Florida Law Review

Volume 65 | Issue 4 Article 5

July 2013

Criminal Corporate Character

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CRIMINAL CORPORATE CHARACTER

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Abstract

In the last few years, corporations have been accused of crimes ranging from environmental pollution on an unprecedented scale, to manslaughter, to election tampering, to large-scale antitrust violations. Many of these accused companies had previously committed similar acts or even the exact same offense. Unfortunately, the rules of evidence in the federal system and in virtually every state system prohibit the use of this information in a prosecution for such crimes. The reasons for this prohibition are based in historical anomalies, a mistaken understanding of corporate function, and a misplaced anthropomorphism of the corporation. This combination of errors has resulted in the questionable practice of excluding relevant evidence in cases where the justifications for exclusion are either nonexistent or weak and the benefits of admitting the evidence clearly prevail. This Article demonstrates the fallacies of this continued practice and argues in favor of change. Specifically, this Article shows why evidence concerning the character of a corporation should be allowed in criminal settings to prove that the corporation acted in conformity with that character on the date in question. Courts so far have not given much consideration to the question and have simply assumed that the character evidence rules apply to corporations. I base my objections to this practice on the goals of corporate criminal liability, the inherent weaknesses of the character evidence rules generally, and the way in which corporate structure exacerbates those weaknesses. Lawyers should argue that the character evidence rules do not apply to corporations, judges should decide accordingly, and legislatures should amend both the Federal Rules of Evidence and their state counterparts to make it unambiguously clear that corporations are not covered by the same principles regarding character as individuals.

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INTRODUCTION

The Federal Rules of Evidence and most state evidentiary rules contain a prohibition against using an individual's past acts as evidence of his character when prosecutors attempt to prove that the individual behaved in a way consistent with that character in a particular instance.[1] For example, if a prosecutor is trying to prove that a defendant killed a man last month, she cannot introduce evidence that he killed a different, unrelated man last year and argue that since he is the type of person who kills, he probably killed the second man as well. This Article argues that this prohibition should not apply in criminal trials of corporations. The past acts of a corporation should be admissible to add weight to the proposition that it committed the offense in question in conformity with its so-called character.

In making this argument, I look at two long-standing questions of criminal law and the rules of evidence, and I examine how the intersection of the answers to these questions should shape the treatment of corporate character evidence. The first question deals with corporate criminal liability and why we prosecute corporations. Prosecutions of these types of legally created entities often result in the punishment of real people such as investors or employees who have committed no wrong. The second question concerns the evidence that can be used in criminal trials generally, and specifically seeks to explore the prohibition on the use of character evidence to show that someone acted in conformity with his character. Why do we exclude information from

1. FED. R. EVID. 404.

a trial that many people agree is probative and in fact everybody uses in daily decision making? This Article argues that examining these questions yields significant arguments for eliminating the prohibition on the use of character evidence against corporations.

As part of this project, I employ the key insights of Professor Peter French on the topic of corporate decision making and his explanations of the fundamental mechanisms that underlie this process as part of a model that he termed the Corporate Internal Decision (CID) Structure.[2] I use this structure as one basis upon which to reject the application of the character evidence rules to corporations. In addition, I also use information relating to corporate recidivism rates and the inherent limitations of corporate criminal penalties to support my argument. There are multiple advantages to adopting my understanding of the character evidence rules as they apply to corporations. These advantages are present in two of the primary purposes of evidentiary law: finding truth and establishing desirable incentives. I argue that the truth-finding function is enhanced by allowing more information to be presented to a jury in circumstances in which the evidence is likely to be more probative than prejudicial. The advantage of establishing desirable incentives is enhanced by the fact that using evidence of past acts against corporations will increase the deterrent effect on them whenever they consider criminal conduct. Other scholars have asked how legal regimes can encourage optimal board behavior,[3] but none have asked how the rules of evidence may play a role in this incentive structure. This Article fills that gap.

In addition to these increased advantages of allowing character evidence against corporations as opposed to individuals, the potential disadvantages are also reduced in the corporate context. One of the largest and most recognized potential harms related to using character evidence is the risk of erroneously subjecting an individual to incarceration.[4] This is not a problem here due to the fact that a corporation obviously cannot be sentenced to imprisonment. Furthermore, use of corporate character evidence is less likely than individual character evidence to produce inaccurate results in the first place. Given these increased advantages and decreased disadvantages, I argue that it would be legitimate to exclude corporations from the character evidence prohibition without doing so for individuals.

Part I discusses corporate criminal liability generally and reviews the

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2. *See infra* Part II.

3. *See, e.g.*, Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1 (2002) (discussing legal issues surrounding board size, meeting procedures, and director liability).

4. *See* People v. Molineux, 61 N.E. 286, 293–94 (N.Y. 1901) (citation omitted).

arguments supporting and opposing it. I show that both the proponents of expanding and those of limiting corporate criminal liability would likely favor my proposal to change the rules of evidence. I explain the motives behind imposing corporate criminal liability and demonstrate how the legal system has attempted to meet those goals. Relatedly, I will examine how the use of respondeat superior as a basis for liability has been implemented, and why commentators have recommended changes to existing liability standards. Part II investigates in more detail the nature of corporations, especially their decision making processes. After concluding this foundational inquiry regarding corporations, Part III clarifies the character evidence rules and their prohibitions, and discusses the arguments for and against eliminating those rules generally. This Part also illuminates whether and how these rules are and should be applied to corporations in the future. In this context, I analyze not only the reasons for the rules but also the reasons for having corporate criminal liability in the first place, as well as some of the distinctions between people and corporations. I conclude that the character evidence rules should be understood not to apply to corporations in criminal prosecutions.

I. CORPORATE CRIMINAL LIABILITY

Both the existence and appropriate level of corporate criminal liability have been debated since its inception over a century ago.[5] Before that time, corporations were not subject to the criminal law. William Blackstone believed that this was "so obvious that it needed no elaboration."[6] When addressing the question in 1701, American courts held that only individuals could be charged criminally.[7] In 1909, the United States Supreme Court finally established corporate criminal liability and used the respondeat superior principle to establish guilt in *New York Central & Hudson River Railroad Co. v. United States*.[8] Today, a corporation can be held criminally liable for virtually any

5. *See* Amy J. Sepinwall, *Guilty by Proxy: Expanding the Boundaries of Responsibility in the Face of Corporate Crime*, 63 HASTINGS L.J. 411, 415 (2012); *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1478 n.2 (1996).

6. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *476 ("A corporation cannot commit treason, or felony, or other crime.")).

7. Kathleen F. Brickey, *Perspectives on Corporate Criminal Liability* 3 (Wash. U. in St. Louis Legal Studies Research Paper Series, Paper No. 12-01-02, 2012), *available at* http://ssrn.com/abstract=1980346.

8. 212 U.S. 481, 493–95 (1909). For a discussion of the case, see Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. (forthcoming 2013) (manuscript at 5–8), *available at* http://ssrn.com/abstract=2022379.

crimes, except those requiring commission by a natural person,[9] such as rape.[10] Nonetheless, the debate about corporate criminal liability rages on, and its opponents perceive the practice "as the senseless and puerile reaction of an ignorant public, or as an inefficient relic best replaced by a civil scheme."[11] Why do some commentators view matters in this light?

The main point of contention becomes not whether harm has occurred, but rather who should pay for that harm. Some courts have claimed that saying that a corporation has committed a wrong actually means only that someone at a high decision making level in the corporation has done so.[12] Shareholders have virtually no say in the management of their corporation; rather, the ultimate authority rests with the board, and the day-to-day operations are conducted by other corporate officials.[13] Therefore, one could argue that either the managers or employees should be held liable, but not the corporation, and thus it is unfair to punish the shareholders by imposing criminal penalties on the whole entity.[14] A logical conclusion depending upon how the corporation is viewed is that "corporations don't commit crimes, people do."[15] Hence, corporate criminal liability punishes innocent shareholders and employees who thus become "collateral damage."[16]

This issue was raised in *New York Central* when the defendants argued that punishing the corporation was actually punishing the innocent stockholders, and that since the board could not legally authorize criminal acts, it was impossible for the corporation as an entity to commit a crime.[17] They were potentially relying on the historically held belief that a corporation was not capable of possessing the moral blameworthiness necessary to perpetrate an intentional crime.[18] The Supreme Court, however, rejected these claims and held

9. A natural person has been defined as "[a] human being, as distinguished from an artificial person created by law." Utica Mut. Ins. Co. v. Precedent Cos., 782 N.E.2d 470, 476 (Ind. Ct. App. 2003) (citation omitted).

10. Khanna, *supra* note 5, at 1488.

11. Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. (forthcoming 2012) (manuscript at 3), http://ssrn.com/abstract=2046593.

12. *See, e.g.*, Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1422 (7th Cir. 1986).

13. Carol R. Goforth, "*A Corporation Has No Soul"—Modern Corporations, Corporate Governance, and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 629 (2010).

14. Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19. J.L. & POL'Y 1, 5–6 (2010).

15. Brickey, *supra* note 7, at 2.

16. Alschuler, *supra* note 6, at 1359.

17. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909).

