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H. Justin Pace

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## Rogue Corporations: Unlawful Corporate Conduct and Fiduciary Duty

*H. Justin Pace\**

### ABSTRACT

*On February 28, 2018, Dick's Sporting Goods announced that it would no longer sell long guns to eighteen- to twenty-year-olds. On March 8, 2018, Dick's was sued for violating the Michigan Elliott-Larsen Civil Rights Act, which prohibits discrimination on the basis of age in public accommodations. Dick's and Walmart were also sued for violating Oregon's ban on age discrimination. In addition to corporate liability under various state civil rights acts, directors of Dick's and Walmart face the threat of liability for breaching their fiduciary duties – claims that may be much harder to defend than the more usual breach of fiduciary duty claim.*

*Delaware corporation law has an underappreciated per se doctrine where the board directs the corporation to violate the law. A knowing violation of positive law is bad faith, which falls under the duty of loyalty. The business judgment rule will not apply and exculpation will not be available under Section 102(b)(7). The shareholders may not even need to show harm.*

*This Article examines the relevant legal doctrine but also takes a step back to consider what the rule should be from an ethical and moral standpoint. To do so, rather than apply traditional corporate governance arguments, this Article considers broader moral theories. In addition to the utilitarian calculus that is so ubiquitous in corporate governance scholarship via the law and economics movement, this Article considers the liberalism of both John Rawls and Robert Nozick. But liberalism may seem less persuasive given the rise of illiberalism politically on both the American Right and Left. Given the shift away from liberalism, this Article also considers two non-liberal models: one a populist*

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*modification of Charles Taylor's democratic communitarianism and the other Catholic Social Thought.*

*Unsurprisingly, the proper rule depends on which moral theory is applied. If that theory is liberalism (of either form covered), then a per se approach is troubling. Harm to the corporation must be shown, and either the Delaware legislature or the corporate players, depending on the form of liberalism, must acquiesce to a per se rule. Counterintuitively, it is the per se rule that runs against basic democratic norms. It gives the power to litigate in response to harm, not to the party injured but to a third party. Given the divergent results from applying different moral theories and given the democratic difficulty, the Delaware legislature should clarify the standard. It will likely find that a harsh, per se standard is unjustified.*

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## I. INTRODUCTION

What do Uber’s regulatory strategy, “legal” marijuana dispensaries, Google’s handling of sexual harassment, and Dick’s Sporting Goods’ decision to stop selling long guns to eighteen- to twenty-year-olds<sup>1</sup> all have in common? They all implicate business decisions that would be protected by the business judgment rule but for an embedded violation of law. The treatment of corporate violations of law at the board’s direction under Delaware fiduciary obligation doctrine is an underappreciated topic. Rather than the business judgment rule, such violations trigger a *per se* standard of liability.

Negligence *per se* is “[n]egligence established as a matter of law, so that breach of the duty is not a jury question,” usually arising “from a statutory violation.”<sup>2</sup> It is easier for a plaintiff to plead and prove a claim for negligence where the negligence *per se* doctrine applies. An analogous *per se* doctrine for another claim would have the same effect, including for claims more difficult to plead and prove than negligence.<sup>3</sup> A *per se* standard appears to apply in corporate law to breach of fiduciary duty claims where the corporate directors direct the corporation to violate positive law. Normally, the business judgment rule largely insulates directors from liability for breach of fiduciary duty absent a conflict of interest. One way to circumvent the business judgment rule is by alleging the directors failed to properly monitor the corporation under the rule laid out by the Delaware Court of Chancery in *Caremark*.<sup>4</sup> But a *Caremark* claim is “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”<sup>5</sup> A *per se* theory for breach of fiduciary duty for violating positive law, on the other hand, raises the possibility of a much easier judgment to win.

This Article will consider when a violation of law is a breach of fiduciary duty, whether and when it is a breach of fiduciary duty *per se*, and whether such a breach is and should be subject to exculpation in a corporate charter. A violation of positive law may be relevant in two contexts. The first, and most straightforward, is where the board directed the corporation to violate the law. The second is a failure to monitor claim under *Caremark*. This

1. See *infra* Part IV.

2. *Negligence per se*, BLACK’S LAW DICTIONARY (11th ed. 2019).

3. *Per se* doctrines play a prominent role in antitrust law. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (“State laws that discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’”) (quoting *Granholtz v. Heald*, 544 U.S. 460, 476 (2005)).

4. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996).

5. *Id.* at 967. That may be changing with recent decisions out of Delaware. See, e.g., *Marchland v. Barnhill*, 212 A.3d 805 (Del. 2019); *In re Clovis Oncology Inc. Derivative Litig.*, No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

Article will also address relief, including the appropriateness of injunctive relief and nominal damages where the violation of law maximizes shareholder wealth but is socially detrimental. This Article will focus on Delaware law in the corporate context (limited liability companies raise their own distinct issues).

The possibility of liability for breach of fiduciary duty *per se* has important moral and ethical implications. This Article will consider the ethical implications after establishing the legal framework. The dominance of law and economics in corporate and entity law makes utilitarianism the de facto default ethical framework for examining corporate law issues. But as this Article will show, utilitarianism is unsatisfactory and too limited for the purposes of this scenario. This Article will also apply and consider both the Rawlsian and Nozickian strains of liberalism. And given the recent turn away from liberalism on both the American political Right and the American political Left, this Article will look at the issue through the lenses of two non-liberal frameworks, Catholic Social Thought and a populist version of democratic communitarianism.

Finally, this Article will consider various corporate lawbreaking scenarios in light of these frameworks. Particular attention will be paid to Dick's Sporting Goods' and Walmart's corporate decisions to stop selling firearms to eighteen- to twenty-year-olds, thus violating state law prohibitions on age discrimination in public accommodations. After considering and critiquing each moral theory in the context of examples of corporate lawbreaking, the Article will conclude with a recommendation for how fiduciary obligation law should regard "rogue" corporations.<sup>6</sup>

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6. See *Desimon v. Barrows*, 924 A.3d 908, 934 (Del. Ch. 2007) ("Although directors have wide authority to take lawful action on behalf of the corporation, they have no authority knowingly to cause the corporation to become a *rogue*, exposing the corporation to penalties from criminal and civil regulators.") (emphasis added); see also Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 633 (2010) ("When directors knowingly cause the corporation to do what it may not – engage in unlawful acts or unlawful businesses – they are disloyal to the corporation's essential nature. By causing the corporation to become a *lawless rogue*, they make the corporation untrue to itself and to the promise underlying its own societally authorized birth.") (emphasis added).

## II. LEGAL DOCTRINE

Corporations do not purely exist as a nexus of contracts.<sup>7</sup> They are creatures of statute, operating under statutory grants of authority.<sup>8</sup> Despite the modern, loose approach to those grants, they still operate to cabin corporate actions.

Delaware law<sup>9</sup> requires corporate directors exercise the same level of care as “ordinarily careful and prudent men would use in similar circumstances.”<sup>10</sup> Despite the resemblance to the traditional negligence standard, directors have almost never been held liable for breaches of fiduciary duty under an ordinary negligence standard.<sup>11</sup> Application of an ordinary negligence standard is largely foreclosed for most board actions by the business judgment rule.<sup>12</sup> But if acts that violate law fall under the duty of loyalty rather than the duty of care, then they would not fall under the protection of the deferential business judgment rule.<sup>13</sup>

First, some history regarding the division of fiduciary duties in Delaware: The Delaware Supreme Court’s decision in *Cede & Co. v. Technicolor* led to considerable speculation that there existed a “triad” of

7. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. OF FIN. ECON. 305, 311 (1976) (“The private corporation or firm is simply one form of *legal fiction* which serves as a nexus for contracting relationships.”) (emphasis in original).

8. Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 719 (2019) (citing Leo E. Strine, Jr. et al., *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 649 (2010)); cf. H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware Will Lead, but Will Anyone Follow?*, 16 NEV. L.J. 1085, 1086 (2016) [hereinafter Pace, *Waiver*] (“The [LLC] form is a product of statute, but the LLC is a creature of contract.”).

9. This paper will focus solely on Delaware law. But, given that many states look to Delaware in developing their own corporation law, this issue is likely relevant for many states.

10. *Graham v. Allis-Chalmers*, 188 A.2d 125, 130 (Del. 1963).

11. See Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 574–75 (2008) [hereinafter Bainbridge, *Convergence*] (citing Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1099 (1968)); 1 DENNIS J. BLOCK ET AL., *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 167–72 (5th ed. 1998)).

12. See Bainbridge, *Convergence*, *supra* note 11, at 568 (“Courts generally abstain from intervening in the affairs of corporate decisionmaking, typically by invoking the business judgment rule.”).

13. See, e.g., S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 129 (1979) (“Bad faith may preclude the business judgment defense where directors knowingly violate a statute or comparable expression of public policy.”).

fiduciary duties under Delaware corporation law – the traditional duties of care and loyalty and, now, a duty of good faith.<sup>14</sup> The Delaware Supreme Court made clear in *Stone v. Ritter*, though, that the duty of good faith was a component of the duty of loyalty rather than a separate, standalone fiduciary duty.<sup>15</sup> The addition of the duty of good faith expanded the scope of the duty of loyalty. The duty of loyalty is no longer concerned solely with self-interested transactions; now, the duty of loyalty is omnipresent because every act by a fiduciary on the corporation’s behalf must have a proper corporate purpose.<sup>16</sup>

Folding good faith into the duty of loyalty extends that duty to prohibit not just self-interested actions but also to prohibit unlawful conduct. A director must “exert all reasonable efforts” to protect the interests of the corporation, but those efforts are narrowed: they must be lawful.<sup>17</sup> In listing the ways in which a board might fail to act in good faith, the Delaware Supreme Court included “where the fiduciary acts with the intent to violate applicable positive law.”<sup>18</sup>

Directors are fiduciaries of the corporation.<sup>19</sup> When they act within a proper corporate purpose, they act on behalf of the corporation. The corporation has effectively delegated certain monitoring and decision-making authority to the directors (acting collectively as part of the board). Thus, the authority of the directors extends no further than the power of the corporation to act. This is retired Chief Justice of the Delaware Supreme Court Leo E. Strine’s logic in characterizing corporate existence as being premised on a “nondefeasible promise” to “conduct only lawful business through lawful

14. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (referencing “the triads of [directors’] fiduciary duty – good faith, loyalty or due care”).

15. *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006) (citing *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).

16. Strine, *supra* note 6, at 636.

17. See, e.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988) (“[C]orporate fiduciaries . . . must exert all reasonable and *lawful* efforts to ensure that the corporation is not deprived of any advantage to which it is entitled.”) (emphasis added) (relying on *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

18. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006). The other ways in which a board might fail to act in good faith are beyond the scope of this article. See Bainbridge, *Convergence*, *supra* note 11, at 590–91 (criticizing the *Disney* definition of good faith as threatening “to expand the extent to which courts will review the substance of director decisions and, concomitantly, the liability exposure of corporate directors”).

19. H. Justin Pace, *What Equity, the Promise Economy, and Cognition Mean for How Fiduciary Law Should Develop*, 20 U. OF PA. J. OF BUS. L. 684, 701 (2018) [hereinafter Pace, *Equity*] (citing *Marhart, Inc. v. Calmat Co.*, Civ. A. No. 11,820, 1992 WL 82365 at \*336 (Del. Ch. Apr. 22, 1992) (reported in 18 DEL. J. CORP. L. 330 (1992)) (“Delaware directors are fiduciaries.”)).



activities.”<sup>20</sup> The Delaware General Corporation Law is permissive, but it limits corporations to “any *lawful* business or purpose.”<sup>21</sup> A parallel can be drawn with the requirement that contracts be formed for a lawful purpose to be enforceable.

Defining a violation of law as bad faith would further seem to foreclose a safe harbor for interested transactions. Under the Delaware statute, a transaction is not voidable on the basis that it is interested if it is affirmed by a majority of disinterested directors or by a majority of disinterested shareholders.<sup>22</sup> But the statute qualifies this by providing that the approval must be in good faith.<sup>23</sup> Strine suggests that the good faith qualification means interested transactions that violate the law *cannot* be cleansed and thus are always voidable.<sup>24</sup> There is some logic to this in that violations of law fit poorly with the directors’ duties to act in the best interest of the corporation. But it stretches logic to assume that the Delaware legislature intended to treat violations of law more harshly than the conflicted transactions that sit at the heart of the duty of loyalty doctrine.

#### A. Section 102(b)(7)

Delaware’s division of the fiduciary duties owed by directors to the corporation between the duties of loyalty and care is a distinction with a difference. Violations of the duty of care may be exculpated in the corporate charter under Delaware General Corporation Law Section 102(b)(7). Section 102(b)(7) endorses inclusion in a Delaware certificate of incorporation of a “provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director.”<sup>25</sup> But it also sets limits on that power to exculpate directors from liability for breach of their fiduciary duties. The certificate of incorporation may not limit liability for “breach of the director’s duty of loyalty.”<sup>26</sup> Importantly for the purposes of this Article, Section 102(b)(7) also

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20. Strine, *supra* note 6, at 651.

21. DEL. CODE ANN. tit. 8, § 101(b) (2016) (emphasis added).

22. DEL. CODE ANN. tit. 8, § 144 (2016). Section 144 only refers to disinterested *directors*, making no such qualification for a shareholder vote. *Fliegler v. Lawrence* nonetheless read such a qualification into the statute. 361 A.2d 218 (1976).

23. § 144.

24. Strine, *supra* note 6, at 657.

25. DEL. CODE ANN. tit. 8, § 102(b)(7) (2016).

26. § 102(b)(7)(i).

prohibits limits on liability for “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law.”<sup>27</sup>

The Delaware Court of Chancery has clarified the applicability of Section 102(b)(7) by stating plainly that a violation of positive law violates duty of good faith, itself a subset of the duty of loyalty.<sup>28</sup> The Delaware Supreme Court reiterated this in *Stone v. Ritter*.<sup>29</sup> Thus, violations of positive law would seem to not be excusable. But Section 102(b)(7) also includes an express carve out for a *knowing* failure to comply with the law.<sup>30</sup> Placing violations of law within the ambit of the duty of loyalty would then both create a redundancy in Section 102(b)(7)<sup>31</sup> and prevent exculpation for both knowing and unknowing violations of the law, the former explicitly and the latter implicitly.<sup>32</sup> Corporations would also be barred from indemnifying directors under these circumstances.<sup>33</sup>

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27. § 102(b)(7)(ii). At least one member of the drafting committee thought the good faith language, at least, was surplusage because he viewed a violation of good faith as a violation of the duty of loyalty. Penn. Law, *102(b)(7)* 22:08–24:05, YOUTUBE (June 6, 2019), <https://www.youtube.com/watch?v=wFxA2T-gEOU> [perma.cc/M3RY-S673].

28. *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. Ct. 2003) (“[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.”); *Metro Commc’n Corp. BVI v. Advanced Mobilecomm Techs.*, 854 A.2d 121 (Del. Ch. 2004) (“Under Delaware law, a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity.”); *In re Massey Energy Co., C.A.*, No. 5430–VCS, 2011 WL 2176479, at \*20 (May 31, 2011) (“[A] fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.”).

29. 911 A.2d 362, 370 (Del. 2006).

30. § 102(b)(7)(ii).

31. *But see* Strine, *supra* note 6, at 660 (referencing “the reality that redundancy is actually a pervasive presence in statutes and contracts, operating as a belt-and-suspenders protection against unintended consequences”).

32. *But see id.* at 652 n.69 (interpreting the “knowing” language as allowing exculpation of unwitting violations); Bainbridge, *Convergence*, *supra* note 11, at 589–90 (arguing that Section 102(b)(7) is “an internally contradictory botch job” that should not be relied on to define good faith) (quoting Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131, 1155 (2006)).

33. *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1111 (Del. Ch. 2012) (“Sections 145(a) and (b) of the DGCL *permit* a corporation to indemnify [a corporate officer or director] so long as ‘the person acted in *good faith* and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person’s conduct was unlawful.’”) (citing DEL. CODE ANN. tit. 8, § 145(a), (b) (2016)).

### B. Open Questions

A knowing violation of law at the direction of the corporate board of directors would seem straightforward, regardless of the issues raised above. But while corporations frequently violate the law, it is rarer that they violate the law at the direct instruction of the board.<sup>34</sup> That specific scenario is the focus of the ethical analysis in Part V, but there remain interesting, unresolved legal questions. One example is when a failure by the board to monitor the agents of the corporation in such a way as to prevent violations of positive law breaches their fiduciary duties under *Caremark*. Failure to monitor falls under the umbrella of good faith, and thus the duty of loyalty.<sup>35</sup> Strine suggests that a violation of positive law by the officers – or even just employees – of the corporation could form the basis of a breach of fiduciary duty by the directors for failure to monitor.<sup>36</sup> The U.S. Court of Appeals for the Seventh Circuit, applying Delaware precedent, held in *In re Abbot Laboratories* that directors would be acting in bad faith if “the directors knew of the violations of law, took no steps in an effort to prevent or remedy the situation, and that failure to take any action for such an inordinate amount of time resulted in substantial corporate losses.”<sup>37</sup> The court characterized board behavior in that circumstance as intentional.<sup>38</sup> If this approach were adopted by the Delaware courts, absent steps to prevent or remedy the situation, any violation of law that the board knew about would fall under the *per se* rule, not the more usual, exacting *Caremark* standard.

A *Caremark* claim is “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”<sup>39</sup> But what is

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34. Cf. Bayless Manning, *The Business Judgment Rule and the Director’s Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477, 1494 (1984) (noting that most board time is devoted to “a continuing flow of supervisory process” not “affirmative action on individual matters”).

35. See *In re Caremark Int’l Inc. Derivative Litig.*, 695 A.2d 959, 970 (Del. Ch. 1996) (indicating that a board must “exercise a good faith judgment that the corporation’s information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations” to meet its duty).

36. Strine, *supra* note 6, at 686.

37. *In re Abbott Labs. Derivative S’holders Litig.*, 325 F.3d 795, 809 (7th Cir. 2003). Although the court was technically applying Illinois law, the court examined Delaware precedence because “Illinois case law follows Delaware law in establishing demand futility requirements.” *Id.* at 803.

38. *Id.* at 809.

39. *Caremark*, 698 A.2d at 967. The plaintiff will face a somewhat less difficult task even where it can show the “board failed to oversee the company’s obligation to comply with positive law” rather than simply mitigate business risk. *In re Facebook*,

effectively a *per se* theory of fiduciary duty raises the possibility of a much easier judgment to win. This stands in stark contrast with application of the business judgment rule to duty of care claims, which has been compared to a *per se* theory running in the *other* direction.<sup>40</sup> Breach of fiduciary duty claims under Delaware law in the corporate context could thus be arranged on a continuum from the lightest to the heaviest burden for the plaintiff: violations of law under the *per se* standard < interested transactions < *Caremark* failure to monitor < normal business judgment.<sup>41</sup>

Also relevant is whether a failure to *disclose* a violation of positive law is a breach of fiduciary duty.<sup>42</sup> For both failure to monitor and failure to disclose claims, it would seem that liability is not *per se*. Directors are not strictly liable for the unlawful actions of every corporate agent.<sup>43</sup> Nor must the board disclose every violation of law by corporate agents acting on behalf of the corporation.<sup>44</sup> The directors need not, for example, disclose every traffic ticket received by employees driving on company business.<sup>45</sup>

Another question is what exactly qualifies as “positive law” for these purposes. Black’s Law Dictionary defines positive law as statutory or regulatory law, as opposed to case law or moral law.<sup>46</sup> Strine has characterized the duty to comply with the law as “an obligation to be faithful to the laws of the *chartering society* in exercising corporate powers.”<sup>47</sup> Elsewhere, he has characterized it as loyalty “to the corporation’s basic charter, a charter that precludes the corporation from pursuing profits by

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Inc. Section 220 Litig., No. 2018-0661, 2019 WL 2320842, at \*2 (Del. Ch. May 30, 2019).

40. Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 977 (1994) (Prior to the mid-eighties “the business judgment rule had been applied in such a manner as to constitute an almost *per se* bar to shareholder claims of directors’ breach of their fiduciary duty of care.”) (citing Stuart R. Cohn, *Demise of the Director’s Duty of Care: Judicial Avoidance of Standards and Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591, 594 (1983)).

41. A *Caremark* claim may be “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment,” *In re Caremark Int’l. Derivative Litig.*, 698 A.2d at 967. Also relevant is whether a failure to *disclose* a violation of positive law is a breach of fiduciary duty. *Id.* It seems clear that liability is not *per se*. *Id.* The directors need not, for example, disclose every traffic ticket received by employees driving on company business. *Id.*

42. *See, e.g.*, *Metro Comm’n Corp. BVI v. Advanced Mobilcomm Techs. Inc.*, 854 A.2d 121, 143 (Del. Ch. 2004).

43. *Caremark*, 698 A.2d at 967.

44. *Id.*

45. *Id.*

46. *Positive Law*, BLACK’S LAW DICTIONARY (11th ed. 2019).

47. Strine, *supra* note 6, at 649 (emphasis added).

illegal means.”<sup>48</sup> Corporations are creatures of statute that exist by corporate charter,<sup>49</sup> but it is specifically a *state* corporate charter issued by a single state. This could conceivably only obligate a director of a Delaware corporation to follow Delaware law. The director would be free to direct the corporation to violate New York law or California law or federal law. This seems at odds with the language elsewhere, which neither expressly nor implicitly includes such a limitation. What about foreign law? Is it a breach of fiduciary duty if the board of Alphabet Inc. directs employees to “cheat” on the censored version of its Google search engine that the Chinese government requires?<sup>50</sup> Is a breach of fiduciary duty suit really the best place to litigate Airbnb’s decision to delist rentals in Israel’s settlements in the West Bank?<sup>51</sup> Strine’s view would suggest that it is, and no limiting principle has as of yet developed in the caselaw.

