The Effects of Shareholder Primacy, Publicness, and "Privateness" on Corporate Cultures

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There is widespread belief in both scholarship and business practice that internal corporate cultures materially affect economic outcomes for firms. An often-quoted book on management has argued that "the only thing of real importance that [business] leaders do is to create and manage culture."[1] A recent academic survey found that 51% of executives sampled consider corporate culture as a top three "value driver" at their companies, and another 27% say it is in the top five; a whopping 91% of them say that improving their corporate culture would increase their firm's value.[2] This has become an explosive subject of academic research as well. A prominent 2011 literature review on the connections between corporate culture and organizational effectiveness initially identified some 4,600 scholarly articles from which to draw,[3] a number that would be far larger today.

In turn, there is also a growing belief that corporate governance arrangements materially affect corporate cultures. If this is true, it suggests an intriguing three-link causal chain: governance choices influence

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1. EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 11 (3d ed. 2004); *see also* Boris Groysberg et al., *The Leader's Guide to Corporate Culture: How to Manage the Eight Critical Elements of Organizational Life*, HARV. BUS. REV., Jan.–Feb. 2018, at 44.

2. *See* John R. Graham et al., *Corporate Culture: Evidence from the Field* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 23255, 2017).

3. *See* Chad A. Hartnell et al., *Organizational Culture and Organizational Effectiveness: A Meta-Analytic Investigation of the Competing Values Framework's Theoretical Suppositions*, 96 J. APPLIED PSYCH. 677, 682 (2011). For more information on the same subject published more recently, see generally Elizabeth A. Martinez et al., *Organizational Culture and Performance*, 105 AM. ECON. REV. 331, 333–34 (2015) (assessing links between culture and performance).

corporate performance, at least in part via their effects on internal culture. This Article explores that possibility. The topic is important to lawyers and legal scholars because of the symbiotic nature of law and governance with an increased risk of enhanced corporate criminal and civil liability when cultures are judged to be deficient.[4] Finding the right place for culture in governance is a heavy lift, deeply rooted in the intense academic and political battles about agency theory, shareholder primacy, and corporate social responsibility. As such, the aim of this Article is to explore the many ways corporate governance and culture are studied; to compare and contrast theories about what corporate culture is and how it works; and to study the ways in which it is influenced, and in turn influences, general social beliefs about economic power and privilege.

By many accounts today (though hardly without controversy), the dominant norm in American corporate governance is shareholder primacy. As a result of the combined forces of law, culture, and economic incentives, managers are to act intently for the wealth-maximizing benefit of their shareholders. The theoretical justification for this truncated autonomy is that managers are naturally self-interested, requiring monitoring of various sorts in the name of (if not by) its shareholders in order to minimize opportunism in the exercise of power. To enthusiasts for this principal–agent model of governance, this embrace of the shareholder primacy norm in the last three or four decades has paid off in greater productivity, innovation, and capital formation. Many in financial economics and corporate law, thus, now take it as a normative given.[5] To them, the arguments are only about whether we need to empower and protect shareholders a bit more, less, or whether we have it about right to achieve optimal shareholder wealth over the desired time frame and unit of measurement.[6]

Against this enthusiasm, many sociologists and some legal scholars argue that the coupling of shareholder primacy and shareholder

4. *See* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 944–49 (2017) [hereinafter Langevoort, *Cultures of Compliance*]. As discussed *infra*, the connection between culture and legal compliance programs has become a substantial subject of discussion in law and management studies, about which I have written a good deal. In the U.S., assessments of culture matter at least in terms of prosecutorial discretion and punishment, and increasingly via positive regulatory mandate. *See id.* at 940–44. Outside the U.S., the legal consequences of flawed corporate cultures are increasingly more explicit, if perhaps not all that aggressively enforced. *See generally* Jennifer G. Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (European Corporate Governance Institute, Law Working Paper No. 431/2018; Sydney Law School, Research Paper No. 19/03, 2018) (tracing the growth of interest in cultures in different corporate law systems).

5. *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (providing a distinguished example of the embrace of shareholder primacy and a description of its benefits).

6. So, the debates over long- and short-termism, and about market prices as an accurate (or at least best available) measure of fundamental value in the long run are still inconclusive.

empowerment is toxic, with corrosive consequences for society in general and the long-run interests of firms themselves. They worry that corporate leaders have come proudly to self-identify as zealous agents for their shareholders and attack the myths associated with principal–agent theory insofar as it normalizes unfettered profit-seeking and gross income inequality.[7] Demanding investors who applaud such managers—and the financial markets they drive through active trading in various financial instruments—are, in this portrait, sheep-clothed enemies of the public good. A substantial and increasing amount of popular and public discourse about greedy short-termism gives voice to this, as we shall see.

Naturally enough, the sociologists and their acolytes in law view these aspects of governance entirely through the lens of culture. To those steeped in neoclassical economics, on the other hand, culture studies are too soft and mushy to have anything of use to offer compared to understanding the rational incentives that drive managerial and investor behavior. But, that assumption has been weakening for some time.[8] The particular inspiration for my Article came from reading a recent series of papers in financial economics purporting to find that shareholder empowerment in corporate governance tends, as sociologists fervently predict, to degrade previously ethical corporate cultures. A study by Professors Guiso, Sapienza, and Zingales (GSZ) finds a significant positive correlation for publicly traded companies between survey-based indicators of how employees view the integrity of senior management and the firm's financial performance going forward, value not immediately impounded in stock price.[9] More pointedly, they find that privately owned firms have higher integrity scores on average than otherwise comparable public ones with large institutional investor block ownership.[10] Culture, they argue, best explains these results, which implies that reducing shareholder empowerment would help restore integrity to corporate cultures. The authors are appropriately cautious about their findings, asking mainly that they provoke an intensive research agenda into the

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7. For an excellent book-length account, see generally GERALD F. DAVIS, MANAGED BY THE MARKETS: HOW FINANCE RESHAPED AMERICA (2009).

8. For a review, see Quentin Dupont & Jonathan M. Karpoff, *The Trust Triangle: Law, Reputation, and Culture in Empirical Financial Research*, J. BUS. ETHICS, June 20, 2019, at 1, https://doi.org/10.1007/s10551-019-04229-1 [https://perma.cc/RT53-4KF4].

9. Luigi Guiso et al., *The Value of Corporate Culture*, 117 J. FIN. ECON. 60, 65–66 (2015) [hereinafter GSZ]; *see also, e.g.*, Jillian Grennan, A Corporate Culture Channel: How Increased Shareholder Governance Reduces Firm Value 3 (March 29, 2019) (unpublished manuscript) (on file with Seattle University Law Review); Andrew von Nordenflycht, The Public Corporation—Friend or Foe of Professional Ethics? Ownership and Ethics in Securities Brokerage 3 (Apr. 22, 2011) (unpublished manuscript) (on file with Seattle University Law Review).

10. GSZ, *supra* note 9, at 65–66.

economic significance of corporate cultures. From a lawyer's perspective, my Article is in that same spirit.

My conundrum question is this: suppose managerialism triumphed in the governance wars so as to regain its desired level of autonomy from shareholder pressures for boards and managers—would we then expect to see a *cultural* shift inside corporations toward greater honesty and civil engagement, and if so, why?[11] A helpful diagnostic question is to ask how managers currently construe shareholder and market primacy. Have they internalized it as a value or do they instead resent the demands? My argument here leans more toward resentment, though my contribution is more about how to develop a credible hypothesis than how to prove it, which is ultimately an empirical matter.[12] My hypothesis is that corporate cultures ordinarily reflect an inward point of view wherein the perceived (and maybe mythical) imperatives of organizational survival and success become the dominating values, not serving shareholders or anyone else. Culture is deeply self-protective. If so, more unfettered managerialism in pursuit of better corporate cultures would not be such an appealing solution, and indeed might just produce a different form of rent-seeking.[13]

This then takes us to a second front in the governance wars.[14] Many legal scholars recently (myself included) have written about the increasing demands of "publicness" on highly salient firms, especially those that are publicly traded.[15] These are external, socially-generated pressures in the name of legitimacy, transparency, accountability, and outsider voice. As to these forces, sociologists and their legal kin are downright enthusiastic. After all, if shareholder primacy degrades corporate culture, then these pressures should have precisely the opposite effect, serving as a channel

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11. *See generally* Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169 (2013) (arguing that shareholder primacy is already giving way to a new managerialist philosophy).

12. *See generally* Claire A. Hill & Brett H. McDonnell, *The Agency Cost Paradigm: The Good, the Bad, and the Ugly*, 38 SEATTLE U. L. REV. 561 (2015) (assessing both the strategic and substantive aspects of the academic debate). I do agree that segments of the investor community pushed the norm of shareholder primacy, at least in part, to enhance their own power and legitimacy.

13. This connects to work in financial economics showing that a shift from public to private status—i.e., a private equity transaction—reduces agency costs. *See* Jesse Edgerton, *Agency Problems in Public Firms: Evidence from Corporate Jets in Leveraged Buyouts*, 67 J. FIN. 2187, 2189–90 (2012).

14. *See generally* Christopher M. Bruner, *Center-Left Politics and Corporate Governance: What is the "Progressive" Agenda?*, 2018 BYU L. REV. 267 (2018) (addressing the complicated nature of the political landscape as between shareholder and stakeholder primacy).

15. For articles dealing with publicness as a concept, see, e.g., Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 340 (2013); Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137 *passim* (2011); Onnig H. Dombalagian, *Principles for Publicness*, 67 FLA. L. REV. 649 *passim* (2015).

by which pro-social instincts are infused into them. This, arguably, is what would rush in to freshen the cultural climate once the swamp of shareholder primacy is drained. But for many of the same reasons that I question the deep normativity of shareholder primacy, I am skeptical of this inference as well.[16]

The remainder of this Article explains these doubts, which requires an introduction to the economics of corporate culture, a subject not yet well appreciated in corporate law. Accordingly, Part I introduces the battle over corporate cultures as part of a broader contestation about primacy in corporate governance, offering a perspective on the meaning of corporate culture, its place in political debates over corporate responsibility, and its usefulness to corporate law. This first Part also tries to define with more clarity the differences between the cultural norms of shareholder primacy and publicness. Part II is introductory as well, turning the reader's attention to the overwhelmingly diverse scholarly perspectives on corporate culture (II(A)) and the essential place of corporate culture within the overarching canopy of social culture (II(B)). Part III moves on to ask about the work being done by corporate culture in terms of both law and governance, and the extent to which this can or should be thought of in functionalist terms. Parts IV and V are the main pay-off: an assessment of arguments in light of all the foregoing about the cultural causes and effects about shareholder primacy, publicness, and "privateness." Part VI concludes with a closer look at the politics surrounding the corporate culture wars.

