

# The Promise of Corporate Character Theory

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## I. INTRODUCTION

Efforts to bring a dose of imagination to the study of corporate criminal punishment are long overdue and so very welcome.<sup>1</sup> Scholars of corporate criminal law today are concerned most with questions of moral agency, liability rules, and standards of culpability.<sup>2</sup> It is rare to see normative and doctrinal debate over innovations in corporate punishment, especially proposed reforms that seek greater accountability and justice.<sup>3</sup> Academics are

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1. For a history of corporate criminal liability and punishment, see generally WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2008) (discussing episodic patterns of enforcement).

2. See generally, e.g., Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049 (2016) (proposing a new approach for assessing corporate *mens rea* which treats corporations as holistic entities, rather than atomizing them into individuals).

3. See, e.g., William S. Laufer & Mihailis E. Diamantis, *The Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOCI. SCI. (forthcoming 2018) (on file with author).

strongly wedded to deterrence and retributive theories, as Mihailis Diamantis writes in *Clockwork Corporations: A Character Theory of Corporate Punishment*.<sup>4</sup> A less generous assessment of the literature is that largely dormant theories of corporate punishment remain incoherent, mired in the “mixed goals” approaches adopted by criminal justice functionaries. Certainly in practice, the kind and quality of corporate sanctions appear quite uninspired by theory, if not unabashedly atheoretical. The fact that there is no evidence of the efficacy of corporate crime deterrence policies, in spite of their popularity, supports this conclusion.<sup>5</sup>

The enthusiasm that Diamantis brings to the idea of a corporate character theory of punishment should be embraced given our muddled history of corporate criminal law. There is significant room for theoretical musings about the aims, justification, and methods of corporate punishment. Moreover, corporate character theory is a quite intriguing candidate because it may be argued that: (a) a firm’s character is relevant in conceiving culpability, and (b) the consideration of corporate character evidence at sentencing is consistent with the broad lens used to conceive culpability in relation to the seriousness of founded wrongdoing.<sup>6</sup> Corporate culture and ethos are already a welcomed ingredients of corporate culpability in both prosecutorial and sentencing guidelines.<sup>7</sup> Perhaps most important, Diamantis has proposed a sentencing orientation that has corporate criminal justice as its objective, with the desire to facilitate corporate prosecutions. Bringing the

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4. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 516–20 (2018).

5. See SALLY S. SIMPSON ET AL., CORPORATE CRIME DETERRENCE: A SYSTEMATIC REVIEW 28 (2014); Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1355–56 (2008); Natalie Schell-Busey et al., *What Works? A Systematic Review of Corporate Crime Deterrence*, 15 CRIMINOLOGY & PUB. POL’Y 387, 404–09 (2016); Peter Cleary Yeager, *The Elusive Deterrence of Corporate Crime*, 15 CRIMINOLOGY & PUB. POL’Y 439, 442–43 (2016). Our critical take on corporate punishment stands in sharp contrast to the recent history of conventional correctional philosophies with non-corporate persons. Criminologists find an evolution from the inspiration of rehabilitation to the exactness of desert-based or incapacitative theories, and ending now in the measured world of evidence-based approaches. One would be hard-pressed to discern a comparable history of the State’s use of formal social controls with corporations. See generally, e.g., William S. Laufer & Diana C. Robertson, *Corporate Ethics Initiatives as Social Control*, 16 J. BUS. ETHICS 1029 (1997) (exploring the application of social control theory to formal and informal controls in firms).

6. See generally William S. Laufer, *Culpability and the Sentencing of Corporations*, 71 NEB. L. REV. 1049 (1992) (distinguishing culpability in relation to both the finding of liability and the determination of corporate sanctions).

7. Memorandum from Mark R. Filip, Deputy Att’y Gen., to Heads of Dep’t Components & U.S. Att’y’s, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), <http://www.justice.gov/dag/readingroom/dag-memo-08282008.pdf>; U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM’N 2013), <https://www.uscourts.gov/guidelines/2016-guidelines-manual/2016-chapter-8>.

construct of character to sentencing theory raises hopes that Diamantis might help bridge the person-corporation divide.<sup>8</sup>

Our sense, though, is that character theory is a less-than-ideal candidate for the next stage of the corporate criminal law's theoretical evolution. At present, more work is necessary for it to be a theory of corporate criminal punishment. Most important, the idea of corporate character needs more theoretical work that Diamantis can do. Understood as a virtue-theoretic contribution,<sup>9</sup> the "theory" in corporate character theory is not entirely clear. Understood strictly as a policy proposal, it nicely complements a wide variety of corporate due diligence claims, now nearly a century old, where rogue agents are said to have departed from the firm's commitment to integrity, ethical culture, courageous leadership, and good citizenship—i.e., what Diamantis would call the firm's "character."<sup>10</sup> Due diligence claims are not grounded in any particular theory. They are, though, part of a long-standing strategy to distinguish the acts and intents of agents from those of the principal.<sup>11</sup> And they are employed to counter entity culpability at both the liability and sentencing phases of the criminal process.<sup>12</sup> Diamantis should borrow more from this tradition, and, more important, make more effort to distinguish his approach from it.

Psychological and organizational constructions of corporate character, ethos, culture, and personality are neither settled nor easy emigrants to penal philosophy.<sup>13</sup> Diamantis deserves praise for venturing into this thicket.

8. There is a fascinating and quite solid body of empirical research exploring reasons why corporations are seen as less blameworthy for their wrongs than humans. See, e.g., Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157, 164–65 (2005); Tage S. Rai & Daniel Diermeier, *Corporations are Cyborgs: Organizations Elicit Anger but Not Sympathy When They Can Think but Cannot Feel*, 126 ORG. BEHAV. & HUM. DECISION PROCESSES 18, 25–26 (2015); Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punishment*, 18 J. BEHAV. DECISION MAKING 311, 316–17 (2005); Tom R. Tyler & Avital Mentovich, *Punishing Collective Entities*, 19 J.L. & POL'Y 203, 210–12, 226–29 (2010).

9. When referring to virtue theory, we specifically mean the theoretical constructs developed by virtue ethicists. Of course, philosophers who adopt non-virtue-ethical approaches also theorize about virtue. See, e.g., *Metaphysical First Principles of the Doctrine of Virtue*, in IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 139 *passim* (Mary J. Gregor ed., 1996) (1797).

10. See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1354–55 (1999) (discussing the principal–agent problem in risk shifting terms).

11. See *id.* at 1346–47, 1354–55, 1358–59.

12. See *id.* at 1383–86.

13. See generally, e.g., Dick Hobbs, *The Firm: Organizational Logic and Criminal Culture on a Shifting Terrain*, 41 BRIT. J. CRIMINOLOGY 549 (2001) (examining the integration and symbiosis of crime and family-run neighborhood firms); Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 ANN. REV. L. & SOC. SCI. 45 (2009) (discussing the challenges of importing organizational theory); Christine Parker and Vibeke Lehmann Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?*, 41 ADMIN. & SOC'Y 3 (2009) (researching and questioning the effectiveness of corporate compliance practices on corporate culture).

