

Spirit of the Corporation

*Russell Powell**

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INTRODUCTION

Christian theologians have analyzed the productive and destructive qualities of institutions, sometimes attributing to them human virtues and vices. In *City of God*, Saint Augustine describes a utopian vision of human community within a Christian context as an alternative to the flawed “City of Man.”¹ Contemporary theologians and sociologists have described collective structures of human behavior in institutions as having a kind of “spirit” analogous to the individual human “spirit.”² Institutions are then assumed to take on an existence separate from the individuals within them, and in fact, the “spirit” of an institution influences the behavior of individuals. In *The 20th Century Capitalist Revolution*, Adolf A. Berle Jr. considers the tradition of religious utopianism and whether corporate capitalism has a spiritual character that impacts communities and individuals for good or ill and whether this might have implications for corporate managers.³

1. SAINT AUGUSTINE OF HIPPO, *THE CITY OF GOD* 426, reprinted in *GREAT BOOKS OF THE WESTERN WORLD: VOLUME 18 AUGUSTINE* (Robert Maynard Hutchins ed., 1952).

2. See, e.g., WALTER WINK, *THE POWERS THAT BE: THEOLOGY FOR A NEW MILLENNIUM* 3–4 (1999). See generally David Cloutier, *Why Talk About “Structures of Sin”?*, PUB. DISCOURSE (Jan. 28, 2019), <https://www.thepublicdiscourse.com/2019/01/48918/> [<https://perma.cc/9HEG-5PDK>].

3. ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 164–88 (1954).

This Article provides a contemporary theoretical framework for Berle's insight as a basis for considering its legal and ethical implications for corporate governance. Part II attempts to unpack contemporary understandings of spirit in order to provide a helpful working definition. Part III considers the origins and essential traits of the modern business corporation in the United States. The question posed by Berle—whether corporations can or ought to have a sort of moral orientation—is discussed in Part IV, while Part V ponders potential policy shifts that might tilt the orientation of the “spirit of the corporation” toward the common good. Part VI considers the limits of legal reform and the role of individuals and subgroups in changing corporate paradigms.

I. SPIRIT

Defining a notion as ephemeral as “spirit” outside of specific philosophical or theological contexts presents a variety of challenges in scholarly discourse. This Section attempts to provide a basis for considering spirit in more generalizable terms. It begins with common usage and understanding of the term, and then moves to sociological and broadly inclusive theological constructions of the term.

A. Common Understandings of Spirit

What are the meanings of “spirit,” particularly in ways that do not refer directly to the supernatural? In colloquial American English, “spirit” is used in a variety of contexts. It is used in compound nouns such as the following: school spirit, patriotic spirit, public spirit, civic spirit, team spirit, Christmas spirit, aloha spirit, pioneer spirit, or kindred spirit. There are varieties of spirits such as good, evil, free, or independent. Times and places are said to have a spirit (e.g., Spirit of 76, spirit of the age, spirit of the west, Spirit of St. Louis). Distilled beverages may be called spirits, as may solvents. There are phrases of encouragement, such as “that’s the spirit.” Something may be done “in the spirit” of something else. There is even an airline called Spirit. Perhaps most significantly for legal scholarship, there is the traditional distinction between the letter and the spirit of the law.⁴ This is not an exhaustive list, but it does highlight some commonalities. Spirit may be understood as the essence of a thing as distinguished from its physical form or description.⁵ The first definition of

4. E.g., Richard Anthony, *The Letter of the Law vs. The Spirit of the Law*, DEVOTED TO TRUTH, <http://66.165.89.51/truth/letter.html> [<https://perma.cc/T6XH-RPZB>].

5. See RONALD RADHOFF, *EVOLVING LIFE AND TRANSITION TO THE WORLD BEYOND: THE FANTASTIC JOURNEY OF THE BODY, MIND AND SPIRIT* 130–31 (2011).

spirit in the *Merriam-Webster Dictionary* is “an animating or vital principle held to give life to physical organisms.”⁶

Spirit has very specific and nuanced meanings within religion and belief systems. Although significant differences exist, there is a common Judeo-Christian-Islamic etymology and understanding of spirit in at least some contexts. In the scriptural traditions of the Hebrew Bible, the New Testament, and the Quran, the word usually translated into English as “spirit” is originally a word for breath.⁷ Ruach (רוח) in Hebrew is a cognate with rūḥ (روح) in Arabic. Pneuma (πνεύμα) is a Greek word for breath in the New Testament texts as well as the Septuagint translation of the Hebrew Bible. It is typically translated as *spiritus* in Latin translations like the Vulgate. The English “spirit” derives from the Latin.

Although the contemporary, non-religious understanding of spirit-as-essence may apply in the scriptural contexts of Judaism, Christianity, and Islam, there are also theological and supernatural meanings. In all three traditions, there is a term, translated as “Holy Spirit” in English, using the related word for breath noted above. Holy Spirit is identified with or related to deity. There is also a commonly held notion that human beings have a spirit, which in some traditions exists separately from the body and may transcend death.⁸ All three traditions contain some reference to what might be considered evil spirits.⁹ Thus, in these religious traditions, a spirit as the essence of a being may have a particular orientation toward or away from the deity, which might be understood as a moral orientation. The popular understanding of angels and demons contrasts angels as essentially good spiritual beings, while demons are angels who rebelled against God, thus changing their orientation toward evil. This is typically (though not exclusively) portrayed within Christian contexts.¹⁰

In the popular conception, humans exist between the good and evil spirits being encouraged or tempted by each respectively—in a sense the *tabula rasa*. The trope of an angel sitting on one’s shoulder exhorting good behavior and a devil on the other shoulder egging on bad behavior

6. *Spirit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/spirit> [<https://perma.cc/CY6K-PAUD>].

7. *What Does the Hebrew Word “Ruach” Mean?*, COMPELLING TRUTH, <https://www.compellingtruth.org/meaning-ruach.html> [<https://perma.cc/4EJE-2RDD>].

8. KJERSTI LARSEN, WHERE HUMANS AND SPIRITS MEET: THE POLITICS OF RITUALS AND IDENTIFIED SPIRITS IN ZANZIBAR 46 (2008).

9. Judaism, Christianity, and Islam all have a “Satan” in their texts and have traditions of demonology (although those traditions may have developed later or be marginal, particularly in the case of Judaism).

10. Popularized portrayals of angels and/or demons are found in movies like *It’s a Wonderful Life*, *The Exorcist*, *The Omen*, and *Heaven Can Wait*, or in television series such as *Highway to Heaven*, *Touched by an Angel*, and *Supernatural*.

reinforces this sense of original human innocence and neutrality (an admittedly dramatic oversimplification of the theological traditions). This trope is nearly ubiquitous in cartoons ranging from Donald Duck¹¹ to Homer Simpson.¹² In this portrayal, the human being is understood to have freedom to choose either good or evil. That choice then reflects the essence or spirit of the person.

B. Sociology and Spirit

Social scientists have considered constructions of religion and the idea of spirit for more than a hundred years.¹³ Although these approaches come from a variety of perspectives, they seriously consider the religious as something “real”—this implies there are identifiable patterns in spiritual systems.

1. From the Individual to the Polis

In *The Idea of the Holy*, Rudolf Otto develops a vocabulary to define the aesthetic dimensions of religion.¹⁴ He describes human engagement with the “numinous” (related to spirit if not the explicitly spiritual), which is wholly other, indescribable, terrifying, fascinating, and characterized by dread and awe.¹⁵ He refers to the *mysterium tremendum*, which indicates a sense of awe or uncanny.¹⁶ This need not necessarily imply a turn to the supernatural.¹⁷ Otto begins with the individual’s response to the numinous, whether in the form of the divine, the spirit, or the transcendent.¹⁸

Mircea Eliade’s work is comparative and historical in that it considers the wide breadth of human spiritual experience.¹⁹ His model of archetypes seems concrete and prosaic; however, unlike much religious studies scholarship, he engages the mythological and the divine as legitimate subjects, rather than assuming a veneer of scientific quality.²⁰ In other words, Eliade, unlike some of his colleagues, seriously considers the role of spirit in the development of religion. He also explores the relationship between spirit and other social phenomena (economics in

11. DONALD’S BETTER SELF (Walt Disney Productions 1938).

12. *The Simpsons: Whacking Day* (Fox Network television broadcast Apr. 29, 1993).

13. See, e.g., GRACE DAVIE, *THE SOCIOLOGY OF RELIGION* 26 (2007).

14. RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* (John W. Harvey trans., Oxford Univ. Press 2d ed. 1958).

15. See *id.* at 5–7.

16. *Id.* at 12–13.

17. *Id.* at 12–14.

18. See *id.* at 6.

19. See MIRCEA ELIADE, *THE MYTH OF THE ETERNAL RETURN: COSMOS AND HISTORY* (Willard R. Trask trans., Princeton Univ. Press 2d ed. 2005).

20. See, e.g., *id.* at 34–48.

particular).²¹ In Eliade's view, mythological and divine archetypes act as ideal Platonic forms that religious practices are modeled upon.²² In this sense, spirit is real. In terms of social theory, Eliade shows little regard for politics per se, but he does argue that archetypes determine, and in some sense are determined by, specific forms of human social organization.²³ He thus rejects the study of religions solely from psychological or sociological perspectives and seeks to examine individual patterns or forms of spiritual expression on their own terms.²⁴ He also importantly makes a spiritual connection between the individual and social structures.²⁵

2. Spirit and the Social

William Newman asserts that “regardless of what else may be said of religion, it is also a social phenomenon—it is something that people do in groups.”²⁶ This move toward social and scientific understanding characterizes most contemporary religious studies and sociology of religion scholarship. For example, Emile Durkheim assumes that religion is a definable and appropriate subject of scientific inquiry.²⁷ For Durkheim, religion is characterized by totemism: symbols representing and creating community (whether in the context of totem animals, symbols, or even flags).²⁸ He thus understands religion in a social context (“God is society writ large”).²⁹ In this view, religion is constructed by society, and its expressions have a number of common forms—e.g., a division of the world into sacred and profane; a belief in souls and the spiritual world; and a faith in some form of divinity, asceticism, or rites/liturgy. The identification of these forms allowed Durkheim to identify commonalities across religious traditions to generalize about “religion.” In addition to characterizing religion as “the social,” Durkheim makes a connection between religion and religious community: “A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all those

21. *Id.* at 159–62, 159 n.15.

22. *Id.* at 9–10.

23. *See id.* at 9–11.

24. *See, e.g., id.* at xxvii–xxix.

25. *Id.* at 47.

26. WILLIAM NEWMAN, *THE SOCIAL MEANINGS OF RELIGION: AN INTEGRATED ANTHOLOGY 3* (1974).

27. ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (1912).

28. *Id.* at 205–08.

29. *Id.*

who adhere to them.”³⁰ This is arguably the most influential approach to understanding religion in the social sciences. Thus, spirit for Durkheim would be understood in a social context, distinguished by patterns, rules, norms, and other elements we might identify as culture.

Berger provides a description of the dialectical role of religion in mediating between society and individuals.³¹ This dialectic may be understood as creating an essence or spirit distinct from the group of individuals or the institutional structures that support and limit such a group. He identifies three steps in this process: externalization, objectivation, and internalization.³² Externalization is the physical and mental outpouring of human beings into the world.³³ Objectivation is the phenomenon of these outpourings coalescing around and confronting the original producers (in his terms as a “facticity”).³⁴ Internalization is the reception of this reality by human beings, transforming the “structures of the objective world into structures of the subjective consciousness.”³⁵ This process creates a meaningful order that, when well established, may be described as religion, or “the human enterprise by which a sacred cosmos is established.”³⁶ Religion reinforces the power of internalization by legitimating social institutions as sacred.³⁷ However, there continues to be a reciprocal relationship beyond legitimation, as individuals continue to impact objectivation through their ongoing externalization.³⁸ I am reasonably comfortable with this description as a way of understanding the mediating role of the spiritual, even if it is not entirely comprehensive.

James Wellman’s definition of religion as the social enactment of a desire for the ultimate, usually related to a spirit or god, spirits or gods³⁹ relates to Durkheim’s understanding of religion as the social and seems to incorporate something like Berger’s understanding of its formation in the “enactment.” However, it also appears to synthesize elements of the psychological and the theological. The role of “desire,” for example, acknowledges a fundamental psychological need for order and explanation as a defense, presumably against anxiety. Looking to the “ultimate” and a

30. *Id.* at 46.

31. See PETER BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 25–28 (1990).

32. *Id.* at 4.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 26.

37. See *id.* at 32–39.

38. See *id.* at 10–20.

39. See generally James K. Wellman, Jr., *Is War Normal for American Evangelical Religion?*, in *BELIEF AND BLOODSHED: RELIGION AND VIOLENCE ACROSS TIME AND TRADITION* 195 (James K. Wellman, Jr. ed., 2007).

relationship with the “infinite” evokes a sense of the numinous and makes space for metaphysical and theological understandings of religion. This synthesis may provide a more satisfying description of religion even if it creates some degree of ambiguity by considering the numinous.

Also in the tradition of Durkheim, Clifford Geertz provides a helpful definition in the context of social science:

[A] religion is: (1) a system of symbols which acts to (2) establish powerful, pervasive, and long-lasting moods and motivations in men by (3) formulating conceptions of a general order of existence and (4) clothing these conceptions with such an aura of factuality that (5) the moods and motivations seem uniquely realistic.⁴⁰

That aura might be analogous to essence or spirit.

3. Spirit and the Political

A number of scholars engage with the relationship between spirit and politics in order to consider the overlap and influences between the two. I will discuss Ernest Renan, Robert Bellah, and Slavoj Žižek.

Philosopher Ernest Renan is best known for his political theories and influential historical works on early Christianity. In *What is a Nation?*, Renan describes the nation as “a soul, a spiritual principle,” which might be considered analogous to spirit, with two distinguishing characteristics: a common legacy of memories and present consent by its members.⁴¹ In this sense, he acknowledges the dialectic between individuals and groups identified by the sociological approaches described earlier. He argues that nations are constructed on the basis of cultural, rather than biological, affinity.⁴² He notes the phenomenon of conquerors adopting the religion of the conquered as seemingly counterintuitive.⁴³ He identifies the national with the spiritual,⁴⁴ perhaps as an antecedent to Durkheim’s understanding of the religious as the social. However, it is possible that his thesis anticipates the development of civil religion or a secular spirituality. In fact, it may be that the need for both a common legacy of memories and present consent in societies of diverse groups requires the creation of some sort of communally acceptable worldview, which might best be described

40. Clifford Geertz, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURE: SELECTED ESSAYS* 90 (1993).

41. Ernest Renan, *What Is a Nation?*, in *NATION AND NARRATION* 19 (Martin Thom trans., Homi K. Bhabha ed., 1990) (translating a lecture Ernest Renan delivered at a conference at the Sorbonne on March 11, 1882).

42. *Id.*

43. *See id.* Note however that this is perhaps a gross generalization. In the case of the early spread of Islam, it was generally the reverse. However, in periods of occupation, it was fairly common for invaders to adopt Islam (as in the case of Turkic tribes and the Mongols).

