

## BRANDING CORPORATE CRIMINALS

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*Corporate punishment has a branding problem. Criminal sanctions should call out wrongdoing and condemn wrongdoers. In a world where generic corporate misconduct is a daily affair, conviction singles out truly contemptible practices from merely sharp, unproductive, or undesirable ones. In this way, criminal law gives victims the recognition they deserve, deters future wrongdoers who want to preserve their good name, and publicly reinforces society's most treasured values.*

*Unfortunately, corporate punishment falls far short of all these communicative ambitions. For punishment to convey its intended message, society must be able to hear about it. When courts convict individuals, everyone understands that the conviction places a mark of enduring stigma: "felon," "thief," "murderer," and "fraudster." The state reinforces this communiqué by reserving its harshest and most degrading treatment for individual criminals, caging them and possibly killing them. Corporate punishment, by contrast, is a fleeting affair diluted by civil and administrative off-ramps, public relations spin, and a frenetic media environment. In today's criminal justice system, it can be hard to identify who the corporate criminals even are. Unsurprisingly, corporations view criminal charges as inconvenient economic uncertainties and criminal fines as mere costs of doing business. Public perceptions have largely followed suit.*

*Corporate criminal law could disrupt this perverse dynamic by adopting a new sanction that would "brand" corporate criminals. Although branding sanctions could take many forms—different visual marks of varying size—this Article calls for, at a minimum, appending a criminal designation, ⊕, to*

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*corporate felons' legal names and mandating its appearance on products and communications. This "corporate criminal brand" would stand as a twenty-first century corporate reimagining of its medieval corporal namesake. Lawmakers rightly rejected physical brands on individual criminals long ago. The criminal justice landscape is different for corporations, which feel no pain and have no dignity interests. Unlike monetary fines, corporate criminal branding would unambiguously signal a corporation's criminal status to outside observers. By forcibly integrating corporations' criminal identity into their public image, criminal law might finally have a way to recognize victims and strike at what corporations value most.*

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## INTRODUCTION

“[C]onscience . . . is a more important safeguard against organizational crime than fear of formal punishment.”<sup>1</sup>

“I have laughed . . . at the contrast between what I seem and what I am!”<sup>2</sup>

Whatever happened to shaming corporate criminals? Beginning in the 1970s and throughout the 1980s, white-collar crime scholars advocated for creating a court-ordered “adverse publicity” sanction to impose alongside, or even instead of, the traditional monetary fine.<sup>3</sup> Motivations differed: Some thought that fines alone could not scale large enough to deter corporate wrongdoing.<sup>4</sup> Others claimed that monetary sanctions make sense for civil and regulatory infractions, but only a reputational sanction could convey the stigmatic opprobrium that is criminal law’s signature mark.<sup>5</sup> Regardless of the reasons, an emerging policy consensus pointed toward the need for a corporate shaming sanction, one designed to tarnish a convicted organization’s public image. Federal sentencing policy followed suit. When the U.S. Sentencing Commission released its first set of guidelines for punishing organizations in 1992, it included a new adverse publicity sanction—one seemingly ripped straight from the academic literature.<sup>6</sup>

And then . . . nothing. Far from kicking off an era of corporate stigma, 1992 turned out to be shaming’s high-water mark. Throughout the Federal Sentencing Guidelines’ thirty-year history, sentencing courts have imposed this adverse publicity sanction barely a handful of times. The U.S.

1. JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 140 (1989).

2. NATHANIEL HAWTHORNE, *THE SCARLET LETTER: A ROMANCE* 253 (Henry Altemus ed., Phila., Altemus Bookbindry, 1892).

3. Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U. L. REV. 107, 113, 143 (1971). For most of its history, the criminal law of corporations had treated monetary fines as the only permissible form of corporate punishment. See *United States v. A&P Trucking Co.*, 358 U.S. 121, 127 (1958).

4. See 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, 386–87 (1981); accord MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* 316–18 (1st ed. 1980); BRENT FISSE & JOHN BRAITHWAITE, *THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS* (1983); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975).

5. BRAITHWAITE, *supra* note 1, at 59. See generally Francis T. Cullen & Paula J. Dubeck, *The Myth of Corporate Immunity to Deterrence: Ideology and the Creation of the Invincible Criminal*, FED. PROB., Sept. 1985, at 3, 3; Peter A. French, *The Hester Prynne Sanction*, 4 BUS. PROF. ETHICS J. 19 (1985).

6. U.S. SENT’G GUIDELINES MANUAL § 8D1.4(a) (U.S. SENT’G COMM’N 1992); see Andrew Cowan, Note, *Scarlet Letters for Corporations?: Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387, 2387 & n.3 (1992).

Department of Justice (DOJ)—which now resolves virtually all of its corporate docket through heavily negotiated plea deals or, increasingly, via civil “prosecution agreements”—only sporadically and inconsistently publicizes its corporate enforcement activity, sometimes going so far as to hide it from public view.<sup>7</sup> Even when prosecutors do publicize a resolution, they are as likely to commend a corporation’s cooperation with the investigation as they are to condemn its misbehavior.<sup>8</sup>

Since 1992, the search for alternative corporate sanctions has drifted away from shaming, publicity, and marketing toward rehabilitation, governance, and compliance. In a pivotal 1999 memo, then–Deputy Attorney General Eric H. Holder, Jr. instructed federal prosecutors to scrutinize an organization’s compliance program when making charging decisions.<sup>9</sup> Ever since, judges, prosecutors, and scholars have paid the bulk of their attention to inventing, evaluating, and refining compliance and governance reforms for wayward firms. Forcibly implementing these reforms against offending corporations has become the alternative punishment of choice.<sup>10</sup> Attention to corporate shaming has all but dried up.<sup>11</sup>

Yet corporate punishment is still a mess, even more so than it was when the search for alternative sanctions began over thirty years ago. As any week’s headlines will attest, corporate crime has not gone anywhere. Whereas corporate crime and financial misconduct were once regarded as synonyms, scholars, prosecutors, and courts increasingly recognize that brand-name corporations also commit a broad range of serious “street

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7. Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 454, 458–59 (2019).

8. See W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 957–59 (2019) (discussing institutional incentives). See generally Samuel W. Buell, *Why Do Prosecutors Say Anything?: The Case of Corporate Crime*, 96 N.C. L. REV. 823 (2018).

9. Memorandum from Eric Holder, Deputy Att’y Gen., Dep’t of Just., to All Component Heads and U.S. Att’ys (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/22YD-KMYR>]; Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 968 (2009) (explaining that compliance first appeared in the guidelines before Holder’s memorandum).

10. For an overview of this development, see Baer, *supra* note 9, at 972–75; Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2086–92 (2016).

11. Notable exceptions include David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1817 (2001), and Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1999). Each is now over two decades old. Scholars today have tried to analyze empirically the reputational consequences of conviction, without considering revisions to the sanctions that follow conviction. Samuel W. Buell, *A Restatement of Corporate Criminal Liability’s Theory and Research Agenda*, 47 J. CORP. L. 937, 950 & n.35 (2022) (collecting citations). *But see* W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397 (2021) (distinguishing adverse publicity resulting as a consequence of conviction from adverse publicity as a sanction).

crimes”): homicide,<sup>12</sup> arson,<sup>13</sup> drug trafficking,<sup>14</sup> dumping,<sup>15</sup> and sex offenses.<sup>16</sup> Corporate sentencing remains woefully ill-equipped to meet the preventive and expressive demands of effective punishment. After decades of compliance reforms and prosecution agreements, civil and administrative alternatives have reduced the institution of corporate criminal law to a formalistic exercise diluted by public relations spin and a frenetic media environment.<sup>17</sup> State-mandated governance interventions are poorly designed and shoddily implemented with little meaningful follow-up. In the surest sign of prosecutor’s inattention, the federal government has identified fewer than five corporate criminals who violated one of these mandatory governance reforms.<sup>18</sup> Corporations view criminal charges as inconvenient economic uncertainties and treat criminal sanctions as mere costs of doing business.<sup>19</sup> Indeed, today’s corporate criminal justice system makes it difficult even to identify after the fact who the corporate criminals are.<sup>20</sup>

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12. KATHERINE BLUNT, CALIFORNIA BURNING: THE FALL OF PACIFIC GAS AND ELECTRIC—AND WHAT IT MEANS FOR AMERICA’S POWER GRID 23 (2022); Katherine Blunt & Peg Brickley, *PG&E Pleads Guilty to Manslaughter in Fires as It Nears Bankruptcy Exit*, WALL ST. J., <https://www.wsj.com/articles/pg-e-to-admit-fault-in-84-fire-deaths-plead-guilt-y-to-manslaughter-11592321556> [<https://perma.cc/76HZ-VDAL>] (June 16, 2020, 6:53 PM).

13. Hayley Smith, *PG&E Charged with Manslaughter in Shasta County Fire that Killed 4*, L.A. TIMES (Sept. 24, 2021, 12:39 PM), <https://www.latimes.com/california/story/2021-09-24/zogg-fire-charges> [<https://perma.cc/TSJ2-9D9C>] (noting that “the filing also includes felony arson charges”).

14. Information at 6–9, *United States v. Rochester Drug Coop., Inc.*, No. 19-290 (S.D.N.Y. Apr. 23, 2019), ECF No. 2.

15. Press Release, U.S. Dep’t of Just., *Princess Cruises Lines to Pay Largest-Ever Criminal Penalty for Deliberate Vessel Pollution* (Dec. 1, 2016), <https://www.justice.gov/opa/pr/princess-cruise-lines-pay-largest-ever-criminal-penalty-deliberate-vessel-pollution> [<https://perma.cc/H34R-CXWC>] (“Princess . . . [has agreed to] plead guilty to charges related to illegal dumping of oil contaminated waste from the *Caribbean Princess* cruise ship.”).

16. *E.g.*, Corinne Ramey, *Lawsuits Accuse Big Hotel Chains of Allowing Sex Trafficking*, WALL ST. J. (Mar. 4, 2020, 5:30 AM), <https://www.wsj.com/articles/lawsuits-accuse-big-hotel-chains-of-allowing-sex-trafficking-11583317800> [<https://perma.cc/Z97D-DAFY>] (reporting on lawsuits accusing big hotel companies of ignoring sex trafficking at their properties). *See generally* Erin L. Sheley, *Tort Answers to the Problem of Corporate Criminal Mens Rea*, 97 N.C. L. REV. 773 (2019) (stating the problems and standards involved in corporate sex crimes).

17. *See, e.g.*, Mihailis E. Diamantis & W. Robert Thomas, *But We Haven’t Got Corporate Criminal Law!*, 47 J. CORP. L. 991, 1002–03 (2022); Julie R. O’Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 47 J. CORP. L. 1047, 1056–57 (2022).

18. *See* Caroline M. Whitener, *Hair on Fire: Why Companies Are Less Likely to Feel the Burn Under the DOJ’s Newest Change to Antitrust Enforcement*, 49 PEPP. L. REV. 951, 981 (2022) (“[I]t [is] rare for prosecutors to pursue breaches under active DPAs [deferred prosecution agreements].”).

19. *See, e.g.*, Vikramaditya S. Khanna, *What Rises from the Ashes?*, 47 J. CORP. L. 1029, 1035 (2022); William S. Laufer, *Illusions of Compliance and Governance*, 6 CORP. GOVERNANCE 239, 245–46 (2006).

20. *See* Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 139–43 (2020); Justin Wise, *DOJ Withholding Public Records in Violation of FOIA, Says Garrett’s Collaborator in Duke-UVA Corporate Prosecution Registry*, DUKE L. NEWS (Nov. 11, 2021), <https://law.duke.edu/news/doj-withholding-public-records-violation-foia-says-garretts-collaborator-duke-uva-corporate/> [<https://perma.cc/ER4D-PTWM>]. Broad ignorance about corporate criminal activity indicates that “public disclosure of the relevant facts about material misconduct” is not enough. PRINCIPLES OF LAW, COMPLIANCE AND ENFORCEMENT FOR

Enter corporate criminal branding. This Article aims to reinvigorate the role and propriety of shaming sanctions within corporate criminal law. It offers tools that leverage the lessons of brand and branding in both their punitive and marketing senses. The core proposal is to temporarily affix a visual sign to a corporation's public image reflecting the fact of conviction. In other words, this Article makes the case for a sanction that literally brands the corporate criminal.

This Article offers a range of alternative branding sanctions that courts and prosecutors could use to enhance, refine, and target their stigmatic message. For now, take the following as a starting point for discussion: a sentencing court could order a corporate convict to affix a stigmatic mark to any or all of its legal name, public-facing logo, or commercial brand.<sup>21</sup> In its simplest form, this stigmatic mark could be a standardized, recognizable designator, akin to trademark's ® or copyright's ©. As something between an opening bid and metonym, this Article proposes that, at a minimum, courts consider branding criminal corporations with an ⊕, for "felon."

Corporate criminal branding represents an improved reimagining of the publicity sanctions that scholars and enforcers envisioned decades ago. In fact, the brief in favor of corporate shaming sanctions is considerably stronger now than when the idea last received sustained attention. We now know that merely publicizing the fact of corporate offense is not enough to provoke a response—shame must also be communicated.<sup>22</sup> Today's commercial and media environments are virtually unrecognizable from those of the 1980s in ways that augur in favor of shaming sanctions.<sup>23</sup> During this period, the importance of the corporate commercial brand has ballooned: once an intangible asset of moderate value for certain consumer-facing industries, today, the commercial brand is an essential component of virtually any successful business.<sup>24</sup> Brand equity—that is, the financial value that a business derives from the reputation of its commercial brands—has become one of firms' most important assets, accounting for upward of 30 percent of public companies' market value.<sup>25</sup> At the same time, profound changes in information and communication technology have erased what has traditionally been considered the largest barriers to publicity sanctions—

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ORGANIZATIONS § 6.02(b)(5) (AM. L. INST. 2021). This Article calls for what might be termed "publicity disclosure."

21. 18 U.S.C. §§ 3561, 3563 (sentence of probation and conditions of probation); U.S. SENT'G GUIDELINES MANUAL § 8D1.4(a) (U.S. SENT'G COMM'N 2023) (publicity order).

22. Judith van Erp, *Naming Without Shaming: The Publication of Sanctions in the Dutch Financial Market*, 5 REG. & GOV. 287, 303 (2011).

23. See generally Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012).

24. See Kevin Lane Keller & Keith Richey, *The Importance of Corporate Brand Personality Traits to a Successful 21st Century Business*, 14 J. BRAND MGMT. 74, 75 (2006); Philip Kotler & Waldemar Pfoertsch, *Being Known or Being One of Many: The Need for Brand Management for Business-to-Business (B2B) Companies*, 22 J. BUS. & INDUS. MKTG. 357, 358 (2007).

25. Neeraj Bharadwaj, Dominique M. Hanssens & Ramesh K.S. Rao, *Corporate Brand Value and Cash Holdings*, 27 J. BRAND MGMT. 408, 408 (2020) (collecting citations).

namely, the ability to reach the public. Taken together, today's public corporation is both more sensitive about, and more vulnerable to, reputational consequences.

Advocating for a return to branding as a form of punishment might strike some as a medieval anachronism, out of step with broader calls for a twenty-first century approach to criminal justice. After all, viewing the long history of state-sanctioned punishment, shaming sanctions play a dark role. There is the scarlet letter and the iron mask, the pillory and the stocks, the burned skin and hewn limbs. Our criminal justice system rejected these physical marks of penal stigma long ago—and for good moral and practical reasons that we wholeheartedly endorse.<sup>26</sup> Even though criminal justice scholars still hotly debate the propriety of shaming sanctions more generally—including specifically for individual white-collar offenders—everyone agrees that physical branding is a deeply unfitting punishment for natural people.<sup>27</sup>

Yet for many of the same moral and practical reasons that criminal law rejected branding-as-corporal-punishment, branding-as-corporate-punishment promises to be an effective means of sanctioning business entities. The most potent objections to shaming sanctions, developed in the context of general criminal law, carry substantially less weight when the target is a corporation instead of an individual. Unlike the individuals whose bodies authorities mutilated in the Middle Ages, corporations have no bodily form to scar. What they have instead is an abstraction, a carefully cultivated and curated public personality—their brand.

The primary goal of this Article is to make the case for adding the corporate criminal brand to the existing set of sanctions levied against corporate criminals. At the same time, this Article calls for a closer relationship and cross-disciplinary dialogue between criminal-justice and marketing professionals concerning how to better communicate about corporate crime. After all, courts and prosecutors today are not experts at corporate publicity; if the battle were pitched between Madison Avenue and Main Justice, the government would be perennially outgunned and

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26. See generally Joan E. Durrant, *Corporal Punishment: From Ancient History to Global Progress*, in HANDBOOK OF INTERPERSONAL VIOLENCE AND ABUSE ACROSS THE LIFESPAN 343, 343–62 (Robert Geffner, Jacquelyn W. White, L. Kevin Hamberger, Alan Rosenbaum, Viola Vaughan-Eden & Victor I. Vieth eds., 2022); Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179 (1982).

27. For a very small sample, see MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 90–112 (2004); OWEN FLANAGAN, HOW TO DO THINGS WITH EMOTIONS: THE MORALITY OF ANGER AND SHAME ACROSS CULTURES 163–64 (2021); John Braithwaite, *Shame and Criminal Justice*, 42 CAN. J. CRIMINOLOGY 281, 282 (2000); Chad Flanders, *Shame and the Meaning of Punishment*, 54 CLEV. ST. L. REV. 609, 617 (2006); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 375 (1999); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYC. PUBL. POL'Y & L. 645, 648–49, 680–81 (1997); Raffaele Rodogno, *Shame, Guilt, and Punishment*, 28 LAW & PHILOS. 429 (2009); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1056–57 (1998).

out-funded.<sup>28</sup> However, the flourishing field of marketing scholarship promises to change this calculus, putting criminal law functionaries in a position to make corporate branding a powerful tool for justice.

Although it was always apparent that corporations cared, and cared a lot, about their public reputations, scholars considering adverse publicity sanctions for the first time in the 1980s were only vaguely aware of how, and how much, a corporation's public image or brand mattered to the larger enterprise.<sup>29</sup> Since then, the field of brand management has flourished, investigating in detail how corporate reputations develop, thrive, and decline. Today, nine out of ten corporate executives agree that the public's trust in their business is imperative.<sup>30</sup> There is a deep literature analyzing when and to what extent individuals reevaluate their relationships with firms upon learning about corporate wrongdoing.<sup>31</sup> These developments offer a new opportunity for corporate criminal law to draw on the insights of business and marketing professionals.

