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### Toward a Nexus of Virtue

Ronald J. Colombo

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# Toward a Nexus of Virtue

Ronald J. Colombo\*

## *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 to promote 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 financial crisis. Instead of focusing on virtue, however, the response of most policymakers and commentators has been to focus on regulatory reform. This is unfortunate. Although regulatory reform certainly has its place, it holds limited promise*

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\* Associate Professor of Law, Hofstra University School of Law. I thank Notre Dame University School of Law for inviting me to present an earlier draft of this Article at its 2011 "Governance and Business Ethics in a Post-Crisis World"; the Association for the Study of Law, Culture, and the Humanities for allowing me to present an earlier draft at its 14th annual conference; and my own Hofstra University School of Law for permitting me to present a draft at its faculty workshop series. On each occasion, I received helpful feedback from individuals too numerous to mention. I am also indebted to Chapin Cimino, Dan Greenwood, Lyman Johnson, Brian McCall, and Judd Sneirson for their suggestions and comments throughout the drafting process, and to Cynthia Thomas for her exquisite research assistance.

*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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### *I. Introduction*

Could virtue have prevented the financial crisis? Possibly.

Although the predominant narrative has characterized the crisis as one of inadequate financial regulation<sup>1</sup> (rebutted by an

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1. See, e.g., Thomas J. Schoenbaum, *Saving the Global Financial System: International Financial Reforms and United States Financial Reform, Will They Do the Job?*, 43 UCC L.J. 479, 504 (2010) (identifying “failures in government regulation and oversight” as one cause of the crisis); Joseph William Singer, *Economic Regulation and the Rule of Law: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 48 JUDGES’ J. 4, 4 (2009) (“[W]e got into this mess . . . partly because of inadequate regulation.”).

opposite diagnosis, which lays the blame essentially on too much regulation<sup>2</sup>), sustained attention has not been focused upon the critical roles that virtue and character (or, more aptly, the lack thereof) have played.<sup>3</sup> 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<sup>4</sup> and malfeasance.<sup>5</sup> Such a framing would suggest a different set of responses due to recognition that virtuous dispositions would have countered such ethical shortcomings. (Among the many virtues implicated here would be justice, courage, and truthfulness,<sup>6</sup> in addition to the virtue of simply doing one's duty.<sup>7</sup>) In short, and with

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2. The regulation is 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 Overreactions, and the Current Surge of Government's Size, Scope, and Power*, 33 HARV. J.L. & PUB. POL'Y 531, 531 (2010) ("[The crisis's] roots lie, first, in government policies to promote more widespread homeownership than would occur in a free market and, second, in the Federal Reserve System's mismanagement of interest rates and the money stock."); Editorial, *Dodd-Frank's Faulty Rx*, INV. BUS. DAILY, May 18, 2011, at A7 ("Overregulation is what fed the subprime bubble. And their remedy—more regulation—is more poison.").

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. The nonfeasance is in the form of corporate managers failing to act with due caution and prudence in their decision making. See Barry Ritholtz, *Putting an End to "I'll Be Gone, You'll Be Gone" Bonuses*, WASH. POST, Mar. 14, 2011, at G6 (describing the actions taken by those in the financial industry as "reckless"); Adam Shell, Paul Davidson & John Waggoner, *Finding Blame: Crisis Inquiry Panel Calls Recession Avoidable*, USA TODAY, Jan. 28, 2011, at 1B (stating that many were aware of the risks but took them anyway).

5. The malfeasance is in the form of outright fraud. See Greg Gordon, *Justice Department Eyes Possible Wall Street Fraud*, PITT. POST-GAZETTE, Jan. 15, 2010, at A6 ("[T]he Justice Department is investigating whether lenders or Wall Street firms defrauded investors in the sale of risky mortgage securities . . ."); Gretchen Morgenson & Louise Story, *A Financial Crisis with Little Guilt*, N.Y. TIMES, Apr. 14, 2011, at A1 (discussing why there have been few prosecutions for fraud).

6. See Geoff Moore, *Humanizing Business: A Modern Virtue Ethics Approach*, 15 BUS. ETHICS Q. 237, 251 (2005) (listing the virtues that philosopher Alasdair MacIntyre views as important).

7. "Doing one's duty" is traditionally at the minimum of virtuous behavior.

apologies to the National Rifle Association, regulation (inadequate or otherwise) didn't kill the economy—people killed the economy.<sup>8</sup>

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<sup>9</sup> in 2002 and the Dodd–Frank Act<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.”<sup>13</sup> As one

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See Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. L. REV. 1167, 1168 (“To have never been more graceful than your duty, more generous or forgiving, would feel a sort of shallow victory. In short, one wishes not to have only been dutiful but to have been virtuous.”).

8. See *Guns Don't Kill People, People Kill People*, URBANDICTIONARY.COM, <http://www.urbandictionary.com/define.php?term=guns%20don%27t%20kill%20people%2C%20people%20kill%20people> (last visited Jan. 30, 2012) (discussing the meaning of the NRA slogan) (on file with the Washington and Lee Law Review).

9. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2006)).

10. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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. See Ben Protess, *In Split Vote, S.E.C. Adopts Rules on Corporate Pay*, N.Y. TIMES, Jan. 26, 2011, at B4 (“Although the shareholders’ votes [on executive compensation] are only symbolic, dissension among a majority of investors could embarrass a company.”); Reynolds Holding, *Companies Pay Price for Ignoring Say-on-Pay Votes*, REUTERS BREAKINGVIEWS (May 7, 2011) <http://blogs.reuters.com/columns/2011/05/06/companies-pay-price-for-ignoring-say-on-pay-votes/> (last visited Jan. 30, 2012) (“A negative vote can lead to bad publicity or the ouster of directors.”) (on file with the Washington and Lee Law Review).

12. See *infra* Part III.B (discussing the limits of law in generating virtue).

13. See Christopher Landau, *Can Religion Help the Economic Crisis?*, BBC NEWS, Sept. 25, 2009, available at <http://news.bbc.co.uk/go/pr/fr/1/2/hi/business/8275498.stm> (discussing alternative principles and solutions, such as religion); see also William Arthur Wines & J. Brooke Hamilton III, *Observations on the*

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.”<sup>14</sup>

Finally, and particularly disturbing, an examination of the past crises suggests 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.<sup>15</sup> This opens the possibility that existing law and regulation not only fail to promote virtue but may actually be working to undermine it.<sup>16</sup>

This Article argues that policymakers should take into account character and virtue more seriously than they do currently. It suggests further that a good place to start would be 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 character and individual morality.<sup>17</sup>

In the pages that follow, I shall make the case for applying virtue ethics to corporate law. Part II of this Article will provide a background and summary of virtue-ethics philosophy. This will be brief because this Article is not (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 III offers a few reasons why virtue is a necessary supplement to

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*Need to Redesign Organizations and to Refocus Corporation Law to Promote Ethical Behavior and Discourage Illegal Conduct*, 29 DEL. J. CORP. L. 43, 51 (2004) (“Sarbanes–Oxley, while certainly well-intentioned, falls short for several reasons. It might more accurately be considered a modest first step by Congress rather than a solution.”).

14. Wines & Hamilton, *supra* note 13, at 75.

15. See *id.* at 54 (“When the business in which they work . . . threatens their welfare *unless* they act illegally or unethically, or conditions rewards on illegal or unethical actions, *good people will do bad things.*”).

16. See RONALD R. SIMS, *ETHICS AND ORGANIZATIONAL DECISION MAKING: A CALL FOR RENEWAL* 21 (1994) (discussing authors who have argued that “organizational life frequently pushes individuals to behave unethically”).

17. See *infra* Part II (describing the components of virtue ethics).

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 III also explores the law's limited ability to inculcate virtue, explaining that virtue is best achieved via conduct that is voluntary (versus coerced).

Part IV 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 IV 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.<sup>18</sup>

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 provide management with more avenues to exercise virtue.

## II. Virtue Ethics

Before delving into the application of virtue ethics to corporate law,<sup>19</sup> let us first explore the philosophical underpinnings of virtue-based ethics.<sup>20</sup> As virtue ethics is a field of study that is ancient yet

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18. See SIMS, *supra* note 16, at 105 ("It stands to reason that organizational decision making can be improved if employees can be encouraged to think ethically and to approximate more closely effective and ethical decision making.").

19. See *infra* Part IV.

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*, in *ETHICAL THEORY: CLASSICAL AND CONTEMPORARY READINGS* 334 (Louis P. Pojman

still developing, a great deal of variation may exist between the approach taken by one virtue ethicist and the next.<sup>21</sup> 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*.<sup>22</sup> 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.<sup>23</sup> Anscombe suggested an approach that was both entirely different and quite ancient.<sup>24</sup> Anscombe suggested a focus on character and virtue.<sup>25</sup>

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.<sup>26</sup> A related

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ed., 2d ed. 1995); Robert Louden, *Some Vices of Virtue Ethics*, in *ETHICAL THEORY: CLASSICAL AND CONTEMPORARY READINGS* 347 (Louis P. Pojman ed., 2d ed. 1995) [hereinafter *ETHICAL THEORY*]. 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 weigh 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 Failure of the Ethics of Virtue*, in *XIII MIDWEST STUDIES IN PHILOSOPHY* 83, 84 (Peter French et al. eds., 1988) (describing the different approaches taken by virtue ethicists); see also ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 115–17 (1992) (distinguishing the author's approach to virtue ethics from other approaches).

22. See NOEL STEWART, *ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY* 54, 54 (2009) (“What started as a trickle, with an article by Elizabeth Anscombe . . . has now become a groundswell of books and articles advocating . . . virtue ethics.”).

23. *Id.*

24. See *id.* (“Aristotle is the ancient but major inspiration behind the recent surge in virtue ethics, which is challenging the supremacy of the three action-centered theories.”).

25. *Id.*

26. See Leslie Stephens, *Virtue-Based Ethical Systems*, in *ETHICAL THEORY*, *supra* note 20, at 317, 317 (“Whereas action-oriented ethics emphasizes *doing*, virtue- or agent-based ethics emphasizes *being*—being a certain type of person who will no doubt manifest his or her being in actions or nonactions.”).



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.”<sup>27</sup> Rather, “virtue ethics looks down the road to what a human life should be, life as a *whole*.”<sup>28</sup>

Of course, the focus on “being” has obvious repercussions when it 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.<sup>29</sup> 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.<sup>30</sup> To virtue ethicists, one ought to live life “excellently,” which, in turn, will further the individual’s, and society’s, happiness and well-being.<sup>31</sup> 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?”; <sup>32</sup> 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.<sup>33</sup> But that, of course, begs the questions: What is a “virtuous life”? What are “virtues”? Philippa Foot captured the general understanding well when she wrote that “virtues are in general beneficial characteristics, and indeed ones that a human being needs to have, for his own sake and that of his fellows.”<sup>34</sup> As David Norton explained more recently, “In the

27. See STEWART, *supra* note 22, at 56 (“Utilitarianism and Kant, the main alternatives, focus on getting the actions right and so focus on the *moments* that make up your life rather than the bigger picture.”).

28. *Id.*

29. See *id.* at 55 (“It’s not that virtue theorists don’t care what actions are performed; it’s that they think getting the person right is the *most important* thing, and once you’ve done this, good actions will follow automatically.”).

30. See *id.* at 58 (“The virtues are the *means* and the *end*.”).

31. See Stephens, *supra* note 26, at 318 (“The aretaic concept of teleology focuses . . . on the goal of life—living well and achieving excellence.”).

32. See David L. Norton, *Moral Minimalism and the Development of Moral Character*, in XIII MIDWEST STUDIES IN PHILOSOPHY, *supra* note 21, at 180, 182.

33. See *id.*

34. PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 3 (1978), *quoted in* Robert M. Adams, *Common Projects and Moral Virtue*, in XIII MIDWEST STUDIES IN PHILOSOPHY, *supra* note 21, at 297, 302.

classical understanding the virtues are excellences of character that are objective goods, of worth to others as well as to the virtues-bearer . . . .”<sup>35</sup> These two summaries underscore the more communal orientation of virtue ethics versus other ethical traditions.<sup>36</sup> For an excellent individual is understood to make an excellent neighbor as well.

A seminal tract on virtue ethics is Aristotle’s *Nicomachean Ethics*.<sup>37</sup> Hailing from the fourth century B.C., *Nicomachean Ethics* posits that “eudaimonia” (best translated as authentic flourishing, as opposed to mere transient pleasure or satisfaction) requires virtue as its predicate.<sup>38</sup> And since Aristotle famously observed that man is a social animal,<sup>39</sup> 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 her.<sup>40</sup> In the parlance of modern economics, one could say that an individual’s

35. Norton, *supra* note 32, at 181.

36. See STEWART, *supra* note 22, at 56. For an extended discussion on the nature of virtues, see SOLOMON, *supra* note 21, at 191–98.

