

The Law’s Missing Account of Corporate Character

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ABSTRACT

People commonly talk about corporations in anthropomorphizing terms—corporations “do” and “think” things of consequence. Correspondingly, the law has doctrines for attributing acts and mental states to corporations. People also commonly talk about corporations as having a broad range of familiar character traits—sincerity/insincerity, honesty/deceitfulness, altruism/egotism, etc. Yet the law has no corresponding doctrine for discerning these corporate attributes even though they, like corporate acts and thoughts, have important social, economic, and moral implications. The present article argues that this oversight should be remedied. It discusses examples from civil, criminal, and constitutional law where a theory of corporate character could plug doctrinal holes, further the law’s internal objectives, and open conceptual space for promising research.

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INTRODUCTION

Tesla is innovative.¹ Ben & Jerry's is wholesome.² Apple is committed to privacy.³ Starbucks is socially conscious.⁴ If you don't know these things, you're missing out on some obvious aspects of our shared social experience. It would be about as bad as not knowing that Amazon delivers most goods in two days⁵ or that Macy's holds a huge parade every Thanksgiving.⁶ All of these statements represent facts that shape our most basic interactions with these corporations. I use an iPhone because I trust Apple will respect my personal data—even when the government comes forcefully knocking.⁷ I order a last-minute Christmas present because I know Amazon will deliver it in time for unwrapping by the fire.⁸

Though all these statements seem equally true and natural considerations in how we navigate our corporate relationships, the law does not treat them the same. Consider first the two statements about Amazon and Macy's, which

1. See *The World's Most Innovative Companies*, FORBES, <https://www.forbes.com/innovative-companies/#21e7cad1d65> (last visited Nov. 5, 2018) [<https://perma.cc/K2DF-EXS5>].

2. See Merrill Fabry, *Ben & Jerry's Is Turning 40. Here's How They Captured a Trend That Changed American Ice Cream*, TIME (May 4, 2018), <http://time.com/5252406/ben-jerry-ice-cream-40> [<https://perma.cc/8692-P9A5>].

3. See Don Reisinger, *Apple's Commitment to Privacy Was on Display This Week*, FORTUNE (June 16, 2018), <http://fortune.com/2018/06/16/apple-privacy-commitment> [<https://perma.cc/MV9P-EKYF>].

4. See Dan Ritter, *3 Reasons It's Hard to Hate Starbucks*, USA TODAY (July 6, 2014, 8:30 AM), <https://www.usatoday.com/story/money/business/2014/07/06/why-its-hard-to-hate-starbucks/12022699> [<https://perma.cc/9MWD-K4U9>]; Bill Chappell, *Starbucks Closes More Than 8,000 Stores Today for Racial Bias Training*, NPR.ORG (May 29, 2018, 10:10 AM), <https://www.npr.org/sections/thetwo-way/2018/05/29/615119351/starbucks-closes-more-than-8-000-stores-today-for-racial-bias-training> [<https://perma.cc/V6N3-TQB7>].

5. See *Prime Delivery*, AMAZON, <https://www.amazon.com/b?ie=UTF8&node=15247183011> (last visited Nov. 5, 2018) [<https://perma.cc/78LT-L7GM>].

6. See *Macy's Thanksgiving Day Parade*, MACY'S, <https://www.macys.com/social/parade> (last visited Nov. 5, 2018) [<https://perma.cc/FLK5-VCRK>].

7. See Arash Khamooshi, *Breaking Down Apple's iPhone Fight with the U.S. Government*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html> [<https://perma.cc/6TYH-4ZFQ>].

8. See Carolyn Bernucca, *Can I Still Order from Amazon for Christmas? Last-Minute Shoppers Still Have Hope*, ELITE DAILY (Dec. 23, 2017), <https://www.elitedaily.com/p/can-i-still-order-from-amazon-for-christmas-last-minute-shoppers-still-have-hope-7681725> [<https://perma.cc/G8DA-QE73>].

describe things those two corporations *do*.⁹ The law has longstanding, formal doctrines for recognizing these facts. According to the doctrine of respondeat superior, federal law attributes to a corporation any act of any of its employees taken within the scope of their employment and with some intent to benefit the corporation.¹⁰ Likewise, all states have some doctrine for attributing acts to corporations.¹¹

By contrast, the opening four statements—about Tesla, Ben and Jerry's, Apple, and Starbucks—describe how those corporations *are*. Our perceptions of such corporate attributes shape how we, both individually and collectively, are prepared to interact with corporations and their products. Corporations know this. They expend massive amounts of money for marketing and branding campaigns to shape our perceptions of them.¹²

One way to think about these action-shaping corporate attributes is as a kind of corporate “character.” Character traits generally refer to dispositions people have to behave in particular ways.¹³ Honest people are disposed to tell the truth. Innovative people are disposed to advance original methods and ideas. This is true whether the people with the traits are natural or corporate.

Though character is intimately connected to action, there is no easy way to cobble together a legal doctrine for character from the more familiar legal doctrines for corporate action. Action and character are importantly different. Most basically, actions are events¹⁴ while character traits are dispositions. The trait precedes the action. What counts as evidence of one will be different from what counts as evidence of the other. More intuitively, action and character can come apart. People, both natural and corporate, sometimes act out-of-character.¹⁵ An honest person may tell a lie in a high-stress moment, but a lie told by an honest person is not thereby true.

9. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 496 (1909) (recognizing, for the first time, the possibility of corporate criminal liability under federal law for affirmative acts).

10. See 18B AM. JUR. 2D *Corporations* § 1841, Westlaw (database updated May 2019).

11. The Model Penal Code requires participation by a high managerial agent before it will attribute lower-level employee acts. MODEL PENAL CODE § 2.07(4)(c) (AM. LAW INST. 1962).

12. More than \$200 billion will be spent on marketing in the United States in 2019. Greg Sterling, *Report: Digital Now Makes Up 51% of US Ad Spending*, MARKETING LAND (Sept. 20, 2018, 4:44 PM), <https://marketingland.com/report-digital-now-makes-up-51-of-us-ad-spending-248617> [<https://perma.cc/DD2H-UG5T>].

13. See MICHAEL MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 548 (2010); Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 100 (1996) (“[B]ad character’ in this context means a ‘settled disposition’ . . . to commit acts that violate the law.”).

14. See George Wilson & Samuel Shpall, *Action*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 4, 2012), <https://plato.stanford.edu/entries/action> [<https://perma.cc/6ZQX-W8ZC>] (“The latter events, the doings, are the *acts* or *actions* of the agent . . .”).

15. See Joel J. Kupperman, *Virtue in Virtue Ethics*, 13 J. ETHICS 243, 243 (2009) (“People do not always behave in the same (‘consistent’) way. They sometimes act out of character.”); Robert C. Solomon, *Victims of Circumstances? A Defense of Virtue Ethics in Business*, 13 BUS. ETHICS Q. 43, 44–45 (2003) (discussing the importance of accommodating out-of-character actions in business ethics).

Given the salient social significance of corporate character, it is surprising that the law has no doctrine for it. Many readers entrenched in the traditional legal frameworks will find this claim anticlimactic and maybe even false. Why should the law care about corporate character? We got along without it so far. Doesn't the law focus on acts because they are most important? Corporations affect us directly through their acts, not through their characters.

This article is a response to those readers. It may be no surprise that the law is unconcerned with corporate character, but this article argues that the law should care. It also explains how the law sometimes already seems to care implicitly about corporate character but lacks the vocabulary and conceptual scheme to do so in a serious way. This article begins by outlining in general terms what corporate character traits are and motivates the thought that corporations have them (Section II). It then provides a series of examples (Section III) where an account of corporate character could help further common legal objectives. The article closes by considering some possible objections (Section IV).

In the interest of full disclosure, I owe readers a caveat at the start. I will not offer a complete account of corporate character, nor of corporate virtue and vice. The outline in the next section should give a general sense of what corporate character is supposed to be. The present hope is to show that a more complete account should be of legal interest. I leave that account as a future ambition.

I. INTRODUCING *CORPORATE CHARACTER*

We already think of corporations in terms of character. In ordinary thought and speech, it is almost as natural to regard Apple's Genius Bar as supportive as it is our own close friends. So there shouldn't be much popular resistance to incorporating corporate character into the law if, as I hope to show, there is some legal value to doing so. Scholarly resistance is par for the course.

For example, some readers will surely call into question the initial motivation of this article: that people ordinarily think of corporations as having character traits, like that the Genius Bar is helpful. Isn't this due to effective marketing and branding from Apple? The corporation wants customers to associate its services with that trait because that's how it gets more loyal customers. This accurate observation may raise a chicken-and-egg worry. Far from being naturally disposed to think of corporations as having character, maybe we have all been duped by modern marketing departments into conceiving of them in those terms. But corporations did not lay that egg (nor hatch that chicken). Thinking of corporations as having character is just a modern manifestation of a sociopsychological disposition we all have to view all sorts of collectives as having character. Human beings have thought and spoken in these terms since earliest recorded history. Sparta is severe¹⁶ while Athens is

16. See generally PLUTARCH, ON SPARTA (Christopher Pelling ed., Richard J.A. Talberg trans., Penguin Books 2005) (1988); PAUL ANTHONY RAHE, THE SPARTAN REGIME: ITS CHARACTER, ORIGINS, AND GRAND STRATEGY (2016).

cultured.¹⁷ Millers are thieving and young students are frisky.¹⁸ Capulets are hot-headed and Montagues are level-headed.¹⁹ Modern marketing departments arose, by most accounts, in the mid-twentieth Century²⁰ (and by some accounts in the mid-nineteenth Century),²¹ to take advantage of this sociopsychological disposition, not to invent it.

In this Part, I aim to show that there are few conceptual barriers to introducing a legal framework for corporate character. The first step is to present an outline of what corporate character is supposed to be and to show that the law already has the necessary basic concepts and tools to account for it. Corporate character need be no more “ephemeral”²² than other familiar fixtures of corporate law. The second step is to show that corporations actually have characters. It’s one thing to introduce a concept, but another to point out what it refers to. Once this stage is set, the next section showcases what value corporate character can offer.

A. No New Metaphysics

Character (I’ll italicize words that refer to concepts) shouldn’t present any novel conceptual challenges for corporate law. It is just another perspective on relationships between things to whose existence the law is already committed. If the conceptual building blocks are already there, introducing a new concept is just a matter of describing the configuration to which it refers.

Not all concepts are like this. Some require genuinely new conceptual ingredients and can seem spooky before the familiarity of long use sets in. *Consciousness. Numbers. Graviton. Responsibility. Evil.* These are all supposed to refer, on the more ambitious accounts, to ground-level and fundamental phenomena.²³ They are entities, processes, and relationships that are not fully explicable in terms of other, preconceived entities, processes, and relationships. To introduce concepts like these in a meaningful way (and not just hypothetically or “for the sake of argument”), one first needs some heavy metaphysics to persuade oneself and others that they refer to sorts of things that could exist. Sometimes

17. Athens was known as the “city hall of Wisdom.” See PAUL CARTLEDGE, *ANCIENT GREECE: A HISTORY IN ELEVEN CITIES* 90 (2009).

