

Are Moral Firms Committed Firms?

Colin Mayer

Corporate purpose is everywhere, but will it stay? Is it a business revolution or a passing fad, destined to go the way of so many business concepts? Reliance on the good judgment and goodwill of corporate leaders is a justifiable cause for concern, and resort is often sought instead in the apparently safe harbor of public regulation. But reliance should not be placed on governments and regulators alone to constrain the corporate giants in the face of a system that motivates abusive behavior. Instead, attention should be devoted to alignment of the intrinsic interests of corporations with those of society more generally.

Rebecca Henderson's essay "Moral Firms?" in this issue of *Dædalus* is a compelling and powerful call for a new moral economy.¹ It argues that business has the potential to go beyond its currently perceived function as an engine of profit for its shareholders to play a pivotal role in addressing many of the failings that afflict our economic and political systems. Her essay points to important examples of what has and is being achieved, and the way in which business is grasping the environmental and social challenges it faces.

Henderson correctly notes that business is often regarded as psychopathic in promoting its own interests at the expense of others.² The essay could do more to explain the features of companies that avoid that characterization and succeed in moving beyond their self- to other-regarding interests.³ How does business combine its traditional financial objectives with the broader ones that the new purpose-driven proponents advocate? Is all that is required more enlightenment on the part of corporate leaders, and, if so, what is meant by enlightenment in this context?

The notion of enlightenment is captured in what is termed "enlightened shareholder value." This is the basis of some legal forms of the corporation, such as in the UK Companies Act of 2006.⁴ However, this is quite restrictive in suggesting that companies should only promote the interests of their stakeholders insofar as that assists in enhancing the success of the company and its shareholders over the long term.⁵ Is this sufficient in addressing the environmental and social challenges that economies and societies face, or is more required of business? If the latter, how should this be realized and has it been achieved anywhere to date?

Henderson gives several examples of companies that are meeting the aspirations of those who believe that business can play a transformational role in creat-

ing a better world.⁶ The question that these firms raise is: are they not only doing good things but doing them in a way that we can feel confident will persist? That is, can the winners of today's best business awards avoid, as has too often been the case in the past, becoming tomorrow's corporate collapses and scandals, or the subjects of hedge fund activism and hostile takeovers? If so, what are the characteristics of these firms, and what can we learn from them that is and should be transferable to others? If we cannot now identify businesses that have and will continue to succeed in delivering environmental and social, as well as financial, benefits, what will allow us to in the future?⁷

The purposeful, responsible business agenda is at a critical juncture. It has attracted a global following of corporate leaders who purport to be advocates of the new movement. But one could, often justifiably, interpret their conversions more cynically as no more than an opportunistic exploitation of the emerging zeitgeist and avoidance of regulation on the road to Wall Street.⁸ Critics thus frequently advocate for the importance of exerting pressure from outside the firms. As Margaret O'Mara concludes in her excellent accompanying response to Henderson's essay, "as it was in a Gilded Age dominated by railroads, oil, and steel, the path to the 'moral firm' most likely will come not from within the corporation, but from popular politics and regulatory action outside of it."⁹

I do not doubt the need for regulation to complement purposeful business. But history does not lend much optimism to the conclusion that regulation might be a substitute for or sufficient in taming the corporate giants. If it were so, then we would not be where we are today, looking down the barrel of extinction and failing democracies. The prospects for regulation are caught in the shadow of the manifest failure of democracies to cope with the most egregious forms of corporate abuse, such as in the Global Financial Crisis of 2007–2008, Volkswagen emissions scandal, and ongoing opioid crisis. What is still more worrying is the capacity of increasingly fragmented national governments to confront the growth of global natural monopolies in everything from social networks and access to knowledge and information to public health and the environment. The prospect of a global government may be neither desirable nor probable, but the global, not just multinational, corporation is already with us.

Henderson makes the powerful point that purposeful business, whose role it is to solve problems, relishes rather than resents regulation that prevents unscrupulous competitors undermining their good work. But business bending regulation to its own ends, however noble they may be, to keep competitors out, however detrimental they may be, inevitably raises concerns.

More substantially, we must recognize that regulation, like competition, requires, as Adam Smith emphasized, a general recognition of what is right and proper. However extensive and effective are the scope and enforcement of regu-

lations, they are abused by those who are set on circumventing them and turning them to competitive advantage. Purpose cannot simply be about producing profitable solutions but also requires an understanding and acceptance of what are legitimate and illegitimate sources of profits: namely, those that respectively do and do not derive from profiting without causing problems for others.

It is therefore critical that the advocates of the new movement establish the basis on which investors, regulators, and, above all, the public at large can look at business with confidence and acknowledge that it has seen the light and reformed its ways. We are not yet there. Instead, there is a serious risk that all the good work that has been done to date in persuading business to get a purpose, to elevate the importance it attaches to its stakeholders as well as its shareholders, and to recognize that the long term is not the next quarterly or annual report but future generations, will drown in a sea of ESG-washing (“environmental, social, and governance” investing), unsubstantiated sustainability commitments, and corporate scandals. The corporate social responsibility movement arguably did more harm than good by intensifying cynicism and skepticism of business. It is vital that corporate purpose does not do the same.