37. See ARISTOTLE, *NICOMACHEAN ETHICS* (Roger Crisp ed., Cambridge Univ. Press 2000); see also Stephens, *supra* note 26, at 318 (discussing Aristotle’s conception of virtue). 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: ECONOMICS AS IF PEOPLE MATTERED* 59 (Harper Perennial 1973) (“[T]he Buddhist sees the essence of civilisation not in a multiplication of wants but in the purification of human character.”).

38. See Stephens, *supra* note 26, at 318 (“The virtues are to be sought as the best guarantee to the happy life.”). Some may “dismiss Aristotle as ignorant of and irrelevant to the contemporary business world.” See SOLOMON, *supra* note 21, at 18 (noting the tendency of some to do this). In response, I second Robert Solomon who wrote that this would be a “mistake,” for Aristotle “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. ARISTOTLE, *POLITICS* 4 (C.D.C. Reeve trans., Hackett Publishing Co. 1998) (stating “a human being is by nature a political animal”). 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 *XIII MIDWEST STUDIES IN PHILOSOPHY*, *supra* note 21, at 342–43; see also SOLOMON, *supra* note 21, at 26–27 (“[A] [h]omo sapien[ ] deprived of a community and a culture is a pathetic, virtually helpless animal.”).

40. See *supra* text accompanying notes 34–36 (discussing the communal nature of virtue ethics).

private morality imposes very public externalities—indirectly if not directly.

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.<sup>41</sup>

The correctness of Aristotle's insight here is difficult to deny. Imagine a father who lacks the virtue of temperance, or self-control.<sup>42</sup> 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. If the father falls ill or loses his job, he further harms his immediate family, perhaps burdens his extended family, and is likely to draw upon the resources of his fellow citizens.

This still poses another 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.<sup>43</sup> Aristotle expanded upon this list, identifying as virtues: courage, friendliness, temperance, truthfulness, liberality, wittiness, magnificence, shame, pride, justice, good temper, and honor.<sup>44</sup> Contrary, perhaps, to the

41. See Robert Merrihew Adams, *Common Projects and Moral Virtue*, in 13 MIDWEST STUDIES IN PHILOSOPHY 297, 300 (Peter French et al. eds., Univ. of Notre Dame Press 1988) ("Thus human good is found largely in activities whose point and value depend on the participation of other people in a common project.").

42. Temperance is one of the original moral virtues Plato expounds in *The Republic*. See David L. Norton, *Moral Minimalism and the Development of Moral Character*, in 13 MIDWEST STUDIES IN PHILOSOPHY 180, 181 (Peter French et al. eds., Univ. of Notre Dame Press 1988) (introducing the virtues of classical morality through Socrates as depicted in Plato's *Republic*).

43. See *id.* (applying the classical virtues to people in modern times); PLATO, *THE REPUBLIC* bk. IV, at 89–115, 103 (Paul Negri & Joslyn T. Pine eds., Benjamin Jowett trans., Dover Publ'ns 2d ed. 2000) (c. 399 B.C.E.) (discussing the four virtues of the governing state—wisdom, courage, temperance, and justice—and applying them to the individual).

44. SOLOMON, *supra* note 21, at 200 (citations omitted).

clarion cry of Barry Goldwater,<sup>45</sup> Aristotle famously exhorted moderation, asserting that virtue was often found in the “golden mean” between the vices of excess and deficiency.<sup>46</sup> (Thus, the virtue of “courage” is the mean between “cowardice” and “rashness.”)<sup>47</sup>

Aristotle posited that virtues can be derived from reason when one considers the nature of humanity and society.<sup>48</sup> “A virtue is a trait that helps one to fit into and contribute to society.”<sup>49</sup> 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).<sup>50</sup>

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45. See Barry Goldwater, Sen., The Republican National Convention, Acceptance Address (July 16, 1964), in *The Republican National Convention, Acceptance Address*, VITAL SPEECHES OF THE DAY (Vital Speeches of the Day, Phoenix, Ariz.), Aug. 15, 1964, at 642, 644, available at <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm> (last visited Jan. 30, 2012) (“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!”).

46. See STEWART, *supra* note 22, at 61 (explaining Aristotle’s doctrine of the golden mean).

47. *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 (Univ. of Notre Dame Press 1981) (discussing the nature and metaphysics of virtues and their relationship to social order).

48. See Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in 13 *MIDWEST STUDIES IN PHILOSOPHY* 32, 33 (Peter French et al. eds., Univ. of Notre Dame Press 1988) (describing Aristotle’s account of human flourishing as justifiable with reference to reasons that derive from “features of humanness” in conjunction with local traditions); see also Philippa Foot, *VIRTUES AND VICES* 1–18 (Univ. of Cal. Press 1978) (remarking about moral virtue and its effect on society).

49. See SOLOMON, *supra* note 21, at 107.

50. See Conly, *supra* note 21, at 86 (discussing how to evaluate character based on virtues). Aristotle conceived of human flourishing as possessing virtues relevant to the human function, which is to reason. See *id.* at 86–87 (describing Aristotle’s conception of flourishing as evaluating the function of a thing to determine whether it is a good thing, such as the human capacity to reason). 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.

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.<sup>51</sup> Indeed, virtue has been commonly defined as the “habit” of doing good,<sup>52</sup> 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, 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 instead to act at odds with what she believes to be right.<sup>53</sup>

As shall be explained, virtue ethicists have differed with respect to the role that coercion plays in the development of virtue.<sup>54</sup> There is universal agreement, however, that repeated voluntary action can lead to the development of virtue.<sup>55</sup> Moreover, I believe it is fair to go one step further and hold that a

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51. See STEPHENS, *supra* note 26, at 318 (explaining Aristotle’s view that “moral [virtues] must be lived in order to be learned” and not merely taught).

52. See *id.* (“By living well we acquire the right habits. These habits are in fact the virtues.”).

53. See XXII THOMAS AQUINAS, SUMMA THEOLOGIA 67–95 (Anthony Kenny trans., Blackfriars 1964) (describing how dispositions, including virtues, are formed and destroyed according to a person’s actions and choices). Virtues are often deemed to be interrelated and mutually reinforcing. See XXIII THOMAS AQUINAS, SUMMA THEOLOGIA 55–67 (W.D. Hughes trans., Blackfriars 1969) (stating that moral virtues and habits tending toward good deeds are connected); DANIEL J. SULLIVAN, AN INTRODUCTION TO PHILOSOPHY 150–51 (Bruce Publ’g Co. 1957) (discussing how to live a virtuous life); see also Lawrence Kohlberg, *Development of Moral Character and Moral Ideology*, in 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 383, 387 (Martin L. Hoffman & Lois Wladis Hoffman eds., Russel Sage Found. 1964) (interpreting findings of studies as supporting “common views of moral character as a set of general ‘good habits’ or as a ‘strong conscience’”). But see SOLOMON, *supra* note 21, at 259 (“The Aristotel[i]an thesis of the unity of virtues . . . that, if one (truly) has one virtue, he or she will have all of them . . . [is] just plain false.”).

54. See *infra* Part III.B.

55. See *infra* text accompanying note 112 (“[A]ll [virtue ethicists] accept the notion that decisions voluntarily made move an individual farther along the path of virtue.”).

consensus exists for the proposition that the more voluntary one's choice of action is, the more effectively it will promote the development of one's virtue.<sup>56</sup>

In light of the preceding, the importance of virtue ethics to corporate law is difficult to miss. Because "man is a social animal,"<sup>57</sup> 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."<sup>58</sup> And such activities, even when economically based, are still rich in interactions that could test, develop, or undermine virtue.<sup>59</sup> 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. 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.<sup>60</sup>

Every system of ethics has its detractors, and virtue ethics is no exception.<sup>61</sup> As this Article is not a piece of philosophy per se (rather it merely seeks to utilize and apply, without unnecessary addition or subtraction, a preexisting philosophical system), I will not launch into a full-fledged *apologia* for virtue ethics. I will, however, borrow Robert Solomon's description of the approach as indicative of why I find virtue ethics normatively attractive:

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56. See *infra* Part III.B.

57. ARISTOTLE, *supra* note 39.

58. Robert Merrihew Adams, *Common Projects and Moral Virtue*, in 13 MIDWEST STUDIES IN PHILOSOPHY 297, 300 (Peter French et al. eds., Univ. of Notre Dame Press 1988).

59. See *id.* at 301 ("[O]ne must be more than an economic benefactor if one is to be humanly good to one's associates.").

60. See SOLOMON, *supra* note 21, at 104 ("We talk about 'making a living' as if it is primarily a matter of income, but the truth is that the living we make has as much to do with life and meaning as it does with paying the rent.").

61. See, e.g., William Frankena, *A Critique of Virtue-Based Ethical Systems*, in ETHICAL THEORY, *supra* note 20, at 334–39 (arguing against the virtue-ethics notion that moral virtues alone form the basis of moral life); Robert Louden, *Some Vices of Virtue Ethics*, in ETHICAL THEORY, *supra* note 20, at 347–56 (arguing against the virtue-ethics approach as providing no resolution for ethical dilemmas and arguing that some principles must exist without moral virtues).

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.<sup>62</sup>

I would also like to anticipate and briefly respond 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.<sup>63</sup> For this notion has indeed been a traditional component of virtue-ethics thinking.<sup>64</sup>

As an initial matter, Robert George, a modern and prominent virtue ethicist, has proffered a vision of virtue ethics with softened objective edges.<sup>65</sup> George criticizes Aristotle and Aquinas for overly objectivizing and for positing too narrow a view of what constitutes the “good.”<sup>66</sup> 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

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62. SOLOMON, *supra* note 21, at 104.

63. *See id.* at 114–15 (offering the utilitarian criticism of virtue ethics that calculating and comparing the harm of actions is difficult).

64. *See* ROBERT GEORGE, MAKING MEN MORAL 38–39 (Oxford Univ. Press 1993) (criticizing Aristotle for failing to recognize a “multiplicity of ways that different people (and communities) can pursue . . . those goods”).

65. *See id.* (stating that we should “recognize a multiplicity of basic human goods”).

66. *See id.* at 38–41 (arguing against Aristotle’s view of one superior good).

deliberating and choosing among competing valuable possibilities, commitments, and ways of life.<sup>67</sup>

In other words, what causes one person to flourish can very well differ from what causes another to flourish.<sup>68</sup> This loosens, to a significant degree, the objective strictures put into place by Aristotle and Aquinas. Nonetheless, as George repeatedly makes clear, virtue ethicists generally maintain that there are indeed objectively “good” and “bad” ways of living.<sup>69</sup> “Whatever happiness may be, and however it differs from person to person, there are certain essential if variable personal ingredients that are required,”<sup>70</sup> and these certain essential ingredients are exactly what we call virtues.

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 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.<sup>71</sup> Aristotle, and to an extent Plato, seemed to capture these common precepts in their list of virtues.<sup>72</sup> It is difficult to imagine too much disagreement with these lists, regardless of one’s

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67. *Id.* at 38–39.

68. SOLOMON, *supra* note 21, at 106 (“Happiness is a large, ill-defined notion.”).

69. See GEORGE, *supra* note 64, at 38 (discussing the multiplicity of goods).

70. SOLOMON, *supra* note 21, at 107.

71. See C.S. LEWIS, *ABOLITION OF MAN* 51–61 (MacMillan 1947) (listing moral laws and duties of numerous cultures and nations); George Bragues, *The Ancients Against the Moderns: Focusing on the Character of Corporate Leaders*, 78 J. BUS. ETHICS 373, 383 (2008) (setting forth Benjamin Franklin’s recognition of moderation, sincerity, resolution, and justice, among others, as virtues); Linda M. Sama & Victoria Shoaf, *Reconciling Rules and Principles: An Ethics-Based Approach to Corporate Governance*, 58 J. BUS. ETHICS 177, 183 (2005) (identifying truth, honesty, and fairness as global “hypernorms”). That said, specific instantiations of these precepts have diverged—sometimes quite widely. See SOLOMON, *supra* note 21, at 196–97 (providing examples of topics eliciting differing attitudes among cultures).

72. See *supra* text accompanying notes 43–44 (listing the classical virtues).



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 herself—that she live a life in accord with whatever 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.”<sup>73</sup> Thus, to the extent that individuals are in possession of 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.

### *III. Virtue and the Limits of Law*

Although virtue ethics focuses only indirectly on “end results,”<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

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73. Lawrence Kohlberg, *Development of Moral Character and Moral Ideology*, in 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 383, 405 (Martin L. Hoffman & Lois Wladis Hoffman eds., Russel Sage Found. 1964) (citations omitted).

