

# Clockwork Corporations: A Valiant Effort to Do the Impossible

John Hasnas\*

## I. INTRODUCTION

It is a genuine pleasure to be invited to comment on Mahailis Diamantis's excellent article, *Clockwork Corporations: A Character Theory of Corporate Punishment*.<sup>1</sup> I intend to lavish considerable praise on this Article both because it deserves it, and in order to compensate for the inappropriate criticism to which I intend to subject it. I believe that Professor Diamantis has done the best job possible of doing what he sets out to do. But because what he sets out to do is impossible, I will—admittedly unfairly—criticize him for not doing something else.

Professor Diamantis's goal in *Clockwork Corporations* is to provide an account of the proper form of punishment for *corporate* criminality. Individuals working for a corporation are, of course, subject to prosecution and conviction for any crimes that they commit while functioning as a corporate agent. However, under current law, should a corporate employee commit a crime within the scope of his or her employment,<sup>2</sup> the corporation<sup>3</sup> is also subject to prosecution and conviction *as a collective entity*.<sup>4</sup> Professor

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

2. Technically, corporations are criminally liable for the actions of their employees taken within the scope of their employment *with the intent to benefit the corporation*. See *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962). However, the intent to benefit element, which is broadly construed, is not relevant to the present discussion, and so, for purposes of concision, will be disregarded.

3. This form of collective criminal liability is not limited to corporations, but applies to all forms of business organizations. Once again, to facilitate communication and reduce verbiage, I will use the term 'corporation' to refer to all business organizations regardless of their legal form.

4. Corporations are also subject to prosecution and conviction under the collective knowledge doctrine that attributes the knowledge possessed by all of its employees to the corporation as a collective entity. This allows the corporation to have the mens rea required by crimes requiring intent even if no individual employee possesses the necessary knowledge.

Diamantis seeks to identify the form of punishment that is appropriate to the latter situation. He asks how corporations should be punished as collective entities. His answer is the character theory.<sup>5</sup>

The problem with Professor Diamantis's Article is not that he does not effectively show that if corporations are to be subject to punishment as collective entities, they should be punished according to the character theory. The problem is that corporations should not be subject to punishment as collective entities at all.<sup>6</sup> As a result, Professor Diamantis's inquiry reduces to: "What is the proper form of punishment to impose in cases in which punishment is improper?" Because the obvious answer to this question is "none," I contend that what Professor Diamantis actually offers is not a theory of punishment, but a theory of regulation masquerading as a theory of punishment.

This is not really a criticism of Professor Diamantis's project—or, to the extent that it is, it is an unfair one. Professor Diamantis is entitled to define his project however he chooses, and he makes it clear that he is operating within the framework of current law. As he tells us in the article's Introduction:

One goal of this Article is to work so far as possible within the constraints of present legal and political realities. In theory, there may be ways to promote corporate reform and solve the problems discussed in this Article without turning to character theories of punishment. Some scholars think that scrapping corporate criminal law entirely and relying only on civil liability would improve things. But such proposals are fanciful in the current political climate. . . . As such, abolishing corporate criminal law and other similarly radical options are outside this Article's methodological ambit. It takes the basic contours of corporate criminal law as given and shows how they can function best.<sup>7</sup>

However, by electing to "take[] the basic contours of corporate criminal law as given"—in assuming that corporations may be punished as collective entities—Professor Diamantis has committed himself to providing an

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*See* United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987). Again, because this form of corporate liability is not central to the present discussion, it will not be specifically addressed.

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

6. For the full development of the argument for this conclusion, see John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009); Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009); John Hasnas, *The Phantom Menace of the Responsibility Deficit*, in THE MORAL RESPONSIBILITY OF FIRMS 89 (Eric W. Orts & N. Craig Smith eds., 2017).

7. Diamantis, *supra* note 1, at 515–16 (footnotes omitted).

adequate theory of corporate punishment.<sup>8</sup> But because it is both morally improper and practically counter-productive to punish corporations as collective entities, as Professor Diamantis's article amply, if implicitly, demonstrates,<sup>9</sup> there is no such thing. Therefore, Professor Diamantis has set out to do the impossible. Because this is the case, it is not surprising that what Professor Diamantis actually offers is not a theory of corporate punishment, but a theory of corporate regulation hiding under the label of a theory of punishment.

