Towards a Nexus of Virtue

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TOWARDS A NEXUS OF VIRTUE

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ABSTRACT

Corporate law, like all law, should be directed toward the common good. The common good requires that corporate activity be restrained, if not actively directed, by human virtue. An analysis of the corporate enterprise suggests that those corporate actors with the greatest stake in the exercise of virtue, and best positioned to influence corporate activity via the exercise of virtuous judgment, are the corporation’s officers. Thus, one of the primary objectives of corporate law should be the promotion of virtue among corporate officers.

Contrary to what some might assume, the promotion of virtue among corporate officers need not entail a promulgation of “thou shalls” and “thou shall nots.” Indeed, the suggestions put forth in this Article would serve to broaden, rather than narrow, the liberty of corporate officers. This is because corporate law, as currently constituted and interpreted, works to inhibit the exercise of virtue.

The need for virtue-directed corporate decision-making has been demonstrated repeatedly over the course of history, most recently by the recent financial crisis. Instead of focusing on virtue, however, the response of most policymakers and commentators has been on regulatory reform. This is unfortunate. Although regulatory reform certainly has its place, it holds limited promise of success, for a variety of important reasons. A wiser approach would focus more seriously on virtue - the force most capable of preventing a repeat of the fraud and dereliction of duty that marked the recent financial crisis (and most predecessor crises as well).

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INTRODUCTION

Could virtue have prevented the financial crisis? Possibly.

Although the predominant narrative has characterized the crisis as one of inadequate financial regulation (rebutted by an opposite diagnosis, which lays the blame essentially on too much regulation), sustained attention has not been focused upon the critical role that virtue and character (or, more aptly, the lack thereof) have played. For instead of framing the crisis as essentially a matter of improperly structured economic incentives, one could easily frame the crisis as largely the result of rampant nonfeasance and malfeasance. Such a framing would suggest a different set of responses, out of recognition that virtuous dispositions would have countered such ethical shortcomings. (Among the many virtues implicated here would be justice, courage, and truthfulness, in addition to the virtue of simply doing one’s duty.) In short, and with apologies to the NRA, regulation (inadequate or otherwise) didn’t kill the economy – people killed the economy.

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2 In the form of government intervention in the economy – especially with regard to the monetary policy and the housing market. See e.g. Robert Higgs, Cumulating Policy Consequences, Frightened Overreaction, and the Current Surge of Government’s Size, Scope, and Power, 33 HARV. J.L. & PUB. POL’y 531 (2010); Dodd-Frank’s Faulty Rx, INV. BUS. DAILY, May 18, 2011, A07.

3 There have been exceptions. See e.g. John Mixon, Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse, 24 NOTRE DAME J.L. ETHICS & PUB. POL’y 327 (2010); Ben G. Pender II, Invigorating the Role of the In-House Legal Advisor as Steward in Ethical Cultural and Governance at Client-Business Organizations: From 21st Century Failures to True Calling, 12 DUQ. BUS. L.J. 91 (2009).

4 In the form of corporate managers failing to act with due caution and prudence in their decisionmaking. Adam Shell, Paul Davidson and John Waggoner, Finding Blame: Crisis Inquiry Panel Calls Recession Avoidable, USA TODAY, Jan. 28, 2011 at 1B; Barry Ritholtz, Putting an End to I’ll Be Gone, You’ll Be Gone’ Bonuses, WASHINGTON POST, Mar. 13, 2011, at G6.


7 For “doing one’s duty” is traditionally at the minimum of virtuous behavior. See Ekow N. Yankah, Virtue’s Domain, 2009 U. Ill. L. Rev. 1167, 1167, 1210 (2009).

Given the predominant narrative, it comes as no surprise that the policy prescriptions that have followed the most recent financial crises (such as the Sarbanes-Oxley Act\(^9\) in 2002 and the Dodd-Frank Act\(^{10}\) in 2010) focus on regulation, and not people. Put differently, these prescriptions do not attempt to lead market participants to better behavior via an improvement of character – they simply require better behavior.\(^{11}\) As shall be discussed, it is far from clear that the imposition of mandatory rules and regulations can foster the development of virtue and bring about the kind of improvement in character that is so critically needed to forestall the next financial crisis.\(^{12}\) Indeed, one could fairly say that by failing to consider virtue as a part of the solution, both Sarbanes-Oxley and Dodd-Frank largely rely on the very same principles and types of solutions that “took the economy to the brink of collapse.”\(^{13}\) As one article put it, we need remedies “different from those designed to prevent the greedy, the power obsessed, or the completely self-interested from breaking the law or acting unethically.”\(^{14}\)

Finally, and particularly disturbing, an examination of the past crises suggests that is that the problem facing corporate America runs deeper than simply bad people doing bad things – it seems to extend to good people doing bad things as well.\(^{15}\) This opens the possibility that existing law and regulation not only fails to promote virtue, but may actually be working to undermine it.\(^{16}\)

This article argues that policymakers should take character and virtue more seriously into account than they currently do. It suggests further that a good place to start taking would be with the field of corporate law.

In so doing – by focusing on character and virtue, instead of economics, rules, and regulations – this article proffers a “virtue ethics” approach to corporate governance. For unlike more common ethical systems, which are ordinarily utilitarian or duty-based, virtue ethics stresses the role of

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\(^11\) One exception to this would be the executive compensation provisions of the Dodd-Frank Act, which attempt merely to shame corporate actors away from awarding unseemly pay packages to their high-ranking officials. Ben Proteiss, In Split Vote, S.E.C. Adopts Rules on Corporate Pay, N.Y. TIMES, Jan. 26, 2011, at B4; Reynolds Holding, Companies Pay Price for Ignoring Say-On-Pay Votes, REUTERS BREAKINGVIEWS, May 06, 2011.

\(^12\) See infra Part II.B.


\(^14\) Id. at 75.

\(^15\) See id. at 54.

\(^16\) See RONALD R. SIMS, ETHICS AND ORGANIZATIONAL DECISION MAKING 21 (1994).
character and individual morality.\textsuperscript{17}

In the pages that follow, I shall make the case for applying virtue ethics to corporate law. Part I of this article will provide a background and summary of virtue ethics philosophy. This will be brief because this article is not (or at least not primarily) a contribution to the debate over the merits or shortcomings of virtue ethics – such a conversation is best left to full-time philosophers. Instead, this article adopts virtue ethics largely as given, and focuses instead on its applicability to corporate law.

That said, before getting to the question of applicability, Part II offers a few reasons why virtue is a necessary supplement to legal rules and regulation. It does so by discussing the serious limitations on law’s ability to rein in misconduct (on both practical and theoretical levels). Shifting gears a bit, Part II also explores the law’s limited ability to inculcate virtue, explaining that virtue is best achieved via conduct that is voluntary (versus coerced).

Part III is where virtue ethics is used to analyze both the corporation and corporate law. Its objective is to articulate a vision of the corporation consistent with virtue ethics principles, and to consider the degree to which corporate law as currently constructed conforms to that vision. Since the prevailing paradigm of corporate law is contractarian, Part III undertakes its analysis within the confines of the “nexus of contracts” conceptualization of the corporation.

This article concludes that a corporation’s officers ought to be the focal point of any discussion of corporate ethics, based upon their own personal interests and their unique role in the firm. If, as I posit, our desideratum is corporations that are ethically managed, then we need corporate officers who are individuals of virtue. In other words, virtuous corporate officers are the critical means by which we can achieve the desired end of better corporate conduct.\textsuperscript{18}

Consequently, corporations and corporate law should prioritize the development of virtue among corporate officers. There are a variety of ways in which corporations and corporate law can do this (some of which will be briefly explored), but the simplest and most significant would be to simply provide management with more avenues to exercise virtue.

\textsuperscript{17} See infra Part I.

\textsuperscript{18} “It stands to reason that organization decision making can be improved if employees can be encouraged to think ethically and to approximate more closely effective and ethical decision making.” See Sims, supra note 16, at 105.
Towards a Nexus of Virtue

I. VIRTUE ETHICS

Before delving into the application of virtue ethics to corporate law, let us first explore the philosophical underpinnings of virtue-based ethics. As virtue ethics is a field of study that is both ancient yet still developing, a great deal of variation may exist between the approach taken by one virtue ethicist and the next. Yet certain generalizations (or, in some cases, editorial choices on my part) can and must be made.

Modern virtue ethics can be traced back to Elizabeth Anscombe’s 1958 article entitled “Modern Moral Philosophy.” Anscombe’s article put into words a growing dissatisfaction with the utilitarian and deontological theories of ethics that had dominated philosophical debate for the last couple of centuries – dissatisfaction linked toward the advocacy of “bad actions, or impossible actions, or no action at all” in the face of a moral quandary. Anscombe suggested an approach that was both entirely different and quite ancient. Anscome suggested a focus on character and virtue.

One preliminary distinction between aretaic (or virtue-based) ethical systems and most others is that the aretaic systems can be characterized as focused primarily upon “being,” whereas most other systems can be said to focus on duty or effects. A related difference is that virtue ethics is focused directly on character development, and as such it does not approach each ethical quandary in isolation, from “moment to moment.” Rather, “virtue ethics looks down the road to what a human life should be, life as a whole.”

Of course, the focus on “being” has obvious repercussions when it

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19 See infra Part II.
20 Virtue ethics, like all philosophies, certainly has its fair share of critics. See, e.g., William Frankena, A Critique of Virtue-Based Ethical Systems, and Robert Louden, (1984) in ETHICAL THEORY (Louis P. Pojman, ed. 1995). Although in this section I shall sketch the basics of virtue-based ethics, and proffer a justification of the same, this Article is not a piece of philosophy per se and will not attempt to methodically and critically weight the merits of ethics philosophy versus competing systems. In other words, I shall be accepting virtue ethics as given, and applying it to corporations and corporate law.
21 See Sarah Conly, Flourishing and the Ethics of Virtue, in MIDWEST STUDIES IN PHILOSOPHY VOL. XIII 84 (Peter French et al. eds. 1988); see, e.g., ROBERT C. SOLOMON, ETHICS AND EXCELLENCE 115-116 (1992).
22 See NOEL STEWART, ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY 54 (2009).
23 See id.
24 See id.
25 See id.
27 See Stewart, supra note 22, at 56.
28 See Stewart, supra note 22, at 56.
comes to action, for those who have cultivated a character of “being” good and virtuous are more likely to act in ways that are good and virtuous. But action is not the primary concern of virtue ethicists. End results are not the focus inasmuch as how one gets to the end result.

In virtue ethics, the “how” is by means of character and virtue. To virtue ethicists, one ought to live life “excellently,” which, in turn, will further the individual’s, and society’s, happiness and well-being. Indeed, the classical ethicists on whose shoulders modern virtue ethicists stand endeavored to answer the question: “What is a good life for a human being?” and not the more direct and mundane question: “What ought I to do?”

And to the classical philosophers, a good life for a human being is a virtuous life. But that, of course, begs the question: what is a “virtuous life”? What are “virtues”? Philippa Foot captured the general understanding well when she wrote that “virtues are in general beneficial characterics, and indeed ones that a human being needs to have, for his own sake and that of his fellows.” As David Norton explained more recently, “In the classical understanding the virtues are excellences of character that are objective goods, of worth to others as well as to the virtues-bearer…. These two summaries underscores the more communal orientation of virtue ethics versus other ethical traditions. For an excellent individual is understood to make an excellent neighbor as well.

A seminal tract on virtue ethics is Aristotle’s *Nicomachean Ethics*. Hailing from the fourth century B.C., *Nicomachean Ethics* posits that “eudaimonia” (best translated as authentic flourishing, as opposed to mere

29 Id.
30 Id.
31 Id. at 318.
33 See id.
36 See Stewart, supra note 22, at 56. For an extended discussion on the nature of virtues, see Solomon, infra note 312, at 191-198.
37 ARISTOTLE, NICOMACHEAN ETHICS; see Pojman, supra note 26, at 318. Although virtue ethics traces its roots back to ancient Greece, its focus on “being” as opposed to “doing” or “having” resonates with Eastern traditions as well. See E.F. Schumacher, *SMALL IS BEAUTIFUL* 32 (1973) (Harper Perennial 2010) (“the Buddhist sees the essence of civilization not in a multiplications of wants but in the purification of human character”).
transient pleasure or satisfaction) requires virtue as its predicate. And since Aristotle famously observed that “man is a social animal,” virtue is not simply a matter of individual concern, but rather a concern of society as a whole. As indicated, an individual’s excellence (or lack thereof) usually has repercussions for all those around him or her. In the parlance of modern economics, it could be said that an individual’s private morality imposes very public externalities – indirectly if not directly.

For citizens who lack virtue undermine not only their own happiness, but that of their communities as well (ranging from their immediate family, to their local community, and beyond). For this reason, the identification of what exactly constitutes “virtue” ordinarily (and arguably must) take into account the social dimension of human existence.

The correctness of Aristotle’s insight here is difficult to deny. Imagine a father who lacks the virtue of temperance, or self-control. Perhaps this shortcoming exhibits itself most obviously when it comes to the consumption of alcohol. Such a shortcoming could readily cause the father to alienate friends and family, and perhaps neglect his children. This certainly takes its toll on all parties involved. To the extent that the father falls ill, or loses his job, he further harms his immediate family, perhaps burdens his extended family as well, and is likely to draw upon the resources of his fellow citizens too.

But this still begs the further question: what are those traits and habits that contribute to eudemonia? Or, put differently, how exactly are the virtues to be identified? Four that have stood the test of time are set forth in Plato’s Republic: wisdom, courage, temperance, and justice.

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38 See Pojman, supra note 26, at 318. Some may “dismiss Aristotle as ignorant of and irrelevant to the contemporary business world.” Solomon, supra note 21, at 18. In response, I second Robert Solomon who wrote that this would be a “mistake,” for he “anticipated, centuries before there were investment bankers, bond traders, Fannie or Ginnie Maes, the source of some of the worst ills of our economy.” Id. Indeed, Aristotle could be called “the first (known) business ethicist.” Id. at 101.

39 See ARISTOTLE, POLITICS. Indeed, “[h]umans cannot develop themselves intellectually, culturally, and morally without cooperative association with other humans.” Richard J. Regan, Virtue, Religion, and Civic Culture, in MIDWEST STUDIES IN PHILOSOPHY VOL. XIII 343 (Peter French et al. eds. 1988); Solomon, supra note 21, at 26-27 (“a Homo sapiens deprived of a community and a culture is a pathetic, virtually helpless animal”).

40 See supra text accompanying notes 34-35.

41 See Robert M. Adams, Common Projects and Moral Virtue, in MIDWEST STUDIES IN PHILOSOPHY VOL. XIII 300 (Peter French et al. eds. 1988).

42 “Temperance” is one of the original moral virtues expounded by Socrates. See David L. Norton, Moral Minimalism and the Development of Moral Character, in MIDWEST STUDIES IN PHILOSOPHY VOL. XIII 181 (Peter French et al. eds. 1988).

43 See id.; see PLATO, THE REPUBLIC Book IV (Dover 2000).
expanded upon this, identifying as virtues: courage, friendliness, temperance, truthfulness, liberality, wittiness, magnificence, shame, pride, justice, good temper, and honor. Contrary, perhaps, to the clarion cry of Barry Goldwater, Aristotle famously exhorted moderation, asserting that virtue was often found in the “golden mean” between the vices of excess and deficiency. (Thus, the virtue of “courage” is the mean between “cowardice” and “rashness.”)

Aristotle posited that the virtues can be derived from reason when one considers the nature of humanity and society. A virtue is a trait “that helps one to fit into and contribute to society.” This, in turn, leads to both the individual – and society’s – flourishing. Thus, those habits that contribute to eudemonia (flourishing) are the seeds of virtue, and those that undermine eudemonia are virtue’s opposite (vice).