74. *Supra* Part II.

75. See *supra* text accompanying notes 4–6 (discussing virtue as it pertains to nonfeasance and malfeasance).

76. See Yankah, *supra* note 7, at 1210 (concluding that “human beings aspire to more than to fulfill even their most stringent moral duties; human

### *A. The Inadequacy of Regulatory Solutions*

Financial crises and scandals in the United States are almost invariably met with a regulatory response.<sup>77</sup> 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 prevent repeats of precisely the very same crises. Put differently, legislative and regulatory responses are generally reactionary<sup>78</sup> and tend largely to address the repercussions of yesterday's conduct; they cannot hope (and rarely even try) to foresee the countless unknowable problems of tomorrow.<sup>79</sup>

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.<sup>80</sup>

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beings . . . aim at full and flourishing lives"). "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." Wines & Hamilton, *supra* note 13, at 59. 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, Member, Fed. Convention, Remarks During the Virginia Debate on the Adoption of the Federal Constitution (June 2, 1788), in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 531, 537 (Jonathan Elliot ed., 2d ed. 1891).

77. See *supra* text accompanying notes 9–10 (mentioning the Sarbanes–Oxley Act and the Dodd–Frank Act).

78. See Wines & Hamilton, *supra* note 13, at 50 ("The law focuses on regulating yesterday's problems while the fertile brains of corporate managers are already moving into new areas.").

79. See *id.* at 58 ("The law continually regulates yesterday's business abuses.").

80. See SIMS, *supra* note 16, at 106 ("Whereas some organizations have published codes of ethics . . . to help guide behavior (or counter unethical

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 and 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 corporation[s]”<sup>81</sup> and are simply one step removed from the lowest of five stages of corporate moral development (the “[a]moral [o]rganization”).<sup>82</sup> Such corporations can be expected to comply with the letter of their ethical codes—but not with their spirit.<sup>83</sup> Indeed, employees oftentimes work very hard at finding a way to do something that clearly violates the spirit of code, rule, or law,

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behavior) . . . in all organizations, the ultimate test is the strength of an individual employee’s personal ethical framework.”); Edward Peter Stringham, *Embracing Morals in Economics: The Role of Internal Moral Constraints in a Market Economy*, J. ECON. BEHAV. & ORG. (forthcoming), available at <http://ssrn.com/abstract=1748635> (asserting the important role of internal moral constraints on individual behavior). See generally Gustavo Grullon et al., Religion, Ethics, and Corporate Behavior (Sept. 8, 2009) (unpublished manuscript), available at <http://www.bauer.uh.edu/departments/finance/documents/Religion.pdf> (examining the influence of religion on corporate behavior); Sean T. McGuire et al., *The Impact of Religion on Financial Reporting Irregularities*, ACCT. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1909278](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909278) (same).

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. See generally *id.*; McGuire, *supra*. 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. See, e.g., Gilbert Harman, *No Character or Personality*, 13 BUS. ETHICS Q. 87, 89–90 (2003) (explaining that “‘correspondence bias’ or ‘the fundamental attribution error’” occurs when there “is a bias toward explanations in terms of corresponding personality traits” which results in “the error of ignoring situational factors”).

81. See R. Eric Reidenbach & Donald P. Robin, *A Conceptual Model of Corporate Moral Development*, 10 J. BUS. ETHICS 273, 276 (1991) (stating that the “legalistic corporation” requires “obedience to laws, codes, and regulations”).

82. See *id.* at 282 (summarizing the five stages of the moral development of corporations).

83. See *id.* at 276 (“[T]he legalistic corporation [is] so named because of the preoccupation the corporation exhibits for compliance with the *letter* of the law as opposed to the *spirit* of the 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 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 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).<sup>84</sup> This provides a further limitation on the

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84. See Ronald J. Colombo, *Trust and the Reform of Securities Regulation*, 35 DEL. J. CORP. L. 829, 830 (2010) (“Trust is a critical, if not *the* critical, ingredient to the success of the capital markets (and of the free market economy in general).”). 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 West’s Success, Say the Chinese*, (Mar. 3,

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.<sup>85</sup>

### *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.<sup>86</sup> 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.<sup>87</sup>

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2011), <http://www.ionainstitute.ie/index.php?id=1336> (last visited Jan. 30, 2012) (“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.” (quoting a member of the Chinese Academy of Social Sciences)) (on file with the Washington and Lee Law Review).

85. See Colombo, *supra* note 84, at 850 (“By limiting the opportunities to take advantage of another (via rules or regulations that prevent misconduct, make misconduct unlawful, or otherwise subject misconduct to sanctions), law and regulation limit the ability of individuals and institutions to demonstrate their trustworthiness.”).

86. See XXIII THOMAS AQUINAS, SUMMA THEOLOGIA 129–33 (Edmund Hill trans., Blackfriars 1964); cf. REINIER R. KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW 18 (2004) (“[T]he overall objective of corporate law—as of any branch of law—is presumably to serve the interests of society as a whole.”). Of course, there are those who object to imputing any morality to an organization. See, 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 organizational 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.”). See generally PETER A. FRENCH, CORPORATE ETHICS (1995) (finding that corporations can be moral agents); Geoff Moore, *Corporate Moral Agency: Review and Implications*, 21 J. BUS. ETHICS 329 (1999) (arguing that corporations should be morally responsible). 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.

87. See GEORGE, *supra* note 64, at 1 (“Laws cannot make men moral.”).

According to some modern virtue ethicists, the development of virtue requires liberty of action—the ability to choose ill in addition to choosing good.<sup>88</sup> 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*.”<sup>89</sup> 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.”<sup>90</sup>

George’s philosophical argument receives support from the social sciences, which have found that “direct training and physical types of punishment may be effective in producing short-run situational conformity but do not directly produce general internalized habits of moral character . . . carried into permissive situations.”<sup>91</sup> 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,<sup>92</sup> but even by our laws.<sup>93</sup> Contracts signed under duress are unenforceable, as they are not considered the product of free will.<sup>94</sup> Culpability for

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88. See *id.* at 25 (“[M]orality . . . is a reflexive good, namely, a good that is (and can only be) realized in *choosing* uprightly, reasonably, well; a good into whose very definition *choice* enters.”).

89. See *id.*

90. *Id.*

91. See Kohlberg, *supra* note 53, at 389 (in the context of research into children’s moral development).

92. See II THOMAS AQUINAS, SUMMA THEOLOGIA, 83–95 (Timothy McDermott trans., Blackfriars 1964).

93. See H.L.A. HART, THE CONCEPT OF LAW 178 (2d ed. 1994) (explaining that the voluntary requirement for moral wrongdoing is upheld through the *mens rea* requirement in law which permits “those who offend without carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to the law” to “be excused”).

94. See RESTATEMENT (SECOND) OF CONTRACTS §§ 174–75 (1981) (describing that duress by physical compulsion prevents contract formation and duress by

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.”<sup>95</sup>

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 of compelling people to mimic virtuous behavior, they do a poor job (according to George) of directly making people virtuous.<sup>96</sup>

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threat make a contract voidable); 28 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 71:8 (4th ed. 2003) (stating that when “a party is compelled by physical force to do an act that he has no intention of doing” he is under duress and “there is no contract at all, or a ‘void contract’”).

95. See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 7.1(a) (2d ed. 2003) (stating that the insanity defense may be applied if when the act was done, due to mental illness, defendant did not “know the nature and quality of the act he was doing” or if he did know what he was doing, he did not know it was wrong); 2A CHARLES ALAN WRIGHT & PETER J. HENNING, *FEDERAL PRACTICE AND PROCEDURE* § 498 (4th ed. 2009 & Supp. 2011) (stating that a defendant can use the insanity defense if due to “severe” mental disease or defect the defendant was unable “to appreciate the nature and quality or the wrongfulness of his acts” (citation omitted)).

96. See GEORGE, *supra* note 64, at 44 (“Laws can compel outward behavior, not internal acts of the will; therefore, they cannot compel people to realize moral goods. They cannot, in any direct sense, ‘make men moral.’”). 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 *id.* at 44–45 (“By suppressing industries and institutions that cater to moral weakness, and whose presence in the moral environment makes it difficult for people to choose uprightly, such laws can protect people from strong temptations and inducements to vice.”). 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 *id.* at 46 (“A morals law may prevent moral harm, thus benefitting a potential wrongdoer, simply by protecting him from the (further) corrupting impact of acting out the vice.”). But this, according to George, should not be confused with the development of virtue. See *id.* at 44 (stating that laws cannot “make men moral” directly). Unfortunately, the term “morality” itself has multiple definitions. I would suggest that its first definition (“conformity to the rules of right conduct”) is that which applies to the traditional understanding of law’s role with respect to morality. WEBSTER’S *ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* 930 (1989). When I speak of “virtue” and “morality” throughout this Article, I am referring to the third definition of morality: “moral quality or

George's position would seem to conflict with a long tradition within virtue ethics 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."<sup>97</sup> There was a sense that coerced habituation could pave the way for internalization, voluntary choice, and genuine virtue.<sup>98</sup> 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."<sup>99</sup> 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."<sup>100</sup> One of the points of this is to afford individuals and private institutions the space needed to develop and pursue virtue.<sup>101</sup> 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.

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character." *Id.*

97. Regan, *supra* note 39, at 344. To Aristotle "[a]rgument can merely inform people of the right thing to do; it cannot motivate them to do it." GEORGE, *supra* note 64, at 23, as reprinted 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.* (citation omitted). 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, *supra* note 43, at 56–88 (explaining the proper method of education in the ideal city).

98. See Ralph F. Gaebler, *On the Incompatibility of Political Virtue and Judicial Review: A Neo-Aristotelean Perspective*, 34 HAMLINE L. REV. 263, 284 (2011) (stating that habituation causes students to perform "virtuous acts for their own sake").

99. *Id.*

100. Regan, *supra* note 39, at 345.

101. See *id.* ("The principle of subsidiarity assigns only a limited role to the state in the development of a civic culture conducive to moral virtue.").



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 state exist to supplement and foster, not to supplant or hinder, the self-development of citizens through individual effort and voluntary associations with others.<sup>102</sup>

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.<sup>103</sup> It also touches upon a fundamental question of human nature: are people inherently disposed toward virtue, or inherently disposed toward vice?<sup>104</sup>

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:<sup>105</sup> people differ from one another when it comes to

102. Regan, *supra* note 39, at 345.

103. As was well articulated in Montesquieu's highly influential *Spirit of Laws*. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 350 (2009) ("At the heart of the republican tradition is a belief in the critical importance of some kind of civic virtue and the impossibility of a public-serving government without it."). See generally Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1 (1990).

104. Compare IX THOMAS AQUINAS, SUMMA THEOLOGIA 247–51 (Kenelm Foster trans., Blackfriars 1968), with THOMAS HOBBS, LEVIATHAN 63 (Prometheus Books 1988) (explaining that in the natural condition "if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their owne conservation, and sometimes their delectation only), endeavour to destroy, or subdue one another"). Aristotle falls in between Aquinas and Hobbes, holding that "[h]uman beings are blank slates . . . with the capacity to receive either virtue or vice." Gaebler, *supra* note 98, at 282. Modern science appears to vindicate Aquinas's position. See generally MORAL MARKETS (Paul Zak ed., 2008).

105. At least to someone who has raised multiple children.

certain natural tendencies.<sup>106</sup> 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.<sup>107</sup> 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."<sup>108</sup>

Given that Aquinas concurs in the belief that the "purpose of human law is to lead men to virtue,"<sup>109</sup> 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 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.<sup>110</sup>

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 counterproductive. For those who are not so imbued, the law should not demand standards of behavior to which only the truly virtuous could readily conform. 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."<sup>111</sup>

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106. See AQUINAS, *supra* note 86, at 107–11.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

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.<sup>112</sup>

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.<sup>113</sup> Thus, to the extent that law makes it easier for individuals to develop habits of doing good,<sup>114</sup> 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 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 good job in removing temptations—thus increasing the likelihood that an individual will choose to do the right thing versus the wrong thing.<sup>115</sup>

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112. See Gaebler, *supra* note 98, at 289–91 ("As a functional part of the mechanics of virtue, deliberation is the distinctive feature of *choice* that differentiates it from both wish and non-rational desire and, therefore, makes a crucial contribution to the exercise of virtue and vice." (emphasis added)).

113. See GEORGE, *supra* note 64, at 44–46 ("[M]oral laws can help to shape the framework of understandings and expectations that helps to constitute the moral environment of any community.").

114. See *supra* note 52 and accompanying text (explaining that virtue has been defined as "habit" of doing good and habits are developed through repetition).