I. GOVERNANCE AND CULTURE

Matters relating to managerial prerogative vis-à-vis either shareholder rights or societal interests have been a contested intellectual and political battleground for the last fifty years, at least. The fundamental questions are by now familiar ones.[17] Are shareholders or a broader set of stakeholders the intended beneficiaries of corporate law, and why?[18] Then, depending on the response to that first question, what mix of rights and

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16. To be clear, I self-identify as seeking a more public-regarding conception of corporate rights and responsibilities, with shareholder power nonetheless playing a legitimate and important subsidiary role to check a dangerous excess of managerialism. *Cf.* Robert B. Thompson, *Anti-Primacy: Sharing Power in American Corporations*, 71 BUS. LAW. 381 (2015) (articulating a separation of powers analogy).

17. *See generally* RESEARCH HANDBOOK ON SHAREHOLDER POWER *passim* (Jennifer G. Hill & Randall S. Thomas eds., 2015) (multiple chapters offering perspectives on this issue). This includes battling over using stock market prices as the dominating metric for good or bad governance.

18. To be sure, most would agree that the economic system and all its institutions exist for society's benefit. Those who push a strong vision of shareholder primacy believe that it creates better conditions for maximum efficiency, innovation, and optimal social (as well as private) wealth.

responsibilities as among managers, directors, shareholders, and other stakeholders produces the optimal output of the preferred benefit? Students of corporate governance (and readers of the Berle symposia) know that there can be endless mixing and matching of possible answers. Even if shareholder best interest is the chosen goal, for instance, one can be in favor of either more managerial autonomy or greater shareholder power—this is still probably the biggest divide among legal scholars and financial economists. On the other hand, if one thinks that broader public or stakeholder interests deserve primacy, one could still be in favor of more managerial autonomy, more shareholder power, or (most commonly) enhanced stakeholder or government influence.

The debates surrounding the role of the shareholder are mainly academic, but they connect to serious political battling that has been going on for many decades now. The usual historical narrative posits that managerialism held sway for a few decades during the middle part of the last century, enabling managers to share some of the rents with employees, communities, and the government ("benevolent managerialism"), though perhaps also wasting resources in sinecures and inefficiency.[19] Exploring this was Adolf Berle's project back in the day.[20] Nearly everyone now agrees that some kind of inflection occurred around the late 1970s through the 1980s due to a mix of interrelated forces,[21] including, in no particular order: (1) the growth of institutional investors who used their new-found leverage to achieve greater shareholder empowerment vis-à-vis management; (2) the rise of independent directors; (3) advances in the market for corporate control and a shift in the law dealing with control transactions from business judgment to something (in Delaware, at least) more shareholder-regarding;[22] (4) technological change in both production and finance that turned corporate attention to new capital marketplace opportunities; (5) an explosion in scholarship in business and law that was enthusiastically in support of shareholder primacy to counter managerial selfishness (agency costs), the lessons of which became central in business

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19. For a discussion of the behavioral consequences of enhance managerial prerogative, see generally Marianne Bertrand & Sendhil Mullainathan, *Enjoying the Quiet Life? Corporate Governance and Managerial Preferences*, 111 J. POL. ECON. 1043 (2003).

20. For one of many studies of Berle and the problems that interested him, see William W. Bratton & Michael L. Wachter, *Tracking Berle's Footsteps: The Trail of* The Modern Corporation*'s Last Chapter*, 33 SEATTLE U. L. REV. 849 (2010).

21. *See, e.g.*, Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1510–40 (2007).

22. *See id.* at 1520–28. Although Delaware law had a brief period in the mid-1980s that can so be described, it backed off any embrace of hostile control transactions in the *Paramount Commc'ns, Inc. v. Time Inc.* litigation in 1989. 571 A.2d 1140 (Del. 1989). Nearly all other states have already moved to give management more leeway to defeat a bid, no matter how lucrative to shareholders. Of all the forces supposedly pushing in the direction of shareholder primacy, law is probably the weakest.

schools and law schools; (6) far more stock-based compensation for corporate executives; and (7) the stunning growth in the number of American households who invested in common stock, directly or indirectly, and could thus envision themselves as intended beneficiaries. While these were economic shifts, not just cultural ones, it is common to hear claims that the inflection brought about a new culture of shareholder primacy with the sole goal of shareholder wealth maximization.[23] Managers became agents, and shareholders became their principals.

The political skirmishing in corporate governance that continues on today is about the consequences of this inflection, which plays out in the dark shadow of what today is immense public unease about economic fairness and opportunity. The current generation of battlers sort into different encampments that fight under three main banners.[24] On one side are the staunch managerialists who simply want back the autonomy they arguably lost, and to preserve what they still have. They have a small cadre of allies in those who may be attracted to either shareholder or stakeholder primacy but think that strong managerialism is instrumentally the best way to pursue their preferred ends. Together, they fight against committed shareholder primacists who want more rights and greater managerial accountability to investors.[25] We should not over-dramatize: it is not always clear how much value really is at stake as to the specific issues being contested here (e.g., staggered boards, proxy access, shareholder voice, say-on-pay); some of the tenacity seems more about identity and pride than large territorial gains.[26] Still, combatants on each side push hard

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23. For a good discussion of all these changes and the shareholder-regarding culture they produced, see generally DAVIS, *supra* note 7.

24. Many of those leaning more to the conservative side argue that now that managerial and shareholder interests are better aligned via a set of largely non-legal institutions, labor, product, and financial markets can largely be left alone to generate the optimal incentives needed for wealth maximization. Their opponents say that a greater dose of legally-induced shareholder empowerment is still needed to counter a lingering excess of managerial prerogative. *Compare* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993), *with* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004).

25. To describe all this in war-like terms is hyperbole, of course; governance issues in the U.S. have never (at least not yet) received enough sustained public attention for that description to fit. In general, the managerialists are well organized and so have the upper hand in ordinary times. *See generally* Usha Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 435 (2017) (pointing out that corporate law issues normally have low political visibility). Scandals, of course, have long prompted short-term legislative attention to governance abuses, which are the source of much of what we know today as corporate and (especially) federal securities law. *See generally* Bruner, *supra* note 14; Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817, 1820–22 (2007). On how fleeting the effects can be, see generally John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012).

26. *See* Claire A. Hill, *An Identity Theory of the Short- and Long-Term Investor Debate*, 41 SEATTLE U. L. REV. 475, 483–94 (2018) (giving illustrations of identity-driven arguments). Indeed,

to get their way from legislatures, agencies like the SEC, and courts (or at least try to block the same by their opponents[27]), exerting pressure on public and elite opinion to gain leverage.

There is a second front in these governance wars. Those who wanted greater corporate social responsibility in the 1970s and 1980s were seemingly shoved aside as the fight between shareholder advocates and managers became the main event.[28] So stakeholder primacists mostly grit their teeth through the 1990s. In 2001 and 2002, Enron and Worldcom finally gave them their told-you-so moment via what seemed to be shareholder wealth maximization run amok.[29] By this time, the counter-narrative had emerged, in sociology in particular, that treated agency cost theory and shareholder primacy as destructive myths that became deeply internalized as legitimate yet promoted corporate irresponsibility. The culture of wealth maximization had blinded all of us, they claimed, to what was now lost (expectations of benign managerialism in the interest of society as a whole) and the escalating risks that could be justified in the name of enhancing equity portfolios, including managers' own bloated ones. Expectations that managers naturally pursued selfish goals (the justification for the principal–agent model of corporate governance) became dangerously self-fulfilling and normalizing. The global financial crisis a few years later extended that to the problem of systemic risk among financial firms, which brought with it much more pain and angst about whether society had lost its way in the relentless pursuit of wealth for both shareholders and managers.[30]

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there is a good argument to be made that the battling simply creates the illusion that managerial power is being moderated, thereby deflecting responsibility and blame. *See* Marcel Kahan & Edward B. Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 2034–37 (2014) (discussing myths in corporate law). Or maybe stalemate in the battling is good—a recognition that neither side deserves total victory. *See generally* Thompson, *supra* note 16 (discussing virtues of checks and balances in corporate governance).

27. *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011) (challenging the legality of pro-shareholder reforms).

28. During the portion of the governance wars of the late 1970s and 1980s, dealing with the market for corporate control and hostile corporate takeovers, stakeholders (particularly labor, but also local communities) strongly allied with the managerialists and together won many more battles than they lost—indeed, to the point where the incidence of hostile takeovers diminished considerably. But they were being used for the most part; as sociologist critics insist, whatever happened to hostile takeovers, the trend toward shareholder wealth maximization continued along other paths.

29. These were massive financial reporting scandals that resulted in the insolvency of two of the country's largest public companies. *See generally* Donald C. Langevoort, *Technological Evolution and the Devolution of Corporate Financial Reporting*, 46 WM. & MARY L. REV. 1 (2004) [hereinafter Langevoort, *Technological Evolution*] (tracing the causes and consequences of the scandals).

30. On the connections between shareholder influence and losses in the crisis, see generally William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010).

Societal unease with the unchecked pursuit of private wealth and power underlies the distinctive demands of publicness. Publicness is a relatively new label in legal scholarship, if not necessarily a new idea. While publicness can simply refer to the purely regulatory consequences that arise when a firm becomes subject to the mandates of the federal securities laws, the construct is in fact deeply cultural. The label describes the consequences when influential actors in society expect corporate managers and owners to pay attention to public-regarding preferences and not heedlessly pursue selfish corporate objectives. As applied to corporate governance, this commonly comes in the form of insistence on more transparency, openness to others' voices, and accountability for harms that threaten or are felt by persons outside the firm.[31] Publicness is legitimacy-based, claiming that the corporation's right to exercise large-scale economic power comes with a quid pro quo—some sociologists pushing a similar idea call it "social license."[32] Insofar as it has a normative rather than purely descriptive connotation—i.e., that transparency, voice, and accountability are valuable public goods, not just common memes—it shares space with the progressive agendas of corporate social responsibility and sustainability, albeit with more emphasis on the process of governance than particular outcomes.

The idea behind publicness is simple enough. Corporations that fall short of expectations suffer reputationally in many different ways when something serious goes wrong. And the legal consequences that follow will often be harsher because of those perceived shortcomings. Thus, it behooves boards of directors in particular to understand and acknowledge the special challenges that come when avoiding and dealing with potential scandals that implicate these values. Law is a very big part of publicness, in that sometimes these inchoate demands get worked into new legal rules or enforcement of existing rules by regulators and enforcers who share, promote, or are otherwise influenced by those societal values.[33] The

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31. *See* Bruner, *supra* note 14, at 297–303. The original use of publicness in legal scholarship came from comparative administrative law, with the observation of how the demands of transparency, accountability, and voice that had become settled with respect to governmental authorities were being directed to powerful non-governmental organizations as well. *See* Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 30–31 (2009).