In this Comment, I will not take issue with the substance of Professor Diamantis's assertions. With a few exceptions, I believe these assertions to be entirely correct. Rather, I will attempt to act as an interpreter, translating Professor Diamantis's language of punishment into the more appropriate language of regulation. While rarely disagreeing with Professor Diamantis, I will frequently suggest that his observations carry different implications than the ones which he actually draws.

## II.

Let's start with a translation of the Article's Introduction.

Professor Diamantis begins his Article by claiming that he is "seek[ing] to uncover the implicit logic behind corporate prosecutors' decisions . . . [which if] pushed and perfected as an approach . . . [to] corporate punishment" would lead to the character theory.<sup>10</sup> But, this implies that character theory is a theory of punishment only on the assumption that prosecutors are attempting to punish the corporations. However, as Professor Diamantis amply demonstrates throughout his Article, this is precisely what corporate prosecutors are desperately trying to avoid doing.<sup>11</sup>

Professor Diamantis notes the wide "discrepancy between the scope of corporate criminal liability and the infrequency of [corporate] conviction,"<sup>12</sup> and prosecutors' excessive use of deferred prosecution agreements ("DPA") and non-prosecution agreements ("NPA") to avoid even having to bring cases against corporations to trial.<sup>13</sup> In explanation, Professor Diamantis cites the lesson that prosecutors learned from Arthur Andersen's conviction, which "turned into a long-lasting catastrophe that put the company and its 75,000 employees out of business."<sup>14</sup> He notes that "[w]hen a successful conviction could entail massive harm to the very social welfare prosecutors are supposed to protect, DPAs and NPAs are a natural choice."<sup>15</sup> In other words, having

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8. *Id.* at 516.

9. *See infra* Part III.

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

11. *See, e.g., id.* at 562-63.

12. *Id.* at 512.

13. *Id.*

14. *Id.* at 513.

15. *Id.* at 514.

seen what happens when the state punishes corporations in their collective capacity, prosecutors want to avoid punishing corporations at almost any cost. Prosecutorial practice, far from embodying any inchoate theory of corporate punishment, is an implicit recognition of the inappropriateness of such collective punishment.

Translation: Whatever prosecutors are doing, it cannot be a model for a theory of punishment.

Professor Diamantis asserts that “[t]he perception that large, public corporations routinely escape conviction is troublingly paradoxical.”<sup>16</sup> However, the apparent paradox disappears as soon as one realizes that corporations, whether large and public or otherwise, should not be subject to punishment in the first place. Routinely escaping conviction is not problematic when one should not be subject to conviction at all. As Professor Diamantis points out, corporations

have an extremely wide base of liability. Under current doctrine, they are automatically liable for almost any crime any individual employee commits on the job. This adds up to a staggering degree of exposure for large corporations—the 75 largest corporations in the United States employ over 100,000 potential points of liability.<sup>17</sup>

Given that this confronts prosecutors with the choice of either enforcing an extreme form of vicarious criminal liability which can cause massive collateral damage or trying to avoid corporate prosecution whenever possible, there is nothing particularly troubling about prosecutors opting for the latter alternative.

Translation: Prosecutorial practice implies that corporate punishment is inappropriate.

Professor Diamantis worries that the “[f]ailure to hold corporations accountable frustrates society’s effort to condemn corporate criminality and can cast a shadow on the broader legitimacy of criminal law.”<sup>18</sup> But this worry, while a real one, is misplaced. For, it is not the *failure*, but the *futile attempt* to hold corporations accountable *rather than the individual members of the corporation who actually commit the crimes* that frustrates society’s effort to condemn corporate criminality. Prosecutors’ unwillingness to pursue this damaging form of vicarious liability can *and should* cast a shadow not on the legitimacy of criminal law in general, but on that of corporate criminal liability.

Further, note the slightly oxymoronic nature of Professor Diamantis’

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16. *Id.* at 510.

