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# The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture

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## The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture

David G. Yosifon \*

### ABSTRACT

*A mature assessment of the society we are making for ourselves, and the legacy we are leaving to the future, must come to terms with consumer culture. Theoretical discourse, as well as common experience, betray persistent ambiguity about what consumerism means to and says about us. In this Article, I argue that this ambiguity can in part be explained by examining the social relations of consumption in contemporary society. These involve, crucially, the relationship between producer and consumer that is dictated by corporate governance law, and embodied in the decision-making dynamics of the directors who command corporate operations. The enigmatic nature of consumer culture can be understood as resulting from a lack of integrity in the social relations between corporations and consumers. Having made this diagnosis, I argue that the character of our consumer culture can be improved by introducing greater sincerity into the social relations of consumption. These concerns contribute to a broader set of arguments for reforming corporate governance law to require corporate directors to attend to the interests of multiple stakeholders in corporate decision-making, and not just the interests of shareholders. Regardless of whether one embraces this prescription, the analysis developed here can enrich our understanding of what is at stake in debates about our corporate law.*

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“There is something in the structure of the human animal which compels him to produce superfluously.”

Norman O. Brown<sup>1</sup>

“To ignore it is to court nostalgia. To engage with it, however, is to risk . . . mak[ing] the same point over and over: technological consumerism is an infernal machine, technological consumerism is an infernal machine.”

Jonathan Franzen<sup>2</sup>

## I. INTRODUCTION

Consumer culture is a defining feature of modern life. It is also a cardinal normative concern. Understanding what consumerism “means” is essential to a mature assessment of the society we are making for ourselves, and the legacy we are leaving to the future. Mainstream economists and policymakers perennially insist that

1. NORMAN O. BROWN, LIFE AGAINST DEATH: THE PSYCHOANALYTICAL MEANING OF HISTORY 256 (1959).

2. Jonathan Franzen, *Perchance to Dream: In the Age of Images, A Reason to Write Novels*, HARPER’S, Apr. 1996, at 35, 43.

consumption must be encouraged in order to fuel development and ensure prosperity.<sup>3</sup> Yet there is persistent ambiguity in theoretical discourse, and common experience, about the meaning of our consumer culture. In this Article, I argue that this ambiguity can, in part, be explained by examining the social relations of consumption in contemporary society. These social relations involve, crucially, the relationship between producer and consumer that is dictated by corporate governance law, and embodied in the decision-making dynamics of the directors who command corporate operations. The enigmatic nature of consumer culture can be understood, to some useful extent, as resulting from a lack of integrity in the social relations between corporations and consumers.

If our consumer culture is (partially) a function of the social relations of consumption, then perhaps we can improve the character of that culture by introducing greater integrity into those social relations. This can be accomplished through the reform of corporate law. Specifically, I claim that legitimate concerns about consumer culture contribute to a broader set of arguments for reforming corporate governance law to require corporate directors to attend to the interests of multiple stakeholders in corporate decision-making, and not just the interests of shareholders. Regardless of whether one embraces this prescription, the analysis developed here can enrich our understanding of what is at stake in debates about our corporate law: what it is, what it does, and what it might do.

Groucho Marx once said, “When I hear the word culture I reach for my wallet.”<sup>4</sup> Legal scholars, too, seem to worry that cultural analysis will operate as the pretty ruse of a theoretical pick-pocket, leaving us dazzled, perhaps, but poorer in understanding than when we started out. The conventional categories of legal analysis favor inquiries that are plainly tractable, even quantifiable. This is

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3. See *infra* text accompanying notes 21–23 (describing the role that the “Keynesian consensus” plays in conventional economic and policymaking discourse).

4. Peter Borsay & Callum Brown, *Review of Books*, 22 *URBAN HISTORY* 139, 139 (1995) (quoting Groucho Marx). Groucho’s quip was a variation on the line attributed to the Nazi leader Hermann H. Goering: “Whenever I hear the word culture, I reach for my revolver.” The Goering quote is apparently apocryphal. See PAUL F. BOLLER, JR. & JOHN GEORGE, *THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, AND MISLEADING ATTRIBUTIONS* 36 (1989) (“This statement actually . . . comes from Hanns Johst’s drama *Schlageter*, produced at the State Playhouse in Berlin in 1933.”). It is conceivable that Goering was familiar with the Johst play and used the line himself.

motivated by an estimable desire to get at the usable knowledge that objective, quasi-scientific approaches promise. It is also driven by a scrupulous commitment to avoiding methods that risk illiberally celebrating or condemning particular values or ways of life, which cultural analysis might seem to imply.<sup>5</sup>

Mainstream corporate law scholarship exemplifies this tendency. It has principally been concerned with analyzing the shareholder predicament in corporate affairs, construed in terms of financial risk and return. “Progressive” or critical corporate law scholarship looks beyond the shareholder’s stake in corporate operations, but also has largely eschewed cultural assessment, tethering its analysis instead to countable versions of corporate “harm” such as environmental externalities, declining wages, or tobacco-related deaths.<sup>6</sup> Even cutting-edge scholarship marshaling the insights of social psychology for corporate law study has restricted its attention to categories that are at least in principle measurable, such as “consumer risk perception.”<sup>7</sup> The insights supplied by these scholarly tranches are crucial, but they leave out of the conversation an important aspect of what we want to talk about when we talk about corporations. It lets pass, and thus gives a pass to, the cultural significance of corporate law, particularly as it relates to consumerism. This Article is concerned with developing a way of thinking about consumer culture within corporate law discourse.

The great anthropologist Clifford Geertz defined “culture” in straightforward, encompassing terms, as “a system of inherited conceptions expressed in symbolic forms by means of which men

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5. See Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (examining the psychological limits of liberalism). The exception is that corporate law scholars have given some attention to the culture of the corporate boardroom. See, e.g., STEPHEN BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 77–104 (2008) (exploring the utility of boardroom culture as a means of encouraging directors to work honestly and effectively). Examination of this culture, however, has been for the purpose of understanding how firms act or fail to act in the shareholder interest, without any study of the general cultural implications of that activity.

6. See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467–1552 (1999) [hereinafter Hanson & Kysar, *Taking Behavioralism Seriously*] (arguing that profit-maximizing tobacco companies exploited psychological vulnerabilities of tobacco consumers for decades, in ways that conventional economic and legal analysis were unprepared to assess).

7. See David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681 (2008) (reviewing scholarship of this sort).

[and women] communicate, perpetuate, and develop their knowledge about and attitudes toward life.”<sup>8</sup> My focus on “consumer culture” is an effort to consider what our consumerism means to us and what it says about us, as individuals and as a society. I do not explore here the content of consumer culture. I will not assess particular discourses on sex, gender, race, or class occasioned by consumer culture generally, or through particular consumer cultures of smoking, electronics, or fast food.<sup>9</sup> That sort of work is fascinating, and sometimes even credible, but here I am trying to characterize consumer culture at a more general level of abstraction, and from a particular vantage. I am concerned with the process through which consumer culture comes into being. Specifically, I am concerned with the way that corporate law shapes the social relations of consumption, and thus, shapes consumer culture.

The Article is organized as follows. Part II describes the fundamentally ambiguous, or ambivalent, depiction of consumer culture that emerges from those intellectual traditions that have intensely grappled with it. Part III critiques the scant and under-theorized role that assessment of consumer culture has played within corporate law scholarship. Part IV examines the social relations of consumption as they are described by contemporary corporate governance law, and embodied in the decision-making dynamics of corporate boards of directors. My claim is that the problem of “insincerity” described in Part IV must be understood as an essential component of the social relations of consumption in our society, and thus as central to the meaning of consumer culture. Part V describes a reform program that aims to make corporate decision-making more sincere, which, among other benefits, may give consumer culture more integrity, and make the meaning of consumer culture less ambiguous. Part VI gives a brief conclusion.

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8. CLIFFORD GEERTZ, *Religion as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 87, 89 (1973).

9. *But see infra* text accompanying notes 18–20 (noting scholarship on the relationship between consumerism and landmark civil rights movements pursuing racial, gender, and sexual orientation equality).

## II. THE AMBIVALENT MEANING OF CONSUMER CULTURE

While mainstream corporate law scholars have not struggled with consumer culture, intellectuals in other disciplines have evaluated it with interest, and usually skepticism. A robust tradition in academic cultural history explains the emergence of consumerism in what might generally be called “functionalist” terms. Mass consumerism emerged in the late nineteenth and early twentieth centuries as a reliable means of channeling a wide range of human desires in an efficient, predictable manner that was compatible with the formalized, sanitized way of life emerging under corporate capitalism.<sup>10</sup> For the working-class, consumerism became a compensatory salve for the ignominy of industrialized labor. For the wealthy, conspicuous consumption became a way of grappling with status anxiety in a world with unprecedented social mobility.<sup>11</sup> For American culture as a whole, consumer culture in the twentieth century became a central organizing principle of individual and associational identity, replacing the centrality of the worker and civic-minded ethic that had theretofore dominated the American scene.<sup>12</sup>

Cultural analysts have been spooked by consumer culture from the beginning. Consumer culture, many have said, sterilizes and homogenizes the otherwise messy but sublime human condition. It promises transcendence but it does not deliver. Instead, it sets us back. This long-standing critical tradition can be traced at least to William Wordsworth—“Getting and spending, we lay waste our powers . . . / We have given our hearts away, a sordid boon!”<sup>13</sup>—and has echoed in American letters from Thorstein Veblen to Bob Dylan,

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10. See, e.g., COLIN CAMPBELL, *THE ROMANTIC ETHIC AND THE SPIRIT OF MODERN CONSUMERISM* (1987); T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE 1880-1920* (1981); PETER N. STEARNS, *AMERICAN COOL: CONSTRUCTING A TWENTIETH-CENTURY EMOTIONAL STYLE* 209–14 (1994).

