From Here to There: A Reply to Professor Baer

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To solve any problem, it is good to have an idea of where you want to end up and how you plan to get there. In *Clockwork Corporations: A Character Theory of Corporate Punishment*, I propose a solution to an intersecting set of concerns that arise from how we sanction corporate criminals.[1] I am grateful to Professor Miriam Baer for offering her critical reflections.[2] The sort of basic moral theorizing from which the Article stems is currently not in vogue among corporate law scholars, so it was generous of her to take the time to give it serious consideration. Baer is ultimately skeptical of corporate character theory, both as a destination and as a journey. Its imagined future is one she finds troublesome, and she thinks the steps toward it range from impracticable to dangerous. In this Reply, I hope to evoke a little more sympathy. The distance between corporate character theory and the sort of alternative she seems to prefer may be shorter than she acknowledges, and the path I propose could be the surest way of getting us both there.

Baer drops evocative hints at an imagined state of affairs that she believes is superior to one shaped by character theory. She provocatively closes her Response by saying "there are no good corporations or bad ones."[3] Taken out of context, that statement risks implying more than it says. She still thinks that a corporation can have "crimogenic properties,"[4] and that it is obvious the legal system should strive to fix them insofar as it can.[5] However, she objects to "criminally punish[ing] a corporation on account of those properties."[6] It is unclear whether Baer thinks there are *any* properties on account of which corporations should be criminally punished. Her final remark, that there are only "criminal corporations . . . because our society elects to label them" that

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

2. Miriam H. Baer, *Propping Up Corporate Crime with Corporate Character*, 103 IOWA L. REV. ONLINE 88 (2018).

3. *Id.* at 99.

4. *Id.* at 98.

5. *Id.* ("Who *wouldn't* choose to fix the very organizational defects we know to cause crime?").

6. *Id.* (emphasis omitted).

way, suggests skepticism.[7] Knowing Baer and her work, I believe she is open to there being some circumstances that warrant corporate punishment; however, she thinks these circumstances are very narrow.[8] She still wants the law to address corporations' criminogenic properties, but she favors a more diagnostic approach to these, modeled after regulation.[9] Trying to fix corporations is OK in her book.[10] We can fix without flagellating, and she believes regulators are the best party to do it.

If we were to spell out Baer's quasi-regulatory ideal in more detail, bearing in mind a couple hard political and legal realities, we might approach something very close to character theory. From a distance, the two resemble each other quite closely. She is opposed to most of the ways we presently punish corporations and prefers to focus on sanctions that bring about reform. Corporate character theory agrees with her on both points. It is in part a response to the injustice, counterproductivity, and incoherence of traditional conceptions of corporate punishment.[11] It also rejects any mode of corporate punishment aside from coerced reform.[12]

What causes Baer pause is that character theory self-consciously styles the reform it recommends as a mode of punishment (rather than regulation) and envisions sentencing judges (rather than regulators) imposing it.[13] These are both necessary compromises with existing conditions that Baer should be willing to make. As she observes, "corporate criminal liability is here to stay"[14] because the voting public demands punishment of corporate criminals.[15] There is no foreseeable political will to shrink the range of corporate liability and punishment—indeed, the legislative trend here and abroad is toward

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7. *Id.* at 99. Baer also asks, "Do we prosecute corporations because we truly believe they deserve punishment, or do we continue to rely on the criminal justice system because alternative institutions lack the ability to bring about the structural changes we deem desirable?" *Id.* at 98. Assuming she means "or" as an exclusive disjunctive, she seems to be suggesting that we do not (she does not?) think corporations truly deserve punishment.

8. Certainly narrower than under current law. *See id.* at 95 ("[O]ur current legal rule [for corporate liability] of *respondeat superior* is already overinclusive.").

9. *Id.* at 98 ("[W]hy do we spend so much time thinking up new justifications for corporate criminal law when we could instead focus our energies on introducing better regulatory alternatives?").

10. *Id.* (seeming to agree that "the government should identify and remedy a corporation's most notable crimogenic properties").

11. Diamantis, *supra* note 1, at 516–18.

12. *See id.* at 514 ("Character theory would refine the sorts of reform and rehabilitation that prosecutors currently pursue and make them the *exclusive* mode of corporate punishment.").

13. *See* Baer, *supra* note 2, at 98.

14. *Id.* at 99.

15. See Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 612 (2012) ("The public has increasingly registered greater moral outrage in response to corporate governance scandals. Moral outrage, in turn, fuels retributive motivations and therefore supports those institutions best poised to take advantage of such motivations.").

expansion.[16] That being the case, a theory of punishment that is motivated and limited[17] by the regulatory objectives she endorses[18] should be an easy bargain for Baer to strike. It is unclear why coercive reform would be objectionably "punitive" when judges impose it, but not when regulators do. If Baer were more inclined toward realpolitik,[19] she could view character theory as a tool for duping the public into thinking judges punish corporations when they do the kind of fixing she endorses. (As an aside, I would be among those duped and in need of duping.)

