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WHY AGENCIES PUNISH

MAX MINZNER*

ABSTRACT

In addition to promulgating regulations, federal administrative agencies penalize entities that violate their rules. In 2010 alone, the National Highway Traffic Safety Administration imposed a statutory maximum \$16.4 million penalty on Toyota, and the Securities and Exchange Commission recovered \$535 million from Goldman Sachs, the largest civil penalty a financial services firm has ever paid. The academic literature proposes two major theories explaining why agencies might seek these monetary penalties. First, agencies might seek to deter misconduct by using civil penalties to raise the expected cost of regulatory violations above the cost of compliance. Alternatively, agencies might use civil penalties as one step in an escalating series of enforcement responses to recalcitrant behavior by a regulated entity. Both of these theories assume that agencies punish in order to induce compliance with agency regulations. In the language of the criminal law, agencies are assumed to be consequentialists. Agency descriptions of their penalty policies support this assumption. Agencies claim to focus on deterrence, not retribution, when setting penalties.

This Article argues that consequentialist theories fail to explain the actual civil penalty policies in place at a range of federal administrative agencies. Instead, agency penalty policies are largely

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designed to achieve retributive ends. In short, agencies are more interested in desert than deterrence. The presence of widespread retribution in agency punishment raises serious concerns about legitimacy and competence. Administrative agency punishment lacks the transparency and structural protections that legitimize retribution in the criminal context. Additionally, agency subject matter expertise is unlikely to extend far enough to implement retributive theories effectively.

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INTRODUCTION

Administrative agencies, the fourth branch of government, famously blend the functions of the other three.¹ Agencies write rules, adjudicate their meanings, and penalize violations. Scholars commonly assume that agencies have a straightforward goal when they punish: agencies penalize to induce compliance with their rules. Penalties aim to curb violations and prevent their reoccurrence. In the language of the criminal law, agencies are seen as consequentialists. Through their penalties, agencies seek to achieve positive social outcomes. For example, penalties might deter misconduct by raising the expected cost of violations above the cost of compliance, or might attempt to reinforce norms of compliance through punishment.

Criminal law, of course, also recognizes a second primary aim of punishment: retribution. The goal of retributivism is punishment itself—wrongdoers are punished because they deserve it, not to achieve some broader social end. Indeed, recent empirical work demonstrates that, for most people, retribution is the primary concern in their punishment decisions. For example, mock jurors are highly motivated by factors related to retribution, such as *mens rea*, rather than those related to deterrence, such as the probability of detection.² In contrast, administrative agencies are generally assumed to be different from mock jurors in that they do not impose punishment based on the desert of the violator. Such retributive sanctions are usually reserved for more traditional criminal proceedings.

This Article is an attempt to test this assumption. I analyze agency punishments to determine why administrative agencies impose civil money penalties, with a particular focus on the penalty policies of four federal agencies: the Mine Safety and Health

1. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“[Administrative agencies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking. Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system.”).

2. See *infra* Part I.B.

Administration (mine worker safety), the Office of Foreign Assets Control (economic sanctions enforcement), the Federal Communications Commission (affordable access to electronic communications), and the Nuclear Regulatory Commission (nuclear material safety). The central claim is that although administrative agencies talk about deterrence when imposing civil penalties, the actual factors that agencies emphasize in calculating penalties suggest that retribution is an important and, in most cases, the dominant motivation. I argue that agency retribution raises serious concerns from both theoretical and practical standpoints. There is substantial reason to doubt whether administrative agencies are capable and legitimate retributive entities.

Part I describes the scholarly assumption of consequentialism in agency civil penalties and compares this assumption to experimental results reflecting a desire for retributivism in test subjects. These studies on “empirical desert” suggest relatively consistent retributive desires among the general public. These results should raise questions about the assumption that agencies are not retributivists. The remainder of Part I considers the penalty policies of the four agencies that serve as the central case studies for this Article. Consistent with the consequentialist assumption, all four agencies reject retribution as a stated goal of their punishment policies, and all four agencies claim that deterrence is a central focus of their approach to civil penalties.

Part II tests the four agencies’ claims. By looking at the relative emphasis on various components of an agency policy on civil penalties, we can determine whether the agency’s goals are deterrence, retribution, or something else. Theories of optimal deterrence would place harm or risk at the center of a penalty regime, along with the probability of detection. Such theories would be relatively unconcerned with mens rea, recidivism, and entity size. In turn, theories of complete deterrence would emphasize gain and the probability of detection, with perhaps some consideration of mens rea and a prior history of violations. The actual penalty policies in place at all four agencies bear little resemblance to these theoretical approaches. Consistent with the studies on empirical desert, all four agencies emphasize the role of mens rea and harm, or risk of harm, in setting penalties, with some attention for recidivist behavior but

little or no concern for gain or the probability of detection. Like most people, administrative agencies emphasize the goal of desert over deterrence.

Part III considers the normative implications of this conclusion. If administrative agencies are truly retributivists, does it matter? I identify two central problems with agency retribution. First, agencies lack the characteristics of legitimate retributive entities. Transparency is a prerequisite to desert-oriented punishment, and agency penalties arrive cloaked in the language of deterrence. Legitimate retributive entities do not talk about consequentialism while delivering retribution. Agency punishment also lacks the procedural protections that provide legitimacy to criminal retribution. Because agency punishments are labeled “civil,” they escape the procedural limitations that restrict, but also validate, retribution for traditional criminal punishments. Second, agencies are unlikely to be capable of delivering retributive punishment effectively. An agency might have substantial subject matter expertise in mine safety or export regulation, but that expertise is unlikely to transfer to the central task of retribution: distinguishing those violators who deserve more punishment from those deserving less.

I. CONSEQUENTIALISM AND CIVIL PENALTIES

Administrative agencies lack the inherent power to impose civil penalties. Under the Administrative Procedure Act, agencies can only impose sanctions when authorized by Congress.³ Congress, though, has granted that authority to agencies quite freely.⁴ Agencies routinely use civil penalties to enforce requirements in areas as diverse as workplace safety,⁵ protection of the Antarctic

3. See 5 U.S.C. § 558(b) (2006) (“A sanction may not be imposed ... except within jurisdiction delegated to the agency and as authorized by law.”); *SEC v. Sloan*, 436 U.S. 103, 111 (1978).

4. As early as 1979, Colin Diver claimed that it was “almost inconceivable that Congress would authorize a major administrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction.” Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1436 (1979).

5. See 29 U.S.C. § 666 (2006) (authorizing the Occupational Safety and Health Administration (OSHA) to impose civil penalties for workplace safety violations).

wilderness,⁶ and export controls to foreign powers.⁷ This Part examines both the academic literature on the goals of agency punishment and the reasons agencies themselves have articulated for imposing civil penalties. In theory, civil penalties can serve multiple purposes, including deterrence, retribution, reimbursement of government expenses, and disgorgement.⁸

Section A outlines the consequentialist assumption underlying the two dominant theories of agency punishment. The theoretical literature assumes that agencies impose penalties in order to obtain compliance rather than to exact retribution. In contrast, Section B describes the recent scholarly literature on empirical desert. There is strong reason to believe that most people, when asked to punish, are primarily interested in retribution rather than deterrence. Given these results, we should be hesitant to assume that agencies are different. Section C describes the civil penalty policies of four administrative agencies, explaining why they serve as appropriate case studies of agency punishment in action and providing an opportunity to test the consequentialist assumption. Finally, Section D examines stated agency policies on civil penalties. Agencies allege they impose penalties for nonretributive reasons and seek to obtain compliance, rather than punishment, in their enforcement regimes.

A. The Consequentialist Assumption: Why Academics Think Agencies Punish

The academic literature on agency use of civil penalties divides into two broad categories, both of which assume that penalties are

6. See 16 U.S.C. § 2407 (2006) (authorizing the Director of the National Science Foundation to impose penalties for introducing waste into Antarctica).

7. See 50 U.S.C. § 1705 (2006) (authorizing the Department of the Treasury to enforce export control restrictions with civil penalties).

8. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 186 (2000) (“To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.”); *United States v. Halper*, 490 U.S. 435, 448 (1989) (emphasizing the need for a relationship between the government’s costs and the penalty), *overruled by Hudson v. United States*, 522 U.S. 93 (1997); *Tull v. United States*, 481 U.S. 412, 422 (1987) (discussing retribution and deterrence as goals of civil penalties).

not retributive.⁹ The first model rests purely on theories of economic deterrence. Regulated entities are assumed to be rational, wealth-maximizing actors that comply with costly rules if, and only if, the expected penalty for violations is greater than the costs of compliance.¹⁰ Civil penalties are the mechanism the government uses to impose the sufficient costs.¹¹ Violations will occur when the gain (g) from the violation exceeds the expected civil penalty.¹² The government then faces the problem of determining the appropriate fine (f) to achieve the desired level of deterrence.

One option is a *cost internalization* model.¹³ The government can require wrongdoers to pay for the harm (h) they cause.¹⁴ Because most violations occur in an environment where some misconduct goes undetected,¹⁵ the violator will offend depending on three factors: the probability of detection of the offense (p), the gain from the violation, and the fine that will be imposed. Specifically, violations occur if $g > pf$ and the gain exceeds the expected punishment. Assuming a fixed probability of detection, the government then sets $f = h/p$.¹⁶ This model is commonly referred to as an *optimal deterrence* approach because, rather than deter all violations, the government only seeks to prevent misconduct when the net social benefit from the violation exceeds the net social costs.

9. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 20 (1992) (describing the two models).

10. See Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 453 & n.9, 454 (2003) (collecting sources); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 919-20 (2001) (describing this approach as the “foundation” of environmental enforcement).

11. See Malloy, *supra* note 10, at 454.

12. See Spence, *supra* note 10, at 920-21 (illustrating the calculation regulated entities use when deciding whether to comply with a law).

13. See, e.g., Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 243 (2009) (describing optimal deterrence as cost internalization).

14. See *id.*

15. In an environment where enforcement is certain, the government can simply set the fine equal to the harm. As a result, potential violators will violate if and only if their gain exceeds the harm.

16. This basic formula setting fines equal to the harm as enhanced by the reciprocal of the probability of detection has its origins in the writings of Jeremy Bentham but traces its modern development to Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 190-93 (1968).

Some violations will still occur when the gain from the violation outweighs the harm.¹⁷

Instead of an optimal deterrence model, an agency might instead take a *complete deterrence* approach and attempt to prevent all violations, even if the conduct produces a net benefit.¹⁸ Penalties are designed to strip away gains rather than internalize costs and are set at a level of $f = g/p$ so that, in expectation, the violator is punished at a level equal to his benefit from the violation. Because the expected punishment resulting from the violation exceeds the benefit to the wrongdoer, the conduct does not occur and deterrence is complete.¹⁹

The primary alternative model to this economic framework builds on the work of Ian Ayres and John Braithwaite²⁰ and emphasizes that regulated entities frequently have goals that diverge from pure economic rationality. Corporate actors may be motivated by money, by social responsibility, by both goals in some combination, or by neither goal.²¹ Different motivations call for different regulatory responses. Ayres and Braithwaite endorse a model of escalating enforcement—regulators are encouraged to start initially with gentle persuasion to allow well-motivated actors to identify themselves, advance to warning letters and penalties if persuasion

17. This model also assumes that punishment is imposed only after the undesired harm occurs. Of course, conduct is often punished based on the risk imposed in advance rather than waiting until the harm occurs after the fact. Risk regulation fits easily into this model as well with the harm resulting from the violation being replaced by the expected harm, that is, the probability of the harm occurring multiplied by the harm that would take place if it occurred. Cf. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984) (discussing the social desirability of liability compared to regulation).

18. See Keith N. Hylton, *The Theory of Penalties and the Economics of Criminal Law*, 1 REV. L. & ECON. 175, 177-78 (2005); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195-96, 1205 (1985).

19. For analyses of complete and optimal deterrence under various assumptions, compare Hylton, *supra* note 18, at 177-78, and Posner, *supra* note 18, at 1195-96, 1205 (arguing for complete deterrence in the context of market-avoiding behavior), with A. Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?*, 10 J.L. ECON. & ORG. 427, 428 (1994) (noting general superiority of internalization based on error costs).

20. See generally AYRES & BRAITHWAITE, *supra* note 9; JOHN BRAITHWAITE, *TO PUNISH OR PERSUADE: ENFORCEMENT OF COAL MINE SAFETY* 139 (1985).

21. See AYRES & BRAITHWAITE, *supra* note 9, at 27.

proves ineffective, and finish with license suspension or revocation.²²

Under this framework, civil monetary penalties represent an intermediate sanction residing in the middle of the range of options that administrative agencies possess to penalize regulated entities, somewhere above warning letters and below criminal sanctions. They allow regulators to tailor the regulatory response on a case-by-case basis. They serve the classic law-and-economics goal of increasing costs for those actors who are rationally motivated, but they are unnecessary for entities that have more virtuous motives and are insufficient for actors that are either irrational or beyond deterrence.²³

B. Intuitive Retributivism: Why People Punish

The approaches outlined above assume that agencies are consequentialists. The alternative theory is that administrative agencies might be retributivists. Agencies might impose punishment to the extent that they believe the violator *deserves* it, not to achieve some broader social end. If agencies are actually seeking to achieve retribution, they have a lot of company. It would mean that administrative agencies look a lot like the rest of us. A substantial literature has developed examining penalties in experimental contexts. This research, outlined in more detail in Part II below,

22. *Id.* at 35-36. Such an escalating “regulatory pyramid” of enforcement draws on the game-theoretic literature outlining a “tit for tat” strategy as the optimal solution to a repeated-play prisoner’s dilemma game. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 175-76 (1984).

23. See AYRES & BRAITHWAITE, *supra* note 9, at 53. The availability of civil penalties also can serve other consequentialist goals. For example, they might improve the credibility of potentially more significant sanctions, *see id.*, and serve an expressive function by communicating what standards are particularly important. See generally Tracey Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1199-1204 (2004). Such an expressive function may help entities internalize the notion that the rules are fair and reinforce the possibility of social disapproval if they violate the law. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* 3-5 (Princeton Univ. Press 2006); Malloy, *supra* note 10, at 454-55 (collecting sources); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-71 (1997). Less desirably, civil penalties might also serve an antiexpressive effect, undermining the norms that are already in place by setting a price for unlawful conduct. See Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 13-14 (2000). The expressive role of punishment is discussed further *infra* Part III.

suggests that when asked to punish, people do not engage in the deterrence calculus but instead act as “intuitive retributivists.”²⁴ A series of experimental studies have found that intuitive assignments of punishment focus on facts that are relevant from a retributive framework rather than a consequentialist perspective.²⁵ For instance, experimental subjects vary punishment based on factors relevant to a retributive calculation, such as the severity of the offense and the mental state of the violator, rather than factors that are relevant to theories of deterrence, such as the probability that the violation will be detected and the publicity surrounding the penalty that will be imposed.²⁶ These results hold even though test subjects identified deterrence as an important reason for punishment.²⁷ In short, people talk like consequentialists but act like retributivists.

24. Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2086 (1998); see also Cass R. Sunstein, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1167 (2002).

25. See, e.g., Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 39-41 (2007) (collecting studies).

26. See Kevin Carlsmith, John Monahan & Alison Evans, *The Function of Punishment in the “Civil” Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & L. 437, 445 (2007); Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 437, 444-46 (2002) [hereinafter Carlsmith, *The Role of Retribution*] (finding that test subjects seek out information relevant to desert rather than deterrence); Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 295 (2002) [hereinafter Carlsmith et al., *Why Do We Punish?*] (finding test subjects largely indifferent to variations in detection probability and publicity of offense); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW. & HUM. BEHAV. 659, 676 (2000) [hereinafter Darley et al., *Incapacitation*] (finding test subjects motivated by severity of the offense but largely indifferent to the need for incapacitating an offender).

27. See Kevin Carlsmith, *On Justifying Punishment: The Discrepancy Between Words and Actions*, 21 SOC. JUST. RES. 119, 135 (2007) [hereinafter Carlsmith, *On Justifying Punishment*] (“When a person is asked for a justification of punishment, they respond with some combination of motives that almost always include retribution and deterrence. Behaviorally, however, they consistently operate according to principles of retributive justice.”); see also Carlsmith, *The Role of Retribution*, *supra* note 26, at 439; Carlsmith et al., *Why Do We Punish?*, *supra* note 26, at 295 (“[A]lthough people value deterrence and deservingness almost equally as motives, they seem to sentence at the individual level from a strictly deservingness-based stance.”); Catherine A. Sanderson & John M. Darley, *“I Am Moral but You Are Deterred”: Differential Attributions About Why People Obey the Law*, 32 J. APPLIED SOC. PSYCHOL. 375, 400-01 (2002).