18. See GEOFFREY CHAUCER, *THE CANTERBURY TALES* (1387), reprinted in *THE RIVERSIDE CHAUCER* 3 (Larry D. Benson & F.N. Robinson eds., Houghton Mifflin 3d ed. 1986) (reciting the Miller’s Tale and Prologue).

19. See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 1, sc. 1 (Barbara A. Mowat & Paul Werstine eds., Simon & Schuster 2004) (1597).

20. See Marc de Swaan Arons, *How Brands Were Born: A Brief History of Modern Marketing*, ATLANTIC (Oct. 3, 2011), <https://www.theatlantic.com/business/archive/2011/10/how-brands-were-born-a-brief-history-of-modern-marketing/246012> [<https://perma.cc/5RG5-WDEK>].

21. See Ronald A. Fullerton, *How Modern Is Modern Marketing? Marketing’s Evolution and the Myth of the “Production Era,”* J. MARKETING, Jan. 1988, at 108.

22. Matthew Caulfield & William S. Laufer, *The Promise of Corporate Character Theory*, 103 IOWA L. REV. ONLINE 101, 114 (2018) (arguing against “ephemeral corporate character”).

23. See Jonathan Schaffer, *Monism: The Priority of the Whole*, 119 PHIL. REV. 31 (2010) (discussing different notions of metaphysical fundamentality).

this is easy, as for *consciousness* (“Just look inside.”).²⁴ Sometimes it is harder, as for *graviton* (“It’s the most elegant way to explain X, Y, and Z phenomena that we’ve observed and measured.”).²⁵ And sometimes it is well-nigh impossible, as for *number* (“What the heck are they anyway?”).²⁶ In that last sort of case, people may start to wonder whether it isn’t best to think of the concept in a merely fictionalizing sense.²⁷

Other familiar concepts are different in that they refer to configurations of more basic concepts we already have.²⁸ *Stop sign*, for example, picks out an octagon of red metal with the white letters “S,” “T,” “O,” and “P” painted on it. The burden for introducing concepts like *stop sign* is much lower. No new metaphysical motivation is needed beyond the usually easy claim that the properties the basic concepts pick out can all be co-located. Then you just have to persuade people that the properties sometimes actually are co-located and that there’s value to having a way to refer to those things when they appear together.

Character is more like *stop sign* than *consciousness*. It doesn’t refer to anything that requires more metaphysical motivation than the concepts we already have. Entertaining the concept just requires a shift of perspective, reconceptualizing things, properties, and relationships we already think exist. Traits of character are tendencies (philosophers call them “stable dispositions”) people have to act in certain ways when presented with certain environmental cues.²⁹ In theory, it could be any disposition to engage in any single similarity class of behavior in any single similarity class of circumstance. This means there could be an unlimited number of character traits—one for every behavior-circumstance similarity class pair. However, there are a handful of traits that tend to be socially and normatively most salient. For example, a courageous person tends to be daring when opportunities for valor present themselves. A deceitful person tends to dissimulate when doing so would be advantageous. *Character* is just a way of referring to recurrent relationships between agents, their acts, and their circumstances. And the existence of these constituent elements—agents, acts, and circumstances—is more or less uncontroversial in most circles, including in the law.³⁰

Similarly, *corporate character* should be no more contentious than *circumstance*, *corporate agent*, and *corporate act*. At this point, readers are likely to fall into two camps. There are those who will read “corporate agent” and “corporate

24. See Thomas Nagel, *What Is It Like to Be a Bat?*, 83 PHIL. REV. 435 (1974).

25. See PETER LIPTON, *INFERENCE TO THE BEST EXPLANATION* (2004).

26. See Paul Benacerraf, *What Numbers Could Not Be*, 74 PHIL. REV. 47 (1965).

27. See HARTY FIELD, *REALISM, MATHEMATICS, AND MODALITY* 230–42 (1989) (arguing for fictionalism about mathematics).

28. See Tuomas E. Tahko & E. Jonathan Lowe, *Ontological Dependence*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 11 2015), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=dependence-ontological> [<https://perma.cc/CVB3-6YMQ>].

29. Steven Wall, *Enforcing Morality*, 7 CRIM. L. & PHIL. 455, 464 (2013) (“Character traits are stable dispositions to respond, either well or poorly, to moral and prudential reasons.”).

30. See MODEL PENAL CODE § 1.13 (AM. LAW INST. 1962) (defining “act” and “person”); *id.* § 2.02(2) (defining culpability with respect to circumstances).

act” without blinking an eye.³¹ And there are those who will circle the first sentence of this paragraph in red ink, confident they uncovered the fatal flaw of the project: “Bizarre! Corporations are not agents, they cannot act intentionally, and so they have no character.”³² I’m sympathetic to both responses. On the one hand, as I’ve discussed extensively in earlier work, thinking of corporations as agents and praising or condemning them for their acts comes very naturally to all of us.³³ We need good grounds for calling such a pervasive aspect of our shared experience into doubt. On the other hand, it seems we’ve got pretty good grounds for doubt. Whatever corporations are—bundles of rights and obligations³⁴ or networks of contracts³⁵, they are very different from the other sorts of agents we know. It can be hard to see how their agency—as opposed to the agency of individual natural person constituents—is even supposed to enter the picture.³⁶

Neither perspective, though, is directly relevant to the concern of this article, which is whether there are serious barriers *for the law* to recognize corporate character. Whatever confidence or skepticism we may individually have about corporate agency and action, the law’s position has long been clear: corporations are agents³⁷ and they can act.³⁸ Corporate character cannot seem any more incredible than corporate agency and acts. The law is committed to the conceptual constituents of *corporate character*, so it should be a relatively short step to introduce the concept itself.

31. See, e.g., CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2013).

32. See, e.g., Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (2003) (arguing that corporations are not agents and do not act intentionally).

33. Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2077–80 (2016).

34. See *Trs.’ of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (describing a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law . . . possess[ing] only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence”); Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 S. CT. ECON. REV. 95 (1995) (discussing the theory according to which corporations are “bundle[s] of rights and obligations”).

35. See Barry D. Baysinger & Henry N. Butler, *The Role of Corporate Law in the Theory of the Firm*, 28 J.L. & ECON. 179 (1985); Steven N.S. Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1 (1983); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

36. See generally John R. Searle, *Minds, Brains, and Programs*, 3 BEHAV. & BRAIN SCI. 417 (1980) (describing the implausibility of attributing mental states to a system that is composed of people carrying out orders).

37. See 1 U.S.C. § 1 (2012) (defining “person” to include corporations); MODEL PENAL CODE § 1.13(8) (AM. LAW INST. 1962) (defining “person” to include corporations).

38. See *Merchants’ Nat. Bank v. State Nat. Bank*, 77 U.S. 604, 645 (1870) (“Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances.”); MODEL PENAL CODE § 2.01(1) (AM. LAW INST. 1962) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”); *id.* § 2.07 (specifying the conditions under which a corporation is liable for an offense).

B. Corporate Character Exists

So far I've argued that the law already has the basic conceptual tools needed to introduce *corporate character*. There's no need for new concepts referring to spooky new phenomena in the world; the everyday commitments of the law's perspective on corporations has got all that's needed. That doesn't yet mean there would be any point to going through the trouble of developing legal doctrines for corporate character. For one thing, even if the concept makes sense, it may not refer to anything in the real world. Consider an analogy: I could come up with the perfectly sensible concept *gropsign*, which refers to all the green stop signs in the world. But I'd have a hard time persuading anyone that it would be worth the trouble of incorporating the concept into their repertoire. There aren't any (or not many) gropsigns. Similarly, even if *corporate character* is a perfectly sensible concept referring to corporations' stable dispositions to act in certain ways in certain circumstances, it would not be worth the trouble if corporations did not have such dispositions.

A related critique has been made of individual character. According to the situationist critique, human beings don't have stable dispositions to act in particular ways.³⁹ The critique is based on empirical evidence suggesting that people's supposed behavioral dispositions are easily disrupted. In one experiment, for example, psychologists staged scenes for unknowing subway customers.⁴⁰ They discovered that people who found some spare coins in a payphone were significantly more likely moments later to stop and help someone (a secret confederate of the psychologists) who dropped an armful of papers.⁴¹ The conclusion some people draw from these studies is that contextual factors, rather than character traits like empathy or helpfulness, are the driving force behind people's actions.⁴² Character theorists respond to the situationist critique by pointing out that the scenarios used in experiments are highly stylized, so drawing sweeping conclusions from them may be unwarranted.⁴³ Everyday experience seems to confirm that some people are reliably helpful; others are not. Anyone who can't figure that out stands to be perpetually disadvantaged in interpersonal interactions: "Fool me once, shame on you. Fool me twice, shame on me."⁴⁴ The most the situationists' experimental data show, according to this response, is that circumstances can

39. See JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2002); John M. Doris, *Persons, Situations, and Virtue Ethics*, 32 NOÛS 504 (1998); Gilbert Harman, *No Character or Personality*, 13 BUS. ETHICS Q. 87 (2003).

40. See Alice M. Isen & Paula F. Levin, *Effect of Feeling Good on Helping: Cookies and Kindness*, 21 J. PERSONALITY & SOC. PSYCHOL. 384 (1972).

41. *Id.*

42. *Id.*

43. See generally John Sabini & Maury Silver, *Lack of Character? Situationism Critiqued*, 115 ETHICS 535 (2005).

44. This is the modern version of a much older proverb. See ANTHONY WELDON, *THE COURT AND CHARACTER OF KING JAMES* 52 (G. Smeeton 1817) (1650) ("The *Italians* having a Proverb, 'He that deceives me once, it's his fault; but if twice, it's my fault.'"); see also *Star Trek: Friday's Child* (NBC television broadcast Dec. 1, 1967).

affect the behavioral manifestation of people's characters at the margins, not that people lack character entirely.⁴⁵ Situationists remain unpersuaded. If something as trivial and irrelevant as finding a quarter can mask or activate a person's character traits, what work is there left for the character trait itself to do?⁴⁶ The truth likely lies somewhere between the two positions.

Whatever the merits of the situationist critique for individual character, available evidence supports the existence of corporate behavioral dispositions. Since the present question is whether the law could embrace an understanding of *corporate character*, the relevant understanding of *corporate agency* and *action* must come from the law itself. From the law's perspective, corporations are unquestionably agents, and their acts are the acts of their employees (assuming the scope of employment and intent to benefit requirements are met). So corporate character exists (from the law's point of view) only if corporate employees are disposed (while on the job) to behave in certain ways in certain circumstances. For example, an honest corporation would have employees that are disposed to tell the truth while on the job.

