

Propping up Corporate Crime with Corporate Character

Miriam H. Baer

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I. INTRODUCTION

Mihailis Diamantis begins his Article¹ with the familiar account of corporate criminal liability and several of its most intractable puzzles. The corporation is a person for purposes of corporate criminal liability,² but it is rarely prosecuted and instead enjoys the benefit of an extrajudicial settlement agreement.³ The executive branch's increased employment of this type of agreement leaves most observers unhappy—often for opposing reasons—and

1. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018).

2. See generally *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) (explaining that corporations are treated as an individual for criminal liability).

3. For empirical evidence on the incidence of corporate prosecutions, convictions, and the government's use of extrajudicial agreements such as DPAs and NPAs, see Cindy R. Alexander and Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 562 (2015) (collecting federal data indicating a grand total of 66 DPAs, 90 NPAs and 199 corporate guilty pleas for the years 1997–2011). These extrajudicial agreements can either be styled as “deferred” prosecution agreements or “non” prosecution agreements. For explanations on the differences between the two, see Cindy R. Alexander & Yoon-Ho Alex Lee, *Non-prosecution of Corporations: Toward a Model of Cooperation and Leniency*, 96 N.C. L. REV. 859, 862 (2018) (defining and distinguishing NPAs and DPAs).

fuels the public's perception that corporations and their greedy executives can violate laws without consequence.⁴

Many have already mined this topic.⁵ Diamantis enlivens the conversation by proposing a new theory of corporate punishment, which he labels “character theory.”⁶ As Diamantis acknowledges, the theory has several precursors. For example, scholars have long argued that criminal law ought to assess a corporation's ethos or culture.⁷ Diamantis's approach diverges from these earlier works in that it goes beyond examining the corporation's prevailing cultural norms and focuses additionally on the corporation's policies, rules, and organizational structure.⁸ To that end, Diamantis's character test functions remarkably like a proxy for the “effective corporate compliance” metric that already pervades most discussions of corporate criminal punishment.⁹

Unlike the case of flesh-and-body executives, the argument for prosecuting the corporation—which is, after all, a legal fiction—is not obvious.¹⁰ As a practical matter, the corporation cannot be sent to jail; the

4. See BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* ch. 3 (2014) (explaining and critiquing the deferred prosecution process).

5. For more recent discussions, see, e.g., Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323 (2017); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016). For earlier accounts, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 861–86 (2007); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1382–405 (1999).

6. Diamantis, *supra* note 1, at 509.

7. See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1125–65 (1991) (outlining the classic argument for liability scheme that incorporates analyses of the corporation's “ethos”); Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 9–10 (2012) (arguing that corporate culture plays an important role in influencing illegal behavior). For a more skeptical account of the culture challenges that inhere in incorporating it into regulatory policies regarding corporate compliance, see Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017) (citing studies demonstrating complex relationship between free-wheeling cultures and socially desirable dispositions such as creativity and tendency towards innovation).

8. Diamantis, *supra* note 1, at 540–41.

9. Prosecutors often take into account the corporation's attempt to educate and train its employees on relevant laws, monitor wrongdoing, and discipline wayward employees. The corporation's compliance function is responsible for these activities, and the presence or absence of an “effective” compliance program can affect whether and how leniently a corporation is treated by prosecutors at the charging stage of a prosecution. See UNITED STATES ATTORNEY'S MANUAL 9-28.300 (5), (7). For more on compliance, see Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009) (“‘Compliance’ is a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law.”). See generally GEOFFREY PARSONS MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT AND COMPLIANCE* (2d ed. 2017) (explaining rise of compliance function within firms).

10. For the classic law and economics account of why corporate criminal liability is either unnecessary or affirmatively harmful, see Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J.

standard criminal sentence for a corporation looks highly similar to the package of reforms a civil regulator might demand were said regulator to write out a wish list.¹¹ Accordingly, the difference is one of institutional design: by designating a case “criminal,” the government unilaterally changes the rules of a game. Out go finely honed regulations and notice-and-comment rulemaking, and in come broadly worded statutes and expansive prosecutorial discretion. Out goes the relatively undemanding regulatory fine, and in comes the more onerous criminal conviction and the reputational costs and collateral consequences that accompany it.¹² And finally, out goes the hapless, under-supported civil regulator and in comes the aggressive, formidable prosecutor.

