all major white-collar cases; like cases should be treated alike, different cases should be treated differently and criminal sentences should not vary substantially according to nonrelevant factors (such as the location of prosecution, identity of sentencing judge, or heat of public emotion).”); see also Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 269.

<sup>91</sup> See, e.g., KAPLOW & SHAVELL, *supra* note 87, at 301-02 & n.19; Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 430-31 (2011) (contrasting “instrumental” and “comparative” proportionality). Jurists have drawn on both concepts as well. *Compare* Tison v. Arizona, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”), with Blakely v. Washington, 542 U.S. 296, 331 (2004) (Breyer, J., dissenting) (“Simple determinate sentencing has the virtue of treating like cases alike, but it simultaneously fails to treat different cases differently.”), and United States v. Johnson, 273 F. App’x 95, 100-01 (2d Cir. 2008) (observing that the “hallmark” of common law sentencing “is that like cases are treated alike”).

<sup>92</sup> The current draft of the *Model Penal Code* appears to include both. See MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007) (listing the purposes of the sentencing provisions: “to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders”). Meanwhile, the Supreme Court has taken the position that, at least in the federal system, judges ought to adjust sentencing to the individual *offender* and not simply the *offense*. See Pepper v. United States, 131 S. Ct. 1229, 1239-40 (2011).

<sup>93</sup> See MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. at 3-5 (Tentative Draft No. 1, 2007) (explaining that the new sentencing guidelines attempt to place punishments with a “range of severity” as exact determinations of desert and proportion are typically not possible); cf. Ristroph, *supra* note 76, at 738-39 (criticizing the lack of precision in desert

embracing proportionality generally, has left much of the decision making to legislatures, judges, and prosecutors.<sup>94</sup>

Consider the folly of asking whether the Department of Justice delivered “enough” retribution last year. Whole categories of crimes may be undeserving (or at least less deserving) of sanctions, while several salient cases may exist where punishment was particularly appropriate. Nevertheless, we would have an extremely difficult time quantifying the department’s overall aggregate retributive effect.<sup>95</sup>

One might worry that this lack of consensus would stunt public actors’ ability to take action. But for public actors who punish, the lack of agreed-upon meaning acts as a source of power rather than a restraint. Punishment is expressively over-determined: everyone projects onto it his or her own view of what is warranted and correct, and as a result, everyone is assured by the public actor’s embrace of “just punishment” as a government goal.<sup>96</sup> Consequently, punishers enjoy great political and, as I argue later, economic discretion. They have far-ranging abilities to declare what merits condemnation through statute, to fund enforcement units tasked with imposing such condemnation, and to set the penalties in response to condemnatory acts. Moreover, punishers can better protect their prerogatives because, at the policy

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theory).

<sup>94</sup> See *Ewing v. California*, 538 U.S. 11, 25 (2003); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146-49 (2009) (questioning the Supreme Court’s failure to exercise robust proportionality review in non-capital cases); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 903 (2011).

<sup>95</sup> See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782-85, 818-20 (1994). For the same reason, studies that tabulate annual enforcement actions or fines in the securities context tell us relatively little about whether the government has imposed sufficient retribution. The Department of Justice’s annual performance self-review, which focuses primarily on the Department’s previously set numerical targets, also reflects this evaluative gap:

Success for the Department is highlighted when justice is served fairly and impartially and the public is protected. ...[T]rying to isolate the effects of our work from other factors that affect outcomes over which the Department has little or no control presents a formidable challenge....As a result, we have focused on more targeted measures of programmatic performance...

DEP’T OF JUSTICE, ANNUAL PERFORMANCE AND ACCOUNTABILITY REPORT, FY 2011, at § II-1 (2011), available at <http://www.justice.gov/ag/annualreports/pr2011/par2011.pdf>.

<sup>96</sup> Expressive overdetermination is Professor Dan Kahan’s term for when policy discourse enables divergent cultural groups to find affirmation of their own worldviews in a given policy. See Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN L. REV. 115, 145 (2007). Kahan views this as a potentially positive development, since it allows for otherwise “illiberal” groups to engage with each other in a participatory democracy. See *id.* at 145-50.

level, it is difficult to define retributive goals in a concrete manner that facilitates the public's sustained oversight and intervention.

These powers are not limitless. The current economic climate has created a scarcity of resources among numerous state law enforcement organizations at the street-crime level, and state and local criminal law institutions have long claimed that the public leaves them too few resources to do the job that the public actually prefers. Nevertheless, the argument here is not that punishers have *endless* resources but that they have *more* resources than other government officials and that they are less likely to lose access to those resources over time.

Nor is my claim that punishers *never* experience pushback from the public. Sometimes punishers overreach and strike a public chord. The notorious "three-strikes laws,"<sup>97</sup> although legal, have attracted vocal, but often unsuccessful, opposition throughout the years, as have mandatory minimum sentencing schemes for drug traffickers.<sup>98</sup> Notwithstanding these relatively few outliers, however, *at the policy level*, punishers have a fair amount of latitude to do as they please, in part because we lack reliable and legitimate methods for measuring and testing retributive policy. Our metrics are not much more sophisticated than tabulating annual enforcement actions, criminal cases, convictions, and fines and pointing out particularly salient wins or losses.<sup>99</sup> As a result, we have little data that tell us whether our elected and

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<sup>97</sup> Three-strikes laws are statutes that impose mandatory and often draconian sentences on third-time felons. See, e.g., David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 559 (2000). Despite strong criticism from practitioners and academics, three-strikes laws and "get tough" regimes enjoy at least superficial public support. See Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2233 (2010) (observing that California's three-strikes statute was "directly enacted by voters"); Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 38-40 (2000) (suggesting that public support for habitual offender laws, although palpable, may not be particularly deep).

<sup>98</sup> See Luna, *supra* note 17, at 711.

<sup>99</sup> A number of articles have addressed the lack of useful metrics for measuring and assessing prosecutorial policy. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983-91 (2009); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 72-73 (2011); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589-91 (2009). At the federal level, see Daniel C. Richman, *"Project Exile" and the Allocation of Federal Law Enforcement Authority*, 43 ARIZ. L. REV. 369, 400 (2001).

The Department of Justice is required to file annual reports of its performance, and engage in strategic planning. See, e.g., 31 USC § 1115 (2006). The Department's goals, however, are quite abstract (e.g., "protect the rights of the American people"), and the strategic targets are internally generated and quantitative in nature (e.g., "complete X investigations of Y category of crime"). See DEP'T OF JUSTICE, *supra* note 95, at § I-13-14.



appointed officials are meeting ostensibly agreed-upon retributive goals, assuming we could even articulate and agree upon those goals.<sup>100</sup>

By contrast, we have far more concrete goals for our regulators. We command our regulators to improve social welfare, or in lay terms, make everyone better off.<sup>101</sup> Unlike retribution, improving social welfare is an eminently testable social policy goal. Congress can measure a given agency's effect on welfare when Congress makes funding and legislative decisions.<sup>102</sup> OIRA can subject regulation proposed by non-independent agencies to rigorous cost-benefit analysis.<sup>103</sup> And outsiders, from academia to special interest trade groups, all have the ability to test an agency's concrete welfare-based arguments in courts and in the court of public opinion.<sup>104</sup> As a result, it is an understatement to say that the federal regulator's job is tremendously difficult. Without angering his political patrons, the regulator must endure numerous criticisms as to how often and how much he has fallen short of his concrete and testable goals.<sup>105</sup> All the more reason, then, why the regulator

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Accordingly, although these reports may aid higher-level officials in cutting bureaucratic slack, they do not appear to impose much restraint on the Department's overall ability to set and pursue a retributive agenda.

<sup>100</sup> Professor Cahill proposes to fix this shortcoming by theorizing his own consequentialist framework for applying retributive justice. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 822 (2007).

<sup>101</sup> CROLEY, *supra* note 72, at 10-11 ("'Public interested' regulation . . . denotes . . . regulation that improves social welfare. . . . [It] is therefore beneficial on net; in economic terms, it is Kaldor-Hicks efficient.").

<sup>102</sup> This is not to say that punishers are not subject to congressional oversight or budgetary constraints. As Dan Richman has observed, legislators can exercise political control in a number of ways: "By strategically using oversight hearings, budgetary controls, agency design, and restrictions on investigative options, legislators could moderate enforcement in sensitive areas without sacrificing the symbolic and deterrent benefits of broad prohibitions and without tackling the challenges of *ex ante* specification." Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2093 (2009). Nevertheless, given the greater ability to measure and test regulatory goals, legislator-principals can more easily control regulator-agents as opposed to punisher-agents. For an overview of the various ways in which legislatures use the political process to shape regulatory policy, see, for example, Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1462-82 (2011) (describing various strategies legislators adopt in order to ensure that regulators carry out their wishes).

<sup>103</sup> Barkow, *supra* note 72, at 18 ("[U]nlike executive agencies, [independent agencies such as the SEC] do not have to submit cost-benefit analyses of proposed rules for review by the President's Office of Information and Regulatory Affairs.").

<sup>104</sup> See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011) (challenging the cost-benefit analysis underlying the SEC's proxy access rule).

<sup>105</sup> Thus, even the SEC's more measured critics have asked "whether the SEC . . . is competitively fit to act as a regulator in a capital marketplace that is now so institutional and global." Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1027 (2009).

might decide to abandon his job altogether and adopt the stance and programmatic goals of a punisher.<sup>106</sup>

### C. *Punishment's Public Nature*

Even when corporate regulators devise rules and regulations well within the boundaries of their enabling statutes, they still must justify these interventions in relation to other, private alternatives.<sup>107</sup> Thus, we often encounter the recurring refrain: Why should we expect government regulators to outdo the market in setting optimal terms for corporate governance?<sup>108</sup> Even when markets fail, government officials can fail just as much, if not even more.<sup>109</sup> Particularly in the corporate governance context,<sup>110</sup> private ordering and markets occupy a strong default position in public discourse.<sup>111</sup> Accordingly,

<sup>106</sup> One can imagine instances in which regulators simply quit their jobs or where they attempt to morph into punishers. A robust analysis of these alternatives is beyond the scope of this Article.

<sup>107</sup> CROLEY, *supra* note 72, at 1.

<sup>108</sup> Consider Stephen Choi's comment, which reflects a common theme in securities and corporate governance scholarship: "Lawmakers often regulate first and ask questions later, ignoring both the potential downsides of regulation as well as the possibility of market-based alternative solutions to market failures." Stephen J. Choi, *A Framework for the Regulation of Securities Market Intermediaries*, 1 BERKELEY BUS. L.J. 45, 48 (2004).

<sup>109</sup> Behavioral economists' study of systematic cognitive error arguably has undermined the market default argument. See Rachlinski & Jourden, *supra* note 46, at 459-60. Even here, however, some contend that markets can overcome decision-making error as well as, if not better than, regulators. See Choi & Pritchard, *supra* note 60, at 50-51 (arguing that competition among regulators may reduce regulation infected by biases and heuristics). Other research suggests that intermediaries or agents in business organizations are less likely to exhibit certain biases. See, e.g., Jennifer Arlen, Matthew Spitzer & Eric Talley, *Endowment Effects Within Corporate Agency Relationships*, 31 J. LEGAL STUD. 1, 5 (2002) (reporting experimental research showing that use of corporate agents greatly reduced alleged "endowment effect" in corporate business transactions).

<sup>110</sup> See, e.g., John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 728-29 (1984) (justifying mandatory disclosure rules by reference to market failure).

The preference for markets and private ordering, in turn, relates back to Ronald Coase's mid-twentieth-century prediction that – "in the absence of significant externalities, information asymmetries, or garden-variety transaction costs – the law can (and should) defer to the attempts of private parties to allocate rights and obligations optimally." Arlen, Spitzer & Talley, *supra* note 109, at 2 (citing R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 10 (1960)). Not surprisingly, Arlen et al. conclude, "[Therefore,] corporate law should generally avoid imposing immutable (or 'mandatory') rules, except when necessary to address conventional market failures . . ." *Id.*

<sup>111</sup> Bernard Harcourt attributes private ordering's ascendance to, among other things, the convergence of a number of economists and law and economic scholars at the University of Chicago throughout the mid- and later-twentieth century. See HARCOURT, *supra* note 11, at 136-39 (describing the importance of "the Chicago School" to free market rhetoric in

regulators must defend their market interventions as both necessary and useful.<sup>112</sup>

Punishment, by contrast, carries little of regulation's ideological baggage.<sup>113</sup> Once we agree that a certain class of persons deserves punishment, we are far more likely to accept the government's role in channeling and expressing the public's condemnation and in imposing just deserts.<sup>114</sup> If we are, as Professor Jodi Short recently documented, fearful of government regulation, our fear ironically does not extend to the state's imposition of retributive punishment.<sup>115</sup>

Several scholars have attempted to account for the public's dichotomous attitudes toward regulation and punishment, with mixed results. Bernard Harcourt traces the dichotomy to the University of Chicago's law and economics school, whereas Nicola Lacey suggests that the difference lies with a country's political make-up (in other words, the more socialist a country is, the less punitive it is).<sup>116</sup> Neither of these accounts, however, incorporates the vast and growing literature on the psychology of punishment.

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American governance).

<sup>112</sup> Some see this as a form of regulatory "minimalism." See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55-56 (2011) (arguing that regulatory "experimentalism" is more pervasive than most presume and also more desirable than minimalist approaches).

<sup>113</sup> See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1196 (1985) (explaining fraud liability as a protective device for markets). But see HARCOURT, *supra* note 11, at 136-39, 147 (critiquing Posner's account because it does not explain "why certain categories of purportedly efficient behavior are criminalized" and because it ignores the complex "institutional framework" on which voluntary market transactions rely).

<sup>114</sup> See SIMON, *supra* note 18, at 21; Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1059-60 (2007) (exploring the justifications for a state monopoly on punishment); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 918 (2007) ("[T]he provisioning of criminal justice services, at least beyond the field of law enforcement, remains the exclusive province of the state.").

<sup>115</sup> In her recent article, Jodi Short provides empirical evidence that the public's discontent with regulation results not from concerns about inefficiency or administrative cost but rather from a deep-seated fear of state power. See Jodi Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. (forthcoming 2012) (manuscript at 2-3, 47-58), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1739015](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739015).

