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ARTICLES

CATALYST, OBSTACLE, OR SOMETHING IN BETWEEN? DEALING WITH THE LAW IN BUILDING ETHICAL CORPORATE CULTURE

COUNTESS ALEXANDRA* & TIMOTHY L. FORT**

In 2004, Congress amended the organizational chapter of the U.S. Federal Sentencing Guidelines to require that corporations create “organizational culture[s]” leading to “ethic[s]” and “compliance” in order to obtain the benefits created in the chapter’s encouragement of compliance systems.¹ The amendments occurred after the turn of the century debacles of companies such as Enron and Worldcom. Congress recognized that a reflexive governance regime aimed only at punishing non-compliance misses the levers necessary to create effective compliance systems.² Paradoxical as it may seem, studies showed companies that focused on compliance were less effective in complying with the law than those organizations that incorporated a non-legal set of ethical duties and aspirations.³

Many companies have since sought to create more ethical business cultures⁴ though the riddle of how to measure such affective dimensions remains difficult—as does knowing exactly what prosecutors and judges may look for in determining the extent of the ethicality of company programs.⁵ Such riddles are worthy of inquiry and comprise a

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1. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (2004).

2. See JACOB DAHL RENDTORFF, RESPONSIBILITY, ETHICS AND LEGITIMACY OF CORPORATIONS 354 (2009).

3. Lynn Sharp Paine, *Managing for Organizational Integrity*, 72 HARV. BUS. REV. 106 (1994); Dov Siedman, *Why Companies Shouldn’t Do’ Compliance*, FORBES (May 4, 2012, 11:30 AM), <http://www.forbes.com/sites/dovseidman/2012/05/04/why-ceos-shouldnt-do-compliance/2/>.

4. See, e.g., *Pharmaceutical Company Eli Lilly to Pay Record \$1.415 Billion for Off-Label Drug Marketing*, FDA (Jan. 15, 2009), <http://www.fda.gov/iceci/criminalinvestigations/ucm260967.html>; see also Karen L. Stewart & Whiton S. Paine, *Johnson & Johnson: An Ethical Analysis of Broken Trust*, 5 J. ACAD. & BUS. ETHICS 1 (2012). Johnson & Johnson, which has long had a heralded culture, was subject to a shareholder derivative suit for abandoning the company’s commitment to an ethical culture. The company is now seeking to re-establish that ethical cultural foundation for its compliance program.

5. See Siedman, *supra* note 3..

burgeoning literature in their own right.⁶ Reference to much of that literature will be made throughout this paper.

We set out, however, to ask the rare question directed at the other side of corporate culture: assuming that a company already *has* a vibrant ethical culture, what stance should the company take toward a greater integration of the law? At first blush, it is worth asking why a company would rely more fully on legal requirements if an ethical culture is functioning well. To be sure, some companies have hosted a well-regarded, trustworthy corporate culture, only to see indiscretions tarnish the company's reputation and lead to a greater reliance on the law thereafter.⁷ Yet, such instances do not get to the heart of the question. Legal wrongdoing, even if a company has previously had a pristine reputation, remains legal wrongdoing and suggests that stricter laws and rules are necessary to prevent future wrongdoing. Our question goes further: why would a company rely on the law even if it has had no, or almost no, legal issues?

One answer is preventative. Simply because some strategies do work does not mean that they cannot be improved and so some may turn to legal principles in order to stay at the cutting edge of ethical issues. While intellectually plausible, we have not found instances of companies following such a line of reasoning.

The more likely answer lies in the possibility that as companies grow and expand, they confront both new legal regimes, as well as increasingly diverse workforces with norms and values different from those of the company's original culture. This statement should not be interpreted as condescending. Instead, it should be read as a real-world recognition that if cultures differ—and they clearly do—then some kind of articulation of the values and norms of an organization is necessary to inform all relevant parties in a company as to what constitutes expected behavior.

Such policy and rule-making inevitably takes on the character, explicitly or implicitly, of law-making. Assuring that the company complies with legal regulations when entering new countries also calls for corporate leaders to explicitly articulate and institute those processes necessary to be compliant. For example, a small South American company may have a vibrant, trustworthy, ethical culture, but if it expands to the United States its informal customs and values may not obtain any recognition so as to be in compliance with the Sentencing Guidelines. Accordingly, companies may rely on the law in order to obtain access to the large economic markets.

6. See, e.g., David Hess, Robert S. McWhorter & Timothy L. Fort, *The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics*, 11 *FORDHAM J. CORP. & FIN. L.* 725 (2006); see also David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 *MICH. L. REV.* 1781 (2007).

7. See, e.g., Anita Raghavan, *In Scandal's Wake, McKinsey Seeks Culture Shift*, *N.Y. TIMES* (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/business/self-help-at-mckinsey.html?_r=0.

To some, however, law undermines the very essence of ethics itself. Philosophers often view the heart of moral agency as rooted in an individual desire to undertake proper activity because of the inherent good of the principle in question, not because failure to do so might subject them to criminal or civil liability.⁸ Outside of this Kantian perspective, others have argued that to the extent the law takes away moral choices and places them within the province of governmental responsibility, individual moral achievement and growth can be undermined as well.⁹ Thus, our task is to assess many of the same materials and literature often used in the ethics-law culture question, but from this unique perspective we seek to find a way in which the law's necessary and, optimally, supportive function does not inhibit more robust behaviors and attitudes enculturated within organizations that authentically seek moral goods.

In doing so, our aim is four-fold. First, an answer to this question should be beneficial for companies addressing this precise problem. Second, the uniqueness of our approach to the question may well shed light on the more typical question of how to integrate ethics into legal compliance programs. That is, if we know the dangers of the law to good cultures, that might allow us to nuance the application of law (for those compliance-driven) in order for them to also achieve an optimal balance among economics, law, and affectivity. Third, we expect that analyzing this question will also provide insight as to optimal governance structures that provides room for the ethics component in corporate culture regardless of the starting point from which one asks this question. Finally, we will suggest that this analysis provides insight for government regulators and regimes if their aim is to, indeed, encourage companies to act more responsibly.

To make this argument, our paper is divided into four parts. In Part I, we review the literature to date that sets out the building blocks for an ethical corporate culture. Economics, Law, and Affectivity comprise these three building blocks. The balance among these three is the heart of debates that fill PowerPoint screens in boardrooms and classrooms on corporate governance, television screens on corporate scandals, and movie screens that articulate a popular culture narrative of the oxymoronic nature of the term business ethics.

In Part II, we provide an overview of research on the factors that impact corporate culture. This research highlights the importance of affectivity—the emotional desire to achieve good—in creating positive cultures as well as the entropic threat of reliance on law and economics to produce the same. As part of this, we construct a matrix that demon-

8. See IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 19–20 (1797); see also Bill Shaw & John Corvino, *Hosmer and the “Why Be Moral?” Question*, 6 BUS. ETHICS Q. 373 (1996).

9. See Michael Novak, *Wealth & Virtue: The Moral Case for Capitalism*, NAT'L REV. (Feb. 18, 2004, 9:13 AM), <http://old.nationalreview.com/novak/novak200402180913.asp>; see also PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977).

strates common factors that appear in this research. This research will point to some important challenges for corporate governance.

In Part III, we build on these findings to further analyze the importance of the affective dimension of ethics and corporate culture. The legal and economic dimensions are relatively well understood and covered in Part I, but we believe that there is a dearth of understanding of how affective aspects of ethics and culture relate to the other two sectors.

In Part IV, we conclude with our recommendation of how the legal and economic dimensions can have their rightful place within corporate culture without undermining the ethical orientation that companies either seek to retain or to build.

I. A TRI-PARTITE MODEL OF ETHICS, LAW, AND BUSINESS

Illegal business behavior is not new, nor is unethical business conduct. As long as there has been trade, opportunities have existed for cheating. One need only look to ancient sacred scriptures to see the recognition of such cheating with regulations and punishments set to deter it. Legal scholar Reuven Avi-Yonah has also traced the notion of corporate social responsibility to Roman antiquity, arguing in part that governments provided companies with the benefit of limited liability in exchange for engaging in activities that benefited the public.¹⁰

Economists delve into this history as well. F.A. Hayek, for instance, comments that if two people in an ancient time met in an isolated area, one party might kill or steal from the other and, if the person could get away with it, he or she might just do that. However, to the extent a community exists, sanctions will be imposed on the killer/cheater because it is not in the long-term self-interest of the members of the community to allow such behavior to occur. What is in their self-interest is trading as opposed to killing and stealing—and what fosters trading is for people to honor their promises. Thus, business has a natural interest in ethics and in the societal need to police bad behavior.¹¹

This tension among law, ethics, and business thus stretches deep into human history and has its modern form today. What has arguably made the tension more acute is the rise of large business organizations combined with liquid global markets. Many commentators have noted that when management becomes separated from ownership, a new dynamic is introduced to corporate governance. A company with a dominant majority shareholder or a family-owned business will likely

10. In early American legal history, incorporation was granted only when businesses demonstrated a social good that would occur through chartering; common examples included ferry services or the formation of municipalities. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005).

11. See, e.g., F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* 47 (1988) (citing Hume's contention that the market creates incentive "even [for] bad men to act for the public good").

take on the values of the founder and owner(s).¹² In such cases, the differences between the leader's personal values and those of the company are not likely to be dissonant and messages concerning appropriate behaviors will more easily flow through the organization.¹³

However, when companies undertake their initial public offering, the game changes. New investors enrich the company's capital structure (as well as providing cash for the founders). New shareholders possess the same rights to voice their views as to how the governance of a company should proceed, with a primary value of all the shareholders frequently narrowing to economic performance. Some companies take steps to preserve their traditional way of doing business at the time of an IPO and so some values—including non-economic values—may persist in a company's culture over a long period of time.