Of course, the irony of all this is that prosecutors haven’t used their great powers to secure thousands, or even hundreds, of corporate convictions. Instead, the Department of Justice has, over the past two decades or so, leveraged the threat of criminal conviction to procure a mix of fines and reforms through extrajudicial settlements known as Deferred Prosecution Agreements (“DPAs”) and Non-Prosecution Agreements (“NPAs”).¹³ In other words, despite their power and mission, federal prosecutors approach corporate prosecutions differently from individual ones. For individual defendants, federal prosecutors seek convictions and sentences of imprisonment.¹⁴ For corporations, prosecutors rely on extrajudicial settlements to pursue the types of compliance and governance reforms one might expect of either civil regulators or litigators in private lawsuits.¹⁵

Presumably, some of this arises out of corporate criminal law’s collateral consequences, which Diamantis rightly criticizes as too blunt.¹⁶ For many

LEGAL STUD. 319, 322 (1996) (“[W]here appropriate civil penalties do not already exist, criminal liability in response is inferior as a practical matter to an appropriate corrective on the civil side.”).

11. See Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, in PROSECUTORS IN THE BOARDROOM 87, 90 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (observing that in the case of securities fraud, organizational criminal liability “striv[es] to rework itself into a form of civil regulatory liability”).

12. *Id.* at 89 (comparing civil security proceedings, in which the corporate offender may “end up writing two checks” to the SEC and private class action attorneys, and a criminal case, which at least resolves with “serious, enforceable reform measures”). As Buell himself has argued, a corporate criminal action also carries with it certain expressive effects. See, e.g., Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 518 (2006); see also Gilchrist, *supra* note 7, at 6 (describing expressive costs of immunizing corporations from criminal liability).

13. Alexander & Lee, *supra* note 3, at 862 (defining and distinguishing NPAs and DPAs).

14. Whether and how prosecutors maximize convictions or sentences is a weightier, more complex matter. For the purposes of this discussion, however, it is enough to say that prosecutors *generally* aim for sentences of imprisonment when the target of their prosecutions is a human being as opposed to an entity. Cf. Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1435 (2018) (“‘Winning’ for prosecutors necessarily involves limiting the defendant’s liberty in some way.”).

15. Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1794–98 (2010).

16. Diamantis, *supra* note 1, at 525.

types of corporations (particularly publicly held ones), it is difficult to see a corporate prosecution to its logical endpoint—a conviction and judicially imposed sentence—without threatening the company’s overall livelihood, and in a few instances, the broader economy.¹⁷ Accordingly, prosecutors have devised an alternative, third-way approach that pleases very few.¹⁸ To critics, the DPA is too weak, too vague, and too temporary to secure lasting corporate reform.¹⁹ To their opponents, the DPA is equally problematic: It demands interventions in corporate governance that may be excessively costly and not scientifically proven to ensure future compliance with law.²⁰

Apart from the pragmatic critiques, a growing number of scholars have attempted to pinpoint corporate punishment’s “first principles”: Why (or when) should we criminally punish corporations? Deterrence-based justifications analyze corporate crime’s potential to induce compliance with law.²¹ Retributive theories mine the various reasons society deems certain types of behavior worthy of blame.²² Declaring both penological theories wanting, Diamantis proposes a third. The purpose of corporate punishment, Diamantis contends, is criminal law’s power to generate “good corporate character and civic virtue.”²³ Under this framework, the corporate prosecution’s stated goal is neither the prevention of wrongdoing nor the

17. See generally Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 COLO. L. REV. 1 (2014) (identifying difficulties of prosecuting banks); David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1444 (2014) (quoting DOJ officials’ concerns with the stock market and broader economy as reason for avoiding charges against corporate entities).

