NOTE

The Case for a Federal Corporate Charter Revocation Penalty

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ABSTRACT

Though American corporations are creations of state law, the federal government predominantly regulates their behavior. This mismatch helps explain both the inadequate deterrence that the current system of criminal sanctions imposes on corporations as well as the unmet social need for retribution. This Note argues that Congress should authorize a federal corporate charter revocation penalty for corporations that are repeatedly convicted of certain crimes. Congress, exercising its power to preempt states from fields in which the states and Congress share authority, could authorize federal courts to impose such a penalty. Charter revocation would improve both general and specific deterrence against corporate crime and better meet the public's need for retribution. Congress should apply the charter revocation penalties to the type of morally laden, socially damaging crimes that meet the U.S. Sentencing Commission's factors for increasing the severity of a sentence. The charter revocation penalty should be structured to protect innocent parties, such as employees, while preventing the morally culpable, such as officers and directors, from reconstituting the condemned corporation.

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INTRODUCTION

In 2005, an explosion at an oil refinery owned by BP-North America ("BP-NA") in Texas City, Texas, killed fifteen people and injured hundreds more.[1] The U.S. Chemical Safety and Hazard Investigation Board investigated and implicated organizational and safety deficiencies extending from the refinery's management all the way to BP's corporate boardroom in London.[2] The company was fined $50 million for a felony violation of the Clean Air Act[3] and was later as-

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1 Richard Mauer & Anna M. Tinsley, *Gulf Oil Spill: BP Has a Long Record of Legal, Ethical Violations*, MCCLATCHY (May 8, 2010), http://www.mcclatchydc.com/2010/05/08/93779/bp-has-a-long-record-of-legal.html.

2 *Id.*

3 Clean Air Act, 42 U.S.C. §§ 7401–7515 (2006).

sessed $87 million more in fines by the Occupational Safety and Health Administration for 270 previously cited and still-unfixed safety violations, and 439 new violations.[4]

The next year, after BP had received warnings about corroded pipes, a badly corroded and improperly maintained pipeline in Alaska owned by BP spilled 200,000 gallons of oil on the tundra, the worst oil spill ever on the North Slope.[5] Only five months later, another BP pipeline riddled with corrosion broke open, spilling even more oil on the tundra.[6] BP pled guilty to a misdemeanor violation of the Clean Water Act[7] and paid $20 million in fines.[8] Though congressional hearings revealed that BP employees throughout the company faced retaliation for reporting problems, a BP vice president told a federal court that BP had learned its lesson.[9]

Just three years later, however, with BP still on criminal probation,[10] yet another BP pipeline owned by another BP subsidiary exploded in Alaska, spilling 46,000 gallons of water and oil onto the North Slope and prompting yet another criminal probe.[11] Meanwhile, in 2007, BP-NA admitted that its traders cornered the American market for propane shipped by pipeline from Texas.[12] BP agreed to pay more than $300 million in restitution and civil and criminal penalties.[13]

Most recently, in April 2010, the Deepwater Horizon, an offshore oil rig leased and operated by BP near Louisiana, exploded and sank, killing eleven workers[14] and precipitating the largest marine oil spill in

4 Mauer & Tinsley, *supra* note 1.

5 *Id.*

6 *Id.*

7 Clean Water Act, 33 U.S.C. §§ 1251–1376 (2006).

8 Mauer & Tinsley, *supra* note 1.

9 *Id*.

10 Monica Hatcher, *BP Gets a Break over Its 2005 Case*, HOUS. CHRON., Sept. 27, 2010, at B8. Any corporation may be sentenced to a term of probation at the court's discretion. 18 U.S.C. § 3561(a) (2006); U.S. SENTENCING GUIDELINES MANUAL § 8D1.1 (2010). A term of criminal probation is required for convicted corporations that do not pay a fine. 18 U.S.C. § 3551(c).

11 Mauer & Tinsley, *supra* note 1.

12 Under a deferred prosecution agreement with the Justice Department, BP-NA admitted that its traders illegally cornered the market for February 2004 TET propane—propane shipped from Texas to the Midwest and Northeast via the Texas Eastern Products Pipeline. CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT 1.3–.4 (2008), *available at* http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf.

13 *Id*.

14 Leslie Kaufman, *Search Ends for 11 Oil Rig Workers, but Spill Seems Contained for Now*, N.Y. TIMES, Apr. 24, 2010, at A8.

world history.[15] The ecological injury to the Gulf of Mexico will likely take decades to heal.[16] Though the criminal investigation is still ongoing,[17] reports that, for example, there were shortcomings in the well design[18] and that the blowout preventer was installed on a test pipe rather than on the actual well[19] suggest that BP may be criminally negligent under the Clean Water Act for the resulting pollution.[20]

These are only the most severe illegal activities in which BP entities have been caught engaging over the recent past.[21] The ongoing and serious nature of BP's criminal activity suggests that the criminal sanctions applied against it are failing to deter criminal activity by the company, activity that has killed dozens of people and created ecological catastrophes.[22] At the same time, however, the fines and penalties against BP are some of the largest of their kind in history;[23] arguably BP is not getting an easy ride from prosecutors.

The BP experience highlights deep structural problems in the American system of corporate criminal liability. BP-NA is incorporated in Maryland and is one of thirteen domestic subsidiaries of BP, the global energy giant based in the United Kingdom.[24] Though BP-NA is legally a creature of the State of Maryland, commentators have not suggested an enforcement role for Maryland in the wake of BP's misbehavior, or an enforcement role for the states in which other BP subsidiaries are incorporated. Maryland, for its part, has no serious incentive to punish its creation: the damage occurred far away, and any serious attempt by Maryland to hold BP accountable would al-

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15 Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14.

16 *See* Justin Gillis & Leslie Kaufman, *The Corrosive Legacy of Oil Spills: Hidden Damages to Environment Can Last Long After a Cleanup*, N.Y. TIMES, July 18, 2010, at A1.

17 *See* Press Release, United States Dep't of Justice, Attorney General Eric Holder on Gulf Oil Spill (June 1, 2010), *available at* http://www.justice.gov/ag/speeches/2010/ag-speech-100601.html.

18 Clifford Krauss & Henry Fountain, *Report on Oil Spill Pinpoints Failure of Blowout Preventer: Finding Could Prompt Changes in Fail-Safe Devices*, N.Y. TIMES, Mar. 24, 2011, at A18.

19 *Oil Spill: Safety Valve Was Wrongly Plumbed on Rig, Says BP Executive*, TELEGRAPH (Aug. 25, 2010, 10:17 PM), http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7964890/Oil-spill-safety-valve-was-wrongly-plumbed-on-rig-says-BP-executive.html.

20 *See* 33 U.S.C. § 1319(c)(1)(B) (2006).

21 *See* CORPORATE FRAUD TASK FORCE, *supra* note 12, at 1.3–.4; *see also* BP p.l.c., Annual Report (Form 20-F) 130–33 (Mar. 2, 2011) (discussing recent legal proceedings against BP).

22 *See supra* notes 1, 12, 14.

23 *See* Mauer & Tinsley, *supra* note 1 (citing OSHA fine of $87 million for violations relating to refinery accident as largest in the agency's history).

24 *See* Eastling v. BP Prods. N. Am., Inc., 578 F.3d 831, 831 (8th Cir. 2009); BP p.l.c., *supra* note 21, at 220.

most surely result solely in lost revenue for Maryland as BP reincorporated in another, friendlier, state. Nor, for their part, have Alaska, Texas, or Louisiana moved to revoke BP's license to conduct business in their states.[25]

The reality today is that prosecution of egregious criminal behavior committed by corporations—behavior resulting, for example, in preventable deaths, property destruction, and environmental devastation—is handled largely at the federal, rather than state, level.[26] The systematic failure of federal law enforcement to adequately address corporate crime, of which BP provides an illustrative recent example, is rooted in part in the disconnect between the dominance of federal criminal law and the state-based existence of most corporations.

