

Looking Glass: A Reply to Caulfield and Laufer

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Sometimes it takes one's critics to hold up a mirror and recall one to oneself. Matthew Caulfield and William Laufer extend that kindness to me in their Response¹ to my Article, *Clockwork Corporations: A Character Theory of Corporate Punishment*.² There I propose an approach to punishing corporate criminals that draws on virtue ethical themes. Caulfield and Laufer fault me for offering "an orthodoxly consequentialist proposal"³ that fails to "take the virtuistic roots of character theory seriously."⁴ With the exception of some miscommunications of my own which I strive to correct below, I have the rare pleasure of agreeing with almost all of their insights.

Every scholar is familiar with the delicate task of sculpting what he wants to say into what others want to hear. Most legal academics working on corporate crime are open minded about the proposals they will entertain, but it must have the right packaging. Aside from a handful of retributivists,⁵ "[c]orporate criminal law . . . operates firmly in a deterrence mode."⁶ Character theory was meant to be something different, an alternate normative framework for measuring when and what punishment is appropriate for corporate criminals. In early drafts of the Article, I learned that the bulk of my audience found the most natural language for framing character theory

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1. Matthew Caulfield & William S. Laufer, *The Promise of Corporate Character Theory*, 103 IOWA L. REV. ONLINE 101 (2018).

2. Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018).

3. Caulfield & Laufer, *supra* note 1, at 114.

4. *Id.* at 106.

5. See, e.g., Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–19 (1998); William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J. L. & BUS. 71, 79 (2018) (providing "some reasons for the consideration of progressive ideals in corporate criminal law, from our collective failure to express moral indignation over corporate wrongdoing to the value of justifying this body of law in theories of desert"); see also Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2062–64 (2016) (discussing the "approach to desert [which] justifies criminal punishment by its expressive significance").

6. Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1325 (2001).

—“virtue” and “vice”—to be distractingly distant from the more familiar language of “expected cost” and “expected benefit.”⁷ So I reframed my arguments using a “broadly consequentialist perspective” that shares the same underlying goal of deterrence—“preventing corporate crime.”⁸ If I could show that character theory would reduce corporate crime, I thought, maybe the deterrence folks would eventually indulge some talk of virtue.

One risk of stepping into another’s shoes is that you might forget to step out. After spending months in the role of a thoroughgoing consequentialist, I thought my task was done once I had argued that character theory would effectively prevent corporate crime. Caulfield and Laufer have reminded me that was just the first tentative step. Their criticisms that character theory is under-theorized⁹ and inadequately distinguished from competing approaches¹⁰ are spot on and gratefully received. As they say, a truer account would take *virtue*, rather than something else like social welfare, as fundamental.¹¹

Thanks in part to Caulfield and Laufer, that project is now underway.¹² Having now spent more time back in my virtue ethical shoes, I want to temper some of their expectations about just how far virtue theory will likely go. For one thing, it is unlikely that social welfare will fall out of the picture entirely. Caulfield and Laufer are right to imply that historical accounts of human virtue refer to individual flourishing or happiness,¹³ rather than summative values like social welfare.¹⁴ Corporations are fundamentally different kinds of “people,”¹⁵ and an account of their virtue will likely be quite different. Caulfield’s and Laufer’s rhetorical question—“[W]hat could be ‘naturalist’ virtues for an organization?”¹⁶—answers itself. Corporations are not natural beings, so their virtues must derive from elsewhere. As Caulfield and Laufer

7. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836, 842 (1994).

8. Diamantis, *supra* note 2, at 514.

9. See Caulfield & Laufer, *supra* note 1, at 103 (“[T]he idea of corporate character needs more theoretical work.”).

10. *Id.* at 106–07 (“[T]he burden falls squarely on [Diamantis’] shoulders to ascribe to more than the same consequentialist normative/justificatory framework as classical deterrence theory.”); see also *id.* at 114–15 (“Our aim is not to resolve a dispute of novelty. It is only to determine whether Diamantis offers an alternative to deterrent and retributive theories.”).

11. *Id.* at 115–17.

12. See, e.g., Mihailis E. Diamantis, *The Law’s Missing Account of Corporate Character*, 16 GEO. J.L. & PUB. POL’Y (forthcoming 2019).

13. ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. I, at 13 (Lesley Brown ed., David Ross trans., Oxford Univ. Press 2009) (350 B.C.E.) (“With those who identify happiness with virtue . . . our account is in harmony . . .”).

14. Caulfield & Laufer, *supra* note 1, at 118.

15. See Diamantis, *supra* note 2, at 509 (“Implicit in how prosecutors now treat corporate defendants is the recognition that their fundamentally different nature allows for a different approach to punishment.”).

16. Caulfield & Laufer, *supra* note 1, at 118.

point out, corporations also lack the rich mental lives that are important in virtue ethics.¹⁷ On standard accounts of human virtue, perception and emotion are crucial ingredients—perceiving when circumstances call for virtuous action and being motivated to that action by the right emotion.¹⁸ Most legal scholars agree that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.”¹⁹ While some philosophers are prepared to be more generous—allowing intentions and beliefs to corporations—they generally draw the line at perceptions and emotions.²⁰ My approach aims to be metaphysically very modest—I want to introduce corporate virtue without “ephemeral”²¹ corporate minds or specious corporate biology.

Corporations are artificial people.²² Like all artifacts, they are made for some human end.²³ Excellence in a corporation will likely be defined by reference to that end.²⁴ The end of a knife is to cut, so being sharp is one of its excellences. On this approach, if social welfare is part of the end of corporations (as I think likely), it will remain an important consideration in any theory of corporate virtue. The challenge will be to specify precisely what the relevant end is and to show why the corporate excellences that conduce to it have a normative salience that the sharpness of knives does not.

This is where the hybrid status of corporations as artifacts that are also “persons” can do some work. Unlike typical artifacts, which are inert unless acted upon, most scholars of corporate crime agree that corporations are capable of acting. While corporations were once only held criminally liable for omissions (i.e. *not* acting),²⁵ those days are at least a century behind us.²⁶ I agree with Caulfield and Laufer that we can probably do better than respondeat

17. See *id.* at 118–19.

18. See Daniel Jacobson, *Seeing by Feeling: Virtues, Skills, and Moral Perception*, 8 ETHICAL THEORY & MORAL PRAC. 387, 387 (2005) (“Virtue ethics frequently appeals to the idea of moral perception.”); Susan Stark, *Virtue and Emotion*, 35 NOÛS 440, 440 (2001) (“Aristotle has famously argued that virtue is a state of character that not only involves doing the right actions but also involves feeling the right emotions.”).

19. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part).

20. See, e.g., CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 176 (2011) (“[G]roup agents . . . have to count as persons, albeit ones of an institutional rather than a biological kind. To be sure, group agents are not flesh-and-blood persons. They . . . lack the perceptions and emotions of human individuals.”).

21. Caulfield & Laufer, *supra* note 1, at 114.

22. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636, (1819) (“A corporation is an artificial being . . . existing only in contemplation of law.”).

23. See Risto Hilpinen, *On Artifacts and Works of Art*, 58 THEORIA 58, 58–59 (1992).

24. Aristotle frames his inquiry in the *Nicomachean Ethics* in such teleological terms. See ARISTOTLE, *supra* note 13, bk. I, at 3 (“All human activities aim at some good: some goods subordinate to others.”).

25. See, e.g., *R v. Birmingham & Gloucester Ry. Co.* (1842) 114 Eng. Rep. 492, 495–96; 3 Q.B. 223, 231–33 (Eng.).

26. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 491–93 (1909).

superior (the dominant legal doctrine) when attributing acts to corporations.²⁷ Just about any sensible account of corporate action will be enough to move from thinking of corporate excellence in terms of the inert qualities all artifacts have, to thinking of it as excellence of character. Corporate virtues, assuming they exist, are character traits, i.e. “stable disposition[s] to behave.”²⁸ With some theory of corporate action in hand, the path clears for an account of corporate character, and, from there, of which character traits are virtues.