17. *Id.* at 510–11 (footnotes omitted).

18. *Id.* at 511–12 (footnotes omitted).

description of his enterprise. He states that “the Article points out that preventing corporate crime does not necessarily require deterring it. The Article does this by introducing character theory as a systematic approach for structuring corporate punishment.”<sup>19</sup> One would think that the final word of the second sentence should be “regulation,” not “punishment.” Preventing crime is what one does in advance of criminal activity. That is what we use regulation for. Punishing crime necessarily comes after criminal activity and is a response to it. If the purpose of character theory is to prevent crime, then it is an odd candidate for a theory of punishment. As we will see subsequently, Professor Diamantis’ character theory is designed to reduce the amount of crime committed by corporate employees. If so, then what sense does it make to restrict its operation to those corporations in which employees have already committed crimes?

The oxymoronic flavor of the enterprise continues when Professor Diamantis notes that current prosecutorial efforts “to reform corporations at various stages of the criminal justice system”<sup>20</sup> are undermined by “distorting influences of deterrence and retribution [that] continue to hamstring any chance of success.”<sup>21</sup> Doesn’t this sound like the complaint that efforts to punish corporations are interfering with the effort to regulate their behavior? Or consider the claim that “[f]ixing corporate character as the sole criterion for the extent and method of corporate punishment leads to some surprising, though ultimately beneficial, recommendations, such as abolishing the corporate criminal fine.”<sup>22</sup> But if one substitutes a theory of regulation for a theory of punishment, is it really that surprising that the punitive elements disappear?

Translation: Character theory is a theory of regulation being imposed on corporations in the guise of criminal punishment.

### III.

Let’s examine Parts II, III, and IV of the Article next. In this portion of his Article, Professor Diamantis examines and criticizes the efforts to ground corporate punishment in retributivist and deterrence theory, showing how they drive prosecutors to the overuse of NPAs and DPAs.<sup>23</sup> This critique of retributivist and deterrence theory is designed to clear the deck for his introduction of character theory as a superior alternative ground for corporate punishment.

I cannot recommend this portion of Professor Diamantis’s Article highly enough. This is not because of its critique of retributivist and deterrence

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19. *Id.* at 514.

20. *Id.* at 515.

21. *Id.*

22. *Id.*

23. *See id.* at 516–33.

theory, but because it contains one of the most concise and coherent synopses of the argument against corporate criminal liability that I can find in the literature.

Professor Diamantis labels Section III(B) of his article, “Theoretical Problems with Deterrence.”<sup>24</sup> Yet, the first “theoretical problem” he discusses in Section III(B)(1) is the problem of punishing the innocent.<sup>25</sup> Please note that punishing the innocent is not a problem of deterrence theory. Deterrence theory advocates imposing punishment on those who are guilty of a crime to deter others from acting in a similar matter.<sup>26</sup> It is true that punishing the innocent is a violation of deterrence theory.<sup>27</sup> It is also a violation of retributivist theory.<sup>28</sup> It is a violation of any theory of punishment because it is a moral wrong.

Punishment is the coercive imposition of a harm upon a party in response to that party’s failure to behave as required by some binding code of conduct.<sup>29</sup> Ordinarily, coercing others is a wrong. What distinguishes punishment from the ordinary application of coercion is that the harm imposed by punishment is deserved. It is the link between the coercion applied and the violation committed by the individual to whom it is applied that renders the coercion morally acceptable. “Punishing” the innocent is not punishment. It is naked coercion and a moral wrong. Demonstrating that corporate punishment punishes the innocent is not a critique of deterrence theory, it is a demonstration that corporate punishment is morally unacceptable.

Professor Diamantis does an excellent job of showing that 1) “it is impossible to injure a corporation’s financial interests without, and except by way of, harming the financial interests of individuals;”<sup>30</sup> 2) the individuals whose financial interests are harmed are rarely the individuals who committed the crimes and usually consist of shareholders, employees, and customers who are innocent of wrongdoing;<sup>31</sup> and 3) the harm to innocent parties is not a regretted collateral effect of the punishment, but the way the punishment is intended to function.<sup>32</sup> That is, he does an excellent job of showing that corporate punishment inherently involves punishing the innocent, and hence is morally unacceptable.