18. *See* Pamela H. Bucy, *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF

that since a corporation acts through its officers and agents, their purposes, motivations, and intentions are also those of the corporation.[19] This established the use of respondeat superior, a principle of liability from tort law, as a viable criminal law theory. After *New York Central*, commentators objected that corporate criminal liability ran against the purpose of criminal law, that is, "punishment of the morally blameworthy—because it relied upon vicarious guilt rather than personal fault."[20] Others felt that the respondeat superior standard for criminal liability was "overly broad."[21] For instance, under some circumstances the federal government and a number of states impose liability on the corporation for the actions of any employee, even if the employee was instructed not to perform the action or if the corporation was a victim.[22] Some corporate convictions have been based on seemingly individual actions, with catastrophic results for the corporation and its employees (such as the collapse of Arthur Anderson, which resulted in the loss of 85,000 jobs) that are not rectified even if the conviction is later reversed.[23] The current practice of conviction without reference to corporate character reduces the amount of intentionality that can legitimately be ascribed to the conduct, which blurs the line between civil and criminal liability and dilutes the impact of criminal convictions.[24] By not using corporate intent, we "squander[] the power of the criminal law."[25]

Professors Daniel Fischel and Alan Sykes have argued that corporate criminal liability is unnecessary and in fact can lead to overdeterrence, whereby corporations spend more money avoiding crime than they should.[26] Nonetheless, while corporations are a necessary part of modern life and bring many advantages, they also have the ability to cause great harm.[27] With the exception of governments, corporations are the most powerful institutions in the world, and are sometimes even more powerful than governments.[28] Corporate actions and policies have

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CRIME & JUSTICE 259, 259 (Joshua Dressler ed., 2d ed. 2002).

19. *N.Y. Cent.*, 212 U.S. at 492–93.

20. Khanna, *supra* note 5, at 1485 (citations omitted).

21. Sheley, *supra* note 8, at 4.

22. *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 970 (D.C. Cir. 1998); United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985).

23. Alschuler, *supra* note 6, at 1364–66.

24. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099–1100 (1991).

25. *Id.* at 1183–84.

26. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 321 (1996).

27. Gilchrist, *supra* note 11, at 2.

28. Goforth, *supra* note 13, at 618 (citation omitted).

contributed to, if not caused, many environmental and other types of disasters.[29] Corporations are capable of committing crimes far in excess of what individuals can achieve due to their size, resources, and complexity.[30] Those who argue in favor of criminal sanctions for corporations identify the harms that corporate misconduct can cause, mention the "expressive value of punishing corporations," and argue that in light of societal perceptions, failing to punish corporations could "delegitimiz[e] the criminal law."[31] Corporate criminal liability may be appropriate due to the "collective qualities" of corporations—that is, their "geographic, structural, and temporal complexities"—that amplify the potential harm caused and thereby justify criminal liability.[32] Professor Pamela Bucy also argues that we should criminalize corporate behavior due not only to the large amount of harm corporations can cause, but also the "unique opportunities for unlawful behavior" arising from corporations' organizational structures.[33]

Other commentators have stated that corporations are just legal fictions that refer to the people and agreements behind the organizations and, therefore, any liability should attach to these individuals.[34] Yet this understanding has been objected to on several different grounds, including the observation that corporations have cultures that differ from those of the individuals in them.[35] Furthermore, due to the nature of a large corporation and possible complexity of its various hierarchies, it can be difficult to determine which one individual may have violated the law.[36] Just prosecuting individuals for their acts can be problematic from an incentives perspective, not only because it may be difficult to identify the persons responsible for the criminal action, but also because it may not be possible to overcome the internal pressures created by the corporation.[37]

In some situations it is not individuals alone who perpetrate the crimes, but rather a corporation's standard operating procedure or a part of its business strategy plays a role in it.[38] A corporation's culture and

29. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 119 (2009).

30. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1484 (2009).

31. Sheley, *supra* note 8, at 3 (citations omitted).

32. *Id.* at 4.

33. Pamela H. Bucy, *Corporate Criminal Liability: When Does it Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1437 (2009).

34. *See* Gilchrist, *supra* note 11, at 15.

35. *See id.* at 15–16.

36. Brickey, *supra* note 7, at 22.

37. Bucy, *Corporate Ethos*, *supra* note 24, at 1119.

38. *See, e.g.*, Beale, *supra* note 30, at 1484 (citing the engineering giant Siemens'

customs can, to varying degrees, affect individuals' attitudes and behaviors.[39] Attributing the criminal behavior of corporations to the individual alone may disregard the institutional processes occurring within the organization.[40] Corporate culture and organizational structure can influence individual decision making in many relevant ways.[41] It has long been acknowledged that the policies of some corporations can encourage criminal behavior.[42] One infamous example of corporate misconduct clearly related to corporate character was Big Tobacco's long-time pattern of misleading regulators and the public about the health risks involved in smoking.[43] Sometimes "it is appropriate not to ask 'What was going on with those people to make them act that way?' but instead to ask 'What was going on in that organization that made people act that way?'"[44] When dealing with an organization, it is not enough for discrete individuals to exercise self-control; rather, control must be part of the organization.[45]

Corporate criminal liability has also been defended as an appropriate "expression of the community's moral judgment."[46] The idea is that if we do not hold a corporation criminally liable when people think we should, then the criminal justice system itself will be weakened due to appearances of favoritism and unequal application of the law.[47] Furthermore, people do seem to experience "*greater* moral indignation toward corporations than toward natural persons for the same crimes."[48] A final argument in favor of corporate criminal liability is based on the fact that corporations that adhere to the law are sometimes at a competitive disadvantage compared to corporations that disregard the

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systemic use of bribes as one example).

39. Ripken, *supra* note 29, at 103.

40. Charles R.P. Pouncy, *Reevaluating Corporate Criminal Responsibility: It's All About Power*, 41 STETSON L. REV. 97, 110 (2011).

41. *See* Goforth, *supra* note 13, at 634 (identifying increased risk taking, team playing at the expense of good judgment, and cutting corners).

42. *See* MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 58 (2006).

43. *See generally* Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387 (1999).

44. Goforth, *supra* note 13, at 648 (citation omitted).

45. Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of* Citizens United, 65 U. MIAMI L. REV. 1, 6 (2010).

46. Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009).

47. Gilchrist, *supra* note 11, at 56.

48. *Id.* at 57; *see also* Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 792 (2000) ("People often search for group rather than individual-level causes for extremely negative events.").

law.[49] If we did not have criminal sanctions, these law-abiding corporations would be placed at an even greater disadvantage.

The availability of civil corrective measures further complicates the question of the appropriateness of criminal sanctions. Some scholars think that corporate misconduct can be controlled through civil enforcement while others believe that civil fines cannot replicate the reputational harm of criminal sanctions.[50] Furthermore, some find the unpredictability associated with reputational damage stemming from a criminal conviction to be advantageous,[51] whereas others view this advantage as lessened by "imprecision and lack of uniformity."[52] Even though objections to criminal sanctions remain, commentators and practitioners who favor them have claimed that prosecution of corporations should actually be simplified.[53] To understand this debate, it is best to take a step back and examine in more detail the general goals that criminal sanctions are intended to achieve.

A. *The Purpose of Corporate Criminal Liability*

The classic goals of criminal law are deterrence, retribution, rehabilitation, and incapacitation.[54] The United States Supreme Court has held not only that deterrence is an appropriate purpose of criminal liability, but also that corporations can appropriately be considered blameworthy and, therefore, retribution would be another justification for corporate criminal liability.[55] The expression of condemnation is another possible purpose of criminal law. There is clearly a wide range of levels of condemnation for various criminal acts, but some condemnation is consistently present and many have argued that this expression has a value beyond any deterrent effect that may be associated with it.[56] A possible goal of criminal law is to both convey

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49. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942 (2005).

50. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 512–16 (2006).

51. *See id.* at 514.

52. Gilchrist, *supra* note 11, at 42.

53. *See, e.g.*, Beale, *supra* note 30, at 1482.

54. Brickey, *supra* note 7, at 14; Sheley, *supra* note 8, at 6.

55. United States v. Park, 421 U.S. 658, 673 (1975).

56. Gilchrist, *supra* note 11, at 5; *see also* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 619 (1998) (arguing that the public wants to see condemnation of both individuals and corporations through the criminal law and that imposing criminal sanctions therefore increases public welfare). For a discussion of the expressive function of criminal liability in the intellectual property context, see Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH.

society's feelings of condemnation for certain types of behavior and help shape those feelings.[57] Arguments are often made, however, that neither expression nor retribution are proper goals. Many scholars and judges treat deterrence as the goal for corporate criminal liability,[58] and some scholars have even claimed that the "chief civilized purpose of criminal law is deterrence."[59]

Deterrence can be broken down into both general and specific deterrence. The idea of general deterrence is that punishing one person or entity will convince other people or entities not to behave in the same manner.[60] Unlike general deterrence, specific deterrence is aimed at the actual person or institution that committed the offense and attempts to prevent that entity from committing the same or similar acts in the future.[61] To argue from a deterrence perspective, we need to show that corporate criminal liability deters more than individual liability alone.[62] In this context, it is important to understand the specific factors that affect decision making behavior. In a survey of corporate ethics, "superiors" were ranked as the most important contributing factor to criminal or unethical decision making.[63] In that spirit, criminal liability is supposed to "stimulat[e] a maximum effort" on the parts of owners and managers in their responsibility to direct their numerous agents in compliance with the law.[64]

In that same spirit of maximizing utility, "[a] judge's goal in punishing a corporation should be to induce a level of monitoring that will prevent more criminal harm than the monitoring will cost."[65] Corporate liability may thus also be thought of as a way to induce internal monitoring as opposed to serving only as an external constraint.[66] Furthermore, the problem of corporate crime is seemingly contagious and, for example, in the last decade just about every major pharmaceutical company has been charged and has pled guilty or agreed to a settlement based upon serious misconduct.[67] While potentially

469, 494 (2011).