32. *See* Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 L. & SOC. INQUIRY 307, 313–22 (2004). As used here, publicness is a term of art for the amalgam of ways managerial autonomy is challenged by external public demands beyond simple law enforcement. It has connections to many scholarly constructs in various fields, such as reputational capital in economics and the "halo effect" in psychology and economics.

33. *See* Jill E. Fisch, *The Mess at Morgan: Risk, Incentives and Shareholder Empowerment*, 83 U. CIN. L. REV. 651, 679, 681 (2015) (analyzing Morgan scandals). *See generally* Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014) (analyzing Morgan scandals).

securities laws are a favored tool for this insofar they address a potent source of private privilege and power (large corporations) with a built-in bias for both transparency and accountability, and some inviting pathways for voice as well via shareholder voting.

A clear manifestation of publicness is the increasing acknowledgement that bolstering a healthy corporate culture is part of officers' and directors' business judgment responsibilities. Growing pressure in this direction has stemmed from noxious compliance (and seemingly cultural) disasters that go back to Enron and the financial crisis and extend forward to contemporary failures at firms like Wells Fargo, General Motors, Volkswagen, and the money center banks caught up in the LIBOR-rigging scandal.[34] The Department of Justice and certain regulatory authorities have stressed that evidence of an unhealthy corporate culture may matter in terms of how painful a sanction is imposed in the event of wrongdoing, or upon whom.[35] There is even more of a buy-in to this in European countries.[36] The Netherlands central bank, for instance, has a team of social scientists (mostly psychologists) trained to spot dysfunctional behaviors and cultures and who can recommend leadership changes as a corrective if needed.[37]

Corporate culture has thus become part of the governance wars on both fronts.[38] Anti-managerialists accuse their opponents in the executive suite of enabling cultures of greed and arrogance that lead to the corporate

34. *See generally* Dan Awrey et al., *Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?*, 38 DEL. J. CORP. L. 191 (2013) (discussing financial crisis scandals); Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, ADMIN. SCI., Sept. 2018 (discussing recent scandals). For recent discussions on how to regulate with a view toward better cultures, see Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 116; Linda K. Treviño et al., *Regulating for Ethical Culture*, BEHAV. SCI. & POL'Y, May 23, 2018, at 57. Both articles point to the pressing need to develop better metrics by which the quality of corporate cultures and climates can be assessed.

35. I have explored the idea of challenges associated with a "culture of compliance" in depth elsewhere and so will not address the cultural dimension of compliance programs to any great extent here. *See* Langevoort, *Cultures of Compliance*, *supra* note 4, at 944–45 and *passim*.

36. *See generally* Hill, *supra* note 4 (comparing jurisdictions around the world).

37. *See generally* DE NEDERLANDSCHE BANK, SUPERVISION OF BEHAVIOR AND CULTURE: FOUNDATIONS, PRACTICE AND FUTURE DEVELOPMENTS 159 (2015); John M. Conley et al., *Can Soft Regulation Prevent Financial Crises?: The Dutch Central Bank's Supervision of Behavior and Culture*, 51 CORNELL INT'L L.J. 773 (2019).

38. This is particularly at the federal level, with efforts to limit the SEC's disclosure authority to matters of financial materiality and the goals of securities regulation to investor protection and (especially) capital formation. *See* DONALD C. LANGEVOORT, SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET, AND THE DILEMMAS OF INVESTOR PROTECTION 108, 164–66 (2016) [hereinafter LANGEVOORT, SELLING HOPE]. As Mark Roe points out, something of a bargain exists among managers, investors, and the state of Delaware to minimize stakeholder pressures on otherwise efficient governance arrangements. *See* Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491, 2493–94 (2005).

scandals we read about with all too much frequency. The managerialists return fire with charges, arguably supported by research like GSZ, of rampant cultural degradation by selfish investors who force managers to obsess over short-term results.[39] These cross-claims imply something (accurately or not) about group-level character and disposition, which in turn affects attributions of responsibility and blame when good or bad things happen. They help portray organizational actors as good guys or bad guys, perceptions that become usable ammunition in the political and legal skirmishing.

Before moving on to examine governance and culture in more detail, note something about the two separate factions against which the managerialists seem to be fighting. In principle (and in fact), those favoring more of a public-facing role for large corporations along the second front should be very wary of those who fight on the other front for more shareholder influence. But, the politics of corporate governance are complicated. Shareholder and stakeholder advocates have a common foe in the managerialists, and the managerialists have considerable political clout. They thus have to fight as allies to avoid a beating, fundamental philosophical differences notwithstanding. As a result, the biggest investors often appear as leading advocates for public-regarding values, and progressives often support greater shareholder rights.[40] Institutional investors like Blackrock—and even more so public pension fund investors[41]—play the publicness game quite openly.[42] As such, shareholder and stakeholder interests can easily get lumped together as kindred challenges to managerial autonomy. And so, any evidence that somehow associates increased shareholder rights with bad culture, fairly

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39. As past Berle symposia contributions have amply shown, many commentators claim that shareholder primacy and empowerment are the enemy of the common good and, thus, could be expected to join in the celebration of empirical evidence that associates it with a higher incidence of bad corporate behavior. As discussed *infra*, this was the point championed by the late Lynn Stout, both in individual work and joint efforts with Margaret Blair. For significant examples, see generally Stout, *supra* note 11. *See also* Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U. L. REV. 297 (2015); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001).

40. *See generally* Bruner, *supra* note 14 (describing how many forces lead to this complicate political map, which among other things produce a "left-center" embrace of shareholder rights in federal securities law, but an inconsistent-seeming skepticism of shareholder primacy as to matters of the state corporate law).

41. *See generally* DAVID H. WEBBER, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (2018) (exploring the law and politics of labor's use of securities regulation and corporate law devices).

42. In the right circumstances, institutional shareholder pressure—and its influence on stock prices—can be important pathways through which publicness norms spread. *See* Chitru S. Fernando et al., *Corporate Environmental Policy and Shareholder Value: Following the Smart Money*, 52 J. FIN. & QUANTITATIVE ANALYSIS 2023, 2024–25 (2017).

or not, can be appropriated by politically savvy managerialists to claim that more autonomy on the whole—including freedom from publicness in all its manifestations—would bring about healthier corporate cultures and better outcomes for all. This connects to Mark Roe's recent conjecture that the contemporary crusade against short-termism allows executives to deflect responsibility for the economic dislocation palpably felt by the public: "'We're not the problem' . . . . 'It's the short-term traders and the activist shareholders that prevent us from being the good guys we'd really otherwise be. Our hands are tied.'"[43]

II. IN SEARCH OF CORPORATE CULTURE

A. Interdisciplinarity

Now that this Article has introduced the relationship among corporate culture, shareholder primacy, and publicness, the next two Sections explore the diverse scholarly perspectives on corporate culture and pinpoint its essential place within the overarching canopy of social culture. To be clear up front, my aim here is not to assess the consequences for the firm of either shareholder power or publicness. Rather, it is to ask what role culture plays in that process, and what is going on in the collective mindset of the firm. Many scholars, including occasional contributors to prior Berle symposia, have made more direct arguments without resorting to cultural explanations or invoking soft concepts like social construction or legitimacy.[44] For example, they may argue that greater shareholder power leads directly to certain outcomes (e.g., short-termism). Perhaps that is sensible, in the name of parsimony. If incentives and revealed preferences tell a convincing enough story as a matter of theory or empirical observation, why bother with culture? I have some answers, but they will have to wait. The remainder of this still-introductory Section simply takes inventory of the interdisciplinary tools available to study corporate culture once we choose to pay attention to it.[45] Readers already familiar with all this can skip forward.

While there are many definitions of culture in organizational studies, we can think of culture as an internal "system of shared values defining what is important, and norms[] defining appropriate attitudes and

43. Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71, 116 (2018).

44. For a good discussion, see *id.* at 75–82.

45. Legal scholars have drawn from this work for some time, often using it to mount critical attacks on the conservative, *laissez faire* attitudes in corporate law that fail to restrain anti-social corporate norms. An early legal classic is CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975).

behaviors"[46] or, more simply perhaps, "how we do things around here."[47] These are capacious to be sure. At its core, corporate culture deals with taken-for-granted *values* about good and bad, right and wrong, legitimate and illegitimate, in the way the firm conducts its business. Culture extends as well into the more mundane, including styles of speech, appropriate appearance, and the like. These are less important but not inconsequential; expected shirt colors or style of dress might have little meaning in any deep sense, for example, but send a message indirectly about authority and conformity.

This is where assessing the cultural causes and effects of something like shareholder primacy gets hard. First, the general assumption in the literature is that neither owners nor senior management teams can determine the culture (though they surely have a "tone at the top" role in it).[48] We are looking for powerful norms that influence a large portion of managers and others who get work done. And we are looking for beliefs and values that are embraced. Strong shareholder pressure surely has incentive effects: if a small set of large institutional investors can demand the replacement of the chief executive officer (CEO), or ramp up compensation incentives to align managerial preferences with those of transient shareholders, that power will be felt inside the firm. But, there is no reason to assume that norms will shift to legitimize that power. To the contrary, the consequences might be resentment and reactance from the managers whose autonomy lessens.

Indeed, that is the claim I am making here. Particularly as to applied practitioners in law and business, there is a desire for more than this kind of theory or abstraction in invoking culture. Practitioners want the ability to assess, if not actually feel, culture in operation—to understand its content and the routes by which its forces travel. So where to look for useful insights?[49] This is where sociologists and cultural anthropologists claim their authority. Such deep dives, they say, are precisely what their field is good at.[50] Researchers do sustained ethnographic studies inside

46. Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 RES. ORG. BEHAV. 157, 166 (1996).

47. Treviño et al., *supra* note 34, at 60.

48. *See* Langevoort, *Cultures of Compliance*, *supra* note 4, at 939.

49. An excellent recent review along these lines is Jennifer A. Chatman & Charles A. O'Reilly, *Paradigm Lost: Reinvigorating the Study of Organizational Culture*, 36 RES. ORG. BEHAV. 199, 202–13 (2016).

