

## CHARACTERISTICS OF SOULLESS PERSONS: THE APPLICABILITY OF THE CHARACTER EVIDENCE RULE TO CORPORATIONS

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*Under Federal Rule of Evidence 404, the character evidence rule, it is well established that evidence of character generally is not admissible to show that a person acted in conformity with that character on a particular occasion. No consensus exists, however, as to whether the character evidence rule should also apply to corporations.*

*In this article, Professor Kim argues that the ban on character evidence should not be extended to corporations. Professor Kim begins with a discussion of various rationales offered to support the character evidence rule, emphasizing Kantian conceptions of human autonomy. She then examines varying definitions of “character” and concludes that character may best be regarded as a reflection of the internal operating system of the human organism. Next, Professor Kim turns to an analysis of the personhood of corporations and determines that corporations are persons and moral actors with the capacity to possess character. This corporate character is separate and apart from the character of the corporation’s individual members and reflects the internal operating system of the corporate organization.*

*Finally, Professor Kim suggests that the human autonomy rationale for the character evidence rule does not apply with equal force to corporations. She then concludes with an examination of the practical implications of excluding corporations from the protections afforded individuals under Rule 404.*

To a seemingly ever-increasing extent the members of society, individual and corporate alike, are awash in an existential sea, out

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of sight of beacons of external guidance. The individual may make up, in part, for this absence of navigational aids by turning inward for a sense of direction. The corporate personality, however, looks inward into darkness. The corporation has no soul.<sup>1</sup>

## I. INTRODUCTION

Rule 404 of the Federal Rules of Evidence, the character evidence rule, prohibits the admission of evidence of a person's character to prove that the person acted in conformity with that character on a particular occasion.<sup>2</sup> The rule barring the use of character to show conduct has become one of the "great enigmas" of the law of evidence,<sup>3</sup> and the utility of the rule itself has been the subject of much scholarly debate.<sup>4</sup> One of the most intractable problems with the rule lies in the lack of a clear definition of the term "character." Wigmore referred to character as a person's "disposition" or "a trait, a group of traits, or the sum of traits."<sup>5</sup> McCormick defined character as a "generalized description of a person's disposition, or of the disposition in respect to a general trait."<sup>6</sup> These definitions are consistent with early trait theories of personality in the psychological literature.<sup>7</sup>

1. Russell B. Stevenson, Jr., *Corporations and Social Responsibility: In Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709, 712 (1974).

2. FED. R. EVID. 404(a). Rule 404(a) provides in part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ." *Id.* Rule 404 codifies the common law ban on the admissibility of character evidence to prove conduct. See 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5233 (1978).

3. See 1A JOHN H. WIGMORE, EVIDENCE § 54.1, at 1150 (Peter Tillers rev. 1983). One of the problems associated with the character evidence rule involves the complexity of its practical application. "The practical implications of the rule are complex and convoluted. The theoretical underpinnings of the rule are obscure. The historical origins of the rule are poorly understood." *Id.*

The rule also lacks a single, uniformly recognized rationale: "[T]he effort to explain the justification for the ban on character evidence seems to require a multivariate explanation; different policies or reasons are invoked to explain and justify different aspects of the ban on character evidence, and the search for a comprehensive justification theory is abandoned." *Id.* at 1151; see also *infra* Part II.B (discussing alternative rationales for the character evidence rule).

4. See, e.g., Craig R. Callen, *Simpson, Fuhrman, Grice, and Character Evidence*, 67 U. COLO. L. REV. 777 (1996); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758 (1975); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986); Miguel A. Méndez, *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters."* 49 HASTINGS L.J. 871 (1998); Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—Or, Rationales of The Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747 (1996); Joel Schrag & Suzanne Scotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J.L. ECON. & ORG. 319 (1994); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982).

5. 1A WIGMORE, *supra* note 3, §§ 52, 55, at 1147, 1159. Wigmore referred to these traits as being "fixed" or permanent. *Id.* § 55, at 1159.

6. 1 MCCORMICK ON EVIDENCE § 195, at 825 (John W. Strong ed., 4th ed. 1992).

7. Gordon Allport is most often associated with the development of trait theory. See Leonard, *supra* note 4, at 26; see also *infra* Part III.A (describing various theories of personality, including trait

One scholar has recently argued, however, that the conception of character as a bundle of fixed traits is inadequate and that character instead should be regarded as the “animating spirit” or the “internal operating system” of the human organism.<sup>8</sup> This definition draws on Aristotle’s discussion of the soul and the human psyche, which reveals that human beings are naturally organized persons.<sup>9</sup> In other words, humans have an internal operating system that organizes, directs, and regulates behavior. Within each person is a set or collection of rules, principles, operations, and procedures that affects how that person behaves.<sup>10</sup> The consistency of behavior over time that the term character connotes can be viewed as the result of a consistent pattern of choices and decisions. Character, then, arises out of this internal structure or logic that moves individuals to make the decisions that they make.<sup>11</sup>

An important question this discussion raises is whether the above-delineated definition of character is limited to human beings. More specifically, to what extent may a legal entity or person, such as a corporation, possess an identifiable character? Studies in organizational behavior reveal that organizations often develop an identity that is independent of and transcends the specific individuals who control or work within the organization.<sup>12</sup> Models of organizational decisionmaking suggest that corporations have specific, internal organizational processes and procedures that drive their decisionmaking functions.<sup>13</sup> Perhaps the corporation’s distinctive decisionmaking structure may be regarded as an aspect of the “internal operating system” of the business organization or the “character” of the corporation. This possibility raises an even broader question with respect to the applicability of the character evidence rule: does Federal Rule of Evidence 404 extend to the conduct and character of corporations? It is not altogether clear whether evidence of past cor-

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theory). Trait-oriented definitions of character do not necessarily include a moral component. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 7–8 (1993). In fact, some commentators have suggested that a conception of character based on morality is inappropriate. See *id.* at 8. Others have argued that the definition of character should include a moral component. See 22 WRIGHT & GRAHAM, *supra* note 2, § 5233 (Supp. 1999). Wigmore stated that character is to be considered as “the actual moral and psychical disposition or sum of traits.” 1A WIGMORE, *supra* note 3, § 52, at 1148.

8. Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 782 (1998).

9. See *id.* at 824–25.

10. See *id.*

11. See *id.* at 828; see also *infra* Part III.B (discussing the conception of character as an internal operating system).

12. See, e.g., DAVID A. WHETTEN & PAUL C. GODFREY, *IDENTITY IN ORGANIZATIONS* 1–80 (1998) (discussing the concept of organizational identity); see also STEPHEN P. ROBBINS, *ORGANIZATIONAL BEHAVIOR* 601–18 (1994) (discussing organizational culture and the process of “institutionalization,” which occurs when an organization takes on a life of its own, apart from any of its members); discussion *infra* Part IV.B.

13. See, e.g., MAIREAD BROWNE, *ORGANIZATIONAL DECISION MAKING AND INFORMATION* 18–70 (1993); ROBERT A. ULLRICH & GEORGE F. WIELAND, *ORGANIZATION THEORY AND DESIGN* 189–214 (1980). See generally MARCUS ALEXIS & CHARLES Z. WILSON, *ORGANIZATIONAL DECISION MAKING* (1967).

porate misconduct may be admissible to show the corporation's fundamentally bad nature and actions in conformity therewith.

Whether the character evidence rule should apply to corporations in the same manner it applies to individuals is a complex issue that the courts have not squarely addressed.<sup>14</sup> Without much explanation or discussion, courts generally have assumed that corporations do fall within the purview of the character evidence rule.<sup>15</sup> Absent substantive analysis of the issue, however, this assumption seems inappropriate.

The resolution of the issue may turn on two separate inquiries. First, is the corporation a "person" capable of having character for purposes of Rule 404? Second, even if a corporation may be regarded as a "person," is the corporation capable of truly possessing a "character" that is inde-

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14. See *West v. Marion Labs., Inc.*, No. 90-0661-CV-W-2, 1991 WL 517230, at \*1 n.1 (W.D. Mo. Dec. 12, 1991) ("Rule 404(b) limits the admissibility of character evidence as applied to 'persons.' Whether a corporation may assume a 'character' for the purposes of Rule 404(b) has been largely unanswered by the caselaw."); see also Richard C. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123, 124 n.2 (1987) (acknowledging that the intent to exclude legal entities such as corporations from the scope of Rule 404 is not altogether clear because corporations are treated as persons in some legal contexts).

15. See, e.g., *American Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1336 (Alaska 1982) (assuming, without discussion, that Alaska Rule of Evidence 404 applied to a waterbed manufacturing company, restricting evidence of the corporation's alleged "pattern" of "callous and reckless disregard"); *Bexar County Appraisal Review Bd. v. First Baptist Church*, 846 S.W.2d 554, 562 (Tex. Ct. App. 1993) (assuming, without discussion, that Texas Rule of Evidence 404 applied to a realty company in a civil case, strictly limiting the admissibility of evidence of good or bad character); see also 22 WRIGHT & GRAHAM, *supra* note 2, § 5233, at 350 n.63 (Supp. 1999) (citing California cases that assume, without discussion, that the character evidence rules apply to entities); cf. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986) (finding that Rule 404, which forbids using evidence of deeds that are symptomatic of bad character, does not prohibit the use of bad acts to prove that a corporate employer must have known that its white workers were systematically harassing black workers); *El Meson Espanol v. NYM Corp.*, 521 F.2d 737, 739 (2d Cir. 1975) (noting that although corporations enjoy the same rights to plead general damages as individuals, a corporation has no character to be affected by a libel); *Cleveland v. KFC Nat'l Management Co.*, 948 F. Supp. 62, 64-66 (N.D. Ga. 1996) (allowing corporate character evidence as manifested in prior acts of a corporation's employees under Federal Rule of Evidence 415 in a Title VII action "[t]o allow defendant corporation to shield itself from character evidence and disadvantage the victims of corporate sexual misconduct would be to emasculate the force of Rule 415"). In *Norwest Bank New Mexico, N.A. v. Chrysler Corp.*, 981 P.2d 1215 (N.M. Ct. App. 1999), the court did not mention the character evidence rule at all when it allowed Chrysler Corporation to present evidence of its good corporate character to rebut testimony of its bad character. In that case, injured occupants of a Chrysler minivan who were ejected from the vehicle during an accident sued Chrysler. The plaintiffs alleged they were thrown from the minivan because of a defective latch on the rear door that caused the door to open. See *id.* at 1218. In support of their claim for punitive damages, the plaintiffs presented evidence attempting to show Chrysler's policy of indifference toward consumer safety. The plaintiffs referred to what was termed "twenty points of corporate misconduct" regarding the door latch. *Id.* at 1225. "Chrysler chose to rebut the charge of indifference and bad corporate character" by showing that it had a policy of encouraging the use of seat belts and that this policy reflected Chrysler's character as being a "good" and "responsibly acting" manufacturer. *Id.* The trial court instructed the jury to use the evidence for the punitive damages issue only. See *id.* at 1227. Clearly missing from the instructions, however, was an admonition not to use the evidence for character purposes. In fact, the character evidence rule was not discussed at all. Apparently, it had not appeared to the court as even being an issue.

Most courts similarly assume the applicability of Rule 404 to corporations "sub silentio without analyzing the merits of the question." EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2.04 (1984).

pendent of the individual members of the organization?<sup>16</sup> The text of Rule 404 on its face does not provide clear guidance as to the parameters of the word “person.”<sup>17</sup> Nor does it define “character” in any comprehensive way.

This article examines whether Rule 404’s ban on character evidence should apply to corporate persons. Part II begins with an overview of the character evidence rule and its underlying purposes. Particular emphasis is given to the different rationales that traditionally have been invoked to explain and justify the ban on character evidence. A critical review of these traditional rationales reveals their inadequacies, and an alternative rationale based on the ideal of human autonomy is then explored. Perhaps the best and most convincing explanation for the ban on character evidence may be found in the Kantian imperative to respect human dignity and autonomy above all other concerns.

Part III tackles the difficult task of composing a satisfactory definition of individual character. Psychological data in the study of personality provide some insight into the concept of character. In addition, philosophical conceptions of character as the “animating spirit” or “internal operating system” of a person are particularly illuminating.

Part IV then examines whether a corporation can be regarded as a person that is in fact capable of possessing character. Conditions of personhood must be discussed in light of the different conceptions of personhood. More particularly, distinctions must be made between the conception of a corporation as a legal person, versus a moral person, versus a natural person. An examination of the various models of corporate personhood reveals that a corporation is a person and moral actor equipped with the capacity to have character.

Part V describes the concept of corporate character. Organizational behavior and decisionmaking theories indicate that a corporation may take on a certain culture, or ethos, that produces a distinct corporate identity. This organizational character persists over time and shapes, limits, and directs the behavior of the individual members of the organization. There is a sense in which the character of the corporation may be related to the corporation’s internal operating system. A corporation may be viewed as a person capable of possessing a corporate character,

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16. One commentator has suggested that there are certain clues that indicate Rule 404 was not designed to cover evidence of corporate character. *See* 22 WRIGHT & GRAHAM, *supra* note 2, § 5233, at 360. One such clue is that the original version of Rule 404 used the personal pronouns “he” and “his” when referring to the person whose character was at issue. The use of such terms suggested that the rule applied strictly to individuals and did not include entities like corporations. This is not very helpful, however, because, as Wright and Graham point out, similar terms are used in other rules that do apply to corporations. *See id.* Moreover, Rule 404 was amended in 1987 to adopt gender-neutral language. *See id.* § 5231.1, at 338 (Supp. 1999). The masculine personal pronouns were eliminated completely, creating deeper uncertainties about the scope of the rule. *See id.* at 339.

17. In fact, the Federal Rules of Evidence do not define “person,” and the word is not used in a consistent manner throughout the rules. *See id.* § 5233, at 359.

not altogether different from an individual person capable of having a particular character.

Part VI next analyzes whether Rule 404 should apply to corporations in the same manner in which it applies to individuals. This article suggests that it should not. The underlying human autonomy rationale for the character evidence ban does not apply with equal force to corporations. More specifically, as non-natural persons, corporations do not possess the intrinsic value that human beings have as ends in themselves. Thus, the protections of Rule 404 should not be extended to corporate persons. This part examines the practical implications of such a recommendation in greater detail.

Finally, part VII concludes that, in light of the human autonomy and dignity interests that the legal system is meant to protect, Rule 404 should not be used to exclude evidence of corporate character.

## II. THE CHARACTER EVIDENCE RULE

### A. *General Description of the Rule*

With some exceptions, Rule 404 prohibits the prosecution in a criminal case and all parties in a civil case from presenting evidence of a person's character as circumstantial evidence of that person's conduct on a particular occasion.<sup>18</sup> Rule 404 must be read in conjunction with Rule 405, which sets forth the three primary methods of proving character.<sup>19</sup> First, testimony may be offered about a person's reputation in the community for a pertinent character trait.<sup>20</sup> Second, witnesses who know the person may offer their opinions concerning the person's character.<sup>21</sup> Finally, specific instances of the person's prior conduct, which purportedly reveal that person's character, may be introduced.<sup>22</sup> Of the three meth-

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18. See FED. R. EVID. 404(a). See generally 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 99 (2d ed. 1994). For a discussion of the common law history of the character evidence rule, see David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1167-72 (1998). Although Rule 404 applies in both civil and criminal proceedings, this article will focus more particularly on the use of Rule 404 in criminal cases involving individual and corporate defendants.

19. See FED. R. EVID. 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."); see also 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 404.12[1] (Joseph M. McLaughlin ed., 2d ed. 1999); 22 WRIGHT & GRAHAM, *supra* note 2, § 5262.

20. See 2 WEINSTEIN & BERGER, *supra* note 19, § 405.03 (discussing reputation evidence to prove character); 22 WRIGHT & GRAHAM, *supra* note 2, § 5264; see also David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 306 (1995).

21. See 2 WEINSTEIN & BERGER, *supra* note 19, § 405.04 (discussing opinion evidence to prove character); 22 WRIGHT & GRAHAM, *supra* note 2, § 5265; see also Leonard, *supra* note 20, at 306-07.

22. See 2 WEINSTEIN & BERGER, *supra* note 19, § 405.05 (discussing the admissibility of specific acts); 22 WRIGHT & GRAHAM, *supra* note 2, § 5266; see also Leonard, *supra* note 20, at 307.

ods, specific conduct evidence is traditionally accepted to be the most reliable and highly probative.<sup>23</sup>

Character evidence can be relevant in a number of different ways. Evidence of a person's character is relevant if character itself is at issue in the case.<sup>24</sup> When a person's character is an ultimate issue, the basic rule prohibiting the use of character evidence does not apply.<sup>25</sup> Character evidence may also be relevant as circumstantial proof of the veracity of a witness. A witness's testimony can be impeached by proof of the witness's untruthful character.<sup>26</sup> Under Rule 404(a)(3), the general rule prohibiting the use of character evidence does not apply when such evidence is used for impeachment purposes.<sup>27</sup>

Finally, character evidence may be relevant to prove conduct circumstantially. This article focuses primarily on this last use of character evidence, the use that Rule 404 so carefully restricts. If employed for this purpose, specific instances of a person's prior conduct are relevant only because they prove the tendency of that person to act in a particular way. For example, if a defendant is charged with committing armed robbery, the jury, upon hearing evidence of the defendant's prior convictions for theft, may infer that the defendant has a criminal character and, therefore, is likely guilty of the armed robbery at issue. The chain of reasoning is based on the belief that knowing how a person behaved in the past will enable us to infer that person's character, and that inference will help us

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23. See 22 WRIGHT & GRAHAM, *supra* note 2, § 5262, at 567; Uviller, *supra* note 4, at 850 (acknowledging that "probative value of evidence of specific acts exhibiting the trait in question is probably superior to proof by either of the other two modes"); Wydick, *supra* note 14, at 129 (noting that each method of proving character has advantages and disadvantages but that evidence of specific instances of conduct is likely to be the most accurate).