18. Diamantis, *supra* note 1, at 509.

19. GARRETT, *supra* note 4 at 149–50.

20. Diamantis, *supra* note 1, at 558; Arlen & Kahan, *supra* note 5, at 379–80 (voicing skepticism on value of certain types of compliance mandates).

21. For representative examples, see Arlen & Kahan, *supra* note 5, at 361–62, employing law and economics analysis to offer limited defense of corporate DPA’s and NPA’s; Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 688–95 (1997) (demonstrating superior deterrence results from use of liability system that takes into account corporation’s self-reporting and monitoring efforts); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 274 (2008) (arguing that severe penalties will fail to deter “precisely when entity liability is vital from a deterrence standpoint, i.e., in decentralized organizations where individual wrongdoers are difficult to identify”).

22. Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 120–21 (2010) (“[T]he primary purpose of retributive sanctioning involves the belief ‘that society is more morally just when the good prosper and the bad suffer.’”). Robson contends that deterrence has long overshadowed retribution as a purpose of punishment in the corporate context. *Id.* at 121. For an argument that the purpose of retribution is solely to communicate condemnation, but *not*, as Robson suggests, impose suffering, see Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 911 (2010), which rejects accounts of retribution that “conflat[e] . . . punishment with suffering.”

23. Diamantis, *supra* note 1, at 507 (abstract).

punishment of past transgressions.²⁴ Rather, it is the installment of reforms designed to alter an errant corporation's "disposition" to commit crime.²⁵

In a world that, as of late, has become increasingly cynical, Diamantis's optimistic belief that the criminal justice system can rehabilitate corporations is refreshing. There are, however, strong reasons to discount Diamantis's claim that "we know it is possible to alter corporate character[,] and [we] have a decent sense of how to do it."²⁶ Indeed, there may be reason to affirmatively fear character-based justifications of corporate punishment. In the remainder of this short Response, I sketch at least three reasons to be wary of so-called character-based theories of corporate criminal liability.

II. DIAGNOSIS AND CAUSATION

Diamantis makes clear that he means "character" to refer not to the company's culture or ethos, but rather to its "stable disposition."²⁷ If, for example, Company X employs a compensation policy that all but forces employees to create fake client accounts, we might say Company X's policy created a disposition to engage in fraud. In Diamantis's ideal world, a prosecutor would charge Company X with its relevant crime (wire fraud, for example), and a judge would fashion a sentence that included a number of governance reforms that dismantled the policies that produced its antisocial disposition. By contrast, if a rogue employee committed the same crime in contravention of the corporation's policies and structure, we would say such behavior was "out of character" for the company and would expect a judge to leave the corporation's policies and governance structure intact.²⁸

So much for the simple examples. Diamantis's theory of character reform suffers the same drawbacks as more traditional rehabilitative approaches to criminal punishment.²⁹ For the easiest cases, we can identify with relative certainty the various flaws or strong points that make a corporation more or less compliant. Once we move beyond that, we get lost. The addition of a single new variable exponentially confuses our efforts to pinpoint the cause of a given crime. Was it the firm's compensation policy that induced employees to bribe foreign employees, or was it the size and composition of the board? Did the compliance officer report to the wrong individual in the C-suite, or was the program insufficiently resourced? Which problem should we fix first: the compliance program's structure and funding or the policies

24. *Id.* at 534.

25. *Id.* at 540-42.

26. *Id.* at 542.

27. *Id.* at 545 (emphasis omitted).

28. *See id.* at 545.

29. *See generally* Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127 (2011) (discussing the design challenges of rehabilitation programs for individuals).

on compensation and commissions? And if we fix all these problems at once, how are we so sure we won't generate some new problem?³⁰