<sup>116</sup> Bernard Harcourt has traced the dichotomous attitudes toward regulation and punishment to neoliberalism, on the one hand, and to Richard Posner's famous justification of criminal law as a protection device for market transactions, on the other. See HARCOURT, *supra* note 11, at 147. Nicola Lacey adopts a "political systems" explanation for punishment, arguing that, among industrialized countries, those with more socialist and representative political systems favor less punishment. See LACEY, *supra* note 53, at 115-16. Neither Harcourt's nor Lacey's account incorporates the vast psychological literature on how laypersons view and experience punishment. See *supra* notes 40-47 and accompanying text.

In the public sphere, punishment's domination is best explained by its expressive component, which lends the state a powerful argument in justifying its monopoly and also accords with the psychological literature indicating the public's desire to express its moral outrage.<sup>117</sup> If punishment is the means by which society communicates its moral condemnation of bad acts, then the state is society's most appropriate proxy for communicating such condemnation.<sup>118</sup> Even if we delegate certain functions to private or quasi-private individuals<sup>119</sup> (or allow punitive damages in tort<sup>120</sup>), in the contemporary world, we are inclined to anoint the government as the preeminent source of punishment.<sup>121</sup>

#### D. *Punishment's Practical Advantages*

The three foregoing sections demonstrate punishment's general allure to government actors: it is non-deliberative and channels moral outrage; it is difficult to define and therefore difficult to test or criticize; and it is unquestionably public in character. Given these benefits, what practical payoffs might we see for institutions that "punish" as opposed to institutions that "regulate"?<sup>122</sup> In this section, I explore three categories of advantages: legal tools, money, and human talent.

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<sup>117</sup> For an introduction to the notion of criminal punishment as an expressive tool, see Dan M. Kahan, *What Do Alternate Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594-605 (1996) (explaining the "expressive dimension" of punishment); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2191 (2001) (describing "theories of penal encounter centering on retribution and social denunciation").

Treating retribution separately from punishment's expressive function does not lessen the state's claim. Retributivists embrace the state's involvement because its involvement (and use of procedure) distinguishes the imposition of "just deserts" from ordinary vengeance. See, e.g., MOORE, *supra* note 14, at 152.

<sup>118</sup> See Bilz, *supra* note 114, at 1062; Steiker, *supra* note 16, at 803-09. For an argument that expressive arguments are insufficient to explain or justify different treatment of criminal law, see Rosen-Zvi & Fisher, *supra* note 16, at 108-11.

<sup>119</sup> Roger Fairfax has documented instances in which state governments sometimes farm out the prosecution function to private attorneys. See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 416 (2009). Ric Simmons and David Sklansky have also observed the rise of private policing. See Simmons, *supra* note 114, at 919; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1168 (1999).

<sup>120</sup> See Markel, *supra* note 16, at 241.

<sup>121</sup> Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, in CRIMINAL LAW CONVERSATIONS, *supra* note 82, at 129; Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 171 (2010).

<sup>122</sup> Most institutions do both. See, e.g., Braithwaite, *supra* note 4, at 20-24 (exploring Rudolph Giuliani's skillful use of a hybrid of regulation and punishment with regard to "crime on the streets and crime in the suites"). This "hybridity" is related to but distinct

Admittedly, whether punishment creates identifiable benefits for a given institution is ultimately an empirical question whose answer is beyond the scope of this Article. Because punishment spans different jurisdictions and types of institutions, it is not particularly easy to isolate or measure a “punishment effect.” Yet, we can at least theorize *where* punishment’s payoffs are most likely to occur, which can provide the basis for future testing.

### 1. Legal Tools

Since roughly 1970, society has permitted, if not encouraged, the enactment of redundant and repetitive criminal statutes, as well as the imposition of increasingly harsher penalties for violating such statutes.<sup>123</sup> The expansion in criminal law has led to the robust “overcriminalization” critique that is popular among practitioners and scholars.<sup>124</sup>

The political explanation for criminal law’s predominance is that legislatures enact broad criminal laws and impose harsh jail sentences because such conduct sends positive signals to an unhappy public while shifting the details of implementation and sentencing to less visible prosecutors and judges.<sup>125</sup> Criminal legislation is cheap: it enables lawmakers to demonstrate to the public that they are “doing something,” pleases the lobbies that are most vocal, and yet allows the same lawmakers to avoid responsibility for unintended consequences that arise from the prosecution (or declination of prosecution) of those laws.<sup>126</sup>

The choosing punishment dynamic broadens our understanding of this phenomenon. First, it reminds us that moral outrage, and not the labeling of a law as “criminal,” drives public action.<sup>127</sup> Second, it further explains why public actors, responding to the public’s desire for punishment, are likely to trend toward adjudicative, *ex post* solutions over more forward-thinking innovative procedures.<sup>128</sup> Adjudication includes a communicative element.<sup>129</sup>

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from the phenomenon of overlap and leakage between civil and criminal penalty systems. See, e.g., Sara Sun Beale, *What Are the Rules if Everybody Wants to Play? Multiple Federal and State Prosecutors (Acting) as Regulators*, in PROSECUTORS IN THE BOARDROOM, *supra* note 19, at 202, 203 (observing that numerous civil settlements are negotiated “in the shadow of criminal liability”).

<sup>123</sup> See, e.g., Stuntz, *supra* note 53, at 507.

<sup>124</sup> See *supra* notes 17, 18, 51 and accompanying text.

<sup>125</sup> See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 751-52 (2005); Stuntz, *supra* note 53, at 529-33 (distinguishing federal and local legislators’ incentives).

<sup>126</sup> Kahan, *supra* note 65, at 50; Stuntz, *supra* note 53, at 548-51.

<sup>127</sup> See Beale, *supra* note 122, at 203.

<sup>128</sup> For a discussion of the various shortcomings of the adjudicative, case-by-case approach, see Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM, *supra* note 19, at 177, 195-96 (discussing accountability and consistency concerns). The choosing punishment dynamic is also consistent with Robert Kagan’s theory of “adversarial legalism,” whereby policymaking and dispute resolution occur primarily

Punitive enforcement actions – to the extent they conclude in an agency’s favor – are more likely to garner public support, particularly when the public seeks the comeuppance of a given set of corporate actors. Experimental, quasi-rulemaking procedures, by contrast, are difficult to explain and therefore difficult to justify to an angry public. Whenever outrage is present, regulators ought to lose out to punishers.

Finally, the choosing punishment dynamic reminds us that punishment is not a mere sanction that follows chronologically and derivatively from regulation. To the contrary, punishers take an active role in shaping the laws and legal processes that determine future sanctions. In the wake of scandals and crises, punishers routinely lobby legislatures for additional substantive laws, enhanced procedural powers, and expanded jurisdiction.<sup>130</sup> Punishers do not sit on the sidelines while regulators make law. Rather, punishers play a strong role in law’s creation.

Of course, punishers are not the *only* public actors who shape law. Much of the law that arises in the form of statutes and regulations seeks to regulate and not necessarily to express blame or condemn others. Nevertheless, it is no accident that Sarbanes-Oxley contained a number of provisions that improved the government’s ability to punish suspected corporate fraudsters.<sup>131</sup> Nor is it a

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through “lawyer-dominated litigation.” See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 3 (2002). Kagan distinguishes adversarial legalism from “other methods of governance and dispute resolution that rely instead on bureaucratic administration, or on discretionary judgment by experts or political authorities.” *Id.*

<sup>129</sup> I recognize that criminal theorists such as Moore separate out expressive condemnation from retributive punishment. See MOORE, *supra* note 14, at 84-90. The psychological literature, however, suggests a greater overlap between the two, whereby the condemnation of the wrongdoer is part of the desert.

<sup>130</sup> An instructive example is (now former) Acting Assistant Attorney General Rita Glavin’s testimony in March 2009 before the House Committee on Financial Services. See *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Financial Services*, 111th Cong. (2009) (statement of Rita Glavin, Acting Assistant Att’y General, Criminal Division, Department of Justice). Another example is Glavin’s testimony before the House Judiciary Committee one month later. See *Proposals to Fight Fraud and Protect Taxpayers: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 12 (2009) [hereinafter *Proposals to Fight Fraud and Protect Taxpayers*] (statement of Rita Glavin, Acting Assistant Att’y Gen., Criminal Division, Department of Justice). In both instances, Glavin was seeking to persuade Congress to enlarge the DOJ’s statutory and financial power.

<sup>131</sup> For a discussion of Sarbanes-Oxley’s criminal and enforcement-related provisions, see Frank O. Bowman, III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 392-411 (2004). Some of these provisions had little to do with the accounting fraud that triggered Sarbanes-Oxley. See, e.g., Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 438-40 (2009).

coincidence that one of Dodd-Frank's more popular provisions was its inclusion of an increased bounty for whistleblowers whose reports lead to successful SEC enforcement actions.<sup>132</sup> Laws can contain blaming components alongside regulatory provisions.

Some observers might wonder if the competition between punishers and regulators for legal tools is problematic, particularly where statutes are concerned. After all, law is not a finite resource like money. There is no technical cap on the number of statutes that legislatures can enact. Nevertheless, legislators have only so much time and human capital to spend on the political process in a given year. Accordingly, if punishers and regulators both seek certain types of legal tools, we should expect punishers to find greater ease in securing the tools they desire the most.

## 2. Money

Overlapping laws and regulations do not mean much if public actors lack the budgets necessary to enforce them. If punishers have an advantage securing substantive legal tools (i.e., statutes and regulations), does that advantage also translate into additional funding and heftier budgets? Put another way, to what extent does an institution's punitive orientation toward corporate entities influence its funding relative to other public agencies?

This question is not easily answered, and differences are likely to arise between federal and state institutions.<sup>133</sup> In the corporate governance context, one need not search long for claims of underfunding by regulatory or law enforcement agencies. The SEC has often claimed itself to be the victim of a dearth of funds,<sup>134</sup> despite a growing regulatory and enforcement portfolio.<sup>135</sup>

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<sup>132</sup> For more on the SEC's whistleblower program as enhanced by Dodd-Frank, see *Whistleblower Program*, SEC. & EXCHANGE COMMISSION (Aug. 12, 2011), <http://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml>; see also Douglas W. Baruch & Nancy N. Barr, *The SEC's Whistleblower Program: What the SEC Has Learned from the False Claims Act About Avoiding Whistleblower Abuses*, HARV. BUS. L. REV. (July 25, 2011), available at <http://www.hblr.org/2011/07/the-secs-whistleblower-program-what-the-sec-has-learned-from-the-false-claims-act-about-avoiding-whistleblower-abuses/>.

<sup>133</sup> See, e.g., Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 521-23 (2011) (examining allocations of power between local and more centralized prosecuting authorities within states and the federal government).

<sup>134</sup> See, e.g., U.S. SEC. & EXCH. COMM'N, OFFICE OF INVESTIGATIONS, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 364 (2009), available at <http://www.sec.gov/news/studies/2009/oig-509.pdf> ("[Doria] Bachenheimer also attributed the SEC's failure to uncover Madoff's Ponzi scheme to a lack of resources: 'The resource issues and the challenges that we were facing . . . We had to buy our own legal pads. We had to buy our own pens. It got to the point where we didn't have paper for the printers. . . . We had cases that had remained open for years.'"); U.S. SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., INVESTIGATION OF THE SEC'S RESPONSE TO CONCERNS REGARDING ROBERT ALLEN STANFORD'S ALLEGED PONZI SCHEME 26 (2010), available at

The FBI too has claimed, at times, a lack of funds, including in connection with the financial crisis.<sup>136</sup> Since government units include both punishers and regulators, it is difficult to determine whether an agency's punitive bent improves, reduces, or has no effect on its funding.

Nevertheless, all things being equal, punishment ought to improve an agency's funding prospects at the margin. That is, it ought to be easier to secure funds when the public is in a greater mood to punish *and* when the public institution requesting the money has made a public commitment to deliver such punishment.<sup>137</sup>

Consider the Fraud Enforcement and Recovery Act (FERA) of 2009.<sup>138</sup> While Congress debated the massive Dodd-Frank bill for over a year, FERA garnered strong bipartisan support in just a number of months.<sup>139</sup> In addition to altering several statutes and rolling back a court decision on money laundering, FERA provided law enforcement agencies significant resources for the investigation and prosecution of financial crimes.<sup>140</sup> Indeed, over a two-year period, FERA authorized the injection of an additional \$500 million into the FBI, the Secret Service, and a number of additional agencies with jurisdiction over crimes ostensibly related to the financial crisis.<sup>141</sup> Of course,

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<http://www.sec.gov/news/studies/2010/oig-526.pdf>; see also Jayne W. Barnard, *Evolutionary Enforcement at the Securities and Exchange Commission*, 71 U. PITT. L. REV. 403, 407 (2010) (concluding that Khuzami and his lieutenants "walked into a[n] Enforcement] Division that was under-resourced, demoralized, and insecure").

<sup>135</sup> See Donald C. Langevoort, *The SEC and the Madoff Scandal: Three Narratives in Search of a Story*, 2009 MICH. ST. L. REV. 899, 902.

<sup>136</sup> Eric Lichtblau et al., *F.B.I. Struggling to Handle Wave of Finance Cases*, N.Y. TIMES, Oct. 19, 2008, at A1.

<sup>137</sup> This certainly has been the case with the public's response to street crime. See, e.g., SIMON, *supra* note 18, at 45-46; Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 226 (2008) (observing an increase in punishment resources for street crime and a consequent defunding of social institutions that might otherwise mitigate or moderate crime); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 257-58 (2004).

<sup>138</sup> See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified in scattered sections of 18 U.S.C. and 31 U.S.C.).

<sup>139</sup> For more on FERA's drafting and quick passage, see Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 IND. L.J. 257, 298 (2011).

<sup>140</sup> See Fraud Enforcement and Recovery Act of 2009 § 3. For an argument in favor of increasing the DOJ's resources for fighting fraud in the wake of the recession, see *Proposals to Fight Fraud and Protect Taxpayers*, *supra* note 130, at 12 (statement of Rita Glavin, Acting Assistant Att'y Gen., Criminal Division, Department of Justice).