A prominent example of this is the aforementioned case of Johnson & Johnson ("J&J"). When the company made its public offering in 1944, the founders attempted to perpetuate the company's (and founding family's) values through J&J's Corporate Credo, which set out duties and aspirations for the company that were lead by service to, in order, customers, employees, communities, governments, and finally to shareholders.¹⁴ The company conducted training around the Credo for decades, making it a criterion for hiring and promotion decisions as well as daily conduct for J&J employees.¹⁵ The pervasiveness of the Credo in J&J's culture was given significant credit for J&J's famous 1982 decision to pull its best-selling brand, Tylenol, off the shelves nationwide when an outside party sabotaged the product resulting in six Chicago-area deaths.¹⁶ J&J's CEO, James Burke, explained that the company had to take such a drastic action because "we couldn't live up to the Credo."¹⁷ At the time, that unforced recall was considered to be a questionable business action tantamount to admitting guilt, but it proved to be a brilliant defense of the company's brand and its lead product.¹⁸

As one public relations executive said, in 1982, no one voluntarily recalled products.¹⁹ Yet, J&J's action proved to the public that it was a company that people could trust, keeping its products safe for the public and standing behind its promises. Tylenol had been J&J's best-sell-

12. See, e.g., R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 240–42 (1984).

13. See R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 *BUS. ETHICS Q.* 409 (1994).

14. Thomas Moore, *The Fight to Save Tylenol* (*Fortune*, 1982), *FORTUNE* (Oct. 7, 2012, 1:00 PM), <http://features.blogs.fortune.cnn.com/2012/10/07/the-fight-to-save-tylenol-james-burke/>; see also *Our Credo*, JOHNSON & JOHNSON, https://www.jnj.com/sites/default/files/pdf/jnj_ourcredo_english_us_8.5x11_cmyk.pdf (last visited Jan. 26, 2014).

15. Moore, *supra* note 14.

16. *Id.*

17. *Id.*

18. Judith Rehak, *Tylenol Made a Hero of Johnson & Johnson: The Recall That Started Them All*, *N.Y. TIMES* (Mar. 23, 2002), http://www.nytimes.com/2002/03/23/your-money/23iht-mjj_ed3.html.

19. *Id.*

ing product, producing seventeen percent of the company's net income in 1981.²⁰ Two months after the recall, the company brought Tylenol back to the market with a market share that had plunged from 37% to 7%. A year later, the market share was back to 30%.²¹

The move to perpetuate a culture through a Credo has been replicated by other companies²² and while it may often be effective, it also is a contracting strategy rather than one just based in property. Property law trumps, however, and the shareholders—as owners of the company—maintain the right to change the governance orientation of a company, including said contract efforts.²³

Liquid global markets place significant pressures toward property and away from contracts over time in at least two significant ways. With shareholders moving in and out of company ownership, it seems unlikely that shareholders buy and sell with full consideration of the contracting attempts to sustain corporate culture over time. Such investing decisions—whether by institutional investors, day traders, or simply by pensioners and individual investors utilizing various mutual fund options—are more likely to be based on the likelihood of monetary returns.²⁴ To be sure, there are *some* individual investors and mutual fund vehicles that will consider issues pertaining to corporate cultures and values perpetuated by those companies that align with non-economic interests of potential shareholders.²⁵ Even so, the percentage of such funds remains relatively small²⁶ and even within such funds, it is difficult to ascertain the particular culture of a given industry. Freeport-McMoran Copper and Gold may be an extractive industry, for example, but its voluntary initiatives to work with stakeholders²⁷ look quite different than other extractives, which have been sued for violating human rights of native peoples near facilities.²⁸

20. *Id.*

21. *Id.*

22. See, e.g., *Our Core Values*, WHOLE FOODS, <http://www.wholefoodsmarket.com/mission-values/core-values> (last visited Feb. 14, 2014); *Verizon Credo*, VERIZON, <http://responsibility.verizon.com/verizon-credo/> (last visited Feb. 14, 2014); *Company Credo*, DRC INT'L, <http://drcworldwide.com/t44/17110/Company-Credo.html> (last visited Feb. 14, 2014).

23. TAYLOR WESSING, *SHAREHOLDER ACTIVISM: GUIDE TO SHAREHOLDER RIGHTS 2* (2012), available at http://www.taylorwessing.com/uploads/tx_siruplawyermanagement/Shareholder_activism_-_Guide_to_shareholder_rights.pdf.

24. See, e.g., PRICEWATERHOUSECOOPER, *DO INVESTORS CARE ABOUT SUSTAINABILITY? SEVEN TRENDS PROVIDE CLUES* (2012).

25. See, e.g., Michael Chamberlain, *Socially Responsible Investing: What You Need to Know*, FORBES (Apr. 24, 2013, 3:31 PM), <http://www.forbes.com/sites/feonlyplanner/2013/04/24/socially-responsible-investing-what-you-need-to-know/>.

26. *Id.*

27. See S. Prakash Sethi, et al., *Freeport-McMoran Copper & Gold, Inc.: An Innovative Voluntary Code of Conduct to Protect Human Rights, Create Employment Opportunities, and Economic Development of the Indigenous People*, 103 J. BUS. ETHICS 1 (2011).

28. See, e.g., David R. Baker, *Chevron's Links to Burma Stir Critics to Demand It Pull Out*, SAN FRANCISCO CHRONICLE (Oct. 3, 2007, 4:00 AM), <http://www.sfgate.com/news/article/Chevron-s-links-to-Burma-stir-critics-to-demand-2499304.php?page=2>; Ivana Sekularac & Anthony Deutsch, *Dutch Court Says Shell Responsible for Nigerian Spills*, REUTERS (Jan. 30,

While many extractives were faced with charges of human rights abuses, environmental degradation and bullying of governments, for instance, Freeport took a different approach. It continued to cooperate with the voluntary codes of conduct that members of the industry sought to create, but it also developed its own code of conduct that provided protection for the indigenous people on whose land the line was located, and in providing house, health benefits, and educational opportunities in formal consultation with representatives of the local population. It also committed itself to external, independent auditing of its code of conduct with an obligation to allow reports of these audits to be made public without interference from the company.²⁹

Liquid markets also place property-orienting pressures on companies because of the shortness of time within which investment decisions are made. Technology allows near instantaneous trading so that investors can move in and out of the market on an hourly basis.³⁰ That opportunity furthers investor evaluation of companies on a very short-term basis rather than a long-term one with monetary returns thus typically taking priority over long-term strategies that emphasize values or corporate culture.³¹

These pressures toward short-term economic results—the property emphasis—are further enhanced by globalization. Investors from around the globe are likely to bring with them a diversity of values that may well challenge those that had been enshrined prior to a company's IPO.³² And with 24/7 stock trading, the emphasis on ongoing evaluation of companies further enhances short-term monetary performance.³³

In spite of these pressures, the aim to create strong ethical culture persists, and does so for reasons rooted in the same value sectors: there is evidence that ethical corporate cultures are economically successful;³⁴ lawmakers consistently pass legislation that attempts to rein in

2013, 8:06 AM), <http://www.reuters.com/article/2013/01/30/us-shell-nigeria-lawsuit-idUSBRE90S16X20130130>.

29. Sethi et al., *supra* note 27.

30. See Jacob Goldstein, *Putting a Speed Limit on the Stock Market*, N.Y. TIMES (Oct. 8, 2013), http://www.nytimes.com/2013/10/13/magazine/high-frequency-traders.html?_r=0.

31. ASPEN INST., *OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT* (2009), available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/overcome_short_state0909_0.pdf.

32. David Tennant & Claremont Kirton, *The Impact of Foreign Direct Investment, Financial Crises and Organizational Culture on Managers' Views as to the Finance-Growth Nexus*, 41 J. ECON. ISSUES 625 (2007).

33. See, e.g., Bill George, *Activists Seek Short-Term Gain, Not Long-Term Value*, N.Y. TIMES (Aug. 26, 2013, 10:56 AM), http://dealbook.nytimes.com/2013/08/26/activists-seek-short-term-gain-not-long-term-value/?_php=true&_type=blogs&_r=0.

34. See JOSHUA DANIEL MARGOLIS & JAMES P. WALSH, *PEOPLE AND PROFITS?: THE SEARCH FOR A LINK BETWEEN A COMPANY'S SOCIAL AND FINANCIAL PERFORMANCE* (2001).

corporate excesses;³⁵ and the public and civil society continually press for more responsible behavior from companies as explained below.

A. *The Economics of Ethics*

1. Ethics Embedded Within Economics

Though it may seem that economics focus solely on money, it is not difficult to find economists making strong connections to ethics. The utilitarian justification for economics, of course, is not surprising. This connection between ethics and economics champions an increase in social welfare as a result of policies such as free trade. The argument, at the heart of most free market economists, is that freer trade results in more competitive companies, reduces external costs (i.e. taxes and tariffs), spawns innovation, and increases purchasing power of consumers, all of which allow societies to become richer, more educated, and healthier, among other positive attributes.³⁶ While socialist and other non-free market economists debate this perspective,³⁷ and while there are variations as to the ideal balance of free trade and regulation that are hotly contested, the general view that free trade (of some degree) increases social welfare is one that currently dominates the global marketplace.³⁸

The more interesting relationship between ethics and economics is ontological. Here the argument is that at the core of economics is a non-economic, ethical dimension that foundationally allows economics to exist and for trade to develop. Four economists are emblematic of this relationship.

Adam Smith stands at the forefront of this position.³⁹ Smith, a moral philosopher, is most remembered for notions such as the “invisible hand” that creates social welfare even when individual bakers and butchers are acting from their own self-interest.⁴⁰ Yet, Smith does not leave the relationship between ethics and economics solely within social welfare terms. He posits that those individual bakers and butchers also fill roles as citizens of a society with moral sentiments and obligations for the well-being of that community.⁴¹ Such roles hem in a self-inter-

35. Narjess Boubakri, Omrane Guedhami, & Oumar Sy, *Corporate Governance and Ultimate Control*, in *INSTITUTIONAL APPROACH TO GLOBAL CORPORATE GOVERNANCE: BUSINESS SYSTEMS AND BEYOND* 394 (J. Jay Choi & Sandra Dow eds., 2008).

36. See, e.g., Chris Scott, *NGOs Team Up in Lobbying Push for Global CSR Treaty*, PR WEEK (June 28, 2002), <http://www.prweek.com/article/149328/ngos-team-lobbying-push-global-csr-treaty>.

37. MAX BEER, *THE LIFE AND TEACHINGS OF KARL MARX* 101–03 (1921).

38. In a 2013 study on economic freedom, only 33 out of 177 countries receiving scores received a ‘repressed’ rating. Denise Bedell, Tina Aridas & Valentina Pasquali, *Economic Freedom by Country—2013 Ranking*, GLOBAL FINANCE, <http://www.gfmag.com/component/content/article/119-economic-data/12450-economic-freedom-by-country.html.html#axzz2tLVTmtu7> (last visited Feb. 14, 2014).

39. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (6th ed. 1790), available at http://www.ibiblio.org/ml/libri/s/SmithA_MoralSentiments_p.pdf; see also PATRICIA WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* (1991).