Thinking about character as belonging to the firm raises perennial normative and metaphysical concerns over the conception of personhood and agency, questions like who has character and whose character matters. Questions about the genuineness and authenticity of a firm's character will also continue to hound sentencing decisions in ways comparable to the issuance of corporate apologies and those actions of firms designed to "make amends" in any restorative sense.<sup>14</sup> Once again, this is a great opportunity for Diamantis to wrestle with age-old questions about the greatest threats to this kind of fault and culpability.

We expect that Diamantis would join us in calling out firms that hide behind the purchase of compliance programming as further insurance against entity liability.<sup>15</sup> It is far from uncommon for prosecutors to ask corporations to spend more money on character, where expenditures are untested, evidence-empty proxies for changes in character. Few companies rigorously measure what they do by way of character change (e.g., changes in culture and leadership), and even fewer prosecutors would know what to ask for to evaluate any changes in a corporation's character.<sup>16</sup> Notably, concerns about moral hazards associated with claims of good corporate character are still unresolved.<sup>17</sup>

For those committed to furthering corporate criminal justice, and getting punishment right, it may make sense to reflect a bit more on the statistics first raised by Diamantis that point to the infrequency of federal and state corporate prosecutions.<sup>18</sup> So few corporations are held accountable considering the robust base rate of survey-reported wrongdoing.<sup>19</sup> At the same time, so few corporations are offered deferred prosecution and non-prosecution agreements—approximately thirty-five corporations per year.<sup>20</sup>

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14. See generally William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307 (2007) (reviewing the problem of authenticity in corporate apologies and remorse).

15. See Laufer, *supra* note 10, at 1356–59.

16. See generally William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J. L. & BUS. 71 (2017) (outlining the "compliance conundrum" which describes the risk to firms and, thus, their hesitance to employ evidence-based measurement). Most recently, Eugene Soltes offered a framework for the evaluation of compliance programs and initiatives. See Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J. L. & BUS. 101 (2018).

17. See Laufer, *supra* note 10, at 1382–86, 1405–07.

18. See Diamantis, *supra* note 4, at 510.

19. See generally ETHICS & COMPLIANCE INITIATIVE, THE STATE OF ETHICS & COMPLIANCE IN THE WORKPLACE (2018), <https://www.ethics.org/knowledge-center/2018-gbes/> (offering an annual rate of reported wrongdoing, along with pressure to compromise principles).

20. See BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 47–48 (2014); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855, 897 (2007). For the latest data, see *Data and Documents*, CORPORATE PROSECUTION REGISTRY, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html> (last updated Sept. 20, 2018).

This is also an opportunity for Diamantis to recast his theorizing about punishment to serve more than just a small handful of the largest, most elite, and most capable corporate persons. Government functionaries have not pulled their weight in holding these firms responsible for the integrity of their compliance representations. With just a bit more work, Diamantis may be able to counter the instrumental use of corporate compliance expenditures, wrapped up in untested self-presentations about a firm's character.

We are united behind proposals for penal reform that shy away from any additional gifts of compliance cover, gestures that strengthen the hands of the players in a long-standing, multi-stakeholder compliance game.<sup>21</sup> Recognizing corporate character should not be a victory for those who play a regulatory game with no accepted metrics for corporate character, where the game's currency remains compliance expenditures. The conclusion of *Clockwork Corporations* that corporate character theory is "a win for everyone" requires further critical reflection.<sup>22</sup> Theories of punishment must, by their very nature and definition, incorporate the imposition of loss and adversity. We believe that Diamantis might also agree that there must be a loser of sorts.<sup>23</sup>

In Part II, we discuss our concerns with corporate character theory as a theory. As we praise Diamantis for his path breaking efforts with the construct of character, we also raise questions about the difficulties of importing organizational theory into the corporate criminal law. In Part III, we ask about the problem of knowing which firms have character, and how vulnerable that assessment might be to self-interested claims of due diligence. Finally, in Part IV, we discuss the importance of asking how corporate character theory plays into the hands of those actively pursuing a compliance game. We conclude that Diamantis's proposed "theory," while restarting a critically important discussion about how the corporate criminal law should accommodate and value a firm's character, is still incomplete. It would benefit from recognizing the players and rules of the compliance game, along with the intransience of the due diligence tradition.

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21. See, e.g., William S. Laufer, *O Compliance Game*, in REGULAÇÃO DO ABUSO NO ÂMBITO CORPORATIVO: O PAPEL DO DIREITO PENAL NA CRISE FINANCEIRA (Eduardo Saad-Diniz et al. eds., 2015) (outlining the compliance game and stakeholder participants); William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 395, 421–22 (2017) (referring to the impact and influence of the "compliance game").

22. Diamantis, *supra* note 4, at 565.

23. See Steven Walt & William S. Laufer, *Corporate Criminal Liability and the Comparative Mix of Sanctions*, in WHITE-COLLAR CRIME RECONSIDERED 309, 312–23 (Kip Schlegel & David Weisburd eds., 1992) (discussing the many sentencing alternatives to criminal fines); Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 280 (1991) ("[W]ithout its condemnatory aspect, deliberate imposition of harm is not punishment. At most it is a penalty.").

## II. THE SEARCH FOR THEORY IN CHARACTER THEORY

The consideration of character in corporate criminal law is far from new.<sup>24</sup> As Diamantis and others note, the concept of “corporate character” is often another approximation of corporate “culture” or “ethos.”<sup>25</sup> As a concept originating in the management sciences, corporate character *qua* culture is often seen as an instrument for the financial success as opposed to the thicker conceptions of “success” that virtue theorists would demand.<sup>26</sup> To his credit, Diamantis disclaims such a thin formulation of corporate character.<sup>27</sup> If there is to be such a thing as corporate character, it seems it cannot merely consist in corporate culture, at least not without some further justification. But we would ask Diamantis to do even more in offering a viable substitute, especially if we take the virtuous roots of character theory seriously. If the lens of virtue is entirely forsaken, Diamantis’s conception of corporate character runs the risk of being entirely positivistic.

Without more, it seems as if Diamantis is supporting an empirical proposition that corporate crime is best thwarted not by the imposition of fines, but by force of certain organizational processes, structures, and characteristics.<sup>28</sup> Crimes of corporations are best deterred, in other words, by adopting the organizational-structural measures prescribed.<sup>29</sup> This empirical proposition, though, requires more empirical evidence or at least the formalities of a theoretical model. The normative armor enclosing this proposition is of the orthodox consequentialist variety. We attempt to resist the idea that Diamantis’s account is a mere variant of deterrence theory. But the burden falls squarely on his shoulders to ascribe to more than the same consequentialist normative/justificatory framework as classical deterrence

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24. See Diamantis, *supra* note 4, at 539 n.194 (citing Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 767–72 (1992)); Robert E. Wagner, *Criminal Corporate Character*, 65 FLA. L. REV. 1293, 1295 (2013). For an early, brief review of ethical and organizational work that has used “corporate character” rhetoric, see Geoff Moore, *Corporate Character: Modern Virtue Ethics and the Virtuous Corporation*, 15 BUS. ETHICS Q. 659, 665, 681 n.7 (2005).

25. Diamantis, *supra* note 4, at 540–41; see KENNETH E. GOODPASTER, CONSCIENCE AND CORPORATE CULTURE 3–9 (2007); Moore, *supra* note 24, at 665–66, 681 n.7.

26. See Moore, *supra* note 24, at 665–67, 681 n.7.

27. Diamantis, *supra* note 4, at 540–41.

28. *Id.* at 548–57.