<sup>141</sup> Subsequent testimony by one of the co-sponsors of the bill, Charles Grassley, demonstrates the bill's intended breadth. See *Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Sen. Charles Grassley,



given the statute's broad definition of what counts for funding purposes, tracing the statute's underlying goals to the agencies' subsequent performance is nearly impossible.<sup>142</sup>

FERA aptly demonstrates the benefits of choosing punishment: Congress funds enforcement but grants punishers a relatively free hand in deciding how to spend and use those funds. Given the broad definition of goals, legislators struggle to offer sustained critiques of the enforcement agencies' use of those funds. Punishers thus benefit not only from their ability to secure legal tools but also from their ability to secure the funding necessary to implement such tools.

### 3. Talent

Finally, punishment ought to create an advantage for agencies in attracting human capital, or the dedicated and gifted employees I refer to collectively as "talent."

A number of commentators have written lately about the "revolving door" between the SEC and private business. The theory, espoused by Stavros Gadinis in the academic literature and Michael Lewis in the popular press, is that SEC administrators and regulators purposely treat corporate actors with kid gloves because they hail from the private sector and intend to return there in a few years.<sup>143</sup> Ostensibly, the revolving door reduces regulation's effectiveness. Regulators, more worried about their employment prospects in the future, fail to do their jobs in the present.<sup>144</sup>

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Member, S. Comm. on the Judiciary), *available at* 2011 WLNR 1939026.

<sup>142</sup> See section 3(f)(1) of the Fraud Enforcement and Recovery Act of 2009, which permits funding for "criminal, civil, or administrative violations . . . involving financial crimes and crimes against Federal assistance programs, including mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs."

The following subsection provides that funding may also be used for training and research, including "programs for improving the detection, investigation, and prosecution of economic crime including financial fraud and mortgage fraud." *Id.* § 3(f)(2). This latter provision also provides funding for listed agencies to assist state and local criminal enforcement agencies in investigating the above listed crimes. *See id.* The authorization thus includes, on its face, funding for the prosecution and investigation of conduct that had no connection whatsoever with the financial crisis that allegedly spurred the enactment of FERA.

<sup>143</sup> *See* Michael Lewis & David Einhorn, Op-Ed., *How to Repair a Broken Financial World*, N.Y. TIMES, Jan. 3, 2009, at WK10; Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers* 6 (Aug. 11, 2009) (unpublished manuscript), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1333717](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333717).

<sup>144</sup> *See* Ramirez, *supra* note 24, at 974 (suggesting that federal prosecutors shy away from local corporate prosecutions out of a desire to maintain future job prospects). For a refutation of this thesis, *see* CROLEY, *supra* note 72, at 95 ("More likely, the future

Interestingly enough, few have successfully advanced similar arguments with regard to the United States Attorney's Office in Manhattan, even though the members of that office also often advance to notable positions within private practice.<sup>145</sup> If anything, the revolving door prospect increases prosecutorial aggression with regard to corporate prosecutions.<sup>146</sup> What accounts for the difference?

Perhaps we can answer that question by identifying variations in the populations that *seek* employment with the government in the first place. To the extent that punishment enjoys a better narrative than regulation, we should expect lawyers seeking employment to prefer punishment to regulation. Punishers often bask in the warmth of heroic narratives, while regulators toil in relative obscurity.<sup>147</sup> If, according to popular narratives, punishers are heroes and regulators are technocrats, then institutions that adopt a more punitive stance ought to enjoy an advantage in the initial competition for legal talent. True, differentiation in terms of skills, geography, personal tastes, and interests should modify punishment's inherent advantage. We should not be surprised when a prosecutor sometimes jumps ship for a top position within a given bureaucracy or when some law students lean toward more transactional, regulatory positions in desirable locations such as New York City or

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employment prospects of administrative regulators depend entirely on the regulators' experiences with regulatory issues, not on particular decisions that were friendly to an interest group or groups."'). Langevoort also has questioned the revolving door theory. See Langevoort, *supra* note 135, at 904-05.

<sup>145</sup> Cf. David Zaring, *The Southern District of New York Offers Riches*, CONGLOMERATE BLOG (Aug. 16, 2010), <http://www.theconglomerate.org/2010/08/-the-southern-district-of-new-york-offers-riches.html> (demonstrating strong job prospects for prosecutors from the Southern District of New York office, which has also taken on a number of well publicized corporate prosecutions). For an earlier study, see Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 627 (2005) (finding that prosecutors in high-private-salary districts were less likely to agree to plea bargains than counterparts in other districts).

<sup>146</sup> Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617, 630-31 (2011) (arguing that prosecutors retain incentives to try famous or notorious cases in order to become prominent in the field and seek lucrative private sector jobs).

These divergent accounts suggest that the private sector may provide differing incentives for lawyer-regulators and lawyer-prosecutors. If corporate law firms hire prosecutors because the firms value aggression and strong litigation skills, then prosecutors have every incentive to win trials and strike hard bargains. By the same token, if corporate law firms hire legal regulators because the firms desire negotiating skills and network contacts with other regulators, then they are likely to value the lawyers' abilities to negotiate and persuade. Accordingly, the revolving door may encourage aggressive behavior among prosecutors while simultaneously rewarding more conciliatory behavior by lawyer-regulators.

<sup>147</sup> SIMON, *supra* note 18, at 41.

Washington, D.C. Nevertheless, within otherwise similar public institutions, at the staff- or line-attorney level, punishment ought to outshine pure regulation.

Should there be any doubt about this point, one need only look to recent changes within the SEC's Enforcement Division. Although the SEC had always portrayed itself as a punisher where insider trading was concerned,<sup>148</sup> since the discovery of Bernard Madoff's fraud in December 2008 (precipitated solely by Madoff's startling admission), the SEC's Enforcement Division has recast itself as an all-purpose investigator and punisher. First, the SEC Commissioner removed certain impediments to initiating and pursuing investigations.<sup>149</sup> Second, and perhaps more importantly, it replaced its top enforcement personnel. Robert Khuzami, the former chief securities prosecutor at the United States Attorney's Office, became the Chief of Enforcement. He recruited two former prosecutors from the same United States Attorney's Office to work for him in high-level positions.<sup>150</sup> Notably, the SEC did not fill those positions with career SEC attorneys.

Once in office, Khuzami enacted a number of reforms to remake the enforcement division in the image of a local prosecutor's office.<sup>151</sup> He reduced the number of supervisors and sent many of them back into the field, reorganized the division into subject-matter units devoted to investigating particular types of transgressions, announced his intention to expand cooperation programs from entities to individual cooperators (a tool that

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<sup>148</sup> See Coffee, *supra* note 29, at 264-65 (citing *Illegal Insider Trading: How Widespread Is the Problem and Is There Adequate Criminal Enforcement?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Linda Thomsen, Director, Division of Enforcement, Securities and Exchange Commission)) (discussing the number of enforcement actions brought over a five-year period). Insider trading continues to be an enforcement priority. See, e.g., *SEC Enforcement Actions: Insider Trading Cases*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/spotlight/insidertrading/cases.shtml> (last modified Oct. 6, 2011) (touting a forty-three percent increase in the number of cases filed from the previous year).

<sup>149</sup> The SEC (a) eliminated the "penalty pilot program" that had required Enforcement Division attorneys to obtain the SEC's approval prior to negotiating penalties with corporate defendants and (b) streamlined the process for initiating investigations and serving subpoenas. See Zachary A. Goldfarb, *Schapiro's SEC Expected to Step up Enforcement*, WASH. POST, Feb. 4, 2009, at D01 (analyzing Schapiro's then-expected termination of the penalty pilot program); Marisa McQuilken, *Rising Stock: SEC Enforcement Lawyers Are Happily Picking up the Pace*, LEGAL TIMES, Mar. 2, 2009, at 1 (discussing the Enforcement Division's increased role in general); Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, *Sustainable Reform Prioritizing Long-Term Investors Requires the Right Orientation* (Feb. 5, 2010), available at <http://www.sec.gov/news/speech/2010/spch020510laa.htm>.

<sup>150</sup> Barnard, *supra* note 134, at 406-07.

<sup>151</sup> Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

criminal law enforcement agencies already used), and went on a public relations kick that included a positive depiction in the *New York Times* as the public's new, star crusader.<sup>152</sup>

These changes alone do not necessarily transform the Enforcement Division into a punisher; they could as easily improve the agency's ability to levy a form of regulatory discipline through ex ante regulation and administrative and civil fines that sought to do no more than internalize costs ex post.<sup>153</sup> But Khuzami's public stance – broadcast in speeches, congressional testimony, and newspaper features – indicated something more than pure welfare-enhancing deterrence; it signaled that the SEC was gearing up for both retributive punishment and the increased budget and attention that accompany it.<sup>154</sup>

## II. PUNISHMENT AND CORPORATE GOVERNANCE

Part I offered a generalized theoretical account of punishment's various comparative benefits. This Part explores the choosing punishment dynamic with regard to corporate governance policy. It juxtaposes the so-called regulatory institutions that affect corporate governance law with the punitive institutions that have played an increasingly larger role in demanding how corporations and their managers should behave.

Section A begins by surveying the traditional non-punitive mechanisms familiar to corporate governance practitioners and scholars. The four standard sources of corporate regulation (both public and private) are markets, shareholder democracy, litigation, and public regulation. I refer to these mechanisms as “non-punitive” because at least in theory they are intended not to communicate moral condemnation or impose just deserts, but rather simply to restrain socially undesirable conduct. In theory, too, these mechanisms are driven by rational deliberation and not by intuition and heuristics.

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<sup>152</sup> See Jenny Anderson & Zachery Kouwe, *The Enforcer*, N.Y. TIMES, Feb. 9, 2010, at B1; Louise Story, *The Generals Who Ended Goldman's War*, N.Y. TIMES, July 18, 2010, at BU1; Edward Wyatt, *S.E.C. Puts Wall Street on Notice*, N.Y. TIMES, Apr. 19, 2010, at B1.

<sup>153</sup> Cf. Coffee, *supra* note 36, at 193-97; Joel Feinberg, *The Expressive Function of Punishment*, reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 25, 26-27 (Gertrude Ezorsky ed., 1972) (distinguishing “punishment” from penalties that are “mere ‘price-tags’ attached to certain types of behavior that are generally undesirable, so that only those with especially strong motivation will be willing to pay the price”).

<sup>154</sup> See Wyatt, *supra* note 152, at B1. Promising punishment and imposing it are two very different things. Accordingly, although Khuzami has employed a substantial amount of punishment rhetoric in his defense of the Enforcement Division, commentators (most notably, Judge Jed Rakoff of the Southern District of New York) have roundly criticized the Division's practice of securing fines from financial institutions with no admission of guilt. See, e.g., Peter J. Henning, *Behind Rakoff's Rejection of Citigroup Settlement*, N.Y. TIMES, Nov. 28, 2011, <http://dealbook.nytimes.com/2011/11/28/behind-judge-rakoffs-rejection-of-s-e-c-citigroup-settlement/> (explaining Judge Rakoff's reaction to the SEC's policy of settling cases without any admission of guilt).

All four mechanisms share well-documented weaknesses, which I review briefly for those unfamiliar with the topic. Although scholars have mined this field for years, they have yet to consider the extent to which corporate *punishment* impacts these regulatory shortcomings. Similarly, scholars have failed to consider the extent to which regulatory infighting among proponents of markets, voting, or litigation creates opportunities for punitive institutions to enter the fray and secure a larger-than-expected role in shaping corporate governance policy.

Section B then introduces the reader to the concept of corporate punishment. The institutions described in this section often proceed under statutes that are only incidentally tied to corporate governance. Legislators have crafted these statutes with broader ills – fraud, misrepresentation, noncompliance – in mind. Nevertheless, these laws provide public actors ample opportunity to punish corporate governance lapses.

Finally, section C offers an account of why corporate punishment is not likely to yield to corporate regulation any time soon. The public has increasingly registered greater moral outrage in response to corporate governance scandals. Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.

#### A. *Corporate Regulation*

When we think of corporate governance law, we often think of state corporation law and, increasingly, federal securities law. To varying degrees, state corporate governance law betrays a preference for non-retributive legal mechanisms.<sup>155</sup> Investors rely on a combination of private and public institutions to impose an amoral form of restraint, sometimes referred to as “discipline,” albeit in a non-retributive kind of way, on corporate managers and directors. When this type of restraint or discipline works, shareholder welfare improves and theoretically so does that of society as a whole. This is the predominant agency-cost<sup>156</sup> explanation of corporate law and governance, and it is far removed from the moral intuitions that guide retributive punishment.<sup>157</sup>

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<sup>155</sup> Corporation law’s preference may reflect its law-and-economics influence. See Arlen, Spitzer & Talley, *supra* note 109, at 2.

<sup>156</sup> Judge Posner succinctly defines agency costs as follows:

A principal hires an agent to do a job that the principal could not do as well (or as cheaply) himself. The principal wants the agent to strive to do the best possible job at the lowest possible cost. . . . But the agent is a self-interested person just like the principal. Unless the principal can evaluate and monitor the agent’s performance with great accuracy and adjust the agent’s compensation accordingly, the agent is unlikely to be perfectly faithful to the principal. He will slack off, or divert revenues to himself, or both.

Richard A. Posner, *Are American CEOs Overpaid, and, if so, What if Anything Should Be Done About It?*, 58 DUKE L.J. 1013, 1015 (2009).

<sup>157</sup> Steven Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory*

This is not to say that morally informed arguments are absent in corporate settings. To the contrary, a number of scholars have argued that moral considerations can and should pervade decision making within the corporate sphere.<sup>158</sup> Nevertheless, with the exception of the SEC's Enforcement Division, the *legal institutions* that dominate corporate governance law have tended to shy away from the nakedly retributive claims that are prevalent elsewhere.<sup>159</sup> Instead, agency-cost reduction prevails across scholarly and judicial arenas. As I demonstrate below, this singular interest in reducing agency costs, in turn, results in a world in which scholars and practitioners identify and debate – with relative ease – the various flaws in the institutions that are supposed to regulate corporate governance.

### 1. Markets

For libertarians and free market adherents, private markets remain *the* optimal means for incentivizing good behavior by corporate actors.<sup>160</sup> When a

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*Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 316 n.23 (2007) (“[O]ptimal corporate governance would minimize net agency costs.” (citing John E. Core et al., *Is U.S. CEO Compensation Inefficient Pay Without Performance?*, 103 MICH. L. REV. 1142, 1160-61 (2005))).