44. *Id.*

as “religious,” and may take on its own essence. In other words, for Renan, the nation must either draw upon a common tradition or find overlap among a plurality of traditions to create something new.

Robert Bellah is a sociologist best known for his work related to “American civil religion.”⁴⁵ He argues that Americans embrace a common civil religion with certain fundamental beliefs, values, holidays, and rituals parallel to, or independent of, their chosen religion.⁴⁶ Bellah identifies three critical stages of civil religious tradition in the United States. The first stage is established by the leaders of the revolution, and it is closely identified with the experience of the Hebrews flight from Egypt to the promised land.⁴⁷ The second stage occurs at the time of the American Civil War and establishes President Lincoln as a civil Christ figure who sacrifices himself for the community.⁴⁸ The third stage is characterized by America’s wrestling with its political, economic, and military dominance in the world.⁴⁹ This seems to raise the sort of questions that faced the Davidic Kingdom of Israel or the early Christians who sought the reign of God.⁵⁰

Once the third stage is established, a new question emerges: how is power to be righteously exercised by the faithful? This stage is analogous to the Roman Empire after Christianity became the official faith. The *mélange* of American civil religion incorporates elements of major religious traditions—including elements of Protestantism, Catholicism, and Judaism, in particular—as well as various patriotic symbols used to connect people from other traditions not noticeably represented. However, “faith” in such a religion is likely to be tenuous in nature, because the new conglomeration of symbols and traditions maintains a religious character but also invites secular themes as the public image of religion is stripped of clear identifications with any particular tradition (other than through general references to God, which invoke ideas of monotheism). Even so, civil religion has created a sense of the numinous in its symbols (flags, mottos, ceremonial dress, military cemeteries, monolithic architecture and sculpture, etc.) and “liturgies” (such as pledges, anthems, inaugurations, memorial services, etc.).

45. Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS J. AM. ACAD. ARTS & SCI. 1, 1 (1967).

46. *Id.* at 5.

47. *Id.* at 6–8.

48. *Id.* at 9–11.

49. *Id.* at 12–16.

50. Brian Collins, *Land, the Kingdom of God, and the Davidic Covenant*, EXEGESIS & THEOLOGY (Apr. 8, 2017), <https://exegesisandtheology.com/2017/04/08/land-the-kingdom-of-god-and-the-davidic-covenant/> [<https://perma.cc/NX96-E8AV>].

The critical theorist, Slavoj Žižek, famously critiques liberal democracies in his essay, “The Clash of Civilizations at the End of History,” wherein he examines the film *Children of Men* as an allegory for the modern world.⁵¹ Ironically, the film is set in a dystopian future.⁵² The film describes a world in which human beings are no longer able to reproduce.⁵³ The privileged have fallen into profound self-indulgence and have imposed an oppressive political and military order to protect their power.⁵⁴ Refugees and marginalized religious groups are held in camps that are beset by violence—but it is only these groups that maintain spirit, drive, and desire.⁵⁵ Žižek compares the privileged in the film to liberal democracies, in which people have become passionless consumers living in fear of terrorism, consuming fat, and smoking tobacco.⁵⁶ It is the poor, the oppressed, and those who refuse to be colonized who preserve the human spirit.⁵⁷ It is not surprising then that, in the film, it is among the outcasts that the miracle child is born. Through this allegory, Žižek critiques the ostensible neutrality, objectivity, and fairness of liberal democracies, including their view of secularism.⁵⁸ In a sense, wealthy, liberal society represents the distortion of spirit as contrasted with the virtuous spirit of the marginalized in Žižek’s view.⁵⁹

In the context of exploring politics, then, spirit may be (1) the essence of political identity, (2) an idea to be adapted by the political in order to provide social cohesion, (3) a force shaped by politics, or (4) a source of identity and inspiration that must be free of political control.

C. Theology of Spirit

There are a number of theologies of spirit (or pneumatology).⁶⁰ However, Walter Wink provides a narrative that fits within several of the sociological views described above and may be particularly helpful in considering spirit within human institutions, such as the corporation.⁶¹ He refers to the broader spiritual forces in the world as “powers.”⁶² This is a

51. See Slavoj Žižek, *The Clash of Civilizations at the End of History* (2007) (unpublished manuscript) (on file with Seattle University Law Review).

52. *CHILDREN OF MEN* (Strike Entertainment 2006).

53. *Id.*

54. *Id.*

55. *Id.*

56. Žižek, *supra* note 51.

57. *Id.*

58. *Id.*

59. *See id.*

60. See, e.g., VELI-MATTI KARKKAINEN, *PNEUMATOLOGY: THE HOLY SPIRIT IN ECUMENICAL, INTERNATIONAL, AND CONTEXTUAL PERSPECTIVE* (2002).

61. See WINK, *supra* note 2.

62. *See id.* at 13–36.

reference to the New Testament passage, Ephesians 6:12, which states: “[W]e wrestle not against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this world, against spiritual wickedness in high places.”⁶³ This passage has been understood as describing a hierarchy of spiritual forces or beings (demonic in this case but with corresponding angelic forces).⁶⁴ Wink explains:

Religious tradition has often treated the Powers as angelic or demonic beings fluttering in the sky. Behind the gross literalism of that way of thinking; however, is the clear perception that spiritual forces impinge on and determine our lives My first real breakthrough in understanding these invisible powers came when I stumbled over the angels of the churches in the New Testament Book of Revelation. Why, I wondered are each of the seven letters in chapters two and three addressed, not to the congregation, as in the apostle Paul’s letters, but to the congregation’s *angel*? The congregation was not addressed directly but through the angel. The angel seemed to be the corporate personality of the church, its ethos or spirit or essence. Looking back over my own experience of churches, I realized that each did indeed have a unique personality. Furthermore, that personality was real. It wasn’t what we call a “personification” like Uncle Sam or the Quaker on the box of oats. But it didn’t seem to be a distinct spiritual entity with an independent existence either. The angel of a church was apparently the spirituality of a particular church. You can sense the “angel” when you worship at a church. But you also encounter the angel in a church’s committee meetings and even in its architecture. People self-select into a certain congregation because they feel that this angel is compatible with their values. Hence the spirit of a church can remain fairly constant over decades, even centuries, though all the original members have long since departed.⁶⁵

The first example of spirit attributed to social structures is the faith community: the Church in Ephesus or the Church in Corinth. The communities take on an existence that is dependent on the individual members but also exists on its own.

I searched for other data in ancient religious writing that might shed light on these corporate angels. The tenth chapter of Daniel in the Hebrew Scriptures extended my understanding to encompass the angels of entire nations, who represented their

63. *Ephesians* 6:12 (King James).

64. Eric Covington, *Power and the “Powers” in Thomas Aquinas’ Lectura ad Ephesios*, 5 J. BIBLICAL & THEOLOGICAL STUD. 40, 57 (2020).

65. WINK, *supra* note 2.

nation in the heavenly “court.” Cities, too, had angels, as did individuals. In other Jewish and Christian sources I discovered ancient sages who believed that everything in creation has its own angel. That meant, I concluded, that everything has both a physical and a spiritual aspect. The Powers That Be are not, then, simply people and their institutions, as I had first thought; they also include the spirituality at the core of those institutions and structures. If we want to change those systems, we will have to address not only their outer forms but their inner spirit as well.⁶⁶

The spirit of a community or institution is not merely the aggregation of structures that construct it. It develops its own essence, so reform cannot rest entirely on reforming those structures.

I found the implications of that ancient view staggering. It means that every business, corporation, school, denomination, bureaucracy, sports team—indeed, social reality in all its forms—is a combination of both visible and invisible, outer and inner, physical and spiritual. Right at the heart of the most materialist institutions in society we find spirit. IBM and General Motors each have a unique spirituality⁶⁷

If corporations have something we might identify as spirit, there are undoubtedly common traits shared by corporations, as well as idiosyncratic differences created by particular industries, regions, and business philosophies.

As we have already suggested, however, the spirituality that we encounter in institutions is not always benign. It is just as likely to be pathological. And this is where the biblical understanding of the Powers surpasses in profundity the best of modern sociology. For the angel of an institution is not just the sum total of all that an institution is (which sociology is competent to describe); it is also the bearer of that institution’s divine vocation (which sociology is not able to discern). Corporations and governments are “creatures” whose sole purpose is to serve the general welfare. And when they refuse to do so, their spirituality becomes diseased. They become “demonic.”⁶⁸

Unlike Berle, Wink has no question that corporations exist to serve the common good. He further observes that failure to serve that end is a distortion of the ideal spirituality of a corporation.

66. *Id.* at 4.

67. *Id.* at 4–5.

68. *Id.* at 5.

I had never been able to take demons seriously. The idea that fallen angels possessed people seemed superstitious. But if the demonic is the spirituality produced when the angel of an institution turns its back on its divine vocation, then I could not only believe in the demonic, I could point to its presence in everyday life. And if the demonic arises when an angel deviates from its calling, then social change does not depend on casting out the demon, but recalling its angel to its divine task.⁶⁹

If this understanding has validity, then legal reform is unlikely to be successful in fundamentally reorienting institutions toward the common good unless they address the essence of an institution created by the dialectic between human subjects and framing institutions.

Although Wink was a Methodist theologian, his understanding of human institutions is arguably consistent with the Catholic notion of “structural sin”—individual human sin that collectively shapes human institutions, allowing them to perpetuate sinful patterns of behavior and injustice.⁷⁰

II. CORPORATION

Defining the modern business corporation in the United States context is not nearly as complex as defining “spirit.” However, there are a number of nuances. Corporate law, including formation, is governed by state law, so there is generally tremendous diversity across states. However, there are a number of common traits, some of which are the result of federal law (both case and statutory). Today, all U.S. corporations are legal persons as defined by federal precedent, which includes the right to property, to contract, to sue, to be sued, speech rights, procedural rights, and religious freedoms, among others.⁷¹ All corporations are presumed to have limited liability⁷² (which may technically be waived, but I have never seen it done). Ownership of a corporation is almost always evidenced by stock.⁷³ Corporate stock may be traded on public exchanges if the

69. *Id.* at 5–6.

70. See José Ignacio González Faus, *Sin, in MYSTERIUM LIBERATIONIS: FUNDAMENTAL CONCEPTS OF LIBERATION THEOLOGY* 536–39 (Ignacio Ellacuría & Jon Sobrino eds., 1993) (providing a description of structural sin).

71. See, e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

72. See, e.g., Ron Harris, *A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing*, 16 J. INSTITUTIONAL ECON. 643 (2020).

73. See DEBORAH E. BOUCHOUX, *FUNDAMENTALS OF BUSINESS ORGANIZATIONS FOR PARALEGALS* 421 (2017).

appropriate registration requirements are met.⁷⁴ Corporations are governed by directors, who may also be owners, managers, or both, but they need not be.⁷⁵ Founders must properly file a charter or articles of incorporation with the state. Corporations have no definite lifetime, making them effectively immortal so long as they are solvent.

Corporations may be small or large, and they may have one or many owners. Most U.S. corporations are closely held, which means their shares are not traded on a public market.⁷⁶ However, some of those closely held corporations are extremely large.⁷⁷ Large, publicly traded corporations are often placed in a separate category from smaller corporations. There is a rich body of literature arguing that such corporations, which typically have a majority of outside directors and professional managers, have incentives very different from small corporations.⁷⁸

One major difference between large corporations and small corporations is their tax treatment. Tax treatment may differ depending on size and election—with smaller businesses often choosing treatment as an “S corp” to receive pass-through treatment by the IRS, similar to the traditional tax treatment of partnerships.⁷⁹ In contrast, larger corporations are treated as “C corps” and are subject to taxation themselves at the entity level in addition to taxes owed by owners for realization events such as the sale of stock or the distribution of dividends.⁸⁰ Some businesses, particularly smaller ones, are organized as limited liability companies

74. *Exchange Act Reporting and Registration*, U.S. SEC. & EXCH. COMM’N (Oct. 24, 2018), <https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting> [<https://perma.cc/LM9M-XSHB>].

75. *Powers & Duties of Corporation Directors & Officers*, WOLTERS KLUWER (Apr. 24, 2019), <https://ct.wolterskluwer.com/resource-center/articles/powers-and-duties-of-corporate-directors-officers> [<https://perma.cc/C89M-RENT>].

76. Jean Murray, *What Is a Closely Held Corporation?*, THE BALANCE SMALL BUS. (Apr. 8, 2020), <https://www.thebalancesmb.com/what-is-a-closely-held-corporation-398187> [<https://perma.cc/NQ4C-RMCK>].

77. Cargill is a “\$115 billion-in-sales agricultural giant that has topped *Forbes*’ list of America’s largest private companies for 28 of the past 30 years.” Chloe Sorvino, *Silent Giant: America’s Biggest Private Company Reveals Its Plan to Get Even Bigger*, FORBES (Oct. 22, 2018), <https://www.forbes.com/sites/chloesorvino/2018/10/22/silent-giant-americas-biggest-private-company-reveals-its-plan-to-get-even-bigger-1/#503eacbbc7b> [<https://perma.cc/FT3R-VYQ2>].

Koch Industries is a \$110 billion-in-sales corporation that is involved in a wide range of industries, “such as refining, chemicals and biofuels; forest and consumer products; fertilizers; polymers and fibers; process and pollution control equipment and technologies; electronics; information systems; commodity trading; minerals; energy; glass; ranching; and investments.” *Koch Industries*, FORBES (Dec. 17, 2019), <https://www.forbes.com/companies/koch-industries/#47b7bd6874ce> [<https://perma.cc/PZ99-U7UJ>].

78. See BERLE, *supra* note 3; Blair & Stout, *infra* note 100; Bainbridge, *infra* notes 104–05.

79. *S Corporations*, IRS (July 31, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations> [<https://perma.cc/GM43-R6RQ>].

80. *Forming a Corporation*, IRS (July 31, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation> [<https://perma.cc/8T9K-9JP2>].

(LLCs), which became popular in the 1990s once they were allowed to presume pass-through tax treatment.⁸¹ The legal framework for LLCs is arguably more idiosyncratic than that of corporations, but they share many core traits (e.g., limited liability, personhood, etc.).⁸²

Large, publicly traded corporations have important distinctions from smaller corporations. As noted earlier, business entities vary widely in terms of size and scope. What does a small, family-owned farm or restaurant (whether organized as an LLC or as a corporation) share in common with a large public company? First, they share the main default attributes noted above. Second, and perhaps more importantly, they are formed in order to produce profits. Some economists argue that the modern business corporation has been the most effective human institution for mobilizing capital and growing economies.⁸³

III. CORPORATE FORM FOR “GOOD” OR “ILL”

When teaching corporate law over the past twenty years, I begin the class with a thought experiment asking students to describe a corporation. The description typically begins with certain common structural similarities such as limited liability or stock as the indicia of ownership. At some point, we discuss the notion of corporate “personhood,” along with its legal and philosophical implications. If a corporation is a person, its characteristics, including rights and obligations, are worth considering.⁸⁴

On the second day of class, I typically show select scenes from the documentary, “The Corporation.”⁸⁵ The film has a particular point of view, and I ask students to observe critically. The film raises a similar question regarding the essence of a corporation. In interviews, the filmmakers ask random subjects on the street or in a mall if McDonalds, the Body Shop, Disney, or Monsanto are persons, then “what sort of persons are they?”⁸⁶ Most responses anthropomorphize corporations using familiar human qualities, such as young, energetic, goofy, deceptive, or immaculately

81. See *Limited Liability Company (LLC)*, IRS (Apr. 6, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc> [<https://perma.cc/H4HN-6X5K>]. Depending on the terms agreed upon by LLC members, the IRS will treat an LLC as a corporation, partnership, or part of the LLC’s owner’s tax return.

