THE CONVENTIONAL PROBLEM WITH CORPORATE SENTENCING (AND ONE UNCONVENTIONAL SOLUTION)

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A recent wave of expressive accounts of corporate criminal law operate on the promise that corporate punishment can express a unique form of condemnation not capturable through civil enforcement. Unfortunately, the realities of corporate sentencing have thus far failed to make good on this expressive promise. Viewed in light of existing conventions that imbue meaning into our practices of punishment, corporate sentences rarely impose hard treatment in a manner or degree that these conventions seem to require. Accordingly, standard corporate sanctions turn out to be ill-suited to deliver—and, often, will likely undermine—the stigmatic punch upon which expressive defenses of corporate criminal law depend. A common response to this conventional problem with corporate sentencing has been to propose more, and harsher, corporate punishments. However, this approach overlooks the extent to which corporate punishment derives its stigmatic force from preexisting norms and conventions concerning individual punishment.

If trying to improve corporate punishment, then, expressivists might instead seek either to leverage or to dismantle the underlying conventions that give existing sanctions meaning. An example of the former strategy would be to revitalize long-neglected proposals for corporate shaming by adopting a criminal convention currently absent from the corporate space—namely, the pervasive,

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stigmatic application of epithets like "thief" or "felon." An example of the latter would be to join criminal justice reformers in targeting conventions that, in recent decades, have enabled increasingly draconian sentencing practices. On this view, dissolving corporate sentencing's conventional problem may represent a further, incidental benefit of systemic criminal justice reform.

Keywords: *corporate punishment, expressive theories of law, corporate criminal law, expressive function of punishment, criminal justice reform*

INTRODUCTION

For the past two decades, scholarship in corporate criminal law has been marked by an expressive turn.[1] Efforts to defend this longstanding (and equally long-maligned) institution have recently, and increasingly, appealed to expressive theories of law to help rationalize and justify the extension of criminal liability and punishment to business organizations.[2] Expressive theories of law—and, in particular, those concerned with the expressive function of punishment—emphasize the uniquely condemnatory power that a criminal conviction can deliver over and above an otherwise comparable civil sanction.[3] What makes this expressive insight particularly appealing is that it identifies a pathway by which apologists for corporate criminal law can navigate around foundational, skeptical objections questioning both the possibility of, and the purpose for, holding

1. For an incomplete sample, see Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 INDIANA L.J. 473 (2006); Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2062–64 (2016); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1 (2012); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417 (2009); William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N. Y.U. J.L. & BUS. 71, 79 (2018); W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. UNIV. L. REV. 479 (2017) [hereinafter, Thomas, *Persons*]; David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235 (2016) [hereinafter, Uhlmann, *Pendulum Swings*]; *see also* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 274–76 (2014).

2. Following convention, this essay used "corporation" as a catch-all term for business organizations; nothing hangs on the demarcation of this specific organizational form.

3. *See infra* Part I.A.

corporations criminally responsible.[4] In doing so, this expressive turn makes meaningful, albeit incomplete, progress toward a full theory and justification for maintaining an institution of corporate criminal law.

But this expressive approach to corporate criminal law has a punishment problem—what this essay refers to as the *conventional problem with corporate sentencing* (or *conventional problem*, for short). A central premise underwriting corporate criminal law's expressive turn is that a corporation's punishment promises to express a distinct type of punitive condemnation not replicable through other enforcement mechanisms.[5] Unfortunately, corporate sentencing turns out to be profoundly ill-equipped to make good on this expressive promise. The problem here is twofold. First, monetary sanctions are generally poor candidates for expressing criminal condemnation because they tend to be difficult to distinguish from civil penalties.[6] This expressive ambiguity can be overcome in principle; however, the closer we inspect sentencing practices surrounding corporate fines, the worse this problem looks in practice. Second, courts have increasingly embraced corporate probation as a means to "assist an organization in encouraging ethical conduct."[7] But whatever other merits these conditions of probation bring, there is neither a pre-existing convention to suggest these sanctions will be understood to be especially severe, nor is there antecedent reason to suspect that they will be perceived as such going forward.[8] In short, the current suite of monetary and non-monetary sanctions imposed through corporate sentencing law are not well-suited to deliver—and, as applied in many cases, will likely even undermine—the stigmatic punch upon which expressive accounts of corporate criminal law depend.

This conventional problem with corporate sentencing is relatively prosaic as compared to more philosophically esoteric challenges attendant to

4. *See infra* Part I.B.

5. Unless otherwise specified, this essay uses the term "condemnation" to refer to the family of punitive attitudes that might be expected to be expressed by criminal conviction or punishment. To do so is not to suggest that condemnation is the only relevant punitive attitude here: there are real, important differences between concepts like condemnation, denunciation, censure, stigma, and shame. *See infra* Parts I.A, IV.A.

6. *See infra* Part II.B.1.

7. U.S. SENTENCING GUIDELINES MANUAL, ch. 8, introductory cmt. (U.S. SENTENCING COMM'N 2020) [hereinafter, U.S.S.G.].

8. *See infra* Part II.B.2.

corporate criminal law. The concern here is not whether corporations are incapable of experiencing punishment or being condemned.[9] Rather, at issue here is whether, taking our existing social conventions surrounding criminal punishment as they are, we lack the tools to successfully condemn them. As such, the conventional problem is concerned with the way we punish corporations around here[10]—most of the focus will be on the U.S. Sentencing Guideline's recommendations for organizational sentencing[11]—and particularly with the social meanings that conventionally attach to these sanctions.[12]

The limits of standard responses to the conventional problem suggest that it is, if not intractable, then at least extremely durable. Perhaps the most common response is to solve the problem by imposing harsher versions of the same sanctions against corporate criminals.[13] But whatever the merits of this policy, it doesn't necessarily solve the conventional problem as much as relocates it. In the other direction, some expressive defenses seem to appeal to other aspects of the criminal process on the hope that they will shore up the expressive deficiencies with corporate sentencing.[14] But this approach risks begging the question against the very expressive insight it seeks to leverage.

Rather than attempt to address the conventional problem within the confines of the social conventions about criminal punishment that currently apply to corporations, this essay argues that a more promising, durable solution is to revise or revisit those conventions. One strategy is to revitalize the use of shaming sanctions, which express condemnation more

9. This essay largely operates from the assumption that expressive theories have the conceptual resources necessary to engage or avoid these more metaphysical problems. Insofar as these issues cannot be entirely cabined, cursory discussions appear particularly in Parts I.B.1, III.B, and IV.A.

10. Notably absent from this discussion is the role of civil prosecution agreements as an alternative to corporate conviction. This is because prosecution agreements face near-universal criticism from expressive theorists (among many others). Miriam H. Baer, *Three Conceptions of Corporate Crime (and One Avenue for Reform)*, 83 LAW & CONTEMPORARY PROBLEMS 1, 2–3 (2021) (collection citations). Whatever is said about sentencing here likely applies straightforwardly, and more acutely, to prosecution agreements.

11. State law arises only in passing, *see infra* notes 129–32, because most corporate criminal law is prosecuted at the federal level. W. Robert Thomas, *Incapacitating Corporate Criminals*, 72 VAND. L. REV. 905, 915 (2019) [hereinafter, Thomas, *Incapacitation*].

12. *See infra* Part II.A.

13. *See infra* Part III.A.

14. *See infra* Part III.B.

directly while avoiding some of the spillover harms of corporate punishment, by importing social conventions not currently employed in the corporate space—namely, the pervasive, stigmatic use of *criminal epithets*. The criminal justice system inspires a rich and richly stigmatic vocabulary for talking about felons and criminals, including terms like "felon" and "criminal."[15] But we don't tend to call corporations murderers or killers when they kill, nor thieves or tax cheats when they steal, nor arsonists, drug traffickers, nor any number of other criminal epithets. One instrumental response to the conventional problem with corporate sentencing, then, is to leverage the existing shaming conventions surrounding criminal epithets to increase the expressive meaning of corporate punishment.

On the other hand, embracing shaming sanctions in this manner is morally risky in ways that help to illustrate that ultimately, our social conventions around punishment are the problem. The demand for punitive condemnation is beyond what we can reasonably, reliably expect of corporate sanctions—but also, and much more importantly, it is beyond what we should want the criminal justice system to impose on individuals. Consistent with and alongside growing trends advocating for systemic criminal justice reform, this essay argues that we should aspire to improve our social conventions surrounding the meaning of punishment. To be clear, we should do so not because it solves the conventional problem with corporate punishment, but because those conventions themselves are not worth keeping. Nevertheless, criminal justice reform may have the incidental benefit of dissolving the conventional problem with corporate sentencing.

This essay is structured as follows: Part I focuses on the promise of expressive approaches to corporate criminal law. Part II argues that current trends in corporate sentencing are unlikely to deliver on this promise. Part III considers two strategies for responding to the conventional problem from within the confines of the social conventions we currently have, and Part IV argues that the underlying conventions, not the sentences, are what need to be changed.

I. THE EXPRESSIVE TURN IN CORPORATE CRIMINAL LAW

Expressive theories of law are invoked more than they are explained, which gives rise to complaints that they "too often obfuscate rather than

15. *See infra* Part IV.A.

illuminate."[16] Consider briefly, then, how an expressive theory of punishment figures into a broader account of criminal law and why this expressive insight might be especially appealing when trying to make sense specifically of corporate criminal law.