Situating character theory within the criminal law—as a tool for judges to sentence convicted corporations—is also a concession to existing conditions that would advance and strengthen Baer's agenda. She imagines that the best parties to carry out her goal of fixing rather than punishing are, "in theory," civil regulators and private actors.[20] As she concedes, though, both presently "lack the ability to bring about the structural changes [she] deem[s] desirable."[21] Private parties are short on resources, competence, and publicly-oriented incentives; civil regulators have these but lack the requisite power.[22] Prosecutors may be next on the roster: They have both resources and power. However, Baer seems to agree[23] with the dominant view that prosecutors lack the competence[24] and the incentives[25] to design compliance right. With private parties, regulators, and prosecutors off the stage, the cast of characters capable of fixing corporations, and competent to do so, quickly grows thin. One that remains is the sentencing judge.

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16. *See* Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009) ("[A] comparative review reveals something that may come as a surprise: [I]n other countries, the focus in the past several decades has been on the creation of corporate criminal liability in jurisdictions in which it did not exist, and where such liability already existed the modern reforms included modifications intended to make it easier, rather than harder, to prosecute corporations criminally.").

17. This is one important respect in which character theory differs from the role "the 'effective corporate compliance' metric . . . already [plays in] most discussions of corporate criminal punishment." Baer, *supra* note 2, at 89.

18. I discuss in more detail the bivalent punitive-regulatory faces of character theory in, Mihailis E. Diamantis, *Duck-Rabbit: A Reply to Professor Hasnas*, 103 IOWA L. REV. ONLINE 133 (2018).

19. In fact, Baer would prefer more transparency, rather than less. *See* Miriam H. Baer, *Too Vast to Succeed*, 114 MICH. L. REV. 1109, 1121–22 (2016).

20. *See* Baer, *supra* note 2, at 98.

21. *See id.*

22. *See id.*

23. *See id.* at 94.

24. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 72 (2014) ("[C]ompliance programs [required in DPAs] are often described in fairly general terms. They refer to 'appropriate due diligence' and 'effective compliance' without defining it."); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 953 (2009) ("Despite the fact that the DOJ has intoned an interest in generating a more ethical 'corporate culture,' its prosecutors have little expertise in bringing about this development . . . .").

25. *See* Matthew Caulfield & William S. Laufer, *The Promise of Corporate Character Theory*, 103 IOWA L. REV. ONLINE 101, 119–21 (2018).

Though Baer does consider judges for the role, she finds them wanting. Her criticism of judges focuses on the tough questions they will have to answer (What about corporations causes them to misbehave?[26]) without an adequate scientific basis (Will this reform actually improve things?[27]). Baer wonders how "character theory [could] address these problems"[28] without becoming an open "invitation to judges to meddle in [a] corporation's daily affairs."[29] But anyone hoping to fix corporate misbehavior must answer these questions—whether they are sentencing judges or Baer's regulators. The comparative advantage of sentencing judges—aside from their power to act on their answers—is their capacity to solicit input from anyone who might have answers (experts, regulators, private parties, prosecutors, etc.) and the institutional independence to balance what they learn objectively.[30] Private parties do not have public interests at heart, and regulators are subject to capture by the very industries they are meant to regulate.[31] So while Baer's criticisms of sentencing judges are true to life, they wash out when compared to the alternatives.

Baer does point to some unique faults of character theory. She notes, for example, that she is wary of "character" as a "term that can mask a number of illiberal, idiosyncratic, or even hateful ideologies."[32] She alludes[33] to the "good moral character" requirement placed on people seeking naturalized citizenship,[34] which has been used as a "powerful exclusionary device" against those with criminal convictions.[35] One could easily imagine "character" put to even more invidious uses, such as a pretext to persecute on the basis of race, gender, ethnicity, etc.

This is a weighty concern that character theory needs to take seriously. The word "character" is malleable, and malleability opens the potential for abuse.[36] If it would help avoid these problems, I would be happy to accept Baer's suggestion that judges use the word "structure" instead.[37] Ultimately, it

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26. *See* Baer, *supra* note 2, at 92 ("The addition of a single new variable exponentially confuses our efforts to pinpoint the cause of a given crime.").

27. *Id.* at 93 (emphasizing the potential unexpected consequences of some organizational reforms).

28. *Id*.

29. *Id.* at 94.

30. *See* Diamantis, *supra* note 1, at 564–65.

31. *See, e.g.*, John C. Coffee Jr., *A Course of Inaction*, LEGAL AFF. (2004), http://legalaffairs.org/issues/March-April-2004/review_coffee_marapr04.msp (discussing the "rapidly revolving door between the SEC and private legal practice").

32. *See* Baer, *supra* note 2, at 97.

33. *Id.*

34. 8 U.S.C. § 1427(d) (2012).

35. *See* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1572–73 (2012).

36. *See* Baer, *supra* note 2, at 97 ("[C]haracter's elasticity allows any decisionmaker—be it a prosecutor, legislator, or judge—to mask ideology with some anodyne call for 'good corporate citizenship.'").