24. See 2 WEINSTEIN & BERGER, *supra* note 19, § 404.10[2]; Wydick, *supra* note 14, at 132. Rule 405(b) provides for the admission of character evidence in cases where character "is an essential element of a charge, claim, or defense." FED. R. EVID. 405(b); see, e.g., Schafer v. Time, Inc., 142 F.3d 1361, 1371-72 (11th Cir. 1998) (finding the victim's character or reputation to be an essential element of defamation or libel claims); United States v. Crump, 934 F.2d 947, 953-55 (8th Cir. 1991) (finding character evidence to be relevant to the material issue of the defendant's predisposition when the defendant raises the defense of entrapment).

25. See 1 MUELLER & KIRKPATRICK, *supra* note 18, § 105, at 574. In any such case, character is not being used as a means to prove conduct circumstantially but rather is an end in itself. See generally 1A WIGMORE, *supra* note 3, § 69.1.

26. See Leonard, *supra* note 20, at 307; Wydick, *supra* note 14, at 133; see also, e.g., United States v. Williams, 986 F.2d 86, 89 (4th Cir. 1993) (finding that a previous arrest for cashing stolen checks with a fraudulently obtained fake driver's license was probative of the defendant's truthfulness and credibility as a witness); United States v. Sperling, 726 F.2d 69, 75 (2d Cir. 1984) (ruling that an inquiry into the witness's false credit card applications was probative of the witness's character for untruthfulness).

27. See FED. R. EVID. 404(a)(3); see also 1 MUELLER & KIRKPATRICK, *supra* note 18, § 104, at 573. Rule 404(a)(3) references Rules 607, 608, and 609, which govern the admissibility of impeachment evidence. See FED. R. EVID. 607-09. For a discussion of the use of character evidence for impeachment purposes, see generally Richard D. Friedman, *Character Impeachment Evidence: The Asymmetrical Interaction Between Personality and Situation*, 43 DUKE L.J. 816 (1994); Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian[!?!] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637 (1991) [hereinafter Friedman, *Psycho-Bayesian Analysis*]; and H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776 (1993).

ascertain whether the person engaged in the conduct at issue. Character evidence is probative for this purpose only if we assume that character traits are relatively stable and that people generally act in conformity with their character.<sup>28</sup>

A distinction must be made here between the law's treatment of evidence of a person's character, on the one hand, and evidence of a person's habits, on the other. The evidence rules do not prohibit the use of habit evidence to prove that the conduct of an individual was in conformity with that individual's habits.<sup>29</sup> "Habit" is described as "one's regular response to a repeated specific situation" or "[a] person's regular practice of meeting a particular kind of situation with a specific type of conduct."<sup>30</sup> Such responses become almost semi-automatic over time. Habits are to be distinguished from character, which represents a more "generalized description of one's disposition, or of one's disposition in respect to a general trait."<sup>31</sup> Although there is a general ban on character evidence to prove conduct, habit evidence is admissible to prove conduct in conformity therewith.

Aside from the different treatment afforded to habit evidence, the evidence rules carve out several exceptions to Rule 404, only a few of which are highlighted here.<sup>32</sup> In a criminal prosecution, the defendant may offer evidence of the defendant's "good" character to prove that the

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28. See Leonard, *supra* note 4, at 17; Wydick, *supra* note 14, at 132.

29. Rule 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

FED. R. EVID. 406. See generally 2 WEINSTEIN & BERGER, *supra* note 19, §§ 406.01–06.

30. FED. R. EVID. 406 advisory committee's note. Some of the elements of habit include specificity, frequency, invariability, and visibility. See 23 WRIGHT & GRAHAM, *supra* note 2, § 5273, at 33–36. The routine practice of an organization is comparable to the habit of an individual. See *id.* § 5274. Thus, the habit evidence rule is expressly applicable to organizations. In general, courts are much more willing to allow evidence of the routine practice of an organization than evidence of the habit of an individual. See Michael H. Graham, *Evidence and Trial Advocacy Workshop: Habit and Routine Practice*, 19 CRIM. L. BULL. 149, 153 (1983). The greater receptivity of the courts to organizational routine evidence is not necessarily because they believe it is more reliable than individual habit evidence; rather, they believe there is a greater need for the evidence, and it is much easier to prove. See 23 WRIGHT & GRAHAM, *supra* note 2, § 5274, at 45.

31. FED. R. EVID. 406 advisory committee's note. There is not always a clear line between character and habit:

While it is difficult to delineate the difference between character and habit, it is appropriate to note that the more particular and the more regular the performance of an act, the more likely it is to be regarded as habit. In other words, the easier it is to describe with particularity what it is that someone does and the more routine the action, the more likely a court is to hold the activity to be a habit.

23 WRIGHT & GRAHAM, *supra* note 2, § 5273, at 33 (quoting REDDEN & SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 85 (1975)); see also 1A WIGMORE, *supra* note 3, § 92, at 1609–10.

32. For a thorough discussion of many of the exceptions to the character evidence rule, see Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 224–26 (1996); Uviller, *supra* note 4, at 853–81; Wydick, *supra* note 14, at 141–94.



defendant did not commit the crime at issue.<sup>33</sup> Once the defendant offers such evidence, however, the door is opened for the prosecution to rebut the defendant's "good" character evidence with inquiry into the defendant's "bad" character.<sup>34</sup>

In many cases, evidence of other crimes or acts may also be used to show facts other than character. Notwithstanding the general character evidence ban, Rule 404(b) allows specific instances of prior conduct to be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>35</sup> In a prosecution for drug dealing, for example, evidence of a defendant's prior possession of drugs for personal use may not be used to prove the defendant's conduct but may be admissible to show the defendant's motive for distributing drugs, i.e., to finance his own drug use and assure himself a steady supply.<sup>36</sup> The same evidence that would be barred if used to prove the defendant's commission of a crime in conformity with character may be admitted so long as its purpose is to prove anything other than character. This special purpose exception allows a good deal of character evidence to be admitted, leaving in the hands of jurors the arduous task of distinguishing between the permissible and impermissible uses of the evidence.<sup>37</sup> Although the character evidence rule is riddled with various exceptions, the general ban on character evidence

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33. See 1 MUELLER & KIRKPATRICK, *supra* note 18, § 101; Wydick, *supra* note 14, at 141–42; see also, e.g., *Michelson v. United States*, 335 U.S. 469, 476 (1948) (holding that the defendant "may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged"); *United States v. Webb*, 625 F.2d 709, 710–11 (5th Cir. 1980) (holding that the defendant on trial for shooting at flying helicopter could present testimony of witnesses as to the defendant's peaceful and nonviolent nature); *United States v. Lewin*, 467 F.2d 1132, 1139 (7th Cir. 1972) (finding that the defendant has the right to offer evidence of good character).

34. See 2 WEINSTEIN & BERGER, *supra* note 19, § 404.11[2][b]; see also, e.g., *United States v. Moore*, 27 F.3d 969, 974 (4th Cir. 1994) (holding that the prosecution could present evidence of the defendant's prior loan defaults after the defendant presented testimony of witnesses as to the defendant's honest and trustworthy character); *United States v. Jordan*, 722 F.2d 353, 358 (7th Cir. 1983) (holding that the prosecution could inquire into the defendant's prior arrest after the defendant testified as to his reputation for character traits of peaceful and law-abiding citizenship).

35. FED. R. EVID. 404(b); see 2 WEINSTEIN & BERGER, *supra* note 19, § 404.20[1]; Uviller, *supra* note 4, at 877; see also Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 578–80 (1990) (discussing the use of prior uncharged misconduct against a defendant under Rule 404(b)).

36. See *United States v. Templeman*, 965 F.2d 617, 619 (8th Cir. 1992). The use of character evidence has been approved for a variety of purposes under Rule 404(b). See, e.g., *United States v. Perez-Garcia*, 904 F.2d 1534, 1544 (11th Cir. 1990) (finding that the evidence of defendants' prior incidents involving boats was admissible to counter the defense that defendants had little familiarity with boating); *United States v. Mills*, 895 F.2d 897, 907–08 (2d Cir. 1990) (holding that the prior offense was so similar to the charged offense that it was a "signature" crime given the unique process used to make counterfeit currency).

37. See Uviller, *supra* note 4, at 877–79. It may be unrealistic to assume that the average juror can and will use evidence of a defendant's character for one exclusive purpose and not for another. See Lawson, *supra* note 4, at 773. One commentator refers to such "mental gymnastics" as unachievable. Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 665 n.5 (1998).

remains. Courts hold steadfastly to the principle that a person's prior misdeeds are not admissible to prove that person's character and, stemming from that character, the person's behavior on a particular occasion.<sup>38</sup>

### B. *Traditional Rationales for the Rule*

Discerning the underlying rationale for the character evidence rule is not easy. Commentators have proffered a variety of explanations to justify the ban against character evidence. One of the most often cited rationales is that a person "must be tried for what he did, not for who he is."<sup>39</sup> More specifically, character evidence raises the danger of unfair prejudice. This prejudice can take two different forms. The first, inferential error prejudice, occurs when the fact finder overvalues the evidence or, more specifically, overestimates its predictive value.<sup>40</sup> If jurors learn that a person has committed bad acts in the past, the jurors may jump to the unjustified conclusion that the person committed the offense at issue, ignoring the true strengths and weaknesses of the noncharacter evidence in the case.<sup>41</sup> A good example of this type of inferential error is the reasoning: "Once a thief, always a thief."<sup>42</sup>

The second type of prejudice, nullification prejudice, occurs when jurors use inferences from character evidence to make decisions not permitted under the law.<sup>43</sup> In particular, a jury may convict a defendant, regardless of the evidence in the case, simply because the jury believes the defendant is a bad person and deserves punishment for that alone.<sup>44</sup>

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38. See 22 WRIGHT & GRAHAM, *supra* note 2, § 5234 (discussing the inadmissibility of character evidence for the forbidden purpose of proving conduct on a particular occasion); see also CHARLES E. WAGNER, FEDERAL RULES OF EVIDENCE CASE LAW COMMENTARY 292–303 (1999) (citing cases that prohibit the use of character evidence for proving conduct at issue, cases that allow the use of character evidence for proving conduct at issue, and cases that allow the use of character evidence for other purposes).

39. *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); see Leonard, *supra* note 18, at 1162 n.1. The principle that individuals should be accountable only for what they do and not for who they are has risen to constitutional proportions. See Mendez, *supra* note 32, at 224 n.4 (citing *Robinson v. California*, 370 U.S. 660, 666–67 (1962)).

40. See Park, *supra* note 4, at 768 ("[I]nferential error prejudice occurs in its pure form when the trier overestimates the diagnostic value of prior crimes in showing the defendant to be guilty of the crime charged.").

41. See Mendez, *supra* note 32, at 223–24. The fear is that jurors will unintentionally accord this type of evidence too much weight in determining whether the defendant committed the crime charged. See 1A WIGMORE, *supra* note 3, § 58.2, at 1212 ("The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and . . . allow it to bear too strongly on the present charge . . .").

42. See Park, *supra* note 4, at 768.

43. See *id.* at 770.

44. See *id.* at 770–71. "A strong form of [nullification] prejudice would be shown if the jury returned a guilty verdict, despite its belief in the defendant's innocence of the crime charged, because it wanted to punish him for his bad character." *Id.* at 771. The term "nullification prejudice" is drawn from the broader concept of jury nullification, which occurs when jurors choose to ignore the substantive law as it is given to them by the court and follow their own path instead. See Lawrence W. Crispo

Upon hearing of the defendant's past misdeeds, jurors may feel that the defendant has done enough in the past to warrant punishment, whether or not there is sufficient evidence to find the defendant guilty of the present crime.<sup>45</sup> The bad character evidence may arouse the jury's hostility against the defendant and cause the jury to render a guilty verdict based on emotion, rather than on fact. Admitting evidence of a defendant's character is, therefore, very dangerous; it can induce jurors to make a judgment about the defendant's worth as a person and obscure the evidence regarding the offense charged.<sup>46</sup> The character evidence rule serves the important purpose of preventing such unfair prejudice.

Another commonly posited rationale for the character evidence rule is that the probative value of such evidence is quite meager.<sup>47</sup> There is no reason to believe that the commission of one act is "in itself evidence that the same or a like act was again done by the same person."<sup>48</sup> Rule 404 is grounded on the belief that evidence of a person's prior conduct does not make it any more or less probable that the person engaged in certain conduct on a specific occasion. Therefore, the evidence is irrelevant and serves no other purpose than to prejudice the jury.<sup>49</sup>

An alternative rationale for the character evidence rule explains that even if evidence of a person's character has some relevance, the courtroom is not a particularly good setting for discerning the true nature of a person's character.<sup>50</sup> The artificial atmosphere of the courtroom

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et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 3 (1997). See generally Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999).

45. If the defendant was not convicted for past misdeeds, the jury may believe that the defendant has wrongly escaped punishment for these acts. The jury may then subconsciously feel the need to punish the defendant for a crime that the defendant appears to have "gotten away with." Imwinkelried, *supra* note 4, at 1490. The admission of character evidence may alter the jury's "regret matrix." *Id.* The regret matrix is based on the assumption that jurors desire to minimize the regret they feel over reaching incorrect decisions. Jurors will most likely feel less regret if they wrongfully convict a person whom they believe has committed other crimes and escaped punishment for them. See Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 274 (1995); see also Imwinkelried, *supra* note 4, at 1490-91.

46. See Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1007 (1984) ("[J]urors may apply a theory of culpability based on status rather than on conduct. They may conclude that the accused is a bad person deserving of punishment and removal from society, whether or not he committed the specific act charged.").

47. See FED. R. EVID. 404(a) advisory committee's note ("Character evidence is of slight probative value." (quoting California Law Revision Commission)).

48. 1A WIGMORE, *supra* note 3, § 192, at 1859.

49. See 22 WRIGHT & GRAHAM, *supra* note 2, § 5239, at 438 ("Where the proof of other acts is offered to show that the person engaged in the disputed conduct, the weak probative value of the evidence of other crimes, wrongs, or acts is swamped by the countervailing considerations of fairness and efficiency.").

50. See Tillers, *supra* note 8, at 832. Studies have shown that the "specific setting in which judgment about a person is made bears significantly upon the evaluation of information about that person." Lawson, *supra* note 4, at 775. The courtroom setting itself may induce jurors to focus on certain types of stimulus information, thereby limiting jurors' ability to form an accurate unitary impression of a person's character. See *id.* at 775-76.

makes it difficult to ascertain the “tacit (but genuine) knowledge of character” that people usually glean from their ordinary interactions with each other.<sup>51</sup> Drawing accurate inferences in the trial setting is in many ways more difficult than drawing such inferences in everyday life because parties, witnesses, lawyers, and triers of fact are all acting artificially.<sup>52</sup> Because it is not realistic to assume that true character may be discerned in the courtroom, the character evidence rule serves to prevent parties from engaging in the futile attempt to do so.

A final reason traditionally offered to justify the character evidence ban is that such evidence will confuse the jury, complicate issues, and unnecessarily delay the case.<sup>53</sup> Proof of a person’s character would take a great deal of time to develop. There is a risk that multiple mini-trials about specific instances of the defendant’s prior conduct would have to be conducted. The introduction of conflicting evidence about those prior acts could be extremely time-consuming and detract from the central issues at stake in the case.<sup>54</sup> The rule excluding character evidence minimizes the risk of such delay and distraction.<sup>55</sup>

### C. *Evaluation of the Traditional Rationales*

Closer examination of the traditional rationales offered for the character evidence rule reveals that they do not constitute entirely ade-

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51. Tillers, *supra* note 8, at 831–32. It is unclear whether reliable and useful evidence of a person’s true character can in fact “be generated in a formal judicial setting such as a trial in which parties, witnesses, and triers do not act or interact ‘naturally.’” *Id.* at 832. In court, people usually are on their best behavior: “Parties and witnesses are told to dress and behave in ways that are appropriate to the images the lawyers want to convey. They are taught to testify ‘in character’ — to be polite, low key, thoughtful . . . . Family members and friends are recruited to show up and play supporting roles.” Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 847 (1998).

52. See Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 741–42 (1998) (noting the problems caused by the trial setting). In addition, the fact that the courtroom atmosphere is focused so narrowly on determining the guilt of the accused may sensitize jurors to respond more negatively to information about the accused’s criminal behavior than would otherwise be the case. See Lawson, *supra* note 4, at 775–76 (discussing the impact of a specific setting on the perceiver’s sensitization to certain kinds of stimulus information); Mendez, *supra* note 46, at 1044–46 (discussing the role a setting plays in how people make judgments about others).

53. See Leonard, *supra* note 18, at 1185–86. “[C]ourts exclude character evidence out of fear of its complicating effect and jury confusion that can result.” *Id.* at 1185; see Leonard, *supra* note 4, at 18 n.101 (“Giving unlimited rein to this type of character evidence . . . in the majority of trials . . . would almost certainly result in a confusion of the issues, making the task of the jury even more difficult.” (quoting Morris K. Udall, *Character Proof in the Law of Evidence—A Summary*, 18 U. CIN. L. REV. 283, 298 (1949))); Mendez, *supra* note 32, at 223.

54. See 22 WRIGHT & GRAHAM, *supra* note 2, § 5232, at 346; Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777 (1981).

55. Although this section has highlighted most of the major rationales for the character evidence rule, several other minor policies underlying the ban on character evidence have been identified and discussed thoroughly elsewhere. See, e.g., Leonard, *supra* note 18, at 1185 (noting that one reason for excluding character evidence is the unfairness of surprising the unprepared defendant with such evidence); Mendez, *supra* note 46, at 1006–07 (same); Park, *supra* note 52, at 748 (observing that an alternative rationale for the character evidence rule is to prevent adversarial misconduct in the form of bullying, threats, and revenge).

quate justifications for the ban. To argue that character evidence is irrelevant and completely devoid of probative value is unconvincing. The Federal Rules of Evidence define "relevant evidence" as evidence having "any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence."<sup>56</sup> Under this expansive definition of relevance, all evidence with the slightest degree of probative value is admissible unless there is a warranted reason for excluding it. So long as an item of evidence tends to prove or disprove any proposition, it is logically relevant. Therefore, "[p]ractically all character evidence, when measured against this enormously liberal standard, is 'relevant.'"<sup>57</sup> Evidence of a particular character trait of a party or a witness almost always has at least some probative value. Beyond the standard of minimal relevance, our common experience tells us that persons often do exhibit a characteristic manner of behaving or reacting in certain circumstances. In fact, "the average person is able to explain, and even predict, the behavior of persons with a facility and success that is remarkable."<sup>58</sup> The rule banning character evidence cannot be justified by a blanket assertion that such evidence lacks probative value altogether.