This Note argues that, to remedy this issue, Congress should give federal prosecutors the authority to revoke a state-granted corporate charter as punishment for federal crimes. There are three central reasons for making charter revocation available as a federal penalty. First, such a change would improve deterrence. Giving federal prosecutors this existential power[27] over corporations would improve deterrence by preventing fines from becoming a cost of doing business for corporations. In BP-NA's case, repeated penalties of tens of millions of dollars[28] appear to have failed to send a strong enough signal to the company to force a change in its behavior.

Second, federal charter revocation better meets the criminal justice goal of retribution. Although an individual can be imprisoned for criminal acts, a corporation has "no soul to be damned, and no body to be kicked,"[29] making monetary penalties the most commonly applied federal criminal sanction.[30] Corporate fines and restitution can

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25 In fact, federal prosecutors decided against even revoking BP's criminal probation resulting from the Texas City disaster despite BP's failure to make mandated safety upgrades. Hatcher, *supra* note 10.

26 *See infra* Part II.

27 This is the legal equivalent to the power of the federal government to execute a human being under 18 U.S.C. §§ 3591–3593 (2006). The application of the death penalty to humans is not the subject of this Note. The point is merely that although federal courts have statutory and constitutional authority to execute a human being, they have no equivalent power over a corporation or other artificial person (though federal courts may indirectly terminate a corporation's existence by divesting it of its assets under U.S SENTENCING GUIDELINES MANUAL § 8C1.1 (2004)). 18 U.S.C. §§ 3591–3593; Gregg v. Georgia, 428 U.S. 153, 207 (1976).

28 *See supra* notes 1, 12.

29 John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (emphasis and internal quotation marks omitted).

30 *See* U.S. SENTENCING COMM'N, TABLE 51: ORGANIZATIONS RECEIVING FINES OR RESTITUTION BY PRIMARY OFFENSE CATEGORY AND APPLICABILITY OF CHAPTER EIGHT FINE

often be passed along to consumers,[31] and frequently leave the corporation fundamentally unchanged from before the penalty was levied,[32] leaving the public need for retribution against the bad actor unmet.[33] Providing a meaningful way to end a corporation's existence as punishment for serious criminal behavior meets the public's need for retribution far better than the current system.

Third, corporate charter revocation goes to the integrity of the law itself. Incorporation is an affirmative grant of power issued by a state.[34] In other words, a corporation is a legal fiction[35]: it has no natural existence, but instead exists because the law recognizes it.[36] The integrity of the law is challenged when a state's own creation flaunts the very system that created it. The affirmative blessing of incorporation cannot possibly mean that other laws, such as those regulating criminal conduct, must give way. Thus, revocation of charters for corporations that have shown themselves to be incapable of complying with the law protects the integrity of law itself.

This Note begins with a brief history of the corporate form in the United States and the evolution of corporations from local, public-oriented entities chartered by state legislatures to enormous multinational organizations whose legal existence is a matter of rote administration by a state agency. This Part also describes the development of corporate criminal liability. Part II illustrates why the current system fails to provide adequate deterrence or retribution for corporate misconduct. It also explains why current legal mechanisms to end a corporation's existence—including charter revocation by state attorneys general, fines equal to the corporation's assets after designation as a criminal purpose organization, and debarment from federal contracting—each fail to meet these needs or have disqualifying problems

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GUIDELINES: FISCAL YEAR 2009 (2009), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table51.pdf.

31 *See* Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 993 (2005).

32 *See, e.g.*, *supra* text accompanying notes 1–19 (describing BP's continued criminal behavior despite frequent federal fines).

33 For analysis of the importance of retribution to criminal corporate behavior, see Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109 (2010). For a description of public outrage in the wake of the Deepwater Horizon disaster, see Kristin Jensen & Jim Snyder, *As Outrage Grows, So Does BP's Adviser Crew*, BLOOMBERG BUSINESSWEEK (June 17, 2010, 5:00 PM), http://www.businessweek.com/magazine/content/10_26/b4184030288892.htm.

34 *See generally* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

35 *See* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1645 (1982).

36 *Id.*

of their own. Part III details the legislation that Congress should pass to authorize federal prosecutors to revoke a state-granted corporate charter and discusses the situations in which courts should apply such punishment.

I. A Brief History of the Corporate Form in the United States and the Development of Corporate Criminal Sanctions

A corporation is an unnatural person, a collection of individuals and assets that the law grants personhood.[37] Although the modern business corporation is a major feature of American life, it is relatively new to the American legal system.

A. *State Incorporation and the Race to the Bottom*

At the time of the ratification of the Constitution, the colonies had collectively chartered only twenty-one business corporations.[38] The vast majority of these corporations served as quasi-public institutions, meeting a specific and narrowly defined public need defined by the legislation that chartered them.[39] The corporation allowed legislatures to attract capital for public purposes like bridges and canals by offering benefits such as limited liability.[40] States retained tight control over these early corporations, revising or amending their charters at will.[41] The vast majority of profitmaking businesses in the United States at its founding were sole proprietorships or general partnerships.[42] Although Congress was thought to have a general incorporation power early in the Republic's history, and in fact used that power to charter the Bank of the United States in 1791, political opposition to the Bank and to federal incorporation generally resulted in rare use

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37 *See generally* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 Tenn. L. Rev. 793 (1996).

38 Daniel A. Crane, *Antitrust Antifederalism*, 96 Calif. L. Rev. 1, 6 (2008).

39 John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 Cornell L. Rev. 310, 339 (2004).

40 Katie J. Thoennes, Comment, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 Hamline L. Rev. 203, 206 (2004).

41 *Id.*; *see also* Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 Am. J. Legal Hist. 160, 161 (1982) (discussing states' strict rules concerning corporate activities).

42 Crane, *supra* note 38, at 6.

of this power.[43] By the early twentieth century, incorporation was firmly rooted in the realm of state, rather than federal, law.[44]

Throughout the nineteenth and early twentieth centuries, states revoked or modified corporate charters when legislatures determined that these state creatures were not acting in the public interest.[45] In addition, courts strictly construed the limited and specific powers stated in most charters.[46] Slowly, however, the nature of corporations changed, as did the relationship between corporations and their parent states. For example, though state charters limited most corporations to a single line of business before the Civil War, legislatures began to relax their incorporation statutes during the rapid industrialization of the late nineteenth century for the purpose of attracting corporations to their states.[47] By attracting corporations to incorporate within their state, legislators could gain substantial revenue for their state governments through corporate filing fees and franchise taxes.[48]

States soon began to compete for incorporations by offering various legal incentives, including, for example, granting charters for any legal purpose whatsoever, eliminating requirements that directors be state residents, allowing unlimited capitalization, and ending public disclosure of annual reports.[49] New Jersey dramatically liberalized its incorporation statute in 1891, and within ten years ninety-five percent of the Nation's large corporations were incorporated there, earning New Jersey the nickname "the traitor state."[50] New Jersey, however, was quickly toppled by Delaware, which liberalized its incorporation statute not long after New Jersey.[51] In 1913, New Jersey, responding to political pressure from the Progressive movement, amended its incorporation law to be much more restrictive, giving Delaware the

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43 *Id.* at 11.

44 *Id.*

45 *See* Thoennes, *supra* note 40, at 223 & n.127. At the time, corporations could not be liable for crimes, for as unnatural persons, they could not possess the mens rea necessary for a criminal act. *See* Robson, *supra* note 33, at 111, 114. This was before both the development of strict liability crimes and the application of criminal liability to corporations, discussed *infra* Part I.B.

46 Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987).

47 Crane, *supra* note 38, at 12.

48 For example, corporate filing fees and franchise taxes provided sixty percent of New Jersey's revenue in 1901, following liberalized incorporation requirements that attracted trusts to the state. *Id.* at 12–13.

49 *See id.* at 12.

50 *Id.* at 12–13.