Part I of this Article lays out the present, dysfunctional landscape of corporate criminal sentencing. Corporate criminal law presently fails to achieve any familiar purpose of criminal justice, whether preventive, expressive, or retributive. Virtually no scholars or commentators defend any meaningful aspect of our current system of corporate criminal justice; none endorse it entirely. We have gone so far as to argue in prior work that corporate sanctions are so deficient that the United States does not have a recognizable institution of corporate criminal law at all.<sup>32</sup> The only people happy with the current state of affairs are the prosecutors and corporations who play what Professor William S. Laufer calls a mutually beneficial "compliance game."<sup>33</sup>

Disrupting the status quo will require more than mere recalibration of today's favored tools, like fines and compliance mandates. To make progress, we must reconsider the conceptual limits of corporate sanction. Part II lays the groundwork for a such a path by introducing the fundamentals

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28. See W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, 2 STETSON BUS. L. REV. 1, 28 (2022); cf. Coffee, *supra* note 4, at 425–26 ("At its best, the government sounds like the back pages of the *New York Times* ('good, gray and dull'); at its worst, its idea of communication is exemplified by the *Federal Register*.").

29. See *supra* notes 3–5.

30. See Wes Bricker, Kathryn Kaminsky & Kathy Neiland, *Trust Survey: Key Findings and Lessons for Business Executives*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 30, 2023), <https://corpgov.law.harvard.edu/2023/04/30/trust-survey-key-findings-and-lessons-for-business-executives/> [https://perma.cc/9LSK-MWE9].

31. Allison R. Johnson, Valerie S. Folkes & Juan Wang, *When One Bad Apple Spoils Consumers' Judgment of the Brand: Exposure to an Employee's Non-workplace Transgression and Potential Remedies*, 46 J. ACAD. MKTG. SCI. 725, 725–26 (2018) (collecting citations). See generally STRONG BRANDS, STRONG RELATIONSHIPS 117–58, 360–75 (Susan Fournier, Michael Breazeale & Jill Avery eds., 2015); Susan Fournier, *Consumers and Their Brands: Developing Relationship Theory in Consumer Research*, 24 J. CONSUMER RSCH. 343 (1998).

32. See Diamantis & Thomas, *supra* note 17, at 993.

33. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 79–80 (2017).



of the commercial corporate brand as a key, and increasingly important, source of a business's value and public reputation.

From there, we cautiously seek lessons from criminal branding in Part III. Until relatively recently, authorities brutally tattooed and scarred convicted felons. These painful affronts to human dignity were rightfully abandoned in the nineteenth century. But corporations do not experience pain; they have no dignitary interests or moral autonomy. And, as it happens, the criminological goals of branding sanctions—informing the public, expressing society's condemnation, and preventing re-offense—are precisely the areas in which current corporate criminal punishment falls short.

In Part IV, we offer a reimagined approach to criminal branding for application to modern corporations. Lacking physical form, corporations can bear a record of their conviction only if it is attached to their legal name, product packaging, or business communications—in short, to their corporate brand. The discussion below contains a range of illustrative possibilities, each of which conveys different amounts of information and expresses different levels of authoritative condemnation. Part V argues that these sanctions leverage multiple economic and psychological pathways to induce corporations to obey the law—not least because so much of corporate equity is tied to public image. Lastly, Part VI contends that, although corporate criminals will certainly devise stratagems to blunt the force of branding sanctions, judges and prosecutors have responsive tools readily available.

#### I. THE EMBARRASSING, ENDURING INADEQUACY OF CRIMINAL FINES (AND OTHER CORPORATE PUNISHMENTS)

The early desire for an adverse publicity sanction reflected a then-developing view that monetary fines, long the paradigm of corporate punishment, were no longer (and maybe never were) up to the demands of a functioning corporate criminal justice system. Although the early 1990s saw a wholesale reimagining of the federal government's approach to fines—resulting in the Organizational Sentencing Guidelines—the problems with corporate criminal fines have endured.<sup>34</sup>

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34. It should be noted that monetary sanctions are no longer the only way to punish corporations, even if they still remain the most likely sanction. In addition to fines, corporate sentences and pretrial diversion agreements can require a period of probationary supervision and mandated compliance reform. See W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601, 608–17 (2017); Mihailis E. Diamantis, *An Academic Perspective*, in THE GUIDE TO MONITORSHIPS 75, 79 (Anthony S. Barkow, Neil M. Barofsky & Thomas J. Perrelli eds., 1st ed. 2019) (“Compliance programmes are another organisation-level feature that influences the occurrence (and recurrence) of crime within a corporation.”). These can hardly be the criminal justice hook. Probation, at least as conventionally understood in the United States, signals light treatment of the sort reserved for minor, first-time infractions. Flanders, *supra* note 27, at 618; Thomas, *supra* note 11, at 415–17. Professor Brandon Garrett has compared such provisions to reform-oriented civil remedies. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 860 (2007). John Braithwaite has compared them to administratively imposed self-regulation. John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466, 1469–70 (1982). In any case, even supervised reform is the exception

A. *Stuck Between Deterring Too Much and Not at All*

Corporate fines have initial intuitive appeal, making it understandable that the monetary fine has long sat at the center of corporate sentencing. On the one hand, attempts to punish bring into relief ways in which the corporate person is not like other persons. A corporation has “no soul to damn,” and, even more pressing, no body to imprison.<sup>35</sup> On the other hand, even if corporations do not have pockets, they do have pocketbooks. Fines provide a straightforward mechanism for impacting corporations’ financial interests.<sup>36</sup> Indeed, at least at first glance, there may be something especially fitting in fining a business corporation, which is fundamentally a profit-seeking enterprise.

And yet, monetary sanctions have long suffered from systemic defects that severely limit their value as a form of corporate punishment. To be clear, if the goal is to destroy a corporate criminal (and to threaten would-be corporate criminals with destruction), then monetary fines are one of several mechanisms that can straightforwardly accomplish that task. The Federal Sentencing Guidelines specifically authorize, under narrow circumstances, imposing fines designed “to divest [an] organization of all its assets.”<sup>37</sup> Destruction, though, is a blunt tool. No one thinks that criminal enforcement should regularly pose an existential threat for corporate targets.<sup>38</sup> The collateral effects of corporate demise ripple widely, impacting employees, investors, creditors, and the broader economy.<sup>39</sup> Ever since the fourth-largest accounting firm in the United States collapsed as a result of DOJ enforcement in 2002, prosecutors have bent over backwards to add nuance to their enforcement policies.<sup>40</sup> The problems with criminal fines arise as a

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rather than the rule (imposed in well under 50 percent of agreements). See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 588 (2015).

35. See Coffee, *supra* note 4, at 459.

36. See generally Thomas, *supra* note 34, at 918–19 (discussing and critiquing past and present uses of corporate criminal fines).

37. U.S. SENT’G GUIDELINES MANUAL § 8C1.1 (U.S. SENT’G COMM’N 2023).

38. See, e.g., Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 110 (2006) (criticizing laws that “give federal prosecutors life and death power over business entities”). But see Veronica Root Martinez, *The Government’s Prioritization of Information over Sanction: Implications for Compliance*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 85, 89 (arguing that prosecutors should seek more destructive fines against corporations).

39. Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1402 (2002) (“A firm may have a distinct and large set of employees, creditors, patients, or customers who will be affected.”).

40. See Mike Koehler, *Measuring the Impact of Non-prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 501–03 (2015) (“The perceived ‘Arthur Andersen effect’ (i.e. that criminal charges alone, and certainly criminal convictions, could be the death sentence of a business organization) caused the DOJ to reconsider its historical binary option to resolving alleged instances of corporate criminal liability.”); Jesse Eisinger, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* 56–57 (2017) (“In the later years of

consequence of trying to impose them as a meaningful, but less than lethal, sanction.

The trouble is, there is only so much that nonlethal fines can do to deter corporate wrongdoing. Professor John C. Coffee, Jr., long ago identified a persistent “deterrence trap.”<sup>41</sup> Corporate fines can only deter if they exceed the expected benefits of corporate crime.<sup>42</sup> Due to the high payoff of corporate crime and the low prospect of getting caught, deterrent fines would have to be large—so large that they would exceed anything the corporate target could possibly pay.<sup>43</sup> Once the magnitude of a monetary fine exceeds the value of a firm, there is no extra deterrence to be gained by ratcheting the penalty even higher. Hence, the deterrence trap.<sup>44</sup>

The enforcement realities of corporate criminal law compound the deterrence trap. When it comes to deterrence, what matters is not the absolute value of the penalty, but rather its *expected* value—that is, the size of a hypothetical fine discounted by the likelihood that it will be imposed.<sup>45</sup> Although corporate crime remains alive and well, all indications are that corporate criminal enforcement is not. For each of the last ten years, federal authorities convicted roughly 140 organizations, amounting to less than a quarter of 1 percent of the federal government’s overall criminal docket.<sup>46</sup> Prosecutors resolve another forty cases each year through civil prosecution agreements, usually with the largest corporate criminals who engage in the most impactful misconduct.<sup>47</sup> What these numbers hide is that, according to the best available estimates, only 5 percent of corporate crimes ever come to light.<sup>48</sup>

Even if corporate fines could get around being simultaneously too high and too low, they face an even more formidable economic law: agency costs. To affect corporate behavior, corporate fines must influence the individuals who are in a position to shape what the corporation does.<sup>49</sup> Corporate fines

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the 2000s and 2010s, top Justice Department officials invoked Andersen when discussing corporate investigations, certain that the government had gone too far.”)

41. Coffee, *supra* note 4, at 390; Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006).

42. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968).

43. Coffee, *supra* note 4, at 390.

44. *Id.*

45. *Id.* at 389–90.

46. U.S. SENT’G COMM’N, THE ORGANIZATIONAL SENTENCING GUIDELINES: THIRTY YEARS OF INNOVATION AND INFLUENCE 13 (2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829\\_Organizational-Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf) [<https://perma.cc/4X4P-KF8C>].

47. GIBSON DUNN LLP, 2020 YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS AND DEFERRED PROSECUTION AGREEMENTS 2 (2021), <https://www.gibsondunn.com/2020-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/> [<https://perma.cc/FY2Q-KK3N>].

48. Diamantis & Laufer, *supra* note 7, at 454.

49. See Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals?: Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 3 (1999) [hereinafter Alexander & Cohen, *Why Do Corporations Become Criminals?*]; Cindy

necessarily misfire. Because they come out of general corporate coffers, fines primarily burden passive shareholders rather than active corporate managers.<sup>50</sup> Of course, managers may themselves also be shareholders, but whatever benefits an employee may gain from misconduct will more often than not offset the fractional share that they experience of any corporate-level sanction.<sup>51</sup> Deterrence theory and corporate fines cannot overcome the basic economic fact of agency costs.<sup>52</sup>

### B. *Fines Don't Mean Punishment*

Deterrence matters for corporate criminal law, but it is not all that matters. Criminal conviction also serves to call out and distinguish truly contemptible practices from merely sharp, unproductive, or undesirable ones that are better the province of civil and regulatory responses.<sup>53</sup> The problem with corporate fines here is that nothing marks them out as being especially criminal or punitive.

Monetary sanctions are expressively ambiguous. A financial penalty might be construed as a straightforward, even fitting, mechanism for setting back a business's interests—but it is not obviously a *punitive* one. Fines are just as likely to be interpreted as a means of buying one's way out of the “real” sanction.<sup>54</sup> For this reason, they are the characteristic *civil* sanction,<sup>55</sup>

R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 11, 14 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (examining causes of corporate crime “through the lens of an economic model in which corporate crime is the outcome of decisions by rational utility-maximizing individuals who have the ability to incur criminal liability on behalf of the corporation”).

50. Cf. Thomas, *supra* note 34, at 44–46 (proposing broader use of executive compensation clawbacks in order to better target executive financial incentives). In 2023, the DOJ announced a pilot program implementing a modified version of this clawback proposal. Dylan Tokar, *Justice Department Seeks to Spread the Pain of Corporate Fines to Executives at Fault*, WALL ST. J. (Mar. 2, 2023, 10:09 AM), <https://www.wsj.com/articles/justice-department-policy-seeks-to-spread-the-pain-of-corporate-fines-5ec14581> [<https://perma.cc/Z9M4-EUEJ>].

51. See Mihailis E. Diamantis, *The Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865, 880 (2019).

52. Alexander & Cohen, *Why Do Corporations Become Criminals?*, *supra* note 49, at 2; see also Lawrence Summers, *Companies on Trial: Are They 'Too Big to Jail'?*, FIN. TIMES (Nov. 21, 2014), <https://www.ft.com/content/e3bf9954-7009-11e4-90af-00144feabdc0> [<https://perma.cc/Y7XD-BTBX>] (“Paying with shareholders' money as the price of protecting themselves [managers] is a very attractive trade-off.”).

53. See Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2062–64 (2016). Recent scholarly and policy work on corporate criminal law overlooks these expressive goals, which otherwise play a central role in criminal enforcement. See, e.g., PRINCIPLES OF LAW, COMPLIANCE AND ENFORCEMENT § 6.02 cmt. a (AM. L. INST. 2021) (omitting expressive goals in a list of “purposes of an enforcement policy”). This Article offers a corrective.

54. See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 146–47 (2001); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621 (1996); Thomas, *supra* note 11, at 412–15.

55. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 854–55 (2000) (“Civil and criminal liability have distinct social

in which making affected parties whole and internalizing externalities are more salient aims.<sup>56</sup> Standing alone, fines signal that offending carries a price.<sup>57</sup> This characterization is fundamentally at odds with criminal law's characteristic message of prohibition.<sup>58</sup>

Even if monetary sanctions are generally a source of ambivalent meaning, criminal fines could be designed to overcome this expressive ambiguity. Corporate fines could pick up some of their criminal justice slack if, for example, they were especially large and disruptive of business interests.<sup>59</sup> However, there are two obstacles to this fix—one in principle, and one in practice. As discussed in the previous section, there are limits to how large fines can be; it is unclear that they could go high enough to be expressively appropriate. In practice, fines-as-punishments are not qualitatively larger than fines-as-penalties. In fact, the opposite is true: criminal fines are often much smaller than civil penalties because of statutory caps.<sup>60</sup> There is no greater indictment of the current regime of corporate criminal fines than the fact that, given a choice between the two, firms in many industries would prefer to find themselves in criminal court rather than in civil litigation.<sup>61</sup>

Making matters worse, the punitive portion of any monetary sanction is often much lower than its face value. Focusing on the headline number for a monetary sanction is often misleading. In reality, the sticker price can usually be broken down into two numbers: restitution and fine. Restitution, by definition, is not punishment<sup>62</sup> because it serves a civil law purpose.<sup>63</sup>

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meanings . . . . [T]he finding of [criminal] liability must recognize that . . . the victim or object's value is beyond price.”).

56. Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1496 (1996) (“A corporation exposed to liability internalizes the costs of harm and provides incentives for its managers to avoid harm. Because the cost of harm is internalized, the costs of production will reflect the true economic costs and the level of production will approach the optimal level.”).

57. See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 195 (1991).

58. BRAITHWAITE, *supra* note 1, at 141–42 (arguing that adopting an “overly economically rational conception of the corporation” is self-defeating with respect to designing corporate punishment).

59. See Thomas, *supra* note 11, at 418–20.

60. See, e.g., Ivan Penn, *PG&E Ordered to Pay \$3.5 Million Fine for Causing Deadly Fire*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/business/energy-environment/pge-camp-fire-sentenced.html> [<https://perma.cc/75QU-RBV7>].

61. See Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 108 (2004). Granted, the choice is not necessarily exclusive; firms often find themselves facing both criminal and civil actions.

62. *United States v. Nichols*, 169 F.3d 1255, 1280 (10th Cir. 1999) (“[T]he district court erred in viewing restitution as a punitive act.”); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 96 (2014) (“[M]any courts disavow the idea that criminal restitution is an instrument for punishment, instead characterizing restitution as solely compensatory.”).

63. Stephen R. Giles, Lynn Foster, Russ Altizer, Jay Barth, Jim Cargill, John Hill, Robin Miller, John V. Phelps, William Marshall Prettyman & Howard Warren, *Non-legislative Commission on the Study of Landlord-Tenant Laws*, 35 U. ARK. LITTLE ROCK L. REV. 739, 759 (2013) (“In today’s legal system, restitution to a private party is a remedy that is typically enforced through civil and not criminal court.”). Indeed, restitution used to be a bedrock field of the common law before being effectively reduced to just a civil remedy. See Chaim Saiman,

Restitution must be paid first—even when it means that, afterward, the organization is no longer in a position to pay its punitive fine.<sup>64</sup> In a recent thirty-year retrospective, the U.S. Sentencing Commission determined that nearly one-third of all organizations sentenced since 1992 were unable to pay some or all of the punitive fine.<sup>65</sup>

### C. Prosecution Agreements Compound These Problems

The discussion has focused on criminal fines imposed at sentencing—that is, an official punishment imposed by the state in response to, and because of, the fact of a conviction or guilty plea. Virtually everything said above carries forward to monetary penalties specified in out-of-court “prosecution agreements” that the DOJ often uses to settle corporate criminal investigations.<sup>66</sup> This is in large part because, as a practical matter, penalties in prosecution agreements are anchored by, and thus largely mirror, court-ordered punishments.

The basic structure of a prosecution agreement loosely resembles pretrial diversion: the government agrees not to prosecute a corporation, resulting in a non-prosecution agreement (NPA), or to indefinitely delay moving forward with an indictment, resulting in a deferred prosecution agreement (DPA). In exchange, the offending corporation agrees to a host of conditions that, in practice, are mostly indistinguishable from the terms that would otherwise appear in a plea agreement. The Organizational Sentencing Guidelines instruct sentencing judges to calculate culpability scores that correspond to fine ranges.<sup>67</sup> Prosecutors follow suit in civil pretrial diversion agreements, usually starting (and often ending) with the stipulated monetary penalty that the corporation would pay upon conviction.<sup>68</sup>

The concessions that prosecutors extract from corporations through pretrial diversion are paltry, whether reckoned as a percentage of market capitalization (on average, less than 0.04 percent),<sup>69</sup> of annual revenue (on average, less than 1 percent for large corporations),<sup>70</sup> or of the total sanction

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*Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEG. STUDS. 99, 102 (2008).

64. U.S. SENT’G GUIDELINES MANUAL § 8B1.1(c) (U.S. SENT’G COMM’N 2023) (“If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.”).

65. See U.S. SENT’G COMM’N, *supra* note 46, at 36.

66. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 70 (2014) (discussing fines imposed in DPAs).

67. U.S. SENT’G GUIDELINES MANUAL ch. 8.

68. CRIM. DIV. OF THE U.S. DEP’T OF JUST. & ENF’T DIV. OF THE U.S. SEC. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 74 (2012), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [<https://perma.cc/874V-M7P6>] (“DPAs describe the company’s conduct, cooperation, and remediation, if any, and provide a calculation of the penalty pursuant to the U.S. Sentencing Guidelines.”).

69. GARRETT, *supra* note 66, at 70.

70. Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 333–37 (2021).

for any instance of misconduct (on average, 14 percent).<sup>71</sup> When individual defendants cannot pay a high enough fine, criminal law imprisons them; when a corporation cannot pay, federal prosecutors offer to reduce the fine. Half of pretrial diversion agreements impose no fine at all!<sup>72</sup>

Dollar amounts aside, prosecution agreements face near-universal criticism from expressively minded critics.<sup>73</sup> Prosecution agreements allow corporations to end criminal investigations while avoiding conviction and its consequences. Monetary sanctions are worse in this context. If monetary sanctions carry a perception that they are a way of buying one's way out of more serious consequences, then perceptions are reality here.<sup>74</sup> Corporations literally buy their way out of conviction—and the communal condemnation that conviction represents<sup>75</sup>—when they sign a prosecution agreement.