57. *See generally* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990).

58. *See, e.g.*, Khanna, *supra* note 5, at 1494 & nn.91–93.

59. Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 833 (1927).

60. Brickey, *supra* note 7, at 14.

61. *Id.* at 16.

62. Khanna, *supra* note 5, at 1494–95.

63. CLINARD & YEAGER, *supra* note 42, at 59.

64. United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972)

65. Alschuler, *supra* note 6, at 1360.

66. *Id.*

67. Beale, *supra* note 30, at 1484 (citation omitted).

overstating the problem, the U.S. Supreme Court made a relevant point when it said that "to give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at."[68] Today, there are many administrative agencies and extended civil liability that could work to curtail corporate misconduct. Notwithstanding this fact, criminal liability has not only survived but has actually increased dramatically.[69] This is in part because of its capability to simultaneously achieve "consequential, retributive and expressive benefits."[70] Whichever purpose (or combination of purposes) we choose, we are still left with the question of how optimally to achieve it via the toolkit of corporate criminal liability.

B. *Achieving the Goals of Corporate Criminal Liability*

After *New York Central*, whenever corporations were prosecuted, courts used respondeat superior to establish liability without much additional analysis.[71] In *New York Central*, the statute had explicitly stated that a corporation could be held liable.[72] After the Supreme Court's ruling, however, lower courts began reading other criminal statutes as though they applied to corporations whether there was any indication that the legislature had intended them to do so or not.[73] Under the respondeat superior standard, a corporation can be held criminally liable if three conditions are satisfied: (1) an agent of the corporation acted with the requisite mental state, (2) the agent acted within the scope of his employment, and (3) the agent intended to benefit the corporation.[74]

Some federal courts have imposed liability upon a corporation based on a theory of collective *mens rea*, where no specific individual had that *mens rea*, resulting in company liability even though no culpable individual could be identified.[75] Indeed, all of the elements of criminal corporate liability are easily met for a variety of reasons. For example, an agent can act within the scope of employment even though the

68. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495–96 (1909).

69. Baer, *supra* note 14, at 4.

70. *Id.* at 2.

71. Alschuler, *supra* note 6, at 1364.

72. *N.Y. Cent.*, 212 U.S. at 491.

73. *See, e.g.*, United States v. Union Supply Co., 215 U.S. 50, 54–55 (1909); London v. Everett H. Dunbar Corp., 179 F. 506, 510 (1st Cir. 1910); People v. Star Co., 120 N.Y.S. 498, 500 (N.Y. App. Div. 1909); State v. Ice & Fuel Co., 81 S.E. 737, 738 (N.C. 1914).

74. Khanna, *supra* note 5, at 1489–90.

75. Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 501 (1996).

corporation had forbidden the wrongful conduct. Furthermore, the agent could have intended to "benefit the corporation" when that was not his only motivation and he had ultimately not benefitted the corporation at all.[76] Nevertheless, some argue that even potentially excessive prosecutions of a corporation, which punish it for employee actions that are against its publicized policy, can help to deter such acts and encourage the corporation to implement effective measures rather than empty policy declarations.[77] The fear is that a corporation can impose seemingly good compliance programs without actually affecting the culture or the desire to comply with the law.[78] In recognition of this possibility, courts usually do not acknowledge even extensive compliance programs as a defense to the illegal conduct, even if it was committed by only one employee.[79]

Nevertheless, as desirable as avoiding criminal behavior may be, extreme penalties can cause overdeterrence and lead to an excessive increase in corporate resources devoted to enforcement.[80] Furthermore, when convicted—or possibly even only accused—of a crime, a corporation can suffer significant consequences in addition to the criminal charges or fines themselves, including loss of the ability to conduct the business in which it had been involved and a significant negative impact on its stock prices and other business opportunities it may have had.[81] Some scholars, legislators, and practitioners have recognized this danger and have argued for limiting the scope of liability to actions that can be traced to people high up in the corporation such as executive managers or members of the board of directors.[82] For example, Australia has passed legislation imposing new forms of liability that focus on the culture of the corporation or the inadequate management rather than on the simpler respondeat superior approach.[83] Similarly, some English laws require a corporate "alter ego," usually meaning a high-up official in the corporation.[84]

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76. Khanna, *supra* note 5, at 1490. Practically speaking, prosecutors do consider whether or not it was a "rogue" employee who committed the crime or if the culture of the corporation contributed to the offense. Baer, *supra* note 14, at 7 (internal quotation marks omitted); *see also* Sheley, *supra* note 8, at 8.

77. *See* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORGS. 53, 55–56 & n.6 (1986).

78. Ramirez, *supra* note 49, at 965.

79. Brickey, *supra* note 7, at 9.

80. Fischel & Sykes, *supra* note 26, at 325–26.

81. Beale, *supra* note 30, at 1501–02.

82. Sheley, *supra* note 8, at 8.

83. Beale, *supra* note 30, at 1493.

84. Khanna, *supra* note 5, at 1491 (internal quotation marks omitted).

Domestically, the Model Penal Code (MPC), along with some states, only imposes liability on corporations based upon the actions of high-level managers or the board of directors—and even then, only when they were acting on behalf of the corporation and within the scope of their employment.[85] The MPC's focus on high-level managers places an additional requirement upon the respondeat superior liability framework, with the idea that these managers' actions would then represent the policy of the corporation.[86] Yet three problems with the MPC formulation have been identified: (1) it is too broad because high-level managers may still be acting on their own, (2) a corporate policy that results in a low-level employee's committing a crime would not result in liability for the corporation, and (3) it gives high-level managers an incentive to remain unaware of criminal conduct.[87] To correct these issues, Professor Bucy has argued that corporate culture should be taken into account and should give corporations a good faith defense to criminal conduct that may have been committed by one of their employees.[88] Her position is that simple respondeat superior liability does not encourage law-abiding behavior and "fails to distinguish between those that are culpable and those that are not."[89] Professor Bucy believes that corporate liability should rest on a corporate "ethos," or corporate personality, and require that this ethos have encouraged the commission of the criminal act.[90] She proposes using the past acts of the corporation to establish this ethos.[91] Other commentators have gone so far as to argue that past conduct should result in increased penalties to the point of corporate death for repeat offenders.[92]

Whatever one's view of corporate criminal liability, it is unlikely to be eliminated, as can be surmised from the fact that no Attorney General in the last century has sought to narrow corporate criminal liability standards.[93] Nonetheless, even among those who argue in favor of corporate criminal liability, there is a call for an increased requirement showing a "pervasive criminal intent throughout the corporate entity, in order to better justify finding the 'corporate person' collectively liable for criminal misconduct."[94] Similarly, on the

85. Alschuler, *supra* note 6, at 1364.
86. *See* MODEL PENAL CODE § 2.07(4)(c) (Proposed Official Draft 1962).
87. *See* Bucy, *Corporate Ethos*, *supra* note 24, at 1104–05.
88. Bucy, *Corporate Criminal Liability*, *supra* note 33, at 1441–42.
89. *Id.*
90. Bucy, *Corporate Ethos*, *supra* note 24, at 1099.
91. Alschuler, *supra* note 6, at 1379 (citation omitted).
92. *See, e.g.*, Ramirez, *supra* note 49, at 972–73.
93. Alschuler, *supra* note 6, at 1387.
94. Sheley, *supra* note 8, at 46.

opposing side, commentators who generally think corporate crime is a problematic issue agree that if liability is to be imposed, it should be upon those companies whose criminal conduct is genuinely "corporate" rather than individual in nature.[95] Furthermore, most would agree that in the law, a paramount goal is that like actors should be treated alike and different actors should be treated differently.[96] The question for the purposes of this Article is what does it mean for two corporations to be "alike?" To answer this question, we again need to step back and ask what our conception of a corporation is in the first place.

C. *Corporations and Personhood*

It was pointed out almost a hundred years ago that juries are more likely to find corporations guilty than they are to find individuals guilty, and it is worthwhile to examine why.[97] This state of affairs is unlikely to arise from corporations' all being malevolent. As it happens, many early corporations were explicitly benevolent institutions, including several new church congregations.[98] At their root, corporations exist because some endeavors require joint efforts and can only be achieved with many individuals participating. If the activities of large numbers of people are properly coordinated, the result can be far superior to the sum of what the individuals contributed.[99] One of the challenges that have arisen as a result, however, has been to define this new collective entity and answer whether or not it is a "person."

There are at least three different ways that a corporation can be viewed as a person: a moral person, a natural person, and a legal person.[100] A corporation clearly is not a natural person, clearly is a legal person, and arguably is a moral person that should be "held morally accountable for its actions."[101] At the same time, Justice John Paul Stevens has stated that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]heir 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."[102] In a similar vein, many assert that corporations cannot

95. *See, e.g.*, Fischel & Sykes, *supra* note 26, at 325.

96. Bucy, *Corporate Ethos*, *supra* note 24, at 1100 (citing H.L.A. HART, THE CONCEPT OF LAWS 155 (1961)).

97. *See* Edgerton, *supra* note 59, at 834–35.

98. *See* Goforth, *supra* note 13, at 625.

99. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 264 (1999).