82. *LLC vs S Corp vs C Corp: Choosing the Best Entity Structure for Your Business*, WOLTERS KLUWER, <https://ct.wolterskluwer.com/resource-center/articles/choosing-business-types-llc-vs-s-corp-vs-c-corp> [<https://perma.cc/CE6Q-WKVD>].

83. See, e.g., Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMPAR. L. 785, 810–11 (2005).

84. See, e.g., KENT GREENFIELD, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* (2018).

85. *THE CORPORATION* (Zeitgeist Films 2003).

86. *Id.*

dressed.⁸⁷ Such descriptors may reflect a characteristic of products or corporate managers, but the film attempts to identify common traits and focuses on the assumed regulatory imperative to maximize shareholder wealth, presumably at the expense of all other competing values.⁸⁸ The characterization of corporations as externalizing machines with similarities to sharks, whales, and monsters is exaggerated, but the attempt to describe how the essence of corporations is shaped by the regulatory and legal framework surrounding them is intriguing and may justify serious consideration of the essence or spirit of the modern corporation.

As corporate law scholars, my peers and I tend to focus on the importance of legal rules in constraining the behavior of business entities. However, at least some of those structures are likely psychological, sociological, or both. Although the following examples are admittedly anecdotal, they demonstrate a clear exception to the priority of legal rules in shaping the essence of the corporation.

I regularly have the opportunity to interact with members of the business law bar nationally and locally. These attorneys tend to be very successful, often elite-educated, with extensive transactional and litigation experience. In panels and discussions that address corporate fiduciary duties, I consistently ask what core duty is owed by a director to the corporation. The practicing attorney's answer I nearly always receive is "to maximize shareholder wealth." It is true that this is a presumably bright-line standard that has come to serve as a shorthand for the duty described by statute (the MBCA being the most common). It was popularized by the 1919 landmark case *Dodge v. Ford Motor Company* in the Michigan Supreme Court, and the principle is raised in legal opinions across jurisdictions.⁸⁹ However, the language of nearly all state statutes follows the principles of the MBCA:

8.30(a) Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.⁹⁰

Thus, the core of the duty is to act honestly in the "best interests of the corporation." Courts may interpret this as meaning that directors are required to prioritize shareholder wealth maximization (a standard that has itself been problematized),⁹¹ but it is not the analytical starting place. A

87. *Id.*

88. *Id.*

89. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

90. MODEL BUS. CORP. ACT § 8.30(a) (2002).

91. See, e.g., Joan M. Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 970 (2017); Fred Matera,

typical hypothetical would consider the actions of a board that takes massive risks to increase short-term share price but ultimately weakening or potentially bankrupting the corporation. Day traders and hedge fund managers may profit handsomely, while long-term holders such as pension or mutual funds ultimately suffer losses. The “best interests of the corporation” statutory standard arguably provides a more principled basis for evaluating such director decisions. If wealth maximization is understood to consider a wide variety of shareholders and stock holding periods, it loses its effectiveness as a bright-line rule. So, the assumption of the primacy of shareholder wealth maximization may owe more to the education, psychology, and group dynamics of corporate lawyers than to the law, particularly statutory rules.

The second example is the assumed influence of Delaware corporate law, particularly its case law. Courts in many jurisdictions rely on Delaware corporate case law in resolving complex issues.⁹² Virtually every foundational business entity, business organization, and corporate law class in North America focuses, at least in part, on a survey of Delaware corporate law. There are economic and historic explanations for this phenomenon, and it may serve as a helpful gap-filler for states without clear precedent. Like many in corporate practice, most of my clients in California, D.C., and New York were Delaware corporations. When I moved to the state of Washington, an MBCA jurisdiction, I was very surprised when a prominent corporate litigator explained to me that some rules for derivative suits in Washington relied on Delaware case law rules even when they were in apparent tension with the local statute. Even if this assertion does not actually constitute a trumping of local law, it illuminates the nearly universal influence of and bias toward Delaware law. Again, this may indicate a psychological or social dynamic, distinct from law, or perhaps even economics, in shaping corporate behavior and essence.

Reimagining corporate fiduciary duties to consider employees, communities, the environment, and other potential stakeholders is certainly not the only, or necessarily the best, approach to orienting the essence of corporations toward the common or greater good. It is one example among many urging investors, managers, and regulators to a higher standard.

With the Proper Time Horizon, the Interests of Shareholders and Stakeholders Should Be Aligned, LINKEDIN (Aug. 27, 2019), <https://www.linkedin.com/pulse/proper-time-horizon-interests-shareholders-should-aligned-fred-matera> [<https://perma.cc/B5H5-SC5T>].

92. See *About Delaware's General Corporation Law*, DELAWARE.GOV, <https://corplaw.delaware.gov/delawares-general-corporation-law/> [<https://perma.cc/Z5RJ-TKY6>].

IV. IMPLICATIONS FOR CORPORATE STRUCTURE AND GOVERNANCE

If institutional structures such as cities, nations, or corporations have an identifiable spirit, can the institutions that shape that spirit, such as law, influence those structures toward the “good”? First, it is imperative to give meaning to moral categories such as good.

Although moral and religious traditions have a wide variety of definitions for good and evil that may not be generalizable outside of particular communities, let us accept for the purposes of argument that most traditions value some conception of justice, which is often understood as the balancing of the common good with individual human dignity and flourishing. For example, the principal values reflected in Catholic social thought are the dignity of the human person and the common good.⁹³ Inherent in this duality is potential tension when the rights and dignity of the individual conflict with what is for the greater good of the group. This example is analogous to the framework I use in pedagogy to evaluate the policy implications of particular legal rules. It is not a perfect analogy, but the approach creates some common vocabulary for critique.

One of the predominant measures of traditional corporate governance, efficiency, considers the net gain or loss of resources. There is a rich literature of utilitarianism and law and economics with tools for evaluating efficiency (maximizing wealth in a particular community or system) as well as established norms for cost-benefit analysis in the implementation of regulations.⁹⁴

However, the good of efficiency may be in tension with the common good, to the extent that it does not consider distributional concerns (often construed as fairness). “Pareto-optimality” is one approach to addressing distributional concerns and considers a system optimal if there are no policy changes that can increase utility (resources available) without harming someone.⁹⁵ A “Pareto superior move” is one that increases utility without causing harm to anyone.⁹⁶ This is only one approach to distributional concerns, but I assert that all, or nearly all, moral or

93. *An Introduction to the Principles of Catholic Social Thought*, CTR. FOR SOC. CONCERNS, <https://socialconcerns.nd.edu/content/introduction-principles-catholic-social-thought> [<https://perma.cc/JD6J-Z4EU>]. Other related values include respect for life, the importance of the institutions of family and community, rights and duties of people, the preferential option for the poor, the dignity of work and workers, solidarity and, finally, stewardship.

94. *E.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

95. *See* Charles K. Rowley, *Wealth Maximization in Normative Law and Economics: A Social Choice Analysis*, 6 GEO. MASON L. REV. 971, 982 (1998) (discussing Pareto’s influence on modern economic theory).

96. *See id.* at 985.

evaluative frameworks for policy address some distributional concerns. They may arise in the context of concern regarding market failures rather than concern for identifiable inequitable outcomes.⁹⁷

Traditional notions of justice often rooted in Platonic thought consider justice as the balance of other virtues.⁹⁸ If we accept that two core virtues of human institutions are flourishing (measured as efficiency) and the common good (measured as distributional fairness), then justice as a virtue requires balancing the two. A corporate spirit encouraging or tolerating fraud, exploiting employees, or destroying the environment may justify legal and regulatory intervention designed to create institutional frameworks that promote or at least incentivize sustained legal profits, expanding employment, living wages, and responsible stewardship of resources.

If the spirit of a corporation is formed in part by the institutions that support and constrain them (such as law), then legal change may result in a change in the essence of a corporation beyond isolated behaviors. From a sociological perspective, if the spirit is the result of the dialectic between behavior (motivated by underlying belief) of managers and owners and the institutional frameworks that incentivize them, then adjusting those incentives may change the essence of a corporation.⁹⁹ Berle considered the importance of a spiritual turn in the corporation; specifically, whether legal rules, owners, and managers ultimately have a role in promoting the “good life” which may perhaps be understood as the “common good.”¹⁰⁰ One concrete step toward this shift could be the adoption of stakeholder and related models of corporate governance advocating that corporate

97. Note some shifts from neoclassical economics to welfare and behavioral economics.

98. Bibi Afifeh Hamed Dashti, *The Concept of Justice in Greek Philosophy (Plato and Aristotle)*, 5 MEDITERRANEAN J. SOC. SCI. 1163, 1164, 1166 (2014). “To both Plato and Aristotle, justice meant goodness as well as willingness to obey laws. . . . The promotion of balance and harmony in thought and action was pre-eminently social in character.” *Id.* at 1163.

99. *See, e.g., id.*

100. BERLE, *supra* note 3, at 166–67 (“For the fact seems to be that the really great corporation managements have reached a position for the first time in their history in which they must consciously take account of philosophical considerations. They must consider the kind of a community in which they have faith, and which they will serve, and which they intend to help to construct and maintain. In a word, they must consider at least in its more elementary phases the ancient problem of the ‘good life,’ and how their operations in the community can be adapted to affording or fostering it. . . . Businessmen charged with commercial enterprise are not accustomed to this sort of thinking. As a rule, they reject the idea that this is a part of their function. . . . The greatest leaders in the corporate field take a contrary view. They forcefully argue that corporations are always citizens of the community in which they operate, while large ones necessarily play a mighty part in the life of their time. It is not possible for them, these men state, to carry on great corporate business apart from the main context of American life.”).

fiduciaries consider the interests of stakeholders other than shareholders in making business decisions.¹⁰¹

I use the term “stakeholder theory” very broadly so as to include the stakeholder movement of the late 1980s, the team production model, corporate social responsibility and some foreign corporate governance regimes such as codetermination in Germany and the *de facto* system in Japan.¹⁰² All of these models challenge the shareholder primacy standard and allow or require boards to consider the interests of employees and other groups with a stake in the enterprise.

A. Shareholder Exclusivity

The contractarian model of the corporation proposed by many legal scholars is sometimes linked to shareholder wealth maximization and the shareholder¹⁰³ (or in some cases the director¹⁰⁴) primacy model.¹⁰⁵ It may be categorized as a shareholder exclusivity model. The first part of the model is not terribly controversial—the separation of ownership and management; shareholders, as the owners of the firm, elect directors who hire professional managers to run the day-to-day operations of the corporation.¹⁰⁶ The separation of ownership and control in public

101. See generally Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 89 (2005); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227 (2002); Marleen A. O’Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993); Marleen A. O’Connor, *Labor’s Role in the American Corporate Governance Structure*, 22 COMPAR. LAB. L. & POL’Y J. 97 (2000); STEVEN F. WALKER & JEFFREY W. MARR, *STAKEHOLDER POWER: A WINNING PLAN FOR BUILDING STAKEHOLDER COMMITMENT AND DRIVING CORPORATE GROWTH* (2001); John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What’s So Special About Shareholders?*, 4 BUS. ETHICS Q. 393 (1994); R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984); PETER F. DRUCKER, *THE NEW SOCIETY: THE ANATOMY OF THE INDUSTRIAL ORDER* (1950). For a discussion of alternative ethical approaches to governance questions, see Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35 (2005); Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. SOC. JUST. 181 (2005).

102. See *infra* Section V.B.

103. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005) (arguing for increased shareholder democracy).

104. See Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1735–36 (2006) (defending director primacy in response to Professor Bebchuk).

105. See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1424–25 (1993); see *cf.* ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). Note that I refer to shareholder primacy in the context of the duty to maximize shareholder wealth rather than in the context of direct shareholder versus board or management control.

106. See Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 898 (2010).

companies is said to be acceptable to shareholders because directors and managers owe shareholders, and no other parties, the fiduciary duties of loyalty and care (which is related to the second part of the model—the exclusive obligation to maximize shareholder wealth).¹⁰⁷ Shareholder exclusivity argues that if other parties are owed duties, investors will be less willing to part with capital because profits might be diverted to others.¹⁰⁸ The typical hypothetical for illustrating this tension is a plant closing:

Managers could increase the value of the corporation's shares if an unproductive plant were closed; at the same time, such a closing would displace workers and disrupt the community in which the corporation is situated. Under the shareholder primacy norm, managers must close the plant to fulfill their duty to shareholders, despite the harm to workers and other nonshareholder communities that such a closure would engender.¹⁰⁹

The iconic case for shareholder exclusivity is the Michigan Supreme Court's 1919 decision in *Dodge v. Ford*, noted earlier.¹¹⁰ Henry Ford stopped paying extraordinary dividends in 1916 in order to raise wages, lower prices, and expand production facilities.¹¹¹ The Dodge brothers brought suit to force distribution of an extraordinary dividend.¹¹² According to the court, if Ford had justified his business decisions as being in the best interest of the shareholders, his decisions would have stood.¹¹³ However, because Ford admitted on the stand that he intended to benefit employees and customers rather than shareholders directly, his actions were cast as eleemosynary and inappropriate.¹¹⁴ In reality, there were a number of other competitive, reputational, and tax issues that likely influenced both the decision to withhold dividends and the character of Ford's testimony.¹¹⁵ Even so, corporate law textbooks typically note this case as stating the rule of shareholder primacy: Directors and managers have a duty to maximize returns for shareholders alone and may not

107. See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32–33.

108. See *id.*; see also Bainbridge, *supra* note 104, at 1430 (explaining that other costs, such as litigation expenses, may arise, affecting shareholders).

109. Testy, *supra* note 101, at 1231.

110. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

111. *Id.* at 683–84.

112. *Id.* at 668–69.

113. *Id.* at 683–85.

114. *Id.*

115. See, e.g., GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* 65–71 (1992).

consider other interests.¹¹⁶ As noted earlier, this is not the rule in most states.¹¹⁷ One might wonder then why this case is used to introduce or frame discussions of corporate fiduciary duties and the business judgment rule.