## II. COMMERCIAL CORPORATE BRANDS

Today's fixation with punitive corporate fines relies on a false syllogism. Corporations do not have bodies, the reasoning goes, so the law cannot jail them.<sup>76</sup> But they do have bank accounts, so at least the law can fine them. So far, so good.

The syllogism fails because it stops there, implying that the corporate fine is the only punitive grip that the law can hold over corporations. However, corporations have far more than bank accounts, and their bank accounts are not necessarily their most valuable asset. A further source of value for a corporation is that intangible concept encapsulating its efforts to develop a good reputation, to invest in ongoing and future relationships with its consumers, and to build a loyal base of employees and stakeholders—in short, in the corporation's commercial brand.

At its most basic, a commercial brand functions to associate, in the minds of customers, a business's products or services with the firm itself.<sup>77</sup> To be sure, brands have provided a tool of identification and individuation for millennia.<sup>78</sup> In the 1800s, branding helped newly emerging national manufacturers steer customers away from longstanding, local commercial

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71. GARRETT, *supra* note 66, at 70.

72. *See id.*

73. Miriam H. Baer, *Three Conceptions of Corporate Crime (and One Avenue for Reform)*, 83 LAW & CONTEMP. PROBS., no. 4, 2020, at 1, 2–3 (collecting citations).

74. David M. Uhlmann, *Deferred Prosecution and Non-prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1335 (2013).

75. Cindy R. Alexander and Jennifer Arlen “find no intrinsic differences in the content of” convictions and DPAs. Cindy R. Alexander and Jennifer Arlen, *Does Conviction Matter?: The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87, 89 (Jennifer Arlen ed., 2018). However, they attend only to the factual information the two types of resolution convey and not to expressive content. In this latter respect, DPAs and convictions are, by design, starkly different. *See Diamantis & Thomas, supra* note 17, at 999, 1004.

76. *See generally* Thomas, *supra* note 8.

77. Kevin Lane Keller & Donald R. Lehmann, *Brands and Branding: Research Findings and Future Priorities*, 25 MKTG. SCI. 740, 740 (2006).

78. *See* KEVIN LANE KELLER & VANITHA SWAMINATHAN, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 43–45 (5th ed. 2020).

relationships while simultaneously cultivating a shared sense of identity and professional loyalty across a geographically far-flung workforce.<sup>79</sup> But what has changed since these early days is the prevalence, sophistication, and centrality of corporate branding as a source of value.

In the twenty-first century, branding is an essential aspect of modern business. The most valuable brands in the world today—think Apple and Google, Nike and Under Armour—account for a collective economic value that runs into the trillions.<sup>80</sup> Brand equity has become one of firms' most important intangible assets. This is true not merely for a subset of consumer-facing businesses but also increasingly for firms across industrial and business-to-business sectors.<sup>81</sup> Marketing expenditures to develop, foster, and maintain a corporation's public image now make up, on average, more than 10 percent of companies' budgets.<sup>82</sup> Brand equity accounts for approximately 30 percent of most public companies' market value.<sup>83</sup> In the case of uniquely iconic brands, like Coca-Cola and McDonald's, brand equity has at times represented a staggering 60–70 percent of the company's total market capitalization.<sup>84</sup>

Brand equity is, in an important respect, inherently forward-looking. What is being measured by “[b]rand equity is the financial value of brand loyalty.”<sup>85</sup> As such, “[t]he value of a brand—and thus its equity—is ultimately derived from the words and actions of consumers.”<sup>86</sup> This is particularly true for what marketing professionals refer to as “the corporate brand,” as distinct from any specific product's own brand (think Microsoft, not Xbox.) Very coarsely, whereas “a product brand is defined by what it does and represents,” a corporate brand concerns the business directly over and above its products or services; as such, “a corporate brand is defined as much by who it is as what it does.”<sup>87</sup>

Corporate branding plays a critical role in fostering what might be best understood as a corporation's public personality. Corporate personality, in

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79. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 798, 810; W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479, 517–18 (2018).

80. See INTERBRAND, BEST GLOBAL BRANDS 2021 REPORT: THE DECADE OF POSSIBILITY 15 (2021), <https://interbrand.com/thinking/best-global-brands-2021-download/> [<https://perma.cc/88Y5-46MC>] (“The combined value of the top 100 brands increased from \$2,326,491 million in 2020 to \$2,667,524 million in 2021.”).

81. Kotler & Pfoertsch, *supra* note 24, at 358 (“Brands serve exactly the same general purpose in [business-to-business] markets as they do in consumer markets . . .”).

82. DELOITTE, DUKE FUQUA & AM. MKTG. ASS'N, THE CMO SURVEY: MANAGING AND MEASURING MARKET SPENDING FOR GROWTH AND RETURNS 30 (2021), [https://cmosurvey.org/wp-content/uploads/2021/08/The\\_CMO\\_Survey-Highlights\\_and\\_Insights\\_Report-August\\_2021.pdf](https://cmosurvey.org/wp-content/uploads/2021/08/The_CMO_Survey-Highlights_and_Insights_Report-August_2021.pdf) [<https://perma.cc/8CHL-LYEZ>].

83. See Bharadwaj et al., *supra* note 25, at 408 (collecting citations).

84. KELLER & SWAMINATHAN, *supra* note 78, at 9–10.

85. DARYL TRAVIS, EMOTIONAL BRANDING: HOW SUCCESSFUL BRANDS GAIN THE IRRATIONAL EDGE 28 (2000) (quoting LARRY LIGHT & RICHARD MORGAN, THE FOURTH WAVE: BRAND LOYALTY MARKETING (1994)).

86. Keller & Lehmann, *supra* note 77, at 745.

87. Keller & Richey, *supra* note 24, at 75.



this brand-marketing sense, describes a phenomenon much broader and more nuanced, if no less durable, than the similar-sounding legal concept of corporate personhood. Brand management scholars evaluate corporate brands, as well as the relationships formed between them and their customers, in acutely anthropomorphized terms.<sup>88</sup> Indeed, the leading framework identifies five core personality traits—sincerity, excitement, competence, ruggedness, and sophistication—that consumers in the United States regularly associate with various corporate brands.<sup>89</sup> So familiar are these relationships between a firm and its customers that researchers analyze them using typologies that include categories like “casual friends,” “committed partnerships,” “flings,” “secret affairs,” and “enmities.”<sup>90</sup> Some corporate personas are so identifiable or iconic that they have transcended to the status of archetypes. These days, sleek, design-conscious startups style themselves as “the Apple of [blank],” whereas critics pillory scandal-driven firms as “the next Enron.”<sup>91</sup>

In short, firms today store substantially more value in their public image and reputation than ever before. At the same time, our understanding of how that value is created and preserved—and, as Part III details, how it can be negatively impacted—has become dramatically more sophisticated.

### III. CONTEXT TO PUNITIVE BRANDING

Punitive branding and shame sanctions are nothing new. Deranged medieval authorities invented many painful and degrading variations.<sup>92</sup> Scholars argue that branding sanctions still exist today, albeit in sterilized forms better suited to modern unease with physical distress.<sup>93</sup> Permanent felony records and sex-offender registries may be better at hiding the impact of criminal branding, but they can be equally destructive.

This part provides some context to branding as a sanction: its history, its purposes, and its implications for corporations. The practice and discussion

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88. See generally Jennifer L. Aaker, *Dimensions of Brand Personality*, 34 J. MKTG. RSCH. 347 (1997); C.B. Bhattacharya & Sankar Sen, *Consumer–Company Identification: A Framework for Understanding Consumers’ Relationships with Companies*, 67 J. MKTG. 76 (2003).

89. See Aaker, *supra* note 88, at 347. For international comparisons, see generally Jennifer Lynn Aaker, Jordi Garolera & Verónica Benet-Martínez, *Consumption Symbols as Carriers of Culture: A Study of Japanese and Spanish Brand Personality Constructs*, 81 J. PERSONALITY & SOC. PSYCH. 492 (2001). For further discussion, see Keller & Lehmann, *supra* note 77, at 740. *Cf. id.* (discussing criticism but noting that “anthromorphism [sic] of a brand is common in both casual consumer conversation . . . and advertising messages”).

90. Fournier, *supra* note 31, at 362 tbl.1. See generally STRONG BRANDS, STRONG RELATIONSHIPS, *supra* note 31, at 117–58, 360–75.

91. See, e.g., Ryan Browne, ‘The Enron of Germany’: Wirecard Scandal Casts a Shadow on Corporate Governance, CNBC (June 29, 2020, 4:37 AM), <https://www.cnbc.com/2020/06/29/enron-of-germany-wirecard-scandal-casts-a-shadow-on-governance.html> [<https://perma.cc/3RC2-ZFEU>].

92. See *infra* Part III.A.

93. E.g., NUSSBAUM, *supra* note 27.

of branding to date has focused exclusively on individuals.<sup>94</sup> As applied to human criminals, branding is counterproductive and morally indefensible. With corporations, things are different. The corporate context casts branding in a different light. As a distinct type of entity, criminal corporations present an opportunity to capitalize on branding's expressive and preventive potential while avoiding its moral and pragmatic pitfalls.

#### A. *The Dark History of Branding Individuals*

Shaming and branding sanctions inhabit a dark and disturbing history. Even if they have some legitimate criminological purpose, branding and shaming have inevitably come paired with unacceptable violations of individuals' physical, psychological, and moral integrity. The methods used to impose them often reflect a sadistic or fanatically self-righteous disposition.

Branding sanctions go back at least as far as the Old Testament. The "mark of Cain" publicly signaled the murder of Abel; it warned others to leave Cain to live out his cursed life.<sup>95</sup> The first societies to systematically use tattoos and branding as punishment were the Thracians, Persians, Greeks, and Romans.<sup>96</sup> Visible mutilations marked criminals with symbols that reflected the nature of their crime.<sup>97</sup>

*Figure 1: Ancient Greek arm brand tattoos.*<sup>98</sup>



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94. Peter French came the closest to discussing corporate branding; even there, the invocation of branding is primarily evocative or metaphorical. *See generally* French, *supra* note 5.

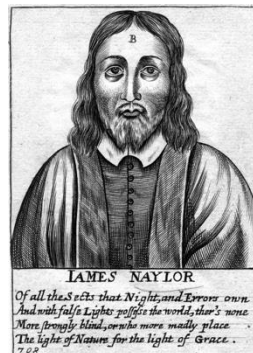
95. *See* SIMON A. COLE, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* 7 (2001).

96. *See* MARGO DEMELLO, *BODY STUDIES: AN INTRODUCTION* 248 (2014); NUSSBAUM, *supra* note 27, at 234–35 (discussing shaming sanctions in ancient Rome).

97. *See* DEMELLO, *supra* note 96, at 248.

98. Giselle Acosta, *The Stigma of Stigmata: Tattoos in the Ancient World*, *ANTIGONE*, <https://antigonejournal.com/2023/03/stigma-ancient-tattoos/> [<https://perma.cc/HZM5-N33H>] (last visited Apr. 3, 2024).

Figure 2: Early Modern English brand on forehead (blasphemy).<sup>99</sup>



Punitive tattooing and scarring moved from Roman society to European countries including England, France, and Germany, which used branding to mark slaves, prisoners, adulterers, runaway soldiers, and other criminals and outcasts.<sup>100</sup> Medieval and Early Modern branding served multiple functions: to inflict suffering, to publicly stigmatize, and to help others recognize offenders.<sup>101</sup>

Not all shaming sanctions involved permanent scarring or disfigurement. In seventeenth- and eighteenth-century Europe, authorities locked large metal masks on people found guilty of gluttony, lying, eavesdropping, or gossip.<sup>102</sup> The goal was to inflict discomfort and ridicule.<sup>103</sup> Masks had distinct designs signifying the different crime of the wearer, such as a long nose to punish lying.<sup>104</sup> Masks could also serve a preventive function. The “scold’s bridle,” for example, incorporated a spiky iron bit that prevented convicted gossips from speaking.<sup>105</sup>

99. *Portrait of James Nayler (1618–1660)*, WIKIMEDIA COMMONS (May 29, 2008, 2:04 PM), <https://commons.wikimedia.org/wiki/File:JamesNayler-1.jpg> [<https://perma.cc/5UAW-2FYH>].

100. DEMELLO, *supra* note 96, at 248–51.

101. COLE, *supra* note 95, at 7.

102. Joanna Gillan, *Scold’s Bridle: 12 Torturous and Humiliating Shame Masks of the Middle Ages (in Pics)*, ANCIENT ORIGINS, <https://www.ancient-origins.net/artifacts-other-artifacts/scolds-bridle-0017368> [<https://perma.cc/3BCL-KX5Z>] (Oct. 7, 2022, 2:53 PM).

103. *Id.*

104. See Wu Mingren, *No Gossiping, Gluttony, Lying, or Eavesdropping! European Metal Masks Would Shame You into Good Behavior*, ANCIENT ORIGINS, <https://www.ancient-origins.net/history-ancient-traditions/no-gossiping-gluttony-lying-or-eavesdropping-european-metal-masks-would-021197> [<https://perma.cc/U3GB-DTHA>] (Jan. 28, 2017, 1:54 PM).

105. Gillan, *supra* note 102; ALICE MORSE EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* 96 (1896) (“[S]colding women . . . were gagged for that annoying and irritating habit. The [scold’s bridle] was . . . a shocking instrument, a sort of iron cage, often of great weight; when worn, covering the entire head; with a spiked plate or flat tongue of iron to be placed in the mouth over the tongue. Hence if the offender spoke she was cruelly hurt.”).

Figure 3: Early Modern European scold's bridle (gossip).<sup>106</sup>



Figure 4: American colonial "A" clothing patch (adultery).<sup>107</sup>



The American colonies inherited branding and shaming sanctions from Europe, with each colony adopting its own punitive language to communicate the type and number of offenses.<sup>108</sup> In Maryland, every county had branding irons used to burn an offender's cheek with letters signifying their crimes: "SL" for seditious libel, "M" for manslaughter, and "F" for forgery.<sup>109</sup> New York mandated branding the letter "P" on the foreheads of perjurers.<sup>110</sup> East Jersey called for the letter "T" to be branded on a first-time burglar's hand and the letter "R" on a repeat offender's forehead.<sup>111</sup> The location of the brand also carried meaning. Some colonies punished first-offense burglary with a "B" on the right hand, on the left hand for a second offense, and on the forehead if the offender committed burglary on a

106. *Scold's Bridle*, WIKIMEDIA COMMONS (July 20, 2018, 6:50 PM), [https://commons.wikimedia.org/wiki/File:Scold's\\_Bridle\\_AKG34260.jpg](https://commons.wikimedia.org/wiki/File:Scold's_Bridle_AKG34260.jpg) [<https://perma.cc/M7RJ-KJMQ>].

107. Melissa Gouty, *Where Did the Idea for the Scarlet Letter Come from?: Read the Novel, Hester*, LITERATURE LUST (Nov. 7, 2022), <https://www.literaturelust.com/post/where-did-the-idea-for-the-scarlet-letter-come-from-read-the-novel-hester> [<https://perma.cc/5NRB-R2SD>].

108. See COLE, *supra* note 95, at 7.

109. See generally James A. Cox, *Bilboes, Brands and Branks: Colonial Crimes and Punishments*, COLONIAL WILLIAMSBURG, Spring 2003, at 19.

110. See 1 COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 129 (Alb., James B. Lyon, State Printer 1896) (1683) ("An Act to prevent willful Perjury").

111. See COLE, *supra* note 95, at 7.

Sunday.<sup>112</sup> Sometimes, authorities determined that temporary signs or letters reflecting the offense were sufficient.<sup>113</sup>

As these examples suggest, branding as punishment in the colonies had a dual purpose: “to inflict pain [and] to permanently, and often very publicly, proclaim the crime, either through the words or letters used.”<sup>114</sup> In this way, brands could serve a preventive (and educative) function, warning future associates to take care not to become victims (or offenders).<sup>115</sup>

In the nineteenth century, corporal branding began to disappear from Anglo-American criminal justice primarily for two reasons. The first was advancements in the technology of criminal administration, which made the practical need to rely on branding less urgent. Premodern society could rely on personal contacts, memory, and exile to identify criminals.<sup>116</sup> Later, with the anonymity of large cities and the mobility of criminal offenders, branding replaced communal memory.<sup>117</sup> The bodies of convicts became moving records of their crimes. But by the turn of the nineteenth century, French courts had developed alphabetical registers of convicts.<sup>118</sup> American criminal record-keeping followed soon after.<sup>119</sup> Although these written registers were not perfect in tracking criminal offenders, the bureaucratic turn in the administration of criminal justice provided a more centralized, and more humane, method of tracking offenders.

The second development that led to branding’s demise was social. People came to realize that these punishments were not only debasing but also generally ineffective at preventing further crime.<sup>120</sup> Western criminologists began prioritizing rehabilitation, albeit through imprisonment and forced labor.<sup>121</sup> By 1872, the United States outlawed branding even in military courts.<sup>122</sup> Today, although the U.S. Supreme Court has not decided the issue directly, branding individuals’ bodies likely violates the Eighth Amendment.<sup>123</sup> The constitutional problem with branding is not just the

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112. Cox, *supra* note 109.

113. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991).

114. DEMELLO, *supra* note 96, at 248–49.

115. See COLE, *supra* note 95, at 304–05 (describing the role criminal identification plays in “prevent[ing] crimes before they occur”).

116. See *id.*

117. See *id.* at 40–41.

118. See *id.* at 44.

119. See *id.* at 47.

120. See Massaro, *supra* note 113, at 1929.

121. See *id.*

122. Act of Aug. 5, 1861, ch. 54, § 3, 12 Stat. 317 (abolishing “flogging as a punishment in the army”); see also 10 U.S.C. § 855 (“Punishment . . . by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter.”).