Basing the character evidence rule on a generalized fear of undue prejudice is also problematic. The concern is that jurors will be unduly influenced by evidence of a person's character and exaggerate its importance in making their decisions. This assumption about jurors' poor inferential skills, however, is not necessarily warranted.<sup>59</sup> It is not entirely clear why we must assume that people are incapable of weighing the value of character evidence. To argue that character evidence is being afforded more weight than it is worth requires that one know the true weight of the evidence. It is questionable whether any one individual is better positioned than another to know that jurors are making more out

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56. FED. R. EVID. 401.

57. Tillers, *supra* note 8, at 783; *see also* Leonard, *supra* note 4, at 5–8 (discussing logical relevancy). Commentators have argued that because of its relevance, evidence of a person's character should not be banned from the field of proof. *See, e.g.*, Uviller, *supra* note 4, at 890 ("It is foolish to exclude helpful evidence simply because it tends to prove the fact by proving predisposition to perform it. Relevant is relevant.").

58. Tillers, *supra* note 8, at 784 (quoting Paul M. Churchland, *Eliminative Materialism and the Propositional Attitudes*, in *A NEUROCOMPUTATIONAL PERSPECTIVE: THE NATURE OF MIND AND THE STRUCTURE OF SCIENCE* 1, 2 (1989)). When it comes to considerations of character, psychologists have recognized that to some extent, a lay person, when provided with information about the past conduct of another person, can predict the future behavior of that person with a substantial amount of accuracy. *See* Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 *CRIM. L. BULL.* 504, 517 (1991). It is valid to suggest that individuals do behave in consistent ways to some degree:

In the ordinary course, we are justified by our common experience in believing that people continue to act in characteristic ways and hence, in similar circumstances, it becomes more likely that the predisposed defendant performed a similar act, i.e., the act in issue. Once we can demonstrate a character trait of predictive value, the resulting predisposition becomes highly probative.

Uviller, *supra* note 4, at 884.

59. There is no reason why we should treat triers of fact as "inferential idiots." Tillers, *supra* note 8, at 793.

of character evidence than they should. Moreover, if we accept the premise that character evidence does have a certain amount of probative value, we may also be justified in believing that jurors in certain circumstances accord character evidence substantial weight for very good reason.<sup>60</sup>

The fear of nullification prejudice is also a weak justification for the ban on character evidence. As discussed previously, the special purpose exception to the character evidence rule allows character evidence to be admitted so long as it is used to show facts other than character, such as motive or intent.<sup>61</sup> If we are truly concerned that character evidence tends to induce a jury to ignore the law and the facts and punish the defendant for being a bad person, then we would not permit such inflammatory evidence for any purpose. The risk that a jury will render a guilty verdict based solely on the defendant's prior bad acts would exist whether the evidence is admitted for a limited, noncharacter purpose or not.<sup>62</sup> Thus, the nullification prejudice rationale does not go far in justifying the character evidence rule.

Equally unhelpful is the argument that character evidence should be banned because the artificial nature of the courtroom setting makes it impossible to ascertain character in any meaningful way. Although drawing inferences about something as complex and subtle as character may be difficult, it cannot be any less difficult than drawing inferences about other complex and subtle concepts like intent, knowledge, and motive.<sup>63</sup> We require jurors in the unnatural setting of the courtroom to make conclusions about these sorts of fine nuances of the human mind. It seems plausible that character similarly might be discernible despite the limits of the courtroom setting.

Finally, the argument that admitting character evidence reduces the efficiency of court proceedings by increasing expenses and delays and complicating issues does not by itself convincingly support the character evidence ban. Character evidence is readily admitted in other phases of criminal proceedings despite the time-consuming nature of its presentation. In the sentencing phase, for example, courts focus heavily on the criminal history of the defendant.<sup>64</sup> Courts take into account the prior convictions of the defendant and entertain evidence of the defendant's character to fashion an appropriate sentence. The presentation of such

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60. See *id.* at 791–92. In any event, if a particular item of evidence does present dangers of unfair prejudice, the court may always exclude it under Rule 403, which provides in part: “[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” FED. R. EVID. 403. Thus, if the primary reason for banning evidence of character is to prevent undue prejudice, the normal rules of evidence address this concern without having to resort to a separate rule for character evidence.

61. See FED. R. EVID. 404(b); discussion *supra* notes 35–37 and accompanying text.

62. See Tillers, *supra* note 8, at 788.

63. See *id.* at 833 n.97.

64. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(f) (1996) (requiring courts to take into account the defendant's criminal history when determining the appropriate sentence).

evidence is necessarily time-consuming. If we were truly concerned about increased delays and inefficiencies in court proceedings due to the admission of character evidence, we would exclude it from all phases of criminal prosecutions. The fact that consideration of character evidence is permissible in certain aspects of court proceedings indicates that inefficiency itself is not the key rationale for the rule banning character evidence.<sup>65</sup>

The standard explanations for the character evidence rule are thus not entirely adequate. An effort to rethink the rule and examine more closely the possible reasons for its existence reveals that a more compelling rationale for the rule lies in the notion of human autonomy.<sup>66</sup>

#### D. Human Autonomy Rationale

Central to the concept of autonomy is the notion of self-governance, self-rule, or self-determination.<sup>67</sup> The ancient Greek writers first used the term to describe city-states that had the authority to govern themselves, independent of foreign powers.<sup>68</sup> Social contract theorists of the seventeenth and eighteenth centuries extended the concept to human beings, regarding individuals as inherently free and independent with authority to regulate their own conduct.<sup>69</sup>

More specifically, philosopher Immanuel Kant accorded autonomy a primary role in philosophical discourse about human value. According to Kant, human beings have the capacity to legislate universal principles of morality through their own will and then use these self-given laws to guide their actions.<sup>70</sup> This view of autonomy presupposes an “enduring self” that possesses the ability to make free choices and act independently.<sup>71</sup> The “enduring self” is to be distinguished from an “enduring character”: the “self is that which *has* the character and is autonomous in the sense that it has the power after reflection to change or not to change the character to some degree.”<sup>72</sup>

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65. See James Landon, Note, *Character Evidence: Getting to the Root of the Problem Through Comparison*, 24 AM. J. CRIM. L. 581, 607 (1997).

66. See discussion *infra* Part II.D.

67. See ALFRED R. MELE, *AUTONOMOUS AGENTS: FROM SELF-CONTROL TO AUTONOMY* 3 (1995).

68. See 1 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 587 (Edward Craig ed., 1998) [hereinafter ROUTLEDGE]. The Greeks used the terms “autonomia” and “autonomos” that stemmed from the root words “autos” (self) and “nomos” (law). See *id.*; see also THOMAS MAY, *AUTONOMY, AUTHORITY AND MORAL RESPONSIBILITY* 48 (1998).

69. See 1 ROUTLEDGE, *supra* note 68, at 587.

70. See *id.* at 587–88. In his treatise on moral philosophy, Kant describes man as “free in respect of all laws of nature, obeying only those laws which he makes himself.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 103 (H.J. Paton trans., 1964). See generally HOWARD CAYGILL, *A KANT DICTIONARY* 88–89 (1995) (discussing Kant’s conception of autonomy).

71. 6 ROUTLEDGE, *supra* note 68, at 501.

72. *Id.* (emphasis added). Human beings, as agents of free will, are alone responsible for the type of character they possess. See ROGER J. SULLIVAN, *IMMANUEL KANT’S MORAL THEORY* 127 (1989).

The autonomy of the self is the basis for the principle of human dignity and respect for persons. Kant's theory of autonomy gives rise to his well-known formulation of the categorical imperative: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."<sup>73</sup> All human beings have an absolute value as ends in themselves. This unconditional worth requires that all persons be treated with respect and never merely as a means to an end.<sup>74</sup>

Pursuant to these Kantian conceptions of human autonomy, respect for human dignity requires that the law treat individuals as autonomous, self-governing beings. The character evidence rule reflects this respect for human autonomy; the use of character evidence to prove individual conduct violates the law's commitment to regard each person as "mentally free and autonomous at every point in his life."<sup>75</sup> Admitting evidence of a person's character to show conduct is inconsistent with the principle of autonomy because it assumes that human beings do not have the capacity to govern their own behavior and that their character dictates their actions.<sup>76</sup> Character evidence invites jurors to regard human conduct as a result of character rather than free will. Therefore, respect for human dignity and autonomy requires the exclusion of prior bad acts to prove that the person committed the offense charged.

The character evidence rule is supported by the imperative that human beings always be treated as ends in themselves. One scholar has identified certain "aspirational goals" for the character evidence rule that are consistent with this imperative.<sup>77</sup> For example, the moral doctrine of *loshon hora*, which forbids one from speaking of the character of others in a derogatory or harmful way, serves to protect personal dignity.<sup>78</sup> According to the doctrine, verbal expressions of judgment and condemnation deny the value of others and ultimately serve to demean oneself.<sup>79</sup>

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*See generally* ROBERT P. WOLFF, *THE AUTONOMY OF REASON: A COMMENTARY ON KANT'S GROUNDWORK OF THE METAPHYSIC OF MORALS* (1973).

73. KANT, *supra* note 70, at 96; *see also* CAYGILL, *supra* note 70, at 99–102 (describing Kant's conception of the categorical imperative); 5 ROUTLEDGE, *supra* note 68, at 190 (discussing Kant's *Formula of Humanity as an End in Itself*).

74. *See* 8 ROUTLEDGE, *supra* note 68, at 285, 636; *see also* 5 ENCYCLOPEDIA OF PHILOSOPHY 110 (Paul Edwards ed., 1972) (describing persons as "ends-in-themselves" and sources of value in their own right); ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT'S ETHICS* 65–83 (1994) (discussing Kant's *Formula of Respect for the Dignity of Persons*). *See generally* PATRICK A. HUTCHINGS, *KANT ON ABSOLUTE VALUE* (1972).

75. 1A WIGMORE, *supra* note 3, § 54.1, at 1151; *see also* Leonard, *supra* note 20, at 310 & n.31.

76. *See* Tillers, *supra* note 8, at 796 (arguing that the human autonomy rationale for the character evidence rule relies on two presuppositions: "(i) the use of character as *evidence* implies that *character* causes people to act the way that they do, and (ii) people are not autonomous, or self-governing, if their character causes them to act the way that they do").

77. *See* Leonard, *supra* note 18, at 1186–92.

78. "Loshon hora" literally means "evil talk" in the Talmudic tradition. *See id.* at 1188; *see also* David P. Leonard, *The Perilous Task of Rethinking the Character Evidence Ban*, 49 HASTINGS L.J. 835, 839 (1998).

79. *See* Leonard, *supra* note 18, at 1189–90.



Thus, the rule against trial by character, which requires the exclusion of negative information about another's background, protects individual human dignity and engenders mutual respect.<sup>80</sup>

Even more significant is the rule's protection against unnecessary human degradation and humiliation. The possibility exists that any attempt to discern the true nature of a person's character would require such deep investigation into the inner recesses of the human heart and soul that the search itself would be demeaning.<sup>81</sup> Ascertaining character through the presentation of detailed personal histories would require invasions of privacy that any person would find abhorrent. The rule banning such inquiries into character preserves the law's interests in human dignity and respect for autonomy.

In summary, the importance of protecting human autonomy interests provides an alternative rationale for the character evidence rule that is more convincing than those traditionally offered. Nonetheless, assuming that there is adequate support for the rule excluding character evidence, one still encounters substantial difficulties with its implementation. One of the most problematic aspects of implementing the rule lies in the inability to define character in a satisfactory manner.

### III. DEFINITION OF CHARACTER

Reaching a comprehensive definition of character is a formidable task. Wigmore perceived character to be "any and every quality or tendency of a person's mind, existing originally or developed from his native substance, and more or less permanent in [its] existence."<sup>82</sup> An early attempt to codify the evidence rules defined character as "the aggregate of a person's traits, including those relating to care and skill and their opposites."<sup>83</sup> The conception of character as a bundle of traits corresponded with early psychologists' trait theories of personality.<sup>84</sup> Competing theories of personality in psychology have contributed over time to a better understanding of the mental and emotional makeup of a person, but they

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80. See Leonard, *supra* note 78, at 839–41.

81. See Tillers, *supra* note 8, at 833–34.

82. Leonard, *supra* note 18, at 1165 n.13 (quoting JOHN H. WIGMORE, *THE SCIENCE OF JUDICIAL PROOF* § 52, at 103 (3d ed. 1937)).

83. MODEL CODE OF EVID. Rule 304 (1942).

84. The legal concept of character and the psychological concept of personality are closely related. Gordon Allport described the relationship between the two: "Character is a term frequently used as a synonym of personality. . . . There is no historical reason why the term should not be used interchangeably with personality as indeed it frequently is." GORDON W. ALLPORT, *PERSONALITY: A PSYCHOLOGICAL INTERPRETATION* 50 (1937). Allport noted, however, that the term character carried certain moral connotations: "[I]nstead of defining character as the volitional aspect of personality, it is sounder to admit frankly that it is an ethical concept. . . . Defined in this way, the psychologist does not need the term at all; personality alone will serve. *Character is personality evaluated, and personality is character devaluated.*" *Id.* at 52; see also Taslitz, *supra* note 7, at 31 (referring to personality as the psychologists' equivalent of the legal concept of character).

have not themselves provided a complete and consistent description of this complex notion we call character.

### A. *Theories of Personality*

Early twentieth-century psychologist Gordon Allport developed a theory of personality known as modern trait theory. He postulated that individuals possess fundamental predispositions, or traits, that are unique to each person and influence how that person behaves.<sup>85</sup> According to Allport, “[t]raits are not creations in the mind of the observer, nor are they verbal fictions; they are here accepted as biophysical facts, actual psychophysical dispositions.”<sup>86</sup> These traits are relatively stable elements of personality that cause a person to exhibit generally consistent behavior across many different situations.<sup>87</sup> For example, an individual who possesses the trait of peacefulness can be expected consistently to exhibit peaceful behavior in the face of widely divergent circumstances.

Trait theories of personality grew out of favor when subsequent psychological research revealed that individual behavior varies significantly depending on the situation.<sup>88</sup> Character traits were found to be weak predictors of conduct,<sup>89</sup> and behaviorists rejected trait theory and replaced it with a theory of specificity, or situationism.<sup>90</sup> This theory emphasized the situational determinants of behavior and treated individual conduct in a given situation largely as a function of environmental fac-

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85. See ALLPORT, *supra* note 84, at 286–311; see also WALTER MISCHEL, INTRODUCTION TO PERSONALITY: A NEW LOOK 122–24 (4th ed. 1986) (describing Allport’s trait theory).

86. ALLPORT, *supra* note 84, at 339. Although the origin of the notion of character as a collection of traits often has been traced to Allport’s work in psychology, some commentators have observed that trait-oriented concepts existed in the philosophical literature even before Allport. See, e.g., Tillers, *supra* note 8, at 818–22, 818 n.58 (associating the notion of character traits and dispositions with David Hume’s philosophy and treatise on human nature).

87. See ALLPORT, *supra* note 84, at 312–65 (discussing the nature and consistency of traits and unity of personality); see also Leonard, *supra* note 4, at 26 (describing Allport’s theory). For a detailed explanation of Allport’s conception of traits, see B.R. HERGENHAHN, AN INTRODUCTION TO THEORIES OF PERSONALITY 182–86 (3d ed. 1990); see also Thomas J. Reed, *The Character Evidence Defense: Acquittal Based on Good Character*, 45 CLEV. ST. L. REV. 345, 365–69 (1997).

88. See Lawson, *supra* note 4, at 780–82; Leonard *supra* note 20, at 316.

89. See Leonard, *supra* note 20, at 311; Méndez, *supra* note 4, at 878.

90. See Reed, *supra* note 87, at 371–72 (discussing behaviorism and the rejection of trait theory). Walter Mischel is often credited with pioneering the challenge to trait theory and developing the theory of situationism. See Leonard, *supra* note 20, at 316 & n.56; see also Friedman, *Psycho-Bayesian Analysis*, *supra* note 27, at 649–50. Mischel stressed the importance of situational factors in explaining individual behavior. “[B]ehavior depends on stimulus situations and is specific to the situation . . . . Individuals show far less cross-situational consistency in their behavior than has been assumed by trait-state theories.” WALTER MISCHEL, PERSONALITY AND ASSESSMENT 177 (1968). By identifying the inadequacies of earlier personality theories, Mischel’s work invited counterattacks from other personality theorists and led to major conceptual revisions in the study of personality. See HERGENHAHN, *supra* note 87, at 333–35, 338. Trait theories continue to hold some prominence in the study of personality disorders. See Bruce Bower, *Piecing Together Personality*, 145 SCI. NEWS 152 (1994) (discussing the five-factor model of diagnosing and treating personality disorders).

tors.<sup>91</sup> Proponents of situationism argued that although behavior patterns often may be stable, they typically are not highly generalized across situations.<sup>92</sup> It is impossible, therefore, to accurately predict future behavior after observing only one instance of a person's past conduct.<sup>93</sup>

A compromise position between trait theory and situationism emerged after much debate between the two camps. This intermediate approach, known as interactionism, emphasized both personality traits and situational factors in predicting behavior.<sup>94</sup> More specifically, persons and situations are regarded as being inextricably linked in the process of interaction.<sup>95</sup> According to interactionists, neither trait factors nor situational factors alone can determine behavior.<sup>96</sup>

Psychologists recently have forged a new theory of personality, the cognitive-affective system theory, which conceptualizes personality as "a stable *system* that mediates how the individual selects, construes, and processes . . . information and generates . . . behaviors."<sup>97</sup> Although re-

91. See Joseph P. Forgas & Guus L. Van Heck, *The Psychology of Situations*, in MODERN PERSONALITY PSYCHOLOGY: CRITICAL REVIEWS AND NEW DIRECTIONS 418-55 (Gian-Vittorio Caprara & Guus L. Van Heck eds., 1992) [hereinafter MODERN PERSONALITY PSYCHOLOGY] (discussing the situationist approach to personality).