11. See THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (1899).

12. See Richard Wightman Fox & T.J. Jackson Lears, *Introduction* to *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1890*, at vii (Richard Wightman Fox & T.J. Jackson Lears eds., 1983); STEPHEN NISSENBAUM, *THE BATTLE FOR CHRISTMAS* 139 (1996) (arguing that “[c]onsumer capitalism and civic virtue were not commonly associated with each other in early nineteenth-century America,” but the emergence of the modern Christmas rituals “helped intensify and legitimize a commercial kind of consumerism”).

13. William Wordsworth, *The World Is Too Much with Us*, in *POEMS* 122 (1807).

the latter of whom warned that: “advertising signs they con / You into thinking you’re the one / That can do what’s never been done / That can win what’s never been won / Meantime life outside goes on / All around you.”<sup>14</sup> Consumer culture, on this reading, is manipulative and degrading.<sup>15</sup>

The most strident critics of consumerism claim that the situation is worse than what Dylan described. It is not so much that consumer culture keeps you from the life that is going on all around you—the fact is, according to the most mournful tally, there is no longer any real life going on anywhere other than the shadow, shallow life of consumerism. These people say things like: “All that once was directly lived has become mere representation.”<sup>16</sup> The domination of consumer culture empties out and replaces other forms of meaning from social life, in particular, meanings that previously were made in community, politics, and religion.<sup>17</sup>

However, a different tradition of cultural studies celebrates consumer culture as a highly effective vehicle of personal and social liberation. Personal liberation, because consumerism allows individuals an accessible means of escape from the narrow terms of identity otherwise provided only by stultifying tradition or work. Social liberation, because consumer culture became a crucial site of various civil rights movements. Consumer goods have literally created and carried the message of equality, quintessentially through

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14. BOB DYLAN, *It’s Alright, Ma (I’m Only Bleeding)*, on BRINGING IT ALL BACK HOME (Columbia 1965). Of course, Dylan here commoditizes the con of the commoditization of difference. This does not dispel but rather more deeply demonstrates the infinite loop of commoditization on which the critics of consumerism dwell, and despair. See also VEBLER, *supra* note 11.

15. Even as we can locate criticism of “consumerism” as a distinctly historical phenomena, we can also see it as a more-or-less universal feature of reflection on the human condition. Wordsworth’s lament about our “sordid boon” was written in 1807, long before the rise of large corporations or modern consumer culture in the late nineteenth and early twentieth centuries. We could probably make biographical arguments about Wordsworth being at the vanguard of a burgeoning cultural phenomenon, but truly we could also surely find expressions like this offered by sensitive thinkers since we first climbed down from the trees, or at least since we started planting the beer. The issue I am pursuing here is what our institutional arrangements do, in particular what corporate law does, to exacerbate, mitigate, enliven, subdue, rectify, or improve this eternal aspect of the human condition.

16. GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* 12 (Donald Nicholson-Smith trans., Zone Books 1999) (1967).

17. See *id.* at 12–14.



music, but also through books, movies, and television. This happened in the United States in the middle decades of the twentieth century, and at the end of the twentieth century it gave shape to the “velvet revolution” in the Soviet bloc, where the desire for consumer culture forced political change.<sup>18</sup> Consumerism may be a somewhat vapid or fleeting approach to identity, but its superficiality replaces otherwise pernicious, oppressive, and ultimately, *boring* discourses on identity that draw their authority from racism, sexism, classicism, and hetero-normativity.<sup>19</sup> Consumer culture expands the possibilities of not just material pleasures, but also our inner life. Advertising is testimony to our abundance—personal and social. The acolytes of this tradition insist, contra Dylan, that, far from being a con, advertising is “the last utopian idiom.”<sup>20</sup>

In a sense, everything depends upon which of these interpretations of consumer culture, the condemning or the celebratory, is right. What seems to be at stake is, in the words of James Livingston, “whether emotional frugality or expenditure is the proper structure of [our] souls.”<sup>21</sup> At stake too is the attitude that we should have, skeptical or celebratory, to recurring, mainstream macro-economic and political claims about the importance of consumption activity, and the imperative of encouraging ever-greater levels of consumption, in order to ensure economic development and political stability.<sup>22</sup> Whether this “Keynesian consensus” is good

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18. See generally LIZABETH COHEN, A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003); see also Elisa Glick, *The Dialectics of Dandyism*, 48 CULTURAL CRITIQUE 129–30 (2001) (emphasizing the role of consumer culture in both identity formation and political engagement in the gay rights movement).

19. See generally DEIRDRE N. MCCLOSKEY, THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE 25–26 (2006) (emphasizing the bleak and oppressive nature of cultural life for the vast majority of people in the pre-modern era).

20. JAMES LIVINGSTON, AGAINST THRIFT: WHY CONSUMER CULTURE IS GOOD FOR THE ECONOMY, THE ENVIRONMENT, AND YOUR SOUL 115–16 (2011) [hereinafter LIVINGSTON, AGAINST THRIFT] (“Could advertising be the thesaurus of our real feelings, the indispensable, vernacular language we use to plot our positions on the emotional atlas that is everyday life?”).

21. *Id.* at xiii.

22. The Keynesian outlook emphasizes the urgency of *encouraging* consumption. This is because consumers have a propensity to increase consumption when their income increases, but not by as much as their income is increased. Keynes called this “a fundamental psychological law.” JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT,

economics is beyond the present inquiry.<sup>23</sup> My point is rather to draw critical attention to the relentless, uncritical emphasis that the consensus outlook places on spurring consumer demand. We must know what to make of such consumption, and what it is making of us.

### III. THE ABSENCE OF CONSUMER CULTURE IN CORPORATE THEORY

Critical assessment of consumerism has not been a feature of traditional corporate law scholarship. The focus of the field has instead been on one important problem in the social relations of *production* under corporate capitalism: the separation of ownership and control in enterprise. The problems inherent to this mode of organization have been evident at least since Adam Smith wrote the following in *The Wealth of Nations*:

The trade of a joint stock company is always managed by a court [think board] of directors. This court . . . [is] subject, in many respects, to the control of a general court of proprietors [think shareholders]. But the greater part of those proprietors seldom pretend to understand anything of the business of the company [think rational ignorance] . . . The directors of such companies . . . being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the

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INTEREST, AND MONEY 96 (First Harbinger ed., 1964). This consumer habit becomes a core element in "Keynesianism." Because consumers save a greater portion of their income, demand will ultimately be insufficient to justify productive investment of capital. This under-investment means under-employment. Workers seeking to provide for their own future consumption refuse to supply the current demand sufficient to justify the current investment that would employ them. This creates a "liquidity trap" or a "savings glut" in which consumers are unwilling to spend their earnings and business is unwilling to invest in productive activity. Under such conditions, Keynesianism calls on policymakers to take steps to encourage consumption.

23. The familiar motto, "We are all Keynesians now," is quasi-apocryphally attributed to Milton Friedman, who was quoted to that effect in a *Time Magazine* cover story in 1965. *We Are All Keynesians Now*, TIME, Dec. 31, 1965, at 74. Friedman, however, insisted that what he actually said was, "In one sense, we are all Keynesians now; in another, nobody is any longer a Keynesian." See Milton Friedman, *Letter to the Editor*, TIME, Feb. 4, 1966, at 15. I am not focused here on proving the universality of Keynesianism. It is enough for present purposes to assert that this is a widespread view in both formal economics and ordinary politics.

partners in a private copartnership frequently watch over their own . . . . Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company [the agency problem].<sup>24</sup>

This shareholder agency problem has continually commanded the attention of corporate law scholars. Its modern statement is pinned to Adolf Berle and Gardiner Means' totemic *The Modern Corporation and Private Property*, published in 1932, and its "formalization" credited to Michael Jensen and William Meckling's *Theory of the Firm* article in 1976.<sup>25</sup> Every year, still, the law reviews are filled with studies and arguments treating the problem with ever-greater nuance.

To properly characterize consumer culture, we must begin close to this canonical starting place. The corporate reorganization of the economy that separated ownership and control in production *also* introduced new social relations of consumption, by separating production and consumption. This disaggregation created a *consumer* agency problem that has received little attention by scholars. Before the mid-nineteenth century, most business activity was organized through familial relationships, and most of what was consumed was produced by relatives or neighbors.<sup>26</sup> Where consumers produce for themselves or in affective associational arrangements, such as family or kin networks, the interests of

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24. ADAM SMITH, *THE WEALTH OF NATIONS* 849 (London, Methuen & Co., 1904) (1776). As with Wordsworth, *see supra* note 13, Smith's writing could be seen as prescient, as he was describing a social problem that would not become widespread, or appreciated as widespread, until several generations after he lived. In another sense, however, again as with Wordsworth, Smith is describing a problem that has been with humankind in all epochs, whenever some have purported to work on behalf of others. My focus is on the particular challenges presented by these universal human predicaments in our time, in our systems, and within our corporate law. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* (2003) (tracing agency problems in business operations back at least to Ancient Egypt).

25. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

26. *See* ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 17 (1977) (asserting that "the family remained the basic business unit" well into the nineteenth century); *see also* Christopher Clark, *Household Economy, Market Exchange and the Rise of Capitalism in the Connecticut Valley, 1800-1860*, 12 J. SOC. HIST. 169, 173 (1973) (describing "networks of exchange relationships . . . [among] neighbors and relatives" that formed the basis of consumption patterns for rural families in the early nineteenth century).

production and consumption are aligned.<sup>27</sup> The problem is that under such “primitive” modes of economic organization, relatively little is produced or consumed, and the ravages of deprivation are more threatening than the depravities of abundance.