Some policies, in hindsight at least, seem to all but command employees to commit crimes. A strict bonus system that values revenues above all else is readily identified as the culprit when employees predictably cheat to improve their monthly numbers.³¹ But some policies permit crime to take hold simply by failing to recognize certain behavioral weaknesses.³² In other instances, the company may fail to recognize changes in circumstance or the law.³³ And in yet a fourth category of cases, the company's robust investment in pro-social activities, such as the company's compliance function, may ironically generate more crime or more *serious* crime.³⁴ Thus, as Veronica Root has pointed out, because different crimes can function as substitutes, the company that focuses too much on violations of the Foreign Corrupt Practices Act may inadvertently encourage its employees to engage in other wrongful behaviors.³⁵ By the same token, a company whose compliance policies threaten termination for even relatively minor offenses may cause employees to more aggressively conceal wrongdoing in order to evade detection.³⁶

How would a character theory address these problems? Diamantis's piece declines to flesh out these details. Nor does he address the quantum of proof

30. Arlen and Kahan avoid this problem by arguing that prosecutors should focus solely on those instances in which corporate actors are insufficiently incentivized to police and disclose wrongdoing within the firm. See Arlen & Kahan, *supra* note 5, at 385.

31. See, e.g., Cindy A. Schipani et al., *Doing Business in a Connected Society: The GSK Bribery Scandal in China*, 2016 U. ILL. L. REV. 63, 91 (describing ways in which compensation systems fueled GlaxoSmithKline's bribery scandal even though its compensation policy appeared "reasonable and fair").

32. For a discussion on the relationships between behavioral weaknesses and corporate fraud see Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 104–08 (2014) (explaining hyperbolic discounting to describe its contribution to corporate fraud).

33. Some would argue this was the case with the Foreign Corrupt Practices Act ("FCPA"). When the federal government suddenly expanded criminal enforcement of the Act in the early 2000s, corporate lawyers lacked a firm sense of the law's boundaries. See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 560–63 (2011) (citing uncertainty arising out of dearth of judicial opinions interpreting FCPA's statutory terms). Conversely, a compliance officer who fails to recognize situational factors and instead focuses too intently on a given manager's disposition or personality is likely a victim of fundamental attribution error. See Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2259–61 (2017) (explaining fundamental attribution error and how it would apply in FCPA context).

34. See generally Todd Haugh, *The Trouble With Corporate Compliance Programs*, 59 MIT SLOAN MGMT. REV. 55 (2017) (explaining that comprehensive compliance programs do not always reduce crime).

35. See Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1015–16 (2017) (criticizing "narrow" settlement agreements that focus solely on preventing recurring violations of the FCPA while ignoring the rest of the company's compliance program).

36. On the unintended crimogenic effects of corporate self-policing, see Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1119 (2016) ("Rather than deterring misconduct, a pumped-up enforcement regime might induce corporate employees to evade detection.").

necessary to establish a corporation's disposition (as distinct from a particular violation of law); to show the causative link between that disposition and a given violation of law; or the proof that a given reform will effectively neutralize that disposition without generating or exacerbating other equally problematic character flaws. These are all problems to be worked out in the future, presumably by sentencing judges, even though it is unclear how a character-based approach to punishment would convince either corporations or prosecutors to avoid the various extra-judicial settlements that currently short-circuit the criminal justice system. Presumably, prosecutors will forego DPAs because character theory, as explained by Diamantis, rejects draconian punishments such as license revocation and debarment. That is all well and good, but prosecutors have no power to rewrite the various laws that impose harsh collateral consequences for convictions and indictments. Whether a convicted company loses its license still falls largely within the purview of a civil regulator. Unless Diamantis can convince state and federal agencies to rewrite their own laws and regulations, character theory is no more likely to alter extrajudicial settlements than any other reform proposal.³⁷

To be fair, Diamantis isn't trying to write *the* definitive manual on how to use corporate criminal law to rehabilitate corporations. Rather, he is attempting to establish a promising alternative theory of corporate punishment—one that satisfyingly explains what it is prosecutors are doing when they negotiate DPAs and other settlement agreements. He certainly can fill in these details in the future. And he is indubitably correct that researchers across several disciplines have studied compliance for several decades, from which there now exists a body of valuable information from which to draw. Nevertheless, one cannot help but feel that the character approach serves as an invitation to judges to meddle in the corporation's daily affairs without much scientific basis. This may not be a problem for individual dignity or autonomy, as Diamantis's analysis demonstrates, but it most surely is one that ought to give us pause if we care about efficiency, institutional competence, and rule of law concerns.³⁸

At bottom, a theory of punishment that seeks to alter corporate character is one that empowers federal courts to alter the corporation's internal governance. Given state courts' longstanding unwillingness to interfere in the business judgement of the corporation's directors, it is curious that Diamantis

37. For Diamantis's claim that collateral damages ought not to apply (at least not in the same way) under character theory, see Diamantis, *supra* note 1, at 548–51.