92. See MISCHEL, *supra* note 90, at 282.

93. See Lawson, *supra* note 4, at 782; Mendez, *supra* note 32, at 227-28. Not all psychologists agreed with the theory of situationism. Hans Eysenck's research demonstrated that a purely situational approach to personality was inadequate. He noted that certain dimensions of personality have a strong genetic basis. See Hans J. Eysenck, *Personality and Criminality: A Dispositional Analysis*, in 1 ADVANCES IN CRIMINOLOGICAL THEORY 89, 90 (William S. Laufer & Freda Adler eds., 1989) (discussing the physiological features associated with psychoticism, extraversion, and neuroticism). He argued not only that a strong correlation exists between personality and criminality but also that it is possible to some degree to predict later criminality from earlier assessments of personality. See *id.* at 93-104. Using identical twin and adoptive children studies, Eysenck revealed that hereditary, dispositional factors do play a role in criminal and antisocial behavior. See Reed, *supra* note 87, at 377; see also *id.* at 373-79 (discussing Eysenck's theories of personality and criminal behavior). See generally HANS J. EYSENCK & MICHAEL W. EYSENCK, PERSONALITY AND INDIVIDUAL DIFFERENCES (1985). Research confirms that certain dimensions of behavior, such as aggression, may be determined in part by heredity and may be linked to specific physiological and neurological factors. See K.E. MOYER, THE PSYCHOBIOLOGY OF AGGRESSION 20-58 (1976). Individual differences in aggressive behavior have also proven to have a high degree of stability over time. See MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 66 (1990) (citing L. Rowell Huesmann et al., *Stability of Aggression over Time and Generations*, 20 DEVELOPMENTAL PSYCHOL. 1120, 1120-34 (1984); Dan Olweus, *Stability of Aggressive Reaction Patterns in Males: A Review*, 86 PSYCHOL. BULL. 852-75 (1979)).

94. See Salvatore R. Maddi, *The Continuing Relevance of Personality Theory*, in FIFTY YEARS OF PERSONALITY PSYCHOLOGY 85, 87 (Kenneth H. Craik et al. eds., 1993). Maddi notes that all person-situation debates end inconclusively because human behavior can never be entirely the result of internal, person variables on the one hand or external, situation variables on the other. See *id.*; see also David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 561-62 (1994) (discussing the differing approaches of trait theory, situationism, and interactionism).

95. See David Magnusson & Norman S. Endler, *Interactional Psychology: Present Status and Future Prospects*, in PERSONALITY AT THE CROSSROADS: CURRENT ISSUES IN INTERACTIONAL PSYCHOLOGY 3, 4 (David Magnusson & Norman S. Endler eds., 1977).

96. See *id.* at 3-4; see also Joop Hetteema & Douglas T. Kenrick, *Models of Person-Situation Interactions*, in MODERN PERSONALITY PSYCHOLOGY, *supra* note 91, at 393-417.

97. Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL.

jecting trait theorists' belief in the stability and distinctiveness of certain traits, the cognitive-affective system theory nonetheless acknowledges that "stable intraindividual patternings" do exist.<sup>98</sup> These patterns reflect the individual's "distinctive behavior organization" and can "form a sort of behavioral signature."<sup>99</sup> What is most interesting about this new theory of personality is that it describes individuals as having a unique, underlying, stable personality system. Although individual behavior can vary across different situations, individuals possess a system of internal organization that produces predictable behavior variance across those situations.<sup>100</sup> Cognitive-affective system theory is unique in this regard:

Like many personality models, this system generates variation in the individual's behavior across different situations. Distinctive for the present model is that this variation across situations is neither entirely random, nor does it merely represent common differences in normative levels of social behavior in different situations shared by all individuals. Instead, the behavioral variation in relation to changing situations constitutes a potentially predictable and meaningful reflection of the personality system itself.<sup>101</sup>

Thus, there are certain systemic forces that influence individual behavior. This description of personality as an internal operating system of sorts contributes greatly to a conception of character that prior legal definitions have lacked. Rather than focusing narrowly on unitary traits, this systems theory adopts an expansive, multidimensional approach to character that provides greater insight into human behavior.

### B. *Character as an Internal Operating System*

Derived from the cognitive-affective system theory of personality, the conception of character as the internal organizational system of the human organism accords with certain philosophical notions of the human persona as well. Aristotle's classic discussion of the soul and the human psyche in *De Anima*<sup>102</sup> suggests that human beings should be regarded as "naturally organized" persons.<sup>103</sup> In other words, individuals are self-

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REV. 246, 246 (1995) (emphasis added); see also Mendez, *supra* note 32, at 228–34 (summarizing cognitive-affective theory).

98. Mischel & Shoda, *supra* note 97, at 251.

99. *Id.*

100. See *id.* at 254–56.

101. *Id.* at 255. The cognitive-affective system theory postulates that "stable individual differences in the organizations of the relations among cognitions and affects" will give rise to "characteristic, predictable patterns of variation in the individual's behavior across situations." *Id.* at 256. Viewed in this manner, human behavior cannot be characterized as "random or whimsical." Reed, *supra* note 87, at 357.

102. ARISTOTLE, *DE ANIMA* 163–78 (Kenelm Foster & Silvester Humphries trans., 1959). "Anima" is often translated as "soul." Thus, Aristotle's classic treatise is commonly referred to as "On the Soul." See 1 ROUTLEDGE, *supra* note 68, at 424–25, 433. Some scholars note that "anima" may be interpreted as the "psychic principle" or "animating principle" of all living things. HENRY B. VEATCH, *ARISTOTLE: A CONTEMPORARY APPRECIATION* 60 (1974).

103. ARISTOTLE, *supra* note 102, at 163–78.

organizing and self-regulating entities.<sup>104</sup> Within each person is a set or collection of rules, procedures, and principles that organizes, directs, and regulates that person's behavior.<sup>105</sup> This internal operating system governs how a person behaves in any one situation based on the person's perceptions, past experiences, and self-regulating laws.<sup>106</sup>

Human behavior thus may be viewed in part as the result of an internal decisionmaking system. Although conduct cannot be predicted with perfect accuracy, there is a certain degree of continuity in the conduct of most individuals over time.<sup>107</sup> This consistency of behavior that the term character connotes may be regarded as the result of a consistent pattern of choices and decisions.<sup>108</sup> Character arises out of this internal structure or logic that moves individuals to make the decisions and choices that they make.<sup>109</sup> In this light, human character is not merely a haphazard collection of traits and attributes. Rather, a person's character or pattern of behavior may be regarded as "a reflection or expression of a set of internal principles and operations."<sup>110</sup>

This concept of character seems to be far more helpful than previous attempts to define the term. It provides for a much more satisfying explanation of both the consistency and the variance in human behavior than either trait theory or a purely situational approach can afford. Viewing human beings as self-regulating organisms with an internal decisionmaking system is also consistent with accepted notions of autonomy.<sup>111</sup>

Armed with this new concept of character, we must turn to the important question of whether this definition of character, and its implications for the character evidence rule, apply with equal force to corporations. A satisfactory analysis of the issue requires an initial inquiry into the personhood of corporations and the extent to which a corporation is even capable of possessing an identifiable character.

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104. See Tillers, *supra* note 8, at 824–25. Kant's conception of the autonomy of rational human agents is similar. Kant believed that human beings have a capacity for self-determination. This sovereignty over oneself is manifest in the individual's ability to create and be governed by self-given laws and principles. As a function of their free will and reason, human beings can legislate universally valid principles that direct and guide their actions. See 1 ROUTLEDGE, *supra* note 68, at 587–88 (discussing Kant's philosophy of autonomy); SULLIVAN, *supra* note 72, at 44–49 (discussing Kant's philosophy of freedom, autonomy, and self-given laws); *supra* notes 70–72 and accompanying text.

105. See Tillers, *supra* note 8, at 811, 825. Human beings are viewed as "entities who are governed by and who constitute certain ordering principles . . . [T]he existence of such a set of internal principles governing human beings . . . makes it possible to say or think that a person exists . . ." *Id.* at 824.

106. See *id.* at 821–25.

107. See *id.* at 812; Davies, *supra* note 58, at 516; see also Taslitz, *supra* note 7, at 65–69 (discussing cross-situational dispositions and consistency of behavior when principles of aggregation are applied).

108. See Tillers, *supra* note 8, at 811.

109. See *id.* at 828.

110. *Id.* Conceptualizing character in this manner accords with our own hunches about the nature of human behavior: "Our intuitions and common sense tell us that there is within each one of us some set of principles and operations—some kind of a structure or 'logic'—that influences how we behave." *Id.*

111. See discussion *supra* notes 67–72 and accompanying text.

## IV. THE CORPORATION AS A PERSON

Prior to approaching the issue of corporate character for purposes of Rule 404, it is necessary to examine the question of whether a corporation<sup>112</sup> is itself a person, separate and distinct from its individual members. There is a fundamental ambiguity in deciding whether corporations are independent persons because corporations are treated like individuals for some purposes and not for others.<sup>113</sup> Different conceptions of personhood make the analysis even more complex. Although there is no single concept of what it means to be a person, distinctions may clearly be made among the concepts of a natural person, a legal person, and a moral person.<sup>114</sup> A corporation is not a natural person, but it is certainly recognized under the law as a legal person.<sup>115</sup> There is also a very real sense in which a corporation may be regarded as a moral actor and thus held morally accountable for its actions.<sup>116</sup> The following discussion suggests that corporations do exist as persons with an identity independent of the identities of the individuals who own and work within the organization.

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112. For purposes of this article, the term "corporation" refers generally to large, public corporations. Although there are qualitative differences between small, privately held corporations and their large, publicly held counterparts, an analysis of these differences is outside the scope of this discussion. This article is concerned primarily with the large, profit-making, publicly held corporation of the type that pervades the modern American economy. For an interesting discussion of the rise of the modern corporation and the law's treatment of it, see SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* 35-74 (1996); see also RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784-1855: BROADENING THE CONCEPT OF PUBLIC SERVICE DURING INDUSTRIALIZATION* (1982).

113. For example, the corporation enjoys some but not all of the same constitutional protections afforded to individuals. Corporations have a right to be free from unreasonable searches and seizures under the Fourth Amendment, but they may not invoke the privilege against self-incrimination under the Fifth Amendment. See *Hale v. Henkel*, 201 U.S. 43, 43 (1906). Corporations are considered persons for purposes of the due process and equal protection clauses of the Fourteenth Amendment, but they may not claim the rights of persons under the privileges and immunities clause of Article IV. See *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). See generally Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577 (1990).

114. See AMELIE O. RORTY, *MIND IN ACTION: ESSAYS IN THE PHILOSOPHY OF MIND* 31-34 (1988) (distinguishing between the legal and moral concepts of the person and noting that "there is no such thing as 'the' concept of a person"); Richard Tur, *The "Person" in Law*, in *PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY* 116, 116-29 (Arthur Peacocke & Grant Gillett eds., 1987) (discussing the legal concept of the person). See generally DANIEL C. DENNETT, *BRAINSTORMS: PHILOSOPHICAL ESSAYS ON MIND AND PSYCHOLOGY* 267-85 (1978); CATHERINE MCCALL, *CONCEPTS OF PERSON: AN ANALYSIS OF CONCEPTS OF PERSON, SELF AND HUMAN BEING* (1990); Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHIL.* 5 (1971).

115. As a legal person, the corporation is capable of legal acts and of bearing legal consequences. Possessing legal rights and duties much like those of natural persons, corporations have the power to contract, to own and convey property, and to sue and be sued. See HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* 148 (3d ed. 1983). See generally Walter R. Goedecke, *Corporations and the Philosophy of Law*, 10 *J. VALUE INQUIRY* 81 (1976) (discussing the legal status of corporations).

116. See discussion *infra* Part IV.C.

### A. *The Corporation as a Real Person*

Corporations traditionally have been referred to as fictitious, artificial persons under the law.<sup>117</sup> Under the fiction theory of corporate personhood, the corporation exists as a person only because the law recognizes it as such. The corporation owes its existence to the state that creates it and can do only what the state allows it to do.<sup>118</sup> So viewed, the corporation exists merely in an imaginary way, qualitatively different from the way in which the natural persons who compose the corporation exist.<sup>119</sup>

A variation of the fiction theory views the corporation less as a creation of the state and more as the product of a contractual agreement between private parties.<sup>120</sup> The contractual paradigm accepts the fiction theory's conclusion that, absent the legal effect granted by the state, there is no corporate identity apart from the incorporators. The contractual model, however, rejects the premise that it is the state, rather than the incorporators, which creates the corporation. According to this model, corporations spring into existence not when the state grants their charters but when shareholders by mutual agreement form the corporate enterprise.<sup>121</sup>

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117. See HENN & ALEXANDER, *supra* note 115, at 145; see also *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 530 (4th Cir. 1987) (“[T]he entire structure of basic corporate law is built upon a series of fictions, most notably the fiction that a corporation is something that really exists . . . .”); Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987) (“The edification of the corporation to the status of person is one of the most enduring institutions of the law and one of the most widely accepted legal fictions.”).

118. See Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 579 (1989).

119. See *id.* at 579–80; see also Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 208 (1979) (noting that, at the moment the corporation is created by law, the fiction theory “does not view the law as recognizing or verifying some pre-legally existing persons; [instead, the fiction theory] argues that the law creates its own subjects”). In *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall articulated the fiction theory of corporate personality: “[A] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.” *Id.* at 636.

120. See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 184–85 (1985) (“In this conception, the corporation was not a creature of the state but of individual initiative and enterprise.”). Under the contractual model, the corporation is to be viewed as a nexus of contracts:

[The] corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships . . . . There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labor, material and capital inputs and the consumers of output.

Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

121. See Horwitz, *supra* note 120, at 203 (“The corporation . . . ‘is really an association formed by the agreement of its shareholders, and . . . the existence of a corporation as an entity, independently of its members, is a fiction.’”) (citing 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS at iii (2d ed. 1886)); Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1647, 1648 n.31 (1982) [hereinafter *Constitutional Rights*] (discussing the contract theory of corporate personhood). The role of the state, according to the contractual theory, is limited to enforcing the nexus of private contracts that form the corporate entity. See Henry N. Butler, *The Contractual*

The problem with these fictional paradigms of the corporate person is that they fail to acknowledge the real existence of the corporation apart from the law's recognition of it. The corporation is more than a mere legal fiction or the sum of shareholders' contractual rights and duties. It is a real person whose continued existence does not depend on the state nor on the identity of the corporation's individual members. A corporation exists as an objective fact, prior to and separate from the state.<sup>122</sup> If, for example, a large corporation unwittingly failed to pay its annual fees to the state to continue doing business and the state consequently refused to recognize the corporation's existence, the corporation would not suddenly cease to exist in an objective sense:

Legalistics aside, any large corporation is first and foremost an institution. . . . Clearly it is not the law, with its fiction of juristic personality, that supplies the life blood and beating heart of these vast mechanisms. If the law, acting through some instrumentality, declared that they did not exist, the entities would be found to be not fictitious, but factual. . . . The huge machine would keep right on rolling. This is the essence of an institution, and not of a legalistic creation.<sup>123</sup>

As a practical matter, it is cognitively incongruous to maintain that the corporation is a fiction in light of everyday experience.<sup>124</sup> We regularly observe and interact with corporations as entities. We read newspaper accounts of corporate mergers and acquisitions, follow lawsuits alleging corporate manufacturing of defective products, acknowledge corporate gifts to charities and good causes, and remit our monthly payments to utility companies. Our own experience tells us that corporations are not merely fictional creatures. To insist that they are denies the empirical reality of their existence. The more sound approach is to view the

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*Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 100 (1989). Extrapolations of the contractual theory have been used to redefine in financial economic terms almost every major topic in corporate law. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991). The nexus-of-contracts view of the corporation is not a completely accurate model to describe corporate practice. See William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 180-97 (1992); Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 55-64, 66-69 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

A related model suggests that corporations should not be understood as objects, artificial or otherwise, but as a set of role relations. See *Constitutional Rights*, *supra*, at 1652. In the corporate context, individuals hold roles as shareholders, officers, directors, and employees. These individuals have "significance by virtue of the position they hold, rather than by virtue of their individual identities." *Id.* at 1653 n.48. The corporation is thus regarded as merely a complex web of social relations. See MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* 64 (1980) (arguing that, in some sense, the corporation may be understood as being "constructed not of persons but of roles and positions that it has created and defined").

122. See Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 260-61 (1911).

123. ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 18-19 (1954).

124. See Peter A. French, *Responsibility and the Moral Role of Corporate Entities*, in *BUSINESS AS A HUMANITY* 88, 90 (Thomas J. Donaldson & R. Edward Freeman eds., 1994) ("It is rather like insisting that one's playmate is imaginary even after he or she has just hit one over the head with a hammer and stolen all the ice cream.").



corporation as a real person with separate and independent rights and obligations, rather than as an imaginary, artificial person.

This view of the corporation is often referred to as the real or natural entity model of corporate personhood.<sup>125</sup> Under this approach, even if the corporate personality is regarded as a fiction for purposes of the law, the objective entity itself can in no way be characterized as fictional. “The union of the members [of the corporation] is no fiction. The acting as if they were one person is no mere metaphor. In a word, although corporate personality is a fiction, . . . it is a fiction founded upon fact.”<sup>126</sup>

### B. *The Corporation as an Independent Person*

Even if the corporation exists as a real person, it is important to determine whether the corporation enjoys such existence on its own or merely as a byproduct of aggregating its individual members. In other words, is the corporation a distinct and independent person, separate and apart from the human beings that make up the corporate structure, or is the corporation merely an aggregation of such individuals, the sum total of the human beings involved in its operations?