As important as it is to identify virtue and its significance, it is also critically important to come to an understanding of how virtue is developed. Aristotle wrote that moral virtue cannot be acquired via instruction alone, but rather needed to be developed through choice and action. Indeed, virtue has been commonly defined as the “habit” of doing good, and habits are “learned” via repeated doing. This comports well with common experience. Countless individuals know what they ought to do, yet fail to actually do it. The gulf between knowledge and willpower can be wide indeed, and a person of virtue is someone who has effectively bridged that gulf. To take the analogy one step further, the bridge is built by repeatedly acting in accord with one’s conscience. Conversely, the bridge is damaged each time an individual ignores the dictates of conscience, and chooses

44 See Solomon, supra note 21, at 200.
45 “I would remind you that extremism in the defense of liberty is no vice! And let me remind you also that moderation in the pursuit of justice is no virtue!” Barry Goldwater, 1964 Republican National Convention.
46 See Stewart, supra note 22, at 56.
47 See id. For a full list of the virtues Aristotle identified, see id. at 73-74. The task of identifying virtues is further aided by the recognition of certain general themes and understandings that have emerged in human societies across continents and ages. See ALASDAIR MACINTYRE, AFTER VIRTUE 169-89 (1981).
49 See Solomon, supra note 21, at 107.
50 See Conly, supra note 21, at 86. Aristotle conceived of human flourishing as particularly limited to an individual’s ability to reason. See id. at 87. Modern virtue ethicists generally adopt a broader approach, and admit a greater variety of activities, concerns, and interests as potentially constitutive elements of human flourishing. See id. at 87-93.
51 See Pojman, supra note 26, at 318.
52 Id.
instead to act at odds with what he or she believes to be right.53

As shall be explained, virtue ethicists have differed with respect to the role that coercion plays in the development of virtue.54 There is universal agreement, however, that repeated voluntary action can lead to the development of virtue.55 Moreover, I believe it is fair to go one step further, and hold that a consensus exists for the proposition that the more voluntarily one’s choice of action is, the more effectively it will serve to promote (or undermine) the development of one’s virtue.56

In light of the preceding, the importance of virtue ethics to corporate law is difficult to miss. Since “man is a social animal,” it comes as no surprise that “human good is found very largely in activities whose point and value depend on the participation of other people in a common project.”57 And such activities, even when economically based, are still rich in interactions that could serve to test, develop, or undermine virtue.58 “This speaks directly to human activity within the corporation. To limit the analysis of such activity to merely the economic incentives entailed, or to the limitations imposed by rules and regulations, blinds one to an entire dimension of reality. For through such activity, individuals not only earn a living, but also (and, perhaps more importantly) learn, exercise, and develop the virtues that will constitute their very character.59

Every system of ethics has its detractors, and virtue ethics is no exception.60 As this article is not a piece of philosophy per se (and rather merely seeks to utilize and apply, without unnecessary addition or subtraction, a pre-existing philosophical system), I will not launch into a full-fledged apologia for virtue ethics. I will, however, borrow Robert

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53 THOMAS AQUINAS, SUMMA THEOLOGIA, ST I-II, Q. 52 & Q. 53. It should also be noted that virtues are generally deemed to be inter-related, and mutually reinforcing. See DANIEL J. SULLIVAN, AN INTRODUCTION TO PHILOSOPHY 150-51 (1957) (reprinted 1992); THOMAS AQUINAS, SUMMA THEOLOGIA, ST I-II, Q. 65, Art. 1. See also Lawrence Kohlberg, Development of Moral Character and Moral Ideology, in REVIEW OF CHILD DEVELOPMENT RESEARCH 497, 387 (L.W. Hoffman, ed. 1964) (“findings suggest a core of truth to common-sense notions of general good character, and provide some justification for adding up measures of various aspects of moral conduct into a total assessment of moral character”); but see Solomon, supra note 21, at 259 (“The Aristotelean thesis of the unity of virtues is … just plain false.”).

54 See infra Part II.B.

55 See id.

56 See id.


58 See id.

59 See Solomon, supra note 21, at 104.

Solomon’s description of the approach as indicative of why I find it normatively attractive:

The bottom line of the Aristotelean [virtue ethics] approach to business ethics is that we have to get away from “bottom line” thinking and conceive of business as an essential part of the good life, living well, getting along with others, having a sense of self-respect, and being part of something one can be proud of.61

I would also like to anticipate and respond briefly to what may be the most common objection to virtue ethics and its application: the notion that certain conduct is objectively “good” or “bad,” and that we are capable of accurately identifying it as such.62 For this notion has indeed been a traditional component of virtue ethics thinking.63

As an initial matter, Robert George, a modern and prominent virtue ethicist, has proffered a vision of virtue ethics with softened objective edges.64 George has criticized Aristotle and Aquinas for overly objectivizing, and for positing too narrow a view of what constitutes the “good.”65 As George puts it:

Without adopting the relativistic view which sees the good as so radically diverse that whatever people happen to want is good, we can and should recognize a multiplicity of basic human goods and a multiplicity of ways that different people (and communities) can pursue and organize instantiations of those goods in living valuable and morally upright lives…. There is no single pattern anyone can identify as the proper model of a human life, not because there is no such thing as good and bad, but because there are many goods. Moreover, people are fulfilled in part by deliberating and choosing for themselves a pattern of their own. Practical reasoning is not merely a human capacity; it is itself a fundamental aspect of human well-being and fulfillment: a basic dimension of the human good consists precisely in bringing reason to bear in deliberating and choosing among competing valuable possibilities, commitments, and ways of life.66

In other words, what causes one person to flourish can very well differ from what causes another to flourish.67 This loosens, to a significant degree, the objective strictures put into place by Aristotle and Aquinas. Nonetheless, as George repeatedly makes clear, virtue ethicists do generally

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61 Solomon, supra note 21, at 104.
62 See id. at 115.
63 See ROBERT GEORGE, MAKING MEN MORAL 38 (1993).
64 See id.
65 See id.
66 Id.
67 Solomon, supra note 21, at 106.
maintain that there are indeed objective “good” and “bad” ways of living.⁶⁸ “Whatever happiness may be, and however it differs from person to person, there are certain essential if variable personal ingredients that are required.”⁶⁹ And these “certain essential ingredients” are exactly what we call “virtues.”⁷⁰

Many if not most people, I believe, can subscribe to this “least common denominator” approach to morally good conduct, as human experience appears to attest. For all our diversity as human beings, what men and women across time and continents appear to have in common appears greater (to this author at least) than what divides them. Reason would dictate, therefore, that certain choices and arrangements would be conducive to human flourishing, whereas others would be counterproductive. Not surprisingly, therefore, there has been wide agreement across cultures and ages as to certain very basic moral precepts.⁷¹ Aristotle, if not Plato, seemed to capture that in his list of virtues.⁷² It is difficult imagining too much disagreement with these lists, regardless of one’s ethical preferences, and if someone could merely credit these habits of character as “good,” one could readily overcome the quandary of having to identify “good” versus “bad” generally or on other levels.

Yet we might be able to prescind even from this level of moral absolutism without abandoning the use of virtue ethics entirely. For one could import from the virtue ethics tradition the core component that an individual be true to himself or herself – that he or she live a life in accord with whatever he or she deems to be good and just. And “[w]hile philosophers have been unable to agree upon any ultimate principle of the good which would define ‘correct’ moral judgments, most philosophers agree upon the characteristics which make a judgment a genuine moral judgment.”⁷³ Thus, to the extent that individuals are in possession of

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⁶⁸ See George, supra note 65, at 38.
⁶⁹ Solomon, supra note 21, at 107.
⁷⁰ Id.
⁷² See supra text accompanying notes 43- 44.
⁷³ Lawrence Kohlberg, Development of Moral Character and Moral Ideology, in REVIEW OF CHILD DEVELOPMENT RESEARCH 497, 405 (L.W. Hoffman, ed. 1964).
certain values, whatever values those may be, one could argue (from a virtue ethics perspective) that such individual’s personal fulfillment and development requires a life lived in consistency with those values – in consistency with moral judgments made within the context of corporate employment.

II. VIRTUE AND THE LIMITS OF LAW

Although virtue ethics focuses only indirectly on “end results,” the end results of virtue ethics are certainly not something to ignore. As already argued, virtue would have served as a check on the widespread nonfeasance and malfeasance that marked our most recent financial crisis. Moreover, even if corporate actors could be expected to comport themselves with the law (and their duties as defined thereunder), there is only so much that can be legislated. Law has its limits, both practically and prudentially, and virtue serves to fill the law’s gaps.

A. The Inadequacy of Regulatory Solutions

Financial crises and/or scandals in the United States are almost invariably met with a regulatory response. Such responses have obviously failed to prevent crises from reoccurring. Indeed, the most one could realistically hope for is that new layers of regulation will serve to prevent repeats of precisely the very same crises. Put differently, legislative and regulatory responses are generally reactionary, and tend largely to address the repercussions of yesterday’s conduct; they cannot hope (and rarely even

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74 See supra Part I.
75 See supra text accompanying notes 4-6.
76 See Yankah, supra note 7, at 1210. “Ethics completes the law in that promotion of the general good and avoidance of harm to others are seen as the overall purposes of law.” William Arthur Wines & J. Brooke Hamilton III, Observations on the Need to Redesign Organizations and to Refocus Corporation Law to Promote Ethical Behavior and Discourage Illegal Conduct, 29 Del. J. Corp. L. 43, 59 (2004). As James Madison argued: “No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea.” James Madison, Remarks During the Virginia Debate on the Adoption of the Federal Constitution (June 20, 1788) (quoted in Zephyr Teachout, 94 Cornell L. Rev. 341, 378-79 (2009)).
77 See supra text accompanying notes 9-10.
78 “The law focuses on regulating yesterday’s problems while the fertile brains of corporate managers are already moving into new areas.” Wines & Hamilton, supra note 76, at 50.
try) to foresee the countless unknowable problems of tomorrow.\footnote{Id. at 58 (“The law continually regulates yesterday’s business abuses.”).}

This is a significant and nearly universal limitation to regulatory solutions. Even the wisest of regulators cannot, with perfect accuracy, anticipate the future, which makes it exceedingly difficult (if not impossible) to implement policies capable of addressing every conceivable future problem or wrongdoing.

Virtue, however, is capable of exerting its influence beyond regulation’s outer limits. Virtue is capable of restraining the individual from exploiting a loophole that he or she discovers in the law – a loophole that would cause the individual’s misconduct to evade detection and/or punishment. In short, virtue protects society where law cannot.\footnote{See Sims, supra note 16, at 106. (“Whereas some organizations have published codes of ethics … to help guide behavior (or counter unethical behavior) … in all organizations, the ultimate test is the strength of an individual employee’s ethical framework.”); Edward Peter Stringham, Embracing Morals in Economics: The Role of Internal Moral Constraints in a Market Economy 22-23 (available at ssrn.com/abstract=1748635) (asserting the important role of internal moral constraints on individual behavior). See also McGuire, Sean T., Omer, Thomas C. and Sharp, Nathan Y., The Impact of Religion on Financial Reporting Irregularities (August 2010) (available at ssrn.com/abstract=1548154); Gustavo Grullon, George Kanatas and James Weston, Religion, Ethics, and Corporate Behavior (2009) (available at https://www.bauer.uh.edu/departments/finance/documents/Religion.pdf). These two studies examined the influence of religion on corporate behavior, and although religion and virtue are two distinct phenomena, both religion and virtue are characterized by certain personal commitments of belief and/or behavior. I refer to these studies in support of the general proposition that such personal commitments – whatever their source – do indeed significantly serve to affect behavior, even within the corporate context. A particularly trenchant line of criticism to this proposition is the assertion that character is largely situational, and thus “virtue” is not a phenomenon that transcends particularized contexts. E.g., Gilbert Harman, No Character or Personality, 13 BUS. ETH. Q. 87, 87, 89 (2003).}

And by “law” I am referring not only to actual legislation and regulatory rulemaking, but to all external restraints on one’s activity. Consider the distinction, between an organization that has a code of ethics imposed upon its employees, versus an organization that has a code of ethics internalized by its employees. Corporations falling within the former camp are described by R.E. Reidenbach and D.P. Robin as “legalistic corporations,”\footnote{See R. Eric Reidenbach & Donald P. Robin, A Conceptual Model of Corporate Moral Development, 10 J. BUS. ETH. 273, 276 (1991).} and are simply one step removed from the lowest of five stages of corporate moral development (the “amoral corporation”).\footnote{See id.} Such corporations can be expected to comply with the letter of their ethical codes – but not with their spirit.\footnote{See id. at 276-77.} Indeed, employees oftentimes work very hard at finding a way to
do something that clearly violates the spirit of code, rule, or law, while at
the same time just barely satisfying its most narrow reading.

Additionally, even if law could possibly foresee and address every
possible future wrongdoing, we may not want it to. On a practical level,
there is the question of resources and expense. There is the difficulty of
crafting such potentially expansive regulation in a way as to effectively
retard the bad without unduly burdening the good. Thus, even if our
regulators were omniscient, they would still not be omnipotent.

Further still, there may be prudential reasons to refrain from legislating
against everything that could be conceivably legislated against. At its
extreme, financial regulation could approach the equivalent of a police
officer on every corner – a state of affairs inconsistent with a society that
considers itself free.

Most fundamentally of all, legal and regulatory solutions to “the crisis”
largely address its symptoms, not its underlying causes. Just because law or
regulation enables something to be done, and even though economic
incentives may encourage something to be done, does not mean that it
should or must be done. “Overleveraging,” to take one example, is merely
a symptom of imprudence, if not greed. Imprudence, then, is a root cause
of the crisis – overleveraging would simply be one of its manifestations.
Opposing the vice of imprudence is the virtue of “prudence.” A prudent
individual would not borrow to his or her legal limits in order to maximize
potential investment returns (or ability to consume), but would rather
carefully and seriously weigh these rewards against potential risks. The
inculcation of prudence would not only serve as a bulwark against
overleveraging, and against all other problems and misconduct associated
with imprudence.

Finally, there is reason to believe that, at a certain point, law undermines
trust. Many theorists have pointed to trust as foundational to the success
of the market economy (if not society as a whole).84 This provides a further
limitation on the desirability of regulatory solutions to the financial crisis.
As I have argued elsewhere, by rigorously circumscribing conduct, law
limits the ability of individuals to prove their trustworthiness, to the
detriment of both the economy and to society as a whole.85

84 See Ronald J. Colombo, Trust and the Reform of Securities Regulation, 35 DEL. J.
CORP. L. 829 (2010). Interestingly and unexpectedly, this conclusion was largely
endorsed by a member of the Chinese Academy of Social Sciences. See Tom O’Gorman,
Christianity the Reason for the West’s Success, say the Chinese (Iona Institute for Religion
(“The Christian moral foundation of social and cultural life was what made possible the
emergence of capitalism and then the successful transition to democratic politics [ due to
the trust it engendered]. We don’t have any doubt about this.”).

85 See Colombo, supra note 84, at 848-56.
B. Can Law Make Men Moral?

Given the preceding, an objective of corporate law (from a virtue-ethics perspective, at least) ought to be the development and exercise of virtue within the corporation for the benefit of the common good.\(^{86}\) However, there is yet another way in which law is arguably limited, a way that is wholly different than that just described. Law is limited in its ability to make people virtuous.\(^{87}\) According to some modern virtue ethicists, the development of virtue requires liberty of action – the ability to choose ill in addition to choosing good. The coercive power of law is largely at odds with this important voluntary dynamic, thereby frustrating the development of virtue.

This position is best articulated by Robert George, who has argued that: “[m]orality is, above all an internal matter, a matter of rectitude in choosing: one becomes morally good precisely, and only, by doing the right thing for the right reason.”\(^{88}\) If, conversely, one conducts himself or herself appropriately out of fear of legal sanction, all that is achieved is “outward conformity with what morality requires,” via an appeal to “subrational motives.”\(^ {89}\)

\(^{86}\) Cf. Reiner R. Kraakman et al, The Anatomy of Corporate Law 18 (2004) (“the overall objective of corporate law – as of any branch of law – is presumably to serve the interests of society as a whole”); see also Thomas Aquinas, Summa Theologia, ST I-II, Q. 96, Art. 3. Of course, there are those who object to imputing any morality to an organization. E.g., Kenneth E. Goodpaster & John B. Matthews, Jr., Can a corporation have a conscience? 60 Harv. Bus. Rev. 132, 133 (1982) (“It is improper to expect organization conduct to conform to the ordinary principles of morality… We cannot and must not expect formal organizations, or their representatives acting in their official capacities, to be honest, courageous, considerate, sympathetic, or to have any kind of moral integrity.”) (quoting John Ladd). But see id. (“Organizational agents such as corporations should be no more and no less morally responsible …. Than ordinary persons.”); and see generally Peter A. French, Corporate Ethics (1995); Geoff Moore, Corporate Moral Agency: Review and Implications, 21 J. Bus. Ethics 329 (1999). I shall prescind from this debate because it is not directly applicable to my project; the focus of this article is on the virtue of individuals within the corporation enterprise, despite my use of the term “corporate virtue” to refer to this.