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24. *Id.* at 520.

25. *Id.* at 520–24.

26. *Id.* at 518–19.

27. *See id.* at 522–24, 562.

28. *Id.* at 568–69.

29. The Oxford English Dictionary defines punishment as “[t]he infliction . . . of a penalty as retribution for an offence.” *Punishment*, *n.*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/punishment> (last visited Sept. 5, 2018).

30. Diamantis, *supra* note 1, at 521.

31. *Id.* at 521–24.

32. *Id.* at 522–24.

I recommend Sections III(B)(2) & (3) and Section IV of the Article just as highly. Although, like Section III(B)(1), Sections III(B)(2) & (3) are nominally directed toward the application of deterrence theory to corporate punishment, they are actually critiques of corporate punishment *per se*.<sup>33</sup> Since, as Professor Diamantis establishes in Subsection (1), the only way to punish a corporation is by harming its financial interest, his arguments in Subsections (2) & (3) are not limited to deterrence theory, but are perfectly generalizable.<sup>34</sup>

And they are good arguments. Punishing corporations by harming their financial interests does indeed price crime—that is, turn the decision as to whether to break the law into an economic calculation—as Professor Diamantis argues in Subsection (2).<sup>35</sup> In order to combat this, the state is inevitably led to impose “unacceptably severe corporate sanctions,”<sup>36</sup> as Professor Diamantis argues in Subsection (3). This, in turn, leads prosecutors to employ NPAs and DPAs to avoid imposing such draconian and socially damaging sanctions, as Professor Diamantis effectively demonstrates in Section IV.<sup>37</sup> What Professor Diamantis has forcefully demonstrated in this portion of his Article is that efforts to punish corporations as collective entities are essentially self-defeating.

Translation: Punishing corporations as collective entities is morally improper and practically counterproductive.

It is interesting to note that the force of Professor Diamantis’s argument leads him to the obvious solution, which is to “abolish[] corporate criminal law whole-hog.”<sup>38</sup> However, as one of those rare academics who insists on living in the real world, he rejects this solution, in part, on the ground that “reforms calling for the abolition of corporate criminal law are not feasible in the current political climate.”<sup>39</sup> This concession to political reality places

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33. *See id.* at 524–27.

34. *See id.* at 520–22

35. *See id.* at 524–25.

36. *Id.* at 525, 530.

37. *Id.* at 527–32.

38. *Id.* at 530.

39. *Id.* at 531. Unfortunately, Professor Diamantis backs up this entirely understandable appeal to political reality with an incorrect theoretical consideration when he states that “going the purely civil route would undermine what many think is a distinguishing social benefit of criminal law: providing society with a means of expressing its collective condemnation of certain conduct. In the corporate context, this may mean denouncing corporate acts that unduly prioritize profit over individual rights.” *Id.* (footnotes omitted). But, in fact, there is no lack of opportunity for society to express its condemnation of acts that prioritize profit over rights by prosecuting the corporate employees who commit the crimes as individuals.

Recall that corporate criminal liability is respondeat superior liability that imputes the crimes of corporate employees to the corporation. Thus, to successfully prosecute a corporation, prosecutors must be able to establish criminal activity on the part of individuals within the corporation—individuals who are themselves subject to prosecution. Going after such individuals gives society a perfectly effective means of expressing its condemnation of their acts.

Professor Diamantis in the unenviable situation of having to supply an adequate theory of corporate punishment immediately after delivering a persuasive argument that corporations should not be punished. To extricate himself, he suggests that “if we take the project of corporate reform and develop it into a theory of corporate punishment for the entire criminal justice system, we could eliminate the need for DPAs and NPAs, while avoiding the problems that plague deterrence and retribution theory.”<sup>40</sup>

Translation: If we take a theory of corporate regulation that is not a theory of punishment and call it a theory of punishment, we can resolve the problem of how to punish entities that should not be punished.