40. WERHANE, *supra* note 39, at 165.

41. *Id.*

est that only narrowly pursues profit and instead promulgates the regulations that position economic pursuits within a legal framework and also within ethical boundaries.⁴²

The Austrian economist F.A. Hayek took this connection a step further. Hayek argued that free trade had benefited society in at least two ways. One of those pertained to how trade allowed the production and accumulation of more material goods, creating a robust economy and the positive that aspects go with it (such as employment, better education, better health, etc.).⁴³ In that sense, Hayek's arguments find themselves well within the utilitarian justification of social welfare already sketched. Yet, it is when Hayek takes this argument a step further that he also reveals an ontological foundation of ethics to economics that is not only instructive for large, macro-based issues, but for issues of ethical corporate culture.

Hayek argues that increased trade leads to international peace.⁴⁴ His argument is that trade creates relationships. Sustaining trade requires that those relationships be nourished by some straightforward ethical practices, such as truth-telling, promise-keeping, and production of high-quality goods and services.⁴⁵ A virtuous cycle can be created, he argues, with parties recognizing that expanding trade requires such practices, which leads to more trade, which leads to a wider set of relationships with a result that parties to a trading system will recognize both the value of sustaining the trade and also the ethical practices that sustain them, both logically leading to peace over war.

Part and parcel with the importance of trade, then, is ethics. Interestingly, Hayek's position does not entail any particular philosophical commitment to an inherent value of ethics. His approach remains utilitarian in that he values ethics primarily because it allows for this trading matrix to develop.⁴⁶ Thus, his justification remains similar to that of the social welfare utilitarians, but Hayek digs deeper into the mechanics of the relationship. Hayek also argues that the most efficient way for individuals to learn the importance of these ethical practices is for institutions of civil society to teach them as having their own innate values; it is too inefficient for traders to learn this reciprocally supportive relationship through trial and error. Moreover, such inefficiencies mean that the knowledge gained will likely be after the fact and, thus, too late to benefit a particular exchange in question.⁴⁷

A third example comes from the recent work of Robert Frank and David Rose. In his book, *Passions Within Reason*, Robert Frank argues

42. *Id.* at 165–66.

43. *See* HAYEK, *supra* note 11, at 39–40.

44. *Id.*

45. *Id.* at 41. Indeed, this is one of the reasons that trade embargoes are so controversial. On the one hand, sanctions and embargoes provide a pressure point short of actual violence and so may provide the necessary pressures for changes without bloodshed. At the same time, the consistent lack of a trading relationship further isolates parties from each other, which may make subsequent peace building efforts more difficult.

46. *Id.* at 13–14.

47. *Id.* at 74–75.

that individuals make decisions on the basis of sentiments and emotion more than reasoned, economic calculus.⁴⁸ As he puts it in one famous passage, “[those] who are sensible about love are incapable of it.”⁴⁹ Like David Hume before him, Frank recognizes that our emotions tend to be our first clue in what we should do, ethically and economically, and those emotions must be part of our understanding of both.⁵⁰ David Rose has recently argued that economics cannot create social welfare on their own (nor can the law, nor politics).⁵¹ As he puts it, there are many copies of the U.S. Constitution floating around in South America without many constitutional republics being created.⁵² He emphasizes the need for ethics as a non-legal, non-economic discipline for restraint; guilt, he argues can police aberrant behavior in a way far more efficient than economics or law and allows economic development to occur. As with the inefficiency and lateness of learning the economic value of ethics through after-the-fact experience, guilt occurs too late to police behavior.⁵³

2. Practitioner Evidence

In sketching these positions, our aim is not to endorse any of them *per se*, nor to exhaustively chronicle a vast literature on the subject. Rather, we aim to highlight the fact that well-regarded economists highlight the connection between these two subjects. The fact that these economists champion the connection between ethics and economics logically implies that such a connection would carry over into more focused assessments of the conduct of business and the ethics businesses must practice. And, indeed, both practitioners and empirical scholars make this connection as well.

While headlines often go to the scandalous or outrageous business person and that person’s obsession with wealth and greed, it is also not difficult to find leaders who would agree with former Federal Reserve Chairman Alan Greenspan, who in Congressional testimony stated that in today’s economy, reputation is the key value companies bring to the market; if they lose that reputation they can also end the company.⁵⁴ Greenspan’s remarks came on the heels of the turn-of-the-century scandals of Enron and Worldcom and were made with particular reference

48. ROBERT FRANK, *PASSIONS WITHIN REASONS* (1988).

49. *Id.* at 190.

50. *Id.*; see also Amy M. Schmitter, *Hume on the Emotions*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/emotions-17th18th/LD8Hume.html> (last visited Feb. 12, 2014).

51. Interview with David Rose on the Moral Foundations of Economic Behavior, University of Missouri, St. Louis, EconTalk.org (Jan. 23, 2012), available at http://www.econtalk.org/archives/2012/01/david_rose_on_t.html.

52. *Id.*

53. *Id.*

54. *Federal Reserve Board’s Semiannual Monetary Policy Report to Congress Before the H. Comm. On Fin. Services*, 107th Cong. (2002) (statement of Alan Greenspan, Chairman, Federal Reserve) available at <http://www.federalreserve.gov/boarddocs/hh/2002/february/testimony.html>.

to the demise of Arthur Andersen.⁵⁵ One need not search long for boutique examples of companies with a clear social commitment, such as Ben & Jerry's,⁵⁶ Whole Foods,⁵⁷ Timberland,⁵⁸ and many others. Such commitments do not ensure ethical perfection, but theirs are companies that do explicitly and consciously set out to integrate ethical values with their business model. Rankings of most ethical companies also note large multinationals such as Marriott, Pepsi, Deere, Henkel AG, Kao, Swiss Re, and Stora Enso among others, have been recognized multiple times in *Forbes* annual rankings.⁵⁹ Indeed, when efforts have been made to legally require more corporate attention to company stakeholders, one response has been that a well-run business already is treating these constituents well and so there is no need for additional regulation.⁶⁰ In short, the integration of law, ethics, and economics is possible in business practice.

3. Academic Corroboration

Such arguments find empirical, academic support as well. In an exhaustive study of over eighty other studies that attempted to measure the relationship between corporate financial performance and corporate social performance, Joshua Margolis and James Walsh found that there was a weak, positive correlation between the two.⁶¹ That is, ethical conduct generally helps a company's profitability, especially when measured over the long-term.⁶² Companies can certainly be profitable without being ethical, but companies can also successfully integrate the two and indeed, tend to do slightly better financially when they do.⁶³ Other large-scale studies corroborate these findings as well,⁶⁴ so that one can conclude that on the basis of traditional economists, actual business practice, and academic scholarship, there can be a constructive connection between ethics and economics. Establishing that con-

55. See James A. Thompson, *Greenspan for Dummies*, THE ALBION MONITOR (May 17, 2002), <http://www.monitor.net/monitor/0205a/copyright/greenspanfordummies.html> (giving a former *Wall Street Journal* contributor's perspective on Greenspan and suggesting that Arthur Andersen's culpability may have been exaggerated).

56. See Andrea Newell, *Ben and Jerry's Social Mission*, TRIPLEPUNDIT (Apr. 18, 2013), <http://www.triplepundit.com/2013/04/ben-jerrys-social-mission/>.

57. See Charlie Kannel, *Corporate Responsibility Spotlight: Whole Foods Market*, THE MOTLEY FOOL (Sept. 14, 2012), <http://www.fool.com/investing/general/2012/09/14/corporate-responsibility-spotlight-whole-foods-ma.aspx>.

58. See Aman Singh, *Responsible Boots: A Peek into Timberland's Post-Merger Future*, FORBES (Aug. 2, 2011, 1:19 PM), <http://www.forbes.com/sites/csr/2011/08/02/responsible-boots-a-peek-into-timberlands-post-merger-future/>.

59. See Jacquelyn Smith, *The World's Most Ethical Companies*, FORBES (Mar. 6, 2013, 2:40 PM), <http://www.forbes.com/sites/jacquelynsmith/2013/03/06/the-worlds-most-ethical-companies-in-2013/>.

60. See, e.g., William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385 (1990); Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173 (1997).

61. See MARGOLIS & WALSH, *supra* note 34, at 8, 13.

62. *Id.* at 10–14.

63. *Id.*

64. See, e.g., Marc Orlitzky, Frank L. Schmidt, & Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403 (2003).

nection becomes critical for the creation and nurturance of corporate culture.

B. *Legal Requirements Mandating Desired Practices*

The old adage that one cannot legislate morality seems to have fallen on deaf ears of legislators, who regularly adopt laws with very specific moral agendas.⁶⁵ This should not be especially surprising. Law and ethics may not be co-terminus, but both seek to encourage certain behaviors and punish others. While a central argument of our paper is that the legal enforcement of moral values runs great risks of undermining the vibrancy of ethical corporate culture, the law does have a place in reining in unethical behavior. Many such regulations exist, but here are a few examples.

Europe's commitment to protection of individual privacy led to the passage of the EU Privacy Directive in 2002.⁶⁶ The directive sought to protect EU residents from use of data pertaining to them by businesses without their explicit consent.⁶⁷ More recently, the Data Protection Directive was enacted to provide further privacy protection pursuant to seven principles: notice to data subjects that data is being collected; the stated purpose for any use; the preclusion of data disclosure without the subject's consent; the security of stored data to prevent abuses; disclosure as to who is collecting data; providing data subjects access to their data with the right to make corrections to inaccuracies in the data, and making available measure for the subjects to hold data collectors accountable.⁶⁸ Both directives were enacted pursuant to ethical objectives of protections of privacy itself and human rights.⁶⁹

Another specific European example pertains to gender issues. In 2002, Norway startled European businesses with a proposal requiring women to hold at least forty percent of executive board positions by 2008, a goal successfully achieved.⁷⁰ Similar legislation then was considered⁷¹ and passed⁷² by other countries as well. Here again, the laws

65. While a close study of this phenomenon is beyond the scope of this paper, consider campaigns on prominent social issues such as the Civil Rights Movement.