If corporations can, like humans, have stable dispositions to act, responses to some of Caulfield’s and Laufer’s questions come into view. They ask whether anything with dispositions, e.g. salt (which is disposed to dissolve in water), or anything capable of acting, e.g. a mob (which can perform acts of destruction), has character.²⁹ The answer must be “no.” While salt may have dispositions, they are not dispositions *to act*. And while mobs may act, they do not act in *stable* ways. With respect to mobs, Caulfield and Laufer helpfully suggest that what a mob lacks is a “formal internal organization [and a] ‘logically integrated set of commitments.’”³⁰ These are the features that can give organized groups like corporations stable disposition to act, i.e., character traits.³¹

I should also warn that corporate character theory will likely embrace, rather than “wrestle with[,] the idea that all corporations are associated with deviance of some sort.”³² Most virtue ethicists would find it unsurprising that even “virtuous” corporations sometimes commit wrongs. Honest people sometimes lie if the stakes are high enough. Courageous people may act cowardly in moments of sufficient psychological stress. In general, all virtuous people will sometimes act out-of-character.³³ Why should we expect more of corporations? Recognizing that sometimes good corporations can act out-of-character is one of the *strengths* of character theory. It forces us to consider seriously whether corporate-level punishment of any kind is appropriate in

27. See Caulfield & Laufer, *supra* note 1, at 111 (“[Diamantis’ view] relies on an ancient and largely empty artifact of criminal corporate liability: *respondeat superior*.”); *but cf.* Diamantis, *supra* note 5, at 2050 (offering an alternative to *respondeat superior* because that doctrine “increasingly produces outcomes at odds with any sensible notion of criminal justice”).

28. See Diamantis, *supra* note 2, at 534 (footnote omitted).

29. See Caulfield & Laufer, *supra* note 1, at 112–13, 112 n.61.

30. *Id.* at 112–13 (footnote omitted) (quoting Kendy M. Hess, *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241, 243 (2014)). This remark contrasts with their earlier criticism that the “organizational processes, measures, or policies” that undergird corporate character on my account bear “no necessary logical connection [to] corporate action.” *Id.* at 109. As they make clear later in their Response, such organizational features are critical to a group having “moral agency,” i.e. the capacity for morally-valenced action. *Id.* at 112–13.

31. A corporation’s character is not identical to these organizational features. *Cf. id.* at 109. Corporate character supervenes on them in the same way that human character supervenes on (without being identical to) arrangements of neurons.

32. *Id.* at 117.

33. See DAVID HUME, A TREATISE OF HUMAN NATURE 575 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1738); *John* 8:7 (King James) (“He that is without sin among you, let him first cast a stone at her.”).

such circumstances. I argue it is not.³⁴

Just in case there are any consequentialists reading this, I would like to make clear that I still stand by everything I said in *Clockwork Corporations*. If Caulfield and Laufer are right that the character theory I presented is just a form of “deterrence redux,”³⁵ then I pitched the paper well. But it is likely to seem a highly unorthodox sort of deterrence. Talk of corporate reform (the main punitive tool I propose) is not new to corporate deterrence theory, so long as it focuses on ex-ante reform initiated by the corporation itself.³⁶ However, the sort of coercive ex-post reform that character theory envisions is a far cry from that.³⁷ Both approaches are ways of “ensuring that bad acts are not repeated,” but not every way of doing this counts as deterrence.³⁸ Capital punishment prevents particular criminals from reoffending, but because it incapacitates them, not because it specifically deters.³⁹ Giving everyone a basic income might reduce the incidence of theft,⁴⁰ but by rendering theft unnecessary, not by deterring it. Deterrence usually works, like Caulfield and Laufer imagine all punishment must, by imposing “loss[es] and adversity.”⁴¹ Character theory favors a more constructive approach.⁴² I leave it to deterrence

34. See Diamantis, *supra* note 2, at 545.

35. See Caulfield & Laufer, *supra* note 1, at 107 & n.31 (emphasis omitted).

36. See Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1159–60 (1983).

37. See Arlen, *supra* note 7, at 842–43.

38. Harvey M. Silets & Susan W. Brenner, *The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality*, 13 AM. J. CRIM. L. 329, 371–72 (1986).

39. See W. Robert Thomas, *Incapacitating Criminal Corporations*, VAND. L. REV. (forthcoming 2019) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3243455 (“Capital punishment . . . restricts through disablement, such that a person is rendered incapable of committing future crimes.”) (emphasis omitted).