115. This was one of the solutions to last decade's research analyst scandal, which I commended. See Ronald J. Colombo, *Buy, Sell or Hold?*, 73 BROOK. L. REV. 91, 118 (2007) ("Rule 2711 attempts to minimize the fundamental conflicts of interest that give rise to research analyst misconduct via structural changes and disclosure . . .").

#### IV. Corporations and Virtue

Corporate law is not immune to the limitations and shortcomings shared by all other fields of law.<sup>116</sup> Moreover, as institutions suffused with interpersonal relationships, corporations would appear to be ideal candidates for analysis under the lens of virtue ethics (which, after all, is built largely upon the proposition that human beings are social animals<sup>117</sup>). 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.<sup>118</sup>

Thus, there are at least two interrelated 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.

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-

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116. See *supra* Part III.A. (explaining that laws are limited by the fact that they are generally reactionary, deal with the effects of past conduct, and cannot foresee the countless problems of the future).

117. See *supra* text accompanying note 39 (discussing Aristotle's observation that "man is a social animal").

118. See *supra* text accompanying notes 1–8 (arguing that a lack of character and virtue has played an important role in causing the recent financial crisis).

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, the easy part.<sup>119</sup> 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 ensuring that their corporations were fulfilling all requisite moral and ethical obligations.<sup>120</sup> 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.<sup>121</sup>

But the traditional view is not the prevailing view today. 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."<sup>122</sup> Pursuant to this understanding, the corporation

119. 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, at 26 (2002) ("It is fair to say that the economic theory of the firm is now the dominant paradigm in corporate law." (citation omitted)).

120. See Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law Via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 266–67 (2008) ("[B]y maintaining the traditional paradigm of the corporation . . . the shareholders' moral obligations can fairly be used to guide and circumscribe corporate activity." (emphasis omitted)).

121. See *id.* at 249 ("[T]he traditional conceptualization of the corporation (namely, that of a company owned by its shareholders) can be substantially harmonized with the ends promoted by the 'progressive' approaches to corporate law . . . made possible via recourse to an Aristotelian understanding of ownership."). Since management and oversight of the corporation is entrusted to its board of directors, it is the board's duty to exercise this moral responsibility on behalf of the shareholders. See *id.* at 248–49. In response to the argument that the shareholders and directors might embrace different moralities, the Aristotelian philosophy asserts the objectivity of morality—a notion which, if accepted, dispels the problem of potentially conflicting moralities. See *id.* at 272.

122. See BAINBRIDGE, *supra* note 119, § 1.5, at 26. But see Julian Velasco,

is a network of interconnected explicit and implicit contracts.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

Without distancing myself from my past scholarship, I nevertheless wish to utilize the attorney's prerogative to "argue in the alternative." I want to articulate a role for virtue within the prevailing, modern understanding of both the corporation and morality—within the context of contractarian thought.<sup>126</sup>

As before, a major component of this undertaking involves identifying the party or parties who should hold the responsibility for exercising virtue on behalf of the corporation. In other words, who within the corporation ought to be entrusted with the ability to formulate and actualize corporate virtue?

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*Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 897 (2010) ("[T]here seems to be substantial agreement among legal scholars . . . that shareholders do not own corporations . . . [m]ost people—not just the public and the media, but also politicians, and even bureaucrats and the courts—seem to believe that shareholders do, in fact, own corporations.").

123. See BAINBRIDGE, *supra* note 119, § 1.5, at 27 ("[T]he firm is not a thing, but rather a nexus or web of explicit and implicit contracts establishing rights and obligations among the various inputs making up the firm.").

124. See *id.* at 28–29.

125. See *id.* at 30 ("The basic thesis of the hypothetical bargain methodology is that by providing the rule to which the parties would agree if they could bargain . . . , society facilitates private ordering.").

126. Such an approach also has the benefit of addressing the problem of anchoring corporate virtue to shareholders given the realities of the modern shareholders—rationally apathetic and largely institutional. See Larry Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1022 (2011) ("[D]ispersed, passive, and anonymous shareholders that corporate-governance-based regulation purports to protect are unlikely to have much expressive interest at stake in corporate activities."). The contractarian approach, however, 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" with "people working together for common goals," an appreciation of the roles of ethic and the importance of the individual within the corporation, would, I suggest, flow more naturally. See SOLOMON, *supra* note 21, at 109.

The answer to this question informs the answer to another important one: Whose virtue ought corporate law serve primarily to foster? 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 the 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.<sup>127</sup>

The question of vulnerability requires us to ask: Which of the corporation's various constituencies is most exposed to suffering the 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

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127. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250 (1999) (identifying the different entities that are involved in the functioning of a corporation).

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—specifically, about how one makes the various decisions that one must make throughout life.<sup>128</sup> 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.<sup>129</sup> An important factor that could influence these choices, either positively or negatively, is the environment in which they are made.<sup>130</sup>

As such, it would seem that constituencies external to the corporation would ordinarily be least vulnerable when it comes to the safeguarding and development of the corporation's 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 "inside" versus those who are "outside" the corporation is not particularly clear.<sup>131</sup> To the contractarian, the corporation is not a "thing" that has well-defined borders, but rather a network of explicit and implicit contracts.<sup>132</sup> 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

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128. See *supra* text accompanying notes 47–59 (explaining that virtue is developed by repeatedly engaging in virtuous actions and decisions).

129. See *supra* text accompanying note 52 (defining virtue as the habit of making the right decisions).

130. See *supra* text accompanying note 113 (stating that the enactment of laws can help facilitate an environment that promotes the development of virtue).

131. William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 420 (1989).

132. See BAINBRIDGE, *supra* note 119, § 1.5, at 26.



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 discussed hereinafter.<sup>133</sup>

External constituencies have less interest in corporate virtue because the 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 because 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. Ordinarily, the harm imposed is 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 also genuine corporate cultural polluters—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.<sup>134</sup> The culture of temptation that this gives rise to is exactly the kind of

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133. See *infra* notes 137–45 and accompanying text (clarifying that although traditionally investors are bifurcated into stockholders and bondholders, in this case they can be grouped into one category of investors).

134. See PETER A. FRENCH, CORPORATE ETHICS 48–49 (1995) (describing the power of corporate advertising to exploit the weaknesses of consumers); see also, e.g., Stephanie Pappas, *30% of Girls' Clothing Is Sexualized in Major Sales Trend*, LIVESCience (May 20, 2011 10:36 AM), <http://www.livescience.com/14249-girls-clothing-sexualized.html> (last visited Jan. 30, 2012) (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) (on file with the Washington and Lee Law Review).

environment that makes the development of virtue more difficult and therefore less likely.<sup>135</sup>

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 and preservation of virtue than those on the outside. Generally speaking, the overall cultural degradation effected by corporate conduct will harm both insiders and outsiders equally.<sup>136</sup> 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 responsible for deciding, and executing, the choice to pollute in the first place. Indeed, the insiders 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 be vulnerable to its restriction by the corporation. Thus, those constituencies that are most external to the corporation—business partners, customers, and the communities where it does business—would not be the appropriate constituencies 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

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135. See Yuval Eylon, *Virtue and Continence*, 12 ETHICAL THEORY & MORAL PRAC. 137, 146 (2009) (highlighting the difficulty of acting virtuously because an individual must recognize temptation as “something that might mislead someone into acting non-virtuously”).

136. An exception would exist in 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 Bob Sector, *Cities/Billboard Battle: Priest Pleads Moral Right to Deface Ads*, L.A. TIMES, Aug. 16, 1990, at A5; see also Stuart Elliott, *Liquor Ads Cut in Minority Areas*, USA TODAY, Mar. 6, 1990, at B1.

into the categories of equity (stockholders) and debt (bondholders).<sup>137</sup> Further, stockholders have traditionally been characterized as owners of the corporation, and with this characterization flowed several important practical and rhetorical consequences.<sup>138</sup> As a result, if anyone's morality ought to govern the conduct of the corporation, it would seem to be that of the shareholders.<sup>139</sup> In any event, it would not be 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 much less important. Under the contractarian approach, stockholders are not owners of the corporation, but merely one of many corporate constituencies.<sup>140</sup> That said, stockholders are afforded "ownership-like" rights in the corporation under the contractarian approach, but for reasons that are *wholly economic in nature*.<sup>141</sup> 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.

This would seem to comport well with reality. Investors are ordinarily diffuse and rationally apathetic, and do not follow the

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137. See Thomas R. Hurst & Larry J. McGuinness, *The Corporation, the Bondholder, and Fiduciary Duties*, 101 J.L. & COM. 187, 196 (1991) ("[T]he argument that bondholders and stockholders should be viewed simply as different classes of investors in the corporation undeniably has some legitimacy."). See also generally Morey W. McDaniel, *Bondholders and Stockholders*, 13 J. CORP. L. 205 (1988).

138. See 18 C.J.S. *Corporations* § 420 (2011) (noting that some courts "regard the stockholders as the equitable owners of the assets"); 11 WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 5100 (explaining that shareholders have "a beneficial interest in the corporate property . . . [including] a proprietary interest in the corporation and a qualified beneficial interest that is an indirect or collateral interest in the corporate property.").

139. This is exactly something I have argued in my previous scholarship. See Colombo, *supra* note 120, at 267–68.

140. See Brian McCall, *The Corporation as Imperfect Society*, DEL. J. CORP. L. (forthcoming 2011) (manuscript at 9) ("[Some] scholars see the corporation as joint property; a corporation is owned by a variety of constituencies whose ownership takes different forms.").

141. See *id.* at 7 ("Corporate decision making is placed in the realm of economic decision making which is rooted in the idea of negotiating for one's particular or individual economic best interest.").

corporations in which they have invested particularly closely.<sup>142</sup> Moreover, most investors are not even human. Institutional investors dominate the equities markets, and they have often invested via an intermediary such as another institution, like a hedge fund or mutual fund.<sup>143</sup> Such actors are unlikely to have a particularly strong interest in corporate virtue.<sup>144</sup> 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*.”<sup>145</sup> This would suggest that 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 also 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 seem, generally and relatively speaking, to lack interest in corporate virtue, and

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142. See Ribstein, *supra* note 126, at 1022.

143. See Blerina Reca, Richard W. Sias & Harry J. Turtle, Are Institutional Investors Informed? Evidence from Entry, Exit and Adjustments 2 (Feb. 14, 2011) (unpublished manuscript), available at <http://www.mfa2011.com/papers/RecaSiasTurtle%20-%20Are%20Institutional%20Investors%20Informed.pdf> (“[I]nstitutional investors dominate the trading of securities.”).

144. *But see* Colombo, *supra* note 120, at 266 n.145 (arguing that the moral responsibility of ownership does not lessen with attenuation).

145. Moore, *supra* note 6, at 239 (quoting Charles Handy, *What's a Business For?*, HARV. BUS. REV., Dec. 2002, at 49, 51 (emphasis added)).

are 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 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 virtuous decision making, would appear to be the directors, officers, and employees. Admittedly, to a limited extent, the shareholders also share in this power, and to an even more limited extent, so do the other constituencies previously considered.<sup>146</sup> 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.

First, consider 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, especially in relation 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.<sup>147</sup>

This 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

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146. The power of the shareholders is limited because 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 suits. See 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:12 (3d. ed. 2010); see also 5 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2097 (2011) (describing the general, but limited, powers of the shareholders).

147. See RICHARD SENNETT, THE CORROSION OF CHARACTER 42–45 (1998) (elucidating the implications of hierarchical control within industrial companies). 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 broadcast).

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 even less frequently overridden. Low-level employees, therefore, are not 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 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 connect with the corporation in ways that none of the other constituencies 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.<sup>148</sup>

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. 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.<sup>149</sup>

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.<sup>150</sup> That said, officers also “play a critical

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148. See EDWARD BRODSKY & M. PATRICIA ADAMSKI, *LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES* § 1:2 (2011) (describing the responsibilities of directors and officers); see also 22 ALAN S. GUTTERMAN, *BUSINESS TRANSACTIONS SOLUTIONS* § 98:12 (2011).

149. See R. Eric Reidenbach & Donald P. Robin, *A Conceptual Model of Corporate Moral Development*, 10 J. BUS. ETHICS 273, 273 (1991).

150. See, e.g., Stephen M. Bainbridge, *The Board of Directors as Nexus of*

role in corporate governance.”<sup>151</sup> Scholars are increasingly coming to the view that officers, rather than directors, truly control the modern business corporation.<sup>152</sup> 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.”<sup>153</sup> This is true 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 (such as, “thou shall 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.”<sup>154</sup> 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.<sup>155</sup> Indeed, when one examines the

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*Contracts*, 88 IOWA L. REV. 1, 6 (2002) (explaining the theory of director primacy which asserts that the board of directors controls corporations).

151. Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 663 (2007).