Chief Justice Strine has been dismissive of concerns about expanding fiduciary obligation to cover violations of law, suggesting that it is of no concern because in many cases no injury is caused and thus damages will not be available.<sup>52</sup> But injury may, of course, exist.<sup>53</sup> More to the point, Delaware courts have still awarded attorneys’ fees where a breach of fiduciary duty does not result in measurable damages.<sup>54</sup> The Delaware Court of Chancery has

48. *Id.* at 652.

49. Pollman, *supra* note 8, at 719 (citing Leo E. Strine, Jr. et al., *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 649 (2010)).

50. See Ryan Gallagher, *Google Plans to Launch Censored Search Engine in China, Leaked Documents Reveal*, THE INTERCEPT (Aug. 1, 2018, 4:58 AM), <https://theintercept.com/2018/08/01/google-china-search-engine-censorship/> [perma.cc/5FFS-RFVR] (“Google is planning to launch a censored version of its search engine in China that will blacklist websites and search terms about human rights, democracy, religion, and peaceful protest . . . . The custom Android [search] app . . . has already been demonstrated to the Chinese government.”).

51. The decision by Airbnb prompted a suit in response for discrimination under Israeli law. *Israeli Settler Sues Airbnb for Dropping West Bank Listings*, JEWISH TELEGRAPHIC AGENCY (Nov. 23, 2018, 6:42 AM), <https://www.jta.org/2018/11/23/israel/israeli-settler-sues-airbnb-dropping-west-bank-listings> [perma.cc/5HZT-U5Z8].

52. Strine, *supra* note 6, at 652 n.69.

53. An Oregon man sought \$10,000 in compensatory and \$1,000,000 in punitive damages from Walmart for alleged violations of his civil rights under state law. Nick Morgan, *Man Denied Sale of Rifle by Dick’s and Walmart Seeks \$1M*, THE BULLETIN (Aug. 11, 2018 11:12 AM), <https://www.bendbulletin.com/nation/6443458-151/mandenied-sale-of-rifle-by-dicks-and> [perma.cc/XV4N-TT84]; see also *infra* Part IV.4.

54. See, e.g., *William Penn P’ship v. Saliba*, 13 A.3d 749, 759 (Del. 2011) (granting attorneys’ fee even though the plaintiffs “were left without a typical damage award because the Court’s appraisal of the property came in at a value lower than the sale price” because otherwise the plaintiffs “would have been penalized for bringing

refused to award damages where the plaintiffs failed to carry their burden of proof,<sup>55</sup> but “the internal logic of Delaware law demands that the burden shift to the defendant” after the plaintiff has proven breach.<sup>56</sup> And harkening back to the equitable roots of fiduciary obligation,<sup>57</sup> Delaware courts may loosen “normally stringent requirements of causation and damages when a breach of the duty of loyalty is shown” due to “concerns of equity and deterrence.”<sup>58</sup> The Delaware Supreme Court has stated that damages from a breach of fiduciary duty should be calculated liberally.<sup>59</sup> Certainty is not required.<sup>60</sup> Nor is uncertainty to the defendant’s benefit – those uncertainties will be resolved against the party that breached their duties.<sup>61</sup> Even the availability of only nominal damages could drive settlement for non-nominal amounts where a claim has a very high likelihood of surviving motions to dismiss and for summary judgment. And the Delaware Court of Chancery has broad powers to fashion equitable remedies.<sup>62</sup>

Finally, tying corporate liability to violations of non-corporate law has the potential to create political risk.<sup>63</sup> That political risk can lead to increased

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a successful claim against the [defendants] for breach of their fiduciary duty of loyalty.”).

55. *In re* PLX Tech. Inc. Stockholders Litig., C.A. No. 9880-VCL, 2018 WL 5018535, at \*56 (Del. Ch. Oct. 6, 2018).

56. Holger Spamann, PLX, *Burden of Proof for Damages, and the Internal Logic of Delaware Law*, HARVARD L. SCH. FORUM ON CORP. GOV. AND FIN. REG. (Nov. 30, 2018), <https://corpgov.law.harvard.edu/2018/11/30/plx-burden-of-proof-for-damages-and-the-internal-logic-of-delaware-law/> [perma.cc/YN8F-4399].

57. *See* Pace, *Equity*, *supra* note 19, at 687–91 (detailing the equitable roots of fiduciary law).

58. CertiSign Holding, Inc. v. Kulikovsky, C.A. No. 12055-JRS, slip op. at 77 (Del. Ch. June 7, 2018) (citing *In re* Primedia Inc. Deriv. Litig., 910 A.2d 248, 262 (Del. Ch. 2006)).

59. Thorpe v. CERBCO, Inc., 676 A.2d 436, 444 (Del. 1996).

60. Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC, C.A. No. 11802-VCL, slip op. at 123 (Del. Ch., July 6, 2018).

61. *Id.* at 124 (“[U]ncertainties in awarding damages are generally resolved against the wrongdoer.”).

62. *See, e.g., In re* Oxbow Carbon LLC Unitholder Litig., C.A. no. 12447-VCL, slip op. at 4–27 (Del. Ch. Aug. 1, 2018) (discussing the court’s equitable powers at length).

63. For example, an SEC commissioner “berated Citigroup Inc. executives in a private meeting over the bank’s decision to curtail some of the business it does with companies that sell guns.” Robert Schmidt, *Senators Seek Probe of SEC Member Who Assailed Citi’s Gun Stance*, BLOOMBERG (June 13, 2018), <https://www.bloomberg.com/news/articles/2018-06-13/senators-seek-probe-of-sec-member-who-assailed-citi-s-gun-stance> [perma.cc/9UTP-RHZS]. Of course, the implications of changes to policies related to the sale of firearms go beyond potential

damages. The Governor of Florida has responded to Airbnb delisting rentals in Israel's settlements in the West Bank by ordering that the state stop reimbursements to state employees for stays through Airbnb while on official state business.<sup>64</sup> Airbnb's decision in other circumstances would be protected by the business judgment rule, but because it may violate Florida<sup>65</sup> and Israeli<sup>66</sup> law, Airbnb may now be liable for damages not just from a settlement or verdict in any lawsuit but from other consequences such as the loss of revenues from employees of the third-largest state in the United States traveling on official business.<sup>67</sup> This would be true even if Airbnb's actions do not violate Florida law.<sup>68</sup> Implications of the applicable rule, though, are as much ethical as they are legal.

### III. ETHICAL FRAMEWORK

A *per se* rule for violations of positive law implicates broader principles. It implicates, for example, the tension between fiduciary obligation's equitable roots and its modern statutory and contractual form.<sup>69</sup> But it also implicates broader democratic norms.

The existing scholarship on fiduciary liability for corporate violations of law takes a narrower approach.<sup>70</sup> Rather than examine this issue directly through the lens of more common approaches in the corporate governance scholarship, this Article will instead examine it through political theory models. There is utility in stepping back and looking at a problem through a new lens: it allows us to judge those models against first principles. To the extent that Americans have in significant numbers rejected the old liberal order, it is fruitful to consider ethical frameworks other than those that provide the philosophical foundation for the free-market conservatism of the modern

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liability for aiding and abetting violations of prohibitions of age discrimination in public accommodations under state law. *See infra* Part IV.4.

64. Letter from Governor Ron DeSantis to David Clark (Jan. 15, 2019), <https://www.flgov.com/wp-content/uploads/2019/01/DMS-Letter.pdf> [perma.cc/FB2A-LZJU].

65. *Id.*

66. *See supra* note 56 and accompanying text.

67. Letter from Governor Ron DeSantis to David Clark, *supra* note 64.

68. *Id.*

69. *See generally*, Pace, *Equity*, *supra* note 19 (discussing the tension both in the historical development of fiduciary obligation law and in the scholarly literature).

70. *See, e.g.*, Strine, *supra* note 6; Pollman, *supra* note 8; Bainbridge, *Convergence*, *supra* note 11; Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

American Right<sup>71</sup> and the egalitarian liberalism of the modern American Left.<sup>72</sup> Conversely, applying theoretical models to concrete issues helps test the usefulness and correctness of those models.<sup>73</sup>

Why five models rather than just one, superior model? For a rule to be just, it must meet some standard of substantive correctness.<sup>74</sup> If multiple separate models of political theory each have significant flaws, then using only one model is more likely to lead to rules that are substantively incorrect. As this Article will show, each of the five models discussed below have fatal flaws. And if multiple separate political theory models tend to reach the same results, then they provide an analytic check on each other. Because political theory models can include errors and can be misapplied, the likelihood of a conclusion being optimal is higher where more than one theory supports it.<sup>75</sup> But where the application of multiple theories leads to different results, we must reconsider any single conclusion and give serious consideration to how to resolve the split.<sup>76</sup> I will return to the issue of how to resolve that split after demonstrating that applying the five below models to the issue at hand leads to divergent conclusions.<sup>77</sup>

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71. See Thomas Nagel, *Foreword* to ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA xvi (1974) (pointing toward Anarchy, State, and Utopia as providing the “libertarian element . . . of the ideology of modern conservatism” and “free-market conservatism” with “a philosophical foundation”).

72. See *id.* (pointing toward John Rawls and Ronald Dworkin as providing “egalitarian liberalism” with a philosophical foundation).

73. Cf. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 11 (Dover 2006) (“I cannot stand forward, and give praise or blame to anything which relates to human actions and human concerns, on a simple view of the object as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction.”).

74. Cf. Randy E. Barnett, *The Virtues of Redundancy in Legal Thought*, 33 CLEV. ST. L. REV. 153, 153 (1990) (“By ‘justice,’ I mean the correctness of the end or results of a legal system . . . . Put another way, justice is the substantive correctness of a legal decision.”).

75. Cf. *id.* at 154–55 (“The greater the number of different sound methods of evaluation that converge on a single conclusion, the more confident we can be in that conclusion.”).

76. Cf. *id.* at 155 (“Conversely, a conflict between competing sound modes of analysis over a particular conclusion should lessen our confidence in it and motivate us to search for a better approach.”).

77. See *infra* Part V.



### A. Utilitarianism

The orthodox approach, in implication if not expression, in business law scholarship over the last several decades has been utilitarianism.<sup>78</sup> Utilitarianism is rooted in the work of Jeremy Bentham and John Stuart Mill.<sup>79</sup> Under this view, the best rule maximizes happiness by producing “the greatest possible surplus of pleasure over pain.”<sup>80</sup> An action is “right” if it tends to promote happiness and more right the more it promotes happiness; an action is “wrong” if it “tends to produce the reverse of happiness” and more wrong the more it does so.<sup>81</sup> Corporate governance literature essentially defines happiness as maximizing overall economic value.<sup>82</sup> With caveats, this approach has much to commend it. The problem is not so much that the economics are off as that some of the underlying assumptions are unsupportable.

Utilitarianism would seem to accept *any* action that resulted in greater overall economic value. Under utilitarianism, then, efficient breach is not unjust. This is uncontroversial, at least within the scholarship and the law. Parties are free to breach a contract so long as they pay damages. Utilitarianism does not strictly require the latter;<sup>83</sup> justice does. In the context of positive law, utilitarianism would seem to justify violating the law so long as the benefit – whether to the actor or more broadly – exceeded the harm.

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78. See Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. L. REV. 753, 786–87 n.142 (2007) (“Bentham is recognized in some circles as ‘the parent of economic analysis of law.’”) (quoting Cass R. Sunstein, *Animal Welfare and Economic Analysis*, THE FACULTY BLOG (April 18, 2006), [http://uchicagolaw.typepad.com/faculty/2006/04/animal\\_welfare\\_.html](http://uchicagolaw.typepad.com/faculty/2006/04/animal_welfare_.html) [perma.cc/VLQ7-UMZ8]); see also Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1387 (2008) (referring to utilitarianism as “corporate law’s implicit moral theory”)

79. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); JOHN STUART MILL, UTILITARIANISM (1789); see also Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (Harvard Univ. Press 1996).

80. HENRY SIDGWICK, THE METHODS OF ETHICS 413 (1874).

81. MILL, *supra* note 79, at 10.

82. See Coase, *supra* note 79; EASTERBROOK & FISCHEL, *supra* note 79.

83. Cf. Matt Zwolinski, *The Separateness of Persons and Liberal Theory*, 42 THE J. OF VALUE INQUIRY 147, 149 (2008) (“For a utilitarian, there is no essential difference between one person’s utility and another’s.”).

This view justifies theft so long as the first party valued the object of the theft more highly than the second party valued it.<sup>84</sup>

The answer to that problem is that utilitarian calculus should not focus on individual acts (act-utilitarianism). Rather, the focus should be on the utility of rules (rule-utilitarianism).<sup>85</sup> The rule-utilitarian examines the benefit to a society of a given rule at the aggregate level, and instead of examining the utility of each act violating the rule, condemns all violations of a rule deemed beneficial.<sup>86</sup> But arguably, this distinction is both artificial and not in line with the traditional conception of utilitarianism.<sup>87</sup> And an ethical framework that does not tell us *when* we can break rules is of limited value. Two rules might be beneficial to society: “directors should act to maximize the economic return to the corporation’s shareholders” and “directors should ensure that the corporation operates in compliance with the law.” A useful ethical framework should give us a way to resolve contradictions between the two. And while rule-utilitarianism avoids stamping its approval on some pernicious behavior, such as the theft mentioned above, it does not save us

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84. “Question. What if I see something that I wanna take and it belongs to someone else?”

“Then you will be arrested.”

“But what if I want it more than the person who has it?”

“Still illegal.”

“That doesn’t follow. No, I want it more.”

GUARDIANS OF THE GALAXY (Marvel Studios 2014). Scholars have even gone so far as to argue that utilitarian and other consequentialist models could lead to justifying rape, murder, and genocide. Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of the Law*, 96 CAL. L.R. 323, 333 (2008) (citing Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM – FOR AND AGAINST* 105 (1973); David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351, 356–62 (2002); John C. Harsanyi, *Problems with Act-Utilitarianism and Malevolent Preferences*, in HARE AND CRITICS 89, 96 (Douglas Seanor & N. Fotion eds., 1988)).

85. KAREN LEBACQZ, *SIX THEORIES OF JUSTICE: PERSPECTIVES FROM PHILOSOPHICAL AND THEOLOGICAL ETHICS* 23 (Augsburg Publishing House 1986). See also Bruner, *supra* note 78, at 1428 (defining act- and rule- utilitarianism). According to Redish and Berlow, there is “a seemingly limitless variety of nuanced approaches to [utilitarian] theory.” Redish & Berlow, *supra* note 78, at 771.

86. Redish & Berlow, *supra* note 78, at 771.

87. *Id.* (“Bentham and Mill made no distinctions at all between ‘act-’ and ‘rule-’ utilitarianism.”); see also Bruner, *supra* note 78, at 1429 (“Philosopher David Lyons has argued that act utilitarianism and rule utilitarianism, upon close inspection, are ‘extensionally equivalent.’” (relying on DAVID LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 62–197 (1965))).

from the possibility of a need “that we all be sacrificed in the monster’s maw, in order to increase total utility.”<sup>88</sup>

Utilitarianism presents another serious problem: it is frequently too hard to calculate the change in utility that will result from a given rule change, or even calculate with any accuracy the likelihood of a given change in utility. This invariably leads to justifying a policy change that fits one’s priors by claiming that it will increase utility. But because the change in utility is not easily susceptible to accurate calculation, this means moving away from rigorous analysis of policy choices, not toward the sort of rigorous analysis we find desirable. All theories will necessarily consider some form of utilitarian calculus when an accurate calculation is available and rights have been determined and incorporated. The advantage of other theories is that they provide rules that are useful when an accurate calculation is *not* available.

Utilitarianism, though, must be considered first because it looms large over every other ethical model. For all its weaknesses, utilitarianism is persuasive enough at least that every other model *must* take into account changes to overall utility.

### B. Liberalism

Fiduciary obligation has long been viewed through a moral lens rather than an economic lens.<sup>89</sup> Or to put it another way, relying on Kant’s liberalism rather than utilitarianism,<sup>90</sup> people must be treated as ends, not merely as means to an end.<sup>91</sup> Central to liberalism is the individual and the rights of the

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88. NOZICK, *supra* note 71, at 41 (“Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater gains in utility from any sacrifice of others than these others lose. For, unacceptably, the theory seems to require that we all be sacrificed in the monster’s maw, in order to increase total utility.”).

89. *See, e.g., Pace, Equity, supra* note 19, at 701–06 (summarizing and critiquing “traditionalist” views of fiduciary obligation).

90. The line between utilitarianism and liberalism is fuzzy. John Stuart Mill’s “more instrumental justification of liberalism” straddles the line. Redish & Berlow, *supra* note 78, at 764 (citing JOHN STUART MILL, ON LIBERTY 63 (1859)). But utilitarianism’s basic framing of individuals as means rather than ends separates it from liberalism. *See Zwolinski, supra* note 83, at 152 (discussing Kantian critiques of utilitarianism by Nozick and Rawls on this basis).

91. Stakeholder theory has a Kantian foundation. *See, e.g., R. Edward Freeman & John McVea, A Stakeholder Approach to Strategic Management, in BLACKWELL HANDBOOK OF STRATEGIC MANAGEMENT 17* (M. Hitt, E. Freeman & J. Harrison, eds. 2001) (describing the justification for the stakeholder theory as rooted in Kantian principles because it argued that “managers should make corporate decisions respecting shareholders’ well-being rather than treating them as *means to a corporate end*”) (emphasis in original). Catholic Social Thought also takes the position that

individual. Most definitions of liberalism “recognize the centrality of some form of individual autonomy.”<sup>92</sup> Per Northwestern Law Professor Martin Redish, “autonomy dictates a significant level of free choice for the individual on issues of some consequence to him, unfettered by coercive external forces, either governmental or private.”<sup>93</sup> Liberalism is arguably the most important philosophical foundation for U.S. law. Let us, then, consider two important strains of liberalism: John Rawls’ Theory of Justice<sup>94</sup> and Robert Nozick’s Entitlement Theory.<sup>95</sup>

### 1. John Rawls’ Theory of Justice

Rawls and Nozick have very different visions of what liberalism requires. While Nozick sees liberalism as requiring substantive autonomy be protected, Rawls rejects utilitarianism,<sup>96</sup> but otherwise takes a looser view.<sup>97</sup> Redish has characterized Rawls as focusing on protecting not substantive autonomy but instead process-based autonomy; that is, “the ability of individuals to control the nature of their participation in the processes of collective democratic government.”<sup>98</sup> Public positions and offices, for example, must be open to all under Rawls’ view. Substantive autonomy, on the other hand, “refers to the more general power of individuals to make decisions directing the course of their lives.”<sup>99</sup> Substantive autonomy includes a right to actions that negatively affect the interests of others so long as their rights are not infringed.<sup>100</sup> To Nozick, on the other hand, procedural protections are necessary but not sufficient.<sup>101</sup>

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people, especially workers, must be treated as an ends, not as a means. *See, e.g., Laborem Exercens* ¶ 7 (1981).

92. Redish & Berlow, *supra* note 78, at 764.

93. *Id.*

94. JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press revised ed. 1999). According to Nozick himself, “[p]olitical philosophers must either work within Rawls’ theory or explain why not.” NOZICK, *supra* note 71, at 183.

95. NOZICK, *supra* note 71, at 183.

96. *See* RAWLS, *supra* note 94, at 3 (“Justice . . . does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.”).

97. *Id.*

98. Redish & Berlow, *supra* note 78, at 765.

99. *Id.* at 765.

100. *Id.* (“[S]ubstantive liberty . . . may extend . . . to also include individual decisions that simultaneously impact the interests of other members of society, such as whether to sell automatic weapons.”).

101. NOZICK, *supra* note 71, at 31 (“There is no side constraint on how we may use a tool . . . . There are procedures to be followed . . . . But there is no limit on what we may do to it to best achieve our goals.”).

Rawls structured his Theory of Justice around “justice as fairness.”<sup>102</sup> Rawls argued that we can only rationally choose how to structure a just society from the “original position” behind a “veil of ignorance.”<sup>103</sup> Parties choosing principles from behind the veil of ignorance “do not know what position they hold in society.”<sup>104</sup> An individual in such a situation has an incentive to arrange society in the fairest manner possible. Rawls derived from this his “First Principle, which requires that individuals be given as much liberty as possible so long as each member of society enjoys the same degree of liberty.”<sup>105</sup> Rawls’ Second Principle requires that inequalities resulting from state intervention “be to the greatest benefit of the least advantaged members of society; and they are to be attached to positions and offices open to all, under conditions of equality of opportunity.”<sup>106</sup> Inequalities tie in with the “problem of distributive social justice,” which concerns how the benefits of societal cooperation should be distributed and allocated.<sup>107</sup> Rawls did not take an absolutist view of inequality; rather, he argued that both social inequality and economic inequality could be just, but *only* if those inequalities “result in compensating benefits for *everyone*, and in particular for the least advantaged members of society.”<sup>108</sup>

Rawls’ version of liberalism has two basic and insurmountable problems: transaction costs and aggregate wealth. Rawls did not take into account transaction costs. Even if we might, behind the veil of ignorance, choose to arrange our affairs in a different manner, we may rationally choose not to rearrange our affairs in that manner in reality. Not because of oppression or self-interest, but because both the costs of change and the inevitable risk associated with it – the transaction costs – would be too high.<sup>109</sup> And as Nozick explains, any patterned principle of distribution requires

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102. See LEBACQZ, *supra* note 85, at 33 (rooting “justice as fairness” in “the social contract theories of Locke and Rosseau, and the deontology of Kant”).