123. See Ian P. Farrell, *Enlightened Originalism*, 54 HOUS. L. REV. 569, 579 (2017) (“I argue that we should consider public lashings and branding hands as violating the Eighth Amendment’s original meaning . . .”); *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995) (“[B]randing or tattooing HIV-positive inmates (the branding of persons who are HIV-positive was once seriously proposed as a method of retarding the spread of AIDS), or making them wear a sign around their neck that read ‘I AM AN AIDS CARRIER!’ would constitute cruel

physical pain and maiming that it involves. “[T]he infliction of psychological pain can violate the Eighth Amendment,” too.<sup>124</sup> “[P]ractices . . . that degrade, humiliate, or taunt . . . can give rise to actionable claims under the Eighth Amendment.”<sup>125</sup>

### B. Contemporary Analogues to Punitive Branding

Although physical mutilation and marking are no longer part of our criminal justice system, modern day analogues of branding persist. Shaming sanctions have even been on the rise since the early 1990s.<sup>126</sup> Dissatisfaction with current punishments, primarily the ineffectiveness and inhumanity of imprisonment, have made shaming sanctions a more popular option for judges across the country.<sup>127</sup> Some judges give offenders the choice of prison or, for example, wearing shirts that convey their status as a felon.<sup>128</sup>

In a similar vein, several states, including Georgia, Minnesota, and Ohio, have explored laws requiring offenders convicted of driving under the influence (DUI) to use license plates that signify their offense.<sup>129</sup> Minnesota, for example, introduced so-called “whiskey plates,” whose number starts with a “W.”<sup>130</sup> Although a police officer cannot stop a car simply because it has a whiskey plate,<sup>131</sup> the plates draw officers’ attention and stigmatize driving under the influence.<sup>132</sup> Ohio judges can also order drivers convicted of DUI to use distinctive bright yellow plates with red letters.<sup>133</sup> A 2004 law went so far as to mandate these “Party” plates for repeat offenders and others convicted of certain offenses.<sup>134</sup> The hope was that public shame would deter

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and unusual punishment.”); *cf.* *Smith v. Doe*, 538 U.S. 84, 98–99 (2003) (speaking critically about, but not rejecting, punitive branding).

124. *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999). *But cf.* *Ingraham v. Wright*, 430 U.S. 651 (1977) (concluding that corporal punishment of schoolchildren does not violate the Eighth Amendment).

125. *Escobar v. Mora*, 496 F. App’x 806, 811 (10th Cir. 2012).

126. *See Kahan, supra* note 54, at 635–36 (discussing “the growing popularity of shaming sanctions”).

127. *See Massaro, supra* note 113, at 1884.

128. *See Whitman, supra* note 27, at 1056.

129. *See Erica Vincent & Steven Lambert, Transportation: License Plate Policy Update*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/transportation/transportation-license-plate-policy-update> [<https://perma.cc/7PTW-5WBP>] (Oct. 12, 2016).

130. Doug Kans, *Understanding Whiskey Plates in Minnesota*, KANS L. FIRM, LLC (Jan. 23, 2016), <https://www.dwiminneapolislawyer.com/understanding-whiskey-plates/> [<https://perma.cc/DPJ3-WYFY>].

131. *State v. Henning*, 666 N.W.2d 379, 385 (Minn. 2003) (“[T]he mere presence of the special series plates does not amount to ‘reasonable articulable suspicion.’”).

132. As of 2021, Minnesotans ordered to use a whiskey plate can opt to have an ignition interlock installed in their car instead. MINN. STAT. § 169A.60.13(f) (2023) (“[T]he commissioner . . . must issue new registration plates for any vehicle owned by a [DUI] violator . . . if the violator becomes a program participant in the ignition interlock program . . .”).

133. OHIO REV. CODE ANN. § 4510.13(A)(7) (West 2023).

134. *Id.*

future violations,<sup>135</sup> although judges appear to be slowly assigning fewer of these plates.<sup>136</sup>

*Figure 5: Comparison of regular to “Whiskey” plates from Minnesota (bottom left), and regular to “Party” plates (bottom right) from Ohio.<sup>137</sup>*



Today, by far the most common approach to shaming sanctions is to connect the fact of conviction to an accessible, searchable public record. For example, Florida introduced a law to publicize animal abusers’ names for three, five, or ten years, depending on the severity of their crime.<sup>138</sup> The best-known public criminal databases are sex offender registries, which arose due to public fear and outrage over sex crimes.<sup>139</sup> In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act<sup>140</sup> initiated the federalization of sex offender policy.<sup>141</sup>

135. See PATRICIA O’ROURKE, OHIO DRIVING UNDER THE INFLUENCE SPECIAL LICENSE PLATES, OLR RSCH. REP. (Feb. 8, 2004), <https://www.cga.ct.gov/2004/rpt/2004-R-0115.htm> [<https://perma.cc/5NB8-9ZTD>].

136. See Cornelius Frolik, *Judges Assigning Fewer ‘Party Plates’ in Ohio*, DAYTON DAILY NEWS, <https://www.daytondailynews.com/news/local/judges-assigning-fewer-party-plates-ohio/ioUGAod9u47vnyYL7kED0L/> [<https://perma.cc/63CC-WV6T>] (Feb. 8, 2020) (Ohio “party” plate).

137. *License Plate Information*, DRIVER & VEHICLE SERVS., <https://dps.mn.gov/divisions/dvs/Pages/license-plate-information.aspx> [<https://perma.cc/VK5D-UBMK>] (last visited Apr. 3, 2024) (regular Minnesota plate); Kans, *supra* note 130 (Minnesota “whiskey” plate); Jessie Balmert, *Ohio Launches New License Plate—with Wright Flyer Flying in the Right Direction*, COLUMBUS DISPATCH (Jan. 3, 2022, 1:17 PM), <https://www.dispatch.com/story/news/politics/2022/01/03/new-ohio-license-plate-wright-flyer-correct-now-available-bmv/9006277002/> [<https://perma.cc/V3D2-M8BV>] (regular Ohio plate); Frolik, *supra* note 136.

138. See Ayana Archie, *A Proposed Bill in Florida Would Ban Dogs from Hanging Their Heads Out of Car Windows*, NPR (Feb. 23, 2023, 4:35 AM), <https://www.npr.org/2023/02/23/1158935096/florida-bill-dogs-car-window-cat-declawing> [<https://perma.cc/K4ZE-ZUC7>].

139. Carla Schultz, *The Stigmatization of Individuals Convicted of Sex Offenses: Labeling Theory and the Sex Offense Registry*, THEMIS: RSCH. J. JUST. STUD. & FORENSIC SCI., Spring 2014, at 64, 74.

140. Pub. L. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of the U.S.C.).

141. *Id.*

Two years later, Megan's Law<sup>142</sup> required states to establish their own registration and notification systems for sex offenders.<sup>143</sup>

Formally, registries are not punishment, at least not for purposes of the U.S. Constitution.<sup>144</sup> Still, it is revealing that, in reaching this conclusion, the Supreme Court specifically distinguished sex offender registries from corporal branding.<sup>145</sup> Addressing whether a registry could be considered punitive, the Court concluded that branding "inflict[s] physical pain and stage[s] a direct confrontation between the offender and the public."<sup>146</sup> By contrast, the Court reasoned, social stigma and exclusion are not the intention behind, even if they are a foreseeable consequence of, public registries.<sup>147</sup>

Even if registries are not punishment, they are unquestionably punitive. Once placed on a registry, individuals often remain there for life (and sometimes beyond).<sup>148</sup> Since the Adam Walsh Child Protection and Safety Act of 2006,<sup>149</sup> these registries have been converted into online public databases.<sup>150</sup> Sex offender registration is not a physical mark, but it is a permanent and public sign of past criminal conduct. Although the fact of conviction is not persistently displayed on the offender, many states require certain offenders to affirmatively inform their neighbors of this status.

### C. Criminological Goals of Branding

Branding sanctions are penalties that publicize the fact of criminal conviction and convey the community's condemnation.<sup>151</sup> In paradigmatic cases, criminals themselves are forced to carry the message. As illustrated in the prior two sections, the tools included permanent physical mark, a temporary adornment, or mandatory self-identification.

For purposes of this Article, it is important to distinguish criminal branding's general penological purposes from the specific sanctions used to accomplish them. Historically, sanctions used to brand criminals required mutilation—like cutting and burning—that caused extreme pain.<sup>152</sup> Others, like the scold's bridle, degraded their targets by making them the object of

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142. Pub. L. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(e)) (repealed 2006). Congress repealed Megan's Law, replacing it with comprehensive legislation to create a national registry for sex offenders. Adam Walsh Child Protection Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of the U.S.C.).

143. 42 U.S.C. § 14071(e)(2) (repealed 2006).

144. *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (rejecting a challenge under the Ex Post Facto Clause to retroactive application of a state's sex offender registry law).

145. *Id.* at 98–99.

146. *Id.* at 98.

147. *Id.* at 99 ("The purpose and the principal effect of notification [under a sex offender registry system] are to inform the public for its own safety, not to humiliate the offender.").

148. *See* Schultz, *supra* note 139, at 68.

149. Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of the U.S.C.).

150. *See* 34 U.S.C. § 20921(a).

151. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 43–47, 93–94 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

152. *Id.*



ridicule.<sup>153</sup> Physical suffering and social debasement are unacceptable affronts to humanity.<sup>154</sup> This sort of distinction is built into the Eighth Amendment: “cruel and unusual punishment” is unconstitutional not because it is punishment, but because there are some forms of sanction that a decent political community refuses to tolerate. Similarly, even if branding were successful as a form of individual punishment, there are some punishments that are and ought to be morally proscribed.

This Article can only succeed, then, if *corporate* criminal branding (1) has some legitimate criminological purpose that is worth the effort and (2) can be implemented in a way that does not cause pain or social debasement. This section argues for the former condition; the next section addresses the latter.

Branding can serve legitimate criminological goals. One major function branding originally had, and still has, is communicative.<sup>155</sup> By making a counterparty’s criminal history visible, brands inform naïve members of the public about the dangers that people around them may pose. This puts them in a position to take any precautions that they feel are necessary to protect themselves. Sex offense registry laws explicitly tap into this logic.<sup>156</sup>

Branding’s communicative function is distinct from, and does not depend on, the indelible vehicles—like physical scarring and sex-offender registration—that are often used to convey its message. Permanent brands rely on an empirically shaky and morally pernicious premise—namely, that conviction is a status, rather than an event, marking out the individual as forever a criminal. As a descriptive matter, not all criminals are predisposed to reoffend.<sup>157</sup> Although individuals convicted of sex crimes against children have very high recidivism rates, the same is not necessarily true of other sex offenses, e.g., consensual sex between teenagers.<sup>158</sup> Additionally, any predisposition to reoffend varies in a fairly predictable manner across an individual’s life-course, generally dropping dramatically in later years.<sup>159</sup> Automatic and permanent branding falsely presumes that criminal disposition is uniform across cases and invariant across time. These attempts

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153. EARLE, *supra* note 105, at 3–4.

154. *Cf.* Whitman, *supra* note 27, at 1059 (“Even if shame sanctions were wholly unobjectionable from the point of view of *punishment* theory, they would still fail the test of a sane *political* theory.”).

155. *See* Cox, *supra* note 109, at 40–41.

156. For example, in passing its sex offender registry statute, Alaska found that “sex offenders pose a high risk of reoffending” and identified “protecting the public from sex offenders” as the “primary governmental interest.” 1994 Alaska Sess. Laws ch. 41, § 1.

157. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 842 (2014) (“But because individuals vary much more than groups do, even a relatively precisely estimated model will often not do well at predicting individual [recidivism] outcomes in particular cases.”).

158. *See* Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED. SENT’G REP. 357, 359 (2008) (discussing varied recidivism statistics).

159. *See* Glen H. Elder, Jr., *The Life Course Paradigm: Social Change and Individual Development*, in EXAMINING LIVES IN CONTEXT: PERSPECTIVES ON THE ECOLOGY OF HUMAN DEVELOPMENT 101, 104–05 (Phyllis Moen, Glen H. Elder, Jr. & Kurt Lüscher eds., 1995) (describing life-course theory).

at branding misfire because they publicly and irrevocably collapse the offender's identity into the fact of conviction. Although this conflation of act and identity would be bad in and of itself, it is also criminologically counterproductive. Turning individuals previously convicted of a crime into convicts pushes them to the periphery of society, making reintegration difficult, if not impossible.<sup>160</sup> Ironically, social and economic exile increases the probability of reoffending.<sup>161</sup>

A second major purpose of branding is expressive, serving to convey society's condemnation of the offense and support for its victims. In prominent theories of criminal law, this expressive dimension is essential to, and defining of, criminal punishment.<sup>162</sup> Although civil penalties can also deter, remediate, and cause (financial) suffering, criminal punishment uniquely condemns. "Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted."<sup>163</sup> Shaming sanctions like brands involve the "deliberate public humiliation of the offender."<sup>164</sup> In a sense, they are the quintessential criminal sanction. They publicly display criminal status, allowing others to directly judge, criticize, and shame the offender.<sup>165</sup>

Done right, shaming sanctions promise valuable preventive gains with little public cost.<sup>166</sup> Branding that involves no physical disfigurement or intervention can still deter because people wish to avoid the negative social

160. See *Welcome to the NICCC*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.nationalreentryresourcecenter.org/> [<https://perma.cc/CY8K-8UG9>] (last visited Apr. 3, 2024) ("Collateral consequences are legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities."); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) ("[A] new civil death is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences.").

161. See STANDARDS FOR CRIM. JUST.: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS intro. (AM. BAR ASS'N 2004) ("[C]ollateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism."); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1342–43 (2006) ("[T]he burdens of collateral sentencing consequences decrease the likelihood that offenders will lead law-abiding lives upon release from prison."). See generally BRAITHWAITE, *supra* note 1.

162. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."); see also Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 525 (2006) ("[C]riminal legal process[] adds unique and strong communicative force to any societal conclusion about institutional fault.").

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

164. Flanders, *supra* note 27, at 610.

165. See *id.* at 612.

166. See *id.* ("[S]haming does not involve the deliberate infliction of physical suffering on the offender. Compared to imprisonment, shaming punishments inflict much less physical cruelty.").

repercussions of public shame. “The anxiety shaming exploits is a fear of abandonment or isolation, usually from a social group or other community that is necessary or valuable to the individual.”<sup>167</sup> Further, as Professor John Braithwaite emphasizes, shaming can be done in a respectful manner that heals rather than stigmatizes.<sup>168</sup> “[T]he communication of disapproval is of central importance.”<sup>169</sup> But disapproval can be either reintegrative or stigmatic. Stigmatic disapproval shuns offenders without any rituals to mend the rift.<sup>170</sup> Reintegrative disapproval, by contrast, emphasizes forgiveness and reconciliation. How individuals manage shame can have significant implications for their future behavior. Offenders who encounter stigmatic disapproval are less likely to acknowledge their offense and are more likely to adopt a posture of hostility and defiance.<sup>171</sup> Reintegrative shaming can lead to a more positive outcome because offenders are more likely to acknowledge their wrongdoing and begin a healing process that lowers the likelihood of re-offense.<sup>172</sup>

The historical difficulty with shaming sanctions is that the line between stigmatic and reintegrative shaming can be hard to navigate for lay judges and prosecutors who have no expertise in social messaging or marketing. The public audience is a critical player in determining the effectiveness of shaming sanctions.<sup>173</sup> In the ideal case, shaming sanctions induce the audience to condemn criminal behavior and identify defendants as authors of that behavior, but they do not render defendants themselves objects of contempt.<sup>174</sup> Authorities, however, have not always been able to calibrate the public’s reaction. Shaming sanctions require public participation, but, in untutored hands, this participation can slide into a “mob-like affair” that degrades and dehumanizes the offender and the mob alike.<sup>175</sup>

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167. Massaro, *supra* note 113, at 1902.

168. See John Braithwaite, *Street-Level Meta-strategies: Evidence on Restorative Justice and Responsive Regulation*, 17 ANN. REV. L. & SOC. SCI. 205, 219 (2021).

169. Kristina Murphy & Nathan Harris, *Shaming, Shame and Recidivism: A Test of Reintegrative Shaming Theory in the White-Collar Crime Context*, 47 BRITISH J. CRIMINOLOGY 900, 901 (2007).

170. See generally ELIZA AHMED, NATHAN HARRIS, JOHN BRAITHWAITE & VALERIE BRAITHWAITE, SHAME MANAGEMENT THROUGH REINTEGRATION (2001).

171. Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RSCH. CRIME & DELINQ. 445 (1993); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1766 (1999) (“Reintegrative shaming proponents contrast their approach with the destructive shaming of traditional Western criminal justice systems that ostracize, alienate, and often breed defiance or lead to rejection of prosocial norms and attachment to antisocial ones.”).

172. Murphy & Harris, *supra* note 169.

173. Massaro, *supra* note 113, at 1903–04.

174. Braithwaite, *supra* note 27, at 282 (“Reintegrative shaming communicates disapproval within a continuum of respect for the offender; the offender is treated as a good person who has done a bad deed. Stigmatization is disrespectful shaming; the offender is treated as a bad person.”).

175. Flanders, *supra* note 27, at 627; Whitman, *supra* note 27, at 1059 (“[P]ublic shaming can have the dangerous consequence of stirring up riots and other mob actions.”).

*D. Corporate Branding Is Different*

Corporations are different. As applied to individuals, branding's criminological goals may be inseparable from its unacceptably painful, degrading, and counterproductive effects. Corporate branding, by contrast, is able to capture the good without the bad. Indeed, it may be uniquely positioned to square the enforcement circle of productive corporate sanction. Or so we argue. In this section, we introduce the distinctive attributes of corporate offenders that raise the prospect of capitalizing on branding's communicative, expressive, and preventive benefits while avoiding its disqualifying harms.

Although the criminal law generally governs persons—natural and corporate alike—there are important ways in which corporate persons and individual persons differ from each other. When it comes to criminal responsibility, we have both argued that the similarities predominate: business entities are suitable targets of criminal *responsibility* for many of the same reasons, and in much the same way, that individuals are.<sup>176</sup> But with respect to *punishment*, many of the differences raise distinct opportunities and merit separate treatment.

Even though branding is an unsuitable means of punishing individuals—primarily because it violates their inherent right to bodily and psychological integrity—corporations have fundamentally different attributes and implicate different moral concerns. For one thing, a corporate entity does not experience psychological distress.<sup>177</sup> Neither can a corporation feel bodily pain—after all, it has “no body to kick.”<sup>178</sup> Although we generally agree that corporations' incorporeal status is overblown in many discussions of corporate criminal justice,<sup>179</sup> complaints about corporal punishment simply are not implicated in the corporate case. A clear problem with historical branding is that it imposed physical and psychological suffering. That concern does not arise for corporations.

Another worry about physically branding individuals is that it collapses the fact of conviction into an enduring, personal status. There are many reasons to be concerned about treating conviction as a status, not least of which is the prosaic reality that, in most circumstances, such a conflation is

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176. See Diamantis, *supra* note 53, at 2079 (“Recent cognitive science indicates that the practice of blaming groups like corporations closely resembles the practice of blaming individuals.”); W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It's Too Narrow*, 53 ARIZ. ST. L.J. 199, 211 (2021).

177. *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir. 2000) (“[C]orporations, unlike natural persons, have no emotions.”). *But see* Bryce Huebner, *Genuinely Collective Emotions*, 1 EUR. J. PHIL. SCI. 89 (2011) (arguing that “there is substantial philosophical and empirical support for the existence of collective emotions”).

178. See Coffee, *supra* note 4, at 390–91; *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (“Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss.”), *overruled by* *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393 (2d Cir. 2009).