152. See Franklin A. Gevurtz, *The Historical and Political Origins of the Board of Directors*, 33 HOFSTRA 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, 550 (2003) (“Neither shareholders nor managers control corporations—boards of directors do.”).

153. Johnson & Ricca, *supra* note 151, at 665.

154. See Wines & Hamilton, *supra* note 13, at 55 (“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.”); see also Kohlberg, *supra* note 53, at 386 (“[M]oral character traits should be assessed from actions, rather than from judgments and feelings.”).

155. See SIMS, *supra* note 16, at 83 (“Upper management is critical in determining the ethical culture of an organization.”); see also Peter F. Drucker,

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.”<sup>156</sup>

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.<sup>157</sup> 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 broadly identify 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, which is rarely the case when it comes to directors, who are usually much more removed and dissociated from the corporations they serve.<sup>158</sup>

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*What Is “Business Ethics”?*, NAT’L AFF., Spring 1981, at 18, 36 (noting that it is important for managers to serve as role models for ethical behavior and to shun behavior that is not appropriate); cf. Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 439 (2005) (“Corporate officers stand at the very center of recent business scandals.”).

156. See Johnson & Ricca, *supra* note 151, at 665; see also Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1105–06 (2009) (noting the influence of corporate executives in recent corporate failures such as Enron, Tyco, and WorldCom).

157. Specifically, outside or independent directors.

158. See Nicola Faith Sharpe, *The Cosmetic Independence of Corporate Boards*, 34 SEATTLE U. L. REV. 1435, 1453 (2011) (“Directors are usually officers of other companies, and acting as a director occupies only a small fraction of any given director’s time.”). But see Marcel Kahan & Edward Rock, *Embattled 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



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 she discharges the corporate duties that dominate her daily life,<sup>159</sup> which 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."<sup>160</sup> Instead, "[i]t comes from executives themselves who want the opportunity to think through and clarify the conflicts in which they find themselves on a daily basis."<sup>161</sup>

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.<sup>162</sup> A director's life, on the other hand, is not so heavily characterized by his or her duties as a board member,

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deal more often with vocal and resistive shareholders.

159. See Alasdair MacIntyre, *Social Structures and Their Threats to Moral Agency*, 74 PHIL. 311, 315 (1999) ("For the lives of individuals are constituted in large part by the various roles that they play . . ."); cf. EDWIN M. HARTMAN, *ORGANIZATIONAL ETHICS AND THE GOOD LIFE* 85 (1996) (explaining that the design of a morally sound organization would be "productive but not unjustly hard on any stakeholder"). 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.

160. SOLOMON, *supra* note 21, at 5.

161. *Id.*

162. See Wines & Hamilton, *supra* note 13, at 72 ("Aristotle taught that we tend to become what we do."). 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.

Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 406 (2005) (internal citations omitted).

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,<sup>163</sup> and this undermines pinning anything upon officers 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, 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.<sup>164</sup>

### *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.<sup>165</sup> In this subpart and the one immediately following, I shall

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163. See Michael Follett, *Gantler v. Stephens: Big Ephiphany or Big Failure?*, 35 DEL. J. CORP. L. 563, 564 (2010) (“[C]ourts have yet to fully define corporate officers’ roles.”). An impressive effort to remedy the dearth of scholarship on corporate officers has been undertaken by Lyman Johnson. See, e.g., Lyman P.Q. Johnson, *Corporate Law Professors as Gatekeepers*, 6 ST. THOMAS L.J. 447, 450 (2009) [hereinafter Johnson, *Gatekeepers*] (noting the misconception by corporate officers that they are required by law to maximize profits and arguing that calls for professionalism have failed to balance this misconception); Johnson, *supra* note 155, at 440 (arguing that vague theories that officers are “fiduciaries” do not have the support of any conceptual or positive law foundations); Johnson & Ricca, *supra* note 151, at 663 (discussing the question of whether the corporate officer’s duties are equivalent to that of the corporate director).

164. 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 (suggesting that unethical actions of managers results from organizational life, which is structured by the board of directors).

165. 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., *Can a Corporation Have a Conscience?*, 60 HARV. BUS. REV. 132, 137 (1982). Like Goodpaster and

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 obstacles.

Substantively, the simplest and most effective way for corporate law to encourage and promote virtue is to stop punishing it.<sup>166</sup> 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 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.”<sup>167</sup>

The primary culprit in maintaining a “corporate box” that excludes considerations of virtue is the “shareholder primacy norm.” As generally (although, arguably, incorrectly)<sup>168</sup> 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.<sup>169</sup> Indeed, the only

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Matthews, I believe that the responses to these concerns are largely convincing. See *id.* at 139–41 (responding to objections).

166. See Wines & Hamilton, *supra* note 13, at 75 (urging organizations to become “more like town meetings and less like the hierarchical organizational charts derived from military models”).

167. *Id.*

168. See Johnson, *Gatekeepers*, *supra* note 163 at 450 (“[N]o 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) (observing that corporate law originates from corporate charters and bylaws, state statutes, and judicial decisions and discussing the conspicuous absence of the shareholder-wealth maximization obligation from any of these sources); Colombo, *supra* note 120, at 268–70 (arguing that a broad duty to shareholders that encompasses more than wealth maximization “should be received as the restoration of a principle that has been unduly narrowed to consider economic interests alone”).

169. See Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 COLUM. BUS. L. REV. 773, 775–76 (emphasizing the inherent destructive force of the shareholder wealth maximizing duty). The wealth maximization

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).<sup>170</sup> 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.<sup>171</sup>

Toward this singular end, officers and directors are bound via judicially enforceable fiduciary duties of care and loyalty, under pain of a shareholder derivative lawsuit should they waver.<sup>172</sup>

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.<sup>173</sup> But the business judgment rule notwithstanding, the shareholder primacy norm remains a powerful influence 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.<sup>174</sup> Indeed, the most recent decision from the

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norm is, of course, a child of capitalism generally. Adam Smith himself "equated the growth of markets and the division of labor with the material progress of society, but not with its moral progress." SENNETT, *supra* note 147, at 38.

170. See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982) ("[M]anagers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm . . .").

171. Moore, *supra* note 6, at 239 (quoting Alasdair MacIntyre, *Corporate Modernity and Moral Judgement: Are They Mutually Exclusive?*, in ETHICS AND PROBLEMS OF THE 21ST CENTURY 122, 126 (K.E. Goodpaster & K.M. Sayre eds., 1979)).

172. See BAINBRIDGE, *supra* note 119, at 408–10 (discussing the different views of the relationship between officers/directors and shareholder and noting the common theme of fiduciary obligations and the threat of a shareholder derivative suit).

173. See Sneirson, *supra* note 168, at 1005–06 (noting the deference of the courts under the business judgment rule).

174. See BAINBRIDGE, *supra* note 119, at 285–86 (observing that "judicial precedents are divided" on the question of corporate officers' coverage by the

Delaware Supreme Court was not entirely clear on this very question.<sup>175</sup> Thus, although most commentators believe the rule is applicable to officer conduct,<sup>176</sup> 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. A growing body of scholarship supports the notion that law possesses an “ability to influence individual behavior by an existence decoupled from its enforcement.”<sup>177</sup> 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.<sup>178</sup> 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

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business judgment rule); Johnson & Ricca, *supra* note 151, at 663 (discussing the fiduciary duties of officers as agents and whether these duties are identical to the fiduciary duties imposed on directors).

175. See *Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (finding that the fiduciary duties of directors and officers are identical but failing to discuss the applicability of the business judgment rule).

176. See Gregory Scott Crespi, *Should the Business Judgment Rule Apply to Corporate Officers, and Does It Matter?*, 31 OKLA. CITY U. L. REV. 237, 237 (2006) (asserting that the conventional wisdom is that the business judgment rule applies to corporate officers); Follett, *supra* note 163, at 570 (stating that Delaware court decisions have indicated that corporate officers share in the protection afforded by the business judgment rule).

177. Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1384 (2008).

178. See Wines & Hamilton, *supra* note 13, at 73–74 (using Professor Zimbardo’s guard/prisoner role-playing experiment to discuss the debasing influence of role on human behavior); see also Daniel J.H. Greenwood, *Team Spirit: Doing Bad Things in the Cause of Good*, in *THE RANGE OF EVIL: MULTIDISCIPLINARY STUDIES OF HUMAN WICKEDNESS* 5, 6 (William Andrew Myers, ed., Interdisciplinary Press, 2006) (“But put people in an institution and tell them that their job is to increase profits, and a startlingly large number seem to take leave of their ordinary moral sensibilities.”).

wrong—even the personal morality of the decision maker.<sup>179</sup> As MacIntyre 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.<sup>180</sup>

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 “was the creator and inventor of modern management”<sup>181</sup>—has opined that “[t]here is only one ethics, one set of rules of morality, one code, that of *individual* behavior in which the same rules apply to everyone alike.”<sup>182</sup> He rejected the

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179. “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 they needed to shed whatever refinements of personality and intellect they had brought with them to Salomon Brothers.” MICHAEL LEWIS, *LIAR’S POKER* 41 (1989), *quoted in* SOLOMON, *supra* note 21, at 13.

Anecdotaly, 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 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.”

180. ALASDAIR MACINTYRE, *AFTER VIRTUE* 74 (1984), *quoted in* John Dobson, *MacIntyre’s Position on Business: A Response to Wicks*, 7 *BUS. ETHICS 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.” Dobson, *supra*, at 128.

181. John A. Byrne, *The Man Who Invented Management*, *BUS. WK.*, Nov. 28, 2005, at 98.

182. Peter F. Drucker, *What Is “Business Ethics”?*, *NAT’L AFF.*, Spring 1981,

notion that one's morality needed to be checked at the office or boardroom door.<sup>183</sup>

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 duty to do to be true to his oath of office?"<sup>184</sup>

Philosophically, this phenomenon is a form of casuistry.<sup>185</sup> 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.<sup>186</sup> Jane Jacobs explored this subject at length in her classic work, *Systems of Survival*.<sup>187</sup> According to Jacobs, the mixture of moral norms suitable in one context to another is not merely unnecessary, but rather threatens to create "monstrous moral hybrids."<sup>188</sup>

Although casuistry could operate to ratchet up one's moral obligations (such as when a mother sacrifices what is rightfully

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at 18, 19.

183. *See id.* ("There is only one code of ethics, that of individual behavior, for prince and pauper, for rich and poor, for the mighty and the meek alike.").

184. *Id.* at 26. Drucker distinguishes casuistry from the ethics of interdependence, which he ascribes to Confucian origin. *See id.* at 30 (noting that Confucianism prescribes five different general ethics according to the relationship, which allows it to escape the mistake made by casuistry ethics by combining the flexibility of situational ethics with the moral imperatives of universal ethics).

185. *See id.* at 22 (noting that casuistry, like business ethics, was an attempt to create "a set of special ethics for those in power").

186. *See id.* ("[T]he ruler has a duty . . . to subordinate his individual behavior and his individual conscience to the demands of his social responsibility.").

187. JANE JACOBS, *SYSTEMS OF SURVIVAL* (1992).

188. *Id.* at 80–81.

hers for the well-being of her children), it can also take on a less savory character (as exemplified by Bismark's remark).<sup>189</sup> Moreover, although casuistry can be justifiably defended in principal,<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup>

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 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 preexisting 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.”<sup>193</sup>

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189. See *supra* text accompanying note 184 (noting Drucker's distinction between casuistry and the ethics of interdependence).

190. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 46–50 (2010) (discussing a lawyer's obligation to represent her clients to the best of her ability).

191. See Drucker, *supra* note 182, at 24 (arguing that casuistry implies that “the rules which decide what is ethical for ordinary people do not apply equally, if at all, to those with social responsibility”).

192. R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 184 (1926), *quoted in* SOLOMON, *supra* note 21, at 145.

193. SOLOMON, *supra* note 21, at 105.



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, preexisting ethical duties.<sup>194</sup> Application of the greatest of virtues to Aristotle—"phronesis" or "prudence"—should help an officer appreciate this and navigate any apparent conflict.<sup>195</sup>

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*.<sup>196</sup> The ALI's *Principles* defines 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

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194. 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 id.* at 260 ("[E]ven Aristotle realized that the search for the perfect world was futile, that one did the best with what one had."). 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 PHIL. REV. 87, 87–90 (1982) (arguing that moral dilemmas are nonexistent); *see also* Terrance McConnell, *Moral Dilemmas*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010), available at <http://plato.stanford.edu/archives/sum2010/entries/moral-dilemmas/> (discussing the two most widely cited examples of a moral dilemma and describing how both examples do not illustrate an actual moral dilemma). 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. 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, 148–55 (1996).