The corporate organization of production introduced new social relations of consumption. Now the consumer stood at arms-length from the hand that would feed, clothe, and delight her, and the “morals of the market place,”<sup>28</sup> rather than those of hearth or neighborhood, described the atmosphere of exchange. When, as under corporate capitalism, production and consumption are so separated, “it cannot be well expected,”<sup>29</sup> to borrow Adam Smith’s verbiage, that corporate directors “will watch over [consumer interests] with the same anxious vigilance”<sup>30</sup> with which consumers would watch over it themselves. We should anticipate that “negligence and profusion” regarding the “affairs” of consumers “must always prevail” in corporate operations.<sup>31</sup> Yet this consumer agency problem has rarely been identified, and has never been pursued with the academic doggedness that has served the shareholder agency problem.<sup>32</sup>

Canonical corporate theory compounds its error of ignoring the consumer agency problem when it insists that solving the allegedly all-important shareholder agency problem requires shareholder primacy in corporate governance. In an effort to mitigate “negligence and profusion,”<sup>33</sup> the law binds corporate directors with the yoke of *fiduciary* obligation to the shareholders. So charged, and

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27. Cf. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 749–59 (2005) (describing operational discretion in the operation of small, non-corporate businesses). Elhauge argues that corporate managers have a similar latitude to engage in operational restraint. He is wrong about that as a matter of positive law. See David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. REV. 181, 200–03 (2013), but the idea is useful when considering a reform program. See *infra* Part V.

28. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.) (contrasting the moral expectations “trodden by the crowd” with those expected of a fiduciary).

29. See SMITH, *supra* note 24, at 849.

30. *Id.*

31. *Id.*

32. See David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS. L. REV. 253 (2009) (analyzing and critiquing the role of the consumer in dominant corporate theory).

33. See SMITH, *supra* note 24, at 849.

operating in a broader economic and cultural context that deepens their fealty to shareholders, directors are moved to search for profits wherever they might be found, including, where possible, by manipulating non-shareholders, including consumers. Adam Smith was not as impressed with this problem as he was the shareholder agency problem:

The prejudices of some political writers against shopkeepers and tradesmen are altogether without foundation . . . . Some of them, perhaps, may sometimes decoy a weak customer to buy what he has no occasion for. This evil, however, is of too little importance to deserve the public attention . . . . It is not the multitude of alehouses, to give the most suspicious example, that occasions a general disposition to drunkenness among the common people; but that disposition, arising from other causes, necessarily gives employment to a multitude of alehouses.<sup>34</sup>

Corporations generate profits by discerning and serving consumer “disposition[s],” not by “decoy[ing]” them.<sup>35</sup> Whatever meaning there is in consumer culture depends entirely on the consumer. And this too has been the position taken by Smith’s modern heirs in corporate law scholarship, down again to Michael Jensen, Oliver Williamson, or Stephen Bainbridge.<sup>36</sup>

One early twentieth-century economist did come close to formulating the consumer predicament in the agency-problem terms that I am urging. In his 1923 book, *The Control of Industry*, Dennis Robertson (a mentor to Ronald Coase) dedicated a chapter to examining “Industry and the Consumer.”<sup>37</sup> Robertson cataloged “the grievances, real or imaginary,” of consumers under the capitalist

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34. SMITH, *supra* note 24, at 407. Here we see already, in Smith, a prejudice that continues to haunt corporate law discourse. Analysts who deal with shareholder exploitation get the neutral title “economist,” while those who address the consumer predicament are maligned as “political writers.” *Id.*

35. *See id.*

36. *See, e.g.*, Jensen & Meckling, *supra* note 25; OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985); BAINBRIDGE, *supra* note 5.

37. Robertson’s book furnished the line quoted and made famous by Coase, comparing corporations to “islands of conscious power in this ocean of unconscious co-operation, like lumps of butter coagulating in a pail of buttermilk.” D. H. ROBERTSON, *THE CONTROL OF INDUSTRY* 84 (1923), *quoted in* R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388 (1937).

system.<sup>38</sup> He includes familiar protests against advertisers who “[f]rom every hoarding and newspaper . . . explain vociferously to the consumer what he wants, until he almost—but not quite—comes to believe that it is true,”<sup>39</sup> among other complaints.<sup>40</sup> Robertson reviews prevailing (then and now) solutions to these problems, most of which involve the palliatives of general welfare legislation.<sup>41</sup> Hitting on the consumer agency problem formulation, Robertson writes that such remedies, “all embody, in one form or another, the ambitious notion of undoing the great division of function which first took place when Eve picked the apple and Adam ate it, and reintegrating the consumer with the producer.”<sup>42</sup>

There was promise in Robertson’s image, but he did not quite see it. There may have been a division of labor between Adam and Eve, but there was no agency problem as such. As spouses, their well-being was inextricably intertwined.<sup>43</sup> There is no tension or division of interests between production and consumption where the functions are separated under such affective conditions. Eve has no incentive to mangle or thieve, since any harm that comes to Adam from bad fruit is suffered by her too. Love aligns their interests better than any stock option plan could hope to. It is true that Eve faltered in her production responsibilities, and that Adam bears the burden of her lapse when he consumes.<sup>44</sup> They are both expelled from Paradise. But there is a difference between what it means to lose Paradise through manipulation or indifference, and what it means to lose it through loving incompetence. She *meant* well.<sup>45</sup> The social relations attending the consumption are crucial to characterizing its meaning, its significance, and the world that the

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38. *Id.* at 101.

39. *Id.*

40. *Id.* at 101–03.

41. *Id.* at 103. *But see infra* text accompanying notes 104–09 (criticizing the view that corporate abuses can be effectively policed through general welfare legislation).

42. ROBERTSON, *supra* note 37, at 103.

43. “Therefore shall a man [or woman] . . . cleave unto his [or her] wife [or husband]: and they shall be one flesh.” *Genesis* 2:24.

44. “God called unto Adam . . . Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?” *Genesis* 3:9–11.

45. “[W]hen the woman saw that the tree *was* good for food, and that it *was* pleasant to the eyes, and a tree to be desired to make *one* wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her . . .” *Genesis* 3:6.

consumption is making. The consequences of their consumption, calculated only by countable things, like lost leisure time in the Garden, or hours later suffered tilling arid soil or engaged in painful childbirth, may be the same whether their expulsion was a result of being fooled or being foolish. But there is a subtler meaning to their consumer experience that resides in the nature of the relationship between producer and consumer. It is the difference between the Snake fooling Eve into taking the apple, and Eve (merely) foolishly giving the apple to Adam.<sup>46</sup>

Emphasizing the meaning that abides in the social relations of consumption compels a departure from focusing on marketing and advertising as the oracle of consumer culture. Or, put better, showcasing the social relations of consumption adds an important variable to the hermeneutics of consumer culture that otherwise puts more pressure on marketing analysis than it can effectively bear. We cannot understand the consumer culture of the Garden only by evaluating the words and manner deployed in saying, “try this luscious apple.”<sup>47</sup> The Devil might have used razzle-dazzle. Eve may have used sex appeal. The formal attributes of the speech can tell us something about what the apple consumption “signified,” beyond the crunch and sweetness of the fruit. But to more deeply understand the meaning of the consumption, to understand the soul that it makes and the cultural world that it creates, we must understand also the motive and institutional role of the producer in consort with the consumer.<sup>48</sup> This factor has largely been missing from both condemning and celebratory analyses of consumer culture, and it is what I mean to capture here.<sup>49</sup>

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46. “[T]he serpent was more subtil than any beast of the field . . .” *Genesis* 3:1.

47. See *supra* text accompanying notes 42–46.

48. The poets of labor have made a rich tradition of showing the unsuitability of the Garden of Eden for Adam and Eve, who, such poets insist, could only really be human through their *work*. See, e.g., LOUIS UNTERMEYER, *Eve Speaks*, in *THESE TIMES* 183, 187 (1917) (“Better the long uncertainty of toil . . . Than this enforced and rotting indolence.”). But for poets of consumerism the misery of the Garden must be the perversity of the miser, the absurdity of allowing the apple to be wasted in eternal exchange value, a deposit of humanity’s obedience to God’s command. Eve and Adam, one might say in a footnote, liberated the apple from this reification, and redeemed its use value. See LIVINGSTON, *AGAINST THRIFT*, *supra* note 20.

49. For example, a 500-page collection of riveting essays by leading cultural historians on the emergence of consumerism, contains nothing whatsoever on corporate law or corporate

My use of the “consumer agency problem” formulation replicates categories of analysis used in conventional corporate theory, because those categories have generated great insight in the traditional approach, and might usefully be redirected. Similarly, I use the “social relations of consumption” framework in an effort to redeploy an important insight of Marxism, an intellectual tradition that burns some distance from the flame of mainstream corporate theory, but which on this issue may be similarly illuminating. Marx used the term “social relations of production” to reference the set of relationships in which humans become enmeshed in order to sustain themselves. Different methods of production involve different kinds of social relations. For example, the social relations that a subsistence farmer must enter into in order to survive are very different from the social relations to which a wage laborer in a mechanized factory must submit in order to sustain herself. Marx emphasized that the social relations of production are essential components of the way human beings think about themselves and the world around them.<sup>50</sup> He famously wrote: “It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.”<sup>51</sup> While “the social relations of production” has proven a useful analytic tool,<sup>52</sup> it gives short shrift to the role of *consumption* in shaping men and women’s sense of their lives. As the contracts scholars Ian Macneil wrote in 1983, “[t]he social relations of consumption have perhaps in the past . . . [been] largely

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governance. CONSUMPTION AND THE WORLD OF GOODS (John Brewer & Roy Porter eds., 1993). This oversight is routine in discussions of consumer culture.

50. See Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1347 (1979) (internal citations omitted) (explaining that a Marxist “social psychology . . . begins with the idea that people interpret the material conditions of their existence in ways that make their experience coherent and adds that the primary, though not exclusive, material conditions shaping those interpretations are the social relations of production”) (citation omitted).