The contractarian model is powerful in both its descriptive and predictive capacities from a certain point of view. However, shareholder exclusivity in particular presumes a significant level of development (e.g., reasonably efficient markets and sophisticated infrastructures) and stability (e.g., reliable means of legal enforcement for contracts and fiduciary duties). Major fraud and business failures over the past twenty years have demonstrated the difficulty of holding managers accountable to shareholders even with sophisticated corporate laws and securities regulations.¹¹⁸

We see the interconnectedness of corporations, labor, governments, communities, banks, and other parties in states attempting to promote democratic and market institutions. In Iraq, Afghanistan, and Russia, it becomes clear that the ability of passive investors to earn returns on equity investments depends on the level of development and stability of local communities.¹¹⁹ To that extent, passive investors might be willing to transfer rents to the state, employees, creditors, and others who are able to create a climate that makes positive passive investment returns possible. Viewing this situation exclusively from the point of view of investors in sophisticated markets, like the U.S., discounts the role of other economic actors who make passive investment reasonably secure. Infrastructure degradation, environmental harm, labor unrest, social unrest, consumer fear, and other factors outside of the control of shareholders or managers could conspire to erode the underlying development and stability that make complex capital markets successful. Lest critics dismiss this view as naïve, note that successful economies such as those in Sweden, Germany, the United Kingdom, and Japan all acknowledge a more substantial role

116. See, e.g., WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, *BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS* 276 (5th ed. 2003); DANIEL Q. POSIN, *CASES AND ANALYSES ON THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTITIES: A SOCRATIC APPROACH* 264 (2005).

117. See Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 92–95 (1999).

118. See, e.g., Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Collapses as Suitor Cancels Plans for Merger*, N.Y. TIMES (Nov. 29, 2001), <https://www.nytimes.com/2001/11/29/business/enron-s-collapse-the-overview-enron-collapses-as-suitor-cancels-plans-for-merger.html> [<https://perma.cc/FQN8-PL2B>].

119. See, e.g., Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1067–68 (2004); Samina Sabir, Anum Rafique & Kamran Abbas, *Institutions and FDI: Evidence from Developed and Developing Countries*, 5 FIN. INNOVATION 8 (2019).

for employees in corporate governance than is allowed by shareholder exclusivity or most U.S. jurisdictions.¹²⁰

B. Stakeholder Theories

The approaches previously lumped together as stakeholder theories have roots in early scholarship incorporating a communitarian ethic into analysis of corporate decision-making.¹²¹ These arguments have resurfaced periodically in various forms. Corporate social responsibility scholarship in the 1970s advocated a stricter regulatory response.¹²² “Stakeholder theory” in the late 1980s came in vogue as managers sought ways to frustrate hostile takeovers.¹²³ According to the shareholder exclusivity model, directors and managers should not prevent these transactions if they are in the best interest of the shareholders.¹²⁴ However, when takeovers result in officer layoffs, manager interests almost certainly conflict with shareholder interests.¹²⁵ Late 1980s stakeholder theory provided managers with a justification for considering interests other than those of shareholders, particularly in the takeover context.¹²⁶ This particular manifestation was not necessarily progressive, but it did result in legal reform that could establish a basis for more progressive change.¹²⁷

The weak form of basic stakeholder theory is that managers and directors ought to be allowed to consider interests other than shareholder wealth maximization.¹²⁸ This is the rule in most states today.¹²⁹ The strong form of basic stakeholder theory requires that directors and managers consider the interests of competing stakeholders.¹³⁰ This necessitates a clear definition of whose interests must be considered and in what context.

120. See, e.g., O’Connor, *Labor’s Role in the American Corporate Governance Structure*, *supra* note 101.

121. See DRUCKER, *supra* note 101.

122. See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

123. Springer, *supra* note 117, at 92–94.

124. See Lucian A. Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 944–45 (2002); see also Bebchuk, *supra* note 103.

125. See Bebchuk, Coates & Subramanian, *supra* note 124.

126. See Springer, *supra* note 117.

127. See Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309 (2011).

128. See Fabian Brandt & Konstantinos Georgiou, *Shareholders vs. Stakeholders Capitalism* 7–8 (2016) (unpublished seminar paper) (on file with the University of Pennsylvania Carey Law School, Legal Scholarship Repository).

129. Springer, *supra* note 117, at 94–96.

130. H. Jeff Smith, *The Shareholder vs. Stakeholder Debate*, 44 MIT SLOAN MGMT. REV. 85 (2003). “[A] manager’s duty is to balance the shareholders’ financial interest against the interests of other stakeholders such as employees, customers and the local community[.]” *Id.*

The only state that adopted this rule was Connecticut, although it was amended to be made permissive in 2010.¹³¹

A more coherent and rigorous expression of this view is advocated by Professors Margaret Blair and Lynn Stout, who have proposed the so-called Team Production Model.¹³² Managers, shareholders, employees, creditors and local communities act as a team.¹³³ Directors act as independent mediators and apportion rents to the various participants.¹³⁴ This approach acknowledges the interdependence of the participants and proposes to be more efficient in the allocation of returns.¹³⁵

Contemporary corporate social responsibility scholarship attempts to quantify social costs more broadly by considering environmental and political concerns as well as the interests of traditional stakeholders.¹³⁶ This body of work incorporates a number of critical lenses for evaluating corporate theory and practice, including critical race theory, feminist jurisprudence, and environmentalism.¹³⁷ The advantage of this approach is that it is holistic, but the breadth of scope makes evaluating competing interests a challenging task.

Considering the interests of groups other than shareholders is not merely theoretical. A number of countries require that boards address the concerns of employees. The German *Aktiengesellschaft*, or AG,¹³⁸ uses a structure of “codetermination.”¹³⁹ Essentially, this guarantees that employees either directly or through labor organizations have board representation.¹⁴⁰ In very large AG’s such as Siemens, shareholders elect

131. Springer, *supra* note 117, at 101; Joseph R. Shealy, *The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*, 94 N.C. L. REV. 686, 695 (2016) (describing the 2010 amendment of the Connecticut statute to be permissive).

132. See Blair & Stout, *supra* note 101.

133. *Id.* at 250–53.

134. *Id.* at 270–79.

135. *Id.*

136. See Testy, *supra* note 101, at 1238.

137. See *id.* at 1239–40.

138. Translation of German Word “Aktengesellschaft” into English, GOOGLE TRANSLATE, <https://translate.google.com/#view=home&op=translate&sl=de&tl=en&text=Aktiengesellschaft> [<https://perma.cc/KE24-ZGEW>] (Aktengesellschaft is the German word for corporation).

139. Mark J. Roe, *Corporate Governance: German Codetermination and German Securities Markets*, 5 COLUM. J. EUR. L. 199, 199–200 (1999) (arguing that codetermination has created problems in boardroom dynamics and has negatively impacted securities markets in Germany); see also O’Connor, *Labor’s Role in the American Corporate Governance Structure*, *supra* note 101, at 102–03 (arguing that elements of codetermination provide a helpful contrast for analyzing corporate governance in the United States); Dieter Sadowski, Joachim Junkes & Sabine Lindenthal, *Employees and Corporate Governance: Germany: The German Model of Corporate and Labor Governance*, 22 COMPAR. LAB. L. & POL’Y J. 33, 36–40 (2000).

140. Sadowski, Junkes & Lindenthal, *supra* note 139, at 36–39.

half of the supervisory board (a corporate board of directors equivalent).¹⁴¹ Employees and unions elect the remaining half.¹⁴² Directors have an obligation to their electoral constituencies that avoids complicated competing fiduciary duties.¹⁴³ This sort of major structural change would be difficult in American corporations without some compensation for existing shareholders who would sacrifice a percentage of control.

In practice, large Japanese corporations use what Professor Marleen O'Connor refers to as a Neutral Referee Model.¹⁴⁴ Corporate boards consider the competing interests of shareholders and employees.¹⁴⁵ Long-term stability and profitability may require that employee interests trump short-term wealth maximization gains.¹⁴⁶ The challenge of adopting such a system in the United States would be to define a clear test for balancing interests.

China is also an interesting example. Large Chinese corporations have been growing so fast that there is tremendous demand for shares.¹⁴⁷ Limits on foreign ownership have magnified this phenomenon.¹⁴⁸ As a practical matter, shareholders in Chinese corporations have few mechanisms for holding management accountable for maximizing returns.¹⁴⁹ Managers tend to be beholden to government interests which value factors such as the needs of local industry, export volume, and full employment.¹⁵⁰ As the Chinese economy continues to expand,

141. See *Supervisory Board*, SIEMENS, <https://new.siemens.com/global/en/company/about/supervisoryboard.html> [<https://perma.cc/DF4W-CNSE>].

142. *Id.*

143. See Franck Chantayan, *An Examination of American and German Corporate Law Norms*, 16 ST. JOHN'S J. LEGAL COMMENT. 431, 444–45 (2002).

144. O'Connor, *Labor's Role in the American Corporate Governance Structure*, *supra* note 101, at 107–09; see also, Takashi Araki, *A Comparative Analysis: Corporate Governance and Labor and Employment Relations in Japan*, 22 COMPAR. LAB. L. & POL'Y J. 67 (2000).

145. O'Connor, *Labor's Role in the American Corporate Governance Structure*, *supra* note 101, at 108 (“Rather than provide direct representation on the board as under the German system, directors’ fiduciary obligations would be altered so that directors would have the duty to balance the competing considerations of workers and shareholders in an equitable manner.”).

146. See Araki, *supra* note 144, at 67–68.

147. See Cindy A. Schipani & Junhai Liu, *Corporate Governance in China: Then and Now*, 2002 COLUM. BUS. L. REV. 1, 66–67 (2002) (“The traditional enterprise governance regime is not compatible with the market economy that China is in the midst of developing.”).

148. The state-ownership model was dominant between the 1950s and 1980s and was the only legal form available to provide safeguard for State property. See *id.* at 5–6.

149. *Id.* at 49–50 (discussing how the Chinese Corporate Law is silent on the director’s duty of care and does not have mechanisms in place to monitor directors’ performances); see also Guanghai Yu, *Using Western Law to Improve China's State-Owned Enterprises of Takeovers and Securities Fraud*, 39 VAL. U. L. REV. 339, 371–75 (2004) (proposing generally a new framework for public accountability).

150. See Schipani & Liu, *supra* note 148, at 28–30 (“Some government agencies still treat SOE-corporatized corporations like traditional SOEs, and control them in traditional ways using excessive administrative power. Such control includes requiring approval of decisions already made by the board

its model for governance is likely to play a more significant role internationally. So, both theory and competing practice provide potential alternatives to shareholder exclusivity, especially with regard to concern for employee interests.

There is a growing body of research contending that considering the interests of non-shareholder stakeholders positively contributes to long-term returns and may not ultimately conflict with shareholder interests.¹⁵¹ The movement by most states to allow consideration of interests other than short-term wealth maximization gives directors and managers flexibility to address the impact of their decisions on the various factors that make passive capital investment feasible.¹⁵²

V. CORPORATE CONVERSION AND THE LIMITS OF LAW

Although legal scholars tend to spend a tremendous amount of time, thought, and effort proposing legal reform with an aim to effect social change, I remain skeptical that such reform alone is capable of transforming the essence of an institution. Law can create incentives, but incentives do not necessarily result in behavioral change. As of July 2020, twenty-two states and the District of Columbia had some sort of requirement to wear a facemask in public in the attempt to limit the spread of coronavirus.¹⁵³ However, large segments of the populace emphatically refused to comply.¹⁵⁴ In some cases, law enforcement officials publicly opposed such regulations and refused to enforce them.¹⁵⁵ This section will

of directors, bypassing the general meeting of shareholders, directly appointing directors and executives and interfering with daily operations. For example, a survey in early 1999 reveals that ‘of the enterprises which are undergoing the reform of establishing a modern enterprise system, officials are still nominated by government departments instead of the board of directors.’”)

151. See UNEP FIN. INITIATIVE, *SHOW ME THE MONEY: LINKING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES TO COMPANY VALUE* (2006); UNEP FIN. INITIATIVE, *A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT* (2005).

152. For an interesting discussion of corporate constituency statutes, see Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1228 (2004) (“I ultimately conclude that while there are some decent arguments for constituency statutes, and they are not as harmful as many of their opponents feared, they are, all in all, not a good idea. They are a poor substitute for direct employee involvement in corporate governance.”).

153. Sophia Ankel & Connor Perrett, *More than 20 US States Are Now Requiring Residents to Wear Face Masks When in Public*, BUS. INSIDER (July 12, 2020), <https://www.businessinsider.com/coronavirus-the-17-states-requiring-people-to-wear-masks-public-2020-6> [<https://perma.cc/G9AT-H9JS>].

154. Ryan Hughes, *Palm Beach County Commissioners Mandate Face Masks in Public*, FOX29 (June 23, 2020), <https://www.wflx.com/2020/06/23/live-palm-beach-county-considering-face-mask-mandate/> [<https://perma.cc/X7XC-SHK8>].

155. See Michael Crowe, *Lewis County Sheriff on Mask Requirement: ‘Don’t Be a Sheep,’* KING5 (June 24, 2020), <https://www.king5.com/article/news/health/coronavirus/wa-sheriff-on-mask->

consider the limits of rules imposed from above and the need for internal change from below. It will then consider examples of internal corporate change from below, in some cases in tension with legal rules. Finally, it will describe an example of corporate corruption as a contrast.

A. Limitations on Law in Changing the Essence of a Corporation

Considering the spirit of the corporation may provide helpful insights into the limits of legal reform in changing behavior. Both the sociological and theological conceptions of spirit described earlier understand it as formed both by the individual human persons whose decisions direct the institution and the framework of institutions that support and constrain it. Law is one of those institutions, but, as mentioned earlier, it is not the only one. A change in legal rules may modify incentives for those who own or manage corporations, but the habits and patterns of decision-making and bureaucratic processes create a somewhat rigid framework that limits the range of acceptable decisions. For example, a primary motivator for corporate owners and managers is the accumulation of wealth. However, those interests are not naturally aligned when owners are not also managers. This creates a spectrum of alignment from the single owner/manager (sole proprietor model) business to the public company with professional outside management. Moving away from the sole proprietor model creates the agency problem which occupies so much of traditional corporate legal scholarship.¹⁵⁶ Fiduciary duties, as well as much of securities regulation, are intended to hold management accountable, addressing the agency problem. The combination of multiple competing interest groups and internal mechanisms that perpetuate legacy policy commitments almost certainly limit the impact of isolated or atomized legal reforms.

Wink's consideration of spirit addresses the reinforcing structures that perpetuate violence in human institutions.¹⁵⁷ Were he to describe the typical spirit of corporations, he would likely focus on greed, the priority of financial gain by owners and managers, and the legal and social

order-dont-be-a-sheep/281-094bddc6-b99f-412f-b871-6a2157292775 [https://perma.cc/6358-9W7Z].

156. See, e.g., ADOLF A. BERLE & GARDINER MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* 116 (Routledge ed., 2017) (“[W]here the bulk of the profits of enterprise are scheduled to go to owners who are individuals other than those in control, the interests of the latter are as likely as not to be at variance with those of ownership and that the controlling group is in a position to serve its own interests. . . . In examining the break up of the old concept that was property and the old unity that was private enterprise, it is therefore evident that we are dealing not only with distinct but often with opposing groups, ownership on the one side, control on the other—a control which tends to move further and further way from ownership and ultimately to lie in the hands of the management itself, a management capable of perpetuating its own position.”).