51 William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 664 (1974).

edge.[52] Delaware's dominance has continued to grow since then so that today Delaware captures eighty-five percent of the incorporations of firms that shop for jurisdictions in which to incorporate.[53] Though the annual taxes of each firm incorporated in Delaware are no more than $150,000,[54] revenues from corporate licenses, in the aggregate, provide more than $750 million to the small state.[55]

Today, corporate status is granted by state administrative agencies with delegated authority rather than by legislatures, with very few requirements and for virtually any purpose.[56] In fact, a recent survey of state incorporation statutes found that none of the fifty state statutes require a corporation to comply with state or federal law, beyond the routine reporting requirements of the incorporation statute itself, to maintain its incorporation.[57]

Though incorporation today is a routine administrative process, states retain broad powers to revoke corporate charters, should they choose to exercise them. All fifty states have *quo warranto* statutes with strong language allowing public officials such as the Attorney General (or, in some cases, private citizens[58]) to seek charter revocation for abuse or misuse of chartered powers,[59] yet these statutes are virtually never used today.[60] This is unsurprising, as an attorney general has strong incentives not to police behavior of corporations chartered in his state because the effects of corporate misbehavior are likely to occur outside of the state. Corporations are frequently taxpayers and employers, and are represented by lawyers and lobbyists.

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52 *Id.*

53 Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 555–56 (2002). Clearly there are other factors that lead corporations to incorporate in Delaware, such as a sophisticated court system for handling corporate disputes. *Id.* at 557. The point is that Delaware successfully competed for incorporations and has strong incentives not to drive corporations away by aggressively prosecuting them.

54 *Id.*

55 *State Government Tax Collections: 2010 State: Delaware*, U.S. CENSUS BUREAU, http://www.census.gov/govs/statetax/1008destax.html (last updated Mar. 15, 2011).

56 Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for Environmental Violations*?, 63 LA. L. REV. 175, 186 (2003).

57 *Id.*

58 Alabama, for instance, allows private citizens to file charter revocation lawsuits directly. ALA. CODE § 6-6-591(a)(1) (LexisNexis 2005).

59 For example, many states allow charter revocation for antitrust penalties. *See, e.g.*, Kathleen Foote, *State Antitrust Enforcement*, *in* 48TH ANNUAL ANTITRUST INSTITUTE 795, 803 (PLI Corporate Law & Practice, Course Handbook Ser. No. 1603, 2007) (citing CAL. BUS. & PROF. CODE § 16753 (Deering 2007); 740 ILL. COMP. STAT. ANN. 10/7(1), (3) (West 2006); WASH. REV. CODE ANN. § 19.86.150 (LexisNexis 2001)).

60 Crusto, *supra* note 56, at 190–91.

Regardless of whether corporations are criminal or law-abiding, they are likely to wield commensurate political power. State enforcement action is unlikely to stop the misbehavior anyway because a corporation can simply reincorporate in a friendlier state with a less aggressive attorney general and carry on as before. Hence, the "race to the bottom" effectively results in freeing corporations from meaningful state prosecution: another state, more desperate for the revenue from the incorporation than the state in which a criminal corporation is incorporated, will provide a new home where the corporation can reincorporate without fear of prosecution.

These factors constitute the major underlying problem with a system of state incorporation: states have largely abdicated the field of regulating corporate behavior and punishing corporate crime.[61] Indeed, states have every reason to enforce as little as possible.[62]

B. *The Rise of Federal Corporate Criminal and Civil Liability*

As the states abdicated the field of policing corporate behavior, the federal government increasingly occupied the field.[63] Over time, federal criminal and civil liability has almost completely replaced state policing of corporate behavior.[64]

At common law, corporations could not commit crimes.[65] During the late nineteenth century, this approach began to change. In 1886, the Supreme Court assumed in *Santa Clara County v. Southern Pacific Railroad Co*.[66] that a corporation was a legal "person" entitled to protection under the Fourteenth Amendment.[67] This radically expanded a corporation's rights under the law, but also opened the door for a corporation to be subject to penalties that previously had been applied only to "actual" people.[68] Courts gradually extended liability to

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61 *See id.* at 191 (citing personal communication by the author with Professor Robert W. Hamilton of the University of Texas Law School).

62 *See* Bebchuk & Hamdani, *supra* note 53, at 557.

63 *See* Baker, *supra* note 39, at 340–41.

64 *See id.*

65 1 WILLIAM BLACKSTONE, COMMENTARIES *464. There were several barriers to corporate criminal liability, including the lack of a physical body, lack of mens rea, and the doctrine of *ultra vires*, which treated corporations as incapable of acting outside of their charter. *See* Robson, *supra* note 33, at 114.

66 Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

67 *Id.* at 396 (indicating in a headnote approved by the Chief Justice that, as a preliminary matter to addressing the merits of the case, the Court believed that the Fourteenth Amendment applies to corporations).

68 *See* Robson, *supra* note 33, at 114–15.

corporations for crimes of general intent,[69] and then to crimes of specific intent.[70] In 1909, the Supreme Court exposed corporations to full criminal liability in *New York Central & Hudson River Railroad Co. v. United States*,[71] where it upheld a railroad's conviction for paying illegal "rebates" to its clients and noting that, without criminal liability for corporations, many crimes would go unpunished.[72] In the decades after *New York Central*, Congress, recognizing that some corporations had grown more powerful than the states that chartered them, proceeded to legislate "an unrelenting expansion of criminalization of business conduct."[73] Given that the nonhuman nature of corporations prevents criminal punishments such as imprisonment and execution, there is little distinction between civil and criminal penalties for corporate misconduct.[74]

Today, corporations can face federal criminal sanctions for a large variety of activities.[75] Under the Organizational Sentencing Guidelines, federal courts may impose a wide range of civil and criminal penalties on corporate criminals,[76] including restitution,[77] public notice of conviction,[78] disgorgement of wrongly gained assets,[79] and, most frequently, fines.[80]

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69 *See* United States v. Van Schaick, 134 F. 592, 602 (C.C.S.D.N.Y. 1904).

70 United States v. MacAndrews & Forbes Co., 149 F. 823, 835–36 (C.C.S.D.N.Y. 1906).

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

72 *Id.* at 494–96.

73 Robson, *supra* note 33, at 116 (noting that corporations have been held criminally liable for acts committed by low-level employees, acts committed though no individual has the requisite mens rea, and when employee defendants have been acquitted).

74 Ramirez, *supra* note 31, at 943. Although many commentators have criticized the theoretical underpinnings of corporate criminal liability, this liability has been part of the American legal landscape for more than a century and shows no signs of retreat. Rather than address these concerns, this Note assumes that corporate criminal liability will remain a part of the legal landscape for the foreseeable future.

75 U.S. SENTENCING GUIDELINES MANUAL ch. 8, introductory cmt. (2010) ("Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents."). Hence, corporations can be liable for virtually any crime that their agents can commit (except those requiring physical presence, such as rape and murder). V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1488–89 (1996).

76 U.S. SENTENCING GUIDELINES ch. 8. Although the Sentencing Guidelines are advisory rather than mandatory, a sentencing court must still consider the ranges set forth in the Guidelines. United States v. Booker, 543 U.S. 220, 245 (2005).

77 U.S. SENTENCING GUIDELINES § 8B1.1.

78 *Id.* § 8D1.4(a).

79 *Id.* § 8C2.9.

80 *See id.* § 8B1.

The Sentencing Guidelines also provide for a "death penalty" for organizations whose primary purpose is criminal.[81] The Guidelines implement this death penalty by setting a fine "sufficient to divest the organization of all its net assets."[82] This fine is designed to put the corporation out of business by forcing the forfeiture of all of its assets to the government. Although the corporation may continue to legally exist, depletion of its assets closes the corporation down. The provision does not typically apply to an ordinary, state-chartered, for-profit corporation, however, as it may only be applied to organizations "operated primarily for a criminal purpose or primarily by criminal means."[83] In practice, the organizational death penalty is very rarely applied: only a few reported cases appear to have applied it, and then only to minor players.[84]

There are other, indirect ways that federal prosecutors and regulators can exercise existential control over corporations in specific circumstances. The U.S. Department of Health and Human Services can exclude providers of health care supplies and services from contracting with the federal government on the basis of fraud, often sounding the death knell for providers shut out of Medicare and Medicaid.[85] Similar provisions apply to contractors working for the Department of Defense and other agencies.[86] These statutes demonstrate that, although Congress has already empowered courts and federal agencies to take actions that will ultimately destroy a corporation when it is warranted, more is needed to deter and punish corporate crime.