If we cannot rely on either the enlightenment and goodwill of corporate leaders or the effectiveness of regulation to align private with public interests, to whom or what should we turn? The answer, I would suggest, is the law: not just public law in the guise of regulation, but private law in the form of corporate law. In establishing the fiduciary duties of directors to the success of the corporation and the benefit of its members (its shareholders), corporate law deliberately refrains from imposing a requirement on corporations to specify a purpose. This is a mistake, and has two drawbacks. The first is that it fails to ensure an alignment between the profit interests of the members of the corporation and the interests of society at large in social cohesion and prosperity. And second, it does not provide the basis on which corporations can commit to putting the interests of other parties ahead of those of shareholders.¹⁰

Henderson’s essay does an excellent job of establishing the power and potential of corporate purpose and its capacity to lay the foundations of an enduring transformation. But it should seek to tackle head-on the problems that have already been identified and that lie ahead. Just as we expect corporate leaders to evaluate the resilience of their business purposes and strategies, we should stress-test the business models that we promote. Would corporate purpose have avoided the worst abuses of financial institutions in the financial crisis or the failures of business in the COVID-19 pandemic and the energy crisis? How far will it go, even in conjunction with better designed and more effectively delivered government policy and regulation, in tackling inequality, social inclusion, and environmental degradation?

We need to ensure that the foundations of corporate purpose are not as fragile as its predecessors and that the new business models contribute to solving, not causing, the economic, environmental, political, and social crises of the future.

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ENDNOTES

- ¹ Rebecca Henderson, “Moral Firms?” *Dædalus* 152 (1) (Winter 2023): 198–211.
- ² Paul Babiak, Craig Neumann, and Robert Hare, “Corporate Psychopathy: Talking the Walk,” *Behavioral Sciences and the Law* 28 (2) (2010): 174–193; Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable & Robinson, 2004); and Martin Brueckner, “Corporation as Psychopath,” in *Encyclopedia of Corporate Social Responsibility*, ed. Samuel O. Idowu, Nicholas Capaldi, Liangrong Zu, and Ananda Das Gupta (Berlin: Springer, 2013).
- ³ Alex Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (Cambridge: Cambridge University Press, 2020); and Claudine Gartenberg, “Purpose-Driven Companies and Sustainability,” in *Handbook on the Business of Sustainability*, ed. Gerard George, Martine R. Haas, Havovi Joshi, et al. (Cheltenham, United Kingdom: Edward Elgar Publishing, 2020).
- ⁴ Andrew Keay, “The Enlightened Shareholder Value and Corporate Governance,” *Modern Law Review* 76 (5) (2013): 940.
- ⁵ Colin Mayer, “Ownership, Agency and Trusteeship,” *Oxford Review of Economic Policy* 36 (2) (2020): 223–240.
- ⁶ See, for example, Ranjay Gulati, *Deep Purpose: The Heart and Soul of High-Performance Companies* (New York: Penguin Business, 2022).
- ⁷ British Academy, *Policy and Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme* (London: British Academy, 2021).
- ⁸ See Lucian Bebchuk and Roberto Tallarita, “The Illusory Promise of Stakeholder Governance,” *Cornell Law Review* 106 (1) (2020): 91; Colin Mayer, “Shareholderism Versus Stakeholderism—A Misconceived Contradiction: A Comment on ‘The Illusory Promise of Stakeholder Governance,’ by Lucian Bebchuk and Roberto Tallarita,” *Cornell Law Review* 106 (7) (2020): 1859; Lucian Bebchuk and Roberto Tallarita, “Will Corporations Deliver Value to All Stakeholders?” *Vanderbilt Law Review* 75 (4) (2022); Lucian Bebchuk

and Roberto Tallarita, “Was the Business Roundtable Statement Mostly for Show?—(2) Evidence from Corporate Governance Guidelines,” *Harvard Law School Forum on Corporate Governance*, August 18, 2020; Lucian Bebchuk, Kobi Kastiel, and Roberto Tallarita, “Stakeholder Capitalism in the Time of COVID,” Law Working Paper No. 670/202 (Brussels: European Corporate Governance Institute, 2022), https://ecgi.global/sites/default/files/working_papers/documents/stakeholdercapitalisminthetimeofcovid/ecgi.pdf; and Lucian Bebchuk, Kobi Kastiel, and Roberto Tallarita, “For Whom Corporate Leaders Bargain,” *Southern California Law Review* 94 (6) (2022).

⁹ Margaret O’Mara, “Can Firms Act Morally?” *Daedalus* 152 (1) (Winter 2023): 222.

¹⁰ Colin Mayer, “What is Wrong with Corporate Law? The Purpose of Law and the Law of Purpose,” *Annual Review of Law and Social Sciences* 18 (2022): 283–296.