These results on intuitive retributivism should give us pause when assuming consequentialist goals for administrative agencies. Although agencies have substantial control over their penalty policies, Congress ultimately oversees their conduct. Members of Congress are unlikely to emphasize deterrence if their constituents are interested in retribution. Notably, when Congress has taken action with respect to agency civil penalty calculations, it has pushed agencies in directions consistent with this retribution literature. For example, research suggests that lay jurors, like agencies, place significant weight on the size of the organization to be punished.²⁸ In 1995, Congress passed the Small Business Regulatory Enforcement Fairness Act,²⁹ which required federal agencies that regulated small businesses to establish a policy to provide for the reduction or waiver of civil penalties when a small entity violated a statutory or regulatory requirement.³⁰ If Congress implicitly expected retribution in penalty determinations, it would hardly be surprising that it would get its wish.

Similarly, internal politics may be as important as external pressure. Administrative agencies are not monoliths; they are composed of their employees. There is little reason to believe that administrative agency employees are significantly different from college students participating in experiments or jurors deciding on punitive damages. If individuals are primarily motivated by retributive desires when they are asked to impose punishments, it may be unrealistic to expect that their behavior changes based on their employment.

C. Testing the Consequentialist Assumption: The Agencies

How can we tell whether agencies are interested in deterrence or retribution when they penalize regulated entities? For agencies that are relatively silent on the process of calculating penalties, it can be

28. See Cass Sunstein et al., *supra* note 24, at 2105.

29. 5 U.S.C. § 601 (2006).

30. Congress not only passed the rule, it enforced it with a Government Accountability Office (GAO) audit of various agencies. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-280, REGULATORY REFORM: IMPLEMENTATION OF SELECTED AGENCIES' CIVIL PENALTY RELIEF POLICIES FOR SMALL ENTITIES (2001), available at <http://www.gao.gov/new.items/d01280.pdf>.

extremely difficult. For instance, in April 2010, United States Transportation Secretary Ray LaHood announced that the National Highway Transportation and Safety Administration (NHTSA) would seek a record civil penalty against Toyota for its failure to notify the government of a defective pedal.³¹ NHTSA alleged that automobile manufacturer learned of the defect as early as September 2009 but failed to disclose it for months.³² As a result, the agency sought, and Toyota agreed to pay, the statutory maximum civil penalty of \$16.375 million.³³ NHTSA, though, provided only limited justification as to why this case deserved the maximum.³⁴ NHTSA not only did not explain how it decided to assign the statutory maximum penalty in the Toyota case, it has not provided any system of guidelines explaining how it calculates civil penalties.

NHTSA is not alone. For example, the Office of Pipeline Safety (OPS) within the Department of Transportation can and does impose substantial civil penalties for violations of safety regulations covering natural gas pipelines.³⁵ Like NHTSA, though, OPS does not provide a detailed explanation of how it calculates civil penalties.³⁶ Penalties imposed on an ad hoc basis provide little

31. Press Release, Nat'l Highway Safety Admin., Secretary LaHood Announces DOT Is Seeking Maximum Civil Penalty for Toyota (Apr. 5, 2010), *available at* <http://www.nhtsa.gov/PR/DOT-59-10>.

32. *Id.*

33. See Settlement Agreement at 2, Toyota Motor Corp., TQ 10-002, NHTSA (Apr. 19, 2010), *available at* http://images.thetruthaboutcars.com/2010/04/toyota_0419.pdf. Toyota's failure to disclose the defect exposed it to a potential civil penalty of \$6,000 per vehicle, 49 C.F.R. § 578.6(a) (2011), and the NHTSA estimated that the defect affected 2.3 million vehicles, *see* Settlement Agreement, *supra*, at 1, producing a theoretical exposure of \$13.8 billion. However, the maximum penalty for a "related" series of violations is \$16,375,000. *See* 49 C.F.R. § 578.6(a).

34. NHTSA simply pointed to its statutory obligation under 49 U.S.C. § 30165 to consider the size of the business of the violator and the gravity of the violation. *See* Settlement Agreement, *supra* note 33, at 11.

35. *See Stakeholder Communications: Enforcement*, PHMSA, http://primis.phmsa.dot.gov/comm/reports/enforce/CivilPenalty_opid_0.html (last visited Jan. 23, 2012) (showing resolution of 446 cases generating \$40 million in civil penalties from 2002 and 2011).

36. The Department of Transportation has promulgated regulations enumerating the factors for OPS to consider in its penalty determinations without providing any mechanism for OPS to weigh these factors. *See* 49 C.F.R. § 190.225 (requiring the administrator of OPS to consider (a) the nature, circumstances, and gravity of the violation; (b) the degree of the respondent's culpability; (c) the respondent's history of prior offenses; (d) the respondent's

guidance to what agencies are trying to accomplish, making it difficult to distinguish retribution from deterrence.³⁷

However, although isolated penalties provide limited information, *systems* of penalties are different. Such systems rank violations by indicating which facts will lead to greater or lesser punishment. As discussed further in Part II, theories of retribution and deterrence emphasize different factors in setting civil penalties.³⁸ As a result, close scrutiny of agency penalty policies reveals what agencies are trying to accomplish.³⁹

I consider the civil penalty systems of four agencies with missions spanning the federal administrative state: the Mine Safety and Health Administration (MSHA); the Office of Foreign Assets

ability to pay; (e) any good faith by the respondent in attempting to achieve compliance; (f) the effect on the respondent's ability to continue in business; and (g) such other matters as justice may require). These factors are virtually identical to the factors OPS is required to consider by statute. See 49 U.S.C. § 60122(b) (2010).

37. Despite this difficulty, an approach of undisclosed or unclear penalties is difficult to justify in any system focused on deterrence. Optimal and complete deterrence both assume that the potential penalty is clearly communicated to potential violators. If offenders are unable to determine the likely consequences of their actions, they cannot correctly calculate the expected value of their conduct. As a result, even if penalties are set appropriately, violations may occur based on erroneous estimates by those in the regulated community. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2447-48 (1997) ("If people do not know the law and do not understand the penalties, then it is tough to see how increasing the penalties will ever make a difference."); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 997-98 (2003) (describing the difficulty of conveying the messages of deterrence when punishments are uncertain).

38. The claim that retributive theories of punishment make clear assertions about the ordinal ranking of punishment is contested. Compare Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 893 (2002) ("[R]etributivism can determine neither the ordinal nor the cardinal ranking of crimes and their concomitant degrees of punishment."), with Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1835 (2006). Even if one generally accepts the argument that, as a normative matter, desert theories are too vague to serve as a foundation of a system of punishment, civil penalty systems that are attempting to achieve that goal can be distinguished from systems aimed at deterrence.

39. Other scholars have made similar efforts with respect to the United States Sentencing Guidelines, reaching divergent conclusions. See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 67-68 (2003) (arguing that just deserts provides the best explanation); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 561 (2003) (concluding that utilitarianism is the most plausible explanation for the Guidelines' structure).

Control (OFAC); the Federal Communications Commission (FCC); and the Nuclear Regulatory Commission (NRC). As described below in the remainder of this Section, these agencies have diverse missions and different approaches to calculating civil penalties. Despite their differences, the agencies share several qualities that make them appropriate case studies for agency punishment in action. First, all four agencies have issued relatively clear policies outlining their penalty calculations. Because the penalty systems provide—more or less—specific relationships between the various inputs to the penalty calculation and the civil penalty eventually imposed, examining these relationships reveals whether the systems are aimed at retribution or deterrence. Second, each agency retains dominant, if not exclusive, control over enforcement in the subject matter areas they oversee, unlike, for example, the Environmental Protection Agency (EPA), where state enforcement of federal law plays an important role,⁴⁰ or the Securities and Exchange Commission (SEC), for whom private civil suits help ensure compliance with federal law.⁴¹ In all four of these agencies, state regulation plays only a limited role in enforcing the provisions of the key statutes,⁴² and private rights of action, if they exist at all,

40. See CLIFFORD RECHTSHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* 91 (2003).

41. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (“Private enforcement of the proxy rules provides a necessary supplement to Commission action.... [T]he possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.”); James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 *EUR. COMPANY & FIN. L. REV.* 164, 203 (2009) (arguing that private suits play a more important role in ensuring compliance with securities law than SEC enforcement).

42. The federal government has completely preempted safety regulation in the nuclear industry, see *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212 (1983) (“State safety regulation is not preempted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”), and attempts at state regulation of the export control restrictions overseen by OFAC would be constitutionally suspect. See *Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006) (describing the act of state doctrine). FCC regulations broadly preempt wide areas of state regulation, see, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984), and the 1996 Telecommunications Act expanded the FCC’s preemption of state law to limit the ability of states to create barriers to entry. See 47 U.S.C. § 253 (2006). Although MSHA leaves open the option of state regulatory provisions that are stricter than the federal requirements, see

are relatively inconsequential compared to other regulatory regimes.⁴³

Finally, these agencies have substantial control over the penalties they impose. In all four agencies, civil penalty litigation proceeds administratively, rather than in a federal district court. If the final civil penalty determination lies in the hands of a district judge rather than the agency itself, agency pronouncements on the size of penalties that will be imposed are less significant. These four agencies, though, retain the ability to shape civil penalties to serve whatever policies they desire. As a result, there is more reason to believe that the announced policies relating to the imposition of civil penalties reflect the penalties actually imposed in practice.

30 U.S.C. § 955 (2006), the actual implementation of stricter state regulation varies. See Scott M. Matheson, Jr., *The State of Utah's Role in Coal Mine Safety: Federalism Considerations*, 29 J. LAND RESOURCES & ENVTL. L. 143, 159 (2009) (discussing state variation in regulation).

Importantly, states lack the power to enforce the actual requirements of the Federal Mine Safety and Health Act of 1977 (Mine Act) itself. See *id.* at 154-55; Alison D. Morantz, *Mining Mining Data: Bringing Empirical Analysis To Bear on the Regulation of Safety and Health in U.S. Mining*, 111 W. VA. L. REV. 45, 48 (2008). In this sense, states have a more limited role in mine safety enforcement than they do in the broader area of occupational safety enforcement overseen by OSHA, MSHA's sister agency. States have the power to completely displace OSHA regulation with a state regime by obtaining federal approval to do so. See 29 U.S.C. § 667(b) (2006).

43. The Mine Act only creates a private right of action in whistleblower cases, not for violations of safety regulations. See *Gunnells v. United States*, 514 F. Supp. 754, 757-58 (S.D.W. Va. 1981). Similarly, the primary rules enforced by OFAC, the Trading with the Enemy Act and the Cuba Assets Control Regulations, do not contain private rights of action. See *Glen v. Club Méditerranée, S.A.*, 365 F. Supp. 2d 1263, 1272 (S.D. Fla. 2005), *aff'd*, 450 F.3d 1251 (11th Cir. 2006). In the FCC context, the Supreme Court has held that "the Communications Act of 1934 did not create new private rights." *Scripps Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942). Consistent with this language, although a few provisions of the Federal Communications Act create private rights of action, most do not. Compare *N. Cnty. Comm. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1160 (9th Cir. 2010) (holding no private right of action for unreasonable compensation claim), and *Chanayil v. Gulati*, 169 F.3d 168, 171 n.3 (2d Cir. 1999) (holding no private right of action for violations of certain disclosure requirements), and *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3d Cir. 1982) (holding no right of action under "Personal Attack Rule"), with *DirectTV v. Seijas*, 508 F.3d 123, 124 (3d Cir. 2007) (holding private right of action exists for signal piracy). Finally, under the Price Anderson Act, the federal government partially insures nuclear reactors against certain tort damage claims, limiting their importance. Of course, state law remedies may still exist within these regulatory regimes. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249, 258 (1984) (holding state law remedies not preempted by Atomic Energy Act).

1. *The Mine Safety and Health Administration*

Initially establishing its Guidelines in the early 1970s, the Mine Safety and Health Administration was one of the earliest agencies to explicitly describe how it would calculate civil penalties.⁴⁴ Under the Mine Act, MSHA must consider six statutory factors in setting civil penalties: the appropriateness of the penalty to the size of the business of the operator charged, the operator's history of violations, whether the operator was negligent, the gravity of the violation, the operator's good faith in coming into compliance, and the effect of the penalty on the operator's ability to remain in business.⁴⁵ MSHA has established a point system for the first four of these factors with increasing penalties for higher scores.⁴⁶ The final penalty is reduced by 10 percent if the mine operator timely abates it and can be further reduced if the amount of the fine threatens the operator's ability to remain in business.⁴⁷ The total number of points then maps onto a scale that assigns a dollar value for each level.⁴⁸

2. *The Office of Foreign Assets Control*

The Office of Foreign Assets Control, a component of the Department of Treasury, enforces economic sanctions targeted at selected countries and organizations by prohibiting trade with those countries and organizations and freezing assets in the United States belonging to them. OFAC has the authority to impose civil penalties on individuals and entities that violate its regulations.⁴⁹ In 2009, OFAC issued a final rule establishing a set of Enforcement Guidelines delineating how it intended to calculate civil penalties.⁵⁰

The process starts with an examination of eleven "General Factors" relating to the violation to determine whether a civil pen-

44. See Diver, *supra* note 4, at 1447 (describing the penalty system then in place).

45. 30 U.S.C. § 820(i) (2006).

46. See 30 C.F.R. §§ 100.1-100.4 (2011).

47. See *id.*

48. See 30 C.F.R. § 100.3.

49. See, e.g., 31 C.F.R. § 501.701 (2011).

50. See *id.* app. A.

alty is appropriate.⁵¹ Once OFAC decides to seek a penalty, the penalty depends on three factors: whether OFAC views the violation as “egregious,” whether the violation was self-reported, and the value of the underlying transaction.⁵² The penalty for self-reported, nonegregious violations is one-half the value of the transaction, whereas an identical violation that was not self-reported is penalized at an amount for the “applicable schedule,” which produces a penalty that is moderately larger than the value of the transaction.⁵³ Egregious violations are punished either at the statutory maximum or at half the statutory maximum, depending on whether they are self-reported.⁵⁴ In cases in which the violator cooperates with OFAC but does not receive credit for self-reporting, the violation can be reduced 25 to 40 percent.⁵⁵ First-time violators are also entitled to a 25 percent reduction.⁵⁶

3. *The Nuclear Regulatory Commission*

The Nuclear Regulatory Commission can impose civil penalties for violations of the Atomic Energy Act and related regulations.⁵⁷ The NRC uses a multistage approach to penalty calculation.⁵⁸ Base civil penalties depend on two factors: the severity level of the violation and the identity of the entity to be penalized.⁵⁹

Violation Severity Levels are determined on a case-by-case basis, but the NRC has set out a long list of example violations, broken

51. The enumerated factors are: (A) the willfulness or the recklessness of the violation; (B) the actual knowledge of the violation; (C) harm to the sanctions program objectives; (D) the individual characteristics of the violator; (E) the existence of a compliance program; (F) the target’s remedial response to the violation; (G) cooperation with the investigation; (H) timing of the violation; (I) other enforcement action; (J) the deterrent effect of the sanction; and (K) other factors that might be relevant on a case-by-case basis. *Id.*

52. *Id.*

53. *See id.* For instance, for transactions between \$1,000 and \$10,000, the penalty is \$10,000 whereas for transactions between \$10,000 and \$25,000, the penalty is \$25,000. *Id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See* 42 U.S.C. § 2282 (2006).

58. NUCLEAR REGULATORY COMM’N, NRC ENFORCEMENT POLICY 16 (2011), <http://pbadupws.nrc.gov/docs/ML0934/ML093480037.pdf> [hereinafter NRC ENFORCEMENT POLICY].