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81 Ramirez, *supra* note 31, at 944–45.

82 U.S. SENTENCING GUIDELINES § 8C1.1.

83 *Id*. (identifying as examples organizations established to illegally manufacture controlled substances, and hazardous waste disposal companies lacking legitimate means to dispose of hazardous waste).

84 *See* Order Accepting Report and Recommendation of the United States Magistrate Judge Concerning Plea of Guilty, United States v. Alliance Pharmacy Servs. Inc., No. 3:05-CR-240-P, 2006 U.S. Dist. LEXIS 86475 (N.D. Tex. Nov. 30, 2006) (applying U.S. SENTENCING GUIDELINES § 8C1.1 to dissolve a criminal corporation); *see also* Ramirez, *supra* note 31, at 945 n.68 (stating that reported cases applying section 8C1.1 "are scarce").

85 42 U.S.C. § 1320a-7(a)(1), (b)(7) (2006); *see also* Ramirez, *supra* note 31, at 949–50 (stating that healthcare providers convicted of certain fraud-related crimes face a mandatory requirement of exclusion from participation in any federal healthcare program for a minimum of three years).

86 Ramirez, *supra* note 31, at 950–51.

II. Why Current Sanctions Do Not Provide Adequate Deterrence or Retribution and Punish Innocent Parties

As described above, states charter corporations but the federal government largely regulates and punishes them. This dichotomy has exacerbated serious pathologies in both deterring corporate crime and in providing retribution when such crime occurs.[87]

States and the federal government punish corporations in various ways. States virtually never revoke corporate charters as punishment for criminal behavior.[88] Restitution, imposed on roughly thirty percent of federally convicted organizations,[89] serves purely utilitarian ends: to make the wronged whole. That leaves fines as the punishment for the vast majority of corporate convicts.[90] Yet the small number of fines imposed—131 organizations received federal fines for criminal acts in 2009—means that, whether intended for retributive or deterrent purposes, the fines need to be enormous to compensate for the small likelihood of being imposed.[91] Yet the median fine in 2009 was only $119,000,[92] and because none of the fines was imposed on "criminal purpose organizations" (for which the fine level amounts to a death sentence), it is almost certain that none of the fines directly puts a corporation out of business.

A. Inadequate Deterrence

The current system of deterring criminal punishment is systematically impotent at both the state and federal levels, providing neither appropriate specific, nor general, deterrence.[93]

1. State Level

When states do revoke corporate charters, it is generally for ignoring legal formalities, such as failing to file annual reports, rather

87 See Crane, *supra* note 38, at 27–50, for an analysis of the general problems inherent in state corporate chartering in the antitrust context.

88 *See infra* Part II.A.1.

89 U.S. Sentencing Comm'n, *supra* note 30.

90 *Id.*

91 *See* Coffee, *supra* note 29 (describing "deterrence trap").

92 U.S. Sentencing Comm'n, Table 52: Mean and Median Fine or Restitution Imposed on Sentenced Organizations by Primary Offense Category: Fiscal Year 2009 (2009), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table52.pdf. The mean fine was substantially higher at $17 million, but this is largely due to three outlier fines of more than $60 million. *Id.*

93 *See* Ramirez, *supra* note 31, at 962–72.

than as a penalty for criminal behavior.[94] Florida, for example, revoked the charters of fraudulent stock brokerage companies in the 1990s that had defrauded investors of $81 million, but the charters were revoked for filing technicalities rather than as explicit punishment for crimes committed.[95] Similarly, in 1998, New York Attorney General Dennis Vacco very nearly revoked the charters of tobacco industry front groups that peddled junk science promoting tobacco use.[96] Further, the revoked charters in both Florida and New York were for fairly minor corporate players in the larger economy.[97] States typically reserve charter revocation for smaller corporations with fewer assets because these are more likely to forgo a legal formality that allows the state to revoke the charter on a technicality.[98] This frees larger and wealthier corporations, which are more likely to have legal counsel and comply with legal formalities, from fearing that criminal activity could result in losing their charters on a technicality.

In recent years, some legislatures have considered bills that would add teeth to a state's revocation power, generally by augmenting the state's existing discretionary power with a mandatory element in certain situations. The Kentucky Senate passed legislation in 1994 that would automatically revoke a corporation's charter to do business in Kentucky if employees were convicted of bribing public officials.[99] Similarly, in 2003, a California state senator introduced the Corporate Three Strikes Act to prohibit repeat corporate offenders from incorporating or transacting business in California.[100] However, neither bill became law.[101]

What about Delaware? The effectiveness of enforcement across all states can be judged largely by the performance of the legal infrastructure of the state home to most of America's major corporations.[102] The Delaware Code provides for the attorney general's filing

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94 Crusto, *supra* note 56, at 189, 191.

95 Charlie Cray, *Chartering a New Course: Revoking Corporations' Right to Exist*, MULTINATIONAL MONITOR, Oct.–Nov. 2002 at 8, 8–9.

96 *Id.* at 9.

97 *Id.* at 8 (noting that multinational corporate lawbreakers have not been subject to charter revocation statutes).

98 *Id.*

99 David Kligman, *Senate Approves Penalizing Firms when Workers Bribe Public Officials*, LEXINGTON HERALD-LEADER (Ky.), Jan. 25, 1994, at A11.

100 S.B. 335, 2003 Leg., Reg. Sess. (Cal. 2003).

101 A Westlaw search shows that they failed to become law.

102 *See* Bebchuk & Hamdani, *supra* note 53, at 588; Daniel Gross, *Listening to Delaware*, SLATE (Nov. 7, 2003, 5:52 PM), http://www.slate.com/id/2090984/ (Fifty-eight percent of Fortune 500 companies are incorporated in Delaware).

for revocation of a corporate charter in the county Court of Chancery for "abuse, misuse or nonuse of its corporate powers, privileges or franchises."[103] Though the Delaware Court of Chancery interpreted this statute to allow revocation for "[c]ontinued serious criminal violations by corporate agents,"[104] the power to revoke appears to have not been invoked since the 1950s,[105] and even then was invoked only against small local, nonprofit corporations for serving alcohol at prohibited times[106] and for resisting desegregation.[107] Delaware and other states fail to utilize their broad law enforcement power to revoke charters for any corporations, let alone major corporations that have committed serious misconduct.[108] Because Delaware and other states so often fail to use their powers to punish or destroy corporate criminals, they fail to adequately deter corporate crime.

2. *Federal Level*

Though a bewildering array of federal laws criminalizes corporate behavior,[109] the regime has failed to deter disastrous corporate crime over the past decade. From Enron and WorldCom[110] to the lending practices that created the 2008 financial crisis[111] and the recent improper foreclosure filings,[112] corporate misconduct has recently occurred on a massive scale. This is not because the issue has escaped government attention: President Bush set up a Corporate Fraud Task Force within the Justice Department in 2002,[113] and Congress responded to the Enron, WorldCom, and other accounting scandals with

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103 DEL. CODE ANN. tit 8, § 284(a) (West 2010).

104 Craven v. Club Fourteen, Inc., No. CIV.A.1015, 1959 WL 59355, at *2 (Del. Ch. Mar. 4, 1959).

105 This is evidenced by a "citing references" search on Westlaw for DEL. CODE ANN. tit. 8, § 284.

106 *Craven*, 1959 WL 59355, at *2.

107 *See* Young v. Nat'l Ass'n for Advancement of White People, Inc., 109 A.2d 29, 30 (Del. Ch. 1954).

108 *See* Cray, *supra* note 95, at 8.

109 *See* Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 17 (2001) (finding that the U.S. Sentencing Guidelines contain "roughly 970" separate statutory provisions prescribing federal criminal penalties).

110 *The Banks that Robbed the World*, BBC NEWS (June 9, 2004, 9:33 GMT), http://news.bbc.co.uk/2/hi/business/3086749.stm.