157. See WINK, *supra* note 2, at 37–62.

structures like shareholder primacy that reinforce prioritization of financial gain over other goods. His response to the “Powers” (his term for the collected structures he identifies as dominating human persons) is as follows:

One does not become free from the Powers by defeating them in a frontal attack . . . [W]e are liberated not by striking back at what enslaved us . . . but by a willingness to die rather than submit to its command. . . . We are dead insofar as we have been socialized into patterns of injustice. We died, bit by bit, as expectations foreign to our essence were forced upon us. We died as we began to become complicit in our own alienation and that of others. . . . Each of us has already lost what would have been our way, had we only known how to find it . . . [A]t some point we must begin to become ourselves. And to do that, we who are dead must die to our learned preferences for domination.¹⁵⁸

This death to self might be understood as the sacrifice of self-interest in the context of greed and the imperative to amass wealth. From an explicitly Christian perspective, Wink recommends the following:

Do not continue to acquiesce in your oppression by the Powers; but do not react violently to it either. Rather, find a third way, a way that is neither submission nor assault, flight nor fight, a way that can secure your human dignity and begin to change the power equation. . . . Turn your cheek, thus indicating to the one who backhands you that his attempts to shame you into servility have failed. Strip naked and parade out of court, thus taking the momentum of the law and the whole debt economy and flipping them, jujitsulike [sic], in a burlesque of legality. Walk a second mile, surprising the occupation troops by placing them in jeopardy with their superiors. In short take the law and push it to the point of absurdity. These are, of course, not rules to be followed legalistically, but examples to spark an infinite variety of creative responses in new and changing circumstances. They break the cycle of humiliation with humor and even ridicule, exposing the injustice of the system. They recover for the poor a modicum of initiative that can force the oppressor to see them in a new light.¹⁵⁹

The reorientation of the essence of an institutional structure is thus dependent upon the human persons who contribute to the enterprise. From a theological point of view, it may be considered a form of conversion, a fundamental change of heart or viewpoint. Corporations are constituted by all stakeholders to some degree (regardless of the requirements of

158. *Id.* at 93–94.

159. *Id.* at 110.

fiduciary duties), so it might be that the threshold conversion occurs in a variety of places.

B. Corporate Conversion as Change from Below

In an effort to restrain corporate excess and externalities, a number of movements have attempted to provide frameworks for evaluating the relative “good” or “evil” of corporations. Perhaps the most notable are corporate social responsibility and the benefit corporation. Under these frameworks, a number of different groups evaluate, grade, and rank corporations according to their commitment and effectiveness in terms of corporate social responsibility.¹⁶⁰ Although many jurisdictions have some version of a benefit corporation that explicitly allows business entities to serve defined public good, B Lab has come to serve as a gatekeeper by certifying “B Corps” using criteria beyond those allowed or required by state law.¹⁶¹

Many businesses are lauded as good corporate citizens. Some of those businesses were founded with an intention to serve some aspect of the public good.¹⁶² Others shifted focus as a result of changed values of corporate leaders.¹⁶³ This is most often attributed to chief executive officer, but senior management teams, boards of directors, shareholder activists, and labor leaders may all play a role.

1. CEOs

Perhaps the most obvious critical person in orienting a corporation toward the good is the chief executive officer. Although they are accountable to boards of directors, CEOs have broad authority to make decisions with potentially massive impacts on stakeholders. Thus, it is not surprising that a CEO’s personal transformations or epiphanies may shape

160. See, e.g., Vicky Valet, *The World’s Most Reputable Companies for Corporate Responsibility 2019*, FORBES (Sept. 17, 2019), <https://www.forbes.com/sites/vickyvalet/2019/09/17/the-worlds-most-reputable-companies-for-corporate-responsibility-2019/#700b7a2a679b> [<https://perma.cc/C3GS-Z3SF>]; *The CSRHub Ratings Methodology*, CSRHUB, https://esg.csrhub.com/csrhub-ratings-methodology?_ga=2.23584498.937665841.1593757526-1506186005.1593757526 [<https://perma.cc/55YZ-5WV3>].

161. See *About B Corps*, B CORP., <https://bcorporation.net/about-b-corps> [<https://perma.cc/6G2L-GRJY>].

162. See, e.g., BEN & JERRY’S, <https://www.benjerry.com> [<https://perma.cc/3EPC-7Z57>]; PATAGONIA, <https://www.patagonia.com/home> [<https://perma.cc/2G94-U2Q8>]; NATURA, <https://www.naturabrazil.com> [<https://perma.cc/S2DN-48AH>]; TOMS, <https://www.toms.com/> [<https://perma.cc/8G6B-TRKK>]; WARBY PARKER, <https://www.warbyparker.com> [<https://perma.cc/5VWZ-PYJM>].

163. See, e.g., STARBUCKS, <https://www.starbucks.com> [<https://perma.cc/GW4J-PYLR>]; MICROSOFT, <https://www.microsoft.com/en-us> [<https://perma.cc/W9DM-PNB7>]; INTERFACE, <https://www.interface.com/US/en-US> [<https://perma.cc/5NFY-TNZX>]; COSTCO, <https://www.costco.com> (last visited Dec. 29, 2020).

the essence of the corporation. I note Ray Anderson, Jim Sinegal, Howard Schultz, and Bill Gates as examples below.

a. Ray Anderson at Interface

Ray Anderson, founder of Interface and green business pioneer, revolutionized the way modern day corporations view sustainability. Anderson's commitment to sustainability began when he had what he called "the spear in the chest epiphany" after reading *The Ecology of Commerce*.¹⁶⁴ Anderson believed that the only way the Earth can change is if business, the most pervasive and influential force on the planet, is willing to lead.¹⁶⁵ In the same year as this epiphany, Anderson declared that his company, Interface, was "committed to becoming the world's first environmentally sustainable . . . and . . . restorative company."¹⁶⁶

Perhaps more than any other corporate leader, Anderson makes a direct connection between spirit and the corporation. He identifies his epiphany regarding corporate responsibility to protect the environment as a kind of conversion, analogous to his own experience of Christian conversion.¹⁶⁷ Anderson's reorientation toward the common good was not a result of a purely internal process. It was employees of Interface who confronted him with the ecological problems created as a result of the company's productions.¹⁶⁸ In 1994, he was asked what his company was doing for the environment and whether he had an ecological "vision."¹⁶⁹ He could not give an answer, and this deeply disturbed him.¹⁷⁰ He educated himself and began to wrestle with the challenge of economic and environmental sustainability in an industry (floorcoverings) reliant on petrochemicals.¹⁷¹

His newfound commitment to sustainability prompted a number of internal reviews of manufacturing processes and company policies in an effort to minimize the environmental impact of the corporation.¹⁷² Anderson supported a formal process to review the environmental sustainability of Interface.¹⁷³ By 1997, he was able to articulate an ecological vision for Interface:

164. *Ray's Life*, RAY C. ANDERSON FOUND., <https://www.raycandersonfoundation.org/rays-life/> [<https://perma.cc/7VW4-WCDS>].

165. *Id.*

166. *The Interface Story*, INTERFACE, https://www.interface.com/US/en-US/sustainability/our-history-en_US [<https://perma.cc/HX2P-LWEE>].

167. *See generally* RAY C. ANDERSON, *CONFESSIONS OF A RADICAL INDUSTRIALIST* (2009).

168. *Id.* at 9–10.

169. *Id.* at 255.

170. *Id.* at 255–66.

171. *Id.* at 2.

172. *See id.* at 5–6.

173. *Id.* at 16–19.

If we're successful, we'll spend the rest of our days harvesting yester-year's carpets and other petrochemically derived products, and recycling them into new materials; and converting sunlight into energy; with zero scrap going to the landfill and zero emissions into the ecosystem. And we'll be doing well . . . very well . . . by doing good. That's the vision.¹⁷⁴

Anderson passed away in 2011, but under his leadership the company had begun to address some of its most problematic impacts.

[T]he company had made significant progress towards that vision, reducing greenhouse gas emissions by 35 percent, fossil fuel consumption by 60 percent (favoring renewable forms of energy), waste to landfill by 82 percent, and water use by 82 percent and Interface had avoided over \$450 million in costs, increased sales by 63 percent and more than doubled earnings.¹⁷⁵

Arguably, there are few businesses that are truly environmentally neutral, but Interface had a clear impact on the corporate culture of related chemical industries, by shining light on its own need for reform. Anderson has been lauded as a key corporate leader in challenging unquestioning shareholder exclusivity at the expense of the environment and the community.¹⁷⁶ Something fundamental changed in the way Interface was managed, and it had concrete, definable impacts. It resulted in the sort of change in orientation of corporate "spirit" described by Wink and others.

Ray C. Anderson is the central character in that dynamic, but it would be a mistake to identify a founder, CEO, or chairperson with the corporate entity entirely. Anderson was in dialogue with people under him in the corporate hierarchy and above him in the regulatory framework.¹⁷⁷ His convictions were challenged and shaped by both, resulting in a paradigm shift. Then as the primary agent of the corporation, he did have a profound impact on its orientation toward environmental impact and sustainability. The shift was not immediate and required buy-in from the board, shareholders, employees, suppliers, and distributors.¹⁷⁸ Eventually, the operations of the network of parties providing inputs to the business had

174. *Biography*, RAY C. ANDERSON FOUND., <https://www.raycandersonfoundation.org/biography> [<https://perma.cc/L4H4-9AWW>].

175. *Id.*

176. Ray C. Anderson, *Sustainability and the Bottom Line: The Responsible Collusion of Economics, Social Responsibility, and the Environment*, 2 J. VALUES-BASED LEADERSHIP 1, 3 (2009) ("The task of reversing the 'plundering' process would become even more daunting for Anderson when he went a significant step further with his pledge to give back to the earth more than what Interface was taking from it. But in doing so, Anderson was keenly aware about the concerns of third parties who were also Interface stakeholders.").

177. *See id.*

178. *See id.*

fundamentally changed. Anderson would describe the change in commitment from maximizing profits to one of optimizing profit with minimized externalities for the benefit of the community, or truly sustainable profits.¹⁷⁹ He spoke about his own epiphany, but the impact on the “spirit” of Interface might be understood as a kind of conversion—a transformation that impacted market competitors and government.

b. Jim Sinegal at Costco

Jim Sinegal, co-founder and former CEO of Costco Wholesale Corporation, became a retail legend for his genuine care for customers and employees. Part of Sinegal’s success is attributed to his egalitarian business philosophy and belief that culture drives everything in a successful business.¹⁸⁰ Sinegal believed that “if you find good people, give them good jobs, and pay them good wages, good things will happen.”¹⁸¹ This belief differentiated Sinegal from other CEOs in the retail industry and is what transformed Costco into the international multi-billion dollar retail giant it is today.¹⁸²

Sinegal was mentored by Sol Price, founder of FedMart and Price Club (which later merged with Costco), who is often referred to as the father of the warehouse club.¹⁸³ Sinegal worked his way up the ladder at FedMart before founding Costco in 1983, but he credited Price for shaping his approach to corporate management.¹⁸⁴ Price’s hierarchy of duties at FedMart and Price Club persisted in the merged PriceCostco, and ultimately in Costco run by Jim Sinegal: “Our first duty is to our customers. Our second duty is to our employees. Our third duty is to our stockholders.”¹⁸⁵ This approach challenges the role of shareholder exclusivity, particularly with regard to short-term returns. Even so, these values are deeply embedded in the corporate culture and spirit of Costco.

179. *See id.*

180. Melissa Campanelli, *A Few Thoughts from Costco’s Jim Sinegal*, TOTAL RETAIL (Nov. 1, 2017), <https://www.mytotalretail.com/post/a-few-thoughts-from-costcos-jim-sinegal/> [<https://perma.cc/3UD6-C5DD>].

181. James D. Sinegal, *A Long-Term Business Perspective in a Short-Term World*, ETHIX (Apr. 1, 2003), <https://ethix.org/2003/04/01/a-long-term-business-perspective-in-a-short-term-world> [<https://perma.cc/CG8F-C4ZX>].

182. Barbara Farfan, *Costco’s Retail Innovation Craze*, THE BALANCE SMALL BUS. (Dec. 12, 2019), <https://www.thebalancesmb.com/costco-international-expansion-and-retail-innovation-2891768> [<https://perma.cc/B3PX-V2RC>].

183. *See generally* ROBERT E. PRICE, SOL PRICE: RETAIL REVOLUTIONARY & SOCIAL INNOVATOR (2012).

184. *See* James Sinegal, *Foreword* to ROBERT E. PRICE, SOL PRICE: RETAIL REVOLUTIONARY & SOCIAL INNOVATOR, at vii–ix (2012).

185. PRICE, *supra* note 183, at 61.

That commitment has not been without cost. Costco has long been criticized for its commitment to members and employees. A number of shareholder proposals have challenged the board's commitment to long-term sustainable growth by valuing members and employees. "On Wall Street, they're in the business of making money between now and next Thursday. . . . We want to build a company that will still be here 50 . . . years from now."¹⁸⁶

This focus on long-term sustained profits was used by Sinegal to justify the company's emphasis on member satisfaction and employee wellbeing and retention. It is a core value of the business that has survived repeated scrutiny and reflects an important aspect of the core essence of Costco.

Challenges to the board continued even after Sinegal retired. For example, in 2020, a shareholder proposal for a so-called "True Diversity Board Policy" requiring "ideological" diversity was included in proxy materials and opposed by the board.¹⁸⁷ These policies were put forward at a number of corporations that have been committed to board diversity and long-term sustainability in an effort to challenge boards and management teams that have been associated with "liberal" perspectives or causes.¹⁸⁸

Unlike Interface, which experienced transformation in its values, Costco has been fairly consistent in its commitment to these core values that challenge some conceptions of shareholder primacy. That spirit was fostered by the founders and has been embraced and nurtured by employees and later boards.

c. Howard Schultz at Starbucks

Howard Schultz, former CEO of Starbucks Coffee Company, turned the regional coffee company into one of the world's top brands.¹⁸⁹ Schultz

186. Steven Greenhouse, *How Costco Became the Anti-Wal-Mart*, N.Y. TIMES (July 17, 2005), <https://www.nytimes.com/2005/07/17/business/yourmoney/how-costco-became-the-antiwal-Mart.html> [<https://perma.cc/HJN5-8SW3>].

187. See COSTCO, NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 25–27 (Dec. 10, 2019), <https://investor.costco.com/static-files/de687eea-3ac1-487c-b1e2-537861ee0031> [<https://perma.cc/K23T-W9TN>].