29. *Id.*

theory.<sup>30</sup> The worry in need of attention is that if Diamantis does just this, the novelty of his approach will be unduly limited.<sup>31</sup>

It may be argued that Diamantis is hoping for more than a *deterrence redux* by suggesting that the State forgo any punitive sentencing when corporations are found guilty of egregious criminal acts, on the exculpatory condition that such offenses are literally out of character. But, once again, the burden is his to show how this is more than or different from a reincarnation of a successful “due diligence” defense—a defense that emerged in the early 1900s in the aftermath of the U.S. Supreme Court’s ruling in *New York Central Railroad* that prescribed vicarious liability.<sup>32</sup> Corporations fearing something approaching strict liability learned quite quickly that an optimal level of compliance expenditures minimized the likelihood of entity liability.<sup>33</sup> This investment in compliance as organizational “due diligence” often takes the form of pricing possible sanctions in relation to the corporate compliance investment.<sup>34</sup> We are left wondering how this history accommodates the critique of Diamantis that, “[t]he picture of corporate crime that deterrence theory encourages is morally repulsive.”<sup>35</sup> The risk here is that Diamantis might be asked why is it not reasonable to reach the same conclusion about corporate character theory.

30. Diamantis acknowledges most deterrence theorists are consequentialists. Diamantis, *supra* note 4, at 533. We argue deterrence theory, understood as a normativistic penal theory rather than an empirical one, is really just the consequentialist theory of punishment. See Kyron Huigens, *Street Crime, Corporate Crime, and Theories of Punishment: A Response to Brown*, 37 WAKE FOREST L. REV. 1, 9 (2002) (“[W]hat is commonly called the deterrence theory of punishment is more accurately called the consequentialist theory of punishment. Consequentialism gives deterrence and the other social welfare-promoting effects of punishment whatever justifying and explanatory power they have.”); John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 583 (1982) (arguing that the restraint, rehabilitation, deterrence, and education justifications for criminal punishment “together form the consequentialist theory of criminal punishment: punishment is a means to obtain socially desirable consequences”).

31. Several scholars have pointed out that proactive crime prevention is within the domain of deterrence theory. See, e.g., Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1159 (1983) (“[T]o treat rehabilitation and incapacitation as distinct from deterrence when applied to corporate criminal law is to entertain a misconception.”); Harvey M. Silets & Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 371–72 (1985). Silets and Brenner explain methods for achieving deterrence:

Deterrence focuses upon ensuring that bad acts are not repeated. One way to achieve this end is to inflict a level of disutility upon the offender that ensures that he will avoid similar conduct in an effort to avoid a repetition of this disutility. Another way to avoid the repetition of bad acts is to reinforce the offender’s commitment to the ideals of the system.

Silets & Brenner, *supra*, at 371–72 (footnote omitted).

32. N.Y. Cent. R.R. Co. v. United States, 212 U.S. 481, 495 (1909).

33. See LAUFER, *supra* note 1, at 23, 71, 101.

34. See *id.* at 103.

35. Diamantis, *supra* note 4, at 525.

The severance of culpability in relation to liability, on the one hand, and culpability in relation to punishment, on the other, also makes one wonder how character theory connects to the crime committed. Without such a connection, culpability and sentencing fail to match up in ways that are often taken as axiomatic in penal theory. Diamantis says that the largely posited connection between the two is an “unjustified assumption” buttressed by weak arguments.<sup>36</sup> This is an interesting and provocative line of inquiry. Diamantis is surely right to question the very basic conceptual assumptions of criminal legal theory. Just one of the many laudable merits of *Clockwork Corporations* is its willingness to question even the most entrenched, popular ideas in prevailing academic discussion.

The clear problem that arises when character is made the focus of sentencing, however, is the question of why we should not sentence even the non-culpable. If we disconnect the finding of liability from sentencing, why not sentence the innocent? Even some factually innocent corporations will lack good “character” in Diamantis’s sense.

This very problem has figured prominently in previous discussion of character theories.<sup>37</sup> Duff, for example, points out that there is a symmetry across the various major theories of punishment insofar as they all have an act requirement.<sup>38</sup> For the character theorist, this act requirement is a little puzzling. Duff entertains two potential justifications for such a requirement. One, that acts constitute the only reliable evidence of character available “without unduly oppressive or intrusive investigative methods.”<sup>39</sup> Second, that there is a logical connection between acts and character—that acts are in some way constitutive of character, and thus character is “actualized in and only in action of the relevant kind.”<sup>40</sup> We do not intend to revisit the conceptual intricacies involved in such a debate. Instead, we wish to point out that neither of these potential reasons for an act requirement in character theory applies in the corporate context.

In the first case, there is easily observable evidence of bad character on Diamantis’s account. We could investigate, for instance, if a corporation has

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36. *Id.* at 537 n.179.

37. See MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 564 (2010); R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & PHIL. 345, 364 (1993) [hereinafter Duff, *Choice, Character, and Criminal Liability*]; R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147, 156–57 (2002) [hereinafter Duff, *Virtue, Vice, and Criminal Liability*]. In *Choice, Character, and Criminal Liability*, Professor Duff inquires:

What is the connection between action and character; what kind of inference are we to make from one to the other? How can one criminal act warrant any inference to a character-trait (why is action sufficient for liability)? Why should we require action at all (why is action necessary for liability)?

Duff, *Choice, Character, and Criminal Liability*, *supra*, at 364.

38. Duff, *Virtue, Vice, and Criminal Liability*, *supra* note 37, at 156.

39. *Id.*

40. *Id.*



the kind of compliance program that is satisfactory for Diamantis. Further, Diamantis argues that the idea of corporate dignity apart from individual dignity is absurd.<sup>41</sup> The suggestion that it is likely permissible to interfere in some ways with the corporate character where we could not with individual character is perhaps the most powerful idea in *Clockwork Corporation*. So, whatever other investigative methods we could use to attain evidence of bad character would not be so oppressive or unduly intrusive. In the second case, Diamantis clearly endorses a conception of corporate character in which there is no such logical connection to actions. A corporation has a deficient character if it lacks organizational processes, measures, or policies X, Y, and Z. On this account, there is no necessary logical connection between corporate actions and a corporation's character.

Diamantis is right that the relation between culpability and sentencing deserves further scrutiny. But it is clear why the assumption of a connection between sentencing and liability—especially on a *corporate character* account—is most intuitive. If we should sentence those with bad character, and not sentence those with good character, why should we not hold every corporation with bad character liable, and acquit every “good” corporation? Diamantis may want to avoid the prosecutions of firms that are criminally culpable but not worthy of sentencing because the theoretical justification for criminal sentencing is independent of criminal liability.

Diamantis points out that regimes of criminal liability do not typically allow character evidence, and scant attention has been paid to the connection between liability and sentencing.<sup>42</sup> But that may not be enough—rather, we would want to see a sketch of the boundaries of his theory to tell us how a character theory could coherently accommodate a fissure between liability and sentencing. In short, how could corporate character theory avoid the command to sentence (punish) the non-culpable? This appears to be another wonderful opportunity for Diamantis to chart new theoretical paths.