Some commentators argue that corporations cannot be separated from the natural persons who compose them. This aggregate or atomistic view of corporations regards corporations as being essentially “mere clusters or aggregates of individuals.”<sup>127</sup> It must always be remembered that the corporate entity is “owned, managed, and administered by *people*[, and] [i]ts so-called actions are but manifestations of actions by real persons.”<sup>128</sup> Corporations rely entirely on human beings to function, and it is these individuals who bear the rights and burdens of the corpora-

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125. See Horwitz, *supra* note 120, at 217–18. German legal theorist Otto Gierke is often credited with introducing this model of realism into Western thought. See *id.* at 179–81 (citing OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (F.W. Maitland ed., 1900)); see also French, *supra* note 119, at 209; Hager, *supra* note 118, at 580.

126. Machen, *supra* note 122, at 266.

127. MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS* 15 (1986); see also LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 11–18 (1987) (discussing the claim that social groups such as corporations are nothing more than the individuals who constitute them). May believes that “all talk of social groups can be reduced to talk of individual persons.” *Id.* at 10. This atomistic view of organizations has found its way into other disciplines as well. For example, psycho-dynamic theories of organizational culture postulate that organizations are essentially patterns of human behavior. The organization ceases to exist when these patterns of behavior stop. See LIONEL STAPLEY, *THE PERSONALITY OF THE ORGANISATION: A PSYCHO-DYNAMIC EXPLANATION OF CULTURE AND CHANGE* 50 (1996). “Organisations are not held together by functional branches or systems[;] the cement that holds them together is ultimately psychological. In order that the organisation is to exist, people must be motivated to engage in the stable recurring patterns of behaviour that define the organisations and give them continued existence.” *Id.*

128. Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, in 1 *ADVANCES IN CRIMINOLOGICAL THEORY*, *supra* note 93, at 31, 36. The corporate entity is merely a tool in the hands of actual people. See Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 325 (1985).

tion.<sup>129</sup> Thus, according to the aggregate paradigm, the corporation exists as a person only as an aggregation of the natural persons who constitute the corporate enterprise.

This model of the corporation, however, is seriously flawed. It leaps from the indisputable premise that corporations act through individuals to the unwarranted conclusion that only individual identity is relevant.<sup>130</sup> The existence of the corporation as a real person does not depend on the identity of its individual members. Individuals in the corporation may be replaced without affecting the continuity or the identity of the organization.<sup>131</sup> This substitutability of individuals differentiates formal organizations, such as corporations, from “other kinds of social systems, e.g. the family, the community or the nation, which are collectivities that are dependent for their existence on specific individuals . . . and that change when they change.”<sup>132</sup> In addition, permanence is one of the distinguishing features of a large organization. Permanence refers to “the fact that ‘organizations can persist for several generations . . . without losing their fundamental identity as distinct units, even though all members at some time come to differ from the original ones.’”<sup>133</sup> Thus, the existence and identity of the organization are divorced from the identity of the individuals who compose the organization.<sup>134</sup> In fact, the existence of the organization “typically predates the membership in it of any particular individual.”<sup>135</sup>

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129. See Machen, *supra* note 122, at 266. As a general matter, the reductionist approach of the aggregate model tends to focus less on employees of the corporation and more on shareholders, officers, and directors. See French, *supra* note 119, at 209.

130. See Michael B. Metzger, *Organizations and the Law*, 25 AM. BUS. L.J. 407, 410–11 (1987) (arguing it is inappropriate to focus “exclusively on the individual actions that combine to produce corporate action . . . [The corporation] is a markedly different creature than the individual persons who constitute its human capital”).

131. See John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 THE MONIST 488, 488 (1970).

132. *Id.* The corporation as an organic unity will always be greater than the sum of its individual parts. See John Braithwaite & Brent Fisse, *On the Plausibility of Corporate Crime Theory*, in 2 ADVANCES IN CRIMINOLOGICAL THEORY 15, 22 (William S. Laufer & Freda Adler eds., 1990); Horwitz, *supra* note 120, at 181; see also MAY, *supra* note 127, at 18–24 (summarizing the argument that social wholes are entities in their own right, existing independently of the individual humans who compose the wholes).

133. DAN-COHEN, *supra* note 127, at 32 (quoting PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS 1 (1962)).

134. See *id.*; see also PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 19–30 (1984) (demonstrating that the identity of a corporation is independent of the aggregate identities of those associated with it at any particular time, in spite of the fact that its operations require that persons be associated with it).

135. DAN-COHEN, *supra* note 127, at 50. Grappling with the question of whether it is the individual or the organization that comes first is much like asking whether it is the chicken or the egg. Some commentators suggest that aggregation theory’s reductionist approach provides the incorrect answer: the individual. It is, in fact, organizations that precede individuals, rather than the converse. See *id.* at 24 (“Membership, in the case of the large organization, presupposes organization, rather than the other way around: for there to be a large membership group, there must be in the first place an organization that will be willing and able to [bring] individuals into membership.”).

A corporation is a unified and distinctive social person with an existence that is separate from the human beings that compose it.<sup>136</sup> Organizations have their own preferences and goals that cannot be characterized as merely an aggregate of individual preferences.<sup>137</sup> As a distinct social organism, the corporation has the capacity to come to terms with its environment and move with its goals. It is not difficult to conceptualize a corporation as an adaptive social structure. In other words, a corporation has the ability to adapt to its surroundings and mobilize and direct human energies toward set corporate aims.<sup>138</sup> Pursuant to its organizational goals, the corporation makes its own decisions through its decisionmaking systems.<sup>139</sup>

There is a very real sense in which a corporation has a will that cannot be reduced to the individual wills of the corporation's members.<sup>140</sup> One model of organizational decisionmaking views corporate decisionmaking as essentially a political bargaining process<sup>141</sup> where several individuals or teams of individuals in the corporation may be involved in the making of a single business decision. Because various individuals with

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136. See Braithwaite & Fisse, *supra* note 132, at 22 (describing organizations as "socio-technical systems, not just aggregations of individuals"); Machen, *supra* note 122, at 259 ("[A]ny group whose membership is changing is necessarily an entity separate and distinct from the constituent members.").

Dan-Cohen makes this point explicit by telling an allegory of the "Personless Corporation." See DAN-COHEN, *supra* note 127, at 46–49. Personless Corporation is a large, public corporation that manufactures widgets. It decides to purchase all of its own outstanding stock, thereby becoming an "ownerless" corporation. It then automates its entire operation and becomes fully computerized. Because computers ably handle all the functions of the corporation, the corporation's human employees are no longer necessary and are subsequently let go. When the last employee is retired, computers run the corporation's operations entirely. The displacement of human management has little effect on both the actual operations and the legal status of the corporation. The computers' capacity for complex computations enables the computers to make decisions, predictions and plans, and adjust to changing conditions. See *id.* at 47–48. The moral of the story is that one may "strip the corporation of all individuals and yet preserve, both conceptually and legally, the identity of [the corporation]." *Id.* at 49. Corporations have a distinct existence and identity that does not depend on the aggregation of individuals within the corporation.

137. See LANE TRACY, *THE LIVING ORGANIZATION: SYSTEMS OF BEHAVIOR* 33–46 (1989) (discussing the distinct nature of organizational values, purposes, goals, and attitudes); see also DAN-COHEN, *supra* note 127, at 33, 36–38 (discussing an organization's capacity for organizational preferences and goal orientation).

138. See Henry L. Tosi, *Selznick's "TVA and the Grass Roots,"* in *THEORIES OF ORGANIZATION* 94, 94 (Henry L. Tosi ed., 1978). The corporation "is molded by forces tangential to its rational, ordered structure and stated goals. [It] may be viewed as a dynamic conditioning field which shapes the behavior of those at its helm . . . . It is a tool which has a life of its own separate from that of the members, yet mobilizing interacting human beings to get the work done." *Id.* at 94–95.

139. See James G. March & Zur Shapira, *Behavioral Decision Theory and Organizational Decision Theory*, in *DECISION MAKING: AN INTERDISCIPLINARY INQUIRY* 92, 97 (Gerardo R. Ungson & Daniel N. Braunstein eds., 1982) ("Organizational decisions are no more made by individuals than the choices of individuals are made by the hands that sign the papers.").

140. See Virginia Held, *Corporations, Persons, and Responsibility*, in *SHAME, RESPONSIBILITY AND THE CORPORATION* 159, 171 (Hugh Curtler ed., 1986). The term "will" refers to "what a corporation can have as the direction of its goal-directed decision, or as the carrying forward of its plans." *Id.* at 170.

141. See Metzger, *supra* note 130, at 433–36 (describing Graham Allison's well-known Bureaucratic Politics Model of decisionmaking); Simeon M. Kriesberg, Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 *YALE L.J.* 1091, 1103–05 (1976) (same).

different intentions contribute to the decisionmaking process, the ultimate corporate action may not be the preferred course of any one particular individual involved. The corporation's decision, or will, "may be an amalgam of independent [individual] decisions, a compromise among views of several teams."<sup>142</sup> Tracing the will or intent of the corporation to any particular individual or group of individuals is, therefore, impossible.

Moreover, in most instances, individual participants may contribute a small part to a collective decisionmaking process without necessarily being aware of the totality of that process. Certain individuals may be asked for their input on discrete, isolated issues without being informed of how the input will be incorporated into the bigger picture. As a result, none of them fully understand the larger implications of their singular contributions.<sup>143</sup> It is not appropriate in such cases to pinpoint the final intent of the corporation on specific individuals who each played only a small role in forming the intentionality of the corporation.<sup>144</sup>

[T]he claim that corporate intentions can be nothing but the intentions of individuals does not seem correct. . . . Human motivation is complex, and it would be implausible to think that corporate decisions do reflect the intentions of the members in a completely reducible way. It is much more believable to think that as a multitude of persons with varying amounts of power and influence contribute to a corporate decision, the outcome is certainly shaped in ways that produce corporate "intentions" quite different from those that entered into the process.<sup>145</sup>

Similarly, acts of the corporation often cannot sensibly be reduced to the actions of individuals associated with the organization. The acts instead must be described with reference to the corporation as a whole because the acts are qualitatively different from those of its individual members. For example, when a corporation decides to purchase property, one person may produce a report that advocates the purchase, other members may discuss the report and vote in favor of the purchase, and a final member may be ordered to execute the purchase. To say that the

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142. Kriesberg, *supra* note 141, at 1104.

143. See DAN-COHEN, *supra* note 127, at 32-33. The "total information that leads to a certain [organization] decision (or action or product) is not normally possessed by any single individual nor is it straightforwardly related to the combined knowledge possessed by a number of identifiable individuals." *Id.* at 32.

144. See Braithwaite & Fisse, *supra* note 132, at 25 ("The concepts of corporate policies and procedures do not express merely the intentionality of a company's directors, officers, or employees, but they project the idea of a distinctly corporate strategy."). To call organizational decisions "collective decisions" is inappropriate if the term is used to refer to a decision made by a collection of individuals. See Ladd, *supra* note 131, at 493. "Social decisions are precisely decisions . . . that are to be attributed to the organizations themselves and not to collections of individuals." *Id.* But see Michael Keeley, *Organizations as Non-Persons*, 15 J. VALUE INQUIRY 149, 151-54 (1981) (arguing that corporate intentionality cannot be distinguished from the intentions of participating individuals).

145. Held, *supra* note 140, at 171-72. To illustrate her point, Held describes a hypothetical case in which a corporation's ultimate intention to proceed with moving a plant is not the true intention of any of the corporate executives who collectively made the final decision. See *id.* at 171.

corporation's purchase of the property is an act that is indistinguishable from the acts of each of the members of the corporation is inadequate. It fails to capture the fact that the corporation itself acts, and the myriad actions of the individual members are but stepping stones to the corporate action. The structure of the corporation incorporates the actions of its individual members, resulting in a whole action that is different from its parts.<sup>146</sup>

It is true that corporate action depends in part on the action of human beings. As agents of the corporation, human beings effectuate the corporation's decisions. Based on this point, one author has suggested that "it would be absurd to say that corporations could act even though all human beings have perished."<sup>147</sup> Yet this proposition is not necessarily an absurdity. One can imagine a situation where the actions of human beings are completely absent from the preprogrammed operations of a corporation; the corporation may continue to perform its automatic functions and be a causal actor without the involvement of human hands.<sup>148</sup>

To the extent human beings are involved in corporate actions, they act for the corporation, on behalf of the corporation, and within the parameters of the corporation's goals, policies, and preferences. These corporate actions are considered social decisions or actions owned by the corporation.<sup>149</sup> Although each member of the board of directors has the power to vote in favor of a stock split, for example, only the board as a whole can authorize the split. The authorization is a corporate action that belongs to the corporation and constitutes more than merely the aggregation of all individual actions.

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146. French argues that the corporation's internal decision structure (CID Structure) enables it to act in a manner that is distinguishable from the members of the corporation's personnel. The primary function of the CID Structure is to organize information from various levels of the corporation's power structure into a decisionmaking and ratification process. The CID Structure synthesizes and orders the intentions and acts of various biological persons into a corporate decision or action. See French, *supra* note 119, at 212. It can be said that "[a] functioning CID Structure *incorporates* acts of biological persons." *Id.*; see *infra* notes 163–70 and accompanying text (discussing CID Structure); see also Held, *supra* note 140, at 170 (noting that it is logical to ascribe actions to collective entities and illustrating that corporations can act even in the absence of human actions). The actions of the corporation may be regarded as distinct and impersonal because they do not directly reflect individual decisions and actions. See DAN-COHEN, *supra* note 127, at 36. Ultimately, the actions of the corporation are "owned by the organization as author." Ladd, *supra* note 131, at 493–94.

147. Held, *supra* note 140, at 170 (quoting philosopher Irving Thalberg).

148. Held describes the hypothetical case of a corporation that regularly dumps poisonous chemicals into a river as part of its normal operations. The dumping continues automatically unless the system is shut down completely. All human beings perish without shutting down the dumping system. Finally, the poisonous chemicals kill the fish in the river. It is not absurd to say that the fish were killed by the corporation. Although there may be other ways to describe the causal forces, to say that the corporation's operations, without the involvement of human beings, caused the death of the fish is "by no means nonsensical." *Id.* at 170; cf. Braithwaite & Fisse, *supra* note 132, at 21 ("If all humankind perished in a nuclear war and pre-programmed missiles of the U.S. Army continued to be launched, why could we not describe their launching as an action of the U.S. Army?").

149. See William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 687–88 (1994) (discussing Ladd's conception of ownership/authorship of corporate actions).

Admittedly, there are dangers in engaging in overpersonification of the corporation. Extreme anthropomorphizing of the corporate person can produce bizarre results.<sup>150</sup> Engaging in extreme reductionism, however, is equally unhelpful. Part of the “genius” of the corporation is its ability to perform extensive, complex, sophisticated tasks that individuals themselves, with all of their talents, cannot otherwise perform alone.<sup>151</sup> A corporation is not simply an aggregate collection of individuals. It is a real person with an existence that is greater than the mere sum of its parts.

### C. *The Corporation as a Moral Actor*

Once it is determined that the corporation exists as a real person and that this existence is independent of the particular individuals associated with the corporation, the next question is whether the corporation can be regarded as a moral actor. We may accept that a corporation is a person, real and separate from its members, but can it be held morally responsible for its character and its actions?<sup>152</sup> If I poison someone, for example, I am certainly morally responsible for that action. If a corporation poisons a community by leaking toxic chemicals into the groundwater, is the corporation likewise morally responsible? Aside from its legal accountability, the corporation may have certain moral duties if it can be characterized as a moral actor. Closer examination must be given to the question of whether the corporate person has moral obligations independent of the moral obligations of its individual members.

Society certainly perceives the corporation as being a moral entity.<sup>153</sup> People often search for group rather than individual-level causes for extremely negative events. In fact, studies show that people are more likely to hold Jones Corporation morally responsible for harmful events

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150. The anthropomorphization of the corporation can be carried to “grotesque lengths.” Machen, *supra* note 122, at 256. Take for example, the following description of a corporation: the “corporate organism is an animal: it possesses organs like a human being. . . . It even possesses sex: some corporate organisms, like the church, are feminine, while others, such as the state, are masculine.” *Id.*

151. See Paul B. Thompson, *Why Do We Need a Theory of Corporate Responsibility?*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 140, at 113, 117. This genius or “corporate action” can be understood in terms of the composition of various individual talents. “It is action of the whole, of the system, and to attribute this action to any of the individual associates of the corporate whole is to commit a fallacy of division.” *Id.*

152. This question has intrigued moral theorists for years. We know that the corporation is “more than its collection of participants, but does ‘more’ here imply *moral agency*?” THOMAS DONALDSON, CORPORATIONS AND MORALITY 19 (1982). See generally MAY, *supra* note 127.

153. See DONALDSON, *supra* note 152, at 1–2. Donaldson discusses the case of a corporation in Japan that was forced by the courts to pay massive damages for dumping poison in the ocean. The poison eventually triggered horrible and crippling birth defects in local communities. The corporation, however, had broken no laws because the dumping levels fell within accepted ranges under Japanese government regulations. The verdict against the corporation nonetheless “expresse[d] the common intuition that corporations have a *moral*, and not merely legal, character.” *Id.* at 2.

than Mr. Jones.<sup>154</sup> Determining whether it is appropriate to hold corporations morally blameworthy, however, requires more than simply relying on intuitive preferences.

From one point of view, attributing moral blame to a corporation can be regarded as “no wiser than attributing intention and blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”<sup>155</sup> One may argue that it is not the corporation itself that has blameworthy intentions and commits blameworthy acts but the individuals behind the corporation who engage in the wrongdoing. The individuals may be regarded as moral persons and, therefore, morally accountable, while the instrumentality of their actions may not be so perceived.