38. Rule of law issues arise insofar as a sentencing judge can impose obligations on the corporate defendant without any legal limitation, such as forcing a corporation to forego behavior that has not been declared illegal by a legislature. Cf. Slobogin, *supra* note 29, at 1132 (flagging similar issues that arise in risk-based sentencing of individuals). See generally Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements*, 8 J. LEG. ANALYSIS 191 (2016) (exploring issues that arise in regard to prosecutor-driven settlements).

imagines such a fulsome role for federal judges.³⁹ Why would we say a state court is institutionally incompetent to interfere in corporate affairs but that a federal court is? More importantly, given the amount of charging discretion prosecutors currently enjoy, one cannot help but register concern when one considers the gulf between the hands-off business judgment rule and Diamantis's preferred rehabilitative approach. Under one regime, judges sit primarily on the sidelines. Under the other, judges are invited to reshape the corporation's policies, governance and whatever else may affect its "disposition." Does the mere fact of a criminal prosecution truly justify such a difference?

I don't mean to say there is no value in asking whether a corporation's misstep was a one-off situation or evidence of a deeper pathology. Nevertheless, absent a deeper understanding of just what character is, much less how to unravel the multiple variables that affect it, it is all but impossible to embrace character as a *superior* alternative to retribution or deterrence.

III. IS CHARACTER THEORY INCOMPLETE?

A comprehensive theory of punishment ought to do more than tell us how to style a particular sentence. It should guide us as well in deciding whom we should investigate, whom we should charge, and roughly how harshly we should charge that person or entity compared to others.⁴⁰ In that regard, character theory falls short.⁴¹ Presented primarily as a sentencing tool, it fails to tell us which activities are deserving of criminal punishment in the first place. Surely, it cannot be the case that all corporations that possess "bad dispositions" are deserving of criminal prosecution.⁴² If that were the case, the resulting theory of criminal punishment would become overinclusive.⁴³ There has to be some sort of harmful event that triggers the state's criminal apparatus, and character theory does not tell us what that event is or should be.

Of course, our current legal rule of *respondeat superior* is already overinclusive. A corporation is technically responsible for its employee's violation of law provided the employee was acting within his apparent authority and acted with *an* intention of aiding the corporation, which could

39. Diamantis, *supra* note 1, at 564 (arguing that the judiciary's lack of business expertise can be "easily remedied").

40. See generally Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007) (discussing the "real world" challenges of implementing a theory of punishment).

41. See Diamantis, *supra* note 1, at 549 (rejecting corporate fines as means of rehabilitating corporate character).

42. There is an additional problem here: How will a public steeped in retributive discourse (particularly, the notion that a punishment ought to fit *the crime*) respond to a criminal liability regime that produces results so out of step with the rest of criminal law?

43. Admittedly, this shortcoming is not unique to character theory. See Cahill, *supra* note 40, at 817–19 (identifying ways in which retributive theory is said to be incomplete).

include improving the corporation's profits or stock price.⁴⁴ As I have argued elsewhere, no scholar seriously contends that *respondeat superior* faithfully reflects either the retributive or deterrence based rationales for punishment.⁴⁵ A criminal law steeped in deterrence would take account of whether a corporation attempted to prevent and monitor the misconduct or self-reported it once it became aware of it.⁴⁶ And one that took retribution seriously would examine carefully whether the corporation directly or indirectly encouraged the employee's behavior. *Respondeat superior* adheres to neither of these theories; rather, it casts its net as broadly as it can and leaves the dirty business of choosing targets to government prosecutors.