179. Thomas, *supra* note 34, at 623–25.

woefully, injuriously inaccurate.<sup>180</sup> Few individuals are and will always be the person they were in their worst moments. It is at once descriptively inaccurate and morally stingy to treat someone's crimes as permanent proof of their bad character or propensities.<sup>181</sup> It is also counterproductive to the criminal justice system's own goals. The enduring stigma of conviction, along with the battery of collateral consequences that reinforce it, make reintegration nearly impossible for many former felons.<sup>182</sup> Pushed to the outskirts of society and economy, former felons find themselves trapped in circumstances that push them toward re-offense. Thus, it comes as little surprise that the United States has some of the highest recidivism rates in the world.<sup>183</sup>

Compared to individuals, corporations are constitutively better fit for status or propensity designations, particularly in the specific context of corporate criminal law. As a descriptive matter, many corporations do in fact demonstrate durable 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.<sup>184</sup> Corporate criminal law already builds propensity for wrongdoing into both prosecutorial and sentencing considerations. The DOJ treats evidence of propensity as central to deciding whether to prosecute.<sup>185</sup> The Organizational Sentencing Guidelines similarly take evidence of propensity as grounds for an increased sanction.<sup>186</sup> As a result, corporate criminal law already selects for a specific type of offender—namely, one whose past behavior simultaneously evidences organizational fault and indicates that the defendant is apt to be branded as a criminal corporation.

Finally, because corporations' essential features are incorporeal—that is, they have a legal name, rather than a physical body—corporate branding

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180. See 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/> [<https://perma.cc/7292-SW2S>]; see also Gwenda M. Willis & Elizabeth J. Letourneau, *Promoting Accurate and Respectful Language to Describe Individuals and Groups*, 30 SEXUAL ABUSE 480, 480–82 (2018) (collecting sources).

181. See Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. REV. 2011, 2066–71 (2019).

182. See Chin, *supra* note 160, at 1801.

183. *Recidivism Rates by Country 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/recidivism-rates-by-country> [<https://perma.cc/26MW-2JGG>] (last visited Apr. 3, 2024).

184. See Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 516 (2018); Thomas, *supra* note 11, at 426–28.

185. See U.S. Dep't Just., Just. Manual § 9-28.600(B) (2024) ("Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it."); *id.* § 9-28.500 (discussing "pervasiveness of wrongdoing within a corporation").

186. U.S. SENT'G GUIDELINES MANUAL § 8C1.1 (U.S. SENT'G COMM'N 2023) (instructing judges to consider "the history and characteristics of the organization" they are sentencing); *id.* § 8C2.5 (instructing judges to consider corporations' history of prior misconduct).

need not be permanent in the ways that corporal branding paradigmatically is. To be clear, it is not our intention to make corporate branding easy to shed; reincorporating (or changing one's legal name) should not enable a corporation to circumvent the sanction.<sup>187</sup> Yet, a sentencing court can clearly impose this sanction as a condition of probation, confident that the brand can be removed when probation ends. This flexibility is not merely a technical nicety for conforming to existing rules around probation. If branding can be undone, then its removal represents a mechanism for making credible, authoritative assertions about a corporation's genuine rehabilitation.<sup>188</sup>

#### IV. HOW TO BRAND A CORPORATE CRIMINAL

The basic ambition of corporate criminal branding is to affix the fact of conviction to a corporation's public image. In so doing, the state would publicly affirm that what the corporation did was wrong, thereby simultaneously notifying the public, condemning the corporation's conduct, and acknowledging its victims. The brand would inform anyone who engages the corporation—whether in a business, social, or consumer capacity—of this important part of their counterparty's history. A sentencing court would, for want of a better phrase, (criminally) brand the criminal corporation's (commercial) brand.

We have already discussed failed historical attempts at corporate publicity sanctions, but there are some modern-day analogues too. British courts can order companies convicted of manslaughter or homicide to publicize their offenses.<sup>189</sup> Relatedly, the United Kingdom maintains a public online registry of corporate directors who have been disqualified for unfit conduct.<sup>190</sup> Dutch authorities publicize sanctions through the financial market.<sup>191</sup> California's Public Employees' Retirement System publicized a "focus list" of corporations with bad governance practices.<sup>192</sup> And, perhaps an example closest in form to our first branding proposal below, the Nasdaq stock exchange appends an extra letter to a company's ticker symbol to reflect certain types of noncompliance with exchange rules (e.g., a "H" indicates that the company was "Deficient and Delinquent").<sup>193</sup>

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187. See *infra* Part VI.A; Mihailis E. Diamantis, *Corporate Identity*, in EXPERIMENTAL PHILOSOPHY OF IDENTITY AND THE SELF 203, 210 (Kevin Tobia ed., 2022).

188. See Diamantis, *supra* note 184, at 551 (arguing that, through well-structured sanctions, the government could help a former corporate criminal "credibly convey to marketplace participants that it is now a trustworthy business partner"). See generally BRAITHWAITE, *supra* note 1, at 124–52 (discussing reintegrative potential of shaming sanctions for addressing white-collar crime).

189. Corporate Manslaughter and Corporate Homicide Act of 2007, § 10 (UK).

190. *Director Disqualification Outcomes: Summary of Results*, INSOLVENCY SERV., <https://www.insolvencydirect.bis.gov.uk/IESdatabase/viewdirectorssummary-new.asp> [<https://perma.cc/T7ZM-4C4E>] (last visited Apr. 3, 2024).

191. See generally van Erp, *supra* note 22.

192. See Skeel, *supra* note 11, at 1836–39.

193. *New Display Requirement: Financial Status Indicator*, NASDAQTRADER (Oct. 3, 2005), <https://www.nasdaqtrader.com/TraderNews.aspx?id=nva2005-057> [<https://perma.cc/7SUQ-G2Q5>].

### A. *A Criminal Law Framework for Corporate Branding*

Sentencing courts already have the legal authority to impose the types of criminal brands discussed below. In reality, brands are just a spin on the sort of publicity sanction that the U.S. Sentencing Commission envisioned (and then promptly forgot) when drafting the Federal Sentencing Guidelines in the 1990s. Significantly, Chapter Eight of the U.S. Sentencing Commission Guidelines Manual already permits courts to require a convicted organization, as a condition of probation, “to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.”<sup>194</sup> Moreover, the guidelines specify that the disclosure must be at the company’s own “expense and in the format and media specified by the court.”<sup>195</sup>

Even absent Chapter Eight of the guidelines, courts could impose corporate criminal brands as a condition of probation. 18 U.S.C. § 3564(b) requires that conditions of probation be “reasonably related” to the purposes of punishment, provided that they “involve only such deprivations of liberty or property as are reasonably necessary.”<sup>196</sup> Because members of the public have an interest in knowing about a corporation’s misdeeds, branding is a reasonable, and reasonably effective, means of getting the information out there.<sup>197</sup> The law of probation also provides an existing framework that constrains and limits the imposition of this sanction in ways that prevent abuses. Probation is inherently a temporary status. Federal law specifies that a term of probation should not last more than five years, with shorter terms appropriate depending on the underlying crime.<sup>198</sup> Following that format, a corporate criminal brand too should be temporary: it may be removed upon successful completion of probation or upon a judicial determination that the brand is no longer warranted.<sup>199</sup>

### B. *A Marketing Framework for Corporate Branding*

Corporate criminal branding is not a single sanction. It describes an approach for creatively conceiving an entirely new class of corporate sanctions. It is inspired by, and borrows from, tools that corporations already use in their positive marketing efforts. Indeed, successful corporate criminal branding will require consultation with marketing experts—a point we discuss at length below. This section offers several illustrative examples that scratch the surface of possibility. Flexibility is the order of the day. Courts

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194. U.S. SENT’G GUIDELINES MANUAL § 8D1.4(a) (U.S. SENT’G COMM’N 2023).

195. *Id.*

196. 18 U.S.C. § 3563(b) (allowing sentencing judges to impose discretionary conditions of probation).

197. *Cf. id.* § 3563(b)(3) (allowing sentencing judges to compel corporations to “give to the victims of the offense the notice ordered pursuant to the provisions of section 3555”).

198. *Id.* § 3561(c); U.S. SENT’G GUIDELINES MANUAL § 8D1.2.

199. *See* 18 U.S.C. § 3564 (allowing judges to terminate a term of probation early or to extend it).

should—by choosing from among the options discussed below or approaches of their own devising—tailor the brand to suit the facts of particular corporate defendants and their crimes.

Branding sanctions can be categorized along the following four dimensions,<sup>200</sup> all of which a sentencing court should bear in mind.

*Visibility.* Courts can adjust how visible a brand is. Does it jump out at a causal glance, or must onlookers search for it? Both the visual features of the branding mark (color, size, contrast, etc.) and its location influence visibility. In terms of location, the brand could attach to a firm's legal name, its trade or "doing business as" name, its logo, its registered public image, or its consumer packaging (and, on packaging, in any number of locations of varying prominence). Determining which location, or combination of locations, is appropriate for affixing the brand will be a fact-specific inquiry. The locations serve different, if overlapping, purposes. Branding a firm's legal name puts counterparties on notice—something that, among many other benefits, would assist those parties in complying with other legal requirements concerning doing business with convicted corporations.<sup>201</sup> Branding a firm's logo or consumer packaging, by contrast, would make the mark more visible to lay audiences.<sup>202</sup>

*Education.* Courts should bear in mind how much information it is appropriate for a brand to convey given the underlying penological ambitions. One key function of branding sanctions is to educate the public about the fact and nature of conviction. Nevertheless, there is a tradeoff between detail and legibility. Simple, uniform marks are easy to interpret and make the bare fact of conviction immediately salient; however, they lack detail or content. By comparison, highly detailed marks can convey a lot of information, but they risk becoming too cumbersome for members of the public to easily recognize and interpret.<sup>203</sup>

*Evocation.* Marks can elicit emotional responses. Courts should consider whether a neutral informative mark or one that stokes the public's ire, approbation, or indignation is more appropriate.

*Duration.* For any branding sanction, courts should consider how long to impose it. In general, the default term of probation is for one to five years, with the possibility of extension if warranted.<sup>204</sup> The time horizon may be a fixed period of months, or courts could tie it to dynamic corporate

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200. See generally Rajeev Batra & Kevin Lane Keller, *Integrating Marketing Communications: New Findings, New Lessons, and New Ideas*, 80 J. MKTG. 122 (2016).

201. See, e.g., 17 C.F.R. § 230.506(d) (2024) (preventing people convicted of certain felonies from participating in certain types of securities offerings).

202. See Skeel, *supra* note 11, at 1821–23.

203. At the extreme, the few adverse publicity sanctions actually imposed on corporations by sentencing courts involve long newspaper advertisements detailing the facts of the case; heavy on substance and light on style, these one-off announcements scan more like class action solicitations or clickwrap contracts than stigmatic marks. See *infra* notes 208–11 and accompanying text.

204. U.S. SENT'G GUIDELINES MANUAL § 8D1.2 (U.S. SENT'G COMM'N 2023) (implementing 18 U.S.C. § 3561(c)).



performance goals (e.g., implementing compliance, avoiding further misconduct).

Each of the examples of corporate brands discussed below represent different configurations of these variables.

### *C. Illustrative Examples*

In its simplest form, a corporate criminal brand could be a uniform mark that makes its significance immediately apparent to third parties. Visually, this might mean limiting the brand to a specific iconography. Analogues include the familiar © and ® marks, which, when attached to an image or text, signify to every onlooker that it is copyrighted or trademarked. As a modest proposal, we could do worse than to brand convicted corporations with an ⓘ for “felon.” A court might require the corporation to append ⓘ to its name in communications with business partners and customers (including on product labeling). This sort of brand would represent a rather minimal intervention. Though moderately visible—it would appear in all corporate correspondence, but as unobtrusively as its intellectual property counterparts—ⓘ is neither very informative nor evocative. It has the benefit of advising the public that their corporate counterparty has committed some sort of crime, but not what crime or how serious of a crime.

In circumstances in which a bit more evocation and education are appropriate, judges could instead adopt a set of icons that reflect the offender’s misconduct—for example, different marks for environmental crimes or financial crimes—and convey the seriousness of the offense (e.g., repeat offenses or the grade of the felony). The animating principle would be to establish a clear, recognizable mark whose general meaning lay viewers can easily understand.<sup>205</sup> Corporations already use similar marks to communicate positive attributes.

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205. For an interesting example of recruiting adverse marketing tactics in this way to help inform consumers, see Scott Morgan, *Could Financial Warning Labels Help Borrowers Avoid Risky Loans?*, MARKETPLACE (May 29, 2023), <https://www.marketplace.org/2023/05/29/risky-financial-products-loans-warning-labels/> [<https://perma.cc/AA5C-JFQK>] (“[Warning labels featuring images] would send a clearer message that this is a potentially dangerous product.” (quoting Mike Litt, consumer campaign director at the U.S. Public Interest Research Group)).

Figure 6: Official logos denoting products that are recyclable, cruelty-free, and fair trade, respectively.<sup>206</sup>



Judges and prosecutors could martial the same mechanism to have corporations communicate negative facts about criminal history.

Figure 7: Logos that could be standardized criminal brands for corporations that committed environmental, financial, and pharmaceutical crimes, respectively.<sup>207</sup>



These marks are a bit more educative than  $\text{\textcircled{1}}$  because they make readily apparent what sort of violation a corporation committed. Judges could tweak their impact by making the marks more or less visible—by, for example, mandating their placement location and minimum size. Images like these are valuable because they communicate clearly and immediately to the viewer that something is amiss with the corporation. At the same time, visual uniformity ensures that the brand does not unduly alter or interfere with the firm’s self-expression of its public image. Likewise, uniform iconography ensures that the brand remains noticeable without crowding out or replacing the firm’s ability to market itself.

The corporate criminal brands discussed so far emphasize simplicity over detail. In this respect, they diverge from the original literature on adverse publicity sanctions, which prioritized offender-specific disclosures rather

206. *Recycling Symbol*, WIKIMEDIA COMMONS, [https://en.wikipedia.org/wiki/File:Recycling\\_symbol.svg](https://en.wikipedia.org/wiki/File:Recycling_symbol.svg) [https://perma.cc/B4FF-VK69] (Oct. 25, 2022, 8:58 AM) (international recycling symbol); *Leaping Bunny Logo*, LEAPING BUNNY PROGRAM, <https://www.leapingbunny.org/leaping-bunny-logo> [https://perma.cc/AJ7H-9STC] (last visited Apr. 3, 2024) (leaping bunny symbol for identifying animal cruelty-free companies); *The FAIRTRADE Marks*, FAIRTRADE INT’L, <https://info.fairtrade.net/what/the-fairtrade-marks> [https://perma.cc/LFJ8-RZ3F] (last visited Apr. 3, 2024) (fair trade mark).

207. Copyright Alexandra Hval, whose works can be found at [www.alihval.com](http://www.alihval.com). “Thank you, beautiful! -M.E.D.”

than iconographic clarity.<sup>208</sup> The few courts imposing publicity sanctions under the guidelines have often done so by requiring convicted corporations to place a one-off advertisement in local or trade newspapers.<sup>209</sup> The thought was that: (1) consumers were hard to reach through the means of communication readily available to government entities and (2) the government was too boring a speaker.<sup>210</sup> Newspaper advertisements seemed like a natural solution; however, newspaper advertisements provided too much detail, and too sporadically, to have a meaningful impact.<sup>211</sup> Today, it goes without saying that the internet has upended these traditional means of communication.

Prior governmental efforts to impose informative, brand-like requirements on corporations have also largely failed. Nutrition labels, for example, provide rich information but have yet to achieve their intended effect: stimulating consumers to make healthier food choices.<sup>212</sup> The reason for the disconnect is complex, including socioeconomic influences and food insecurity.<sup>213</sup> But an important part of the story is that the labels, despite being informative, are too complex, too invisible (on the back of packaging), and too plain.<sup>214</sup>

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208. *E.g.*, Fisse, *supra* note 3, at 147 (proposing “a ‘Corporation Gazette’ published by an official agency and which contains descriptions of corporate offences, penalties imposed, and the aims of the legislation involved”).

209. *See supra* note 203; *see also* *Indiana Cardboard Maker Fined for Chemical Spill*, MANUFACTURING.NET (Sept. 7, 2007), <https://www.manufacturing.net/operations/news/13062635/indiana-cardboard-maker-fined-for-chemical-spill> [<https://perma.cc/LJU4-QKQR>]. Perhaps emphasizing the point, the company’s actual apology can no longer be found.

210. Coffee, *supra* note 4, at 425–26.

211. A review of LexisNexis, the U.S. Sentencing Commission’s statistics, and the Corporate Prosecution Registry shows this sanction being applied in fewer than a dozen instances. *See* CORPORATE CRIMINAL REGISTRY, <https://corporate-prosecution-registry.com/browse/> [<https://perma.cc/HQH8-JLPB>] (last visited Apr. 3, 2024).

212. *See* Gaia Claudia Viviana Viola, Francesca Bianchi, Elia Croce & Elisabetta Ceretti, *Are Food Labels Effective as a Means of Health Prevention?*, 5 J. PUB. HEALTH RSCH. 768 (2016); Jayachandran N. Variyam, *Do Nutrition Labels Improve Dietary Outcomes?*, 17 HEALTH ECON. 695, 701–04 (2008).

213. *See* Carolyn Dimitri & Stephanie Rogus, *Food Choices, Food Security, and Food Policy*, J. INT’L AFFS., Spring/Summer 2014, at 19, 24–25; Andrea Freeman, *Transparency for Food Consumers: Nutrition Labeling and Food Oppression*, 41 AM. J.L. & MED. 315, 316 (2015).

214. *E.g.*, Ingrid Borgmeier & Joachim Westenhoefer, *Impact of Different Food Label Formats on Healthiness Evaluation and Food Choice of Consumers: A Randomized-Controlled Study*, 9 BMC PUB. HEALTH 184, 191–94 (2009); Iina Ikonen, Francesca Sotgiu, Aylin Aydinli & Peeter W. J. Verlegh, *Consumer Effects of Front-of-Package Nutrition Labeling: An Interdisciplinary Meta-analysis*, 48 J. ACAD. MKTG. SCI. 360 (2020).