37. *See id.* at 98 ("Diamantis's character account could just as easily be conveyed by the term 'structure.'").

is the concept rather than the term that most interests me. In discussions of theory, I still think using "character" is helpful. Doing so highlights the continuity between my proposal and character-based theories of individual punishment. The corporate and individual contexts may hold lessons for each other that would be masked otherwise. When push comes to shove and theory translates to practice, I have no problem saying that the organization-level features that generate or prevent crime are part of a corporation's "structure."

Even if "character" were to find its way from theory into practice, there are three considerations that may help allay Baer's concerns. First, her discussion of the abuses of "character" focus on cases of individual discrimination on the basis of individual characteristics. Though the law does recognize that corporations can have color[38] and creed,[39] these are usually not their most socially salient features. As a result, there is not the same pervasive history of discrimination against corporations regarding the sorts of characteristics that most concern Baer. Second, "character" is not alone in its corruptibility—one does not have to look far to find examples of "regulation" used as a pretext for invidious discrimination.[40] Third, it should help that the relevant notion of "character," as I define it in the Article, is narrow and objective—a disposition to commit (or to avoid) crime.[41] This should significantly restrain potential abuse.[42] Discriminatory purposes and effects may still surface under character theory's narrow definitions if such purposes and effects are embedded in the statutes defining what counts as a crime. However, the admirable task of stamping out those discriminatory purposes and effects lies beyond the ambit of a theory *of punishment*.

On this last point, Baer is right that a significant limitation of the character theory I propose is that, as a theory only of whether and how *to punish*, it does not say whom *to investigate* or *convict*.[43] While standard versions of retribution and deterrence purport to be all-inclusive criminal justice packages,[44] I deliberately limited character theory to sentencing. I did this in part because I believe a different theory is better suited to evaluating criminal *liability*.[45]

38. *See generally* Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2024–27 (2006) (discussing "courts' current recognition of race in corporations").

39. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768–75 (2014) (finding that private corporations can have sincere religious beliefs).

40. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (finding an impermissible discriminatory purpose against Asian Americans).

41. *See* Diamantis, *supra* note 1, at 534 ("[O]nly a narrow set of character traits legitimately interest the criminal justice system: those that amount to stable dispositions to commit crimes.").

42. Baer doubts this. *See* Baer, *supra* note 2, at 97 ("When we say a corporation has bad character, that might mean one thing to Professor Diamantis, but something quite different to the general public.").

43. *Id.* at 95 ("[Character theory] fails to tell us which activities are deserving of criminal punishment in the first place.").

44. *Id.* at 97.

45. *See generally* Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049

Additionally, I think that the "growing number of scholars [who] . . . attempt[] to pinpoint corporate punishment's 'first principles'"[46] unjustifiably assume that one first principle should answer all of criminal law's questions. There could be significant advantages to taking a more modular approach to criminal theory.[47] These scholars may be right that the same principle can best say when and how to prosecute, convict, and punish. They could arrive at that conclusion through a series of more modest, separate inquiries into the different phases of the criminal justice process. Assuming from the start that the answers must all tend in a uniform direction risks making things too difficult and forecloses the possibility that (as I think) they will not so tend.

In Baer's Response, there is at least one practicality where her preference for regulation over criminal punishment (when it comes to fixing corporations) has a distinct leg up: Corporate conviction currently brings fearsome collateral consequences (like debarment or loss of license) that everyone wants to avoid.[48] This is not something prosecutors and judges can change, separately or in concert. "Whether a convicted company loses its license still falls largely within the purview of a civil regulator."[49] So without coordinated legislative or regulatory intervention, character theory cannot get off the ground: Prosecutors will still favor pretrial diversion over convictions in order to avoid collateral consequences, and judges will remain on the sidelines. This is a significant hurdle.

If I am right that Baer could see a version of her own regulatory ideal in character theory, the real question is not which path has hurdles (they both do), but which path's hurdles are higher. Character theory needs judicial and prosecutorial buy-in, in concert with legislative or administrative cooperation on the issue of unpopular[50] collateral consequences. Baer's regulatory preferences would require downsizing the politically unassailable system of corporate criminal justice,[51] the further empowerment of a deeply controversial administrative state,[52] and a solution to the perennial problem of regulatory capture.[53] In the end, though, if I am right that the character theory

(2016) (arguing for an expressive retributive approach to corporate criminal liability).

46. Baer, *supra* note 2, at 91.

47. I have work in progress that explains and justifies this claim further. *See* Mihailis E. Diamantis, Speech at the Benjamin N. Cardozo School of Law CrimFest (July 16, 2018) (on file with author).

48. Baer, *supra* note 2, at 94.

49. *Id.*

50. *See, e.g.*, Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1062–63 (2008) (discussing some of the problems collateral consequences of conviction cause in corporate criminal law).

51. *See* Baer, *supra* note 15, at 626–27 (discussing public demand for corporate punishment and its impact on politics and governance structures).

52. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (answering "yes" to the titular question).

53. *See* Baer, *supra* note 15, at 594 n.72 ("Capture occurs when special interest groups use

of punishment checks most of Baer's preferred corporate sanction boxes, who cares how we get there . . . let's just get going.

money and power to influence and persuade administrative agencies not to act in ways that further the public's overall welfare.").