In the absence of such a justification, some might speculate that, contrary to initial appearances, Diamantis is offering something other than a new penal theory. A critic might say that his proposed theory is really no more than a clever regulatory or administrative proposal. Deterrence theory assumes that punishment only comes after a finding of *actus reus* and *mens rea*. Volitional and cognitive constructions are at the very core concepts of the

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41. Diamantis, *supra* note 4, at 541–42. Although corporations may be worthy of some moral consideration, we agree that they do not share the value of autonomy that would prevent us from tinkering with a given individual's character *a la* Clockwork Orange. See generally Kendy M. Hess, “If You Tickle Us . . .”: *How Corporations Can Be Moral Agents Without Being Persons*, 47 J. VALUE INQUIRY 319 (2013) (arguing that corporations lack the kind of vulnerability necessary for personhood); Kenneth Silver, *Can a Corporation be Worthy of Moral Consideration?*, 147 J. BUS. ETHICS (2018) (suggesting the conceptual possibility of distinguishing among the kinds of values different entities worthy of moral consideration, particularly corporations and human persons, may hold).

42. Diamantis, *supra* note 4, at 536.

corporate criminal law.<sup>43</sup> Rather than a new penal theory, some critics might say that we are left with a proposal that corporations are required to instantiate certain organizational measures—measures justified by a purportedly vast body of organizational–scientific literature. This, itself, is an interesting idea, but we need to know what measures, what bodies of scholarship, and how both connect in meaningful ways to a conception of culpability. Diamantis is in a wonderful position to offer these specific measures and supportive scholarship in the future.

At the same time, Diamantis could connect the dots between earlier iterations of corporate rehabilitation to his novel take on what corporate character means. As noted earlier, there is a long history of corporations making the case that their exemplary compliance practices, commitment to integrity, and character should be recognized.<sup>44</sup> Agents who commit crimes are departing from known corporate policies, practices, and instructions. For nearly a century, we have heard pleas that a firm’s good character would make it wrong to attribute an agent’s fault to the entity.<sup>45</sup> This is the storied history of vicarious liability.<sup>46</sup>

### III. IN SEARCH OF THE “CHARACTER” IN CHARACTER THEORY

Diamantis’s theory assumes a particular motivation relating to the current prosecution practices against corporations. Prosecutors are not bringing charges against corporations because they fear the direct and indirect consequences criminal sanction would incur. Rather, character theories offer a path that allows us to “punish” corporations without such adverse consequences. In the next Section, we raise some normative and practical questions about this assumption. The theory is explicitly not meant to be exclusively descriptive—it is meant to offer a normative account.<sup>47</sup> Thus, behind the curtain of corporate character theory, we hope to find some sort of justificatory structure for corporate punishment and means of punishment. As we have already suggested, we believe there is a person behind the curtain, a consequentialist, who sees corporate punishment as an instrument to reduce crime. But, to find this person, we first must entertain the idea that a virtue-based account is really there.

#### A. CHARACTER THEORY AND VIRTUE

Character-based accounts of criminal liability have a long history. Sophisticated treatments of these theories find broad inspiration in Hume or

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43. See LAUFER, *supra* note 1, at 68–98.

44. See William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 AM. BUS. L.J. 157, 160–62 (1996) (challenging the conventional account of compliance as evidence of good citizenship).

45. See LAUFER, *supra* note 1, at 17.

46. See *infra* Section III.A for a discussion of *respondeat superior*.

47. Diamantis, *supra* note 4, at 533 n.152.

Aristotle and have populated scholarly journals for more than half a century.<sup>48</sup> Of course, Diamantis does not propose a theory of criminal *liability* but rather one of sentencing,<sup>49</sup> and a theory that is specific to corporations. These features offer Diamantis some shelter from classic critiques of character theories of liability. By focusing on sentencing, he avoids the inconvenience that character is not typically a factor in determining culpability or criminal liability.<sup>50</sup> The focus on “corporate” criminal law avoids the worrisome intrusion of criminal law into the character of individuals.<sup>51</sup> But we contend that these moves present additional problems that Diamantis is in a fine position to address.

At the outset of Diamantis’s discussion of corporate character, we are confronted with the casual observation that “[c]haracter theories are easily adapted to the corporate context.”<sup>52</sup> According to Diamantis, vicarious liability offers a foundational concept of corporate action which, for a proper ascription of character, requires us only to show that a corporate entity “disposes [its] employees to behave in some way.”<sup>53</sup> This argument seems problematic. It relies on an ancient and largely empty artifact of criminal corporate liability: *respondeat superior*. One of us has critiqued the use of this doctrine on several occasions, concluding that its importation from the civil context carries with it no purported theoretical justification, and as a matter of intuitive criminal culpability, it seems both over- and under-inclusive.<sup>54</sup> And, notably, a number of scholars have proposed models of “genuine corporate culpability” that seem to do much better at capturing corporate action.<sup>55</sup> Elsewhere, Diamantis offers a parallel critique of vicarious liability in corporate criminal law, calling it at best “an antiquated gimmick”<sup>56</sup> and arguing that it ultimately “undermines fundamental goals of criminal law.”<sup>57</sup>

48. See, e.g., MICHAEL S. MOORE, *Choice, Character, and Excuse, in* PLACING BLAME: A THEORY OF THE CRIMINAL LAW, *supra* note 37, at 548, 556–63 (referencing both Aristotle and Hume); Duff, *Choice, Character, and Criminal Liability, supra* note 29, at 353 (discussing “Aristotle’s concept of *prohairesis*”); Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 WAYNE L. REV. 905, 919 (1972) (discussing Aristotle and character).

49. Diamantis, *supra* note 4, at 536–38.

50. *Id.*

51. *Id.* at 540–43.

52. *Id.* at 539.

53. *Id.* at 539–40.

54. LAUFER, *supra* note 1, at 28–29; see generally William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000) (offering an additional critique of vicarious fault while proposing standards of culpability that are consistent with a desert-based account).

55. William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 664–68 (1994) (reviewing different conceptions of “genuine corporate culpability”).

56. Diamantis, *supra* note 2, at 2050.

57. *Id.* at 2058.

As a theory of corporate action even in the civil context, it has faced enduring, compelling critique.<sup>58</sup>

It is easy to see how the broader concept of corporate moral agency adds complexity. Many virtue theorists, when confronting the nexus of the virtues and the firm, are content to describe what the morally good manager, directors, or employees will do to promote the larger interests (or ‘common good’) of the relevant community—in our case, the firm.<sup>59</sup> This is derived from the Aristotelian concept of the good citizen or role of the person as a social animal.<sup>60</sup> Rather than seeing firms as entities with distinct characters, it is most natural for these theories to envision the firm as a community, something which figures prominently into Aristotle’s moral and political philosophy. Diamantis proposes, however, a conception of a distinctively corporate-level character that, without further detail, would seem to find a character in any superstructure that disposes agents to act in certain ways.

Diamantis is surely right that most accounts of character are connected to dispositions. But, he would no doubt agree that not everything with dispositional properties has character.<sup>61</sup> Moral agency, for instance, would seem to be a prerequisite to having the kind of moralized notion of “character” Diamantis seeks to establish.<sup>62</sup> Mobs and random collections of individuals, aggregative collectives, are not generally seen to be held collectively responsible.<sup>63</sup> Rather, the most plausible accounts of group moral agency have some minimal requirements of formal internal organization<sup>64</sup> or

58. See, e.g., T. BATY, VICARIOUS LIABILITY: A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES 154 (1916) (concluding that only plausible justification for vicarious liability is the “deep pockets” justification); Oliver Wendell Holmes Jr., *Agency*, 5 HARV. L. REV. 1, 14 (1891) (arguing that agency law is “the resultant of a conflict between logic and good sense”).