51. See KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 21 (Maurice Dobb ed., S.W. Ryazankay trans., 1970) (1904). This assertion, if not taken too rigidly, is entirely consistent with the claims of contemporary social psychology, which emphasizes the often unseen influences of situation in shaping human cognition, preference formation, and decision-making. See generally, Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. REV. 1 (2004) [hereinafter Hanson & Yosifon, *The Situational Character*] (summarizing and assessing psychological research of this sort).

52. See, e.g., Tushnet, *supra* note 50.



dependent on the social relations of production. They have now, however, become increasingly independent and, in the developed world at least, perhaps a good deal more important than the material social relations of production.”<sup>53</sup>

The separation of production and consumption under corporate capitalism implicates another Marxist concept that has no direct analogy in canonical corporate law scholarship, but which may be usefully exploited (no pun intended) in the assessment of consumer culture, and that is the idea of “commodity fetishism.”<sup>54</sup> Marx emphasized that under capitalist social relations of production, labor becomes “alienated” from the goods that it creates.<sup>55</sup> Workers no longer identify with the products of their labor (as they do under pre-capitalist conditions), and the role and identity of labor is invisible to the consumer of what is produced. Instead of reflecting the labor that made them, commodities come to be conceived in terms of their “exchange value,” that is, the amount of money they can be sold for on the open market. To consumers, this “exchange value” seems to exist *sui generis* in the commodity, like the power presumed to be present in the amulets of reverential fetish in “the mist-enveloped regions of the religious world.”<sup>56</sup>

Commodity fetishism is a powerful concept, but it is typically used to emphasize the negation of labor from the cultural significance of commodities, rather than to affirmatively assess the relationship of the consumer to commodities. This is a symptom of the over-emphasis on the social relations of production, and too little focus on consumption. Where Marxism-influenced scholars do examine the consumer relationship to fetishized commodities, they

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53. Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 387 n.151 (1983). See also *id.* at 406 n.202 (“[I]n any given historical setting, the social relations of consumption may be of more significant social effect than the social relations of production.”). Macneil does not appear to have pursued this idea in these terms in his subsequent voluminous writings, and his is the only use of the phrase “social relations of consumption” in the Westlaw database of Law Reviews and Journals (compared with seventy-four hits for “the social relations of production”). Search of Westlaw database of Law Reviews and Journals, August 4, 2015.

54. KARL MARX, 1 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 81–96 (Ben Fowkes trans., Penguin Classics 1992) (1867) [hereinafter MARX, CAPITAL] (explicating “[t]he fetishism of commodities and the secret thereof”).

55. *Id.*

56. See MARX, CAPITAL, *supra* note 54, at 83.

seem to reify the alienation Marx describes, rather than penetrating through it. Earlier, for example, I referenced the work of James Livingston, who celebrates consumerism as a means of liberating commodities from fetishized exchange value status, and personalizing their use values.<sup>57</sup> Analysts in this mode seem to leave it entirely to the consumer to endow the commodity with her own meaning, rather than construing that meaning in terms that are suffused with the social relations of consumption in the corporate milieu.

Instead of either condemning or celebrating consumer culture, I am aiming to explain the role that corporate law plays in sustaining these conflicting interpretations. Corporate capitalism may catalyze the alienation of labor from the goods it produces, but corporate social relations nevertheless constrain, shape, and contextualize the meaning of the consumptive occasion. Corporate law, of course, does not exhaustively describe the social relations of consumption in our society. But it provides one route into a characterization that may help explain the ambiguities of consumer culture that are at once so familiar, and so contradictory.

#### IV. CORPORATE GOVERNANCE AS A SOCIAL RELATION OF CONSUMPTION

The emergence of large, publicly traded corporations in the twentieth century reorganized capitalism in a way that minimized the role of individual capitalists and wealthy families, and elevated the role of professional corporate directors.<sup>58</sup> To solve the shareholder agency problem, corporate law introduces a particular

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57. See LIVINGSTON, *AGAINST THRIFT*, *supra* note 20, at xv.

58. See JAMES LIVINGSTON, *PRAGMATISM AND THE POLITICAL ECONOMY OF CULTURAL REVOLUTION, 1850–1940*, at 100 (1994) (“[T]he transition from proprietary to corporate capitalism entails the social (not the literal) death of capitalists in the same sense that the transition from feudalism to capitalism entailed the social death of the landed nobility.”); see also *supra* text accompanying notes 24–25. While executive officers and other corporate functionaries are crucial figures in the social relations orchestrated by corporate enterprise, I focus here on corporate directors, because this allows for narrowed and particular treatment of the issues, and because corporate law specifies that it is the directors who ultimately bear responsibility for corporate operations. See 8 DEL. GEN. CORP. L. § 141(a) (“The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.”).

social relation between shareholders and directors. In so doing, it also commands a particular social relation between directors and consumers. The most widely used corporate law in the United States, the law of Delaware, requires directors to manage their firms solely in the interests of shareholders.<sup>59</sup> Directors are permitted to deal solicitously with non-shareholders, but *only* where doing so is “rationally related” to furthering the shareholder interest.<sup>60</sup> Workers may be treated well if it will draw more productive workers to the firm, quality goods may be produced in environmentally responsible ways if doing so will attract consumers. But where the shareholder interest is in tension with non-shareholders, the shareholder interest must always prevail. The ambivalent meanings of our consumer culture reflect the reality that corporations sometimes serve shareholders by discerning and serving consumer desires, and corporations sometimes serve shareholders by exploiting consumers. It is not always possible, indeed, it is usually impossible, to identify and distinguish these two kinds of profit-seeking operations just by looking at the consumption behavior. Who can tell?<sup>61</sup> But there can be no doubt that both dynamics are ubiquitous. From a corporate law perspective, it makes no difference how the profits are made. Good faith for the shareholders is all Delaware will say.

Corporate law’s agnosticism as to how profits are made is obscured through the social relations of consumption which that same law incarnates. It is obscured because corporate directors are

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59. See John Armour et. al., *Delaware’s Balancing Act*, 87 IND. L.J. 1345 (2012) (giving evidence of, and summarizing explanations for, Delaware’s dominance). Some corporate law scholars disagree with my doctrinal characterization and insist that Delaware law provides directors with latitude to manage firms in the service of non-shareholders even where doing so compromises shareholder interests. See, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 95 (2012). I show why shareholder primacy really is the law of Delaware in David G. Yosifon, *The Law of Corporate Purpose*, *supra* note 27; see also David G. Yosifon, *Corporate Aid of Governmental Authority: History and Analysis of an Obscure Power in Delaware Corporate Law*, 10 U. ST. THOMAS. L.J. 1086 (2013) (extending this assessment).

60. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1985) (“A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”).

61. Is smoking cool, or is it manipulative? Is junk food delicious, or pernicious? One cannot say, in an ethically serious way, just by observing the consumption of cigarettes or junk food. Nor, I think, can one say so from an evaluation of tobacco or fast food advertising alone. See *supra* text accompanying notes 46–49.

not snakes, and they are not devils. They are human. Modern psychologists have confirmed what Adam Smith wrote in his *Theory of Moral Sentiments*: “Man [and woman] naturally desire[], not only to be loved, but to be lovely; or to be that thing which is the natural and proper object of love. He naturally dreads, not only to be hated, but to be hateful.”<sup>62</sup> Directors are motivated to see themselves as serving consumers, not mulcting them.<sup>63</sup> They are keen to see their corporate operations always as serving consumers, even though we must expect that this is not, in fact, what they are always doing. Directors avoid the dissonance that might otherwise arise in trying to both serve their shareholders and self-affirm as “lovely,” by patronizing overly sanguine conceits about the nature of their work.

In public settings, and no doubt in private ones too, corporate directors routinely insist that they are committed to ensuring that their firms operate as good corporate citizens.<sup>64</sup> That profit is not their guiding light, certainly not their only one, but rather, that they are committed to serving all of their stakeholders, including their workers and consumers. A familiar trope involves a director reviewing the arduous, but finally heroic, struggle their firm

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62. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 166 (Arlington House 1969) (1759); see also Hanson & Yosifon, *The Situational Character*, *supra* note 51, at 90–95 (reviewing social psychology research on the motive to self-affirm).

63. See Hanson & Yosifon, *The Situational Character*, *supra* note 51, at 94–95 (emphasizing the self-affirmation motive at that heart of human psychology). There has been little systematic or deep study of boards of directors as decision-making bodies as such. “The dynamics of boardroom teams—including how each director contributes to the cognitive output of the board as a whole—remain . . . shrouded in mystery.” The Second International Conference on Engaged Management Scholarship, Solange Charas, *Boardroom Theater: Actors, Actions and Their Consequences* 4 (2012). We do not have deep studies informing us about how directors think or how boards make decisions. This is perhaps necessarily so, as Board deliberations are confidential, even secretive, by their nature. The picture we sketch of this factor in the social relations of consumption must be drawn from corporate governance law, and fundamental insights of social psychology.

64. See David G. Yosifon, *The Dalai Lama and Corporate Law*, *THE CORPORATE SOCIAL RESPONSIBILITY PODCAST* (2014) (downloaded using iTunes) (describing and critiquing a public dialogue between directors of Silicon Valley corporations and His Holiness the Dalai Lama on the relationship between corporate operations and compassion); see also David G. Yosifon, *Is Corporate Patriotism a Virtue?*, 13 *SANTA CLARA J. INT’L LAW* (forthcoming 2016) (arguing that the commands of shareholder primacy conflict with morally legitimate imperatives of patriotic conscience, and suggesting reforms that would allow firms to operate more patriotically).

undertook, listening to community groups, engaging critics, and finally ceasing the doing of some nefarious thing: dumping, bribing, skimping, or misleading (the nefarious thing having inevitably begun under a previous management team).<sup>65</sup> It always starts out as a story about the company doing the right thing, irrespective of the cost. But then comes the inevitable *deus ex machina*, wherein the director reveals that it turned out that the socially responsible course was *also* profitable for shareholders. Because it encouraged buy-in among workers and consumers and the community. The director's vignette then becomes the *urtext* for that occasion's discussion of socially irresponsible corporate activity generally. The solution, plainly, is to get corporations to perceive that the responsible thing to do is also the profitable thing to do, just as happened in the director's vignette. Profit sacrifice is celebrated as no sacrifice at all, and corporate law is vindicated as being socially responsible.