103. *Id.* at 34; Redish & Berlow, *supra* note 78, at 766.

104. See LEBACQZ, *supra* note 85, at 34.

105. Redish & Berlow, *supra* note 78, at 766. (internal citations omitted).

106. *Id.* (internal citations omitted).

107. NOZICK, *supra* note 71, at 184.

108. RAWLS, *supra* note 94, at 13 (emphasis added).

109. *Cf.* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE 184 (Penguin Books 2011) (“According to Burke, no mortal is smart enough to design a society from first principles. A society is an organic system that develops spontaneously, governed by myriad interactions and adjustments that no human mind can pretend to understand. Just because we cannot capture its workings in verbal propositions does not mean it should be scrapped and reinvented according to the fashionable theories of the day. Such ham-fisted tinkering will only lead to unintended consequences, culminating in violent chaos.”).

repeated violations of individual property rights because it is not self-perpetuating.<sup>110</sup>

The other fatal flaw to Rawlsian liberalism is that it focuses on an arrangement to the benefit of the “least of these” to the exclusion of considerations of absolute wealth. Transactions that create value and thus increase absolute wealth are enormously beneficial. Such transactions have lifted hundreds of millions of people out of poverty in the last several decades.<sup>111</sup> To be sure, Rawls did “argue that inequalities are justified if they serve to raise the position of the worst-off group in the society, if without the inequalities the worst-off group would be even more worse off.”<sup>112</sup> But a transaction that benefits the wealthy but does not benefit nor hurt the poor is, all else equal, beneficial to society.<sup>113</sup> The focus on “the least of these” also does not give useful guidance on any number of issues, including this one.<sup>114</sup>

Rawls paid limited attention to when violations of law are justified. Under Rawls’ view, an unjust law must be *changed*,<sup>115</sup> not necessarily disobeyed. We are to comply with just laws,<sup>116</sup> although that does not answer the question of the appropriate liability standard for corporate directors. For unjust laws, Rawls not only departed from the view that we have an obligation to disobey them, but also argued we, at least sometimes, have an obligation to obey them.<sup>117</sup> This may be a matter of semantics, though, as this obligation

110. NOZICK, *supra* note 71, at 167–74.

111. *See, e.g.*, ANGUS DEATON, *THE GREAT ESCAPE: HEALTH, WEALTH, AND THE ORIGINS OF INEQUALITY* 160 (Princeton University Press 2013) (“[T]he rapid growth of average incomes, particularly in China and India, and particularly after 1975, did much to reduce extreme poverty in the world. In China most of all, but also in India, the escape of hundreds of millions from traditional and long-established poverty qualifies as the greatest escape of all.”); *see also Caritas in veritate* ¶ 21 (2009) (“[G]rowth . . . continues to be a positive factor that has lifted billions of people out of misery.”).

112. NOZICK, *supra* note 71, at 188; *but see* RAWLS, *supra* note 94, at 13 (“Offhand it hardly seems like that person who view themselves as equals, entitled to press their claims upon one another, would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others.”). Rawls’ discussion of efficiency seems to suggest that he doesn’t necessarily see such transactions as beneficial. RAWLS, *supra* note 94, at 60; *but see id.* at 72 (indicating that, once welfare has been maximized for the worst-off representative, the next step is to maximize welfare for the second worst-off representative man).

113. *See* NOZICK, *supra* note 71, at 188.

114. *See id.*

115. *Id.* at 3.

116. *Id.* at 308.

117. RAWLS, *supra* note 94, at 308 (“Now it is sometimes said that we are never required to comply in these cases. But this is a mistake. The injustice of a law is not, in general, a sufficient reason for not adhering to it.”).

does not hold for laws that “exceed certain limits of injustice.”<sup>118</sup> Rawls viewed compliance with unjust laws as necessary for a functioning society.<sup>119</sup> He even went so far as to argue that civil disobedience might not be justified in a society that oppresses many minority groups because it could create “serious disorder,” which might lead “to a breakdown in the respect for law and the constitution, thereby setting in motion consequences unfortunate for all.”<sup>120</sup> Where disobedience to the law is justified, though, courts should take that into account in reducing or suspending punishment.<sup>121</sup>

Redish associates Rawls and Nozick with process-based and substantive autonomy, respectively,<sup>122</sup> and he concludes that, per either Rawls or Nozick, liberal democracy “requires that individuals be autonomous when participating in governmental processes and seeking to influence the decisions of democratic institutions.”<sup>123</sup> In analyzing corporate law, this Article will view Rawlsian liberalism through the lens of Redish’s focus on the importance of process-based autonomy and democratic norms, a focus that is particularly useful for examining the appropriateness of a *per se* rule. Now, though, we turn to the scholar whom Redish contrasts with Rawls – Robert Nozick.

## 2. Robert Nozick’s Entitlement Theory

Nozick’s version of liberalism more readily fits into John Stuart Mill’s harm principle: power can only be exercised over a person “to prevent harm for others,” not for “[h]is own good, either physical or moral.”<sup>124</sup> Mill’s harm principle, of course, raises a question of its own: How do we determine harm to others? Is this a question for the courts or for the legislature?

Under Nozick’s Entitlement Theory, people are entitled to holdings that they obtain in accordance with the principles of justice in acquisition and

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118. *Id.*; *see also id.* at 309 (“[I]t is evident that our duty or obligation to accept existing arrangements may sometimes be overridden. . . . Unjust laws do not all stand on a par.”); *Id.* at 310 (“[O]nly a few [writers] think that any deviation from justice, however small, nullifies the duty to comply with existing rules.”); *Id.* at 314 (“A law or policy is sufficiently just, or at least not unjust, if when we try to imagine how the ideal procedure would work out, we conclude that most persons taking part in this procedure and carrying out its stipulations would favor the law or policy.”).

119. *See id.* at 312 (“Without some recognition of this duty mutual trust and confidence are liable to break down.”).

120. *Id.* at 328.

121. *Id.* at 339.

122. Redish & Berlow, *supra* note 78, at 767 (noting that “Nozick and Rawls failed explicitly to recognize the process-based/substantive dichotomy”).

123. *Id.*

124. MILL, *supra* note 90, at 91.

justice in transfer.<sup>125</sup> That is, people have a right to property obtained in a just fashion, and they have the right to dispense that property.<sup>126</sup> Because people *only* have a right to what they acquire justly, provisions must also be made for remedying holdings acquired unjustly.<sup>127</sup>

Nozick relied heavily on “the Kantian principle that individuals are ends and not merely means.”<sup>128</sup> This means that individuals “may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable.”<sup>129</sup> Individual rights may be violated only if “prior consent is impossible or very costly to negotiate,” but full compensation must be paid regardless.<sup>130</sup> Under this Principle of Compensation, compensation must be paid both for the “border crossings” just mentioned and for a ban on action that infringes on individual liberty by robbing individuals of the “freedom to act.”<sup>131</sup> This leads to protections for what Redish terms “substantive autonomy”: “the more general power of individuals to make decisions directing the course of their lives.”<sup>132</sup> This is hardly a radical view in theory, but it is extraordinarily strict in application.

Nozick’s view focuses on the individual, and in doing so, he rejects the notion of a social good divorced from individuals.<sup>133</sup> Social entities do not have interests that demand consideration; only individuals do.<sup>134</sup> Nozick was concerned that talk of the social good would provide cover for the use of individuals as means rather than ends.<sup>135</sup> This led Nozick to the conclusion that only what he termed the minimal state – a very minimal state – can be morally justified because “[a]ny state more extensive violates people’s rights.”<sup>136</sup>

Only the minimal state can be justified because the rights of an association are limited to “the *sum* of the individual rights that its members or clients transfer to the association.”<sup>137</sup> This would logically extend to corporations. Shareholders cannot give the corporation any rights they do not

125. NOZICK, *supra* note 71, at 151.

126. *Id.*

127. *Id.* at 152–53.

128. *Id.* at 30–31.

129. *Id.*

130. *Id.* at 72.

131. LEBACQZ, *supra* note 85, at 53.

132. Redish & Berlow, *supra* note 78, at 765.

133. *See generally* NOZICK, *supra* note 71.

134. *Id.* at 32–33 (“[T]here is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives.”).

135. *Id.* at 34.

136. *Id.* at 149.

137. *Id.* at 89.



possess,<sup>138</sup> and the state cannot give the corporation any additional rights because it, too, has no more rights or powers than the individuals associated with it. Proponents of concession theory argue that the corporation is fundamentally a state creation, and thus “the state has the right to regulate its creation as it sees fit.”<sup>139</sup> Nozick would reject this view to the extent that it would give the state power to regulate the corporation beyond the (very limited) power it has to regulate individuals.

But Nozick’s Entitlement Theory has its own problems. Nozick’s absolutist view regarding the infringement of individual rights makes the entire modern corporate economy, built on limited liability, suspect. Limited liability is, after all, an artificial, state-imposed limit on redress for infringement of individual rights. Nozick recognized just that: he argued that a corporation should be free to contract for limited liability, but that its tort liability must be unlimited.<sup>140</sup> But this dragoons in persons who are not tortfeasors merely because they have an interest in an association. To the extent the corporation is a tortfeasor, it makes perfect sense that the entirety of its assets be at stake. To the extent an individual is a tortfeasor, it makes perfect sense that the entirety of the individual’s assets be at stake. And that is just the case under modern limited liability. An individual is always responsible – and liable – for their own acts. It does not follow that buying a share of the residual income of the corporation should open the buyer to potentially unlimited liability. That would seem to violate Nozick’s own principles. Under Nozick’s view, no greater body can have any rights that the individuals that comprise it do not possess.<sup>141</sup> He evidently sees limited liability as violating this principle. But, in fact, it does not. It effectively retains an active participant-passive investor distinction that roughly maps to who caused harm by infringing on the rights of an individual.

Nozick’s minimal state is almost certainly impractical. Even if it is not, it is so tremendously dissimilar to the state as it exists today that we run into an issue similar to that which we ran into with Rawls. The change to a minimal state would be so drastic that not just Burkean conservatives, highly concerned with the risk and cost of change, would blanch at the prospect. A relatively well functioning system should not “be scrapped and reinvented

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138. Cf. Daniel T. Ostas, *Cooperate, Comply, or Evade?: A Corporate Executive’s Social Responsibilities with Regard to Law*, 41 AM. BUS. L.J. 559, 591 (2004) [hereinafter Ostas, *Cooperate, Comply, or Evade?*] (arguing shareholders have “no moral authority to authorize the CEO to do anything that [a sole] proprietor could not ethically do.”).

139. Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WILLIAM & MARY BUS. L. REV. 1, 20 (2015) (citing Stephen Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 333 (2014)).

140. NOZICK, *supra* note 71, at 133–34.

141. *See id.*

according to the fashionable theories of the day.”<sup>142</sup> More directly relevant, the tremendous dissimilarity between our state and a minimal state makes it very difficult to use Nozick’s work to meaningfully distinguish between government interventions: almost all will fail to pass muster. While liberalism provides valuable insights into a per se rule for violations of positive law, it is not perfect nor is it the only perspective worth discussing.

### C. Communitarian Models

Given the rise of populism and illiberalism in the United States (both on the political right and on the political left),<sup>143</sup> there is value in considering perspectives other than liberalism. The rise of populism and illiberalism may be due in part to a class bias associated with reliance on liberalism. Non-liberal models other than utilitarianism may also be underappreciated due to both the prevalence of utilitarianism in corporate scholarship and a class bias toward liberalism. In particular, a focus on liberal individualism may obfuscate the dangers of a breakdown in civil society, something toward which communitarianism is better orientated. Given those concerns, this Section will also consider two communitarian models. The first is a populist modification of Charles Taylor’s democratic communitarianism.<sup>144</sup> The second is Catholic Social Thought.

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142. PINKER, *supra* note 109, at 184 (describing Burke’s philosophy).

143. See, e.g., Fareed Zakaria, *Opinion: America’s Democracy has Become Illiberal*, THE WASH. POST (Dec. 29, 2016), [https://www.washingtonpost.com/opinions/america-is-becoming-a-land-of-less-liberty/2016/12/29/2a91744c-ce09-11e6-a747-d03044780a02\\_story.html?utm\\_term=.947049d8545a](https://www.washingtonpost.com/opinions/america-is-becoming-a-land-of-less-liberty/2016/12/29/2a91744c-ce09-11e6-a747-d03044780a02_story.html?utm_term=.947049d8545a) [perma.cc/7C5X-AEN7] (arguing that the “liberty and law” half of liberal democracy is, in the United States and abroad, “vanishing, leaving just the outer, democratic shell”). Senator Elizabeth Warren has proposed reforms that would create criminal culpability for executives of large corporations who “negligently permit or fail to prevent” violations of law by the corporation and would require executives of very large corporations to certify that no lawbreaking was occurring in the company. Kevin LaCroix, *Senator Warren’s Proposed Executive Liability Legislation is Contrary to Legal Traditions*, D&O BLOG (Apr. 24, 2019), <https://www.dandodiary.com/2019/04/articles/director-and-officer-liability/senator-warrens-proposed-executive-liability-legislation-is-contrary-to-our-legal-systems-principles/> [perma.cc/ZP66-NHHS].

144. See Redish & Berlow, *supra* note 78, at 774–75 (providing the label and associating it with Charles Taylor).

## 1. Populist Communitarianism

Proponents of communitarianism see liberalism as overemphasizing individualism at the expense of the community as a whole.<sup>145</sup> Democratic communitarianism elevates “the social institutions that shape the community as a whole” above “the value of individual autonomy.”<sup>146</sup> Democratic communitarianism, unlike utilitarianism, shares with liberalism “a commitment to a foundational premise of societal self-determination.”<sup>147</sup> But under this view, we can only be free by shaping our society “through instruments of common decision.”<sup>148</sup> Paradoxically, it is coming together to decide how we bind ourselves that “is an essential part of the exercise of freedom.”<sup>149</sup>

The individual is no longer the “foundational democratic unit,” as with liberalism; under democratic communitarianism, it is the community as a whole.<sup>150</sup> The idea that “society is best served by political decisions that reflect the preferences of the entire community”<sup>151</sup> is closely related to the conception of virtue theory in business ethics, which sees managers as owing duties to society as a whole.<sup>152</sup> It is unclear, though, that “society as a whole” is the appropriate definition of “community” even for communitarianism. Democratic communitarians believe that the state can best serve the interests of society by adopting policies designed to promote human interaction as a part of broader society.<sup>153</sup> That interaction largely takes place not in some abstract “community as a whole” but rather through smaller communal entities. Given that, the “community as a whole” is of limited utility. A large assortment of smaller communal entities serve an even greater role in shaping an individual’s identity, and the shaping of identity is to a great degree driven by individual choices.

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145. *Id.* at 774.

146. *Id.*

147. *Id.*

148. CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS VOL. 2* 187, 208 (Cambridge Univ. Press 1985).

149. *Id.*

150. Redish & Berlow, *supra* note 78, at 775.

151. *Id.* at 774; *see also* TAYLOR, *supra* note 148, at 208 (asserting that certain issues “can only be effectively decided by society as a whole”).

152. *See* Timothy L. Fort, *Goldilocks & Bus. Ethics: A Paradigm That Fits “Just Right”*, 23 J. CORP. L. 245, 247 (1998) [hereinafter Fort, *Goldilocks*] (characterizing communitarian theories as “the necessary partners of virtue theory”).

153. Redish & Berlow, *supra* note 78, at 775; *see also* TAYLOR, *supra* note 148, at 205 (arguing that individuals only acquire their identities by interacting with other humans as part of a broader society).

Democratic communitarianism only supports protecting individual autonomy if doing so does not undermine communal attachments, which democratic communitarians see as so important to shaping choices by individuals.<sup>154</sup> Democratic communitarians believe that laws should promote communal attachments rather than atomistic individual autonomy.<sup>155</sup> It follows logically, then, that laws should not *discourage* communal attachments. Laws that “crowd out” civil society are to be assiduously avoided.

Democratic communitarians shy from atomistic individual autonomy because they see “an individual’s identity as bound up with each person’s various communal attachments.”<sup>156</sup> But if “living in society is a necessary condition of the development of rationality . . . or of becoming a fully responsible, autonomous being,”<sup>157</sup> responsible, autonomous beings are a necessary condition for building a full society. It is not clear that democratic communitarians appreciate the extent to which individuals and their individual choices are necessary to forming the smaller communal entities that make up civil society.

Additionally, there is a tension between democratic communitarianism and pluralism. We may have “a significant obligation to belong,”<sup>158</sup> but what if we do not want to belong? Democratic communitarianism ought to, at the very least, accept that people will want to change the small communal entities to which they belong, and in a free society, they must be permitted to do so. The irony in Taylor’s arguments against “atomism” is that it is individual freedom that best facilitates community building.<sup>159</sup>

Taylor takes a pinched view of the communal entities that shape individual identity. He focuses not on the smaller communal entities that allow a pluralistic society to thrive, and are arguably more important to civic society, but rather on the “bearers of our culture [such as] museums, symphony orchestras, universities, laboratories, political parties, law courts, representative assemblies, newspapers, publishing houses, television stations, and so on.”<sup>160</sup> Churches, trade unions, and local Rotary Clubs are nowhere to be found. Taylor’s communitarianism is a community by and for elites.

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154. Redish & Berlow, *supra* note 78, at 775.

155. *See id.* (“Communitarian theory is grounded in the belief that individual autonomy divorced from the communal ties that shape that autonomy is incoherent.”).

156. *Id.*

157. TAYLOR, *supra* note 148, at 189.

158. *Id.* at 206.

159. *See* NOZICK, *supra* note 71, at 334 (“Treating us with respect by respecting our rights, it allows us . . . to choose our life and to realize our ends . . . aided by the voluntary cooperation of other individuals possessing the same dignity.”).

160. TAYLOR, *supra* note 148, at 205.

Democratic communitarianism bears at least some resemblance to populism. Populists, though, have not typically paid significant attention to corporate governance.<sup>161</sup> With what this Article calls “democratic communitarianism,” I make three populist tweaks to Taylor’s democratic communitarianism to give it more salience given current trends. First, I add a suspicion of “elites.”<sup>162</sup> Populists worry that elites will seek to rig the game in their favor.<sup>163</sup> Those elites include both large corporations<sup>164</sup> and their directors and executives,<sup>165</sup> but they probably include the managers of large public pension funds as well.<sup>166</sup> This is a way of incorporating well-founded

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161. See Stephen M. Bainbridge, *The Curious Silence of Populists of Corporate Purpose and Social Responsibility*, PROFESSORBAINBRIDGE.COM, STEPHEN BAINBRIDGE’S J. OF LAW, RELIGION, POLITICS, AND CULTURE (July 12, 2018, 1:57 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2018/07/the-curious-silence-of-populists-on-corporate-purpose-and-social-responsibility.html> [perma.cc/WW96-CBK9] (noting the “great deal of discussion . . . about the need to reform big business” but “relatively little discussion of [corporate purpose] in the populist literature”).

162. Stephen M. Bainbridge, *Corporate Purpose in a Populist Era*, UCLA SCHOOL OF LAW RESEARCH PAPER SERIES: RESEARCH PAPER NO. 18-09 n. 15 (2018) [hereinafter Bainbridge, *Populist Era*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3237107](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237107) [perma.cc/32K5-V24X] (“[P]opulism is a worldview that sees corrupt elites standing in opposition to ordinary people.”) (relying on JOHN B. JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* 14 (2016)); see also RUSSELL KIRK, *THE POLITICS OF PRUDENCE* 144 (describing populism as “a revolt against the Smart Guys,” largely represented today by the Knowledge Class).

163. See Robert D. Atkinson et al., *How Tech Populism is Undermining Innovation*, INFO. TECH. & INNOVATION FOUND.: REPORT (Apr. 1, 2015), <http://www2.itif.org/2015-tech-populism.pdf> [perma.cc/CC9K-DMLQ] (“The populist view is that elites, especially big business and big government, will prevent useful rules from being established – or, if those rules are established, will find ways to bypass them at the expense of the broader public.”); see also Bainbridge, *Populist Era*, *supra* note 162, at 13 (“A 2005 Harris Poll found that ‘big business’ was the social institution the largest number of respondents identified as having too much political power.”) (citing EVAN OSBORNE, *THE RISE OF THE ANTI-CORPORATE MOVEMENT: CORPORATIONS AND THE PEOPLE WHO HATE THEM* 197 (2009)).

164. See, e.g., Greg Coleridge, *The System Isn’t Broken, It’s Fixed: Ending Big Money and Corporations in Our Elections*, 44 U. TOLEDO L. REV. 541, 557 (2013).

165. See, e.g., Bainbridge, *Populist Era*, *supra* note 162, at 7 (“Populists historically have viewed corporate managers and directors as elites opposed to the best interests of the people.”).

166. Cf. MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 29 (Princeton University Press 1994) (“By populism . . . I mean to refer to a widespread attitude that large institutions and

concerns about what economically-minded utilitarians would label as agency costs and regulatory capture.

Second, I add a bias toward smaller communal entities over the community as a whole. “Smaller communal entities” are also known as “voluntary associations,”<sup>167</sup> “little platoons,”<sup>168</sup> “wee little bowls,”<sup>169</sup> or simply “associations.”<sup>170</sup> Adding a bias toward smaller communal entities better provides for pluralism,<sup>171</sup> and it recognizes the importance of these smaller communal entities to civil society.<sup>172</sup> To put it in utilitarian terms:

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accumulations of centralized economic power are inherently undesirable and should be reduced even if concentration is productive.”).

167. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 48 (Simon & Schuster Paperbacks 2000) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513–17 (J.P. Mayer ed., George Lawrence trans., Garden City, N.Y.: Doubleday 1969)).

168. BURKE, *supra* note 73, at 44 (Dover 2006); *but see* James McElroy, *Knock It Off With the ‘Little Platoons’ Already*, *THE AMERICAN CONSERVATIVE* (June 28, 2018), <https://www.theamericanconservative.com/articles/knock-it-off-with-the-little-platoons-already/> [perma.cc/3KAB-353A] (arguing the original Burke quote does not support the use of the term “little platoons” to apply broadly to smaller communal entities).

169. Fort, *Goldilocks*, *supra* note 152, at 246–47 (arguing that “business ethics requires authentic communities that respect individual autonomy” to serve as “mediating institutions” – Fort’s “wee little bowls”).

170. *See generally* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

171. *Cf.* Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 *OHIO ST. L.J.* 691, 699 (2015) (“[A]cceptance of pluralism . . . facilitates human flourishing far more than an exclusively communitarian perspective does.”).

172. *See* Timothy L. Fort, *Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 *NOTRE DAME L. REV.* 173, 195–96 (1997) (arguing that “basic human social needs of affection, friendship, prestige, and recognition” have traditionally been “met by mediating institutions such as families, churches, and guilds”) (citations omitted). The concern for smaller communal entities is one shared by Catholic Social Thought. *See, e.g.*, POPE LEO XIII, *Rerum Novarum*, ¶ 2 (1891) (“The ancient workmen’s guilds were destroyed in the last century, and no other organization took their place.”); *id.* ¶¶ 36–38 (lauding workmen’s associations and “societies for mutual help” for drawing employers and workmen more closely together); POPE PIUS XI, *Quadragesimo Anno*, ¶ 37 (1931) (referencing the “gratifying increase and spread of associations among farmers”); POPE JOHN XXIII, *Mater et Magistra*, ¶ 88 (1961) (encouraging the state to make special provision for artisan enterprises and cooperative associations via “instructions, taxes, credit facilities, social security, and insurance”); *id.* ¶ 146 (encouraging farmers to “strive jointly to set up mutual-aid societies and professional associations”); POPE PAUL VI, *Pacem in Terris*, ¶ 24 (1963) (“[I]t is by all means necessary that a great variety of organizations and intermediate groups be established

they create positive externalities.<sup>173</sup> One may question how well this resulting model aligns with the corporation. UCLA Law Professor Stephen Bainbridge does not find the idea that large multinational corporations can perform the role of smaller communal entities as credible.<sup>174</sup> Multinationals are owned by “a new class of absentee owners” who do not and cannot recognize their mutual obligations with local communities.<sup>175</sup> This does not account for the role that corporate giving plays in the financing of smaller communal entities and for the importance of corporate employees in those entities, but that is probably less true for large multinationals than for local businesses. Purely in terms of what produces the strongest possible array of smaller communal entities, there is much to be said for the populist ideal of small businesses “with local owners who [are] embedded in the community.”<sup>176</sup>

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which are capable of achieving a goal which an individual cannot effectively obtain by himself.”); POPE PAUL VI, *Gaudium et Spes*, ¶ 75 (1965) (“Rulers must be careful not to hamper the development of family, social or cultural groups, nor that of intermediate bodies or organizations.”); POPE JOHN PAUL II, *Laborem Exercens*, ¶ 20 (1981) (“All these rights . . . give rise to yet another right: the right of association, that is, to form associations for the purpose of defending the vital interests of those employed in the various professions. These associations are called labor or trade unions . . . . The experience of history teaches that organizations of this type are an indispensable element of social life.”); POPE JOHN PAUL II, *Centesimus Annus*, ¶ 13 (1991) (“[T]he social nature of man is not completely filled in the state, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy, always with a view to the common good.”).

173. See, e.g., Jonathan Haidt, *Moral Psychology and the Misunderstanding of Religion*, EDGE (Sept. 21, 2007), [https://www.edge.org/conversation/jonathan\\_haidt-moral-psychology-and-the-misunderstanding-of-religion](https://www.edge.org/conversation/jonathan_haidt-moral-psychology-and-the-misunderstanding-of-religion) [perma.cc/6LET-RR2C] (arguing that churches, social fraternities, and college sports teams generate positive externalities).

174. Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. OF CATH. SOC. THOUGHT 595, 597 (2004) (citing Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILLANOVA J. L. & INV. MGMT. 3, 15 (2002)); but see Fort, *supra* note 172, at 175, 196–201 (1997) (arguing that business can and should serve as “mediating institutions[,] communities which socialize their members[,] ‘mediating’ between the individual and society as a whole.”).

175. Bainbridge, *Populist Era*, *supra* note 162, at 14 (citing PETER KOLOZI, CONSERVATIVES AGAINST CAPITALISM: FROM THE INDUSTRIAL REVOLUTION TO GLOBALIZATION 87 (2017)).

176. *Id.* at 15 (citations omitted); see also Fort, *supra* note 172, at 176 (“Although the process is traditionally associated with institutions such as family, church, and the local community, businesses ought to be mediating institutions as well.”) (citing Timothy L. Fort, *Business as Mediating Institution*, 6 BUS. ETHICS Q. 149, 156 (1996)).

Third, I add a bias toward law and order. This is perhaps only a small change from democratic communitarianism, which sets great store by laws passed by duly elected legislatures (and presumably would set even greater store by popular referendums). But the bias towards law and order ties in with my first modification due to the common perception that the elite need not play by the same rules as the unwashed masses.<sup>177</sup> And there is an additional element that goes beyond democratic communitarianism in deferring to legal authority and prizing stability.<sup>178</sup> This also adds shades of civic republicanism.<sup>179</sup>

Populist communitarianism has its advantages over Taylor's democratic communitarianism, but it too is fatally flawed. Concerns about elites are well founded, but a simple bias against elites fails to distinguish between elites whose status is earned by creating value<sup>180</sup> and those engaged in rent-seeking. Too often populist policies hurt the very people they were supposed to protect.<sup>181</sup> The emphasis on smaller communal entities can be difficult to square with populist rhetoric, which rarely mentions them and tends to focus

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177. See *supra* note 164; see also Bainbridge, *Populist Era*, *supra* note 162, at 17 (“[P]opulists have long believed that state law is too lax in regulating large corporations.”) (citations omitted).

178. Blue-collar families prize stability much more than novelty, in contrast with the managerial and professional elite. JOAN C. WILLIAMS, *WHITE WORKING CLASS 28* (Harvard Bus. Rev. Press 2017); see also *The New Political Divide, and a Plan to Close It*, *THE ECONOMIST* (Mar. 25, 2017) <https://www.economist.com/books-and-arts/2017/03/25/the-new-political-divide-and-a-plan-to-close-it> [perma.cc/B35K-RS77] (distinguishing Anywheres who “value social and geographical mobility” from Somewheres who “value family, *authority* and nationality”) (emphasis added) (reviewing DAVID GOODHART, *THE ROAD TO SOMEWHERE: THE POPULIST REVOLT AND THE FUTURE OF POLITICS 44* (Hurst 2017) (associated a question on the British Social Attitudes survey – “The law should always be obeyed, even if a particular law is wrong” – and associated it with a subset of his populist Somewheres classification)).

179. See Redish & Berlow, *supra* note 78, at 797 (“Public action model adherents claim . . . the class action is justified solely because it aids in the enforcement of laws that implement broader purposes.”). Rawls also displays a bias toward law and order. See, e.g., RAWLS, *supra* note 94, at 340 (“Up to a certain point it is better that the law and its interpretation be settled than that it be settled rightly.”).

180. The ranks of the wealthiest people in the world are heavy with entrepreneurs. Catherine Clifford, *Entrepreneurs Rank High Among the 50 Wealthiest People in the World*, *ENTREPRENEUR* (Jan. 28, 2016), <https://www.entrepreneur.com/article/270093> [perma.cc/BXC9-PPWJ].

181. *Why Tariffs are Bad Taxes*, *THE ECONOMIST* (July 31, 2018), <https://www.economist.com/the-economist-explains/2018/07/31/why-tariffs-are-bad-taxes> [perma.cc/W3AS-ULNJ] (explaining why tariffs are regressive and hurt the poor).



instead on national unity.<sup>182</sup> The emphasis on law and order appears Burkean in theory,<sup>183</sup> but too often looks like mere meanness in practice.<sup>184</sup> To the extent populism is driven by anti-immigration (or anti-immigrant) sentiment,<sup>185</sup> it may be of limited utility for other issues.

## 2. Catholic Social Thought

The second non-liberal (and non-utilitarian) model I will consider comes from Catholic Social Thought (“CST”). I include Catholic Social Thought for four reasons. First, there are well over 50 million Catholics in the United States,<sup>186</sup> and the hierarchical structure and long history of the Church allows for a central body to build a political theory over time.<sup>187</sup> Second, the Church

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182. See, e.g., Francis Fukuyama, *The Rise of Populist Nationalism*, CREDIT SUISSE (Jan. 23, 2018), <https://www.credit-suisse.com/corporate/en/articles/news-and-expertise/francis-fukuyama-the-rise-of-populist-nationalism-201801.html> [perma.cc/Z4QS-DTX6] (tying populism to nationalism and pointing to the institutions of liberal democracy as bulwarks against the two).

183. See Russell Kirk, *Edmund Burke and the Principle of Order*, THE RUSSELL KIRK CTR. FOR CULTURAL RENEWAL (Nov. 30, 2009), <https://kirkcenter.org/by-kirk/burke-principle-of-order-1952/> [perma.cc/7JQT-MEJU] (tying Burke’s political philosophy to the rule of law and especially to a distinct concept of order).

184. See, e.g., Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, THE N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> [perma.cc/C4RP-THD2] (reporting that a new zero tolerance immigration policy resulted in a “‘sharp increase’ in the number of children separated from a parent or guardian.”)

185. See generally Eric Kaufmann, *WHITESHIFT: POPULISM, IMMIGRATION, AND THE FUTURE OF WHITE MAJORITIES* (Harry N. Abrams 2019) (arguing that populism on the right is closely tied to how important voters consider restricting immigration and that the rise of the populist right in Europe is closely tied to a rise in concern over immigration).

186. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2012*, table 75 (2012), <https://www.census.gov/library/publications/2011/compendia/statab/131ed/population.html> [perma.cc/W2UY-QUJ6].

187. Catholic Social Thought, then, is tied to a large political body in way that the Christian Realism of Reinhold Niebuhr or the liberation theology of Jose Porfirio Miranda are not. This is no guarantee of salience even among Catholics, of course, but it gives a stronger base from which to work. Catholic Social Thought is formed in significant part by seven major encyclicals, or papal letters on Catholic doctrine, and one pastoral constitution. See POPE LEO XIII, *Rerum Novarum*, *supra* note 192; POPE PIUS XI, *Quadragesimo Anno*, *supra* note 172; POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172; POPE PAUL VI, *Pacem in Terris*, *supra* note 172; POPE PAUL VI, *Populorum Progression* (1967); POPE JOHN PAUL II, *Laborem Exercens*, *supra*

has long worked to position CST as an alternative to both liberalism and socialism.<sup>188</sup> Third, CST is persuasive as a matter of first principles. Fourth, CST is more concrete than other models, and thus more readily applied.<sup>189</sup> CST “focuse[s] more directly on social problems and concrete issues of justice” than the work of Rawls and Nozick.<sup>190</sup> CST also has a long history as an alternative to liberalism.<sup>191</sup>

CST has a number of other advantages that make it attractive as a model of political theory. It has an international perspective relative to other

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note 172; and POPE JOHN PAUL II, *Centesimus Annus*, *supra* note 172. All quotes are pulled from DAVID J. O'BRIEN & THOMAS A. SHANNON, EDs., *CATHOLIC SOCIAL THOUGHT: ENCYCLICALS AND DOCUMENTS FROM POPE LEO XIII TO POPE FRANCIS* (Orbis Books 3d ed. 2016).

188. *See, e.g.*, POPE JOHN PAUL II, *Laborem Exercens*, *supra* note 172, at ¶ 14 (1981) (“[T]he above principle . . . diverges radically from the program of collectivism as proclaimed by Marxism . . . . At the same time it differs from the program of capitalism practiced by liberalism.”); POPE PAUL VI, *Octogesima Adveniens* ¶ 26 (1971) (“[T]he Christian who wishes to live his faith in a political activity cannot without contradicting himself adhere to ideological systems which radically or substantially go against his faith and his concept of man. He cannot adhere to the Marxist ideology . . . nor can he adhere to the liberal ideology.”); POPE PAUL VI, *Populorum Progression*, *supra* note 187, at ¶ 58 (1967) (“One must recognize that it is the fundamental principle of liberalism, as the rule for commercial exchange, which is questioned here.”); POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 23 (1961) (“For the unregulated competition which so-called *liberals* espouse, or the class struggle in the *Marxist sense*, are utterly opposed to Christian teaching and also to the very nature of man.”); POPE LEO XIII, *Rerum Novarum*, *supra* note 172, at ¶ 4 (1891) (“[Socialists] are . . . emphatically unjust, for they would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community.”).

189. *See* POPE JOHN PAUL II, *Sollicitudo Rei Socialis* ¶ 41 (1987) (“[Catholic Social Thought] is a doctrine aimed at guiding *people’s behavior*.”) (emphasis added).

190. LEBACQZ, *supra* note 85, at 66.

191. *See, e.g.*, Gerald J. Russello, *Catholic Social Thought and the Large Multinational Corporation*, 46 J. CATH. LEGAL STUD. 107, 107 (2007) (“In particular, CST offers a critique of classical liberal economics and its conception of persons as autonomous consumers or shareholders seeking to maximize their preferences.”) (citing Mark Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. L. STUD. 35 (2005)); *see also* POPE JOHN PAUL II, *Laborem Exercens*, *supra* note 172, at ¶ 14 (“[T]he right to private property is subordinated to the right to common use.”); POPE PAUL VI, *Populorum Progression*, *supra* note 187, at ¶ 58 (“One must recognize that it is the fundamental principle of liberalism, as the rule for commercial exchange, which is questioned here.”)

American-, or at least Western-, centric models.<sup>192</sup> CST recognizes people as self-interested.<sup>193</sup> CST sees people as simultaneously individuals with personal “rights and obligations [that] are universal and unviolable”<sup>194</sup> and as members of society with social duties.<sup>195</sup> Using CST also allows us to introduce shades of objective truth communitarianism<sup>196</sup> and virtue ethics.<sup>197</sup> CST acknowledges the legitimate role of profits.<sup>198</sup> But per the Catechism of the Catholic Church, businesspeople must consider the common good in addition to profits.<sup>199</sup>

CST maintains a number of hallmarks across the decades. Like Rawls,<sup>200</sup> CST focuses particularly on the poor<sup>201</sup> and concerns itself with

192. See, e.g., POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 178 (“[T]he Church by divine right pertains to all nations. This is confirmed by the fact that she already is everywhere on earth and strives to embrace all peoples.”).

193. See, e.g., *id.* at ¶ 229 (“[T]here is deeply rooted in each man an instinctive and immoderate love of his own interests.”).

194. POPE JOHN PAUL II, *Pacem in Terris*, *supra* note 172, at ¶ 9.

195. See, e.g., *id.* at ¶¶ 30–31 (“[I]t also follows that in human society to one man’s right there corresponds a duty in all other persons: the duty, namely, of acknowledging and respecting the right in question. . . . A well-ordered human society requires that men recognize and observe their mutual rights and duties.”).

196. See Redish & Berlow, *supra* note 78, at 774 (“‘Objective truth communitarianism’ posits that there are objectively good and bad policy decisions.”).

197. Bainbridge, *CST*, *supra* note 174, at 600 (“Catholic social teaching is the tradition of virtue ethics.”)

198. POPE JOHN PAUL II, *Centesimus Annus*, *supra* note 172, at ¶ 35.

199. UNITED STATES CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH ¶ 2432 (2d ed. 1997); see also Leo L. Clarke & Edward C. Lyons, *The Corporate Common Good: The Right and Obligation of Managers to Do Good to Others*, 32 U. OF DAYTON L. REV. 275, 282 (2007) (“[A]ccording to Catholic social principles the corporate common good is not simply based on a concept denoting a full, i.e., fair, economic distribute of profits among stakeholders, but reflects the full range of ‘human and moral factors’ that stakeholders may rightfully take into account in pursuing their moral duty to ‘be at the service of the whole of society.’”); Vincent J. Miller, *The Common Good and the Market*, AMERICA MAG. (April 1, 2019) (“[P]apal social teaching has consistently stressed that markets are limited and imperfect tools with potentially destructive aspects (inequality and exclusion, environmental degradation, erosion of community). For this reason, they are but one aspect of broader social flourishing, one that must be yoked to the common good through other modalities of human freedom.”).

200. *Supra* Part III.B.1.

201. See, e.g., POPE JOHN XXIII, *Pacem in Terris*, *supra* note 172, at ¶ 56 (“Considerations of justice and equity, however, can at times demand that those involved in civil government give more attention to the less fortunate members of the community, since they are less able to defend their rights and to assert their legitimate claims.”); POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 20 (asserting that

distributive justice.<sup>202</sup> CST recognizes the inherent dignity of work<sup>203</sup> as well as the inherent dignity of a human person and its tie to liberty.<sup>204</sup> CST also recognizes the link between liberty and virtue<sup>205</sup> and the importance of liberty to democracy.<sup>206</sup> CST recognizes that man is a social animal.<sup>207</sup> People and communities are shaped by their shared past.<sup>208</sup> CST recognizes that humans benefit from the actions of their predecessors and that this creates an ethical duty to work for the benefit of future humans.<sup>209</sup>

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the State should be especially diligent in safeguarding the rights of “the weaker, such as workers, women, and children”); *see also* U.S. CATHOLIC BISHOPS, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* ¶ 24 (1986) (“The fundamental moral criterion for all economic decisions, policies, and institutions is this: They must be at the service of *all people, especially the poor.*” (emphasis in original)).

202. POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 73–74 (“[V]igilance should be exercised and effective steps taken that class differences arising from disparity of wealth not be increased, but lessened so far as possible. . . . “[T]he economic prosperity of any people is to be assessed not so much from the sum total of goods and wealth possessed as from the distribution of goods according to norms of justice.”).

203. *See, e.g.*, POPE JOHN PAUL II, *Laborem Exercens*, *supra* note 172, at ¶ 9 (“And yet in spite of all this toil – perhaps, in a sense, because of it – work is a good thing for man.”).

204. *See, e.g.*, POPE PAUL VI, *Guadium et Spes*, *supra* note 172, at ¶ 17 (“[M]an’s dignity demands that he act according to a knowing and free choice.”); *id.* at ¶ 59 (“All of these considerations demand too, that, within the limits of morality and the general welfare, a man be free to search for the truth, voice his mind, and publicize it; that he be free to practice any art he chooses; and finally that he have appropriate access to information about public affairs. It is not the function of public authority to determine what the proper nature of forms of human culture should be.”).

205. *See, e.g., id.* at ¶ 17 (“Only in freedom can man direct himself toward goodness. . . . Man achieves such dignity when . . . he pursues his goal in a spontaneous choice of what is good.”).

206. *See, e.g., id.* ¶ 73 (“[T]he protection of personal rights is a necessary condition for the active participation of citizens, whether as individuals or collectively, in the life and government of the state.”).

207. *See, e.g.*, POPE JOHN XXIII, *Pacem in Terris*, *supra* note 172, at ¶ 31 (“Since men are social by nature they are meant to live with others and to work for one another’s welfare.”); POPE PAUL VI, *Populorum Progressio*, *supra* note 191, at ¶ 36 (“[M]an finds his true identity only in his social milieu.”).

208. POPE PAUL VI, *Guadium et Spes*, *supra* note 172, at ¶ 53.

209. *See, e.g.*, POPE PAUL VI, *Populorum Progressio*, *supra* note 191, at ¶ 17 (“We have inherited from past generations, and we have benefitted from the work of our contemporaries: for this reason we have obligations toward all, and we cannot refuse to interest ourselves in those who will come after us to enlarge the human family.”).

CST remains highly relevant today. The term “social justice” was first used by Pope Pius XI in 1931 in *Quadragesimo Anno*.<sup>210</sup> Perhaps more importantly, Pope Pius XI’s encyclical *Quadragesimo Anno* also introduced the concept of subsidiarity.<sup>211</sup> Subsidiarity is the idea that the lowest level of organization possible to address an issue should be the one to do so.<sup>212</sup> Social justice has obvious salience, and subsidiarity is an implicit guiding principle in the constitutional design of the United States<sup>213</sup> and an explicit guiding principle in the constitutional design of the European Union.<sup>214</sup> CST makes a moral case for subsidiarity, but there is sound economic reasoning that favors subsidiarity as well.<sup>215</sup>

CST strikes a middle ground between liberalism’s intense focus on the individual and democratic communitarianism’s rejection of the relevancy of

210. See O’BRIEN & SHANNON, *supra* note 187, at 42 (“A new phrase – *social justice* – appeared in *Quadragesimo Anno* to describe the type of justice that demanded due recognition of the common good, a good which included, and did not contradict, the authentic good of each and every person.”). The term appears in ¶ 58: “Each class, then, must receive its due share, and the distribution of created goods must be brought into conformity with the demands of the common good and social justice.” POPE PIUS XI, *Quadragesimo Anno*, *supra* note 172.