A. The Role (and Limits) of Expressive Theories of Law

The crux of any expressive theory is the observation that, as a descriptive matter, our actions express attitudes concerning underlying substantive values, and that, as a normative matter, actors should thereby "act in ways that express appropriate attitudes towards" some subset of those values.[17] This expressive insight has been leveraged across a wide range of legal domains and subjects.[18] But, and owing to diagnoses of punishment's expressive function tracing to Hart and especially Feinberg, perhaps nowhere has its influence been more acutely felt than with respect to criminal theory.[19]

The expressive theory of punishment seeks to explain what distinguishes a criminal punishment from a civil penalty, given that both impose material sanctions on a recipient (what Feinberg calls, in the context of punishment, "hard treatment").[20] On the classic account, only punishment is conventionally understood to further express society's condemnation of the defendant.[21] And it is these distinct meanings conveyed by and through their impositions that makes a punishment different from, and qualitatively worse than, a penalty: being labelled a criminal stigmatizes and condemns the wrongdoer in ways that a civil judgment cannot.

16. Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 917 (2018); *see* RICHARD MCADAMS, THE EXPRESSIVE POWERS OF LAW 11–21 (2015) (proposing a taxonomy of expressive theories of law).

17. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 PENN. L. REV. 1503, 1504 (2000). Most expressive accounts understand the category of "actor" broadly to include not just individuals but also collective entities—most obviously, the State. *Id.* at 1514–30.

18. *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (2000).

19. Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965); Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958).

20. Feinberg, *supra* note 19, at 397.

21. Feinberg, *supra* note 19, at 401–02; Hart, *supra* note 19, at 404–05.

Two points bear special emphasis. First the claim here is not that the criminal law both condemns and punishes a convicted defendant; rather, "the punishment *is* the expression of condemnation."[22] Conviction and punishment are thus intertwined: the imposition of hard treatment is at once licensed by the fact of conviction, which signals the appropriateness of a special type of condemnation, and simultaneously underwrites and reaffirms the severity of that condemnation.[23] Second, accepting this expressive function of punishment does not, by itself, thereby justify state punishment. Expressive theories are formal rather than substantive—that is, "They specify the *form* of normatively required constraints on action, not the *contents* of specific moral factors."[24] They are not intended to provide "an independent, substantive moral or political philosophy that specifies content-laden grounds" guiding or constraining action.[25] Thus, although the expressive function of punishment highlights the ostensibly unique condemnatory force of the criminal law, it is a further question on what grounds having a legal institution to deliver this sort of condemnation is socially desirable, useful, or otherwise necessary.

A comprehensive review of substantive theories of criminal law and punishment falls wells outside both the scope and target of this essay. It suffices here to note that, unsurprisingly given its regulative role as a formal theory, the underlying expressive insight is compatible with a wide range of approaches: Some expressively minded, substantive theories of criminal law are prospective or broadly consequentialist in character.[26] Others adopt

22. Chad Flanders, *Shame and the Meaning of Punishment*, 54 CLEV. ST. L. REV. 609, 612 (2006).

23. This is not to say that conviction and punishment cannot contribute separately to the expressive message. *See infra* Part II.A. My thanks to Mihailis E. Diamantis for pressing this distinction.

24. Anderson & Pildes, *supra* note 17, at 1570 (emphasis added), *id.* at 1511–12 (analogizing expressive theories to "rules of grammar or logic"); Sunstein, *supra* note 18, at 2048. *See generally* CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY 45–58 (2009) (distinguishing formal and substantive theories).

25. Anderson & Pildes, *supra* note 17, at 1570; *cf.* Nathan Hanna, *Say What? A Critique of Expressive Retributivism*, 27 L. & PHIL. 123, 130–31 (2008) (arguing that conflating formal and substantive functions begs the question against expressive accounts of punishment).

26. *E.g.*, ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1996); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) [hereinafter, Kahan, *Secret Ambition*]; Uma Narayan, *Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment*, 13 OXFORD J. LEGAL STUD. 166 (1993).

a more retributive approach.[27] Some emphasize the State's obligation to communicate certain punitive attitudes to the offender; others privilege the denunciatory, or educational, role of state action in expressing certain attitudes to the broader community of citizens.[28]

B. The Expressive Insight's Appeal for Corporate Criminal Law

What is true for criminal law generally is true here: appeals to the expressive character of criminal law figure into a wide range of substantive accounts defending the need for corporate criminal law. Ultimately a complete justification for corporate criminal law should provide sufficient reason both to condemn business organizations and to expect that condemnation works.[29] That said, and abstracting away from any particular account, the promise of this expressive insight is that it can help to chart a path around longstanding skeptical objections regarding both the possibility of, and the purpose for, holding corporations criminally responsible.

1. Skepticism About the Possibility of Corporate Criminal Law

Skepticism about the possibility of corporate criminal responsibility reflects centuries-old ambivalence about the coherence of extending legal status to artificial entities.[30] The modern version of this worry operates from a premise, common particularly to retributive or desert-oriented accounts of criminal law, that "moral responsibility is a necessary condition for the application of the criminal sanction."[31] As such, and although corporations have long been treated as persons in other legal domains,[32] they are

27. *E.g.*, R.A. Duff, Punishment, Communication, and Community 132 (2003); Jean Hampton, *An Expressive Theory of Retribution*, *in* Retributivism and Its Critics 1 (Wesley Cragg ed., 1992).

28. *See* Bill Wringe, *Must Punishment Be Intended To Cause Suffering?*, 16 Ethical Theory & Moral Prac. 863, 865–66 (2013) (distinguishing communicative from denunciatory theories of punishment according to the audience of the expression).

29. *Cf.* Buell, *supra* note 1, at 519 ("Expressive theory has not yet articulated a standard for when norms impel us to criminally blame an entity.").

30. Thomas, *Persons*, *supra* note 1, at 486–98.

31. John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 Am. Crim. L. Rev. 1329, 1330 (2009).

32. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 Utah L. Rev. 1629, 1639–41.

incapable of satisfying the criminal law's prerequisites; moral responsibility demands a qualitatively more sophisticated type of moral agency than corporate persons can supply.[33] To this end, skeptics have complained that corporations lack the cognitive sophistication,[34] affective capacity,[35] or independent moral standing[36] necessary to qualify.

By insisting on corporate *moral* responsibility as a prerequisite for corporate *criminal* responsibility, possibility skepticism threatens to cut short attempts to defend such an institution before they can even get off the ground. Granted, there are steadfast advocates of the view that corporations are in fact moral agents in and of themselves—or, at least, can be held morally responsible enough to constitute apt targets of a retributive criminal law.[37] But even many advocates of corporate criminal law seem to find it deeply implausible that corporations could be independent agents in any morally robust sense. At the very least, appealing to corporations' moral status in order to provide a basis for criminal liability just pushes the

33. *See generally* Amy J. Sepinwall, *Corporate Moral Responsibility*, 11 PHIL. COMPASS 3 (2016).

34. *Compare* Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, 30 MIDWEST STUD. PHIL. 16, 23 (2006), *with* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011), *and* Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDWEST STUD. PHIL. 59 (2006).

35. *Compare* John S. Baker Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 350 (2003), *and* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 430 (2012), *with* Bryce Huebner, *Genuinely Collective Emotions*, 1 EURO J. PHIL. SCI. 89 (2011), *and* David Silver, *A Strawsonian Defense of Corporate Moral Responsibility*, 42 AM. PHIL. Q. 279 (2005).

36. *Compare* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009), *and* Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS. Q. 531 (2003), *with* Thomas Donaldson, *Moral Agency and Corporations*, 10 PHIL. CONTEXT 54 (1980), *and* Kenneth Silver, *Can a Corporation Be Worthy of Moral Consideration?*, 159 J. BUS. ETHICS 253 (2019).

37. *But see* Sylvia Rich, *Corporate Criminals and Punishment Theory*, 29 CAN. J.L. & JURISPRUDENCE 97 (2016) (arguing that corporations cannot made to suffer retributive punishment even if they can be held morally responsible); *accord* Samuel W. Buell, *Retiring Corporate Retribution*, 83 L. & CONTEMP. PROBS. 25 (2020). On the irrelevance of subjective experience to the concept of punishment, see Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907 (2010); Wringe, *supra* note 28, at 873–74.

question back to a more foundational, and much more vexing, question about the nature of moral agency writ large.[38]

The appeal of the expressive insight as against this type of possibility skepticism is that it makes space for a morally inflected account of criminal law—*viz.*, one in which a central feature of the institution is to level normatively laden judgments in response to wrongdoing—without having to invoke corporate moral agency. For one thing, the corporation itself need not be the audience for the State's expression of condemnation; it is enough "that the affliction convey disapproval in terms that [community] members understand."[39] Various audiences might suffer expressive harm from the absence of corporate criminal law: citizens,[40] victims,[41] industry competitors,[42] and even employees of the firm itself.[43] On this approach, corporate criminal law serves to express the State's intolerance for certain incidences of massive harm, or to resist a message that corporate privilege "undermines its appearance of equal application of laws."[44]

Even according to those substantive accounts of criminal law for which the State communicates its condemnation directly to the offender,[45] the expressive turn still provides a wealth of resources to respond to skepticism about the possibility of corporate criminal liability. Expressive theories can rely on "a relatively 'thin' conception of the [corporation as] wrongdoer."[46] As such, the State's expression of condemnation toward a corporate criminal need not appeal to a corporation's failings *qua* moral agent.[47] On this

38. Sepinwall, *supra* note 35, at 429–30 (noting that "attempts to argue for or against the corporation's moral agency" turn on foundational moral and ontological questions "that have confounded philosophers . . . for millennia").

39. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 636 (1996) [hereinafter, Kahan, *Alternative Sanctions*]; *see supra* notes 26–28.

40. Diamantis, *supra* note 1, *passim*; Henning, *supra* note 1, at 1427; Bill Wringe, *Collective Agents and Communicative Theories of Punishment: Collective Agents and Punishment*, 43 J. SOC. PHILOS. 436, 444 (2012); Uhlmann, *Pendulum Swings*, *supra* note 1, at 1259–71.

41. *E.g.*, Friedman, *supra* note 1, at 842.

42. GARRETT, *supra* note 1, at 64.

43. Buell, *supra* note 1, *passim*; W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 602, 639–41 (2017) [hereinafter, Thomas, *Fines*].

44. Gilchrist, *supra* note 1, at 51; *see also* Henning, *supra* note 1, at 1427.

45. *See supra* notes 27–28.

46. Friedman, *supra* note 1, at 845–46.

47. Buell, *supra* note 1, at 502 (arguing that conviction conveys that the organization "has arranged itself badly").

view, it is enough that the corporate person is recognized as an independent participant in social and legal practices, which includes those understood to express punitive attitudes toward other participants within the practice.[48] In short, the expressive insight offers the promise of grounding the possibility of corporate criminal law not on the corporation's independent moral status but instead on separate obligations owed by the State to its individual citizens.

2. Skepticism About the Purpose for Corporate Criminal Law

Deterrence theorists are willing, in principle, to apply the same legal fictions about corporations to criminal law as they are to any other enforcement regime.[49] Thus, unlike possibility skepticism, purpose skepticism is not animated by questions of corporate moral agency or the special normative timbre of criminal law generally. But if retributivists are skeptical about the bare possibility of holding corporations criminally responsible, many deterrence theorists are skeptical that there is any useful point served by doing so.

According to purpose skepticism, an institution for punishing corporations is duplicative of existing enforcement mechanisms: the criminal law can prosecute individuals for the crimes they commit through or within a business organization, whereas civil and regulatory mechanisms exist to regulate businesses themselves.[50] Moreover, on this view, corporate criminal law is arguably less effective than these alternatives. The criminal justice system is designed to make securing a conviction harder for the State as compared to a civil enforcement action.[51] But if the ambition is to deter corporate wrongdoing, criminal procedure protections hamper

48. Margaret Gilbert, *Corporate Misbehavior and Collective Values*, 70 BROOK. L. REV. 1369, 1376 (2004); Thomas, *Persons*, *supra* note 1, at 502–04.

49. *E.g.*, Cindy Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective, in* PROSECUTORS IN THE BOARDROOM II (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008).

50. *E.g.*, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1995).

51. *See* Miriam H. Baer, *Law Enforcement's* Lochner, 105 MINN. L. REV. 1667 (2021) (discussing the extent of constitutional criminal procedure for corporations).

enforcement efforts. Particularly for scholars who are predisposed to rely exclusively on monetary sanctions as a tool of corporate enforcement—which can be imposed just as easily through a civil or regulatory response as through the criminal law—these added hurdles are a waste.[52]

As before, the expressive insight promises a pathway around this type of objection. That criminal law functions to expresses condemnation not otherwise achievable through civil regulatory enforcement offers a reason to maintain this subfield of criminal law even when the same types of material sanctions appear across enforcement regimes. Punishment does not merely impose a material sanction; it expresses punitive attitudes in a manner that cannot be recreated through a civil action.[53] Moreover, this extra, distinct expressive harm helps to explain and defend the need for elevated procedural protections within corporate criminal law. On the one hand, insofar as the State's condemnation is ordinarily to be avoided, placing its imposition behind these extra protections afforded by criminal procedure helps to ensure that it is not leveled carelessly.[54] And on the other hand, the process of going through these hurdles helps to bolster the expressive force of the State's condemnation.[55] Precisely because the State has to prove its case more aggressively in the criminal context, its success in securing such a conviction thereby speaks more loudly, more confidently, about the corporation's wrongdoing.

II. THE CONVENTIONAL PROBLEM WITH CORPORATE SENTENCING

At the foundation of expressive defenses of corporate criminal law is a promise that corporate punishment works—specifically, that the State

52. A related concern is that, to the extent criminal law does bring further stigma to the offender, then this makes a criminal sanction more predictable than a civil sanction; better to impose a high civil sanction than a lower, messier, punishment. For a detailed discussion and response to this argument, see Buell, *supra* note 1, at 512–16.

53. Friedman, *supra* note 1, at 854; *see also* Buell, *supra* note 1, at 501; David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295, 1335 (2013) [hereinafter, Uhlmann, *Erosion*].

54. W. Robert Thomas, *Making Sense of Corporate Criminals: A Tentative Taxonomy*, 17 Geo. J.L. & Pub. Pol'y 775, 783 (2019).

55. Buell, *supra* note 1, at 522; *see also* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. Rev. 858 (2014); Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. Crim. L. & Criminology 305 (2018).

is able to impose hard treatment on corporations in a manner that expresses condemnation in a publicly recognizable way. But the unfortunate reality is that corporate sentencing is ill-equipped to make good on that promise. Corporate sentencing struggles to deliver on the expressive promise underwriting justifications of corporate criminal law because the standard suite of sanctions available do not conventionally condemn in a manner that expressive approaches to corporate criminal law require.

A. Social Conventions, Public Meaning, and Criminal Punishment

Public and especially state expression gets significant purchase from preexisting social conventions.[56] Conventions and social norms matter because expressive theories depend entirely on public meaning: determining whether and what conduct expresses requires an act of public interpretation.[57] And while true of actions generally, this need for publicly intelligible means of interpretation is particularly salient when it comes to a collective entity or state institution, whose actions admit of greater risk for ambiguity. The fact that citizens recognize past state actions to carry certain meanings—whether condemnation, endorsement, etc.—enable the State to express that same attitude in the future by repeating the action. Simply put, "social conventions or norms . . . set public standards for expressing certain attitudes."[58]

Punishments are conventional sources of public meaning.[59] That is, certain hard treatments have come to express the sorts of punitive attitudes needed to distinguish punishments from mere penalties; we have a set of punishments that are regularly imposed through a regular process, and that are broadly identifiable to members across the political community.[60] Granted, social norms are culturally contingent and subject to change.[61]

56. Anderson & Pildes, *supra* note 17, at 1525 ("Expressive meanings . . . are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community."); Sunstein, *supra* note 18, at 2050 ("The social meanings of actions are very much a function of existing social norms.").

57. Elizabeth Anderson, Value in Ethics and Economics 18–20 (1993).

58. Anderson & Pildes, *supra* note 17, at 1513.

59. Kahan, *Alternative Sanctions*, *supra* note 39, at 599 ("The expressive theory also underscores the importance of form and convention in punishment.").

60. Feinberg, *supra* note 19, at 402 ("[C]ertain forms of hard treatment have become the conventional symbols of public reprobation.").

61. *See infra* Part IV.

Nevertheless, two broad observations can be made about the content of these punitive social conventions. First, the severity of hard treatment informs the degree of condemnation. All things being equal, "the more severe the hard treatment, the more severe the censure it communicates."[62] We should not overread this observation—our social conventions are probably not as finely tuned as our sentencing laws—but this heuristic is salient especially in outlier cases.[63] An unexpectedly draconian sanction, like the bankrupting of accounting firm Arthur Andersen following its conviction, looms large in the public imagination.[64] And lenience can speak just as loudly: a consistent failure to hold police officers responsible for killing unarmed Black citizens sparked national protests responding with outrage to the message, expressed by the State's inaction, that Black lives don't matter.[65]

Second, certain types of punishments have acquired meanings all their own, which may contribute something further to the overall expressive message.[66] For an obvious example, the fact that imprisonment has long been reserved as a sanction only for criminal convictions expresses something about the wrongness of crimes as distinct from civil wrongs.[67] To some extent, social conventions around the type of punishment are subsumed into, or are at least interwoven with, conventions surrounding the perception of a punishment's severity. But not entirely.[68] From one perspective, both a life's term imprisonment and capital punishment are equally severe: both confine an offender away from society until death.

62. DUFF, *supra* note 27, at 132; Narayan, *supra* note 26, at 179.

63. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 256 (1990) ("[T]he importance of communication is dramatically heightened if the symbolic message which it contains is unexpected or in some way controversial.").

64. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES 31–37 (2017) (discussing Arthur Andersen's legacy); *see also* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013).

65. Alvin B. Tillery Jr., *What Kind of Movement is Black Lives Matter? The View From Twitter*, 4 J. RACE, ETHNICITY, & POLS. 297, 304–06 (2019).

66. DUFF, *supra* note 27, at 145; Diamantis, *supra* note 23, at 25–42.

67. *E.g.*, Flanders, *supra* note 22, at 612 ("[C]onventionally, . . . [w]ords alone are not good enough; the walls of a prison are.").