Corporate directors regularly make this claim, that there is coherence—that there is *integrity*—between the interests of shareholders and those of non-shareholders. A prominent example is found in the book *Conscious Capitalism*, by John Mackey, founder, and a director, of Whole Foods Markets, Inc.<sup>66</sup> Mackey, a strong proponent of shareholder primacy in corporate governance,

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65. Case studies of corporate social responsibility campaigns reveal a pattern in which the worst offenders in a particular area relating to social responsibility are forced to confront their misdeeds by activists and interest groups, and then ultimately become responsible corporate leaders in the area. See Cristina A. Cedillo Torres et. al., *Four Case Studies on Corporate Social Responsibility: Do Conflicts Affect a Company's Corporate Social Responsibility Policy?*, 8 *UTRECHT L. REV.* 51, 52 (2012). Some observers see this as evidence of the effectiveness of contemporary corporate social responsibility pressures. *Id.* The pattern appears to tract the aphorism attributed to Mahatma Gandhi: "First they ignore you, then they laugh at you, then they fight you, then you win." This may be a *predictable* sequence of steps for activists in various domains. And the fact that the campaign "win[s]" in the end says something laudable about the campaign and the campaigners. But it says nothing commendable about the system in which the activists are operating. The fact that Gandhi was ultimately successful in establishing Indian independence is hardly evidence that the British imperial system was operating as well as might be hoped. Similarly, the success of activist movements aimed at forcing socially responsible policies on corporations should not be read as evidence of the appropriateness of the prevailing corporate governance system.

66. The book is co-authored by Raj Sisodia, a marketing professor at Bentley University. JOHN MACKEY & RAJ SISODIA, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* (2013). I refer to Mackey in the text for ease of usage, and because he is an influential director of a large, publicly traded corporation. No disrespect (nor letting off the hook) is intended to Sisodia.

proclaims that business is most profitable when it “consciously” cares for non-shareholders: “In addition to creating social, cultural, intellectual, physical, ecological, emotional, and spiritual value for all stakeholders, conscious businesses also excel at delivering exceptional financial performance over the long term.”<sup>67</sup> Mackey even predicts that because rapacious firms are less profitable, “[e]ventually, the marketplace will weed out businesses that aren’t sufficiently conscious.”<sup>68</sup> But this is plainly wrong. While profit maximization surely does not *inevitably* involve trade-offs between stakeholders, it is also true that sometimes profits can maximize through “insufficiently conscious” business practices. Indeed, if the weeds can make some profits, then they are likely to persist, even if other plants prove more profitable. Over fifty years ago, Armen Alchian showed that firms do not need to maximize profits in order to survive, they just need to make *some* profits.<sup>69</sup> If there is profit to be made in exploitative conduct, and “conscious” firms decline to reap it, the exploitative conduct will still happen. The profits will be made, and the firms that make them will continue to do business.

Even if it were true that shareholder primacy in corporate governance will “eventually” weed out firms that are not socially

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67. *Id.* at 35.

68. *Id.* at 276–77, 289. The only support Mackey offers for his claim that firms pursuing all stakeholder interests are more profitable than those that do not is his assertion that there are “dozens” of high-profile, successful firms operating under the tenants of conscious capitalism. *Id.* Dozens! Cf. Tobias Fünke, a fictional character in the television comedy *Arrested Development* who suffers from “never nudism,” a psychological affliction which compels him to never be fully nude, even when he showers. As the story develops, Tobias comes to embrace his identity as a “Never Nude.” In a scene that has become an internet “meme,” he holds forth at a Never Nude rally and bellows: “There are dozens of us. Dozens!” The line is played for laughs, and it gets them. Mackey’s “dozens” was probably not meant for laughs. See *Arrested Development: In God We Trust* (Fox television broadcast Dec. 21, 2003).

69. See Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 213 (1950) (“Realized positive profits, not *maximum* profits, are the mark of success and viability. It does not matter through what process of reasoning or motivation such success was achieved. The fact of its accomplishment is sufficient. This is the criterion by which the economic system selects survivors: those who realize *positive profits* are the survivors; those who suffer losses disappear.”); see also Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 579–80 (1990) (summarizing reasons why markets cannot force the reform of underperforming firms, including, perhaps most importantly, the inefficacy of markets for control, “given the ability of target managers to impose substantial costs and risks on unwanted bidders”).

conscious, we are still left *among* the weeds in our present world, and at all times sooner than “eventually.” Shareholder primacy apologists such as Mackey never say what kind of time-horizon they have in mind when promising convergence of stakeholder interests in the long-term. Is it a decade? A century? Millennia? As John Maynard Keynes put it, “[i]n the long-run we are all dead.”<sup>70</sup> How long until that fated day, when the profitability of conscious firms will “weed out” exploitative firms? Throughout his book, Mackey frankly acknowledges that “[i]f a business seeks only to maximize profits to ensure shareholder value and does not attend to the health of the entire system, short-term profits may indeed result, *perhaps lasting many years . . .*”<sup>71</sup> Many years may be all some people, values, or ecosystems have left. In the shorter-term, individual suffering, family disintegration, community collapse, and cultural decay may beckon. Consumers suffering exploitation in their eclipsing youth can take no comfort in the misty legend that “many years” from now shareholder-oriented firms will figure out that better profits are to be had by treating non-shareholders with dignity.<sup>72</sup>

Recently, several states, including Delaware, have adopted “Public Benefit Corporation” statutes which create a new form of business entity that *requires* directors to balance the interests of shareholders and non-shareholders in corporate operations.<sup>73</sup> The very existence of these Public Benefit Corporation statutes expresses the law’s understanding that socially responsible operations are not

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70. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923) (emphasis omitted).

71. MACKEY & SISODIA, *supra* note 66, at 52 (emphasis added).

72. “Eventually” is a reservation that significantly undermines the claim that shareholder primacy is consonant with non-shareholder interests. But the weakness of the “eventually” gambit evades scrutiny by mis-resonating with moral attitudes that celebrate “delayed gratification,” and criticize the hedonism of instant gratification. This illogically makes the “long term” feature of Mackey’s argument seem *more* impressive, rather than less.

73. See 8 DEL. GEN. CORP. L. § 365(a) (“The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that *balances* the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.”); see also David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?* (2015) (draft on file with author) (assessing ways in which the Delaware Public Benefit Corporation statute affects how the Delaware General Corporation Law should be interpreted).

*really* always consonant with profits. The fact that corporate directors are not rushing, or even crawling,<sup>74</sup> to adopt these organizational forms is evidence that they somehow know that profits and social responsibility are *not* always aligned, even if they will not acknowledge it clearly to themselves or others. The capital markets' failure to abandon conventional corporations to invest in forms that ensure equal attention to non-shareholding stakeholders gives the "acid bath of economics" to delusions that social responsibility and shareholder profits are always the same thing.<sup>75</sup> But the failure to recognize and speak the truth of stakeholder dis-alignment, and the truth of shareholder privilege in corporate governance, obfuscates the nature of the producer-consumer corporate relationship, infecting consumer culture with dis-integrity and ambiguity.

74. See Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 249–50 (2014) ("Overall, very few companies have opted into the public benefit corporation and its variations.")

75. See RICHARD A. POSNER, *SEX AND REASON* 437 (1992) ("Clear thinking . . . is obstructed by layers of . . . ideology, superstition, and prejudice that the acid bath of economics can help us peel away."). Of course the new social enterprise forms were hardly necessary to demonstrate this, since business has long had available to it standard forms of "for-profit" corporations that are more solicitous of non-shareholding interests than Delaware. For example, the New York statute has long stated that

(b) In taking action . . . a director shall be entitled to consider, without limitation . . . the effects that the corporation's actions may have in the short-term or in the long-term upon any of the following: . . . (ii) the corporation's current employees . . . (iv) the corporation's customers and creditors; and (v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.

N.Y. BUS. CORP. LAW § 717 (McKinney 2015). The reason that states like New York can get away with this kind of non-shareholderist language is precisely because Delaware dominates so completely in the sale of corporate charters. These states could probably not attract corporate business even if they copied and pasted Delaware's statute and case law into its own law. Therefore, these states might as well enjoy whatever expressive social responsibility comes with having multi-stakeholder language on its books. Indeed, the history behind these permissive provisions in these states' corporate codes is that they were developed in response to agitation from labor groups that were panicked by the mass layoffs attendant to the wave of profit-maximizing corporate takeovers in the 1980s. Labor groups were relatively influential in these states, and corporations were genuinely disinterested in what these states' corporate statutes said because they were not using them anyway, so it was relatively easy to get this multi-stakeholder language into these states' laws. See *generally* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992) (surveying statutes). There are no cases interpreting these permissive, multi-stakeholder provisions, because they are not real corporate law.