#### IV.

Finally, let’s examine Sections V, VI, & VII. In this portion of his Article, Professor Diamantis defines character theory, shows how it can be applied to corporations, and argues that it provides an approach to punishing corporations that is both morally and practically superior to current practice. Once again, this portion of the Article is filled with useful observations and insightful analysis. Indeed, I have no disagreement with the *substance* of Professor Diamantis’s assertions in these sections. My objections are all semantic. You see, it doesn’t matter how many times one calls a theory of regulation a theory of punishment, it is still a theory of regulation.

Professor Diamantis begins Part V by defining character theory as a virtue ethics-based theory of punishment to distinguish it from deontologically-based retributivism and consequentialist-based deterrence theory.<sup>41</sup> Virtue ethics is concerned with the development of virtuous character traits—ingrained dispositions to act virtuously. Professor Diamantis explains that “[a]ccording to character theories, the purpose of punishment is to cultivate virtuous character traits, both in the convicted criminal and in the community at large.”<sup>42</sup> Thus, “character theories of punishment say the state should design punishment to reform convicted criminals of their dispositions to commit crime, to inhibit the formation of similar dispositions in society at large, and to leave good character traits of all types to flourish.”<sup>43</sup>

Some skepticism is engendered by contemplating how an ethical theory that prescribes cultivating virtuous character traits could be a theory of punishment. Unless the inculcation of virtuous character traits is painful, where is the punishment? This skepticism is reinforced by Professor Diamantis’s own efforts to distinguish between “punitive measures and other exercises of state power,”<sup>44</sup> where he asserts that “a loose understanding of

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40. *Id.* at 533.

41. *Id.*

42. *Id.* at 533–34.

43. *Id.* at 534.

44. *Id.* at 535.

criminal punishment as sanctions that are dead-weight losses (like capital punishment and prison time), transfers of value to the state or community (fines and community service), or solely directed at the individual criminal (public shaming and probation) will do.”<sup>45</sup> But under this definition of criminal punishment, unless efforts to cultivate virtuous character traits involve prison time, fines, mandatory community service, or public shaming—something Professor Diamantis subsequently denies—those efforts do not constitute punishment. Rather, they must be some “other . . . exercise[] of state power.”<sup>46</sup> An attempt to regulate behavior, perhaps?

Professor Diamantis recognizes the practical and moral difficulties in applying a character theory of punishment to individuals. Besides the decades of evidence indicating that we lack the knowledge and psychological techniques to reform human character, even the effort to do so constitutes an ethically objectionable affront to individual autonomy and dignity.<sup>47</sup> Nevertheless, he contends that such problems do not beset the effort to apply character theory to corporations:

Many of the hurdles character theories of punishment encounter with individual defendants do not arise for corporations. For one thing, imposing changes to corporate character through punishment does not implicate the same autonomy and dignity concerns as it might for individuals. Philosophers who write about dignity focus on the case of individual human dignity; none has applied the concept in any meaningful way to corporations. Legal scholars have broached the topic of corporate dignity only to reject it.<sup>48</sup>

This is entirely correct. The problem for Professor Diamantis is the reason *why* it is correct. Corporations do not have morally significant autonomy and dignitary interests because they do not have brains, bodies, personal identities, or *characters*.

Here is where we get into semantics.

Under virtue ethics, one’s character is one’s ingrained disposition to perform virtuous (or vicious) acts *oneself*. One attains good character by repeatedly performing virtuous acts—by habituating oneself to virtuous action. Many things can help one attain a virtuous character.

One’s parents can influence one’s behavior by encouraging or requiring one to act properly when one is a child. One’s polity can influence one’s behavior by incentivizing virtuous action or punishing vicious action. But

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45. *Id.*

46. *Id.*

47. *Id.* at 539.

48. *Id.* at 541 (footnotes omitted).

character is one's *own* disposition to act virtuously or viciously, which is distinct from the influences that help form this character.