68. GARLAND, *supra* note 63, at 256 ("Each specific sanction has attached to it recognizable symbolism, so that, in any particular context, imprisonment means one thing, but fine another, probation something else, and so on.").

But obviously, there's a clear difference between the two sentences, reflected in part by the different meanings of each punishment.[69]

B. Corporate Sentencing Cannot Live Up to the Promise

If our social conventions around criminal punishment are to be taken seriously, then it seems that expressive defenses of corporate criminal law are built atop a promise of serious punishment. Corporations have a track record for causing massive, widespread harms both by virtue of their scale and because some types of wrongdoing are worth committing only at scale.[70] Just for a handful of recent examples: British Petroleum's grossly inadequate safety measures produced a string of fatal workplace accidents, culminating in the Deepwater Horizon oil spill.[71] Pacific Gas & Electric (PG&E) spent decades neglecting dilapidated equipment, which caused the deadliest wildfire in California's history and thousands of other conflagrations.[72] Boeing's Airmax disasters killed hundreds, and traced to concerns about the company's corroded corporate culture that was years in the unmaking.[73] And Wells Fargo did not defraud just one or two customers by opening phony bank accounts in their names—the bank admitted to committing millions of acts of fraud.[74] In short, "When corporations engage in criminal conduct, they generally do so in a big way."[75]

69. Kahan, *Secret Ambition*, *supra* note 26, at 435–51.

70. W. Robert Thomas, *Corporate Criminal Law is Too Broad—Worse, It's Too Narrow*, 53 ARIZ. ST. L.J. 504, 545–56 (2021).

71. Nat'l Commission on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling, at vii (2001), http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf.

72. *See infra* notes 129–32.

73. Andrew Tangel et al., *The Four-Second Catastrophe: How Boeing Doomed the 737 MAX*, WALL ST. J. (Aug 16, 2019), https://www.wsj.com/articles/the-four-second-catastrophe-how-boeing-doomed-the-737-max-11565966629; David Gelles, *'I Honestly Don't Trust Many People at Boeing': A Broken Culture Exposed*, N.Y. TIMES (Jan. 10, 2020), https://nyti.ms/2NfMPKZ.

74. Matt Levine, Opinion, *Wells Fargo Opened a Couple Million Fake Accounts*, BLOOMBERG, Sep. 9, 2016, https://www.bloomberg.com/opinion/articles/2016-09-09/wells-fargo-opened-a-couple-million-fake-accounts? sref=6EqCxNHb; Todd Haugh, *The Power Few of Corporate Compliance*, 52 GA. L. REV. 128 (2018).

75. Henning, *supra* note 1, at 83.

Which brings us to the conventional problem with corporate sentencing. As it turns out, the sentences currently imposed against corporations struggle to bear the weight that expressive defenses expect corporate punishment to carry. The claim here is neither that corporations are incapable of being punished, nor that corporate punishment is unable in principle to express condemnation. Nor, for that matter, does the claim address whether these sentencing practices might secure other penological benefits. The conventional problem with corporate sentencing simply argues that, both in principle and in practice, the corporate punishments employed today aren't sufficiently hard treatment to the degree that our existing social conventions require.[76]

1. Corporate Fines Look Like Penalties, Not Punishments

Monetary sanctions are the paradigmatic corporate punishment: historically fines were the only means of punishing a convicted corporation,[77] and they remain far and away the most frequently imposed sentence.[78] But from an expressive perspective, the problem with corporate fines is that neither in principle nor in practice are they likely to convey the degree of condemnation that expressive apologists for corporate criminal punishment would have them do.

As a starting point, monetary sanctions in general don't carry anything like the conventional weight that other types of punishments do. Expressive theorists have long noted that "[f]ines condemn much more ambivalently" than, say, imprisonment.[79] Monetary sanctions are routinely applied outside the criminal law context; as such, and particularly when unaccompanied by other, more severe forms of hard treatment, a criminal

76. Feinberg, *supra* note 19, at 412 (arguing that sanctions are "not a conventional vehicle for the expression of censure. . . . therefore lack[] the reprobative symbolism essential to punishment generally"); *cf.* Douglas Husak, *The Metric of Punishment Severity: A Puzzle about the Principle of Proportionality*, *in* OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME? 97, 112 (Michael Tonry ed., 2019) ("[I]n order for a sanction to qualify as a clear and uncontroversial instance of punishment, it not only must be imposed with the intention to censure, it must also succeed in creating shame.").

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

78. *Sourcebook of Federal Sentencing Statistics*, U.S. SENT'G COMMISSION, S-133 tbl.51 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf.

79. Kahan, *Alternative Sanctions*, *supra* note 39, at 621.

fine looks more like a penalty than a punishment.[80] In other words, the fact that fines are routinely imposed as penalties makes it the case that they unlikely to function, or at least function well, as punishments. And this concern that fines-as-punishments lack the conventional stigma attendant to other forms of hard treatment is just as true in the corporate setting as for the rest of criminal law. Corporations are required to pay monetary fines in civil and regulatory contexts all the time—in other words, fines are used routinely as both penalties and punishments. As a consequence, there is widespread concern that corporate criminal law allows companies to pay for the privilege of doing wrong; monetary fines, on this view, represent merely a "cost of doing business."[81]

Of course, the bare fact that a sanction is monetary in character need not disqualify it from bearing expressive weight.[82] Even if fines are generally a source of ambivalent meaning, sentences could be designed to overcome this ambivalence: fines-as-punishments might be categorically more severe than fines-as-penalties, for example, or otherwise distinguished by how the attendant harm spread among members of the corporation.[83] However, a closer look under the hood of actual sentencing practices fails to deliver here, and only further reinforces concerns that monetary sanctions are merely a cost of doing business. First, no clear distinction exists between either the magnitude or the impact of corporate fines. In general, fines-as-punishments are not qualitatively larger than fines-as-penalties.[84] In fact, the opposite is true: criminal fines often result in *smaller* penalties owing to the fact that they are fixed by statute and subject to constitutional

80. *E.g.*, DUFF, *supra* note 27, at 147; Flanders, *supra* note 22, at 625; Kahan, *Alternative Sanctions*, *supra* note 39, at 621.

81. *E.g.*, Peter A. French, *The Hester Prynne Sanction*, BUS. & PROF. ETHICS J. 20 (Winter 1985); Hamdani & Klement, *supra* note 49, at 278; Henning, *supra* note 1, at 1426–27. Complaints that monetary sanctions foster the impression that companies can buy their way out of trouble are especially acute when it comes to prosecution agreements. *See* Uhlmann, *Erosion*, *supra* note 53.

82. *Cf.* Kahan, *Alternative Sanctions*, *supra* note 39, at 624 ("In the abstract, fines could be viewed as sanctioning rather than merely pricing misconduct. . . . ").

83. *See infra* Part III.A.

84. An exception here is for fines "sufficient to divest the organization of all its net assets." U.S.S.G. § 8C1.1; *see* GARRETT, *supra* note 1, at 156–57 (noting its imposition is vanishingly rare). This forced termination of the enterprise—sometimes called a "corporate death penalty"—does not suffer the same conventional shortfalls. *See infra* Part III.A.

limitations.[85] Neither are fines-as-punishments distinguishable from fines-as-penalties along some other dimension that would buoy their expressive content. At most, the primary difference between fines-as-punishments and fines-as-penalties has to do with the dischargeability of the latter in bankruptcy and some limited tax implications.[86]

Second, even when large monetary sanctions are imposed as punishment, often the sticker price belies the actual sanction. For one thing, historically the federal government has a much worse track record for *collecting* fines than it does for *imposing* them.[87] For another, monetary sanctions are often reported without distinguishing between a fine and restitution. But restitution is not punishment—a thief is not punished by being forced to return the goods she stole.[88] Nevertheless, the Sentencing Guidelines prioritize restitution, which means courts will invariably impose a smaller fine than otherwise deemed appropriate in order to account for the firm's other obligations.[89] Finally, monetary sanctions have been imposed as in-kind payments in ways that further muddy, and even undermine, the message. For example, subsequent to the 2008 financial crisis several financial institutions received large monetary sanctions, to be paid largely in the form of homeowner mortgage relief. Anticipating this outcome, many banks kept nonconforming assets on their books for this purpose, so that these banks were "punished" by being ordered to write off assets they had already planned to write off anyway.[90]

To reiterate, these practices might be successful by other metrics: prioritizing restitution might be good policy, while in-kind payments might sometimes be more fitting. But with respect to the expressive meaning of current sentencing trends, it remains the case that more attention to the details of corporate sentencing weakens the case that monetary sanctions

85. Vikramaditya Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95 (2004) (identifying conditions under which a corporate conviction is preferable to civil or regulatory alternatives). For a vivid example, see infra at nn. 129–32.

86. Thomas, *Fines*, *supra* note 43, at 617 n. 77.

87. Ezra Ross & Martin Prikikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. POL'Y REV. 453 (2011).

88. U.S.S.G. ch. 8, introductory cmt. ("[R]esources expended to remedy the harm should not be viewed as punishment.").

89. U.S.S.G. § 8B1.1(c), § 8C3.3(a).

90. Lynnely Browning, *Too Big to Tax: Settlements Are Tax Write-Offs for Banks*, NEWSWEEK, Oct. 27, 2014, http://www.newsweek.com/2014/11/07/giant-penalties-are-giant-tax-writeoffs-wall-street-279993.html; *see* U.S.S.G. § 8B1.1(d).

are well calibrated to express condemnation of the sort and severity promised by expressive defenses of corporate criminal law.