Many commentators argue that it is inappropriate to attribute moral personhood to corporations because, unlike human beings, corporations are not capable of feeling emotions and affections.<sup>156</sup> Human beings can feel pain, suffer pangs of conscience, and experience moral blame and shame. Corporations, however, do not have a heart or soul per se and lack the ability to empathize with others who are affected by their actions. Thus, without a conscience, corporations cannot be regarded as morally responsible persons.<sup>157</sup>

One way to solve this problem is simply to project the emotions and conscience of the corporation’s individual human members onto the corporation itself. The corporation, then, would have a conscience that de-

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154. See Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 LAW & HUM. BEHAV. 151 (1989); see also Valerie P. Hans, *Expanding Psycholegal Inquiry: The Analysis of Attitudes Toward Corporate Responsibility*, in LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE 355 (James R.P. Ogloff ed., 1992).

155. Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 313 (1991). The long-standing dialogue among legal scholars about the logic and necessity of imposing criminal liability on corporations is, in some sense, related to the analysis of the moral status of corporations. There are moral overtones to the argument that criminals should be punished based on the theory of retribution or just deserts. See John T. Byam, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 583 (1982); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1167–69 (1983).

Initially, corporations were subject only to strict liability for harms, thereby evading any difficult questions regarding the moral blameworthiness of corporations. See Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 422–23 (1982). As corporations began to be prosecuted for intent crimes, difficulties emerged in the attempt to locate evil intent in an entity without a soul. See *id.* at 410–15; James R. Elkins, *Corporations and the Criminal Law: An Uneasy Alliance*, 65 KY. L.J. 73, 95–96 (1976–77); Harvey M. Silets & Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 335–37, 343–49 (1986). For a discussion of the efficacy of imposing criminal liability and sanctions on corporations, see generally John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386 (1981); Bruce P. Coleman, *Is Corporate Criminal Liability Really Necessary?*, 29 SW. L.J. 908 (1975); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996).

156. See Richard T. De George, *Corporations and Morality*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 140, at 57, 62; Held, *supra* note 140, at 173; Rita C. Manning, *Corporate Responsibility and Corporate Personhood*, 3 J. BUS. ETHICS 77, 80 (1984).

157. See Thomas Donaldson, *Personalizing Corporate Ontology: The French Way*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 140, at 99, 109–10.

rives its origin from the individuals within the organization. By “spelling out the processes associated with the moral responsibility of individuals and projecting them to the level of [the] organization,” the corporation can be held morally responsible.<sup>158</sup>

The difficulty with this approach, however, is that it falls into the trap of viewing the corporation from an aggregate model perspective.<sup>159</sup> Drawing corporate moral responsibility from the moral responsibility of the corporation’s individual participants fails to recognize the distinct and independent nature of the corporate person. The corporation’s real and separate existence makes it a morally blameworthy agent apart from the individuals associated with it.<sup>160</sup>

Corporations satisfy both the input and output conditions for moral responsibility. They make decisions, have rights and duties in law, carry on nonlegal relationships with other corporations and with human persons; in short, they participate in the whole spectrum of activities and relationships we associate with persons. . . . [N]ot only are corporations persons in a full-fledged moral sense, but [they] are essential elements of the moral world.<sup>161</sup>

Because a corporation has the capacity to be an intentional actor and to modify its actions after learning of unintended harmful consequences, it may be regarded as a morally responsible being.<sup>162</sup>

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158. Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, in W. MICHAEL HOFFMAN & ROBERT E. FREDERICK, *BUSINESS ETHICS: READINGS AND CASES IN CORPORATE MORALITY* 170 (3d ed. 1995); cf. Larry May, *Negligence and Corporate Criminality*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 140, at 137, 152–56 (arguing that the corporation does not have a conscience distinct from the consciences of its members).

159. See *supra* notes 127–29 and accompanying text (discussing the aggregate model of corporate personhood).

160. Corporate morality is not dependent upon or composed of the sum of individual moralities. See J.R. LUCAS, *THE PRINCIPLES OF POLITICS* 281 (1966); D.E. Cooper, *Collective Responsibility*, 43 PHIL. 258, 259–63 (1968) (explaining that collective responsibility exists and is not reducible to individual responsibility). Statements ascribing moral responsibility to a conglomerate cannot be reduced to an aggregation of statements ascribing moral responsibility to the conglomerate’s individual members. See FRENCH, *supra* note 134, at 13.

161. French, *supra* note 124, at 93. French goes so far as to suggest that to “achieve full moral personhood, humans must associate with corporate institutions that forge relationships between their members and also between their members and the larger corporate units. Gaining moral personhood, in effect, involves finding a place in a corporatelike institution.” *Id.* at 94. French identifies Jean-Jacques Rousseau as one of the forefathers of the theory of the corporation as a moral person. See FRENCH, *supra* note 134, at 105–08. In Rousseau’s view, individuals cannot achieve full moral personhood until they associate themselves with the corporate union of the state. The civil state transforms humans from mere biological creatures to noble, moral beings. See *id.* Corporate-like entities provide the context in which individuals can develop a moral personality. The attribution of moral qualities, therefore, moves not from individuals to the corporation but in the opposite direction, from the corporation to the individuals associated with it. See French, *supra* note 124, at 94–95.

162. See FRENCH, *supra* note 134, at 165. These conditions of moral responsibility may be phrased in another way: moral blameworthiness requires first, that the actor be able to make decisions, and second, that the actor inexcusably failed to perform an assigned task. See Braithwaite & Fisse, *supra* note 132, at 27.



Peter French argues that corporate intentionality may be traced to the corporation's internal decision structure (CID Structure).<sup>163</sup> CID Structures have two essential elements: (1) an organizational flowchart that delineates the various levels within the corporate hierarchy and (2) corporate rules that are usually manifested in corporate policy.<sup>164</sup> Before the corporation acts, it must first contemplate that action and determine whether it is appropriate and feasible.<sup>165</sup> The CID Structure receives input from various individuals within the corporate hierarchy, evaluates that information in light of basic corporate policies, and engages in a decisionmaking and ratification process.<sup>166</sup> "When operative and properly activated, the CID Structure accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision."<sup>167</sup> Corporate acts may be done for corporate reasons that are qualitatively different from the individual reasons that component members may have for doing what they do.<sup>168</sup> The CID Structure provides the corporation with the capacity to act intentionally and to order its behavior.<sup>169</sup> What this shows, according to French, is that corporations can be intentional actors in their own right and thereby exist as "full-fledged moral persons."<sup>170</sup>

Whether or not one accepts French's conclusion that corporations are in fact moral persons, his arguments make a convincing case for according corporations at least the status of moral actors. As a matter of moral standing, moral actors, or agents, can be distinguished from moral recipients. Moral actors are morally accountable for their conduct and are subject to moral duties and obligations.<sup>171</sup> Their actions can be con-

163. See FRENCH, *supra* note 134, at 44.

164. See *id.* at 41. Every corporation has such an internal decision structure. The organization chart clarifies the ranking and responsibilities of individuals within the corporation. The corporate rules are a reflection of the basic corporate policies that "must subordinate individual ambitions and decisions to the needs of the corporation's welfare and survival." *Id.* at 43 (quoting PETER DRUCKER, *THE CONCEPT OF THE CORPORATION* 36 (1972)). Corporate policies are "independent of and not reducible to the wants, beliefs, and desires of those persons associated with the corporation." FRENCH, *supra* note 134, at 111.

165. When, for example, the corporation purchases a significant business asset, the corporation must engage in some level of analysis to determine whether the capital expenditure is justified.

166. See FRENCH, *supra* note 134, at 41-42.

167. *Id.* at 41.

168. See *id.* at 43-46.

169. See *id.* at 44. Corporate intentionality underlies certain corporate acts:

[W]hen the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.

*Id.*

170. *Id.* at 47. For a critique of French's views on corporate intentionality and moral personhood, see DONALDSON, *supra* note 152, at 20-23; MAY, *supra* note 127, at 69-72. But see Christopher Meyers, *The Corporation, Its Members, and Moral Accountability*, 3 BUS. & PROF. ETHICS J. 33, 38 (1983) (relying on French's "perceptive and plausible" account of the CID Structure); Thompson, *supra* note 151, at 133 (finding French's theory "logically coherent" and "a good way to determine the ontological standing of corporat[ions]").

171. See De George, *supra* note 156, at 63.

sidered morally blameworthy or praiseworthy. Moral recipients, in contrast, are those entitled to receive moral consideration in their own right and entitled to claim moral rights by virtue of their status.<sup>172</sup> Moral actors and moral recipients are not necessarily coextensive. One commentator frames the distinction in terms of moral personhood:

A moral actor is subject to the moral law and one can correctly evaluate such an actor's actions from a moral point of view. But being a moral actor can be distinguished from being a moral person and does not carry with it the moral rights that moral personhood does.<sup>173</sup>

As moral actors, corporations are morally accountable for their conduct.<sup>174</sup> This moral responsibility is neither derived from, nor the sum total of, the moral responsibility of the individuals within the corporation. There are certainly instances when individual members may be derelict in performing their duties and, for personal gain, commit harmful acts for which they must be held morally accountable. There are other times, however, when individuals will be dutifully performing their jobs, and harm may nonetheless result; or the corporation's inadequate structure may encourage individuals to perform their jobs negligently, thereby resulting in harm. In such cases, it is the corporation, not the individuals, that contributed to the harm, and the corporation is thus morally responsible.<sup>175</sup>

Those who argue that moral responsibility for corporate actions must ultimately be traced to individuals engage in unnecessary reductionism. The use of the aggregate model of the corporation is inappropriate in determining moral agency. To the extent that corporations act, their actions can be morally evaluated without reducing the evaluation to the individuals associated with the corporation.<sup>176</sup> Corporations are real

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172. See 6 ROUTLEDGE, *supra* note 68, at 499. Moral standing, although analogous to legal standing in some respects, is conceptually distinct. There can be moral standing without the corresponding legal standing and, vice versa, legal standing without fundamental moral standing. See *id.* at 550–53.

173. De George, *supra* note 156, at 63.

174. See *id.* (“[C]orporations . . . are subject to moral rules without being moral persons. It suffices to recognize that as human creations, which are used by human beings for certain ends and which can be said to act, corporations have the status of moral actors.”); see also Manning, *supra* note 156, at 77 (“[C]orporations are ‘moral agents’ . . . and hence, we can hold them [morally] responsible.”); Meyers, *supra* note 170, at 41 (As a moral agent, “the corporation can and should be held morally accountable for its actions.”). *But cf.* Braithwaite & Fisse, *supra* note 132, at 31 (“[I]t is unnecessary to accept the philosophically controversial idea that corporations are moral persons in order to justify holding corporations criminally responsible.”); Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 274 (1991).

175. See David T. Ozar, *The Moral Responsibility of Corporations*, in ETHICAL ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH 294, 298–99 (Thomas Donaldson & Patricia H. Werhane eds., 1979).

176. See French, *supra* note 124, at 92–93; Meyers, *supra* note 170, at 37; see also Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 754 (1992) (explaining that often “the diffusion of responsibility in organizations and the ways in which individual decisions are channelled by corporate rules, policies and structures . . . may [result] in . . . no individual or group of individuals [being] ‘justly to blame’ for [corporate misconduct]”). It is often quite logical to

and independent persons morally obliged to abide by moral laws. The moral responsibility stems in part from the fact that corporations can act and do so with intention.

Once it is established that a corporation may be regarded as a real person with an independent identity and status as a moral actor, the ensuing question is whether it is possible for the corporation as a person to possess a distinctive character, one for which the corporation may be held morally accountable. If the existence of the corporation as a person does not depend on the identity of its members, does it logically follow that the character of the corporation likewise does not depend on the identity of its members? To the extent the corporation possesses a character of its own, a working definition of that character must be formulated.

## V. CORPORATE CHARACTER

Prior to determining whether corporations can possess character, we must have some conception of what corporate character actually is. In one sense, business organizations can take on a certain culture or personality that dominates the business environment. The popular business management literature is filled with guidebooks that describe corporate culture and provide managers with tips on how to change it.<sup>177</sup> Corporate marketing strategists and public relations managers work hard to present a certain image of the corporation to the general public. Lawyers for corporate clients are conscious of the existence and power of this corporate image, or character, and play upon it to succeed in litigation.<sup>178</sup>

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blame or praise a corporation collectively, as opposed to trying to locate those individuals in the corporation who are guilty or meritorious. *See* Held, *supra* note 140, at 163. *But see* De George, *supra* note 156, at 64, 66 (arguing that ultimately the moral responsibility for corporate actions will be derivative of individual human beings).

177. *See, e.g.*, TERRENCE E. DEAL & ALLAN A. KENNEDY, *CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE* (1982); ROB GOFFEE & GARETH JONES, *THE CHARACTER OF A CORPORATION: HOW YOUR COMPANY'S CULTURE CAN MAKE OR BREAK YOUR BUSINESS* (1998). Deal and Kennedy identify five elements of business culture that lead to four different types of corporate atmospheres. The elements are: (1) business environment, (2) values, (3) heroes, (4) rites and rituals, and (5) cultural network. *See* DEAL & KENNEDY, *supra*, at 13–15. The four general categories of corporate culture are: (1) tough-guy/macho culture, (2) work-hard/play-hard culture, (3) bet-your-company culture, and (4) process culture. *See id.* at 107–08; *see also* STANLEY M. DAVIS, *MANAGING CORPORATE CULTURE* (1984). Davis notes that several other popular terms may be used to describe corporate “culture,” including “being, core, . . . ethos, identity, ideology, manner, patterns, philosophy, purpose, roots, spirit, style, vision, and way.” *Id.* at 1 n.1. Some authors have even identified specific characteristics or traits associated with “excellent” corporate cultures. THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES* 13–16 (1982) (listing eight attributes of highly regarded companies).

178. Legal practitioners' guides advise lawyers to plan ways to “present a favorable image of the corporation at trial” and to subtly weave evidence of the corporation's “personal character” into the case. Jeffrey R. Parsons, *Managing the Jury: A Trial Lawyer's Perspective on the Art of Jury Persuasion*, in *FIFTH ANNUAL LITIGATION SUPERCOURSE*, at 301, 311 (PLI Litig. & Admin. Practice Course Handbook Series No. 497, 1994); *see also* JoAnne Dellaverson, *Keeping Your Case on Track: Motions in Limine in Employment Discrimination Cases*, in *LITIGATING EMPLOYMENT DISCRIMINATION*

Some observers have noted the presence of a certain ethos that exists in all corporations.<sup>179</sup> The notion of corporate ethos involves the “abstract and intangible character of a corporation, separate from the substance of what it actually does.”<sup>180</sup> This corporate identity arises out of the dynamic of the corporation’s individual members working together toward corporate goals. The corporate ethos reflects an organizational personality that is independent of the individuals who work within the organization.<sup>181</sup>

Although there are various popular conceptions of a corporation’s personality or image, the question remains whether these conceptions adequately capture a corporation’s character. A refined definition of individual character describes it as the internal operating system or internal logic of the human organism.<sup>182</sup> Each person possesses a unique collection of rules, procedures, and operating principles that organizes and directs how that person behaves. If corporate character is viewed in the same light as individual character, there is a very strong sense in which corporations can be said to possess character as well.

Corporations have internal operating systems that govern their actions and reflect a certain organizational intelligence.<sup>183</sup> The corporation’s goals, rules, policies, and procedures shape and influence the behavior of individuals in the corporation.<sup>184</sup> As self-organizing and self-regulating entities, corporations direct their activities and decisionmaking functions in much the same way that individuals do. The corporation’s internal decision structure draws upon the organizational flowchart of the corporation’s hierarchy and the corporation’s rules.<sup>185</sup> The ordered decisionmaking processes constitute an essential element in the entire operating system of the corporation. Thus, if character in the individual may be viewed as a reflection of a set of internal principles and opera-

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CASES, at 303, 306 (PLI Litig. & Admin. Practice Course Handbook Series No. 522, 1995) (advising lawyers to resist plaintiffs’ attempts to show the corporate employer’s “bad character”).

179. See, e.g., Pamela H. Bucz, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991). The term “ethos” refers to the “characteristic spirit or prevalent tone of sentiment of a community, institution or system.” *Id.* at 1123.

180. *Id.*

181. See *id.* at 1099 (“The living cell provides an apt analogy: Just as a living cell has an identity separate from the activities of its constituent molecules, a corporation has an identity separate from its individual agents.”). The organization becomes a distinct social organism as it is infused with values. See PETERS & WATERMAN, *supra* note 177, at 98–99.

182. See discussion *supra* Part III.B.

183. See DAN-COHEN, *supra* note 127, at 39 (describing organizations as “intentional systems endowed with organizational intelligence”). Organizational theorists note that an organization functions as a system of different flows, including formal authority, regulated information flows, informal communication, work constellations, and ad hoc decision processes. See HENRY MINTZBERG, *THE STRUCTURING OF ORGANIZATIONS* 35–64 (1979).

184. See Moore, *supra* note 176, at 753. As an institution, the corporation necessarily has “a set of principles and a rule of conduct which limit and direct individual actions and behavior.” FRENCH, *supra* note 134, at 43 (quoting DRUCKER, *supra* note 164, at 36–37).

185. See discussion of CID Structure *supra* notes 163–70 and accompanying text.

tions, the character of a corporation may likewise be regarded as an expression of its internal operating system.

A reductionist may argue that whatever character the corporation does possess cannot be extricated from the character of the individuals associated with the corporation. According to this view, any reference to corporate character involves an aggregation of the character of the corporation's constituent members. This argument, however, fails to account for the distinct nature of the corporation's identity, culture, and functions. Corporate character can transcend the character of the corporation's members because the organization develops an internal operating system and a resulting pattern of behavior that is different from and greater than that of the corporation's constituents.<sup>186</sup> The identity of an organization's culture does not rely on the identity of the individuals within the organization. Corporate culture may be transmitted from one generation of employees to the next. The character of the corporation arises not from its personnel but from its internal structure and operating system. The corporation's entire personnel, therefore, may change without significantly altering the character of the corporation.<sup>187</sup>

Just as human behavior may be regarded in part as the result of an internal decisionmaking system, corporate actions may similarly be viewed as the product of the corporation's decisionmaking system. Because the corporation's CID Structure provides the framework for forming any corporate decision, the ultimate social decisions or actions of the corporation cannot be traced to a single individual or group of individuals. "The organization . . . takes from the individual some of his decisional autonomy, and substitutes for it an organization decisionmaking process."<sup>188</sup> As a result, no major decision in the corporation is the sole responsibility of any one particular person. Such decisions evolve through the interaction of many individual decisions that are systematically incorporated in the decisionmaking structure of the corporation.<sup>189</sup>

If viewed in this manner, the character of the corporation is distinguishable from that of its individual members. In certain instances, it is also relatively stable over time. The internal operating rules and policies

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186. See WALLY OLINS, *THE CORPORATE PERSONALITY: AN INQUIRY INTO THE NATURE OF CORPORATE IDENTITY* 13 (1978). In fact, corporations may develop organizational identities that are uniquely their own:

Many mature organisations manage to develop an ethos, a way of doing business, that is so characteristic and so much a part of them that they seem to pursue it relentlessly, almost regardless of who runs the company. These companies have a personality which is so ingrained, so much a part of them, that the corporate identity expresses itself in their every action.