188. See, e.g., James McRitchie, *Costco 2020 Proxy: How I Voted*, CORP. GOVERNANCE (Jan. 14, 2020), <https://www.corpgov.net/2020/01/costco-2020-proxy-how-i-voted/> [<https://perma.cc/4GS5-Q2LN>] ("This proposal, which I assume is from National Center for Public Policy Research, seeks to add a litmus test for the 'ideology' of directors. Although Egan-Jones recommended, for, I do not. While I certainly favor diversity, and diversity of thought is important, I do not want candidates to have to describe their political ideology. We do not live in a dictatorship. Corporations should not be democratic-free zones. Directors should not be required to identify their political affiliations. Political ideology should play no role in the execution of board responsibilities. Vote: AGAINST.")

189. #209 *Howard Schultz*, FORBES, <https://www.forbes.com/profile/howard-schultz/> [<https://perma.cc/37TT-T2YT>] (profile from #Forbes400: *The Definitive Ranking of the Wealthiest Americans in 2020*, FORBES (Sept. 8, 2020)).

used his expertise in sustainable growth to expand Starbucks from eleven stores to more than thirty thousand stores worldwide.¹⁹⁰ From the time Schultz became CEO until 2011, “Starbucks averaged two new store openings each and every day.”¹⁹¹ Starbucks’s growth was sparked by Schultz’s vision of providing a coffeehouse experience—providing “an oasis for busy people in the midst of [their] hectic and fragmented lives.”¹⁹² This unique experience is symbolic of Starbucks and is why the company continues to steadily grow and mature.

Schultz has written about how his background and upbringing shaped his approach to corporate management.¹⁹³ He has also on occasion noted the importance of his Jewish faith in his professional values. In a 2011 essay, Schultz recounts a Holocaust story from the late Rabbi Nosson Tzvi Finkel that impacted him deeply:

As they went into the area to sleep, only one person was given a blanket for every six. The person who received the blanket, when he went to bed, had to decide, “Am I going to push the blanket to the five other people who did not get one, or am I going to pull it toward myself to stay warm?”

And Rabbi Finkel says, “It was during this defining moment that we learned the power of the human spirit, because we pushed the blanket to five others.”

And with that, he stood up and said, “Take your blanket. Take it back to America and push it to five other people.”¹⁹⁴

Schultz internalized this as a communitarian value he attempted to incorporate in principle at Starbucks. The company’s commitment to fair trade sourcing, living wages, employee healthcare, education, and community advancement all fit within the general ambit of corporate social responsibility, and those policies developed in tandem with the CSR movement as it developed in the 1990s and 2000s.¹⁹⁵ While such policies serve legitimate business purposes in terms of good will, reputation, and brand identification, they are sometimes discounted by critics as

190. *Id.*

191. *Starbucks Facts*, SOFT SCHS., https://www.softschools.com/facts/business/starbucks_facts/2766/ [<https://perma.cc/FG35-JYCS>].

192. *Howard Schultz 1953 — Biography*, REFERENCE FOR BUS., <https://www.referenceforbusiness.com/biography/S-Z/Schultz-Howard-1953.html> [<https://perma.cc/5SLG-7WXU>].

193. See generally HOWARD SCHULTZ, *FROM THE GROUND UP: MY JOURNEY TO REIMAGINE THE ROLE OF A GLOBAL BUSINESS* (2019).

194. Howard Schultz, *A Blanket of Trust*, AISH (Nov. 8, 2011), <https://www.aish.com/ci/be/48880957.html> [<https://perma.cc/A365-6JEV>].

195. STARBUCKS, FY2008 GLOBAL RESPONSIBILITY REPORT (June 1, 2010), <https://globalassets.starbucks.com/assets/76f95d923db341fe9237a3360e0d03e3.pdf> [<https://perma.cc/W6Z3-SVDD>].

superficial window dressing;¹⁹⁶ it is notable that many public companies do not make similar commitments while Starbucks has been reasonably consistent over the years in making these values part of its corporate culture.

The experience of Starbucks differs from that of Interface and Costco. The company began as a single coffee shop in Seattle's Pike Place Market. It was run as a typical small business until its rapid expansion. Schultz was faced with the challenge of running a large, international public company subject to the scrutiny of analysts and regulators. His commitment to farmers, employees, and communities was rooted in his personal convictions and a broader Seattle culture of social responsibility that he helped to shape.

d. Bill Gates at Microsoft

Bill Gates, best known as the co-founder of the Microsoft Corporation, is the epitome of capitalist success. When Gates and Paul Allen started Microsoft, they had a farfetched vision of having a computer on every desktop and in every home.¹⁹⁷ Today, this vision has become "a reality in many parts of the world."¹⁹⁸ Aside from Gates's success with Microsoft, Gates and his wife, Melinda, founded the Bill & Melinda Gates Foundation, "the world's largest private charitable foundation."¹⁹⁹ Gates's commitment to donating and giving back is what makes him a business magnate many aspire to be.

Gates served as the CEO of Microsoft until 2006, Chairman of the Board until 2014, and a board member until 2020.²⁰⁰ At each stage, he indicated that these transitions were to allow him more time to concentrate on his philanthropy.²⁰¹ He created the William H. Gates Foundation in 1994 and then in 2000 consolidated his foundations with a five billion dollar grant to the new Bill & Melinda Gates Foundation, which would become the largest charitable foundation in the world.²⁰² The foundation

196. See, e.g., *When Is Being Good Not Good Enough?*, FORBES (Nov. 28, 2006), https://www.forbes.com/2006/11/28/leadership-starbucks-charity-lead-citizen-cx_mc_1128companies.html [<https://perma.cc/V48F-A64V>].

197. *About Bill*, GATES NOTES, <https://www.gatesnotes.com/Bio> [<https://perma.cc/4SMQ-9VHZ>].

198. *Id.*

199. *Bill Gates*, FORBES, <https://www.forbes.com/profile/bill-gates/#3aa560b6689f> [<https://perma.cc/AS8P-PQAJ>].

200. See Rob Enderle, *Bill Gates Always Seems to Know When It's Time to Go*, COMPUTERWORLD (Mar. 16, 2020), <https://www.computerworld.com/article/3532478/bill-gates-always-seems-to-know-when-it-s-time-to-go.html> [<https://perma.cc/7MQE-V9JH>].

201. *Id.*

202. See *History*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/Who-We-Are/General-Information/History> [<https://perma.cc/QG5Q-8EWG>].

is committed to global health, education, and economic sustainability.²⁰³ Almost the entirety of the Gates's fortune (primarily consisting of Microsoft stock) will eventually be distributed through the foundation to further these goals.²⁰⁴

Although Bill Gates has never described the sort of epiphany or conversion as Ray Anderson recounts, there appears to be a transition in his views towards Microsoft, wealth, and spirituality. Accounts of the early years of Microsoft tend to cast Gates as aggressive, self-interested, and single-mindedly focused on expansion and profit, not unlike the next generation of tech entrepreneurs, such as Mark Zuckerberg.²⁰⁵ He made disparaging comments regarding religion that garnered him a place on the list of "27 Celebrities You Probably Didn't Know Are Atheists."²⁰⁶ However, there appears to be an evolution in his views and commitments at least traceable from the time of his marriage to Melinda (French) Gates in 1994, the same year he created his first foundation. Melinda Gates is a practicing Catholic, and the couple raised their children attending a local Catholic church.²⁰⁷ This was also a time of incredible growth for Microsoft. Its corporate culture had been described as cutthroat with regard to its treatment of both employees and competitors.²⁰⁸ However, as the firm grew, there was an increasing awareness that the long-term sustainability of the firm might require commitments to employees and the local community (Redmond and the greater Seattle region, in

203. See *Foundation Fact Sheet*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/Who-We-Are/General-Information/Foundation-Factsheet> [<https://perma.cc/5E5D-4Z EQ>].

204. *Bill and Melinda Gates Give 95% of Wealth to Charity*, BBC NEWS (Oct. 18, 2010), <https://www.bbc.com/news/av/entertainment-arts-11565953> [<https://perma.cc/5B26-AHDW>].

205. See, e.g., Mike Hofman, *Young Bill Gates Was an Angry Office Bully*, GQ (Oct. 28, 2015), <https://www.gq.com/story/young-bill-gates-was-an-angry-office-bully> [<https://perma.cc/996B-GXSY>]; see also Rainer Zitelmann, *Bill Gates Was an Angry, Difficult Boss in Early Microsoft Days—Here's Why Employees Still Liked Him*, CNBC (Feb. 24, 2020), <https://www.cnbc.com/2020/02/24/bill-gates-was-difficult-boss-in-early-microsoft-days-but-employees-still-liked-him.html> [<https://perma.cc/JD43-K973>].

206. See Dan, *27 Celebrities You Probably Didn't Know Are Atheists*, THINK ATHEIST: BLOG (July 2, 2009, 11:30 PM), <http://www.thinkatheist.com/profiles/blogs/27-celebrities-you-probably> [<https://perma.cc/8PF6-PX7E>].

207. Jeff Goodell, *Bill Gates: The Rolling Stone Interview*, ROLLING STONE (Mar. 13, 2014), <https://www.rollingstone.com/culture/culture-news/bill-gates-the-rolling-stone-interview-111915/> [<https://perma.cc/7ZE2-NRSX>]. See generally MELINDA GATES, *THE MOMENT OF LIFT: HOW EMPOWERING WOMEN CHANGES THE WORLD* (2019) (within this book, Melinda discusses, among other things, her Catholic faith).

208. *Presenting: Satya Nadella Employed a 'Growth Mindset' to Overhaul Microsoft's Cutthroat Culture and Turn It into a Trillion-Dollar Company—Here's How He Did It*, BUS. INSIDER (Mar. 7, 2020), <https://www.businessinsider.com/microsoft-ceo-satya-nadella-company-culture-shift-growth-mindset-2020-3> [<https://perma.cc/2GQT-UCL9>].

particular).²⁰⁹ Eventually, at the direction of Gates, Microsoft would come to be viewed as a leader in corporate social responsibility. After the tech bubble of 2000, the stock price leveled off.²¹⁰ The firm repositioned itself as a traditional blue chip holding rather than as a technology growth stock. The Gates Foundation ramped up its research and distribution capacity in the early 2000s, and in 2000, Gates stepped down as CEO in order to focus on that charitable work.²¹¹ This personal journey had an impact on the culture and essence of Microsoft, making the transition from brash expansionist to responsible corporate citizenship. The company certainly still has its detractors, but it is often noted as an example of what large technology firms can, and perhaps ought to be, when compared with similar firms (Amazon and Facebook, in particular).²¹²

In an illuminating Rolling Stone interview in 2014, Gates appeared to shift from his earlier statements disparaging religion by noting that it is an important source of morality:

The moral systems of religion, I think, are super important. . . . We've raised our kids in a religious way; they've gone to the Catholic church that Melinda goes to and I participate in. . . . I think it makes sense to believe in God, but exactly what decision in your life you make differently because of it, I don't know.²¹³

Many business leaders have impacted the culture and essence of Microsoft, but the personal journey of Bill Gates toward social responsibility undoubtedly impacted the character of the corporation.

2. Leadership Teams

The previous section describes the impact of notable CEOs in establishing or transforming corporate culture. However, in some cases senior managers set standards for good corporate behavior without a single dominating leader. These stories are potentially more complex, but I

209. See *Environmental Sustainability*, MICROSOFT, <https://www.microsoft.com/en-us/corporate-responsibility/sustainability> [<https://perma.cc/7Z8N-AW6A>]; *Empowering our Employees*, MICROSOFT, <https://www.microsoft.com/en-us/corporate-responsibility/empowering-employees> [<https://perma.cc/S39P-SW7A>].

210. See Wayne Duggan, *Here's How Much Investing \$1,000 in Microsoft at Dot-Com Bubble Peak Would Be Worth Today*, YAHOO! NEWS (Sept. 4, 2020), <https://www.yahoo.com/news/heres-much-investing-1-000-124514082.html> [<https://perma.cc/KZD4-AHEW>] (“Microsoft’s high watermark of the dot-com bubble was \$119.94 back in 1999 following a two-for-one stock split. When the bubble burst, Microsoft traded all the way back down to \$40.25 in late 2000.”).

211. *Gates Steps Down as Microsoft CEO*, FORBES (Jan. 13, 2000), <https://www.forbes.com/2000/01/13/mu7.html#70ad25105d83> [<https://perma.cc/Y9H8-5QFQ>].

212. See, e.g., *Microsoft Corporation CSR/ESG Ranking*, CSRHUB https://www.csrhub.com/CSR_and_sustainability_information/Microsoft-Corporation [<https://perma.cc/UEL2-YFYC>].

213. Goodell, *supra* note 208.

quickly note five companies that consistently rank very highly in corporate responsibility and sustainability rankings as a result of the commitment of senior managers. Some of these firms have played a significant role in reimagining the scope of corporate fiduciary duties and the B Corp movement.

a. Ben & Jerry's

Most famous for their iconic pop culture-inspired ice cream flavors, Ben & Jerry's ice cream empire started from humble beginnings. Founders Ben Cohen and Jerry Greenfield opened their first "ice cream shop in a converted gas station in Vermont" in 1978.²¹⁴ Ben & Jerry's quickly exploded in popularity and became one of the most popular ice cream brands. In addition to the company's financial success, Ben & Jerry's became one of the first companies in the world to give a social mission equal importance with its economic goals.²¹⁵ Ben & Jerry's has a three-part mission: (1) their economic mission is "to manage [their] Company for sustainable financial growth," (2) their social mission "compels [them] to use [their] Company in innovative ways to make the world a better place," and (3) their product mission "drives [them] to make fantastic ice cream" products.²¹⁶

The alternative, liberal, and countercultural approach to corporate governance established by the founders and management team proved to be deeply enduring. In 2000, the company was sold to Unilever in a somewhat controversial move that pitted an obligation to accept an unsolicited offer that objectively appeared to be in the financial interest of shareholders over the values of the firm.²¹⁷ However, the unique character of the company has persisted. Ben & Jerry's is now a certified B Corp and continues to support some of the values held by the previous management team, even though it is owned by a large multinational conglomerate that does not always share those values.²¹⁸ This may serve as an example of corporate essence ultimately taking on an existence separate from founders, managers, and parent companies.

214. Leigh Weingus, *The Sweet Story of How Ben & Jerry's Built Its Ice Cream Empire*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/ben-and-jerrys-ice-cream_n_6271368 [<https://perma.cc/5YCF-GSHE>].

215. *Ben & Jerry's Joins the B Corp Movement!*, BEN & JERRY'S, <https://www.benjerry.com/about-us/b-corp> [<https://perma.cc/6JTY-H9XF>].

216. *Our Values*, BEN & JERRY'S, <https://www.benjerry.com/values> [<https://perma.cc/JCY8-RCDH>].

217. Constance L. Hays, *Ben & Jerry's to Unilever, with Attitude*, N.Y. TIMES (Apr. 13, 2000), <https://www.nytimes.com/2000/04/13/business/ben-jerry-s-to-unilever-with-attitude.html> [<https://perma.cc/N9TY-WWWB>].