211. POPE PIUS XI, *Quadragesimo Anno*, *supra* note 172 at ¶¶ 79–80. Subsidiarity was reaffirmed by *Mater et Magistra*. POPE JOHN XXIII, *supra* note 172, at ¶ 53.

212. POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 53.

213. Compare George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUMBIA L. REV. 331, 337 (Stating that “[a]lthough subsidiarity has not figured as a term in United States constitutionalism, it plainly touches on issues of enduring concern to the federalism balance in [the United States] as well,” but concluding that federalism in the U.S. is “left entirely to an unstructured political process” and that “no real attempt has been made to ensure respect for subsidiarity as such”) with Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, in FEDERALISM AND SUBSIDIARITY 8 (James E. Fleming & Jacob T. Levy eds. 2014) (arguing that, after the “U.S. neo-federalist revival” of the late 1990s, “Bermann’s claim is thus no longer sustainable, if it ever was”).

214. Bermann, *supra* note 213, at 334 (1994) (describing subsidiarity as a central principle for European Union); see also Calabresi & Bickford, *supra* note 213, at 6 (“The principle of subsidiarity formally entered EU law in the 1992 Treaty of Maastricht and was reaffirmed by the Treaty of Lisbon.”).

215. See, e.g., Friedrich von Hayek, *The Price System as a Mechanism for Using Knowledge*, in COMPARATIVE ECONOMIC SYSTEMS: MODELS AND CASES 29–40 (Homewood, Ill. 1985) (“The knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.”).

the individual.<sup>216</sup> For example, the Compendium of the Social Doctrine of the Church defines the common good as “the sum total of social conditions which allow people, either *as groups or as individuals*, to reach their fulfillment more fully and more easily.”<sup>217</sup> Private property must be protected, but use of that property should consider the common good, so restrictions or takings done for the common good may be justified.<sup>218</sup>

CST recognizes a role for the state, which means it must accept the bounds of the law at least some of the time. Law is valuable because it “affords protection to the citizens both in the enjoyment of their own rights and in the fulfillment of their duties.”<sup>219</sup> Like populist communitarianism,<sup>220</sup> CST is concerned with elites using their influence to flout the law to the detriment of society.<sup>221</sup> CST has a great respect for using the law to enforce and promote social norms, even for things as picayune as speed limits.<sup>222</sup> But laws only “derive their binding force from the law of nature” if they are just.<sup>223</sup>

216. Milton Friedman criticized CST for a “collectivist moral strain.” Milton Friedman, *Good Ends, Bad Means*, in *THE CATHOLIC CHALLENGE TO THE AMERICAN ECONOMY* 99 (Thomas M. Gannon ed. 1987).

217. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH* ¶ 164, [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html) [perma.cc/HQ42-P9L2].

218. Compare POPE PIUS XI, *Guadium et Spes*, *supra* note 172, at ¶ 71 (arguing private property “constitutes a kind of prerequisite for civil liberties”) with POPE PAUL VI, *Populorum Progressio*, *supra* note 191, at ¶ 24 (arguing expropriation of property sometimes necessary for the common good where it is “extensive, unused, or poorly used, or because they bring hardship to peoples or are detrimental to the interests of the country”). The potential justifications for expropriations of property in *Populorum progressio* are very broad. But any arguments for expropriation of corporate assets on the basis they are “poorly used” are countered by the pressures of the equity markets and by the possibility of a hostile takeover, not to mention the poor record of expropriated corporate assets being used for the common good.

219. POPE JOHN XXIII, *Pacem in Terris*, *supra* note 172, at ¶ 68.

220. *Supra* Part III.c.1.

221. POPE PIUS XI, *Guadium et Spes*, *supra* note 172, at ¶ 4 (“Yet there are those who, while possessing grand and rather noble sentiments, nevertheless in reality live always as if they cared nothing for the needs of society. Many in various places even make light of social laws and precepts, and do not hesitate to resort to various frauds and deceptions in avoiding just taxes or other debts due to society.”).

222. *Id.* (“Others think little of certain norms of social life, for example those designed for the protection of health, or laws establishing speed limits; they do not even avert to the fact that by such indifference they imperil their own life and that of others.”).

223. POPE LEO XIII, *Rerum Novarum*, *supra* note 172, at ¶ 8 (“Civil laws . . . as long as they are just, derive their binding force from the law of nature. The authority

The people are “conscience-bound to obey” just laws.<sup>224</sup> But legitimate political authority can only “be exercised within the limits of morality and on behalf of the dynamically conceived common good, according to a juridical order enjoying legal status.”<sup>225</sup> But lack of legitimate political authority alone is insufficient to relieve one from the obligation to obey. While people should obey even illegitimate political authority “to the extent that the objective common good demands,”<sup>226</sup> that only goes so far. Law is only binding when it accords with reason,<sup>227</sup> and people have the right “to defend their own rights and those of their fellow citizens against” abuses of authority.<sup>228</sup>

CST has taken a much dimmer view of free agreement among parties than, say, Nozick or the modern law and economics utilitarians. If workers are not compensated according to the laws of justice and equity, then “justice is violated in labor agreements, even though they are entered into freely by both sides.”<sup>229</sup> Traditionally, CST has favored a “living” or “family” wage over a contract wage.<sup>230</sup> But given the economics, this frequently counsels *against* the regulation of wages: if raising the minimum wage results in automation and fewer entry-level jobs,<sup>231</sup> then leaving be the minimum wage

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of divine law adds its sanction, forbidding us in the gravest terms even to covet that which is another’s.” (emphasis added)).

224. POPE PIUS XI, *Quadium et Spes*, *supra* note 172, at ¶ 74.

225. *Id.*

226. *Id.*

227. POPE LEO XIII, *Rerum Novarum*, *supra* note 172, at ¶ 38.

228. POPE PIUS XI, *Quadium et Spes*, *supra* note 172, at ¶ 74.

229. POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 18.

230. *See, e.g.*, POPE PIUS XI, *Quadragesimo Anno*, *supra* note 172, at ¶ 2 (“[T]he wage scale must be regulated with a view to the economic welfare of the whole people.”); POPE JOHN XXIII, *Mater et Magistra*, *supra* note 172, at ¶ 71 (“We therefore consider it Our duty to reaffirm that the remuneration of work is not something that can be left to the laws of the marketplace . . . [W]orkers must be paid a wage which allows them to live a truly human life and to fulfill their family obligations in a worthy manner.”).

231. *See, e.g.*, David Neumark & William L. Wascher, *Minimum Wages and Employment: A Review of Evidence from the New Minimum Wage Research*, NAT’L BUREAU OF ECON. RESEARCH 121 (2006) (“[T]he oft-stated assertion that the new minimum wage research fails to support the conclusion that the minimum wage reduces the employment of low-skilled workers is clearly incorrect. Indeed, in our view, the preponderance of the evidence points to disemployment effects.”); Grace Lordan & David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, NAT’L BUREAU OF ECON. RESEARCH (2017), <https://www.nber.org/papers/w23667> [perma.cc/C5ST-3WWM] (“[I]ncreasing the minimum wage decreases significantly the share of automatable employment held by low-skilled workers, and increases the likelihood that low-skilled workers in automatable jobs become unemployed.”).

is the more just result. And evaluation of efforts to provide for a family wage through government subsidies, such as the earned income tax credit, must take into account the disincentive to work,<sup>232</sup> given the value that CST places on vocation.

To say that the “fundamental moral criterion for all economic decisions” is that they “must be at the service of *all people*”<sup>233</sup> is odd given that economic decisions are typically only at the services of the parties involved. Economic transactions in a free market create wealth, but absent positive externalities, they create wealth for the parties involved, not for “all people.” Indeed, even where positive externalities are present, those positive externalities will likely only benefit some people, not all people. But how can you criticize, morally, a transaction that leaves some people better off and hurts no one? The “must” language used in the Bishop’s Letter would appear to do just that.<sup>234</sup>

CST even goes so far as to state that “[i]f the positions of the contracting parties are too unequal, the consent of the parties does not suffice to guarantee the justice of their contract.”<sup>235</sup> This has obvious parallels to the unconscionability doctrine, which requires unequal bargaining power as the first element.<sup>236</sup> But the focus on relative bargaining power tends to ignore the walkaway option for the party with lesser bargaining power and the economic incentives for the party with greater bargaining power to still provide value to the other party.<sup>237</sup> The sort of “one-sided contracts” that tend to result from disparities in bargaining power can be, and frequently are, economically efficient.<sup>238</sup>

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232. *But see* Nada Eissa & Hilary Hoynes, *Behavioral Responses to Taxes: Lessons from the EITC and Labor Supply*, NBER Working Paper No. 11729 (2005), <https://www.nber.org/papers/w11729> [perma.cc/KJ8U-7QP3] (surveying the literature and summarizing it as showing that the EITC encourages people to enter the work force and does not cause them to work fewer hours).

233. U.S. CATHOLIC BISHOPS, *Economic Justice for All*, *supra* note 201, at ¶ 24 (emphasis in original).

234. *Id.*

235. POPE PAUL VI, *Populorum Progressio*, *supra* note 191, at ¶¶ 58–59.

236. *See* Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor”*, 102 GEORGETOWN L.J. 1383, 1385 (2014) (discussing the unconscionability doctrine in the United States as established by *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

237. *Id.* at 1402.

238. *See generally*, Lucian A. Bebchuk and Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006) (focusing on the potential reputational costs to opportunistic businesses).



CST may be better on subsidiarity in theory than in practice. In practice, the Church is arguably too quick to endorse top-down solutions.<sup>239</sup> And the Church's implementation of subsidiarity is arguably self-serving. The Church presumably interprets subsidiary as requiring both parochial schools and the Vatican's international leadership role be protected.<sup>240</sup>

CST's persuasive power is limited because it is inextricably tied to religion. Some people will always reject it for that reason. But liberalism itself demands that we not reject it *solely* on the basis of its religious context and substance. Early American discourse on liberty, for example, put religious liberty on equal footing with economic liberty and free expression.<sup>241</sup> One need not accept the theological implications of CST to accept it as a persuasive, communitarian model that can be justified using public reason.

Each of the five models of political theory, then, is deeply imperfect. But each, in turn, has something to offer. Therefore, considering all five models will provide a richer understanding of a given issue. Indeed, we will see that each provides some illumination on the optimal rule for director fiduciary liability for unlawful corporate conduct. Before applying those models to the issue at hand, though, let us consider several high-profile, recent

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239. See, e.g., POPE JOHN PAUL II, *Centesimus Annus*, *supra* note 172, at ¶ 58 (“There is a growing feeling . . . that this increasing internationalization of the economy ought to be accompanied by effective international agencies which will oversee and direct the economy to the common good, something that an individual state, even if it were the most powerful on earth, would not be in a position to do.”); POPE PAUL VI, *Populorum Progressio*, *supra* note 191, at ¶ 50 (“A planned program is of course better and more effective than occasional aid left to individual good will.”); POPE PIUS XI, *Quadragesimo Anno*, *supra* note 172, at ¶ 65 (“Growth must not be allowed merely to follow a kind of automatic course resulting from the economic activity of individuals.”); *id.* ¶ 79 (suggesting that a “competent and sufficiently powerful authority at the international level” is necessary to prevent war and that its existence would remove the defense justification for military force); *id.* ¶ 86 (“The international community . . . should regulate economic relations throughout the world so that they can unfold in a way that is fair.”).

240. *But see* POPE JOHN PAUL II, *Centesimus Annus*, *supra* note 172, at ¶ 53 (“During the last hundred years the church has repeatedly expressed her thinking, while closely following the continuing development of the social question. She has certainly not done this in order to recover former privileges or to impose her own vision.”).

241. Anastasia P. Boden, *Caricature Assassination: Andrew Koppelman and the Myth of Tough Luck Libertarianism*, 9 N.Y.U. J.L. & LIBERTY 513, 547 (2015) (internal citations omitted); *cf.* RAWLS, *supra* note 94, at 17 (“[W]e are confident that religious intolerance [is] unjust. We think that we have examined these things with care and have reached what we believe is an impartial judgment not likely to be distorted by an excessive attention to our own interests.”).

examples of unlawful corporate behavior at the tacit direction of or with the alleged knowledge of the board.

#### IV. RIPPED FROM THE HEADLINES

Corporate lawbreaking inhabits a greater range than a dichotomy between a package firm instructing its drivers to cut delivery time by illegally double-parking<sup>242</sup> and a manufacturing company illegally polluting a river.<sup>243</sup> Penn Law Professor Elizabeth Pollman has identified numerous other examples of corporations bumping up against the law.<sup>244</sup> In addition to wrongdoing without social benefit (beyond corporate profit), Pollman groups unlawful corporate behavior that may have social benefits into the following categories: innovation and entrepreneurship,<sup>245</sup> battles of federalism,<sup>246</sup> moral stances and claims for rights,<sup>247</sup> and general business lobbying.<sup>248</sup> It is rare, but not unknown, for a corporate board to direct a violation of positive law.<sup>249</sup> This is, of course, much rarer than a corporate violation of positive law for the simple reason that the vast majority of corporate actions are not taken at the direction of the board.<sup>250</sup> But it does happen, and recent events have given us more interesting examples than double-parking.

This Section will discuss four recent instances of corporate violations of positive law either at the board's direction or with the board's knowledge: Uber and its guerilla regulatory tactics, the "legal" marijuana industry, derivative suits against Google directors related to handling of executives accused of sexual harassment, and the decisions by Dick's Sporting Goods and Walmart to stop selling long guns to eighteen- to twenty-year-olds in defiance of state civil rights acts barring age discrimination.

##### *A. Uber and Its Guerilla Regulatory Tactics*

The taxi industry in the United States is heavily regulated, but that regulation was designed for a different service than that envisioned by

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242. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 272–73 (2002).

243. Strine, *supra* note 6, at 652 n.71.

244. Pollman, *supra* note 8, at 729–48.

245. *Id.* at 732–39.

246. *Id.* at 739–42.

247. *Id.* at 742–46.

248. *Id.* at 747–48.

249. *Id.* at 722–48.

250. *See, e.g.,* Manning, *supra* note 34, at 1494 (noting that boards rarely take “affirmative action on individual matters”).

Uber.<sup>251</sup> Recognizing the threat that the regulatory landscape posed for its business model, “Uber approached each launch like a guerilla attack,” launching its services in a given jurisdiction without first meeting with the relevant regulators.<sup>252</sup> After establishing the value of its service to consumers, Uber would then leverage its customers as grassroots political support for the regulatory change that would allow it to continue to operate.<sup>253</sup> In the process, it ignored a cease-and-desist letter from the San Francisco Metro Transit Authority and California Public Utilities Commission and “repeatedly paid fines and settlements as a cost of doing business.”<sup>254</sup> Ignoring legacy regulations was so central to Uber’s corporate strategy that it defies belief that it did not take place without the approval of the board.<sup>255</sup> Indeed, according to Bradley Tusk, the political consultant who helped design Uber’s strategy, it became known as Travis’ Law, named after Uber co-founder and then-CEO Travis Kalanick.<sup>256</sup> Tusk reports that Kalanick characterized the need for Uber’s strategy as existential: “If we have to ask for something that’s already legal, we’ll never roll out.”<sup>257</sup> But when Kalanick described the legal stakes as “fines[, t]owing cars[, s]tuff like that,” Tusk responded that “those are just costs of doing business.”<sup>258</sup>

Uber’s actions would, at the very least, fall afoul of the Seventh Circuit’s approach applying Delaware precedent in *In re Abbott* to hold that failing to stop known violations of the law is intentional behavior on the part of the board.<sup>259</sup> The Fourth Circuit, applying California law, even held that non-illegal conduct that intentionally skirted the regulatory authority of a government agency was bad faith.<sup>260</sup> But it is hard to believe that Uber’s skirting of the law resulted in harm to the corporation: at one time Uber was

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251. Rafi Mohammed, *Regulation Is Hurting Cabs and Helping Uber*, HARV. BUS. REV. (July 9, 2014), <https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber> [perma.cc/U7Y4-FUHW] (“Much of [Uber’s] spectacular growth has been fueled by outdated regulation.”).

252. Pollman, *supra* note 8, at 734 (quoting ADAM LASHINSKY, *WILD RIDE: INSIDE UBER’S QUEST FOR WORLD DOMINATION* 97 (2017)).

253. *Id.* at 723; *see also* BRADLEY TUSK, *THE FIXER: MY ADVENTURES SAVING STARTUPS FROM DEATH BY POLITICS* 109 (2018).

254. Pollman, *supra* note 8, at 722.

255. *Id.* at 734.

256. TUSK, *supra* note 253, at 109.

257. *Id.* at 108.

258. *Id.*

259. *See supra* Part II.

260. *In re Landmark Land Co.*, 76 F.3d 553, 565 (4th Cir. 1996).

the most valuable private company in the world.<sup>261</sup> In skirting taxi cab regulations, Uber has also created social benefits.<sup>262</sup>

Uber raises an interesting question regarding a *per se* standard for violations of law: how should it treat a series of aggressive, questionable, but not clearly illegal business choices?

### B. The “Legal” Marijuana Industry

Medical marijuana is legal under state law in thirty-three states, including New York and Florida.<sup>263</sup> Recreational marijuana is also legal under state law in eleven states, including California and now Illinois.<sup>264</sup> But marijuana remains a Schedule I controlled substance under federal law.<sup>265</sup>

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261. Zack Friedman, *These 197 Tech Companies Are the World’s Most Valuable Unicorns*, FORBES (May 30, 2017), <https://www.forbes.com/sites/zackfriedman/2017/05/30/tech-unicorns/#29079f871179> [perma.cc/8CLQ-5U49]; but see Heather Somerville, *Uber narrows loss but still a long way from profitability*, REUTERS (Aug. 15, 2018), <https://www.reuters.com/article/uber-results/uber-narrows-loss-but-still-a-long-way-from-profitability-idUSL1N1V611I> [perma.cc/A7FX-QBG4] (Uber may have “narrowed” its net loss to \$891 million for a quarter, but it remains an unprofitable business).

262. See Brishen Rogers, *The Social Costs of Uber*, 82 UNIV. OF CHI. L. REV. ONLINE 85, 86, 90–91 (2017) (stating that Uber has “created a far more efficient market for car-hire services,” has had “obvious positive effects on consumer welfare,” has reduced environmental harms by reducing “consumers’ incentives to purchase automobiles,” may reduce drunk driving, and that its model “may enable Uber and regulators to ensure safety and root out discrimination against passengers with relative ease”); Alissa Walker, *Lyft and Uber Serve Low-Income Communities Better than Taxis, Says Study*, CURBED (July 2, 2018), <https://www.curbed.com/2018/7/2/17511530/lyft-ride-hailing-taxis-discrimination> [perma.cc/C7B9-43KQ] (describing study suggesting that taxi companies were more likely to engage in discriminatory behavior than Uber and Lyft). As a maturing, now publicly-held company, Uber is starting to play nice with law enforcement. Sarah Frier, *Uber Wants the Law on Its Side*, BLOOMBERG BUSINESSWEEK (Apr. 29, 2019), <https://www.bloomberg.com/news/articles/2019-04-23/uber-shares-ride-data-to-get-law-enforcement-on-its-side> [perma.cc/TQ5K-PP63].

263. *State Medical Marijuana Laws*, NAT’L CONF. OF ST. LEGISLATURES (Feb. 27, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [perma.cc/D8T8-7JX2].

264. *Marijuana Overview*, NAT’L CONF. OF ST. LEGISLATURES (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [perma.cc/U7G5-ASGE].

265. 21 U.S.C. § 812 Schedule I(C)(10) (2018); Leah Asmelash & Melissa Alonso, *Illinois Lieutenant Governor Beats Long Lines to Become One of the First to Legally Buy Weed in the State*, CNN (Jan. 1, 2020, 5:12 PM),

The cultivation and sale of marijuana is a growth business nonetheless. Marijuana dispensaries outnumber Starbucks in some locales,<sup>266</sup> and a marijuana business might be worth hundreds of millions of dollars.<sup>267</sup> State legalization lowers the risk of selling marijuana, but it does not insulate dispensaries from the threat of federal raids.<sup>268</sup> And as marijuana remains prohibited under federal law, the directors of *any* marijuana business organized as a corporation would fall afoul of a *per se* rule for allowing it to remain in the marijuana business.<sup>269</sup> Even if the business is incorporated in a state where marijuana is legal, violations of federal positive law would still presumably trigger the *per se* standard.<sup>270</sup>

Marijuana businesses are still in their nascence in the United States. Due to the challenges described here and elsewhere,<sup>271</sup> marijuana business owners may avoid organizing their businesses using a legal entity altogether. This would cost them access to limited liability and the advantages of entity personhood but may save them from fiduciary liability. One of the few large, incorporated, publicly traded marijuana businesses is MedMen Enterprises, Inc.<sup>272</sup> MedMen trades on the Canadian Stock Exchange because the legal status of marijuana prevents it from using American exchanges.<sup>273</sup> It has U.S.

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<https://www.cnn.com/2020/01/01/us/illinois-marijuana-juliana-stratton-lines-trnd/index.html> [perma.cc/7FHG-LDAB].

266. Luke Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 522 (2015) (relying on Nancy Benac & Alicia Caldwell, *Marijuana Legalization Gains Support, Confounding Policymakers*, HUFFINGTON POST (June 29, 2014), [http://www.huffingtonpost.com/2013/06/29/marijuana-legalization\\_n\\_3521547.html](http://www.huffingtonpost.com/2013/06/29/marijuana-legalization_n_3521547.html) [perma.cc/NGE7-25VK]).

267. *Id.*

268. *Id.* at 526–27.