59. *Id.* at 70.

down by substantive categories of violation types⁶⁰ that fall in each of the four Severity Levels.⁶¹ The NRC has explained that risk determines the Severity Levels. Severity Levels I and II generally involve violations that “resulted in or could have resulted in serious [or significant] safety or security consequences.”⁶² At the low end, Severity Level IV violations result “in no or relatively inappreciable potential safety or security consequences.”⁶³

The second consideration in the penalty calculation is the identity of the program to be penalized, ranging from a high of \$140,000 for power reactors to a low of \$7,000 for research reactors, academic users, medical users, and other small material users.⁶⁴ These penalties are then modified by the severity level of the violation, with violations of Severity Level I leading to a base civil penalty amount of 100 percent of that set for the program of that size, whereas violations of Level II and III are 80 percent and 50 percent of those levels, respectively.⁶⁵

Once the base penalty determination has been made, the NRC then examines four additional factors in setting the penalty amount: prior history, credit for identification, credit for corrective action, and circumstances warranting a discretionary adjustment to the penalty.⁶⁶ First, in cases involving a nonwillful Severity Level III violation, the NRC considers whether there has been a recent enforcement action against the licensee.⁶⁷ Next, the Commission

60. *See id.* at 8. The substantive categories are Reactor Operations; Fuel Cycle Operations; Materials Operations; Licensed Reactor Operators; Facility Construction; Emergence Preparedness, Health Physics, Transportation, Inaccurate and Incomplete Information or Failure to Make a Required Report; Discrimination, Reactor, Independent Spent Fuel Storage Installation, Fuel Facility, and Special Nuclear Material Security, Materials Security; Information Security; and Fitness for Duty. *Id.* at 33-64.

61. *Id.* at 10. Violation Severity Levels range from I (the most serious) to IV (the least serious), but the NRC has indicated that Level IV violations are not normally subject to civil penalties. *See id.* at 70.

62. *Id.* at 10.

63. *Id.*

64. *See id.* at 70. The NRC also has a separate penalty for loss, abandonment, or improper transfer or disposal of material. *See id.*

65. *See id.* at 70.

66. *See id.* at 16-22.

67. *See id.* at 16. Specifically, the Commission looks to whether this is the first nonwillful Severity Level III violation within the last two years or two inspections, whichever is longer. *Id.*

considers whether the licensee identified the violation or if it came to light as a result of Commission action or as a result of a system event.⁶⁸ If either the licensee receives credit for identification or the violation was not willful and no greater than Severity Level III, the licensee will receive either no penalty or the base penalty, depending on whether there is credit for corrective action.⁶⁹ If the licensee does not receive credit for identifying the problem and the violation was Severity Level I, II, or a willful Severity Level III violation, the licensee will receive either the base civil penalty or twice the base penalty, depending on whether there is credit for corrective action.⁷⁰ Finally, the NRC decides whether there should be a discretionary adjustment of the penalty.⁷¹

4. *The Federal Communications Commission*

The 1934 Communications Act established the Federal Communications Commission and charged it with providing non-discriminatory access to “rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”⁷² The FCC imposes two different types of civil penalties under two slightly different statutory structures. First, penalties authorized generically by section 503 of the Communications Act have a statutory maximum.⁷³ For these penalties, base penalties are set for a wide range of potential violations. For example, the base penalty for transmission of indecent or obscene materials is set at \$7,000, whereas the penalty for exceeding power limits starts at \$4,000.⁷⁴ Second, other statutes authorize penalties in fixed amounts, which are then subject to mitigation.⁷⁵ Both types are then subject to adjustment according to factors

68. *See id.* at 16-17.

69. *See id.*

70. *See id.*

71. *See id.* at 22.

72. 47 U.S.C. § 151 (2006).

73. *See* 47 U.S.C. § 503 (2006). FCC civil penalties are called “forfeitures” as a result of the language of the governing statute. *See id.*

74. *See* 12 FCC Rcd. 17,087, 17,113-14 (1997).

75. *See id.* at 17,117.

described in the FCC rules.⁷⁶ Upward adjustment criteria include egregious misconduct, ability to pay/relative disincentive, whether the violation was intentional, the presence of substantial harm, prior violations of FCC requirements, substantial economic gain, and repeated or continuous violations.⁷⁷ Downward adjustment criteria include whether the violation was minor, whether the violation was in good faith or was disclosed voluntarily, a history of overall compliance, and an inability to pay.⁷⁸ Although the FCC had previously provided specific guidance in evaluating these factors, the current version of the FCC guidelines does not provide weights for increasing or reducing the base penalty.

D. Why Agencies Say They Punish

Before engaging in a detailed analysis of these penalty policies, it is worth examining the stated justifications that agencies provide. All four agencies emphasize consequentialism, rather than retribution, when describing their enforcement approach.⁷⁹

76. *See id.*

77. *Id.* at 17,116. “Relative disincentive” is the phrase the FCC uses to capture the notion that the same penalty is felt differently by different entities.

78. *Id.*

79. These agencies are not alone. The SEC, the Department of the Interior, the Commodity Futures Trading Commission, and the EPA all explicitly focus their use of civil penalties on deterrence, not retribution. *See* Gordon, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (Mar. 16, 1993); Premex, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,892-93 (Feb. 17, 1988); Department of Interior Interim Rule Relating to Native American Graves Protection and Repatriation Act Regulations—Civil Penalties, 62 Fed. Reg. 1820, 1821 (Jan. 13, 1997) (“Civil penalty amounts will be calculated to ensure compliance and not as retribution.”); ENVTL. PROT. AGENCY, POLICY ON CIVIL PENALTIES 1 (1984); James D. Cox & Randell S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 751 (2003) (discussing central role of deterrence in SEC enforcement). I am aware of one agency that has indicated that it might consider retribution as a legitimate goal of its civil penalty policy. In 2003, the Federal Trade Commission issued a policy statement on equitable remedies in competition cases and drew a distinction between disgorgement and civil penalties based on the differing goals of these sanctions. “[D]isgorgement is an equitable remedy whose purpose is simply to remove the unjust gain of the violator. Penalties are intended to punish the violator and reflect a different, additional calculation of the amount that will serve society’s interest in optimal deterrence, retribution, and perhaps other interests.” Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,823 (2003).

First, both of the primary enforcement documents the NRC has promulgated emphasize deterrence.⁸⁰ The NRC Enforcement Manual specifically disavows retribution as a goal,⁸¹ and the NRC Enforcement Policy⁸² states that it “endeavors to ... [d]eter noncompliance by emphasizing the importance of compliance with NRC requirements [and] [e]ncourage prompt identification and prompt comprehensive correction of violations of NRC requirements.”⁸³ More specifically, the NRC explicitly identifies these goals as the reason for imposing civil penalties.⁸⁴

NRC civil penalty cases reinforce these policy statements. In *Atlantic Research Corp.*, the NRC interpreted its governing statute to impose a requirement that penalties serve nonretributive ends:

From the standpoint of the imposing authority the penalty is “remedial” if it aims to improve conduct and is not motivated solely by a desire to inflict punishment for its own sake, *i.e.*, as retribution. Whenever the conduct-affecting motive is present, a civil penalty is “remedial” and there should not be any semantic limitation on the NRC's power to impose it.⁸⁵

Subsequent decisions have continued to reject retribution as a goal.⁸⁶

Similarly, in rulemakings setting out its civil penalties, MSHA has always relied heavily on consequentialist rationales for its civil

80. See NRC ENFORCEMENT POLICY, *supra* note 58, at 3 (broadly detailing the NRC policies on enforcement); NUCLEAR REGULATORY COMM'N, NRC ENFORCEMENT MANUAL (2010), <http://www.nrc.gov/about-nrc/regulatory/enforcement/guidance.html#manual> (providing guidance to NRC staff in the implementation of the Enforcement Policy).

81. NUCLEAR REGULATORY COMM'N, *supra* note 80, at 4-53 to -54 (“The purpose of a civil penalty is not retributive, but remedial, and should: (1) Encourage licensees to take effective and lasting corrective actions to avoid future problems by being in compliance; and (2) Create a deterrent that will prevent future violations, both for the individual licensee and for other, similar licensees.”).

82. The NRC penalty calculation method is laid out in the NRC ENFORCEMENT POLICY, *supra* note 58, at 14-22.

83. *Id.* at 5.

84. See *id.* at 16-20 (noting the goals of civil penalties as encouraging identification and correction of violations, achieving deterrence, and focusing licensee attention on significant violations).

85. 11 N.R.C. 413, 421 (1980).

86. See *Tenn. Valley Auth.*, 60 N.R.C. 160, 216 (2004); *Hurley Med. Ctr.*, 25 N.R.C. 219, 239 (1987); *Duke Power*, 21 N.R.C. 1759, 1773 & n.9 (1985).

penalties.⁸⁷ MSHA has specifically focused on the legislative history of the Mine Act, which clearly indicates that deterrence represents one of the central goals of Congress, and has emphasized language that appears to set out a notion of complete deterrence, instructing that penalties be set at a level sufficient to strip away the gain from the violation:

Increasing penalties is consistent with Congress's intent that penalties "be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."⁸⁸

In the same rulemaking, MSHA noted related language from the Supreme Court implicitly assuming that the deterrent value of civil penalties provides the primary justification for imposing them.⁸⁹

87. *See, e.g.*, Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592, 13,593 (Mar. 22, 2007) (codified at 30 C.F.R. pt. 100) ("MSHA's experience shows that penalties are an important tool in reducing fatalities, injuries, illnesses, and violations."); Criteria and Procedures for Proposed Assessment of Civil Penalties, 71 Fed. Reg. 53,054, 53,056 (Sept. 8, 2006) (codified at 30 C.F.R. pt. 100) ("The Congress intended that the imposition of civil penalties would induce mine operators to be proactive in their approach to mine safety and health, and take necessary action to prevent safety and health hazards before they occur. In this proposal, the Agency is strengthening the civil penalty assessment regulations which will be an important tool in the reduction of fatalities and improvement in miner safety and health."); Civil Penalties for Violations of the Federal Mine Safety and Health Act of 1977, 43 Fed. Reg. 23,514, 23,515 (May 30, 1978) (codified at 30 C.F.R. pt. 100) ("[W]hile Congress did not want excessive penalties levied against noncoal operators, it also was concerned that, as a whole, penalties were too low to be an effective deterrent of unsafe or unhealthful conditions or practices.").

88. Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. at 13,593 (quoting S. REP. NO. 95-181, at 41 (1977)); *Sec'y of Labor v. Davis Coal*, 2 FMSHRC 619, 625 (1980) (quoting same language); *see also* Criteria and Procedures for Proposed Assessment of Civil Penalties, 71 Fed. Reg. at 53,055 ("The intended purpose of civil penalties under the Mine Act is to 'convince operators to comply with the Act's requirements.'" (quoting S. REP. NO. 95-181, at 45 (1977))).

89. *See* Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. at 13,593 (citing *Nat'l Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976)) ("A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.").

Like MSHA and the NRC, the FCC rulemakings outlining its system of guidelines for calculating civil penalties⁹⁰ emphasize deterrence:

We believe that the increases in our forfeiture authority as well as the accompanying legislative history of our forfeiture authority support our determination that forfeiture amounts should be set high enough to serve as a deterrent and foster compliance with our rules.⁹¹

The FCC has included language suggesting it favors a complete deterrence approach preventing entities from benefiting from violations. For instance, the FCC noted that “we intend to take into account the subject violator’s ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business.”⁹²

Finally, unlike the other agencies, OFAC has included some language recognizing retribution as a potential goal of civil penalties. In responding to a comment endorsing a *purely* retributive approach to penalties, OFAC noted that punishment has multiple purposes.⁹³ Like the other agencies, however, OFAC repeatedly identifies deterrence as the central goal of its civil penalty system in enforcement of economic sanctions: “Penalties, both civil and criminal, serve as a deterrent to conduct that undermines or

90. See 47 C.F.R. § 1.80(b)(4) (2011). This rulemaking readopted a penalty system previously promulgated by policy statement and struck down by the D.C. Circuit. See Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd. 4,695 (1991), *rev’d* U.S. Tel. Ass’n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994).

91. 12 FCC Rcd. 17,087, ¶ 19 (1997); see also *id.* ¶ 20 (discussing differences in deterrent impact of penalties on entities of different sizes). The FCC does recognize that a second goal of penalties is to serve as a “meaningful sanction when violations occur.” *Id.* ¶ 19. Although this could be read as retributive, the agency seemed to be drawing a distinction between specific and general deterrence. See *id.* (quoting a House report that identifies the goals as “a meaningful sanction to the wrongdoers and a deterrent to others”).

92. *Id.* ¶ 24; see also *id.* ¶ 31 (“Licensees must strive to comply with rules. [Warning letters] could invite some licensees to commit first-time violations with impunity.”).

93. See Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,599 (Nov. 9, 2009) (codified at 31 C.F.R. pt. 501) (“OFAC rejects this argument [that OFAC’s enforcement response should focus solely on the Subject Person’s culpability], as the purpose of enforcement action includes raising awareness, increasing compliance, and deterring future violations, and not merely punishment of prior conduct.”).

prevents ... sanctions programs from achieving their various goals.”⁹⁴

II. CIVIL PENALTIES IN THE ADMINISTRATIVE STATE: THEORY AND PRACTICE

As outlined above, the basic approach to deterrence involves setting penalties such that the expected value of the fine ensures that violators either bear the costs they impose or are deprived of any gains from misconduct.⁹⁵ These basic models are subject to a large number of extensions and modifications. The literature on the law and economics of punishment has often looked at administrative agencies and proposed modifications to their enforcement regimes to better achieve the goals of deterrence with respect to the probability of detection,⁹⁶ the credit for self-reporting and remediation,⁹⁷ the harm resulting from the violation,⁹⁸ the costs of enforcement,⁹⁹ and the decision not to seek penalties at all.¹⁰⁰ In all

94. Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51,933, 51,934 (Sept. 8, 2008) (codified at 31 C.F.R. pt. 501); *see also* Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,594 (Nov. 9, 2009) (codified at 31 C.F.R. pt. 501); 31 C.F.R. § 501 app. A (2011) (noting the agency will examine the impact of the action “on promoting future compliance with U.S. economic sanctions” by the same and other entities in setting the final penalty level).

95. *See* discussion *supra* Part I.A.

96. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 742-44 (1997) (examining environmental audit policies in the context of optimal deterrence); David A. Dana, *The Perverse Incentives of Environmental Audit Immunity*, 81 IOWA L. REV. 969, 978-92 (1995) (discussing how the probability of detection factors into corporate decisions of regulatory compliance along with audit immunity implications); Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 594-605 (2006) (arguing for alteration of tax policies to structure penalties to inherently account for the probability of detection).

97. *See* Alexander Pfaff & Chris William Sanchirico, *Big Field, Small Potatoes: An Empirical Assessment of EPA’s Self-Audit Policy*, 23 J. POL’Y ANALYSIS & MGMT. 415, 418, 426-27 (2004).

98. *See* Cox & Thomas, *supra* note 41, at 763 (analyzing the role of investor losses in SEC enforcement actions).

99. *See* Robert J. Jackson, Jr. & David Rosenberg, *A New Model of Administrative Enforcement*, 93 VA. L. REV. 1983, 1985 (2007) (discussing improved audit techniques to achieve equivalent deterrence at equal cost).

100. *See* P. Fenn & C.G. Veljanovski, *A Positive Economic Theory of Regulatory Enforcement*, 98 ECON. J. 1055, 1066-68 (1988) (examining decisions not to impose penalties in the context of workplace health and safety enforcement in the United Kingdom).

of the extensions, though, the core of the model remains the same. Penalties are largely shaped by gain, harm or risk of harm, and the probability that the penalty will be imposed.

