

## Is Retributive Corporate Punishment Possible?

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Samuel W. Buell, *Retiring Corporate Retribution*, 83 **Law & Contemp. Probs.** \_\_\_ (forthcoming 2020), available at [SSRN](#).

Can corporations be blameworthy? Can they deserve punishment? If so, can we actually give them their just deserts?

Yes, yes, and no. At least, that's what [Samuel Buell](#) says in this [new article](#), where he contends that we should dispense with the notion of retribution when considering corporate punishment. Buell's principal idea is that corporations cannot be retributively punished, since they cannot "be harmed or set back in ways that could satisfy" the retributive requirements of desert. His novel theoretical challenge to retributivism in corporate punishment compels us to rethink how the criminal justice system should interact with corporations.

Buell begins by defining retributive punishment as punishment that is "pursued in order to fulfill a moral imperative—that the wrongdoer must be punished." Buell then surveys the different accounts of what constitutes such punishment—*inter alia* the experience of suffering, the "setting back" of well-being or interests, and the expression of condemnation. The common thread is that retributive punishment requires a subject with "experiential capacity." (Foreshadowing: Corporations don't have this.)

Buell next explains why prior challenges to corporate retributivism have failed. These arguments contended that corporations can't be blameworthy because they aren't people and don't have minds. Buell provides good reason to think that argument is too quick. Even though corporations don't themselves have minds, Buell argues that we can locate *mens rea* in corporate action. Corporate action involves collective human decisionmaking to which we can ascribe responsibility. Moreover, collective human decisionmaking is distinct from individual human decisionmaking—blaming a group for a decision is distinct from blaming each of the individuals for participating in the group decision. Thus, the corporation is an appropriate locus for responsibility and blame for collective human decisionmaking. The upshot then is that corporations can be blameworthy for their actions and thus they can deserve punishment.

But, according to Buell, here's where the real problem arises: We cannot actually give corporations the punishment they deserve. *This* then is the sense in which it matters that corporations aren't people and don't have minds: They cannot experience pain or suffering, or anything for that matter. Now corporations can have their well-being or interests "set back." But because corporations do not have experiential capacity, such putative punishment is not retributive in nature. It may produce good instrumental consequences, but it cannot give corporations their just deserts. Condemning corporations is similarly retributively empty, since corporations cannot understand or process such condemnation. People associated with the corporation might—but the corporation itself, the subject of the putative punishment, cannot. Buell puts it best when he writes, "From a retributive point of view, the problem is not that corporations are too big to jail but rather that they are too inhuman to feel." Even if the public demands retribution from corporations and prosecutors comply, that is really just to advance the beneficial result of quelling public outrage—it's not true retribution.

Buell then brings to bear the practical impact of these insights about retributivism and the corporate form. Buell notes that the Department of Justice first formalized the doctrine of corporate criminal liability in a 1999 memorandum signed by then-Deputy Attorney General Eric Holder (and now known as the Holder Memo). Though amended many times, the Holder Memo has firmly held to consequentialist principles of advancing welfare and balancing costs with benefits in corporate punishment, without explicitly directing the DOJ to pursue corporate retribution. But the DOJ's handling of

corporate crime, and in particular the use of deferred prosecution and nonprosecution agreements, has come under criticism. The criticisms take many forms but they often have a retributive tenor. Especially since the 2008 financial crisis, there is public frustration with the fact that corporations seemingly haven't gotten the punishment they deserved. But on Buell's analysis, there's good reason for that and it isn't because of DOJ policy. It's because of the impossibility of corporate retribution. Indeed, even if the public is satiated with corporate admissions of guilt, the guilty pleas still won't satisfy the demands of retribution. Consequently, Buell concludes that we should "retire corporate retribution."

Apart from the merits, where Buell has set forth a compelling case, I think readers will find it hard to retire the topic because of the fascinating questions Buell has unearthed. Here are a few that come to mind:

First, similar to the way in which we locate *mens rea* and blameworthiness in the collective human action of the corporation, why can't we also locate the experience of punishment in the collection of people that constitute the corporation? For example, suppose I band together with my friends to create a corporation, and we engage in blameworthy misdeeds. If our corporation is legally dismantled, then so too is *our* collective. Each of us, who are capable of feeling, are punished *qua* members of the collective: That part of our life and our identity has been dissolved, and ergo punished. Similarly, we might be condemned *qua* members of the collective, for which we can feel guilt or shame. Might these notions ground corporate retribution?

Second, embracing the conclusion, if the public is satiated by the purported retribution of corporate admissions of guilt, but those are not in fact retributively valid, what should we make of the merits of public retributive intuition in general? Should it make us any warier of the retributive demands of the public in criminal justice?

Third, does this illuminate something about retributive theory in the individual context? That is, because of their lack of experiential capacity, corporations cannot be given their "just deserts." But people can also lack experiential capacity for punishment. Some might not have functioning minds, but others may lack the relevant capacity as well. Imagine a person growing up in extreme dysfunction and distress, due to being raised in abject poverty or an atmosphere of pervasive violence. Our forms of punishment—even our most extreme forms—may not have the right retributive impact on that person. Do our forms of punishment then also fail to be retributive regarding that person?

Fourth, what is, with specificity, the proper object of retributivist desert? Does investigating the locus of desert in the corporate form clarify what makes an individual blameworthy and deserving of punishment? Is the resulting desert object coherent and intuitively sound?

In sum, Buell's piece is accessible, informative, and thought-provoking. He provides strong reason to rethink whether corporation retribution is worth pursuing, and his insights might give us reason to consider further whether retribution and the public's understanding of it are indeed well-founded and sensible. I expect this piece to be a catalyst for many scholarly dialogues.

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