2. Organizational Probation Is Soft Treatment

Probation has recently come to occupy a prominent role in corporate sentencing as a non-monetary complement, or alternative, to traditional fines.[91] Overwhelmingly, the attention paid to corporate probation focuses on its role as a vehicle for imposing court-ordered compliance and governance reforms;[92] less commonly, courts use probation to require that the corporation complete community service or otherwise carry out remedial orders in lieu of monetary restitution.[93]

Leveraging corporate punishment to "assist an organization in encouraging ethical conduct" has received a mixed reception.[94] Advocates note that rehabilitation is a longstanding justification for criminal punishment, for which corporations are potentially well suited.[95] Critics respond that criminal interventions into private governance are costly, inefficient, and unlikely to produce meaningful reforms.[96] And complicating these disagreements is the reality that, for much of this period, courts and prosecutors showed little interest in whether these governance reforms were effective or even faithfully imposed.[97]

Regardless of whatever benefits these alternatives to criminal fines might or might not offer, delivering on the expressive promise of corporate criminal law is not one of them. As a conventional matter, probation and community service are recognizable as criminal

91. U.S.S.G. ch. 8, pt. D; *see Sourcebook*, *supra* note 78, at tbl.53.

92. U.S.S.G. § 8B2.1, § 8D1.4(b)(1).

93. U.S.S.G. § 8B1.2; § 8B1.3. Probation can also be used to publicize the fact of conviction. *See infra* Part IV.A.

94. U.S.S.G. ch. 8, introductory cmt.

95. *E.g.*, Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 542–44 (2018); Henning, *supra* note 1. *But see* Thomas, *Incapacitation*, *supra* note 11, at 965–69.

96. *E.g.*, Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 353 (2017); Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL'Y 1, 10 (2010); Laufer, *supra* note 1, at 112.

97. Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1801 (2011); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

punishments.[98] But they are understood specifically to be "soft treatment"—that is, punishments reserved for minor offenses.[99] This is a problem in particular because expressive defenses of corporate criminal law seem most preoccupied with major incidents of corporate wrongdoing as reason to maintain the institution.[100] Put simply, punishing someone with probation and community service hardly seems like throwing the book at them.[101] Indeed, these sanctions are sometimes derided as inadequate or as quasi-punishment—particularly when celebrities and white-collar executives avoid long prison terms in exchange for probation and community service.[102] It is unlikely that imposing these sanctions in a corporate setting will elicit a wildly different response. In other words, these sanctions express condemnation of a sort associated with punishment, but at least traditionally that expression is relegated to minor, less severe wrongs—which does not fit with the pattern of corporate crime.

Again, the conventional problem does not depend on the further assumption that corporate probation must necessarily be soft treatment; what matters is how probation is conventionally understood. To that point, corporate probation could turn out to be quite onerous. On paper, a sentencing court's remedial powers through probation are "almost endless."[103] As such, corporate probation could be used to impose sweeping, draconian governance reforms—even if, to date, the focus has been on

98. Although court-ordered community service suffers a similar, if not more acute, ambiguity problem as fines.

99. Flanders, *supra* note 22, at 618; Kahan, *Alternative Sanctions*, *supra* note 39, at 644–45; Sunstein, *supra* note 18, at 2050. This sentiment is an old one. *See Current Notes*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 457, 461 (1954) ("Public opinion . . . frequently looks upon probation as a soft treatment.").

100. *See supra* notes 70–75.

101. Kahan, *Alternative Sanctions*, *supra* note 39, at 627 ("Against the background of social norms, community service . . . trivializes the magnitude of the offense.").

102. *E.g.*, Samuel W. Buell, *It's Easy to Hate White Collar Criminals, But It's Surprisingly Hard to Sentence Them*, QUARTZ, July 2, 2016, https://qz.com/721212/its-easy-to-hate-white-collar-criminals-but-its-surprisingly-hard-to-sentence-them/; Andrea Peyser, Opinion, *Proof That Celebrities Get Special Treatment in Court*, N.Y. POST, Nov. 18, 2013, https://nypost.com/2013/11/18/entitled-celebs-get-special-treatment-in-court/. *Cf.* Sunstein, *supra* note 18, at 2050 ("When a violator is told to engage in community service, he appears to have 'gotten off,' even if the service is, to him, worse than a short period in jail.").

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

a limited, modest set of compliance tweaks.[104] For that matter, the American public almost certainly fails to appreciate how invasive non-carceral sentences can be for individuals; rarely are the conditions of probation actually "soft treatment" for those experiencing them.[105] But regardless, the conventional challenge is that these sanctions "do not adequately express society's disapproval of the crime."[106]

In summary, the promise of expressive approaches to corporate criminal law is that the criminal law delivers some important stigmatic force over and above civil enforcement. Put simply, there is value in corporations being subject to punishments and not just penalties. However, insofar as the criminal law conventionally expresses condemnation through hard treatment, the hard treatments currently available to corporations are unlikely to be perceived as particularly . . . well, hard. Accordingly, there is little reason to suspect that the sanctions faced by corporations are well situated to deliver on the expressive promise that underwrites this apology for corporate punishment.

III. CONVENTIONAL RESPONSES

Taking as given the social conventions that we have surrounding criminal punishment, what sorts of responses can expressive accounts offer? One strategy addresses the conventional problem on its terms by increasing the amount of hard treatment imposed on corporations. A second seeks to dissolve the conventional problem by emphasizing the condemnatory force expressed through other aspects of the criminal process.

A. Increasing Hard Treatment

A popular response to the conventional problem of corporate sentencing is to call for more, and harsher, corporate punishment.[107] Representative of this view, some scholars have called for more liberal use of the "corporate

104. Thomas, *Incapacitation*, *supra* note 11, at 163–64.

105. *See id.* at 135–36 (collecting citations).

106. Flanders, *supra* note 22, at 618.

107. Miriam Baer, *Corporate Criminal Law Unbounded*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 475, 487 (Wright et al., eds., 2021) (identifying scholars who "profess that prosecutors are not punishing or reforming corporations nearly enough for their actual or supposed transgressions").

death penalty."[108] Others seek larger or different fines.[109] Others advocate for more aggressive, invasive types of governance reforms.[110] There's an intuitive logic to this strategy: if the problem is that corporate sentences are currently too lenient to secure the condemnation needed to justify the institution, then just ratchet up the sentences.

At first glance, increasing the hard treatment imposed on corporations would seem to straightforwardly solve the conventional problem with corporate sentencing. But first, there is a limit to how much hard treatment can be ratcheted up above the status quo. This point is generally true of punishment: there are moral, legal, and practical limits to how much hard treatment the State is able to impose as punishment. These practical limits have special purchase given the artificial nature of the offender. Sanction a company too harshly, and there may be no reason to continue the business as a going affair.[111] Dramatically increasing the magnitude of corporate fines, for example, risks creating a circumstance where the fines pose existential threat to the entity: for a $10 million company, a $10 million fine is indistinguishable from a $100 million or $100 billion fine.[112] There is a limit to how much current sanctions can increase; at some point, it can be hard to see any further value—expressive or otherwise—served by imposing fines above what the entity can pay.[113]

Second and more fundamentally, ratcheting up the hard treatment of corporations doesn't necessarily solve the challenge facing expressive defenses of corporate law as much as it just relocates the problem. After all, corporate punishment is not costless: imposing hard treatment upon a corporation reliably results in innocent (and, in some cases, faultless) individuals—including shareholders, employees, and consumers—experiencing

108. *E.g.*, GARRETT, *supra* note 1, at 156–57; Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 974–76 (2005).

109. John Coffee Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 387–88 (1981); Thomas, *Fines*, *supra* note 43.

110. GARRETT, *supra* note 1, at 158–60; Laufer, *supra* note 1.

111. *See* U.S.S.G. § 8C3.3(b).

112. *But see* Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. REG. 1 (2019).

113. One might be tempted to analogize these impossibly large fines to the practice of sentencing individuals to concurrent life sentences, but it's not immediately clear which way the analogy cuts. Do people see multiple life sentences as somehow more severe, or instead as farcical overkill?

harm.[114] This problem of spillover harms is already a central preoccupation for substantive justifications for corporate criminal law.[115] And recall that providing a full expressive defense of corporate criminal law requires two things: justifying the need for an institution of condemnation and showing that such an institution would actually condemn.[116] Imposing more hard treatment on corporate criminals makes progress on the latter problem at the expense of the former.

Consider for illustration an extreme version of this approach in which the only punishment for any corporation's conviction is termination—that is, a corporate criminal law where the corporate death penalty is the only available punishment. We can comfortably stipulate that such a punitive regime would solve the conventional problem. But it would do so by dramatically increasing the burden borne by any attempt to justify having such an institution in the first place. Expressive accounts already face resistance owing to concerns about spillover harms; Arthur Andersen remains the metonym for corporate criminal law run amok.[117] Turning Anderson from the exception into the rule would require a substantially bigger lift than any substantive account of corporate criminal law is likely to support.