It may seem that I've set the bar too low for myself. Do corporations trivially have character traits because their employees do?⁴⁷ If corporate character is a matter of how employees are disposed to behave, it may seem that corporate character is just a matter of individual character. And if individual employees have character traits, so do corporations. Such a bootstrapped understanding of corporate character would be uninteresting.

There are three reasons the bootstrapping argument cannot be enough. It is true that a corporation with honest employees will be disposed to tell the truth and so will itself be honest. For small corporations, where single individuals are responsible for broad segments of corporate operations, these individual employees may be alter-egos of their corporate employers. In those cases, corporate character may just be a matter of individual character—the corporation's honesty may be nothing more than the employee's honesty.

However, for larger corporations, this cannot be the full story. Honesty as a character trait is unevenly distributed across the population of potential employees. For a big corporation to be populated by and large with honest employees, it would need some mechanism in the hiring process that could screen employees for honesty. The corporation's disposition to honesty would not *just* be a matter of having honest employees, but also of its hiring practices. Without those, dishonest employees would filter among its ranks, and the corporation would quickly cease to have a truthful disposition.

45. See Sabini & Silver, *supra* note 43.

46. See DANIEL C. RUSSELL, PRACTICAL INTELLIGENCE AND THE VIRTUES 170–72 (reprt. ed. 2012).

47. See John Hasnas, *Clockwork Corporations: A Valiant Effort to Do the Impossible*, 103 IOWA L. REV. ONLINE 28, 37 (2018) (suggesting that “the character of the corporation would be identical to the character of the corporation's employees”).

The second reason the bootstrapping story cannot be the full story is that employees' general dispositions to be truthful may be irrelevant to whether their corporate employer is honest. What matters for corporate honesty is not whether employees are honest round-the-clock, but whether they are honest while on the job. A corporation full of employees who two-time and steal from collection plates on weekends could nonetheless be disposed to honesty so long as those same employees are honest while at work. Of course, as I discuss further below, there would have to be something about the corporation that manages to alter its employees' ordinary dispositions for eight hours a day. The corporation's honesty would then be dependent on whatever mechanism it has to induce honesty from its employees.

The third reason bootstrapping isn't enough is that some character traits, as a logical matter, cannot be reduced straightforwardly to the same traits in employees. Egoism is a trait marked by an outsized concern for one's own interests over the interests of others. The self-other distinction differs depending on whether we focus on employees or corporations. A corporation filled with egotistical employees may be dysfunctional, but not because it regularly acts in *its own* interests; rather, it would be disposed to further the disparate interests of its individual employees. An egotistical corporation would be one whose employees were disposed to give the corporation's interests an outsized value over the interests of others. Such employees may even be self-sacrificing (the opposite of egoism) to a self-serving employer.

This leaves us, then, with the question of whether corporations ever have features that can induce regular patterns of behavior in their employees. Whatever the strength of situationalist critique for individuals, a mounting body of evidence affirms the common experience that corporate workplaces affect employees' patterns of behavior. While the details remain elusive, the mechanisms by which the workplace exerts this influence are not particularly mysterious. Organizational theorists have long recognized that corporate ethos or culture can have a significant impact on how employees behave.⁴⁸ Aspects of corporate culture are premised upon shared understandings, practices, and histories that bring some features of the environment to social salience.⁴⁹ A corporation may have an ethical culture, characterized by a shared practical orientation among employees that certain other-regarding considerations are to be borne in mind and acted upon. These employees—at least during work hours while they are participating in that culture—will be more disposed to act in line with those ethical considerations. It follows that the corporation will too. Business ethicists and corporate scholars have had an enduring interest in how corporate culture influences employee

48. See, e.g., FIONA HAINES, CORPORATE REGULATION: BEYOND 'PUNISH OR PERSUADE' 25 (1997) ("Organizational culture forms the 'touchstone' by which individuals behave and act.").

49. See EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 257–69 (1949).

behavior and how to shape corporate culture to make it a positive influence.⁵⁰

While ethos is one important corporate feature that influences how individual employees behave, it is not the only one. Corporate policies and procedures can influence the opportunities and incentives employees have to engage in certain forms of behavior. For example, employees working at a corporation that provides informal or compensation-based incentives to engage in pro bono work will likely be inclined to take on pro-bono work. This corporation would, all else being equal, count as having a more charitable character. Organization-level features can also discourage certain forms of behavior by increasing detection rates and exposing employees who engage in that behavior to penalties.⁵¹ Other mechanisms can operate more directly by foreclosing certain patterns of behavior—if employees have no access to customer accounts, they cannot commit misdeeds with them.

A corporation's character depends on the sum total of organization-level features that induce its employees to behave in predictable ways when circumstances calling for that sort of behavior arise. I mean for the class of features relevant to corporate character to be open-ended. Our present understanding of what those features are is far from complete.⁵² That such features exist is largely beyond doubt. The more we understand, the more the law will be able to do with corporate character, and the more confidently the law will be able to do it. I turn now to some of the opportunities *corporate character* could open.

II. WHAT *CORPORATE CHARACTER* HAS TO OFFER

Even if there are no unique conceptual barriers to introducing *corporate character* and the concept likely picks out real features of corporations, that is still not enough to show that *corporate character* merits a place in the law. There are lots of concepts that are not philosophically troublesome, which pick out real things, but which would give the law little normative or practical advantage. *Casual Fridays* may be an example. Everyone knows what casual Fridays are, but it's hard to imagine a reason the law should go through the trouble of developing a doctrine for them. In the rare instance that *casual Fridays* matters—perhaps someone's employment contract promised to have casual Fridays—an ad hoc

50. See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099–1101 (1991) (discussing how corporate ethos can “encourage” kinds of employee behavior); Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 30, 64 (2012); Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 753 (1992) (characterizing corporate character in terms of the “goals, rules, policies and procedures that are features of the corporation as an entity”); Martin Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517, 525–27 (1979).

51. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in PROSECUTORS IN THE BOARDROOM 11, 11–18 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

52. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 71–83 (2017).

approach should suffice: What did the parties understand “casual Fridays” to mean?

This section argues that *corporate character* is not like *casual Fridays*. *Corporate character* should be a pervasive concern in corporate law because there is a lot of work it could do furthering the law’s own goals, filling doctrinal gaps, and opening new directions for policy development. The examples below are meant to be illustrative rather than exhaustive.

A. Normative Insight into What Makes for a Bad Corporation

One prominent goal of the law is to direct burdensome consequences to “bad” corporations. Corporate criminal law explicitly has just deserts (i.e. giving bad corporations what they deserve) as one of its goals.⁵³ Civil law often has the same goal, whether in tort law,⁵⁴ employment discrimination,⁵⁵ unfair and deceptive practices,⁵⁶ etc.

To achieve this goal, the law must have some account of what it means for a corporation to be bad (in the sense relevant to the specific area of law at issue). The dominant trend in the law is to identify bad corporations as corporations that have done bad things. This is because the law’s only doctrine for understanding corporate culpability is respondeat superior, the function of which is largely to attribute employee acts to their employers. The focus on acts resonates with and codifies retributive perspectives on what it means for people (corporate or otherwise) to be bad.

Virtue ethics is another perspective on what it means for a person to be bad. It has enjoyed a resurgence of interest among philosophers in the last half century.⁵⁷ According to virtue ethicists, being bad is more a matter of how you are rather than what you do—a person is bad to the extent he/she/it

53. See 18 U.S.C. § 3553(a) (directing sentencing judges to impose a “just punishment” that reflects the “characteristics of the defendant”).

54. See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (“Although compensatory damages and punitive damages are typically awarded at the same time [in tort cases] by the same decisionmaker, they serve distinct purposes. . . . The latter, which have been described as ‘quasi-criminal,’ operate as ‘private fines’ intended [in part] to punish the defendant.”) (internal citations omitted).

55. See 42 U.S.C. § 1981 (authorizing punitive damages in employment discrimination cases).

56. See Dmitry Karshtedt, *Enhancing Patent Damages*, 51 U.C. DAVIS L. REV. 1427, 1439–40 (2018) (“In this Article, I examine where actual knowledge of the patent as a trigger for treble damages comes from, and probe whether it is consistent with the goals of the patent system. . . . Given these goals [which include retribution], an enhanced damages standard concentrated on the defendant’s subjective culpability makes sense.”).

57. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); G. E. M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1 (1958); Marcia Homiak, *Moral Character*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (last updated Mar. 9, 2015), <https://plato.stanford.edu/entries/moral-character> [<https://perma.cc/L7BM-EEJU>] (“Questions about moral character have recently come to occupy a central place in philosophical discussion. Part of the explanation for this development can be traced to the publication in 1958 of G. E. M. Anscombe’s seminal article ‘Modern Moral Philosophy.’”).

has a bad character.⁵⁸ Acts still play a role in the assessment, but the role is subsidiary. Character traits, recall, are stable dispositions to act in certain ways. How a person acts is both evidence for and partly constitutive of the sort of character they have.⁵⁹ The focus of moral assessment, remains character. A person may still be good, despite doing something bad, if the single bad act was out-of-character.⁶⁰

To the extent the law concerns itself with what bad corporations deserve, virtue ethics is a live moral theory and should be part of the conversation. It may be that each of the major moral theories only partially captures what it means for a corporation to be good or bad, and the law would be better off if it could benefit from all of those perspectives. Even if it turns out that virtue ethics is radically misguided (for natural people, or corporations, or both), we will only know this after taking the view seriously and exploring what it would look like in law. Doing so would require, first and foremost, developing a more precise legal understanding of what corporate character could be. The next step would be to distinguish corporate character traits into the virtuous, the vicious, and the neutral.⁶¹

A doctrine of corporate character would even be a valuable asset for act-focused theories of moral evaluation. One basic problem in the philosophy of action is to distinguish between actions that proceed from an agent and events that happen to him/her.⁶² For example, a person may jump off a bridge, or be pushed, or fall off after her leg seizes up. Only the first could qualify as her action; the other two are things that happened to her. New experimental evidence I have gathered with a collaborator suggests the importance of character assessment in distinguishing between actions and other events.⁶³ We asked subjects about pairs of scenarios where an event happens (e.g. a driver hits a child who ran into the street), but where the agent involved had different character traits in each version of the pair (e.g. being a cautious driver versus being an incautious driver). The data show that people are significantly more likely to regard character-consistent

58. See Gary Watson, *On the Primacy of Character*, in *IDENTITY, CHARACTER, AND MORALITY: ESSAYS IN MORAL PSYCHOLOGY* 449 (Owen Flanagan & Amelie Oksenberg Rorty eds., 1990).

59. See David Lewis, *Finkish Dispositions*, 47 *Phil. Q.* 143 (1997) (characterizing dispositions in terms of counterfactual relationships between stimuli and manifestations).

60. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 575 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1738).

61. See Mihailis E. Diamantis, *Collective Virtue and Vice* (Dec. 1, 2018) (unpublished manuscript) (on file with author).