Figures 8: A nutrition label<sup>215</sup>

Nutrition Facts	
Serving Size 3 oz. (85g)	
Servings Per Container 2	
Amount Per Serving	
Calories 200	Calories from Fat 120
% Daily Value*	
<b>Total Fat</b> 15g	<b>20 %</b>
Saturated Fat 5g	<b>28 %</b>
Trans Fat 3g	
<b>Cholesterol</b> 30mg	<b>10 %</b>
<b>Sodium</b> 350mg	<b>28 %</b>
<b>Total Carbohydrate</b> 30g	<b>10 %</b>
Dietary Fiber 0g	<b>0 %</b>
Sugars 5g	
<b>Protein</b> 5g	
Vitamin A 5%	Vitamin C 2%
Calcium 15%	Iron 5%
*Percent Daily Values are based on a diet of other people's misdeeds.	
†Your Daily Values may be higher or lower depending on your calorie needs.	
	Calories 2,000 2,500
Total Fat	Less than 65g 80g
Sat Fat	Less than 20g 25g
Cholesterol	Less than 300mg 300mg
Sodium	Less than 2,400mg 2,400mg
Total Carbohydrate	300mg 370mg
Dietary Fiber	25g 30g

Although we think that clarity and visibility are generally more important than maximal education, new technologies may mean that judges interested in branding corporate criminals do not have to choose between these values. For example, digital versions of the corporate criminal brands could link to public documents (or perhaps to plain-language summaries) describing the underlying criminal action. In the real world of tangible products and services, QR codes could provide easy access to the same information for the 90 percent of Americans who own a smartphone.<sup>216</sup> This dynamic approach to branding, simultaneously implementing connected tangible and virtual forms, would allow judges to capture different constellations of brand attributes in a single sanction. The uniform, recognizable mark is more likely to be noticed and thus inform interested observers about the fact of criminal history (higher visibility, lower educative value), whereas a link can provide more detail for interested parties (lower visibility, higher educative value).<sup>217</sup> Corporations already use similar techniques for their own marketing campaigns.<sup>218</sup>

215. Natalie Rizzo, *What's the Most Important Thing on a Nutrition Label?: Dietitians Weigh In*, TODAY (Dec. 13, 2022, 2:09 PM), <https://www.today.com/health/diet-fitness/how-to-read-a-nutrition-label-rcna61437> [https://perma.cc/Q5PX-NWZ5] (nutrition label).

216. *Mobile Fact Sheet*, PEW RSCH. CTR. (Jan. 31, 2024), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [https://perma.cc/RH7T-JE89].

217. Shintaro Okazaki, Angeles Navarro, Prokriti Mukherji & Kirk Plangger, *The Curious Versus the Overwhelmed: Factors Influencing QR Codes Scan Intention*, 99 J. BUS. RSCH. 498, 499 (2019).

218. Isaac Twum Asare & Daisy Asare, *The Effective Use of Quick Response (QR) Code as a Marketing Tool*, INT'L J. EDUC. & SOC. SCI., Dec. 2015, at 67, 69–70.

Figure 9: A QR code



None of the criminal brands discussed so far are particularly evocative. QR codes could, in theory, link to emotive descriptions of corporate evil and victim suffering, but, as discussed above, authorities have shown themselves unable or unwilling to conjure verbal indignation.<sup>219</sup> In some particularly egregious cases of corporate wrongdoing, courts may want a criminal brand to have more visceral impact. This would help convey the state's firm rejection of the corporation's misconduct and impact corporate counterparties on a psychological level that QR codes and iconography cannot.<sup>220</sup> Of course, corporations already use insights about consumer emotion in their own advertising campaigns.<sup>221</sup> The government also, on occasion, draws on the same tools. Consider, for example, mandatory cigarette warning labels adopted in other countries.

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219. See William S. Laufer, *Where Is the Moral Indignation over Corporate Crime?*, in *REGULATING CORPORATE CRIMINAL LIABILITY* 19, 24–25 (Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann & Joachim Vogel eds., 2014) (arguing that prosecutors engage in “a kind of *faux indignation*” of corporate criminals); Mihailis E. Diamantis, *The Monster Within: Representing Corporate Evil*, in *CORPORATE EVIL: LAW, CULPABILITY AND REGULATION* (Penny Crofts ed., forthcoming 2024).

220. See Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 *BERKELEY TECH. L.J.* 1227, 1251 (2008) (“Three schools of thought have developed to explain how consumers are influenced by emotion in their appreciation of advertising and the use of trademarks.”); SALLY SATEL & SCOTT O. LILIENTHAL, *BRAINWASHED: THE SEDUCTIVE APPEAL OF MINDLESS NEUROSCIENCE* 34 (2013) (“Neuroscience has much to say about such major phenomena as attention, emotion, and memory that are essential to motivating consumers.”).

221. See Vinod Venkatraman, John A. Clithero, Gavan J. Fitzsimons & Scott A. Huettel, *New Scanner Data for Brand Marketers: How Neuroscience Can Help Better Understand Differences in Brand Preferences*, 22 *J. CONSUMER PSYCH.* 143, 149 (2012) (noting that advertisers can use neuroscience to “detect distinct emotional states and their corresponding distinct decision-making processes”).

Figure 10: Evolution of mandatory cigarette warning labels in Australia.<sup>222</sup>



Labels like these use visceral text and imagery to convey the debilitating dangers of tobacco smoke at the point when consumers are making their decision.<sup>223</sup> As the progression of labels illustrates, there is wide range within which to tailor emotional impact.<sup>224</sup> The effect of a label's intervention is adjustable, depending on size, placement, and content. The same could be true of evocative branding sanctions, suitably tailored to convey the impact of corporate crime.

#### D. Tailoring Brand to Context

In selecting the type of brand to impose and tailoring its four primary attributes, judges and prosecutors should consider several individuating factors of the target corporation and the crime that it committed.<sup>225</sup> Some of these factors overlap with those that criminal law already recognizes as aggravating factors when calculating corporate criminal fines. For example, repeat offenders and offenders that inflict large harms on numerous individuals may justify more impactful branding interventions.<sup>226</sup> Other factors are more particular to branding as a sanction. The size of a

222. Holly Honderich, *Why US Lags Behind on Graphic Cigarette Warnings*, BBC (Aug. 16, 2019), <https://www.bbc.com/news/world-us-canada-49374996> [https://perma.cc/9DJR-UT82].

223. Canada has even proposed requiring that every individual cigarette have a warning printed on it: "Poison in every puff." The Associated Press, *Canada Proposes Printing a Warning on Every Cigarette*, NPR (June 11, 2022, 2:32 AM), <https://www.npr.org/2022/06/11/1104363396/canada-warning-cigarette> [https://perma.cc/R82K-EN5Z].

224. See generally Maansi Bansal-Travers, David Hammond, Philip Smith & K. Michael Cummings, *The Impact of Cigarette Pack Design, Descriptors, and Warning Labels on Risk Perception in the U.S.*, 40 AM. J. PREVENTATIVE MED. 674 (2011). But see generally Timothy J. Straub, Note, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 FORDHAM URB. L.J. 1201 (2013) (summarizing regulatory challenges).

225. See generally WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2006) (discussing relevance of corporate peer attributes); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193 (2016) (discussing individualized impact of reputational sanctions on corporations).

226. See U.S. SENT'G GUIDELINES MANUAL § 8C2.8 (U.S. SENT'G COMM'N 2023).

corporation<sup>227</sup> or the level of competition it faces from business rivals<sup>228</sup> will influence the impact the sanction can have. The type of offense will also play an important role. Offenses that directly affect people in tangible ways—like consumer fraud and environmental crimes—are perhaps best suited for branding sanctions because they have more familiar socio-moral significance. More abstract and complicated offenses with diffuse harms on institutions rather than on individuals are probably less amenable to branding. Insider trading may be one example: it is a serious offense,<sup>229</sup> but one that few laypeople intuitively comprehend or likely need to be warned specifically about.<sup>230</sup>

The industry of the offender is another relevant factor. Economists know that the effect of shaming sanctions varies by industry.<sup>231</sup> In some cases, consumer-facing businesses that sell nonessential products may be especially sensitive to shaming sanctions.<sup>232</sup> Although that fact may be irrelevant for the purposes of setting a criminal fine, it could justify a lighter-touch approach to punitive branding.<sup>233</sup> By contrast, data show that other industries—like logging, which rarely interacts directly with retail consumers—experience fewer reputational effects from criminal conviction.<sup>234</sup> In that context, branding sanctions would have to be particularly loud to have any impact. Finally, there are some industries in

227. Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203, 241 (2022) (“[B]ig corporations can dilute the reputational sanction.”).

228. See Felix von Meyerinck, Vesa Pursiainen & Markus Schmid, *Competition and the Reputational Costs of Litigation* 30 (Univ. of St. Gallen, Sch. of Fin., Working Paper No. 2021/06, 2021), <https://www.alexandria.unisg.ch/server/api/core/bitstreams/1188583a-ddcc-406c-940f-e91bd12d27b9/content> [https://perma.cc/NAM3-SN7C].

229. 18 U.S.C. § 1348 (authorizing imprisonment for “not more than 25 years”); see also Zachary J. Lustbader, Note, *Title 18 Insider Trading*, 130 YALE L.J. 1828, 1835 (2021) (advancing “a doctrinal framework for Title 18 insider trading liability”).

230. See JOHN P. ANDERSON, *INSIDER TRADING: LAW, ETHICS, AND REFORM* 192 (2018).

231. See, e.g., Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 504–16 (1999); Edward M. Iacobucci, *On the Interaction Between Legal and Reputational Sanctions*, 43 J. LEGAL STUD. 189 (2014); Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 792–93 (1993); Jonathan M. Karpoff, John R. Lott, Jr. & Eric W. Wehrly, *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 656 (2005) [hereinafter Karpoff et al., *Reputational Penalties for Environmental Violations*].

232. See generally John Armour, Colin Mayer & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. & QUANTITATIVE ANALYSIS 1429 (2017); Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008).

233. On the other hand, insofar as branding’s impact depends on the reactions from members of society, there is something fitting to a sanction that hits harder in some contexts than others. In this respect, what is often derided as a “messy” or “unpredictable” quality of branding sanctions is actually their strength: the deterrence effect ties directly to the public’s updated perception of the defendant firm. Our thanks to Professor Jennifer Arlen for pressing this point in discussion.

234. Karpoff et al., *Reputational Penalties for Environmental Violations*, *supra* note 231, at 668 (“[F]irms do not on average experience reputational losses when they violate environmental regulations.”).

which a criminal brand would be self-undermining.<sup>235</sup> Consider an adult website that is convicted of selling or hosting child pornography. Far from harming the website's reputation among its customers, a government-imposed brand might perversely amount to free advertising.<sup>236</sup>

Judges and prosecutors should not navigate the dicey terrain of corporate branding alone. The law, like many other disciplines, tends to silo itself from other expertise. Corporate criminal justice is predominantly and unsurprisingly made up of law-trained criminal justice actors like judges, prosecutors, and the white-collar defense bar.<sup>237</sup> Well-designed punishments against business corporations, of any stripe, now require looking beyond criminal justice to engage experts in business. If the ambition of corporate criminal branding is to communicate effectively to the public, then sentencing courts should design brands in coordination with marketing experts and brand management specialists. The Federal Sentencing Guidelines already allow judges to “consider the views of any governmental regulatory body that oversees conduct of the organization” when designing the terms of probation.<sup>238</sup> They also direct courts to consider the defendant's input about possible steps for reform<sup>239</sup> and empower judges to appoint any other necessary experts.<sup>240</sup> “When confronting an issue requiring expertise he or she does not possess, a federal judge will frequently appoint a special master to assist.”<sup>241</sup> For designing branding sanctions, that special master could be a marketing expert.

Prosecutors should also collaborate with marketing professionals. Already, when negotiating pretrial diversion agreements, prosecutors sometimes patch the gaps in their knowledge by informally consulting industry regulators.<sup>242</sup> Prosecutors can also recruit relevant experts to work

235. See generally John F. Mahon, *Corporate Reputation: A Research Agenda Using Strategy and Stakeholder Literature*, 41 BUS. & SOC'Y 415 (2002).

236. But see *infra* Part VI.B. Our thanks to Professor Ellen Podgor for pressing this example. See also Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 541, 543 (2009) (“[P]ubliciz[ing] information that a particular corporation has engaged in abusive tax planning could actually send an unintended *positive* signal to the members of a corporation's community.”).

237. See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1066 (2008).

238. U.S. SENT'G GUIDELINES MANUAL § 8D1.4 cmt. 1 (U.S. SENT'G COMM'N 2023).

239. *Id.* § 8D1.4(b)(1) (“The organization shall develop and submit to the court an effective compliance and ethics program . . .”).

240. *Id.* § 8D1.4 cmt. 1 (“To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program.”).

241. 13 ROBERT L. HAIG, ROBERT M. ABRAHAMS & JULIAN M. WISE, SPECIAL MASTERS, BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 148:28 (5th ed. 2022) (footnote omitted); see also U.S. SENT'G GUIDELINES MANUAL § 8D1.4 cmt. 1 (“To assess the efficacy of a compliance and ethics program submitted by the organization, the court may employ appropriate experts . . .”).

242. See Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM, *supra* note 49, at 177, 192 (“[C]onsultation [by prosecutors] with expert agencies is fairly commonplace even if it is not formally institutionalized.”); Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM,



alongside them in designing recommended sanctions. A similar story could be told about the federal government's initial efforts to employ compliance and governance reforms through the criminal justice system. Prosecutors tried to handle these reforms on their own in a largely ad hoc manner—and were rightly criticized for doing so.<sup>243</sup> But in recent years, the DOJ has benefited from enlisting governance experts. In short order, it hired its first-ever Compliance Counsel in 2015, promulgated detailed guidelines for evaluating corporate compliance programs in 2020, and has continued to bulk up a dedicated team of compliance specialists to assist in fraud investigations.<sup>244</sup> Meanwhile, courts and prosecutors recruit external monitors to act like special masters overseeing corporate probation.<sup>245</sup> The DOJ could, and we argue should,<sup>246</sup> similarly look to marketing professionals to assist in publicizing corporate criminal enforcement to an underinformed public.

#### *E. Navigating the First Amendment: Branding as Labeling*

The branding sanctions proposed here are unlikely to fall afoul of the First Amendment. Commercial speech enjoys a more relaxed, “intermediate scrutiny” protection—and even then, only if the speech itself is not false, deceptive or misleading.<sup>247</sup> Intermediate scrutiny might even overstate the constitutional hurdles facing corporate criminal branding. As recently as 2018, the Supreme Court reiterated that a lower, “reasonably related”

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*supra* note 49, at 154, 158–59 (“[F]ederal prosecutors usually work arm in arm with regulators when pursuing organizational prosecutions.”).

243. *See, e.g.*, Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in *PROSECUTORS IN THE BOARDROOM*, *supra* note 49, at 62, 63–64; Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & POL’Y 1, 8 (2010); Garrett, *supra* note 34, at 856–57.

244. *See* Stephen Dockery, *U.S. Compliance Expert Carrying Out New Type of Investigation*, WALL ST. J.: RISK & COMPLIANCE BLOG, <https://www.wsj.com/articles/BL-252B-10325> [<https://perma.cc/6CMU-3BR4>] (May 23, 2016, 6:05 PM); U.S. DEP’T OF JUST., *EVALUATION OF CORPORATE COMPLIANCE PROGRAMS* (2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [<https://perma.cc/M9SU-HXF4>]; Dylan Tokar, *Revamped DOJ Compliance Unit Takes On Greater Role in Corporate Settlements*, WALL ST. J.: RISK & COMPLIANCE J. (June 22, 2022, 7:23 PM), <https://www.wsj.com/articles/revamped-doj-compliance-unit-takes-on-greater-role-in-corporate-settlements-11655940214> [<https://perma.cc/4ULZ-CJMA>].

245. *See, e.g.*, Alexander & Cohen, *supra* note 34, at 588; Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 336–37 (2017). *See generally* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007); Veronica Root, *Modern-Day Monitorships*, 33 YALE J. REGUL. 109 (2016).

246. *See* Thomas & Diamantis, *supra* note 28, at 3–5.

247. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 576 (1980) (Blackmun, J., concurring); *see, e.g.*, *Warner-Lambert Co. v. Fed. Trade Comm’n*, 562 F.2d 749, 758 (D.C. Cir. 1977) (allowing the Federal Trade Commission to order company to engage in corrective advertising to prevent or correct consumer deception). *See generally* Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707 (2018) (cataloguing state and federal laws addressing deception).

standard applies to certain regulations that “impose a disclosure requirement rather than an affirmative limitation on speech.”<sup>248</sup>

Whatever the ambit of the First Amendment’s protections, the kinds of sanctions imposed here are unlikely to fall afoul of it. For one thing, federal labeling law already imposes a wide assortment of disclosure requirements and affirmative obligations applicable to specific products, businesses, or sectors.<sup>249</sup> Dozens of statutes regulate what firms must, may, and cannot say about their products—from nutritional labeling to pharmaceuticals, from alcohol and tobacco warnings to clothing tags, and from environmentally friendly marketing to “Made in the USA.”<sup>250</sup>

Judged against the tumultuous past few years of Supreme Court jurisprudence, one might be forgiven for being hesitant to carry forward recent case law when it comes to the First Amendment and corporations. Just ten years ago, the U.S. Court of Appeals for the D.C. Circuit rejected graphic warnings that the U.S. Food and Drug Administration had mandated for cigarette packaging in part because they went beyond providing purely factual information.<sup>251</sup> But even if apprehension is well-founded generally, the same cannot be said for the criminal law context. Put simply, a defendant’s individualized, ex post sanction is substantially different from ex ante, industry-wide regulation. The government’s power to impinge on the interests of its citizens has always been at its strongest when imposing criminal sanctions.<sup>252</sup> Convicted criminals—including those currently serving terms of probation—have some of the fewest protections.<sup>253</sup>

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248. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010); *see also Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2372 (2018). For a discussion of the Supreme Court’s compelled disclosure jurisprudence, *see* Eric Goldman, *Zauderer and Compelled Editorial Transparency*, 108 IOWA L. REV. ONLINE 80 (2023).

249. *See* Bryan M. Haynes, Anne Hampton Andrews & C. Reade Jacob, Jr., *Compelled Commercial Speech: The Food and Drug Administration’s Effort to Smoke Out the Tobacco Industry Through Graphic Warning Labels*, 68 FOOD & DRUG L.J. 329, 331–33 (2013) (discussing the legality of tobacco warning labels); *see also* Tamany Vinson Bentz & Carolina Veltri, *The Indirect Regulation of Influencer Advertising*, 75 FOOD & DRUG L.J. 185, 187–92 (2020).

250. *E.g.*, Textile Fiber Products Identification Act, 15 U.S.C. §§ 70–70k; Wool Products Labeling Act of 1939, 15 U.S.C. §§ 68–68j; Made in USA Labeling Rule, 16 C.F.R. § 323 (2024); 21 C.F.R. §§ 101.1–101.108 (2024) (food labeling regulations); 21 C.F.R. §§ 201.1–201.26 (2024) (pharmaceutical labeling regulations).

251. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012), *overruled in part by* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

252. *See* ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* § 1.1 (7th ed. 2013).

253. *See* *Gall v. United States*, 552 U.S. 38, 48 (2007) (“Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.”); *United States v. Knights*, 534 U.S. 112, 121 (2001) (applying a lower constitutional standard to the Fourth Amendment rights of probationers); *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (“To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special

Sentencing guidelines and precedent are rife with examples of compelled speech, from forced apologies,<sup>254</sup> to mandatory reporting to probation officers,<sup>255</sup> to required notices to future employers.<sup>256</sup> As discussed above, criminal courts have long had the power to impose shaming sanctions against offenders.<sup>257</sup> Defendants have been required to hold up signs, to attach messages to their vehicles, and to wear clothing with messages like “[o]nly an idiot would drive on a sidewalk to avoid a school bus.”<sup>258</sup> Although we are broadly opposed to using shaming sanctions against individuals, it remains the case that these decisions routinely survive free speech challenges.<sup>259</sup> The Supreme Court is generally inclined to permit government restrictions on “categories of speech that have been historically unprotected.”<sup>260</sup>

Indeed, the special circumstances implicated in the criminal justice context inform why we argue for branding as a criminal, rather than administrative, sanction. The practical case for corporate criminal branding likely carries over to at least certain kinds of administrative offenders. For constitutional purposes, the proposal stands on its best foot when carried out with the full force of the criminal justice system behind it.