Human nature dictates that directors believe they serve shareholders by serving consumers. And corporate law dictates that those beliefs be formed in ignorance. Corporate law prescribes and constrains the way that directors think and talk about corporate decision-making. Directors have an obligation to become informed about and to deliberate on the consequences of corporate policy for the shareholders.<sup>76</sup> Directors' minds and voices are thus actively turned, by legal injunction, to contemplation of the shareholder interest. At the same time, corporate law forbids directors from giving supportive voice to policies that would aid non-shareholding stakeholders at the expense of shareholders.<sup>77</sup> Square pegs of social responsibility that cannot fit the round hole of shareholder primacy are left unplaced in the corporate conscience. While shareholder primacy reigns, corporate social responsibility in the boardroom is "the love that dare not speak its name."<sup>78</sup> And if it cannot speak, then it cannot fully flourish, and cannot be contrasted with or balanced against the one love that is normative for directors: the shareholder interest. This limitation on directorial discourse necessarily influences the mind, conscience, and decisions of corporate directors. The combination of forced speaking, on behalf of shareholders, and forbidden speaking, about non-shareholders, gives shape to a particular kind of knowledge and practice, and precludes others. It keeps directors thinking carefully about the shareholder interest, and thinking only casually about non-shareholder interests.<sup>79</sup>

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76. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

77. In every reported case where directors have admitted to sacrificing shareholder interests in favor of other stakeholder concerns, Delaware courts have found that the directors violated their fiduciary obligations to shareholders. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that directors were not permitted to privilege creditor interests over shareholder interests in the course of selling their company, which the directors admitted to doing); *Ebay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) ("I [Chancellor William Chandler] cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . .").

78. LORD ALFRED DOUGLAS, *Two Loves*, in *THE CHAMELEON* (1894).

79. The law of fiduciary duty thus engenders affective connotations between directors and shareholders. Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 599 (2001). But it mutes other affective processes. Empathy is developed by projecting one's own thoughts and feelings about a situation onto others, who we assume must feel things similarly to the way that we do. See June Carbone & Naomi Cahn, *Behavioral Biology*,

By limiting the form and content of directorial deliberation, corporate law ensures that the cognitive dissonance that might otherwise emerge in the simultaneous pursuits of profit-maximizing duty and self-affirmation finds instead easy harmonious resolution in directors' minds, and in the corporate conscience.<sup>80</sup> The particular construction of this coherence is shaped by corporate governance law, which pushes directors to devote their scarce cognitive and emotional resources in favor of the shareholder interest. We must suppose, at least at the margin, that the law of fiduciary duty will push dissonance reduction in a manner that privileges the shareholder interest, at the expense of other values.

An experiment by the social psychologist Dan Ariely captures the kind of boardroom shading that I have in mind. Ariely and his collaborators designed an experiment called the "Dots Test" which put subjects before a computer screen that flashed a series of images of squares with dots inside of them.<sup>81</sup> Sometimes the dots were distributed with more to the left side of the square, and sometimes they were distributed with more to the right.<sup>82</sup> For each image, subjects were told to determine which side of the square had more dots. The images flashed too quickly for subjects to actually count the dots, so they were forced to make uncertain judgments. Subjects were told they would receive one cent every time they hit the computer key indicating more dots on the left side, and five cents every time they hit the key indicating more dots on the right side.

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*the Rational Actor Model, and the New Feminist Agenda* 11 (Geo. Wash. U. L. Sch. Pub. L. and Legal Stud. Res. Paper, Series Paper No. 276, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=98448](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=98448) (citing contemporary studies of empathy). Directorial loyalty involves putting shareholders above other stakeholders, and it also involves putting shareholders above directors themselves. For the fiduciary, "thought of self [is] to be renounced, however hard the abnegation." *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928) (Cardozo, J.) (explaining loyalty). This suppression of the self marginalizes the mechanism that produces empathy. This may be the secret mission of the duty of loyalty. It is not the selfishness but rather the *selflessness* of the fiduciary that makes him such a danger to others. The selfless individual is not *more* capable of empathy, he is less capable of it. The fiduciary relationship intensifies one's devotion to a particular person or group, but diminishes one's capacity to be concerned for others.

80. On the importance of dissonance avoidance in contemporary models of human cognition and decision-making, see Hanson & Yosifon, *The Situational Character*, *supra* note 51, at 107–25 (summarizing social psychological studies).

81. See DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY* 126–30 (2012).

82. *Id.* at 127–29.

Subjects were also told that they would not be evaluated for the correctness of their answers.<sup>83</sup> Ariely summarizes his scheme: “[b]y creating this skewed payment system, we gave the participants an incentive to see reality in a slightly different way . . . . [T]hey were faced with a conflict between producing an accurate answer and maximizing their profit.”<sup>84</sup> Subjects then responded to two-hundred images flashed in rapid succession.

A silly, stylized rational-actor model of human behavior would predict that subjects would systematically hit the key indicating more dots on the right, because their decisions were unreviewable, and five cents is better than one cent. But as realistic models of human decision-making predict, this is not what happened. Instead, the experimenters found a widespread tendency towards a little bit of cheating, and no self-conscious recognition of cheating.<sup>85</sup> That is, people were biased towards the higher-paying interpretation of what they were seeing, but they viewed themselves as making fair and objective assessments. Of perhaps particular relevance to the decision-making dynamics of the boards of our most powerful corporations, Ariely found that “creative” individuals were more prone to click on the right (higher paying) key than were other types of people. The greatest divergence between “creative” types and the baseline population came in squares with a small difference in the number of dots on the left and right. The creative types were not more prone to engage in “bold” lies, but rather, were more prone to “lie,” to themselves and the experimenters, at the margins. Ariely concludes: “the link between creativity and dishonesty seems related to the ability to tell ourselves stories about how we are doing the

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83. In corporate law terms, subjects were given business judgment rule protection for their answers on the dots test. *See infra* notes 115–16 and accompanying text (noting that under the “business judgment rule,” courts will not evaluate the substance of business decisions that corporate boards make in good faith).

84. ARIELY, *supra* note 81, at 129.

85. *Id.* at 163–91. Ariely argues that there is a fundamental human tendency to be “morally flexible” in this way (it is “hardwired,” if you must), but he emphasizes that “cultural context” can influence the “magnitude of the fudge factor that is considered acceptable for any particular domain.” *Id.* at 242. Again, by “acceptable,” he means acceptable not just to observers, but to the liar him or herself.

right thing, even when we are not.”<sup>86</sup> Governing under the substantive and procedural dictates of shareholder primacy, directors can privilege the shareholder interest, and short-change other shareholders, all the while subjectively believing that their decisions are not just profitable for shareholders, but fair to everyone involved.

Of course, it would be naïve to think that directors always actually put their shareholders first, consciously or subconsciously. Sometimes it seems obvious that corporate directors are ignoring the law of corporate governance and are sacrificing corporate profits in favor of some other value.<sup>87</sup> These exceptions further highlight the dis-integrity brought on by the rule. Especially in such instances, the law of corporate governance, with its insistence of shareholder primacy, forces opacity, and disingenuousness into the deliberative process in the boardroom, making it impossible to draw anything but muddled conclusions about the meaning and significance of corporate operations in our culture.

Consider, for example, this tale that comes out of the sub-prime mortgage debacle. In the fall of 2008, Bank of America was poised to buy the investment bank Merrill Lynch, which was going down in a sea of bad debt.<sup>88</sup> After a merger agreement was in place between the two firms, Merrill Lynch’s financial position worsened (from an already dire situation). Bank of America’s board considered abandoning the merger, which it may have had the right to do under the standard “material adverse change” clause of the merger

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86. *Id.* at 172. Interestingly, Ariely’s research team found no correlation between higher or lower “intelligence” as such and the tendency to cheat in a manner that deviated from the norm. *Id.* at 176.

87. Doug Baird and Todd Henderson argue that corporate directors routinely engage in behavior that is not even arguably consistent with the idea that directors owe fiduciary obligations exclusively to shareholders. Douglas G. Baird & M. Todd Henderson, *Other People’s Money*, 60 STAN. L. REV. 1309 (2008). One example they give is the practice of firms electively filing for bankruptcy, which provides an orderly structure for dealing with creditor claims, but extinguishes shareholder claims altogether. *Id.* at 1320. My claim is not that the shareholder primacy norm precludes boards from ever engaging in socially responsible decision-making. Rather, my view is that the shareholder primacy norm distorts the discourse and precludes the kind of completeness in deliberation that would allow for better, more coherent decisions.

88. See Robert J. Rhee, *Fiduciary Exemption for Public Necessity: Shareholder Profit, Public Good, and the Hobson’s Choice During a National Crisis*, 17 GEO. MASON L. REV. 661 (2010).

agreement.<sup>89</sup> Bank regulators within the federal government, however, believed that a collapse of the Bank of America-Merrill Lynch merger would devastate already staggering credit markets, threatening to destroy the American economy (and possibly the global economy).<sup>90</sup> That is, regulators were concerned that a privately useful decision by Bank of America's board might be socially irresponsible. This the regulators communicated to the directors. Also, the regulators communicated that if the board insisted on exercising its right to terminate the merger, the government might feel compelled to exercise its power under federal banking regulations to remove the incumbent members of the Bank of America board, in the public interest.<sup>91</sup>

Lo and behold, upon further deliberation, the Bank of America directors decided they would, after all, go ahead with the merger.<sup>92</sup> In his engaging review of this episode, Professor Robert Rhee concludes that the directors were obviously influenced by the regulators' threat to replace the board, and it seems likely that the directors were also genuinely concerned about the pressing social interests at stake in their decision.<sup>93</sup> However clear this is, it is even clearer that the social responsibility implicated in their decision played no part in the explicit deliberation of the board. The minutes reflect that the board concluded the decision was in the shareholder interest.<sup>94</sup> The statements of individual board members testifying before Congress reflect the same. Those minutes and that testimony were entirely predictable. They could have been written by anyone familiar with the board's decision, but unfamiliar with the board's deliberation. This is because *any* other explanation of the decision would have been a confession that the directors had violated their fiduciary obligations to their shareholders. And yet the statements appear to be entirely unbelievable (except, perhaps, to the board members themselves). *At best*, our highest-level corporate discourse

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89. *See id.* at 669–72.

90. *See id.*

91. *See id.*

92. *See id.*

93. *Id.* at 684 (“The board minutes plainly state that the government’s threat did not influence the board members, though such self-serving notice, by itself, cannot be taken seriously.”).

94. *See id.*

about this pressing social crisis was had through winks and nods, dumb and indecorous innuendo. In this way our corporate law creates corporate speech on corporate social responsibility that is at once entirely predictable, totally unbelievable, and utterly useless.