218. BEN & JERRY'S, *supra* note 215.

b. Natura

When it comes to social responsibility in business, an obvious exemplar would be Natura. The Brazilian cosmetics company “has built a reputation for treating the environment, suppliers[,] and customers responsibly.”²¹⁹ Natura commits to sustainability by reducing waste, controlling raw material consumption, using environmentally friendly packaging, and working with other like-minded environment focused companies.²²⁰ Additionally, unlike many of its competitors, Natura has met its carbon-zero goal since 2007 by funding projects aimed at sequestering carbon emissions.²²¹

Although Antonio Luiz Seabra started the business as a single sundries shop in São Paulo in 1969,²²² Natura has grown into a multinational conglomerate including the Body Shop, Aesop, and Avon.²²³ Sustainability and social responsibility have been core commitments of the management team, particularly over the past three decades.²²⁴ Seabra hired strategically to ensure that these values would continue to be embraced by managers and remain at the core of the corporation’s identity even as the firm has grown.

c. Patagonia

Patagonia, the well-known and respected American clothing company, leads by example in taking action against the most pressing environmental issues facing our world.²²⁵ Since 1985, Patagonia has awarded over \$89 million to the preservation and restoration of the natural environment through its commitment of either 1% of sales or 10% of profits, whichever is greater, to various international grassroots

219. Danilo Vivan, *How Natura Became an Even More Sustainable Company*, BELIEVE EARTH, <https://believe.earth/en/how-natura-became-an-even-more-sustainable-company/> [https://perma.cc/53EX-JXWJ].

220. *Environmental Engagements*, NATURA, <https://www.naturabrasil.fr/en-us/our-values/environmental-commitments> [https://perma.cc/942N-9CYM].

221. Richard Lapper, *A Sustainable Approach to the Beauty Business*, STRATEGY+BUS. (Oct. 16, 2019), <https://www.strategy-business.com/article/A-sustainable-approach-to-the-beauty-business> [https://perma.cc/WSZ6-QDSG].

222. Geoffrey Jones, *The Growth Opportunity that Lies Next Door*, HARV. BUS. REV., July–Aug. 2012, at 141.

223. Angela Monaghan & Sarah Butler, *Body Shop and Aesop Owner Close to Buying Avon in £1.58bn Deal*, THE GUARDIAN (May 22, 2019), <https://www.theguardian.com/business/2019/may/22/body-shop-aesop-owner-natura-takeover-avon> [https://perma.cc/CQ3H-RWBW].

224. See Carla Camargo Leal, Marta Fabiano Sambiase Lombardi & Leonard F. C. Basso, *The Activity of Natura from the Perspective of Sustainable Development and of Corporate Social Responsibility*, 8 MGMT. RSCH. 165 (2010).

225. See *How We Work with Factories, Farms and Mills*, PATAGONIA, <https://www.patagonia.com/working-with-factories-farms-mills/> [https://perma.cc/3EZ3-W5QM].

environmental groups.²²⁶ Aside from environmental activism, Patagonia's nearly two thousand employees are paid market or higher wages and receive excellent benefits, including generous health care, subsidized child care, flexible work schedules, and paid time off for environmental internships.²²⁷

Patagonia's environmental focus can be attributed to its founder, Yvon Chouinard, but this value, along with a broader commitment to corporate responsibility, is shared by the executive team of the company.²²⁸ The company is now a B Corp and is consistently cited as a model of corporate sustainability and culture.²²⁹

d. TOMS Shoes

"For every pair of shoes purchased, one pair is donated to a rural neighborhood in a developing country."²³⁰ For the past fourteen years, TOMS has held to its buy one, give one promise. TOMS's commitment to equity is commendable and changes to adapt. As of April 1, 2020, TOMS began to direct one-third of its net profits to the TOMS COVID-19 Global Giving Fund.²³¹ TOMS explicitly commits to promoting the common good with each sale.²³²

Founded by Blake Mycoskie and Alejo Nitti in 2006, TOMS Shoes, LLC was taken over by creditors in 2019.²³³ However, the transition has not changed the focus on charity, equity, and development at this certified B Corp. Some continuity in the management team and buy-in on the part of the new owners has allowed the company to maintain its identity even as it faces financial challenges.²³⁴ Although the company continues to

226. *1% for the Planet*, PATAGONIA, <https://www.patagonia.com/one-percent-for-the-planet.html> [<https://perma.cc/9BKH-YKHE>].

227. *History*, PATAGONIA, <https://www.patagonia.com/our-footprint/corporate-responsibility-history.html> [<https://perma.cc/XH38-BXUL>].

228. See Eduardo Sasso, *Is Governance the Unexplored Secret Behind Patagonia's Business Success?*, GREENBIZ (Nov. 18, 2019), <https://www.greenbiz.com/article/governance-unexplored-secret-behind-patagonias-business-success> [<https://perma.cc/FXU6-CZ3B>].

229. *Id.*

230. Akhil Upneja, *TOMS: Impact and Effectiveness of "Buy One, Give One" Model*, YALE GLOB. HEALTH REV. (July 8, 2016), <https://yaleglobalhealthreview.com/2016/07/08/toms-impact-and-effectiveness-of-buy-one-give-one-model/> [<https://perma.cc/D64P-C6JD>].

231. *TOMS COVID-19 Global Giving Fund*, TOMS, <https://www.toms.com/uk/global-giving-fund.html> [<https://perma.cc/D7K2-B847>].

232. See *Impact*, TOMS, <https://www.toms.com/us/impact.html> [<https://perma.cc/4MSV-Y2N2>].

233. Irene Anna Kim, *How Toms Went from a \$625 Million Company to Being Taken Over by Its Creditors*, BUS. INSIDER (May 16, 2020), <https://www.businessinsider.com/rise-and-fall-of-toms-shoes-blake-mycoskie-bain-capital-2020-3> [<https://perma.cc/9M9Y-XG7L>].

234. See, e.g., Ben Unglesbee, *Toms Shoes Creditors Take Ownership of the Company*, RETAIL DIVE (Jan. 2, 2020), <https://www.retaildive.com/news/toms-shoes-creditors-take-ownership-of-the-company/569685/> [<https://perma.cc/7VUA-F4N9>].

struggle (as do nearly all retail businesses in 2020), the persistence of its character and essence speaks to an identity separate from the founders and even particular managers.

e. Warby Parker

Warby Parker's "Buy a Pair, Give a Pair" program is an example of the company's strong commitment to helping and giving back to those in need.²³⁵ The program is simple, yet effective: "for every pair of Warby Parker glasses purchased, a pair of glasses is distributed to someone in need."²³⁶ With this program and others related to the promotion of equity and the common good, Warby Parker commits to making a difference and lasting impact. In some ways the apparently eleemosynary approach to marketing is similar to that of TOMS Shoes.

Warby Parker was founded in 2010 by Jeffrey Raider, Andrew Hunt, Neil Blumenthal, and David Gilboa with support from the Wharton Venture Initiation Program.²³⁷ By 2015 it was valued at \$1.2 billion and was established as a B Corp.²³⁸ It is an example of a successful company formed by a new generation of social entrepreneurs. The four ground rules at the core of Warby Parker's corporate culture are the following: "[t]reat customers the way we'd like to be treated"; "[c]reate an environment where employees can think big, have fun, and do good"; "[g]et out there"; and "[g]reen is good."²³⁹ The founding management team built these values into the structure of the company and they have hired and trained new employees with these priorities. As a newer stage company than those already mentioned, Warby Parker could serve as an interesting subject for empirical research related to the durability of its corporate culture and values.

3. Shareholder Activists

Pressure to further the common good does not come only from CEOs, founders, boards, and management teams; shareholders can also play an important and constructive role. Some shareholder activism advocates various approaches to shareholder primacy, but many

235. *The Whole Story Begins with You*, WARBY PARKER, <https://www.warbyparker.com/buy-a-pair-give-a-pair> [<https://perma.cc/9MY3-AKR9>].

236. *Id.*

237. Dinah Eng, *In Hindsight: How Warby Parker Got Its Start*, FORTUNE (May 30, 2019), <https://fortune.com/2019/05/30/warby-parker-founders/> [<https://perma.cc/3DLW-CEW4>].

238. *Warby Parker*, BUS. MODEL TOOLBOX, <https://bmttoolbox.net/stories/warby-parker/> [<https://perma.cc/V4LL-PRHJ>].

239. *Culture*, WARBY PARKER, <https://www.warbyparker.com/culture> [<https://perma.cc/7G3R-B6N2>].

shareholder proposals address environmental or social concerns.²⁴⁰ Such efforts are occasionally approved, but even when they are rejected by boards or shareholders, proposals included in proxy materials shine light on important issues (which is often a primary objective of shareholder activists).

In my experience, some of the most effective shareholder advocacy has involved appeals to management teams that do not result in a formal proposal for a shareholder vote. Corporate leaders are sometimes sympathetic to issues raised by shareholders who attempt to further equity or sustainability goals in a nonadversarial context.²⁴¹

a. South African Divestment

Throughout the 1980s, many United States shareholders took part in corporate protest that involved corporate divestment by investors who wanted to express disfavor with apartheid and American corporate complicity in it.²⁴² A number of colleges and universities, including Columbia, Amherst, Smith, Wisconsin, and Tufts divested themselves of some or all of their holdings in firms that did business in South Africa.²⁴³ Despite the large effort by many shareholder activists, many American corporations doing business in South Africa questioned whether joining the divestment protests was worth sacrificing profitable operations.²⁴⁴ South African leaders, including Nelson Mandela, asserted that the divestment movement was critical in weakening apartheid and created a necessary condition for the new constitution.²⁴⁵

b. Contemporary Divestment: Fossil Fuel, Sudan, etc.

Divestment from fossil fuel companies has been a controversial topic in recent years. Many institutional investors express their unease at fossil fuel divestment, mainly because of the potential financial injury that could arise from a less diversified portfolio.²⁴⁶ “On the other hand, proponents

240. See, e.g., Anastasia O'Rourke, *A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility*, 12 BUS. STRATEGY & ENV'T 227 (2003).

241. I have observed this dynamic with socially conscious investment groups, pension funds, and religious communities.

242. Paul Lansing, *The Divestment of United States Companies in South Africa and Apartheid*, 60 NEB. L. REV. 304, 307 (1981).

243. *Id.*

244. See *id.* at 308.

245. See, e.g., Adele Simmons, *Outside Opinion: Skeptics Were Wrong; South Africa Divestment Worked*, CHI. TRIB. (Dec. 15, 2013), <https://www.chicagotribune.com/business/ct-xpm-2013-12-15-ct-biz-1215-outside-opinion-20131215-story.html> [<https://perma.cc/LR47-QFBP>].

246. Surbhi Sarang, Note, *Combating Climate Change Through a Duty to Divest*, 49 COLUM. J.L. & SOC. PROBS. 295, 301 (2016).

argue that complying with fiduciary duty *requires* divestment. . . .”²⁴⁷ The burning of fossil fuels are a major cause of climate change that may require immediate attention and action by corporate leaders.²⁴⁸ However, it remains to be seen whether this divestment will become as impactful a strategy as it was in South Africa.

c. Environmental Activism

Many of the United States corporate business leaders recognize the urgency of environmental issues such as climate change. Despite their concern, there was a common belief amongst corporate leaders “that pursuing a sustainability agenda runs counter to the wishes of their shareholders.”²⁴⁹ Thankfully, this perception is outdated. In a recent study, seventy senior executives at forty-three institutional investing firms almost universally voted that environmental, social, and governance issues were “top of mind” for them.²⁵⁰ The implementation of sustainable thinking in a corporate context is a necessary environmental focus that many institutional investors are realizing is critically important.²⁵¹

d. Socially Conscious Investment

Over the past ten years, there has been a massive increase in funds being allocated and invested in businesses contributing to efforts emphasizing sustainability and other social issues.²⁵² During the first quarter of 2019, record funds were invested in businesses prioritizing environmental, social, and governance issues.²⁵³ Dirk Schoenmaker, professor at Erasmus University Rotterdam, wrote an essay providing a framework for sustainable finance.²⁵⁴ He describes “Sustainable Finance 3.0” as a transition from risk to opportunity where financial institutions invest only in sustainable companies and projects.²⁵⁵ Within this model,

247. *Id.* at 302.

248. See *The Causes of Climate Change*, NASA, <https://climate.nasa.gov/causes> [<https://perma.cc/37Y4-WM5M>].

249. Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV., May–June 2019, at 106.

250. *Id.*

251. See, e.g., Alissa K. Amico, *Investing in the Environment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 18, 2019), <https://corpgov.law.harvard.edu/2019/02/18/investing-in-the-environment> [<https://perma.cc/3E9H-2L2L>].

252. Pippa Stevens, *Sustainable Investing Is Set to Surge in the Wake of the Coronavirus Pandemic*, CNBC (June 7, 2020), <https://www.cnbc.com/2020/06/07/sustainable-investing-is-set-to-surge-in-the-wake-of-the-coronavirus-pandemic.html> [<https://perma.cc/AN59-NNJ3>].

253. See *id.*

254. See DIRK SCHOENMAKER, INVESTING FOR THE COMMON GOOD: A SUSTAINABLE FINANCE FRAMEWORK 7–8 (Stephen Gardner ed., 2017).

255. *Id.* at 37.

investors evaluate investment opportunities “based on their potential to generate positive social and environmental impacts.”²⁵⁶ If more companies and corporate leaders adopt this sort of model, we would expect to observe a rise in funds being allocated to businesses contributing to the common good.

4. Labor Pressure

Labor law provides some formalized procedures via unions, but most employees in the United States are not represented by a union.²⁵⁷ As a result, employees in most businesses have relatively little power to effect change and impact corporate policies. However, that has not prevented nonunion employees from organizing sickouts and other forms of work stoppage in opposition to corporate policies addressing a range of issues.²⁵⁸ One traditional solution to solving the tension between employee and shareholder interests has been to align those roles. I will briefly note the employee buyout of United Airlines as an example of change from below and the acquisition process of the Mondragon Corporation as an example of change from above.

a. Union Equity Participation in United Airlines

As a solution to ongoing labor strife and financial challenges, United Airlines in 1994 enacted an Employee Stock Ownership Program that gave a controlling interest in the corporation to employees.²⁵⁹ This was hailed as a new model by some and may be an example of a positive change in the culture or spirit of a corporation as a result of employee influence.²⁶⁰ However, as a result of eroding relationships with its unions and the challenges to the travel sector created by 9/11, United filed for Chapter 11

256. *Id.*

257. See Heidi Shierholz, *The Number of Workers Represented by a Union Held Steady in 2019, While Union Membership Fell*, ECON. POL’Y INST. (Jan. 22, 2020), <https://www.epi.org/publication/2019-union-membership-data/> [<https://perma.cc/W398-96DB>].

258. See, e.g., Louise Matsakis, *Amazon Sick-Out Unites Tech and Warehouse Workers in Protest*, WIRED (Apr. 24, 2020), <https://www.wired.com/story/amazon-sick-out-tech-warehouse-workers-protest/> [<https://perma.cc/NW43-HJTN>].