269. Marijuana businesses (and the businesses that do business with them) face other hurdles in utilizing U.S. business law infrastructure. *See, e.g.*, Clifford J. White III & John Sheahan, *Why Marijuana Assets May Not Be Administered in Bankruptcy*, 36 AM. BANKR. INST. J. 34, 34 (2017) (“[T]he bankruptcy system may not be used as an instrument in the ongoing commission of a crime, and reorganization plans that permit or require continued illegal activity may not be confirmed.”); Arthur Linton Corbin, CORBIN ON CONTRACTS vol. 6A § 1373 (West 1962) (“A bargain may be illegal because the performance that is bargained for is illegal; and the performance may be illegal because governmental authority has declared it to be a ‘crime.’”).

270. *See supra* Part II.B.

271. *See generally* Scheuer, *supra* note 266.

272. James F. Peltz, *Fast Growing Pot Seller MedMen Faces Lawsuit by Former Insider*, L.A. TIMES (Feb. 24, 2019), <https://www.latimes.com/business/la-fi-cannabis-medmen-lawsuit-20190224-story.html> [perma.cc/5962-T64N].

273. Stephen Rodrick, *Rise of Big Weed: MedMen’s Growing Pains*, ROLLING STONE (Apr. 16, 2019), <https://www.rollingstone.com/culture/culture->

subsidiaries (a Delaware LLC and a California corporation), but MedMen itself is incorporated in Canada.<sup>274</sup> There are currently two lawsuits pending: one against the founders alleging breach of fiduciary duty, the other against the company alleging a variety of misconduct.<sup>275</sup> These suits do not include *per se* claims, but they highlight that marijuana businesses are already involved in breach of fiduciary suits. The cost to the plaintiff of tacking on a *per se* claim – thus increasing the risk of and potential magnitude of liability for the directors – is relatively low.

### C. Google and Board Imprimatur for Sexual Harassment

The Me Too movement is resulting in more than just embarrassment for companies: it is creating legal risk for directors.<sup>276</sup> The usual view might be that any board fiduciary liability for sexual harassment by company employees would be limited to *Caremark* claims.<sup>277</sup> But rather than pursue “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment,”<sup>278</sup> the complaint in a recent derivative suit against board members of Google’s parent company states outright, “*This is not a ‘failure to supervise’ case.*”<sup>279</sup>

Rather, the complaint alleges that the board “was directly involved in and approved” the relevant severance payments.<sup>280</sup> It “violated California and federal law” when it “allowed the illegal conduct to proliferate and

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features/medmen-dispensaries-lawsuit-scandal-marijuana-pot-822427/  
[perma.cc/UV26-YWJC].

274. Complaint at ¶ 3, Parker v. MM Enterprises USA, LLC, No. 19-smcvV-00189 (Cal. Sup. Ct. Jan. 29, 2019).

275. James Peltz, *Fast-Growing Pot Seller MedMen Faces Lawsuit by Former Insider*, L.A. TIMES (Feb. 24, 2019), <https://www.latimes.com/business/la-fi-cannabis-medmen-lawsuit-20190224-story.html> [perma.cc/36HT-NPMJ]; Complaint at ¶ 2, MMMG-MC, Inc. v. Bierman, No. 19-smcv-00045, (Cal. Sup. Ct. Jan. 8, 2019); Complaint, Parker v. MM Enterprises USA, LLC, No. 19-smcv-00189 (Cal. Sup. Ct. Jan. 29, 2019).

276. See generally Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1612–66 (2018) (surveying a number of post-Me Too derivative lawsuits and noting that claims may fall under *Caremark* or a *per se* standard, although the latter “is perhaps the doctrinal category in which the doctrinal case for liability is the weakest”).

277. *Id.* at 1630–41.

278. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996).

279. Complaint at ¶ 12, Martin v. Page, No. 19-civ-00164 (Sup. Ct. Cali. Jan. 10, 2019) (emphasis removed).

280. *Id.*

continue.”<sup>281</sup> Because the board did not meet its obligation to conduct Google’s affairs “in compliance with all applicable laws, rules, and regulations,”<sup>282</sup> the board’s actions were bad faith and “[e]ll outside the scope of the business judgment rule.”<sup>283</sup> The complaint points not just to direct harm to Google caused by the alleged unlawful conduct but also to indirect harm such as a recent coordinated employee walkout across Google offices.<sup>284</sup>

The allegations against Google directors might seem thin. The unredacted portions of the complaint are not clear as to what exactly was the underlying unlawful conduct, and it is by no means certain that reacting to unlawful conduct by terminating the offending party – even with a hefty severance – qualifies as failing to stop known violations of the law under *In re Abbott*.<sup>285</sup> But the yawning chasm between the standards for a *per se* claim and a *Caremark* claim makes the complaint’s characterization as “not a failure to supervise case” dangerous to Google.

Another example from the Me Too movement where the *per se* standard might apply is with Harvey Weinstein and the Weinstein Company. Did the board fail to meet its duty to monitor by approving an employment agreement for Harvey Weinstein that effectively allowed him to buy his way out of sexual assault and harassment scandals with a liquidated damages provision?<sup>286</sup> Weinstein’s 2015 employment contract provided that if he “treated someone improperly in violation of the company’s Code of Conduct,” he would be required to reimburse the company for settlements and judgments and to “pay the company liquidated damages of \$250,000 for the first such instance, \$500,000 for the second such instance, \$750,000 for the third such instance, and \$1,000,000 for each additional instance.”<sup>287</sup>

Bainbridge has argued that a board presented with red flags has a duty to investigate under *Caremark*,<sup>288</sup> and the Weinstein Company board surely

281. *Id.* ¶ 43.

282. *Id.* ¶ 56.

283. *Id.* ¶ 14.

284. *Id.* ¶ 152–56.

285. *See supra* Part II.

286. *See* Hemel & Lund, *supra* note 276, at 1643–44 (discussing the possibility of a fiduciary suit against the Weinstein Company based on a failure to monitor).

287. *Harvey Weinstein’s Contract with TWC Allowed for Sexual Harassment*, TMZ (Oct. 12, 2017 2:57 PM), <http://www.tnz.com/2017/10/12/weinstein-contract-the-weinstein-company-sexual-harassment-firing-illegal/> [perma.cc/99M5-9E8A] (quoting Weinstein’s employment contract).

288. Stephen M. Bainbridge, *CEO Private Lives in the Present Dystopia*, PROFESSORBAINBRIDGE.COM (May 9, 2018), <http://www.professorbainbridge.com/pr ofessorbainbridgecom/2018/05/ceo-private-lives-in-the-present-dystopia.html> [perma.cc/R4BV-RJSG] (citing Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009)).

was presented with red flags, given the content of his employment agreement.<sup>289</sup> Moreover, the board's actions may fall under the stricter standard from *In re Abbott* rather than *Caremark*. The directors certainly "knew of the violations of law," and the company surely suffered "substantial . . . losses."<sup>290</sup> But the board *did* take steps to "prevent or remedy the situation."<sup>291</sup> The decision to attempt to prevent illegal behavior through financial disincentives rather than either firing Weinstein outright or firing him when he treated someone else improperly might be ethically dubious and it may have been bad business judgment, but it would seem to be just the sort of business judgment the business judgment rule is designed to protect. *A per se* standard threatens to treat that decision much more harshly.

#### *D. Dick's Sporting Goods and Walmart Violate Civil Rights Laws by Refusing to Sell Guns*

Finally, and perhaps most interestingly, Dick's Sporting Goods and Walmart recently announced that they would cease all firearms sales to eighteen- to twenty-year-olds.<sup>292</sup> Unfortunately for those companies, several states have enacted civil rights laws barring age discrimination in places of public accommodation such as retailers.<sup>293</sup> The change in policy has significant business implications.<sup>294</sup> But the change in policy at Dick's, at

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289. Cf. Ted Johnson, *Weinstein Scandal Triggers Questions of Corporate Liability and Even Complicity*, VARIETY (Oct. 25, 2017), <https://variety.com/2017/biz/news/harvey-weinstein-sexual-harassment-corporate-liability-21st-century-fox-1202598683/> [perma.cc/YL6K-87KM] (quoting prominent Delaware lawyer Franci G.X. Pileggi for the proposition that "If it is correct that the board knew about this propensity and the future likelihood of an occurrence, then the question would be whether the board was fulfilling its fiduciary duty").

290. *In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 809 (7th Cir. 2003).

291. *Id.*

292. Julie Creswell and Michael Corkery, *Walmart and Dick's Raise Minimum Age for Gun Buyers to 21*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/business/walmart-and-dicks-major-gun-retailers-will-tighten-rules-on-guns-they-sell.html> [perma.cc/2YQZ-FYE5]. Dick's and Walmart are already barred by federal law from selling handguns to 18- to 20-year-olds, so the new policy only applies to long guns such as rifles and shotguns.

293. See, e.g., MICH. COMP. LAWS § 37.2302(a) (2019); OR. REV. STAT. § 659A.409 (2019).

294. Dick's change in policy was spurred in part by learning that the Parkland shooter bought some of his guns at a Dick's location. The possibility of selling guns to a mass shooter creates litigation risk. See, e.g., *Texas Judge Lets Church Shooting Victims Sue Gun Retailer*, U.S. NEWS (Feb. 4, 2019), <https://www.usnews.com/news/best-states/texas/articles/2019-02-04/texas-judge->



least, appears to have been driven in significant part by Dick's CEO Edward Stack's view that "we have a problem with gun laws in this country" and that the change "was about our values and standing up for what we think is right" even if it "would have a negative effect on [Dick's] business" because the "issue transcends [Dick's] bottom line."<sup>295</sup> The Monday after the Parkland shooting, Stack told Lee Belitsky, Dick's CFO, "I don't really care what the financial implication is."<sup>296</sup> Dick's policy change, then, is the sort of lawbreaking Pollman categorizes as a moral stance.<sup>297</sup> The financial implication itself is hard to pinpoint, but sales and net income are down.<sup>298</sup> According to Stack, he expected the change in policy to cost Dick's "[a] quarter of a billion dollars" and the company did lose close to that.<sup>299</sup> Stack pointed to both public backlash against its policy change and to competition from Amazon as drivers in the declines.<sup>300</sup> Dick's stock price dropped in response to its announcement of declining sales and net income, but its stock price still rose ten percent between February 2018 and March 2019.<sup>301</sup>

Because the board expressly approved Stack's proposal,<sup>302</sup> it also would fall afoul of a *per se* rule. Indeed, Dick's and Walmart have already been sued

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lets-church-shooting-victims-sue-gun-retailer [perma.cc/XAR6-B48X] (reporting on a judicial ruling that will allow a lawsuit to move forward against Academy Sport & Outdoors for selling a gun to the 2017 Sutherland Spring shooter).

295. Edward W. Stack, Opinion, *I Run Dick's Sporting Goods. It's Congress's Turn to do Something About Guns*, WASH. POST (Mar. 21, 2018), [https://www.washingtonpost.com/opinions/i-run-dicks-sporting-goods-its-congresss-turn-to-do-something-about-guns/2018/03/21/3dd1b040-2c3f-11e8-b0b0-f706877db618\\_story.html?utm\\_term=.bb93b6f4605f](https://www.washingtonpost.com/opinions/i-run-dicks-sporting-goods-its-congresss-turn-to-do-something-about-guns/2018/03/21/3dd1b040-2c3f-11e8-b0b0-f706877db618_story.html?utm_term=.bb93b6f4605f) [perma.cc/FB98-MB6Q].

296. Sarah Nassauer, *How Dick's Sporting Goods Decided to Change Its Gun Policy*, WALL STREET JOURNAL (Dec. 4, 2018), <https://www.wsj.com/articles/how-dicks-sporting-goods-decided-to-change-its-gun-policy-1543955262> [perma.cc/5A7J-PKN9].

297. Pollman, *supra* note 8, at 742.

298. Tiffany Hsu, *Dick's Sporting Goods Shifts From Guns Even as Sales Suffer*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/business/dicks-sporting-goods-stock-gun-control.html> [perma.cc/G8AJ-6J3G].

299. Michelle Kessel, *Corporations and Guns: How Companies Are Reshaping the Gun Control Debate*, CBS NEWS (Oct. 6, 2019, 9:31AM), <https://www.cbsnews.com/news/corporations-and-guns-how-companies-are-reshaping-the-gun-control-debate/> [perma.cc/5SS7-XQU9].

300. Tiffany Hsu, *Dick's Sporting Goods Shifts From Guns Even as Sales Suffer*, N.Y. TIMES, <https://www.nytimes.com/2019/03/12/business/dicks-sporting-goods-stock-gun-control.html> [perma.cc/HL5Z-GXAS].

(Mar. 12, 2019).

301. *Id.*

302. Nassauer, *supra* note 296.

in Oregon and Michigan under those states' respective civil rights laws.<sup>303</sup> Dick's settled the Oregon suit but has not changed its policy.<sup>304</sup> The Oregon Bureau of Labor & Industries "issued a memo . . . suggesting that it is illegal for retailers to restrict gun and ammunition sales based on the buyers [sic] age" after a complaint was filed by an eighteen-year-old when a Walmart store refused to sell her a rifle or ammunition.<sup>305</sup>

## V. APPLYING THE LEGAL AND ETHICAL FRAMEWORK

Both observance and disregard of the law have a long tradition in moral argument. Martin Luther King, Jr. pointed to Augustine and Thomas Aquinas in dividing laws into just and unjust.<sup>306</sup> Unjust laws are defined by their lack of "harmony with the moral law."<sup>307</sup> Relying on Aquinas, King pointed to eternal law and natural law as the source of moral law.<sup>308</sup> Just laws carry "not only a legal but a moral responsibility" of obedience.<sup>309</sup> But "one has a moral responsibility to *disobey* unjust laws."<sup>310</sup> King did not seem to provide for any middle ground where a director can exercise discretion. But King was

303. Complaint, *Watson v. Dick's Sporting Goods, Inc.*, No. 18-cv-07671 (Cir. Ct. Ore. March 5, 2018); Complaint, *Watson v. Walmart, Inc.*, No. 18-cv-07628 (Cir. Ct. Ore. March 5, 2018); Complaint, *Fulton v. Dick's Sporting Goods* (Cir. Ct. Mich. Mar. 6, 2018); Nick Morgan, *Injunction Denied in Under-21 Gun Suit*, MAIL TRIBUTE (Apr. 13, 2018), <http://mailtribune.com/news/crime-courts-emergencies/injunction-denied-in-under-21-gun-suit> [perma.cc/UV8Z-3WE9]; see also Jazz Shaw, *Oregon Looks to End Walmart's Policy Against Rifle Sales To 18 To 20 Year Olds*, HOT AIR (Sept. 4, 2018, 6:41PM), <https://hotair.com/archives/2018/09/04/oregon-looks-end-walmarts-policy-rifle-sales-18-20-year-olds/> [perma.cc/QGB4-P883] (reporting on the Watson suit and another lawsuit against Walmart on the same basis); Nick Morgan, *supra* note 53 (reporting on similar suits against two other retailers).

304. Jonathan Levinson, *Dick's Sporting Goods Settles Lawsuit Over Gun Sale Age Restrictions*, OR. PUB. BROADCASTING (Dec. 4, 2018 5:06 PM), <https://www.opb.org/news/article/dicks-sporting-goods-settles-lawsuit-gun-sale-age-restrictions/> [perma.cc/6HYY-FH8H].

305. Ted Sickinger, *Oregon retailers can't bar gun sales based on age, BOLI suggests*, THE OREGONIAN, (Aug. 23, 2018), [https://www.oregonlive.com/politics/ind-ex.ssf/2018/08/oregon\\_retailers\\_cant\\_bar\\_gun.html](https://www.oregonlive.com/politics/ind-ex.ssf/2018/08/oregon_retailers_cant_bar_gun.html) [perma.cc/WZ34-FWL4]; but see Nick Morgan, *supra* note 303 (quoting lawyers for Dick's as arguing that "The letter does not state that the refusal to sell firearms to those under 21 is illegal, and it expresses no opinion on the merits of any potential claim").

306. Martin Luther King, Jr., *Letter From Birmingham Jail*, ATLANTIC MONTHLY (Aug. 1963).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* (emphasis added).

also making an argument about when one should violate the law, not about liability for doing so. Indeed, King believed that civil disobedience must be done “with a willingness to accept the penalty.”<sup>311</sup> King’s arguments tell us very little about what the appropriate standard of liability should be for directors for breach of *fiduciary duty*.

Others have taken for granted that economic activity should not violate the law. Adam Smith said that “[e]very man, as long as he does not violate the laws of *justice*, is left perfectly free to pursue his own interest in his own way.”<sup>312</sup> Milton Friedman famously said that in a free economy, “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits . . . .”<sup>313</sup> The next part of that sentence, though, is “so long as it stays within the rules of the game.”<sup>314</sup> This might seem to embrace Strine’s view of the law, but Friedman defined the “rules of the game” as “engag[ing] in open and free competition, without deception or fraud.”<sup>315</sup> It is possible to violate any number of laws and regulations while openly and freely competing in the marketplace, without deception or fraud,<sup>316</sup> just as Smith’s “laws of justice” do not necessarily extend to all laws.<sup>317</sup>

Complicating matters is the extreme growth in laws *malum prohibitum* relative to laws *malum in se*.<sup>318</sup> To put it another way, behavior is increasingly prohibited by law because it is against the law, not because it is morally wrong. A definition of good faith that extends to violations of laws *malum prohibitum* would then significantly restrict the discretion of directors operating in a highly regulated economy where criminal law is increasingly used as a tool to regulate corporate conduct.<sup>319</sup> Beveridge claims that there are no corporations in compliance with the law, only corporations “out of

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311. *Id.*

312. ADAM SMITH, *THE WEALTH OF NATIONS* 687 (LONDON, W. STRAHAN & T. CADELL 1776) (emphasis added).

313. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 112 (U. Chi. Press 1962).

314. *Id.*

315. *Id.*

316. *But see* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (arguing that “the basic rules of society” include “both those embodied in law and those embodied in ethical custom,” implying that what a businessperson may not do in the pursuit of profit is larger than the law, not smaller).

317. SMITH, *supra* note 312, at 687.

318. Crimes that are *malum prohibitum* “are acts that are criminal merely because they are prohibited by statute, not because they violate natural law.” Bainbridge, *Convergence*, *supra* note 11, at 592.

319. *Id.* at 594.

compliance with the law to varying degrees.”<sup>320</sup> Given the proliferation of law and regulations, any and all violations of law simply cannot fairly be characterized as “a dishonest, pretextual use of power for noncorporate purposes.”<sup>321</sup>

Complicating our inquiry is that we are not asking whether illegal conduct should lead to liability. We are asking whether illegal conduct should lead to liability *by* the directors *for* breach of fiduciary duty *to* the corporation (and, indirectly, its shareholders). One way to analytically tie the former to the latter is by arguing that shareholders lack the authority to direct the corporation to violate the law.<sup>322</sup> Strine expresses incredulity that “an act of intentional misconduct that injures the corporation could be loyal.”<sup>323</sup> If shareholders lack the authority to direct the corporation to violate the law, then violating the law is disloyal because the shareholders necessarily have not authorized it. But the *moral* authority to direct an action by the corporation<sup>324</sup> is not the same as the *actual* authority to do so. A controlling shareholder who directs the corporation to violate the law would not then be able to disclaim liability on the basis that they lacked the authority to do so.

Strine’s approach could also create significant liability – if only in the form of attorneys’ fees – even where there is no injury to the corporation. The question is how strict a standard should apply. Standards in Delaware in the corporate governance context range from the very lenient business judgment rule to the much stricter *per se* standard that Strine seems to advocate.<sup>325</sup> The stark difference in standards for conduct that may be functionally and morally equivalent, but-for falling afoul of one of thousands upon thousands of picayune laws and regulations,<sup>326</sup> adds just the sort of confusion that the

320. Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729, 732 (1996).

321. Strine, *supra* note 7, at 655.

322. *Cf.* Ostas, *Cooperate, Comply, or Evade?*, *supra* note 138, at 591 (“The sole proprietor is generally free to maximize the profitability of his or her business operations; however, he or she cannot do so in a way that violates the spirit of high moral content regulation. If the proprietor becomes a passive shareholder and hires the CEO to manage the firm, the proprietor has no moral authority to authorize the CEO to do anything that the proprietor could not ethically do.”); *see also* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(1) (AM. LAW INST. 1994) (“[T]he corporation, in the conduct of its business is obliged, to the same extent as a natural person, to act within the boundaries set by law.”).

323. *But see* Strine, *supra* 6, at 660.

324. Ostas, *Cooperate, Comply, or Evade?*, *supra* note 138, at 591.

325. *See* Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1156–57 (1990).

326. The makers of Country Time Lemonade covered legal fines for children operating unlicensed lemonade stands. Jason Kottke, *Country Time Will Cover Illegal*

Delaware legislature and courts seek to mitigate.<sup>327</sup> *Stone v. Ritter* provided doctrinal clarity;<sup>328</sup> making violations of law *per se* acts of bad faith would remove much of that clarity. Adding a requirement that the violation be “knowing” would reduce liability but would reduce certainty as well.<sup>329</sup>

One answer is to use violations of law as a burden shifting trigger rather than as a basis for liability. For example, the Delaware Supreme Court held in *Technicolor* that, if the burden of proof for a breach of duty of care claim was met, then the burden shifted to the directors, who now had the burden of showing that they caused no harm (entire fairness) rather than the plaintiffs having the burden of showing damages.<sup>330</sup> This approach would allow directors to escape liability where the corporation was not harmed (albeit not where they incorrectly believed that the corporation would not be harmed).<sup>331</sup> To consider the appropriate rule, we now return to our five models of political theory.