A critical (realistic) observer of the Bank of America-Merrill Lynch transaction is forced into incredulity or cynical amusement reading the directors' assertions that the decision to proceed with the merger was made because they decided it was in the shareholders' interest.<sup>95</sup> Always our discourse on corporate operations must be subsumed within this clouded mindset. It is corporate law, through the shareholder primacy norm, which keeps our corporate directors from talking openly and honestly about what is at stake and what should wisely be done about it. It is corporate law that imposes this cynicism on our conversations about what corporations are and what they are doing. The shareholder primacy norm in corporate governance creates the perverse situation in which serious assessment of corporate decision-making relating to socially pressing matters must *begin* by discounting the actual deliberations by directors making the decision.

Rhee, reflecting a general consensus among corporate law scholars, writes that “[t]hese elisions are the white lies of corporate law, not malicious or mendacious, but perhaps necessary to maintain a proper decorum of law and policy.”<sup>96</sup> But if these lies are necessary to maintain a proper decorum in the very domain where law and policy most explicitly condemns lying (“[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard”),<sup>97</sup> perhaps the decorum is masking something indecorous in law and policy. If we cannot trust that what is said in the boardroom is the real story, then how can we make sense of the corporate decisions that come out of them? What kind of meaning, other than a confused and indeterminate one, can we take from corporate conduct? Our current corporate governance law, together with attendant theory, norms, and ethics, practically requires, and certainly encourages, this kind of insincerity. This breeds cynicism

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95. *See id.* at 672.

96. *Id.* at 698.

97. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (providing a classic exposition of the meaning of fiduciary obligation).

and skepticism, which become core features of corporate capitalism's consumer culture.

#### V. PRESCRIPTIVE INTEGRITY IN CORPORATE LAW AND CONSUMER CULTURE

Nobody wants to return to the “penurious self-sufficiency of the household system,”<sup>98</sup> much less the dreary, limited cultural life it contained.<sup>99</sup> Corporate law critics should recognize, respect, and help advance the transcendent power of consumerism. Reformers seeking to constrain the exploitative aspects of consumerism must eschew prescriptions that threaten to cripple the efficient production of goods and services that the corporate form provides. Critics must pursue their progressive aims without getting trapped in the role of the joyless scold who seeks to censor consumer marketing that deploys sex, humor, or whimsy in “misleading” ways.<sup>100</sup> The challenge is to find a way to improve upon the quality of consumer culture without limiting its creativity and freedom.

Some corporate critics seek to do more than censor. Sonya Katyal explores the emergence of (what she calls) “semiotic disobedience” as a response to the corporate control of cultural meaning.<sup>101</sup> “Semiotic disobedience” is the practice of disrupting and re-appropriating corporate control of social meaning through “culture

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98. See ROBERTSON, *supra* note 37, at 104.

99. Of course some people and sub-cultures in our society do choose a life of material privation and self-sufficiency. See, e.g., SCOTT DANNEMILLER, *THE YEAR WITHOUT A PURCHASE* (2015) (memoir of a family's experiment of dropping out of consumer culture). But the meaning of such a life is very different when it is chosen than when it is the only option society contains.

100. See, e.g., my own earlier proposal to address the obesity epidemic by prescribing a “tombstone” advertising regime for junk-food products, which would limit advertising of such goods to black lettering on white background, describing in simple, precise terms the item offered, its ingredients, price, and place of provision, in David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507 (2006) [hereinafter Yosifon, *Resisting Deep Capture*].

101. Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 489–90 (2006). Katyal's phrase references the idea of “semiotic democracy” developed by the media studies scholar, John Fiske. “[S]emiotic democracy” stands for the proposition that language, symbols, and all manner of commercial expression are subject to reinterpretation by recipients of such expression, in ways that may dramatically alter the speakers' intended meaning. *Id.* (citing Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 139 (1993)).

jamming” activities, including unauthorized use of intellectual property to convey anti-corporate personal or political messages.<sup>102</sup> Semiotic disobedience treats as a scarce resource the physical embodiments of expression, especially in the public sphere, and its attitude laudably recognizes the limited cognitive capacity of speakers and listeners, which traditional First Amendment discourse has been loath to address. This is culture *jamming*, not one more contribution to an imagined free-flowing river of meaning.<sup>103</sup>

But “semiotic disobedience” is no way to run a country. Its proponents, and other corporate antagonists ranging from the Tea Party members to activists in the Occupy movement, speak in desperate terms about the role of corporations in our society, terms that I fear increasingly resonate with widening swaths of Americans. I am looking for a constructive way of responding to this desperation. A thoughtful, peaceful, deliberative approach to renegotiating the meaning of consumer culture might better take place through the reform of corporate governance law.

Many academic proponents of shareholder primacy in corporate governance acknowledge that their preferred regime creates an incentive for firms to overreach in dealing with potentially vulnerable stakeholders, such as workers or consumers.<sup>104</sup> However, shareholder primacists insist that this problem should be addressed through reliance on *external* governmental regulation aimed at containing these kinds of abuses, such as labor laws, and consumer protection statutes, rather than reform of corporate governance law. Government regulation of that sort, they insist, will force shareholder-primacy firms to pursue profits in non-exploitative ways.

In previous work, I have argued that this external “general welfare legislation” response to the consumer agency problem does not add up, even on the canonical account’s own terms.<sup>105</sup>

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102. See generally *id.*

103. See Yosifon, *Resisting Deep Capture*, *supra* note 100, at 599–601 (insisting that First Amendment theory must fully grapple with a fundamental problem that it too often refuses to acknowledge: the cognitive and temporal limitations on human speech and listening).

104. See, e.g., BAINBRIDGE, *supra* note 5, at 68–72 (insisting that corporate exploitation of non-shareholders should be cured by external regulation, not corporate governance law).

105. See, e.g., David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197 (2011).



Corporations seek profits for shareholders not only in “markets,” but also in the legislative arena, by working to stunt the development of the “general welfare legislation” that shareholder primacists insist is necessary to constrain the corporate overreach they acknowledge is endemic to their system. The logic of collective action suggests that corporations—relatively small in number, focused in purpose, led by talented professionals—will routinely prevail over widely dispersed workers, consumers, environmentalists, and communities, in the competition for regulatory favor.<sup>106</sup> This problem has been ossified by the ruling in *Citizens United v. Federal Elections Commission*,<sup>107</sup> which specifies that corporations have a First Amendment right to operate in the political domain.<sup>108</sup> Indeed, if it is true that consumer culture depoliticizes individual and collective understanding of the human predicament, then that would pose an additional challenge to the canonical account of shareholder primacy, which presupposes a robust political dynamic that can generate a regulatory regime capable of constraining the externalizing tendencies of shareholder primacy in corporate operations.<sup>109</sup>

I urge a reformative program that alters the social relations of consumption. The reform I have in mind would require directors to sincerely consider the impact of corporate decision-making on multiple stakeholders, not simply shareholders. This sincerity gambit would regulate the way that corporate law requires directors to speak about and to consumers.<sup>110</sup> It does not compel or forbid speech on particular subjects, nor does it specify the form or content of speech. It regulates the deliberative process through which corporate speech is generated, and it sets new default rules for what kind of speech

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106. See generally Hanson & Yosifon, *The Situational Character*, *supra* note 51.

107. 558 U.S. 310 (2010).

108. See also David G. Yosifon, *Consumer Lock-In and the Theory of the Firm*, 35 SEATTLE U. L. REV. 1429, 1449 (2012) [hereinafter Yosifon, *Consumer Lock-in and the Theory of the Firm*] (“So long as *Citizens United* is good constitutional law, shareholder primacy is bad corporate theory.”); David G. Yosifon, *The Citizens United Gambit in Corporate Theory: A Reply to Bainbridge on Strine & Walker* (Santa Clara Univ. Sch. of Law, Working Paper No. 4-14, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2510967](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510967) (responding to Bainbridge’s claims that *Citizens United* does not raise doubts about the legitimacy of shareholder primacy theory).

109. See *supra* text accompanying notes 10–17.

110. See Yosifon, *Consumer Lock-in and the Theory of the Firm*, *supra* note 108, at 1429.

different actors in the corporate nexus are entitled to.<sup>111</sup> It is a way of getting corporate boards to discuss more openly and honestly what their firms are doing. By reforming corporate governance in this way, the law can help consumer culture be more honest. It can give consumer culture more integrity.<sup>112</sup>

Directors would still be charged with pursuing profits for shareholders. To till the arid soil, and make beautiful electronics, we must use the productive capacity of aggregated capital and centralized decision-making that the corporate form provides. Without a credible promise of profits, capital will be no more willing to participate in corporate operations than would consumers without consumption or labor without wages. As an initial guiding principle, the law should instruct corporate directors to seek profits for shareholders. But that principle should be circumscribed by an obligation to actively, honestly, and sincerely undertake that pursuit in a way that is mindful of the interests of non-shareholding stakeholders in corporate operations. The law should require this reflection, then give directors wide latitude in allowing the reflection to shape corporate decisions.<sup>113</sup>

This is an attempt to influence meaning by orienting motive, without controlling content. It avoids the narrowness and blandness, the cold social and cultural life, prescribed by a discursive regime focused on truth and falsity. We must have sincerity, clarity, and straightforwardness at the core of the consumer relationship with the firm, so that we can with confidence enjoy the play and exploration occasioned by looser speech at the periphery. As Jeffrey Lipshaw

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111. See David G. Yosifon, *Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders*, 21 HEALTH MATRIX: J. OF L. MED. 189 (2011).

112. See Werner H. Erhard, Michael C. Jensen, & Steve Zaffron, *Integrity: A Positive Model that Incorporates the Normative Phenomena of Morality, Ethics, and Legality* (Harvard Business School NOM Unit Working Paper No. 06-11, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1542759](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542759) (developing an approach to “integrity” that the authors argue will result in more substantial improvement in corporate operations than has been accomplished by Jensen’s work on the agency problem).