100. Kim, *supra* note 48, at 784.

101. *Id.*

102. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part).

decide, act, or intend on their own, and that these functions are simply accomplished through their human members, without whom it would have no identity or any ability to function.[103] One possible criticism of this view of the corporation as an extension of the humans involved is the fact that a corporation can live for several generations without changing even if every human involved has changed.[104] It would seem then that it cannot merely be an extension.

Historically, it has been disputed whether the corporation is an entity beyond the people involved and its legal status.[105] Chief Justice John Marshall described one view of corporations in *Trustees of Dartmouth College v. Woodward*: [106] "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 . . . ."[107] Another view supported early on by the U.S. Supreme Court in *Santa Clara County v. Southern Pacific Railroad Co.*[108] was that a corporation has rights and duties conferred upon it due to the rights and duties of its human members.[109] Today, it is established that corporations are treated in many ways as though they were natural people. For example, they can own property, participate in binding legal contracts, can be sued in court (and in turn sue others), and can be prosecuted and held responsible for criminal actions.[110] This does not mean, however, that they should always be treated the same as natural people. This Article argues that evidence law should draw a crucial distinction between individuals and corporations when it comes to how it treats character.

II. CORPORATE DECISION MAKING

It is important here to first lay some groundwork on the nature of corporations and their functioning, beginning with corporate decision making. One problem in this area stems from the fact that corporate conduct is undertaken by people with different and possibly conflicting motivations, which can at times result in actions being taken that are not profit maximizing for the corporation.[111] This is due in part to the fact

103. *See, e.g.*, Ripken, *supra* note 29, at 100.

104. PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH 1 (1962).

105. Ripken, *supra* note 29, at 100.

106. 17 U.S. 518 (1819).

107. *Id.* at 636.

108. 118 U.S. 394 (1886).

109. *Id.* at 396 (citing oral arguments).

110. Brickey, *supra* note 7, at 2.

111. Gilchrist, *supra* note 11, at 36.

that people do not always follow economic considerations,[112] but rather sometimes make decisions for various reasons ranging from legal obligations to self-interest to the maintenance of social relationships.[113] Even at the level of shareholders, who presumably have aligned general goals of making money, there can be a variance in areas like risk tolerance (possibly due to age and retirement considerations) or tax implications.[114] Because people in a corporation hope to maximize their joint efforts, however, they are often willing to give up individual control and defer to an agreed-upon decision making hierarchy.[115]

Consequently, shareholders have almost no power to make day-to-day decisions in the corporations they own.[116] The official power in a corporation resides with the board of directors.[117] Further, most boards act in an advisory capacity and oversee the upper-level managers who typically run operations on a daily basis.[118] Rather than describing a corporation as a group of individuals, it is more accurate to say that it is a hierarchy of teams, with a specific team—the board of directors—at the top.[119] In most corporations, disagreements are raised to the next level of the hierarchy, with the ultimate arbitration ability residing with the board of directors.[120] Major decisions in a corporation evolve through many different individuals who integrate their knowledge and individual decisions into the structure of the corporation.[121] Given this, the decisions (and ultimately the character) of a corporation can be distinguished from those of any individual.[122] The vast majority of decisions "are made collegially among team members at lower levels" of the corporation.[123] Some commentators have argued that corporations may be more capable than humans of acting in a purposeful, rational, and calculating manner,[124] and some studies have shown that groups make better decisions than the average individuals in the group and in fact make better decisions than the best individual in the group.[125]

112. *See* Blair & Stout, *supra* note 99, at 315–19.

113. *See id.*

114. Stephen M. Bainbridge, *Competing Concepts of the Corporation (a.k.a. Criteria? Just Say No)*, 2 BERKELEY BUS. L.J. 77, 91 (2005).

115. *See* Blair & Stout, *supra* note 99, at 275–77.

116. Bainbridge, *supra* note 3, at 4.

117. *Id.*

118. *Id.* at 8.

119. *Id.* at 2.

120. Blair & Stout, *supra* note 99, at 279.

121. HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 221–22 (3d ed. 1976).

122. *Id.* at 221.

123. Blair & Stout, *supra* note 99, at 282.

124. *See, e.g.*, Ripken, *supra* note 29, at 128.

125. Bainbridge, *supra* note 3, at 12. *But see* David Schkade et al., *Deliberating About*

Under some circumstances, groups also make decisions faster than individuals.[126]

Once we have established that, rather than individuals, it is a team or group making decisions, the next question of interest is how the group goes about doing so. In varied settings, corporations are likely to develop many different specific ways of making decisions.[127] "One model of organizational decisionmaking views corporate decisionmaking as essentially a political bargaining process where several individuals or teams of individuals in the corporation may be involved in the making of a single business decision."[128] Therefore, given the complexities of this process, the final corporate action may not be the one that any specific person would have chosen individually.[129] "All organizations must have some mechanism for aggregating the preferences of the organization's constituencies and converting them into collective decisions."[130] One of the most prominent models of corporate decision making is the Corporation Internal Decision (CID) Structure.[131] In this understanding, every corporation has a CID Structure:[132]

> CID Structures have two elements of interest to us here: (1) an organizational or responsibility flow chart that delineates stations and levels within the corporate power structure and (2) corporate decision recognition rule(s) (usually embedded in something called "corporation policy"). The CID Structure is the personnel organization for the exercise of the corporation's power with respect to its ventures, and as such its primary function is to draw experience from various levels of the corporation into a decision-making and ratification process.[133]

The CID Structure allows information and positions developed by human individuals to be synthesized and turned into a decision by the

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Dollars: The Severity Shift, 100 COLUM. L. REV. 1139, 1141 (2000) (describing the potentially distorting effect of group polarization on jury decisions in tort law). For a discussion of the literature on the individual decision making of judges versus the group decision making of juries, see generally Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012).

126. *See* Bainbridge, *supra* note 3, at 12–14 & nn.46–47.

127. *See* Metzger & Dalton, *supra* note 75, at 551–52.

128. Kim, *supra* note 48, at 789 (citation omitted).

129. *Id.* at 790.

130. Bainbridge, *supra* note 114, at 90.

131. *See* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 211 (1979).

132. *See id.* at 212.

133. *Id.*

corporate entity, permitting different inputs and perspectives to come together for a common goal.[134] The goals of corporations and individuals are often similar, and to the extent there is a difference, it tends to arise from the aims of corporations being more stable and less varied than those of individuals.[135] "The collective nature of the corporation's decision-making system transforms the individual inputs, making the individual intentions and actions unrecognizable when the final corporate intention is formulated."[136] Given the CID Structure, corporate decision making must be more transparent than individual thoughts or choices because communication between many different entities has to occur before a corporate decision can be reached.

III. CHARACTER EVIDENCE

A. *The Nature of Character Evidence*

"For at least two centuries, both English and American courts have generally prohibited the use of character evidence as circumstantial proof that a person engaged in a particular conduct . . . ."[137] Here, I will briefly delineate the common understandings of "character" and what evidence is allowed versus what evidence is prohibited. According to Professors Christopher Mueller and Laird Kirkpatrick, "'character' means a person's disposition or propensity to engage or not engage in various forms of conduct."[138] Character evidence has also been described as information, not about a fact currently at issue in the litigation, but rather about the person's or entity's past conduct.[139] Other related definitions of character are "a human being's propensity to engage in a general type of conduct"[140] and an "internal operating system" that influences a person's behavior.[141] This could be seen as very similar to a CID Structure in corporations.[142] As applied in evidence law, "character" has also been described as "a collection of 'traits,' each a self-contained packet of potential conduct consistent with

134. *Id.*

135. *Id.* at 214.

136. Ripken, *supra* note 29, at 127.

137. David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1164–65 (1998).

138. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 182 (4th ed. 2009).

139. Chris Chambers Goodman, *The Gate(way)s of Hell and Pathways to Purgatory: Eradicating Common Law Protections in the Newly Sculpted Character Evidence Rules of the United Kingdom's 2003 Criminal Justice Act*, 66 U. MIAMI L. REV. 79, 82 (2011).

140. Richard C. Wydick, *Character Evidence: A Guided Tour of the Grotesque Structure*, 21 U.C. DAVIS L. REV. 123, 124 (1987).

141. Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 782 (1998) (internal quotation marks omitted).

142. *See supra* Part II.

previously observed reactions to events, people, or things."[143] Or character could simply be defined as a collection of traits and dispositions.[144] Even though the exact definition of *character* may be elusive, we do have a sense of the concept, which boils down to a general impression of what a person is like. This brings us to the matter of what evidence law prohibits in this regard.

Rules limiting the use of character evidence exist in virtually every jurisdiction in the United States.[145] Federal Rule of Evidence 404 states: "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 . . . ."[146] This rule is read in conjunction with Rule 405, which establishes three types of character evidence one *can* introduce at times: (1) testimony about a person's reputation in the community for a specific character trait, (2) a witness's opinion about a character trait, and (3) specific instances of conduct that demonstrate the person's character.[147] Evidence prohibited for seeking to prove action in conformity with a certain character may be admissible under a different theory,[148] for example, to show that the person had the necessary knowledge or required intent.[149] When admitted for some other purpose, however, it is subject to objection, increased appellate scrutiny, and limited use in argument. An example of the character evidence rule in practice would be the prosecution in an aggravated battery case wanting to introduce evidence that the defendant has previously shown his violent character and has on more than one occasion seriously injured other people. The prosecution wants to argue that because of this history, the defendant is more likely to have committed the battery in the case at bar. The rules of evidence would, however, generally prohibit this.[150]

Other countries have greatly relaxed the prohibition on character evidence,[151] and since the Federal Rules of Evidence were passed in

143. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 849 (1982) (citation omitted).