62. See Mihailis E. Diamantis, *Is Action a Philosophically Useful Concept?* (June 1, 2018) (unpublished manuscript) (on file with author); Wilson & Shpall, *supra* note 14 (“It has been common to motivate a central question about the nature of action by invoking an intuitive distinction between the things that merely *happen* to people — the events they undergo — and the various things they genuinely *do*. The latter events, the doings, are the *acts* or *actions* of the agent, and the problem about the nature of action is supposed to be: what distinguishes an action from a mere happening or occurrence?”); J. DAVID VELLEMAN, *THE POSSIBILITY OF PRACTICAL REASON* 1 (2000). The “did/happened” distinction has also been criticized as a framing question for action theory. See Harry G. Frankfurt, *The Problem of Action*, 15 *AM. PHIL. Q.* 157 (1978).

63. See Mihailis E. Diamantis & Yuan Yuan, *Real Life Action* (2018) (unpublished manuscript) (on file with author).

behavior as action.⁶⁴ If the same results carry over to corporate agents,⁶⁵ a theory of corporate character could help act-focused theories more accurately identify which events count as acts.

The benefits of having an account of character to assist in identifying events that are actions may be even more pronounced in the corporate context than in the individual context. This is because, for corporate agents, there are more ways behavior can fall short of action. For natural agents, their doings may not qualify as actions if the external world intervenes in unanticipated ways (e.g. I hand you a cup of what I think is water, but someone has swapped it for petrol) or the internal world produces the behavior in a way that excludes agency (e.g. my arm swung out because of a seizure). Both exceptions apply equally to corporations by virtue of the exceptions applying to their natural person employees: an employee's external or internal worlds may do strange things, thereby disqualifying the event from being an act, whether hers or her employer's. For corporations, though, there is always a third possibility: the employee, who may seem to be acting on behalf of the corporation, may actually be acting solely in her individual capacity.⁶⁶ *Respondeat superior*, with its scope-of-employment and intent-to-benefit requirements, offers one way to distinguish these cases. However, if the observations in the previous paragraph are correct, considerations of corporate character may prove a useful supplement for identifying bad corporations. On this view, an employee's acts that are consistent with her corporate employer's character would be more likely to count as corporate acts, and less likely to count if inconsistent.

Lastly, corporate character could help address new normative questions in the law. For example, once a corporation has been identified as a bad corporation (under whatever moral theory), what sorts of changes, if any, could it go through so that it no longer counts as the same bad corporation, liable for sanction? This is one of the basic philosophical questions of personal identity.⁶⁷ How does identity persist through time? Which changes to a person effect a change in identity, and which are more superficial? While there is a long philosophical tradition of work on personal identity for natural people, related work for corporate people is

64. *Id.*

65. Available data suggest that people ordinarily think about the responsibility of corporate persons in the same way they think about the responsibility of natural persons. See Bertram F. Malle, *The Social and Moral Cognition of Group Agents*, 19 J.L. & POL'Y, 95, 132 (2010) ("[G]roup agents can be blamed through the operation of the same cognitive apparatus through which individuals are blamed.").

66. In such cases, courts say that the employee is on a "frolic of his own." See *Bennis v. Michigan*, 516 U.S. 442, 469 (1996) (Stevens, J., dissenting); *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) ("[T]here is no reason to suppose that Congress [in Title VII] wished courts to ignore the traditional distinction between acts falling within the scope of employment and acts amounting to what the older law called frolics or detours from the course of employment."); Stuart M. Speiser et al., *Scope or Course of Employment—"Frolics"; Detours; Deviations; Forbidden Acts*, 1 AM. L. TORTS § 4:18 ("[C]ourts and legal scholars have used the rubric 'frolic' to denote a substantial departure from the master's business that breaks the master and servant relationship.").

67. See Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3 (1971); Peter A. French, *Complicity: That Moral Monster, Troubling Matters*, 10 CRIM. L. & PHIL. 575 (2016).

just beginning.⁶⁸ The corporate case is significantly more complicated because of the larger number of changes corporations can realistically undergo: changes in ownership, employee base, management, branding, business model, and industry, not to mention mergers, consolidations, acquisitions, and spin-offs.

The closest the law has to a theory of identity for corporations is successor liability, which applies very narrowly—only during corporate reorganization.⁶⁹ Even where it does apply, it is wildly implausible as a theory of corporate identity since it effectively says reorganization can never alter corporate identity.⁷⁰ Under current law, present-day corporations are treated as being identical to their past counterparts, and hence liable for past misconduct, no matter how radically the corporation may have changed in the intervening years. I have argued elsewhere that corporate character could help the law develop a more nuanced and productive perspective.⁷¹ A theory that pinned corporate identity to corporate character would be broader reaching than the doctrine of successor liability and would cohere with ordinary moral intuitions about how corporations persist through time. On such a theory, if a corporation committed a past crime and retained the character traits that led it to do so, the law would treat it as the “same” corporation and subject to punishment. If intervening changes significantly improved the corporation’s character, the law would treat it as having undergone a break in identity, freeing it of liability for the past crime.

B. Corporate Punishment

Criminal law has been punishing corporations for over a century⁷² without a defensible theory of corporate punishment. The main alternatives are retribution and deterrence. Neither is suitable to the corporate context. Again, corporate character could provide the foundation for a way forward.

Retributivists want corporations to suffer their just deserts.⁷³ The trouble is corporations don’t experience suffering.⁷⁴ The best retributivists can offer is the imposition of harms on criminal corporations, typically in the form of a monetary

68. See Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. REG. 1 (2019); Peter A. French, *The Diachronic Moral Responsibility of Firms*, in THE MORAL RESPONSIBILITY OF FIRMS 53 (Eric W. Orts & N. Craig Smith eds., 2017).

69. *Successor Liability*, PRACTICAL LAW GLOSSARY ITEM, Westlaw (2017).

70. See Diamantis, *supra* note 68, at 12–16.

71. See *id.*

72. See John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329 (2009).

73. See IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., Hackett Publishing 2d ed. 1999) (1797); Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 30 (Paul Edwards ed., 1967) (noting that retributivists maintain that “the punishment of crime is right in itself, that it is fitting that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment”); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 429 (2007) (“The corporation that transgresses that boundary can be as subject to retribution as an individual.”).

74. See *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 n.2 (1st Cir. 2000) (“[C]orporations, unlike natural persons, have no emotions . . .”).

fine.⁷⁵ But fines flow directly through the corporate fiction to harm shareholders, who, more often than not, will be innocent of their corporation's misconduct.⁷⁶ Shareholders, as natural people, do suffer. So, paradoxically from the retributivist's perspective, the bulk of the suffering corporate punishment can inflict goes to those who do not deserve it.

Deterrence theorists want to alter corporate incentives so that criminal conduct becomes unappealingly costly.⁷⁷ Just as corporations can't suffer, they also don't really have their own incentives.⁷⁸ The individuals who act on behalf of corporations have incentives, and one way to deter corporate misconduct would be to target those.⁷⁹ But corporate punishment cannot be the way to do it. Whatever benefits an employee may gain from misconduct will more often than not outweigh the fractional share they experience of any corporate-level sanction. Deterrence theory and corporate fines cannot overcome the basic economic problem of agency costs.⁸⁰

Retributivism and deterrence theory both fail because they attempt to strike at features of corporations that don't really exist. Character theory offers a way to target features of corporations that do.⁸¹ Character theories of punishment maintain that the primary goal of criminal punishment is to reform criminal disposition.⁸² This approach actually gives the criminal justice system something it can, in theory, accomplish. As discussed above, corporations do have organization-level character traits that induce their employees to behave in particular ways. If a corporation has criminogenic traits—such as overly lax compliance or

75. See *Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (“Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss.”), *overruled by* *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009).

76. See Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1366–67 (2009) (“This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too.”).

77. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1325 (2001) (“Corporate criminal law . . . operates firmly in a deterrence mode.”); Alexander & Cohen, *supra* note 51, at 14–15 (“Within [deterrence theory’s] rational-choice ‘deterrence’ framework, individuals weigh the costs and benefits of crime-related activity against the expected sanction to maximize their private utility under the constraints of the organization in which they find themselves (or select into).”).

78. See Lynn A. Stout, *The Problem of Corporate Purpose*, 48 GOVERNANCE STUD. BROOKINGS 1, 5, 7 (2012).

79. See Alexander & Cohen, *supra* note 51, at 14 (examining causes of corporate crime “through the lens of an economic model in which corporate crime is the outcome of decisions by rational utility-maximizing individuals who have the ability to incur criminal liability on behalf of the corporation”).

80. See Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1 (1999).

81. Mihailis E. Diamantis, *How to Punish a Corporation*, CLS BLUE SKY BLOG (Dec. 12, 2017), <http://clsbluesky.law.columbia.edu/2017/12/12/how-to-punish-a-corporation> [<https://perma.cc/7CMD-ZDYV>].

82. See Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507, 533–34 (2018).

inappropriate incentive structures—that actuate employee misconduct, these are distinctly corporate features that authorities can target. For this reason, character theory may be the only theory of corporate punishment that makes any conceptual sense. If the law of corporate punishment is to adopt character theory, in part or in full, it needs some doctrine for attributing corporate character.

C. Making Sense of Corporate Sincerity

The notion of corporate sincerity has taken on significance in recent years, both in scholarship and in the law itself. William Laufer has prominently critiqued what he calls the corporate “compliance game”⁸³ that plays out in how prosecutors, regulators, and large corporations resolve allegations of corporate misconduct.

This compliance game is really a match of institutional appearances with some distinct characteristics, including the fact that the largest firms are spared prosecution due to perceived or at least expressed systemic risk; firms of any size and scale, whose prosecution does not pose a risk, are offered a crafted plea agreement; symbolic prosecutions of high profile defendants are sought, episodically, to assuage concerns over market fairness; and small firms, those with limited access to counsel, are far, far more likely to be prosecuted to conviction. Ultimately, stakeholders in this game seek to protect and enhance their positions without disturbing the equilibrium and, remarkably, without concern for whether their efforts actually affect rates of offending behavior. This is a game that seeks optimal compliance expenditures to minimize liability risks; gives all players moral and legal cover; placates constituencies with the appearance of legitimacy; and offers beautifully crafted images of leadership and governance with integrity.⁸⁴

The compliance game fosters a dynamic in which corporations pretend to comply and authorities happily embrace the pretense. Part of the solution to the game is to find a way to induce sincere commitments by corporations to engage in authentic compliance. Moving forward, then, requires an understanding of what corporate sincerity means.⁸⁵

Recent Supreme Court jurisprudence has also brought corporate sincerity into the limelight. In *Burwell v. Hobby Lobby Stores, Inc.*,⁸⁶ the Court decided whether for-profit corporations could benefit from provisions of the Religious Freedom Restoration Act (“RFRA”) that exempted people from neutral

83. See Laufer, *supra* note 52, at 79–80.

84. *Id.* at 112–13.