111 Richard B. Schmitt, *FBI Saw Threat of Loan Crisis*, L.A. TIMES, Aug. 25, 2008, at A1.

112 David Streitfeld & Gretchen Morgensen, *Foreclosure Furor Rises; Many Call for a Freeze*, N.Y. TIMES, Oct. 6, 2010, at B1.

113 Exec. Order No. 13,271, 3 C.F.R. 245 (2003).

the Sarbanes-Oxley Act[114] in 2002, dramatically strengthening accounting disclosure rules for corporations.[115]

Over the past decade, why has so much corporate crime continued to occur even as federal criminal sanctions were strengthened? One likely reason is that the number of federal corporate criminal convictions is strikingly low; in 2009, only 177 organizational defendants were sentenced under the Organizational Sentencing Guidelines.[116] This represents a decline of 30% from ten years earlier, when 255 organizations were sentenced.[117] Given that there were almost six million business firms in the United States in 2008,[118] 177 convictions is an astonishingly small number. This is especially true in light of an older study of the 580 largest corporations in the United States, which found that over 60% had a federal civil or criminal enforcement action initiated against them in 1975 or 1976.[119] Although it is difficult to obtain accurate data on uninvestigated corporate crime, given the numerous examples of egregious criminal behavior by major corporations over the last decade,[120] it seems unlikely that fewer than 200 corporations break criminal statutes each year.

Because a corporation and its agents know that there is an extremely small likelihood of being charged and convicted, a fine must be far larger than the expected gain to provide adequate deterrence.[121] But shareholder limited liability ensures that once a fine exceeds the corporation's assets, the assets of the shareholders are out of reach, so any fine is limited in size to the corporation's assets.[122] Further, fines are often levied against the corporation itself rather than against di-

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114 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 & 18 U.S.C.)

115 *See* Elisabeth Bumiller, *Corporate Conduct: The President*; *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES, July 31, 2002, at A1.

116 U.S. SENTENCING COMM'N, *supra* note 30.

117 U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2009, at 10 (2010), *available at* http://www.ussc.gov/Research/Research_Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

118 U.S. CENSUS BUREAU, STATISTICS OF U.S. BUSINESSES, *available at* http://www.census.gov/econ/susb/ (2008 data showing number of business firms).

119 MARSHALL B. CLINARD ET AL., U.S. DEP'T OF JUSTICE, ILLEGAL CORPORATE BEHAVIOR, at xix–xx (1979). The 1975–1976 study looked at enforcement actions rather than convictions, making exact comparisons with recent statistics for Sentencing Commission convictions difficult.

120 *See, e.g.*, *supra* notes 1, 10, 19 and accompanying text (describing BP's criminal behavior); *see also* CORPORATE FRAUD TASK FORCE, *supra* note 21 (describing a wide variety of corporate criminal convictions in fiscal year 2009).

121 Coffee, *supra* note 29, at 389 (describing the "deterrence trap").

122 *Id.* at 390.

rectors and officers responsible for the illegal behavior.[123] Hence a punishment levied against the corporation itself, especially where management cannot be directly implicated, fails to adequately deter directors and officers from engaging in or condoning illegal behavior because the fines will be borne by the corporation (and thus essentially by the stockholders) rather than by management. Any reasonable solution needs to provide incentives to the people who can change the corporation's behavior—the directors and officers—to do so. These are fundamental problems that make a system of corporate sanctions based almost exclusively on monetary fines[124] systematically impotent and thus incapable of deterring corporate crime.

B. *Inadequate Retribution*

Not only does the current system fail to deter corporate crime adequately, but it also fails to provide adequate retribution against convicted corporations.[125] Unlike deterrence, which is generally utilitarian in purpose, retributive punishment is based on the belief, best known through the writings of Immanuel Kant, that "society is more morally just when the good prosper and the bad suffer."[126]

Retribution has long been recognized as a central goal of American criminal punishment.[127] The American legal system, with its greater emphasis on individual responsibility than comparable legal systems elsewhere,[128] is comfortable with "unembarrassed condemnation where condemnation is warranted."[129] Though retributivism permeates American criminal law, it is perhaps clearest in sentencing for capital crimes, where the moral blameworthiness of the defendant is apparent.[130] For example, in *Booth v. Maryland*,[131] the Supreme Court

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123 Unfortunately, the U.S. Sentencing Commission does not report whether any individual defendants are sentenced alongside organizations for the same offenses. Particularly with large and complex criminal indictments, however, plea agreements often involve large fines against the corporations without admission of fault by individual officers or directors. *See, e.g.*, CORPORATE FRAUD TASK FORCE, *supra* note 21.

124 According to the U.S. Sentencing Commission, in 2009, nearly ninety percent of convicted organizations paid fines, made monetary restitution, or both, and eleven percent of convicted organizations paid neither. *See* U.S. SENTENCING COMM'N, *supra* note 30, at 10–11.

125 For a general discussion of the theoretical underpinnings of organizational criminal liability, see Robson, *supra* note 33, at 119–21.

126 *Id.* at 121 (internal quotation marks omitted).

127 James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 87 (2003) (describing the central role of retribution in American criminal punishment).

128 *Id.* at 94–95.

129 *Id.* at 87.

130 *See* JEFFRIE G. MURPHY, *Getting Even: The Role of the Victim*, *in* RETRIBUTION RECONSIDERED 61, 80–81 (1992).

emphasized the personal blameworthiness of the defendant—rather than the impact on the victim—by finding the use of "victim impact statements" in sentencing unconstitutional.[132] The moral culpability of the defendant alone, according to the *Booth* Court, should determine his punishment, to the exclusion of the effect of the defendant's actions on his victim.[133]

Scholars have noted that retribution has increased in importance in recent decades, and this shift is reflected in policies such as "three strikes" laws and increased prison sentences.[134] Criminal liability for corporations, however, ignores retributive goals, instead basing corporate criminal sanctions primarily on deterrence through the use of fines.[135] Because fines are assessed as both criminal and civil penalties, especially for strict liability *malum prohibitum* offenses, and thus are frequently utilized as a deterrent, fines alone carry a weak retributive sting.[136] Because fines do not send a clear retributive signal, they do not, on their own, meet retributive needs as fully as other punishments when levied in response to "deliberate actions that violate core societal values."[137] By restricting freedom, prison is the most obvious retributive punishment for a human convict.[138]

There is no principled basis for applying retributive sanctions against individuals but not corporations.[139] Because retributive sanction requires only a culpable actor and conduct that is morally wrong, corporations are just as capable of receiving retributive punishment as natural persons.[140] Note that gross negligence that endangers lives and causes economic and environmental damage is itself morally reprehensible. Therefore, when BP chooses to ignore the huge risks it imposes on its employees and on society in its pursuit of the bottom line, the corporation is making a decision with a moral component. Furthermore, American law has treated corporations as natural per-

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131 Booth v. Maryland, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

132 *Id.* at 504–06.

133 *Id.*

134 Whitman, *supra* note 127, at 87, 90.

135 U.S. SENTENCING COMM'N, *supra* note 30, at 11.

136 *See supra* Part II.A.

137 *See* Robson, *supra* note 33, at 124, 136–37.

138 Prison obviously provides both specific and general deterrence as well.

139 Corporations obviously cannot be put in prison, but, as this Note proposes, there are others ways to restrict a corporation's freedom.

140 Robson, *supra* note 33, at 127. *But see* Khanna, *supra* note 75, at 1494 (asserting that deterrence but not retribution is an appropriate goal for corporate criminal and civil sanctions).

sons for most purposes for over a century.[141] Perhaps most important, the lack of a retributive sanction against corporations whose conduct is commonly understood as morally wrong helps to reinforce the idea of a "stacked deck": the widespread public perception that corporations exert undue influence over American society and politics, and are able to get away with criminal activity that natural persons cannot.[142] Criminal law should punish corporations no less than human criminals, with an eye not only to deterrence, but also to retribution.