50. For a thought-provoking call for more use of ethnography in corporate governance and law, see generally Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Māori Corporation Walk into a Bar...*, 39 SEATTLE U. L. REV. 353, 357 (2016). For notable examples of corporate ethnography, see for example KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET (2009); ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988); WILLIAM M. O'BARR & JOHN M. CONLEY, FORTUNE AND FOLLY:

individual companies, spending time on the inside to hear their descriptions and stories and identify the myths, routines, ceremonies, and totems that collectively come to define what is legitimate and valued or treated with scorn or disgust. Less intrusive techniques are available as well: structured interviews and surveys to elicit impressions from a wider range of persons in a firm or industry, which can be pieced together into coherent accounts of both commonalities and differences in expressed beliefs.[51]

Large organizations operate on a scale that is hard for any research team to observe in real time, however, which necessarily means that it will be studying just a slice of the enterprise, and only at a particular time. Moreover, it can be difficult to gain access to the most sensitive personnel within an organization or know that they are being candid rather than reciting from internalized scripts. Given these challenges, the risk is that interpretation of culture becomes more art than science, enabling the researchers' own prior assumptions and biases to take hold. First-rate ethnographic work in the corporate area exists notwithstanding these challenges,[52] though the most influential contemporary research in the sociology of corporate behavior appears to be more a mix of theory (e.g., field theory, social constructionism) and data analysis—very much resembling what GSZ does.[53]

While the field of organizational behavior might have been formed under the influence of sociology, today it draws just as much from research in psychology, particularly social cognition. Here, the individual brain becomes the main focus of inquiry into judgment and decision-making inside business organizations.[54] The main tools for understanding

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THE WEALTH AND POWER OF INSTITUTIONAL INVESTING (1992); John M. Conley & William M. O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 L. & CONTEMP. PROBS. 5 (1997). More generally on research challenges, see DAVID A. WESTBROOK, NAVIGATORS OF THE CONTEMPORARY: WHY ETHNOGRAPHY MATTERS (2008); Greg Urban & Kyung-Nan Koh, *Ethnographic Research on Modern Business Corporations*, 42 ANN. REV. ANTHROP. 139 (2013).

51. *See* Garry C. Gray & Susan S. Silbey, *Governing Inside the Organization: Interpreting Regulation and Compliance*, 120 AM. J. SOC. 96, 106–07 (2014) (using both ethnography and structured interviews to study compliance practices).

52. *See* Marina Welker, *Notes on the Difficulty of Studying the* Corporation, 39 SEATTLE U. L. REV. 397, 404–06 (2016).

53. For examples of these mixed methodologies, see Neil Fligstein, *The Theory of Fields and Its Application to Corporate Governance*, 39 SEATTLE U. L. REV. 237 (2016); Jiwook Jung & Frank Dobbin, *Agency Theory as Prophecy: How Boards, Analysts and Fund Managers Perform Their Roles*, 39 SEATTLE U. L. REV. 291 (2016).

54. An excellent discussion of the divide between sociology and psychology in organizational behavior with a welcome stress on ways it might be bridged is Barry M. Staw & Robert I. Sutton, *Macro Organizational Psychology*, *in* SOCIAL PSYCHOLOGY IN ORGANIZATIONS 350, 353 (J. Keith Murnighan ed., 1993). More recently, with a focus on culture and other forces at work in determining responses to legal demands, see Ruthanne Huising & Susan S. Silbey, *From Nudge to Culture and*

perception and choice are controlled laboratory experiments. Of particular relevance to thinking about legal compliance is the burgeoning sub-discipline of behavioral ethics—judgment and decision-making in choices about right and wrong, including obedience to law.[55] There are massive numbers of interesting studies, which in turn are described in a number of very accessible books and extensive literature reviews of behavioral ethics by prominent psychologists and management scholars.[56] Legal scholars have drawn extensively from social cognition and the study of managerial traits to shed light on numerous issues of corporate governance and compliance.[57]

There are severe methodological challenges to the use of psychology in organizational behavior as well. However, even if sound in experimental design, experiments may fail to capture the social richness and incentive structures found in complex organizations. The individual's behavior, or at best small group behavior, is the focus of study. This methodological individualism means that culture is thereby diminished in importance. There may also be concern that decision-making in business settings is by people who have been selected for and survived the rigors of competition and are thus not representative of the more random sampling that generates subjects for psychology experiments.

So, culture remains slippery to grab hold of, leading to some inevitable methodological accommodations to gain traction. Some psychologists working on organizational behavior, for example, simply assume from common sense or anecdotal observation that the same heuristics and biases found in individual judgment will naturally be replicated in corporate cultures, perhaps even amplified.[58] That is, if people generally work hard cognitively to maintain—accurately or not—a self-conception as good, law-abiding citizens, we would expect to find the same work being done for the firm by its internal culture.

Other empirical work in organizational behavior tries to get at culture indirectly. "Upper echelon" research focuses on the impact of firm leaders on corporate behaviors, following up on a long-standing debate between

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Back Again: Coalface Governance in the Regulated Organization, 14 ANN. REV. L. & SOC. SCI. 91, 105–07 (2018).

55. For a recent overview, see generally YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR (2018); LANGEVOORT, SELLING HOPE, *supra* note 38, at 28.

56. *See, e.g.*, EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE COLLAR CRIMINAL 135–37 (2016); Nicholas Epley & David Tannenbaum, *Treating Ethics as a Design Problem*, BEHAV. SCI. & POL'Y., May 2017, at 73; Treviño et al., *supra* note 34; Linda Klebe Treviño et al., *(Un)ethical Behavior in Organizations,* 65 ANN. REV. PSYCH. 635 (2014).

57. Myself included. *See* Langevoort, *Cultures of Compliance*, *supra* note 4, at 950–51.

58. For a good survey, see generally Norbert Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCH. REV. 687 (1996).

those who think leadership drives both culture and choice and those who deem leaders to be largely of symbolic or ceremonial significance. Numerous researchers seek proof in one direction or the other; one recent study confidently found a clear link running from individual CEO personality characteristics relating to adaptability and attention to detail to the prevailing culture, for example, and then from culture to objective measures of financial performance.[59] That finding sounds a lot like financial economics.

Economists arrived late to culture studies; in neoclassical economic models, as noted earlier, culture was thought to offer little of use given the commitment to rational expectations and revealed preferences. But for the last few decades, more and more economists, too, have come to accept that there are powerful connections between culture of various sorts and economic outcomes.[60] They see corporate cultures as a potentially efficient means of coordinating complex activity and, perhaps, countering both agency costs and free rider problems.[61]

Unlike sociologists and cultural anthropologists, economists are dedicated functionalists with efficiency as the prime criterion, and they are more likely to make inferences about culture from observable inputs and outputs than subjective assessment. As data sources become bigger and more manipulable, these observations become more intriguing. A good example is a study showing that firms with CEOs who benefit from suspicious and possibly illegal activity (options backdating) are more likely to engage in unrelated misbehaviors as well, signaling an unethical culture.[62] In addition to economic, sociological, and psychological studies on corporate cultures, there are other cross-disciplinary approaches as well. Behavioral ethics has particularly interesting insights that, for

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59. *See* Charles A. O'Reilly, III et al., *The Promise and Problems of Organizational Culture: CEO Personality, Culture, and Firm Performance*, 39 GROUP & ORG. MGMT. 595, 607 (2014).

60. Earlier work by GSZ focused on general cultural forces and their impact on economic behavior. Luigi Guiso et al., *Does Culture Affect Economic Outcomes?*, 20 J. ECON. PERSP. 23, 25–30 (2006). They connect general culture and corporate culture in Luigi Guiso et al., *Corporate Culture, Societal Culture, and Institutions*, 105 AM. ECON. REV. 336, 337–38 (2015).

61. *E.g.*, David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 93 (James E. Alt & Kenneth A. Shepsle eds., 1990); Ernst Fehr, *Behavioral Foundations of Corporate Culture* 2–4 (UBS Int'l Ctr. Of Econ. In Soc'y Public Paper No. 7, 2018). For my commentary, see generally Donald C. Langevoort, *Opening the Black Box of "Corporate Culture" in Law and Economics*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 80 (2006) [hereinafter Langevoort, *Black Box*] (discussing adaptive theory of cultural content).

62. Lee Biggerstaff et al., *Suspect CEOs, Unethical Culture and Corporate Misbehavior*, 117 J. FIN. ECON. 98, 99–100 (2015); *see also* Robert Davidson et al., *Executives' "Off the Job" Behavior, Corporate Culture and Financial Reporting Risk*, 117 J. FIN. ECON. 5, 7 (2015).

example, support some of the predictions of conventional economics.[63] Advances in cognitive neuroscience—the newest wave of behavioral research[64]—show some early promise as well in assessing the impact of culture on group beliefs and social behaviors.[65]

All these different ways of getting at corporate culture produce a useful ecological diversity. But purists in each discipline too often seem not to read each other, much less collaborate, and we have noted some of the mutual mistrust directed at the respective methodologies. Sociologists and anthropologists draw a fairly hard line to push back against causal accounts and lessons that focus on individual-level behaviors and interventions rather than social forces. Famously, they treat the standards and metrics economists use—market efficiency and principal-agency conflicts, in particular—as the products of social construction manifesting themselves in observable behaviors only because they are believed to be true—Robert Merton's idea of the self-fulfilling prophecy played out in markets.[66] That, in turn, makes conventional economists' collective heads explode. Here is where the governance and culture battle lines form.

B. Corporate Cultures Inside Social Culture

Corporate culture operates within an overarching canopy of social culture. To be sure, some law-oriented discussions of corporate culture simply seem to assume that shared values and beliefs are entirely firm-specific, so that all the interesting and important instigators of cultural differences are at work inside the boundaries of a given firm. That can be true almost by definition. Corporate cultures are the belief systems that operate with respect to the firm and its activities, so they are necessarily internal to it. But that focus misses something very important.

63. For a thorough discussion, see Eyal Zamir, Reinforcing Law and Economics: Behavioral Support for the Predictions of Standard Economic Analysis (Hebrew Univ. of Jerusalem Legal Research Paper No. 18-17, 2018) (on file with Seattle University Law Review).

64. On the promise and limits of neuroeconomics, see generally Carlos Alós-Ferrer, *A Review Essay on Social Neuroscience: Can Research on the Social Brain and Economics Inform Each Other?*, 56 J. ECON. LIT. 234 (2018); Owen D. Jones, *Brain Perspectives on Investor Behavior and Decision-Making Errors*, 41 SEATTLE U. L. REV. 349 (2018). For a useful introduction to neuroeconomics, see generally ROBERT M. SOPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT THEIR BEST AND WORST (2017).

65. For an interesting commentary on the role of "groupishness" in organizational ethical behavior points to the role of oxytocin in the human brain, see Jesse Kluver et al., *Behavioral Ethics for Homo Economicus, Homo Heuristicus, and Homo Duplex*, 123 ORG. BEHAV. & HUM. DECISION PROCESSES 150, 154 (2014) (noting that "[a]ll of these consequences of the release of oxytocin serve a group-related purpose—namely, they serve to bind individuals to highly cooperative higher-level units, often in the service of outcompeting other groups").

66. *E.g.*, Jung & Dobbin, *supra* note 53, at 319 (following Merton). For a somewhat less critical view, see generally Ezra Zuckerman, *Market Efficiency: A Sociological Perspective*, *in* THE OXFORD HANDBOOK ON THE SOCIOLOGY OF FINANCE 223 (Karin Knorr Cetina & Alex Preda, eds., 2012).