59. Daryl Koehn, *Virtue Ethics, the Firm, and Moral Psychology*, 8 BUS. ETHICS Q. 497, 499–501 (1998); Domènec Melé, *Integrating Personalism into Virtue-Based Business Ethics: The Personalist and the Common Good Principles*, 88 J. BUS. ETHICS 227, 238–39 (2009); Alejo José G. Sison & Joan Fontrodona, *The Common Good of the Firm in the Aristotelian–Thomistic Tradition*, 22 BUS. ETHICS Q. 211, 235, 237–39 (2012); Alejo José G. Sison, *Toward a Common Good Theory of the Firm: The Tasubinsa Case*, 74 J. BUS. ETHICS 471, 476, 477–79 (2007); Craig Walton, *Character and Integrity in Organizations: The Civilization of the Workplace*, 20 BUS. & PROF. ETHICS J. 105, 110 (2001).

60. Koehn, *supra* note 59, at 499–501; Sison & Fontrodona, *supra* note 59, at 219; Walton, *supra* note 59, at 106–08.

61. Salt, for instance, is disposed to dissolve in water under certain conditions. Solubility is often used as a classic example of dispositional properties. See MOORE, *supra* note 37, at 564–65; D. H. Mellor, *In Defense of Dispositions*, 83 PHIL. REV. 157, 159–61 (1974).

62. Geoff Moore notes the parallel between corporate moral agency debates and the debate surrounding corporate-level virtue. Geoff Moore, *Corporate Character, Corporate Virtues*, 24 BUS. ETHICS: A EURO. REV. S99, S99–S100 (2015).

63. Marion Smiley, *Collective Responsibility*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2017), <https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility>.

64. See Amy J. Sepinwall, *Corporate Moral Responsibility*, 11 PHIL. COMPASS 3, 4 (2016) (pointing out that the easiest case for corporate moral agency would be the one made for a formally structured organization); see generally Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207

“logically integrated set of commitments.”<sup>65</sup> Surely, then, there are minimal metaphysical requirements for a collective to have character.<sup>66</sup> One might, then, want to more charitably ascribe an additional requirement to Diamantis’s account of corporations with character—not only do they dispose their members to act in certain ways, but also meet the requirements of corporate moral agency. Even if such requirements are met, however, we would still need an account of why character requires nothing else, especially given the classical treatments that speak of character only in the context of natural persons.<sup>67</sup>

Diamantis’s move from the individual to the corporate, while solving one problem with character theories of punishment, raises other issues with character. Of course, Diamantis is not alone in having to address these stubborn questions of corporate metaphysics. We gesture to these problems because: (1) they stress that the formulation of a concept of ‘corporate character’ is not as straightforwardly easy as Diamantis makes it seem, and (2) we think that these problems, while nearly universally challenging, are opportunities for Diamantis to clarify what role (instrumental, justificatory, etc.) corporate character plays in his policy recommendations.<sup>68</sup> Diamantis’s account requires just a bit more to convince the reader that a corporation’s character matters in any normatively thick sense.

#### B. AN ORTHODOXLY CONSEQUENTIALIST APPROACH?

Early in *Clockwork Corporations*, Diamantis explicitly adopts a consequentialist approach, positing that the prevention of corporate crime

(1979) (articulating an account of corporate moral agency with a focus on the internal decision structures of corporations).

65. Kendy M. Hess, *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241, 243 (2014).

66. Michael Moore, *Liberty and Drugs*, in DRUGS AND THE LIMITS OF LIBERALISM 61, 93 (Pablo De Greif ed., 1999) (“Having one’s actions, emotions, traits, and mental states possess some minimal threshold of coherence is necessary for a being to have any character, indeed, for it to be a person.”).

67. Even if we want to ascribe character not only to natural persons, but also all moral persons, the requirements for corporate personhood and corporate moral agency are generally seen as distinct (and, for many, corporations are not persons insofar personhood requires something beyond agency). See THOMAS DONALDSON, CORPORATIONS AND MORALITY 20–23 (1982); PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 34–40 (1985); see generally Hess, *supra* note 41 (distinguishing corporate moral agency from corporate moral personhood); Rita C. Manning, *Corporate Responsibility and Corporate Personhood*, 3 J. BUS. ETHICS 77 (1984) (discussing the crucial distinctions between metaphysical personhood, moral agency, and moral personhood); Silver, *supra* note 41 (exploring how non-persons can not only be agents, but also worthy of moral consideration). *But cf.* Amy J. Sepinwall, *Denying Corporate Rights and Punishing Corporate Wrongs*, 25 BUS. ETHICS Q. 517, 523–24 (2015) (“Moral agents are necessarily moral persons.”).

68. Geoff Moore notes the special difficulty of applying virtue to the corporate form. Moore, *supra* note 62, at S99 (“While the application of virtue to individuals within (business) organizations is straightforward, there has been a debate over the application of notions such as virtue and character to the corporate form.”).

does not require deterrence in the traditional sense.<sup>69</sup> Indeed, he offers that character theory would prevent more crime than traditional deterrence approaches.<sup>70</sup> Diamantis may be recalling what decades ago were called “structural interventions,” a group of measures designed to transform internal firm processes.<sup>71</sup> A brief consideration of one such account suggests that his “theory” is an orthodoxly consequentialist proposal. Our aim is not to resolve a dispute of novelty. It is only to determine whether Diamantis offers an alternative to deterrent and retributive theories.

There is some research that focuses specifically on sentencing, arguing that fines are inappropriate in light of the unique attributes of institutional crime and that they ultimately frustrate the proper goals of corporate criminal punishment.<sup>72</sup> Much like that of Diamantis, this work points out the problematic effects fines have on several stakeholder groups.<sup>73</sup> The concept of rehabilitation the work proposes is aligned with a central normative objective of corporate sentencing, i.e., reducing a corporation’s propensity to commit crime.<sup>74</sup> This may be accomplished by restructuring operations and procedure to ensure compliance, along with other proactive measures to prevent wrongdoing.<sup>75</sup>

Restructuring, it is argued, may be far more effective and efficient than criminal fines.<sup>76</sup> This line of thought is so very similar to that of Diamantis, though it proceeds without any recourse to virtue theory. Without positing some sort of ephemeral corporate character, those arguing for structural interventions contend that such sentencing measures are probably better at reducing crime than fines or other common practices. Many others have

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69. See Diamantis, *supra* note 4, at 514. Diamantis takes “a broadly consequentialist perspective,” through which his “Article points out that preventing corporate crime does not necessarily require deterring it.” *Id.*

70. *Id.* (“Character theory would . . . ultimately do more to prevent corporate wrongdoing than deterrent approaches can.”).

71. See KIP SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS 34–37 (1990); see also Garrett, *supra* note 18, at 931–35 (exploring “structural” remedies for organizational crime).

72. Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353, 354–55 (1979) (arguing that fines “fail to take account of the significant novel qualities of institutional crime, thereby frustrating the goals that corporate criminal liability is intended to serve” (footnote omitted)).

73. *Id.* at 362–63.