In fairness, there is surely room to increase corporate punishment, or at least increase its frequency, without sinking the entire expressive enterprise. And there may be creative solutions for increasing hard treatment in ways that don't jeopardize the organization.[118] But neither should we be too quick to dismiss the conventional problem as merely one of underpunishment; harsher sanctions are not a panacea. For that matter, harder treatment alone doesn't answer the conventional problem—it must be hard treatment that accords with conventional meanings of punitive condemnation.[119] And even if increasing the severity of corporate punishments

114. Thomas, *Fines*, *supra* note 43, at 618–20 (collecting citations).

115. For a concise summary of the debate, see Alex Sarch, *Skepticism About Corporate Punishment Revisited*, *in* THE PALGRAVE HANDBOOK OF APPLIED ETHICS 213, 214 nn. 5–7 (Alexander & Ferzan eds., 2019).

116. *See supra* Part I.B.

117. *See supra* note 64.

118. *E.g.*, Coffee, *supra* note 109, at 387–88 (equity fines); Sepinwall, *supra* note 35, at 449–50 (speech restrictions); Thomas, *Incapacitation*, *supra* note 11, at 971–72 (incapacitating sanctions).

119. *See supra* Part II.B.

addresses the conventional problem with corporate sentencing, doing so also raises the justificatory bar that any substantive theory of corporate criminal law will ultimately need to clear.

B. Falling Back on the Fact of Conviction

Recognizing corporate sentencing's challenges in delivering on the expressive promise for corporate criminal law, there is a temptation to appeal instead to other aspects of the criminal process as sufficient to express the State's condemnation. Even if corporate sentencing is an inadequate vehicle for expressing condemnation, isn't just the choice of criminal law meaningful enough?

Suggestive of this strategy, several scholars emphasize that "we communicate far more about our condemnation of wrongdoing when we call conduct criminal, whether the defendant is a corporation or an individual."[120] And if all that is meant by these observations is that punishment does not provide the exclusive source of expressive meaning, then the point is well taken. Deciding to prosecute, proving a case to the satisfaction of criminal law's higher thresholds, finding guilt through a conviction—all of these actions have expressive significance, which contributes to the punitive attitudes conveyed through the institution of criminal law.[121] Of all these actions, conviction most clearly, unambiguously conveys the State's condemnation; as compared to punishment, conviction is less dependent on mediating social conventions to fix its meaning.

But to the extent these observations suggest a stronger claim—namely, that conviction alone suffices to ground an expressive defense of corporate criminal law—then that claim rests on shaky ground. Meaning is not additive: the expressive inadequacy of corporate sentencing is not something that can be made up for by the fact of conviction or by a stern denunciation because the expressive force of conviction is deeply

120. Uhlmann, *Erosion*, *supra* note 53, at 1333; *see also* Buell, *supra* note 1, at 501 ("Criminal liability is distinguished by its communicative force."); Henning, *supra* note 1, at 1427 ("As an expression of the community's moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents, apart from any instrumental benefits from having a coercive means available to deter certain conduct.").

121. *See supra* note 55; cf. Anderson & Pildes, *supra* note 17, at 1508 ("Action, by definition, expresses intentions, and therefore always has expressive meaning.").

intertwined with the expressive force of punishment.[122] The core insight driving the expressive function of punishment is that hard treatment is conventionally necessary to convey the depth and seriousness of condemnation unique to the criminal law.[123] It is simply not the case that merely convicting will suffice here: "The linguistic utterance does not mean the same thing as the practice of condemnation, even when it purports to."[124]

Thus, appealing to conviction as grounds enough to justify corporate criminal law misunderstands the conventional problem's critique. The issue is not just that conviction cannot shore up the conventional problem, but rather that failing to punish adequately undermines the credibility and gravity of conviction as a source of condemnation.[125] Much of the stigmatic punch of conviction is driven by or guided by a social convention according to which hard treatment invariably follows.[126] A conviction that then failed to impose punishment anywhere near commensurate to the crime seems outrageous to the extent that it indicates the State wasn't really serious about its initial condemnation.[127]

For a particularly vivid example of how corporate sentencing can undercut the expressive force of conviction, consider PG&E's role in causing the deadliest wildfire in California history, for which the utility company pled guilty to 84 counts of involuntary manslaughter.[128] Emphasizing the condemnatory force of conviction, the trial court required PG&E's chief executive to admit, in open court, to each count individually.[129] But

122. Anderson & Pildes, *supra* note 17, at 1567 ("[T]o condemn meaningfully requires not a mere utterance, even in the form of a stern lecture from the bench, but a practice of punishment socially understood to express condemnation effectively, such as incarceration.").

123. Feinberg, *supra* note 19, at 402.

124. Anderson & Pildes, *supra* note 17, at 1568; *accord* Kahan, *Alternative Sanctions*, *supra* note 39, at 600–01.

125. By the same token, one expressive critique of prosecution agreements is that they seek to get the benefits of punishment on the cheap through side agreements with prosecutors. Uhlmann, *Erosion*, *supra* note 53, at 1333–35.

126. *See supra* notes 62–65.

127. Anderson & Pildes, *supra* note 17, at 1567; GARLAND, *supra* note 63, at 256.

128. Although this case involves California, rather than federal law, the lesson is instructive here to the broader claim.

129. Katherine Blunt & Peg Brickley, *PG&E Pleads Guilty to Manslaughter in Fires as It Nears Bankruptcy Exit*, WALL ST. J., June 16, 2020, https://www.wsj.com/articles/pg-e-to-admit-fault-in-84-fire-deaths-plead-guilty-to-manslaughter-11592321556; *see also* Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 966 (1998) (defending an expansion of this practice).

whatever solemnity this plea colloquy generated was undercut by the ultimate punishment imposed, which capped PG&E's fine at a statutory maximum of approximately $3.5 million. It would be insulting to suggest that this punishment fit a crime that, beyond the staggering loss of life, destroyed thousands of homes and wiped out entire towns.[130] Of course, by this point PG&E had already committed to paying billions of dollars in civil penalties;[131] the charges pleaded to were chosen in part to avoid disrupting pending bankruptcy proceedings.[132] But these observations just serve to reinforce the broader point that criminal fines, as they are currently constituted, are often deeply unsuited to the task that expressive theories of corporate criminal law would have them carry out. A $3.5 million fine is woefully insufficient as a punishment to express the degree of condemnation one would expect to accompany criminality on such a massive scale; the punishment itself calls into question whether California was ever serious about its outrage in the first place.

Appealing to the fact of conviction to dissolve the conventional problem thus risks begging the question against the very expressive insight at issue—or, at the very least, being ad hoc. Yes, a conviction is stigmatizing all by itself; and yes, it's conceivable that an institution could exist that expresses condemnation without punishment. But why think these premises justify extending the criminal law to corporations without bleeding into the rest of criminal law, where the fact of conviction alone doesn't suffice? While corporate persons are different from individual persons in ways that should matter to the criminal law,[133] it would be surprising to discover that convicting a corporation provides the condemnatory force inherent to the

130. Kirk Siegler, *The Camp Fire Destroyed 11,000 Homes. A Year Later Only 11 Have Been Rebuilt*, NPR, Nov. 9, 2019, https://www.npr.org/2019/11/09/777801169/the-camp-fire-destroyed-11-000-homes-a-year-later-only-11-have-been-rebuilt.

131. *See* Bhargav Acharya, *Bankrupt PG&E Reaches $13.5 Billion Settlement with California Wildfire Victims*, REUTERS, Dec. 6, 2019, https://www.reuters.com/article/us-california-wildfire-pg-e-us/bankrupt-pge-reaches-135-billion-settlement-with-california-wildfire-victims-idUSKBN1YB03 M (describing victim fund for wildfires caused by PG&E through 2017 and 2018).

132. PG&E reportedly declined to plead guilty to a lesser charge, a single count of arson, because the resulting fine would then have been closer to $200 million. Katherine Blunt, *PG&E to Plead Guilty to Involuntary Manslaughter Charges in Deadly California Wildfire*, WALL ST. J., Mar. 23, 2020, https://www.wsj.com/articles/pg-e-to-plead-guilty-to-involuntary-manslaughter-charges-in-deadly-california-wildfire-11584962649.

133. Thomas, *Incapacitation*, *supra* note 11, at 941–46.

criminal law while maintaining that individuals must routinely be imprisoned for the same message to stick.[134] That point aside, it no longer becomes clear what work the expressive insight would be contributing to such an account. After all, even if hard treatment isn't logically required in order to punish, nevertheless it turns out to be the conventional way that the criminal justice system expresses condemnation.[135] If it were true that the conviction alone delivered all the condemnatory force necessary to ground an expressive account of criminal law, then it's not clear why we would need an account of the expressive function of punishment at all.[136]

In summary, the conventional problem with corporate punishment cannot be avoided by appealing to other condemnatory functions of the criminal law. Whatever differences there are between the meanings of conviction and punishment, their successful expression is intertwined. In particular, conviction alone cannot justify an account of corporate criminal law when the conventions informing the meanings behind corporate punishment operate so as to undermine the stigmatic force upon which such an account depends.

IV. WHAT IF THE CONVENTIONS ARE THE PROBLEM?

The prior section canvassed strategies for responding to the conventional problem of corporate punishment, which largely take as given the social conventions we have surrounding punishment. This final section considers whether a better strategy may be to focus on the social conventions underlying the conventional problem. One approach would be to reinvigorate corporate shaming sanctions by leveraging social norms currently embedded in the criminal justice system, but which have not crossed over to the corporate space. Alternatively, rather than work to change the sanctions

134. For an argument that the State has an obligation to hold corporations at least as responsible as other citizens, see Thomas, *Persons*, *supra* note 1, at 531–37.