<sup>158</sup> See, e.g., Thomas Joo, *Narrative, Myth, and Morality in Corporate Legal Theory*, 2009 MICH. ST. L. REV. 1091, 1092; Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1047 (1997); Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1, 15 (2003).

In a related vein, a number of scholars have discussed the positive effects of social norms on corporate behavior. See, e.g., Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1086-87 (2004) (discussing informal reputational sanctions visited upon corporate managers in the wake of various scandals and mishaps); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1824-25 (2001).

<sup>159</sup> Consider a recent Delaware Court of Chancery decision that rejected a derivative shareholder suit premised on the board's failure to perceive and prevent Citigroup's disastrous participation in the subprime mortgage business:

[I]t is often difficult to distinguish between a desire to blame *someone* and a desire to force those responsible to account for their wrongdoing. Our law, fortunately, provides guidance for precisely these situations in the form of doctrines governing the duties owed by officers and directors of Delaware corporations. This law has been refined over hundreds of years, which no doubt included many crises, and *we must not let our desire to blame someone for our losses make us lose sight of the purpose of our law.*

*In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 139 (Del. Ch. 2009) (second emphasis added).

<sup>160</sup> See Jonathan R. Macey, *The Politicization of American Corporate Governance*, 1 VA. L. & BUS. REV. 10, 24 (2006) (“[A] robust market for corporate control is vitally important as a corporate mechanism for monitoring and disciplining managers.”); see also Stephen J. Choi & Eric L. Talley, *Playing Favorites with Shareholders*, 75 S. CAL. L. REV. 271, 273-74 (2002) (“[T]he takeover market creates a powerful incentive for managers to constrain their

corporation produces a substandard product, fewer people purchase it. At some point, the corporation's revenues and profits fall.<sup>161</sup> As profits fall, the firm's value also decreases, and fewer investors purchase or hold the company's stock, assuming a liquid market for such stock.<sup>162</sup> As its stock price plummets, the (publicly held) corporation becomes vulnerable to a hostile takeover by outsiders who perceive an opportunity to extract greater value from the firm's underlying assets.<sup>163</sup> Alternately, the corporation's board may become the subject of an insurgent proxy contest or vexatious litigation by disgruntled shareholders. To head off these problems, the board replaces its officers and ushers in a different team and management strategy.<sup>164</sup>

Unfortunately, markets alone cannot restrain managerial opportunism.<sup>165</sup> Information asymmetries undermine market efficiency, as do legal restraints – such as those on hostile takeovers.<sup>166</sup> Moreover, officers are likely to hide corporate wrongdoing from shareholders intentionally. At least where insider trading is prohibited, capital markets cannot efficiently discipline officer-driven wrongdoing while the wrongdoing is kept under wraps.<sup>167</sup> We therefore need additional mechanisms to restrain managerial incompetence and opportunistic behavior.

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own rapacity in the interests of self-preservation.”).

<sup>161</sup> ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 15 (1970) (“The customer who, dissatisfied with the product of one firm, shifts to that of another, uses the market to defend his welfare or to improve his position; and he also sets in motion market forces which may induce recovery on the part of the firm that has declined in comparative performance.”); see also Lawrence A. Cunningham, *Behavioral Finance and Investor Governance*, 59 WASH. & LEE L. REV. 767, 768-69.

<sup>162</sup> See Hurt, *supra* note 19, at 389.

<sup>163</sup> JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 118 (2008).

<sup>164</sup> *Id.* at 235 (“Hostile takeovers are associated with increases in managerial efficiency, as high share price is considered the strongest hostile takeover defense.”).

<sup>165</sup> See William Bratton & Michael Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 726-27 (2010).

<sup>166</sup> For a criticism of statutes that impose such restraints, see, for example, MACEY, *supra* note 163, at 118. For the response that legal takeover defenses do not undermine market discipline as much as one might expect, see Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 896-97 (2002).

<sup>167</sup> See Hurt, *supra* note 19, at 389-90. Even here, however, the market provides a long-term disciplining device insofar as shareholders might completely exit or discount a market whose issuers were deemed untrustworthy.

## 2. Shareholder Democracy and Board Oversight

Aside from selling their stock, shareholders might take matters into their own hands by exercising their vote over various corporate affairs.<sup>168</sup> All states follow, to some extent, the structure whereby shareholders elect board members and board members bear the responsibility for hiring and firing corporate officers.<sup>169</sup> Theoretically, directors restrain officers through their oversight capacity, and shareholders restrain directors through their ability to elect them into or out of office.

According to the traditional critique, this type of restraint fails on two fronts. For one, directors are too removed from the corporation's daily affairs and identify too easily with the corporation's officers.<sup>170</sup> Additionally, shareholders of publicly held firms do not fare much better because they are widely dispersed, unsophisticated, and uninformed.<sup>171</sup> As a result, the classic collective action problem renders them rationally apathetic.<sup>172</sup>

Some evidence suggests that this account of governance futility is overly pessimistic. The emergence of third-party intermediary shareholders such as hedge,<sup>173</sup> pension, and mutual funds<sup>174</sup> reduces the problem of shareholder apathy, although these entities arguably introduce other, equally problematic

<sup>168</sup> Paul Rose, *Common Agency and the Public Corporation*, 63 VAND. L. REV. 1355, 1359 (2010) ("Under the standard agency theory guiding efforts to empower shareholders, increased monitoring by shareholder-principals of manager-agents will reduce agency costs created by management shirking and expropriation of private benefits . . .").

<sup>169</sup> See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2001) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

<sup>170</sup> See LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 23-44 (2004).

<sup>171</sup> ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 84-90 (1935).

<sup>172</sup> See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971). Macey's argument is slightly more nuanced. He contends that dispersed holdings render shareholders unable "to form effective political coalitions to block management's political mobilization" against market discipline. See MACEY, *supra* note 163, at 235.

<sup>173</sup> See Robert C. Illig, *The Promise of Hedge Fund Governance: How Incentive Compensation Can Enhance Institutional Investor Monitoring*, 60 ALA. L. REV. 41, 83 (2008); Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation*, 61 VAND. L. REV. 299, 302-03 (2008).

<sup>174</sup> Among the three, commentators have lauded hedge funds as offering the best opportunities for reducing agency costs. See Robert C. Illig, *What Hedge Funds Can Teach Corporate America: A Roadmap for Achieving Institutional Investor Oversight*, 57 AM. U. L. REV. 225, 228-29 (2007); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1042-43 (2007).



agency problems.<sup>175</sup> Similarly, shareholders have demonstrated a surprising adeptness with the SEC's precatory proposal machinery.<sup>176</sup> This has led some to argue that corporate managers enjoy less omnipotence than they did in the past.<sup>177</sup> Nevertheless, shareholder democracy, by almost all accounts, is an insufficient source of managerial discipline.

### 3. Shareholder Litigation

The most controversial source of restraint in corporate governance law is shareholder litigation.<sup>178</sup> By many accounts, this form of restraint is quite weak,<sup>179</sup> some would either eliminate or reduce its influence even further.<sup>180</sup>

To bring a derivative suit on the corporation's behalf, shareholders must clear procedural demand and ownership hurdles.<sup>181</sup> Such hurdles exist because

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<sup>175</sup> Rose, *supra* note 168, at 1359 (“[A]lthough shareholder power may result in reduced agency costs due to management empire-building, other agency costs are created that may reduce the effectiveness of or even outweigh the gains from shareholder power.”); *see also* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1293 (2008).

<sup>176</sup> Rule 14a-8 requires management to include on the corporate proxy advisory shareholder proposals of 500 words or fewer, provided the proposals meet certain criteria laid out by the rule. *See* 17 C.F.R. § 240.14a-8 (2011). “[Such proposals] have had a powerful admonitory effect on corporate boards, with corporate boards often voluntarily assenting to non-binding proposals rather than risking wrath at the next director election.” Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1095-96 (2008).

<sup>177</sup> *See* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1044-45 (2010). Shareholders still are not permitted to vote on most matters affecting the company. *See* STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 34-35 & n.25 (2008) (“In all states, the corporation code provides for a system of nearly absolute delegation of power to the board of directors.”).

<sup>178</sup> TOM BAKER & SEAN J. GRIFFITH, *ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION* 1 (2010) (“Because public regulators cannot oversee every company at every moment and cannot anticipate or even respond to every report of a potential wrong . . . [shareholder] lawsuits . . . fill an important gap in the regulatory framework affecting American business.”).

<sup>179</sup> *See* Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 108 (2006) (“A combination of substantive doctrines and procedural requirements embodied in corporate law has made it nearly impossible for shareholders to prevail when challenging the decisions and practices of corporate management.”).

<sup>180</sup> *See, e.g.,* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1305-07 (2008) (arguing for granting the SEC power to “prescreen” shareholder lawsuits before they can be filed).

<sup>181</sup> *See* ARTHUR R. PINTO & DOUGLAS M. BRANSON, *UNDERSTANDING CORPORATE LAW* § 14.03 (3d ed. 2009).

the corporation's decision to engage in litigation, like most other aspects of governance, is seen as a prerogative of the corporation's board.<sup>182</sup>

Substantive law also constrains shareholder litigation, through, among other things, the business judgment rule<sup>183</sup> and statutory provisions enabling corporations to insure, indemnify, and exculpate directors under certain circumstances.<sup>184</sup>

The foregoing leaves a fairly narrow window for shareholder derivative suits – and a nearly closed one for suits seeking damages for oversight failures.<sup>185</sup> Only where undisclosed conflicts of interest, bad faith, or intentional violations of law are present is there much likelihood of a derivative suit going forward and succeeding.<sup>186</sup> By that point, we would expect to see “punishers” – criminal prosecutors, State Attorneys General

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<sup>182</sup> See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (stating that directors' power to decide whether to file a suit on the corporation's behalf follows from the general precept that power to manage the corporation's affairs resides with the board). Shareholders may forego demand if they demonstrate that such demand is futile by pleading facts that raise doubt that the board is disinterested and independent or that the transaction in question was the product of the board's “valid business judgment.” *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). When the alleged misconduct relates to inaction and not a specific transaction, the test is whether the pleadings raise doubt as to the independence of the board when the complaint was filed. *Rales v. Blasband*, 634 A.2d 927, 933-34 (Del. 1993) (substituting an alternate test when the claimed misconduct is the board's alleged inaction).

<sup>183</sup> See *Aronson*, 473 A.2d at 812 (“The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a). It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981))).

<sup>184</sup> Delaware permits corporations to include a charter provision exculpating directors from monetary liability for lapses in the duty of care. See DEL. CODE ANN. tit. 8, § 102(b)(7) (2001). The corporation also may secure director and officer liability insurance for liability stemming from decisions that harm the corporation, although D&O insurance will stop short of protection for bad faith acts or intentional misconduct. For an introduction to the D&O contracting process, see BAKER & GRIFFITH, *supra* note 178, at 42-56.

<sup>185</sup> *Citigroup*, 964 A.2d at 125 (“The presumption of the business judgment rule, the protection of an exculpatory § 102(b)7 provision, and the difficulty of proving a *Caremark* claim together function to place an extremely high burden on a plaintiff to state a claim for personal director liability for a failure to see the extent of a company's business risk.”).

<sup>186</sup> See, e.g., *In re Am. Int'l Grp. Inc. S'holder Consol. Derivative Litig.*, 965 A.2d 763, 799 (Del. Ch. 2009) (permitting the case to go forward where there was significant evidence of criminal activity).

(SAG), and SEC enforcement agents – on the scene.<sup>187</sup> We also would expect to see claims filed under Rule 10b-5 of the Securities Exchange Act.<sup>188</sup>

Meanwhile, federal law also places a number of procedural restraints on shareholder class action litigants. They must bring their claim in federal court,<sup>189</sup> abide by the Private Securities Litigation Reform Act by alleging scienter with particularity in their complaint, and await the court's determination of a motion to dismiss before discovery commences.<sup>190</sup> Despite these elaborate hoops, private enforcement actions proceed and account for a substantial percentage of securities class action recoveries.<sup>191</sup> If private litigation is a poor source of regulation, it is not because class actions fail but rather because, even when they succeed, the suits largely result in circular payments by the company to its previous shareholders.

#### 4. Public Regulation

Apart from markets, shareholder democracy, and private litigation, public regulators also play a role in corporate governance.<sup>192</sup> The SEC is the primary federal agency charged with protecting the integrity of the security markets and with protecting investors in publicly held companies. Historically, the SEC has not regulated corporate governance but rather the sales and purchases of securities.<sup>193</sup> Nevertheless, over the years, the SEC's jurisdiction has expanded from mandating adequate and truthful disclosure to overseeing internal governance relationships and structures.<sup>194</sup>

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<sup>187</sup> For an extensive account of how multiple litigations are directed at the same firms, see Jessica Erickson, *Overlitigating Corporate Fraud: An Empirical Examination*, 97 IOWA L. REV. 49 (2011).

<sup>188</sup> BAKER & GRIFFITH, *supra* note 178, at 3-5 ("Among [shareholder litigation] claims, securities class actions represent, by far, the largest potential source of liability.").

<sup>189</sup> Section 101(a)(1) of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227, 3227, provides that securities fraud class actions on behalf of more than fifty members or prospective members "shall be removable to the Federal district court for the district in which the action is pending."

<sup>190</sup> See 15 U.S.C. § 77z-1(b)(1) (2006) ("In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

<sup>191</sup> Coffee, *supra* note 29, at 245.

<sup>192</sup> From the economist's perspective, public regulation "aims to induce outcomes which would not be reached by free market activity. It is therefore designed to overcome some perceived instance of market failure." Anthony Ogus, *Criminal Law and Regulation*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS: CRIMINAL LAW AND ECONOMICS, *supra* note 39, at 90.

<sup>193</sup> George W. Dent, Jr., *For Optional Federal Incorporation*, 35 J. CORP. L. 499, 509 (2010) ("[T]he SEC's jurisdiction is limited to matters like disclosure and proxy solicitations; it does not extend to corporate governance in general.").

<sup>194</sup> See generally Roberta Karmel, *Realizing the Dream of William O. Douglas – The*

Regulation can intervene *ex ante*, in the sense that public regulators can promulgate prospective rules and standards that dictate, directly or indirectly, how individuals or groups should behave. The SEC's regulation of the processes for issuing stock, filing quarterly and annual statements, and conducting tender offers are all examples of how it regulates the stock market. The SEC's requirements regarding audit and compensation committee independence and disclosure of codes of business conduct are also examples of regulation, albeit regulation directed at how corporations govern themselves.