This observation is far from novel. Agencies are aware of this literature and routinely cite it.¹⁰¹ More significantly, the Administrative Conference of the United States (ACUS), the independent agency designed to foster improved agency practice, made a broad recommendation to agencies that they adopt a complete deterrence approach:

A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection.¹⁰²

Agencies have often cited to the ACUS recommendations on civil penalty determinations in setting their specific policies on civil penalties.¹⁰³

101. For example, as early as 1986, the Federal Trade Commission commissioned an academic study of optimal penalty calculation that relied on the academic literature. See John Nash, *Optimal Civil Penalties* 30 (Fed. Trade Comm'n, Working Paper No. 138, 1986), available at <http://www.ftc.gov/be/workpapers/wp138.pdf>. In addition, a range of agencies have cited Gary Becker's seminal article, *Crime and Punishment*, *supra* note 16, and its basic results about harm and the probability of detection. See, e.g., Registration Under the Advisers Act of Certain Hedge Fund Advisers, 69 Fed. Reg. 72,054, 72,062 n.88 (Dec. 10, 2004) (codified at 17 C.F.R. pts. 275, 279) (SEC Final Rule); New Entrant Safety Assurance Process, 73 Fed. Reg. 76,472, 76,481 n.10 (Dec. 16, 2008) (codified at 49 C.F.R. pts. 365, 385, 387, 390) (FMCSA Final Rule). The CFTC perhaps came closest to explicitly adopting a complete deterrence approach to penalties. See GNP Commodities Inc., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 (Aug. 11, 1992) (asserting penalties must strip away the gain from violations and be enhanced to compensate for undetected violations). But the agency was reversed on appeal, see *Monieson v. CFTC*, 996 F.2d 852, 864-65 (7th Cir. 1993), and subsequent efforts to adopt an approach based purely on theories of economic deterrence never achieved a majority vote of the Commissioners. See *Saryk*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,826 at 56,456-62 (July 22, 2004) (Brown-Hruska, Comm'r, concurring in part, dissenting in part); *R&W Tech Services*, [2003-2004 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,556 at 55, 392-96 (Aug. 6, 2003) (same).

102. 1 C.F.R. § 305-79.3 (1995), available at <http://www.law.fsu.edu/library/admin/acus/305793.html>. The recommendations of the Administrative Conference were traditionally published in the CFR, but the practice ceased with the 1995 defunding of ACUS.

103. See Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3,337, 3,370 (proposed Jan. 22, 1997) (codified at 20 C.F.R. pt. 726); Compliance and Enforcement Procedures Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 30,584, 30,587 (proposed July 9, 1992) (codified at 25 C.F.R. pt. 575); 6 FCC Rcd.

Very different concerns shape retributive penalties. Unlike the forward-looking approach of deterrence, retribution is backward-looking, focusing on the violator and his conduct. Punishment is imposed because a wrongdoer deserves it, not to achieve some broader external goal.¹⁰⁴ Retributivism, of course, is not one theory, but many.¹⁰⁵ For my purposes, two primary theories matter. First, normative theories of desert examine how entities *should* be punished.¹⁰⁶ Second, theories of empirical desert consider how individuals impose punishment in experimental contexts.¹⁰⁷ From a normative standpoint, I intend to emphasize aspects of retributivism that, in my view, are widely shared across different theories: proportionality and moral blameworthiness. Punishment is acceptable only to the extent that it is proportionate to desert.¹⁰⁸ Wrongdoers who deserve more punishment must receive more punishment, and moral blameworthiness makes one defendant deserve more punishment than another.¹⁰⁹ Additionally, where such data are available, I will particularly compare civil penalty policies to the results of the literature relating to empirical desert.

The central argument of this Section is that, proceeding from these basic frameworks, systems of penalties that are primarily

4,695, 4,695 (1991) (FCC civil penalty policy).

104. See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 104 (1997); Lawrence Alexander, *The Doomsday Machine: Proportionality, Punishment and Prevention*, 63 *MONIST* 199, 199-202 (1980); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 *VA. L. REV.* 677, 700 (2005).

105. How many theories is even a matter of some debate. Compare John Cottingham, *Varieties of Retribution*, 29 *PHIL. Q.* 238, 238 (1979), with Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 146 (2008).

106. See, e.g., Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 *WM. & MARY L. REV.* 1831, 1832, 1834 (2007).

107. See *id.* at 1832, 1834-35.

108. See, e.g., Lee, *supra* note 104, at 700; Alice Ristroph, *How (Not) To Think Like a Punisher*, 61 *FLA. L. REV.* 727, 738-39 (2009); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, in 16 *CRIME & JUST.* 55, 56 (Michael Tonry ed., 1992).

109. See, e.g., Kyron Huigens, *Rethinking the Penalty Phase*, 32 *ARIZ. ST. L.J.* 1195, 1203 (2000); Lee, *supra* note 104, at 710 & n.155; Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 *DUKE L.J.* 263, 279 (2005) (“A principle of just deserts can, but need not, demand proportionality between *offense* and sanction; what the principle really demands is a correspondence between *desert* and sanction.”); Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 *CONN. L. REV.* 109, 120 (2008).

focused on deterrence can be distinguished from systems that emphasize retribution. In particular, I will look at several factors that play a role in administrative punishment and try to classify them according to the theory of punishment they primarily serve. Foremost among these are the probability the violation will be detected and punished, the harm or the risk of harm resulting from the violation, the gain from the misconduct, the history of the entity committing the violations, the size or wealth of the entity committing the violation, and the mental state of the entity committing the violation. To a large degree, of course, most of these could matter for theories of deterrence and retribution. However, different theories of punishment require different emphases in setting penalties, and the extent to which each of these factors receives attention in the penalty calculation will help determine which theory of punishment the system is serving.

A. Harm, Gain, and the Probability of Detection

1. The Theory

The standard economic analysis outlined in Part I above leads to the straightforward conclusion that in a system of administrative penalties designed to achieve optimal deterrence, the probability of detection and the harm from the violation—or in the case of risk regulation, the expected harm—should lie at the center of the penalty calculation.¹¹⁰ Other factors may matter, but these two aspects should dominate. Similarly, in a system of complete deterrence, the gain to the violator and the probability of detection should be the primary focus in penalty determinations.¹¹¹ Notably, the emphasis on these factors is largely exclusive. For an optimal deterrence model, gain is essentially irrelevant. An optimal deterrence model assumes that some violations should take place and only those violations in which the costs exceed the benefits should be deterred.¹¹² As a result, only the harm, not the gain, plays a role in the penalty determination. Although the size of the offender's

110. See *supra* notes 13-17 and accompanying text; *supra* note 19.

111. See *supra* notes 18-19 and accompanying text.

112. See *supra* notes 16-17 and accompanying text.

benefit from the violation will determine whether or not it occurs, the offender's benefit does not have an impact on the size of the penalty. In contrast, in a complete deterrence approach, harm is largely irrelevant.¹¹³ As long as the offender does not benefit, the harm will not occur.

Moreover, harm and gain should not simply matter abstractly by merely increasing penalties as harm and gain increase. They need to be calibrated more precisely to ensure that the offenders do not earn net benefits or impose net costs. For example, systems of complete deterrence cannot simply impose a rule of "more punishment for greater gains." Instead, such systems must try to determine how much the offender benefited by breaking the rule.

In a retributive system, these factors play a different role. As noted above, detection probability is irrelevant to retribution.¹¹⁴ Desert-oriented punishment gives no reason to incorporate the likelihood of a punishment into the calculation of its size. Indeed, normative theories of desert should affirmatively reject including this probability as a factor in the punishment calculation. Because the probability of detection is effectively independent of the extent of a violator's wrongdoing, altering the punishment on this basis is very likely to undermine the basic principle of proportionality underlying retributivist theories.¹¹⁵

The literature on empirical desert reinforces this theoretical result. Numerous experimental studies have demonstrated that individuals place little or no importance on the probability that the defendant's conduct will be detected and punished. Study participants do not adjust penalty amounts based on the probability of the misconduct being detected.¹¹⁶ Similarly, when asked about the appropriateness of considering the probability of detection in the context of punitive damages and regulatory enforcement, overwhelming majorities of those surveyed rejected the optimal

113. See *supra* notes 18-19 and accompanying text.

114. See *supra* note 103 and accompanying text.

115. See Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 73-74 (1980) (describing this result as "anathema" to retributivists).

116. See, e.g., Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 243 (2000). Even when the probability of detection varied from 1 in 100 to 1 in 5 (a factor of 20), there was no statistically significant difference in the penalty imposed by mock jurors. See *id.* In fact, although not statistically significant, cases involving a higher probability of detection produced slightly *higher* damage awards. See *id.*

deterrence approach.¹¹⁷ A 2009 study of both members of the public at large and Israeli judges found similar results: virtually no relationship exists between the probability of detection and the penalties imposed, even though participants expressed a stated desire to implement a deterrence rationale.¹¹⁸

Whether the outcomes of misconduct—the harm to the public or the gain to the wrongdoer—should matter for theories of retribution is sharply debated.¹¹⁹ A well-respected, and arguably dominant, retributive position is purely intent-based.¹²⁰ Outcomes do not matter and only the culpable mental state of the violator should determine the existence or the amount of punishment.¹²¹ To be sure, the harm wrongfully *risked* plays a crucial role in determining culpability.¹²² Everyone adopting a retributivist position would agree that intentionally risking more significant harm enhances the defendant's culpability compared to conduct that is less risky.¹²³ From the perspective of harm-irrelevant retributivists, however, the final outcome itself is merely the result of “moral luck,” independent of the culpability itself.¹²⁴

Although this is a common retributivist position, it is not the only one. Other retributivists argue that outcomes can matter to culpability.¹²⁵ Conduct that risks harm is punishable, but to a lesser

117. See *id.* at 245-46.

118. See Jonathan Baron & Ilana Ritov, *The Role of Probability of Detection in Judgments of Punishment*, 1 J. LEGAL ANALYSIS 553, 580-82 (2009). Baron and Ritov found that individuals do not take probability into account when setting penalties, even though a substantial number of their survey participants indicated that it was an appropriate consideration and they were able to induce a minority of those surveyed to consider probability under certain circumstances. See *id.* at 580-81. The authors suggest that this result indicates that jurors may not be disinterested in deterrence but are simply inattentive to it. See *id.* at 582.

119. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 472-74 (1978) (asserting that relevance of actual harm is a “deep, unresolved issue”).

120. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 171 (2009); FLETCHER, *supra* note 119, at 472; MOORE, *supra* note 104, at 193-95 (describing harm irrelevance as the “standard educated view”).

121. See sources cited *supra* note 120.

122. See, e.g., MOORE, *supra* note 104, at 193.

123. See, e.g., ALEXANDER & FERZAN, *supra* note 120, at 47 & n.38.

124. See, e.g., *id.* at 188-91 (“Bad luck ... cannot affect our culpability.”).

125. See MOORE, *supra* note 104, at 193; Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 267 (1994); see also Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CALIF. L. REV. 791, 792 (2000); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*,

extent than conduct that leads to an undesirable outcome that actually occurs.¹²⁶ Even for these scholars, though, outcomes take a back seat in culpability determinations.¹²⁷ From this perspective, as Michael Moore has noted, actual harm is something of a “poor relation” because culpability is both necessary and sufficient for punishment, whereas harm is neither.¹²⁸

Although the importance of outcomes is an open question in the philosophical literature, the literature on empirical desert has an answer. Harm matters for the public at large. Experimental studies find that, when asked to punish, test subjects are strongly motivated by the outcome of the misconduct.¹²⁹ Behavior that causes harm is punished more severely than conduct that does not, and punishment increases as the magnitude of the harm increases.¹³⁰

2. *The Practice*

Consistent with a retributivist approach, the enforcement probability is entirely absent from the process of calculating penalties for every agency. Similarly, with the limited exceptions discussed below, gain is largely irrelevant to the penalty determination for all four agencies. All other things being equal, extremely lucrative and difficult-to-detect rule violations are punished no more severely than those in which compliance with the rule is cheap and violations are always punished. Perhaps equally important, no agency tries to quantify gain or harm to ensure that the penalty is as least as great as the estimated financial benefit from the violation or an approximation of the harm caused or risked by the violation. Such a calculation, although difficult, is central to any deterrence-oriented approach to punishment.¹³¹

in PHILOSOPHY AND THE LAW OF TORTS 72, 76 (Gerald J. Postema ed., 2001).

126. See, e.g., MOORE, *supra* note 104, at 280-81.

127. See, e.g., *id.* at 193.

128. See *id.*

129. See, e.g., Carlsmith, *On Justifying Punishment*, *supra* note 27, at 133-34.

130. See, e.g., *id.*; Carlsmith et al., *Why Do We Punish?*, *supra* note 26, at 288, 296.

131. I am aware of one agency that does take such an approach to punishment. The EPA sets penalties in a manner designed to ensure that the penalty is greater than the gain to the violator from the misconduct by including a “benefit component” in the calculation of the penalty amount. See ENVTL. PROT. AGENCY, *supra* note 79, at 3-4. Even the EPA, though, does not enhance the penalty by the probability of detection. See *id.* at 3-6.

Although the gain and the probability of detection of the violation are absent from the penalty determination, harm and the risk of harm are strongly considered. In the MSHA scheme, the potential total of eighty-eight penalty points available for “gravity” is the largest single category considered in the penalty determination.¹³² The penalties do not, however, appear to move in a manner consistent with a theory of optimal deterrence. As discussed above,¹³³ were MSHA trying to apply notions of optimal deterrence, the risk of harm should turn on an expected value calculation, increasing the penalties for gravity linearly in both the probability of the outcome and the harm. In fact, the *probability* of the outcome is extremely important in determining the ultimate penalty, whereas the *severity* of the outcome itself is relatively unimportant.¹³⁴ For example, the likelihood of occurrence includes five levels of probability, ranging from no “likelihood of occurrence” to “occurred,” each reflecting a ten-point increase in the number of penalty points assigned, producing a total range of zero to fifty.¹³⁵ In contrast, severity scores range from only zero to twenty, even though the lowest category of severity is “no lost work days” whereas the highest category covers fatal injuries.¹³⁶

More noticeably, the penalties increase quite slowly as the number of potential victims increases. For example, a violation that would affect ten or more victims receives only seventeen more penalty points than a violation that would affect only one victim.¹³⁷ In contrast, there is a twenty-point increase in penalty points if the outcome is “reasonably likely” rather than “unlikely,” reflecting a one-level increase in the likelihood of occurrence.¹³⁸ A one-level increase on a five-level scale can hardly reflect the ten-fold increase in probability necessary to justify the comparison to the increase in the number of victims if the agency were trying to engage in a pure expected loss calculation.

132. See 30 C.F.R. § 100.3(e) (2011).

133. See *supra* note 17.

134. See 30 C.F.R. § 100.3(e).

135. *Id.* § 100.3(e) (tbl. XI).

136. *Id.* § 100.3(e) (tbl. XII).

137. *Id.* § 100.3(e) (tbl. XIII).

138. *Id.* § 100.3(e) (tbl. XI).

Like MSHA, the NRC heavily emphasizes the role of harm and risk in setting penalties.¹³⁹ This emphasis is reflected in the NRC examples setting the base severity levels. For instance, in the category of Reactor, Independent Spent Fuel Storage Installation, Fuel Facility, and Special Nuclear Material Security, Severity Level I violations involve the theft, diversion, or sabotage of a significant quantity of “special nuclear material” (SNM) or certain other radioactive materials.¹⁴⁰ Level II events include the loss, destruction, theft, diversion, or radiological sabotage of a smaller quantity of SNM.¹⁴¹ Level III events include an insider attempting an act of radiological sabotage and various failures of licensees to safeguard against unauthorized access.¹⁴² Severity Level IV violations, finally, include a failure of a licensee security or insider mitigation program resulting in an attempted act of radiological sabotage and a loss of SNM of low strategic significance.¹⁴³ These Severity Levels increase as the level of nuclear material involved increases or as an unauthorized person’s access comes closer to causing harm. In that way, they quite reasonably draw strong distinctions between levels of conduct posing risk of harm. They bear little or no relation, however, to the probability of the violation being detected¹⁴⁴ or the benefit the regulated entity derives by saving on the costs of compliance.

OFAC also places harm at the center of the enforcement program.¹⁴⁵ Setting the penalty based on the value of the underlying

139. The NRC has one category of violations in which the base penalty does relate to gain. For loss of certain types of material, the base penalties are set at a level to reflect three times the average cost of disposal of the material. *See* NRC ENFORCEMENT POLICY, *supra* note 58, at 70 n.3. This guarantees that entities will not benefit by “misplacing” material rather than disposing of it properly. However, the presence of this consideration for one type of base penalty simply highlights its absence elsewhere.

140. SNM includes enriched uranium-235, uranium-233, and plutonium. *See* 10 C.F.R. § 73.2 (2011) (defining the regulatory term “formula quantity” to mean “strategic special nuclear material in any combination in a quantity of 5000 grams or more computed by the formula, grams = (grams of U-235) + 2.5 (grams U-233 + grams plutonium)”).

141. *See* NRC ENFORCEMENT POLICY, *supra* note 58, at 57.

142. *See id.* at 57-58.

143. *See id.* at 58.

144. Indeed, the theft or loss of a greater quantity of material is probably *more* likely to be detected than the theft or loss of a smaller quantity.