195. *See* SOLOMON, *supra* note 21, at 174 ("Aristotle thought that it was 'good judgment' or *phronesis* that was of the greatest importance in ethics.").

196. A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1992).

ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.<sup>197</sup>

Consider also Section 2.01 of The ALI's *Principles* ("The Objective and Conduct of the Corporation") which reads:

- 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.<sup>198</sup>

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."<sup>199</sup> I would suggest that an "ordinary" person, prudent or otherwise, would be an individual in possession of some preexisting 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."<sup>200</sup> 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

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197. *Id.* § 4.01.

198. *Id.* § 2.01.

199. *Id.* § 4.01.

200. *Id.* § 2.01.

principles in the execution 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, generally understood as obliging strict shareholder wealth maximization, could thus be viewed as unnecessary and detrimental casuistry at work.<sup>201</sup> unnecessary because it fails to accurately capture the law's nuances for the reasons set forth immediately above,<sup>202</sup> and detrimental because it invites acquiescence to powerful temptations. In corporations, executive compensation (and, moreover, job retention) is often linked to performance.<sup>203</sup> Performance, in turn, is usually linked to corporate profitability and stock appreciation.<sup>204</sup> Officers are thus confronted with a situation in which 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 of the corporation's officers and, understandably, has become a matter of some fixation.<sup>205</sup> As such, anything that a particular officer might do to jeopardize shareholder contentment concerns every other officer in the firm

201. 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. Sayre, 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.”).

202. See *supra* text accompanying notes 196–200 (discussing provisions of the *American Law Institute's Principles of Corporate Governance* which provide for moral and ethical considerations to influence corporate decision making).

203. See SIMS, *supra* note 16, at 22, 24, 31–32 (explaining ways in which financial incentives can be misaligned to encourage unethical decision making).

204. See 1 HR SERIES COMPENSATION AND BENEFITS § 2:17 (2011); WILLIAM A. CALDWELL, COMPENSATION GUIDE § 17:1 (2011).

205. See Daniel F. Muzyka & Lawrence A. Weiss, *Oversight Can Be a Manager's Stay-Out-of-Jail Card*, *GLOBE & MAIL*, Nov. 30, 2009, at B7; Paul Read, *Executive Pay Growth Here Tepid*, *J. BUS.*, Jun. 17, 2010, at A1.

(professionally and personally). Hence, an abundantly scrupulous officer who 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.<sup>206</sup>

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),<sup>207</sup> but also has the potential to shape the officer's personal character over time.<sup>208</sup> It serves to socialize the officer in a way detrimental to many of the virtues he or she had previously developed.<sup>209</sup>

Structural factors also work to separate a corporate officer from his or her personal moral compass.<sup>210</sup> 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.<sup>211</sup> This evokes

206. See Robert C. Solomon, *Victims of Circumstances? A Defense of Virtue Ethics in Business*, 13 BUS. ETHICS Q. 43, 44 (2003).

207. See *id.* ("[P]eople 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.'").

208. See Moore, *supra* note 6, at 242–43 (arguing that the demands of the business world require executives to develop a different character when making business decisions than they would otherwise cultivate in their personal lives).

209. See *id.* at 244.

210. See SIMS, *supra* note 16, at 21 ("[T]he bureaucratic structure of modern corporations encourages managers to behave unethically."); MacIntyre, *supra* note 201, at 132 ("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.").

211. See SOLOMON, *supra* note 21, at 7 ("[T]he rubber check of corporate responsibility bounces up and down the hierarchy and seems to get cashed out nowhere."); MacIntyre, *supra* note 201, at 122 ("[C]orporate structures fragment consciousness and more especially moral consciousness"); Moore, *supra* note 86, at 334 (identifying phenomena of "groupthink" and "risky shift" in organizational life); Michael J. Phillips, *Corporate Moral Responsibility: When It Might Matter*, 5 BUS. ETH. Q. 555, 567–68 (1995); see also *supra* note 179 and

both the chilling Nuremburg refrain of “just following orders,” along with the results of the Milgram experiments regarding acquiescence to authority.<sup>212</sup>

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, geographically localized transactions.<sup>213</sup>

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 or regulatory obligations.<sup>214</sup> 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 the floor or the minimum of permissible ethical behavior.<sup>215</sup> Unfortunately, regulatory requirements are all too often internalized as coterminous with (and, effectively, a ceiling on) the demands of ethics.<sup>216</sup> This can serve to thwart further ethical development.

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accompanying text (illustrating the confusion over who has more moral responsibility—directors or the shareholders).

212. See Wines & Hamilton, *supra* note 13, at 45 (“People act differently when they are in groups than when they are not.”); see also Solomon, *supra* note 206, at 49. See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1983). The Nuremburg trial of Nazi war criminals exposed a striking tendency to shift blame and moral responsibility to higher-ranking officers, as defendants argued they were not personally responsible because they were “just following orders.” Milgram’s experiment in 1961 revealed that a majority of participants would administer what they thought was an extremely dangerous electrical shock to another person when an authority figure instructed them to do so, despite their expressed concerns for the other person’s safety.

213. Cf. Steve Twedt, *E-Mail Isn’t the Way to Build Trust at Work*, PITT. POST-GAZETTE, July 11, 2010, at F1.

214. See Colombo, *supra* note 84, at 845–56.

215. See *supra* note 97 and accompanying text.

216. Cf. SOLOMON, *supra* note 21, at 160–61 (“The idea that the moral life is

All that said, as indicated previously, role-differentiated morality is not (in theory) necessarily problematic.<sup>217</sup> 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.<sup>218</sup> Indeed, this is exactly the perspective of many commentators and officers themselves.<sup>219</sup>

That notwithstanding, I question such a position on a number of grounds. I find it too convenient, and fear that it constitutes but a pretextual fig leaf clothing otherwise naked ambition.<sup>220</sup> 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 overrides all others. And once that is acknowledged, it simply becomes a question of which other

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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)).

217. See *supra* note 190 and accompanying text.

218. See McCall, *supra* note 140, at 7-9.

219. Cf. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at SM17.

220. See *supra* text accompanying notes 190-204 (explaining how, in assuming the role of a corporate officer, an individual takes on moral and ethical duties in addition to, rather than to the exclusion or destruction of, his or her preexisting duties).

ethical principles should counteract the wealth maximization norm, and when.

#### *D. Virtue and Corporate Law—A Prescription*

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.<sup>221</sup>

##### *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.<sup>222</sup> 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 overinclusive (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.<sup>223</sup> Given the discomfort that some scholars have expressed in response to the idea of extending business judgment rule protections to

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221. See *supra* Part IV.C (presenting a variety of structural and substantive obstacles to corporate virtue).

222. See *supra* text accompanying notes 168–172 (describing the prevailing interpretation of the shareholder primacy norm as a single-minded objective to maximize shareholder wealth that does not accept moral or ethical considerations unless they support the ultimate goal of wealth maximization).

223. 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 119, at § 6.4.

officers,<sup>224</sup> 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.<sup>225</sup> Such a rule would be akin, in many respects, to a conscience protection clause, something with which the law is already familiar.<sup>226</sup> 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.)<sup>227</sup> 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

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224. See Johnson, *supra* note 155, at 440 (arguing that the business judgment rule does not and should not apply to corporate officers in the same broad manner as it applies to directors and that officer conduct should be scrutinized more closely than director conduct).

225. Despite the broad diversity of moral opinion in the twenty-first century, implementation of this exception should still be possible. See Kohlberg, *supra* note 53, at 405

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 its content (the action judged) and without considering whether it agrees or not with our own judgments or standards.

226. See WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, *RELIGIOUS ORGANIZATIONS AND THE LAW* § 13:36 (2011) (detailing the evolution and scope of conscience clauses, under which medical practitioners may decline to perform certain procedures that are contrary to their religious beliefs or moral convictions); Martha S. Swartz, "Conscience Clauses" or "Unconscionable Clauses": *Personal Beliefs v. Professional Responsibilities*, 6 YALE J. HEALTH POL'Y L. & ETHICS 269, 271, 274 (2006) (discussing the debate over the expansion of conscience clauses).

227. Cf. ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (1973).



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.<sup>228</sup> Culture, including corporate culture, “gives people’s lives meaning.”<sup>229</sup> 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.”<sup>230</sup>

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.”<sup>231</sup> 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: (1) it will serve to sensitize his or her colleagues and 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 (2) it 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 or dereliction of duty.

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228. See *supra* note 159 and accompanying text (describing how a director’s moral development hinges on her daily decisions); see also Al Gini, *A Short Primer on Moral Courage*, in *MORAL COURAGE IN ORGANIZATIONS* 8 (Debra R. Comer & Gina Vega eds., 2011).

229. See HARTMAN, *supra* note 159, at 153.

230. See *id.*

231. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

Such disclosure should extend not only to complete candor<sup>232</sup> 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 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.<sup>233</sup> 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.<sup>234</sup> This function

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232. See Shannon German, *What They Don't Know Can Hurt Them: Corporate Officers' Duty of Candor to Directors*, 34 DEL. J. CORP. L. 221, 255 (2009).

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

234. See BAINBRIDGE, *supra* note 119, at § 5.8.

cannot be capably carried out if key decision makers are deprived of material information 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 as a partnership may narrow (or broaden) the understanding of "fiduciary duty" for purposes of the partnership, and just as a contract may narrow the understanding of "good faith" for its purposes,<sup>235</sup> 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 other 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.<sup>236</sup> 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 either (a) abandoning the undertaking altogether and (b) dismissing the officer. Those intermediate 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.<sup>237</sup> But it might be a good idea to require that such a

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

236. See 1 PAUL H. TOBIAS, *LIT. WRONG. DISCHARGE CLAIMS* § 2:55 (2011); Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648–49 (2001).

237. If the matter did not come up because the officer intentionally or recklessly withheld his or her beliefs during the hiring or promotion process, then 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.

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,<sup>238</sup> and the current requirement that public companies disclose whenever an executive departs for reasons relating to the corporation’s “policies and practices,”<sup>239</sup> this rule would require a company to report to the SEC and disclose to the 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.<sup>240</sup> This, in turn, is simply one manifestation of

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238. See HAROLD S. BLOOMENTHAL, *SARBANES–OXLEY ACT IN PERSPECTIVE* §§ 5:22, 5:25, 5:26 (2010) (explaining the operation of the Qualified Legal Compliance Committee and other actors in noisy withdrawal scenarios); David Waters, *The Wisdom of Whistleblowing: The Sarbanes–Oxley Act of 2002 and the “Noisy Withdrawal” Provision*, 34 J. LEGAL PROF. 411, 412–14 (2010) (analyzing the impact of Sarbanes–Oxley on the codes of professional responsibility for lawyers).

239. See SECURITIES AND EXCHANGE COMMISSION, FORM 8-K, ITEM 5.02, available at <http://sec.gov/about/forms/form8-k.pdf>.

240. 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. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878–79 (1990) (addressing the unmanageability of a society in which each individual could determine which laws to follow based upon his or her own conscience), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803. Although the general thrust of this concern is meritorious, use of 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 so) is a hotly contested issue. Compare BAINBRIDGE, *supra* note 119, § 9.2, at 417 (“Shareholder wealth maximization is not only the law . . .”), with Johnson, *Gatekeepers*, *supra* note 163, at 450 (“[N]o law requires that businesses pursue only the goal of corporate profit or the goal of investor wealth maximization.”).

the moral pluralism that marks modern society.<sup>241</sup> 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.<sup>242</sup>

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.<sup>243</sup> Simply put, ethical discourse can get “sloppy,” and as such many wish to avoid getting bogged down by it.<sup>244</sup> 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).<sup>245</sup> Such labels mask the true nature of the wealth-maximization approach: this position is itself a point of view informed by its own moral reasoning.<sup>246</sup> 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 invective against factions.<sup>247</sup> But for all his fear of factions, Madison insisted that eliminating the liberty that is

241. See Kruse, *supra* note 162, at 394–96 (discussing moral pluralism as a condition of free societies).

242. See Colombo, *supra* note 115, at 92–93 (discussing the views of proponents of a law and economics viewpoint).

243. See SIMS, *supra* note 16, at 45–46 (discussing organizational impediments to decision making).

244. See SOLOMON, *supra* note 21, at 48 (“Perhaps, one might think, if only ethics could be made more precise, more like business, then business ethics would be more palatable.”).

245. See Robert H. Nelson, *Economic Religion Versus Christian Values*, 1 J. MARKETS & MORALITY 142, 154 (1998) (“Economics is thus part of an overall value system, really a theology of a secular sort.”); Richard A. Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163, 166–67 (1990) (discussing an economic libertarian viewpoint not derived from moral philosophies and describing wealth maximization as a “cleaner approach”).