As anthropologist Greg Urban stressed in an essay for an earlier Berle symposium, firm boundaries are actually very porous when it comes to external cultural influences.[67] From CEOs on down, employees bring multiple aspects of the broader "outside" social and economic culture to work with them each day. Urban notes that this is essential to business success. Acute awareness of marketplace opportunities, risks, and trends requires being in synch with these broader social forces and their normative content. Individual corporate cultures (and industry cultures, etc.) are better seen as subcultures in motion within this complicated societal fabric, not discrete or insular phenomena. Indeed, as we shall see, the dominant sociological account of the corporate culture treats it as part of the much larger fabric of social culture, of which any given corporate culture is but a part.[68]

Many important legal scholars have drawn useful insights for how corporate law operates (or should operate) from the assumption that general social norms strongly influence corporate behavior. John Coffee once suggested that the likelihood of minority shareholder abuse probably correlates fairly closely with perceived level of social cohesion, suggesting a top-down effect of general norms of law-abidingness translating into norms of corporate behavior.[69] Ed Rock famously developed a shaming theory of how Delaware case law works. It often subjects defendants to meaningful public criticism—even while absolving them from actual liability.[70] The lively scholarship of corporate "publicness," with which we began, stresses the behavioral demands that come from social expectations about the terms and conditions that go with the exercise of corporate power.[71]

In financial economics, there are many scholars exploring the causal links between various manifestations of general cultural belief (e.g.,

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67. *See also* Greg Urban, *Corporate Compliance as a Problem of Cultural Motion*, 69 RUTGERS U. L. REV. 495 (2017) (extending ideas to corporate compliance). *See generally* Greg Urban, *Corporations in the Flow of Culture*, 39 SEATTLE U. L. REV. 321 (2016) (discussing interplay of social and corporate norms).

68. This is a main point in the survey by Dupont & Karpoff, *supra* note 8.

69. *See* John C. Coffee Jr., *Do Norms Matter:? A Cross-Country Examnination of the Private Benefits of Control*, 149 U. PA. L. REV. 2151 (2001) (concluding that norms may be more powerful than constitutive legal rules).

70. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1047–49 (1997).

71. For other law-oriented discussions of corporations and cultural norms, see generally, e.g., Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001); Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251 (2002).

religiosity[72] and politics[73]) and corporate financial decisions or performance. These studies suggest that firms whose principal office is located in a geographic area with distinctively liberal or conservative views, for instance, make different business and financial decisions from peer firms in different locales. GSZ makes a brief reference to the fact that a disproportionate number of high integrity firms in their sample were from the southern part of the U.S.[74]

To the extent that these external social norms are healthy ones, this is a good thing. If social norms strongly tend toward trustworthiness, cooperation, and law-abidingness, the corporate culture has less work to do in eliciting the same behaviors inside the firm.[75] There will be little or no role conflict; employees will be happier and more productive. The late Lynn Stout was a forceful advocate for getting rid of the detritus of shareholder primacy so that directors can follow their natural pro-social instincts rather than be made slaves to the production of quarterly earnings growth and high stock prices.[76] This seems to be the GSZ inference, too.

However, two concerns arise from the influence of external social norms. One is that broader social norms may not necessarily be healthy; we can all readily think of aspects of our prevailing culture that corporations might want to select against rather than for in seeking managerial talent: disrespect for authority, conspicuous consumption, excessive individualism, and self-centeredness.[77] Worse, there are some countries and regions where the prevailing culture goes so far as to normalize individual corruption.[78] For instance, a securities firm might

72. On the role of religious beliefs in corporate governance, see generally Mufaddal Baxamusa & Abu M. Jalal, *CEO's Religious Affiliation and Managerial Conservatism*, 45 FIN. MGMT. 67 (2016); Gilles Hilary & Kai Wai Hui, *Does Religion Matter in Corporate Decision Making in America*?, 93 J. FIN. ECON. 455 (2009); Sean T. McGuire et al., *The Impact of Religion on Financial Reporting Irregularities*, 87 ACCT. REV. 645 (2012).

73. *See, e.g.*, Ahmed M. Elnahas et al., *CEO Political Ideology and Mergers and Acquisitions Decisions*, 45 J. CORP. FIN. 162, 163–64 (2017); Irena Hutton et al., *Political Values, Culture, and Corporate Litigation*, 61 MGMT. SCI. 2905, 2906 (2015).

74. GSZ, *supra* note 9, at 73.

75. *Id.* For example, there will be more trust of corporate disclosures in countries where the culture is more trusting generally. *See* Mikhail Pevzner et al., *When Firms Talk, Do Investors Listen? The Role of Trust in Stock Market Reactions to Corporate Earnings Announcements*, 117 J. FIN. ECON. 190, 190–93 (2015).

76. LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAW MAKES GOOD PEOPLE 94–118 (2011).

77. A particularly pertinent example is that one firm's fraud increases the likelihood of fraud on the part of other companies located in the same urban area even though they are in different lines of business and do not compete. In other words, being proximate to yet-undetected misbehavior is a motivator to cheat too. *See* Christopher A. Parsons et al., *The Geography of Financial Misconduct*, 73 J. FIN. 2087, 2087–88 (2018).

78. *See* Xiaoding Liu, *Corruption Culture and Corporate Misconduct*, 122 J. FIN. ECON. 307, 308–09 (2016). Amir Licht has done important work connecting national culture to many aspects of

consciously try to de-emphasize sales pressure in customer interactions via ethics training, only to run up against resistance from financial advisers who interact frequently in their home locales with peers in other firms who continue to associate inflated sales with status and success. The corporate culture will have to push back against these unwanted pressures.

The other concern—and the potentially more insidious one—is that these healthy social norms come to be seen as inconsistent with the perceived "what it takes" to succeed. The firm may want hyper-motivation, risk-taking, and competitive arousal in doses well beyond what ordinary candidates display. It will select for the extraordinary candidates along these dimensions, of course, but may also have to attract others and acculturate them into the desired mindset. If so, corporate culture is now doing a very different kind of work. We shall play out this story in the next sections because it has much to say about the manageability of corporate culture—for both good and bad. The idea that boards and executives cannot possibly have meaningful control over all the external cultural forces at work inside the organization injects a useful cautionary note in discussions about the legal responsibility to manage culture.

Neither can we assume that the corporate culture operates uniformly or effectively throughout the corporation. Localized subcultures can emerge at odds with what is believed or valued elsewhere in the firm, and there will be individual defectors (perhaps many) who do not get, and may actively resist, the preferred messages. A study of the "Nut Island" effect tells the story of an award-winning unit of the Boston Harbor waste disposal authority that came to resist oversight from what it regarded as illegitimate supervision, turning that aim into such a potent belief that it ultimately put raw sewage into the harbor rather than acknowledge the need for help from above.[79] We will come back to this in exploring how culture is transmitted inside organizations.

It is also worth stressing the connection between peer cultures and boundaries of the firm. In sociology and financial economics, researchers have demonstrated the ease by which both information and ideas travel

corporate governance and behavior. *See, e.g.*, Amir N. Licht, *Culture and Law in Corporate Governance*, *in* OXFORD HANDBOOK ON CORPORATE GOVERNANCE AND LAW (Jeffrey Gordon & Gorge Ringe eds., 2018).

79. *See* Paul F. Levy, *The Nut Island Effect: When Good Teams Go Wrong*, HARV. BUS. REV., Mar.–Apr. 2001, at 51. *See generally* Niki A. den Nieuwenboer et al., *Middle Managers and Corruptive Routine Translation: The Social Production of Deceptive Performance*, 28 ORG. SCI. 781 (2017) (discussing conscious disregard of supervisory rules by sub-unit).

from firm to firm via network linkages[80] and governance overlaps (e.g., directors who serve on multiple boards, law firms that serve multiple clients, etc.). Innovations in governance tools, like poison pills for fighting off would-be acquirers[81] or options backdating to make employee stock options more lucrative to the grantees,[82] for example, have been shown to travel both of those pathways to determine who would be early adopters and who would be late or not adopt at all.

These diverse perspectives suggest that it is overly simple to frame questions about corporate cultures in terms of, say, the influence of the CEO on the organization's culture. And even if that is the focus, what drives the CEO's perceptions and beliefs? A CEO who runs in social or political circles that celebrates shareholder culture, religiosity, social service, or inflated entitlement may be moved by those values enough to try to influence the firm to pursue them as well. Whether he or she will succeed is far from clear. We desperately need a theory about how corporate culture forms and changes (or resists change) and the evidence to back it up.

III. FUNCTIONALISM

Having surveyed the meaning and role of corporate culture in various disciplines and debates, we can now wade into deeper waters about the work being done by corporate culture for law and governance. The relatively more recent contributions by economists to the study of corporate cultures posit that cultures exist and persist to the extent that they do useful work in promoting competitive marketplace success.[83] They generate efficiencies. In developing their hypothesis about corporate integrity, for example, GSZ spun out an interesting story. They assume that certain ethical commitments (keeping your word, loyal customer service) have long-term financial value but are constantly under short-term stress.[84] All other things being equal, turning these strategies into non-negotiable cultural values inside the firm helps maintain internal coherence and resist these stressors. But when the firm is publicly-held,

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80. *See generally* Andrew J. Hoffman, *Linking Organizational and Field-Level Analyses: The Diffusion of Corporate Environmental Practice*, 14 ORG. & ENV'T 133 (2001) (offering a cultural account of how environmental practices spread in firms and industries).

81. *See generally* Gerald F. Davis & Henrich Greve, *Corporate Elite Networks and Governance Changes in the 1980s*, 103 AM. J. SOC. 1 (1997) (discussing takeover defenses).

82. *See generally* John Bizjak et al., *Options Backdating and Board Interlocks*, 22 REV. FIN. STUD. 4821 (2009) (discussing executive compensation practices).

83. Sociologists have generally been viewed as anti-functionalist, but this is not essential. For an assessment of the state of knowledge on corporate cultures in terms of functionalism or not, see Chatman & O'Reilly, *supra* note 49, at 205–06.

84. *See* GSZ, *supra* note 9, at 62–63.

the stress is harder to resist: the stock price fails to reflect the hard-to-value norms, and so executive compensation and retention incentives shift greater attention to the shorter-term.[85] This is a familiar argument in the long-term versus short-term debate in corporate law. The disclosure demands associated with public status make it harder to enforce internal norms when violated. This is because investors and other external stakeholders fear that the disclosed violation may just be the "tip of the iceberg," indicating more problems ahead. In the absence of such enforcement, the culture is more likely to devolve via loss of integrity. From this they hypothesize that more CEO power vis-à-vis shareholders (as proxied by relatively larger compensation packages) should correlate positively with integrity, which they find to be the case.