259. See, e.g., Jesus Sanchez, *United Airlines Deal Gives Workers 55% of Company: Jobs: Largest Employee-Owned Firm Gets \$5 Billion in Concessions*, L.A. TIMES (July 13, 1994), <https://www.latimes.com/archives/la-xpm-1994-07-13-mn-15156-story.html> [<https://perma.cc/CRH8-R8FR>] (“Labor Secretary Robert B. Reich hailed the buyout as a model for other service companies: ‘UAL will be the largest employee-owned company in the U.S., and the fact that a healthy company is going into employee ownership is a useful precedent for large service companies in the U.S., whether in the airline industry or telecommunications or other services,’ he said. ‘Now every board of directors in a large company will have to consider employee ownership as an option when they think about restructuring companies.’”).

260. *Id.*

bankruptcy in 2002, ending the dream of employee ownership.²⁶¹ Although some argue that this failure demonstrated a fundamental flaw in employee ownership, others contend that the implemented structure was the problem rather than the principle of employee ownership per se.²⁶² Despite this high-profile failure, approximately 7,000 United States corporations have Employee Stock Option Plans holding a majority of their respective corporate shares, and about 2,000 firms are entirely owned by employees.²⁶³

b. Mondragon's Application of Cooperative Principles in Acquisitions

The Mondragon Corporation, a large multinational business headquartered in Spain employing about 75,000 people,²⁶⁴ is structured as an employee owned cooperative with strict rules regarding governance and compensation intended to include and benefit employees.²⁶⁵ Mondragon has faced numerous financial and policy challenges, and some of its cooperative subsidiaries have failed.²⁶⁶ However, it remains an example of employee ownership that has proven to be durable over time as well as scalable.²⁶⁷ One of the most interesting impacts of its expansion has been the extension of employee ownership to subsidiaries that are purchased by the Mondragon Corporation.²⁶⁸ This is an ironic mirror image of the hard-

261. See, e.g., *United Airlines Puts \$1.5bn Bankruptcy Filing in Place*, THE GUARDIAN (Dec. 9, 2002), <https://www.theguardian.com/business/2002/dec/09/theirlineindustry.usnews> [<https://perma.cc/CDA7-FMLB>].

262. See, e.g., Christopher Mackin, *United It Was Not*, EMPLOYEE-OWNED AM. (2003), <https://employeeownedamerica.com/2018/11/27/united-it-was-not/> [<https://perma.cc/9F3R-XHTQ>] (“In an era chock full of unprecedented evidence of corruption and swashbuckling bankruptcies that put United to shame, it is surely a relevant question to ask who should own American corporations and who should hold them accountable. One voice tells us to trust no one but the experts. Let the mutual fund managers and Wall Street analysts make the tough calls. Another voice, weaker now, tells us to look past the excesses of the Kenneth Lays and Dennis Kozlowskis of the world and trust senior management to do the right thing. A third direction, however, is to go where United ultimately decided not to go—internally, to the employees whose wisdom or folly can truly make a difference.”).

263. See *Learn About Employee Ownership*, EMPLOYEE-OWNED AM., <https://employeeownedamerica.com/the-basics/> [<https://perma.cc/SZ9H-HUBF>].

264. Press Release, Co-operatives U.K., *New Report Highlights Lessons from Mondragon—the World’s Largest Worker Co-op* (May 25, 2019), <https://www.uk.coop/newsroom/new-report-highlights-lessons-worlds-largest-worker-co-op> [<https://perma.cc/DHA4-FLKH>].

265. See Race Mathews, *The Mondragon Model: How a Basque Cooperative Defied Spain’s Economic Crisis*, THE CONVERSATION (Oct. 18, 2012), <https://theconversation.com/the-mondragon-model-how-a-basque-cooperative-defied-spains-economic-crisis-10193> [<https://perma.cc/4RSL-9LH5>].

266. See, e.g., Jill Bamburg, *Mondragon Through a Critical Lens*, MEDIUM (Oct. 3, 2017), <https://medium.com/fifty-by-fifty/mondragon-through-a-critical-lens-b29de8c6049> [<https://perma.cc/72BD-NCAA>].

267. *Id.*

268. Ramon Flecha & Pun Ngai, *The Challenge for Mondragon: Searching for the Cooperative Values in Times of Internationalization*, 21 ORG. 666, 673 (2014).

won employee buyout of United in that managers of the target grant broad ownership rights and protections to employees that they never had to bargain for.²⁶⁹ This is a model for an ostensibly positive change in corporate culture and values largely imposed by a parent company.

C. A Counter Example: Bad Corporate Spirit

Although the previous section focused on corporations that emphasize various aspects of the common good, there are many examples of bad corporate actors recounted in business and legal scholarship. With regard to the nature of a corporate spirit, if there are businesses whose essences are positive and encourage flourishing, we would expect a similar negative impact from a corporation whose essence has been “corrupted.” Amazon, Facebook, and Google have all been criticized for anti-competitive and arguably exploitive market behavior,²⁷⁰ and perhaps they will eventually serve as case studies for the fallen spirit of a corporation; however, I will briefly describe the failure of Enron as a model for the corruption of corporate spirit.

A trove of excellent scholarship has detailed the rise and fall of Enron in the late 1990s and early 2000s.²⁷¹ I read the wildly popular *The Smartest Guys in the Room* by Bethany McLean when it was published in 2003 while I was doing research related to the trial of former CEOs Jeffrey

269. See, e.g., *id.*

270. Julia Cusick, *RELEASE: CAP Brief Finds Evidence of Anti-Competitive Behavior by Amazon, Apple, Facebook, and Google*, CTR. FOR AM. PROGRESS (July 28, 2020), <https://www.americanprogress.org/press/release/2020/07/28/488194/release-cap-brief-finds-evidence-anti-competitive-behavior-amazon-apple-facebook-google/> [<https://perma.cc/27CF-RZXA>].

271. See, e.g., John C. Coffee, Jr., *What Caused Enron: A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 280 (2003) (“Nonetheless, here as elsewhere, logic and experience conflict: Despite the seemingly clear logic of the gatekeeper rationale, experience during the 1990s suggests that professional gatekeepers will acquiesce in managerial fraud, even though the apparent reputational losses would seem to dwarf the gains to be made from an individual client.”); Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 407 (2004) (“[T]he market for corporate control depends on efficiency in the capital markets, but if share prices do not reflect managers’ actual performance, the market for corporate control cannot effectively discipline corporate management.”); Lyman P.Q. Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 52 (2003) (“In the contractarian view, for Enron directors and officers to be loyal to Enron as a company is ludicrous.”); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1315 (2002) (“When it capitalized the LJM-related Raptor I-IV SPEs, Enron booked the notes issued by the SPEs as assets on its balance sheet and increased its shareholders’ equity in a like amount, as one would do when selling newly issued common stock for cash in a public offering.”); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 973 (2002) (“I fear that near-term stock-price obsession in aggressive knowledge-based organizations is naturally embedded, and not easily overcome.”); NANCY B. RAPOPORT & BALA G. DHARAN, *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS*, at xi (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

Skilling and Ken Lay.²⁷² A powerful documentary based on the book was released in 2005, and I have assigned it to my business entities students ever since as a case study in creeping corporate corruption. Even fifteen years later, the issues remain relevant to considering the regulation and management of public companies.

Enron began as a successful natural gas distribution company, founded and led by Ken Lay, who was a pillar of Houston society and an avowedly religious man.²⁷³ Although he was never sentenced because of his untimely death, he was found guilty in the criminal trial against both him and Jeffrey Skilling.²⁷⁴ Even so, some of the most egregious acts were never linked to Lay.²⁷⁵ One narrative floated at the time was that Lay had been a man of integrity and that any truly inappropriate acts had been perpetrated by others, namely Skilling and the CFO, Andy Fastow.²⁷⁶ However, there is evidence that Lay was aware of malfeasance related to Enron Oil's office in Valhalla, New York, in 1987 and did nothing to reprimand or prevent similar occurrences, ostensibly because they were profitable for the corporation.²⁷⁷

The most obvious crimes and violations of fiduciary duties were perpetrated by Andy Fastow (self-dealing, accounting fraud, and so much more).²⁷⁸ Fastow was convicted in a plea that required him to cooperate in the investigation of Skilling (who as CEO had hired him) and Lay (who returned to the role of CEO after Skilling's departure).²⁷⁹ According to testimony from the trial, Skilling was aware that Fastow was willing to bend rules in order to benefit himself and the company.²⁸⁰ Skilling fostered an aggressive corporate culture with explicit Darwinian and

272. BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* (2003).

273. See Sue Cameron, *Obituary: Ken Lay*, *FIN. TIMES* (July 5, 2006), <https://www.ft.com/content/3d6dc48e-0c4b-11db-86c7-0000779e2340> [<https://perma.cc/88ET-V2NL>].

274. Gina Sunseri & Sylvie Rottman, *Enron Verdict: Ken Lay Guilty on All Counts, Skilling on 19 Counts*, *ABC NEWS* (May 26, 2006), <https://abcnews.go.com/Business/LegalCenter/story?id=2003728&page=1> [<https://perma.cc/F5UP-59NK>].

275. See, e.g., William L. Anderson, *Is Ken Lay Really a Criminal?*, *MISES INST.* (June 19, 2006), <https://mises.org/library/ken-lay-really-criminal> [<https://perma.cc/T779-SNZ2>].

276. *Id.*

277. See, e.g., Lynn J. Cook and Dan Ackman, *Premonitions*, *FORBES* (Feb. 18, 2002), <https://www.forbes.com/forbes/2002/0218/040.html#7e8d3a2e33a8> [<https://perma.cc/LUF9-J55U>].

278. Press Release, Fed. Bureau Investigation, Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities & Wire Fraud, Agrees to Cooperate with Enron Investigation (Jan. 14, 2004) [hereinafter Press Release], <https://archives.fbi.gov/archives/news/pressrel/press-releases/former-enron-chief-financial-officer-andrew-fastow-pleads-guilty-to-conspiracy-to-commit-securities-and-wire-fraud> [<https://perma.cc/D42F-RM3C>].

279. *Id.*

280. See Mary Flood, *Skilling Indicted, Likely to Surrender/Ex-CEO Is Highest Enron Exec to Be Accused*, *HOUS. CHRON.*, Feb. 19, 2004, at A1. Five months later, Lay surrendered to the FBI after being indicted on eleven criminal counts of fraud and making misleading statements; Superseding Indictment at 29–43, *United States v. Causey*, No. CR-H-04-25, 2004 WL 1553217 (S.D. Tex. 2004).

hypermasculine overtones—his so-called “guys with spikes.”²⁸¹ One of his highest priorities was obtaining SEC permission to use mark-to-market accounting to book profits immediately for contract obligations in the future.²⁸² This was a reasonable proposal when applied to futures contracts for oil and gas delivery (the early core business of Enron), but it made little sense when applied to massive speculative project finance infrastructure projects in places like India or Nigeria that were becoming the flagship business of the company.²⁸³ I was involved in a number of project finance deals in the Middle East in the mid to late 1990s in which Enron submitted astonishingly low bids; only when the company imploded did I understand that those bids were likely never economically viable.

Institutionally, Enron was founded and originally run by a well-respected businessperson (Lay) who had a reputation for integrity but who also demonstrated a willingness to turn a blind eye for gain. He brought on Skilling as an aggressive leader to push boundaries and grow the company. Skilling certainly knew that some of his policies skirted legality, and he hired Fastow to implement the most egregious.²⁸⁴ Ultimately, the massive losses could no longer be hidden, and the company crashed in the largest bankruptcy up to that time. Studying the company over the past twenty years, the documented creeping corruption has reminded me of the description of temptation and corruption fictionally recounted in C.S. Lewis’ *The Screwtape Letters*.²⁸⁵ In the preface, Lewis describes the context for the book:

I live in the Managerial Age, in a world of “Admin.” The greatest evil is not now done in those sordid “dens of crime” that Dickens loved to paint. It is not done even in concentration camps and labour camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried, and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voices. Hence, naturally enough, my

281. See generally MCLEAN & ELKIND, *supra* note 272, at ch. 5; Cate Meredith, *Everything Wrong with the Smartest Guys in the Room Expanded Edition*, ENRON BLOG (Apr. 3, 2009), <https://caraellison.wordpress.com/2009/04/03/everything-wrong-with-the-smartest-guys-in-the-room-expanded-edition/> [<https://perma.cc/RYU9-ENCB>].

282. *Enron Lesson No. 1: Mark to Market (Fair Value) Accounting*, CREDIT PULSE (May 30, 2008), <https://www.creditpulse.com/accountingfinance/lessons-enron/enron-lesson-no-1-mark-market-fair-value-accounting> [<https://perma.cc/6Z6B-5EE5>].

283. See James V. Grimaldi, *Enron Spanned the Globe with High-Risk Projects*, WASH. POST (Feb. 16, 2002), <https://www.washingtonpost.com/archive/politics/2002/02/16/enron-spanned-the-globe-with-high-risk-projects/bc42d8da-418d-4c62-a4dd-0b03a26d7eb5/> [<https://perma.cc/CL7Y-T7VL>].

284. See Press Release, *supra* note 278.

285. C.S. LEWIS, *THE SCREWTAPE LETTERS* (1942).

symbol for Hell is something like the bureaucracy of a police state or the office of a thoroughly nasty business concern.²⁸⁶

The advice of the main character, Screwtape, as a devil and temptor is that “the safest road to Hell is the gradual one—the gentle slope, soft underfoot, without sudden turnings, without milestones, without signposts[.]”²⁸⁷ A relatively small failure on the part of an otherwise virtuous leader left open the possibility of hiring more compromised leaders and a transformation of the culture, character, and essence of Enron, which ultimately led to its own destruction along with massive collateral damage to thousands of employees and entire communities.

CONCLUSION

There are strong theological arguments from a variety of traditions attributing a spiritual character to human institutions if not an individual spirit. A purely secular approach could conclude that such institutions have identifiable characteristics and cultures which, though created by human persons and other structures, take on an identity separate from those shaping them that may persist. I assert that both views may be identified as something we may understand as “spirit.”

Spirits can be oriented more or less toward the common good and human flourishing or bare self-interest and domination. This orientation is shaped by the relationships the entity has with those who provide inputs (stakeholders) and those who create external incentives (markets and regulators). Changes to legal rules alone are unlikely to result in the transformation of corporate spirit. Enron may serve as an example of a corporation corrupted in its essence as a result of progressively more self-interested and corrupt acts by managers combined with the willful blindness of regulators and observers. Some corporations have transformed as an apparent result of the epiphany of key managers (such as the case of Ray C. Anderson and Interface), but most of the corporations routinely identified as model citizens get to that place as a result of consistent or gradual commitments by investors, managers, and employees—sometimes supported by regulatory frameworks holding corporations to higher standards (such as the variety of benefit corporation entity options and certifications). Legal rules cannot prompt conversion in the hearts of corporate leaders, but they may be able to frame a paradigm that minimizes corruption and appropriately incentivizes pursuit of the

286. *Id.* at VII.

287. *Id.* at 73.

common good as was imagined by Berle in *Corporate Capitalism and "The City of God."*²⁸⁸

288. See generally BERLE, *supra* note 3.