66. Directive 2002/58, of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), 2002 O.J. (L 201) 37 (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=LEX:32002L0058:en:NOT> (Last visited January 25, 2014).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. See DELOITTE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE (2011), *available at* http://www.deloitte.com/assets/Dcom-tanzania/Local%20Assets/Documents/Deloitte%20Article_Women%20in%20the%20boardroom.pdf; see also Judith H. Dobrzynski, *How Women Are Getting on European Boards (And Why U.S. Companies Should Care)*, FORBES (Dec. 14, 2009, 5:10 PM), <http://www.forbes.com/2009/12/14/norway-french-legislation-equality-forbes-woman-leadership-executive-boards.html> (citing France's proposed legislation requiring 40% of boards be comprised of women).

were passed with justificatory aims of equality of opportunity for women as well as for human rights.⁷³

In addition to specific, regulatory approaches, countries also adopt reflexive approaches to achieve desired norms. Two notable examples are the previously mentioned 1991 Amendments to the 1984 Federal Sentencing Guidelines⁷⁴ and *Burlington Industries v. Ellerth*, which was decided in 1998.⁷⁵ These measures set out strong incentives for companies to adopt internal policies to achieve ethical corporate cultures. The *Burlington Industries* Court addressed issues pertaining to sexual harassment, holding that corporations could be held financially responsible for the harassing activities of its employees. The Court also held that if corporations had established good-faith practices to address complaints and to train workers on what behavior was unacceptable, it could require alleged victims to work through the in-house process before appealing to the Courts.⁷⁶ Similarly, the Federal Sentencing Guidelines offered reduced financial punishments for companies convicted of federal crimes if the companies had adopted “effective” compliance programs, including codes of conduct, safe places for employees to make complaints, high-level internal oversight of the program, and self-reporting of violations.⁷⁷ As with the European examples, the justificatory aims for these legal regimes were grounded in ethical aims.⁷⁸

C. Affective Dimensions

1. Philosophical Challenges

Philosophers and theologians have debated the rationale for the motivation to be ethical for millennia. In the famous *Ring of Gyges*, Plato foreshadowed J.R.R. Tolkien in positing a magic ring that made the wearer invisible if the ring was turned a certain way.⁷⁹ With such power, Glaucon claimed that no person would resist the temptations to

72. See, e.g., Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. OF ECON. 137, 147 (2012).

73. While these numbers do appear impressive, there are reactions as well. Many Norwegian businesses privatized after the law took effect to avoid the requirement. Moreover, some have argued that while the law may have increased the number of women in board seats, it has done little to increase the number of women in corporate executive positions. See Saleha Moshin, *Quota System Failing to Bridge Norway's Corporate Gender Gap*, BLOOMBERG NEWS (Oct. 9, 2013, 2:57 PM) <http://business.financialpost.com/2013/10/09/quota-system-failing-to-bridge-norways-corporate-gender-gap/>.

74. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1.

75. 524 U.S. 742 (1998).

76. *Id.* at 770 (citing *DeGrace v. Rumsfeld*, 614 F.2d 796, 805 (1980)).

77. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 1.

78. See, e.g., Frank Navran & Edward L. Pittman, *Corporate Ethics and Sarbanes-Oxley*, ETHICS RES. CTR. (Dec. 31, 2003), <http://www.ethics.org/resource/corporate-ethics-and-sarbanes-oxley>; Jesse Eisinger & Jake Bernstein, *Dodd-Frank Act: How Financial Reform May Be Going Wrong*, BUS. ETHICS (June 5, 2011), <http://business-ethics.com/2011/06/05/1821-from-dodd-frank-to-dud-how-financial-reform-may-be-going-wrong/>.

79. PLATO, *THE REPUBLIC* Book II 358d–361d (360 BC), available at <http://www.webpages.uidaho.edu/jcanders/Ethics/ringgyesreadexcerpt.htm>.

steal, usurp the King, and seduce the Queen because, in the final analysis, human beings are ethical only for fear of being caught in the event of violating social norms.⁸⁰ Socrates responded by suggesting that there are more noble desires in humanity.⁸¹ This debate—whether human beings are ethical only in response to external incentives, which may include avoiding punishment or in receiving economic rewards, or whether we have a nobler desire to do good—has consumed the minds of a multitude of philosophers and numerous pages. Not surprisingly, a consensus emerges that the answer is a mix: humans respond to (positive and negative) external incentives, but there is an aspect of our human nature that calls us to aspire to more noble desires.

Philosophically, nearly all ethics require a notion of moral agency.⁸² Kantian notions of autonomy, for example, require moral agency for a person to choose actions; indeed, in Kantian philosophy, the only thing that is purely good is a good will.⁸³ Libertarian political philosophy similarly eschews government requirements for action, depending instead on individual choice to determine one's own actions.⁸⁴ Further examples are easily produced.

The very nature of ethics has served as a criticism of bringing ethics into discussions about business. If making companies behave is dependent upon law, then one could turn to concrete notions of legal regulation rather than more ethereal notions of ethics.⁸⁵ Robert Prentice, for example, argued after the Enron and Worldcom debacles that the antidote to such problems was not more ethics in business schools (though Prentice, a highly respected professor of business law at the University of Texas, did not oppose such a proposal) but more law; after all, he said, what happened in these turn of the century scandals were flouting of extant law itself.⁸⁶ Similarly, Aneel Karnani, a highly respected professor of Strategy at the University of Michigan, argued in the *Wall Street Journal*, that ethics was not a needed topic in business schools.⁸⁷ If “ethics pays,” then Strategy could easily handle its integration into business planning and perhaps do so better than philosophers.⁸⁸

Perhaps it is, indeed, possible for Strategy or Law to handle all ethical issues confronting business. To date, however, the record does not suggest that they do so in any comprehensive way. Law perpetually reacts to the scandal du jour and while such reaction may be quite valu-

80. *Id.*

81. *Id.*

82. *But see, e.g.*, RICHARD C. LEWONTIN ET AL., *NOT IN OUR GENES* (1985) (proposing a form of biological determinism which questions whether a concept of “ethics” is even possible).

83. *See* KANT, *supra* note 8.

84. *See, e.g.*, DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 95 (1997).

85. Robert Prentice, *Lessons Learned in Business School*, N.Y. TIMES (Aug. 20, 2002), <http://www.nytimes.com/2002/08/20/opinion/20PREN.html>.

86. *Id.*

87. Aneel Karnani, *The Case Against Corporate Social Responsibility*, WALL ST. J. (Aug. 23, 2010), <http://online.wsj.com/news/articles/SB10001424052748703338004575230112664504890>.

88. *Id.*

able to reign in egregious behavior, the law does tend to be slow and over-inclusive, thus requiring supplementation to be effective. Moreover, the fact that Enron, WorldCom, and others flouted the law suggests that there was missing motivation sufficient to respect existing law.⁸⁹ While Strategy may also be able to anticipate the market potential of moral sentiments, the record of quality management⁹⁰ and environmental management⁹¹ tend to find their origin in non-economic values that a social market asserts in advance of an economic market finding a way to integrate the values into a business model.

We do not suggest that the study of ethics makes law and management irrelevant either. Instead, we have proposed that these three be integrated.⁹² An essential element of such an integration is some degree of affection: a desire to do good. As we have already explained, economists themselves have argued that this element is necessary for economics itself to successfully function. We have argued for the efficacy of sincerity: that the optimal way in which ethics is effective is when moral actions are sincerely undertaken.⁹³ In a similar vein, Whole Foods CEO, John Mackey, has proposed the notion of “Conscious Capitalism” which also seeks to encourage businesses to seek moral goods and by so doing, become more competitive in the market.

We believe that business is *good* because it creates value, it is *ethical* because it is based on voluntary exchange, it is *noble* because it can elevate our existence, and it is *heroic* because it lifts people out of poverty and creates prosperity.⁹⁴

Mackey’s Whole Foods puts this into practice by partnering with Fair Trade organizations as a way to provide value that is shared by key stakeholders in terms of good working conditions, wages, and fair prices as opposed to simply “creating value” in terms of higher stock prices for the shareholders.⁹⁵

Though not nearly as daring as Mackey’s claim, Harvard Business School’s Lynn Paine argued for the concept of Organizational Integrity.⁹⁶ Paine argued that employees simply are not motivated to comply with the law; one must build in aspiration quests to inspire them to even attempt to reach the level of basic compliance.⁹⁷ Linda Treviño and Gary Weaver studied the efficacy of legal compliance programs and

89. Prentice, *supra* note 85.

90. See John C. Anderson, Manus Rungtusanatham, & Roger G. Schroeder, *A Theory of Quality Management Underlying the Deming Management Method*, 19 ACAD. MGMT. REV. 472 (1994).

91. See Mark Starik & Gordon P. Rands, *Weaving an Integrative Web: Multilevel and Multisystem Perspectives of Ecologically Sustainable Organizations*, 20 ACAD. MGMT. REV. 908 (1995).

92. Alexandra Countess of Fredriksborg & Timothy L. Fort, *The Paradox of Pharmaceutical CSR*, BUS. HORIZONS (forthcoming 2014).

93. *Id.*

94. See, e.g., JOHN MACKEY & RAJENDRA SISODIA, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* (2013).

95. *Id.* at 273.

96. See Paine, *supra* note 3.

97. *Id.* at 111.

found that they worked when notions of procedural fairness, at a minimum, resulted in even-handed application of the relevant laws.⁹⁸ We will return to these integrations of law, economics, and ethics later in this paper, but for now simply wish to show that there have been some early efforts at integrating them.

As a predicate to such an integration, we proceed to an overview of the study of corporate culture in order to identify the traits and levers in Part II. By identifying these consensus traits and levers, we propose to establish more specific points and ways in which corporate culture can be directed toward more effective integration of the law, economics, and ethics in Part III. That integration will be with a particular eye toward how law and ethics can complement an already existing ethical culture.

II. THE CULTURAL ISSUE

Major “whistleblowing” cases over the past ten to fifteen years have focused on cultures that have gone off-track, including Enron,⁹⁹ Worldcom,¹⁰⁰ and the Bernie Madoff Ponzi Scheme.¹⁰¹ In the aftermath of the mortgage meltdown of a few years ago, similar kinds of greed-driven cultures were reported within the financial industry, even among some high-ranking officials who reported that major institutions sought to “rip the eyeballs out of their own clients.”¹⁰² Woes of some pharmaceutical companies, such as GlaxoSmithKline’s \$3 billion fine for fraud, suggest that problematic cultures reach beyond the financial sector.¹⁰³ Indeed, similar charges hold true with respect to Edward Snowden’s charges of the overreach and hubris of intelligence-gathering agencies.¹⁰⁴

It is hardly surprising then, that both practitioners and scholars focus significant attention on issues of corporate culture. Such concerns with culture extend beyond a desire to avoid scandal. From a

98. See Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131 (1999).

99. See C. William Thomas, *The Rise and Fall of Enron*, J. OF ACCOUNTANCY 41, 41 (2002), available at <http://www.journalofaccountancy.com/Issues/2002/Apr/TheRiseAndFallOfEnron.htm>.

100. See Theodore F. di Stefano, *WorldCom’s Failure: Why Did It Happen?*, E-COMMERCE TIMES (Aug. 19, 2005, 7:00 AM), <http://www.ecommercetimes.com/story/45542.html>.