While surely insightful, GSZ's story begs all sorts of questions: is the top-down inculcation of values really how it works; is integrity really the long-term value maximizing strategy for a firm, or is it instead Oliver Williamson's famous "opportunism with guile";[86] is the market (or are large investors) really unable to value corporate reputation on a forward-looking basis? GSZ assumes that the market eventually learns of the value, so why wouldn't that already have occurred with enough prior experience? Their response to all of these questions, of course, is the empirical evidence: the positive correlation between integrity and subsequent performance; the negative correlation between integrity and large share ownership. Acknowledging that there is still much more to figure out, they conclude, is at least a "first cut" that their story holds up.[87]

Economists' approach to corporate culture is mostly theory-driven, albeit with some loosening of the strict assumptions underlying neoclassical economic theory.[88] In competitive markets, culture is of importance to the extent that it makes firms better able to survive and thrive. Cultural content will vary from firm to firm, but inferior cultures will gradually be weeded out in favor of more adaptive ones. So, what would inferior or adaptive mean? As noted, the standard answer focuses on transaction costs.[89] Efficient organizational behavior requires the coordination of a potentially immense number of agents. If there is

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85. On this dynamic with respect to investments in compliance, see generally Jeffrey N. Gordon et al., *Taking Compliance Seriously* (Columbia Law & Econ., Working Paper No. 588, 2018).

86. *See* Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453, 458 (1993).

87. GSZ, *supra* note 9, at 75.

88. *See generally* Kreps, *supra* note 61 (discussing coordination function); *see generally, e.g.*, THE INTERNATIONAL HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE (Cary Cooper et al. eds., 2001); Eric Van den Steen, *On the Origin of Shared Beliefs (and Corporate Culture)*, 41 RAND J. ECON. 617 (2010); Jesper B. Sorensen, *The Strength of Corporate Culture and the Reliability of Firm Performance*, 47 ADMIN. SCI. Q. 70 (2002).

89. *See* Fehr, *supra* note 61; Langevoort, *Black Box*, *supra* note 61.

considerable disagreement among these agents as to what is true, or important, or legitimate, coordination will bog down in the face of countless negotiations of reality. By hypothesis, then, a valuable corporate culture is one that better puts everyone on the same page.

That, by itself, says nothing about the content of those beliefs. But the same theory suggests that particular belief systems will be favored insofar as they more effectively motivate or enable competitive activity. Most economists assume that rational perceptual accuracy characterizes successful economic actors. But especially from among behavioral economists, the possibility was raised that there could be adaptive heuristics and biases at work in corporate cultures that depart from steely-eyed realism in favor of more motivational belief systems. The most obvious possibility is the optimistic, "can do" culture that has an excess (though not to a dangerous extreme) belief in the ability of the firm to prosper even against the odds.[90] Such cultures might promote perseverance, risk-taking, and long-term thinking that are rewarded on average as against more cautious, angst-laden competitors, even if the likelihood of occasional bad outcomes is also greater.

This idea matters to both law and governance. Some twenty years ago, I made the speculative claim that overconfidence in managerial behavior and corporate cultures posed a particularly interesting and disturbing legal problem with respect to both liability standards (the application of state of mind tests like good faith and scienter) and the deterrence of corporate misbehavior.[91] Since then, I have written about many different manifestations of these legal problems.[92] Other legal scholars now have as well,[93] with what is now an abundance of support from social scientists. In due course, consideration has been given to other distorted beliefs that might be individually and culturally adaptive as well. In general, I have come to believe that competitive incentives favor cultures that promote in-group loyalty, aggression toward out-groups, and

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90. *See generally* Langevoort, *Black Box*, *supra* note 61 (concluding group beliefs promote marketplace success). A large amount of literature exists on over-optimism as a stable and adaptive bias, though most of it focuses on individual cognition and behavior. A prominent formalization of this is Roland Bénabou & Jean Tirole, *Self-Confidence and Personal Motivation*, 117 Q.J. ECON. 871 (2002); *see also* Anand M. Goel & Anjan V. Thakor, *Overconfidence, CEO Selection and Corporate Governance*, 63 J. FIN. 2737, 2739 (2008). For an early and influential expression of this idea, see J.B. Heaton, *Managerial Optimism and Corporate Finance*, 31 FIN. MGMT. 33 (2002).

91. *See generally* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Investors (and Cause Other Social Harms)*, 146 U. P A. L. REV. 101 (1997).

92. *E.g.*, LANGEVOORT, SELLING HOPE, *supra* note 38, at 26–28, 36–42.

93. Important work utilizing these insights includes DAVID SKEEL, ICARUS IN THE BOARDROOM (2006); Jayne Bernard *Narcissism, Over-optimism, Fear, Anger and Depression: The Interior Lives of Corporate Leaders*, 77 U. CIN. L. REV. 405 (2008); Cynthia Williams, *Icarus on Steroids*, 94 GEO. L.J. 1197 (2006).

the rationalization of moderately selfish transgressions of norms of good behavior.[94] Plenty of literature can now be cited to support these predictions, although most of it admittedly relates to individual cognition and behavior, not culture per se.[95]

This focus on the adaptive culture speaks to the possibility of cultural change: who, if anyone, has the ability to change the prevailing culture away from an excess of profitably self-serving bias? This is a key question for law to ask, given recent emphasis on reforming wayward cultures by imposing top-down responsibility for preventing failures. One discouraging possibility is that cultures are largely resistant to change absent a shock to the system, which is unlikely to be administered by choice if the company is not yet in crisis. An aggressive culture perseveres absent strong negative feedback, which can be lacking during frothy market conditions and low enforcement intensity. Leaders are usually better off wrapping themselves in the culture than fighting against it.

This is a dismal sounding assessment. So, what about GSZ and its more optimistic view that the norm of integrity has adaptive value? My intuition is that it depends on marketplace conditions—where commitment to integrity and service really does have a long-term payoff and can be signaled credibly, it can emerge and persist.[96] But it is inevitably at risk in the "last period" setting, when key actors come to believe, accurately or not, that the firm's or their own personal time horizons are tightening

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94. And that competitive success itself increases these perceptions, at least at the individual level. *See* Amos Schurr & Ilana Ritov, *Winning a Competition Predicts Dishonest Behavior*, 113 PNAS 1754, 1754–59 (2016).

95. The idea of moderation in motivated inference is consistent with the idea that people normally do not become so ethically aggressive as to threaten their self-identity as honest and reasonable; the danger is the slippery slope and other cognitive enablers that prompt a descent into corruption one small step at a time when the right—or better to say, wrong—situational circumstances take hold. *See* John Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1179–87 (2005). For supportive evidence from neuroscience, see generally Neil Garrett et al., *The Brain Adapts to Dishonesty*, 19 NAT. NEUROSCIENCE 1727, 1727 (2016). In a recent article, I described the main task of anyone in the firm (e.g., a chief ethics and compliance offer) who wants to counter the temptations of a self-serving culture as having to counter the most pernicious scripts that key corporate agents use to justify themselves and the behavior of others. *See* Langevoort, *Cultures of Compliance*, *supra* note 4, at 955. Tom Tyler's work, in particular, emphasizes that decisions to obey the law require either a strong threat of enforcement or a buy-in to the legitimacy of what is asked. *See generally, e.g.*, Tom Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 257 (2014). If, as is often the case, the threat itself is muted by inadequate enforcement resources or political willpower, then legitimacy dominates. Countering this in the name of good compliance is not easy, especially when the antipathy is deep. Indeed, there is enough dysfunction in lawmaking, regulation, and enforcement to sustain the myths as against arguments otherwise. A company that comes to believe that its business model will accomplish wonders but is being held back by archaic regulatory norms has little difficulty in fostering an aggressive attitude toward opportunism.

96. *See* Thomas M. Jones et al., *How Applying Instrumental Stakeholder Theory Can Provide Sustainable Competitive Advantage*, 43 ACAD. MGMT. REV. 371, 371–73 (2018).

because of intense competition or disruption of their markets. Here, the short game comes to be seen as the only game.[97] Arguably, some firms (and industries) are so fast-paced that they take on permanent "last period" status in terms of the kinds of beliefs and behaviors that are validated and rewarded.[98] Given that their integrity metric was drawn from the "best places to work" survey tool, perhaps GSZ's authors are getting their results about the payoffs from integrity from the less visibly stressed sector of the economy.[99] Or, perhaps a bit more disturbingly, reputations are sticky, so both the internal and external perceptions of the commitment to integrity can persist longer than is justifiable, creating a profitable opportunity in the relative near-term to cash in on the built-up reputational capital.[100] Enron, after all, was a best place to work—number 22 on Fortune's ranking in the year 2000[101]—until it suddenly became bankrupt and deemed a criminal enterprise a year later.

Whatever is going on in the first step in the GSZ analysis, their second inference—that increased shareholder presence or power leads to an erosion in integrity—makes sense under the adaptive culture hypothesis. It seems amply plausible that external shareholder pressure increases internal stress, which challenges the efficacy of the internal "grease" of shared beliefs. High information asymmetry coupled with potentially adverse consequences from bad news, or even not-so-bad news, that cannot be processed with precision (the tip of the iceberg problem to which GSZ alludes) incentivizes disclosure gamesmanship.[102] Here, we can again borrow from psychology. Well-known work by Lerner and Tetlock suggests that accountability can have beneficial effects *ex ante* in resolving agency cost problems. However, it backfires as applied *ex*

97. *See generally* Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 961 (2012) (claiming that most frauds are driven by last period incentives).

98. *See generally* HO, *supra* note 50 (discussing the absence of long-time horizons).

99. GSZ's authors hypothesize that integrity is discovered slowly by the capital markets. *See generally* Alex Edmans, *Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices*, 101 J. FIN. ECON. 621 (2011) (using best places to work data).

100. *See generally* JONATHAN MACEY, THE DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET (2013) (discussing various market failures in the face of reputational checks).

101. *See generally Enron Named a Best Company to Work For*, HOUS. BUS. J. (Dec. 19, 2000), https://www.bizjournals.com/houston/stories/2000/12/18/daily12.html [https://perma.cc/N4P3-Z6RK].

102. In a recent article, I develop an approach to antifraud liability for "soft" statements heavily based by the centrality of perceived credibility and the opportunities for gamesmanship otherwise created. *See* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 984–85 (2019).

post, leading to defensiveness rather than integrity.[103] Where that becomes the inclination, it would be difficult to maintain a healthy culture. Again, this is situational. Firms that are for the moment generating mainly good news can celebrate honestly. But when the internal news turns sour and potentially blameworthy, the temptation to turn to denial and defensiveness strengthens. The gamesmanship (or worse) is thereby legitimized.