### A. Communitarian Models

In some ways, a *per se* standard for violations of positive law is more easily reconciled with a non-liberal model than with a liberal model. To say that violating the law violates the duty of loyalty raises the question: loyalty to whom? The traditional formulation of fiduciary duty was that the loyalty of the director *to the corporation* must be “undivided and unselfish.”<sup>332</sup> Under a *per se* standard, the loyalty of the director is no longer undivided. The adherent of populist communitarianism would be pleased to see the director ordered to show an element of loyalty to the state and its elected representatives. The adherent of CST may have more mixed feelings.

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*Lemonade Stand Fines and Fees This Summer*, KOTTKE.ORG (June 12, 2018), <https://kottke.org/18/06/country-time-will-cover-illegal-lemonade-stand-fines-and-fees-this-summer> [perma.cc/7FVC-TY2P]; see also Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 302 (2010) (noting that some business regulations “have no moral justification whatsoever.”).

327. Cf. Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160 (1990) (stating that the *Van Gorkom* decision “exemplifies the legal uncertainty that contributed to the insurance crisis”).

328. Strine, *supra* note 6, at 695.

329. *See id.*

330. *Cede & Co. v. Technicolor*, 634 A.2d 345, 370–71 (Del. 1993)

331. *Id.* at 371.

332. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939), *superseded by statute*, DEL. CODE ANN. tit. 8, § 144 (2001); see also Pace, *supra* note 19, at 711–13 (giving examples of courts using morally inflected language to talk about fiduciary duties).

## 1. Populist Communitarianism

Both the democratic communitarian and the populist communitarian would support a *per se* rule on the basis that it allows “justice to be defined by the . . . political preferences of those who . . . have been vested with the *a priori* power to define justice.”<sup>333</sup> The populist communitarian might disagree with the democratic communitarian on, for example, the appropriateness of the Apple CEO publishing an open letter criticizing a court order that it decrypt an iPhone used by a terrorist.<sup>334</sup> The democratic communitarian might see the letter as an individual with special knowledge contributing to the public debate and engaging with the democratic process on an important issue. The populist communitarian might see the criticism of the court as a threat to public order and stability coming from an elite who does not want to play by the same rules as everyone else.

Taking my tweaks to democratic communitarianism into account, the populist communitarian would be more favorable to a *per se* rule. A *per se* rule emphasizes the importance of community norms expressed through positive law, presumably including local ordinances. A small, local, privately-held business may fit the definition of a “smaller communal entity,” while a large, national, publicly-held corporation does not.<sup>335</sup> The populist communitarian would for that reason prefer the ability to impose community norms through local ordinances. A *per se* rule has embedded within it a strong presumption in favor of law and stability. A *per se* rule “acknowledges societal interests in the rule of law.”<sup>336</sup> The populist communitarian would be leery of the sort of “disobedience with the potential for innovation or change” that Pollman discusses.<sup>337</sup> A *per se* rule also shackles large corporations and their elite managers and directors. This would be particularly attractive to a populist communitarian who decries elites who do not have to play by the same rules as the rest of society. An approach that insulated directors from liability for violations of positive law through the business judgment rule would appear as just that to the populist communitarian.

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333. Redish & Berlow, *supra* note 78, at 774 (emphasis added).

334. See Pollman, *supra* note 8, at 737–39 (discussing the situation and quoting the open letter).

335. See *id.* at 763 (“[Public corporations] are not associational in terms of fitting a paradigm of a voluntary association or community in which individuals feel a sense of connection.” (citing Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 672–73) (2016))).

336. Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VANDERBILT L. REV. 101, 105 (2019).

337. *Id.* at 731–48.

## 2. Catholic Social Thought

Things are more complicated viewed through the perspective of CST. More than any other theory discussed in this Article, CST is concerned with moral questions that go beyond positive law. CST sets a clear hierarchy when it comes to natural and positive law: a positive law that violates natural law must yield to natural law.<sup>338</sup> This raises the obvious question: who is competent to judge positive law against natural law, if not legislatures? Judges? Individuals? Shareholders, either individually or collectively?

In a pluralistic society where the state plays a significant role, laws and regulations will inevitably conflict with an individual's deeply held principles. But a corporation might "act as a vital counterweight against the state – an alternative island of power within society."<sup>339</sup> A *per se* rule substitutes "some judge's or some bureaucrat's definition of honor" for individuals' own definition of "what constitutes trustworthy or honorable behavior."<sup>340</sup> Rather than making people virtuous, a *per se* rule displaces personal virtue.<sup>341</sup>

Allowing federal, or even foreign, law<sup>342</sup> to hijack state fiduciary obligation law would also seem to violate the principle of subsidiarity.<sup>343</sup> The old approach, requiring that corporations receive a charter from the state,<sup>344</sup> is antithetical to subsidiarity. Charters on demand allow for an essential, organic formation of corporations, which is more in keeping with the principle of subsidiarity.<sup>345</sup> Corporations are creatures in the state in that they rely on a state-issued charter to receive the benefits of the corporate form (most notably, limited liability).<sup>346</sup> But to give that any real teeth – say by including a condition that the corporation follow the law, on pain of fiduciary liability for its directors – moves corporations back to the traditional approach. It violates subsidiarity because it does something at the level of a state that can be done at a lower level – the corporate level itself. It should go without saying that the charter-on-demand corporation has been vastly more successful than the

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338. See, e.g., Avery Cardinal Dulles, S.J., *Catholic Social Teaching and American Legal Perspective*, 30 *FORDHAM URBAN L.J.* 277, 282 (2002).

339. Bainbridge, *CST*, *supra* note 174, at 598.

340. *Id.* at 600.

341. *Id.* (appealing to the authority of Michael Novak, Russell Kirk, and Christopher Lasch).

342. See *supra* Part II.

343. See *supra* Part III.C.

344. Cf. Clarke & Lyons, *supra* note 199, at 289 ("Originally, corporations were viewed as quasi-public entities.").

345. See *supra* Part III.C.

346. See *supra* Part III.C.2.

state-issued-charter corporation. Conversely, the corporation may be able to accomplish just acts that could not be accomplished by individuals.<sup>347</sup>

CST distinguishes between just and unjust laws.<sup>348</sup> It is lawful to resist abuses of authority if that resistance is within “the limits imposed by natural law and the gospel.”<sup>349</sup> Under CST, the board can<sup>350</sup> – and, indeed, should – disobey unjust laws. But conversely, the board must obey just laws.<sup>351</sup> A board is not justified, for example, in violating hours and wages laws<sup>352</sup> or environmental protection laws.

A *per se* rule, then, is clearly too inflexible. Bainbridge argues that “the Church properly is concerned less with rigid codes of conduct than with promoting sound context-based judgment.”<sup>353</sup> Directors must have some leeway for matters of conscience.<sup>354</sup> A *per se* rule is justifiable for violations of law *malum in se* – in fact, it is preferable – but violations of law *malum prohibitum* should be shielded by the business judgment rule, or, if part of an interested transaction, be subject to the entire fairness standard and the normal rules for voiding and cleansing. Even that is not as straightforward as it might seem because there is no clear line between violations of law *malum in se* and *malum prohibitum*.<sup>355</sup> A violation of a requirement that employee health insurance plans cover contraception (or a violation of civil rights laws that demand retailers not refuse to sell long guns to eighteen- to twenty-year-olds)

347. Clarke & Lyons, *supra* note 199, at 297–98.

348. *Supra* Part III.C.2.

349. POPE PAUL VI, *Gaudium et Spes*, *supra* note 172, at ¶ 4.

350. *See, e.g.*, POPE PAUL VI, *Pacem in Terris*, *supra* note 172, at ¶ 51 (“[I]f civil authorities pass laws or command anything opposed to the moral order . . . neither the laws made nor the authorizations granted can be binding on the consciences of the citizens.”); *id.* at ¶ 46 (“[I]f any government does not acknowledge the rights of man or violates them, it not only fails in its duty, but its orders completely lack juridical force.”).

351. *See, e.g.*, POPE PAUL VI, *Gaudium et Spes*, *supra* note 172, at ¶ 74 (stating that when political authority is “exercised within the limits of morality and on behalf of the dynamically conceived common good, according to a juridical order enjoying legal status . . . citizens are conscience-bound to obey”).

352. *See, e.g.*, POPE PAUL VI, *Pacem in Terris*, *supra* note 172, at ¶ 20 (“[T]he worker has a right to a wage determined according to criteria of justice.”).

353. Bainbridge, *CST*, *supra* note 174, at 6.

354. *Cf.* Clarke & Lyons, *supra* note 199, at 289 (arguing that the proper framework for analyzing actions that may not maximize economic return to shareholder is not “fairness to individual shareholders” but rather “a matter of justice”); *but see* King, *supra* note 306 (arguing that civil disobedience requires accepting liability).

355. *See, e.g.*, *Kinney v. State*, 927 P.2d 1289, 1292 (Alaska Ct. App. 1996) (“The distinction between crimes that are ‘mala prohibita’ and those that are ‘mala in se’ has not only shaped but, to a certain extent, also bedeviled the law.”).



might be both considered *malum in se* and just the sort of action morally required.<sup>356</sup>

### B. Utilitarianism

Utilitarianism requires weighing the estimated benefits of a rule against the estimated costs.<sup>357</sup> One of the costs of any rule that increases the likelihood that directors will face liability for breach of fiduciary duty is that it discourages high-quality candidates from taking board positions.<sup>358</sup> The economically-minded utilitarian is also concerned with agency costs.<sup>359</sup> A board directing the corporation to violate the law, especially in regard to a product as politically charged as firearms (in the Dick's and Walmart example), may be acting in furtherance of the directors' personal beliefs rather than the best interest of the corporation. But that agency cost must be weighed against the agency cost of giving monitoring power to shareholders (by opening the possibility of suit under a *per se* standard) and against any other costs associated with a *per se* rule.<sup>360</sup>

The *per se* approach removes some of the control granted to the board over the corporation and gives it to individual shareholders, not to the shareholders as a whole. This effectively gives more power to dissident shareholders.<sup>361</sup> Delaware corporation law gives the lion's share of control over the corporation not to the shareholders but to the board of directors.<sup>362</sup> Shareholders, like judges, "necessarily have less information about the needs of a particular firm than do that firm's directors."<sup>363</sup> A permissive rule allows

356. Cf. Pollman, *supra* note 8, at 744–45 (discussing Hobby Lobby's challenge to the Affordable Care Act); see also Ostas, *Civil Disobedience*, *supra* note 326, at 299–301 (categorizing prohibitions on hiring undocumented workers as arguably unjust).

357. Redish & Berlow, *supra* note 78, at 770.

358. Strine, *supra* note 6, at 687 (noting that *Caremark* recognized just such a risk).

359. Øyvind Böhren, *The Agent's Ethics in the Principal-Agent Model*, 17 J. BUS. ETHICS 745, 750 (1998).

360. See *id.* at 749 (showing agency costs in giving shareholders significant powers are high).

361. Why expect that dissident shareholders will be an issue? Because they already are in the context of shareholder proposals. Nickolay Gantchev & Mariassunta Giannetti, *The Costs and Benefits of Shareholder Democracy* 1 (Eur. Corp. Governance Inst. Working Paper No. 586/2018, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3269378](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269378).

362. See, e.g., Bainbridge, *Convergence*, *supra* note 11, at 559 ("Delaware case law consistently indicates a regime of director primacy." (citations omitted)).

363. *Id.* at 570 (speaking only *vis-à-vis* judges).

directors to be judged not by judges but by presumably more efficient “Darwinian” market forces.<sup>364</sup> That is, shareholders who disapprove of the board’s actions can vote with their dollars and their feet by selling their shares.<sup>365</sup> That, in turn, pressures directors to avoid such a response.<sup>366</sup> The utilitarian might also point out that shareholders are poorly suited to monitoring corporate lawbreaking.<sup>367</sup>

A *per se* rule is more attractive from a utilitarian perspective if the various laws that a corporation might violate at the direction of its board are systematically under penalized.<sup>368</sup> Creating liability for the director may be a more efficient alternative to corporate criminal liability.<sup>369</sup> This might be particularly attractive to the rule-utilitarian. Arguments for and against a *per se* rule implicate the tension between rule- and act-utilitarianism.<sup>370</sup> The more complex, and perhaps more interesting, issues arise for the act-utilitarian.

The act-utilitarian might be inclined to view legal risks and costs as just another cost to be weighed against the benefits of an action. Per Easterbrook and Fischel, “Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm, because the sanctions set by the legislature and courts are a measure of how much firms should spend to achieve compliance.”<sup>371</sup> But even Easterbrook and Fischel added that the same obligation may not extend to acts *malum in se*.<sup>372</sup> Legal risk should be considered because it is not always clear whether an action complies with all laws and regulations.<sup>373</sup> The utilitarian might respond to

364. See *id.* at 571 (“While market forces work a sort of Darwinian selection on corporate decisionmakers, moreover, no such forces constrain judges.” (relying on FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 100 (1991))).

365. See e.g., Yuki Noguchi, *MCI Vote Symbolic of Merger Disapproval*, WASH. POST (May 17, 2005), <https://www.washingtonpost.com/archive/business/2005/05/17/mci-vote-symbolic-of-merger-disapproval/e0a0336c-c898-482a-849a-07f3285edb26/> [perma.cc/WN9U-WKFD].

366. *Id.*

367. Pollman, *supra* note 8, at 755–56 (citing DAVID A. WESTBROOK, *BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION* 63 (2007)).

368. *Id.* at 753–54.

369. *Id.* at 756–57.

370. See LEBACQZ, *supra* note 85, at 17 (briefly introducing the distinction).

371. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982).

372. *Id.*

373. Cf. Sharon Driscoll, *Lawyering at the Edge of Innovation: A Conversation with Kent Walker, Google’s General Counsel and Senior Vice President*, STANFORD LAWYER (Nov. 9, 2016) <https://law.stanford.edu/stanford-lawyer/articles/lawyering-at-the-edge-of-innovation-a-conversation-with-kent-walker-googles-general->

critics arguing that “the legislative intent . . . was not to establish a tariff but to prohibit certain behavior”<sup>374</sup> that the legislature sets the penalties. If the legislature intends to prevent the behavior altogether, it could have set the penalties accordingly.

The utilitarian is also much more likely to recognize that corporate lawbreaking can have informational value by identifying outdated laws and regulations, conflicting laws, and political and market failures.<sup>375</sup> The utilitarian will also recognize that corporate lawbreaking may have positive as well as negative externalities.<sup>376</sup> Not only did Uber drive down prices for car services, it changed laws that benefited other ride-sharing companies.<sup>377</sup> Kellogg’s intransigence regarding cereal labelling rules resulted in regulatory changes that allowed food companies to better give consumers “information about food products.”<sup>378</sup> Lawbreaking can be an effective strategy to build grassroots political support for ending rent-seeking through regulation, as in the case of Uber.<sup>379</sup>

The utilitarian will likely recognize that the change in policy by Dick’s and Walmart will have no effect on the market for guns. It affects only a very small portion of the market (only the market for long guns and only purchases by eighteen- to twenty-year-olds).<sup>380</sup> And that market will continue to be

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counsel-and-senior-vice-president/ [perma.cc/Z7AP-2ZYF] (“We do the best we can to make sure we’re complying with all present and future rules out there, and we’ve usually gotten it right.”) (emphasis added).

374. John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 GEO. WASH. L. REV. 789, 794 n.11 (1984).

375. Pollman, *supra* note 8, at 731; Tim Wu, *Strategic Law Avoidance Using the Internet: A Short History*, 90 S. CAL. L. REV. POSTSCRIPT 7, 17 (2017)).

376. See Pollman, *supra* note 8, at 731–32 (“[T]he benefits that might flow from corporate disobedience aimed at clarifying or changing the law may accrue to others where the company pushes for broad legal change beyond an individual regulatory exemption or waiver.”).

377. *Id.* at 734–35 (citing Jack Stewart, *As Uber Crumbles, Lyft Builds Its Future*, WIRED (June 14, 2017), <https://www.wired.com/story/uber-lyft-crisis/> [perma.cc/66M9-PPNG]); Ben Thompson, *Intel, MobileEye, and Smiling Curves*, STRATECHERY (Mar. 14, 2017), <https://stratechery.com/2017/intel-mobileeye-and-smiling-curves/> [perma.cc/A4LW-TDLF]; see also Rogers, *supra* note 262, at 90–91 (listing positive externalities from Uber).

378. See Pollman, *supra* note 8, at 747.

379. *Supra* Part IV.

380. Lauren Thomas, *Walmart Plans to Dramatically Step Back From Ammunition Sales After ‘Horrible’ Shootings*, CNBC (Sept. 3, 2019), <https://www.cnbc.com/2019/09/03/walmart-plans-to-dramatically-step-back-from-gun-sales-after-horrible-shootings.html> [perma.cc/W7FR-6X3S].

served by any number of sellers.<sup>381</sup> So the cost to eighteen- to twenty-year-olds who want to purchase long guns is negligible, while Dick's and Walmart employees are left happier because they are no longer engaging in a transaction they find immoral. Net happiness increases. The problem with this simple calculus, though, is that neither employees nor shareholders were polled.<sup>382</sup> Many likely take no moral issue with selling long guns to eighteen- to twenty-year-olds (it didn't stop them from working there or buying stock in those companies prior to the policy change, for example), and others likely find it immoral to *refuse* to do so.

Act-utilitarianism, at least, counsels against adopting a *per se* rule for liability for violations of positive law.<sup>383</sup> Absent clear statutory direction, fiduciary obligation should not be used to bootstrap in additional liability

381. There are more firearm dealers in the United States than McDonald's restaurants. Leanna Garfield, *There are 50,000 more gun shops than McDonald's in the US*, BUSINESS INSIDER, Oct. 6, 2017, <https://www.businessinsider.com/gun-dealers-stores-mcdonalds-las-vegas-shooting-2017-10> [perma.cc/Z4ZB-D86C] (citing BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *Report of Active Firearms Licenses – License Type by State Statistics*, Sept. 10, 2017, <https://www.atf.gov/firearms/docs/undefined/ffltypebystate09102017pdf/download> [perma.cc/PN6K-JK43]). Excluding Sam's Club, Walmart operated only 4,177 stores in the United States as of December 31, 2013. Krystina Gustafson, *Time to Close Wal-Mart Stores? Analysts Think So* (Jan. 31, 2014), <https://www.cnn.com/2014/01/31/time-to-close-wal-mart-stores-analysts-think-so.html> [perma.cc/T6GE-6DT9]. Dick's operated just 719 Dick's Sporting Goods stores, and only 35 Field & Stream stores, as of October 28, 2017. Victoria Dean, *Dick's Sporting Goods' Growth Strategy amid Retail Woes* (Jan. 9, 2018), [https://marketrealist.com/2018/01/dicks-sporting-slows-store-expansion/?utm\\_source=yahoo&utm\\_medium=feed&ypr=yahoo](https://marketrealist.com/2018/01/dicks-sporting-slows-store-expansion/?utm_source=yahoo&utm_medium=feed&ypr=yahoo) [perma.cc/P9DL-ZTS4]; *but see* Nick Morgan, *supra* note 303 (reporting on similar policies at other large retailers, including “Bi-Mart, REI, and . . . Kroger”).

382. Mary Pflum and Andrew Kozak, *Walmart Employees Call for Walkout Over Gun Sales*, NBC NEWS (Aug. 7, 2019, 3:22 PM CDT), <https://www.nbcnews.com/business/consumer/walmart-employees-call-walkout-over-gun-sales-n1040171> [perma.cc/VRR3-U4PB] (showing that employees protested because they were not a part of the discussion in Walmart continuing to sell guns in stores); *but see* Ryan Bort, *Taking Guns Off Shelves May Not Be So Bad for Business After All*, ROLLING STONE (Aug. 23, 2019, 3:20PM), <https://www.rollingstone.com/politics/politics-news/guns-dicks-sporting-goods-profitable-875761/> [perma.cc/FKJ6-JQPP] (quoting the CEO of Dick's stating that shareholders were happy with the decision since there was rise in stock price after the removal of guns from stores).

383. *See* Daniel Hunter, *Act Utilitarianism and Dynamic Deliberation*, 41 ERKENNTNIS 1, 30 (1994) (arguing that act-utilitarianist would prefer a “summary” view of rules” rather than *per se* liability).

beyond that provided for violation of the positive law itself.<sup>384</sup> The utilitarian would support a rule that only provides for liability where real harm is shown to the corporation and that defers to the business judgment of the directors.

Optimally, though, the rule should account for both positive and negative externalities rather than only harm to the corporation. The utilitarian view might seem to be that there should not be a special rule for violations of law; rather, violations of law should be treated the same as any other board act (or inaction) that might lead to liability for breach of fiduciary duty. But violations of positive law likely substantially raise the possibility of negative externalities. Given that, a utilitarian may be open to a tougher standard where there is a violation of positive law. The appropriate rule would be a variation on the entire fairness standard – the plaintiff must show that act was net harmful, considering both benefit and harm to the corporation and positive and negative externalities (note the burden has been flipped for prudential reasons).

### C. Liberalism

#### 1. Robert Nozick's Entitlement Theory

The appropriateness of a *per se* rule can be readily dispensed with under a Nozickian brand of liberalism. Violations of law as *per se* breach of fiduciary duty shifts corporate monitoring from the board and the shareholders to legislatures, something a Nozickian would view with suspicion from a practical standpoint.<sup>385</sup> A *per se* rule gives a right to seek recovery to a party – the corporation, presumably acting through a shareholder derivative suit – that may not have been injured.<sup>386</sup> The *per se* rule would appear not to require a showing of an injury to establish a claim, and breach of fiduciary duty allows for claims not directly tied to an injury.<sup>387</sup> Under Nozick's principle of compensation, compensation can only be required where an individual's rights are violated.<sup>388</sup> To require compensation where they are not would violate the rights of the directors.<sup>389</sup>

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384. Note that this paper is limited to considering the effect of a corporate violation of law on the fiduciary duties of the board – the relevant actors (including possibly the corporation) would remain culpable for violating the law itself.