\(^{89}\) Id. This philosophical argument receives support from the social sciences. See Lawrence Kohlberg, Development of Moral Character and Moral Ideology, in Review of Child Development Research 497, 389 (L.W. Hoffman, ed. 1964) (“direct training and physical types of punishment may be effective in producing short-run conformity but do not directly produce general internalized habits or moral character … carried into permissive situations”).
George’s philosophical argument receives support from the social sciences, which has found that “direct training and physical types of punishment may be effective in producing short-run conformity but do not directly produce general internalized habits or moral character … carried into permissive situations.”90 This would appear to comport with common experience. Do we consider “virtuous” the individual who does not steal in the presence of a security guard, or instead the individual who does not steal in the absence of a security guard? Indeed, for any action to have moral worth, it must be voluntary — this is a concept attested to not only by philosophers,91 but even by our laws.92 Contracts signed under duress are unenforceable, as they are not considered the product of free will.93 Culpability for homicide increases with intentionality, and the “criminally insane” (namely, those deprived of reason and therefore unable to exercise moral judgment) can be deemed “not guilty.”94

Whether one’s actions in the face of legal circumscription and high probability of sanction are voluntary or not is an interesting philosophical question in its own right, but it cannot be denied that actions within such a context are certainly “less voluntary” than actions in contexts where negative repercussions are unlikely. Thus, although law and regulation can do a good job at compelling people to mimic virtuous behavior, it does a poor job (according to George) at directly making people virtuous.95

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90 See Lawrence Kohlberg, Development of Moral Character and Moral Ideology, in REVIEW OF CHILD DEVELOPMENT RESEARCH 497, 389 (L.W. Hoffman, ed. 1964) (albeit in the context of research into children’s moral development).
91 See THOMAS AQUINAS, SUMMA THEOLOGIA, ST I-II, Q. 6.
95 The qualifier “directly” is an important one, for George concedes the important role that law plays in fashioning an environment suitable for the development of virtue. See George, supra note 88, at 45-46. Additionally, it should be noted that getting people to “mimic” virtuous behavior is not an altogether terrible objective. If individuals prescind from wrongdoing, that is in itself a good thing, and contributes to the common good, regardless of the reason. As such, the law is rightly concerned with encouraging appropriate behavior. See H.L.A. HART, THE CONCEPT OF LAW 185-212 (2d ed. 1994). But this, according to George, should not be confused with the development of virtue. Unfortunately, the term “morality” has itself multiple definitions. I would suggest that its first definition (“conformity to the rules of rule conduct”) is that which applies to the traditional understanding of law’s role with respect to morality. WEBSTER’S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, Morality (1989). When I speak of “virtue” and “morality” throughout this article, I am referring to the third definition of morality: “moral quality or character.” Id.
George’s position would seem to conflict with a long tradition within the virtue ethics tradition which has been much more optimistic about law’s efficacy in creating virtue. In ancient Greece, “Plato had his guardians, and Aristotle his project of comprehensive laws to make Athenians good.”96 There was a sense that coerced habituation could pave the way for internalization, voluntary choice, and genuine virtue.97 What might first be done for base motives (to avoid pain or experience pleasure, as per the law), will, hopefully, if accompanied by proper moral training, blossom into doing “virtuous acts for their own sake.”98 George has shifted law’s role in the development of virtue from the forefront to the foreground. In doing so, he has arguably built upon the work of the Twentieth-Century philosopher Jacques Maritain, who forcefully advocated the principle of “subsidiarity”: the concept that “the state should do for its citizens only what citizens and voluntary associations of citizens are unable or failing to do for themselves.”99 One of the points of this is to afford individuals and private institutions the space needed to develop and pursue virtue. As such, the subsidiarity principle is at odds with both the proponents of statism and laissez-faire government:

Against those who would have the state organize every facet of human society (or permit it to do so), [Maritain] argued that other units beside the state promote, and should be allowed to promote, the common good according to their own structures. On the other hand, against those who would limit the state to peace-keeping functions in human society, they argued that the state is specifically charged with the task of promoting the common good, that it is hierarchically supreme over other social groups, and that it is responsible for ordering the activities of the latter to the common good. In other words, the state and the machinery of the state exist to supplement and foster, not to supplant or hinder, the self-development of citizens through individual effort and voluntary associations with others.100

96 Richard J. Regan, Virtue, Religion, and Civic Culture, in MIDWEST STUDIES IN PHILOSOPHY Vol. XIII 343 (Peter French et al. eds. 1988). To Aristotle “argument can merely inform people of the right thing to do, it cannot motivate them to do it.” See Robert P. George, The Central Tradition – Its Value and Limits, in VIRTUE JURISPRUDENCE 24, 27 (Colin Farrelly & Lawrence B. Solum, eds. 2008). For this reason, Aristotle thought that law would be necessary to give “some tincture of virtue” to those who would otherwise be without virtue. Id. Plato was even less forgiving: he posited that a tightly-controlled regime of education, training, and control was necessary to forge virtuous individuals. See PLATO, THE REPUBLIC Book III (Dover 2000).


98 Id.


100 Id. at 345.
The importance of the development in philosophical thought that George represents is difficult to underestimate. Indeed, it calls into question much of the traditional Western understanding regarding the function of law. It also touches upon a fundamental question of human nature: are people inherently disposed toward virtue, or inherently disposed toward vice?

This article is certainly not going to resolve these weighty questions. But given their importance to issues at hand, a position must be taken before proceeding. To me, at least, the most convincing words written on this subject are those of Thomas Aquinas, whose approach falls somewhere between those of Aristotle’s and George’s.

Aquinas makes a simple, critical, yet seemingly obvious observation: people differ from one another when it comes to certain natural tendencies. As for moral behavior, some individuals are inclined, by nature, towards acts of virtue, and other individuals are inclined, by nature, towards acts of vice. Not surprisingly, therefore, the effect of law upon these two populations varies. “Men who are well disposed are led willingly to virtue by being admonished better than by coercion, but men who are evilly disposed are not led to virtue unless they are compelled.”

Given that Aquinas concurs in the belief that the “purpose of human law is to lead men to virtue,” what is the wise lawmaker to do in light of the natural variation that exists from one human being to another? It would seem that he or she ought to proceed very carefully, in order to avoid undermining the development of virtue in those individuals naturally disposed to virtue. And as for those individuals who are not so disposed, Aquinas famously warns against setting the bar too high:

The purpose of human law is to lead men to virtue, not suddenly, but

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101 As was well articulated in Montesquieu’s highly influential Spirit of Laws. See Teachout, supra note 76, at 350; see generally Matthew P. Berhman, Montesquieu’s Theory of Government and the Framing of the American Constitution, 18 Pepp. L. Rev. 1 (1990).


103 At least to someone who has raised multiple children.

104 Thomas Aquinas, Summa Theologia, ST I-II, Q. 95, Art. 1

105 See id.

106 Id.

107 Id.
gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz., that they should abstain from all evil. Otherwise, these imperfect ones, being unable to bear such precepts, would break out into yet greater evils.  

Application of this thinking to corporate law would seem to counsel in favor of a “light touch” approach with regard to the promotion of virtuous conduct. For those corporate decision-makers already imbued with virtue, coercive measures could be counter-productive. For those who are not so imbued, the law should not demand standards of behavior that only the truly virtuous could readily conform to. Instead, the law ought to circumscribe only the more “grievous” manifestations of vice – “from which it is possible for the majority to abstain; and chiefly those that are to the harm of others, without the prohibition of which human society could not be maintained.”

This light touch approach can also claim support from the general virtue ethics tradition insofar as a least common denominator position can be distilled. For although only some virtue ethicists admit the possibility of promoting virtue through coercive habituation of good conduct, all accept the notion that decisions voluntarily made move an individual further along the path of virtue.

On a related note, general and substantial agreement can be found for the proposition that, regardless of law’s questionable efficacy in “coercing virtue,” law can certainly contribute to an environment which fosters the development of virtue. Thus, to the extent that law makes it easier for individuals to develop habits of doing good, law facilitates the development of virtue. Similarly, and just as significantly, law can create an environment that undermines an individual’s ability to do good. To the extent that law operates in such a manner, it impedes the development of virtue.

Thus, law’s potential impotence to directly generate virtue should not be misread as a sign of law’s irrelevance to the question of virtue. For law plays a critical, even if an indirect, role. Law can create structures, institutions, expectations, and possibly even norms that contribute mightily to virtue’s development by making it easier to get virtue’s ball rolling. Laws that dismantle and prevent conflicts of interest, for example, do a

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108 Id.
109 Id.
112 See supra text accompanying note 52.
good job in removing temptations – thus increasing the likelihood that an individual will choose to do the right versus the wrong thing.\textsuperscript{113}

III. CORPORATIONS AND VIRTUE

Corporate law is not immune to the limitations and shortcomings shared by all other fields of law.\textsuperscript{114} Moreover, as institutions suffused with interpersonal relationships, corporations would appear to be ideal candidates for analysis under the lense of virtue ethics (which, after all, is built largely upon the proposition that human beings are social animals\textsuperscript{115}). The moment for such an analysis is particularly ripe in light of the recent financial crisis which, as discussed, laid bare corporate decision-making processes seemingly bereft of the influences of virtue.\textsuperscript{116}

Thus, there are at least two inter-related reasons why both the virtue ethicist and the prudent policymaker should be quite concerned with the moral ecology of the corporation: (i) for the sake of the individuals who work within the corporation; and (ii) for the sake of those individuals, institutions, and communities that work with or are affected by corporate activity. In other words, the degree to which virtue influences corporate decision-making is profoundly important to those on the inside of the corporation, but also, in many cases, to those on the outside of the corporation as well.

And concern for the moral ecology of the corporation is buttressed by insights culled from virtue-ethics philosophy, coupled with an acknowledgment of the limitations of law. The former suggests the need for a virtue-conducive environment in order to promote true human flourishing, and the latter reveals the indispensability of virtue as law’s supplement when it comes to preventing misconduct.

This suggests that it is critically important for the corporation to be a virtue-enhancing, rather than a virtue-enervating, institution. Consequently, this should be one of the primary ends of corporate law.

A. The Corporation as a Nexus of Contracts

Identifying the need for virtue’s inclusion in corporation decision making (which I shall refer to as “corporate virtue”) is, relatively speaking,

\textsuperscript{113} This was one of the solutions to last decade’s research analyst scandal, which I commended. See Ronald J. Colombo, \textit{Buy, Sell or Hold?} 73 BROOK. L. REV. 91, 117-18, 152 (2007).

\textsuperscript{114} See supra Part II.A.

\textsuperscript{115} See supra text accompanying note 39.

\textsuperscript{116} See supra text accompanying notes 1-8.
the easy part. As with so many things in life, significantly more difficult is identifying the means for achieving this particular end.

Past scholarship of mine argued that shareholders were responsible for seeing to it that their corporations were fulfilling all requisite moral and ethical obligations. This was predicated on the traditional view that shareholders are the owners of the corporation, and upon the Aristotelian notion that owners are morally responsible for the ways in which their property is used.

But the traditional view is not the prevailing view. Most corporate law scholars today do not think of the corporation as a “thing” capable of being owned, but rather as a mere “nexus of contracts.” Pursuant to this understanding, the corporation is a network of interconnected explicit and implicit contracts. Within this conceptualization, the role of corporate law is to promote efficiency by supplying the default rules that the various corporate constituencies would have bargained for had they the time and ability. Thus, the ordering of rights and responsibilities within the corporation is a function of the strengths, interests, and vulnerabilities of the various parties to the corporation.

Without distancing myself from my past scholarship, I nevertheless wish to utilize the attorney’s prerogative to “argue in the alternative,” and articulate a role for virtue within the context of the prevailing, modern understanding of the corporation and of morality: within the context of contractarian thought.

\[117\] The key term here being “relatively.” The concept that corporate law should have anything to do with virtue is itself a controversial proposition, and cuts against the prevailing trend that casts corporate law in purely economic terms. See, e.g., STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS §1.5 (2002).


\[119\] See id. Since management and oversight of the corporation is entrusted to its board of directors, I charged the board with exercising this moral responsibility on behalf of the shareholders. In response to the argument that the shareholders and directors might embrace different moralities, I turned again to Aristotelian philosophy and asserted the objectivity of morality – a notion which, if accepted, dispels the problem of potentially conflicting moralities. See id.

\[120\] See STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS §1.5 (2002); but see Julian Velasco, Shareholder Ownership and Primacy, 2010 U. ILL. L. REV. 897, 897 (2010).

\[121\] See Bainbridge, supra note 120.

\[122\] Such an approach also has the benefit of addressing the problem of anchoring corporate virtue to shareholders given the realities of the modern shareholder (rationally apathetic and largely institutional). See Larry Ribstein, The First Amendment and Corporate Governance, Illinois Public Law and Legal Theory Research Paper No. 10-24, at 9 (Jan. 12, 2011) (available at: http://ssrn.com/abstract=1739264). That said, the
As before, a major component of this undertaking involves identifying that party (or those parties) upon whom the responsibility for exercising virtue on behalf of the corporation ought to be granted. In other words, who within the corporation ought to be entrusted with the ability to formulate and actualize “corporate virtue”?

The answer to this question informs the answer to another important one: whose virtue ought corporate law serve primarily to foster? For it makes little sense to entrust corporate virtue to a constituency ill-formed in virtue. To the extent, therefore, that an objective of corporate law is (or should be) to support a climate of virtue within the corporation, it can most efficaciously do this by supporting the virtue of those actors most capable of wielding influence over questions of virtue within the corporation. Thus, our immediate task is to identify those actors.

B. Corporate Constituencies and Virtue

Application of the contractarian theory of the corporation to the question of virtue requires identification of that corporate constituency (or constituencies) best suited to exercise virtue, most interested in exercising virtue, and most vulnerable to restrictions on or degradation of virtue vis-à-vis the corporation. The universe of constituencies is generally thought to include:

- Shareholders
- Bondholders
- Directors
- Officers
- Employees
- Suppliers / business partners
- Customers
- The community / communities in which the corporations operates

The question of vulnerability requires us to ask: which of the corporation’s various constituencies is most exposed to suffering the contractarian approach contributes to the view that the corporation is a mere legal fiction, which in turn obscures the applicability of ethics and the concerns I raise from a virtue ethics perspective. If instead, corporations are recognized to be “communities” – “people working together for common goals,” an appreciation of the role of ethics, and the importance of the individual within the corporation, would, I suggest, flow more naturally. See Solomon, supra note 21, at 109.

degradation of its virtue on account of corporate activity? Closely related to this is the question of interest: which of the corporation’s various constituencies would be most interested in exercising virtue on the corporation’s behalf? Taken together and put more simply: who cares the most about whether a particular corporation conducts itself in accordance with the dictates of virtue?

Recall that virtue is largely about choice: about how one makes the various decisions that one must make throughout life. The habit of choosing to do good when confronted with these choices constitutes the development of virtue; the habit of choosing to do bad constitutes the development of vice. An important factor that could influence these choices (positively or negatively) is the environment in which they are made.

As such, it would seem that constituencies external to the corporation would ordinarily be least vulnerable to the corporation when it comes to the safeguarding and development of their virtue. Consequently, these same constituencies would probably have the least interest in commandeering the corporation to act in accord with their understanding of virtue. Although this may seem obvious, a few words of explanation and qualification are in order.

Within the contractarian understanding of the corporation, the line between those who are “within” versus those who are “without” the corporation is not particularly clear. To the contractarian, the corporation is not a “thing” that has well-defined borders, but rather a network of explicit and implicit contracts. That said, not all constituencies participate in the network equally: some are at its center, others at its periphery; some are critical players, others have a level of involvement that is transient and fleeting. Regardless, I am using the term “external” here in the colloquial sense – as those parties not falling under the corporate umbrella. This would include the community in which the corporation does business, the corporation’s customers, and the corporation’s suppliers and business partners. How to best categorize the corporation’s investors (shareholders and bondholders) is less clear, but not critical to the analysis for reasons we shall see in a moment.

External constituencies have less interest in corporate virtue because the

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124 See supra text accompanying notes 47-58.
125 See supra text accompanying note 52.
126 See supra text accompanying note 111.
128 See Bainbridge, supra note 120, at 26-29.
129 See infra text accompanying note 133-141.
corporation does not (ordinarily) shape the moral environment in which they live. A shopper who spends an hour at Target is not defined by that experience – it is a rather small part of his or her day (and an even smaller part of his or her life overall). This contrasts dramatically with the situation of Target’s employees, for example, who spend most of their day (and much of their waking life) at Target.

Even the most nefarious of corporations – companies that busily pollute waterways, or deceive their customers – rarely affect their victims on a moral level. The harm imposed is ordinarily physical or economic. I by no means wish to underestimate the gravity of such harm, but must nevertheless point out that it matters little when the focus of our inquiry is limited to the moral well being (the virtue) of corporate constituencies.