Regulation also can occur *ex post* in the sense that regulators can fine, enjoin, or otherwise sanction behavior that transgresses previously announced rules and standards.<sup>195</sup> *Ex post* enforcement, however, overlaps but is not co-extensive with punishment. That is, an enforcement division *can* levy increased penalties solely for the sake of internalizing costs by taking into account low probabilities of detection. No doubt, some of the SEC's bread-and-butter enforcement likely falls within this category. As I argue below, however, the public regulators who staff the SEC's Enforcement Division increasingly have adopted goals beyond mere cost internalization. They have in various instances decided that it is necessary to *punish* corporate officers and not simply restrain bad conduct. Accordingly, I discuss the world of corporate punishment in greater detail below.

## B. Corporate Punishment

If we rely on markets, shareholders, litigation, and regulators to restrain corporate actors, on whom do we rely to punish them? The three institutions that attract the most attention are the federal Department of Justice (DOJ) and its United States Attorneys' Offices, the SEC, and the SAGs. As I argue below, all three of these institutions have been aided by the relative weaknesses of the regulatory institutions discussed in section A above.

### 1. The Department of Justice

Criminal law's influence over corporate governance is complex. Unlike a state's corporate code, criminal law does not explicitly address the relationship

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*Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79 (2005).

<sup>195</sup> For an in-depth analysis of the difference between structural regulation and sanction-based systems, see Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655 (2006). For more on the difference between rules (which are defined in detail *ex ante*) and standards (which attain definition *ex post*), see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 565 (1992). For an analysis of how rules and standards (or principles) affect securities enforcement and securities rule-making, see Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1 (2008), and James Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625 (2007).

among corporate directors, officers, and shareholders. Technically, one does not go to jail for being a bad director or for violating fiduciary duties.<sup>196</sup>

Nevertheless, many federal criminal statutes “punish” corporate misconduct in the sense that they communicate moral condemnation for conduct that is also the concern of corporate governance policy. Although insider trading and the fraud statutes (mail, wire, and securities fraud<sup>197</sup>) embrace the corporate crimes that most easily come to mind, many other statutes respond to governance transgressions within the corporation. Basic embezzlement and theft statutes extend the state’s power to punish corporate officers who abuse their position and take corporate property.<sup>198</sup> Document preservation statutes obligate corporate employees to preserve evidence; certification statutes force CEOs and CFOs to learn and affirm the content of their public companies’ financial statements. The failure to comply with these and similar laws provide ample grounds for punishment.<sup>199</sup>

Finally, the federal government maintains the particular ability to punish corporations for nearly all of their employees’ federal crimes through a broad theory of respondeat superior.<sup>200</sup> So long as an employee commits a crime with an intention to benefit the company and in the course of her employment, the employee’s conduct triggers entity-level liability for the corporation.<sup>201</sup>

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<sup>196</sup> Arguably, the “honest services” provision of the federal fraud statutes had been interpreted so broadly as to criminalize mere violations of fiduciary duties. See 18 U.S.C. § 1346 (2006) (“[T]he term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”). The Supreme Court’s recent decision in *Skilling v. United States* appears to have cut off this expansion, at least for now. See 130 S. Ct. 2896, 2930-31 (2010) (holding that the “honest services” statute could pass muster under constitutional vagueness doctrines if restricted to “offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes”). For previous criticism of the broad reading of the honest services statute, see Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 8 (2010).

<sup>197</sup> See 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud); *id.* § 1348 (securities fraud); 15 U.S.C. § 78u to 78u-4 (securities fraud).

<sup>198</sup> The Manhattan District Attorney successfully prosecuted Dennis Kozlowski, the former CEO of Tyco, for committing and conspiring to commit grand larceny. See Andrew Ross Sorkin & Roben Farzad, *At Tyco Trial No. 2, Similarities to No. 1*, N.Y. TIMES, June 20, 2005, at C1.

<sup>199</sup> See, e.g., 18 U.S.C. § 1001 (false statements); *id.* § 1350 (officer certification requirement); *id.* § 1520 (destruction of corporate audit records). On the criminal aspects of Sarbanes-Oxley and officer certification, see Stephen J. Choi, *A Framework for the Regulation of Securities Market Intermediaries*, 1 BERKELEY BUS. L.J. 45, 61-62 (2004).

<sup>200</sup> See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493-94 (1909).

<sup>201</sup> Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 PLI/CORP. 815, 817 (2005).

Corporate criminal liability serves an important “blaming function” that Professor Samuel Buell has discussed at great length.<sup>202</sup> According to Buell, corporate criminal liability communicates a message both to society and to the members of a given corporate institution, “a kind of moral assessment [that is] characteristic of judgments of criminality.”<sup>203</sup> Although Buell, like other observers, presumes that moral condemnation is tied to criminal law, retributive messages can be conveyed by other non-criminal institutions, which I discuss in greater detail below.<sup>204</sup>

## 2. The Securities and Exchange Commission

As this Article has argued throughout, retributive punishment thrives beyond the limits of criminal law. Relatively recent changes in the SEC’s Enforcement Division nicely demonstrate this point. On one hand, the Division’s bread-and-butter docket would seem to fall squarely under the amoral “regulatory discipline” rubric: through compensatory fines, disgorgement, and other remedial measures, the Division can correct and deter securities violations and thereby contribute to more efficient markets and improved corporate governance.

But the Division also can impose retributive punishment. That is, through punitive fines, coerced public admissions of guilt, and similar measures that imply moral as well as legal responsibility, the Division communicates public blame and condemnation.

This was not always the case.<sup>205</sup> Prior to 1990, the Enforcement Division’s primary powers included seeking disgorgement of ill-gotten gains and filing

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<sup>202</sup> See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 477 (2006) (identifying the “popular impulse to condemn entities criminally for the harms they visit upon people” as the driving force behind federal prosecutions of corporate entities).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 478 (“Because of its communicative force and preference-shaping authority, only criminal process fully produces these effects of legally imposed entity blame.”); see also Brown, *supra* note 16, at 668 n.31 (arguing that criminal law “has a distinct ability to express condemnation for blameworthy conduct that civil sanctions do not”).

This Article does not dispute the general contention that criminal law is more retributive than other forms of legal sanction. It does contend, however, that we should not ignore the retributive aspects of civil enforcement proceedings. For more on the extent to which federal agencies engage in retributive conduct, see generally Minzner, *supra* note 3.

<sup>205</sup> Braithwaite, *supra* note 4, at 19-20 (“The SEC remained a non-punitive regulatory agency into the 1980s.”). John Braithwaite theorizes that the SEC was influenced by United States Attorney Rudolph Giuliani’s decision to criminally prosecute Wall Street financiers:

Giuliani shocked the world by being a Republican who reversed the deregulatory persona of Ronald Reagan. He brought the symbolism of the War on Crime to where it was not supposed to be seen. Police officers were filmed marching into Wall Street investment houses and emerging with exquisitely besuited men in handcuffs . . . . Giuliani’s strategy was crude but effective. It was about symbolism rather than

civil suits in court seeking injunctive relief; neither activity was particularly steeped in the rhetoric of punishment. In 1990, however, Congress enlarged the Enforcement Division's power to seek civil penalties beyond disgorgement.<sup>206</sup> Whereas disgorgement was a weak penalty, fines and similar penalties offered the SEC the opportunity both to deter wrongdoing *and* to express moral condemnation of the individuals or groups who transgressed the securities laws. The Supreme Court's 1997 decision in *Hudson v. United States*,<sup>207</sup> which effectively narrowed the definition of "criminal" for double jeopardy purposes, also encouraged the SEC's more widespread use of civil fines and remedies.<sup>208</sup> Under the Court's reading of the Double Jeopardy Clause, the SEC was free to impose civil fines on entities that were also the subject of criminal proceedings, provided the fines were not so "punitive in form and effect" as to render them "criminally punitive."<sup>209</sup> The Court explicitly stated, however, that those fines might well be described, "in common parlance," as punishment.<sup>210</sup>

Despite its increased statutory powers, the Enforcement Division did not flex its punitive muscle during the Bush Administration's tenure. This fact raises something of a conundrum: if punishment is more powerful than regulation, why did the SEC Enforcement Division falter in the 2000s?

The question deserves its own treatment.<sup>211</sup> Suffice it to say that the Enforcement Division seemed to suffer from its adoption of a more regulatory stance in the years leading up to the Madoff debacle. It appeared to follow, rather than lead, SAGs such as Eliot Spitzer in terms of investigations and settlements.<sup>212</sup> It erected a number of internal rules that hampered its staff

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equality before the law.

*Id.*

<sup>206</sup> Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429 § 202, 104 Stat. 931, 937-39 (codified as amended at 15 U.S.C. § 78u-2).

<sup>207</sup> 522 U.S. 93 (1997).

<sup>208</sup> See Gary P. Naftalis, *Defending Parallel Civil and Criminal Proceedings*, SM090 A.L.I.-A.B.A. 1257, 1314 (2007) (citing Paul Beckett, *SEC May Seek Civil Fines in Some Cases Involving Parallel Criminal Proceedings*, WALL ST. J., Jan 8, 1998, at B6).

<sup>209</sup> *Hudson*, 522 U.S. at 104-05. *Hudson* directs courts to consider civil penalties according to a multi-factor test set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). See *Hudson*, 522 U.S. at 99-100. For a good discussion of how the Court's analysis has enabled administrative agencies to impose retributive penalties, see Minzner, *supra* note 3, at 908-10.

<sup>210</sup> See *Hudson*, 522 U.S. at 99 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943)).

<sup>211</sup> A number of scholars have already begun to investigate this question. See, e.g., John C. Coffee, Jr. & Hilary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 701, 731 (2009); Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785, 803-04 (2009) (arguing that SEC failed to show adequate leadership in the wake of the 2008 financial crisis).

<sup>212</sup> Coffee and Sale have argued that "[s]tate securities regulators . . . have been

attorneys' abilities to investigate and charge civil and administrative securities cases.<sup>213</sup> And its Chairman required SEC attorneys to seek approval from the full Commission prior to initiating formal investigations and serving subpoenas on individuals and entities suspected of wrongdoing.<sup>214</sup>

Following the emergence of the financial crisis and the election of President Barack Obama, former prosecutor Robert Khuzami was chosen to become the new director of the Enforcement Division.<sup>215</sup> Khuzami enacted a number of changes designed to make the Division act and appear more like a criminal law enforcement agency.<sup>216</sup> Small wonder, then, that the Enforcement Division appears to receive far more attention than the rest of the agency and that the attention is fairly positive.<sup>217</sup>

Khuzami's "retributive turn," however, has inherent limitations. The Division may lack the statutory power to dictate corporate governance arrangements and, accordingly, punish governance mishaps. Second, and perhaps more importantly, the SEC's punitive bite is limited substantially by its inability to initiate criminal charges, by congressional oversight and control over its budget, and to a lesser extent by the Supreme Court's determination that civil penalties must not mimic criminal punishments excessively. In other words, not all punishers (or would-be punishers) are created equally. If criminal prosecutions and jail terms remain the preeminent means by which we communicate moral condemnation,<sup>218</sup> then the SEC will always be weaker than other punishers, regardless of how aggressive its enforcement agents sound in newspaper interviews.<sup>219</sup>

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important fraud detectors and arbitrators, who have, at times created competition pressuring the SEC to take action." Coffee & Sale, *supra* note 211, at 760.

<sup>213</sup> See Peter J. Henning, *Should the SEC Spin off the Enforcement Division?*, 11 TRANSACTIONS: TENN. J. BUS. L. 121, 125-26 & n.20 (2009).

<sup>214</sup> *Id.* at 126 ("The criminal investigatory model appears to be the dominant approach [within the SEC] these days.").

<sup>215</sup> David Scheer & Jesse Westbrook, *SEC Names Ex-Prosecutor Khuzami to Head Enforcement (Update 1)*, BLOOMBERG NEWS (February 19, 2009, 15:17 EST), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=azMOC7v8\\_Ies](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=azMOC7v8_Ies).

<sup>216</sup> Khuzami, *supra* note 151; see also Barnard, *supra* note 134, at 405.

<sup>217</sup> Macey, *supra* note 58, at 643 ("[I]t is clear that the SEC is largely evaluated on the basis of how well its Division of Enforcement performs.").

<sup>218</sup> Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 616 (1998).

<sup>219</sup> Statutorily, the SEC has no power to initiate a criminal prosecution; that power resides exclusively with the DOJ and its United States Attorneys. See SEC Div. of Enforcement, Office of Chief Counsel, ENFORCEMENT MANUAL § 5.2 (2011); see also Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 561 (2003). One SEC Commissioner, Luis Aguilar, has argued for the Enforcement Division's own criminal prosecution authority. See Luis A. Aguilar, SEC Comm'r, Speech Before the North American Securities Administrators Association's Winter Enforcement Conference: Empowering the Markets [sic] Watchdog to



This mismatch between retributive stance and retributive power foreshadows one of punishment's drawbacks: sometimes, punishment amounts to little more than distracting talk, and this distracting talk may become particularly harmful if it simultaneously reduces an agency's determination to regulate.

### 3. State Attorneys General

Finally, in addition to the SEC and federal prosecutors, state prosecutors have increased their ability to punish corporate actors through a proliferation of state securities fraud statutes.<sup>220</sup> Eliot Spitzer altered the corporate regulatory landscape in the 1990s when he relied on New York's Martin Act<sup>221</sup> to investigate conflicts of interest within Wall Street advisory firms.<sup>222</sup> Other states have joined New York in investigating corporate misconduct and opining on corporate governance matters.<sup>223</sup>

Like the SEC, the SAG can impose penalties and remedial obligations that fall along various points of the retribution-restraint spectrum. Unlike the SEC, the SAG is not nearly as circumscribed in its use of retributive penalties and rhetoric. Although nearly all of the New York Attorney General's securities-

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Effect Real Results (Jan. 10, 2009), available at <http://www.sec.gov/news/speech/2009/spch011009laa.htm>.