Given the scope and magnitude of corporate crime perpetrated in the United States in recent years, the public demand for retribution against corporate offenders is strong.[143] Yet, current punishments for corporate crime can hardly provide meaningful retributive sanction against corporate criminals that engage in immoral activity including rigging markets, polluting oceans, and precipitating a global financial crisis. In the case of serial offenders like BP, a strong retributive need goes unmet when the corporation receives fine after fine but continues to engage in a pattern of unrelenting illegal behavior.[144]

III. Proposal: Charter Revocation Penalty for Repeat Criminal Offenders

The current system of corporate criminal sanctions fails to provide adequate deterrence or to meet the public need for retribution. To fill gaps left by state underenforcement and inadequate federal sanctions, Congress should provide for revocation of state-granted corporate charters as punishment for corporations with a history of repeated, serious criminal violations. This Part first addresses the mechanics of the proposed legislation and practical and constitutional objections to the proposal. Next, this Note describes the circumstances under which this "corporate death penalty" should be applied.

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141 *See supra* notes 69–70 (citing cases finding corporations liable for both specific and general intent crimes); *see also supra* note 67 (citing case stating corporations are legal persons for purposes of the Fourteenth Amendment).

142 A 2010 survey found that only twenty-five percent of the public believed that large corporations had a positive effect "on the way things are going." Pew Research Ctr. for the People & the Press, The People and Their Government: Distrust, Discontent, Anger and Partisan Rancor 7 (2010), *available at* http://people-press.org/files/legacy-pdf/606.pdf; *see also* Aaron Bernstein, *Too Much Corporate Power?*, BusinessWeek, Sept. 11, 2000, at 144, 152–53 (describing widespread sense that corporations are failing to play by the rules).

143 *Cf.* Claudia H. Deutsch, *New Surveys Show that Big Business Has a P.R. Problem*, N.Y. Times, Dec. 9, 2005, at C1 (describing widespread public belief that big business operates with impunity).

144 *See supra* notes 4–11 and accompanying text.

A. How Congress Should Impose Charter Revocation

As noted in Part I, corporate charters are issued by states, but law enforcement against corporations by states is ineffective because corporations can simply reincorporate elsewhere and continue to do business in the states that revoked its charter.[145] The most meaningful law enforcement against corporations occurs at the federal level.[146] States already enjoy broad powers over their corporations, but they generally choose not to exercise them.[147] To serve as a meaningful penalty, the charter revocation legislation must come from Congress and must be applied by the federal courts regardless of which state granted a particular incorporation.

Congress should pass charter revocation legislation to preempt state action in fields in which both the state and federal government exercise jurisdiction.[148] The legislation should empower the Justice Department to request charter revocation as a penalty for corporate convictions of the nature described below. The penalty should not create a new category of corporate crime; instead, it should simply be a new penalty that would apply under certain circumstances to convictions for violations of substantive criminal law.

The legislation should explicitly prohibit states from issuing (actually, reissuing) a charter to the corporation receiving the sentence. This solution would simply preempt any state from regranting a charter to the corporation thus sentenced. Moreover, when multiple subsidiaries of a single corporate parent are involved, the corporate parent would be prohibited from reconstituting substantially the same corporations that were convicted and dissolved. The corporation would technically continue to exist until its charter is next up for renewal. During this time, the corporation could be wound down in an orderly way, described in Section D below. When its charter expires, the corporation would necessarily cease to exist, as the state in which it was chartered, along with every other state, would be preempted by Congress from issuing the corporation a new charter.

The statute should specify that, for a period of five to ten years, the directors of the condemned corporation could serve on the same corporate board together only when they are a minority, ensuring that that set of directors would not form a majority of the board of another

145 *See supra* Part I.A.

146 *See supra* Part I.B.

147 *See supra* notes 58–62 and accompanying text.

148 For a recent discussion of Congress's preemption power, see Altria Grp., Inc. v. Good, 555 U.S. 70, 76–77 (2008).

corporation. Similarly, key senior officers should be prohibited from working together for five to ten years. In addition, no director or officer could serve on the board or work for any corporation affiliated with the parent corporation of the convicted corporation. Courts must be empowered to issue injunctions to enforce these rules, preventing reconstitution of substantially the same corporation under another name.

Critics may object that incorporation is a traditional state power that Congress is not free to preempt.[149] In other words, the fact that Congress has not exercised this power at any previous time, but that states exclusively have, implies that Congress lacks that power. For example, in *Printz v. United States*,[150] the Court reasoned that the fact that Congress had never historically ordered state executive officials to enforce federal law suggested that Congress lacked that power.[151] The incorporation privilege has been exercised, however, by both the states and Congress since the founding of the Republic.[152] As described above, Congress chartered the Bank of the United States in 1791,[153] demonstrating an understanding that both Congress and the states enjoyed the incorporation power. Furthermore, Congress has chartered other corporations, including the Boy Scouts of America in 1916[154] and Little League Baseball in 1964.[155]

Congress's power in fields in which states and Congress share jurisdiction—for example, over law enforcement and regulation of the economy—allows Congress to preempt state regulation if it so chooses.[156] Congress has exercised this power broadly, preempting both specific state regulations[157] and foreclosing the states from regulating an entire field.[158] Even when Congress regulates in fields traditionally occupied by the states, Congress's purpose in passing the

149 As described in Part I above, corporate law is primarily state-based law and the incorporation privilege has virtually always been exercised by states rather than Congress.

150 Printz v. United States, 521 U.S. 898 (1997).

151 *Id*. at 907–08.

152 *See supra* Part I.

153 *See* Crane, *supra* note 38, at 11.

154 36 U.S.C. § 30901 (2006).

155 *Id.* § 130501.

156 *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

157 *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 530–31 (1992) (finding explicit preemption of a state common law tort claim by the Public Health Cigarette Smoking Act of 1969, but not several other state law claims advanced by plaintiff).

158 *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100, 102 (1992) (finding that because Congress intended the Occupational Safety and Health Act of 1970 to provide uniform health and safety laws across the states, state regulatory schemes in this field must fail).

statute is the "'ultimate touchstone' in every preemption case."[159] Congress should be explicit in drafting the federal charter revocation legislation that it is preempting the states because courts generally presume that state police powers are not preempted unless Congress makes clear its purpose to do so.[160]

The preemption approach enjoys several advantages over other routes for exercising a federal revocation power. Congress could not simply direct the states to change their incorporation statutes to allow for federal revocation of state-granted charters because it is unconstitutional for Congress to direct states to pass legislation.[161] Nor could Congress tell secretaries of state that they must revoke a charter when a federal court issues such a sentence because Congress may not direct a state executive official to carry out federal law.[162] Therefore, the most effective federal legislation will explicitly preempt state law in this field.[163]

B. *When to Revoke a Charter*

Because charter revocation is the ultimate penalty a corporation can pay—equivalent to the death penalty for a natural person—revocation should be exercised only for repeat offenders of the most serious crimes, namely, corporations that have displayed an inability or unwillingness to respect social expectations and to respond to previous criminal sanctions by ceasing to break the law. In order to provide appropriate deterrence, charter revocation should be reserved only for repeated convictions for the most serious crimes; to provide appropriate retribution, charter revocation should be reserved for serious crimes with a moral element. To meet the dual goals of retribution and deterrence, the charter revocation statute should apply to

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159 Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

160 *Id.* at 77.

161 New York v. United States, 505 U.S. 144, 169–70 (1992) (finding that Congress lacks power to direct a state legislature to act and that exercise of such power would violate fundamental principles of political accountability).

162 Printz v. United States, 521 U.S. 898, 932–33, 935 (1997).

163 Although Congress could exercise its spending power by conditioning federal funds on states passing legislation permitting federal charter revocation in a way that satisfies the four-part test of *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987), this approach may not be effective. Even if the vast majority of states changed their incorporation statutes in order to receive the federal funds, it would only take one state—say, Delaware, where corporate licenses already provide more than $700 million in state revenue—to reject the funds and become a "sanctuary state" for the entire scheme to be rendered ineffective. *See State Government Tax Collections*, *supra* note 55.

corporations that satisfy a two-prong test: they experience (1) repeated convictions of (2) serious crimes with moral content.