But there are important exceptions. For every corporate environmental polluter in existence there are genuine corporate cultural polluters as well – companies whose products and activities make the exercise of goodness and virtue much more difficult. Indeed, it is not too much of an exaggeration to say that corporate marketing and advertising bombards the individual with an endless stream of messages exalting practically every vice (and undermining every virtue) imaginable. The culture of temptation that this gives rise to is exactly the kind of environment that makes the development of virtue more difficult and therefore less likely.

But even with respect to these corporations (the “cultural polluters”), those on the inside are still more likely to be vulnerable when it comes to the development / preservation of virtue than those on the outside. For generally speaking, the overall cultural degradation effected by corporate conduct will harm both insiders and outsiders equally. But the insiders of the corporation will most likely be assailed by an additional layer of degradation – for they are living in the belly of the beast. The insiders not only share in the same culturally polluted environment, but work inside the very factory that’s bellowing out all the pollution – alongside those who are vulnerable.

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130 See Peter A. French, Corporate Ethics 48-49 (1995); e.g. Stephanie Pappas, 30% of Girls’ Clothing Is Sexualized in Major Sales Trend, LiveScience (May 20, 2011) (finding that almost a third of clothing sold and marketed to girls aged “toddler[] to pre-teen” at “15 national retailers, from high-end stores such as Neiman Marcus to inexpensive stores such as Kmart and Target” is “sexualized” in design and appearance).

131 Yuval Eylon, Virtue and Continence, 12 Ethical Theory & Moral Practice 137, 146 (2009).

132 An exception would exist in those situations where a corporation sells and markets its products in particular, targeted communities. There are examples of this, most notably with regard to certain liquor companies that have traditionally advertised most heavily in lower-income neighborhoods. See Cities/Billboard Battle: Priest Pleads Moral Right to Deface Ads, L.A. Times, Aug. 16, 1990, at 5; Stuart Elliott, Liquor Ads Cut in Minority Areas, USA Today, Mar. 6, 1990, at 01B.
responsible for deciding upon, and executing upon, the choice to pollute in the first place. Indeed, they themselves may be relied upon to participate in these efforts.

Therefore, although all corporate actors would arguably have some interest in a corporation’s conformity with virtue, not all parties are equally interested in this conformity. The less a party identifies with the corporation, the less he or she would be interested in exercising virtue on the corporation’s behalf, or vulnerable to its restriction by the corporation. Thus, those constituencies that are most external to the corporation (its business partners, its customers, and the communities in which it does business) would not be appropriate ones to focus on as the key to corporate virtue.

Next, let us consider a corporation’s investors – a constituency that arguably straddles the divide between “external” and “internal.” To what degree do investors have an interest in corporate virtue? Traditionally, investors have been bifurcated into the categories of equity (stockholders) and debt (bondholders). Further, stockholders have traditionally been characterized as owners of the corporation – and with this characterization flowed several important practical and rhetorical consequences. As a result, if anyone’s morality ought to govern the conduct of the corporation, it would seem to be that of the shareholders. In any event, it would not seem appropriate to combine stockholders and bondholders into one constituency class.

But under the nexus of contracts approach, this distinction is much less rigid. Moreover, for our purposes, this distinction is also much less important. For under the contractarian approach, stockholders are not owners of the corporation, but rather merely one of many corporate constituencies. That said, stockholders are afforded “ownership-like” rights in the corporation under the contractarian approach, but for reasons that are wholly economic in nature. This permits us to join stockholders and bondholders together as a class of actors (“investors”) whose interest in the corporation is primarily (if not entirely) economic in nature.

And this would seem to comport well with reality. Investors are

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135 Which is exactly something that I have argued in my previous scholarship. See Colombo, supra note 118, at 267-68.


137 See id. at 8.
ordinarily diffuse and rationally apathetic, and do not follow the corporations in which they have invested particularly closely. Moreover, most investors are not even human – institutional investors dominate the equities markets, and they themselves often have invested via an intermediary (such as another institution, like a hedge fund or mutual fund). Such actors are unlikely to have a particularly strong interest in corporate virtue. Indeed, as one philosopher has described them, shareholders “have none of the pride or responsibility of ownership and are, if truth be told, only there for the money.” This would suggest we disqualify corporate investors from further consideration as potential progenitors and guardians of corporate virtue.

Remaining for our consideration are the three constituencies clearly internal to the corporation: employees, officers, and directors. As internal to the corporation, each of these constituencies certainly identifies with the corporation to a degree. Indeed, unlike the previous constituencies considered (whose relationships to the corporation were primarily if not wholly economic in nature), these remaining three constituencies are characterized by relationships with the corporation that are richer, deeper, and indeed more personal in nature. Employees and officers of a corporation identify with a corporation in ways that customers, suppliers, and the larger community simply do not (usually). Directors, too, have ties to the corporation that transcend their compensation – ties that impose legal duties and ties that have reputational consequences.

Thus, taking a first cut at the question would seem to eliminate investors, customers, business partners, and the larger community within which the corporation operates as potential fulcra of corporate virtue. These constituencies would seem to (generally and relatively speaking) lack interest in corporate virtue, and be less vulnerable toward the corporation when it comes to safeguarding their own personal virtue. This cut would seem to be confirmed when we consider the question of a constituency’s ability to influence the corporation via the exercise of virtue. The parties in the strongest position to influence corporate action, via the exercise of virtue

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140 But see Colombo, supra note 118, at 266 n.145 (arguing that the moral responsibility of ownership does not lessen with attenuation).
virtuous decision making, would appear to be the directors, officers, and employees. Admittedly, to a limited extent, the shareholders also share in this power (as, to an even more limited extent, do the other constituencies previously considered). But for these non-internal constituencies, there is a sharp decline in the opportunity and ability to affect corporate conduct.

Our inquiry is not, however, at its end. For the internal constituencies differ dramatically from one another, and additional analysis is merited to see which among them holds the key (or should hold the key) to corporate virtue.

Consider first low-level corporate employees. Due to the limited degree of discretion that often characterizes their work, these individuals would not be expected to have a tremendous interest in exercising control over corporate virtue (relative to the interest possessed by the other internal corporate constituencies). Indeed, low-level employees are not likely to be confronted with the tough questions and decisions that implicate virtue – such questions and decisions would ordinarily be referred to a more senior employee for resolution.

This also suggests that low level employees suffer less vulnerability when it comes to the potential inhibition of virtue. The relative lack of knowledge they possess with regard to the consequences of their actions, coupled with the lack of discretionary decision making afforded to them, suggests that their moral compasses will infrequently be implicated and still less frequently overridden. They are not, therefore, likely to have a significant interest in corporate virtue.

Additionally, employees (especially low-level employees) oftentimes stand in a quasi-hostile posture when it comes to their corporate employer, underscored most vividly by the phenomenon of unionization. This undermines the argument that employees identify with their corporations, and suggests that employees are not, upon further examination, particularly well suited for exercising virtue on behalf of the corporation.

Not surprisingly, perhaps, the two remaining candidates are the directors and officers of the corporation. Both these constituencies identify (and are identified) with the corporation in ways that none of the other constituencies do.

142 Limited by virtue of the fact that for most shareholders, their ability to exercise power over corporate conduct is restricted to the following means: (i) the election of directors; (ii) the making of shareholder proposals; (iii) voting upon certain fundamental changes to the corporation; and (iv) initiation of shareholder derivative lawsuits. See 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS §9:12 (3d ed. 2011); 5 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §2097 (2011).

143 See RICHARD SENNETT, THE CORROSION OF CHARACTER 42, 44-45 (1998). Indeed, corporate life for the low-level white-collar employee has become the stuff of dark humor – see, e.g., Dilbert (comic strip), The Office (NBC television show).
are. Both wield authority, and exercise discretion, within the corporation to an extent that none of the other constituencies do. Indeed, both are entrusted with the management of the corporation under corporate law.\textsuperscript{144}

This suggests that, when it comes to the question of virtue and the corporation, both directors and officers share in the responsibility to steer their firms along a path informed by virtue. And this comports with research on the formation of corporate culture, which has found that top management is a principal source for a corporation’s cultural beliefs and values.\textsuperscript{145}

But even here, important distinctions can be made – distinctions which lead to the conclusion that a corporation’s officers should be the primary focus when it comes to the promotion and guardianship of virtue within the corporation.

This conclusion will probably be unexpected to many who are familiar with corporate law scholarship. After all, directors receive the lion’s share of attention when it comes to all matters of corporate governance.\textsuperscript{146} That said, officers also “play a critical role in corporate governance.”\textsuperscript{147} And scholars are increasingly coming to the view that officers, rather than directors, truly control the modern business corporation.\textsuperscript{148} As such, this article is not alone in asserting that “fraud prevention and the encouragement of more laudable corporate conduct … must focus on corporate officers, not just directors.”\textsuperscript{149} And this is so for at least two important reasons.

Although both directors and officers serve as critical corporate decision makers, directors discharge this duty on a broader, higher, more generalized level. Directors ordinarily employ their discretion to set corporate policy, and officers employ their discretion to implement corporate policy. As such, virtuous and ethical decision making is usually most difficult and contentious at the officer’s level of implementation. Widespread agreement can oftentimes be marshaled for general propositions of virtuous conduct.


\textsuperscript{146} See, e.g. Stephen M. Bainbridge, The Board of Directors As Nexus of Contracts, 88 Iowa L. Rev. 1 (2002).


\textsuperscript{148} See Franklin A. Gevurtz, The Historical And Political Origins Of The Corporate Board Of Directors, 33 Hof. L. Rev. 89, 104 (2004); but see Stephen M. Bainbridge, Director Primacy: The Means And Ends Of Corporate Governance, 97 Nw. U. L. Rev. 547 (2003).

\textsuperscript{149} Id.
Towards a Nexus of Virtue

(such as, “thou shalt not kill”), but far less agreement can usually be reached when such propositions are applied to particularized situations. Such application is the stuff out of which virtue is truly developed, as attested to by the folk wisdom contained in sayings such as “talk is cheap” and “actions speak louder than words.” By making corporate officers the focus of virtue, we both situate the exercise of virtue in that location where it shall most effectively be developed, and where its exercise is most critical. Indeed, when one examines the various corporate scandals with which so many of us have become familiar, one observes the fact that officers – not directors – usually “played a central role.”

The preceding goes largely to the question of the relative strength of directors versus officers when it comes to the exercise of virtue. When it comes to questions of interest and vulnerability, here too the analysis cuts in favor of identifying the officers as the essential repositories of corporate virtue.

Officers bond with their corporations to a degree that directors do not. Whereas an individual director oftentimes sits on multiple corporate boards, an individual officer rarely serves more than one company. Whereas directors meet periodically to discharge their responsibilities to the corporation, officers are ordinarily working busily each day (and often well into the night) in the discharge of their duties. Whereas the directors of a corporation might identify in a certain way with the companies on whose boards they serve, officers largely define themselves by their corporate role. Indeed, for many officers, their role within and responsibilities to the corporation can take on a vocational nature—that is rarely the case when it comes to directors, who are usually much more removed and dissociated from the corporations they serve.

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150 “While it is important to know what is right, the more daunting challenge in ethics is to discover how to get yourself and others to do the right thing and to avoid doing the wrong thing.” Wines & Hamilton, supra note 76, at 55; see also Lawrence Kohlberg, Development of Moral Character and Moral Ideology, in REVIEW OF CHILD DEVELOPMENT RESEARCH 497, 386 (L.W. Hoffman, ed. 1964) (“moral character traits should be assessed from actions, rather than from judgments and feelings”).


152 See Johnson & Ricci, supra note 147, at 665; see also Lyman Johnson & Dennis Garvis, Are Corporate Officers Advised About Fiduciary Duties, 64 Bus. Lawyer 1105, 1105-06 (2009).

153 I am speaking of outside / independent directors here.

154 See Nicola Faith Sharpe, The Cosmetic Independence Of Corporate Boards, 34 Seattle U. L. Rev. 1435, 1453 (2011); but see Marcel Kahan and Edward Rock, Embattled
All this strongly suggests that a corporation’s officers have a superior interest in exercising virtue on behalf of the corporation relative to the interest of directors. Indeed, a corporate officer’s development as a human being may very well turn on how he or she discharges the corporate duties that dominate his or her daily life – such is not ordinarily the case when it comes to directors. Not surprisingly, therefore, the call for ethics in business “does not come primarily from an outraged public, the polemics-hungry press, or publicly-minded congressional committees. It comes from executives themselves who want the opportunity to think through and clarify the conflicts which they find themselves in on a daily basis.”

Related closely to the question of interest is the question of vulnerability. Inability to exercise virtue in his or her role as an officer can impact an officer’s life in a tremendous way. Indeed, as mentioned, it could very well be a (de)formative influence in the officer’s life. A director’s life, on the other hand, is not so heavily characterized by his or her duties as a board member, and as such is significantly less vulnerable to harms occasioned via a restriction on his or her moral judgment.

Unfortunately, officers are a woefully under-theorized component of the corporate enterprise, and this undermines pinning anything upon officers.

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*CEOs, 88 Tex. L. Rev. 987, 1044 (2010) (“The shift of power from CEOs to outside board members also has implications for the type of persons who will serve on corporate boards. Compared to outside directors fifteen years ago, outside directors today are likely to have more power, to enjoy a less collegial relationship to the insiders, to have a greater workload, to earn greater pay, to have occasional need to become confrontational, and to deal more often with vocal and restive shareholders.”)

155 “For the lives of individuals are constituted in large part by the various roles that they play…” Alasdair MacIntyre, *Social Structures and Their Threats to Moral Agency*, 74 Philosophy 311, 315 (1999). Adopting a rule which placed a corporation’s moral direction in the hands of its officers would also, it seems, comport with a Rawlsian sense of justice as well (given the preceding discussion of interests and vulnerabilities). *Cf* See **EDWIN M. HARTMAN, ORGANIZATIONAL ETHICS AND THE GOOD LIFE** 85 (1996).


157 “Aristotle taught that we tend to become what we do.” Wines & Hamilton, *supra* note 76, at 72. In more recent times, Katherine Kruse has eloquently remarked: Because our personal moral commitments play such an important role in shaping our lives and personal identities, acting contrary to our moral values engenders a sense of personal failure and special regret, even if that failure is due to circumstances outside of our control. Once chosen or articulated through life decisions, achieving a life consistent with our values becomes an important part of our personal identities – or, in the words of Bernard Williams, the nexus of “ground projects” that give shape and meaning to our lives.


as a class. Hopefully, the efforts taken to distinguish officers from directors here will serve the additional purpose of helping to rectify this under-theorization.

In sum, then from a nexus-of-contracts perspective it would appear as though the officers of a corporation constitute that constituency which is most critical to the question of virtue.\footnote{This is not to suggest that the other constituencies play no role, but merely that the officers play the most vital role. The board of directors, in particular, would still need to play an important supporting role. See Sims, supra note 16, at 21.}

\section{C. Virtue and Corporate Law – a Diagnosis}

Having identified corporate officers as the key to corporate virtue, we can now turn to the question of how best to reform corporate law so as to simultaneously (i) foster virtue among corporate officers and (ii) empower the exercise of virtue among corporate officers (two interrelated, and mutually enforcing aims).\footnote{Of course, some will object to any effort to empower a corporation’s officers with the ability to bring moral judgments into his or her decision making process. “Cries of inefficiency and moral imperialism from the right would be matched by cries of insensitivity and illegitimacy from the left, all in the name of preserving us from corporations and managers run morally amok.” Kenneth E. Goodpaster & John B. Matthews, Jr., \textit{Can a corporation have a conscience?} 60 HARV. BUS. REV. 132, 137 (1982). With Goodpaster and Matthews I believe that the responses to these concerns are largely convincing. See id. at 139-41.} In this section and the one immediately following, I shall not lay out a comprehensive plan for reform, but will instead, in broad strokes, outline substantive and structural obstacles to corporate virtue, and suggest changes that I believe would help remove these articles.

Substantively, the simplest and most effective way for corporate law to encourage and promote virtue is to stop punishing it.\footnote{Wines & Hamilton, supra note 76, at 75.} And as currently fashioned and interpreted, that is essentially what corporate law does – it precludes corporate officers and directors from taking moral considerations into account \textit{per se}, and threatens them with liability to the extent that they do. As Williams Wines and Brooke Hamilton wrote: “it is necessary to look for ways to redesign the corporate box so that working within it does
not exclude law and ethics as decision-making factors.”