101. See Robert Lenzner, *Bernie Madoff’s \$50 Billion Ponzi Scheme*, FORBES (Dec. 12, 2008, 6:45 PM), http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html.

102. Greg Smith, *Why I am Leaving Goldman Sachs*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/14/opinion/why-i-am-leaving-goldman-sachs.html?pagewanted=all>.

103. Charles Riley & Emily Jane Fox, *GlaxoSmithKline in \$3 Billion Fraud Settlement*, MONEY (Jul. 2, 2012, 12:49 PM), <http://money.cnn.com/2012/07/02/news/companies/GlaxoSmithKline-settlement/>.

104. See Ewen MacAskill, *Edward Snowden: How the Spy Story of the Age Leaked Out*, THE GUARDIAN (June 11, 2013), <http://www.theguardian.com/world/2013/jun/11/edward-snowden-nsa-whistleblower-profile>.

business standpoint, there has become widespread recognition that a culture of a company matters to business performance.

A. *Starting Points on Culture*

The realization that culture matters to performance has caught the attention of scholars as well. In their influential book, *Diagnosing and Changing Organizational Culture*,¹⁰⁵ Cameron and Quinn provide a short case study from the work of General Motors in the 1950s that demonstrates the financial potential inherent in changing from a dysfunctional corporate culture to one that is positive and constructive.

To avoid unionization, GM built plants in southern and western states, a strategy that not surprisingly did not sit well with the United Auto Workers Union and others, resulting in a highly conflicted work environment.¹⁰⁶ The Fremont, California plant with 5,000 workers that built the Chevrolet Nova was particularly problematic; in 1982, the plant featured low productivity, twenty percent absenteeism, 5,000 grievances filed, three wildcat strikes, and costs of assembling the car thirty percent higher than its Japanese competitors.¹⁰⁷ Sales dropped, quality was ranked worst in the company, and customer satisfaction with the Nova “had hit rock bottom.”¹⁰⁸ While the company had tried various strategies focused on quality, human resources, incentives, and control systems, nothing worked.¹⁰⁹ Finally, GM decided to partner with its competitor, Toyota, to build a tighter car, offering the Fremont plant for the new automobile with a requirement that the plant not be remodeled and the old equipment was to be used; moreover, Toyota had to hire the most senior UAW workers (required because of a contract provision related to joint ventures) so that the most alienated of the workforce would be used.¹¹⁰ Toyota agreed with the proviso that Japanese managers would run the facility.¹¹¹

The plant transitioned from producing the Nova to the Geo Prism and the Toyota Corolla and the results were startling. Absenteeism dropped from twenty percent to two percent; unresolved grievances dropped from 2,000 to zero, total annual grievances dropped from 5,000 to 2,000, wildcat strikes fell from three to zero; assembly costs dropped from thirty percent above Japanese competition to the same; productivity went from the worst in GM to double the GM average; quality went from the worst at GM to the best and the same result held true for customer satisfaction as well.¹¹²

105. KIM S. CAMERON & ROBERT E. QUINN, *DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE: THROUGH THE COMPETING VALUES FRAMEWORK* (3d ed., 2011).

106. *Id.* at 14.

107. *Id.*

108. *Id.*

109. *Id.* at 15.

110. *Id.*

111. *Id.* at 16.

112. *Id.* at 16–17.

Cameron and Quinn argue that while there may have been many reasons for the improvement, an interview with one UAW member captured the reason for the change the best.

This UAW member said that prior to the joint venture, he would go home at night smirking about the things he had thought up during the day to mess up the system. He would leave his sandwich behind the door panel of a car, for example. "A month later, the customer would be driving down the road and wouldn't be able to figure out where that terrible smell was coming from. It would be my rotten sandwich in the door," he chuckled to himself. "Or he would put loose screws in a compartment of the frame that was to be welded shut. People riding in the car would never be able to tell exactly where that rattle was coming from because it would reverberate throughout the entire car. They never figure it out," he said. "Now," he commented, "Because the number of job classifications has been so dramatically reduced [from more than 150 to 8], we have all been allowed to have personal business cards and to make up our own job titles. The title I put on my card is 'Director of Welding Improvement.'" His job was to monitor robots that spot-welded parts of the frame together. "Now when I got to a San Francisco 49ers game or a Golden State Warriors game or a shopping mall, I look for Toyota Corollas in the parking lot. When I see one, I take out my business card and write on the back of it, 'I made your car. Any problems, call me[.]' I put it under the windshield wiper of the car. I do it because I feel personally responsible for those cars."¹¹³

Cameron and Quinn claim that the difference reflects a deep organizational change about how employees think about the company and their role in it.¹¹⁴

B. *The Prima Facie Case*

1. Culture: Anthropology, Sociology, or Psychology

Cameron and Quinn's study of corporate culture has been very influential. The survey tool they use to diagnose cultural issues, called the Organizational Culture Assessment Instrument, has been used by over 10,000 companies.¹¹⁵ As we will see, there are other assessment tools and cultural frameworks, but given the seminal nature of their work, it is worth obtaining a sense of the dynamics of corporate culture first through their work.

Noting that there are more than 150 definitions of culture,¹¹⁶ Cameron and Quinn summarize that there are two main approaches to the understanding of culture: organizations have culture (a sociological

113. *Id.* at 17.

114. *Id.* at 16.

115. *About the Organizational and Cultural Assessment Instrument*, OCAI-ONLINE, <http://www.ocai-online.com/about-the-Organizational-Culture-Assessment-Instrument-OCAI> (last visited Feb. 14, 2014).

116. See CAMERON & QUINN, *supra* note 105, at 18 (citing CLYDE KLUCKHOHN, ALFRED LOUIS KROEBER & WAYNE UNTEREINER, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* (1952)).

view) and organizations are culture (an anthropological view) with the predominant view trending toward the sociological, with a consensus that “the concept of culture refers to the taken-for-granted values, underlying assumptions, expectations, and definitions that characterize organizations and their members.”¹¹⁷ It was only in the 1980s, though, that serious scholarship was devoted to the notion of corporate culture in terms of tying it to corporate performance.¹¹⁸ The reason for the delay in this area’s development, they argue, is that culture was often left as a description of “how things are around here” and generally was not reflected on until challenged.¹¹⁹ Indeed, this becomes very much Cameron and Quinn’s point: until challenged by incompatible values, culture is assumed.¹²⁰ Metaphorically connecting this to language, they state that “most people did not wake up this morning making a conscious decision about which language to speak. Only when confronted with a different language or asked specific questions about their language do people become aware that language is one of their defining assumptions.”¹²¹

Assumptions give rise to contracts and norms that govern human interactions in the organization and they, in turn, give rise to artifacts such as the buildings in which people work, the clothes they wear, and the kind of office they inhabit—as well as logs, mission statements and formal corporate goals.¹²² Those then lead to the actual conduct of individuals in the company.¹²³ If one is to change culture, each level, they argue, needs to be addressed.¹²⁴ They further argue that “culture” is more permanent than “climate,” which “consists of temporary attitudes, feelings, and perceptions.”¹²⁵

The ethical climate approach to ethical issues in organization comes from psychology. It is not only the culture scholars who argue for a difference between culture and climate; scholars focusing on the idea of climate also claim that climate is associated with the sense of psychology and the culture with anthropology.¹²⁶ The ethical climate scholars focus on issues that give rise to there being more conscious attention focused on ethical issues, so that moral awareness and sentiments are cultivated, typically through strong leadership, so that sensitivity to stakeholders and related ethical issues is enhanced.¹²⁷ Thus,

117. *Id.*

118. *Id.*

119. *Id.* at 19.

120. *Id.* at 19–20.

121. *Id.* at 20.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (citing ORGANIZATIONAL CLIMATE AND CULTURE (Benjamin Schneider ed., 1990)).

126. ETHICS AND COMPLIANCE OFFICER ASSOCIATION, ETHICAL CULTURE BUILDING: A MODERN BUSINESS IMPERATIVE 10 (hereinafter ECOA STUDY).

127. Bart Victor & John B. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 ADMIN. SCI. Q. 101 (1988); but see Michelle Westermann-Behaylo, *The Relationship Between Corporate Ethical Climate and Stakeholder Management* (Jan. 31, 2010)

the ethical climate scholars claim a differentiation from the culture scholars in two respects: one is that the source of study is different—psychology rather than anthropology—and also with an emphasis more on normative sentiments rather than anthropology’s attention to structure.¹²⁸ Thus, the ethical climate scholarship claim is that it has more to do with ethical issues than corporate culture issues, which may have little to do with ethics, per se, and more about how culture impacts productivity.

While we acknowledge the disciplinary difference between anthropology and psychology (and sociology as well), the differentiations seem akin to the laborious effort many scholars make to disentangle corporate social responsibility from business ethics and corporate citizenship, governance, and sustainability. To be sure, drawing on different disciplines leads to new and different insights, but they still attend to a common phenomenon, whether in terms of corporate responsibility issues or, for purposes of this paper, ethical corporate culture. Indeed, for purposes of our paper, we assert that “ethical” corporate culture integrates analysis of corporate culture with the ethically-oriented “ethical climate” so that the insights of both can be brought to bear. Further, it does seem, as will be shown, that corporate culture often deals with normative issues.

2. The Competing Values Framework

Given its stature and persuasiveness in the business world, the Competing Values framework requires closer examination. In providing that, we will also show that this framework maps exceptionally well on an integration of law, ethics, and economics we have already introduced. Further, both the Competing Values framework and our tentative integration directly correlate with a deep rooting of corporate values within the biological and physical sciences and also with a contemporary model of business trust-building. Our task is to elaborate upon this consilience in order to then propose insights for the maintenance of ethical cultures with legal norms.

Cameron and Quinn’s research shows that there are four main types of corporate cultures: Clan, Hierarchy, Adhocracy, and Market. The Clan culture has a strong feeling of an extended family with the leaders of the firm seen as mentors or even parents.¹²⁹ Employees share a good deal of personal information at work and this carries over to strong sensitivity to customers.¹³⁰ Human resources professionals focus on long-term development with resulting aspects of loyalty, cohesion, morale, teamwork, participation, and consensus.¹³¹ Employee

(unpublished Ph.D. dissertation, George Washington University) (on file with author), available at <http://pqdtopen.proquest.com/pqdtopen/doc/89184544.html?FMT=ABS>.

128. See ECOA STUDY, *supra* note 126, at 12.

129. See OCAI-ONLINE, ORGANIZATIONAL CULTURE ASSESSMENT INSTRUMENT 5 (2010), available at http://www.ocai-online.com/userfiles/file/ocai_pro_example_report.pdf.