135. Feinberg, *supra* note 19, at 402.

136. The claim here is not that there could be no reason to punish on such account. Recall that the expressive insight is not a substantive theory—it does not tell the State to aim for a target of maximizing condemnation—but rather structures the sorts of evaluations the State can make in pursuit of other substantive goals. *See supra* Part I.A. The claim here is that if conviction sufficed, then a core premise of the expressive function of punishment would turn out to be false.

that are currently being imposed, perhaps we would be better served trying to change how people perceive these sanctions.

A. Reinvigorating Shaming Sanctions

Shaming sanctions represent an underexplored avenue for addressing the conventional problem with corporate sentencing. Peter French first proposed using shame as corporate punishment through "court-ordered adverse publicity," which was ultimately incorporated into the Sentencing Guidelines upon their adoption a few years later.[137] However, throughout its tenure this "public sanction" appears to have been imposed sparingly,[138] and the underlying idea of using shaming sanctions as corporate punishment has received only intermittent attention.[139]

But outside the corporate context, shaming sanctions have received considerable attention from expressive theorists owing to the fact that they are intended to directly "signal a community's moral disapproval of the offender's conduct."[140] The hallmark of a shaming signal is that it subjects the offender to "public humiliation" aimed at lowering the defendant's status in the eyes of the rest of the community.[141] Shaming sanctions substitute out traditional modes of hard treatment and replace them with ritualized acts of publicity—Hester Prynne's scarlet letter, for example—meant to encourage "citizens [to] publicly and self-consciously draw attention to the bad dispositions or actions of [the]

137. U.S.S.G. § 8D1.4(a) (requiring an organization to publish an apology describing its offense, punishment, and steps being taken to avoid future occurrence); *see* French, *supra* note 81, at 20; Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992).

138. The Sentencing Commission does not provide statistics concerning court-ordered apologies, but reviewing the Corporate Prosecution Registry identifies only three cases. *See* Brandon L. Garrett & Jon Ashley, Corporate Prosecution Registry, Duke University and University of Virginia School of Law, at http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html.

139. *See, e.g.*, David A. Skeel, *Shaming in Corporate Law*, 149 PENN. L. REV. 1811, 1817 (2001); Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1998); Cowan, *supra* note 137.

140. Skeel, *supra* note 139, at 1817; *Cf.* JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 72 (1989) ("Shame is more pregnant with symbolic content than punishment [through material sanctions].").

141. Flanders, *supra* note 22, at 621; Kahan, *Alternative Sanctions*, *supra* note 39, at 631–34 (collecting examples).

offender."[142] Shaming punishments thus function differently from other forms of hard treatment in that they "encourage ordinary people to take part in a ritual of degradation" for the purpose of lowering the defendant's status in the community.[143]

By replacing state-imposed hard treatment with community-imposed shame, shaming sanctions raise the possibility of resolving the conventional problem with corporate sentencing "on the cheap"—that is, by securing expressive condemnation without the resulting top-side limitations and spillover harms likely to result from ratcheting up traditional forms of hard treatment.[144] Why then haven't shaming sanctions been embraced more widely?

It seems unlikely that the issue here concerns uncertainty about the possibility of corporate shame. Corporations routinely suffer reputational harm when their misdeeds are uncovered.[145] Moreover, they both can and frequently do behave in ways that would constitute expressions of shame if carried out by an individual.[146] It may be a further question whether this behavior, absent the corporation's phenomenological incapacity to experience the accompanying feeling, counts as experiencing shame.[147] But, as

142. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 368 (1999); Skeel, *supra* note 139, at 1815 ("Whereas imprisonment punishes the offender by taking away her physical freedom, shaming takes aim at the offender's reputation or dignity."). It also informs why the State's use of shame as punishment is so normatively fraught. Flanders, *supra* note 22, at nn. 3–4 (collecting citations). *See generally* MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 176–207 (2006).

143. Flanders, *supra* note 22, at 621; Kahan & Posner, *supra* note 142, at 375 ("[S]haming is crucially different from fines and imprisonment, because it depends on the cooperation of citizens for it to have any effect.").

144. *See supra* Part III.A; *see also* Kahan & Posner, *supra* note 142, at 371, 272–76 (arguing that, because they impose forward-looking reputational costs, shaming sanctions are "a more effective form of fining that reaches assets that fining cannot reach").

145. *See generally* Jonathan M. Karpoff, *Does Reputation Work to Discipline Corporate Misconduct?*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 361 (Barnett & Pollock eds., 2012) (summarizing empirical literature).

146. *See, e.g.*, Rachel Adams, *Starbucks to Close 8,000 Stores for Racial Bias Training After Arrests*, N.Y. TIMES, Apr. 17, 2018, https://www.nytimes.com/2018/04/17/business/starbucks-arrests-racial-bias.html.

147. That is, whether in these circumstances an entity is capable of actually being ashamed, rather than merely playing at being ashamed. Shame is similar in this respect to suffering. *See supra* note 37.

with similar issues surrounding corporate agency, expressive accounts have conceptual resources available here.[148] To that point, it bears noting that the literature on shaming sanctions has long emphasized that a defendant's subjective feelings of shame are not required for shaming sanctions to succeed as a form of punishment.[149]

More plausibly, the issue might be that the publicity sanction, at least as envisioned by the Sentencing Guidelines, looks mostly indistinguishable from the fact of conviction itself. Focusing on the latter, considerable attention has been paid to the reputational effects of corporate prosecutions; despite widespread agreements that corporations face reputational consequences when their wrongdoing is uncovered, it is hotly contested whether the extent to which this harm results is from the fact of disclosure or from the criminal process itself.[150] But whatever stigmatic force these legal processes are applying, it seems that there might be little left over for a further publicity *sanction* to accomplish. This is particularly true because, unlike other sources of reputational harm, "judicial shaming efforts often have a more diffuse target."[151] Moreover, the Guidelines' approach to corporate shaming risks being a relatively sterile affair; the few identifiable examples involve posting a notice of apology in a local paper.[152] On this view, the problem with publicity sanctions is that any condemnation from the publicity of conviction is already accounted for by the fact of conviction.[153]

What could be done to reinvigorate corporate shaming as a viable approach to addressing the conventional problem with corporate shaming? One thought is to notice here that one of the most powerful shaming practices associated with criminal law has not crossed over to the corporate

148. *See infra* Part I.B.1.

149. *E.g.*, Kahan, *Alternative Sanctions*, *supra* note 39, at 636 ("It is not a condition of a successful degradation ceremony that it induce any particular belief or emotion on the part of the offender.").

150. Edward M. Iacobucci, *On the Interaction between Legal and Reputational Sanctions*, 43 J. LEGAL STUD. 189, 192 (2014).

151. Skeel, *supra* note 139, at 1828.

152. *E.g.*, *Indiana Cardboard Maker Fined for Chemical Spill*, MANUFACTURING.NET, Sep. 7, 2007, https://www.manufacturing.net/operations/news/13062635/indiana-cardboard-maker-fined-for-chemical-spill. Perhaps emphasizing the point, the company's actual apology could not be found.

153. If shaming proposals are nothing more than an appeal to the stigma associated with the fact of conviction, then the move suffers the same challenges discussed in Part III.B.

space, which suggests a problem for corporate punishment inasmuch as "[s]haming sanctions are so integrally connected to social norms that it is not entirely clear where one leaves off and the other begins."[154] Specifically, the criminal justice system cultivates, and to a certain extent legitimates, a deeply stigmatizing social practice of *criminal epithets*—that is, labels used to condemn, stigmatize, or otherwise denigrate a person convicted of a crime. Some of these criminal epithets—labels like "murderer," "thief," "rapist," "arsonist," "fraud," and "tax cheat"—are thickly moralized, connecting the label to a specific underlying crime or wrong.[155] Others are thinner or more generic—think of terms like "criminal," "offender," or "felon"—which may have independent legal significance.[156] Regardless, as it turns out, much of this rich and richly stigmatic vocabulary happens not to carry over when the offender is an organization rather than an individual.[157] We don't tend to call corporations murderers or killers when they kill; thieves or tax cheats when they steal; arsonists, drug traffickers, or any number of other criminal epithets. Even thinner epithets like "offender" are used infrequently.[158] In short, there are conventional markers of shame and stigma ready to be leveled against criminal defendants, but for

154. Skeel, *supra* note 139, at 1821.

155. *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 130 (1985) (coining the distinction between "thick" and "thin" evaluative concepts). On their relevance to pejoratives, see Allan Gibbard, *Reasons Thick and Thin*, 100 J. PHIL. 288, 300–01 (2003); Ryan J. Hay, *Hybrid Expressivism and the Analogy Between Pejoratives and Moral Language*, 21 EUROPEAN J. PHIL. 450 (2013).

156. *See* Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563 (2018) (disambiguating felonry's legal and pejorative meanings); *see also* GARLAND, *supra* note 63, at 257 ("When the penal system . . . begins to use a particular vocabulary to describe offenders and to characterize their conduct, such conceptions and vocabularies . . . frequently enter into conventional wisdom and general circulation.").