All this leads me to a brief observation about "short-termism" in the corporate governance debates.[104] For reasons discussed earlier, I am reasonably well persuaded that integrity is undervalued in the capital markets. Not because integrity is unimportant, but because it is hard to commit to the credibly-given dynamics just described. Some firms overcome the challenge and gain stable and reliable reputations, but most do not. Credibility, then, is a key variable, which when doubted by the marketplace leads to managerial (and cultural) frustration and greater inwardness. One foreseeable managerial response is to take steps to manage impressions better—salient short-term actions that will have a payoff. Cost cutting is a possibility, which can produce the pressures and rationalizations that cause a drop in ethics and heightened compliance risks. That much I concede, is consistent with the empirical observations. Going public generates ethical stress. But it is mainly when managerial credibility is already in doubt that makes it unfair and misleading to attribute any cultural devolution to investor greed or amoral myopia, much less legal norms about serving shareholders. In the end, managers of such firms are as complicit as anyone for setting in motion the kind of internal culture where self-serving visions of success and survival come to dominate. If so, more managerialism would not be a good antidote.

IV. CULTURE AND THE PRIMACY DEBATES

The political push in favor of greater managerialism implies that diminishing the influence of investors would bring about a return to benevolence and a greater focus on the collective long term. Integrity and stewardship values can be restored to cultural prominence. The detritus of shareholder wealth obsession flows out of the system, replaced by cleaner water. So, the managerialists' campaign slogan promises. But our survey of how cultures evolve gives reason for doubt.

The managerialists may be right in their prediction, of course—there are foreseeable political and economic conditions where that *could*

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103. *See generally* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999) (discussing pressures to reveal or cover up).

104. More broadly with respect to arguments about whether short-termism is a problem in the first place, see generally Roe, *supra* note 38.

happen. But if my hypothesis is right that cultures emerge and change organically as survival mechanisms to adapt to perceived conditions,[105] this is hardly assured. Increasing stress is likely to be a constant in a global, technology-driven economy.

Notwithstanding anecdotal evidence, like Enron's positioning of a stock ticker display in its headquarters lobby,[106] I am skeptical that corporate managers ever embraced a norm of shareholder primacy, so much as paying it lip service from within the familiar protections of the business judgment rule. My hypothesis is that corporate managers have a deep-seated suspicion of shareholders, considering them insufficiently knowledgeable about long-term firm value and/or biased by conflicts of interest. In other words, managers understand the power investors have, especially over market prices, but resent it as an unwarranted imposition. *Shareholders are therefore perceived as out-groups, not in-groups*. The just desserts from success are divided up among managers and stakeholders pursuant to a bias on the part of directors that sees the managers as main creators of the value[107] and lesser stakeholders (including shareholders) as mere suppliers of resources who need to be paid. The stock and options in which managers are paid naturally make them want high stock prices—they are by no means indifferent to that which also produces shareholder wealth. But the myth and the resulting motivation ascribe something more sacred to marketplace success, even if objective outsiders might see in this something akin to what psychologists refer to the fundamental attribution bias (i.e., taking excess credit for success, while externalizing blame for failure).[108] This frustration has led to the campaign we identified earlier, pushing back hard to recreate the world of managerial autonomy as against the supposed short-termism of

105. *See* Langevoort, *Black Box*, *supra* note 61, at 92–93 ("My account indeed suggests that corporate cultures can produce behaviors that are largely self-serving responses to their particular economic environment, and in the face of strong competition, make very few trade-offs in pursuit of survival and success"). Along these same lines with specific reference to principal-agency theory, see J.B. Heaton, *The "Long Term" in Corporate Law*, 72 BUS. LAW. 353, 353–56 (2017) (discussing how the battling over corporate law "masks the real battle, one between a rational desire by clear-sighted shareholders for shareholder value maximization, on the one hand, and a desire by the courts and others for corporate *longevity*—i.e., long-term corporate survival—on the other"). Heaton points to the role of cognitive biases in the effort to understand this battle. *Id.* at 366.

106. *See* LANGEVOORT, SELLING HOPE, *supra* note 38, at 37.

107. I made the argument around the time of the scandals that it was no coincidence that most all those firms were in markets characterized by rapid technological change and thus backwards-looking regulatory structures that could easily be rationalized away as dangerously anachronistic in a greased-up culture, leading to a slippery slope of accelerating malfeasance. *See generally* Langevoort, *Technological Evolution*, *supra* note 29.

108. *See* Guoli Chen et al., *Making the Same Mistake All Over Again: CEO Overconfidence and Corporate Resistance to Corrective Feedback*, 36 STRATEGIC MGMT. J. 1513, 1514–15 (2014).

shareholder influence. But as we noted earlier and will soon come back to, there is another way of reading that story.[109]

The historical image of twentieth century managerialism as a golden era wrecked by shareholder primacy may well be a self-serving myth. Brian Cheffins points out in recent work that there is evidence of little scandal and high willingness to contribute to labor peace and maintaining the social infrastructure,[110] but he observes that this was a product of a unique time in American history, with a surplus of rents to collect and spend, not likely to be repeated going forward. I doubt that that time was ever as pro-social as portrayed,[111] but agree with his assessment of its historical contingency to whatever degree it was accurate. Unless coupled with a step up in what government or the public insist on from large firms, the golden era image works mainly as a rallying cry for taking back control along with the rents.

And the latter brings us back to publicness. The hoped-for consequence of the dismissal of shareholder primacy, to many, is to create a vacuum that would be filled with pro-social norms. With enough external pressure and the right political conditions, it could. But, I doubt that such pressure would be any more welcome inside the corporate culture than shareholder demands. At first glance, this should pose no comparable threat to internal culture. Disclosure and accountability are soft and benign sounding demands that would not be likely to generate much internal dissonance, especially when the cultural boundaries of the firm are relatively porous. There is ample evidence that successful engagement with stakeholders in response to the expectations of publicness pay off for perceptive firms.[112]

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109. One of the fundamental assumptions in sociology and anthropology is that beliefs matter greatly in determining social norms (and vice versa), quite apart from whether they are true. *See generally* Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI. KENT L. REV. 1569 (2000) (discussing self-serving myths). Field theory posits that powerful actors will try to co-opt ideas to legitimate rent-seeking behavior. *See* Fligstein, *supra* note 53, at 255–56 (using field theory to explain emergence of shareholder primacy norm).

110. This account is developed in full in BRIAN R. CHEFFINS, THE PUBLIC COMPANY TRANSFORMED 343–98 (2019).

111. The mechanisms that lead to the public exposure of illicit corporate behavior have become far more sophisticated and intensely driven than they were back then; indeed, some of these mechanisms are the product, directly or indirectly, of changes in public capital markets. *See generally, e.g.*, Alexander I. Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010) (discussing incentives to report fraud). And the commitment to pro-sociality was to a distinctly conservative vision of the public good, spreading its benefits very unevenly.

112. *See* Witold J. Henisz et al., *Spinning Gold: The Financial Returns to Stakeholder Engagement*, 35 STRATEGIC MGMT. J. 1727, 1727–29 (2013) (discussing positive financial valuation effects of greater stakeholder engagement). *See generally* Karl V. Lins et al., *Social Capital, Trust, and Firm Performance: The Value of Corporate Social Responsibility During the Financial Crisis*, 72 J. FINANCE 1785 (2017) (discussing the value in pro-social investments).

But at many firms, I suspect, the demands of publicness are also coded as threats, especially when the internal culture feels under attack from outside. The demands can seem harsh and unforgiving,[113] and are thus interpreted as unfair and undeserved in order to maintain cognitive consistency and self-respect. So, they trigger denial and reactance. Honesty is a hard norm to maintain when outside groups demand transparency, accountability, and voice, and those inside (via self-deception or not) come to believe that the truth will be distorted or misunderstood in applying those demands. In particular, elite managers and other incumbents will see publicness as a threat to the efficiency of the internal corporate culture as an extension of their attitudes, beliefs, and preferences. So, my hypothesis would be that many of the concerns about external demands undermining the coherence and efficiency of the internal culture are present with respect to publicness as well.

Again, this depends on how forceful publicness is. I lean in favor of it as valuable to corporate law and governance but have to concede that there are open questions. A largely unexplored aspect of publicness has to do with the efficacy of the demands—Do they actually pay off in a meaningful way for stakeholders and society, if not in dividends or capital appreciation? Publicness is hard to measure empirically. Maybe measures of social responsibility and sustainability are workable proxies for publicness. However, the state of the art of assessing its embrace and sustainable commitment (and who it benefits) is still early-stage. For all the skirmishing in the aftermath of multiple scandals in the last two decades, transparency remains limited, accountability often fails dramatically, and outsider voices are amplified but still may not matter. We may have what Marcel Kahan and Edward Rock have described as a world of corporate governance that uses symbolic public palliatives to normalize concentrated corporate control with weak effects in terms of outcomes.[114] They can be more about identity politics than real stakeholder influence.[115] If so, the internal corporate invective that the demands of publicness badly fail a cost–benefit test cannot be dismissed as mere defensiveness, even though I suspect it often is. Myths thrive by ingesting grains of truth. The pushback against publicness may overwhelm it so all that would fill the vacuum in the demise of shareholder empowerment is autonomy in the gathering and distribution of rents.

113. *See* Fisch, *supra* note 33; Sale, *supra* note 33.

114. *See* Kahan & Rock, *supra* note 26, at 2036–37.

115. *See generally* Hill, *supra* note 26 (discussing the value of identity-based incentives to fight battles, possibly beyond their economic significance).

V. PRIVATENESS

The cultural effects of external pressures from public shareholders and stakeholders can usefully be assessed by imagining conditions in firms where those pressures are weakest. Firms vary in their susceptibility to the amalgam of legal and extralegal pressures. SEC registrants get a big dose of it for that reason alone. However, a large, closely-held corporation is subject to regulatory demands (including the antifraud parts of the securities laws) and many of the legitimacy demands that come from consumers, politicians, the media, and other stakeholders. Size matters, but the heft of the company's footprint on society does even more. It is all a matter of degree, a recursive loop of law and public salience.

Almost by definition, then, there will also be certain corporations that face less pressure, inhabiting a dimly lit social and economic setting closer to "privateness" than publicness. Corporations gain a greater degree of privateness by avoiding public share ownership, though as just noted, autonomy may be limited by other factors: size, field-specific regulatory intensity, or visibility in public-facing product or labor markets. So, the natural question relating to culture is to ask what we might predict as we move toward greater privateness. Empirical work is less helpful here because private firms generate less data for the variables that might affect culture.[116]

Consistent with the earlier conjectures about how publicness decreases internal culture coherence by challenging the beliefs and power negotiations (self-serving or otherwise) that grease the internal corporate machinery, a plausible assumption would be that privateness at the very least enables a stronger, more coherent internal culture. Private firms face far less pressure to speak publicly about sensitive matters, avoiding the tip of the iceberg problem that GSZ identify.[117] Messages in a relatively closed system are less likely to become mixed or garbled and are more likely to stay on script. Governance need not be negotiated as much.