#### V. CORPORATE BRANDING AS A TOOL FOR JUSTICE

The central claim of this Article is that corporate criminal branding can succeed where more customary corporate sanctions have failed. Corporate criminal law today is poorly suited to informing the public about corporate misconduct, expressing condemnation of it, and preventing it in the future. Historically, criminal branding served all three goals with respect to individual offenders, but in a way that involved painful mutilation and affronted basic human dignity. Corporations have neither bodily nor

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[probation] restrictions.” (alterations in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972))).

254. *See* *State v. K H-H*, 353 P.3d 661, 665 (Wash. Ct. App. 2015).

255. U.S. SENT’G GUIDELINES MANUAL § 5D1.3(c)(2) (U.S. SENT’G COMM’N 2023); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKLEY J. CRIM. L. 180, 191 (2013).

256. *United States v. Ritter*, 118 F.3d 502, 505–06 (6th Cir. 1997).

257. *See supra* Part III.

258. Associated Press, “*Only an Idiot Would Drive on the Sidewalk*”: *Woman Holds Sign to Serve Sentence for Passing School Bus*, PENN LIVE (Nov. 13, 2012, 5:08 PM), [https://www.pennlive.com/midstate/2012/11/only\\_an\\_idiot\\_would\\_drive\\_on\\_t.html](https://www.pennlive.com/midstate/2012/11/only_an_idiot_would_drive_on_t.html) [https://perma.cc/J3NM-L8R4]. *See generally* Kahan, *supra* note 54.

259. *See* Kenya A. Jenkins, “*Shaming*” *Probation Penalties and the Sexual Offender: A Dangerous Combination*, 23 N. ILL. U. L. REV. 81, 87–89 (2002) (collecting cases); accord Mary Ann Hallenborg, Annotation, *Propriety of Probation Condition Exposing Defendant to Public Shame or Ridicule*, 65 A.L.R. 5th 187 (1999). *But see* *Doe v. Strange*, No. 15-CV-606, 2016 WL 1079153, at \*17–18 (M.D. Ala. Mar. 18, 2016) (holding that plaintiffs alleged a plausible First Amendment challenge to a law requiring sex offenders “to carry identification bearing a government-mandated inscription” as their only form of identification).

260. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)).

dignitary interests, so the major concerns that rightly led to the demise of criminally branding individual defendants do not apply in this context.

Corporate branding does raise new challenges, which we discuss in the next part. First, though, we demonstrate what corporate criminal branding can achieve. It is worth emphasizing that corporate criminal branding is not, and is not intended to be, a corporate justice cure-all. This Article advocates for neither universal branding of corporate criminals nor abandoning existing sanctions. Shaming sanctions only work for behavior that is contrary to “shared moral norms,” rather than technical violations.<sup>261</sup> Furthermore, if overused, the criminal brand risks diluting its own message.<sup>262</sup> This concern counsels in favor of a judicious, rather than knee-jerk, application of the branding sanction. Branding is a qualitatively different form of corporate punishment, one calibrated to impact the corporation’s reputation in a manner that would otherwise be difficult to achieve through conventional remedies.<sup>263</sup> In some cases, branding would be a poor response to a particular firm or a specific type of wrongdoing.<sup>264</sup> In those cases, we are happy to concede that authorities should rely exclusively on other sanctions. Our aim is to expand, not shrink, the discretionary toolbox that prosecutors and sentencing courts have for responding to corporate crime.

#### A. Informing the Public

Branding is nothing if not a tool for informing the public about past misconduct. As discussed above, authorities can tailor corporate criminal brands to reach different audiences, to raise or lower their salience, and to include more or less information. This is a clear improvement over the publicity tools that prosecutors and judges presently rely on: monotonous DOJ press releases, fickle media attention, semipublic deferred prosecution agreements, and legal databases.<sup>265</sup> At a minimum, the corporate criminal brand expands the suite of tools available to prosecutors and judges to communicate with the public about enforcement activity.

The bigger question is whether the public will listen. Communication requires not just a source of information, but also uptake by an audience.<sup>266</sup> Relevant audience members include the general public, as well as customers, investors, creditors, and business partners of the sanctioned corporate

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261. Blank, *supra* note 236, at 566.

262. Judith van Erp, *Shaming and Compliance*, in *CAMBRIDGE HANDBOOK OF COMPLIANCE* 438, 446–47 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

263. *See supra* Parts I.A, II.

264. *See supra* Part IV.D.

265. W. Robert Thomas & Mihailis E. Diamantis, *A Marketing Pitch for Corporate Criminal Law*, *CLS BLUE SKY BLOG* (Aug. 25, 2022), <https://clsbluesky.law.columbia.edu/2022/08/25/a-marketing-pitch-for-corporate-criminal-law/> [<https://perma.cc/WH4R-MRD3>].

266. 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., 2020).

criminal.<sup>267</sup> These latter parties (might) have ongoing relationships with the corporation. They have the greatest interest in receiving information relevant to deciding how to modify the terms on which they are willing to proceed.<sup>268</sup>

Whether and to what extent target audiences register the corporate criminal brand is a task best suited for marketing experts that courts and prosecutors would do well to consult. Getting messages out and getting people to listen is precisely their area of expertise. The same tools they use to help corporate clients communicate good news and a positive image could be used to convey criminal history. The point of criminal branding is not to force every member of the public to care about a criminal conviction. Rather, branding is about empowering the stakeholders who interact with that corporation to shape (or reshape) the terms of that engagement by providing them relevant and easily accessible information. Customers who do not care about environmental compliance will not change how they behave toward a corporation that violates environmental laws. Equally, though, people who do care about the environment deserve to know if a corporation they support through their purchases and investment shares their commitments. As a result, the impact from a shaming sanction may be harder to predict than from a fine, but this just reflects the reality that it is harder for judges to gauge the moral and social significance of the underlying crime.<sup>269</sup> Shaming sanctions respond directly to the public's sensibilities. Inasmuch as consumers, employees, and investors adjust (or do not adjust) their relationship to a corporate offender, shaming sanctions closely tracks the level of moral outrage the public feels (or does not feel) for the corporation's misconduct.

There is evidence that individuals do reevaluate their relationships with firms in response to learning about corporate wrongdoing.<sup>270</sup> Some corporate brands, and the relationships they make possible, are in fact acutely sensitive to wrongdoing. “[S]incere brands,” for example, are least likely to recover their reputation when a transgression becomes public.<sup>271</sup> We tend to associate these relationship impairments with consumer boycotts and other forms of personal and concerted protest meant to distance oneself from the offending corporation.<sup>272</sup> But boycotts are only the most extreme

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267. See Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2095–96 (2006); ERIC A. POSNER, *LAW AND SOCIAL NORMS* 90–91 (2000) (discussing difficulties of calibrating shaming sanctions to reach a specific audience).

268. Takaaki Hashimoto & Kaori Karasawa, *Impact of Consumer Power on Consumers' Reactions to Corporate Transgression*, PLOS ONE, May 3, 2018, at 2 (finding that punitive attitudes vary partially with stakeholders' power to effect change).

269. See *supra* note 233.

270. See Johnson et al., *supra* note 31, at 725–26 (collecting citations); Longinos Marín Rives, Pedro J. Cuestas Díaz & Sergio Román, *Determinants of Consumer Attributions of Corporate Social Responsibility*, 138 J. BUS. ETHICS 247, 254–55 (2015).

271. Jennifer Aaker, Susan Fournier & S. Adam Brasel, *When Good Brands Do Bad*, 31 J. CONSUMER RSCH. 1, 13 (2004) (“Transgressions were particularly damaging to relationships with sincere brands, which showed no signs of recovery despite subsequent reparation attempts.”).

272. See Jill Gabrielle Klein, N. Craig Smith & Andrew John, *Why We Boycott: Consumer Motivations for Boycott Participation*, 68 J. MKTG. 92, 105 (2004).

instantiation of relationship impairment.<sup>273</sup> A consumer might (and very often should) still choose to do business with a firm even after finding out about its conviction, but it would be reductive to characterize reassessment in such starkly economic terms.<sup>274</sup> Not all consumers are in a position to boycott brands, for example, but that does not mean that no damage to the relationships has occurred.<sup>275</sup> How consumers relate to a brand and how the brand is viewed by the community go far beyond just whether a consumer chooses to shop at (or boycott) a particular store. Market participants deserve the opportunity to shape their interactions with a corporation in relation to the social and moral significance of the corporation's behavior. They can only do this if they know that the facts underlying the justice landscape may have shifted.

Data suggest that, in the coming years, information concerning corporate misconduct will become even more relevant to market participants at all levels.<sup>276</sup> Millennials have already demonstrated a stable preference for purpose-driven investments that go beyond a sole focus on profit.<sup>277</sup> This trend will only deepen in the coming decade. The oldest members of Gen Z turn twenty-five this year. They are beginning to discover their purchasing power, choose employers, and decide where to invest. Corporate values matter to Gen Z at each juncture. As consumers, “[t]he core of Gen Z is the idea of manifesting individual identity. Consumption [is] a means of self-expression.”<sup>278</sup> Consequently, Gen Z consumers seek out corporations that they perceive to be an ideological fit. They “increasingly expect brands to ‘take a stand,’” and “[a]bout 80 percent refuse to buy goods from companies involved in scandals.”<sup>279</sup> As employees, members of Gen Z care about integrity.<sup>280</sup> They want to work for firms that share their ideological

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273. See Silvia Grappi, Simona Romani & Richard P. Bagozzi, *Consumer Response to Corporate Irresponsible Behavior: Moral Emotions and Virtues*, 66 J. BUS. RSCH. 1814, 1819–20 (2013) (discussing other responses).

274. Cf. Fisse, *supra* note 3, at 121 (“[I]t is far from correct to say that our impressions of a corporation coincide with our estimation of its products.”); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 141–42 (2008) (distinguishing between extreme and moderate revisions of existing relationships).

275. See Hashimoto & Karasawa, *supra* note 268, at 11 (finding that punitive attitudes vary partially with consumers’ feelings of power or powerlessness).

276. See generally Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020).

277. See *id.* at 1250 (“To win the millennial generation, index funds have turned their attention . . . to the social issues that millennial investors care about: shareholder values.”).

278. Tracy Francis & Fernanda Hoefel, *‘True Gen’: Generation Z and Its Implications for Companies*, MCKINSEY & CO. (Nov. 12, 2018), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-gen-generation-z-and-its-implications-for-companies> [<https://perma.cc/C5SF-URS9>].

279. *Id.*; see also Sajith Narayanan, *Does Generation Z Value and Reward Corporate Social Responsibility Practices?*, 38 J. MKTG. MGMT. 903, 924 (2022) (“Gen Z truly values Social CSR and Environmental CSR and are willing to reward companies with a higher willingness to pay for their brands, higher purchase intention, and increased brand equity.”).

280. See Ashley Stahl, *How Gen-Z Is Bringing a Fresh Perspective to the World of Work*, FORBES (May 4, 2021, 9:00 AM), <https://www.forbes.com/sites/ashleystahl/2021/05/04/how-gen-z-is-bringing-a-fresh-perspective-to-the-world-of-work/> [<https://perma.cc/KRV5-2NBE>]

aspirations, even when doing so means taking a lower wage. As investors, every indication is that Gen Z will double down on the present movement toward environmental, social, and governance (ESG) informed allocations of capital.<sup>281</sup> They deserve to have ready access to the information necessary to navigate the marketplace in a way that conforms to their socio-moral self-understanding. Recent evidence suggests that they will use this information to hold corporations accountable.<sup>282</sup>

### B. Condemning Corporate Wrongdoing

Criminal brands do more than convey information; they also express condemnation.<sup>283</sup> Criminal brands can add an evaluative tone to otherwise sterile relay of facts about corporate misconduct.<sup>284</sup> As suggested above, this evocative dimension is largely missing from the DOJ's communications about corporate crime. Through commercial marketing, corporations cultivate an instinctively positive emotional response to their commercial brand.<sup>285</sup> Authorities could leverage the same tools to induce criminal corporations to convey the ugly side of their business operations too.

Authoritative condemnation of corporate crime is relevant to several constituencies. The first is victims. Criminal branding would serve as a clear recognition that the corporation wronged them. Broad, public visibility is especially important here because of the nature of corporate harm: often diffuse and widespread so that, in many instances, it is even difficult as a practical matter to identify all of its victims.<sup>286</sup> Acknowledging victims and giving them a voice is a worthwhile ambition of criminal justice—one that the status quo of corporate criminal enforcement too often neglects.<sup>287</sup> Corporate criminal branding provides a meaningful corrective.

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("Gen-Z's expectations in the workplace are values-driven and aligned with their personal morals.").

281. See *Majority of Generation Z Investors Identify Green and Sustainable Investing as the Biggest Trend of 2021*, BLOOMBERG (Feb. 3, 2021), <https://www.bloomberg.com/company/press/majority-of-generation-z-investors-identify-green-and-sustainable-investing-as-the-biggest-trend-of-2021/> [<https://perma.cc/R686-NJSP>] ("For the majority of Generation Z students polled, 'companies with a purpose' is a key driver for their investment decisions and many are investing 'for a better tomorrow.'").

282. See Samir D. Parikh, *Scarlet-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. U. L. REV. 425, 429, 449–52 (2022) ("[O]nline social networks have enabled young people to mobilize and demand action in response to the perceived inability of traditional institutions to prevent criminal behavior.").

283. Flanders, *supra* note 27, at 617 ("[S]haming punishments . . . involve direct societal condemnation of the offender.").

284. 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 by audiences for the expression).

285. Katherine Taken Smith, Murphy Smith & Kun Wang, *Does Brand Management of Corporate Reputation Translate into Higher Market Value?*, 18 J. STRATEGIC MKTG. 201, 202–03 (2010).

286. Cf. Skeel, *supra* note 11, at 1827 ("[J]udicial shaming efforts often have a more diffuse target, such as the consumers of products made by the offending firm.").

287. See, e.g., Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, 4; Mihailis E. Diamantis, *What Do We Owe the Victims of Corporate Crime?*, in CORPORATE CRIME: THE

The second key constituency is society more broadly. Consumers and other stakeholders have a right to demand that the criminal justice system that represents them also reflects their moral outrage over corporate crime. Authorities presently have no stigmatizing, quasi-legal epithets for convicted corporations.<sup>288</sup> Conviction does not render them “murderers” or “thieves” in ordinary language.<sup>289</sup> Corporate branding could fill that expressive gap by conveying criminal law’s signature condemnation. It could notify consumers, stakeholders, and other market participants that the corporation violated the law *and portray that what the corporation did was morally abominable*.

Relatedly, competitors represent an easy-to-overlook constituency. When corporate wrongdoing goes unacknowledged or unaddressed, the public tends to respond by concluding that the system is rigged, or that underlying abuses are just the way that business is done.<sup>290</sup> This perception weakens the stability of a broader civil society,<sup>291</sup> and it disserves competitor firms that actually put in the time and effort to comply with the letter and spirit of the law.<sup>292</sup> By clearly condemning specific wrongdoers, corporate criminal branding helps to distinguish bad actors without encouraging a civically unhealthy heuristic that the problem is all corporations, rather than some specific corporation.

### C. Preventing Corporate Crime

The greatest responsibility of corporate criminal law is to prevent corporate crime and minimize its impact on victims.<sup>293</sup> It should be no surprise that corporate criminal branding excels at communication and expression. That is what branding was designed to do. The more interesting result is that criminal branding may be poised to prevent corporate crime better than the stock-in-trade corporate sanction: monetary fines.<sup>294</sup>

There are three pathways through which criminal branding could prevent corporate crime. The most straightforward is through standard deterrence.

FIRM AS VICTIM AND OFFENDER (Miranda A. Galvin & William S. Laufer eds., forthcoming 2024); *see also* William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, 165 (2021).

288. *See* Thomas & Diamantis, *supra* note 28, at 3–5; Thomas, *supra* note 11, at 426–28.

289. *Cf.* Alice Ristorph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 566–67 (2018) (explaining how individuals labeled with terms like “felon” are subjected to substantial social stigma).

290. *See* William S. Laufer & Matthew Caulfield, *Wall Street and Progressivism*, 37 YALE J. ON REGUL. BULL. 36, 44–48 (2019); *accord* Laufer & Hughes, *supra* note 287, at 155.

291. *See* T.M. SCANLON, *Punishment and the Rule of Law*, in *THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY* 219, 225–26 (2003).

292. *See* Richard Dagger, *Punishment as Fair Play*, 14 RES PUBLICA 259, 262–63 (2008).

293. *See* Diamantis & Thomas, *supra* note 17, at 993–95; Friedman, *supra* note 55, at 854–55; Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009).

294. *See generally* Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907 (2018) (discussing various channels by which the reputational impacts of litigation can influence corporate compliance); Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL’Y REV. 1 (2015) (same).



Criminal branding would negatively impact a corporation's reputation in ways that translate to financial costs.<sup>295</sup> Corporations with worse reputations must charge less to induce consumers to purchase their products, and they must pay more to creditors to secure financing.<sup>296</sup> Viewed through this narrow lens, corporate criminal branding is not very different from a criminal fine, albeit a rather indirect and unpredictable one.<sup>297</sup> According to classical economics, firms will avoid criminal behavior so long as the anticipated fine (the actual size of the fine multiplied by the probability of detection) is greater than the anticipated criminal proceeds.<sup>298</sup> We explained above why fines are ill-equipped to deter corporate crime.<sup>299</sup> When viewed as an indirect fine, corporate criminal branding succumbs to the same economic realities.

Corporate criminal branding could overcome the deterrent shortcomings of corporate fines through two different pathways. The key to deterring corporate crime is to find a way to impact the incentives of high-level corporate personnel who are in the best position to influence how the organization behaves.<sup>300</sup> Two important psychological facts about corporate managers allow expressive sanctions like criminal brands to have that effect. First, just as with most people, corporate managers have a prosocial motivation to preserve their moral standing, both in their own eyes and in the eyes of others.<sup>301</sup> Second, managers sympathetically identify with the moral standing of the corporations they run.<sup>302</sup> In other words, they feel as though they partake in their corporations' public moral shame (and, conversely, their corporation's public moral esteem). The interplay between these two facts connects corporate criminal brands to managers' motivational structure.<sup>303</sup> Since criminal brands publicly impugn a corporation's moral standing, they can harness managers' prosocial incentives to steer their corporations clear

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295. See Khanna, *supra* note 56, at 1499–512; Shapira, *supra* note 227, at 237 (“Reputational sanctioning is the process of stakeholders hearing bad news about the firm, downgrading their beliefs about it, and switching to competitors.”).