144. *See* Tillers, *supra* note 141, at 783.

145. *See* Sherry F. Colb, "*Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV 939, 941 & n.7 (2001).

146. FED. R. EVID. 404(a).

147. Kim, *supra* note 48, at 768.

148. *See* 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, 575 (1990); FED R. EVID. 404(b).

149. Kim, *supra* note 48, at 810.

150. *See* FED. R. EVID. 404.

151. *See, e.g.*, Imwinkelried, *The Use of Evidence*, *supra* note 148, at 602 & n.187 (identifying the United Kingdom as one example).

1975, Congress has significantly amended them several times.[152] The most important amendment dealing with character evidence was in 1994, when Congress changed the rules to allow character evidence in cases dealing with sexual misconduct or child molestation.[153] Specifically, Federal Rules of Evidence 413, 414, and 415 allow the use of character evidence to show action in conformity with that character in cases involving sexual assault or child molestation.[154] Character evidence is also used at various specific times in criminal proceedings for sentencing and determining punitive damages.[155] In fact, specific instances of past misconduct are used in various ways and at different times throughout a trial, perhaps most importantly to determine the severity of the penalty. In federal court, the rules of evidence (including those on character evidence) are specifically not applicable during sentencing,[156] and the well-known "three strikes" laws drastically increase a defendant's potential punishment based entirely upon his past conduct.[157]

It has been claimed that "[t]he admissibility of uncharged misconduct evidence is the single most important issue in contemporary criminal evidence law."[158] In some jurisdictions, improper admission of uncharged misconduct is the most common ground for appeals and the most frequent ground for reversals.[159] Given that uncharged misconduct is possibly the most contentious of the character evidence rules, it is helpful to examine what has led to the exclusion of this kind of information.

B. *Arguments Against Admitting Character Evidence*

"[C]haracter evidence is often very probative."[160] There is a risk, however, that juries will give character evidence more weight than it deserves.[161] On the other hand, some scholars have gone as far as

152. Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM L. REV. 1227, 1231–32 n.4 (2001).

153. Leonard, *supra* note 137, at 1162.

154. FED. R. EVID. 413 (sexual assault); FED. R. EVID. 414 (child molestation); FED. R. EVID. 415 (both).

155. Sanchirico, *supra* note 152, at 1233.

156. *See id.* at 1268 (noting that the Federal Sentencing Guidelines only consider a defendant's criminal history category and offense characteristics).

157. *See, e.g.*, Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 3559 (2006); CAL. PENAL. CODE § 1170.12 (Deering 2013) (outlining California's Three Strikes Law).

158. Imwinkelried, *The Use of Evidence*, *supra* note 148, at 576 (citation omitted).

159. *Id.* at 577.

160. Tillers, *supra* note 141, at 792.

161. *Id.*

arguing that the probative value of character evidence is actually low.[162] Given the very low standard necessary for evidence to be considered relevant enough to be admitted,[163] that alone would likely not be a sufficient bar even if true.[164] The starting point for judging the validity of this prohibition is the idea that it is fundamental to American jurisprudence "that a defendant must be tried for what he did, not for who he is."[165] In *Michelson v. United States*,[166] the U.S. Supreme Court pointed out that the rule against character evidence is based upon the fact that in our system, a man cannot be convicted and sent to prison simply because he is "a bad man."[167] Similarly, an old principle in American courts is that "a person should not be judged strenuously by reference to the awesome spectre of his past life."[168] This basic objection to admitting character evidence is only the beginning.

There are several more specific justifications for the ban on character evidence.[169] One commonly mentioned reason is that jurors will overvalue character evidence and jump to an incorrect conclusion about the specific charge once they learn that the defendant has committed other bad acts.[170] A good example of this justification is the often repeated saying "[o]nce a thief, always a thief."[171] As mentioned, the fear is that "jurors might give character evidence undeserved weight,"[172] particularly giving too much weight to dispositions or personality traits and not enough weight to specific situational factors.[173] The danger is potentially even greater when the defendant was accused but not convicted of a previous crime, since the jury may feel that the defendant should be punished for not only the current but also past offenses.[174] This exacerbates the possibility that a juror will decide that the defendant deserves punishment because he is a bad person as opposed

162. *Id.* at 783 (citation omitted).

163. *See* FED. R. EVID. 401.

164. Tillers, *supra* note 141, at 783.

165. United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977).

166. 335 U.S. 469 (1948).

167. *Id.* at 489 (Rutledge, J., dissenting).

168. Leonard, *supra* note 137, at 1162 (citation and internal quotation marks omitted).

169. *See* Imwinkelried, *The Use of Evidence*, *supra* note 148, at 587; Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 223–24 (1996).

170. Kim, *supra* note 48, at 772.

171. *Id.* at 772.

172. Miguel A. Méndez, *Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters*," 49 HASTINGS L.J. 871, 881 (1998).

173. Sanchirico, *supra* note 152, at 1243.

174. *See* Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 561 (1984).

to because he committed the current offense.[175]

Also, with character evidence, a previous defendant may be investigated and charged *because* the police knew about his initial crime, which the jury may not realize.[176] Therefore, the jury is left with the impression that it is very unlikely that a man would be *randomly* suspected of a crime by the police when a year ago, he had committed the exact same crime.[177] Jurors would ask themselves: "If this were a mistake and this person had not committed this crime, what are the odds that he would be prosecuted for it and coincidentally had, in fact, committed the very same crime a year previously?" Logically, they may conclude that such a result is outside the realm of probability. Rather, they would think that this only makes sense because it is not a mistake and this person is being charged now and was convicted then because he repeatedly does the same thing. Yet, this entire train of thought may be erroneous because the police, knowing about the previous crime, may have used that information to suspect him in the first place. The answer to the question of probability is, therefore, that the odds of this happening are very high!

Another series of objections to using character evidence comes from the notion that character evidence is only probative "if we assume that character traits are relatively stable and that people generally act in conformity" with those traits.[178] The prevalent consensus used to be that people have character traits that remain fairly consistent.[179] Some psychologists, however, have questioned the stability of personality traits due to the lack of empirical evidence to support their existence.[180] Hence, psychologists began to doubt the personality trait theory and developed the belief that behavior is much more dependent on specific situational circumstances.[181] If true, the criticisms of the idea that personality traits are stable would be a strong reason for questioning the relevance of character evidence for individuals, particularly given most jurors' strong instinctual reaction to such evidence.[182] When the Federal Rules of Evidence were being drafted, the then-relatively new theory now called "situationism," which viewed environmental factors as the

175. Kim, *supra* note 48, at 772.

176. *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, 273 (1995).

177. *Id.*

178. Kim, *supra* note 48, at 770.

179. Méndez, *Character Evidence Reconsidered*, *supra* note 172, at 877.

180. Méndez, *The Law of Evidence*, *supra* note 169, at 227.

181. Méndez, *Character Evidence Reconsidered*, *supra* note 172, 878. These studies and conclusions were based on individual persons and not corporations. *Id.*

182. *Id.* at 878–79.

major determinants of a person's conduct, predominated.[183] That theory posited that one problem with the reliability of personality traits is the seemingly tiny amount of situational difference that can cause a person to act in disparate ways.[184] Given the near impossibility of observing the decision making process and the number of variables in the human decision making process, situationism argued that it is difficult to develop an accurate or predictive character profile.[185] These arguments helped shape the rules of evidence that we see today.

Courts also exclude this type of evidence due to its complicating effect and the potential for jury confusion.[186] Judicial efficiency is another argument against character evidence, in that allowing it could cause a court to get unnecessarily entangled in the specifics of the parties' past lives.[187] If character evidence were allowed generally, some argue that "trials would turn into contests about which party has the better charitable record."[188] Nonetheless, some of these concerns are not very forceful due to the fact that the court still has the ability to limit evidence under the general rules related to prejudice and probative value.[189] Not only are there several objections to the admission of character evidence generally, but some individuals have attacked the rules allowing character evidence in sexual assault and child molestation cases on the grounds that there is no real distinction between those defendants and other potential defendants that would justify unequal treatment.[190]

C. *Arguments for Admitting Character Evidence*

Arguments for banning character evidence notwithstanding, there are many reasons that support allowing it. First, one of the foundational goals of evidence law is accuracy,[191] because its lack could result in great inefficiency, massive costs on parties and society, the undermining of notice and participation, unpredictability, failures to guide and deter conduct, violations of substantive rights, and the risk of political

183. Susan M. Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 514–15 (1991).

184. Méndez, *The Law of Evidence*, *supra* note 169, at 228.

185. *See* Méndez, *Character Evidence Reconsidered*, *supra* note 172, at 879–80.

186. Leonard, *supra* note 137, at 1185.

187. Sanchirico, *supra* note 152, at 1249.

188. Bexar Cnty. Appraisal Review Bd. v. First Baptist Church, 846 S.W.2d 554, 562 (Tex. Ct. App. 1993).

189. *Id.*

190. Colb, *supra* note 145, at 942.

191. *See* Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. (forthcoming 2013) (manuscript at 12), *available at* http://ssrn.com/abstract=2060340.

illegitimacy.[192] The two fundamental tenets of evidence law are that we should exclude irrelevant evidence and admit relevant evidence unless there is a good reason to exclude it.[193] Even the courts on rare occasion express disdain for character evidence rules and acknowledge the relevance of the excluded information.[194] "[T]he logical relevance of uncharged misconduct is . . . undeniable."[195] Everybody uses character-based reasoning daily.[196] When someone decides whom to trust to fix his car, watch his children, or invest his money, what information does he want to know? Presumably, he would like to find out what happened the last time a given individual performed these activities. The popularity of review websites in which the main purpose is to see how a particular business performed in the past adds more weight to the contention that as a society, we value knowledge about past behavior and use it as a future predictor.[197] Hence, when it comes to everyday life, we very much tend to see the past as relevant.