145. *See* 31 C.F.R. § 501 app. A (2011) (expressing actual or potential harm to sanctions program objectives as a factor affecting administrative action).

transaction can be viewed as an attempt to measure either the harm or the gain from the transaction, but it is not a perfect measure of either for every OFAC violation. In the context of OFAC violations, the harm is best seen as the benefit of the transaction to the sanctioned party whereas the gain is the profit from violation.¹⁴⁶ In cases involving violations of export restrictions, this profit is certainly less than the face value of the transaction, whereas the harm could be much greater. For example, in cases involving the export of military technology that would otherwise be difficult or impossible to obtain, the harm from the violation is likely to be much larger than the transaction value. For other violations, though, the fit between transaction value and harm is much tighter. For instance, OFAC can freeze assets belonging to target countries or individuals.¹⁴⁷ In cases in which a financial institution releases frozen funds to a sanctioned entity, the value of those funds is likely to reflect the harm, at least if the harm is viewed as the value of the transaction to the sanctioned entity. In contrast, for these violations, the gain to the financial institution committing the violation may be a small fraction of the value of the transaction, if effectively nonexistent.

Finally, in setting the base penalty levels, the FCC also emphasizes the potential harm from the violation as the central consideration: “Consistent with our policy of protecting the public and ensuring the availability of reliable, affordable communications, we based the guidelines on the degree of harm or potential for harm that may arise from the violation.”¹⁴⁸ Conduct that merely risks harm is punished less severely than conduct that causes the undesired outcome.¹⁴⁹ For example, actual interference with a

146. OFAC recognizes the connection between transaction value, harm, and benefit. *See id.* (noting that in cases where the transaction value is uncertain, it will look at, among other factors, the economic benefit to the violator and the benefit to the sanctioning party).

147. *See, e.g.*, 31 C.F.R. § 515.201 (2011) (freezing Cuban assets); 31 C.F.R. § 560.201 (2011) (freezing Iranian assets).

148. The Commission’s Forfeiture Policy Statement and the Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Rcd. 17,087, ¶ 20 (1997). The FCC does identify gain in one portion of the penalty process. “Substantial economic gain” is listed as a criterion for enhancing the civil penalty. *Id.* app. A. Notably, though, the increase is not tied to the specific amount of the gain, and the agency does not explicitly indicate that it is making an effort to ensure that there is no net benefit from the misconduct. *See id.*

149. *See* 47 C.F.R. § 1.80 (2011).

signal has a base penalty of \$7,000 whereas conduct that merely risks such interference has a base penalty of \$4,000.¹⁵⁰

As is true with the other agencies, the FCC appears indifferent to the probability of detection and punishment. In some ways, the lack of emphasis on the probability of detection is especially notable in the FCC context because of the wide range in detectability of violations the FCC oversees. For example, among other regulatory requirements, the FCC oversees the transmission of obscene and indecent materials.¹⁵¹ Such violations, including the infamous “wardrobe malfunction” at the 2004 Super Bowl,¹⁵² are almost certain to be detected, given that they are by their very nature broadcast widely. By contrast, the FCC also oversees the enforcement of violations that are likely very difficult to detect, including restrictions on the transfer of substantial control of stations and fraud.¹⁵³ Nothing in the policy statement recognizes the variation in the differential ability of enforcement authorities to detect and punish these different types of violations.

B. Mens Rea

1. The Theory

Although harm, gain, and the probability of detection are the central concerns of theories of deterrence, the mental state of the wrongdoer with respect to the wrongful conduct dominates the field for retributivists.¹⁵⁴ A more culpable mens rea increases the wrongfulness of the act and, as a result, the amount of punishment that is deserved. Individuals who knowingly cause harm deserve greater punishment than those inflicting harm merely recklessly. As discussed above, the strongest possible retributivist position with respect to the mental state of the violator is that *only* culpability

150. *See id.*

151. *See* 47 U.S.C. § 303(m)(1)(D) (2011).

152. *See* CBS Corp. v. FCC, 535 F.3d 167, 209 (2d Cir. 2008) (reversing imposition of civil penalty for Super Bowl indecency), *vacated*, 129 S. Ct. 2176 (2009).

153. *See* 47 U.S.C. § 303(m)(1)(F).

154. *See, e.g.,* MOORE, *supra* note 104, at 192; Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 956 (2000) (“The concept of fault, and in particular the notion of mens rea—the conception of fault as an intentional state on the occasion of wrongdoing—is an essentially retributivist idea.”).

should matter and punishment should rest solely on intention rather than outcome.¹⁵⁵

Consistent with this conclusion, experimental results have repeatedly demonstrated that the mental state behind a violation plays a key role in punishment determinations.¹⁵⁶ For example, mock jurors punish corporations for engaging in explicit cost-benefit analyses.¹⁵⁷ Such cost-benefit calculation, of course, is inherent in the classic Learned Hand statement of negligence liability¹⁵⁸ and is also foundational in the notion of optimal deterrence itself. Setting fines at the level of harm as augmented by the probability of detection assumes that firms are going to engage in those risk calculations. Jurors, though, appear to strongly dislike such behavior by defendants.¹⁵⁹ Examples of such punishment have been widely reported in the popular press, most famously in connection with the Ford Pinto, when Ford was seen as having considered the trade-offs between risk and safety and deciding that the costs of fixing the problem were greater than the risk-adjusted benefits of doing so.¹⁶⁰ More formally, study data demonstrate that both the likelihood of punishment and the size of the penalty imposed have increased significantly when defendants have conducted such risk analyses.¹⁶¹

Although culpability is easy to categorize for retributivists, deterrence theories have struggled to find an appropriate role for mens rea to play in the penalty determination.¹⁶² As an initial matter, a cost-internalization approach assumes that violators might consciously break the rules, because under some circumstances the benefit from the violation might exceed the costs. In those cases, it makes little sense to enhance punishment for more culpable mental states.

155. See ALEXANDER & FERZAN, *supra* note 120, at 171.

156. See, e.g., Carlsmith, *supra* note 27, at 133

157. See W. Kip Viscusi, *Jurors, Judgments, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 119-20 (2001).

158. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d. Cir. 1947).

159. See Viscusi, *supra* note 157.

160. See *id.* at 117-18 (discussing the *Pinto* case).

161. See W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 556-57 (2001).

162. See Claire Finkelstein, *The Inefficiency of Mens Rea*, 88 CALIF. L. REV. 895, 898 (2000) ("On the face of it, the economist has no use for a mental state requirement of any sort.").

On the other hand, the calculation is more complicated when the goal is to deter all violations. I am aware of at least two major articles arguing in favor of a role for mens rea in the economic deterrence literature. Richard Posner, noting that the emphasis on intent in the criminal law is “puzzling to the economist,”¹⁶³ provides three arguments in favor of its incorporation. First, a mens rea requirement might serve as a proxy for calculating the probability of detection, as more culpable mental states may be correlated with attempts to conceal the violation.¹⁶⁴ Second, he argues that mens rea can reflect the violator’s responsiveness to punishment.¹⁶⁵ Violators with a more culpable mental state may demonstrate punishment insensitivity. Finally, Posner views mens rea as a useful tool in identifying what he refers to as “pure coercive transfers,” actions that bypass a functioning market with no redeeming social benefit.¹⁶⁶

In contrast, Professor Jeffrey S. Parker argues that the mens rea requirement solves a very specific information problem.¹⁶⁷ Law enforcement may have difficulty determining the optimal sanction based on the level of social harm and the probability of detection, and as a result, penalties are upwardly biased.¹⁶⁸ Additionally, offenders may not be able to correctly characterize their activity with respect to the criminal prohibition. The mens rea requirement permits offenders to not overinvest in precautionary resources.¹⁶⁹

To the extent that Parker’s and Posner’s first two claims have force in the traditional criminal law context, they are far weaker in the civil administrative context. Posner argues for using mens rea as a proxy for either sensitivity to punishment or the probability of

163. Posner, *supra* note 18, at 1221.

164. *See id.*

165. *See id.*

166. *See id.* Posner compares car theft with the railroad’s negligent destruction of crops that happens to start a fire on a nearby farm. The thief and the railroad both bypass the market, but only the car thief engages in a “pure coercive transfer” because his goal was to take the automobile, whereas the market bypass as a result of the railroad’s fire was merely incidental to productive economic activity. *See* Finkelstein, *supra* note 162, at 901 (citing RICHARD A. POSNER & WILLIAM M. LANDES, *THE ECONOMIC STRUCTURE OF TORT LAW* ch. 6 (1987)).

167. *See* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 745-46 (1993).

168. *See id.* at 769.

169. *See id.* at 773-74.

detection.¹⁷⁰ One persuasive response to Posner's argument is that in traditional criminal cases, judges are not instructed to measure these attributes directly.¹⁷¹ Furthermore, for the civil penalties considered in this Article, the targets are corporations and the penalties are measured in dollars. As a result, there is limited reason to think that violators have unusual sensitivity to punishment. Additionally, administrative agencies have a substantially greater ability to calculate actual probabilities of detection through audits. Mens rea should not be necessary as a proxy for this quality.

Similarly, Parker's argument has limited force here. Administrative agencies regulate a community of entities with greater information than traditional criminal defendants and possess far more information about those entities than the law enforcement community possesses about those it charges with crimes. Mens rea should be less necessary for administrative agencies to solve the dual information problems he identifies.

Posner's third argument in favor of mens rea has achieved the most traction.¹⁷² The primary criticism of his argument is the limited scope of the justification.¹⁷³ It merely separates offenses that, in the language of the Model Penal Code, are committed purposefully from those that are committed knowingly. Violations in which the forbidden object is the conscious object of the wrongdoer are treated differently from those in which it is practically certain, but not necessarily desired, that the harm will occur.¹⁷⁴ As a descriptive account of the criminal law, this distinction does not hold up and does not justify a broad use of mens rea across a wide variety of mental states.

2. *The Practice*

Consistent with a retributive approach, all four agencies place culpability at the center of the penalty process. For example, the structure of the OFAC systems means that the egregiousness

170. See Posner, *supra* note 18, at 1221.

171. See Parker, *supra* note 167, at 763-64.

172. See *id.* at 765 ("Posner's third suggested explanation for mens rea comes closer to the mark, but still is incomplete.").

173. See Finkelstein, *supra* note 162, at 897.

174. See *id.* at 905; Parker, *supra* note 167, at 766.

determination plays an extremely important role in setting penalty levels for OFAC, especially for relatively small transactions.¹⁷⁵ Because the statutory maximum for OFAC civil penalties is the greater of \$250,000 or twice the value of the transaction,¹⁷⁶ penalties for egregious violations are always at least twice the penalty for nonegregious violations that involve a transaction of the same value. For transactions below \$125,000, the increase as a result of an egregiousness determination is even larger. The considerations that lead to an egregiousness determination strongly suggest retribution. OFAC has stated that it will look at the eleven general factors to determine whether the violation was egregious, but with particular emphasis on three of them: whether the violation was willful or reckless, the subject of the investigation's awareness of the conduct at issue, and the harm of the conduct to the objectives of the sanctions program.¹⁷⁷ The first two of these, of course, are focused on the mental state of the violator. In determining the "willfulness or recklessness" of the violation, OFAC analyzes the subject's mental state with respect to the law itself—whether the subject knew the violation violated the law or demonstrated reckless disregard with respect to the violation of the law.¹⁷⁸ The agency also considers whether there was prior notice, a pattern of violations, and management involvement.¹⁷⁹ In determining the awareness of the conduct, OFAC looks to the mental state of the violator with respect to the conduct, evidence of actual or constructive knowledge of the violation, and management involvement.¹⁸⁰ Such a system of enhanced violations, in which penalties increase dramatically when the violator possesses a highly culpable mental state and the violation involves substantial harm, strongly suggests a retributive goal.

175. See Economic Sanctions Enforcement Guidelines, 73 Fed. Reg. 51,833, 51,935 (Sept. 8, 2008) (codified at 31 C.F.R. pt. 501) ("[I]n recognition of OFAC's position that the enhanced maximum civil penalties authorized by the Enhancement Act should be reserved for the most serious cases, the Guidelines distinguish between egregious and nonegregious civil monetary penalty cases.").

176. 50 U.S.C. § 1705(b) (2006).

177. See 31 C.F.R. § 501 app. A (2011).

178. See *id.*

179. See *id.*

180. See *id.*

Similarly, in the MSHA system, the mens rea of the operator of the mine plays a very substantial role in the determination of the final penalty. The increases for a culpable mental state range from zero to fifty penalty points, the second largest potential increase available under the MSHA system.¹⁸¹ MSHA not only considers the mental state of the violator but also draws extremely fine distinctions among various levels of culpability. Violations receive a ten-point enhancement for “low negligence,” defined as cases in which “[t]he operator knew or should have known of the violative condition or practice, but there are *considerable* mitigating circumstances.”¹⁸² Those are distinct from cases receiving a twenty-point enhancement for “moderate negligence,” in which there were mitigating circumstances that were not “considerable,” and cases in which there were no mitigating circumstances at all, reflecting “high negligence” and subject to a thirty-five-point enhancement.¹⁸³ The largest enhancement, fifty points, is reserved for cases in which “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.”¹⁸⁴ Such fine-grained distinctions of culpability would have little role to play in a system of complete or optimal deterrence.

The mental state of the violator also plays a critical role in the NRC calculation. The Commission views willful violations with “particular concern” and states they cannot be tolerated.¹⁸⁵ The focus on mens rea is present in the factors the NRC indicates it will look at in exercising its discretion to deviate from the civil penalty calculation.¹⁸⁶ Among other reasons for deviating, NRC will enhance penalties in cases involving “willfulness, particularly instances where the licensee made a conscious decision to be in noncompliance ... in order to obtain an economic benefit.”¹⁸⁷ Additionally, although the NRC usually does not impose penalties in excess of \$140,000 for any single violation, it reserves the right to exercise its discretion to impose penalties up to the statutory maximum of

181. See 30 C.F.R. § 100.3 tbls. I-XIII (2011) (illustrating the penalty points).

182. 30 C.F.R. § 100.3(d) (emphasis added).

183. *Id.*

184. *Id.*

185. See NRC ENFORCEMENT POLICY, *supra* note 58, at 9.

186. See *id.* at 29.

187. *Id.*

\$140,000 per violation per day in cases in which “a licensee was aware of a violation, or ... had a clear opportunity to identify and correct the violation but failed to do so.”¹⁸⁸ The NRC also enhances penalties when it appears that the licensee made a conscious cost-benefit calculation to gain an economic edge as a result of the violation.¹⁸⁹ The NRC focuses on willfulness not only in setting penalties but also in the exercise of its prosecutorial discretion to seek penalties in the first place. The NRC Enforcement Reports specifically identify those violations that involve willful misconduct, and in each year from 2005 to 2009, a substantial fraction of the cases for which the NRC has sought civil penalties involved willful violations.¹⁹⁰

Finally, the role of the mental state of the violator also appears in the FCC penalty system.¹⁹¹ Notably, the FCC sets the base penalty for two specific violations at levels that are strikingly high compared to others and justifies these high base penalties by focusing on the culpability of the violator. First, the violation that the Commission chose to punish most severely is misrepresentation/lack of candor to the FCC.¹⁹² Alone among the violations, the

188. *Id.* at 15. The central role of mens rea is also apparent in the NRC’s explanation of when it will take enforcement actions against individuals. Virtually all of them require willful misconduct. *See id.* at 30-31.

189. *Id.* at 29.

190. *See* NRC 2009 ENFORCEMENT PROGRAM ANN. REP. 4 (nine of seventeen actions in Fiscal Year 2009 seeking civil penalties involved willfulness); NRC 2008 ENFORCEMENT PROGRAM ANN. REP. 4 (nine of twenty-eight actions in Fiscal Year 2008 involved willfulness); NRC 2007 ENFORCEMENT PROGRAM ANN. REP. 2 (six of eighteen actions in Fiscal Year 2007 involved willfulness); NRC 2006 ENFORCEMENT PROGRAM ANN. REP. 2 (four of fifteen actions in Fiscal Year 2006 involved willfulness); NRC 2005 ENFORCEMENT PROGRAM ANN. REP. 2 (nine of twenty-two actions in Fiscal Year 2005 involved willfulness). The NRC Enforcement Reports are available at <http://www.nrc.gov/reading-rm/doc-collections/enforcement/annual-rpts>. The NRC justifies breaking out willful violations in its Enforcement Reports by emphasizing the seriousness with which the Commission treats intentional misconduct:

Information regarding willful violations is identified because such violations are of particular concern to the Commission. The NRC’s regulatory program is based on licensees and their contractors, employees, and agents acting with integrity and communicating with candor; therefore, a violation involving willfulness may be considered more egregious than the underlying violation taken alone would have been, and the severity level may be increased.