This prediction, then, aligns with GSZ—on average, cultures in the private ownership space have more stability under stress, producing long-term value when the underlying values are about integrity and care for stakeholders. But I suspect that there is considerable volatility and considerable risk associated with too much privateness. Private firms are

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116. Private companies are also very diverse and under-theorized, so that drawing from some overarching governance paradigm is foolish. *See* Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. (forthcoming 2020). Tech start-ups differ considerably in terms of likely cultural influences from family owned companies that have been around for decades; the latter more likely reflect the mythology of family itself, expanded to include employees as family.

117. *See* Levy, *supra* note 79. *See generally* Nieuwenboer, *supra* note 79 (discussing conscious disregard of supervisory rules by sub-unit).

also likely to be places where the prevailing power structure can perpetuate a culture that reflects the beliefs, egos, and desires of those in charge, which will not always be so benign or other-regarding. The Nut Island effect, mentioned earlier, shows what can happen when a subculture becomes obsessed with privilege and privacy.[118] And successful startups surely have their own narratives about risk-taking (and rule-bending) that resist the discipline of internal controls and full disclosure.[119] I would suggest something of a U-shaped curve, with cultures doing their best when checks and balances are working.

These conjectures require rigorous testing, of course, which again is not particularly easy. Data is harder to come by for private firms, and when privacy and freedom are prized, those in power may not open up candidly to ethnographers or survey-takers. Anecdotally, the story told about private companies that have taken on an outsized (but not publicly visible) role in conservative politics is unsettling. An apparently large number of the leaders in the corporate liberty (anti-regulation) movement—for which the Koch brothers have become the most well-known—had run-ins with environmental, consumer protection, or securities regulators earlier in their firms' histories.[120] The anger turned into denial and rationalization. Cultural scripts that de-legitimatize regulators by stressing the oppositional ideology behind law making (e.g., EPA staff as radical environmentalists) or its mindlessness—lazy bureaucrats who have never had to sell a product or meet a payroll—substantially reduces the felt need to obey the law for reasons short of fear of sanctions.[121] In turn, such a cultural trope enables more aggressive political spending to disable or impoverish the regulators even more. Here, in a reversal of the common assumption about how the general culture influences corporate culture, the rationalizations from inside the corporate world come to affect (or infect) the political and social culture. As our society becomes more and more polarized, with far too many people convinced that Washington is the

118. *See* Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 ADMIN. SCI. 23, 25–26 (2018); *see also* Levy, *supra* note 79, at 52.

119. *See* Pollman, *supra* note 116 (giving examples of start-up monitoring failures).

120. Stories of the radical right's multi-billion-dollar commitment to supporting "scientific" attacks on regulation (and the disingenuous building of political alliances with gun owners or abortion opponents for mutual support to gain leverage in the attacks on regulation) stress how many of the biggest donors to this cause passed through a crucible of litigation where they or their companies were targeted by regulators. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 15–20 (2016).

121. This kind of motivated cynicism is a significant challenge to organizational compliance with law, as I have stressed in other work. *See* Langevoort, *Cultures of Compliance*, *supra* note 4, at 961; *see also* SOLTES, *supra* note 56, at 157–58 (rationalization of white-collar crime via denigration of law-makers and law-enforcers). *See generally* Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215 (2017) (discussing reactance to heavy-handed enforcement and compliance tactics).

official year-round home of the devil and his helpers from the domain of publicness, I strongly suspect that there will be even more corporate cultures where the illegitimacy myth becomes infectious.[122]

All this brings more resonance to the legal debate, for example, of whether to require public companies to disclose their political activities and spending practices.[123] Proponents (like me) think that such disclosure would be valuable to shed sunlight on the possibility that senior managers use corporate funds to foster their personal political preferences, which they simply rationalize as corporate best interests; opponents push back with claims that market pressures and good governance practices suffice to assure that management keeps its eye on wealth maximization alone, and disclosure will compromise savvy political strategies. Surely there is a cultural angle to this that deserves to be explored as to both public and private firms.

CONCLUSION

We have now circled back to the governance wars introduced earlier in this Article. This has become bitterly contested territory to committed managerialists, and so it may have seemed shocking that in August 2019, the Business Roundtable—CEOs of the largest corporations in America—publicly disavowed the shareholder primacy norm that it had endorsed since 1997 in favor of a commitment to all corporate stakeholders, a nod to publicness.[124]

There was no reference to corporate cultures in this. The ease of the shift, however, bolsters one claim that I have been making throughout this Article: that management has never thoroughly embraced shareholder primacy as a value, instead resenting its demands. As to a commitment to publicness, the shift says nothing about actually being accountable, truly transparent, or giving stakeholders any real power, and so adheres to the long-standing managerialist goal of autonomy over all else. The business

122. A similar observation might be made about religiosity—corporate power structures supported by an internal culture that self-identifies as strongly religious (e.g., Hobby Lobby) operates mostly in partial darkness but projects outward politically as well. On the need for ethnography in exploring this unique sort of corporate culture, see Gordon, *supra* note 50, at 373–77.

123. For explorations of this issue, see generally Lucian A. Bebchuk et al., *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. (forthcoming 2020); Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593 (2014).

124. The statement was made public at Press Release, Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans' (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/349V-FQ2P].

leaders are simply making a strategic bet that the "shareholders above all" movement, for now at least, is becoming less politically appealing.

So, I doubt that any battle lines are actually being redrawn, even though some fractures along the fronts have become visible. Managerialists have for some time been divided between hard-core libertarians and those seeking accommodation in search of social license. The former continue to seek a wider swath of autonomy and corporate privacy almost as a natural right. The First Amendment has emerged as a newly potent litigation tool, enabling this campaign in terms of brute political spending[125] and perhaps—depending on how the law of corporate freedom of speech turns over the next few years—creating more space for a constitutional freedom not to speak so as to check the regulatory state's love affair with disclosure requirements.[126]

We should not even try to predict the outcome of any of these forthcoming battles, much less the so-called war. Both shareholder rights and stakeholder rights are loosely perceived as progressive causes, as we have seen, but many left-leaning participants have a strong aversion to the power and privilege associated with massive holdings of investor wealth, especially when directly at the production of even more shareholder wealth.[127] The right has in the recent past been a reliable ally for managerial power, but as Steve Bainbridge writes, there is potential stress here as well if right-leaning economic populism redraws the terms of corporate social responsibility in its own nativist image.[128] So, other influential actors in the business community seem anxious to make peace on both fronts, fearful of the angry direction in which public discourse is turning.

For a few years now, evidence has mounted that the public corporation as we knew it for most of the twentieth century is in decline,

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125. On the connection between corporate political expenditures enabled by cases like *Citizens United* and publicness pressures, see generally Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. 269 (2015).

126. *See First Amendment — Compelled Commercial Disclosures — D.C. Circuit Limits Compelled Commercial Disclosures to Voluntary Advertising* — National Ass'n of Manufacturers v. Sec*, 800 F.3d 518 (D.C. Cir. 2015),* Reh'g En Banc Denied, 129 HARV. L. REV. 819 (2016) (invalidating a portion of the SEC's "conflict mineral" disclosure rules on First Amendment grounds). On the libertarian potential in the compelled speech jurisprudence, see Sarah C. Haan, The Post-Truth First Amendment (July 6, 2018) (unpublished paper) (on file with Seattle University Law Review).

127. *See generally* Bruner, *supra* note 14 (discussing the motivations of corporate activists on the left and their allies).

128. *See* Stephen M. Bainbridge, Corporate Purpose in a Populist Era 11–14 (UCLA School of Law, Law-Economics Research Paper Series No. 18-09, 2018) (on file with Seattle University Law Review).

at least numerically if not in gross size.[129] Many corporate governance and corporate law scholars have weighed in on whether, why, and if whatever is happening here is good or bad. A large part of the response is once again political, generating endless deregulatory initiatives in the name of global competitiveness, innovation, and job creation to bring the public company back to health. Facilitating a world of private capital that deserves less, if any, regulatory support and intervention beyond protecting property and contract rights is a move that thrills conservatives in business and politics, part of a many-faceted assault on the regulatory state and its enabler, publicness.

The social science we have reviewed ostensibly bolsters the deregulators' case by offering evidence that strong shareholder rights (or a strong norm of shareholder primacy) are a threat to good corporate culture. I get the point that all other things being equal, highly focused cultures are easier to maintain and generate more value in the absence of heavy shareholder and stock market pressures, for the reasons given above. But all other things are rarely equal, and cultures can devolve for many different reasons. Then, something or someone has to disrupt that cultural devolution, and shareholders may be best positioned to operate as a check on culture run amok.

The supposed value of publicness, on the other hand, is not at all about efficiency or profitability. Indeed, this is where most sociologists and many progressive legal scholars seem to end up. Shareholder primacy undermines the public good and should be curbed, whereas greater transparency, accountability, and voice are good for us all. On the other hand, fervent managerialists want neither and thus are inclined to lump them together to challenge their legitimacy. That creates a political dilemma for progressives. Precisely because publicness is so inchoate, there is (currently) no powerful, organized force to lobby on its behalf. By and large, it has to rely on allies, the most effective of which come from the progressive side of the institutional investor community, or wait for scandals large enough to create a brief moment of political opportunity to seek something stronger. Conversely, the shareholder rights community needs political help, too, and sees the publicness values as a supportive ideology. Thus, publicness and the shareholder rights stay coupled to a greater extent than they need be conceptually. In turn, effective political attacks on one are felt by the other. If that continues, we will see what the consequences are. Publicness remains an important phenomenon descriptively, which is why it is so contested politically and why so much

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129. *See* LANGEVOORT, SELLING HOPE, *supra* note 38, at 111–12, 165–66. For doubts about this hypothesis, see CHEFFINS, *supra* note 110, at 343–98; *see also* Brian R. Cheffins, *The Rise and Fall (?) of the Berle–Means Corporation*, 42 SEATTLE U. L. REV. 445, 482–83 (2018).

effort goes into giving firms flexibility in financing, liquidity, and governance without triggering public status.[130] Normatively, it is hard to measure its impact on corporate behavior.

My aim here has not been to answer the normative questions of what good, if any, publicness does, or whether the turn to privateness is anything more than rent-seeking. I hope to have said something interesting about corporate culture: the many ways it is studied, the comparisons and contrasts in theories about what it is and how it works, and the ways it is influenced by and in turn influences more general social beliefs about economic power and privilege. Corporate publicness and privateness are competing to write the dominant narrative about the legitimate exercise of economic power in society, seeking all the legitimacy their champions can muster. Whatever direction all this battling takes, the importance of corporate culture should not be ignored.

130. *See* Langevoort & Thompson, *supra* note 15, at 357–61.