As has been documented elsewhere, one of the enduring problems for corporate crime, and one which Diamantis himself highlights, is its dependence on prosecutorial discretion.⁴⁷ Thousands of corporations *could* conceivably be charged under a *respondeat superior* theory, but only a handful are investigated every year.⁴⁸ Which principles should guide the prosecutor

44. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1489–90 (1996) (setting forth elements).

45. Baer, *supra* note 36, at 1124 (2016) (arguing that DPAs presuppose corporate malfeasance other than *respondeat superior*'s strict liability rule and that it is this type of malfeasance that has yet to be fleshed out in statutory language).

46. See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) (arguing that strict vicarious liability fails to induce self-reporting if company receives no benefit for monitoring and disclosure of wrongdoing).

47. See, e.g., Diamantis, *supra* note 1, at 510 (referring to “the dark and unjust underbelly to the way prosecutors handle corporate criminals”). Despite his acknowledgement of this critique, Diamantis is largely sympathetic to prosecutors, and in fact argues that their reform approach has much to recommend, given its overlap with his character-based approach. *Id.* at 532–33. To some degree, the DOJ itself has narrowed prosecutorial discretion in this area by promulgating multi-factor charging guidelines that are now published in the United States Attorneys Manual. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.000–9-27.760. Although these guidelines are neither binding nor enforceable as legal rights, they do cast a reportedly “law-like” shadow over the DPA process. Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 833 (2018) (arguing that guidelines form a “lingua franca” for prosecutors and defense lawyers as they negotiate DPAs, NPAs, and other dispositions).

48. See Diamantis, *supra* note 1, at 510–11 (observing the discrepancy between corporate criminal liability's wide scope and its actual occurrence). For a recitation on corporate criminal liability's breadth, consider Mary Jo White's 2005 address to a room of corporate counsel:

All of you in this audience probably know the law well, but its breathtaking scope always bears repeating: If a single employee, however low down in the corporate hierarchy, commits a crime in the course of his or her employment, even in part to benefit the corporation, the corporate employer is criminally liable for that employee's crime.

Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 1517 PLI/CORP. 815, 817 (2005). Despite corporate criminal liability's “breathtaking scope,” prosecutors do not routinely investigate all corporations for employee-related crimes. For example, the Department of Justice entered into just 22 DPA's and NPA's collectively in 2017. *2017 Year-End Update on Corporate Non-Prosecution*, GIBSON & DUNN at 1 (Jan. 4, 2018), <https://www.gibsondunn.com/2017-year-end-mpa-dpa-update>.

when she chooses among corporate targets? Whatever their respective flaws, deterrence and retributive theories of punishment attempt to answer these questions.⁴⁹ (Whether prosecutors actually abide by them is another matter.) Character theory, however, is incomplete. It tells us what goal the sentencer should achieve (better character) but it offers far less guidance to those who write criminal statutes or make charging decisions.

IV. CHARACTER'S DARKER SIDE

Up until now, I have focused on the ways in which character falls short. It is not particularly easy to diagnose or fix, and it fails to guide government actors in defining crimes or deciding whom to charge and how.

An additional reason for being wary of character arises not out of its shortcomings, but rather, from its historical usage. “Character” is a notoriously subjective term that can mask a number of illiberal, idiosyncratic, or even hateful ideologies.⁵⁰ When we say a corporation has bad character, that might mean one thing to Professor Diamantis, but something quite different to the general public.

For over a century, the word “character” has been used as a shorthand or worse for labeling certain out-groups and for justifying biased and shameful misconduct towards those out-groups. Character, in the wrong hands, can do quite a bit of mischief. Those who seek to exclude immigrants or refugees have often denigrated their “character.”⁵¹ Elite institutions of higher education such as Harvard famously used “character” as a means toward limiting the number of Jews admitted to the college beginning in the 1920’s and extending for several decades.⁵² No doubt, Diamantis would strongly recoil from these usages. Therein lies the problem, however: character’s elasticity allows any decisionmaker—be it a prosecutor, legislator, or judge—to mask ideology with some anodyne call for “good corporate citizenship.” And in at least some instances, “good citizenship” will have much less to do with the corporation’s bad acts than it does with personal grudges, populist ideology, or something far worse.