<sup>220</sup> See Douglas Branson, *Trekking Toward Über Regulation: Prospects for Meaningful Change at SEC Enforcement?*, 71 U. PITT. L. REV. 545, 561-64 (2010) (cataloguing a number of securities and corporate governance scandals whose investigations were spearheaded by SAGs and not the SEC); Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 886 (2007) (describing how SAGs have "used litigation to become a regulatory force at the national level").

<sup>221</sup> The Martin Act provides both civil and criminal penalties for, *inter alia*, fraud, deception, omission, false pretenses, or false statements used to induce or promote the purchase or sale of securities within or from the state of New York. N.Y. GEN. BUS. LAW § 352-c (McKinney 1996). For an analysis of the ways in which the Martin Act exceeds the scope of the federal securities laws (and therefore favors the New York Attorney General with greater leverage), see Kulbir Walha & Edward Filusch, *Current Developments, Eliot Spitzer: A Crusader Against Corporate Malfeasance or a Politically Ambitious Spotlight Hound? A Case Study of Eliot Spitzer and Marsh & McLennan*, 18 GEO. J. LEGAL ETHICS 1111, 1116 (2005).

<sup>222</sup> For a discussion of the New York Attorney General's securities enforcement record under Eliot Spitzer's leadership, see Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 952 (2005).

<sup>223</sup> For a survey of state offices and their stance toward securities fraud and similar violations, see Lori Martin, David Zetlin-Jones & Kimberly Chehardy, *The Investment Management Institute: Enforcement Trends and Themes*, 1802 PLI/CORP 333, 341-42 (2010).

related investigations have ended in global structured settlements,<sup>224</sup> the office still may easily convert a deserving case into a criminal prosecution, and its leaders have not hesitated to emphasize the blameworthiness of the industry and corporate entities involved.<sup>225</sup>

Also unlike the SEC, the SAG combines criminal and civil authority under one umbrella, which offers greater leverage, greater investigative power, and greater ability to secure – and spin – a positive outcome. Moreover, whereas the SEC is a single-issue agency, beholden to Congress for funding, the SAG is a multi-purpose agency and therefore potentially more difficult to control in terms of state budgets.<sup>226</sup> Finally, unlike the SEC, whose commissioners are appointed by the President and confirmed by Congress, the SAG is a popularly elected official who enjoys a substantial measure of independence from the state governor's office as well as the state legislature.<sup>227</sup> The SAG's political incentives therefore support a more aggressive, if also publicity-seeking, agenda.

### C. *Corporate Punishment and Moral Outrage*

As the foregoing discussion demonstrates, corporate governance is made up of two very different worlds. The world described in section A is one with which corporate scholars and practitioners are intimately familiar. It is also one characterized by fragmentation and criticism.

These critiques, however, tend to miss an equally important but different world, whose leaders gain strength from retributive motivations and what psychologists often refer to as moral outrage.<sup>228</sup> This is the world that has

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<sup>224</sup> See Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM, *supra* note 19, at 182-85.

<sup>225</sup> See, e.g., Statement of Attorney General Andrew Cuomo Relating to Bank of America and Merrill Lynch, Office of the Attorney General, Media Center (Aug. 3, 2009), available at [http://www.ag.ny.gov/media\\_center/2009/aug/aug3a\\_09.html](http://www.ag.ny.gov/media_center/2009/aug/aug3a_09.html) (describing the timing and disclosure of Bank of America's and Merrill Lynch's 2009 bonuses as a "surprising fit of corporate irresponsibility").

<sup>226</sup> Daniel Richman has observed that Congress can more easily influence enforcement policy through funding (for better or worse) when the relevant agency is responsible for a small portfolio of issues. Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 793-99 (1999).

<sup>227</sup> For a recent analysis of the political power of state attorneys general, see Margaret Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011) ("[A]ttorneys general in most states are independent from the state legislature and governor, representing different constituencies.").

<sup>228</sup> I do not mean to ignore corporate punishers' outputs, because their settlements often do include structural reforms that prosecutors and regulators justify in utilitarian terms such as deterring wrongdoing and improving capital markets. See Brandon Garrett, *Structural Reform Prosecutions*, 93 VA. L. REV. 853, 863-64 (2007). Nevertheless, corporate punishers draw power not from their reformatory goals but rather from their embrace of the public's retributive motivations.

become increasingly visible to the general public, particularly in the aftermath of various scandals and crises.<sup>229</sup>

To the extent retributive motivation is tied up in moral outrage, the gap between these worlds may be quite understandable. In prior decades, corporate wrongdoing, particularly the type of wrongdoing classified as “white collar crime,” received little response from prosecutors, legislators, and judges.<sup>230</sup> Over the past several decades, however, those attitudes have changed considerably.<sup>231</sup> In the wake of the corporate fraud scandals that began the new century, the federal government swiftly and noisily prosecuted a number of corporate chieftains<sup>232</sup> and increased criminal sanctions for corporate-related frauds.<sup>233</sup> Even before then, sanctions for corporate crime had steadily risen under the United States Sentencing Guidelines.<sup>234</sup>

If public actors have changed their tune about corporate crime, then this change appears to be synchronous with society’s attitudes.<sup>235</sup> Few members of the public protested Bernard Madoff’s term of 150 years’ imprisonment, the type of sanction one would expect for a serial killer or violent gang leader.<sup>236</sup>

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<sup>229</sup> Jonathan Macey attributes this power to a number of political and structural factors that accompany the modern administrative state. See Macey, *supra* note 20, at 2418-19 (explaining how executive branch power has enabled the SEC to become the locus of “corporate law enforcement” for civil litigation and has also empowered the SAGs and DOJ in terms of corporate criminal enforcement).

<sup>230</sup> See, e.g., Stuart Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501, 514-16 (2004); cf. Braithwaite, *supra* note 4, at 14 (arguing that “[j]ust deserts thinking . . . had almost no impact on business regulation” in the 1970s among punishment theorists).

<sup>231</sup> See, e.g., Cullen, Fisher & Applegate, *supra* note 97, at 32-33 (citing studies demonstrating “changed public attitudes and increased public support for using the criminal law to sanction white-collar offenders”); Maurice Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 500-01 (discussing studies documenting change in attitudes toward white collar crime and antitrust offenses).

<sup>232</sup> Donald Langevoort observes that the government did the same with Ivan Boesky and others in the wake of the junk bond and savings and loan crisis. See Donald Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1620 (2006).

<sup>233</sup> See James Fanto, *Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation*, 58 FLA. L. REV. 859, 860-61 (2006) (“[The] regulation of public firm management, as it has occurred, is too oriented towards the punishment of directors and officers.”).

<sup>234</sup> See Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT’G REP. 167, 167 (2008).

<sup>235</sup> See Francis Cullen, Jennifer Hartman & Cheryl Lero Jonson, *Bad Guys: Why the Public Supports Punishing White-Collar Offenders*, 51 CRIM. L. SOC. CHANGE 31, 33 (2008).

<sup>236</sup> *Madoff Sentence Cheered, Seen as “Strong” Message*, CNBC (June 29, 2009), [http://www.cnbc.com/id/31610169/Madoff\\_Sentence\\_Cheered\\_Seen\\_as\\_Strong\\_Message](http://www.cnbc.com/id/31610169/Madoff_Sentence_Cheered_Seen_as_Strong_Message).

To the contrary, the general public has evinced a growing need to hold corporate managers accountable for the harms they have caused, and the accountability they seek differs from the sanitized account of cost internalization that law and economic scholars supply.<sup>237</sup> Whether this development stems from a growing distrust of large, powerful organizations, as Donald Langevoort has suggested,<sup>238</sup> or from a more venal need to protect “our most treasured possessions [retirement accounts],” as Christine Hurt has observed, is largely beside the point.<sup>239</sup> When corporate crises and losses occur, demands for punishment follow. Public actors, in turn, hear those demands and respond accordingly.<sup>240</sup>

Given the foregoing, we can safely assume that punishment-oriented institutions will continue to play an important role in shaping the corporate governance landscape. Accordingly, it is a mistake for scholars to ignore retributive motivations when considering how to design the optimal corporate governance regulatory regime. It is an even greater mistake to assume that corporate regulators will remain non-punitive when moral outrage becomes ascendant. With that understanding, I now proceed to the normative question: Is choosing punishment good for society?

### III. THE NORMATIVE IMPLICATIONS OF CHOOSING PUNISHMENT

In the preceding Parts, I explained why public actors might choose punishment over alternate forms of intervention and how that choice manifested itself in the corporate governance context. In this Part, I sketch the theoretical benefits and drawbacks of choosing punishment, with the strong caveat that future empirical and theoretical inquiry is warranted. Nevertheless, the discussion concludes on a decidedly negative note: Like birthday cake, punishment is extremely satisfying in the short term but not particularly healthy over the long term.

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<sup>237</sup> See, e.g., Langevoort, *supra* note 135, at 902. Professor Ribstein attributes some of this outrage to the ways in which corporate business is portrayed in popular culture. See Larry Ribstein, *How Movies Created the Financial Crisis*, 2009 MICH. ST. L. REV. 1171, 1175-77; Larry Ribstein, *Imagining Wall Street*, 1 VA. L. & BUS. REV. 165, 166 (2006).

<sup>238</sup> Donald Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law's "Duty of Care as Responsibility for Systems,"* 31 J. CORP. L. 949, 965 (2006) (commenting that the public increasingly has sought greater transparency and oversight of institutions “that have significant political, economic, or social power, whether public or private”).

<sup>239</sup> Christine Hurt, *Of Breaches of the Peace, Home Invasions, and Securities Fraud*, 44 AM. CRIM. L. REV. 1365, 1368 (2007) (“These new penalties reflect our society's fears for our retirement castles and peaceful capital marketplaces.”).

<sup>240</sup> See, e.g., Joan MacLeod Heminway, *Hell Hath No Fury like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud Under Rule 10b-5*, 2 J. BUS. & TECH. L. 3, 7 (2007).

The first half of this Part explains punishment's theoretical value as a backstop for regulation. By increasing the costs of noncompliance and expanding resources for detection of noncompliance, punishment can help restrain corporate opportunism.<sup>241</sup> Moreover, it reinforces governance norms by coordinating society's response to instances of deliberate wrongdoing and by assuring shareholders and other "good corporate citizens" that their trust in others is well-founded. Finally, punishment offers public actors a means to overcome regulatory pathologies such as capture and bureaucratic inertia. The public admired Eliot Spitzer because he seemed to have the ability to rise above regulatory paralysis when other agencies seemed unable or unwilling to do so.<sup>242</sup> In a world where regulation is weak and regulators are either captured or tied up in red tape, retributive punishment may offer public actors a powerful yet flexible alternative.<sup>243</sup>

The story is not all positive, however. Because punishment focuses on the moral aspects of corporate misconduct, it has a tendency to transform complex gray-area questions into black-and-white parables. It encourages us to look backward, not forward.<sup>244</sup> And, worst of all, it has the tendency to block regulatory innovation and creativity because it attracts talent away from the tasks of governing, managing, and improving institutions and corporate policy, and it instead places that talent squarely in costly, time-consuming adversarial tournaments.<sup>245</sup>

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<sup>241</sup> Erickson, *supra* note 187, at 51 ("Corporate managers, like burglars or tax evaders, are less likely to engage in misconduct if they know that this misconduct could expose them to legal liability.").

<sup>242</sup> See, e.g., Brandon Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM, *supra* note 19, at 165-67.

<sup>243</sup> John Braithwaite's account of Rudolph Giuliani suggests the benefits of a so-called hybrid approach that incorporates both regulatory and retributive responses to wrongdoing. See Braithwaite, *supra* note 4, at 23.

<sup>244</sup> On the structural aspects of corporate punishment, see Garrett, *supra* note 228, at 914 (discussing forward looking reformist aspects of Deferred and Non Prosecution Agreements). Despite these limited aspirations to regulate industry through structural settlements, corporate punishment institutions have been primarily reactive. They promulgate reforms under an adjudicative umbrella, largely in response to scandals and violations of law.

<sup>245</sup> Charles Sabel and William Simon have been some of the strongest proponents of "experimentalist" regulation. See Sabel & Simon, *supra* note 112, at 56. Separately, Simon has criticized the potential for adversarial systems to drive out more experimental governance approaches. See William Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 168-69 (2004).

### A. *How Punishment Reinforces Non-Punitive Regulation*

#### 1. Deterrence

Wrongdoers are deterred when the costs of their conduct, multiplied by the probability of their punishment, outweigh the net expected benefits of such conduct.<sup>246</sup> The great debates in deterrence revolve around increasing sanctions or the probability of detection (the latter is often more effective), imposing monetary or non-monetary sanctions, and determining the implications of boundedly rational.<sup>247</sup> Deterrence theory, however, does not address the extent to which the motivation to punish or regulate affects enforcement outcomes. This section attempts to fill that gap.

To some degree, punishment reinforces regulatory deterrence. Even if motivated by retributive aims, a punitive sanction increases the costs of ignoring non-punitive regulatory institutions.<sup>248</sup> If you ignore fiduciary duties too often, fail to disclose information required by the SEC, and intentionally defraud shareholders, sooner or later you will feel the wrath of society. More concretely, you will lose your house, your friends and family, and your ability to roam freely.<sup>249</sup> That wrath – and those dire consequences – should force even myopic corporate actors to increase their adherence to institutional norms and formal laws and regulations.<sup>250</sup>

Like regulation, punishment deters when threats of punishment are credible.<sup>251</sup> There may be greater reason to believe, however, that punishers will follow through on their threats and thereby generate credibility with the public. To the extent punishers derive pleasure from condemning others,

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<sup>246</sup> See Becker, *supra* note 35, at 180; Posner, *supra* note 113, at 1206.

<sup>247</sup> See generally Becker, *supra* note 35; Polinsky & Shavell, *supra* note 39. On bounded rationality, see Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL ECONOMICS* 13, 14-15 (Cass R. Sunstein ed., 2000).

<sup>248</sup> For law and economics scholars, this is the sole justification for punitive fines, imprisonment, and other government sanctions. See, e.g., A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 882 (1998).

<sup>249</sup> Consider the evocative title of Donald Langevoort's article on how the SEC should use equitable remedies to punish officers who engage in corporate fraud: Donald Langevoort, *On Leaving Corporate Executives "Naked, Homeless and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate over Entity Versus Individual Liability*, 42 WAKE FOREST L. REV. 627 (2007). Langevoort was quoting SEC Chairman Richard Breeden. See *id.* at 627.