NRC 2009 ENFORCEMENT PROGRAM ANN. REP. 4.

191. *See* 12 FCC Rcd. 17,087, ¶ 27 (1997).

192. *See id.* app. A. § 1.

FCC sets that base penalty at the statutory maximum.¹⁹³ The penalty is set at such a level because “[r]egardless of the factual circumstances of each case, misrepresentation to the Commission always is an egregious violation. Any entity or individual that engages in this type of behavior should expect to pay the highest forfeiture applicable.”¹⁹⁴ Second, the highest base penalty specifically denominated in dollars is set at \$40,000 for unauthorized conversion of long distance service; aside from misrepresentation penalties, no other base penalty exceeds \$10,000.¹⁹⁵ In setting penalties at this level, the Commission emphasized its history of treating those violations seriously when “fraud is an issue, or in cases where the carrier’s deliberate failure to ensure that letters of authorization are valid and properly authorized rise to the level of gross negligence.”¹⁹⁶ This central focus on culpability is particularly striking because, at least in theory, it should not be difficult to use billing records for the new and old carriers, at least to estimate the gain to a long distance carrier or the loss to the customer from an unauthorized conversion.

The FCC also demonstrates an interest in culpability in its adjustment factors. The agency applies an upward adjustment for “intentional violation[s]” and a downward adjustment for good faith and voluntary disclosure.¹⁹⁷ The FCC abandoned its system of weighing these factors in 1997 “[t]o reflect more clearly the Commission’s discretion to increase or reduce a forfeiture penalty as much as warranted based on the unique facts of each case.”¹⁹⁸ Assuming that the FCC, though, did not intend to abandon the relative importance of these factors, it still may provide guidance on what the FCC intends to emphasize and distinguish between retribution and deterrence as potential purposes. Prior to the 1997 revisions, the potential increase for intentional violations was 50 to 90 percent and the potential decrease for good faith and voluntary

193. *Id.*

194. *Id.* ¶ 21. The Commission then goes on to note that misrepresentation is likely to lead to revocation of the licensee. *Id.*

195. *Id.*

196. *Id.* ¶ 38.

197. *Id.* app. A, § 2.

198. *Id.* ¶ 26.

disclosure was 30 to 90 percent.¹⁹⁹ No other enhancements could alter the penalty by a greater amount.²⁰⁰

C. *Prior History*

1. *The Theory*

Should retributivists care about recidivism? Leading retributivist theorists are divided on this point. George Fletcher, among others, has argued that prior convictions are irrelevant to offenders' deserts and thus are irrelevant to the punishment they deserved.²⁰¹ Because punishment must remain proportional to wrongdoing and only to wrongdoing, a history of violations does not affect the deserved punishment.²⁰² However, to the extent retributive theory focuses not so much on punishing the violator for the act itself but instead reflects punishment for the wrongdoer's bad character, a history of violations has evidentiary value. Not only can the punisher draw inferences about character from this violation, but the history of violations also provides evidence that the inference of bad character is not mistaken.²⁰³ Reducing punishment out of recognition of the inherent likelihood that anyone could run afoul of a prohibition brings punishment more in line with the actual desert of the wrongdoer.²⁰⁴

Of course, as a practical matter, in traditional criminal cases, enhancements for prior history are commonly justified in terms of retribution.²⁰⁵ This result finds support in the empirical desert

199. 8 FCC Rcd. 6,125, app. § 2 (1993).

200. *Id.* Minor violations also could reduce the penalty by 50 to 90 percent, whereas egregiousness and ability to pay could also increase the penalty by 50 to 90 percent. *Id.*

201. See FLETCHER, *supra* note 119, at 466 ("The contemporary pressure to consider prior convictions in setting the level of the offense and of punishment reflects a theory of social protection rather than a theory of deserved punishment.").

202. See Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 575 (2009) (collecting sources).

203. See Ekow Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029 (2004) (describing and rejecting this view with respect to the "three strikes" provision).

204. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 84-88 (1976); Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 592 (1981).

205. See Lee, *supra* note 202, at 574; Sarah French Russell, *Rethinking Recidivist*

literature. A number of experimental studies have found that individuals take seriously any criminal record in setting punishment, and punishments are enhanced for recidivists.²⁰⁶ Although the role of recidivism in punishment from a desert standpoint is less important than culpability and crime seriousness,²⁰⁷ we should expect it to play a role in administrative punishment if agencies are aimed at retribution.

In contrast, the role of recidivism in punishment has presented a challenge to the proponents of optimal deterrence.²⁰⁸ If the goal of punishment is to force a wrongdoer to internalize the costs of misconduct, it is irrelevant whether the violation is the first transgression or the fifth. The harm is the same if it is imposed or threatened by an unrepentant recidivist as if it is the result of the conduct of a first offender.²⁰⁹ Indeed, because the central premise of optimal deterrence is that violations are sometimes appropriate, repeat offenders are doing nothing more than theory assumes they will do. Under these assumptions, incorporating recidivism in punishment makes no more sense than a focus on *mens rea*.

David Dana has noted an even stronger challenge to enhancements for prior violations in systems of deterrence.²¹⁰ Because many enforcement regimes focus additional attention on those individuals

Enhancements: The Role of Prior Drug Convictions in Federal Sentencing, 43 U.C. DAVIS L. REV. 1135, 1135 (2010).

206. See, e.g., Jennifer Cumberland & Edward Zamble, *General and Specific Measures of Attitudes Toward Early Release of Criminal Offenders*, 24 CAN. J. BEHAV. SCI. 442, 448 (1992) ("For both [property and violent] crime[s], the offender without a past record was consistently seen as a better prospect for release than the recidivist criminal."); Norman J. Finkel et al., *Recidivism, Proportionalism, and Individualized Punishment*, 39 AM. BEHAV. SCI. 474, 481 (1996); Robert J. Gebotys & Julian V. Roberts, *Public Views of Sentencing: The Role of Offender Characteristics*, 19 CAN. J. BEHAV. SCI. 479, 485 (1987) ("The only significant predictors of severity of assigned sentences were the seriousness of the offence and the criminal history of the offender."); Peter H. Rossi et al., *Beyond Crime Seriousness: Fitting the Punishment to the Crime*, 1 J. QUANTITATIVE CRIMINOLOGY 59, 77 (1985) ("[The offender's] record of previous arrests and convictions, was fairly powerful in affecting severity judgments.").

207. See Darley et al., *Incapacitation*, *supra* note 26, at 659. In this study, a history of prior offenses was used as a proxy for likelihood of recidivation, and the authors found that this factor was less important in determining punishment severity than offense seriousness. See *id.*

208. See David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 736 (2001).

209. See *id.* at 782.

210. See *id.* at 783.

with a history of misconduct, enhancing penalties for those with a history of violations undermines the central goal of optimal deterrence by providing increasing penalties where the probability of detection is also increased.²¹¹ Under this framework, if recidivism should matter to punishment, it should serve as a mitigating rather than an aggravating factor.²¹²

A theory of complete deterrence provides a stronger justification for considering prior history. Because complete deterrence emphasizes the goal of a complete elimination of violations,²¹³ repeat violations, especially repeat violations that are similar in nature, suggest an inadequacy of past efforts at deterrence. The easiest example to consider is the defendant with unusually large gains from the violation. The punishment previously imposed reflected the punisher's best guess at the amount of punishment needed to strip away the gain to the violator from the misconduct as enhanced by the probability of detection.²¹⁴ The repeat violation, though, suggests that the prior guess was wrong and that the expected benefit from the violation still exceeds the expected cost, at least for this particular individual. As a result, increasing the punishment to reflect this updated reality improves the chances that the message of deterrence will be appropriately sized.

2. *The Practice*

Prior history plays a significant role in penalty calculation for all four agencies. Of the four agencies, the NRC provides the most limited consideration of prior history. For the least severe violations, those within Severity Level III, the NRC provides a penalty reduction—as long as the violation was not willful—for entities that have not had a violation in the previous two years that is identical to that provided for entities that identify the problem themselves.²¹⁵

211. *See id.*

212. *See* Katyal, *supra* note 37, at 2440 (suggesting that deterrence theory would propose an inverse system of penalties where first offenses are punished *more*, rather than less, severely).

213. *See* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *GEO. L.J.* 421, 421 (1998).

214. *See id.*

215. *See* NRC ENFORCEMENT POLICY, *supra* note 58, at 16.

The NRC also points to a history of violations, particularly repeat violations, as a reason to exercise its discretion to increase penalties.²¹⁶

Similarly, OFAC implements its system of punishment for repeat offenders by providing a reduction for first-time violators.²¹⁷ Entities that have no prior OFAC violations within the previous five years are entitled to have penalties reduced by 25 percent.²¹⁸ However, like the NRC, the OFAC system does not explicitly distinguish between entities with multiple prior violations in that time frame and those with a single violation.²¹⁹

The FCC simply lists factors relating to prior history as potential upward and downward adjustments, suggesting that penalties will be increased for “prior violations of any FCC requirements” or “repeated or continuous” violations, but reduced for a “history of overall compliance.”²²⁰ Prior to abandoning its system of weighting in favor of a more general, factor-based approach, the increases for prior history were substantial, raising the penalty by 40 to 70 percent for a history of violations while reducing it by 20 to 50 percent for a record of overall compliance.²²¹

Finally, MSHA has provided specific enhancements for mine operators who have a substantial history of violations measured by the number of violations detected per inspection day, ranging up to twenty-five penalty points.²²² The retributivist approach underlying the MSHA penalties became particularly clear when MSHA recently substantially increased penalties for repeat violations of the same standard:

MSHA is proposing this new provision because the Agency believes that operators who repeatedly violate the same standard may indicate an attitude which has little regard for getting to the root cause of violations of safe and healthful

216. *See id.* at 29.

217. *See* Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,599 (Nov. 9, 2009) (to be codified at 31 C.F.R. pt. 501).

218. *See id.*

219. *See id.*

220. *See* 47 C.F.R. § 1.80(b)(4) (2011).

221. *See* 8 FCC Rcd. 6215, 6220 (1993).

222. *See* Criteria and Procedures for Proposed Assessment of Civil Penalties, 71 Fed. Reg. 53,058, 53,058-59 (Sept. 8, 2006) (to be codified at 30 C.F.R. pt. 100).

working conditions. The Agency believes that these operators show a lack of commitment to good mine safety and health practices by letting cited and corrected hazardous conditions recur.²²³

Despite its purported claim to a deterrence approach, MSHA emphasizes here the deeply retributivist notion of culpability. Repeat violations are taken as evidence of a more culpable mental state.²²⁴

D. Defendant Size

1. The Theory

Agencies often vary civil penalties based on some measure of the size of the violator, with large entities facing greater penalties than smaller ones.²²⁵ Some scholars have taken the position that defendant wealth should be excluded entirely from the punishment calculus when defendants are organizations and deterrence is the goal.²²⁶ This argument rests on the assumption that organizations are either risk neutral or, if risk averse, able to insure against potential losses.²²⁷ As long as the defendant is risk neutral, penalties generally should not depend on the wealth of defendant, whether the objective is cost internalization or gain stripping.²²⁸

However, defendant size can be a relevant factor if violators are risk averse. For example, if entities and individuals are risk averse, wealth might matter when penalties become large with respect to the wealth of the entity being punished.²²⁹ In the administrative

223. *Id.* at 53,059.

224. *See id.*

225. *See, e.g.*, 31 C.F.R. § 501, app. A (2010) (varying OFAC penalties based on size of violator); 12 FCC Rcd. 17,087, ¶ 20 (1997).

226. *See, e.g.*, Kenneth S. Abraham & John C. Jeffries Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 420-21 (1989); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 911 (1998).

227. *See* Polinsky & Shavell, *supra* note 226, at 886-87.

228. *See id.*

229. *See* Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 415 (1992). Alternatively, Keith Hylton has recently noted that in situations where gain or harm is unobservable, wealth may be able to serve as a proxy if it is correlated with the

context, the penalties imposed will generally be small compared to the entity size and an optimal deterrence approach would suggest that administrative agencies should be largely blind to the size of the entity being punished.²³⁰ Furthermore, if there is reason to believe that entities are risk averse, size should be measured in a manner designed to reflect that risk aversion. The appropriate measure is likely hard to determine, but perhaps net income or net worth is the correct measure.

Defendant size might also matter for retributivists.²³¹ As an initial matter, size may serve as a proxy for riskiness of a violation: misconduct by a large entity may impose a greater threat of harm than identical conduct by a smaller entity. Additionally, we may simply expect more from large entities, holding them to a higher standard and, as a result, imposing greater penalties when they fall short. Alternatively, the requirements of proportional punishment might suggest that defendant size should matter. If larger entities experience similar penalties differently than smaller entities, proportionality suggests that different punishments must be imposed. The empirical desert literature supports this conclusion: mock jurors do care a great deal about the size of the defendant when imposing punishment.²³²

relevant variable of interest. See Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L. REV. 927, 936 (2008). Hylton notes that it is unlikely that harm will both be unmeasurable and correlated with wealth, but more frequently gain will be unmeasurable and correlated with wealth. See *id.* at 940-41. Agencies, though, largely focus on harm rather than gain, as discussed below. See *infra* text accompanying notes 240-43.

230. Even the record civil penalties imposed on Toyota and Goldman Sachs are relatively small compared to the size of the entities. Goldman Sachs announced \$8.3 billion in net earnings in 2010. See Press Release, Goldman Sachs, Goldman Sachs Reports Earnings Per Common Share of \$13.18 for 2010 (Jan. 19, 2011), <http://www2.goldmansachs.com/media-relations/press-releases/current/pdfs/2010-q4-earnings.pdf>. The SEC civil penalty reflected about 6.4 percent of their earnings for the year. Similarly, the \$16.4 million civil penalty imposed on Toyota came in a year when the company announced profits of just over 408 billion yen (about \$5 billion), making it less than half of one percent of earnings that year. Compare Settlement Agreement, *supra* note 33, at 2, with Press Release, Toyota Motor Corp., TMC Announce Year-End Financial Results (May 11, 2011), http://www.toyota-global.com/investors/financial_result/2011/pdf/q4/overview.pdf.

231. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1996) (Breyer, J., concurring) (identifying defendant wealth as a legitimate consideration for purposes of retribution but not deterrence); Markel, *supra* note 13, at 289 (arguing for considering defendant size in the use of punitive damages as a retributive sanction).

232. See Sunstein et al., *supra* note 24, at 2105 n.135 (“[P]eople think in terms of

2. *The Practice*

All four agencies consider entity size in setting the levels of civil penalties. The FCC and OFAC consider entity size at a high level of generality, identifying it as a factor that can be used to adjust penalty levels without assigning it a specific weight. The FCC lists “ability to pay/relative disincentive” as an upward adjustment, whereas “inability to pay” is a consideration for a downward adjustment.²³³ In describing the role of size in its penalty calculations, the FCC emphasizes two factors. First, penalties may have different impacts on entities of different sizes. Second, the size of the entity committing the violation is a proxy for risk and harm for certain violations:

In particular, the identity of the licensee or the nature of the service are not wholly irrelevant to a determination of the seriousness of the harm. We cannot, for example, say that the degree of harm resulting from a violation of operating power limits committed by a full power broadcast station is identical to the degree of harm resulting from the same violation by an amateur radio operator. Nor can we conclude that the prospect of a \$10,000 forfeiture for a particular offense will have the same deterrent effect on a small computer vendor, a moderately-sized radio common carrier, and a \$10 billion per year local telephone company or interexchange carrier.²³⁴

OFAC, in turn, simply states that it will look to the commercial sophistication of the violator, the size of its operations, its financial condition, and the volume of transactions in which it engages, making the role of size in the agency civil penalty calculation somewhat opaque.²³⁵

retribution rather than deterrence and that the intention to punish is an intention to inflict pain; this means that the size of the defendant matters a good deal.”). *See generally* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 196-97 (2009) (discussing the need for both retributivists and consequentialists to consider the differential experience of punishment for different defendants).