296. Kahan & Posner, *supra* note 27, at 371 (“Shaming directly destroys an asset that the fine cannot destroy—the offender’s reputation.”).

297. *E.g.*, Khanna, *supra* note 56, at 1510 (“[F]ines are socially cheaper than reputational loss, and fines are more accurate than reputational loss.”).

298. See Becker, *supra* note 42, at 176.

299. See *supra* Part I.B.

300. See BRAITHWAITE, *supra* note 1, at 149–50; Cullen & Dubeck, *supra* note 5, at 7–8. Courts may be uniquely placed to “provide a supplemental source of gossip, criticism, and sanction for [corporate managers] who are beyond the reach of the firm’s normal systems of social control.” Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1013 (1997).

301. See PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 176–88 (2013); see also BRAITHWAITE, *supra* note 1, at 141.

302. See CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 200 (2000); Buell, *supra* note 162, at 522–23; Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 349 (2003).

303. Professor Andrew K. Jennings has discussed how disclosure of remedial mandates in corporate filings can deter management from shirking on compliance. See *Follow-Up Enforcement*, 70 DUKE L.J. 1569, 1623–24 (2021).

of misconduct.<sup>304</sup> The branding sanction turns the corporation itself into a tool for internally dispersing prosocial, law-abiding norms and raising their salience.<sup>305</sup> Expressively neutral corporate fines are incapable of moving managers, whether emotionally or financially.

The second pathway through which corporate criminal brands could prevent corporate crime is bottom-up rather than top-down. Employees, consumers, and investors can influence how corporations behave.<sup>306</sup> This is not just because they can quit, boycott a product, or threaten to sell shares. That is the familiar logic of economic deterrence. Virtuous customers and investors who dissociate from a criminal corporation do not thereby transform it into a better version of itself. The more powerful agents of change are often the employees, customers, and investors who continue their engagement with a criminal corporation while retaining their high expectations of it.<sup>307</sup> With respect to environmentally friendly business practices and more inclusive employment and governance policies, investors are already leading the way largely by exerting internal pressure on management.<sup>308</sup> As Gen Z comes to play a more prominent role in consumer and financial markets, this trend will only increase.<sup>309</sup> In a near future in which corporate values and identity are expected to shape every major aspect of corporate operations—from sales, to hiring, to funding—the expressive power of criminal branding could be a powerful preventive force.

#### VI. ANTICIPATING CORPORATE EFFORTS TO MUTE CRIMINAL BRANDS

Unsurprisingly, corporations will prefer not to be criminally branded. We should expect a corporation to pursue various strategies to neutralize the sanction—from evading, downplaying, or outright abandoning its brand; to embracing its newfound criminal reputation; to deploying counter-marketing efforts aimed at drowning out the impact of the sanction. There are practical limits to how much corporations will feasibly be able to do. Still, as with all corporate punishments, enforcers need to be diligent if they are going to successfully implement branding. Though corporations are slippery entities, capable of renaming and reorganizing themselves, economic realities make

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304. See Buell, *supra* note 11, at 942–44.

305. See Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 3 U. ILL. L. REV. 673, 706–19 (2023) (observing that criminal law’s expressive force can deter business misconduct, but only if firms help raise the salience of the law’s norms).

306. See *supra* notes 270–75.

307. E.g., van Erp, *supra* note 262, at 445 (discussing labor safety example); Adam Vaughan, *McDonald’s to Switch to Paper Straws in UK After Customer Campaign*, GUARDIAN (June 15, 2018, 5:26 AM), <https://www.theguardian.com/business/2018/jun/15/mcdonalds-to-switch-to-paper-straws-in-uk-after-customer-concern> [https://perma.cc/K9N7-9HZW]. See generally Hashimoto & Karasawa, *supra* note 268.

308. See Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 286 (“Demand for ESG disclosure reform has risen rapidly over the past decade, driven by growing consensus among mainstream investors . . .”).

309. See *supra* notes 277–81 and accompanying text.

it difficult to skirt the effects of criminal branding. Courts and prosecutors (with assistance from marketing professionals) can anticipate where opportunities for gamesmanship remain. This section offers prophylactic steps they could take.

#### A. *The Costs of Abandoning a Criminal Brand*

One extreme response a corporation could take to criminal branding is outright abandoning (even if temporarily) its commercial brand. The law would not physically brand corporations in the way it once branded individuals; perhaps then, the lack of a corporate body could provide a way to avoid punishment. As it turns out, a similar concern recurs in discussions of all manners of corporate sanction. By now it is something of a skeptical trope to claim that a corporation, if it does not wish to suffer the consequences of law enforcement, can simply reincorporate in a new jurisdiction, merge with or transfer its assets to a “new” corporation, or otherwise use corporate law shenanigans to paper away its punishment.<sup>310</sup>

In reality, it turns out that criminal corporations cannot so easily shed their responsibilities. First, as a legal matter, it is quite difficult for corporate entities to shake criminal liability, which follows them through various types of reorganization.<sup>311</sup> And second, even when a legal pathway does exist, reorganization and rebranding can be an extraordinarily expensive path for a company to walk.<sup>312</sup> Remember that brand equity represents a huge source of value for most major businesses.<sup>313</sup> It reflects anticipated loyal relationships earned after long, expensive investments in the firm’s reputation. The decision to abandon or temporarily set aside one’s brand could well incur massive expense for the enterprise. It might be legal for, say, the Coca-Cola Company to just stop using its name.<sup>314</sup> But does anyone think the company would be anything as valuable as its current self if it sold generic sodas instead?<sup>315</sup> Or, to approach the counterfactual in another way:

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310. See, e.g., Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 605–06 (2012).

311. See Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REGUL. 1, 4 (2019); Andrew K. Jennings, *Criminal Subsidiaries*, 92 FORDHAM L. REV. 2013 (2024). Indeed, the historical turn toward tort and criminal liability for corporations seems partially motivated to put a stop to exactly this sort of shirking through corporate law. See Thomas, *supra* note 79, at 513.

312. Laurent Muzellec & Mary Lambkin, *Corporate Rebranding: Destroying, Transferring or Creating Brand Equity?*, 40 EUR. J. MKTG. 803, 803–04 (2005); Laurent Muzellec, Manus Doogan & Mary Lambkin, *Corporate Rebranding—an Exploratory Review*, IRISH MKTG. REV., Jan. 2003, at 31, 39.

313. See *supra* Part II.

314. And although it might be legal to abandon a brand in the sense that the state could not otherwise prohibit the firm from doing so, doing so might well invite a shareholder suit alleging breach of fiduciary duty for waste.

315. See Michael Kavanagh, *When Rebranding Can Come Back to Haunt You*, FIN. TIMES (May 27, 2009), <https://www.ft.com/content/1e686680-4ae5-11de-87c2-00144feabdc0> [https://perma.cc/6SSM-VT3S] (collecting examples); see also Laurent Muzellec & Mary Lambkin, *Does Diageo Make Your Guinness Taste Better?*, 16 J. PROD. & BRAND MGMT. 321 (2007).

if firms could attract customer loyalty without a brand, or after abandoning one, it begs the question of why firms invest so heavily in building their brand in the first place.

To be sure, sometimes a corporate brand becomes so toxic that the economically prudent thing to do is to abandon it. For example, Philip Morris might become Altria (and, maybe, Facebook became Meta?).<sup>316</sup> But all evidence suggests that these cases are the exception rather than the rule. Even when saddled with a criminal mark, many firms will still find greater value—in the short run, but especially in the long run—by preserving the investment and ultimately working to improve rather than abandon their brands.

### B. *The Limits to Embracing a Criminal Brand*

At the other extreme, critics might worry that firms will embrace their newfound criminal status, thereby tapping into subculture trends toward consumer deviance. There is good evidence to support this worry in the individual context.<sup>317</sup> Criminologists like John Braithwaite have documented this risk of shaming sanctions, noting that they can actually drive offenders toward criminal subcultures.<sup>318</sup>

This phenomenon is substantially less likely to tempt corporate actors because it will usually be difficult to profitably embrace a criminal brand. Even if the criminal brand does attract some new stakeholders, it is doubtful that the market share they represent would in many cases be substantial enough to support a full corporate pivot. Whereas certain criminal subcultures are romanticized in film and fiction, it is hard to imagine that, in the real marketplace, corporations will find enough clientele by embracing their newfound reputations as a polluter, fraudster, or hub for worker exploitation.

Even firms that flirt with criminal activity are likely to find that leaning into notoriety is difficult. Several recent case studies illustrate the limits of monetizing a law-breaking reputation. Consider Pornhub. Beginning with an op-ed by *New York Times* columnist Nicholas Kristof, Pornhub faced a series of credible media, congressional, and legal accusations that the website hosted videos of sexual exploitation, including of minors.<sup>319</sup> A dark and dishearteningly realist explanation of this situation is that a substantial clientele wants access to this abusive content. Might corporate criminal branding inadvertently give Pornhub publicity as a source of illegal content?

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316. See John Schwartz, *Philip Morris to Change Name to Altria*, N.Y. TIMES (Nov. 16, 2001), <https://www.nytimes.com/2001/11/16/business/philip-morris-to-change-name-to-altria.html> [<https://perma.cc/97YY-TLZL>]; Editorial Board, Opinion, *Facebook Can't Rebrand Its Way Out of Trouble*, FIN. TIMES (Oct. 29, 2021), <https://www.ft.com/content/521b0053-68f0-4569-8237-f33bd677bb8e> [<https://perma.cc/3KX3-9NM2>].

317. See, e.g., Braithwaite, *supra* note 27, at 287.

318. See BRAITHWAITE, *supra* note 1, at 4, 16; Braithwaite, *supra* note 27, at 287–91.

319. See Nicholas Kristof, Opinion, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> [<https://perma.cc/337B-GKE8>].

Perhaps, but only to a point. Remember that branding matters to more than just consumers. Pornhub's increasingly public reputation as an ethically bankrupt source of abusive content caused other stakeholders to withdraw. For example, credit card processing companies, who might otherwise have been willing to turn a blind eye, eventually found it untenable to do so.<sup>320</sup> Their threat to withhold services forced Pornhub to remove 80 percent of its content.<sup>321</sup>

Similarly, fringe social media sites that permit, or even cater to, violent extremist speech have found it difficult to continue once these reputations become salient to the broader public. For example, in 2018, Robert Bowers carried out an antisemitic terrorist attack against the Tree of Life synagogue in Pittsburgh, killing eleven people and injuring several more.<sup>322</sup> Moments before the attack, he announced his intentions on Gab, an "extremist friendly" social media platform on which he regularly posted racist and antisemitic screeds.<sup>323</sup> Soon after this became public, Gab lost reliable access to an array of its business-essential web services. Firms like GoDaddy, Joyent, and PayPal stopped providing domain registration, web hosting, and payment processing, respectively.<sup>324</sup> Gab's business ultimately survived, but never recovered; subsequent estimates put its user bases down from millions to tens of thousands.<sup>325</sup> Similar publicity shocks have since impacted Parlor and other social networks that attempt to cater to the fringe.<sup>326</sup>

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320. Gillian Friedman, *Mastercard and Visa Stop Allowing Their Cards to Be Used on Pornhub*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/business/visa-mastercard-block-pornhub.html> [<https://perma.cc/HG4H-RP93>].

321. Ryan Chatelain & Associated Press, *Pornhub Removes 10 Million Videos in Response to Allegations About Content*, SPECTRUM NEWS NY1 (Dec. 15, 2020, 2:00 PM), <https://www.ny1.com/nyc/all-boroughs/entertainment/2020/12/15/pornhub-removes-10-million-videos-in-response-to-allegations-about-content> [<https://perma.cc/87FT-49B4>].

322. Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/FGA9-V5B9>].

323. Kevin Roose, *On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html> [<https://perma.cc/S4EM-2NF6>].

324. Ivana Kottasová & Sara Ashley O'Brien, *Gab, the Social Network Used by the Pittsburgh Suspect, Has Been Taken Offline*, CNN BUS., <https://www.cnn.com/2018/10/29/tech/gab-offline-pittsburgh/index.html> [<https://perma.cc/6MDX-3K7A>] (Oct. 29, 2018, 12:00 PM).

325. See Chloe Hadavas, *What's the Deal with Parler?*, SLATE (July 3, 2020, 9:00 AM), <https://slate.com/technology/2020/07/parler-free-speech-twitter.html> [<https://perma.cc/N4VR-TTG3>].

326. Ironically, Gab's commercial fortunes resuscitated somewhat after the 2021 insurrection when similar revelations surfaced about its competitor, Parler. See Jazmin Goodwin, *Gab: Everything You Need to Know About the Fast-Growing, Controversial Social Network*, CNN BUS., <https://www.cnn.com/2021/01/17/tech/what-is-gab-explainer/index.html> [<https://perma.cc/JY8X-7Q8N>] (Jan. 17, 2021, 4:49 PM).

C. *The Tension Between Counter-messaging and Cooperation*

Finally, a firm might attempt to downplay the impact of corporate criminal branding by engaging in counter-programming or counter-marketing.<sup>327</sup> This is an old strategy.<sup>328</sup> There is a certain amount of public engagement with a crisis that the criminal justice system should not only tolerate, but actively encourage. Successful crisis management involves grappling with, and apologizing for, past misconduct.<sup>329</sup> But there is also a reasonable worry that sanctioned firms will obey the letter of a criminal brand mandate, but then spend their considerable marketing resources to undermine its spirit.

Criminal justice enforcers need to be proactive here, and current practices already provide guideposts for successful implementation. Prosecution agreements often take steps to prevent firms from engaging in certain forms of counter-speech—by, for example, making public representations that undermine an agreed-to statement of facts.<sup>330</sup> The implementation of a successful corporate criminal brand will likely require that the firm commit to not just attaching the brand to its name or logo but also refraining from hiding, obscuring, or otherwise defeating the mark. Of course, there will sometimes be a fine line between flouting a sanction and trying to improve one's reputation. As is already the case with pretrial diversion agreements, prosecutors might reserve to themselves the discretion to say when a firm crosses the line.<sup>331</sup>

Implementation challenges demonstrate once again the clear value of bringing in marketing professionals to play an oversight and advisory role.<sup>332</sup> Simply put, courts and prosecutors are not experts here—but they have

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327. Fisse, *supra* note 3, at 133 (“Counter-publicity is likely to be the most popular method of evasion or avoidance for the reason that usually it will be the least expensive, particularly in the case of large corporations.”).

328. *See id.* (“In the U.S.A. the very history of modern corporate public relations began when government criticism and the assaults of Upton Sinclair and other muck rakers provoked response.”).

329. *See generally* WILLIAM L. BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES: IMAGE REPAIR THEORY AND RESEARCH (2d ed. 2015) (reviewing successful and unsuccessful crisis management campaigns).

330. *E.g.*, Deferred Prosecution Agreement at 3–6, *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (E.D.N.Y. July 1, 2013), ECF No. 3-2; Amended Deferred Prosecution Agreement at 3–6, *United States v. Standard Chartered Bank*, No. 12-CR-00262 (D.D.C. 2019), ECF No. 16-1; Press Release, U.S. Dep’t of Just., W. Dist. of N.C., Wells Fargo Agrees to Pay \$3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts Without Customer Authorization (Feb. 21, 2020), <https://www.justice.gov/usao-wdnc/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales> [<https://perma.cc/46UL-USYU>].

331. Press Release, U.S. Dep’t of Just., D. of Mass., eBay Inc. to Pay \$3 Million in Connection with Corporate Cyberstalking Campaign Targeting Massachusetts Couple (Jan. 11, 2024), <https://www.justice.gov/usao-ma/pr/eBay-inc-pay-3-million-connection-corporate-cyberstalking-campaign-targeting> [<https://perma.cc/J76Q-X6XC>] (“The Company agrees, however, that, in the event the U.S. Attorney’s Office determines, in its sole discretion, that the Company has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of the Company’s obligations under this Agreement, an extension or extensions of the Term may be imposed by the U.S. Attorney’s Office . . .”).

332. *See supra* Part IV.D.

access to experts. Leveraging marketing insights as a way of improving criminal punishment requires more than a cursory skim of marketing principles. Experts could devise criminal branding terms that are more resistant to future manipulation.

#### CONCLUSION

Corporate punishment may have a branding problem—but it does not have to stay that way. Finally acknowledging the longstanding shortcomings of corporate fines, the federal government is just now making noise about the need for newer, better corporate sanctions. Since October 2021, the DOJ, led in its effort by Deputy Attorney General Lisa O. Monaco, has sought reforms “to strengthen the way we respond to corporate crime.”<sup>333</sup> The DOJ’s attempts to rethink and revise its approach are now in full swing, with new policies, proposals, and pilot programs introduced throughout 2022 and into 2023.<sup>334</sup> The current crisis in corporate criminal law offers a moment to reimagine corporate punishment for a twenty-first century commercial environment.

We propose resuscitating a modernized adverse publicity sanction for today’s corporate offenders. Whether with an educative icon, evocative symbol, QR code, or any other of a range of marketing best practices, courts and prosecutors have the ability and legal authority, right now, to brand corporate criminals. Corporate criminal branding would adapt the virtues of its corporal namesake while avoiding those moral failings that make criminal branding a categorically unsuitable punishment for individuals. Yet for many of the same reasons that corporal branding is deeply unsuitable for individuals, corporate branding promises to be a uniquely well-designed punishment for organizational wrongdoing. Better than traditional sanctions, corporate branding has the potential to inform the public, to condemn wrongdoing, and, ultimately, to help prevent more corporate crime in the future. By forcibly integrating corporations’ criminal identity into their public brands, criminal law might finally have a way to recognize victims and to strike at what corporations value most.

Corporate criminal branding would allow sentencing courts and the DOJ to leverage the explosion in brand management activity, scholarship, and expertise. These developments have transformed the commercial and

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333. Lisa O. Monaco, Deputy Att’y Gen., U.S. Dep’t of Just., Keynote Address at ABA’s 36th National Institute on White Collar Crime (Oct. 28, 2021), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute> [<https://perma.cc/D9SR-YVN2>].

334. *See, e.g.*, Kenneth A. Polite, Jr., Assistant Att’y Gen., U.S. Dep’t of Just., Remarks on Revisions to the Criminal Division’s Corporate Enforcement Policy (Jan. 17, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law> [<https://perma.cc/LFF3-QK8U>]; Lisa O. Monaco, Deputy Att’y Gen., U.S. Dep’t of Just., Remarks at American Bar Association National Institute on White Collar Crime (Mar. 2, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-remarks-american-bar-association-national> [<https://perma.cc/23YN-BS3Q>].

communications landscapes that predominated when adverse publicity sanctions were first considered and promptly forgotten. Although this Article identifies key considerations for successfully adapting corporate punishment to a modern era, we are the first in line to agree that ④ is not the end of the conversation—it should be the beginning. There is a wealth of marketing expertise and brand know-how in marketing firms and business schools that courts and prosecutors can bring to bear. By encouraging closer engagement between criminal law functionaries and marketing professionals, the ultimate aim of this Article is to make corporate branding—and, for the first time in a long time, corporate criminal law—a powerful tool for justice.