<sup>250</sup> For arguments that shareholder litigation could perform this normative task, see Rock, *supra* note 158, at 1089, and James Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3, 5 (1999). Whatever the strength of these claims, it seems unassailable that the stronger normative "bite" resides with the public institutions that impose punishment.

<sup>251</sup> See, e.g., Daniel Nagin, *Criminal Deterrence at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 6-8 (1998).

punishment offers a robust response to the regulatory problem often referred to as “capture.”<sup>252</sup> Capture occurs when well-financed and well-organized entities regulated successfully lobby agencies for increasingly easier rules and lighter enforcement; underlying such success is the perceived threat that the legislature will reduce the agency’s resources or narrow its jurisdiction.<sup>253</sup> When capture becomes prevalent, deterrence declines; regulated entities and managers need not fear regulators who decline to enforce statutes and regulations.<sup>254</sup>

Punishment may provide a solution to the capture problem, insofar as it provides a psychological benefit to public actors. That is, to the extent punishment attracts public actors who have a taste for condemning others, punishment may offer benefits that even well-funded regulated entities cannot match. Eliot Spitzer could not be “bought off” by Wall Street in part because no financial institution could match his zeal or desire to win. Whatever Spitzer’s drawbacks, no one would have described him as captured by Wall Street.<sup>255</sup>

Punishment also may improve deterrence insofar as it creates positive spillover effects for regulators, either by improving public support for regulatory agencies or by forcing regulatory agencies to compete by increasing their own enforcement efforts.<sup>256</sup> At the case level, punishers may be able to provide regulators with additional information and resources, which in turn improves regulators’ abilities to devise new laws and regulations. At the policy level, punishment may induce a type of public support for government officials that transfers over to regulators, either by changing the social meaning of compliance or altering public attitudes about public agencies and actors. If the public feels good about the SEC’s Enforcement Division, such goodwill may extend to the rest of the agency.

## 2. Generating and Reinforcing Norms

Punishment affects how we perceive certain conduct, which in turn alters the type and degree of resources necessary to restrain such conduct.<sup>257</sup> A jail

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<sup>252</sup> On the subject of altruistic punishment, see Fehr & Gächter, *supra* note 62, at 137 (detecting instances in which individuals punish others, even at cost to themselves); *see also* Dhammika Dharmapala, Nuno Garoupa & Richard McAdams, *Punitive Police? Agency Costs, Law Enforcement and Criminal Procedure* (Mar. 2011) (unpublished manuscript) (on file with author) (discussing altruistic punishment literature).

<sup>253</sup> *See* CROLEY, *supra* note 72, at 17-18.

<sup>254</sup> For a theoretical account of how congressional preferences might affect a specific agency such as the SEC, *see* Macey, *supra* note 222, at 952-56.

<sup>255</sup> Spitzer was not alone. Other SAGs have pursued corporate defendants aggressively. *See* Coffee & Sale, *supra* note 211, at 764-65.

<sup>256</sup> On the benefits of regulatory competition, *see id.* at 760.

<sup>257</sup> Norms can be either internally held beliefs or reputational constraints imposed by others. *See* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of*

term transforms aggressive or shady bargaining into morally reprehensible conduct.<sup>258</sup>

Most corporate chieftains would prefer to avoid fines. But all are horrified by the thought of jail and the prospect of being publicly labeled a criminal. Punishment thus has the potential<sup>259</sup> to improve social norms within corporate firms, to increase corporate officers' willingness to self-regulate, and to eliminate conduct that arguably undermines efficient markets.<sup>260</sup>

Another reason punishment improves compliance is that it reassures the employees and officers who are inclined *not* to break rules that we will hold accountable those who do.<sup>261</sup> Punishment signals to law-abiding employees that the trust they have placed in others is reasonable and likely to be reciprocated.<sup>262</sup> Trust improves corporate governance, since stakeholders are more likely to cooperate with and refrain from second-guessing each other, and it contributes to capital liquidity.<sup>263</sup>

#### B. *When Punishment Hurts*

Despite its benefits, punishment can undermine regulatory institutions and practices. I sketch some of its drawbacks below.

##### 1. Puffery and Overdeterrence

Punishment may be problematic insofar as it undermines optimal deterrence in the corporate context, amounting to little more than puffery in some instances and overdeterrence in others. First, punishment may amount to little more than soothing words, particularly when words appear more cost effective

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*Internalized Norms*, 86 VA. L. REV. 1577, 1582-84 (2000) (explaining the difference between "intrinsic" norms and "instrumental norms" that confer an "advantage gained from having the reputation of being a good citizen"); Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376 (1997).

<sup>258</sup> Feinberg, *supra* note 153, at 27-28.

<sup>259</sup> For drawbacks of creating a heightened corporate police presence, see Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 580-81 (2008).

<sup>260</sup> See James Fanto, *A Social Defense of Sarbanes-Oxley*, 52 N.Y.L. SCH. L. REV. 517, 518-19 (2007) (defending Sarbanes-Oxley as a means of communicating social norms). Like many statutes, Sarbanes-Oxley represented a mix of both punishment and regulation. Hurt, *supra* note 19, at 373-75.

<sup>261</sup> See Kahan, *supra* note 218, at 350.

<sup>262</sup> Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1162 (2006) ("[A]dherence to norms of responsible behavior depends in part on the perception that others are also adhering to those norms.").

<sup>263</sup> See also *id.* at 1163-64 (arguing that punishment can increase "the willingness of individuals to enter into . . . relationships that inhere in family, work, church, and other centers of community life").



and more politically salient than the real thing.<sup>264</sup> For example, William Stuntz's seminal article on overcriminalization, *The Pathological Politics of Criminal Law*, suggested that many criminal statutes were more symbolic than anything else.<sup>265</sup> In the corporate governance context, critics often cite celebrity prosecutions paired with relatively weak enforcement results as evidence that the government's punitive bark is far worse than its bite.<sup>266</sup>

That punishment may be little more than talk is problematic for a number of reasons. It may create a false sense of security among potential victims who find credible (at least initially) the threat of punishment. In the corporate governance context, it may further provide regulated entities with talking points in favor of less regulation, thereby creating a dangerous vacuum in which neither regulation *nor* punishment restrains opportunism and undesirable behavior.

At the other end of the spectrum, punishment may be far more than talk – so much so that it distracts attention and whisks resources away from burgeoning problems,<sup>267</sup> triggers overdeterrence and risk aversion by regulated entities; fuels costly efforts to avoid detection and cover up mistakes, and perversely discourages corporate entities from monitoring and reporting wrongdoing to authorities.<sup>268</sup> All of these “horribles” can come about when public actors focus only on the public's retributive motivations without due regard for the complex manner in which harsh sanctions affect regulated entities and their employees.

The divergence between retributive motivation and optimal deterrence is not obvious at first. At least in theory, retribution's core claim – that offenders should be punished proportionally and in relation to their culpability – bears

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<sup>264</sup> I thank Richard Bierschbach for raising this point.

<sup>265</sup> See Daniel Richman & William Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecutions*, 105 COLUM. L. REV. 583, 610 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001).

<sup>266</sup> See, e.g., Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds – The Center Doesn't*, 117 YALE L.J. 1374, 1383 (2008) (criticizing the Bush Administration's Corporate Fraud Task Force as little more than a “branding device” to take credit for prosecutions that local United States Attorneys were investigating and prosecuting).

<sup>267</sup> Pritchard, *supra* note 27, at 1078 (“The accounting scandal du jour provides an opportunity to fulminate, hold a series of show trials called ‘legislative hearings’ to rake some greedy businessmen over the coals and then enact legislation to protect ‘investor confidence.’”).

<sup>268</sup> For example, we may punish actors in ways that undermine deterrence, such as occurs when punishers fail to accord adequate credit to organizations that monitor, identify, and self-report wrongdoing to authorities. See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON CRIMINAL LAW (Keith Hylton & Alon Harel, eds.) (forthcoming) (criticizing the federal Organizational Sentencing Guidelines as providing inadequate incentives for monitoring and reporting).

some resemblance to the concept of “marginal deterrence” in economics.<sup>269</sup> Under either framework, the pickpocket receives a lesser sentence than the armed robber, and the armed robber receives a lesser sentence than the murderer-rapist.<sup>270</sup>

Beyond these happy coincidences, the two approaches diverge. The amount of culpability someone bears for a given act may differ in translation from the specific sanction necessary to internalize and optimally deter that same act.<sup>271</sup> The psychological characteristics of punishment, in turn, suggest that the divergence may result in harsher punishments than are necessary to secure deterrence.<sup>272</sup>

In sum, we are left with two opposing but equally vexatious problems. Sometimes punishment provides little additional deterrence (because it is cheap talk), and sometimes it induces far more deterrence than society should prefer in an optimal world. In either instance, our retributive motivations undermine the regulatory outcomes we claim to prefer.

## 2. Pretext

Punishment also can serve as a pretext for other goals, such as distributive justice or expressions of populist anger.<sup>273</sup> Punishment-as-pretext not only distorts social welfare, but it also undermines democratic discourse.<sup>274</sup>

In *The Secret Ambition of Deterrence*, Dan Kahan contended that proponents of criminal law often used deterrence arguments as a pretext for what Kahan labeled “illiberal” attitudes.<sup>275</sup> The punishers were unwilling to admit that they liked or disliked a certain group, so they instead adopted

<sup>269</sup> See A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, in 3 *ENCYCLOPEDIA OF LAW AND ECONOMICS: CRIMINAL LAW AND ECONOMICS*, *supra* note 39, at 34-36.

<sup>270</sup> See *id.*

<sup>271</sup> Sunstein, Kahneman, Schkade & Ritov, *supra* note 44, at 1180 (“[T]here is compelling evidence that the popular conception of justice is more concerned with issues of retribution than with issues of deterrence.”); *cf.* KAPLOW & SHAVELL, *supra* note 87, at 37-38 (observing that efficiency- and justice-based goals often diverge).

<sup>272</sup> See *supra* Part I.A.

<sup>273</sup> E.g., Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 32-33 (2010).

<sup>274</sup> Richman and Stuntz lay this out quite nicely in their criticism of pretextual prosecutions:

There is a strong social interest in non-pretextual prosecution, and that interest is much more important than the “fairness to defendants” argument that has preoccupied the literature on this subject. Criminal charges are not only a means of identifying and punishing criminal conduct. They are also a means by which prosecutors send signals to their superiors, including the voters to whom they are ultimately responsible.

Richman & Stuntz, *supra* note 265, at 585.

<sup>275</sup> See Kahan, *supra* note 45, at 415.

technical deterrence language to mask their true intentions.<sup>276</sup> Kahan's point was that we would be a more transparent, deliberative democracy if we forced punishers to throw off their technical cloak of deterrence-speak and debate their true intentions.<sup>277</sup>

"Desert" can perform a function similar to deterrence. Just as we can define deterrence in increasingly elastic and ultimately meaningless terms, so too can we employ "retributive desert" claims on mainly populist grounds.<sup>278</sup> Punishment-oriented institutions then can take advantage of populist sentiment to advance personal ambitions, institutional interests, or redistributive ideologies.<sup>279</sup>

For example, SAGs and other political actors have been quite happy to invoke notions of desert in their treatment of corporate actors such as Goldman Sachs, Bank of America, and AIG. Even if some of the punishment arises from identifiable wrongful conduct, some has also been fueled by the populist meme that financial executives became very rich during the economic boom and will likely stay that way.<sup>280</sup> Arguments against Goldman's shorting the market for collateralized debt obligations are often paired with invocations of the bank's billion-dollar bonus pool for 2009.<sup>281</sup> Bank of America's alleged defrauding of its investors came to the public's attention alongside its former CEO's unfortunate decision to spend a million dollars renovating his conference room and bathroom.<sup>282</sup> Finally, the New York Attorney General's threat to disclose the names of the employees in AIG's financial group who

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<sup>276</sup> *Id.* at 489-90.

<sup>277</sup> *See id.* at 490-91.

<sup>278</sup> Gruber, *supra* note 273, at 40; Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1295 (2006).

<sup>279</sup> Thomas W. Joo, *Legislation and Legitimation: Congress and Insider Trading in the 1980s*, 82 IND. L.J. 575, 577 (2007) (arguing that 1980s insider trading legislation represented Congress's attempt to establish legitimacy and power as an institution "while distancing Washington from Wall Street"). Donald Langevoort's commentary on Sarbanes-Oxley is similar: "The regulatory reaction to Enron, for example, might have been far less about securities regulation per se than public anger that associated the well-publicized social and economic losses to accounts of arrogance and greed." Langevoort, *supra* note 232, at 1612.

<sup>280</sup> Similar narratives pervade the discussion of insider trading prosecutions:

When [insider trading prosecutions] involve the rich and famous like Ivan Boesky and Michael Millken, they tap into images of power, greed, and hubris . . . . Like any good mythological story, these proceedings trigger richly complex public feelings about fortune and responsibility, and allow the government to appear as *deus ex machina* to pronounce the just desserts.

Donald Langevoort, *Re-reading Cady, Roberts: The Ideology and Practice of Insider Trading*, 99 COLUM. L. REV. 1319, 1329-30 (1999).

<sup>281</sup> *See, e.g.*, Joe Nocera, *Short Memories at Goldman*, N.Y. TIMES, Oct. 24, 2009, at B1.

<sup>282</sup> Peter Edmonston, *Thain Says He'll Repay Remodeling Costs*, N.Y. TIMES, Jan. 27, 2009, at B5.

received agreed-upon contractual bonuses seemed to have far less to do with identifiable misconduct than with the SAG's willingness to stoke class-based anger about uneven distributions of wealth.<sup>283</sup>

The point is not to question distributive justice arguments or more practical concerns with large disparities in wealth.<sup>284</sup> There may well be a good case for increasing tax rates or eliminating corporate subsidies. These arguments, however, should be debated out in the open and not under the blurry cover of punishment.

### 3. Institutional Competence

Punishment is problematic insofar as it matches corporate governance reform with government actors who, because of their temperament, knowledge base, and institutional interests, may not be best suited to devise and promote such reform.<sup>285</sup> That is, punishment may have a tendency to mismatch punishers with social problems that are better solved by true regulators.