233. 47 C.F.R. § 1.80(b)(4) (2011).

234. 12 FCC Red. 17,087, ¶ 20 (1997).

235. *See* 31 C.F.R. § 501 app. A (2011).

MSHA provides more explicit guidance with respect to size. Mine size plays an important role in the penalty calculation for MSHA in two respects. First, the size of the mine itself matters, with increasing penalty amounts for larger mines.²³⁶ Similarly, the size of the controlling entity affects the penalty amount, albeit to a lesser degree.²³⁷ The size of the mine itself and the size of the controlling entity are both measured using the same metric. For coal mines, size is measured with respect to the annual tonnage of the mine, whereas for other mines, size is based on the number of hours worked in the mine.²³⁸ MSHA has provided multiple justifications for the incorporation of size, some of which imply a focus on risk aversion, although others suggest that it is a proxy for the riskiness of the conduct.²³⁹ Of course, the tonnage of the mine and the number of hours worked might reflect the wealth of the entity owning the mine, but they might not. More importantly, in many cases, information on wealth is relatively easily available. The majority of coal in the United States is produced by mines owned by publicly traded companies,²⁴⁰ which are required to produce information on both revenue and assets.

Finally, the NRC sets its base penalties based on the size of the entity that committed the violation, ranging from \$7,000 for research, academic, medical, and other small users of nuclear materials to \$140,000 for nuclear power reactors.²⁴¹ The NRC

236. See 30 C.F.R. 100.3(b) (2011).

237. See *id.*

238. See *id.*

239. Compare Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,591, 13,597 (Mar. 22, 2007) (to be codified at 30 C.F.R. pt. 100) (“MSHA proposed increased points for larger operations because in order to provide an equal deterrent, the penalties must be high for larger mines (with potentially higher revenue).”), and Criteria and Procedures for Proposed Assessment of Civil Penalties, 47 Fed. Reg. 22,286, 22,288 (May 21, 1982) (to be codified at 30 C.F.R. pt. 100) (“The principal purpose of the size criterion is to aid in assuring that the amount of the penalty is an appropriate economic incentive for future compliance by the operator.”), with 43 Fed. Reg. 23,514, 23,515 (May 30, 1978) (“[S]ince the primary goal of the Act is to protect worker safety and health, the critical element in determining size should be worker exposure rather than the price of the product or the profitability of the business.”).

240. Approximately 75 percent of coal is produced by approximately 30 percent of mines that are publicly owned. See *Fast Facts About Coal*, NAT'L MINING ASS'N, http://www.nma.org/statistics/fast_facts.asp (last visited Jan. 23, 2012).

241. NRC ENFORCEMENT POLICY, *supra* note 58, at 70 tbl.A.

considers size primarily because misconduct by larger entities imposes greater risk to the public: “Operations involving greater nuclear material inventories, significantly higher consequences resulting from a release/exposure to radioactive material, and consequences to the public and workers receive higher civil penalties.”²⁴² A secondary consideration in the focus on size is “the ability of various classes of licensees to pay the civil penalties.”²⁴³ In an earlier policy statement, the NRC justified considering ability to pay on the theory that “[t]he deterrent effect of civil penalties is best served when the amounts of the penalties take into account a licensee’s ability to pay.”²⁴⁴ Despite the reference to the “deterrent effect” of civil penalties, the NRC does not appear to use risk aversion as the primary determinant of whether civil penalties should be increased for larger entities. Instead, the risk imposed by misconduct involving increasingly greater quantities of nuclear material plays the dominant role in determining penalty levels.

E. Conclusion

The civil penalty policies of these agencies are remarkably consistent in the factors they emphasize. The agencies care deeply about harm or the risk of harm and culpability and ignore the probability of detection. The central emphasis on harm—to the exclusion of gain and the probability of enforcement—eliminates the goal of complete deterrence, and the central role of mens rea in the penalty calculation means that it is difficult to see agencies as engaged in optimal deterrence. Although a system of optimal deterrence would recognize that violations are sometimes socially beneficial, every agency is centrally focused on whether the violator made a conscious choice to break the rules. All four agencies emphasize deterrence as the reason for their penalty systems, yet their actual approaches are far more consistent with a system designed to achieve retribution.

242. *Id.* at 14.

243. *Id.*

244. See Base Civil Penalties for Loss, Abandonment, or Improper Transfer or Disposal of Sources; Policy Statement, 65 Fed. Reg. 79,130, 79,140 (Dec. 12, 2000).

III. IS AGENCY RETRIBUTION A REASON FOR CONCERN?

To the extent that I am correct that agencies primarily focus on retribution, does it matter? If nothing else, this result calls into question a common policy proposal in connection with the experimental studies on empirical desert outlined above. Some scholars have suggested that punishment authority should be transferred to administrative agencies based on the assumption that agencies are more likely to emphasize deterrence than judges and juries.²⁴⁵ If agencies, like individuals, are primarily interested in desert rather than deterrence, the argument for reducing the role of juries in punishment is substantially weaker.

Additionally, there are significant reasons to be concerned about the agencies as retributive entities. This Part explores questions of legitimacy and competence in agency retribution. Section A of this Part argues that administrative agencies generally lack the attributes that would make retributive sanctions legitimate. Section B focuses on the question of expertise. Although agencies may be able to claim some specialized knowledge in setting penalties aimed at consequentialist goals, they are unlikely to have the expertise necessary for retribution.

Thus far, I have described retributive and consequentialist theories as conflicting approaches, reflecting alternatives that agencies might choose to pursue. However, agencies may have chosen to focus on desert to convey a message of condemnation or norm reinforcement.²⁴⁶ An important body of criminal law scholarship argues that desert not only can serve utilitarian ends but is in fact

245. For example, Professor Sunstein proposes that the government might “shift decisional authority away from juries and toward bureaucracies, with the knowledge that whatever ordinary people think, the relevant administrators will seek to promote optimal deterrence.” See Sunstein et al., *supra* note 116, at 250; Sunstein et al., *supra* note 24, at 2121 (“If optimal deterrence is the goal of punitive damages, it would probably be better for the judgment to be made by a judge or (better still) by a specialized regulatory agency.”). Similarly, Professor Viscusi sees the results as providing “an additional rationale for transferring the responsibility for deterring corporate misbehavior from the courts to regulatory agencies.” Viscusi, *supra* note 161, at 589.

246. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 518-19 (2006); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996).

the best way to do so.²⁴⁷ In this sense, policies that look retributive may largely be designed to reinforce norms by punishing only those who truly deserve it. To the extent that expressive punishment reinforces these norms, it is better able to achieve compliance than a cost-internalization or gain-stripping approach.²⁴⁸ As a result, a retributive approach to punishment in the criminal context may be the optimal consequentialist policy. The remainder of this Part will consider both this possibility of norm reinforcement as the motivation for agency retribution as well as the possibility that agencies are primarily interested in retribution for its own sake.

A. Are Agencies Legitimate Retributivists?

As an initial matter, punishment imposed by administrative agencies lacks the hallmarks of legitimacy needed to make retribution appropriate. By its very nature, in order to make retributive punishment legitimate, the punishment must communicate condemnation to the offender,²⁴⁹ which means it must have at least two characteristics. It must be received as condemnation and it must come from an entity authorized to communicate such a message.²⁵⁰ Administrative civil penalties fulfill neither requirement.

As outlined above, administrative civil penalty policies largely divide into two categories: those that do not disclose how penalties are calculated and those that talk about deterrence while engaging in retribution. Both norm reinforcement and retribution for its own sake require transparency. In order to be legitimate, retributive punishment has to be labeled as such. Because penalties are not received as punishment when they are cloaked in the language of

247. TOM TYLER, WHY PEOPLE OBEY THE LAW 161 (1990); Robinson & Darley, *supra* note 23, at 498.

248. Any regulated community, of course, contains both individuals who honestly want to comply with legal requirements and those who must be forced to do so. See AYRES & BRAITHWAITE, *supra* note 9, at 53 (“[Institutions] should be designed to protect us against knaves while leaving space for the nurturing of civic virtue.”).

249. See, e.g., Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 910 (2010).

250. See *id.* at 935.

deterrence, hidden retribution neither legitimately punishes nor adequately reinforces norms.

The identity of the targets of regulatory enforcement raises a further problem with administrative retribution. The vast majority of the entities punished by administrative agencies are corporations.²⁵¹ The concept of retributive punishment fits uneasily with the corporate form. First, ascribing a mental state to a corporate entity is a challenging task. Corporations, like all organizations, act only through agents.²⁵² At what level in the internal corporate hierarchy does the mental state of the agent qualify to inculcate the organization? Although the agency penalty schemes discussed above are centrally focused on questions of mens rea, they largely fail to wrestle with this central question.²⁵³ Additionally, the divided nature of corporate ownership and control means that stockholders bear the brunt of punishment but do not necessarily control the decision making. For this reason, most legal scholars have focused on deterrence, not retribution, as the most appropriate justification for both civil and criminal punishment of corporations.²⁵⁴

An expressive justification provides the strongest argument for viewing organizations as legitimate targets of desert.²⁵⁵ To the extent that administrative sanctions can reinforce norms by imposing

251. To be sure, agencies sometimes punish individuals. For example, the NRC has adopted a “naming and shaming” approach to sanctions in which entities and individuals can be identified as violators even though they are not required to pay a civil penalty. See NRC 2009 ENFORCEMENT PROGRAM ANN. REP. 11.

252. *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991).

253. For instance, MSHA simply looks to the mental state of the corporate “mine operator” whereas OFAC and the NRC state that they will consider whether more senior individuals are involved in the violation. Compare Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592, 13,611 (Mar. 22, 2007) (to be codified at 30 C.F.R. pt. 100) (MSHA penalties), with NRC ENFORCEMENT MANUAL 6-5 (2010) (considering the position and regulatory responsibility of the person involved in the violation among factors to determine the significance of a violation), and Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,599 (Nov. 9, 2011) (to be codified at 31 C.F.R. pt. 501) (OFAC penalties).

254. See, e.g., Buell, *supra* note 246, at 517; 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, 448 (1981); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1182 (1983) (collecting sources); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1494 (1996) (collecting sources).

255. See Buell, *supra* note 246, at 519-20.

retributive punishments, there is no reason to reject those punishments just because they are imposed on corporations. However, reasons exist to be very skeptical of this approach in the administrative context. In addition to the transparency problems discussed above, the problems of vicarious liability seriously undermine the concept of norm reinforcement. As is generically true in the criminal context, corporations are vicariously liable for the actions of their agents when it comes to administrative enforcement.²⁵⁶ As a result, sanctions may be imposed on corporations even when the conduct occurs in violation of the stated policies of the target of enforcement; that is, when the norm has already been accepted.²⁵⁷ Even scholars supporting the notion of norm reinforcement in the context of entity liability reject a pure *respondeat superior* approach.²⁵⁸

This problem is even exacerbated by some agency practices. For instance, MSHA is statutorily required to penalize *every* violation.²⁵⁹ Not surprisingly, this leads to a very large total number of penalties, as well as a high dollar value for those penalties. In 2009, MSHA assessed 173,710 violations reflecting nearly \$140 million in civil penalties.²⁶⁰ Norm reinforcement cannot justify a system that imposes an obligation to punish in every case.²⁶¹

256. See V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1242 (2000).

257. See *id.* at 1243.

258. See Buell, *supra* note 246, at 520.

259. Not surprisingly, the rule does not seem to be followed. See BRAITHWAITE, *supra* note 20, at 139 (“MSHA inspectors to whom I spoke indicated that they did not, and could not, follow the legislative edict of nondiscretionary citation of every violation they observe.”).

260. MINE SAFETY & HEALTH ADMIN., NUMBER OF PENALTIES ASSESSED AND PERCENT CONTESTED JANUARY 2007-SEPTEMBER 2011, *available at* <http://www.msha.gov/stats/contested/citations/civil%20penalties%20assessed%20and%20contested.pdf>.

261. Deterrence theories also would reject a duty to punish. Theories of complete and optimal deterrence both reflect an understanding that the benefits of punishment must be weighed against the costs. When the costs of punishment outweigh those benefits, deterrence theorists recognize that the punishment should not be imposed. In a system in which the relative costs of imposing punishment are high, as is the case with MSHA, a mandatory punishment regime is even harder to explain from a deterrence standpoint. For example, 27 percent of the violations, reflecting about two-thirds of the penalties, were contested by the target mine in calendar year 2009. *Id.* MSHA is not alone in the mandatory punishment category. “Several courts of appeals have read [the Clean Water Act] to require that a civil penalty must be imposed in every case in which a court has found a Clean Water Act violation.” *United States v. Lexington-Fayette Urban Cnty. Gov’t*, 591 F.3d 484, 488 (6th Cir.

Punishing every violation, no matter how minor, dilutes the expressive effect of punishment and undermines the norm that such a system tries to achieve.²⁶²

The second major legitimacy concern with the retributive use of administrative penalties is procedural.²⁶³ Because administrative penalties are “civil”²⁶⁴ in nature, they escape the wide range of constitutional provisions protecting the rights of criminal defendants.²⁶⁵ The protections provide legitimacy to the process of retribution. The Supreme Court largely defers to the initial legislative designation of the penalty as civil or criminal.²⁶⁶ With respect to

2010).

262. See, e.g., Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206-07 (1996). In contrast, at least some retributive theories can be consistent with a mandatory duty to punish. See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797); Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 828 (2007) (outlining various retributive theories, including an affirmative duty to punish).

263. See TYLER, *supra* note 23, at 162.

264. The line between the civil and criminal law is foundational, see, e.g., Issachar Rosenzvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 80-81 & n.3 (2008) (collecting citations), but controversial, with the controversy growing as the line has blurred. See, e.g., Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991); Linda Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 931 (1990); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3, 4 n.6 (2005) (citing articles); Susan R. Klein, *Redrawing the Civil-Criminal Boundary*, 2 BUFF. CRIM. L. REV. 679, 691 (1999). Civil money penalties clearly fall close to the dividing line. Compare *United States v. Halper*, 490 U.S. 435, 449-50 (1989) (holding civil penalties are punishment for double jeopardy purposes), with *Hudson v. United States*, 522 U.S. 93, 101-02 (1997) (overruling *Halper*). See also Jonathan I. Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 480 (1973); Fellmeth, *supra*, at 4.

265. See *Smith v. Doe*, 538 U.S. 84, 102 (2003) (Ex Post Facto Clause); *Hudson*, 522 U.S. at 98-99 (Double Jeopardy Clause); *United States v. Ward*, 448 U.S. 242, 248 (1980) (Fifth Amendment).

266. See *Smith*, 538 U.S. at 92; *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Ward*, 448 U.S. at 248. This approach has been heavily criticized with a range of countertheories offered, suggesting that the punitiveness of the scheme should be either more important in drawing the civil-criminal distinction, i.e., courts should provide little or no deference to the legislative label, see Fellmeth, *supra* note 264, at 42, or it should be less important, and deference should be close to complete, see Cheh, *supra* note 264, at 1389. In contrast, Professor Steiker argues for a redefinition of punishment, placing the notion of blame at the center of the divide. See Carol S. Steiker, *Forward to Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedure Divide*, 85 GEO. L.J. 775, 809 (1997). Other scholars have suggested abandoning the rigid line and recognizing that all penalties

monetary penalties imposed by administrative agencies, Congress has clearly spoken by naming them “civil,”²⁶⁷ but such penalties can still cross the line if they are “so punitive either in purpose or effect as to negate” their designation as civil.²⁶⁸

This test requires the Court to define “punishment,” a task with which it has struggled, but the motivation behind the penalty plays an important role.²⁶⁹ On one side are policies that are remedial in nature. If the government imposes a civil penalty to seek compensation for an injury to itself as victim, that penalty is far less likely to be seen as punitive.²⁷⁰ On the other side are penalties that are retributive, “punishment” in the most traditional definition. Retribution for past wrongs is classically criminal, rather than civil, in nature.²⁷¹ Deterrence has been more difficult to classify.²⁷²

are inherently hybrids of the civil and criminal law, requiring the development of a “middleground” procedural approach, *see, e.g.*, Klein, *supra* note 264, at 720; Kenneth Mann, *Punitive Civil Sanction: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1799 (1992), or reformulating the question in terms of other, more relevant functional distinctions to the procedural questions at issue, *see* Rosen-Zvi & Fisher, *supra* note 264, at 84-85 (looking at the balance of power between the parties and the severity of the sanction).