130. *Id.*

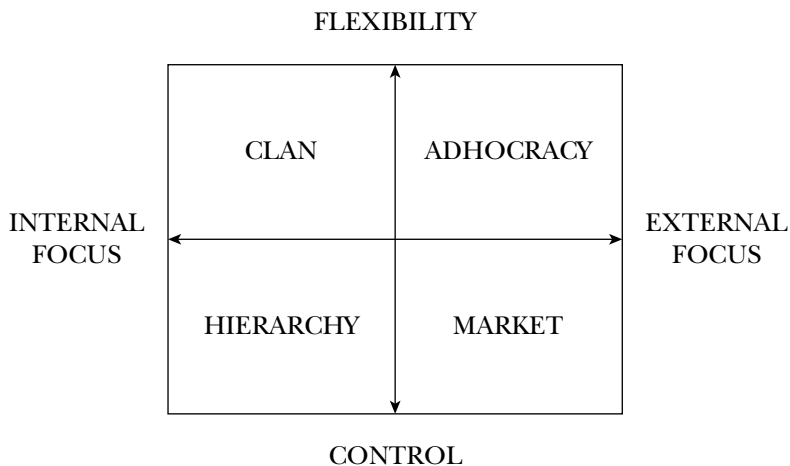
131. *Id.*

empowerment and open communications become crucial in this familial environment.¹³²

The Hierarchical culture, on the other hand, is very formalized and structured.¹³³ Smooth, long-term, efficient performance is valued with leaders being viewed as coordinators and organizers.¹³⁴ Procedures, formal rules, and policies hold the organization together and attention to employees focuses on secure employment and predictability.¹³⁵

The Market Culture is a competitive, results-oriented organization that tends to feature attributes of tough, demanding, hard-driven, and competitive people.¹³⁶ Winning motivates the participants with success being defined in tangible measures of performance and market penetration; leaders are hard-driving competitors.¹³⁷

The Adhocracy culture tends to be entrepreneurial and creative.¹³⁸ Leaders are innovators and risk-takers and thereby encourage such traits in employees.¹³⁹ What binds members of the organization together are a commitment to innovation and a desire to be cutting edge with success measured in the creation of new, unique products and services.¹⁴⁰ In an innovative culture, creating new standards and finding creative new approaches become hallmark strategies.¹⁴¹



132. *Id.*
 133. *Id.* at 7.
 134. *Id.*
 135. *Id.*
 136. *Id.* at 6.
 137. *Id.*
 138. *Id.*
 139. *Id.*
 140. *Id.*
 141. *Id.*

142. Leon J. Schimmoeller, *Leadership Styles in Competing Organizational Cultures*, 10 LEADERSHIP REV. 125, 128 (2010), available at http://www.leadershipreview.org/2010summer/article3_summer_2010.asp.

As with most academic typologies, Cameron and Quinn's framework is set out in an archetypical fashion, but they assert that any given business culture will be a mix of these four types.¹⁴³ The methodology to implement their research then takes place in two steps. First, they administer a straightforward survey based on their research.¹⁴⁴ The survey is comprised of six questions (Dominant Characteristics, Organizational Leadership, Management of Employees, Organizational Glue, Strategic Emphasis, and Criteria of Success) and respondents are given 100 points to allocate for each question along the attributes of the four culture types.¹⁴⁵ The survey is administered twice: the first time, participants are asked to answer the survey according to what currently exists in the workplace, and the second time the participants are to answer the survey according to what they would like to see in the workplace.¹⁴⁶ The difference between the two, then, provides a road map for how to make change and move from what currently exists to what is preferred.¹⁴⁷

This question of change becomes very much the point. Cameron and Quinn name their approach the "Competing Values" for good reason.¹⁴⁸ Values underlying hierarchy and stability exist in considerable tension with those emphasizing innovation, risk-taking, and creating new standards. Similarly, tensions can be found in comparing these four types of culture and would be expected to continue as change occurs.¹⁴⁹ Yet, if one assumes that some kind of change is desirable, then it would seem that a value cluster committed to change is automatically elevated over others. Indeed, we would propose that the value cluster of Adhocracy—the entrepreneurial, creative, innovative set of assumptions that seeks to set out new standards—would be the motivating value to balance among the three other quadrants, which otherwise seem to have little orientation to change per se. If this is true, then a reconceptualization of the framework would look instead like this:

143. See CAMERON & QUINN, *supra* note 105, at 139.

144. *Id.* at 24–25.

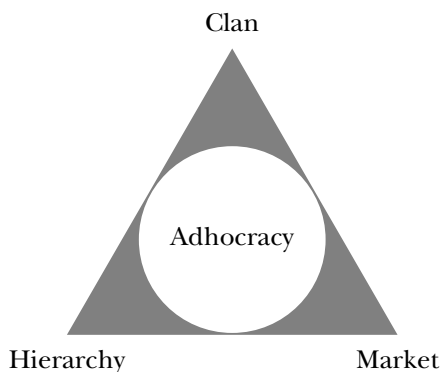
145. *Id.* at 25.

146. *Id.*

147. *Id.*

148. *Id.*

149. It is an open question, however, as to whether these values are "competing" or not. For example, values emphasizing harmony, on the one hand, and competition, on the other, may be able to be balanced with conscious effort. One could envision a sports team, for instance, that features stiff competition for playing time among players, but with loyalty and cohesion still held together not only through a commitment to winning (a Market value) but also by bonding among team members.



This reconceptualization accords with the tri-partite model we have previously sketched.¹⁵⁰ In this reconceptualization, Hierarchy would map with legal, compliance notions of business; Market would map onto the economic; and Clan would map with a moral dimension. Our reconceptualization aims not at claiming a definitive understanding of exact contours of such a graphic, but to more impressionistically locate the tension among these values in a way that brings the “competing” values closer to a common language used by other culture theorists and also in a way that is embedded deeply within our very nature.

Moreover, we would argue that this model further accords well with a leading framework within the field of business ethics. William Frederick, relying on naturalistic foundations rather than on philosophical principles, has long argued that in all nature, there are three value clusters: Economizing, Ecologizing and Power-Aggrandizing.¹⁵¹ Power-aggrandizing values are those that seek status and hierarchy.¹⁵² They exist in the animal world, for instance with competition to become the dominant lion in a given pride or the dominant wolf in a pack.¹⁵³ Power-aggrandizing values also exist in the human world in quests for power and status—the corporate world is no exception.¹⁵⁴ While Frederick tends to be quite negative in his assessment of power-aggrandizing, it can have a stabilizing feature in the creation of laws and regulation that assure that rogue behavior is punished by authorities. This is the basis for the trust-model of business ethics developed by Fort that argues that individuals (and society) reposes trust in a business when an outside party (typically the government through laws) can prevent or punish egregious behavior.¹⁵⁵ It provides the link to the legal compliance approach with which we began this article.

150. See Alexandra & Fort, *supra* note 92.

151. See, e.g., WILLIAM C. FREDERICK, VALUES NATURE AND CULTURE IN THE AMERICAN CORPORATION 9 (1995).

152. *Id.*

153. *Id.* at 146.

154. *Id.* at 151.

155. See TIMOTHY L. FORT, BUSINESS, INTEGRITY AND PEACE (R. Edward Freeman et al. eds., 2007).

Frederick's economizing values refers to the naturalistic impulse to convert raw materials into usable forms. This exists even in the plant world through photosynthesis and in the animal world through basic metabolism.¹⁵⁶ Frederick argues that business provides a social analogue to this function by converting raw materials into usable products and services for society as well.¹⁵⁷ This naturalistic value maps well onto the economic approach to business with which we began this article.

Frederick's ecological value pertains to the way in which there is long-term benefit to mutually beneficial relationships that give rise to the ecological system that allows life itself to flourish.¹⁵⁸ The entire ecosystem, of course, is based on these mutualisms where one creature's existence is embedded within a series of other relationships with other creatures.¹⁵⁹ From the standpoint of human organization, Frederick argues that this is found in the communities in which we live as well, where mutual interdependence is crucial, a feature that maps well with notions of the affective, which also is part of the beginning of this article.

Like Cameron and Quinn, Frederick argues that these are competing, mutually exclusive value clusters that present the challenge of how they can be integrated.¹⁶⁰ One does that, for Frederick, in two ways. One is through what he calls "techno-symbolic" values that are simply our rational capability to recombine, restructure, and to learn consciously how to adapt to new environments.¹⁶¹ This capability is essential to our human nature and is the basis for everything from the creation of language to the design of complex corporate culture and nation-states.¹⁶² The other way in which these three value clusters come into some kind of relationship with each other is through what Frederick calls "x-factor" values.¹⁶³ These are the idiosyncratic features of individuals that spark change and differences in any given organization.¹⁶⁴ We argue that these are consistent with leadership and that the combination of leadership along with the human capability to re-vision, re-structure, and to change—a set of assumptions and traits that seem to map well onto Cameron's and Quinn's Adhocracy Values—explain the culture-building map and opportunities for augmenting corporate culture.

Moreover, as we argue in the next section, we believe that this mapping and conceptualization accords with a meta-analysis of other corporate culture maps that have been created. In the figure below, we take thirteen leading frameworks that assess corporate culture and ethical climate. Eleven focus on culture per se and the final two address issues

156. See Frederick, *supra* note 151, at 156.

157. *Id.* at 163.

158. *Id.* at 187–89.

159. *Id.* at 157–62.

160. *Id.* at 9.

161. *Id.* at 188–92.

162. *Id.*

163. *Id.* at 16.

164. *Id.*

of ethical climate. As noted earlier, the differences between the two tend to be downplayed when considered within the four-part framework for which we argue. Moreover, while judgment calls could be disputed as to which of our four categories we place the dimensions of each of the culture framework, for the most part, there appears to be a consilience suggesting that the model captures much of the scholarship generating on the topic.