85. Laufer sometimes frames what he’d like to see from corporations as “genuine expression of corporate remorse.” William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1318 (2007). Corporate remorse faces the same difficulties that I attribute to corporate sincerity below; remorse implies emotions, and corporations do not have those. Laufer alludes to a solution like the one proposed here—understanding remorse in terms of “some relevant change of heart or *character* in the wrongdoer.” *Id.* at 1316 (emphasis added). While corporations may have just about as much heart as they do emotion, I have been arguing that they do have character.

86. 134 S. Ct. 2751 (2014).

regulations that “substantially burden [their] exercise of religion.”⁸⁷ The Court first had to decide whether a for-profit corporation could count as a “person” for purposes of the Act.⁸⁸ Relying on the default definition of the term “person” provided in the Dictionary Act,⁸⁹ the answer was affirmative. The Court next had to decide when for-profit corporations could claim the Act’s protections. To answer that question, the Court simply extended its interpretation of the Act as applied to individuals: protection kicks in when a regulation would force a corporation to violate its “sincere religious beliefs.”⁹⁰

Whatever one thinks about the Court’s opinion in *Hobby Lobby* (and the paragraphs that follow are NOT an endorsement of it), application of RFRA now requires an understanding of corporate sincerity. As commentators were quick to point out, in the absence of criteria for evaluating corporate religious sincerity, the Court’s decision risks, at best, unprincipled application to future cases,⁹¹ and, worse, incoherence.⁹² The Court did not offer such criteria. It didn’t have to given the facts before them. *Hobby Lobby* is a closely-held, family-owned corporation,⁹³ and there was no question about the sincerity of the family’s religious beliefs.⁹⁴ It seemed natural to conclude that “[Hobby Lobby] sincerely believe[s] that [compliance with the applicable regulation] lies on the forbidden side of the line.”⁹⁵ In any case, on the Court’s reading of the arguments, “no one . . . disputed the sincerity of [Hobby Lobby’s] religious beliefs.”⁹⁶

Some criteria will be needed in the future. The Court showed no indication that RFRA would be limited to closely-held, family-owned corporations with undisputed religious beliefs. Though invited by the government to hold that large, publicly-traded corporations could not have sincere religious beliefs,⁹⁷ the Court

87. 42 U.S.C. § 2000bb–(b)(2) (2012).

88. *Hobby Lobby*, 134 S. Ct. at 2768.

89. 1 U.S.C. § 1 (2012).

90. *Hobby Lobby*, 134 S. Ct. at 2775, 2779.

91. See Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, 115 COLUM. L. REV. SIDEBAR 153, 157 (2015) (“[T]he particular controversy *Hobby Lobby* presented could fairly have been resolved either way. Taken alone, this isolated granting of an exemption seems acceptable, but the Court’s decision raises deep problems about general propositions and future applications.”); Stephan Makino, *Examining Corporate Religious Beliefs in the Wake of Burwell v. Hobby Lobby*, 25 S. CAL. INTERDISC. L.J. 229, 249–51 (2016) (arguing that lower courts will likely reach a number of inconsistent conclusions when applying the criteria laid out by the Court).

92. See Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 75–86 (2015) (arguing that the reasoning employed for adjudicating religious exemption claims in *Hobby Lobby* is too vague to satisfy the values underlying the rule of law); William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, SUP. CT. REV. 71, 118–130 (2014) (discussing the difficulties the Court’s reading of RFRA in *Hobby Lobby* may face in future cases, arguing that there is potential for constitutionally unsound results).

93. *Hobby Lobby*, 134 S. Ct. at 2759.

94. *Id.* at 2779.

95. *Id.*

96. *Id.* at 2274.

97. *Id.* (“[The government] contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere ‘beliefs’ of a corporation.”).

refused to do so. The most the Court said in response to the government's request was that "it seems unlikely that the sort of corporate giants to which [the government] refers will often assert RFRA claims."⁹⁸ With the prospect of public, for-profit corporations claiming religious exemptions, Justice Ginsburg would write in dissent:

As Chief Justice Marshall observed nearly two centuries ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires." . . . Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so for-profit corporations.⁹⁹

The very concept of a for-profit corporation's religious sincerity struck Justice Ginsburg as a non-starter.

There is a reason corporate sincerity has proven elusive to critics of the compliance game and of *Hobby Lobby*. It's not clear that anyone has stopped to ask what sincerity could be for corporations. Turning to the first dictionary definition of the term makes the concept seem patently inapplicable to corporations. A commitment is "sincere" if it "proceed[s] from genuine feelings."¹⁰⁰ That definition accords with a common understanding of what sincerity is: an internal sense of resolve and commitment. Whatever willingness enthusiasts of corporate personhood have shown for corporate actions, intentions, and beliefs, they almost universally draw the line at corporate feelings.¹⁰¹ Individual employees may have "genuine feelings" about compliance or religious doctrine. Presumably, though, corporate-level sincerity must mean something else, something deeper, if it is to solve the compliance game or make sense of an understanding of RFRA that can apply to large, public corporations.

Despite the dictionary definition of "sincerity," genuine feelings and sincerity can come apart. Imagine someone who professes a genuine, fervent commitment to some religious faith. It would be inappropriate, without more, to doubt the sincerity of his commitment. But suppose you have occasion to see some aspects of that person's life, and these observations reflect something quite different about the person. The person never attends prescribed religious ceremonies. He scoffs at alms-seekers. He refuses to contribute, in time or money, to his faith's charitable projects. His debauched lifestyle flaunts his faith's moral code. You might

98. *Id.*

99. *Id.* at 2794–95 (Ginsburg, J., dissenting).

100. *Sincere*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/sincere> [<https://perma.cc/99LJ-V7FZ>].

101. See, e.g., CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 176 (2013) ("[G]roup agents . . . have to count as persons, albeit ones of an institutional rather than a biological kind. To be sure, group agents are not flesh-and-blood persons. They . . . lack the perceptions and emotions of individual humans.").

start to wonder whether he was really being genuine when he first told you of his commitment. You may confront him and ask about his earlier claim and lay out the contrast of his lifestyle. Here, the story could go one of two ways. The person may admit that his commitment was not sincere. Alternatively, he may claim that his commitment to his faith was and remains sincere. He may try to display his sincerity by showing genuine remorse and resolve. If, however, the next day he were to return to the same earlier behavioral patterns, you would be right once again to wonder about his sincerity. You may not doubt the genuineness of any of his feelings; the tears may have been real. But you need not question his feelings to wonder about the sincerity of his commitment.

What this illustrates is that, at a deeper level, sincerity is more about genuine action than it is about genuine feelings. Genuine feelings are generally good evidence of sincerity, because feeling and action often go hand in hand.¹⁰² In cases where feeling and action part, however, it is action that is the more reliable measure of sincerity.¹⁰³

A different sort of case where sincerity and genuine feeling separate may be more relevant for the corporate case. Imagine another person, different from the one above, who claims sincere commitment to his faith. You may ask him about his religious feelings and he replies that he has none. He says he's not a very emotive person in general or in his religious life specifically. His faith doesn't fill him with pride or passion. If you ask him how he knows he's committed to his faith, he responds that he just believes in the tenets of his faith and is dedicated to following its dictates. You may find yourself skeptical of his sincerity because of his dispassionate tone. But suppose you have occasion to see some aspects of his life too. He always attends prescribed religious ceremonies. He gives generously to alms-seekers and assists his faith's charitable projects. His prudent and unselfish lifestyle reflects the punctilio of his faith's moral code. What should we say of this man's claim that he is sincerely committed to his faith? I think saying it was anything other than truthful, despite the absence of feeling, would be out of bounds.

If sincerity is more a matter of patterns of behavior than genuine feelings in cases when the two conflict, there is a role corporate character could play in making sense of what sincerity means for corporations. Like the person described in the previous paragraph, corporations need not be disqualified from having sincere commitments solely because they lack the capacity for genuine feeling.¹⁰⁴

102. See ALFRED MELE, *MOTIVATION AND AGENCY* 134–56 (2003) (counting feelings among the reasons for action).

103. Philosopher Katherine Hawley has made similar points about trustworthiness: action, rather than feelings of commitment, is the ultimate measure of whether someone is trustworthy. See *Katherine Hawley on Trustworthiness*, PHILOSOPHY BITES 7 (Oct. 7, 2018), <https://philosophybites.com/2018/10/katherine-hawley-on-trustworthiness.html> [<https://perma.cc/H5ZN-5HAZ>].

104. For a contrasting perspective, see Amy Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173, 187 (2015) ("Motivation matters when it comes to religious exercise. But motivation is different from intention and it relies on a different capacity. In particular, motivation depends on certain conative and affective states—in the case of religious motivation, a desire to do right, and a fear of the consequences of doing wrong,

Rather, they can manifest sincerity through consistent patterns of behavior. On this reading, corporate sincerity is a matter of corporate character. A corporation that has a sincere commitment to the environment is one that is disposed to take measures to protect and promote ecological health when opportunities to do so arise. Similarly, a corporation has a sincere religious commitment if it is disposed to act consistently with such a commitment. This might involve financially supporting religious projects, closing down in observance of religious holidays, promoting product lines and services consistent with its religious mission, and objecting when authorities call upon it to do something inconsistent with that commitment.¹⁰⁵

Are there overall good policy reasons for recognizing that corporations can have sincere religious commitments? That depends on whether doing so would on balance protect or infringe individual civil liberties.¹⁰⁶ My ambitions in this section do not extend to answering that question. Rather, what I hope to have done is clarify how corporate character can offer an understanding of what it would mean to take corporate religious sincerity seriously—as the law apparently now does. Then at least we have a framework for considering whether doing so is advisable.

Understanding the relationship between corporate character and corporate sincerity may also offer some insights into the corporate compliance game. In particular, it may help explain why sincere commitments to corporate compliance seem so elusive. The point in the justice process at which sincerity becomes relevant to the compliance game is after a corporation has all but admitted its misconduct, acknowledged its compliance systems were inadequate, and is negotiating a resolution with prosecutors.¹⁰⁷ On the character-based understanding of sincerity, a corporation's sincere commitment to compliance would amount to a disposition to take steps to design, implement, and enforce compliance systems when such steps are called for. What would it take for a corporation to persuade prosecutors or onlookers that it has such a commitment? It can't be a matter of showing genuine feeling, as corporations don't have any. One way to demonstrate the character trait would be to point to a past history of compliance-consistent behavior. But, at this stage in the process, the corporation has already conceded a break in that history.

respectively. I have argued elsewhere that the corporation does not possess the capacities necessary to experience these states.”).