267. *Hudson*, 522 U.S. at 103.

268. *Hendricks*, 521 U.S. at 361; *Ward*, 448 U.S. at 249.

269. The Court has often looked toward the multipart test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which requires courts to consider whether the penalty involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. The *Mendoza-Martinez* test suffers from the flaw of all such multipart tests—the difficulty of determining the outcome when the factors point in different directions. *See* Fellmeth, *supra* note 264, at 36; Rosen-Zvi & Fisher, *supra* note 264, at 126.

270. *See* *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); Charney, *supra* note 264, at 497-500 (collecting cases).

271. *See* *Smith*, 538 U.S. at 102; *Hendricks*, 521 U.S. at 361-62; Charney, *supra* note 264, at 509 (“Because retribution is the essence of the criminal action, any loss inflicted on that basis must be classified as a criminal sanction.”); J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 406-07 (1976).

272. In the seminal but relatively short-lived opinion in *United States v. Halper*, the Court placed deterrence with retribution as a form of punishment. 490 U.S. 435, 448 (1989). When the Court retreated in *Hudson*, civil money penalties moved back across the civil/criminal line and took the deterrence motivation with them. The *Hudson* Court noted that money penalties will deter, but the “mere presence of this purpose is insufficient to render a

Although the Court has vacillated, it currently accepts the notion that deterrence as a motivation does not make a penalty scheme suspect, whereas retributive aims may raise constitutional questions.²⁷³

The Supreme Court, though, has refused to look past the legislative designation of the purpose of the punishment to consider how the penalty is applied in practice. In *Hudson v. United States*, the Court recognized that the *amount* of the civil penalty in that case depended on the mental state of the violator, but it relied on the fact that the statute did not include *scienter* as an element.²⁷⁴ In *Seling v. Young*, the Court held that the punitiveness of a penalty scheme does not depend on its application; the statute had to be analyzed for punitive intent and effect on its face.²⁷⁵ The *Seling* Court refused to look at the application of the scheme largely because it viewed the task as too difficult. It saw the analysis of the punitiveness of the scheme as “unworkable”²⁷⁶ and refused to subject the civil nature of the scheme to the “vagaries in the implementation of the authorizing statute.”²⁷⁷

Even though the Supreme Court has been unwilling to look into the details of agency punishment schemes, this case law at least should raise concerns about administrative penalties aimed toward retribution. Because the central procedural protections available in the criminal context are absent on the civil side, there is reason to doubt that administrative penalties can achieve the level of legitimacy available for criminal punishment.

sanction criminal, as deterrence ‘may serve civil as well as criminal goals.’” 522 U.S. at 105 (quoting *United States v. Ursery*, 518 U.S. 267, 292 (1996)). The debate over where to place deterrence as a motive in the context of civil penalties did not start with *Halper*. See Mann, *supra* note 266, at 1830 (dating attempts to separate deterrence and retribution back to 1909).

273. *Smith*, 538 U.S. at 102.

274. See *Hudson*, 522 U.S. at 104 (“‘Good faith’ is considered by OCC in determining the amount of the penalty to be imposed ... but a penalty can be imposed even in the absence of bad faith. The fact that petitioners’ ‘good faith’ was considered in determining the amount of the penalty to be imposed in this case is irrelevant, as we look only to ‘the statute on its face’ to determine whether a penalty is criminal in nature.”).

275. 531 U.S. 250, 262 (2001).

276. *Id.* at 263.

277. *Id.*

B. Are Agencies Capable Retributivists?

There is a second significant problem with agency retribution. Agencies might not be very good at it. The Supreme Court has assumed that agencies are experts in their area of enforcement. When agencies sanction, their discretion “is at its zenith,”²⁷⁸ and penalties are “not to be overturned unless ... ‘unwarranted in law or ... without justification in fact.’”²⁷⁹ As is true in many areas of administrative law, courts justify this deference to agency judgment in setting penalties in terms of the relative expertise of agencies.²⁸⁰ Notably, courts presume that agencies have a specialized understanding of the types of sanctions likely to achieve compliance.²⁸¹

If, in fact, agencies do primarily impose penalties for purposes of retribution, this assumption is dubious. Agencies are unlikely to be able to claim any particular expertise in the allocation of desert-based punishment. Here it is useful to return to the distinction between normative and empirical desert. If desert is derived from reasoned considerations of the implications of philosophical principles, agencies can hardly be seen as experts on the subject.

278. *Pub. Util. Comm’n of Cal. v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006); *see also* *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 159 (D.C. Cir. 1967).

279. *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185-86 (1973) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946)). In *Butz*, the Supreme Court faced a challenge to the decision of the Secretary of Agriculture to suspend a seller of livestock for a regulatory violation. *See id.* at 183. The Court rejected the Court of Appeals decision overturning the suspension, refusing to even impose a requirement of *consistency* on administrative agencies and stating that sanctions are not invalid because they are imposed unevenly. *See id.* at 187-88. Although the sanction in *Butz* was suspension, the strongly deferential standard of review also applies when the sanction is a civil money penalty. *See Modern Cont’l Constr. Co. v. OSHA*, 305 F.3d 43, 53 (1st Cir. 2002); *Lesser v. Espy*, 34 F.3d 1301, 1309 (7th Cir. 1994).

280. “[T]he relation of remedy to policy is peculiarly a matter for administrative competence.” *Am. Power & Light Co.*, 329 U.S. at 112 (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)).

281. The *Butz* Court, for instance, took for granted that deterrence was the goal of the Secretary of Agriculture in setting penalties, noting that his practice “apparently is to employ [the sanction of suspension] as in his judgment best serves to deter violations and achieve the objectives of that statute.” *Butz*, 411 U.S. at 187-88; *see also, e.g.*, *Rizek v. SEC*, 215 F.3d 157, 160-61 (1st Cir. 2000); *Cnty. Produce, Inc. v. USDA*, 103 F.3d 263, 267 (2d Cir. 1997) (“We must defer to the agency’s judgment as to the appropriate sanctions for PACA violations.... The USDA is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to the requirements of PACA.”).

On the other hand, agencies may be capable of applying theories of empirical desert.²⁸² Indeed, the central argument outlined above is that agencies, either consciously or inadvertently, are doing exactly that.

There is no reason, though, to think that administrative agencies have an *unusual* capacity to impose such punishments. Compare agencies to the two natural alternatives: civil juries and district judges. Juries are well placed to take an approach of empirical desert. If the goal of punishment is to reflect community desires, lay jurors have a far better claim of expertise on that subject than administrative agencies. Similarly, federal district judges routinely impose retributive penalties in the course of criminal sentencing.²⁸³ Both of these institutional actors seem more likely to reflect the goals of empirical desert more accurately than agencies.

Furthermore, using desert to reinforce norms faces serious implementation problems in the administrative context. The arguments that justify desert as a utilitarian approach in criminal law are much weaker when applied to administrative civil penalties. Two important characteristics of the criminal law are largely absent in the administrative context—norms are weaker and the goals of punishment are less transparent. As an initial matter, arguments about the consequentialist value of desert generally assume a pre-existing set of norms.²⁸⁴ These norms classify conduct as either acceptable or unacceptable regardless of the existence of punishment.²⁸⁵ Criminal punishment can then respond to these preexisting norms in several important ways. First, by focusing criminal punishment on conduct that already violated these norms, law enforcement leverages the preexisting stigmatizing effect of norm violation to more cheaply obtain compliance.²⁸⁶ Second, the criminal law reinforces these norms by serving as the legitimate institution that

282. *See supra* Part I.B.

283. District judges are statutorily required to consider retribution when sentencing defendants. *See* 18 U.S.C. § 3553(a)(2)(A) (2011); *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (Sentencing Reform Act “states that punishment should serve retributive, educational, deterrent, and incapacitative goals”).

284. *See* PAUL ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW* 96-97, 175-76 (2008).

285. *See id.* at 176.

286. *See id.*

punishes their violation.²⁸⁷ Finally, the criminal law can extend the boundaries of these norms by establishing its legitimacy in situations in which norms are clear.²⁸⁸ By gaining a reputation for fairness in the easy cases by reinforcing preexisting norms, the criminal law can *set* norms in the borderline cases.²⁸⁹

If administrative civil penalties are aimed at norm reinforcement, the task is far more difficult because the norms do not necessarily exist prior to agency action. The problem is clearest in the context of safety regulatory agencies. Both MSHA and the NRC regulate highly dangerous conduct by drawing lines based both on the riskiness of the conduct and the cost of further safety measures.²⁹⁰ The line dividing acceptable behavior (conduct that is sufficiently safe given the cost of additional preventative measure) and unacceptable conduct (behavior where additional safety measures should be mandated given their cost) is hard to draw and is, in many ways, inherently arbitrary. Entities that are regulated by these agencies learn the acceptability of conduct by looking at the rules themselves rather than drawing on a preexisting body of societal norms. Agencies are thus forced to take on the difficult task of norm setting rather than the comparatively easier task of norm reinforcement.

CONCLUSION

The presence of retribution in agency punishment provides an important data point on the plausibility of placing deterrence at the center of any punishment scheme. Administrative agencies are perhaps better situated than any other actors to impose penalties in a manner consistent with the law and economics literature. For example, practicality objections are an important reason that

287. *See id.* at 186.

288. *See id.* at 187.

289. *See* 30 U.S.C. § 811(a)(6)(A) (2000) (identifying “the feasibility of the standards” as a consideration when developing mandatory mining safety and health standards); Kevin Clancy, Note, *Unresolved Safety Issues in Nuclear Power Plant Licensing: Reasonable Assurance of Safety or Nuclear Shell Game?*, 7 COLUM. J. ENVTL. L. 99, 101 (1980) (stating that NRC regulations “reflect the NRC’s assessment of acceptable cost in light of the expected benefit and risk involved”).

290. *See id.*

deterrence has taken a back seat to retribution in other areas of punishment. Scholars have advocated for both cost-internalization²⁹¹ and gain-stripping approaches to punitive damages.²⁹² This effort to bring an economic approach to punitive damages has not been entirely unsuccessful,²⁹³ but it has generally fallen short.²⁹⁴ Similarly, attempts to emphasize deterrence over retribution in the criminal law also have a long history, but not a long history of success. Late nineteenth and early twentieth century reform movements tried to refocus the purposes of punishment on consequentialist goals.²⁹⁵ The Model Penal Code (MPC) represented perhaps the high point of this movement.²⁹⁶ Many states, most famously Minnesota, followed the MPC statement of purpose²⁹⁷ with statutory statements of purpose that set aside retribution as a goal in favor of consequentialist objectives.²⁹⁸ Retribution, though, would not go quietly. Sentencing reforms in the 1970s and 1980s brought

291. Several scholars have advocated for multiplying compensatory damages by the reciprocal of the probability of detection. *See, e.g.*, Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 799-800 (2010); Polinsky & Shavell, *supra* note 226, at 874-75. Catherine Sharkey offers an expanded view of the role of punitive damages in cost internalization. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 401 (2003).

292. *See* Hylton, *supra* note 213, at 423 (arguing for a complete deterrence approach). On the other side, other scholars have assigned nonconsequential purposes to punitive damages. *See, e.g.*, Markel, *supra* note 13, at 245 (describing punitive damages as intermediate retributive sanction); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 961 (2007) (describing punitive damages as state-sanctioned revenge); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 139 (2005) (describing punitive damages as victim vindication).

293. *See* Sharkey, *supra* note 291, at 372 & n.71 (collecting cases).

294. *See* *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 439 (2001) (recognizing broader justifications for punitive damages than optimal deterrence).

295. *See* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1-6 (2003) (outlining history).

296. *See, e.g.*, Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1319-20 (2000); George P. Fletcher, *Mistake in the Model Penal Code: A False False Problem*, 19 RUTGERS L.J. 649, 655 (1988).

297. *See* MODEL PENAL CODE § 1.02(2) (1962) (providing general purposes of punishment).

298. *See* Cotton, *supra* note 296, at 1325-26.

retribution back,²⁹⁹ and academics and legislatures have increasingly revitalized it as the dominant reason for punishment.³⁰⁰

Deterrence has struggled to gain traction for a variety of reasons, but a key component is the real-world difficulty of the approach. Traditional deterrence theories make strong assumptions about how both law enforcement and violators behave, and these assumptions are frequently not true in practice. Although these assumptions fail in the administrative context as well, they are far closer to being true. For instance, deterrence theory assumes that decisions about the level of punishment and the probability of detection are made jointly and simultaneously.³⁰¹ In traditional criminal enforcement, law enforcement sets the probability of detection for violations, whereas a sentencing judge sets the level of punishment. Administrative agencies are different. Because of the blend between executive, legislative, and judicial roles in the administrative context, agencies oversee their inspection and enforcement functions, issue rules establishing systems of penalty guidelines, and decide penalties in individual cases. They therefore control both the probability of detection and the eventual punishment. Because agencies can control all aspects of enforcement, they

299. See Huigens, *supra* note 154, at 980 n.152 (noting “retributivism’s resurgence in the 1970s”).

300. See Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 845-47 (2002) (collecting sources). The more specific and limited efforts to explicitly calculate punishment on approaches based on optimal or complete deterrence have also foundered. Most significantly, initial proposals for the United States Sentencing Guidelines for organizational defendants would have focused on theories of deterrence. For example, there were proposals to explicitly consider the probability of detection as a central component of setting punishment levels for organizations. See Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L. Q. 205, 219-20 (1993) (discussing the consideration of the probability of detection in setting organizational penalties); Jeffrey S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 516 (1989) (proposing a system of optimal deterrence for punishment of organizations). The proposal, though, was ultimately abandoned because, among other reasons, the calculation of the probability of detection was thought to be unworkable. Nagel & Swenson, *supra*, at 219-20.

301. Traditional law enforcement may face even more serious difficulties than the argument in the text outlines because, to the extent that police focus on crimes with the longest sentences, punishment may be positively rather than negatively correlated with the probability of detection. See Katyal, *supra* note 37, at 2411.

have a much greater opportunity to establish a deterrence-based system if they so choose.

Similarly, the information problems in administrative enforcement are far smaller. In the traditional criminal context, the assumption of perfect information by defendants and enforcers is a dubious one.³⁰² Violators are unlikely to be aware of the situations under which fines might be imposed and what those fines are. In contrast, in the civil regulatory environment, regulated entities not only have counsel, but they are also repeat players in the regulation game. They have the opportunity to observe the rules as they develop. On the other side, administrative agencies have one of the most important factors available in the implementation of a model based on the probability of detection: the capacity to generate the necessary data. A central weakness of traditional theories of deterrence is that enforcement often lacks the ability to determine how frequently violators escape the consequences of misconduct.³⁰³ Those problems are substantially reduced in the administrative context because administrative agencies face a much easier problem. The universe of potential violators is much smaller because it is restricted to the regulated entities, and in many cases agencies have the power to audit.³⁰⁴ An administrative agency could, for example, vary its routine audits with less frequent audits that are either more intensive or focused on particular violations. Comparing the rate of detection of violations in these two different approaches would allow the agency to estimate a baseline probability of detection.³⁰⁵

302. See Robinson & Darley, *supra* note 37, at 954 (describing information problems in traditional deterrence theory).

303. See Jonathan S. Feinstein, *Detection Controlled Estimation*, 33 J.L. ECON. 233, 233 (1990).

304. MSHA not only can inspect mines regularly but is statutorily required to inspect every underground mine four times per year and every above-ground mine twice a year. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (2006). These inspections produce a wealth of data on the mining industry, the nature and types of violations that mines commit, and the penalties imposed on mines that violate the rules. See Morantz, *supra* note 42, at 56-58 (outlining the types of data available on mine safety). The NRC has similar audit powers. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1029, OVERSIGHT OF NUCLEAR POWER PLANT SAFETY HAS IMPROVED, BUT REFINEMENTS ARE NEEDED (2006).

305. See, e.g., Feinstein, *supra* note 303, at 239-40, 265-69 (outlining statistical techniques to model the probability that violations go undetected).

Of course, an argument that administrative agencies are more able to implement a deterrence-based approach to punishment than other enforcement entities does not demonstrate that it is possible. Even with the advantages agencies have over traditional law enforcement entities, optimal or complete deterrence might be out of reach. If that is true, though, we should be skeptical of any system of punishment that claims to be designed to achieve deterrence rather than retribution.