In that sense, an increased use of character evidence would allow jurors to use their common sense in determining what information is useful to arrive at their verdicts.[198] Wholly relying on character evidence would be inappropriate,[199] but that does not alter the fact that it does sometimes change the equation and make the possibility that someone committed an act more or less likely.[200] Evidence can be incomplete, inaccurate, or both. At the same time, "by gathering and putting together enough evidentiary traces, ambiguities can be canceled, distortions can be revealed and discounted, and a fair similitude of the past event can be achieved."[201] Relatedly, some of the psychological theories that were relied upon when the Federal Rules of Evidence were drafted are no longer as trusted. Recent psychological theories have suggested that a combination of traits and specific aspects of situations can lead to predictable conduct.[202] Today, many psychologists agree

192. *Id.*

193. *Id.* at 13.

194. Leonard, *supra* note 137, at 1172 (identifying Darling v. Westmoreland, 52 N.H. 401 (N.H. 1872), as one example).

195. Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 289 (1994).

196. *Id.*; Méndez, *The Law of Evidence*, *supra* note 169, at 222.

197. For a discussion of the role of such websites, see Irina D. Manta, *Privatizing Trademarks*, 51 ARIZ. L. REV. 381, 416–17 (2009).

198. Goodman, *supra* note 139, at 120.

199. Virtually nobody would take the position that because someone committed an act in the past, she must be the person who committed the act currently in question.

200. *See* Sanchirico, *supra* note 152, at 1242.

201. Uviller, *supra* note 143, at 847 (citation omitted).

202. *See* Davies, *supra* note 183, at 517–20.

that people do have cross-situational attributes that, when combined with factors in specific situations, help determine what a person will do.[203] In essence, the rules regarding the exclusion of character evidence are at least in part based upon "questionable assumptions about human nature."[204]

There are three additional reasons to allow character evidence. First, allowing character evidence would increase the disincentives of recidivists, because they would know that they have an increased likelihood of conviction due to the admission of prior misconduct evidence.[205] The second additional argument is that, as has been noted by the drafters of the Federal Rules of Evidence, the problem of surprise (and many of the other objections to character evidence) could be dealt with both via notice requirements and the general rule that evidence can be excluded if it would create "unfair prejudice."[206] The third argument, which has been endorsed by some courts, is the low likelihood that an innocent individual will be charged with a crime when he had coincidentally committed the same crime months or years ago, and that this increases the appropriateness of admitting the past evidence.[207] Nonetheless, as mentioned above,[208] this may ignore the possibility that the past act was why the defendant was suspected and charged in the first place.

Due to these arguments, many scholars have recommended allowing the limited use of character evidence because they hope to maximize the amount of probative evidence and minimize unfair prejudice.[209] Professor Richard Uviller may have said it best over thirty years ago:

> Predisposition, so long a pariah in the law of evidence, must be reclaimed from the shadows. Its inference has been persistent and ineradicable because our common experience informs us that evidence of predisposition is probative. But our Victorian sensibilities have demanded denial, and so the influence of the banished force has been devious and distorted. If we hope to achieve rules that make sense, and if we hope to write rules to enhance the accuracy of the fact-finding process, we should abandon our frayed

203. Sanchirico, *supra* note 152, at 1233.
204. Wydick, *supra* note 140, at 125.
205. Imwinkelried, *Undertaking the Task*, *supra* note 195, at 294.
206. FED. R. EVID. 403 advisory committee's note; Leonard, *supra* note 137, at 1185 n.103.
207. *E.g.*, Cleveland v. KFC Nat'l Mgmt. Co., 948 F. Supp. 62, 65 (N.D. Ga. 1996).
208. *See supra* Section III.B.
209. *See, e.g.*, Uviller, *supra* note 143, at 885.

pretense concerning the value of character evidence.[210]

Clinging to these Victorian sensibilities involves an elevated possibility of creating distortion when they are applied to a criminal concept not in effect until after that era.

D. *Applying Character Evidence Rules to Corporations*

It is currently unclear whether a corporation's past misconduct can be admitted to show the corporation's bad character and that it acted in conformity with that character on a specific occasion.[211] Most courts simply assume that Rule 404 applies to corporations without analyzing the merits of that position.[212] Several courts in various settings have extended the character evidence ban to corporations and other groups. For example, when one court barred potential character evidence from being used against a nonhuman entity (in this case, a union), it stated: "[E]vidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion."[213] The court never discussed the fact that it was applying the rule to an organization rather than a person. Another example of a court excluding character evidence in this context can be seen in *American National Watermattress Corp. v. Manville*,[214] where the Alaska Supreme Court applied the character evidence prohibition to a corporation even though the corporation's counsel had not specifically requested this.[215]

In federal court, questions stem in part from the facts that the Federal Rules of Evidence do not define *person* and that the term is used in an inconsistent manner.[216] Some courts have stated that a corporation has no character,[217] and there is no consensus on behalf of courts, commentators, or legislators as to whether the character evidence rules should apply to corporations.[218] One thing that does seem clear is that prior-act evidence can be used against a corporation in cases that involve sexual assault by an employee.[219] Yet this has little to do with

210. *Id.* at 883.

211. Kim, *supra* note 48, at 765–66.

212. *Id.* at 766 n.15.

213. Stafford v. United Farm Workers of Am., 656 P.2d 564, 568 (Cal. 1983) (alteration in original) (quoting CAL. EVID. CODE § 1104) (internal quotation marks omitted).

214. 642 P.2d 1330, 1336 (Alaska 1982).

215. *Id.*

216. Kim, *supra* note 48, at 767 n.17.

217. *E.g.*, El Meson Espanol v. NYM Corp., 521 F.2d 737, 739 (2d Cir. 1975).

218. Kim, *supra* note 48, at 763.

219. Cleveland v. KFC Nat'l Mgmt. Co., 948 F. Supp. 62, 66 (N.D. Ga. 1996) ("To allow defendant corporation to shield itself from character evidence and disadvantage the victims of

the status of the corporation and is based rather on the application of the amended evidence rules regarding sexual assault.[220] The next question this Article addresses is whether the character evidence rules should be amended to reflect the differences between corporations and individuals. As one scholar has pointed out: "When a rule of exclusion flies in the face of common sense and is based on dubious generalizations about the danger of misdecision, it does not take much to justify an exception that will let the trier hear more of the relevant data."[221] I will explore how this idea applies in the case of corporations.

E. *General Proposals to Change the Rules*

Before embarking on a discussion of whether the rules barring character evidence should be changed, I should first acknowledge that the bar is already not absolute and in fact has been changed relatively recently. Character evidence is often used in trials in both appropriate and inappropriate (but unobjected to) ways.[222] For example, allowing a defendant to put on evidence that he has a character or character trait that is inconsistent with having committed the charged offense is a true exception to the idea that conduct cannot be proved by character.[223] The defense can use character evidence in part because this carries a reduced danger of prejudice to the defendant and now the probative value[224] is more likely to outweigh its cost.[225] Furthermore, even though the concerns about unfair prejudice and misdecision are prominent objections to character evidence,[226] and even though this risk is highest when the offense is reprehensible,[227] Congress has already changed the character laws in regard to rape and child molestation—considered two of the most heinous crimes, according to at least one study.[228]

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corporate sexual misconduct would be to emasculate the force of Rule 415.").

220. *See* FED. R. EVID. 415(a).

221. Park, *supra* note 176, at 272.

222. Samuel R. Gross, *Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance*, 49 HASTINGS L.J. 843, 851–54 (1998).

223. *See* FED. R. EVID. 404(a)(1); United States v. Staggs, 553 F.2d 1073, 1075–76 (7th Cir. 1977) (overruled on other grounds).

224. How probative a piece of evidence is means how effective the evidence is in proving some disputed fact. Pardo, *supra* note 191, at 14–15.

225. Wydick, *supra* note 140, at 142.

226. *See supra* Section III.B.

227. *See* William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPP. L. REV. 297, 300 n.9 (1982).

228. Imwinkelried, *Undertaking the Task*, *supra* note 195, at 297 & n.75 (citing *Sin: From Murder to Laziness and Cutting in Line, a Darn-Close-to-Scientific Poll Ranks the Wrongs That Flesh is Heir To*, PEOPLE, Feb. 10, 1986, at 106, 108, *available at* http://www.people.com/people/archive/article/0,,20092922,00.html).