157. *Cf.* Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 827–36 (2018) (discussing how prosecutors talk about corporate crime). The worst epithets we seem to apply to corporations are the names of other corporations. *E.g.*, Josh Barrow, *Nikola Says It's Not the Next Theranos*, N.Y. MAG., Sep. 22, 2020, https://nymag.com/intelligencer/2020/09/nikola-says-its-not-the-next-theranos.html; Ryan Browne, *'The Enron of Germany': Wirecard Scandal Casts a Shadow on Corporate Governance*, CNBC, June 29, 2020, https://www.cnbc.com/2020/06/29/enron-of-germany-wirecard-scandal-casts-a-shadow-on-governance.html.

158. Chapter 8 does not refer to organizations as "offenders," *see* U.S.S.G. ch. 8, whereas the term appears elsewhere throughout other chapters generally and in the context of specific epithets (i.e., "sex offender," "career offender"). Meanwhile, the Sentencing Guidelines include other epithets for individuals. *E.g.*, U.S.S.G. § 5F1.6 (drug trafficker).

whatever reason those conventional labels haven't carried over to the corporate context.

Perhaps the potential of corporate shaming resides in leveraging these richer shaming conventions to improve corporate punishment. After all, there is nothing obviously problematic, as a linguistic or semantic matter, with calling a corporation a criminal any more than with calling it a person.[159] Indeed, in one important respect criminal epithets might be *more* fitting for corporations than for individuals. A longstanding complaint with criminal epithets is that they collapse a person's identity into the fact of conviction even though few individuals demonstrate a pattern or propensity to merit being described as such.[160] By contrast, many corporations do appear to have such propensities—or, at the very least, have demonstrated a pattern of bad behavior far more substantial than the average individual who ends up being labelled as an offender. Indeed, the Justice Department treats evidence of propensity as a central consideration in whether to prosecute a corporation.[161] Compared to the average individual offender, PG&E really does seem like an arsonist; Wells Fargo a fraudster. More generally, if the ambition is to secure a more stigmatizing approach to corporate punishment, then leveraging untapped conventions from other areas of the criminal law seems an instrumentally rational response to the conventional problem with corporate sentencing.

B. Prioritizing Criminal Justice Reform

There are practical challenges with importing criminal epithets into corporate criminal law. At issue here is a broad, decentralized social practice; it may be that little can be done to change it. But a more pressing objection to importing criminal epithets into the corporate space is moral, rather than practical. Simply put: our conventions around criminal epithets are bad

159. 18 U.S.C. § 921(a)(1) ("The term 'person' and the term 'whoever' include any individual, corporation, company, association, firm, partnership, society, or joint stock company."); *see also* 18 U.S.C. § 18 ("[T]he term 'organization' means a person other than an individual."); *accord* U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 app. notes (2018).

160. *See* Gwenda M. Willis & Elizabeth J. Letourneau, *Promoting Accurate and Respectful Language to Describe Individuals and Groups*, 30 SEXUAL ABUSE 480 (2018) (collecting sources).

161. *See* U.S. DEP'T JUST., JUSTICE MANUAL § 9-28.500 (discussing "pervasiveness of wrongdoing within a corporation"); § 9-28.600 cmt. b (2018).

and should be reformed, not expanded. This critique speaks to a more general point about the relationship of corporate criminal law to the criminal justice system, and suggests a surprising new solution to the conventional problem with corporate sentencing—namely, radical criminal justice reform.

Start with criminal epithets. The practical problem is that it is difficult to change existing social norms. But, and without minimizing these challenges, social conventions can and do change.[162] More to the point, shifts can occur as a result of activism and state intervention.[163] If the absence of corporate criminal epithets speaks to a weakly held social convention, then it seems plausible that elite criminal justice actors—i.e., courts, prosecutors, journalists—may well be able to affect these practices through a deliberate embrace of existing shaming conventions.[164] Conventions change, and it's even possible to change them.

But working to import criminal epithets into corporate criminal law seems a morally risky endeavor. Criminal epithets work, if the ambition is to condemn and stigmatize; the problem is that they work far, far too well in this respect.[165] In terms of the direction that we should be changing them, it would seem the clear moral imperative is to cultivate less stigmatizing norms. And although it is ultimately an empirical question, it seems plausible that working to expand the usage of criminal epithets into the corporate setting would operate at cross purposes from efforts to reduce

162. *See* ANDERSON, *supra* note 57, at 18–19; Anderson & Pildes, *supra* note 17, at 1567–68 ("Of course, the forms of punishment that properly express the requisite condemnation can change as cultural understandings change.").

163. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (coining the term "norm entrepreneur); *see generally* Benjamin Justice & Tracey Meares, How *the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL'Y SCI. 159 (2014).

164. *Id.* at 929–30; Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW SOC. INQ. 60, 70–72 (2017). There is some effort to do this already by one trade paper. *See* CORP. CRIME REPORTER, https://www.corporatecrimereporter.com/.

165. Lynn S. Branham, *Eradicating the Label "Offender" from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53 (2019), http://wakeforestlawreview.com/wp-content/uploads/2019/08/9-Wake-Forest-L-Rev-Online-53.pdf; Eddie Ellis, *Language*, PRISON STUDIES PROJECT, https://prisonstudiesproject.org/language; Charlie Ryder, *Why Are the Labels "Offender" and "Ex-Offender" So Offensive?*, DISCOVERING DESISTANCE (Feb. 11, 2013), https://discoveringdesistance.home.blog/2013/02/11/820/.

their role as applied against individuals.[166] At the very least, insofar as much of the expressive force of corporate criminal law is derived from individual criminal law, it seems naïve to suppose that the two practices could swap places. Between the two, the clear priority is either to eliminate or to defang the impact of criminal epithets as applied to individuals. On this view, then, it may be lamentable (at least, for purposes of addressing the conventional problem) that we don't have a convention of applying criminal epithets to corporations; however, it doesn't follow that we ought to pursue one.

Looking more broadly, our conventions around criminal epithets are just one of countless instances where there is too much stigma in and around the criminal justice system. But by now, virtually all observers of our criminal justice system agree that the modern enterprise is profoundly broken: we need substantially less incarceration, less pervasive condemnation and stigma, and less hard treatment overall.[167] It seems inevitable that one component of a move toward sustainable criminal justice reform would need to include changing social norms around the sorts of criminal punishments we already have.[168] These reforms are worth pursuing—not because of anything to do with the conventional problem with corporate sentencing, but because they are the right thing to do.

That said, even if the point of criminal justice reform is not to resolve the conventional problem with corporate sentencing, nevertheless addressing the former may also help the latter. A plausible side effect of criminal justice reform would be to put expressive defenses of corporate criminal law on an improved footing. At the crux of the conventional problem with corporate sentencing is the observation that sanctions like fines, probation, and community service lack the stigmatic force associated with more

166. *Cf.* Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503 (2007) (arguing that improved enforcement of corporate criminal law will encourage pro-defendant reforms generally).

167. *See, e.g.,* THE NEW CRIMINAL JUSTICE THINKING (Dolovich & Natapoff eds., 2017) (collecting essays); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); *see also* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STANFORD L. REV. 933 (2016).

168. This doesn't mean making the perceptions of alternative punishments worse. It may, for example, involve weakening the perceived need for draconian punishments, such that imposing alternatives would thereby be sufficient. Or it may involve a recognition that the supposedly less harsh alternative punishments or actually harsher than many first appreciate.

traditional punishments like incarceration.[169] Here, the conventions at issue are not about corporate punishment—rather, they are about punishment generally. Since its early roots in the nineteenth century, corporate criminal law has been conceived of, and structured as, a project to expand a pre-existing criminal law to include corporate persons, rather than as a separate, independent field of law.[170] That corporate punishment derives public meaning from criminal law more broadly speaks to a fundamental commitment of the institution, which is to preserve a single system of criminal law for corporate and individual persons alike.[171] A consequence of this approach is that expressive accounts of corporate criminal law derive their legitimacy by appealing to features of the criminal law generally. And that means, for the extant purposes, that changing the public meetings attendant to corporate punishment requires changing conventions about criminal punishment more generally. This change would be a good thing, not just for expressive defenses of corporate criminal law, but more importantly for the criminal justice system. And, given the viability of the alternatives, perhaps changing our conventions around corporate punishment may end up as the most promising path forward for expressive theories.

CONCLUSION

Despite its historical longevity, the institution of corporate criminal law has always rested atop shaky, and frequently contested, normative and conceptual foundations. The most promising set of approaches to rationalizing and justifying a modern institution of corporate criminal law all occupy the space of expressive theories of law. But our current approaches to corporate sentencing are profoundly ill-equipped to make good on this expressive promise.

There are several ways to go about solving this conventional problem with corporate sentencing, all of which have their limitations. But too much attention has been paid to fixing the shortcomings with corporate sentences and not enough to addressing the conventions that give them meaning. Reorienting the conventional problem in this way, the best

169. *See supra* Part II.B.

170. Thomas, *Persons*, *supra* note 1, at 518.

171. Thomas, *Incapacitation*, *supra* note 11, at 941–46.

solution may be as simple to see as it is difficult to accomplish: we should work to reform our conventions around punishment. And we should do this not because it solves the conventional problem with corporate punishment—although it might—but because those conventions are not worth keeping in the first place.