113. A reform of this sort would require federalizing corporate chartering in the United States, or at least a much deeper federal preemption of state corporate governance standards than is presently seen under the federal securities laws. If Delaware were to give up shareholder primacy (unthinkable) then another state would quickly offer it, given that states can internalize the benefits of charter-sales to their own coffers, while externalizing the costs of corporate over-reach to other states or countries. While states charter corporations, shareholder primacy will continue to dominate American consumer culture.

notes, “it is not morally wrong to tell a bride [or groom] the white lie that she [or he] is beautiful even when she [or he] is not.”<sup>114</sup> The meaning of the speech, whether it is a lie, puffery, or whimsy, turns on the purpose of the speaker. In the corporate context, we can change the purpose of the speech, and thus its meaning, without constraining its creativity.

A multi-stakeholder corporate governance regime could be institutionalized through the same light-handed but psychologically sophisticated mechanisms through which corporate law presently imposes its shareholder primacy rule. Adhering to the “business judgment rule,” courts do not second-guess the substance of business decisions that boards make.<sup>115</sup> What courts require is that decisions are informed and deliberate. This implies a responsibility to listen and to speak. Self-affirmation and dissonance avoidance motives push us to conform our beliefs to our behavior, including our speech. Note the counter-intuitive order here—it is a crucial insight of contemporary psychology. Sometimes we speak without thinking very much, or speak to serve some external goal or satisfy some external charge, and then we *become* concerned with making our thinking correspond with our speech.<sup>116</sup> Studies have shown the ease with which this can happen, even when there is an obvious external stimulant or inducement to our speech.<sup>117</sup> Requiring directors to express an obligation to multiple stakeholders can stoke within them such a commitment. The corporate soul is already made through this kind of confessional discourse, and it can be remade that way:

[T]he agency of domination does not reside in the one who speaks [the director] (for it is he who is constrained), but in the one who listens and says nothing [the law, the beneficiary] . . . . And this

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114. Jeffrey M. Lipshaw, *Of Fine Lines, Blunt Instruments, and Half-Truths: Business Acquisition Agreements and the Right to Lie*, 32 DEL. J. CORP. L. 431, 457 n.124 (citing Jonathan Sacks, *The White Lie*, in COVENANT AND CONVERSATION: THOUGHTS ON THE WEEKLY PARSHA FROM THE CHIEF RABBI (Dec. 25, 2004), <http://www.chiefrabbi.org/thoughts/vayechi5765.pdf>).

115. See BAINBRIDGE, *supra* note 5, at 106–29 (explaining and justifying the business judgment rule).

116. See Hanson & Yosifon, *The Situational Character*, *supra* note 51, at 107–11 (reviewing studies).

117. See *id.* (reviewing studies).

discourse of truth finally takes effect, not in the one who receives it, but in the one from whom it is wrested.<sup>118</sup>

The new Public Benefit Corporation statutes do not provide any redress to non-shareholders for corporate governance failures. Delaware, not famous for lucidity in its statutory drafting, took unusual pains to be clear on this point: “A director of a public benefit corporation shall not . . . have *any* duty to *any* person on account of *any* interest of such person in the public benefit or public benefits identified in the certificate of incorporation . . . .”<sup>119</sup> My approach does not envision much enforcement by consumers, or other constituencies, in a multi-stakeholder corporate governance regime, but it envisions more than nothing. Under a multi-stakeholder regime, directors would have a duty to become informed and deliberate on the impact of corporate decisions on multiple stakeholders. If that obligation were met, courts would not second-guess directors’ choices. However, under prevailing law, if directors do not satisfy their process obligations in good faith, they lose business judgment rule protection and have the burden of demonstrating that their decisions were entirely fair to the corporation and its shareholders. Similarly, in the reform I imagine, directors who fail to engage in a good faith deliberative process in corporate decision-making would expose themselves to liability unless they could demonstrate that the decision was fair to all stakeholders involved.<sup>120</sup>

Different institutional details could be worked out through this basic framework. Beneath a certain size of operations, it may be

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118. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 62 (Random House 1990) (1978). Or, if you will not have the Foucault, see Lawrence Mitchell making the same point with a lawyer’s clarity: “[t]o understand the importance of being trusted is to understand the way in which the responsibility for trust reposed can affect character. It can create virtue where little had previously existed.” Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 599 (2001).

119. 8 DEL. GEN. CORP. L. § 365(b) (emphasis added).

120. Within a multi-stakeholder governance regime it will have to be acknowledged that different stakeholder interests will sometimes be in tension. Directors will at times be forced to make hard choices. We can be confident that they will be able to make hard choices between competing interests, because they already do this all the time even under the shareholder primacy norm, for example, with respect to shareholders with competing risk tolerances, or time-horizon preferences. Directors are able to manage these conflicting interests presently because the substance of their decisions is non-reviewable.

desirable to maintain a shareholder primacy default, in order not to lose the catalytic power of the entrepreneurial incentive. This suggestion apes existing federal regulatory practices, which only apply to corporate operations that have become large enough to be economically and socially relevant on a national scale.<sup>121</sup> Even once the multi-stakeholder governance threshold is reached, it still need only be a default, one from which corporations can opt out of through engagement with extra-market processes, such as a vote by non-shareholding stakeholders who have “backed into” a fiduciary treatment by the firm. Through such mechanisms a multi-stakeholder firm could turn to governance on behalf of only its shareholders, its workers, or its consumers. Of primary importance in the design of business organizations is not whether governance rules are mandatory or mutable. What is crucial is what the default rule will be.<sup>122</sup>

## VI. CONCLUSION

Consumer culture is a part of our culture. It is one of the important ways that individual and social meaning is made, negotiated, and contested, in modern society. It operates alongside other important cultures and sub-cultures, but it indisputably is a part of how we live now. This is why it is nostalgic, per the Franzen epigraph at the start of this Article,<sup>123</sup> to ignore it. Policymakers, scholars, artists—people concerned with critically assessing the human condition—set themselves too small a project if they pass over consumer culture.

Where consumer culture is not ignored, two interpretations echo, never far from each other, in the interpretive landscape.

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121. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS 155–63 (2012) (describing market capitalization thresholds that determine when firms become subject to governance regulations under the Sarbanes-Oxley and Dodd-Frank reforms).

122. *See* Yosifon, *supra* note 73. It is a common mistake to draw from Ronald Coase’s famous article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), the lesson that default rules are irrelevant so long as parties subject to them are allowed to bargain to a more desirable result. Coase himself emphasized that the main insight of his article was that transaction costs are often prohibitively high, and, therefore, getting the default right as a matter of social policy is crucially important.

123. *See supra* text accompanying note 2.

Consumerism is demeaning and exploitative. Consumerism is satisfying and liberating. Those who only celebrate it seem naïve, but those who only condemn it lose us in their pretension. Doubtless there is an element of truth to both perspectives. Yet this stark ambivalence suggests a confusion at the core of our thinking about consumer culture. This confusion can be traced to a lack of integrity in the social relations of consumption. I have suggested that at its core, consumption under corporate capitalism must be understood through the same “agency problem” framework that has guided corporate theory’s rich understanding of the shareholder’s predicament in our society. The separation of production and consumption makes the nature of the relationship between producer and consumer a principle part of the meaning of consumer culture. The law of corporate governance, led by the corporate law of Delaware, takes this theoretical problem and makes it live in the world. Shareholder primacy in corporate governance law, as it operates through human corporate directors, it gives rise to a corporate relationship with consumers that is confused, confusing, and undesirable. Prevailing corporate governance law encourages firms to deal with consumers in an insincere way, and contributes to a consumer culture that lacks integrity.

The social relations of production under simple, affective kin and community relations cannot (are unlikely to) produce a consumer culture that is transcendent and deeply liberating. The separation of production and consumption creates the efficiencies and attenuation that are more likely to endow a liberating, pluralistic, experimental type of consumer culture. That consumer culture, however, will always be haunted by the consumer agency problem so long as production and consumption is undertaken under the shareholder primacy norm. There will always be, must always be, a suspicion that consumer culture is inauthentic, that it lacks integrity, that there is manipulation in it. Consumer culture under corporate capitalism must then always remain fundamentally ambivalent, or ambiguous, constraining its creative and liberating power.

I have suggested a reform program that would require directors of large corporations to actively attend, openly and honestly, to the interests of multiple stakeholders, including shareholders, workers, and consumers, at the level of firm governance. This is an “orienting” approach to improving the quality of consumer culture, one that avoids the cultural desert of the censor, even as it ushers in a

more sincere system of meaning in consumer culture. The “Keynesian consensus” in modern policymaking presumes “more consumption is the key to balanced growth in the future.”<sup>124</sup> Before we can embark on this consumption and enjoy that growth in good conscience, we must have some faith and confidence in what it means to consume in the corporate system.

The social relations of consumption are but one aspect of the meaning of consumer culture. They explain only a part of the mystery of consumption. Endowing these social relations with greater integrity will not give us final answers about the value and meaning of consumerism. We will still be left with the deeper questions: is simplicity or complexity in consumption the better route to personal happiness and social justice? Does the quickness with which we become bored with a particular consumer delight, and start looking for a new one, reflect superficiality in us, or does it reflect well on our unquenchable curiosity, showing that the world is always short of us, that we are always grasping beyond it? Should we buy now or save for later? Can we develop, as has been sought from Aristotle to Norman O. Brown, “a science of human nature, able to distinguish real human needs from (neurotic) consumer demands”?<sup>125</sup> Reforming corporate governance law will not answer these questions for us. But it may help us finally get to these questions, free from the confusions attendant to disjointed social relations of consumption.

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124. LIVINGSTON, *AGAINST THRIFT*, *supra* note 20, at x.

125. BROWN, *supra* note 1, at 256.