1. Repeated Convictions

Congress should allow courts to apply charter revocation as a presumed but discretionary penalty once the corporation has been convicted of two or more serious crimes (described below) within a ten-year period. That is, the third conviction within a decade would create a presumption for charter revocation, though a court could choose to apply it for any later convictions if, for some reason, the charter was not revoked upon the third conviction (as long as the preceding ten-year period has at least two prior convictions). This presumptive approach has two main advantages over a mandatory "three strikes" approach. First, it avoids rigid application of a severe penalty for the inevitable marginal case. Second, a presumptive yet discretionary punishment has greater retributive bite than an automatic penalty because each revocation acts as an explicit statement of society's disapproval. For these reasons, Congress should impose a presumption, but not a requirement, that federal courts impose charter revocation for a third conviction.

Other commentators have suggested a mandatory three strikes approach to applying charter revocation.[164] This habitual offender approach, which requires severe sentences for repeat convictions, fits comfortably within the resurgence of retribution in American law and produces a clean syllogism between penalties for natural and corporate persons.[165] A mandatory approach also provides certainty and avoids inconsistent application of the law. But the bizarre and arguably unjust results of state three strikes laws—mandatory and grossly excessive sentences resulting from a third conviction for a minor crime[166]—are better not replicated in the corporate context.

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164 Ramirez, *supra* note 31, at 942, 985.

165 Numerous states enacted habitual offender statutes between the 1970s and 1990s that mandated long prison terms for repeated felony convictions. *See* Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 705 (2006). Notably, California adopted a strict "three strikes" approach in the 1990s, which the Supreme Court found not to violate the Eighth Amendment's prohibition on cruel and unusual punishment. Ewing v. California, 538 U.S. 11, 30–31 (2003) (plurality opinion).

166 *See, e.g.*, *Ewing*, 538 U.S. at 19–20 (defendant sentenced to twenty-five years to life for theft of golf clubs); Lockyer v. Andrade, 538 U.S. 63, 68 (2003) (defendant sentenced to twenty-five years to life for theft of videotapes).

Because the drastic consequences of charter revocation may make judges reluctant to apply it, Congress must be explicit about how judges should use their discretion to apply the penalty. Congress should make clear that, upon the third eligible conviction, charter revocation is the presumed penalty. A defendant could rebut the presumption by showing that the three convictions were at the lowest end of the spectrum of serious crimes described below so that charter revocation would be a disproportionate penalty. Absent that showing, the court would be expected to revoke the corporation's charter.

2. *Serious Crimes with Moral Content*

What crimes should make a corporation eligible for charter revocation? As noted above, the seriousness of the penalty suggests that only the most serious crimes—those that cause death, serious damage to the economy, to public health, or to the natural environment, for example—should qualify a corporation for charter revocation.

The U.S. Sentencing Commission provides a helpful policy statement as to what constitutes an especially egregious offense by listing the factors that warrant an upward departure from the sentencing range for organizations.[167] The Commission lists the risk of death or bodily injury,[168] threat to national security,[169] the environment[170] and markets,[171] and presence of official corruption[172] as especially egregious to warrant an upward departure from the sentencing guidelines. To avoid reinventing the wheel, Congress should use these factors as the foundation for the crimes to which to apply charter revocation.

To satisfy retributive goals, the penalty should be reserved for those crimes that also have a moral dimension: that is, "deliberate actions that violate core societal values."[173] For a conviction to count for charter revocation purposes, Congress should require a showing of (1) social harm or injury, and (2) conduct that is viewed by society as immoral.[174] Many modern strict liability offenses that have been des-

167 U.S. SENTENCING GUIDELINES MANUAL §§ 8C4.2–.6 (2010).

168 *Id*. § 8C4.2.

169 *Id*. § 8C4.3.

170 *Id*. § 8C4.4.

171 *Id*. § 8C4.5.

172 *Id*. § 8C4.6.

173 Robson, *supra* note 33, at 124.

174 *Cf.* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1547 (1997) (proposing as an additional third prong, the presence of a culpable actor, which is satisfied for our purposes by the presence of the corporate defendant).

ignated as criminal, but do not necessarily contain the moral content of a crime such as theft or murder, would not subject a corporation to charter revocation. These crimes include *malum prohibitum* white collar crimes such as setting a minimum resale price in violation of antitrust laws[175] and introducing misbranded food or cosmetics into interstate commerce.[176] Charter revocation should not apply to offenses designated as criminal solely for deterrence purposes (because society has determined them to be undesirable), but instead to offenses that reflect moral culpability on the part of the corporate actor as reflected in the two-part test.[177]

C. *Why Charter Revocation?*

Because the current system of federal and state criminal sanctions for corporations fails to satisfy two of the fundamental goals of criminal law, deterrence and retribution,[178] the corporate death penalty should be designed to meet those goals. Similarly, respecting the integrity of the law by preventing a legal fiction from acting illegally must also be a goal in crafting charter revocation legislation. Charter revocation would clearly provide specific deterrence (deterrence against future bad behavior by the convict) by ending the existence of that particular bad actor. Revocation would also provide far stronger general deterrence (deterrence against all potential criminal actors rather than the convict alone) than current law.

Though fines and the public stigma associated with a criminal conviction may damage a corporation's value and reputation,[179] fines almost always allow the officers and directors to continue managing the corporation as before.[180] Charter revocation, however, would change the incentives for directors and particularly officers by directly threatening their position as leaders of the corporation, and with it, their income, prestige, and perks.[181] Charter revocation would pro-

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175 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404–09 (1911) (finding resale price maintenance a per se violation of the Sherman Act), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888–89 (2007) (holding that vertical price restrictions are now subject to rule of reason rather than per se illegal).

176 21 U.S.C. § 331 (2006).

177 Robson, *supra* note 33, at 133–34. Robson uses the Federal Food, Drug, and Cosmetic Act, which imposes criminal liability for causing the adulteration or misbranding of food or cosmetics, as an example of criminalizing regulatory offenses without moral content.

178 *See supra* Part II.A.

179 *See* Ramirez, *supra* note 31, at 945 (noting that corporate bankruptcy or liquidation can follow criminal conviction).

180 *See supra* Part II.A.

181 Unfortunately, because the U.S. Sentencing Commission does not provide information

vide stronger general deterrence than fines, restitution, or any other penalty that does not end the corporation's existence because revocation directly threatens the officers, which changes their incentives far more than current penalties. Other penalties merely signal to shareholders that the corporation has been convicted of a crime on the directors' and officers' watch. This is insufficient to create corporate change because shareholders may lack the power or incentive to replace these officers and directors.[182] Rather than merely provide a potential incentive to shareholders to replace officers or directors, as current penalties do, charter revocation would directly and inevitably put them out of work, providing stronger general deterrence against serious corporate crime. Adding charter revocation as a punishment for corporate crime would encourage directors and officers to police corporate behavior and to ensure compliance with the law, thus providing general deterrence against corporate criminality.

Additionally, revocation would emphatically meet the retributive goals of punishment. Because the death penalty is the ultimate retributive punishment,[183] when viewed as a corporate "death penalty," charter revocation would express society's moral condemnation as no other penalty could. By ending a corporation's legal existence, putting its directors and officers out of work, and selling off its assets, revocation would express that the corporation's actions were so morally blameworthy that in order for society's values to be vindicated, the actor should be extinguished.

Direct charter revocation is a better solution than modifying the current "divestiture of assets" provision in the U.S. Sentencing Guidelines.[184] Under section 8C1.1 of the Organizational Sentencing Guidelines, the "corporate death penalty" operates by fining the corporation an amount equal to its net assets.[185] This is arguably a socially inefficient method of ending a corporation's existence, as it takes the organization's assets out of productive use through forfei-

on convicted corporations, making a comparison of directors' and officers' status before and after conviction can be very difficult. It seems reasonable to assume, however, that given the fairly small average fines described in Part I, corporations and the directors and officers that lead them are generally left similarly situated after conviction. *See, e.g.*, CORPORATE FRAUD TASK FORCE, *supra* note 12, at 1.3–.4 (describing deferred prosecution agreement of PNC in which huge fines were levied without admissions of wrongdoing by corporation or individuals).