The primary culprit in maintaining a “corporate box” that excludes considerations of virtue is the “shareholder primacy norm.” As generally (although, arguably, incorrectly) understood, the shareholder primacy norm directs a corporation’s officers (and directors) to endeavor toward the maximization of shareholder wealth. This single-minded objective countenances no role for moral or ethical thought (unless such considerations have instrumental value, and can themselves be marshaled toward the furtherance of shareholder wealth). Indeed, the only restriction on an officer’s (or director’s) decision making within the paradigm of shareholder primacy is obedience to the law (and there are even scholars who question that). As MacIntyre summarized it:

In his capacity of corporate executive, the manager not only has no need to take account of, but must not take account of certain types of considerations which he might feel obliged to recognise were he acting as parent, as consumer, or as citizen.

Toward this singular end, officers and directors are bound via judicially-enforceable fiduciary duties of care and loyalty, under pain of a shareholder derivate lawsuit should they waver.

The force of this directive is somewhat blunted by the “business judgment rule,” pursuant to which the courts will ordinarily presume that a corporate defendant did indeed fulfill his or her fiduciary duties when deciding upon a particular course of action. But the business judgment rule notwithstanding, the shareholder primacy norm remains a powerful

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162 See Lyman Johnson, Corporate Law Professors As Gatekeepers, 6 U. ST. THOMAS L.J. 447, 450 (2009) (“no law requires that businesses pursue only the goal of corporate profit or the goal of investor wealth maximization”); Judd F. Sneirson, Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance, 94 IOWA L. REV. 987, 995-1007 (2009); Colombo, supra note 140, at 268-70.


164 See Frank Easterbrook and Daniel R. Fishel, Antitrust Suits by Targets of Tender Offers, 80 Mich. L. Rev. 1155, 1168 n.36 (1982) (“managers have no general obligation to avoid violating regulatory laws, when violations are profitable”).


166 See Bainbridge, supra note 120, at 408-410.

167 See Sneirson, supra note 162, at 1005-06.
influence nonetheless for at least a couple of reasons.

First, the availability of the business judgment rule as a defense for corporate officers (as opposed to corporate directors) is not entirely settled.\textsuperscript{168} Indeed, the most recent decision from the Delaware Supreme Court was not entirely clear on this very question.\textsuperscript{169} Thus, although most commentators believe the rule is applicable to officer conduct,\textsuperscript{170} the existence of doubt can only work to impede any divergence from the shareholder primacy norm.

Second, and most importantly: even if the business judgment rule clearly applies to protect corporate officers, the powerful expressive power of the law remains. The simple fact that officers are understood to have a fiduciary duty to maximize shareholder wealth has enormous sway even if this duty is practically unenforceable under most circumstances. For a growing body of scholarship supports the notion that law possesses an “ability to influence individual behavior by an existence decoupled from its enforcement.”\textsuperscript{171} Indeed, the officer or director who takes his or her corporate duties seriously will often consider the “right thing to do” as deciding in favor of a project or undertaking that maximizes shareholder wealth, without reference to potential liability for choosing otherwise.\textsuperscript{172} Thus, the law conditions corporate officers to view shareholder primacy as not merely an operational objective, but as an ethical obligation as well. And this norm perniciously displaces other notions of right and wrong - even the personal morality of the decision-maker.\textsuperscript{173}

\textsuperscript{168} See Lyman P.Q. Johnson & Robert V. Ricca, (Not) Advising Corporate Officers About Fiduciary Duties, 42 WAKE FOREST L. REV. 663, 663 (2007); Bainbridge, supra note 120, at 285-86.

\textsuperscript{169} Gantler v. Stephens, 965 A.2d 695, 709 (Del. 2009).


\textsuperscript{171} Elizabeth M. Glazer, When Obscenity Discriminates, 102 NW. U. L. REV. 1379, 1384 (2008).

\textsuperscript{172} See Wines & Hamilton, supra note 76, at 73-74 (discussing the influence of role on behavior); see also DANIEL J. H. GREENWOOD, THE RANGES OF EVIL: MULTIDISCIPLINARY STUDIES IN HUMAN WICKEDNESS (Interdisciplinary Press, 2006).

\textsuperscript{173} “In the ensuing anarchy the bad drove out the good, the big drove out the small, and the brawn drove out the brains. There was a single trait common to denizens of the back row … [t]hey sensed that the needed to shed whatever refinements of personality and intellect they had brought with them to Salomon Brothers.” MICHAEL LEWIS, LIAR’S POKER (quoted in Solomon, supra note 21, at 13). Anecdotally, I have had the pleasure of teaching a corporate governance seminar at two different law schools over the past three years. An early exercise performed in the seminar requires the students to imagine themselves to be partners in a partnership. I ask the students whether, as partners, they would authorize the creation and sale of “puppy torture videos” if such videos would be
observed:

Managers themselves and most writers about management conceive of them as morally neutral characters whose skills enable them to devise the most efficient means of achieving whatever end is proposed. Whether a given manager is effective or not is in the dominant view a quite different question from that of the morality of the ends which his effectiveness serves or fails to serve.\textsuperscript{174}

Thus, substantively speaking, the shareholder primacy norm appears to be the principal obstacle to a more robust consideration of virtue among corporate officers. This is a particularly curious development since none less than Peter Drucker, “the man who invented management,”\textsuperscript{175} has opined that “[t]here is only one ethics, one set of rules of morality, one code, that of \textit{individual} behavior in which the same rules apply to everyone alike.”\textsuperscript{176} He rejected the notion that one’s morality needed to be checked at the office or boardroom door.\textsuperscript{177}

This naturally raises the question: how did such an unyielding norm come into being? How has the bifurcation of “private” versus “corporate” morality come about? Although the shareholder primacy norm is the means by which this bifurcation is perpetuated, there is no reason why the norm needed to take on such an imperialistic quality. In other words, we can readily imagine a state of affairs pursuant to which the norm is qualified by notions of private and/or traditional morality. Instead, we come to accept a state of affairs well captured by Bismark’s remark: “What a scoundrel a minister would be if, in his own private life, he did half the things he has a

profitable (both short and long term). The students unanimously oppose the idea. Later on, I ask the students to imagine themselves to be corporate directors. Once again I confront them with an opportunity to produce and sell “puppy torture videos,” which (once again) I posit would be profitable. This time, the students overwhelmingly approve the proposal. Their reasoning: their duty as directors requires them to put aside their personal moral qualms and pursue whatever opportunities would maximize shareholder wealth. When pressed as to who has the ultimate moral responsibility for making such decisions, they respond: “the shareholders.”

\textsuperscript{174} Alasdair MacIntyre, \textit{AFTER VIRTUE} 74 (1984) (\textit{quoted in John Dobson, MacIntyre’s Position on Business: A Response to Wicks, 7 BUS. ETH. Q. 125, 128 (1997)}). Indeed, “modern business is so immersed in its context of individualism, acquisitiveness, and market values that it does not even realize that this is a [moral] context.” John Dobson, \textit{MacIntyre’s Position on Business: A Response to Wicks, 7 BUS. ETH. Q. 125, 128 (1997)} (emphasis in original).

\textsuperscript{175} John A. Byrne, \textit{The Man Who Invented Management}, \textit{BUSINESSWEEK}, Nov. 28, 2005.


\textsuperscript{177} See \textit{id.}
duty to do to be true to his oath of office”?

Philosophically, this phenomenon is a form of casuistry. It is predicated on the notion that one’s moral obligations change when one is no longer deciding for himself or herself, but on behalf of a group for which he or she is responsible. Jane Jacobs explored this subject at length in her classic work, “Systems of Survival.” According to Jacobs, the mixture of moral norms suitable in one context to another is not merely unnecessary, but rather threatens the creation of “monstrous moral hybrids.”

Although casuistry could operate to ratchet up one’s moral obligations (such as when a mother sacrifices what is rightfully hers for the well-being of her children), it can also take on a less savory character (as exemplified by Bismark’s remark). Moreover, although casuistry can be justifiably defended in principal, on a practical level it suffers from a serious defect: it largely enables those in positions of responsibility to evade traditional notions of morality and define for themselves what their moral obligations are given their particular situation. A more direct conflict of interest is difficult to find.

Nevertheless, this article does not endeavor to resolve the debate over casuistry. Indeed, the debate is fraught with difficulty. As R.H. Tawney aptly observed:

To argue, in the manner of Machiavelli, that there is one rule for business and another for private life, is to open the door to an orgy of unscrupulousness before which the mind recoils. To argue that there is no difference at all is to lay down a principle which few men who have faced the difficulty in practice will be prepared to endorse as of invariable application, and incidentally to expose the ideas of morality itself to discredit by subjecting it to an almost intolerable strain.

Fortunately, this dilemma need not be resolved here. For present purposes, I believe we can proceed upon the assumption that there is (or should be) more of an overlap than presently appreciated. More

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178 Id. at 26. Drucker distinguishes casuistry from the ethics of interdependence, which he ascribes to Confucian origin. See id.
179 See id. at 22.
180 See id.
182 Id. at 80-81.
183 See supra text accompanying note 178.
184 See MONROE FREEDMAN AND ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 46-50 (2010).
185 See Drucker, supra note 176, at 24.
specifically, it would seem to me that an individual who becomes a corporate officer takes on *additional* moral and ethical duties on account of that role – but in so doing does not, as a general matter, relinquish pre-existing moral duties. Indeed, a major theme of virtue ethics is to live one’s life consistently – to “view one’s life as a whole and not separate the personal and the public or professional, or duty and pleasure.” Thus, while an individual’s role or station in life might impose upon him or her a new set of ethical duties, these duties should not ordinarily be understood to conflict with other operable, pre-existing ethical duties. (Application of the greatest of virtues to Aristotle – “phronesis” or “prudence” – should help an officer appreciate this and navigate any apparent conflict.)

Moreover, the position that one need not subjugate his or her moral principles while serving as a corporate officer arguably has support from sources of mainstream corporate law as well. Consider, for example, the American Law Institute’s Principles of Corporate Governance. The Principles define the officer’s duty of care in section 4.01 as “to perform the director’s or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.”

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Consider also section 2.01 of the Principles (“The Objective and Conduct of the Corporation”) which reads:

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187 Solomon, *supra* note 21, at 145.
188 On this point in particular I part company with Robert Solomon, who declares that there is “no denying the disunity of virtues” and admits the possibility of intractable conflicts of demands due to one’s various roles and responsibilities in life. See id. at 167, 260-61. To resolve these conflicts, Solomon says an individual must rely on his or her judgment and simply do the best that he or she can in the situation. See Solomon, *supra* note 21. I, on the other hand, am of the belief that one’s ethical obligations should not conflict if properly understood and appropriately defined. See Earl Conee, *Against Moral Dilemmas*, 91 The *Philosophical Review* 87 (1982); see also “Moral Dilemmas,” STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010). Consider a father who promises to take his son to a ballgame on Saturday. Assume the father’s car breaks down, and the only way he can get his son to the game in time would be to “borrow” (without permission) his neighbor’s car by hot-wiring it (assume further that the father grew up in Brooklyn). Are we confronted with an irreconcilable clash of duties – the duty to keep one’s promises, and the duty to obey the law? Of course not – the father’s duty to keep his promise was subject to the unstated proviso that he was able to reasonably (and lawfully) fulfill it. For an example of an attempt to provide moral reasoning to a more difficult situation, see Lois Shepherd, *Sophie’s Choice: Medical and Legal Responses to Suffering*, 72 *Notre Dame L. Rev.* 103, 148-56 (1996).
191 *Id.* at §4.01.
(a) … a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.

(b) Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:

(1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law;

(2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and

(3) May devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.  

Neither section 4.01 nor section 2.01 suggests that the officer must disregard his or her humanity by discarding the dictates of morals and conscience. Certainly, the officer’s conduct must be directed to “the best interests of the corporation,” but conjunctively joined to this objective is the command that the officer exercise “the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.”

I would suggest that an “ordinary” person, prudent or otherwise, would be an individual in possession of some pre-existing sense of right and wrong, some moral code by which he or she lives.

Further, section 2.01 explicitly acknowledges that pursuit of corporate objectives “[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business.” This would appear to confirm the propriety of an officer’s exercise of independent moral judgment. Thus, an officer’s reliance upon his or her moral principles in the executive of his or her corporate duties would not appear to be in derogation of the officer’s ethical obligations to the firm, but rather fully consistent with such obligations.

The shareholder primacy norm, as generally understood (as obliging strict shareholder wealth maximization) could thus be viewed as unnecessary and detrimental casuistry at work. Unnecessary because it

192 Id. at §2.01.
193 Id. at §4.01.
194 Id. at §2.01.
195 Similarly, the exercise of independent moral judgment on the part of businesspeople does not appear to be problematic to Jacobs, but rather salutary. See Jacobs, supra note 181, at 63-65.
196 Alasdair MacIntyre, Corporate Modernity and Moral Judgement: Are They Mutually Exclusive?, in ETHICS AND PROBLEMS OF THE 21ST CENTURY 122, 126-27 (K.E. Goodpaster & K. M. Saye, eds. 1979) (“Corporate existence … presupposes a separation of spheres of existence, a moral distancing of each social role from each of the others…. Thus, when the executive shifts from the sphere of the family to that of the corporation he or she necessarily shifts moral perspective.”).
fails to accurately capture the law’s nuances, for the reasons set forth immediately above.\textsuperscript{197} Detrimental because it operates in the face of a significant conflict of interest. In corporations, executive compensation (and, moreover, job retention) is often linked to performance.\textsuperscript{198} (And performance, in turn, is usually linked to corporate profitability and stock appreciation.)\textsuperscript{199} Officers are thus confronted with a situation where it pays them — literally — to discard traditional notions of right and wrong in favor of a rule that permits them to do pretty much whatever they can to increase shareholder wealth. This is a powerful material incentive for any human being, and suggests that the expansive understanding of the shareholder primacy norm may be an example of rationalization.

And then there is the added influence of peer pressure. Shareholder satisfaction, ordinarily driven by profits and upward stock movement, affects all the corporation’s officers and, understandably, has become a matter of some fixation.\textsuperscript{200} As such, anything that a particular officer might do to jeopardize shareholder contentment concerns every other officer in the firm (professionally and personally). Hence, an officer whose scrupulosity interfered with the firm’s financial success is not likely to be the most popular of colleagues. As Robert Solomon explained:

What (outside the corporation) might count as “character” tends to be more of an obstacle than a boon to corporate success for many people. What seems to count as “character” in the corporation is a disposition to please others, obey superiors, follow others, and avoid personal responsibility.\textsuperscript{201}

Consider the possible long-term effects of such an environment on the individual officer from a virtue-ethics perspective. Such an environment not only pressures a corporate officer to put aside his or her moral qualms regarding any given situation (or series of situations),\textsuperscript{202} but also has the potential to shape the officer’s personal character over time.\textsuperscript{203} It serves to

\begin{itemize}
  \item[197] See supra text accompanying notes 190-195.
  \item[198] See Sims, supra note 16, at 21.
  \item[199] See 1 HR SERIES COMPENSATION AND BENEFITS §2:17 (2011); WILLIAM A. CALDWELL, COMPENSATION GUIDE §17:1 (2011).
  \item[202] See id. (“people in corporations tend to behave in conformity with the people and expectations that surround them, even when what they are told to do violates their ‘personal morality’”).
\end{itemize}
socialize the officer in a way detrimental to many of the virtues he or she had previously developed.\textsuperscript{204}

Structural factors also work to separate a corporate officer from his or her personal moral compass.\textsuperscript{205} The multiple levels of authority, from shareholders, to directors, to officers, to other employees, engender confusion over the question of ultimate moral responsibility for corporate decision-making.\textsuperscript{206} This evokes both the chilling Nuremberg refrain of “just following orders,” along with the results of the Milgram experiments regarding acquiescence to authority.\textsuperscript{207}

Additionally, thanks to globalization, an executive in New York can sell products to customers in California – products that were manufactured in Switzerland via component parts supplied from China. The vast distances involved in such globalized commerce (both physically and psychologically) enable a certain level of callousness in decision making that is less likely in face-to-face / locally confined transactions.\textsuperscript{208}

Finally, the heavily regulated world in which corporations operate (especially if they happen to be financial corporations) implicates the problem of “crowding out” morality. Research suggests that actors in heavily regulated contexts often come to equate their moral and ethical obligations to their legal / regulatory obligations.\textsuperscript{209} This is problematic and further hinders the development of virtue because, for a variety of reasons, not all that is legal is virtuous, and corporate actors fall into the habit of acting (and sometimes believing) otherwise. Regulatory requirements, as per Aristotle, might help effectuate virtue – especially if they are viewed as

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\item \textsuperscript{204} See Moore, supra note 203, at 244.
\item \textsuperscript{205} See RONALD Sims, supra note 16, at 21 (“the bureaucratic structure of modern corporations encourages managers to behave unethically”); Alasdair MacIntyre, Corporate Modernity and Moral Judgement: Are They Mutually Exclusive?, in ETHICS AND PROBLEMS OF THE 21ST CENTURY 122, 132 (K.E. Goodpaster & K. M. Saye, eds. 1979) (“In order for moral judgments to be made at all certain social conditions have to be satisfied, conditions which are incompatible with the structures of corporate modernity.”).
\item \textsuperscript{206} See id. at 122 (“corporate structures fragment consciousness and more especially moral consciousness”); Geoff Moore, Corporate Moral Agency: Review and Implications, 21 J. BUS. ETHICS 329, 334 (1999) (identifying phenomena of “groupting” and “risky shift” in organizational life); Michael J. Phillips, Corporate Moral Responsibility: When It Might Matter, 5 BUS. ETH. Q. 555, 567 – 68 (1995); Solomon, supra note 21, at 7 (“the rubber check of corporate responsibility bounces up and down the hierarchy and seems to get cashed out nowhere”); see also supra note 173.
\item \textsuperscript{207} Simply put, “[p]eople act differently when they are in groups than when they are not.” Wines & Hamilton, supra note 76, at 44; see also See Robert C. Solomon, Victims of Circumstances? A Defense of Virtue Ethics in Business, 13 Bus. Eth. Q. 43, 49 (2003).
\item \textsuperscript{208} Cf. Steve Twedt, E-Mail Isn’t the Way to Build Trust at Work, PITT. POST-GAZETTE, July 11, 2010, F1.
\item \textsuperscript{209} See Ronald J. Colombo, Trust and the Reform of Securities Regulation, 35 DEL. J. CORP. L. 829 (2010).
\end{itemize}
the floor or permissibly ethical behavior.\textsuperscript{210} Unfortunately, regulatory requirements are all too often internalized as coterminous with (and, effectively, a ceiling on) the demands of ethics.\textsuperscript{211} This can serve to thwart further ethical development.