COMPARISON OF LEADING CORPORATE CULTURE MODELS AS RELATED TO FREDERICKS' NATURALIST FRAMEWORK

	Economizing	Ecologizing	Power Aggrandizing	Techno-Symbolic/x Factor
Competing Values ¹⁶⁵	Market	Clan	Hierarchy	Adhocracy
OCI ¹⁶⁶	Satisfaction of Needs	People	Security	Task
Denison ¹⁶⁷	Mission	Involvement	Consistency	Adaptability
Culture Web ¹⁶⁸			Power Structures; Organizational Structures; Control Systems; Rituals & Routines	Symbols; Stories
Culture Map		Evidence Values	Levers	Assumptions
Corp Evolution ¹⁶⁹	Systems		Structures	Technology; Skills
Deal & Kennedy ¹⁷⁰			Process; Tough Guy/Macho; Work Hard; Play Hard	Bet Your Company
Barrett ¹⁷¹	Physical	Emotional		Mental; Spiritual
Frontline ¹⁷²	Productivity Rewards; Rewards & Recognition	Environment; Teamwork	Objectives	Developmental Opportunities for Employees; Leadership

165. See CAMERON & QUINN, *supra* note 105.

166. See *Organizational Culture Inventory*, HUMAN SYNERGISTICS (Aug. 2014), http://www.humansynergistics.com/docs/default-source/product-info-sheets/oci_product_info_sheet_v1-0_nopricing.pdf?sfvrsn=4.

167. See Daniel Denison, DENISON CONSULTING, <http://www.denisonconsulting.com> (last visited Nov. 4, 2014).

168. See *The Culture Web*, MINDTOOLS.COM, http://www.mindtools.com/pages/article/newSTR_90.htm (last visited Nov. 4, 2014).

169. See *Corporate Evolution*, MINDTOOLS.COM, http://www.mindtools.com/pages/article/newSTR_90.htm (last visited Nov. 4, 2014).

170. See TERRENCE A. DEAL & ALLAN A. KENNEDY, *CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE* (1982).

171. See Richard Barratt, *Barrett Model*, BARRETT VALUES CENTRE (2009), http://www.valuescentre.com/culture/?sec=barrett_model.

172. See *Corporate Culture*, FRONTLINE LEARNING (2010), http://frontlinelearning.com/Corporate_Culture.html.

Leadership Circle ¹⁷³	Task	Relationship	Reactive	Creative
McKinsey 7S Model ¹⁷⁴	Strategy; Skills	Shared Values; Staff	Structure; Systems	Style
Ethical Culture ¹⁷⁵	Rewards Systems	Training; Selection; Fairness; Informal Norms	Rules; Policies; Decision Processes; Rituals	Leadership; Stories; Language
Alternate Ethical Climate ¹⁷⁶	Means to Achieve Goals; Performance Rewards; Resources Allocated to Tasks	Relationship expected in firms		Determination of goals for the members of the organization

The rows across the top of this chart represent Frederick's value clusters. The column on the far left contains leading corporate culture and ethical climate frameworks. The cells then demonstrate how the leading cultural and climate frameworks utilize concepts similar to Frederick's model. What this chart shows is that there is a great deal of commonality vis-à-vis these frameworks, on the whole, and Frederick's model.

What is also striking is the emphasis that appears on dimensions around the final category, which pertains to leadership, motivation, desire, and aspiration. While each category is consistently represented in the four cells, only this last category is featured in every cell; moreover, motivation appears to be emphasized more often than in the other cells. This suggests that the dimension of the affective—of leadership, x-factor values, and a working culture that is based on more than just compliance and economics—may be more crucial than any of the others.

Such an inference, of course, needs to be tempered by the fact that most of these analyses of culture are offered with an aim to change an existing culture.¹⁷⁷ Such an aim to change tautologically implies a motivation to do things in a different way. For that matter, even if only understanding rather than change per se drives a company to consider corporate culture, such an examination of corporate life has its value. Either way, the critical perspective of aiming for something better remains crucial to the creation of a preferred corporate culture or climate. This suggests that the affective dimension—an internally driven desire to achieve something—is essential for achieving an ideal (or at least workable) corporate culture.

173. See LEADERSHIP CIRCLE (2014), <http://www.theleadershipcircle.com>.

174. See *The McKinsey 7S Framework*, MINDTOOLS.COM, http://www.mindtools.com/pages/article/newSTR_91 (last visited Feb. 12, 2014).

175. See Linda Klebe Treviño, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601, 601–17 (1986).

176. See Deborah Vidaver-Cohen, *Moral Climate in Business Firms: A Conceptual Framework for Analysis and Change*, 17 J. BUS. ETHICS 1211, 1211–26 (1998).

177. See CAMERON & QUINN, *supra* note 105, at 67 (using Apple as an example).

III. THE PARADOX OF THE AFFECTIVE & GOVERNANCE CHALLENGES

So far, we have not suggested that one kind of culture is ethically preferable to another. A hierarchical structure has served the military for millennia, producing men and women of great rectitude, honor, and discipline. At those times when a company has spun out of control with many ethical or legal violations, it may well be that a hierarchical structure is necessary to impose the needed controls.¹⁷⁸ An outside, market focus may be called for when a company's outlook has become too insular without regard for the variety of values existing outside the firm; this could be true when a company has failed to keep up with changes in the economic market, but so too when it has failed to keep up with changes in the social or political market with issues pertaining to diversity. A family-oriented business—one that is family-owned for example—may have been able to create an organization like an extended family, but such an organization may find it difficult to sustain that atmosphere as it grows and expands. An entrepreneurial firm may reach the point where it can become so entrepreneurial that it consistently eschews structure or bonds of relationship, creating a self-centered environment that may not even have a market payoff.¹⁷⁹ We believe that this is one reason why Cameron and Quinn simply identify their cultural change model as one of moving from an existing structure to a preferred structure.¹⁸⁰

Yet, clearly, Cameron and Quinn are saying much more than this. As their paradigmatic example, summarized earlier in this article shows, their framework provides a reminder that attending to issues of human pride, autonomy, relationships, and responsibility have both an independent value and also one that makes for more productive workplaces. That message comes through in the analysis of other leading cultural change models, each one indicating the importance of the affective.

A. *The Essential Dimension of the Affective For Ethical Culture*

At the heart of ethics and ethical cultures are moral sentiments that feature a human quality of caring nature for others. Some may characterize this as our human social nature¹⁸¹ while others may go further and call it a moral aspect of our human nature.¹⁸² Whatever characterization one makes of these natural sentiments, at the heart of any ethics—and at the heart of any change itself—is a desire to care about *something*.¹⁸³ And so, if there is a perception that a culture needs

178. *Id.* at 8.

179. *Id.* at 67 (using Apple as an example).

180. *Id.*

181. Elliot D. Cohen, *You Are a Social Animal*, PSYCHOL. TODAY (Sept. 21, 2010), <http://www.psychologytoday.com/blog/what-would-aristotle-do/201009/you-are-social-animal>.

182. See, e.g., Paul R. Lawrence, *The Biological Base of Morality?*, 4 BUS., SCI., AND ETHICS, 59 (2004).

183. To be sure, it is true that this change could take a dark turn of change to unethical behavior and culture. Addressing that issue becomes the topic of another paper.

to change from a clan to a hierarchy or a hierarchy to a market or any other variation, the sentiment of motivation becomes the starting point, immediately followed by the leadership and organizational capability to change.¹⁸⁴ Logically, this elevates affective/adhocracy as the primary energies for change and an affective, clan-like approach as substantively aspired to.

For example, Whole Foods CEO John Mackey argues that no entrepreneur goes into business solely for making money.¹⁸⁵ There always is a second, non-economic motive. It may be that the entrepreneur has a social cause he or she wishes to pursue¹⁸⁶ or it may be that he or she wants to show their father that he or she can be as successful as another sibling.¹⁸⁷ There is always that “something else.” Mackey argues that the same holds true for employees as well, meaning that a key to success is to structure work so that employees have an opportunity to fulfill their “something else” at work; in doing so, Mackey argues that great passion will be released and the company will be far more effective as well as its work more meaningful.¹⁸⁸ Such a model places significant power in the hands of employees entrusting them to be mature moral agents.

To undertake the risk of changing an environment begs the issue of trust. As we have argued elsewhere, sincerity is an often underappreciated virtue.¹⁸⁹ There may be times and places where a company undertakes an action to gain good publicity and because of a perception that it will pay. What makes those actions especially trustworthy, though, is when those actions are taken for sincere reasons committed to the good of the action itself as opposed to the instrumental benefits that may accrue to the company.¹⁹⁰ Paradoxically, it is thus when actions are taken for their own good that they then have the most value.¹⁹¹ This holds true for issues pertaining to philanthropy, but we assert that it would also apply for the disruptive change that accompanies corporate culture. Thus, moral sentiments, strategically developed and sincerely communicated provide a set of moral values by which change itself best takes place. Moreover, these particular virtues are internally derived goods rather than extrinsically required by laws and controls (associated with hierarchy) and with economic rewards (associated with markets). An optimal corporate culture would most likely be found in the clan structure with strong adhocracy practices.

That a hierarchically-based or market-based culture may need to incorporate such virtues in order to achieve an ethical culture does not strike us as surprising. These virtues are exactly those that define what an ethical culture would seem to be. The challenge is when a clan and/

184. See CAMERON & QUINN, *supra* note 105, at 2.

185. See e.g., MACKAY, *supra* note 94, at 20.

186. *Id.* at 45.

187. *Id.*

188. *Id.* at 86.

189. See Alexandra & Fort, *supra* note 92.

190. *Id.*

191. *Id.*

or adhocracy-based culture has reason to augment legal and economic dimensions as it grows and especially as it grows into geographic areas that have strong external law oversight and requirements. Cameron and Quinn state that:

Over time, companies tend to gravitate toward an emphasis on hierarchy and market culture types. Once their culture profiles become dominated by those lower two quadrants, it seems difficult for them to develop cultures dominated by the upper two quadrants. It's almost as if a law of gravity takes over. The lower quadrants have a tendency to remain dominant the longest. It takes a great deal of effort and leadership to make the change to a clan or adhocracy culture.¹⁹²

B. *Governance Implications: Business As Mediating Institution*

Such a nature accords well with the notion of an extended family where affective values are more likely to persist in future generations of leadership when those generations maintain a long term commitment to the history of the family business, take pride in its ability to make an impact, and respect the individuals who are part of the organization. Such commitments can, of course, also be extended to non-family members even when no one in the given organization is related to each other.

For example, Kristin Hahn, a major Hollywood film producer explicitly sets out to create exactly such an atmosphere of extended family when putting together a team to make a film. Hahn says, “[w]e really look for people we know and who we trust and who also will bring energy and fun to the film. Many talented people are available, but it’s important to bring people together that can work together like a close community.”¹⁹³

Genetic relationships may be one way to engender a caring culture, but sociologically, the important dimension is not family per se, but running a business as a mediating institution. This sociological term includes families as well as other small institutions where there is face-to-face engagement, a closeness, so that individuals experience consequences of moral actions and thereby gain moral character.¹⁹⁴

Natural law theorists have long relied on this concept to claim that these mediating institutions foster the development of moral character. Studies in archeology and neurobiology substantiate the point that human groups experience breaking points at group sizes with limits of 6, 30, 150, and, finally, 500.¹⁹⁵ As population sizes grow larger, hierar-

192. See CAMERON & QUINN, *supra* note 105, at 79.

193. Kristin Hahn, Presentation at Professor Fort’s Cultural Norms in Global Business Class (Feb. 2013).

194. See TIMOTHY L. FORT, ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION 16 (2001) [hereinafter ETHICS AND GOVERNANCE.].