74. *Id.* at 361 (arguing that rehabilitation advances “a goal that should be a crucial objective of all corporate sentences: changing an offender’s behavior so as to reduce the probability of future violations by that offender”).

75. *Id.* (“Rehabilitating a corporation requires that its internal operations and procedures be restructured in such a way as to foster future compliance with the law; institutional elements that facilitated the commission of an offense must be modified so that they operate subsequently to prevent violations.”); see generally Steven Walt & William S. Laufer, *Corporate Criminal Liability and the Comparative Mix of Sanctions*, in WHITE-COLLAR CRIME RECONSIDERED 309 (Kip Schlegel & David Weisburd eds., 1992) (arguing for sanctions that are aimed at reforming internal firm processes).

76. Note, *supra* note 72, at 365 (“Judicially mandated restructuring of internal corporate processes can provide a more efficient sanction than can a fine.”).

critiqued, examined, or aligned themselves with a kind of rehabilitative approach to corporate punishment without recourse to character theories, largely focusing on corporate probation as Diamantis does.<sup>77</sup> We wonder whether the notion of “corporate character,” or the assumptions that support it, are required by his central thesis that the criminal law should be open to evidenced-based, data-driven interventions at the sentencing stage with the objective of preventing crime.

### C. WHAT IF IT WERE A VIRTUE APPROACH?

As we have said, Diamantis is forthright about his theory being consequentialist. While virtue-centered approaches are often framed as an alternative to consequentialist or deontological approaches,<sup>78</sup> such stark line-drawing is rarely warranted since virtue approaches, like consequentialist approaches, are teleological in that they define the right in terms of the good.<sup>79</sup> While this structural truth establishes that consequentialism and

77. See generally Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417 (2009) (arguing in favor of deferred- and non-prosecution agreements as a means of rehabilitating corporations). Diamantis might find much support from Henning’s detailed, theoretically rich account. For a critical account, see Wilson Meeks, Note, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 103–10 (2006) (arguing that the rehabilitative approach to corporate punishment is inefficient, and “create[s] the potential for over-enforcement . . . and the forced adoption of overly intrusive, unfair, or socially undesirable settlement terms”). For other accounts, see CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 30–38 (1993); John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQ. 292, 309–11 (1982); John Collins Coffee Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 463–64 (1979) (entertaining the possibility that one reason to focus on the corporate-level rather than individual-level criminality is that organizations may be rehabilitated); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 499–502 (1988) (examining the possibilities of non-financial sanctions, including corporate probation); Fisse, *supra* note 25, at 1154–55; Günter Heine, *Sanctions in the Field of Corporate Criminal Liability*, in CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES 237, 249–52 (Albin Eser et al. eds., 1998) (“Corporate sanctions, as distinct from individual sanctions, should increasingly be grounded in a *preventive perspective* which leaves room for corporations to amend their ways in the future and bring their practices in full compliance with the law”); William S. Laufer, *Corporate Culpability and the Limits of Law*, 6 BUS. ETHICS Q. 311, 314–16; Erik Luna, *The Curious Case of Corporate Criminality*, 46 AM. CRIM. L. REV. 1507, 1520 (2009); Byam, *supra* note 30, at 586 (“Rehabilitation of corporate violators is unnecessary, impractical, [and] nonsensical.”); Stephen A. Yoder, Comment, *Criminal Sanctions for Corporate Illegality*, 69 J. CRIM. L. & CRIMINOLOGY 40, 53–54 (1978). For other works, see Duff, *Virtue, Vice, and Criminal Liability*, *supra* note 37, at 154 n.10.

78. Rosalind Hursthouse & Glen Pettigrove, *Virtue Ethics*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016), <https://plato.stanford.edu/archives/win2016/entries/ethics-virtue>. See also Gary Watson, *On the Primacy of Character*, in IDENTITY, CHARACTER, AND MORALITY 449, 450 (Owen Flanagan & Amélie Oksenberg Rorty eds., 1990) (“We should recognize the possibility of a view that is at once teleological and nonconsequentialist. An ethics of virtue . . . is a theory of this kind.”).

79. JOHN RAWLS, A THEORY OF JUSTICE 22–25 (1971).

virtue ethics are indeed related, it, in our view, does not merit the subsumption of any aptly classified “virtue approaches” under consequentialism. Virtue approaches, although teleological, are distinct from consequentialism in important ways. As well-known virtue theorists Rosalind Hursthouse and Glen Pettigrove contend, virtue approaches take *virtues* as most fundamental, rather than defining them solely in terms of another more fundamental concept, such as social welfare.<sup>80</sup> Diamantis at one point seems to acknowledge this, contrasting the “purpose” of punishment for retributivists (as deontologists), deterrence theorists (as consequentialists), and character theorists (as focused on the cultivation of virtuous character).<sup>81</sup>

Whether an account of punishment is rooted in virtue theory, then, depends on what it takes to be foundational. To distinguish the virtue theorist from the consequentialist, consider the case of a teenager who has demonstrated a disposition to steal his mother’s valuables—namely, her jewelry and her car. He will not steal from anyone else, just his mother. The mother has three options, each more likely to alter his behavior than the last. First, the mother can try to cultivate in him better dispositions to respect a parent, a goal which is not surely attainable and the least likely to be effectual. Second, the mother may threaten deductions from his allowance or his electronics use, which will likely reduce, though not totally, his propensity to steal from her. Third, a *perfectly* effectual option, let’s say, would be for the mother to keep her jewelry and car keys in a lockbox.

If this teenager were a standalone corporation, we suspect Diamantis would choose among these options solely on how effectual the intervention might be. As of now, he would choose the lockbox—but if he discovered that fines worked perfectly because the teenager cherished his cellphone, and the lockbox was not effectual because the teenager could pick locks, he would instead choose the fines. Holding all else constant, the first thing the virtue theorist would do—try to cultivate the wrongdoer’s virtue—is the last thing it appears Diamantis would do.

This illustrates our pervading worry: that the character of the corporation does not matter (or, perhaps more accurately, may not exist at all) apart from the social consequences Diamantis’s internal organizational modifications may produce. If one attempts to tease out the foundational concepts in Diamantis’s suggested schema of assessing character, character seems to be very much an instrumental concept to improve social welfare and reduce crime, balancing the “social goods” with the “social ills” of punishment.<sup>82</sup> We

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80. Hursthouse & Pettigrove, *supra* note 78.

81. See Diamantis, *supra* note 4, at 533.

82. *Id.* at 558–59. Professor Diamantis argues that:

Most criminal corporations have good character traits as well as bad; and thus, produce social goods as well as criminal social ills.

....



worry that this kind of corporate character theory is a variation on deterrence theory because of this consequentialist focus. If accurate, at worst, this means that corporate character theory fails to invoke character theory in any sense that is not merely metaphorical or rhetorical. This may appear too harsh, but it is a risk that Diamantis is well-positioned to address and counter.

There is certainly promise for a virtue theory that closely aligns with concepts in the virtue-ethical paradigm. Generally, the topic of virtue in business has experienced growing attention in the past decade.<sup>83</sup> Any virtue-ethical approach needs to provide some idea of a virtuous corporation. If Diamantis were to adopt a virtue approach, the question remains as to what a virtuous corporation would look like given virtue is foundational. This question must be answered, if Diamantis is right, from the distinct standpoint of corporate-level character. If we try to glean from Diamantis's account an idea of the virtuous organization, we will find perhaps that it is one, at least, that does not commit crime. At first glance, this is not an especially implausible trait of those with good character.<sup>84</sup> Firms of any scale and size, though, have base rates of wrongdoing that are significant, sustained, and generally unaffected by compliance regimes.