246. See Nelson, *supra* note 245, at 154; Posner, *supra* note 245, at 166–67 (“You can if you want describe wealth maximization or libertarianism or laissez faire as moral philosophies. My point is only that I do not intend to try to derive my free-market views from something more fundamental, more rigorously philosophical.”).

247. See THE FEDERALIST NO. 10 (James Madison) (describing the danger of factions and the utility of a republic to cure the effects of factions).

their “air” would be a remedy “worse than the disease.”<sup>248</sup> Instead, what is needed (along the lines of what Madison recommended) is a means for *managing* moral diversity.<sup>249</sup> Although a detailed plan for managing such diversity is beyond the scope of this Article, scholars are already exploring ways to do just this.<sup>250</sup> 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.<sup>251</sup>

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.<sup>252</sup> 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.”<sup>253</sup> Indeed, a movement to increase the diversity of corporate management has

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248. Jennifer L. Kohn, *Federalist #10 in Management #101: What Madison Has to Teach Managers*, SOCIAL SCIENCE RESEARCH NETWORK, 4–5 (June 1, 2011), <http://ssrn.com/abstract=1845625> (last visited Jan. 30, 2012) (quoting THE FEDERALIST NO. 10, at 55 (James Madison) (Random House, 1937)) (on file with the Washington & Lee Law Review).

249. See *id.* at 5 (discussing Madison’s use of a republic and representational filtering process to mitigate the effects of factions) (citing THE FEDERALIST NO. 10, at 59 (James Madison) (Random House, 1937)).

250. See, e.g., SIMS, *supra* note 16, at 113–27 (addressing ethical decision making within group contexts); Kruse, *supra* note 162, at 442–58 (addressing moral conflicts of interest within the attorney-client relationship).

251. Cf. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 221–24 (2009) (arguing that Delaware courts should not apply default fiduciary duties to limited partnership and limited liability corporation agreements).

252. See SIMS, *supra* note 16, at 62–66 (demonstrating the danger of groupthink with historical examples).

253. Kohn, *supra* note 248, at 5.

been afoot for some time now—and I see no reason that “moral diversity” ought to be excluded from these efforts.<sup>254</sup>

Conversations precipitated by dissenting moral opinions can also fuel “the development of . . . corporate character” by sensitizing the corporation and, when coupled with the disclosure requirements suggested previously,<sup>255</sup> its constituencies to other points of view and other firmly held standards of right and wrong.<sup>256</sup> As Edwin Hartman explained:

Genuinely 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.<sup>257</sup>

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.<sup>258</sup> The 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.<sup>259</sup> At a minimum, it may enable a critical mass of support to coalesce

254. See Bernard F. Matt & Nasrin Shahinpoor, *Speaking Truth to Power: The Courageous Organizational Dissenter*, in MORAL COURAGE IN ORGANIZATIONS 157, 164–67 (Debra R. Comer & Gina Vega eds., 2011) (describing why and how organizations should welcome moral dissenters in the organization’s culture).

255. See *supra* text accompanying notes 238–39 (suggesting a “noisy withdrawal” requirement for resignations or firings due to a moral disagreement).

256. See Geoff Moore, *On the Implications of the Practice-Institution Distinction: MacIntyre and the Application of Modern Virtue Ethics to Business*, 12 BUS. ETHICS Q. 19, 30 (2002) (“The corporation will . . . through the incorporation of the virtues of those who represent it, and of the virtues of influential people in its recent past, be in a position to resist the corrupting power of the organizations with which it . . . relates.”).

257. HARTMAN, *supra* note 159, at 177.

258. See JACOBS, *supra* note 187, at 200–01 (discussing the work of Richard Nielsen regarding “managerial isolation” as a cause of corruption in business organizations).

259. This would counter the “Abilene Paradox,” whereby groups “adopt courses of action in direct opposition of the desires of many or all of their members.” SIMS, *supra* note 16, at 53.

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.<sup>260</sup>

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.<sup>261</sup> 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.<sup>262</sup>

## 2. The Shareholder Primacy Norm Revisited

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.<sup>263</sup>

As a preliminary matter, it should be noted that expanding the business judgment rule, as discussed previously,<sup>264</sup> 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,<sup>265</sup> 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

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260. See Debra R. Comer & Susan D. Baker, *I Defy with a Little Help from My Friends: Raising an Organization's Ethical Bar Through a Morally Courageous Coalition*, in *MORAL COURAGE IN ORGANIZATIONS* 171 (Debra R. Comer & Gina Vega eds., 2011) (discussing the promotion of ethical behavior through collective action).

261. See *id.*

262. HARTMAN, *supra* note 159, at 18.

263. See Dobson, *supra* note 180, at 129 (discussing a model of business in which competition and external goods are not the defining characteristics and which focuses on internal goods in practice-based communities).

264. See *supra* Part IV.D.1 (discussing ways to expand the business judgment rule that serve individual officer and corporation interests).

265. See *supra* text accompanying note 177 (noting the ability of law to influence individual behavior).



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. 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.<sup>266</sup> As John Mackey notes, 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.”<sup>267</sup> Within the virtue-ethics tradition, Plato condemned as “pleonexia” that “sickness of purpose” whereby an individual is fixated on unadulterated materialistic self-interest.<sup>268</sup>

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 (including sovereign wealth funds) are ultimately answerable to human beings.

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266. I have addressed this point in my previous scholarship. See Colombo, *supra* note 120, at 267–68 (“To adopt a normative construct that ignores the reality of those non-economic interests . . . would render a disservice to stakeholders by denying the essence of their humanity.” (quoting Leo L. Clarke & Edward D. Lyons, *The Corporate Common Good: The Right and Obligation of Managers to Do Good to Others*, 32 U. DAYTON L. REV. 280 (2007))); Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL’Y 737 (2009) (reviewing MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed., 2008)).

267. *Rethinking the Social Responsibility of Business: A Reason Debate Featuring Milton Friedman, Whole Foods’ John Mackey, and Cypress Semiconductor’s T.J. Rodgers*, REASON, Oct. 2005, at 29, 31–32 (citing ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976)).

268. SOLOMON, *supra* note 21, at 5.

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.”<sup>269</sup> Although I have been critical of this approach (for it does not enable the exercise of virtue per se, but rather simply enlarges the number of private interests that directors must be attentive to),<sup>270</sup> 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.<sup>271</sup>

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.<sup>272</sup> Its critics contend that corporate officers cannot be expected to serve two masters<sup>273</sup> (let alone multiple stakeholders), and the results will be unsatisfactory.<sup>274</sup>

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269. David Millon, *Criminalization of Corporate Law: The Impact on Shareholders and Other Constituents*, 2 J. BUS. & TECH. L. 101, 101 (2007).

270. See Colombo, *supra* note 120, at 284–85 (recognizing the problems associated with a mandatory implementation of the stakeholder model).

271. See Dobson, *supra* note 180, at 129 (“[I]n this ‘enlightened’ business community, competition, external goods, and markets would still be characteristics. They would just no longer be the defining characteristics.”).

272. See generally Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173 (1997–1998) (examining the normative positions taken in the debate regarding stakeholder theory and arguing that by viewing corporations as mediating institutions, criticisms of the theory do not fatally wound it); Andrew Keay, *Stakeholder Theory in Corporate Law: Has It Got What It Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249 (2010) (examining the arguments for and against stakeholder theory); Benedict Sheehy, *Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, 14 U. MIAMI BUS. L. REV. 193 (2005–2006) (analyzing the origin, history, assumptions, and criticisms of stakeholder and shareholder theories).

273. *Matthew* 6:24 (“No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other. You cannot serve both God and money.”).

274. See George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107, 1107–10 (2007–2008) (criticizing arguments for stakeholder participation in corporate governance as costly and inefficient, particular in light of the globalization of capital markets); John Hendry, *Missing the Target: Normative Stakeholder Theory and the Corporate*

These critiques are formidable, and have contributed to my own unease with stakeholder approaches.<sup>275</sup> A closely related approach, which I shall set forth momentarily, may offer a modest improvement.<sup>276</sup> 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 various stakeholders *per se*. This subtle shift may achieve 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.<sup>277</sup> 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.<sup>278</sup> Indeed, sustained

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*Governance Debate*, 11 BUS. ETHICS Q. 159, 173 (2001) (“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.”).

275. See Colombo, *supra* note 120, at 284–85 (recognizing the problems associated with a mandatory implementation of the stakeholder model).

276. See *infra* text accompanying notes 289–97 (discussing an approach in which corporations prioritize “internal goods” such as craftsmanship over wealth maximization).

277. See *supra* text accompanying notes 182–83 (noting Peter Drucker's views on ethics and his rejection of the notion that individuals must leave their morality at the boardroom door).

278. See *supra* Part I and text accompanying notes 261–62 (discussing the failures of regulation in fostering virtue and noting the contribution disagreement makes to promoting moral discourse).

moral action usually “requires the support of the right sort of community.”<sup>279</sup>

A solution premised upon a broadening of business judgment rule protections is therefore 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.”<sup>280</sup> “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 . . . .”<sup>281</sup>

A solution premised on an understanding of shareholder primacy that encompasses noneconomic 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.<sup>282</sup> Indeed, “our deepest values . . . are profoundly influenced by our community.”<sup>283</sup> For officers, the corporation is their community or, at a minimum, one of their communities. Thus, 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.”<sup>284</sup> 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.”<sup>285</sup> Scholarship has increasingly documented the

279. HARTMAN, *supra* note 159, at 68.

280. Moore, *supra* note 256, at 25.

281. *Id.*

282. To some, this 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 (“[W]e can surely take a more positive view of business activity . . . with its potential for moral development through the possession and exercise of the virtues.”). But see *id.* at 26 (recognizing the argument that capitalism “undermine[s] the possession and exercise of the virtues”).

283. HARTMAN, *supra* note 159, at 146.

284. *Id.* at 149.

285. *Id.* at 150; see also SIMS, *supra* note 16, at 107–12 (describing various approaches to aiding ethical decision making in corporate environments).

“impact of organisational culture on the ethical standards and moral practices of people in organisations.”<sup>286</sup>

Businesses have recognized this for quite some time, which explains why “corporations and other institutionalized collectivities socialize their members to internalize group perceptions and values.”<sup>287</sup> 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. Brooke Hamilton, which identifies no less than twelve “organizational structures that block good conduct”:

- 1) “Ambiguity about priorities”
- 2) “Separation of [p]olicy [d]ecisions from [i]mplementation”
- 3) “Strict line of command”
- 4) “Strong role models”
- 5) “Division of work”
- 6) “Task group loyalty”
- 7) “Protection from outside intervention”
- 8) “Believing [y]our [o]wn [s]tory [t]oo [m]uch”
- 9) “Giving [y]ourself [t]oo [m]uch [c]redit”
- 10) “Circling the [w]agons and [d]emonizing [c]ritics”
- 11) “Praising A and [r]ewarding B”
- 12) “Undervaluing the [p]ublic [g]ood”<sup>288</sup>

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 production itself and the well-being of the

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286. 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 remains controversial. *See id.* at 70–71.

287. Michael J. Phillips, *Corporate Moral Responsibility: When It Might Matter*, 5 BUS. ETHICS Q. 555, 568 (1995). *See also generally* ROB GOFFEE & GARETH JONES, *THE CHARACTER OF A CORPORATION* (1998).

288. Wines & Hamilton, *supra* note 13, at 61–69.

corporation's various constituencies) over "external goods" (such as "profit and shareholder value").<sup>289</sup>

To be clear, MacIntyre readily acknowledges that "a focus on external goods is both a necessary and worthwhile function of the corporation."<sup>290</sup> 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.<sup>291</sup> Pope John Paul II's encyclical *Centesimus Annus* articulated this position quite well, and it is worth quoting from 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.<sup>292</sup>

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.

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289. Moore, *supra* note 256, at 28–29.

290. *Id.* at 29.

291. See *id.* ("There may, for example, be times when the practice becomes so introverted and self-satisfied that it no longer sets out to achieve 'those standards of excellence which are appropriate, and partially definitive of, that activity.'").

292. JOHN PAUL II, ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM: CENTESIMUS ANNUS 68–69 (1991).

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.<sup>293</sup> 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” 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 organisation.<sup>294</sup>

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

- concentration on “the *intrinsic* value of work in business organisations rather than its *instrumental* value,”<sup>295</sup>
- a dedication both to “building community” within the business as part of their responsibilities and to establishing trans-corporate associations that promote and inculcate craftsmanship,<sup>296</sup> and
- 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.<sup>297</sup>

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

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293. See Moore, *supra* note 6, at 247.

294. *Id.* at 248 (quoting Sherwin Klein, *Don Quixote and the Problem of Idealism and Realism in Business Ethics*, 8 BUS. ETHICS Q. 43, 55 (1998)).