All that said, as indicated previously, role differentiated morality is not (in theory) necessarily problematic.\textsuperscript{212} One may very well take the position that, given the specific purpose of the corporation, and given the specific role that officers play within the corporation, the ethical thing for an officer to do is to maximize shareholder wealth.\textsuperscript{213} Indeed, this is, as mentioned, exactly the perspective of many commentators and officers themselves.\textsuperscript{214}

That said, I question such a position on a number of grounds. As mentioned, I find it too convenient, and fear that it constitutes but a pretextual fig leaf clothing otherwise naked ambition.\textsuperscript{215} But even granting the belief’s sincerity, where else in life would an ethical obligation such as this one (regarding property) override all others (including issues of health and safety)? Consider a few analogies: would someone, in whose hands is entrusted the safekeeping of another person’s automobile, sacrifice his life (or that of another) for the protection of the car? Would someone, in whose hands is entrusted the safekeeping of another person’s home, sacrifice her life (or that of another) for the protection of the home? Most people would not, which underscores the point that most ethical principles do indeed, at some point, yield to other, more pressing ethical principles. (Or, perhaps more accurately, most or many ethical obligations are presumed contingent upon situation, context, and other obligations.) Thus, although one can certainly hold the view that, as a corporate officer, it is her duty to maximize shareholder profits, I would suggest that few ethicists (and even the officer herself) would subscribe to the position that this particular ethical obligation override all others. And once that is acknowledged, it simply becomes a question of which other ethical principles should counteract the wealth maximization norm, and when.

\textsuperscript{210} See supra note 96.
\textsuperscript{211} Cf. Solomon, supra note 21, at 161 (“The idea that the moral life is largely a matter of carrying out the duties which attach to one’s ‘station’ in society presupposes an unacceptably conformist attitude towards established social arrangements.”) (quoting Alistair M. MacLeod).
\textsuperscript{212} See Freedman and Smith, supra note 184 and accompanying text.
\textsuperscript{215} See supra text accompanying notes 184-199.
We are finally in a position to consider possible curatives to the problem of corporate virtue. Not surprisingly, these curatives largely track, and attempt to counter, the obstacles to corporate virtue identified above.\textsuperscript{216}

1. Expansion of the Business Judgment Rule

As mentioned, corporate law currently dissuades the exercise of virtue (for directors and, most relevantly, for officers) via the shareholder primacy norm.\textsuperscript{217} Officers who refrain from maximizing shareholder wealth due to moral concerns face the prospect of liability in a shareholder derivative lawsuit.

One of the most obvious steps that could be taken to remedy this situation is to clarify the applicability of the business judgment rule to officer conduct. The coverage that this protection affords would provide officers with some breathing room when it comes to the exercise of moral discretion in the workplace.

The problem with this approach is that it would be over inclusive (from a virtue ethics perspective) because it would cloak all of an officer’s decisions under its protection, and not merely those related to the exercise of virtue.\textsuperscript{218} Given the discomfort that some scholars have expressed in response to the idea of extending business judgment rule protections to officers,\textsuperscript{219} we should ponder whether a more narrowly tailored approach is possible.

An example of such a narrower approach would be to hold the business judgment rule applicable only to those situations where an officer veers from the shareholder primacy norm in deference to his or her moral values.\textsuperscript{220} Such a rule would be akin, in many respects, to a conscience

\textsuperscript{216} See supra Part III.C.
\textsuperscript{217} See supra text accompanying notes 162-166.
\textsuperscript{218} By “all” I mean to the same extent as the business judgment rule protects director decision making – protection that extends to all decisions absent a showing of fraud, illegality, conflict of interest, bad faith, or gross negligence. Bainbridge, supra note 120, at §6.4.
\textsuperscript{220} Despite the broad diversity of moral opinion that marks 21\textsuperscript{st} Century, implementation of this exception should still be possible. “While philosophers have been unable to agree upon any ultimate principle of the good which would define ‘correct’ moral judgments, most philosophers agree upon the characteristics which make a judgment a genuine moral judgment….. In this sense we can define a moral judgment as ‘moral’ without considering whether it agrees or not with our own judgments or standards.” Kohlberg, supra note 109, at 405.
protection clause, something with which the law is already familiar. It would protect the officer from shareholder derivative lawsuit liability only in situations falling within these narrow parameters.

The benefits of such a rule would be limited if the officer, although largely shielded from derivative litigation liability, would nevertheless be subject to an adverse employment action as a result of the exercise of his or her moral judgment. (Indeed, such a situation calls to mind the old joke that in the Soviet Union every citizen had the freedom to speak his or her mind – but only one time.) There is no easy solution to this problem.

From the officer’s perspective, the corporation is the venue in which he or she will, in all likelihood, work out his or her fruition as a human being. It is at work, which will consume most of the waking hours of his life, that the officer will most likely make the daily decisions that will form him into the person he will ultimately become. Culture, including corporate culture, “gives people’s lives meaning.” To the extent that an individual’s values are shaped by his or her working environment, it is not too much of an exaggeration to say that the individual is “a corporate creation.”

From the perspective of the board, and of the officer’s colleagues, the corporation is not a democracy in which each person should be necessarily free to “define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.” It is instead, largely, a command-and-control institution, where order and obedience are paramount. To furnish each officer with broad discretionary latitude would be unworkable, and detrimental to the ends of the corporation.

Reconciling these important and justifiable interests is difficult. Here, I shall sketch the contours of a possible means to do so.

Starting with the officer, it would seem fair to require complete and full disclosure on his or her part before taking a particular moral stand. This *ex ante* declaration is important for at least two reasons: (i) it will serve to sensitize his or her colleagues and/or the board to the moral issues at stake, thus possibly sparking a dialogue in which either the officer, or the officer’s colleagues, may shift their position (thus resolving the situation); and (ii) it

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223 See supra note 155; see also Al Gini, A Short Primer on Moral Courage, in MORAL COURAGE IN ORGANIZATIONS 8 (Debra R. Comer and Gina Vega eds., 2011).

224 See Hartman, supra note 159, at 155.

225 See id.

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is necessary to establish a clear record of the officer’s position – a record that could be reviewed in the event of a legal challenge over the sincerity of the officer’s claim, and a record that could be helpful in the event of future situations where the same officer’s exercise of moral judgment again raises problems within the firm. We do not want to enable an officer to use moral qualms as a post hoc concoction in defense of an assertion of bad decision-making / dereliction of duty.

Such disclosure should extend not only to complete candor when explaining the reasoning behind his or her moral judgment ex ante – but also, arguably, to the hiring and promotional process as well. To the extent reasonably implicated by the corporation’s line of business, or a particular position’s responsibilities, the officer should be required to reveal whatever relevant moral commitments he or she holds (insofar as they are unlikely to be appreciated by the firm). Matters of common morality, such as opposition to murder and theft, would not require disclosure. But to the extent that the prospective officer holds strongly held beliefs that are not universally shared (such as an opposition to gambling, alcohol, or tobacco), and to the extent that such beliefs could reasonably, foreseeably come into play given the company and/or position in question, he or she should be required to divulge them upon or before hiring (and upon a promotion, to the extent any previous disclosure would be insufficient). Failure to make such disclosure calls into question the authenticity of the officer’s commitment to such principles and beliefs, and would jeopardize the officer’s protestations should a controversy arise over the later exercise of his or her moral judgment. Moreover, should an individual’s deeply held beliefs conflict so much with his or her potential firm’s business philosophy as to jeopardize that individual’s hiring, it would appear as though that particular firm is not a good place for the individual to work. In other words, if he or she is sincere about his or her values, a career with such an employer would not seem appropriate. Disclosure is also necessary out of fairness to the corporation. When hiring or promoting an officer, the corporation should be apprised of all material facts that might affect the officer’s ability to discharge his or her putative future duties. Such disclosure is also necessary to enable the board of directors and senior management to fulfill their proper function within the corporation: the function of managerial oversight. This function cannot be capably carried out if key decision makers are deprived of material information.


228 Bear in mind that the individual in question is a corporate officer, and not a low-level employee.

229 See Bainbridge, supra note 120, at 231-32.
regarding the corporation’s officers.

Additionally clarity could be achieved if the firm were to amend its charter to spell out the parameters of the business judgment rule as applicable to its officers. Just a partnership may narrow (or broaden) the understanding of “fiduciary duty” for purposes of the partnership, and just a contract may narrow the understanding of “good faith” for its purposes, a corporation should be permitted to set reasonable parameters on the freedom of officers to exercise moral judgment within the corporation. This can take many forms, ranging from the endorsement and articulation of certain moral principles, to the disavowal of certain moral principles.

Finally, the employment law concept of “accommodation” could be utilized to require the corporation to work around an individual officer’s personal moral qualms whenever reasonably possible. Responsibility for a project deemed objectionable by an officer could be transferred to someone else. If future conflicts are anticipated, perhaps the officer himself or herself can be transferred. In sum, when an officer raises a conscientious objection to a proposed undertaking, there are solutions short of (a) abandoning the undertaking altogether and (b) dismissing the officer. Those solutions should be seriously explored.

Should an accommodation prove unreachable, and should it concern a matter that was not raised during the hiring or promotion process, the corporation should have the power to let the officer go. But it might be a good idea to require that such a resignation / firing come in the form of a “noisy withdrawal” if the corporation in question is a public one. Borrowing from the “noisy withdrawal” rule that the SEC considered in the wake of the Sarbanes-Oxley Act, and the current requirement that public companies disclose whenever an executive departs for “policy reasons,” this rule would require a company to report to the SEC and disclose to the

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230 See HOWARD O. HUNTER, MODERN LAW OF CONTRACTS §8:8 (2011); STEPHEN M. BAINBRIDGE, AGENCY, PARTNERSHIPS & LLCs 147-49 (2004).

231 See 1 PAUL H. TOBIAS, LIT. WRONG. DISCHARGE CLAIMS, §2:55 (2011);

232 If the matter did not come up because the officer intentionally or recklessly withheld his or her beliefs during the hiring or promotion process, than the corporation should certainly have the right to dismiss the officer. But even if the only reason the matter did not come up was because it was not implicated by the position or the employer’s line of business (in other words, because the officer had no reason to raise whatever moral concern that has now become an issue at that earlier time), it would still seem fair, ceteris paribus, to allow the corporation to dismiss the officer.


public (via a Form 8-K) whenever an officer resigns or is fired due to a moral or ethical disagreement. Moreover, the filing should set forth, in reasonable detail, the crux of the moral disagreement. This would ensure that such issues do not escape the attention of the board of directors, but rather percolate up to the highest levels within the corporation. It would also enable shareholders and other corporate constituencies to exercise their own moral judgment and act upon this information should they decide to do so.

A common concern raised by such a proposal is that it would essentially enable each officer to march to the beat of his or her own drum, giving rise to a cacophony of conflicting moralities within the firm.\(^{235}\) (This, in turn, is simply one manifestation of the moral pluralism that marks modern society.\(^{236}\)) A better approach, some would suggest, would be to still such competing moral voices, prescind from moral questions, and simply focus wealth maximization and the limits of the law as our guides.\(^{237}\)

Such, of course, is an entirely understandable approach. Corporate decision making is difficult enough without the added complexity of taking into account concerns beyond wealth maximization.\(^{238}\) Simply put, ethical discourse can get “sloppy,” and as such many wish to avoid getting bogged down by it.\(^{239}\) But we ought to be clear about something: the “cleaner”, more limited approach is not a “morally neutral” or “amoral” one (as its proponents or detractors often suggest\(^{240}\)). Such labels mask the true nature of the wealth-maximization approach: this position is itself a point of view.

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235 Some have raised the concern that such an approach would lead to lawlessness, as it would give corporate officers license to discard fiduciary duties in deference to their particular moral scruples. Cf. Employment Div., Dept. of Human Resources of State of Or. v. Smith, 485 U.S. 660 (1988) (addressing the unmanageability of a society in which each individual could determine which laws to follow or not based upon his or her own conscience). Although the general thrust of this concern is meritorious, use the term “lawlessness” is an exaggeration. This is because we are dealing primarily with norms (namely, the shareholder primacy norm). Whether an officer is legally obligated to pursue wealth maximization (versus normatively encouraged to do) is a hotly contested issue. Compare Bainbridge, supra note 120, at 417 (“Shareholder wealth maximization is not only the law….) with See Lyman Johnson, Corporate Law Professors As Gatekeepers, 6 U. St. Thomas L.J. 447, 450 (2009) (“no law requires that businesses pursue only the goal of corporate profit or the goal of investor wealth maximization”).


237 See Ronald J. Colombo, Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives, 73 Brook. L. Rev. 91, 92-93 (2007).

238 See Sims, supra note 16, at 40.

239 Solomon, supra note 21, at 48.

informed by its own moral reasoning.\textsuperscript{241} I do not disparage this perspective, but rather suggest that the common good would be better furthered by an approach which embraces, rather than silences, moral conversation.

Indeed, the fear of moral diversity calls to mind James Madison’s famous invection against factions.\textsuperscript{242} But for all his fear of factions, Madison insisted that eliminating the liberty that is their “air” would be a remedy “worse than the disease.”\textsuperscript{243} Instead, what is needed (along the lines of what Madison recommended) is a means for managing moral diversity.\textsuperscript{244} Although a detailed plan for managing such diversity is beyond the scope of this article, scholars are already exploring ways to do just this.\textsuperscript{245} Anecdotally, I hasten to add that other forms of business organizations, such as partnerships, have apparently been able to thrive despite any limitation on an individual manager’s (partner’s) ability to exercise personal moral judgment.\textsuperscript{246}

Moreover, it would seem to be folly to quash (versus find ways of managing) dissenting moral viewpoints from corporate decision making for a variety of reasons. Aside from the harm this would cause to the officers individually, it also appears to make poor business sense. It would serve to foster “groupthink,” a dangerous phenomenon for both ethical and non-ethical business reasons.\textsuperscript{247} It cuts against the literature supporting “the value of diversity to corporate culture and performance,” and studies suggesting that “diverse firms have an economically meaningful 1-4\% higher net profit margin and 2.5 – 6\% higher return on equity than comparable ... less diverse firms.”\textsuperscript{248} Indeed, a movement to increase the diversity of corporate management has been afoot for some time now – and I see no reason that “moral diversity” ought to be excluded from these efforts.\textsuperscript{249}

\textsuperscript{242} THE FEDERALIST NO. 10 (James Madison).
\textsuperscript{243} Id. (quoted in Jennifer L. Kohn, Federalist #10 in Management #101: What Madison Has to Teach Managers, at 5 (2011) (available at SSRN)).
\textsuperscript{244} Jennifer L. Kohn, Federalist #10 in Management #101: What Madison Has to Teach Managers, at 5 (2011) (available at SSRN) (citing THE FEDERALIST NO. 10 (James Madison)).
\textsuperscript{245} E.g., Katherine R. Kruse, supra note 236, at 442-458 (addressing moral conflicts of interest within the attorney-client relationship); Sims, supra note 16, at 113-127 (addressing ethical decision making within group contexts).
\textsuperscript{247} Sims, supra note 16, at 62-66.
\textsuperscript{248} See Kohn, supra note 244, at 5.
\textsuperscript{249} Bernard F. Matt and Nasrin Shahinpoor, Speaking Truth to Power, in MORAL COURAGE IN ORGANIZATIONS 164-68 (Debra R. Comer and Gina Vega eds., 2011).
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Conversations precipitated by dissenting moral opinions can also fuel the “the development of … corporate character” by sensitizing the corporation and, when coupled with the disclosure requirements suggested previously, its constituencies to other points of view and other firmly held standards of right and wrong. As Edwin Hartman explained:

[g]enuinely useful principles come out of our experience with each other …. In the course of that experience certain values and principles may change, for the better if we make moral progress. We reach ever better principles and highest-order desires through experience and conversations and negotiations over a long time in a variety of circumstances.