Since his theory focuses on traits that "amount to stable dispositions to commit crimes,"<sup>85</sup> Diamantis must, at some point, wrestle with the idea that all corporations are associated with deviance of some sort. Anyone proposing a character theory of corporations must offer an account of "good" corporations that do "bad" things. To say that a corporation has good character but, nevertheless, is by their very nature associated with the criminal wrongdoing of mid-level managers requires far more attention. It is all too easy to say that a virtuous corporation "may provide a valuable service to consumers, offer good jobs for employees, contribute to or work with

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... When sentencing individual defendants, judges are authorized to conduct a sweeping inquiry into the character of the defendant, balancing the need for punishment against the risk of undermining his socially desirable character traits. The proposal here is to subject corporate criminals to the same treatment . . .

*Id.*

83. See generally Alejo José G. Sison et al., *Guest Editors' Introduction: Reviving Tradition: Virtue and the Common Good in Business and Management*, 22 *BUS. ETHICS Q.* 207 (2012) (arguing for the superiority of virtue ethics and introducing a volume of works on the topic).

84. See William A. Edmundson, *The Virtue of Law-Abidance*, 6 *PHILOSOPHER'S IMPRINT* 1, 1–2 (2006); Kimberley Brownlee, *What's Virtuous About the Law?*, 21 *LEGAL THEORY* 1, 1–2 (2015). For discussion of when ethical obligations in business may conflict with the law, see JOHN HASNAS, *TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW* 59–64 (2006); see generally Carson Young, *Putting the Law in Its Place: Business Ethics and the Assumption that Illegal Implies Unethical*, *J. BUS. ETHICS* (forthcoming 2018), <https://link.springer.com/content/pdf/10.1007%2Fs10551-018-3904-4.pdf> (arguing that illegal business practices are not necessarily unethical, using the example of Uber's early operations in Philadelphia).

85. Diamantis, *supra* note 4, at 534.

charities, or promote environmentally friendly products.”<sup>86</sup> There is no escaping the daunting “good corporation doing bad things” challenge if there is such a thing as a distinctly *corporate* character.

As we stressed in our discussion of the “character” in corporate character theory, the question of what other character traits constitute a virtuous corporation persists.<sup>87</sup> One reason for this—one obstacle that should still be addressed—is that discussing “corporate character” contradicts many of the natural person-specific arguments of some major theories of virtue ethics. For instance, one of the few well-accepted theses in the diverse world of virtue ethics is “the broadly Aristotelian thesis that virtue requires both particular actions and particular emotional responses.”<sup>88</sup> Also, Eudaimonist theories of virtue ethics and moral character<sup>89</sup> often take as their basic idea the concept of *human* flourishing or happiness.<sup>90</sup> The corporation’s lack of affect<sup>91</sup> throws a wrench into the translation of theories with such commitments: How can a corporation have emotions or “flourish” in the relevant sense? Another potential “wrench” is that many modern accounts, such as those of Phillipa Foot or Hursthouse, defend a type of “ethical naturalism” or “Aristotelian naturalism” that conceives human virtues as inextricably tied up with the species’ nature.<sup>92</sup>

Business ethicists have followed suit in applying naturalist virtues to *members* of organizations.<sup>93</sup> But what could be “naturalist” virtues for an organization? Yet another consideration is the motivational features that distinguish character traits from other dispositions.<sup>94</sup> A generous person, it is

86. *Id.* at 558.

87. For an enlightening disambiguation of the different views on what “organizational-level virtue” is (which we take to be the same as “corporate character”), see David S. Bright, Bradley A. Winn & Jason Kanov, *Reconsidering Virtue: Differences of Perspective in Virtue Ethics and the Positive Social Sciences*, 119 J. BUS. ETHICS 445, 454 (2014).

88. Karen Stohr, *Contemporary Virtue Ethics*, 1 PHIL. COMPASS 22, 23 (2006); accord Duff, *Virtue, Vice, and Criminal Liability*, *supra* note 37, at 161–62; see Peter Goldie, *Emotion, Reason, and Virtue*, in EMOTION, EVOLUTION, AND RATIONALITY 249, 255–58, 263–66 (Dylan Evans & Pierre Cruse eds., 2004).

89. Marcia Homiak, *Moral Character*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015), <https://plato.stanford.edu/archives/fall2016/entries/moral-character>.

90. This is the emphasis of Anscombe’s article, which is credited with reviving modern research in virtue ethics. See G. E. M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 18 (1958); For a Eudaimonist approach to criminal law, see, e.g., Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1445, 1449–51, 1456–69 (1995).

91. Amy J. Sepinwall, *Blame, Emotion, and the Corporation*, in THE MORAL RESPONSIBILITY OF FIRMS 143, 144–46 (Eric W. Orts & N. Craig Smith eds., 2017); see Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L. J. 411, 428–29 (2012); but cf. Margaret Gilbert, *Collective Guilt and Collective Guilt Feelings*, 6 J. ETHICS 115, 118, 124–30 (2002) (analyzing the ability of collectives to feel guilt).

92. For discussion, see David Copp and David Sobel, *Morality and Virtue: An Assessment of Some Recent Work in Virtue Ethics*, 114 ETHICS 514, 532–34 (2004).

93. See, e.g., Koehn, *supra* note 59, at 499–501.

94. Duff, *Choice, Character, and Criminal Liability*, *supra* note 37, at 365–66.

said, will be motivated to give to the needy because of their need rather than his or her drive for feelings of power or superiority.<sup>95</sup> While a consequentialist would applaud even the ego-driven philanthropist, the virtue theorist would not. Could corporations as entities have the kind of motives necessary to qualify as having character?<sup>96</sup> In light of the basic features of the modern virtue-ethical paradigm, how the concept of virtue translates to the corporate context is nothing less than mystifying. But this is a challenge that Diamantis also inherits, and he is in an excellent position to weigh in.

Faced with the challenge of forming a concept of corporate character, some have found shelter in MacIntyrean virtue ethics,<sup>97</sup> which has garnered some popularity in organizational theory at-large owing to its specific place for the notions of “practice” and “institution.”<sup>98</sup> These approaches may offer some refuge for Diamantis’s account. But their advocates often focus on corporate character’s “expressive” advantage (or what we would call “rhetorical advantage”) in speaking efficiently and intelligibly about important organizational features.<sup>99</sup> That is, talking about corporate character can sometimes just make it easier to engage in a dialogue about organizational features of moral import. It is clear, however, that Diamantis endeavors to offer more than a new rhetorical strategy.

#### IV. CORPORATE CHARACTER THEORY AND THE COMPLIANCE GAME

Questions about the genuineness and authenticity of a firm’s character—good and bad—are challenges left for reflection in future work.