195. *Id.* at 49–51.

chy tends to be relied upon more, including in business.¹⁹⁶ This insight has implications for corporate culture. Economies of scale provide incentives for companies to grow ever larger as well as more global, but affective sentiments thrive in small organizations, thus suggesting that companies wanting to retain (or introduce) more affective sentiments must design corporations to allow for sub-groupings within the organization. Moreover, a clear sense of purpose, reinforced by leadership, can further allow a commitment to common goals that can foster their affectivity.¹⁹⁷

Recall the earlier example of J&J. A family company until the 1944 initial public offering, J&J stood as a very clan-like, family-like, ecologizing organization. In an effort to preserve that culture at the time of the IPO, the founders of the company articulated J&J's famous Corporate Credo, which detailed the responsibilities the company maintained.¹⁹⁸ Those responsibilities began with the responsibilities to the parents, doctors, nurses and consumers who used the pharmaceutical's products and then extended, sequentially, to the company's employees, suppliers, communities, and governments.¹⁹⁹ The final responsibility was to the company's shareholders with a closing assertion that if the company lived up to these other stakeholder obligations, the shareholders would receive a fair return on their investment.²⁰⁰

Over the years, employees reported that the Credo and its values were very central to the life of the workplace.²⁰¹ In job interviews and in annual reviews, the importance of the Credo was reinforced and, sometimes, rewards were provided to those employees who had the best annual story of the Credo at work.²⁰² This commitment was put to the test when J&J confronted the 1982 tampering with its leading brand, Tylenol.²⁰³

Yet, over the past ten years or so, J&J's image has been tarnished with multiple product recalls.²⁰⁴ Reports of the company's internal

196. See also ROBIN DUNBAR, GOSSIP, GROOMING, AND THE EVOLUTION OF LANGUAGE (1996). Dunbar has other examples as well. He goes on to note that the Mormons followed a pattern similar to the Hutterites, writing that when Brigham Young led the Mormons to Utah, he divided his flock of 5,000 into groups of 150. Dunbar also reports that a study conducted by the Church of England found that the ideal congregation size is less than 200, and that over the past one hundred years, the military company unit has ranged from 130 (the number in Gandhi's ashram) to 170. These anthropological realities suggest that certain capacities are universal among human beings. The findings themselves do not suggest universal norms, but do indicate basic human capacities that may have an impact on how human beings relate to each other.

197. See, e.g., FORT, *supra* note 194 (providing an extensive discussion of the history and sociological dimensions of mediating institutions as applied to business).

198. See JOHNSON & JOHNSON, *supra* note 14.

199. *Id.*

200. *Id.*

201. *Human Resources Practices of Johnson and Johnson*, BEKNOWLEDGE.COM, <http://www.beknowledge.com/wp-content/uploads/2011/01/16790Human%20Resources%20Practices%20of%20Johnson%20and%20Johnson.pdf> (last visited Feb. 12, 2014).

202. *Id.*

203. See Moore, *supra* note 14.

204. See, e.g., Katie Thomas, *New Recalls by Johnson & Johnson Raise Concern About Quality Control Improvements*, N.Y. TIMES (Sept. 12, 2013), <http://www.nytimes.com/2013/>

emphasis also have diminished, which perhaps might explain why a group of J&J shareholders filed a derivative suit against the company's Board of Directors for failing to perpetuate the ethical culture of the firm and thereby leading to persistent legal problems.²⁰⁵ In a settlement with the shareholders, the Board committed to a stronger system of controls and values to return the company to its history.²⁰⁶ Whether or not the company will be successful remains to be seen, but the history of the company over the past fifty years demonstrates the threat of relying on hierarchical structures (power-aggrandizing) and pursuit of markets (economizing) and these values' capacities for crowding out of the affective (ecologizing).

There are governance implications for companies that seek to preserve a prized ethical culture while needing to attend to legal and economic pressures. If a central attribute of an ethical culture is that individuals within the culture are themselves moral agents with beliefs, values, feelings, and sentiments, the external pressures associated with hierarchy and markets pose real threats, especially given the tendency for companies to sag into these areas and to stay there.²⁰⁷

One way to do this is through the work of strong leadership, which does not dictate values per se, but rather creates an atmosphere where individuals are equipped and encouraged to be responsible moral leaders in their own right. Sometimes called transformational leadership, this style of leadership places great weight in the engagement of the individual, often charismatic CEO, who demands and inspires people to undertake an approach in a certain heroic way.²⁰⁸

A second way also requires much of leadership, but in a way that lends itself to a flatter governance structure and style. In this model, the CEO recuses him or herself from making decisions in order to provide the room for others in the organization to assert their own leadership. This itself is a values-based model of management, which would devolve responsibilities first to an active board of directors, but then cascading down as well through senior management and into the ranks of employees.²⁰⁹

A third, institutional way to achieve this result would be to structure the organizations in which people work to accord with the neurological capabilities and sentiments of individuals so that people work in a business that acts as a mediating institution.²¹⁰

09/13/business/new-recalls-by-johnson-johnson-raise-concern-about-quality-control-improvements.html?_r=0.

205. In re Johnson & Johnson Derivative Litig., 900 F. Supp. 3d 467 (D.N.J. 2012).

206. Stipulation and Agreement of Settlement for In re Johnson & Johnson Derivative Litig., *supra* note 205, available at http://www.millerchevalier.com/portalresource/JJ_settlement.

207. See CAMERON & QUINN, *supra* note 105.

208. See, e.g., MACKAY, *supra* note 94.

209. See Alexandra & Fort, *supra* note 92, at 16; see also Lynn Paine and Sarah Mavrinnac, *AES Honeycomb*, HARV. BUS. SCH. CASE COLLECTION (1994 (revised 2009)).

210. See generally ETHICS AND GUIDANCE, *supra* note 194.

C. *Trust-Building and The Affective*

We thus come to the final aspect of our argument. Corporate culture is comprised of three forces, which are integrated, blended, and balanced by a fourth. Whether one names those forces as Hierarchical, Market, and Clan or Power-Aggrandizing, Economizing, and Ecologizing, those forces persist in human organizations. An entrepreneurial dimension—also known as a techno-symbolic aspect—is the force that creates new arrangements with these three forces. With cultures tending to sag toward hierarchical and market-driven structures and behaviors and with more robust cultures being called for, the emphasis on both effective and ethical cultures seems to be one that finds ways to cultivate the affective dimension and place it within the life of corporate culture.

As just noted, one governance mechanism to achieve this might be to create a very flat governance structure with leadership specifically insisting on not taking on all the powers that are available to him or to her. A second governance mechanism could be a leadership model that more directly emphasizes value-based management throughout the company to train and to empower employees to make good, solid, mature decisions. A third mechanism would be to specifically structure the organization itself so that individuals find themselves in a mediating institution with associated small sizes. With any of these approaches, the core message is to trust individuals in the organization to make good decisions and to make sure those decisions are made well—from the threat of punishment and coercion but from the investment in training and respect. Or, to put it otherwise, the primary message is to foster the creation of trustworthy employees and to respect them.

Such an approach, of course, runs risks of individuals jeopardizing companies with legal systems with very strong compliance enforcement. Does a value-based, trusting approach to corporate culture insulate a company from prosecution pursuant to the Federal Sentencing Guidelines? The question answers itself reasonably well.

A company may be able to maintain its commitment to an affective culture if the members of that culture are provided with training and information about the relevant law applicable to them. To return to the comments of Robert Prentice, but with a twist, a way to foster ethical business behavior is through having employees learn business law as well. The same answer, in fact, has already been provided on the economic side of the equation. Companies often teach employees the basics of economics and finance so that they can understand company decisions and make such decisions themselves as well.²¹¹ Thus, the way in which a company with a strong, affective culture can maintain that culture is to maintain its commitment to empowerment of individuals within the organization in order for those individuals to continue to make decisions on the basis of their internal training, education, and empowerment. In introducing the law and economics—external

211. See, e.g., Raj Aggarwal and Betty J. Simkins, *Open Book Management—Optimizing Human Capital*, 44 BUS. HORIZONS 5 (Sept.–Oct. 2001).

motivators of culture—one integrates them into training as opposed to making them solely external systems of punishments or rewards.

While this approach answers the question posed at the outset, it also provides insight for companies that already align with compliance and economics (also known as hierarchy and markets). Such companies may need to open their cultures to a more effective approach, but in doing so, they can find ways to simultaneously maintain robust law-abiding and market-efficacious companies.

IV. CONCLUSION

Though rooted in the strongest scholarship in corporate culture and business ethics, our argument is conceptual. It is, in short, that the affective is often squeezed out of corporate culture, especially as companies grow larger and are also exposed to legal regimes and global markets that place strong pressure on external forces. Yet, the reason that there is demand for studies and consulting in corporate culture lies in the fact that law and economics pressures often short-change the very effectiveness of companies themselves. There is a bottom line weakness that needs shoring up and the affective is frequently turned to as a way to do this.

That attention shines a light on companies, then, that already strongly attend to the affective. Their challenges lie in how to maintain that desired culture even as legal and market pressures build. The answer, we argue, is any one—or combination of several—corporate governance mechanisms that provide strong support for a trained, educated, empowered workforce. This could occur through strong leadership insisting on values-based management; it could occur through leaders who recuse themselves from decision-making so that others can take their own leadership roles; it could occur through structuring institutions so that sizes of organizations match the natural capabilities of individuals who then are in a better position to more spontaneously take on the empowered positions that lead to pride, caring, and affectivity in general. We do not suggest that these three mechanisms are the only possible ways to foster such cultures, but we do believe they provide a strong starting point. Moreover, we suggest that these mechanisms, along with others are better explored through an integration of the law with the literature of managerial theory and practice with an emphasis on Board-level strategies and policies.

A desirable next step is both qualitative and quantitative research that explores the conceptual hypotheses and dimensions we have proposed. Qualitatively, in-depth interviews with both leaders and employees would yield evidence as to ways to integrate the tri-partite structure in a constructive way. Quantitatively, research measuring the legal, economic, and ethical performance would further shed light on this relationship.