Additionally, in large organizations, it is highly unlikely that a moral objection posed by an officer is without support from anyone else within the organization. More often, each officer withholds moral judgment out of a fear of isolation and ostracism. That habit of speaking one’s mind with regard to moral issues could have the salutary effect of bringing broadly held, but rarely expressed, convictions to the fore. At a minimum, it may enable a critical mass of support to coalesce around the position – much more support than the officer voicing the concern might have previously imagined, and enough to make a difference in corporate conduct.

Therefore, not only for the sake of its individual officers, but for the good of the corporation as a whole, it would be wise for a business to “welcome differing views not only on specific rules but also on the nature of the good life” as well. And although the “difficulty of reaching a legitimate agreement about what is morally good is real,” this disagreement is “not fatal to moral discourse,” but rather can fuel it.

2. The Shareholder Primacy Norm Revisted
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Thus far we have examined relief from the strictures of the shareholder primacy norm in the form of an expansion of the business judgment rule. But, of course, relief can be supplied in a more direct way as well: the norm itself can be reformulated or replaced.258

As a preliminary matter, it should be noted that expanding the business judgment rule, as discussed previously,259 could itself shape the shareholder primacy norm. By expanding the rule in a way specifically tailored to protect the exercise of conscience, the law would be effectively exalting conscience over profits. This is an example of the expressive function of the law,260 and could be expected to impact the way officers understand their obligations within the firm. Thus, not only would such an expansion afford practical protection (in the terms of a litigation defense) to corporate officers, but could also very well affect the way officers understand their role and responsibilities within the firm.

Beyond that, and more directly, one modest reformulation of the existing norm would be to read “shareholder primacy” to cover not simply the shareholders’ economic interests, but also those sort of interests that human beings should ordinarily be expected to have as well. Human beings are not mere economic automatons, and for officers to treat them as such is an affront to their dignity and not the fulfillment of their genuine wishes.261 Adam Smith recognized this in The Theory of Moral Sentiments, in which he explained that “human nature isn’t just about self-interest. It also includes sympathy, empathy, friendship, love, and the desire for social approval. As motives for human behavior, these are at least as important as self-interest. For many people, they are more important.”262 Within the virtue ethics tradition, Plato condemned as “pleonexia” that “sickness of purpose” whereby an individual is fixated on unadulterated materialistic self-interest.263

Admittedly, most shareholders today are not individuals but institutions. Nevertheless, with perhaps the exception of sovereign wealth funds, these institutions are ultimately owned by a human being (even if several degrees removed). And regardless of ownership per se, all these institutions

258 See John Dobson, MacIntyre’s Position on Business: A Response to Wicks, 7 BUS. ETH. Q. 125, 129 (1997).
259 See supra Part III.D.1.
260 See supra text accompanying notes 171.
263 Solomon, supra note 21, at 5.
(including sovereign wealth funds) are ultimately answerable to human beings.

Another approach is to replace “shareholder primacy” with an obligation to serve all the constituencies of the corporation – an approach sometimes referred to as the “multi-fiduciary approach.” Although I have been critical of this approach (for it does not enable the exercise of virtue \(\text{per se}\), but rather simply enlarges the number of private interests that directors must be attentive to), it would arguably be an improvement to the status quo. For the multi-fiduciary approach could serve to humanize and, consequently, moralize the corporation by forcing its officers to prioritize something other than stock returns.

Either approach could be accomplished via a judicial re-interpretation of officers’ duties, or more directly via an amendment of corporate charters to such effect. Although this position has its supporters, it has been fiercely criticized as well. Its critics contend that corporate officers cannot be expected to serve two masters (let alone multiple stakeholders), and the results will be unsatisfactory.

These critiques are formidable, and have contributed to my own unease with stakeholder approaches. A closely related approach which I shall set forth momentarily, may offer a modest improvement. Predicated upon corporate excellence, this approach does not aim at satisfying a variety of (somewhat arbitrary) constituencies, but rather on simply doing everything well. The focus is on the craft of business, and not the satisfaction of a various stakeholders \(\text{per se}\). This subtle shift may achieve

\[\text{References} \]


\[265\] See Colombo, supra note 118, at 284-85.

\[266\] See John Dobson, MacIntyre’s Position on Business: A Response to Wicks, 7 BUS. ETH. Q. 125, 129 (1997).


\[268\] Matthew 6:24.

\[269\] See George W. Dent, Jr., Stakeholder Governance: A Bad Idea Getting Worse, 58 CASE W. RES. L. REV. 1107 (2008); John Hendry, Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate, 11 BUS. ETH. Q. 159, 173 (2011) (“Despite all the attention given to normative stakeholder theory over the past decade, no one within the business ethics community had made the case for a realistic version of the theory such as might provide a viable practical alternative to the shareholder perspective.”).

\[270\] See Colombo, supra note 118, at 284-85.

\[271\] See infra text accompanying notes 284-292.
much of the same result as a multi-fiduciary approach, while side-stepping some of its difficulties.

3. Importance of Corporate Culture

Enabling officers to exercise virtue does little if the officers have no interest in availing themselves of such newfound freedom.

Moreover, to this point we have largely presupposed a conflict between the officer’s morality and his duty within the corporation – a conflict that Peter Drucker and others have soundly rejected on philosophical grounds. Or, at best, we have envisioned a corporation where the exercise of virtue was allowed – but not necessarily encouraged. And although conflict and free rein can indeed be the seeds of moral progress, the ordinary way in which virtue is developed and nurtured is via a supportive and reinforcing environment. Indeed, sustained moral action usually “requires the support of the right sort of community.”

Thus, a solution premised upon a broadening of business judgment rule protections is minimalistic. It assumes an unhealthy antagonism between an officer’s understanding of the “right thing to do” and the obligations of his or her position within the firm – a kind of “ethical schizophrenia.” “To redescribe this experience in stakeholder terminology, we could say that individuals find the service of shareholder value in tension with their personal values, which would often support a greater degree of priority being accorded to fellow employees, suppliers, or customers ….”

A solution premised on an understanding of shareholder primacy that encompasses non-economic interests is better, but it too merely enables, rather than encourages virtue. A far better solution would be an environment where the practice and development of virtue was actively encouraged by the corporation. Indeed, our “deepest values … are profoundly influenced by our community.” For officers, the corporation is their community (or, at a minimum, one of their communities). Thus,

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272 See supra text accompanying note 176.
273 See supra Part I and text accompanying notes 256-257.
274 See Hartman, supra note 159, at 68.
276 See id.
277 To some, such is not possible in the corporation. To others, the corporation can be a venue in which virtue is truly exercised, developed, and rewarded. See id. at 26. But see id. at 26 (recognizing the argument that capitalism “undermine[s] the possession and exercise of the virtues”).
278 See Hartman, supra note 159, at 146.
what is needed is a corporate culture that fosters virtue.

Corporate culture is “the body of shared beliefs, values, expectations, and norms of behavior that shape life in the organization and account for certain observable artifacts.”

Corporate culture is essential to virtue and morality because “it is a vehicle for imparting and maintaining the moral principles and the values, good and bad, that animate life in the organization.”

Scholarship has increasingly documented the “impact of organizational culture on the ethical standards and moral practices of people in organizations.”

Businesses have recognized this for quite some time, which explains why “corporations and other institutionalized collectives socialize their members to internalize group perceptions and values.” The mainstream business and corporate law literature is filled with scholarship on this phenomenon. One example would be an article by William Wines and J. Brook Hamilton, which identifies no less than twelve “organizational structures that block good conduct:”

a) “Ambiguity about priorities”
b) “Separation of policy decisions from implementation”
c) “Strict line of command”
d) “Strong role models”
e) “Division of work”
f) “Task group loyalty”
g) “Protection from outside intervention”
h) “Believing your own story too much”
i) “giving yourself too much credit”
j) “Circling the wagon and demonizing critics”
k) “praising A and rewarding B”
l) “undervaluing the public good”

Within the virtue ethics tradition, MacIntyre suggests that the sustainability of virtue in a firm will depend upon the degree to which the corporation prioritizes “internal goods” (such as the craft of service or

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279 See Hartman, supra note 159, at 149.
280 See id. at 150; see also Sims, supra note 16, at 107-115.
281 Amanda Sinclair, Approaches to Organisational Culture and Ethics, 12 J. BUS. ETHICS 63, 63 (1993). That said, the most effective way to manipulate organizational culture to foster improved ethical standards and morality remain controversial. See id. at 70-71.
283 Wines & Hamilton, supra note 76, at 62-69.
production itself and the well-being of the corporation’s various constituencies) over “external goods” (such as “profit and shareholder value”).

To be clear, MacIntyre readily acknowledges that “a focus on external goods is both a necessary and worthwhile function of the corporation.” Investors need to be rewarded for the risk they take on, and it is good to provide a means of generating returns on excess capital. The problem arises when this focus comes at the expense of excellence, craftsmanship, and concern for the individuals and communities impacted by the corporation’s activities. John Paul II’s encyclical *Centesimus Annus* articulated this position quite well, and it is worth quoting from it at some length:

> When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been duly satisfied. But profitability is not the only indicator of a firm's condition. It is possible for the financial accounts to be in order, and yet for the people — who make up the firm's most valuable asset — to be humiliated and their dignity offended. Besides being morally inadmissible, this will eventually have negative repercussions on the firm's economic efficiency. In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business.

Thus, to the extent that a corporation’s focus is on excellence – the excellence of its product, and the excellence in its treatment of its various constituencies – the corporation is fertile for the development, growth, and exercise of virtue.

Geoff Moore, a virtue ethicist in the tradition of MacIntyre, also hit upon the importance of instilling a spirit of “craftsmanship” in the work of the corporate officer. As explained in his article *Humanizing Business*:

> The ideal of craftsmanship is to create that which has quality or excellence; personal satisfaction, pride in accomplishment, and a sense of dignity derived from the consequent self-development are the motivations. In an “excellent”

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285 *Id.* at 29.
286 See *id*.
company, it is this ideal that permeates the firm, and management should provide the moral example of such an ideal; a business management craftsperson attempts to create a quality organisation, and quality products and services are the result of such an organization.\textsuperscript{289}

The component parts of taking craftsmanship seriously within the corporation, according to Moore, are manifold. They would include:

- that “individuals … concentrate on the intrinsic value of work in business organisations rather than it instrumental value,”\textsuperscript{290}
- a dedication to “building community” within the business as part of their responsibilities, and to establishing trans-corporate associations that promote and inculcate craftsmanship,\textsuperscript{291}
- identifying and inculcating those virtues particularly necessary to craftsmanship and the corporate enterprise, which Moore suggests include justice, courage, truthfulness, temperance, prudence, trust, and trustworthiness.\textsuperscript{292}

In short, a major step toward creating a corporate environment more hospitable to virtue would be to invert the means-end relationship between product and profit. The production of a product (or the provision of a service) should not be viewed as a means to the end of profits, but rather profits should be viewed as a means to the end of production (and, along with the end of production, comes the related factors of employment, customer satisfaction, and the like). As revolutionary and ambitious as this inversion may seem, it is actually not that far removed from the American Law Institute’s own formulation of business purpose. In its comments regarding “§ 2.01 The Objective And Conduct Of The Corporation,” the A.L.I. explicitly recognizes that “the corporation is a social as well as an economic institution,” concluding that “its economic objective must be constrained by social imperatives and may be qualified by social needs.”\textsuperscript{293}

e. Corporate objective and corporate conduct. The subject matter of these Principles is the governance of business corporations. The business corporation is an instrument through which capital is assembled for the


\textsuperscript{290} Id. at 249.

\textsuperscript{291} Id. at 250-51.

\textsuperscript{292} See id. at 251-52.

\textsuperscript{293} A.L.I. \textit{PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS}, §2.01 (1992).
activities of producing and distributing goods and services and making investments. These Principles take as a basic proposition that a business corporation should have as its objective the conduct of such activities with a view to enhancing corporate profit and shareholder gain. This objective, which will hereafter be referred to as “the economic objective,” is embodied in Subsection (a). The basic proposition is qualified in the manner stated in Subsection (b), which speaks to the conduct of the corporation. The provisions of Subsection (b) reflect a recognition that the corporation is a social as well as an economic institution, and accordingly that its pursuit of the economic objective must be constrained by social imperatives and may be qualified by social needs.294

Moreover, the concept that a corporation’s existence is not primarily tied to profits, but rather to more substantive and qualitative undertakings, has already been suggested by corporate legal scholars before me. Daniel Greenwood, for example, has explained:

Corporations are not only about increasing share value. They are also about creating jobs for employees and suppliers, and those jobs consist not only of paychecks but also of quality of life and quality of work issues: relationships, individual empowerment, self-improvement and education, health and safety, hours that allow for families, movement and stability in our various communities, support in sickness and old age and for dependents. Corporations also exist to beautify our cities, to provide products for consumers, to support charities, to enhance and not merely destroy our environment.295

Further still, some highly successful businesses are already putting this thinking into practice. Whole Foods immediately leaps to mind. It’s CEO, John Mackey, explicitly disavows the “profit-maximization” objective.296 He acknowledges that this may very well be the objective of the company’s investors, but adds that it’s not the objective of its other stakeholders.297 Under his leadership, Whole Foods strives to provide value to all its constituencies.298 Tellingly, he places responsibility for “defin[ing] the purpose of the company” to its officers.299 As he bluntly puts it, “we ‘hired’ our original investors. They didn’t hire us.”300

None of this is particularly novel – although it has been obscured by the

294 Id.
295 See Greenwood, supra note 163, at 843-44.
297 See id.
298 See id.
299 See id.
300 Id.
triumph of shareholder primacy over the course of the twentieth century.\(^{301}\) Originally, corporations were chartered (and thereby granted the privileges of the corporate form) in order to primarily advance some public good.\(^{302}\) The eclipse of this common-good orientation by the modern private-profit orientation is, historically speaking, a rather recent phenomenon.\(^{303}\) A broader conceptualization of corporate purposes and responsibilities would, therefore, be largely a return to the roots of corporate law. By tethering this broader conceptualization to the concepts of excellence and craftsmanship, we may be able to avoid some of the more vexing challenges of the “two-masters” problem raised by multi-fiduciary approaches.\(^{304}\) For under multi-fiduciary approaches, corporate management would be subject (and answerable) to the potentially conflicting pulls of various constituencies – as expressed via constituency representatives. Each constituency’s representative would most likely be pressing for his or her constituency’s own, particularized private interest – without necessarily regarding the greater good of the corporate enterprise as a whole. By contrast, an approach to excellence and craftsmanship entails satisfying a corporation’s constituencies (and then some) in the manner, and to the extent, that the corporation’s own management perceives as best. Management’s own vision and definition of “excellence” governs. This should serve to reduce the potential conflict and dissonance occasioned by strict and clear lines of responsibility to a handful of sometimes competing constituencies.

In any event, even if it were easy to formulate and agree upon a virtue-based (or excellence-based) corporate culture, it remains incredibly difficult to put such thinking into practice. Moore recognized this, warns against the “corrupting” pull toward instrumentalism, and as such “there needs to be the commitment to exercise the virtues not only in pursuit of the internal goods of the practice which benefits the individual directly, but also against the corporation when it becomes, as it inevitably will at various times, too focused on external goods.”\(^ {305}\) The temptation to put profits ahead of principle is strong and omnipresent, and officers must be selected and trained for resistance to this temptation. In other words, we need to identify and inculcate the courage to speak out, blow whistles, and take a stand against inappropriate corporate conduct - precisely the opposite characteristics so valued in “company men” today.\(^ {306}\) Additionally, we

\(^{302}\) See Colombo, supra note 118, at 250-52.
\(^{303}\) See id. at 253-55.
\(^{304}\) See supra text accompanying notes 268-269.
\(^{305}\) Id. at 250.
\(^{306}\) See supra text accompanying note 201.
need to remove such temptations whenever possible. \(^3\) Even the best of human beings are still, after all, human beings. For this reason, conflicts of interest and opportunities for wrongdoing need to be minimized as much as reasonably possible. Past practices need to be re-examined, for sometimes they can “create support for immoral principles and practices in a way that is hard for even a moral person to discern.” \(^4\) Virtue, especially burgeoning virtue, can be a fragile thing, and it would be wise to remove whatever obstacles we reasonably can to prevent its derailment.