95. *Id.*

96. For a skeptical view, see Nani L. Ranken, *Corporations as Persons: Objections to Goodpaster’s Principle of Moral Projection*, 6 J. BUS. ETHICS 633, 634 (1987). On the error of comparing corporations’ motivations to those of individuals, Ranken argues:

[W]hile the development of habits is something a person might be motivated to undertake, the “institutionalizing” of anything is not something a corporation can be motivated to do. It is an institution, created by persons using another institution (the law). It can be changed by persons, from the outside; but *it* has no inner springs of change analogous to the motives of natural persons. Of course a manager can make decisions for the corporation under conditions which permit us to call these decisions *of* the corporation. But his or her inner springs of change, the cluster of motives that underlie those official actions—surely we should not attribute these to the corporation!

*Id.*

97. See Moore, *supra* note 24, at 662–65; Moore, *supra* note 62, at S101–03; Geoff Moore, *The Virtue of Governance, the Governance of Virtue*, 22 BUS. ETHICS Q. 293, 302–06 (2012) [hereinafter Moore, *The Virtue of Governance*].

98. Moore, *The Virtue of Governance*, *supra* note 97, at 303, 309; see Ron Beadle & Geoff Moore, *MacIntyre, Neo-Aristotelianism and Organization Theory*, in PHILOSOPHY AND ORGANIZATION THEORY 85, 95–104 (Haridimos Tsoukas & Robert Chia eds., 2011); Ron Beadle & Geoff Moore, *MacIntyre on Virtue and Organization*, 27 ORG. STUD. 323, 330–34 (2006).

99. Moore, *supra* note 62, at S110 (“[C]orporate character . . . notions serve an important, and efficient, expressive function allowing us to speak intelligibly about important features of organizations.”).

These challenges are far from insurmountable, and are best seen as a caution against freely accepting the authenticity of corporate character representations. Clearly, the question is not whether any particular corporation is or is not virtuous. The question also is not whether any corporation is deviant or not. For both questions, any answer will always turn on the degree of goodness, badness, or virtuousness of character. How does character theory acknowledge individual differences in character? When does a good corporation that did bad things become a bad corporation? These questions invite serious empirical scrutiny that allows for fine determinations. And, Diamantis can and should resist the delegation of this very complex task to those steeped in organizational science.

Moreover, there is too long a history of reputation management by firms, including greenwashing of different varieties, that should give us pause in relying on anecdotal claims of good character.<sup>100</sup> There is also a long history to the investment in compliance programs and procedures that are free of any evidence of efficacy.<sup>101</sup> In addition, there is a long history of “window dressing” or “cosmetic” compliance programs, designed to convince the unsuspecting and unknowing of some commitment to corporate integrity.<sup>102</sup> Finally, neither prosecutors nor firms have ever embraced the kind of evidence-based empiricism that would recognize, with any confidence, genuine evidence of a good or bad character. And firms continue to spend “integrity dollars” without asking for any evidence that this promotes character.<sup>103</sup>

There may be good reasons that both regulators and the regulated turn a blind eye to actual evidence of good versus bad corporate character. One of us has argued that the failure to wrestle with the most significant questions about corporate character and integrity reveals a comfort with the regulatory status quo; a system-wide equilibrium marked by a series of compromises and concessions from compliance stakeholders. This is a regulatory game that exploits the absence of any serious effort to ensure a firm’s authenticity with respect to their good and bad character.<sup>104</sup>

Thus, the incentives in this compliance game are not fashioned around changing corporate behavior, imbuing or embracing corporate character, and protecting corporate decision making from short-sighted wrongdoing. This is a game that placates stakeholders by giving players moral cover, the

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100. See William S. Laufer, *Illusions of Compliance and Governance*, 6 CORP. GOVERNANCE 239, 240–41 (2006) (analyzing benefits in different types of corporate governance reforms); Laufer, *supra* note 44, at 159 (examining the corporate integrity in firm management); William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 255–58 (2003) (discussing ways in which reputations of firms are laundered).

101. Laufer, *supra* note 21, at 400–07.

102. *Id.* at 402–03.

103. See *id.*

104. Laufer, *supra* note 21, at 408–10.

credible appearance of good character and legitimacy, and well-crafted images of virtuous and principled leadership. And playing this game simply gives fuel to the profits of a compliance and ethics industry.

The most significant requisite of the game is that there is no definitive evidence of a firm's representations; no genuine exploration of whether ethics expenditures and compliance programs actually affect behavior, decision making, character, and culture. In this game, it would be doubtful to muster serious evidence of a firm's good character, assuming that it actually could be measured. Instead, a firm's own representations of their character would more than suffice. It is, simply put, a game of appearances.<sup>105</sup>

Critics may counter by noting that some firms take their character seriously and, in doing so, have program, policies, and cultures that positively influence employees' behavior. We would not disagree. It is simply that the convention is otherwise. Moreover, the prospects for any confidence in knowing good versus bad character must come from actual evidence—and the compliance game makes such evidence more than unlikely. Diamantis is in a good position to show us an exit to this game. He could lead those proposing genuine fault theories in deconstructing, questioning, and challenging corporate representations of good character.

## V. CONCLUSION

There are obstacles to bringing new theoretical perspectives to corporate punishment. And, of course, it is much easier to offer a critique of work from the sidelines. That said, a successor article or an additional response to *Clockwork Corporations* that details and addresses the many obstacles of using corporate character theory would be extraordinarily helpful. In particular, this might tackle the questions: (a) who is in a position to determine good from less-than-good character? (b) how does corporate character differ from the requirements of a due diligence defense? and, (c) how much good character will it take to turn a corporation that has done some bad into a corporation that is now "good"? Diamantis could deftly respond to the theoretical risks, including (a) questions about the thin or thick nature of what Diamantis means by character, (b) whether or not *Clockwork Corporations* is really an outline of a new deterrence theory, and (c) how much more work is necessary for a standalone theory of corporate character that the corporate criminal law may embrace.

There was a time, now quite long ago, when wrestling with theories of corporate punishment dominated the literature. The landmark work of the United States Sentencing Commission in the late 1980s and early 1990s

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105. William S. Laufer, *Compliance and Evidence: Glimpses of Optimism from a Perennial Pessimist*, in DIE VERFASSUNG MODERNER STRAFRECHTSPFLEGE: ERINNERUNG AN JOACHIM VOGEL 423, 423–25 (Klaus Tiedemann et al. eds., 2016); William S. Laufer, *Inautenticità del Sistema Della Responsabilità Degli Enti e Giudizio di Colpevolezza*, in LA RESPONSABILITÀ "PENALE" DEGLI ENTI 9, 23 (Francesco Centonze & Massimo Mantovani eds., 2016).

brought forth a stream of scholarship and serious debate about optimal penalty theory, desert-based punishment, and even orphaned theories of restorative justice.<sup>106</sup> *Clockwork Corporations* should serve as a catalyst to revisit the work of the Commission and think beyond the notion that all theories of punishment must be derived from an ornamental utility calculation.

We say most gratefully that Diamantis started an important discussion about virtue theory and the role of virtue as the defining construction of a “corporate character.” The hope is that this discussion will proceed while, at the same time, ensuring against the perennial and almost always empty promotion of a corporate soul. If only we could recruit Diamantis to subscribe to the sentiment that corporate criminal law has turned into a nuanced game of appearances, he could then protect “virtue” from being its next casualty.

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106. For an excellent and comprehensive treatment of this period, see generally RICHARD S. GRUNER, *CORPORATE CRIME AND SENTENCING* (1994).