Given these exceptions to the character evidence rules, the criteria for the prohibition seem to involve balancing. Hence, the main question in any particular situation is whether the benefits of excluding this type of evidence outweigh the costs.[229] Part of this determination must also take into account that while evidence law is often focused on what many consider to be the main purpose of trials (that is, fact-finding), another purpose of trials can be the provision of incentives.[230] As other scholars have pointed out, if character evidence is actually more reliable than has been historically assumed, it may be appropriate to lift the per se ban and allow judges to make a case-by-case analysis.[231]

Notwithstanding the existence of relatively recent changes to the Federal Rules of Evidence, such rules can be difficult to modify. Indeed, rules of evidence can "survive even when there is no good reason for their continued existence."[232] The advisory committee on the rules of evidence, when referring to the rules regarding character, once admitted that they "lie[] more in history and experience than in logic."[233] This is particularly troublesome when much has changed since the time when the rules were enacted. Professor David Leonard has pointed out that "[w]hen a rule's longevity can be measured in terms of centuries rather than only years or decades, it is particularly appropriate to undertake reform cautiously. The character rule presents such an instance."[234] However accurate this warning may be generally, it carries less weight when the rule under consideration is being applied in a completely new manner. Corporations did not exist in their current form centuries ago and there was no criminal liability imposed upon them when the rule was constructed. Therefore, we should not feel bound by the pedigree of the rule in this context and should rather evaluate it neutrally on its own merits. Using the balancing criteria mentioned above, I argue that the rule should be changed when applied to corporations.

IV. CHARACTER EVIDENCE AS APPLIED TO CORPORATIONS

This Part shows that the term "person" in Federal Rule of Evidence 404 (and its state corollaries) should be understood not to include corporations. Originally, the U.S. Supreme Court established in 1819

229. Méndez, *Character Evidence Reconsidered*, *supra* note 172, at 873.

230. *See generally* Sanchirico, *supra* note 152 (examining the role that trials play in providing incentives).

231. *E.g.*, Méndez, *The Law of Evidence*, *supra* note 169, at 234.

232. Tillers, *supra* note 141, at 782 (citation omitted).

233. Perrin v. Anderson, 784 F.2d 1040, 1044 (10th Cir. 1986) (quoting FED. R. EVID. 404 advisory committee's note) (internal quotation marks omitted).

234. Leonard, *supra* note 137, at 1164.

that a corporation was a "mere creature of law" that owed its existence to government and hence only had the rights and privileges that the government granted to it.[235] If that were still the prominent view, there would not be as much uncertainty about the situation. The argument would likely go that only those rights specifically given to corporations by the government are the ones it possesses, and that because the protection of the character evidence ban was not specifically extended to corporations, it should not apply to them. Over the course of the last century, however, corporations have been given many constitutionally protected rights[236] and have also been treated as persons in other contexts. I argue that when it comes to character evidence rules, they should not be viewed as such. The reasons are consistent with the aims of corporate criminal law and evidence law, including both the search for truth and the desire to establish an optimal incentives structure.

I will begin by describing how the rules apply to an individual and then how definitively lifting the prohibition for corporations specifically would affect the prosecution of a corporation in the same circumstance. The rules currently forbid using the fact that a defendant—say, a car salesman—has a record of falsely representing the condition of the cars he sells to establish that he is the kind of person who would intentionally misrepresent the condition of a car and, hence, did so on a particular occasion.[237] Suppose instead that CarMax, the large used-car resale corporation, had an unwritten de facto policy requiring its salespeople to consistently hide the defects in a car and, after fixing the odometer, the employees indeed lied about the number of miles a car had been driven.[238] I argue that evidence about CarMax's past actions of deception should be allowed in a new prosecution for fraud. In addition to this hypothetical example, there are many real-world examples in which the character of a corporation should be used. For example, in May of 2010, for the fourth time in less than a year, Johnson & Johnson recalled 136 million bottles of children's medicine, prompting the government to accuse them of "systemic failures and a culture of mediocrity."[239] In a prosecution for something like negligent homicide, the prosecution should be able to argue that defendants were negligent

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

236. *See* Sheley, *supra* note 8, at 17.

237. *See* Méndez, *The Law of Evidence*, *supra* note 169, at 222 (criticizing the prohibition on the use of character evidence when applied to individual, unethical car salesmen).

238. This is merely a hypothetical example—I have no information that CarMax does or ever has behaved in this manner.

239. Sepinwall, *supra* note 5, at 413–14 (internal quotation marks omitted) (citing Susan Heavey, *Storm over J&J's Child Drug Recall Only Grows*, REUTERS.COM (May 27, 2010, 4:56 PM), http://www.reuters.com/article/2010/05/27/us-johnsonandjohnson-recall-idUSTRE64P3UD20100527).

in the past and that it is therefore more likely that they were negligent this time. Another good example concerns Massey Energy:

> Massey Energy provides the stark example of a company culture directly contributing to the death of twenty-nine men. On April 5, 2010, "a powerful explosion tore through the Upper Big Branch mine, owned by Massey Energy." The explosion killed twenty-nine miners and left one seriously injured. A spark from a mining tool ignited a pocket of methane, and the exploding methane eventually ignited coal dust. The explosion traveled through more than two miles of mine. An independent commission conducted extensive analysis and investigation before concluding that the explosion was caused by extensive safety violations and was "a completely predictable result for a company that ignored basic safety standards and put too much faith in its own mythology." The safety lapses were so extensive that the commission concludes they could "only be explained in the context of a culture in which wrongdoing became acceptable, where deviation became the norm." . . . . Methane gas, coal dust and a spark caused the explosion; the culture of Massey Energy caused the presence of methane gas, coal dust and a spark.[240]

In a prosecution for this explosion or a subsequent incident, the jury should be able to evaluate the evidence of past actions and determine its significance on whether the company behaved in a similar manner. As has been pointed out by other scholars, "[t]he corporation should be held accountable under the criminal law if the corporation, by establishing organizational cultures that tacitly countenance crime, is the real party-in-interest rather than the so-called 'bad apple.'"[241]

Character evidence may be quite useful in determining if the corporation has established this type of culture, potentially making the evidence very probative. For several decades, scholars have called for the introduction of character evidence when it is more probative than prejudicial.[242] I claim that in corporate settings, it is in fact generally more probative than prejudicial for reasons ranging from the reliability

240. Gilchrist, *supra* note 11, at 10–11 (citations omitted).

241. Pouncy, *supra* note 40, at 112. A possible counterargument would be that to the extent juries (and even judges) suffer from hindsight bias in tort and criminal cases, legal decision makers are in some ways too likely to find liability. My proposal could, therefore, slightly exacerbate the issue. For a discussion of hindsight bias in this context and a summary of relevant studies, see generally Manta, *Reasonable Copyright*, *supra* note 125.

242. *See, e.g.*, Uviller, *supra* note 143, at 883.

of the evidence due to the corporate structure, to the historical oddity that resulted in the initial ban, to the increased ability of the corporation to defend itself, and to corporations' intentional development of their character. As to this last point, "modern corporations develop distinctive personae through increasingly sophisticated marketing techniques."[243] They specifically do so to maximize profits; therefore, it is more appropriate to hold them accountable for all aspects of that character given that changing the incentives could greatly affect how they act subsequently. Defense lawyers also know about and use a corporation's character and image in litigation when attempting to project a positive image of the corporation,[244] which gives courts greater justification to hold them accountable for it.

Historically, early courts rooted the prohibition against character evidence in the "jealous regard for the liberty of the individual."[245] These circumstances are very different when there is no individual and "liberty" is not in question.[246] Further, as pointed out previously, the rules regarding character evidence are at least in part based upon shaky understandings of *human* nature,[247] making them inapplicable to corporations even absent the shakiness.

While rules of evidence have been changed at least in part due to the status of the victim,[248] the status of the defendant should also be a relevant consideration. Evidence rules and procedures were not only constructed originally for individuals,[249] but it is also true that "false convictions of corporations are not as problematic to society as false convictions of individuals."[250] Furthermore, "[t]he unique difficulties associated with detecting, investigating, and proving corporate criminality suggest . . . that the number of false corporate convictions is already very low."[251] Not only is that the case, but one must also consider the magnitude of the risk of recidivism. As mentioned, since 1995, the Federal Rules of Evidence have allowed character evidence to prove action in conformity therewith in sexual assault cases and child molestation cases, including civil cases.[252] This use of character evidence was in part justified by the indications of high levels of

243. Brickey, *supra* note 7, at 20 (citation omitted).

244. Kim, *supra* note 48, at 797.

245. People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901).

246. Most blatantly, a corporation cannot be placed in jail.

247. Wydick, *supra* note 140, at 125.

248. For a discussion of rape shield laws, see Park, *supra* note 176, at 275–77.

249. Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 263 (1991).

250. Khanna, *supra* note 5, at 1512.

251. *Id.* at 1513 (citation omitted).

252. *See supra* note 154 and accompanying text.

recidivism from such perpetrators.[253] Researchers have noticed a similarly high level of consistency in corporate behavior, meaning that corporations tend to act either ethically or dubiously on a regular basis,[254] and often commit the same or very similar offenses repeatedly. Some scholars have even argued for applying a "three strikes" rule to corporations in an attempt to address recidivism.[255] Therefore, the same justification that was used to admit character evidence in sexual assault cases can be used to admit it in corporate criminal cases, and in fact the argument to do so is potentially stronger in the corporate setting.

As pointed out previously, some have attacked the rules allowing character evidence in sexual assault and child molestation cases on the grounds that there is "no principled distinction" between those defendants and other potential defendants that would justify disparate treatment.[256] My proposal does not face this obstacle because there are significant differences between corporations and individuals, including when it comes to general recidivism rates, potential consequences they could each encounter outside the criminal law, the different penalties that individuals face, corporations' increased ability to defend themselves, and the different decision making processes they each experience. Furthermore, the likelihood of unfair prejudice is much higher in sexual crimes—particularly in child-molestation cases—than it is in virtually any corporate crime. At least one study has confirmed what most people would assume: nonviolent theft offenses are usually viewed as much less heinous than crimes such as murder or rape.[257] These results have led at least one scholar to recommend that theft offenses would make a good candidate to begin changing the character evidence rules.[258] My proposal not only limits the change primarily to nonviolent, non-heinous types of crimes,[259] but also distinguishes between significantly different defendants.