182 For a general discussion of shareholder passivity, see, for example, Dalia Tsuk Mitchell, *The End of Corporate Law*, 44 WAKE FOREST L. REV. 703, 706, 724–25 (2009).

183 Jack P. Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. & CRIMINOLOGY 291, 298 (1978).

184 U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (2010).

185 *Id.*

ture to the government.[186] Charter revocation would also eliminate the uncertainty caused by attempting to set fine levels such that all of the corporation's assets are divested and the corporation is forced to dissolve. Because the condemned corporation's assets would be auctioned off and remain in use, charter revocation would minimize disruption to the economy and to innocent parties, at least compared with forfeiting them to the government as under section 8C1.1.[187] Prosecutors and judges may be rightly reluctant to request and apply a corporate death penalty that closes facilities and puts innocent workers out of a job. This Note's proposed charter revocation penalty would allow courts to apply charter revocation to larger corporations with fewer concerns about the economic impact than under the current divestiture of assets regime.

D. Winding Down Corporations that Are Dechartered

As described in Part III, when a corporation is "executed," every effort should be made to ensure that its assets remain in productive use and that damage to innocent parties is minimized. A new legal mechanism for "executing" a corporation is needed to protect innocent parties and to ensure that judges and prosecutors are comfortable with its use.[188] The goal of the charter revocation penalty is to deter crime and provide retribution against corporate criminals, but the potential collateral economic impact of dissolving a corporation, especially a large one, is obvious. Thus, the mechanics of winding down a dechartered corporation are critical. The dissolution of the corporation should impose the harshest penalty on the corporate entity itself, directors, and officers, while only damaging shareholders—who have less control over corporate misconduct—to the extent necessary to incentivize them to take an interest in the corporation's criminal misconduct. Meanwhile, for courts to feel comfortable imposing charter revocation, and to ensure public support for its use, the penalty should dissolve the corporation with as little impact on innocent parties—

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186 *Id.*

187 *See* Ramirez, *supra* note 31, at 975.

188 The effects of the proposed charter revocation penalty would likely be no worse for innocent parties than divestiture under the antitrust laws, an area in which the federal courts have substantial experience. Courts have ordered antitrust violators to divest some or all of their assets for decades, recognizing divestiture as "the most important of antitrust remedies." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330–31 (1961). The federal courts' experience and comfort with divestiture in the antitrust context should ease fears about the application of the corporate charter revocation penalty.

employees, consumers, suppliers, and the larger economy—as possible.

The case for punishing directors and officers (by causing them to lose their jobs and the perks of corporate leadership, along with inflicting the stigma of having led an "executed" corporation) is based on the directors' and officers' responsibility for leading the corporation at the time the crime at issue (or, potentially, the most recent crime) was committed. The directors and officers are not only those who determine how the corporation will operate, including whether it will obey the law, but also are the dominant influence on the internal corporate "culture."[189] Thus, the winding down of the corporation need not take an interest in the fates of directors and officers, who should be rendered unemployed by the charter's revocation.

The owners of the corporation—the shareholders—should be damaged but not wiped out: they should receive a share of the postdissolution proceeds from the sale of the corporation's assets (described below). Though shareholders in publicly held corporations are obviously removed from management of the corporation,[190] charter revocation should still damage shareholders to ensure that they have a strong enough incentive to influence management to prevent corporate crime.[191] Both the problem of distinguishing an innocent shareholder from a guilty one, and the loss of incentive to shareholders to police the corporation that occurs when they are protected during charter revocation, counsel against protecting shareholders. In short, shareholders should have some "skin in the game," though less than directors and officers, to ensure that whatever control or influence they exercise can be used to prevent criminal activity.

When a corporation is dechartered, its assets and employees should remain as undisturbed as possible in the wider economy. To do this, a corporate dissolution "czar" should be appointed by the court to manage the sale of the corporation's assets.[192] If a corpora-

189 Ramirez, *supra* note 31, at 965 (explaining that the ethical leadership within organizations appears to have a strong impact on legal compliance).

190 Voluminous literature exists on how much control shareholders, as nominal "owners" of a corporation, exercise as opposed to management, which actually controls the corporation. *See, e.g.*, Mitchell, *supra* note 182, at 706–07.

191 *But see* Ramirez, *supra* note 31, at 975 (suggesting that "innocent" shareholders should be protected during the dissolution of a corporation). Though public opposition to dissolution of a widely held corporation like BP could be intense, prosecutors and courts would have other countervailing incentives to impose charter revocation.

192 One commentator proposes the creation of a similar temporary position to oversee dissolution but labels it a "trustee." Ramirez, *supra* note 31, at 974.

tion appeals its sentence, a temporary injunction would allow the corporation to continue operating its business normally but would prevent its officers and directors from siphoning the corporation's resources elsewhere. The czar should be experienced in the corporation's line of business and understand the corporation's upstream and downstream relationships. The czar would be authorized to hire staff, paid for by the corporation.

The charter revocation statute should require that the czar keep corporate assets in productive units whenever possible so as to minimize the impact on the corporation's employees and the larger economy. This would be easy for small corporations because the corporation's entire assets would likely be sold intact to a single buyer. For larger corporations in diverse lines of work, this could be more complicated, requiring the czar to determine how to break up the corporation's assets to prepare them for sale. The czar should, for example, sell a condemned corporation's oil refinery and associated distribution infrastructure intact rather than selling the components individually. The czar would not be required to sell the assets at auction, but auction sale would enjoy a presumption under the statute.

The statute should specify that revenues from the sale of the corporation's assets first pay court costs and the costs of the czar's operation during dissolution. Next, nonmanagement employees of the corporation that have clearly suffered harm due to the dissolution, such as being rendered unemployed, should be compensated through a one-time stipend. Finally, the balance should be distributed among the shareholders. In this way, the affairs of the corporation could be wrapped up in an orderly and just way that would protect innocent parties while only causing minimal harm to shareholders.

E. Example of Appropriate Charter Revocation

BP-NA provides a useful example of how the new federal charter revocation penalty could be implemented. Had the corporate death penalty been in place, BP's officers and directors would have had a far stronger incentive to avoid the set of calamities leading up to the 2010 oil spill. Under the proposed statutory scheme, after the repeated federal convictions for serious morally-laden crimes that have killed workers, destroyed small businesses, and polluted the environment, a federal prosecutor could request charter revocation for the corporation. If BP were convicted, the federal trial court could exercise the power granted to it by Congress by issuing an order preventing any state from reissuing a corporate charter to BP-NA and any other domestic BP subsidiary. After the inevitable appeals are exhausted, the czar appointed by the trial court would take an inventory of BP's assets and determine how to break up the refineries, oil fields, and pipelines so as to facilitate their sale and continued productive use.

After selling BP's assets and paying the czar's expenses, the resources would be distributed to laid-off workers and then to shareholders. With the process concluded, the public's need for retribution against a serial bad actor would be satisfied, a chronic outlaw would be removed from society, and other corporations would be on notice that breaking serious rules has drastic consequences. This is just one example of how a federal corporate charter revocation penalty would improve the administration of justice.

Conclusion

The current system of criminal sanctions for corporations fails to provide adequate deterrence or retribution. This problem stems in large part from the fact that states charter corporations, but the federal government usually criminally sanctions them. The current system of corporate criminal sanctions is based primarily on fines and does not adequately meet either goal.

A federal corporate death penalty provides stronger deterrence and retribution against corporate criminals. Congress should authorize such a penalty for corporations that receive three or more convictions for serious crimes that demonstrate moral culpability. Congress could create the federal charter revocation penalty by exercising its preemption power and requiring that no state regrant a corporate charter to a convicted corporation. Such a penalty would dissolve the corporation and wipe out management while inflicting minimal harm on shareholders and even less harm on employees. The result would be a substantial increase in both deterrence and retribution of corporate crime.