Professor Diamantis contends that “[c]haracter theories are easily adapted to the corporate context.”<sup>49</sup> He argues that,

[s]ince character is just a disposition to behave in a certain way, all that is needed is a concept of corporate action. Since shortly after the Civil War, courts have relied on the doctrine of respondeat superior to determine what acts a corporation has performed, in both civil and (later) criminal contexts. According to that doctrine, courts will attribute to a corporation any action taken by any employee “within the scope of employment [and] with the intent to benefit the corporation.” Working with that understanding of corporate action, corporate character is an organizational trait that disposes a corporation’s employees to behave in some way.<sup>50</sup>

But perhaps it is not as easy as Professor Diamantis intimates. Note that in the next to last sentence in the above quoted paragraph, corporate action is identified with the action of individual employees. But then, if we were “[w]orking with that understanding of corporate action,”<sup>51</sup> as the next sentence suggests, the character of the corporation would be identical to the character of the corporation’s employees. Yet, in that final sentence, corporate character somehow becomes “an *organizational trait* that disposes a corporation’s employees to behave in some way.”<sup>52</sup> But this is not character; it is something that influences the formation of employees’ character in the same way that parents influence the formation of their children’s character or laws influence the formation of citizens’ character.<sup>53</sup>

Professor Diamantis’s account of corporate character is entirely metaphorical. Corporations do not and cannot have character traits. They have rules, bylaws, standard operating procedures (“SOP”), and corporate internal decision (“CID”) structures.<sup>54</sup> These rules, bylaws, SOPs, and CID structures certainly influence the behavior of corporate employees, but they

49. *Id.* at 539.

50. *Id.* at 539–40 (footnotes omitted).

51. *Id.*

52. *Id.* (emphasis added).

53. Further evidence of the conflation of corporate character with the influences on character formation is supplied later in the Article where Professor Diamantis states that “[f]rom the perspective of character theory, punishment is only appropriate if there was some organizational vulnerability that disposed the corporate defendant to criminal conduct.” *Id.* at 554. This again identifies corporate character, which under respondeat superior liability consists of the character of the corporation’s individual employees, with the features of the organizational structure that influences the formation of that character.

54. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 211–12 (1979).

are not traits, and certainly not the sort of ingrained traits that virtue ethicists are concerned with; as is evidenced by the fact that they can be altered at a moment's notice by corporate officers and corporate boards.

There is nothing wrong with metaphors, and they can often be quite useful, as long as one does not mistake them for reality. There is nothing wrong with saying that a corporation's internal organizational rules, operating procedures, and decision structures function like or are analogous to the character of individuals. But as Professor Diamantis makes clear in the very next paragraph, what he is offering is not really a character theory, but a theory of organizational behavior. As he states, for his "conception of corporate character to get off the ground, it is crucial to recognize the impact an organization can have on the way individuals within it behave. Organizational theorists have long recognized that corporate-level features—corporate culture, processes and procedures, compensation rubrics, etc.—influence how employees behave."<sup>55</sup>

What Professor Diamantis is proposing is that we utilize the knowledge generated by organizational behavior scholars to create organizational structures and incentives that reduce the likelihood that corporate employees will violate the law. Calling this proposal character theory does not change its nature. It is still a theory of organizational behavior. And limiting its application to corporations that have been convicted of a criminal offense does not change it into a theory of punishment. It is a theory of corporate regulation dressed up as a theory of punishment.

Once we understand that Professor Diamantis is offering a theory of regulation, we have a useful context for reading the remainder of his Article. For example, Professor Diamantis notes that "[s]ome scholars have voiced concern that efforts at corporate reform are misguided because courts, prosecutors, and even compliance professionals themselves do not know which corporate reform methods work."<sup>56</sup> But "there is little reason to despair [because] . . . [o]rganizational theorists and business scholars already know a lot about corporate reform, even if it has so far received too little attention by legal scholars."<sup>57</sup> Indeed, if one is offering a theory of organizational behavior for the regulation of corporations, it makes perfect sense to rely on organizational theorists and business scholars to supply its content.

In Part VI, Professor Diamantis states that "[t]he crux of [his] approach is that sentencing officials should sentence corporations with an eye *exclusively* to character improvement and community education."<sup>58</sup> In other words, sentences should not be punitive, which is what one would expect from a theory of regulation. Although Professor Diamantis continues to call his

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55. Diamantis, *supra* note 1, at 540.