40. See Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35, 37–38 (1973).

41. See Caulfield & Laufer, *supra* note 1, at 105; see also David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1565–66 (2004) (explaining the commonly understood difference between deterrence and rehabilitation).

42. It is not alone in this respect. See, e.g., Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 433 (2007) (“[R]estorative justice processes can . . . strengthen fundamental principles of punishment.”); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 227. Professor Luna contrasts restorative justice with traditional approaches to punishment:

Traditional approaches largely neglect the needs of those directly injured by crime and the resulting damage done to social relationships within an interconnected community. What is needed, some scholars contend, is a punishment theory that takes a broader view of justice in sentencing, mindful of damaged relationships and neglected obligations in civil society. One possibility, commonly described as ‘restorative justice,’ has received substantial international interest and has even made inroads in American criminal justice.

Id. For a fuller explanation of why character theory counts as a theory of *punishment*, see Mihailis E. Diamantis, Response, *Duck-Rabbit: A Reply to Professor Hasnas*, 103 IOWA L. REV. ONLINE 133, 136–

theorists to say whether this sounds more like deterrence or something else.

I would like to close by drawing attention to some *consequences* of character theory that should interest even Caulfield and Laufer. They emphasize their concern over a series of intersecting incentives among corporate suspects and government officials that leads both to “turn a blind eye to actual evidence of good versus bad corporate character.”⁴³ Officials want credit for being tough on crime, and corporate criminals want to put the past behind them. As a result, both sides settle for “window dressing or ‘cosmetic’ compliance.”⁴⁴ The public is none the wiser, and everyone avoids the hard work of designing and implementing meaningful reform.

As I argued in the Article, corporate character theory would facilitate more corporate prosecutions.⁴⁵ This would have two beneficial consequences for the compliance game. One is that there would be more corporate convictions. Today, the largest corporate criminals often exit the criminal justice process through pretrial diversion. They then land relatively unscathed in the friendly territory of the compliance game. More corporate convictions would reinvigorate one of the causalities of the compliance game: the expressive condemnation of a guilty verdict.⁴⁶

The second consequence is that more prosecution gives a third party—the judge—a more important role.⁴⁷ Judges are insulated from the political and financial incentives that drive the compliance game. This may explain why judges seem to be more skeptical of the deals prosecutors and corporations strike.⁴⁸ A scrutinizing judicial eye and strengthened judicial hand would certainly do something to temper the brashness of the compliance game.

It is here that the character theory of corporate punishment and the due diligence defense that others have proposed are importantly different.⁴⁹ A due diligence defense would only further remove judges from the process. It would allow a corporate criminal to escape conviction by arguing that, even though some employee committed crime, the employer genuinely cared about compliance.⁵⁰ As a theory of punishment (and not of liability), the character

37 (2018).

43. Caulfield & Laufer, *supra* note 1, at 120.

44. *Id.* (citing William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 413 (2017)).

45. Diamantis, *supra* note 2, at 569.

46. Professor Laufer has expressed his concern about the shortage of genuine moral indignation at corporate misconduct. *See* Laufer, *supra* note 44, at 413 (“Prosecutors and regulators are often long on moral rhetoric about corporate wrongdoing and short on authentic anger and moral indignation.”).

47. Diamantis, *supra* note 2, at 560.

48. *See, e.g.,* United States v. Fokker Servs. B.V., 818 F.3d 733, 737–38 (D.C. Cir. 2016) (overturning a district court’s effort to invalidate a pre-trial diversion agreement that was too lenient).

49. *See* Caulfield & Laufer, *supra* note 1, at 121 (“[H]ow does corporate character differ from the requirements of a due diligence defense?”).

50. *See* William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*,

theory I advocate would not make such a defense available. Rather, corporations could be convicted despite claiming to have robust compliance processes. The question of corporate character and the adequacy of corporate compliance would then go to the sentencing judge.

I could sum up everything I have just written more concisely: Matt and Bill, I agree. I have not done enough to define or defend corporate character. I need to do more. And I am grateful for the encouragement to do so. I think character theory could eventually be a new way of evaluating corporations and their (mis)conduct. Your Response is the occasion for me to reflect on how to make it so.