Consider the paradigmatic federal prosecutor's office. Certain characteristics of the office reduce its actors' abilities to perceive or publicly acknowledge shades of gray. Generalist prosecutors lack the training or incentive to grasp the difference between systemic and ordinary risk, to mediate fluid and conflicting constituency interests, and to react quickly to unfolding and unexpected events.<sup>286</sup> These are not merely personal shortcomings; they are institutional imperatives. The prosecutor's office organizes itself around the related goals of identifying and reducing information's complexity in order to craft persuasive narratives for judges, juries, and defense attorneys.<sup>287</sup> These crude, reductive stories, in turn,

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<sup>283</sup> Michael J. de la Merced, *Cuomo Seeks A.I.G. Bonus Information*, N.Y. TIMES, Mar. 16, 2009, <http://dealbook.blogs.nytimes.com/2009/03/16/cuomo-seeks-aig-bonus-information>; see also Louise Story, *Cuomo Wins Ruling to Name Merrill Bonus Recipients*, N.Y. TIMES, Mar. 19, 2009, <http://www.nytimes.com/2009/03/19/business/19cuomo.html> (“[Cuomo] also vowed to identify publicly the employees who had received bonuses at the American International Group.”).

<sup>284</sup> See, e.g., Robert Frank, *Income Inequality: Too Big to Ignore*, N.Y. TIMES, Oct. 17, 2010, at BU5. (arguing that economists should join moral philosophers in worrying about income inequality in the United States).

<sup>285</sup> See Stephenson, *supra* note 102, at 1423-24 & n.2. For specific applications in the corporate governance context, see Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM, *supra* note 19, at 62-63 (“Prosecutors rarely have sufficient experience working in any business, much less adequate industry-specific expertise, to make these decisions reliably.”).

<sup>286</sup> *Id.* at 63.

<sup>287</sup> According to cognitive psychologists, jurors do not weigh evidence individually but rather construct “story models” that are most consistent with the evidence presented to them. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519 (1991). “[P]eople create coherent representations

persuade juries to adjudge defendants guilty and defendants to plead guilty in the shadow of likely convictions; all of this meets the public's need for closure and certainty.<sup>288</sup>

While promoting closure, punishment also generates a polarized adversarial system, which causes two second-order effects.<sup>289</sup> First, the personnel that populate punitive institutions are drawn to them because they prefer high pressure, confrontational tournaments.<sup>290</sup> Second, over time, those who work in punitive institutions eventually perceive complex corporate governance issues in oversimplified black-and-white terms.

What does this mean for corporate governance? If, over time, the prosecutors and enforcement attorneys view corporate officers in purely negative terms, the policies they espouse may have little to do with improving corporate governance.<sup>291</sup> Corporate managers may come to view state and federal prosecutors as enemies rather than as public regulators with a legitimate interest in mediating stakeholder conflicts and reducing agency costs.<sup>292</sup> Finally, an overly punitive regime may cause personnel changes *within* corporate firms. That is, corporations seeking to curry favor with punitive institutions may themselves become more punitive internally without necessarily improving corporate governance.<sup>293</sup>

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from the evidence in the form of explanations, and these representations, rather than the raw evidence, determine [the jurors'] decisions." Michael P. Weinstock & Robin A. Flaton, *Evidence Coverage and Argument Styles: Cognitive Factors in a Juror's Verdict Choice*, 17 J. BEHAV. DECISION MAKING 191, 192 (2004); see also REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 23 (1983).

<sup>288</sup> Tyler, *supra* note 57, at 1064-65.

<sup>289</sup> When repeat players are present, however, polarization may decrease. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006) (examining the "gulf" between "insiders" and "outsiders" within the criminal justice system and not between prosecution and defense).

<sup>290</sup> To that end, punishers may not be very different from their corporate-officer prey. See Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 288 (2004) (discussing characteristics – aggression, desire to win – of successful corporate executives and how such characteristics affect efforts to combat fraud). Recall, confrontation is itself a benefit insofar as it insulates against capture.

<sup>291</sup> In contrast, consider James McConvill's positive approach to spurring governance reform. See James A. McConvill, *Positive Corporate Governance*, 6 J. BUS. & SEC. L. 51, 53 (2006).

<sup>292</sup> Tom Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OH. ST. J. CRIM. L. 307, 310 (2009) ("[B]ecause people associate law and legal authorities with punishment, the instrumental relationship between the public and the legal system is antagonistic. People become more likely to resist and avoid legal authorities and less likely to cooperate with them."); see also TOM TYLER, *WHY PEOPLE OBEY THE LAW* 26 (2006).

<sup>293</sup> Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 985-90 (2009).

#### 4. Crowding Out and Distorting Regulation

The foregoing subsections have been leading up to the final problem discussed here, which is that punishment may distort and crowd out both traditional *ex ante* regulatory initiatives,<sup>294</sup> as well as more interactive, experimental forms of regulation often referred to as New Governance.<sup>295</sup>

Here again, the argument may seem surprising: over the prior decade alone, Congress has directed the SEC to enact substantial governance reforms under both Sarbanes-Oxley and Dodd-Frank.<sup>296</sup> Most scholarly observers contend, however, that this burst of lawmaking is largely cyclical, whereby regulation peaks in the wake of economic busts and scandals: “Scandal driven reform followed by political neglect has been a recurring pattern in the securities market.”<sup>297</sup>

The choosing punishment dynamic enriches the regulatory cyclicity debate that has been the center of corporate law scholarship.<sup>298</sup> It suggests additional questions that move beyond the usual concerns with hastily enacted regulation. For example: Does deregulation set the stage for an increase in punishment, as opposed to a later increase in regulation? Does society’s preference for

<sup>294</sup> Traditional approaches include command-and-control rules, as well as more market- or incentive-based regulatory systems. See Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1173-74 (1998) (delineating three regulatory approaches, including command and control, outcome-based standards, and incentive-based systems).

<sup>295</sup> New Governance theory encompasses a number of approaches, whereby “[t]he primary goal . . . is to set into motion and then sustain a style of governance that promotes continuous learning and improvement in a middle ground between top-down command-and-control methods of traditional regulation and the undisciplined free-for-all of deregulation.” Katherine Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 676-77.

<sup>296</sup> Cf. Brown, *supra* note 16, at 678 (“In one obvious sense, the familiar and enduring disfavor of federal regulatory intervention has not prevailed – we have a lot of federal regulation. Congress, the executive, and agencies routinely respond to new crises and attendant harms with revised or expanded regulatory strategies.”).

<sup>297</sup> Choi & Pritchard, *supra* note 60, at 39; see also Bainbridge, *supra* note 61, at 1782; Stuart Banner, *What Causes New Securities Regulation? 300 Years of Evidence*, 75 WASH. U. L.Q. 849, 850 (1997); Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 CONN. L. REV. 393, 396 (2006) (describing the “perverse pattern” of deregulation followed by investor bubbles, followed by busts, followed by re-regulation); Pritchard, *supra* note 27, at 1078 (describing the SEC’s overreaction to market corrections); Robert Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 776 (2006).

<sup>298</sup> In addition to the sources cited in note 297, *supra*, compare Roberta Romano, *Regulating in the Dark* 2-3 (December 18, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1974148&](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974148&), with John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. (forthcoming 2012).

punishment contribute to regulation's cyclicalities or perceived weaknesses?<sup>299</sup> Would regulation's cyclicalities recede were we to find some way to tame our "tastes" for punishment? Moreover, does the expansion of a regulatory agency's enabling statute represent a strengthening of true *regulation*, or is at least some of the expansion attributable to enforcement-driven *punishment*? And finally, is the expansion in regulatory power evidence of a true return to regulation or of the public's desire for punishment?

All of the preceding questions deserve greater investigation by social planners and academics alike. There may be no alternative to punishing those who commit murder or rape (although even here, some will disagree). But there clearly are alternatives to marshaling vast resources in order to condemn corporate misconduct and exact some form of retribution. In lieu of punishing corporate misconduct, we can *govern* it instead.<sup>300</sup> We can treat misconduct as a chronic condition rather than an acute disease that must be eradicated. This type of approach, in turn, would clear a path for more regulation (and more types of regulation) and decidedly less punishment. When we rely excessively on punishment regimes, however, we reduce the resources available for testing and improving more experimental governance approaches. That is, when we rely excessively on punishment, we reduce the efficacy of alternate tools that might improve corporate governance.

The choosing punishment dynamic therefore carries implications for the softer forms of regulation that scholars and practitioners have embraced over the preceding two decades.<sup>301</sup> Unlike command-and-control style regulation, a governance model envisions a more experimental, informal atmosphere in which government agents, stakeholders, and corporate actors exchange information and gradually identify and adjust to governance challenges.<sup>302</sup>

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<sup>299</sup> See Brown, *supra* note 16, at 669.

<sup>300</sup> See, e.g., David Hess & Cristie Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 310 (2008).

<sup>301</sup> See, e.g., AYERS & BRAITHWAITE, *supra* note 33, at 4; Michael C. Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 270 (1998); Jody Freeman & Daniel Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 860 (2005); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 260 (2001); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343-44 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1623 (2001); Jason Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 820 (2008) (reviewing LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006)).

<sup>302</sup> For a description of New Governance regimes, see Baer, *supra* note 293, at 1000-05; Kenneth Bamberger & Dierdre Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 308-09 (2011); Cameron Holley & Neil Gunningham, *Natural Resources, New Governance and Legal Regulation: When Does Collaboration Work?*, 24 NEW ZEALAND L. REV. 309, 316-30 (2011) (examining the limited successes of two New

Regulators retain the ability to punish defectors, but the sanction is to be used sparingly and increase only gradually. According to proponents, the “responsive” or “negotiated” regulatory approach works because it encourages cooperation between government and private actors, reduces noncompliance among private actors, and reduces the government’s overall costs of enforcement.<sup>303</sup>

A substantial concern with this softer approach is that it may too easily devolve into deregulation.<sup>304</sup> For example, in the corporate governance context, Kim Krawiec has voiced the concern that officers and directors may erect cosmetic changes in their governance structure but otherwise continue to act in ways that are harmful to shareholders and society.<sup>305</sup> Professors Coffee and Sale mount an even stronger critique of self-regulatory systems, deriding them as one of the causes of the financial crisis.<sup>306</sup>

The choosing punishment dynamic suggests a different and opposing problem. When scandals occur and moral outrage explodes, ostensibly cooperative regimes can quickly morph into informal and opaque regimes by which government actors quickly impose and escalate punishment. This should not surprise us: when lapses occur, moral outrage is likely to push government actors to act on retributive motivations. Thus, New Governance can devolve into punishment as easily as it devolves into deregulation. Hybrid regulatory/punitive programs, in other words, can shed their regulatory cast rather quickly. This heralds a loss not only for proponents of New Governance but also for regulation more generally.

#### CONCLUSION

This Article theorizes retributive punishment as a preference embraced by public actors whenever moral outrage is present. Punishment’s psychology, plasticity, and public nature confer political advantages on public institutions that regulation does not provide. These advantages, in turn, help institutions compete for legal tools, money, and talent. Although this dynamic may be applied to other contexts, this Article investigates punishment’s effect on corporate-governance enforcement within several legal institutions.

Punishment offers a number of benefits for a society challenged by capture, inertia, and an ideological distrust of public regulation. At some point,

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Governance regimes in New Zealand through a case study).

<sup>303</sup> See AYERS & BRAITHWAITE, *supra* note 33, at 110-16 (identifying numerous benefits of “enforced” self-regulatory model, including economic efficiency).

<sup>304</sup> See, e.g., Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 358-59 (examining the claim that New Governance fuels deregulatory efforts); Kimberly Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003).

<sup>305</sup> Krawiec, *supra* note 304, at 491.

<sup>306</sup> See Coffee & Sale, *supra* note 211, at 717 (deriding the argument for self-regulation as “unpersuasive and highly ideological”).



however, punishment may crowd out and undermine more efficient and valuable forms of public intervention. How we identify and respond to that tipping point are difficult questions that merit further analysis. Nevertheless, the foregoing account demonstrates that it is naïve – and somewhat dangerous – to assume that robust and effective regulation follows automatically on the heels of scandal and recession. Scandals and economic crises may well spur public *action*, but it is not at all clear that they result in robust and lasting *regulation*. To the contrary, where moral outrage is high, crises and scandals may produce distracting sideshows and divert resources to agencies and divisions that have committed themselves to imposing moral condemnation but not to addressing complex problems. It all *looks* like regulation, but much of the action – and much of the motivation – rides on retributive punishment. Once the public's desire to condemn dissipates, punishment disappears and private action remains under-regulated and subject to the crises borne of market failure.

The study of punishment and its effect on regulation suggests several avenues of future study. For example, those who vigorously debate the finer details of how and when we should regulate corporate governance should enlarge their analysis to consider the effects of retributive motivation on public actors and institutions that impact corporate governance policy through enforcement actions and settlements. It is a mistake to think of the SAG, DOJ, or even the SEC's Enforcement Division as just another regulator in the arsenal of public and private institutions designed to reduce agency costs. These institutions act upon and embrace the public's retributive motivations. This, in turn, puts them in a better position to attract and maintain political and public support.

By the same token, criminal law scholars ought to reconsider the venerable project of restoring the dividing line between criminal and civil law. Criminal law may offer defendants greater procedural protections, but the value of those protections are easily overcome by the breadth of substantive law. Indeed, as a result of substantive law's breadth, those protections barely exist when corporate entities are the subject of criminal prosecutions. More importantly, the case-level emphasis on criminal versus civil law ignores the broader costs and benefits that accrue at the policy level. At this higher level of abstraction, an agency's retributive stances may be far more dispositive of public support than the formal "criminal" or "civil" label assigned to given statute.

Punishment has always served a core function of public life, and it always will. We are not about to cease securities fraud prosecutions, nor are we likely to ignore the public's desire to condemn corporate misconduct. For those who subscribe to the retributive justification for punishment, this is quite reasonable: corporate criminals *do* deserve punishment, and they often *have* escaped proportional punishment for the harm they have caused. But we should be more aware of the dynamics that cause just deserts claims to undermine the *regulatory* approaches that are most likely to be of value to a complex and fluid commercial society. For that very reason, we owe it to

ourselves to ask how punishment affects the people and institutions that shape and implement our laws. This Article starts us down that path.