295. *Id.* at 249.

296. *Id.* at 250–51.

297. See *id.* at 251.

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 Section 2.01, "The Objective and Conduct of the Corporation," the American Law Institute explicitly recognized that "the corporation is a social as well as an economic institution," concluding that "its pursuit of the economic objective must be constrained by social imperatives and may be qualified by social needs"<sup>298</sup>:

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 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.<sup>299</sup>

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 other corporate legal scholars. 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

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298. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 cmt. e (1992).

299. *Id.*



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.<sup>300</sup>

Further still, some highly successful businesses are already putting this thinking into practice. Whole Foods immediately leaps to mind. Its CEO, John Mackey, explicitly disavows the profit-maximization objective.<sup>301</sup> He acknowledges that this may very well be the objective of the company's investors but adds that it is not the objective of its other stakeholders.<sup>302</sup> Under his leadership, Whole Foods strives to provide value to all its constituencies.<sup>303</sup> Tellingly, he places responsibility for "defin[ing] the purpose of the business" on its officers.<sup>304</sup> As he bluntly puts it, "we 'hired' our original investors. They didn't hire us."<sup>305</sup>

None of this is particularly novel, though it has been obscured by the triumph of shareholder primacy over the course of the twentieth century.<sup>306</sup> Originally, corporations were chartered (and thereby granted the privileges of the corporate form) in order to primarily advance some public good.<sup>307</sup> The eclipse of this common-good orientation by the modern private-profit orientation is, historically speaking, a rather recent phenomenon.<sup>308</sup> A broader conceptualization of corporate purposes and responsibilities would, therefore, be largely a return to the roots of corporate law. By tethering this broader

300. Greenwood, *supra* note 169, at 843–44.

301. See *Rethinking the Social Responsibility of Business*, *supra* note 267, at 29 (stating that Mackey "strongly disagree[s]" with the view that "the only social responsibility a law-abiding business has is to maximize profits for the shareholders").

302. See *id.* (noting that other groups of stakeholders in the company "define the purpose of the business in terms of [their] own needs and desires").

303. *Id.*

304. *Id.*

305. *Id.*

306. See Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1127–30 (2011) (detailing the development of the "shareholder value" movement—the notion that "the corporation existed to create shareholder value").

307. See Colombo, *supra* note 120, at 251–52.

308. See *id.* at 253–55.

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.<sup>309</sup> 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. He warned against the “corrupting” pull toward instrumentalism, and stressed that “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.”<sup>310</sup> 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.<sup>311</sup> Additionally, we need to remove such temptations whenever

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309. See *supra* text accompanying notes 273–74 (describing criticisms of the “multi-fiduciary approach”).

310. Moore, *supra* note 6, at 250.

311. See *supra* text accompanying note 206 (observing that qualities typically valued in the corporate environment are oftentimes at odds with qualities valued elsewhere).

possible.<sup>312</sup> 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.”<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup>

Part and parcel with an improved corporate culture would be “ethics training”—efforts to directly inculcate ethical values.<sup>316</sup> Although some are optimistic that good behavior can be taught, others are less sanguine.<sup>317</sup> 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, not something that a corporation can easily and readily engender.<sup>318</sup> For an ethics training program to bear fruit, it would seem as though its participants would need to be already in possession of a modicum of virtue.<sup>319</sup>

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312. See Gilbert Harman, *No Character or Personality*, 13 BUS. ETHICS Q. 87, 91 (2003) (suggesting that the best way to avoid vice is to avoid those “People! Places! Things!” that present opportunities for vice); Wines & Hamilton, *supra* note 13, 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.”).

313. HARTMAN, *supra* note 159, at 146.

314. SOLOMON, *supra* note 21, at 136.

315. See *id.* at 140–43.

316. See SIMS, *supra* note 16, at 147–65 (describing the objectives and methods of ethics training).

317. See *id.* 148–50; SOLOMON, *supra* note 21, at 4.

318. See SIMS, *supra* note 16, at 148–50; SOLOMON, *supra* note 21, at 4.

319. And even then, the potential of such programs is probably limited.

This suggests that an essential component of achieving a virtue-friendly corporate culture would be to take ethics and virtue quite seriously in the firm's hiring and promotion process.<sup>320</sup> Instead of concentrating solely on technical prowess and ability, firms could diligently recruit, screen, and advance candidates on the basis of character as well.<sup>321</sup> 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, rather than 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 shown to be a false one.<sup>322</sup> 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."<sup>323</sup> Virtue and an attention to excellence do not hinder corporate success; they advance it.<sup>324</sup>

#### 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.<sup>325</sup> The moral fiber of a corporation "will depend upon the extent to which the surrounding culture adheres to the tenets of

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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 21, at 4. In other words, their value lies in training people to better resolve moral disputes (via recourse to their preexisting moral understandings), more so than training them to be moral. *See id.* at 4–5.

320. *See* HARTMAN, *supra* note 159, at 17–18; SIMS, *supra* note 16, at 109.

321. Undoubtedly, firms already do this to a limited extent. The question here is one of degree and prioritization.

322. SOLOMON, *supra* note 21, at 21.

323. *Id.*

324. *See id.* But see Stephanie Strom, *To Be Good Citizens, Report Says, Companies Should Just Focus on Bottom Line*, N.Y. TIMES, June 15, 2011, at B6 (reporting on a working paper by Daniel Altman and Jonathan Berman that argues that a focus on social responsibility programs will provide less social good than if companies just focus on their bottom lines).

325. *See* SOLOMON, *supra* note 21, at 149.

virtue ethics. If the culture nurtures the virtues . . . then morally enlightened business activity will flourish.”<sup>326</sup> As one philosopher opined, “[t]he moral impoverishment of contemporary business, therefore, is inevitable given the moral impoverishment of modernity.”<sup>327</sup>

Regardless of the degree to which one agrees with the opinion above, whether an individual will pursue a life of virtue or vice is quite often something established in the cradle (or shortly thereafter).<sup>328</sup> Although an individual’s various roles in life go a long way in shaping his or her development as a human being,<sup>329</sup> 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.”<sup>330</sup> 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” and “public” morality seems to be at the heart of some very grave evils.<sup>331</sup> We need our corporations populated by individuals who “understand themselves as accountable, not only in their roles, but also as rational individuals.”<sup>332</sup>

Thus, I agree with Alasdair MacIntyre that “[v]irtue ethics is not antithetical to business activity.”<sup>333</sup> Indeed, “[i]n a virtue-based culture business is an entirely moral pursuit.”<sup>334</sup>

Unfortunately, ours is not a virtue-based culture. Economics and wealth, not virtue, have become “the obsession of all modern

326. John Dobson, *MacIntyre’s Position on Business: A Response to Wicks*, 7 BUS. ETHICS Q. 125, 127 (1997).

327. *Id.* at 128.

328. See Kohlberg, *supra* note 53, at 394 (“[M]ost children know the basic moral rules and conventions of our society by the first grade.”).

329. See MacIntyre, *supra* note 159, at 311–14.

330. *Id.*

331. See *id.* at 312–13 (commenting on the need for individuals to reflect critically upon the morality of their role-specific obligations).

332. See *id.* at 316.

333. Dobson, *supra* note 326, at 128.

334. *Id.*

societies.”<sup>335</sup> 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.”<sup>336</sup>

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”<sup>337</sup>:

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 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.<sup>338</sup>

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.”<sup>339</sup> 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

335. SCHUMACHER, *supra* note 37, at 44.

336. *Id.*

337. *Id.* at 32.

338. *Id.* at 31–32; see also SOLOMON, *supra* note 21, at 17 (noting that “[s]uch quaint notions as integrity and virtue have been put in the back files, and such macho mock values as ruthlessness and raw ambition have been promoted to the status of ideals”).

339. SCHUMACHER, *supra* note 37, at 32.

may rise rapidly: as measured by statisticians but not as experienced by actual people, who find themselves oppressed by increasing frustration, alienation, insecurity, and so forth.<sup>340</sup>

Further, one cannot ignore the hyper-individualism that so indelibly marks the American psyche.<sup>341</sup> 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.<sup>342</sup>

In any event, the moral shortcomings of the modern business corporation are largely a reflection of the moral shortcomings of modern society in general.<sup>343</sup> 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.<sup>344</sup> 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.<sup>345</sup> Simply put,

340. *Id.*

341. See SOLOMON, *supra* note 21, at 74.

342. Ironically, and perhaps helpfully in light of the preceding, the suggestions proffered in this Article are themselves individualistic in that they are built upon *individual* virtue and integrity (which is the heart of virtue ethics). See *id.* at 103.

343. The importance of culture, generally, on behavior is difficult to understate. See James Q. Wilson, *Hard Times, Fewer Crimes*, 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).

344. See *supra* notes 210–13 and accompanying text (discussing the structural factors that contribute to the amoral corporate environment).

345. See generally ALEJO JOSE G. SISON, CORPORATE GOVERNANCE AND ETHICS: AN ARISTOTELIAN PERSPECTIVE (2008).

corporate officers should own a greater amount of stock in their corporations than is now usually the case.<sup>346</sup> 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.<sup>347</sup>

With regard to globalization, and ever-growing corporate hierarchies, Schumacher proposes some solutions in his classic book *Small is Beautiful*.<sup>348</sup> 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.<sup>349</sup> 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, labrynthine gauntlet that confronts anyone who places a telephone call to their corporation of choice. By keeping transactions “human,”

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346. See *id.* at 95 (arguing that “[f]rom the viewpoint of corporate citizenship, therefore, shareholding managers represent the stakeholder group best equipped to govern the corporation”).

347. Even though most corporate scholars no longer view shareholders as owners of the corporation, almost everyone else still buys into this traditional conceptualization. See Velasco, *supra* note 122. Thus, the concept of ownership can be expected to assert its effects on stock-holding officers.

348. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* (HarperCollins 2010).

349. See *id.* at 37 (“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 organised in small units will take better care of *their* bit of land or other natural resources than anonymous companies or megalomaniac governments . . .”).



smaller businesses do not transform individuals (from employees to customers) into 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.<sup>350</sup> Borrowing from the doctrine of subsidiarity,<sup>351</sup> Schumacher urged corporations to decentralize their operations as much as reasonably possible.<sup>352</sup> In his own words: “The fundamental task is to achieve smallness *within* large organisations.”<sup>353</sup> Experience shows that such a business approach is not only possible, but profitable.<sup>354</sup>

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.

### V. Conclusion

“Character is destiny” remarked the Greek philosopher Heraclitus in the sixth century B.C.<sup>355</sup> 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

350. See SCHUMACHER, *supra* note 37, at 260 (laying out the five principles of his theory of large-scale organizations).

351. See *supra* notes 100–02 and accompanying text (detailing the principle of subsidiarity).

352. SCHUMACHER, *supra* note 37, at 260–62 (arguing that a large corporation’s “task is to look at the organisation’s activities one by one and set up as many [semi-autonomous units] as may seem reasonable and possible”).

353. *Id.* at 259.

354. See *id.* at 68–69 (providing General Motors and the British National Coal Board as examples of successful uses of a decentralized approach). 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.” *Id.* at 21.

355. See HERACLITUS, ON THE UNIVERSE fragment 1, 121 (W.H.S. Jones trans., Loeb Classical Library 1931), *quoted in* G. Gordon Liddy, *Character, Conscience, and Destiny*, 96 MICH. L. REV. 1975, 1975 (1998).

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.<sup>356</sup>

We can do better. Virtue can help.

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 is also a bulwark *against* environment."<sup>357</sup> This suggests a two-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.

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356. Or, on a less sanguine note, one could say that our policymakers "always tend to try and cure a disease by intensifying its causes." SCHUMACHER, *supra* note 37, at 39.

357. Solomon, *supra* note 206, at 46.

There are some who have argued that such a firm would “rapidly perish” due to the competitiveness of the marketplace.<sup>358</sup> Indeed, many companies that pursue a balanced approach to profits, that is, an approach that takes into serious consideration other, noneconomic values, eschew public company status because of the pressures of the capital markets.<sup>359</sup> “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.”<sup>360</sup>

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 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.”<sup>361</sup>

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.<sup>362</sup>

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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358. Moore, *supra* note 256, at 20 (quoting J. Dobson, *The Feminist Firm: A Comment*, 6 BUS. ETHICS Q. 227, 227 (1996)).

359. See Moore, *supra* note 6, at 240 (using Applied Energy Systems (AES) and Levi Strauss as examples of companies that, fearing potential moral contamination by the financial markets, either only reluctantly went public, in the case of AES, or went private, in the case of Levi Strauss).

360. *Id.*

361. See HARTMAN, *supra* note 159, at 92.

362. Moore, *supra* note 256, at 30.