105. See Jerry Bowyer, *What Makes Hobby Lobby a Christian Company? Hint: It's Not a Greed or a Misogyny Thing*, FORBES (Apr. 25, 2017, 11:32 AM), <https://www.forbes.com/sites/jerrybowyer/2017/04/25/what-makes-hobby-lobby-a-christian-company-hint-its-not-a-greed-or-a-misogyny-thing/#5718854236d9> [<https://perma.cc/Y6XD-862H>].

106. See Sepinwall, *supra* note 104, at 202 (“[C]orporations may be treated as if they possess rights of religious freedom as a way of protecting the religious freedom rights of the corporation's controlling members.”). See also Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014) (arguing for an understanding of corporate constitutional rights that turns on whether the corporation has standing to protect the rights of individual constituents).

107. See Laufer, *supra* note 52, at 112–13.

So, the claim to sincerity would have to be future-oriented—maintaining that the corporation has acquired a new disposition that will manifest itself going forward. Acquiring a new disposition is not just a matter of snapping one’s fingers, especially where the disposition is likely to be burdensome. Aristotle’s view was that new character traits must be cultivated through character-consistent behavior.¹⁰⁸ The behavior generally comes first, and when practiced long enough, it can become internalized as a disposition. While there may be no conceptual barrier to acquiring a new disposition in a short span of time, it usually doesn’t work that way.

If Aristotle’s observations about human character have any analogue in the corporate context, they show that corporate sincerity in negotiations with prosecutors may be something of a white whale. A corporation in that position lacks the past track record and hasn’t had time to acquire new sincerity organically through character-altering patterns of behavior. This doesn’t mean that the compliance game is unsolvable; it only means that solving it may take time. We cannot expect credible, sincere commitments to compliance from newly discovered corporate criminals. But it may be possible, over time, to induce a sincere commitment to compliance by compelling compliance-consistent behavior. I have described in other work how court-monitored corporate probation could be one way to do this.¹⁰⁹ Under such an approach, prosecutors would bring cases to trial rather than resolve them through pre-trial diversion. Then sentencing courts would impose detailed terms of probation to ensure corporate reform and compliance. Doing so would create a significant new burden on already over-burdened court resources.¹¹⁰ If the critics of the compliance game are right about the urgent need for change (and I believe they are), these hurdles may be worth it.

D. Identity Harms

Corporations’ false representations about who they are can cause a kind of harm to consumers that scholars are starting to call “identity harm.”¹¹¹ Corporations often induce consumers to purchase their products and services, or to pay a premium for them, by claiming to have character traits and commitments with which the consumer identifies.¹¹² Such corporations may market themselves as local,¹¹³

108. ARISTOTLE, NICOMACHEAN ETHICS bk. II.4 (W.D. Ross, trans., 2018) (350 B.C.E.) (“[W]e become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts.”).

109. See Diamantis, *supra* note 82, at 551–62.

110. There are also questions about courts competence to do this. See Miriam Baer, *Propping Up Corporate Character Theory*, 103 IOWA L. REV. ONLINE 88, 94 (2018) (“[O]ne cannot help but feel that the character approach serves as an invitation to judges to meddle in the corporation’s daily affairs without much scientific basis.”).

111. See Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863 (2018).

112. *Id.* at 870 (“Studies consistently find that consumers are increasingly willing to pay a premium for goods sold by companies whose sustainability values align with their own.”).

113. See Oran B. Hesterman & Daniel Horan, *The Demand for Local Food Is Growing – Here’s Why Investors Should Pay Attention*, BUSINESS INSIDER (Apr. 25 2017), <https://www.businessinsider.com/the->

green,¹¹⁴ gay-friendly,¹¹⁵ anti-child labor,¹¹⁶ etc. Consumers' willingness to patronize these corporations may be premised on their sense of shared identity with these commitments. These consumers will be disappointed if they later discover that these corporations buy their goods from international retailers,¹¹⁷ sell products that cause disproportionate environmental harms,¹¹⁸ contribute to the campaigns of anti-gay rights politicians,¹¹⁹ or use ingredients harvested by child laborers.¹²⁰ Beyond being disappointed, customers may suffer "identity harm": they will have been duped by these corporations into participating in practices

demand-for-local-food-is-growing-2017-4 [https://perma.cc/MU6G-VZJV] ("[Consumers are] willing to pay a little more for the confidence that their food purchases help to create jobs and promote local economies; safeguard the environment, protect groundwater and preserve American farmland; and support proper animal treatment.").

114. See, e.g., Christina Caron, *Starbucks to Stop Using Disposable Plastic Straws by 2020*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/business/starbucks-plastic-straws.html> [https://perma.cc/2Y7K-WVKJ] ("Starbucks will stop using disposable plastic straws by 2020, eliminating more than one billion straws a year. Instead, Starbucks, . . . will use recyclable, strawless lids on most of its iced drinks."); *Environmental Stewardship: Our Green Mission*, WHOLE FOODS MARKET, <https://www.wholefoodsmarket.com/mission-values/environmental-stewardship/green-mission> (last visited Nov. 11, 2018) [https://perma.cc/QH4E-Y6CY] (stating the grocery store's commitment to "put planet before profits" and explaining its sustainability initiatives which include the use of alternative energy sources, electric vehicle charging stations, and environmentally friendly purchasing standards).

115. See, e.g., Lisa Marie Segarra, *Apple Watch Is Getting a Pride Month Watch Face at WWDC*, FORTUNE (May 31, 2018), <http://fortune.com/2018/05/31/apple-watch-pride-month-wwdc> [https://perma.cc/83UA-4PNC] (explaining that Apple would be releasing a new rainbow-striped watch face in celebration of Pride Month); Queer Voices, *Ray-Ban's 'Never Hide' Campaign Features Gay Male Couples For First Time*, THE HUFFINGTON POST (Dec. 06, 2017), https://www.huffingtonpost.com/2012/04/26/ray-ban-never-hide-campaign-gay_n_1456315.html [https://perma.cc/E3DS-AQDA] ("Eyewear style icon Ray-Ban is being praised throughout the lesbian, gay, bisexual and transgender (LGBT) blogosphere for a new advertisement that's both gay-inclusive and trendy to boot."); *Case Study: Subaru*, MARKETING THE RAINBOW, <http://marketingtherainbow.info/case%20studies/cs%20cars/subaru.html> (last visited Nov. 11, 2018) [https://perma.cc/G378-ND7E].

116. See, e.g., The GoodWeave Label, GOODWEAVE, <https://goodweave.org/about/goodweave-label> (last visited Nov. 11, 2018) [https://perma.cc/9QEM-3CYH] ("The GoodWeave label means that no child, forced or bonded labor was used in the making of a certified product, and that your purchase supports programs that educate children and ensure decent work for adults.").

117. See, e.g., Robert Anglen, *'Buy Local' Food Programs Deceive Consumers and are Rarely Enforced, a USA TODAY Network Investigation Finds*, THE REPUBLIC/AZ CENTRAL (Mar. 13, 2018), <https://www.azcentral.com/story/news/local/arizona-investigations/2018/03/13/buy-local-made-food-labels-programs-deceive-consumers-rarely-enforced-usa-today-network-finds/389155002> [https://perma.cc/6WPJ-Y3HX] ("In just one example, peanuts are trucked into Oklahoma. But that doesn't stop a peanut butter manufacturer from getting a 'made in Oklahoma' brand.").

118. See, e.g., Dadush, *supra* note 111, at 889–93 (explaining the disappointment consumers felt after it was revealed that Volkswagen had cheated emissions tests for its "clean diesel" vehicles).

119. See, e.g., Emily Friedman, *Target, Best Buy Angers Gay Customers By Making Contribution to GOP Candidate*, ABC NEWS (July 28, 2010), <https://abcnews.go.com/Business/target-best-buy-fire-campaign-contributions-minnesota-candidate/story?id=11270194> [https://perma.cc/WH9D-SANT] ("When Randi Reitan heard about Target's \$150,000 donation to a Minnesota-based political group backing a gubernatorial candidate with penchant for opposing gay rights, she marched straight into the popular superstore and cut up her store credit card.").

120. See, e.g., Dadush, *supra* note 111, at 896–902 (outlining consumers' outrage towards large chocolate manufacturers' use of child labor in supply chains).

that conflict with fundamental aspects of their identities.¹²¹

Though consumers have brought lawsuits premised on identity harms, they have faced various legal hurdles.¹²² For example, how should courts distinguish mere puffery in a corporation's self-presentation from actionable misrepresentations?¹²³ In the sales context, puffery is the "expression of an exaggerated opinion"¹²⁴ or of an obviously hyperbolic fact¹²⁵ in regard to the quality of one's goods or services. It cannot form the basis of a consumer suit, even if the consumers genuinely expected to receive a world-famous burger or split-second delivery.¹²⁶ There is presently no doctrine explaining what constitutes puffery when a corporation misrepresents its ideological commitments to consumers.¹²⁷

Corporate character could be an alternate path forward. Corporate self-presentations could become actionable where they falsely lead a reasonable consumer to think that the corporation has some concrete character trait it in fact lacks. Such an approach would conclude that vague marketing tools, e.g. statements about being family-run or using green-colored packaging, are not actionable. But it would reach other representations that could induce expectations on the part of reasonable consumers that the corporation would behave in particular ways. The "GoodWeave" symbol, for example, signals a concrete disposition to exercise due diligence and not source materials from businesses that use child labor.¹²⁸ The symbol conveys something about a corporation's character, and consumers induced to patronize such a corporation because of their identification with that character trait should be able to sue for identity harm if the corporation's use of the symbol proves false.

E. Unity of the Virtues

Socrates subscribed to a thesis known as "the unity of the virtues."¹²⁹ The basic idea is that certain character traits must come together because virtues mutually

121. See *id.* at 865 ("I define identity harm as the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business's exaggerated or false promises about its wares. . . . Here, identity harm arises when a consumer learns that a purchase made her unwittingly complicit in hurting another human being or the planet.")

122. See, e.g., *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016) (denying relief to plaintiffs in case brought against Hershey for not disclosing to consumers the use of child labor in its supply chain).

123. See Sarah Dadush, *The Law of Identity Harm*, 96 WASH. U. L. REV. 803 (forthcoming 2019).

124. *Puffing*, BLACK'S LAW DICTIONARY (10th ed. 2014).

125. See *Materiality and the Puffing Defense—"Puffing" Defense*, CONSUMER PROTECTION AND THE LAW § 10:9 (2017) ("[P]uffing includes those false sales claims that do not have a tendency to deceive because they are such blatant hyperbole no one would believe them.")

126. See *Malaco Leaf, AB v. Promotion in Motion, Inc.*, 287 F. Supp. 2d 355, 378–79 (S.D.N.Y. 2003) (finding use of "famous" to describe relatively obscure candy was mere puffery); *Cornelius v. DeLuca*, 709 F. Supp. 2d 1003, 1019 (D. Idaho 2010) (dismissing false advertising claim since defendant's statements were "hyperbolic exaggeration" and not representations of fact).