Solomon has suggested a “professionalization” of the corporate officer’s corps, which may very well be part of the solution. \(^5\) Professionals are frequently called upon, and indeed expected, to exercise independent judgment, and officers who viewed themselves as professionals could contribute to a corporate culture less subject to groupthink, and more open to diverse moral perspectives. \(^6\)

Part-and-parcel with an improved corporate culture would be “ethics training” – efforts to directly inculcate ethical values. \(^7\) Although some are optimistic that good behavior can be taught, others are less sanguine. \(^8\) In keeping with the virtue ethics tradition, they are of the opinion that virtue is something learned and developed over the course of a lifetime – and not something that a corporation can easily and readily engender. \(^9\) For an ethics training program to bear fruit, it would seem as though its participants would need to already be in possession of a modicum of virtue. \(^10\)

This suggests that an essential component of achieving a virtue-friendly corporate culture would be to take ethics and virtue quite seriously in the

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\(^3\) Wines & Hamilton, supra note 76, at 56 (“Businesses need to keep out of the back seat of the car on the back row of the drive-in movie because, as our priests, teachers and parents would say, if you go there, putting yourself in that near occasion of sin, you are going to fall.”); Gilbert Harman, No Character or Personality, 13 BUS. ETH. Q. 87, 87, 89 (2003) (the best way to avoid vice is to avoid those “People! Places! Things!” that present opportunities for vice).

\(^4\) See Hartman, supra note 159, at 146.

\(^5\) Solomon, supra note 312, at 136.

\(^6\) See id. at 140, 143.

\(^7\) See Sims, supra note 16, at 147-65.


\(^10\) And even then, the potential of such programs are probably limited. Robert Solomon suggested that the true value of such programs would not be in inculcating ethical principles per se, but rather “to make people more comfortable facing moral complexity.” Solomon, supra note 312, at 4. In other words, to train people to better resolve moral disputes (via recourse to their pre-existing moral understandings), more so than training them to be moral. See id.
firm’s hiring and promotion process. 315 Instead of concentrating solely on technical prowess and ability, firms could diligently recruit, screen, and advance candidates on the basis of character as well. 316 This holds, in my opinion, the greatest promise. It would seem far easier to locate individuals of character and virtue, and train them in the arts of a particular business, then the other way around.

Fortunately, the dichotomy between an “excellent” and “ethical” business on the one hand, and a “profitable” business on the other, is increasingly proven to be a false one. 317 It is becoming ever more clear that “the integrity of the corporation and of the individual within the corporation is the essential ingredient in the overall viability and vitality of the business world.” 318 Virtue and an attention to excellence do not hinder corporate success, they advance it. 319

4. A Product of Society at Large

It must be recognized that business corporations are a component part of the overarching culture and society of their times. 320 The moral fiber of a corporation “will depend upon the extent to which the surrounding culture adheres to the tenets of virtue ethics. If the culture nurtures the virtues … then morally enlightened business activity will flourish.” 321 As one philosopher opined, “[t]he moral impoverishment of contemporary business, therefore, is inevitable given the moral impoverishment of modernity.” 322

Regardless of the degree to which one agrees with the opinion above, whether an individual will pursue a life or virtue or vice is quite often something established in the cradle (or shortly thereafter). 323 Although an

315 See Hartman, supra note 159, at 17-18; See RONALD R. SIMS, ETHICS AND ORGANIZATIONAL DECISION MAKING 109 (1994)
316 Undoubtedly, firms already do this to a limited extent. The question here is one of degree and prioritization.
317 Solomon, supra note 312, at 21.
318 Id.
320 See Sims, supra note 16, at 3; Solomon, infra note 312, at 149.
321 John Dobson, MACINTYRE’S POSITION ON BUSINESS: A RESPONSE TO WICKS, 7 BUS. ETH. Q. 125, 127 (1997).
322 Id. at 128.
323 See Lawrence Kohlberg, DEVELOPMENT OF MORAL CHARACTER AND MORAL IDEOLOGY, in REVIEW OF CHILD DEVELOPMENT RESEARCH 497, 394, 423 (L.W. Hoffman, ed. 1964) (“most children know the basic moral rules and conventions of our society by the first grade”); see also ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1988)
individual’s various roles in life go a long way in shaping his or her development as a human being.\(^{324}\) It is important to remember that each individual “brings with her or himself to each role qualities of mind and character that belong to her or him qua individual and not qua role-player.”\(^{325}\) If such qualities are poorly developed, I posit that there is very little corporate law can do to remedy the situation.

If, on the other hand, these qualities are indeed developed, then there are certainly things (as we have discussed) that corporate law can do to nurture them. On a broader level, it would seem that casuistry ought to be avoided, as this distinction between “private” versus “public” morality seems to be at the heart of some very grave evils.\(^{326}\) We need our corporations populated by individuals who “understand themselves as accountable, not only in their roles, but also as rational individuals.”\(^{327}\)

Thus, I agree with Alasdair MacIntyre that “[v]irtue ethics is not antithetical to business activity…. In a virtue-based culture business is an entirely moral pursuit.”\(^{328}\)

Unfortunately, ours is not a virtue-based culture. Economics and wealth, not virtue, have become “the obsession of all modern societies.”\(^{329}\) As E.F. Schumacher put it: “Call a thing immoral or ugly, soul-destroying or a degradation of man, a peril to the peace of the world or to the well-being of future generations; as long as you have not shown it to be ‘uneconomic’ you have not really questioned its right to exist, grow, and prosper.”\(^{330}\)

In fact, none less than John Maynard Keynes, whose economic theories have dominated Western economic planning since World War II, opined that virtue is inconsistent with our economy, remarking that when it comes to business and the economy, “foul is useful and fair is not”.\(^{331}\)

Keynes advised us that the time was not yet for a “return to some of the most sure and certain principles of religion and traditional virtue – that avarice is a vice, that the exaction of usury is a misdemeanor, and the love of money is detestable.” Economic progress, he counseled, is obtainable only if we employ those powerful human drives of selfishness, which religion and traditional wisdom universally call upon us to resist. The modern economy is

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\(^{324}\) See supra note 155.

\(^{325}\) See MacIntyre, supra note 155, at 315.

\(^{326}\) See MacIntyre, supra note 155, at 311-312, 314-16 (commenting upon the need for individuals to reflect critically upon the morality of their role-specific obligations).

\(^{327}\) See id. at 316.

\(^{328}\) John Dobson, MacIntyre’s Position on Business: A Response to Wicks, 7 BUS. ETH. Q. 125, 128 (1997).

\(^{329}\) E.F. SCHUMACHER, SMALL IS BEAUTIFUL 44 (1973) (Harper Perennial 2010).

\(^{330}\) Id.

\(^{331}\) Id.
propelled by a frenzy of greed and indulges in an orgy of envy, and these are
not accidental features but the very causes of its expansionist success.\footnote{332}{Id. at 31-32; see also Solomon, supra note 312, at 17.}

As Schumacher points out in response to Keynes, “[t]he question is
whether such causes can be effective for long or whether they carry within
themselves the seeds of destruction.”\footnote{333}{E.F. Schumacher, \textit{Small Is Beautiful} 32 (1973) (Harper Perennial 2010).} Schumacher continues:

If human vices such as greed and envy are systematically cultivated, the
inevitable result is nothing less than a collapse of intelligence. A man driven
by greed or envy loses the power of seeing things as they really are, of seeing
things in their roundness and wholeness, and his very successes become
failures. If whole societies become infected by these vices, they may indeed
achieve astonishing things but they become increasingly incapable of solving
the most elementary problems of everyday existence. The Gross National
Product may rise rapidly: as measure by statisticians but not as experienced by
actual people, who find themselves oppressed by increasing frustration,
alienation, insecurity, and so forth.\footnote{334}{Id.}

Further, one cannot ignore the hyper-individualism that so indelibly
marks the American psyche.\footnote{335}{Solomon, supra note 312, at 74.} Any efforts at redirecting corporations upon
a more communitarian path, especially in the United States, faces this
additional hurdle. In a society that generally exalts the individual over the
community, it should come as no surprise that corporate managers drawn
from such society might have difficulty in accepting the notion of
broadened corporate responsibilities.\footnote{336}{See id. at 80-84. Ironically, and perhaps helpfully in light of the preceding, the
suggestions proffered in this article are themselves individualistic in that they are built
upon \textit{individual} virtue and integrity (which is the heart of virtue ethics). \textit{Id.} at 103.}

In any event, the moral shortcomings of the modern business
corporation are largely a reflection of the moral shortcomings of modern
society in general.\footnote{337}{The importance of culture, generally, on behavior is difficult to understate. \textit{See} James Q. Wilson, “Hard Times, Fewer Crimes,” \textit{Wall St. J.}, May 28-29, 2011, at C1
( observing that due to cultural changes, the economic downturn of 2007-09 did not result in
more crime, bucking the predictions of most experts).} This is a problem beyond the reach of corporate law.

5. Structural Remedies

The structure of the modern corporation has been identified as a
contributing factor to the amorality of corporate decision making.\footnote{338}{See supra notes 205-208.} In this
section, I shall consider ways in which corporate structure could be reformed so as to encourage greater development and exercise of virtue within the corporation.

One suggestion, put forth by Alejo Sison, is to reintegrate ownership and control to the extent possible.\textsuperscript{339} Simply put, a corporation’s officers should own a greater amount of stock in their corporations than is now usually the case. There are myriad ways in which this could be implemented, from requiring a buy-in upon hiring, to distributing shares as part of compensation. However accomplished, a management team that both controls and owns a significant stake in the corporation is less likely to suffer from the phenomenon of dispersed moral responsibility. The powerful concept of ownership, and the moral responsibilities that are understood to accompany ownership, could help embolden corporate officers to take greater personal responsibility for actions undertaken by them on behalf of the corporation.\textsuperscript{340}

With regard to globalization, and ever-growing corporate hierarchies, Schumacher proposes some solutions in his classic book “Small is Beautiful.”\textsuperscript{341} As its title suggests, Schumacher’s book forcefully propounds the thesis that smaller-scale, local businesses are preferable to larger-scale, global businesses for a variety of reasons.\textsuperscript{342} Of particular concern for the purposes of this article is that smaller-scale, local businesses do not suffer (or do not suffer as much) from the defects of the modern mega-corporation. Namely, small, local businesses are, all things being equal, in better touch with their customers and other constituencies than their larger counterparts. This closeness serves as a bulwark against the dehumanizing nature that characterizes most transactions with big businesses nowadays – perhaps best exemplified by the computerized, labyrinthine gauntlet that confronts anyone who places a telephone call to their corporation of choice. By keeping transactions “human,” smaller businesses do not transform individuals (from employees to customers) into

\textsuperscript{339} See ALEJO JOSE G. SISON, CORPORATE GOVERNANCE AND ETHICS: AN ARISTOTELIAN PERSPECTIVE (2008).

\textsuperscript{340} Even though most corporate scholars no longer view shareholders as owners of the corporation, almost everyone else still buys into this traditional conceptualization. See Julian Velasco, Shareholder Ownership and Primacy, 2010 U. ILL. L. REv. 897, 897 (2010). Thus, the concept of ownership can be expected to assert its effects on stockholding officers.

\textsuperscript{341} E.F. SCHUMACHER, SMALL IS BEAUTIFUL (1973) (Harper Perennial 2010).

\textsuperscript{342} “Small-scale operations, no matter how numerous, are always less likely to be harmful to the natural environment than large-scale ones…. It is, moreover, obvious that men organized in small units will take better care of their bit of land or other natural resources than anonymous companies or megalomaniac governments ….” E.F. SCHUMACHER, SMALL IS BEAUTIFUL 37 (1973) (Harper Perennial 2010).
anonymities.

Schumacher acknowledged that the modern, gigantic, global corporation is here to stay – but he points out that some of its shortcomings can nevertheless be blunted. Borrowing from the doctrine of subsidiarity,\(^\text{343}\) Schumacher urged corporations to decentralize their operations as much as reasonably possible.\(^\text{344}\) In his own words: “The fundamental task is to achieve smallness within large organizations.”\(^\text{345}\) Experience shows that such a business approach is not only possible, but profitable.\(^\text{346}\)

The advantage of such an approach, from a virtue ethics perspective, would be to replicate (to a degree) the more human feel that ordinarily accompanies small business transactions. This, in turn, provides more fertile ground for human virtue to develop, as it lacks the dehumanizing distance, size, and anonymity that mark most large, global corporations.

**CONCLUSION**

“Character is destiny” remarked the Greek philosopher Heraclitus in the 6th Century B.C.\(^\text{347}\) And the economic crisis that the world is still reeling from is, in large part, the repercussions of a crisis of character.

For at its root, the crisis was caused by a combination of nonfeasance and malfeasance – a failure of people to do their duty and honor their obligations. These are moral shortcomings – character flaws.

But in response, our policymakers and pundits do not offer a solution that gets to this root cause. Instead, they promote more regulation, less regulation, increased reliance on market-based incentives, and decreased reliance on market-based incentives. If the correct mix of solutions is chosen and well implemented, it just might, possibly, forestall the next crisis temporarily.\(^\text{348}\)

We can do better. Virtue can help.

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\(^{343}\) See supra notes 99-100.


\(^{345}\) Id. at 259.

\(^{346}\) See id. The drive to squeeze every bit of profit out of business is what causes many to eschew such an approach. “The substance of man cannot be measured by Gross National Product.”


\(^{348}\) Or, on a less sanguine note, one could say that our policymakers “always tend to try and cure a disease by intensifying its causes.” E.F. Schumacher, SMALL IS BEAUTIFUL 39 (1973) (Harper Perennial 2010).
Although it may be too much to hope for a more virtuous civilization, it should not be too much to hope for business enterprises that are at least on par with prevailing moral standards. Unfortunately, we lack even that.

Due to the structure of the modern business firm and the operation of corporate law, officers in today’s corporations are crippled from exercising the virtue that ordinary human beings ordinarily exercise. Our challenge, therefore, is to find a way to remedy this situation.

If we accept the prevailing understanding of the corporation (as a nexus of contracts), responsibility for corporate virtue should be entrusted to its officers. This is because corporate officers have the greatest interest in, and are in the best position to effect, the exercise of virtue within the corporation. Paramount, therefore, is the character and virtue of the corporate officer.

Robert Solomon insightfully observed that “character is vulnerable to environment but it also a bulwark against environment.” This suggests a 2-pronged approach to the issue of corporate virtue, an approach that focuses on the officer’s character specifically, while at the same time focusing on the corporate culture more generally. We need our corporations to actively recruit and promote individuals of virtue as officers, to assist these officers in the development of their virtue, to empower them to exercise their virtue, and to clear away the temptations that would undermine their virtue.

There are some who have argued that such a firm would “rapidly perish” due to the competitiveness of the marketplace. Indeed, many companies that pursue a balanced approach to profits (that is, an approach that takes into serious consideration other, non-economic values) eschew public company status because of the pressures of the capital markets. “And since no one knows when ‘enough is enough,’ the drive for increased profitability remains a key corporate objective [for the public company]. Hence, the inherent tendency to avarice continues to exist, exacerbated by the power of the financial markets.”

If such is the case, if corporate virtue is an impossible dream, then I do not believe it is untoward to call for a rethinking of the modern business corporation and the economic system within which it is situated. As Edwin

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352 Id.
Hartman remarked: “If a productive business system requires people of bad character doing bad deeds, we must at the very least try to determine the benefits of that productivity and its costs to the moral fabric of society.”

I do not, however, believe that corporate virtue is a futile hope. Indeed, I conclude with Geoff Moore that virtue-driven firms are not only possible, but likely to flourish:

They would do so because the concentration on excellence in the practice and not on external goods *per se*, would, in many cases, actually improve their performance across a range of parameters rather than diminish it. Remembering that one of the cardinal virtues is phronesis or practical wisdom, reminds us that there is a certain astuteness expected of the virtuous.

That is, after all, the central premise of virtue ethics. Good people do good things to the benefit of all. Corporate law needs to unleash the power of this simple insight, by allowing officers to realize and act upon the fullest potential of their goodness.

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354 *Id.*