385. NOZICK, *supra* note 71, at 14 (“Is there really someone who, searching for a group of wise and sensitive persons to regulate him for his own good, would choose that group of people who constitute the membership of [a legislature]?”).

386. *See supra* Part II (discussing that *per se* liability makes corporations' lawsuits easier to bring).

387. *Id.*

388. NOZICK, *supra* note 71, at 151.

389. *Id.* at 153.

It might be argued that violations of the law infringe on the rights of the shareholders because the shareholders have only granted the corporation permission to act within the law. A Nozickian would presumably approve of (or even demand) shareholders be allowed to bargain for a charter provision providing for *per se* liability. It is better to contract for particular paternalistic limitations on one's own behavior than "swallow the exact pattern of restrictions a legislature happens to pass."<sup>390</sup> But they cannot be said to have voluntarily done so. The ability of the shareholders to set fiduciary liability standards is sharply limited.<sup>391</sup>

In Nozick's view, the state is not entitled to force an individual to sacrifice for another individual.<sup>392</sup> A *per se* rule forces sacrifice by the directors – and possibly the corporation and thus the shareholder because a derivative suit may subtract from, not add to, corporate value – even where the director has violated the rights of no other individual (making it a sacrifice, not compensation). Nozick's vision of a state with legitimacy only to protect a narrow set of individual rights would seem to counsel against liability for breach of fiduciary duty for violations of laws that go beyond that, but then it would counsel against liability for those laws altogether.<sup>393</sup> How do we draw the line, and why draw it in this scenario (fiduciary duty) and not in others?

A *per se* standard also forces the shareholders to sacrifice their right to contract for their preferred standard of liability – it is not enough that it might be for their own good.<sup>394</sup> The appropriate standard, then, should be the one that the shareholders consent to (whether explicitly or implicitly, and whether within the corporation's organizational documents). Only if no separate provision is made should a default rule apply; that default rule must only allow for liability where the corporation is harmed (negative externalities are irrelevant to the Nozickian).<sup>395</sup>

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390. *Id.* at 14.

391. *See supra* Part II (discussing how exculpation is limited under Section 102(b)(7)).

392. NOZICK, *supra* note 71, at 33.

393. *Id.* at 30.

394. *See* Redish & Berlow, *supra* note 78, at 788 ("Nozick also noted that 'the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their *own* good or protection.'") (internal quotations omitted).

395. NOZICK, *supra* note 71, at 30.

## 2. John Rawls' Theory of Justice

Under a Rawlsian brand of liberalism,<sup>396</sup> the question is more difficult but the answer the same. The appropriate standard is difficult to determine because Rawls focuses on which rules benefit the least well off, and it is difficult to determine *ex ante* which standard will benefit the poor.<sup>397</sup> It isn't as clear as it might seem that a rule making violations of law *per se* breaches of fiduciary duties will benefit the poor. For one, any damages go to the corporation and, indirectly, to its shareholders, a group richer than the average American in the aggregate,<sup>398</sup> as well as plaintiffs' attorneys, likewise richer.

Two, the violation of law itself may help, not hurt, the poor. Uber may take away taxi driving jobs heavily populated by the poor, but it provides driving jobs of its own and it pulls down the price of hiring a driver, to the benefit of the poor. Uber may also provide safety benefits.<sup>399</sup> Setting aside moral concerns about marijuana, state-legal marijuana businesses give the poor a low-risk (both in regards to legal risk and risk of violence) vehicle to choose to partake in marijuana consumption (although increased use of marijuana may hurt the poor especially).<sup>400</sup> If you accept that gun violence falls hardest on the poor (probable), that Dick's and Walmart's policy change

396. This Article focuses on Rawls' arguments in *A THEORY OF JUSTICE*. See *supra* note 94. It should be noted that Rawls spent considerable effort justifying limits on civil disobedience in *THE JUSTIFICATION FOR CIVIL DISOBEDIENCE* (1969), but civil disobedience is not quite the question at which this paper is aimed.

397. Redish & Berlow, *supra* note 78, at 766.

398. See, e.g., Danielle Kurtzleben, *While Trump Touts Stock Market, Many Americans Are Left Out of the Conversation*, NAT'L PUB. RADIO (Mar. 1, 2017), <https://www.npr.org/2017/03/01/517975766/while-trump-touts-stock-market-many-americans-left-out-of-the-conversation> [perma.cc/96KF-9T6N] ("As of 2013, the top 10 percent of Americans owned an average of \$969,000 in stocks. The next 40 percent owned \$132,000 on average. For the bottom half of families, it was just under \$54,000.").

399. See Rob Verger, *Uber Can Actually Help Prevent Drunk Driving Accidents – in Some Cities*, POPULAR SCI. (Oct. 5, 2017), <https://www.popsoci.com/uber-drunk-driving> [perma.cc/AY72-P6SY] (reviewing the literature on Uber's effects on motor vehicle crashes and noting that some studies have linked the availability of Uber to a decline in crashes while some studies have been inconclusive); see also Rogers, *supra* note 262, at 92–94 (arguing that any safety concerns are not a long-term issue because they will be self-correcting).

400. Solomon Israel, *Denver Marijuana Farms Make Unwelcome Neighbours*, CBC NEWS (Sept. 29, 2016 5:00AM), <https://www.cbc.ca/news/canada/toronto/denver-marijuana-neighbourhoods-1.3761537>; Naomi Schaefer Riley, *Legalized Pot is Making America's Lower Class Poorer and Less Responsible*, N.Y. POST (Aug. 20, 2016), <https://nypost.com/2016/08/20/legalized-pot-is-making-americas-lower-class-poorer-and-less-responsible/> [perma.cc/RSH5-CKS6].

will reduce gun access (dubious), and that it will reduce gun violence (unclear), then it is to the poor's benefit. Even cheating on overtime and other employment laws (e.g., mandatory breaks under California state law) could benefit the poor because such laws artificially depress how much the poor are able to work and thus how much income they are able to earn.<sup>401</sup>

Again, this Article is *only* concerned with the best possible rule for director liability for breach of fiduciary duty for violations of law. Making a violation of law *also* a breach of fiduciary duty adds an additional layer of potential liability. The relevant actors will always be liable for violating the law itself as provided for under the law. Under Redish's gloss on Rawlsian liberalism,<sup>402</sup> that creates an underappreciated problem. Redish advocates a definition of liberalism that is "on most issues of substantive autonomy . . . wholly agnostic."<sup>403</sup> That is, the laws of the land control, regardless of the extent to which they infringe on substantive autonomy, so long as they do not infringe on process-based autonomy.

But there is a non-obvious process-based autonomy problem with the *per se* approach. It adds punishment and deterrence beyond that provided for by the legislature. The legislature may or may not have carefully calibrated the punishment and deterrence of the law,<sup>404</sup> but it is the body provided structurally with that authority. For unelected judges to layer on liability beyond that provided for by the elected branches raises concerns under liberal theory. This liability includes, presumably, liability for violations of federal law and the laws of other states and nations – liability for laws that the Delaware legislature did not pass and has not clearly indicated should provide a basis for liability. Further, the *per se* approach takes control over seeking redress away from the party injured-in-fact and splits it in part between that party and the shareholders of the corporation. And despite the fact that the shareholders share claims to the residual earnings of the corporation, the right to bring a claim will now be available to any shareholder who wants to sue, including gadflies and activists.

A *per se* standard may also result in recovery by *two* parties that may not have been injured. The first is plaintiffs' attorneys, who may recover even if

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401. *Cf.* Jon Hartley, FORBES (May 18, 2016, 2:35PM), <https://www.forbes.com/sites/jonhartley/2016/05/18/new-obama-overtime-regulations-could-harm-tech-startups-and-small-businesses/#368b398d3afc> [perma.cc/97Z4-JBR4] (criticizing expansion of overtime rules due to the distortionary effect of mandated overtime pay).

402. *Supra* Part III.b.

403. Redish & Berlow, *supra* note 78, at 765.

404. *Cf.* Coffee, *supra* note 374, at 794 n.11 (arguing that "the legislature cannot know how high to set penalty levels in order to make the expected penalty cost exceed the expected benefit").



the shareholders do not.<sup>405</sup> The second is the corporation itself. Strine's *per se* formulation does not appear to require a showing of harm.<sup>406</sup> Providing for recovery by a plaintiff when the defendant has not caused injury to the plaintiff is at odds with "corrective justice."<sup>407</sup> Fiduciary obligation law has long allowed for recovery even when there is no harm to the entrustor,<sup>408</sup> but that is based on encouraging loyalty by the agent *to the entrustor*, not to a third party – whether it be the state, society as a whole, or a discrete group targeted for protection by the law.

It is simply incorrect to say that "fiduciary duties constrain officers and directors from 'impos[ing] their personal moral views on the corporation.'"<sup>409</sup> The business judgment rule gives officers and directors enormous discretion to do just that so long as the acts they direct the corporation to take comply with the law.<sup>410</sup> The relevant question is whether the imposition of moral views that violate positive law should be treated differently, and dramatically so, than the imposition of moral views that do not violate positive law. For the reasons stated above, the imposition of moral views that violate positive law should not be treated differently under liberal theory. As Pollman shows,<sup>411</sup> individuals "participating in governmental processes and seeking to influence the decisions of democratic institutions,"<sup>412</sup> while acting through the corporate form, can cause corporate behavior that skirts the law. Creating additional liability for that behavior impinges on "the ability of individuals to

405. See Bainbridge, *Convergence*, *supra* note 11, at 593 ("The real party in interest in derivative litigation is the plaintiff's attorney, not the nominal shareholder-plaintiff. In most cases, the bulk of any monetary benefits go to the plaintiffs' lawyers rather than the corporation or its shareholders."). Prior to *In re Trulia, Inc. Stockholder Litigation*, it was common for merger objection lawsuits to end with "disclosure-only settlements," under which only the attorneys recovered. 129 A.3d 884 (Del. Ch. 2016). A similar problem arises in the class action context.

406. Strine, *supra* note 6, at 650.

407. Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 352 (2007).

408. See, e.g., *Lum v. McEwen*, 57 N.W. 662, 662–63 (Minn. 1894) ("Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at . . . It is not material that no actual injury to the company [principal] resulted.")

409. Pollman, *supra* note 8, at 762 (quoting Jill Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1603 (2006)).

410. Arsht, *supra* note 13, at 129–30.

411. See Pollman, *supra* note 8, at 742–48 (discussing general business lobbying and corporations skirting the law to assert moral stances).

412. Redish & Berlow, *supra* note 78, at 767; but see RAWLS, *supra* note 94, at 321 ("[I]t goes without saying that civil disobedience cannot be grounded solely on group or self-interest.").

control the nature of their participation in the processes of collective democratic government.”<sup>413</sup>

A *per se* rule then cannot be reconciled with the liberalism of either Nozick or Rawls. A liberal theory of fiduciary obligation demands harm to the corporation be shown as a predicate for breach of fiduciary duty, even where the board directed the corporation to violate positive law.<sup>414</sup> Under a Rawlsian-Redishian view, it also demands a clear indication by the legislature in the state of incorporation that the intent of the law is to co-opt the laws of other jurisdictions. The Delaware legislature has not clearly done so.<sup>415</sup> The appropriate standard as it stands today, then, is to treat a violation of positive law no differently than any other corporate decision. The business judgment rule will apply unless there was an interested transaction. A tougher standard would require the Delaware legislature to act.

## VI. CONCLUSION

It might seem rare that a board will direct the corporation to violate the law. Uber’s regulatory strategy and the decisions by Walmart and Dick’s Sporting Goods to not sell long guns to eighteen- to twenty-year-olds may appear anomalous.

They are not anomalous simply because corporations rarely violate the law. Rather, they may be anomalous simply because corporate boards rarely direct the corporation to do *anything*. The primary function of the board is supervisory.<sup>416</sup> And virtually all of the decisions asserting that violations of law are *per se* bad faith were written by Chief Justice Strine. There are obvious parallels to the “so-called triad” of good faith, care, and loyalty that

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413. Redish & Berlow, *supra* note 78, at 765.

414. *See generally* MILL, *supra* note 90.

415. *See supra* Part II (discussing the lack of clarity in the law in this area). The Rawlsian-Redishian view stands in a certain tension with the Delaware General Assembly’s basic approach to corporation law. Rather than make direct provision for entity governance or allow the investors free rein to structure entity governance, as with limited liability companies and limited partnerships, Delaware corporation law allows the Court of Chancery to retain in significant part its traditional equitable role in shaping fiduciary law. *See, e.g., In re Oxbow Carbon LLC Unitholder Litig.*, No. 12447-VCL, slip op. at 4–27 (Del. Ch. Aug. 1, 2018) (discussing the court’s equitable powers at length).

416. *See, e.g.,* Manning, *supra* note 34, at 1494 (noting that boards mostly supervise management, “punctuated only occasionally by a discrete transactional decision,” rather than take “affirmative action on individual matters”).

largely only existed within decisions written by then-Justice Holland,<sup>417</sup> but Strine is an enormously influential figure in the continuing development of Delaware law. Doctrinal uncertainty may continue due to the “cycling phenomenon.”<sup>418</sup>

There *are* practical implications. Entrepreneurial plaintiffs’ lawyers are always on the hunt for the next viable theory of liability against corporate directors, after all.<sup>419</sup> Recent changes in Delaware caselaw that make shareholder suits harder to win provide a particular incentive for entrepreneurial plaintiffs’ lawyers to seek new vehicles for shareholder suits.<sup>420</sup> A *per se* standard might prove lucrative – it opens up liability for losses normally insulated by the business judgment rule. If Nike loses market share because it made Colin Kaepernick the face of a large marketing campaign, shareholders cannot successfully sue because that decision is protected by the business judgment rule.<sup>421</sup> But if Dick’s Sporting Goods

417. See Bainbridge, *Convergence*, *supra* note 11, at 566 (discussing the near-exclusive presence of the term in Justice Holland’s opinions and evidence of skepticism by other jurists).

418. See *id.* at 566 n.36 (discussing how the Delaware Supreme Court’s unanimity norm leads to Delaware corporation law cycling between different doctrinal approaches).

419. “M&A objection class actions . . . replaced traditional stock drop cases as the lawsuit of choice for plaintiff’s attorneys” a decade ago. Jennifer J. Johnson, *Securities Class Actions in State Court*, 80 U. CIN. L. REV. 349, 384 (2011). More recently, the “Delaware Chancery court’s 2016 decision in the *Trulia* case” pushed the percentage of M&A deals challenged in federal court from 26 to 96%. Kevin LaCroix, *Percentage of 2018 Deals Drawing Merger Objection Suits Held Steady*, THE D&O DIARY (Sept. 17, 2019), <https://www.dandodiary.com/2019/09/articles/merger-litigation/percentage-of-2018-deals-drawing-merger-objection-suits-held-steady/> [perma.cc/SZL3-VH2M]. In other circumstances, plaintiffs’ lawyers have been likened to the moles in the Whac-a-Mole game – tightening standards for liability in one area incentivizes plaintiffs’ lawyers to alter the suits they bring. Howard M. Erichson, *Cafa’s Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1607 (2008).

420. Cf. Alison Frankel, *Star Shareholders’ Lawyer Stuart Grant is Quitting His Practice: ‘I Don’t Like Losing’*, REUTERS (June 25, 2018, 12:28PM), <https://www.reuters.com/article/us-otc-grant/star-shareholders-lawyer-stuart-grant-is-quitting-his-practice-i-dont-like-losing-idUSKBN1JL26J> [perma.cc/P7FF-F7BD] (reporting on a prominent shareholders’ lawyer leaving his firm to move into the litigation finance space because he went from winning “90 to 95 percent of our cases” to having “probably lost more than we’ve won,” concluding that “it’s almost impossible to challenge a deal in Delaware” and “the courthouse doors are effectively closed.”).

421. Joshua Fershee, *Nike’s Kaepernick Ad Is the Most Business Judgmenty Thing Ever*, BUS. LAW PROF BLOG (Sept. 13, 2018),

loses market share because it stops selling long guns to eighteen- to twenty-year-olds, shareholders presumably can sue and recover based on that market share, even though civil liability for violating state bars on age discrimination may be negligible.

There are also practical implications for corporate decision-making. One of the goals of corporate governance law is to encourage boards to stay informed and monitor management.<sup>422</sup> The wide disparity in the plaintiff-friendly *per se* standard for a direct violation of law versus the tough standard for a failure to monitor compliance offers a perverse incentive for boards to avoid reviewing decisions that might violate the law. Another concern is that it allows not just shareholders but dissident shareholders to potentially usurp the role of the board.<sup>423</sup> Given the availability of equitable relief, a dissident shareholder could sue Dick's or Walmart to force it to reverse its policy decision to stop selling long guns to eighteen- to twenty-year-olds.

But the real importance of debating the issue may be the light it sheds on more fundamental issues of the role of the corporation, the law, and the individual in society. Starkly different views lead to divergent opinions of what the rules that govern society *should* be. The five models discussed lead to five different approaches.<sup>424</sup> But only the populist communitarian model lends support to what appears to be the current *per se* standard.<sup>425</sup>

How, then, should we handle divergent results? Isn't it true that divergent results force us to choose the theory we prize most highly?<sup>426</sup> One way to handle divergent results is by applying a presumption.<sup>427</sup> I offer three presumptions. One, given that only one of five models supports the *per se* standard, there should be a presumption against that standard. Two, given the lack of clarity in the statutory law and caselaw<sup>428</sup> and given the divergent results reached by applying our five models of political theory,<sup>429</sup> there should be a presumption against applying a rule that stands in such sharp contrast with the rules applied in other, similar situations. There should be a presumption against a *per se* standard of liability for violations of positive law

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[https://lawprofessors.typepad.com/business\\_law/2018/09/nikes-kaepernick-ad-is-the-most-business-judgmenty-thing-ever.html](https://lawprofessors.typepad.com/business_law/2018/09/nikes-kaepernick-ad-is-the-most-business-judgmenty-thing-ever.html) [perma.cc/SP46-4MH2].

422. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

423. Gantchev & Giannetti, *supra* note 361.

424. *Supra* Part V.A–C.

425. *Supra* Part V.A.1.

426. See Barnett, *supra* note 74, at 165 (noting an objection to his these regarding the virtues of redundant methods of analysis).

427. See *id.* at 166 (“We normally handle unyielding conflicts by adopting an operative presumption.”).

428. *Supra* Part II.

429. *Supra* Part V.

because it is a much harsher rule than applies to conduct covered by the business judgment rule or entire fairness.<sup>430</sup> Three, given the same two conditions noted above, the standard should be set by the legislature, not by the courts. Weighing political theory models necessarily requires value judgments of the sort that are rightly the province of representative, elected legislatures.

This perhaps gives the game away by embracing the proceduralism of Rawlsian-Redishian liberalism, but it is also a communitarian approach (if not the exact approach taken by populist communitarianism or CST) because it puts the power to set the standard in the hands of a duly-elected legislature. The legislature is likely to weigh like against like and set a rule that only allows for liability where the corporation itself is harmed. Simply subsuming violations of positive law into the business judgment rule and entire fairness is an attractive option. But the legislature would be justified in a tighter rule that recognizes violations of positive law are more likely to lead to harm than normal business decisions. Once the plaintiff has shown a violation of positive law, the burden shifts to the defendants to show that there was no harm to the corporation. That is likely to partially satisfy the Nozickian liberal (as much as is possible in the non-minimal state)<sup>431</sup> and the utilitarian.<sup>432</sup>

Dispensing with a *per se* rule in favor of treating violations of positive law like any other board action would not only be efficient but would comport with the liberal values that underlie our republic. It also recognizes that fiduciary obligation law is not Superman, crisscrossing the nation in flight searching for wrongs to right. Fiduciary obligation law is calibrated to address a very specific set of wrongs and inefficiencies, and it is poorly suited to serve as a general purpose cure-all. To the extent that the underlying violations of positive law are underpenalized, the solution is for the appropriate legislature

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430. This is troubling in significant part because it appears to create a stark divide in the treatment of similar acts. It would be less troubling were the Delaware courts to embrace a more searching analysis of where the directors were in fact attempting to act in the corporation's best interest, and thus the business judgment rule will insulate their conduct, even if their business judgement was in fact terrible, and where the directors were not acting in the corporation's best interest, and thus the business judgment rule would not apply at all, because they were not acting in good faith. This extends beyond violations of law. A tweet by Elon Musk that appeared to taunt the SEC might qualify as such. Jonathan Stemple, *Tesla's Musk Mocks SEC as Judge Demands They Justify Fraud Settlement*, REUTERS (Oct. 4, 2018, 1:57PM), <https://www.reuters.com/article/us-tesla-musk-sec/teslas-musk-mocks-sec-as-judge-demands-they-justify-fraud-settlement-idUSKCN1ME2CC> [perma.cc/HJX9-6PY4].

431. Cabining how liability for breach of fiduciary duty can be consensually tailored will continue to be an issue. The Delaware legislature might choose to continue to loosen those rules, however.

432. The insistence that some things are rightfully the province of the legislature will continue to stick in the craw of the Posnerians.

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to recalibrate the underlying law, not to draft fiduciary obligation law to do work it is not designed to do or adept at doing.