49. See, e.g., Arlen & Kahan, *supra* note 5, at 385 (pressing for reforms “along three dimensions: first, the general standard for imposing policing mandates; second, the criteria that determine when mandates are imposed; and third, the type of mandates imposed”).

50. Concededly, “deterrence” and “retribution” are similarly overdetermined and prone to abuse. See, e.g., Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 634 (2012) (arguing that “retributive desert,” like deterrence, can be employed by officials to exploit populist sentiment); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 414 (1999).

51. Immigration law explicitly requires “good moral character” of any person seeking naturalized citizenship. 8 U.S.C. § 1427(a) (2012). See generally Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1572–73 (2012) (arguing that immigration authorities have “turned the good moral character requirement into a powerful exclusionary device”).

52. See JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF EXCLUSION AND ADMISSION AT HARVARD, YALE, AND PRINCETON* chs. 4–6 (2005).

V. RECHARACTERIZING CORPORATE CRIME

Perhaps as a thought experiment, one might ask how much of Diamantis's character account could just as easily be conveyed by the term "structure."⁵³ Certain types of structural flaws cause employees and corporate executives to violate the law; armed with this knowledge, the government can and should use whatever tools at its disposal to identify and remedy these defects. Stripped of its "character" language, the proposition appears almost banal. Who *wouldn't* choose to fix the very organizational defects we know to cause crime?

Then again, the question is not just a matter of fixing problems, but of imposing punishment. In other words, corporate criminal law raises "who" questions alongside "what" or "when" questions.⁵⁴ A theory premised on good and bad character is a nice match for the criminal justice system and for the prosecutors who serve as its gladiators. One premised on curing structural defects could just as easily be borne by civil regulators or private actors, at least in theory.

And that brings us full circle to the point I began with, which is that criminal prosecutors are far more powerful than civil regulators, and they easily best the private litigators who seek governance reforms through class actions or similar vehicles. Thus, we should ask ourselves: Do we prosecute corporations because we truly believe they deserve punishment, or do we continue to rely on the criminal justice system because alternative institutions lack the ability to bring about the structural changes we deem desirable? And if it is the latter, why do we spend so much time thinking up new justifications for corporate criminal law when we could instead focus our energies on introducing better regulatory alternatives?

It is one thing to say the government should identify and remedy a corporation's most notable crimogenic properties. It is quite another to say the government should have the power to criminally *punish* a corporation on account of those properties. We would never dream of criminally punishing a city (oddly enough, a municipal corporation) for its crimogenic qualities, much less its "character" flaws. Why, then, are we so bent on doing the same to corporations? Diamantis believes character theory provides a plausible answer. Perhaps. But it seems just as likely that it is yet another crutch we lean on to justify our reliance on a government actor (the prosecutor) whose powers remain largely unparalleled compared to the many regulators who have failed to rein in corporate abuses of law.

53. To that end, Diamantis's account echoes some of the prescriptive analysis set forth in Brandon Garrett's work, although Garrett is more welcoming of punishments such as corporate fines. See GARRETT, *supra* note 4, at 70 (observing that prosecutors "try to rehabilitate corporations using structural reforms"), and 286 (including corporate fines in his list of preferred remedies).

54. Arlen & Kahan, *supra* note 5, at 348–49 (observing that generally applicable regulations frequently come about only after "careful deliberation and . . . input from experts, the affected parties, and the public" as compared with settlement agreements, which are crafted solely by prosecutors).

VI. CONCLUSION

Because corporate criminal liability is here to stay, Professor Diamantis's examination of first principles is warranted and indeed welcome. I also concur that we should focus as intently as we can on the structural defects that fuel, exacerbate or hide individual wrongdoing. But it seems to me that we can engineer this focus without relying so devoutly on criminal law, or on the theories of punishment upon which it rests. At the end of the day, there are no good corporations or bad ones. There are criminal corporations, but only because our society elects to label them criminals.