*Id.* at 82.

187. See Braithwaite & Fisse, *supra* note 132, at 22.

188. HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* 8 (3d ed. 1976); see *supra* notes 139–45 and accompanying text.

189. See SIMON, *supra* note 188, at 221–22. With the use of an example, Simon describes the multiple levels of negotiations and decisions that must be made by various individuals within the corporation's hierarchy before a simple corporate transaction may be accomplished. In Simon's example, the corporation contemplates borrowing a sum of money to finance a particular project. See *id.*

of the corporation are broad principles that describe the corporation's goals and govern its actions.<sup>190</sup> Because of the fundamental purposes they serve in the life of the corporation, such policies must be formulated and implemented with a long-range point of view. In a normative sense, the central policies of the corporation are necessarily fixed and inviolate.<sup>191</sup> To achieve the advantages of a long-range consistency of purpose, the basic policies of the corporation must be relatively stable.<sup>192</sup> Corporate behavior that conforms to the organization's long-range goals and policies will likewise be relatively stable and will persist over time. Thus, the internal operating system of the corporation produces a pattern of corporate behavior that is reinforced by the corporation's structure.<sup>193</sup> Researchers have observed some notable instances of this persistence of corporate behavior. Some corporations appear to be more consistently ethical in their business operations, for example, while others have been charged repeatedly with violations of various types.<sup>194</sup>

One might argue that any consistency of behavior the corporation exhibits is more appropriately regarded as the habit or routine practice of the corporation, rather than the character of the corporation. The corporation develops certain standard operating procedures for handling recurring questions, and these procedures produce routinized corporate responses to particular situations.<sup>195</sup> According to this argument, it seems

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190. See FRENCH, *supra* note 134, at 58.

191. See *id.* at 59 (“[F]or policies to really play the regulative, normative role necessary for them to be fundamental in corporate decision-making and acting, they would have to be accepted as inviolate.”). Although policies of the corporation can and do change, the central policies are inviolate in the sense that any violation of them that is corporately accepted would constitute a different corporation altogether. See *id.* at 62. “[W]hen policies are amended or altered, it is usually only peripheral issues that are involved. Radical policy alteration constitutes a new corporation . . .” *Id.* at 46.

192. See *id.* at 45–46. Some critics of the corporation have noted that the “single-mindedness” that accompanies corporate decisionmaking adds to the sense of “inertia” in the corporation. ROGER M. D’APRIX, *IN SEARCH OF A CORPORATE SOUL* 35–36 (1976) (“There is a good deal of inertia in any organization, and once the corporate ship is on any given course, it takes a mighty pull on the wheel to change direction. And even then the change in course is often painfully slow.”).

193. One way of looking at the consistency and continuity of corporate behavior is to focus on mechanisms of behavior-persistence. Once initiated for a particular purpose or in a specific direction, behavior tends to persist in that direction over time. This phenomenon is partly because of “sunk costs” that make persistence in the same direction advantageous. There is a certain reluctance to ceasing an activity after a great deal of time, money, and effort have already been expended. Another reason for behavior-persistence may be that the behavior itself is reinforced by drawing attention toward its continuance and completion. See SIMON, *supra* note 188, at 95–96.

194. See CLINARD & YEAGER, *supra* note 121, at 58–60 (summarizing research). Research indicated that certain corporations were multiple violators, with a measurable percentage of violating corporations committing a disproportionate share of infractions. See *id.* at 116–19. One longitudinal study revealed that certain corporations acted as criminal recidivists, exhibiting chronic violations of the law even after convictions and punishment. See *id.* at 126–27. Researchers concluded that some corporations “have developed a corporate atmosphere favorable to unethical and illegal behavior.” *Id.* at 117. The corporate criminality is seen as a product of forces endemic to the organization. See generally MARSHALL B. CLINARD, *CORPORATE ETHICS AND CRIME* (1983).

195. See Graham, *supra* note 30, at 150 n.2. (“As a practical matter, most large organizations cannot exist [and function] adequately unless much of their operations are routinized.”). Habits and organizational routines are important mechanisms that produce efficiency and conserve effort. See

more accurate to refer to these automatic corporate practices as organizational routines rather than an outgrowth of corporate character.

Granted, many corporate decisions that are made under controlled or known conditions are routine responses and may be programmed into the corporation's standard operating procedures. A distinction must be made, however, between programmed and nonprogrammed decisions.<sup>196</sup> Programmed decisions have formats that are standardized with clear objectives.<sup>197</sup> These decisions can be routinely performed because "[t]he parameters are well-known; it is merely a question of filling in the present values, following established rules and procedures and churning out a clear response."<sup>198</sup> Nonprogrammed decisions, however, require non-standard forms of response and involve complex analysis and choices.<sup>199</sup> There are many situations when corporations must engage in nonprogrammed decisionmaking. For example, when a corporation must decide whether or not to manufacture a new product, the ultimate resolution of the question is not programmable in the way that the computation of employee benefits or the accounting of receivables are.<sup>200</sup> The corporation must evaluate market conditions, conduct product research, and engage in a process of creative problem solving that can by no means be routinized or programmed into standard operating procedures. Without the capacity for such nonprogrammed decisionmaking, the corporation would be "incapable of innovation, growth, and development with regard to [its] most vital economic interests."<sup>201</sup> Thus, the capacity of corporations to engage in this decisionmaking reflects a dynamic, adaptable internal operating system that produces much more than merely routine behaviors.

Another anticipated objection to this discussion of corporate character is that it is the individuals within the corporation who create and

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SIMON, *supra* note 188, at 88. Evidence of such organizational routines is admissible to prove conduct under Rule 406. *See* FED. R. EVID. 406; discussion *supra* notes 29–31 and accompanying text.

196. *See* SANDRA DAWSON, *ANALYSING ORGANISATIONS* 180–89 (2d ed. 1986). The distinction between programmed and nonprogrammed decisions revolves around the nature of solving problems. *See* FRENCH, *supra* note 134, at 167.

197. *See* DAWSON, *supra* note 196, at 180.

198. *Id.* "Decisions in an organization are 'programmed to the extent that they are repetitive and routine because of existing definite, systematic procedures.'" FRENCH, *supra* note 134, at 167 (quoting GARY DESSLER, *ORGANIZATION AND MANAGEMENT* 317 (1976)). Purely programmed decisionmaking requires uniform, predictable conditions. Any variance in the conditions under which the decision must be made disables the programmed decisionmaking process because it is incapable of dealing with such variances.

199. *See* DAWSON, *supra* note 196, at 180, 189; FRENCH, *supra* note 134, at 168–69.

200. *See* FRENCH, *supra* note 134, at 168. Without nonprogrammed decisionmaking, the corporation would be incapable of engaging in innumerable corporate acts, including for example, initiating a merger, financing an acquisition, relocating a plant, selecting new board members, and selling corporate assets. *See id.* at 169.

201. *Id.* at 169. To succeed in the marketplace, corporations must have the ability to be flexible and respond to changing markets and needs. Corporate decisionmaking systems that require stable and predictable conditions to function "are certain to become moribund, unproductive, and fiscally stagnant in a remarkably short time." *Id.* French utilizes the corporation's capacity for nonprogrammed decisionmaking as another indication of the corporation's status as a moral person. *See id.*

sustain the corporation's character, rather than the corporation itself. As the argument goes, the character of the corporation can be sustained only if all the individual members of the corporation assent to its continuance. The difficulty with this view, however, is that it mistakenly minimizes the influence of corporate structural forces on individual behavior. Individuals undoubtedly retain the power to order their own behavior. Individuals who find objectionable the policies, procedures, and rules that compose the corporation's internal operating system may choose not to conform to them. Nonetheless, it must be recognized that certain central features of the corporation's internal structure may influence, create, and sustain patterns of individual behavior.

Sociologists, for example, have identified certain criminogenic or crime-facilitative corporate systems in which internal structural factors generate or encourage criminal activity.<sup>202</sup> The corporation may be seen as socializing its members to "accept a climate of unethical behavior that is conducive to criminality."<sup>203</sup> In other words, the corporate system itself presents pressures or extremely tempting conditions that facilitate the commission of crime by individuals in the corporation.<sup>204</sup> Individuals who feel uncomfortable with the system may nonetheless choose to give in to systemic pressures for personal or financial reasons.<sup>205</sup> Over time, indi-

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202. See Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517, 518 (1979).

203. MARSHALL B. CLINARD, CORPORATE CORRUPTION 166 (1990); see also Laura S. Schrage & James F. Short, Jr., *Toward a Sociology of Organizational Crime*, 25 SOC. PROBS. 407, 410 (1978).

204. See Needleman & Needleman, *supra* note 202, at 521. For example, if one of the established goals of the corporation is to maximize profits at all costs, certain corporate policies may set various quotas and deadlines that place pressures on corporate managers to do whatever is necessary to comply with such policies, including engaging in illegal or unethical behavior. See CLINARD & YEAGER, *supra* note 121, at 44-48; see also Marshall B. Clinard, *Corporate Ethics and Crime: The Views of Middle Management*, in M. DAVID ERMANN & RICHARD J. LUNDMAN, CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 81, 90-94 (3d ed. 1987) (summarizing research regarding severe and extensive pressures on mid-level managers of large corporations that may contribute to unlawful and unethical behavior). Individuals who are convicted for engaging in such conduct may be viewed by the corporation as being expendable casualties. See Coffee, *supra* note 155, at 408. Large corporations may view mid-level managers as "a fungible commodity that can be sacrificed as convenient scapegoats and easily replaced. Senior managers can piously express appropriate shock at their subordinates' actions while still demanding strict 'accountability' on the part of such managers for short-term operating results." *Id.* at 410. If sufficient internal pressures to violate the law continue to exist within the corporation, individual employees may continue violating the law even after other employees are caught and convicted. See Bucy, *supra* note 179, at 1101.

205. See, e.g., RALPH ESTES, TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS 158 (1996) ("I told [my supervisor] that I couldn't, in good conscience, [engage in certain unethical corporate conduct]. And he said that my conscience did not pay my salary."). The financial pressures on mid-level managers are particularly acute:

The middle manager is acutely aware that he can easily be replaced; he knows that if he cannot achieve a quick fix, another manager is waiting in the wings, eager to assume operational control over a division. . . . For the middle-level official the question is not whether the [illegal] behavior is too risky to be in the interests of the corporation from a cost/benefit standpoint. Rather, it is: which risk is greater—the criminal conviction of the company or his own dismissal for failure to meet targets set by an unsympathetically demanding senior management.



viduals may begin to identify with the organization and its goals.<sup>206</sup> If organizational goals are successfully achieved as a result of unlawful conduct, such conduct naturally tends to be reinforced.<sup>207</sup> The decisions individuals make to use unethical methods to attain organizational goals feed back into the system, thereby sustaining the pattern of unethical conduct. In this manner, unlawful behavior receives additional support from systemic and structural forces in the corporation.<sup>208</sup>

Of course, not all individuals will respond in the same manner to organizational pressures. Recognizing that systemic factors play a role in the behavior of individuals does not deny the importance of the interactive relationship between the individual and the system. Rather, this discussion highlights the salience of the corporation's internal system of policies, principles, and rules in shaping, directing, and influencing behavior in the corporation. It is this internal operating system, with its pervasive, distinct, and relatively stable nature, that may provide the best and most logical way to conceptualize the character of the corporation.

As independent persons and moral actors, corporations have the capacity to develop a certain character. The corporation may not have a soul,<sup>209</sup> but it can be held morally responsible for its actions and its decisionmaking structure.<sup>210</sup> The character of the corporation is part of its

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Coffee, *supra* note 155, at 398–99; *see also* Alan J. Tomkins et al., *Psycholegal Aspects of Organizational Behavior: Assessing and Controlling Risk*, in *HANDBOOK OF PSYCHOLOGY AND LAW* 523, 529–30 (D.K. Kagehiro & W.S. Laufer eds., 1992) (describing the psychological factors that constrain individuals in organizational settings).

206. *See* Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 *MICH. L. REV.* 1377, 1391 (1982). “The survival of [the individual] becomes linked to the survival of the [corporation], and a normative environment evolves that, given difficulty in attaining organizational goals, encourages illegal behavior to attain those goals.” *Id.* Putting aside structural pressures to engage in such behavior, people frequently identify with and feel a sense of loyalty to groups. *See* Coffee, *supra* note 155, at 396; Robert C. Solomon, *Business and the Humanities: An Aristotelian Approach to Business Ethics*, in *BUSINESS AS A HUMANITY*, *supra* note 124, at 45, 51. The stronger the identification with the group, “the more likely it is that [the] individual’s goals will conform to those prescribed by group norms.” Tosi, *supra* note 138, at 68; *see also* SIMON, *supra* note 188, at 12–14 (discussing organizational loyalties).

207. *See* DIANE VAUGHAN, *CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR: SOCIAL STRUCTURE AND CORPORATE MISCONDUCT* 61 (1983).

208. *See id.*; *see also* Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 *B.U. L. REV.* 341, 365 (1991) (noting that “inevitable systemic forces operating in large, diversified firms [may] promote the use of unlawful means to accomplish lawful ends”). In this regard, the corporation’s character fosters illegal behavior. The opposite can also be true; a corporation’s character may do much to cultivate lawful and ethical behavior. In contrast to a “crime-facilitative” system, a “crime-resistant” system may emerge. Such a system would adopt crime control as an organizational goal and deter illegal behavior by members of the corporation. *See* Needleman & Needleman, *supra* note 202, at 526.

209. *See* 1 KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* 14 n.6 (1984) (“[Corporations] ‘cannot commit treason, nor be outlawed, nor excommunicate[d], for they have no souls . . . .’” (quoting *Case of Sutton’s Hospital*, 77 *Eng. Rep.* 960, 973 (K.B. 1612))).

210. *See* DONALDSON, *supra* note 152, at 124–25 (asserting that a satisfactory conception of corporate moral responsibility must include accountability not only for the overall actions of the corporation but also for creating and maintaining decisionmaking structures necessary to bring about those actions). We hold corporations responsible for the outcomes of their policies and decisionmaking pro-

identity and remains distinct from the identity of the corporation's members. Much like the animating spirit or internal logic within individuals that guides human behavior, the internal operating system of the corporation organizes and orders corporate behavior in relatively consistent ways.

## VI. APPLICABILITY OF THE CHARACTER EVIDENCE RULE TO CORPORATIONS

### A. *Analysis and Recommendation*

Having established that a corporation is a person and moral actor with the capacity to possess character, we may now turn to the question of whether the character evidence rule should apply to corporations. At first glance, the question does not appear to be a difficult one at all. On its face, Rule 404 flatly forbids the use of character evidence to prove that a person acted in conformity with that character. If corporations have an identifiable character, evidence of such character should be banned when its only use is to prove corporate conduct.

A more satisfactory resolution of this issue, however, requires more extensive analysis. Rather than limiting the analysis to the text of the rule, closer examination should be given to the underlying rationale for the character evidence rule. As discussed previously, the traditional rationales offered to justify the ban on character evidence have proven to be inadequate.<sup>211</sup> A more compelling explanation for the rule lies in the concept of human autonomy.<sup>212</sup> Kantian conceptions of autonomy place absolute value on human beings as ends in themselves. They must always be treated with respect and never merely as a means to an end.<sup>213</sup> As autonomous, self-governing beings, all individuals have the capacity to legislate universally accepted principles of morality that guide their behavior.<sup>214</sup> The use of character evidence to prove human behavior undermines this fundamental principle of human autonomy. Thus, respect for human dignity and autonomy requires the exclusion of such evidence to prove a person's conduct on a particular occasion.

If we accept the human autonomy rationale as the primary reason for the rule banning character evidence, then any extension of the rule to corporations would be inappropriate. It has been demonstrated that corporations are real and independent persons with an identity that tran-

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cedures in part because they have the capacity to reform such policies and procedures. *See* Braithwaite & Fisse, *supra* note 132, at 28.

211. *See* discussion *supra* Parts II.B, II.C.

212. *See* discussion *supra* Part II.D.

213. *See* KANT, *supra* note 70, at 97; *see also* DAN-COHEN, *supra* note 127, at 57; HOFFMAN & FREDERICK, *supra* note 158, at 32-33; *supra* notes 73-74 and accompanying text.

214. *See* HOFFMAN & FREDERICK, *supra* note 158, at 29-30 (discussing Kant's conception of moral law); *supra* note 70 and accompanying text.

scends the mere aggregation of their component members.<sup>215</sup> What must be recognized, however, is that for all the things that corporations are, there are still many things that corporations are not. A corporation is not a natural person; it is not subject to the same considerations of human autonomy afforded to human beings.<sup>216</sup> The concerns for human dignity and autonomy that underlie Rule 404 in the context of individuals are not raised in the same manner in the context of corporations.