127. See Dadush, *supra* note 123.

128. *Our Mission*, Goodweave, <https://goodweave.org/about> (last visited Nov. 9, 2018) [<https://perma.cc/6RYQ-LQDH>].

129. Terry Penner, *The Unity of Virtue*, 82 PHIL. REV. 35 (1973).

reinforce one another. For example, honesty is a virtue, but it is hard to be fully honest without another virtue, courage. Sometimes telling the truth could be dangerous, and only a courageous person could be honest in such circumstances. In the most ambitious version of the thesis, a person must have all of the virtues in order to have any of them.¹³⁰

The jury is still out among virtue ethicists about whether the virtues are necessarily unified, as Socrates thought.¹³¹ Something short of philosophical necessity may nonetheless be true. It may be that certain character traits are merely correlated. In the white-collar context, for example, studies have shown that marital infidelity among corporate executives is correlated with fraudulent, on-the-job misconduct.¹³² More recent studies suggest that the market has long recognized this. If executives fall short of integrity in their personal lives, the market behaves as if that bodes ill for the corporations they manage.¹³³

Another area of empirical research into correlated character traits is bail determinations. Several states have now moved to a “cashless bail” system, which uses an algorithm to determine whether a suspect will be held until trial or released.¹³⁴ There are a handful of commercial algorithms available, including the Correctional Offender Management Profiling for Alternative Sanctions¹³⁵ and the Level of Service Inventory Revised.¹³⁶ These programs are designed to predict recidivism risk and the likelihood that a suspect will appear for trial. Among the variables these algorithms use are personality, attitudes, relationships, and lifestyle.¹³⁷ The science behind these algorithms uses one set of behavioral dispositions to predict another set of behavioral dispositions.

It's not totally implausible that something like the unity of the virtues might be true for corporations. The employees and customers who interact with corporations on a daily basis seem to believe something along those lines. Recently, thousands of Google employees walked off the job to protest how

130. *Id.* at 35 (“[W]hen Socrates said ‘Virtue is one,’ he meant it quite literally!”).

131. See Susan Wolf, *Moral Psychology and the Unity of the Virtues*, 20 *RATIO* 145, 146 (2007) (noting that empirical observation seems to conflict with the unity of the virtues).

132. See Lee Biggerstaff et al., *Suspect CEOs, Unethical Culture, and Corporate Misbehavior*, 117 *J. FIN. ECON.* 98 (2015); Robert H. Davidson, et al., *Executives Off-the-Job Behavior, Corporate Culture and Financial Reporting Risk* 117 *J. FIN. ECON.* 5 (2015).

133. See Brandon N. Cline, *The Consequences of Managerial Indiscretions: Sex, Lies, and Firm Value*, 127 *J. FIN. ECON.* 389, 391 (2018).

134. *Algorithms in the Criminal Justice System*, ELECTRONIC PRIVACY INFORMATION CENTER, <https://epic.org/algorithmic-transparency/crim-justice> (last visited Nov. 10, 2018) [<https://perma.cc/B4DU-FU3Y>].

135. See Equivant, *Practitioners Guide to COMPAS Core*, <http://www.equivant.com/wp-content/uploads/Practitioners-Guide-to-COMPAS-Core-040419.pdf> (last visited Apr. 4, 2019) [<https://perma.cc/MZ6A-EQPJ>].

136. See D.A. Andrews & James Bonta, *LSR-I: Level of Service Inventory-Revised*, MHS ASSESSMENTS, <https://www.mhs.com/MHS-Publicsafety?prodname=lsi-r> (last visited Nov. 10, 2018) [<https://perma.cc/8PRT-LDKQ>].

137. See *Algorithms in the Criminal Justice System*, *supra* note 134.

Google handles allegations of sexual misconduct.¹³⁸ Somehow, Google had defied their expectations about how it would behave. It is not that Google has any particular reputation for sensitivity about gender issues.¹³⁹ Rather, Google built its name on innovation in web technologies.¹⁴⁰ Yet perhaps the trait of innovation seemed to Google's employees to be inconsistent with insensitivity toward gender issues. Or recall the news that Hobby Lobby smuggled thousands of ancient religious artifacts from Iraq.¹⁴¹ The public seemed genuinely surprised. Hobby Lobby has pinned much of its reputation on its association with Evangelical values.¹⁴² Once again, though, smuggling (even of religious artifacts) seemed inconsistent with the virtues customers generally associated with the corporation. In contrast to the Google and Hobby Lobby stories, imagine how underwhelming a news piece would be if it attributed the same conduct to other corporations, like BP or Herbalife, who have less-than-stellar reputations unrelated to gender issues and historical artifacts.

This expectation that many of us seem to have about some sort of unity of corporate virtues could itself be one of the mechanisms by which the unity comes about.¹⁴³ Corporations want to avoid bad publicity because it is bad for business. What counts as newsworthy (and so capable of generating bad publicity) is in part driven by people's expectations—shock sells. So, a shared expectation that corporate virtues are unified could be self-fulfilling.

If there are correlations between certain corporate virtues and vices, research into them could prove an invaluable resource to compliance professionals and regulators. Currently, those interested in preventing corporate misconduct tend to focus on the most immediate sources of the misconduct. Prosecutors require

138. See Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/10/katherine-hawley-on-trustworthiness.html> [<https://perma.cc/D6BR-UUG9>] ("Google said on Thursday that it would end its practice of forced arbitration for claims of sexual harassment or assault after more than 20,000 employees staged a walkout last week to protest how the internet company handles cases of sexual misconduct.").

139. See, e.g., Clare O'Connor, *Google Sued for Gender Discrimination by Female Former Employees*, FORBES (Sept. 14, 2017), <https://www.forbes.com/sites/clareoconnor/2017/09/14/google-sued-for-gender-discrimination-by-female-former-employees/#6fb3519550c9> [<https://perma.cc/T69E-ERJW>].

140. See *From the Garage to the GooglePlex*, GOOGLE, <https://www.google.com/about/our-story> (last visited May 20, 2019) [<https://perma.cc/42FM-9LGX>] (telling the story of Google and stating "our passion for building technology for everyone has stayed with us — from the dorm room, to the garage, and to this very day.").

141. See Alan Feuer, *Hobby Lobby Agrees to Forfeit 5,500 Artifacts Smuggled Out of Iraq*, N.Y. TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/nyregion/hobby-lobby-artifacts-smuggle-iraq.html?module=inline> [<https://perma.cc/3ST4-7B54>] (explaining the agreement between prosecutors and Hobby Lobby for the return of smuggled artifacts).

142. See, e.g., *Celebrating Independence Day*, HOBBY LOBBY (July 3, 2018), <https://newsroom.hobbylobby.com/articles/celebrating-independence-day-2> [<https://perma.cc/FBB6-JX8Z>] ("Hobby Lobby runs holiday messages at Christmas, Easter and on the Fourth of July. 'These ads don't include sale items or special pricing,' said company president, Steve Green. 'We just want to let people know that we love our Lord, and we love our country.'").

143. My research assistant, Thomas Roster, raised this possibility to me.

corporations to implement compliance mechanisms,¹⁴⁴ regulators require accurate recordkeeping,¹⁴⁵ and compliance professionals recommend regular audits.¹⁴⁶ Though there is not much data demonstrating the effectiveness of the tools actually used,¹⁴⁷ it is hard to imagine that these efforts have no effect when properly designed and implemented.

Data on the unity of corporate virtues could prove another, supplemental resource. It could tell us something about the general character profile of corporations that engage in particular kinds of misconduct and reveal that the best way to address corporate misconduct may sometimes be indirect. Perhaps (this example may be totally fanciful) the best way to address a corporation's tendency to exceed emissions limits or to defraud its customers is to foster in the corporation an acute sensitivity to, and disposition to address, issues of gender inequality and workplace harassment.

Such an approach, if effective, could have broad benefits for everyone involved. Most obviously, the corporation's problematic misconduct would be remedied, and some small step would be made toward combating pervasive gender inequalities. The corporation itself could come out ahead too. It may turn out that, in some cases, the indirect route to preventing misconduct by fostering other corporate virtues would be cheaper than conventional compliance. In light of ballooning compliance expenditures (with very dubious claims to efficacy), it should hardly be surprising if a different approach costs less. Furthermore, a virtue-focused approach to addressing misconduct could flip the usual narrative surrounding compliance. Compliance reforms focus on the capacities of corporations to do wrong. Even if compliance reforms are effective, the shadow of past misconduct may linger—misconduct is a compliance program's *raison d'être*. Under a virtue-focused approach to compliance, corporations engage in a forward-looking project of growth, rather than a fixation on preventing recurrences of bygone wrongs. Corporations could emerge from the process, both in their own eyes and in the eyes of the public, as truly better corporations. They would become newly minted examples of good corporate citizenship, rather than parolees haunted by the specter of their past.

144. See Anthony S. Barkow & Rachel E. Barkow, *Introduction*, in PROSECUTORS IN THE BOARDROOM 1, 3 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) ("Using DPAs, prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance.").

145. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 660 (2000) ("In most regulatory contexts, agencies lack the resources necessary to research, inspect, and pursue all regulated entities that violate regulations. In general, administrative enforcement cases rely significantly on self-monitoring, recordkeeping, and reporting by regulated entities.").

146. See Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 82 (2002) ("Precisely because direct supervision can break down in predictable circumstances, firms with serious compliance programs introduce third-party monitoring as well. This . . . typically involves some element of an audit function, so that 'compliance professionals' routinely review data and episodically initiate their own compliance investigations.").

147. See William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 407, 422 (2018).

III. SOME OBJECTIONS

I am under no illusions that corporate character will be an easy sell. In the previous two dozen pages, there is ample material for many objections about the coherence, practicality, and utility of a legal doctrine for corporate character. In this Part, I respond to some of those objections.

A. Aren't Character Traits Easy to Fake?

A corporation may, for example, engage in religion-consistent behavior (and claim a religious orientation), but out of a sincere commitment to profit rather than piety.¹⁴⁸ If corporate character is about dispositions to behave and a profit-seeking corporation could be disposed to behave like a sincerely religious one (and vice versa), the two might seem to have the same character traits.¹⁴⁹ This was a large part of Ginsberg's dissent in *Hobby Lobby*: For-profit corporations pursue finance, not faith.¹⁵⁰ Disentangling profit motives from religious motives, or any other pair of motives that can produce overlapping behavior, will prove a challenge.

This problem is not unique to corporations. A similar concern arises for natural people all the time. Is he being nice to me because he's kind or because he wants something? Does she regularly attend church because she is committed to her faith or because she values the social approbation churchgoing brings in her community?

The same tools we use to diagnose these questions for natural people might work for corporate people. One thing we can do is just ask the person and see how they respond.¹⁵¹ Philip Petit has made much of corporations' ability to communicate the reasons behind their actions.¹⁵² Maybe the corporation will disclose its true motives in reply (through its CEO, its filings, or its PR department).