56. *Id.* at 543.

57. *Id.* (footnote omitted).

58. *Id.* at 544.

theory a theory of punishment—”[c]haracter theory sees such reform as punishment itself, and as punishment’s sole aim,”<sup>59</sup> calling a theory that has no punitive element a theory of punishment does not make it a theory of punishment, especially since “character theory calls on judges and prosecutors to abandon many of the punitive methods currently in play,”<sup>60</sup> such as fines,<sup>61</sup> license revocation and debarment,<sup>62</sup> and reputational penalties.<sup>63</sup>

Professor Diamantis states that “[o]ne potentially counter-intuitive feature of character theory is its recommendation that crime should sometimes go unpunished. . . . [Because i]f the corporation is in no need of reform, there is no need for character-directed punishment.”<sup>64</sup> But, of course, there is nothing counter-intuitive about this feature of Professor Diamantis’s theory once one realizes that it is not a theory of punishment.

In Section VI(D), entitled *Some Limiting Principles*, Professor Diamantis notes that “[o]ne thing should be acknowledged about almost any corporate reform a court could order—it will be intrusive.”<sup>65</sup> This is, of course, what one would expect from a theory of regulation. Regulations usually are intrusive.

In Section VI(F), Professor Diamantis answers the concern that his character theory may impose significant costs on innocent third parties by arguing that the apparent costs are actually “an investment in the corporation itself . . . [which] data indicates . . . is good for share value in the long run.”<sup>66</sup> Indeed, a theory of the regulation of corporations based on the latest organizational behavior scholarship should prove beneficial to the corporations subject to it. But it would be odd to call the application of requirements that improve corporate performance a punishment.

Finally, a recurrent theme throughout the Article is how ill-equipped prosecutors and judges are to implement the requirements of character theory, but how this defect may be overcome by appealing to industry experts and experienced regulators to aid in this process.<sup>67</sup> But this can hardly be surprising. Prosecutors’ and judges’ expertise lies in punishment, not regulation. If we ask them to apply a theory of punishment that is actually a theory of regulation, we would want them to rely on experts in regulation in implementing it.

Translation: Since it is pointless to punish corporations, we should apply our knowledge of organization behavior and social psychology to create

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59. *Id.*

60. *Id.* at 545.

61. *See id.* at 549.

62. *See id.* at 549–50.

63. *See id.* at 550–51.

64. *Id.* at 545 (footnote omitted).

65. *Id.* at 557.

66. *Id.* at 562–63.

67. *Id.* at 563–65.

organizational incentive structures that are likely to reduce wrongdoing by corporate employees.

## V. CONCLUSION

I will conclude this commentary with the injunction to forget that you ever read it. I cannot dispute Professor Diamantis's judgment that the prospects for eliminating corporate criminal liability are scant. This means that corporations will continue to be subject to morally objectionable punishment as collective entities. If that is the case, then the best that can be done is precisely what Professor Diamantis does—oxymoronically offer a non-punitive theory of corporate punishment.

If we must impose something that we call punishment on corporate entities that should not be punished, then we should impose something that is not punishment on those entities—say a set of regulations designed to reduce future wrongdoing by corporate employees—and call it punishment. If the public demands that corporations be punished even though such punishment is morally improper and practically counter-productive, then there is nothing wrong with tricking it into believing that corporations are being punished when they are not. In fact, it is the ethically appropriate thing to do.

But if that is the case, then the last thing that I should be doing is arguing that Professor Diamantis's character theory is not a theory of punishment. If Professor Diamantis's theory can surreptitiously make our criminal justice system more just, then exposing its true nature is anything but helpful.

Unlike Professor Diamantis, I am apparently one of those academics who cannot resist the urge to trace the implications of abstract principles to their logical end points regardless of the effect doing so has on the real world. Hence, this commentary. If I were less self-indulgent and more concerned with the way the world actually works, I would not have allowed this commentary to be published. But given that I have, the best that I can do now is to enjoin you to make believe that it does not exist.