Human beings as natural persons have intrinsic value.<sup>217</sup> Natural persons possess unconditional worth that is priceless. In Kantian terms, there is a distinction between things that can have “dignity” and things that can be bought for a “price.”<sup>218</sup> As Kant explained: “In the kingdom of ends everything has either a *price* or a *dignity*. If it has a price, something else can be put in its place as an *equivalent*; if it is exalted above all price and so admits of no equivalent, then it has a dignity.”<sup>219</sup> According to Kant, only human beings possess dignity.<sup>220</sup> Human beings, therefore, must at all times be treated with respect as ends in themselves. One of the chief purposes of the law is to provide adequate protection for individual autonomy.<sup>221</sup> What occurs in the courtroom must be consistent with our most basic values regarding human autonomy. “Trials, therefore, must reflect our highest aspirations about . . . the protection of individual dignity.”<sup>222</sup> The use of character evidence in the criminal trial of an individual is thus inconsistent with these aspirations.

The law’s treatment of corporations does not involve the same human autonomy considerations. Unlike human beings, corporations are not ends in themselves; they are formed as means to achieve certain ends and can be purchased for a price.<sup>223</sup> Because they do not possess intrinsic

215. See discussion *supra* Parts IV.A, IV.B.

216. See discussion *infra* notes 223–25 and accompanying text.

217. See SULLIVAN, *supra* note 72, at 193; see also J. GROOTEN & G. JO STEENBERGEN, *NEW ENCYCLOPEDIA OF PHILOSOPHY* 320 (1972) (“The value which is due to the person . . . is absolute: the person has not only value in himself and for himself, he has an infinite value. He can therefore never be used as a pure means.”); HOFFMAN & FREDERICK, *supra* note 158, at 32 (describing Kant’s conception of human autonomy and intrinsic value).

218. KANT, *supra* note 70, at 102.

219. *Id.*

220. See *id.*; see also SULLIVAN, *supra* note 72, at 195–97.

221. Dan-Cohen refers to this view of the law as the “paradigm of individual autonomy.” DAN-COHEN, *supra* note 127, at 56. The justice system is expected to uphold and give force to certain individual rights. In the context of criminal procedure, for example, “the basic needs of the human personality, including privacy, autonomy, and freedom from humiliation and abuse,” must be protected. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 1.6(g) (2d ed. 1992).

222. Leonard, *supra* note 78, at 839.

223. In Kantian terms, organizations do not hold the same elevated status that individuals enjoy: While the Kantian notion of individual autonomy is closely linked to the perception of individuals as ends, formal organizations exist only as means. As such they are not equal members in the Kantian kingdom of ends, and they do not deserve or admit of the special kind of respect that gives rise to the individual’s [autonomy rights].

DAN-COHEN, *supra* note 127, at 61; see also De George, *supra* note 156, at 61; John Ladd, *Persons and Responsibility: Ethical Concepts and Impertinent Analogies*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 140, at 77, 95.

value in themselves, corporations cannot claim the same autonomy rights as individuals.<sup>224</sup> Corporations are not natural persons. As such, they are not entitled to the basic natural rights that attach to natural persons.<sup>225</sup>

This conclusion is not inconsistent with the proposition that corporations are real persons and moral actors, possessing an identifiable existence and character distinguishable from that of the individuals associated with it. Once created by human beings, the corporation does become a very real, as opposed to fictional, entity and has the capacity to intend, to act, and to develop a unique character of its own. This does not mean, however, that this human creation then becomes a natural person entitled to natural rights. What it does mean is that corporations can be held responsible, both legally and morally, for their intentions, actions, and character.<sup>226</sup>

The intent of the character evidence rule to protect human dignity and autonomy does not apply in the corporate context. Because corporations are not natural persons with absolute value as ends in themselves, they do not have the same claims to human autonomy that individuals possess. Therefore, the admission of evidence of a corporation's character does not violate basic principles of individual dignity. As discussed previously, one scholar has suggested that the character evidence rule is undergirded by certain moral doctrines that forbid individuals from speaking of the character of others in negative or harmful ways.<sup>227</sup> Such hurtful speech denies the value of others; it demeans the subject and ultimately the speaker. Thus, by forbidding the admission of negative evidence of a person's character, Rule 404 prevents such demeaning of indi-

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224. See DAN-COHEN, *supra* note 127, at 61–62.

225. For example, a basic human or natural right is the right to life. Corporations clearly do not have such a right. See De George, *supra* note 156, at 61; Ladd, *supra* note 223, at 86; Meyers, *supra* note 170, at 42 n.1. When the corporation is dissolved, it effectively ceases to exist. In such an instance, it would be absurd to oppose the dissolution of the corporation based on the argument that the corporation has a natural right to continue its existence. Natural rights are for natural persons. See FRENCH, *supra* note 134, at 170 (“[C]orporations cannot be said to have natural rights. That, of course, is unexceptionable. To have natural rights something must be natural. Corporations clearly are not.”). As a consequence, corporations may be bought and sold, while human beings may not. See Thompson, *supra* note 151, at 132.

226. Their existence as real persons does not entitle corporations to the same natural rights afforded to human beings, see George F. Deiser, *The Juristic Person—III*, 57 U. PA. L. REV. 300, 302 (1909) (“There is nothing absurd in the statement that there are no such things as the natural rights of corporations.”); see also Hager, *supra* note 118, at 628–29 (discussing reconciliation of the real entity theory with the denial of corporate natural rights), nor does the corporation's status as a moral actor give rise to natural rights. Recall the distinction between moral actors and moral recipients. See discussion *supra* notes 171–74 and accompanying text. The corporation as a moral actor is certainly accountable for its conduct and subject to moral duties and obligations. This does not mean, however, that it is a moral recipient, entitled to moral rights and consideration. Moral actors do not have a claim to natural rights any more than they have a claim to moral ones.

227. See discussion *supra* notes 77–80 and accompanying text. Professor Leonard specifically identifies the doctrine of *loshon hora* that emphasizes the importance of verbal expression. See Leonard, *supra* note 18, at 1188. Words have the capacity to both help and harm. According to the doctrine, the expression of derogatory judgments about other people produces harm that can carry enormous implications. See *id.* at 1189 (“[C]haracter judgments, when voiced, can be the source of the kind of hatreds that divide[s] us as nations, as cultures.”).

viduals and thereby protects human dignity.<sup>228</sup> Speaking negatively of a corporation's criminogenic or crime-facilitative character, however, does not demean any one individual nor does it undermine human autonomy in any way.<sup>229</sup> To the extent Rule 404 is concerned with respecting individual dignity, the rule has no application to corporations that do not have claims to individual dignity and respect.

A corollary to the human autonomy rationale for the character evidence rule is highlighted by an important question: "Is it the case that meaningful—that is, detailed—evidence of character must peer so deeply into the human heart and soul, into the inner recesses of the mind and soul, that such evidence ought to be regarded as so demeaning and degrading that [it] ought to be prohibited for that reason alone?"<sup>230</sup> This question raises a very significant point. Perhaps any attempt to ascertain human character would require such deep examination of the most private parts of a person's life that the search would be utterly degrading. Ascertaining true character through the presentation of detailed life histories would require such extensive invasions of privacy that it would result in demeaning the individual. Therefore, Rule 404, which bans such scrutiny of an individual's personal background, protects the ideals of human dignity, privacy, and worth.

The protection of these ideals is not an issue in the context of corporations. Corporations do not enjoy the same rights of privacy that belong to individuals.<sup>231</sup> The detailed examination of a corporation's business history and activities would not violate the same principles of privacy and worth. Corporations do not have the human dignity interests that many legal rights protect.<sup>232</sup> The desire to uphold individual rights of

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228. See Leonard, *supra* note 78, at 839–40.

229. See discussion *supra* notes 202–08 and accompanying text.

230. Tillers, *supra* note 8, at 833–34. Professor Tillers suggests that greater attention be given to the possibility that the character evidence rule is connected to the policy of preventing unnecessary human degradation. See *id.* at 834 n.99.

231. See California Bankers Assoc. v. Schultz, 416 U.S. 21, 65 (1974) (holding that corporations do not have a right of privacy equivalent to that of individuals under the Fourth Amendment); see also Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 356–57 (1987) (explaining that corporations cannot validly claim a right of privacy).

232. To some extent, this view is reflected in the law's treatment of corporations in the constitutional arena. For example, the Fifth Amendment privilege against self-incrimination does not extend to corporations. See *Wilson v. United States*, 221 U.S. 361, 383–84 (1911); *Hale v. Henkel*, 201 U.S. 43, 69–70 (1906). Although views differ on which interests are central to the privilege against self-incrimination, the respect for individual privacy is certainly one of the underlying values that the privilege is meant to protect:

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life."

*Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (citations omitted). The individual privacy and human dignity interests that are protected by the privilege against self-incrimination do not apply to corporations. See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1229, 1279 (1979) ("Those fifth amendment policies aimed at protecting individuals are irrelevant when a corporation is subjected to an inquiry since a

privacy, as one of the underlying aims of the character evidence rule, has little application in the context of corporations.

In summary, if the human autonomy rationale serves as the primary justification for the rule banning character evidence, the rule should not be extended to corporations. Corporations are not natural persons and are, therefore, not valued as ends in themselves. To the extent the underlying intent of Rule 404 is to protect human dignity and autonomy interests, corporations have no justifiable claim to its protections.

### B. *Practical Implications*

If Rule 404 does not apply to corporations, evidence of a corporation's character can be introduced to assist in the proof of corporate conduct on a particular occasion. In a criminal proceeding, the prosecution would be permitted to present, for example, specific acts of prior corporate conduct to establish the character of the corporation and to prove actions in conformity therewith.

One practical objection to such a scheme is that, even if it is acknowledged that corporations can possess a distinctive character, it is impossible to discover it. As is the case with individuals, character lies so deep within the corporation that attempts to ascertain character in its entirety will prove fruitless. Trying to find and then describe the character of a corporation will be so difficult that it will not be worth the effort.

If ascertaining the character of a corporation is difficult, however, it cannot be any more difficult than discerning the intent of the corporation, and we regularly require proof of such intent in corporate criminal proceedings.<sup>233</sup> There is no reason to believe that the identification of specific aspects of corporate character that are relevant to the conduct at issue will be unachievable. It will not be necessary to provide a compre-

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corporation, unlike an individual, cannot suffer the indignities prohibited by the amendment's protection of the accused's person and thoughts." There is no realistic justification for asserting the corporation's right to privacy because privacy itself "is a term applicable to individuals, not organizations." Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 841 (1996). Simply put, "corporations do not have the human dignity interests that constitutional rights . . . preserve." *Id.* at 801. Some commentators, therefore, have suggested that corporations should not be afforded any of the same basic constitutional rights as individuals. See, e.g., Mayer, *supra* note 113, at 660-61 (arguing that a constitutional amendment should be passed that declares that "corporations are not . . . entitled to the same Bill of Rights protections as individuals" and that corporations are only entitled to the statutory protection conferred by legislatures and referendums); see also Henning, *supra*, at 885 ("[T]he reality [is] that corporations are not the same as individuals and may not lay claim to every constitutional right and privilege accorded to the individual.").

233. For a summary of the historical development of the intent requirement in corporate criminal law, see Brickey, *supra* note 155, at 410-15. See generally Gerhard O.W. Mueller, *Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21 (1957) (discussing the Model Penal Code's approach to corporate criminal liability); Ann Foerschler, Comment, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287 (1990) (suggesting a framework within which the corporation may be considered capable of criminal intent).

hensive diagnostic of the overall character of the corporation. Only the particular aspect of the corporation's character relevant to the conduct in question will be of concern.<sup>234</sup> For example, if the conduct at issue relates to the corporation's compliance with certain federal regulatory requirements, limited aspects of the corporation's character will be at issue. The fact finder may be most interested in whether the corporation has policies and rules governing corporate compliance with such federal regulations, whether a highly monitored and strictly enforced compliance program exists within the corporation, and whether there are specific instances of prior corporate compliance or noncompliance with regulatory requirements. The presentation of evidence involving other unrelated aspects of the corporation's operations will not be necessary to demonstrate this particular feature of the corporation's character.

If viewed as the internal operating system of the corporation, the character of the corporation will be reflected in its policies, procedures, rules, and decisionmaking processes.<sup>235</sup> These policies and processes can be identified through observations of the corporation's consistent behavior over time with respect to particular aspects of its operations and decisions.<sup>236</sup> For example, repetition of criminal activity or repeated failures to remedy problems stemming from unethical behavior may be a basis for concluding that the unlawful and unethical behavior is a genuine outgrowth of the character of the corporation.<sup>237</sup> To make justifiable inferences about a corporation's character, the evidence must reflect a particular pattern of behavior, not merely aberrant conduct.<sup>238</sup>

As mentioned previously, there are three primary methods of proving character: reputation, opinion, and specific acts.<sup>239</sup> In the context of ascertaining corporate character, specific instances of the corporation's prior conduct will provide the fact finder with the most insight. Reputation and opinion evidence, however, may also prove to be helpful.

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234. Proponents of the corporate ethos standard make a similar point for imposing corporate criminal liability:

The corporate ethos standard is concerned only with the ethos relevant to the criminal conduct in question. Thus, a corporation's ethos or "characteristic spirit" toward employees' rights, competitors, research and development, marketing, and the like is relevant only to the extent it sheds light on whether there exists a corporate ethos that encouraged the particular criminal conduct at issue.

Bucy, *supra* note 179, at 1127–28.

235. See discussion *supra* Part V.

236. See FRENCH, *supra* note 134, at 62 (noting that the central policies of a corporation can be revealed through written statements and through actual corporate behavior over a period of time).

237. See Moore, *supra* note 176, at 770. In support of a corporate character theory of criminal culpability, Moore argues that repetition of criminal conduct has the effect of "endorsing" earlier offenses:

Repeat offenses by an organization suggest that the offenses are not mere anomalies, but were caused by some feature of the organizational entity. Moreover, the fact that the organization has not changed this feature to prevent further offenses indicates that the offenses are consistent with the organization's policy or character.

*Id.* at 788.

238. See Schragger & Short, *supra* note 203, at 412.

239. See discussion *supra* notes 19–23 and accompanying text.

Officers, directors, or employees of the corporation who have first-hand experience with and knowledge of particular aspects of the corporation's internal operating system may offer their opinions concerning those aspects of the corporation's character. Additionally, testimony may be offered about the corporation's reputation in the community for pertinent aspects of its character. Although less probative than evidence of specific prior acts of the corporation, reputation testimony may assist in providing some context in which to evaluate the corporation's character.<sup>240</sup>

One may still argue that, even if it is possible to ascertain corporate character, evidence of such character will be irrelevant in many instances and will not be helpful in proving conduct. As discussed previously, character evidence is often highly relevant to explain behavior in particular circumstances.<sup>241</sup> If we assume, however, that character is not relevant in a particular case, the court may simply exclude the evidence under other rules of evidence. Rule 402 flatly prohibits the admission of evidence that is not relevant.<sup>242</sup> Moreover, the court always retains the discretion under Rule 403 to exclude evidence if its probative value is substantially outweighed by the danger of other prejudices.<sup>243</sup> With the safety net provided by Rules 402 and 403, there is no reason to have an outright ban on character evidence for fear that it will be irrelevant in certain instances. The preferable approach is to allow the court to decide how to treat evidence of a corporation's character on a case-by-case basis.

It must be recognized that much character evidence is already admitted under the special purpose exception provided in Rule 404(b).<sup>244</sup> If character evidence is presented for other purposes, such as proof of knowledge or intent, it is readily admissible. In many instances, the exception swallows the rule. The very same evidence that would be barred if used to prove conduct in conformity with character will be admitted so long as it can be skillfully cast as useful for other purposes. These procedural niceties should be abandoned altogether, and evidence of corporate character should be admissible without such contorted justifications for its use.

Because the presentation of corporate character evidence does not implicate the same human autonomy considerations that are raised when

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240. Some corporations certainly take more pride in protecting their reputations than do others. See CLINARD, *supra* note 203, at 166; MOORE, *supra* note 176, at 755 ("There appear to be 'good' and 'bad' corporations, law-abiding corporations and recidivists, and there is a remarkable consensus as to which corporations are which.").

241. See discussion *supra* notes 56–58 and accompanying text.

242. See FED. R. EVID. 402. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." *Id.*

243. See FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

244. See FED. R. EVID. 404(b); discussion *supra* notes 35–37 and accompanying text.



individual character is at issue, the evidence will not produce the harms the rule is meant to prevent. In fact, it is possible that evidence of character will provide more, rather than less, accurate assessments of corporate conduct. According to one view, the best way to counteract inappropriate “snap judgments” by fact finders is to give them more information, not less.<sup>245</sup> If jurors are provided with greater information about the internal operating system and decisionmaking processes of the corporation, there is a good chance the information will help, rather than hinder, the evaluation of the corporate conduct at issue.

## VII. CONCLUSION

The question of whether the character evidence rule should apply to corporations is not an easy one to resolve. For many years, courts have simply assumed that the coverage of the rule extends to corporations. Such an assumption, devoid of any attempt to analyze the issue directly, is unwarranted. Recent efforts to rethink the character evidence rule provide deeper insight into its purposes and provoke broader inquiry into its value.<sup>246</sup> Perhaps the rule’s most compelling purpose and highest value lies in its protection of human autonomy and dignity interests. If such is the case, the rule’s scope need not reach corporations. A corporation, although a complex, highly organized, remarkably intelligent, and productive creature in many respects, is still just a corporation. Although it may be regarded as a real and independent person with an existence and a character distinct from its members, it will never be a natural person entitled to the same autonomy and dignity considerations afforded to individuals. Because it is these individual autonomy considerations that give the character evidence rule its greatest force, the extension of the rule to corporations would be inappropriate. To hold otherwise would diminish the esteemed human autonomy and dignity interests that our legal system is designed to uphold.

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245. See Taslitz, *supra* note 7, at 112 (“[T]he tendency of jurors to make ‘snap judgments’ about character based on limited information can only be counterbalanced by giving them more information.”); cf. Park, *supra* note 52, at 740–41 (suggesting that the American criminal trial, with its exclusion of criminal history evidence, is the legal analogue of “interview illusion,” which is the mistaken “assumption that one can learn a great deal of useful information about people’s personalities from a brief get-acquainted interview” (quoting LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 136 (1991))).

246. See generally Symposium, *Truth & Its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 HASTINGS L.J. 447, 663–894 (1998) (panel discussion revisiting the character evidence rule).