Of course, the corporation may not respond honestly. If it is profit-seeking, confessing that its religious behavior is a pretense would likely undermine its bottom line. It is easy to imagine common analogues for natural people: admitting

148. See GREG STIELSTRA & BOB HUTCHINS, *FAITH-BASED MARKETING: THE GUIDE TO REACHING 140 MILLION CHRISTIAN CONSUMERS* xi (2009) ("If you follow our advice in this book, your company will make more money from increased sales.").

149. Amy Sepinwall proposed a clever analogy showing how character traits are not only easy to fake, but also easy to misread: vegan diets largely overlap with kosher ones. As a result, it can be hard to tell whether a person is vegan or keeps kosher (or both) if she does not eat animal products. See Sepinwall, *supra* note 104, at 187 ("To see this, consider that vegans are necessarily kosher, because the prohibitions vegans follow overlap with those that Kashrut mandates.").

150. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795 (2014) (Ginsburg, J. dissenting) ("Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations."). See also *Matthew* 6:24 (New Int'l Version) ("No one can serve two masters. Either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve both God and Money.").

151. I'm grateful to Molly Wilder for raising this point.

152. See Phillip Pettit, *The Conversable, Responsible Corporation*, in *THE MORAL RESPONSIBILITY OF FIRMS* 15, 15 (Eric W. Orts & N. Craig Smith eds., 2017) (arguing that corporations are fit to be held responsible because they are conversable agents).

that you go to church for a boost to your social standing could undermine your social standing. In such situations, a person's broader behavioral patterns may help separate fact from fiction. It would be informative to know whether the churchgoer pursues opportunities for social advancement outside of her religious community. It would be similarly informative to know whether the corporation claiming religious pretenses engaged in sharp profiteering more generally.

Sometimes, looking to a person's broader behavioral patterns may be uninformative. Two different dispositions may call for similar behavior in all the circumstances the person has encountered. But that just means a person's actual behavior is sometimes an unreliable guide to his/her/its dispositions. This should be unsurprising; it is true of dispositions more generally. Salt, for example, is disposed to dissolve in water even if it has never been wet. To understand its disposition, we have to think counterfactually and investigate its chemical structure to determine whether it *would* dissolve *were* it placed in water. Personal dispositions must be similarly investigated. What distinguishes a profit-seeking from a sincerely religious corporation is how it *would* behave *were* a situation to arise where the two dispositions would call for different behaviors—perhaps business models show staying open on Sunday would overall be more profitable, but the religion calls for Sunday closure.

The objection stands on sturdier ground when framed as an evidentiary point. Even if we can conceptually distinguish between two character traits that call for overlapping behaviors, how do we find out which of the two a corporation has? The clearest evidence would be actual historical circumstances where the dispositions called for different courses of action. Seeing how the corporation behaved in those cases would provide a good window into its true character. However, such cases may be rare for certain character traits. For example, for-profit corporations with religious affiliations often profit most by strengthening and branding their religious commitments.¹⁵³ In the absence of such evidence, the best course might be to do what scientists would do with salt that has never been wet—look inside to structure. Perhaps the structure of the corporation could provide some insight into how it would behave in relevant counterfactuals. The ability to investigate a corporation's structure for evidence of its character is one advantage that the study of corporate character has over human character. We can model how different variables would influence a corporation's internal decision structure to opt for one path (profit) or another (piety).¹⁵⁴ Counterfactual evaluation of corporate structure is nothing new. A similar sort of analysis is run on large financial institutions to determine how they would perform under various hypothetical

153. See, e.g., Emma Green, *Chick-fil-A: Selling Chicken with a Side of God*, THE ATLANTIC (Sept. 8, 2014), <https://www.theatlantic.com/business/archive/2014/09/chick-fil-a-selling-chicken-with-a-side-of-god/379776/> [https://perma.cc/B5X4-3QW9] ("Chick-fil-A claims it '[attracts] individuals who want to be associated with an organization with a values-based vision.' Cathy [the company's founder], once said 'I feel it's the best business decision I ever made.'").

154. See PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 48–67 (1984) (introducing concept of a "corporate internal decision structure").

economic stress situations.¹⁵⁵ By predicting how corporations would behave, we can gain some insight into who they are.

B. Can We Distinguish Character from Other Behavioral Influences?

Character is not the only influence on behavior. The world can also set up opportunities or obstacles. It can entice or dissuade. And it can thereby also influence what people, given all their pre-existing dispositions, do. In the case of natural people, it is important to distinguish these external influences from those that derive internally from character. Suppose a child meticulously and punctually completes her homework every day under the watchful eye of her parent.¹⁵⁶ We may wonder whether the child's work ethic is driven by her own industry or the discipline of her parent. If the latter, she may be fearful or obedient, but not industrious. When she leaves for college, she may find that video games are more of a draw than Victor Hugo. A similar concern could arise with corporations. A corporation that complies with the law may do so for multiple reasons—it may fear the law's sanction, or it may have entrenched ethical dispositions. It may seem that only the latter could be the corporation's character, but distinguishing it from the former may prove difficult.

To some extent, this objection mirrors the previous one about faking character traits. Sometimes, two traits may induce similar behaviors. Conceptually, the two dispositions can be distinguished in (perhaps counterfactual) circumstances where they call for different behaviors: for example, the child goes to college. In practice, the two could be distinguished by investigating internal structure.

Another observation may remove some of the need to distinguish internal influences on corporate behavior from the external influence of the law. The internal/external distinction begins to break down where corporations and the law are concerned. To see why, consider once again the diligent child. Making sense of the example requires imagining a circumstance (like leaving for college) where the external influence (the parent) is absent. It is only then that we can have a sense of what counts as external and internal. The external influences are those that can be removed. But no such analogue exists for the corporate case. The law is a source of constraint on a corporation, but also the source of its powers. Corporations are “mere creature[s] of law.”¹⁵⁷ To remove the influence of law is to destroy the corporation. It would be like suggesting the child is not disposed to breathe because she would not do so in outer space. A corporation that obeys the law because of the (dis)incentives the law provides is still a law-abiding

155. See Robert Weber, *A Theory for Deliberation-Oriented Stress Testing Regulation*, 98 MINN. L. REV. 2236, 2238–39 (2014) (“In the financial area, stress tests can help us to understand how an institution or system would respond to severe, yet plausible, stressed market conditions such as low economic output, high unemployment, stock market crashes, liquidity shortages, high default rates, and failures of large counterparties.”).

156. I have John Hasnas to thank for this example.

157. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

corporation. Remove the law, and there would be no standard by which to deem the corporation law abiding (or not).

C. What if a Character Trait Is Determined By Something Immaterial?

I have insinuated above that corporate dispositions are mostly the product of deeply ingrained cultural norms or long-standing operating procedures. However, sometimes a corporate disposition may be tied to a relatively transient feature, like a particular employee. One troublesome but vocal employee can foster an environment characterized by sexual harassment. The ethical tone set by individuals in management positions can have a large influence on how those beneath them behave.¹⁵⁸ If this is right, changing a corporation's character may sometimes be a relatively trivial matter—replacing the individual.

This observation may seem like an objection because it conflicts with two suggestions I made above: that corporate character is usually not parasitic on individual character and that character change is usually a lengthy process. The observation correctly demonstrates that the suggestions are generalizations subject to exceptions. Far from being an objection, it highlights some of the promise and potential that attention to character could have for corporations and law-makers. If stable behavioral dispositions are sometimes easy to change by making isolated tweaks in organizations, this is something that everyone involved—corporations, legislators, prosecutors, and judges—should leverage to make corporations better.

D. Isn't Corporate Character Extraneous?

Corporate character is nothing new. Lawmakers, judges, prosecutors, and corporations have engaged aspects of corporate character under a different guise for years. The focus of these efforts has been to ensure that corporations have effective compliance programs, i.e., mechanisms in place that will dispose them not to commit crime.¹⁵⁹ If the law already addresses corporate character without a doctrine for it, do we really need *corporate character*?

This is a general sort of complaint that could apply to any compositional concept. Why do we need the new concept if we can refer to the parts separately? For example, people could stop thinking in terms of *stop sign* and instead refer to those “flat-red-metal-octagons-with-white-S-T-O-P-painted-on-them.” But that's an inconvenient mouthful given the prevalence of stop signs. The long locution also risks blinding us to the social and normative salience that those properties have when they coincide in a single object. The risk here is not deeply

158. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 11, 33–34 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

159. See Barkow & Barkow, *supra* note 144, at 3 (“[Using DPAs,] prosecutors impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate governance.”); U.S.S.G. § 8D1.4(b)(1) (2018) (“The organization shall develop and submit to the court an effective compliance and ethics program. . .”).

philosophical or metaphysical; it's a product of our limited psychologies and mental capacities. It's easier for us to see relationships when fewer concepts are involved. That's part of why it's sometimes helpful to talk about water rather than clusters of more fundamental things (hydrogen atoms, oxygen atoms, and covalent bonds; or protons, electrons, strong forces, and electromagnetic forces). Introducing *stop sign* makes it easier for us to understand when we need to stop and who has violated the law.

Corporate character, and a legal doctrine for it, could have a similar focusing effect. By providing a coherent and codifying lens for reasoning about corporate dispositions, character theory could remind us that corporate character traits extend beyond compliance.¹⁶⁰ I have argued elsewhere that thinking of corporate punishment in character theoretic terms shows that some of the sanctions we currently use may be unnecessary or counter-productive.¹⁶¹ I suggested above that themes from character theory, like the unity of the virtues, may point the way to new methods for influencing and evaluating corporate behavior.

IV. CONCLUSION

The ambition of this article is modest: to show that *corporate character* could be a helpful legal concept. The article proceeded in two stages. The first was to show that the law *could* embrace *corporate character*. Understood as stable dispositions to behave, corporate character traits would not require any new and suspicious legal metaphysics. Furthermore, evidence shows that corporations do have the relevant dispositions. The second stage was to show the law *should* embrace corporate character. A legal doctrine of corporate character could be helpful, both in clarifying the law's own objectives and in furthering them.

If the article accomplished its modest ambition, it set the preliminary stage for introducing corporate character to the law. However, there would still be a long way to go before corporate character could be put to use. We would need a more refined understanding of corporate character, virtue, and vice. And then empirical markers for discovering them in particular corporations. And then a legal doctrine and process for attributing character traits. If *corporate character* could deliver on the benefits I describe above, it would be worth the effort.

160. Caulfield and Laufer were good to remind me of this. See Caulfield & Laufer, *supra* note 22, at 106 (“[W]e would ask Diamantis to do even more in offering a viable substitute [for corporate punishment], especially if we take the virtuous roots of character theory seriously.”); Mihailis E. Diamantis, *Looking Glass: A Reply to Caulfield and Laufer*, 103 IOWA L. REV. ONLINE 147, 148–49 (2019).

161. See Diamantis, *supra* note 82, at 549.