Another argument for allowing corporate character evidence to prove action in conformity with that character is based on continuity, which refers to the fact that character evidence is used both before and after the guilt phase of a trial. Corporate criminal liability is so broad that prosecutors must pick and choose from many companies that

253. Goodman, *supra* note 139, at 85.

254. Ripken, *supra* note 29, at 134; Kim, *supra* note 48, at 800.

255. *See, e.g.*, Ramirez, *supra* note 49.

256. *See supra* Section III.B; Colb, *supra* note 145, at 942.

257. Imwinkelried, *The Use of Evidence*, *supra* note 148, at 297 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE SEVERITY OF CRIME (1984), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sc.pdf).

258. *See id.* at 301–02.

259. This is due to the nature of most corporate criminal actions.

technically qualify for prosecution.[260] Attorney General Eric Holder's memorandum giving guidance for prosecutors in corporate matters contained nine factors that should be considered when determining whether to prosecute, including "the corporation's history of similar conduct."[261] Past acts or behavior, therefore, must come into play, and the same evidence that is kept from the jury through character evidence rules is used to determine if the case even goes to the jury. On the other side of the trial, sentencing guidelines indicate that an important factor to consider is the corporate ethos and whether it supports a corporate culture that encourages compliance with the law.[262] This type of information is also supplied by character evidence. Thus, courts are directed to view the very same information they are denied during the guilt phases of a trial to determine the appropriate punishment during the sentencing phase. It seems logical that the evidence that is required to be considered both before and after a trial be available for consideration during a trial.

Another ground for allowing character evidence revolves around the idea of fairness. A possible argument for disallowing corporate character evidence is that it may not be fair to the corporation or its shareholders. One reason this may be viewed as unfair, as discussed in cases dating back to 1684 that have excluded character evidence, has been the possibility of unfair surprise.[263] Their institutional memory and legal assistance, however, would allow corporations to anticipate the use of this evidence. Unlike an individual who may have no idea that his past acts could be used against him in court,[264] a corporation would likely have experienced enough trial or court proceedings to be aware of the possibility. Further, their attorneys would obviously know and point out this possibility.

Introducing character evidence may also not be fair to shareholders. While it remains an open question whether having criminal liability for corporations at all is fair to shareholders, if we set that aside and ask only whether the character evidence rules themselves are fair to those actors, the answer seems to be yes. One could argue that the key to fairness to the investors is whether information regarding the risks and

260. *See* Baer, *supra* note 14, at 3.

261. Sheley, *supra* note 8, at 41 (internal quotation marks omitted) (citing Memorandum from the Deputy Attorney General to All Component Heads and United States Attorneys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF).

262. *See* Sheyn, *supra* note 45, at 15.

263. Leonard, *supra* note 137, at 1185.

264. One suspects, however, that most people with no knowledge of evidence law would assume that their past acts could be used.

rewards possible from an investment in Corporation X is known at the time of investment.[265] With this rule change, the risks will be known since all past acts will be assumed to be admissible evidence in future prosecutions and hence raise the likelihood of conviction and lower the appropriate stock price. Therefore, even though it may have a negative impact on stock prices and potentially cost the corporation money, it would still be fair to the shareholders. One last point in relation to fairness is that if bad character evidence is admissible, the corporation would, of course, have the opportunity to introduce evidence of good corporate character that may negate more unfortunate implications.[266]

Another problem mentioned above in the context of general objections to character evidence, namely the misleading "coincidence" factor,[267] also has reduced impact on corporations. In the case of a corporation, a known environmental polluter may become a suspect if a new pollutant is discovered in a nearby waterway. Yet the danger is not as great as for individuals for several reasons. First, the corporation is likely much more capable of presenting to the jury the fact that it was investigated because of the prior incident and therefore there was no coincidence. Second, a corporation has an increased ability to investigate the incident itself and present alternative suspects much more readily than an individual. Finally, it is possible that this potential problem could be viewed as a benefit in that it will prompt corporations to set a premium on avoiding the first incident of criminal behavior. This may or may not be advantageous given the possibility of overdeterrence,[268] but it is certainly more advantageous than for an individual.

The distinctions between individuals and corporations argue in favor of admitting character evidence in more ways than one, including as related to the concept of personality traits itself. As pointed out above, one problem with the idea of personality traits is the seemingly tiny amount of situational difference that can cause variation in a person's behavior.[269] This problem is mitigated with corporations due to the nature of the CID Structure.[270] Because information has to be shared before decisions are made, but not every minute detail is transmitted in

265. *See* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1268 (1982).

266. *See, e.g.*, Norwest Bank N.M., N.A. v. Chrysler Corp., 981 P.2d 1215, 1226 (N.M. Ct. App. 1999) (affirming the admission of evidence by Chrysler to "rebut[] Plaintiff's evidence of Chrysler's bad corporate character").

267. *See supra* Section III.B; Park, *supra* note 176, at 273.

268. Here overdeterrence means, for example, the possibility that a corporation will spend $100 to avoid a violation that would have resulted in $50 worth of damage.

269. *See supra* Section III.B; Méndez, *The Law of Evidence*, *supra* note 169, at 228.

270. *See supra* Part III.

this process, corporations as entities cannot be aware of the same level of situational detail of which a person may be aware and that may affect her. Small situational differences would thus never gain significance, would not cause a change in corporate behavior, and would lead to more predictability. A person, however, may be motivated to change his behavior by something so small that he would not even be aware of it. For example, a man with a violent disposition may not assault another individual because the latter reminded him of his son in some way that the man did not even recognize. A corporation is not capable of distinctions like that due to the fact that for corporate action, the information is synthesized through several people. This requires presentation of the information and hence cannot go unnoticed or remain subconscious.

In the same vein, when considering the harm caused, one must take into account the fact that the size of many corporations and their potentially widespread misconduct may contribute to increased harm when compared with the discrete actions of individual actors.[271] Different actions taken in remote locations can combine to result in more harmful consequences than the individual actions would seem to indicate.[272] This supports my argument that the rule should be changed because it would be far more difficult, if not impossible, to use information of distant acts by the corporation in the current case without changing the rules of evidence. As pointed out previously, it may be possible to introduce this evidence on a different basis, but this is far from clear and may result in a large amount of uncertainty and increased appellate costs.

A final distinguishing feature of a large corporation is the fact that it can survive for many generations, which is often referred to as its "permanence."[273] A corporation's permanence is another reason the rule against character evidence should not apply to it due to the increased potential harm. The fact that a corporation may be around for several generations increases society's need to ensure that it complies with legal requirements. If it is aware that crimes it commits today could be used against it in the future, there is an increased incentive to avoid not only future crimes but the initial crime as well. Compounding the differences I have discussed between corporations and individuals is that society is unlikely to look kindly upon lenient treatment for corporations, and the legal system risks its legitimacy when the public loses faith in it. Erroneous fact-finding may affect not only the parties to the trial but also the public at large in that society could lose "confidence in the

271. Sheley, *supra* note 8, at 35.

272. *See supra* notes 240–41 and accompanying text (discussing the Massey Energy case).

273. Kim, *supra* note 48, at 788.

civil- and criminal-justice systems, creating a very real risk of disorder."[274] People can become less trusting, however, both if too much and if too little evidence is allowed before the jury, because either circumstance has the potential to affect the judicial search for truth. Jurors themselves may feel deceived if after they acquit a corporation in a close case they find out that the corporation has been convicted of the same crime several times before.

CONCLUSION

I have argued that a corporation should not be considered a "person" when it comes to the prohibition on introducing a person's character to show that he acted in conformity with it. Lawyers should argue that the rule does not apply, judges should concur with this argument, and legislators should perhaps amend the rules for the sake of clarification. I have pointed out that it is possible that past acts are more reliable indicators for corporations than they are for people. There is also a lowered cost of error in admitting that evidence, because corporations do not face incarceration. They also have an increased ability to show rehabilitation (in that a change in policy would be documented with a corporation, but not with a person). Furthermore, corporations are typically better represented in court.

In the past, applying character evidence rules to corporations has faced some opposition because principles of human autonomy and respect militate for limiting them to individuals,[275] but this Article has added to the discourse by illuminating the relationship between character rules and the general purposes of corporate criminal law and evidence law. As I pointed out, one of the primary goals of criminal law is deterrence. Using character evidence for corporations more effectively achieves this goal. Not only does it make conviction more likely for corporations that have previously committed crimes—thereby encouraging them to avoid possible criminal conduct from now on—it also leads corporations without a criminal history to maintain that record, since any crime could have more long-term consequences than it would if character evidence were prohibited. Allowing character evidence for corporations also achieves both of the key goals of evidence law: revealing the truth in court and establishing an efficient incentive structure that facilitates legal behavior. Considering the increased likelihood of accomplishing all of these important goals, corporate character evidence should be admitted in criminal trials. Given that "[a] company's culture is its character, and that character

274. Leonard, *supra* note 137, at 1192.

275. *See* Kim, *supra* note 48, at 779.

influences its actions, good and bad,"[276] it should also influence juries.

276. Gilchrist, *supra* note 11, at 11 (citation omitted).