

Corporate Justice

Corporate Justice

SECOND EDITION

Todd J. Clark

DEAN AND PROFESSOR OF LAW
WIDENER UNIVERSITY DELAWARE LAW SCHOOL

andré douglas pond cummings

DEAN AND PROFESSOR OF LAW
WIDENER UNIVERSITY COMMONWEALTH LAW SCHOOL



CAROLINA ACADEMIC PRESS

Durham, North Carolina

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ISBN 978-1-5310-2961-6
eISBN 978-1-5310-2962-3
LCCN 2025931159

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

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Acknowledgments

Todd J. Clark

Second edition

First, I want to express my sincere appreciation to Dean andré cummings for agreeing to write this book with me approximately 12 years ago, in the summer of 2013. At the time, we were both inspired with a vision to ensure that issues of social, racial, and systematic inequality were adequately explored in the context of the business law classroom. We understood that these issues were of critical importance, but that they were not sufficiently addressed. Out of this context, grew our work in Corporate Justice. This project has been transformative for both of us as scholars, and most importantly, for our students.

Second, I am extremely grateful for our research assistant, Maddy Goolsby's, work on this project. Without her efforts, it would not have been possible to complete this project.

Third, I want to thank my mentors, Dean cummings and Professors Reggie Mombrun, Grace Wigal, Angela Gilmore, and Mary Wright. Every day I am in legal education, I spend that time honoring their commitment to advancing my career and I am forever grateful for their support.

Fourth, I want to thank my family for their love and support. Specifically, I want to thank my mother, Dora L. Clark, my father, Sherwood Hill, my aunt, Selena Comer, and my son, Jordan K. Clark.

Fifth, I want to thank Carolina Academic Press for supporting the publication of our Second Edition of this book.

Finally, as the Dean of Widener University Delaware Law School, I want to share my excitement for serving in my current deanship. While my days are long, the passion, focus, and efforts of my faculty, staff, and students inspire me to continue my scholarly agenda and my fight for justice.

First edition

First, I would like to thank God for putting me in a position to write about and shed light on issues that I find compelling. I would also like to thank my mother, Dora L. Clark, my father, Sherwood Hill, and my aunt, Selena Comer for all of their love and support. Additionally, I would like to thank my son, Jordan K. Clark, for serving as part of my motivation for writing. Hopefully, my writings and work as a professor will one day inspire him to achieve his greatest potential.

Second, working on this project with Dean *andré douglas pond cummings* has been amazing. Dean *cummings* was instrumental in helping me to enter the academy and his mentorship and friendship has helped me to become the professor I am today. Moreover, our work on this book has inspired me to think about the world from a different and more informed vantage point that has inured to the benefit of my classroom teaching and student mentorship.

In addition, I would like to thank Dean Angela Gilmore and Professors Reggie Momburn and Kimberly Cogdell for motivating and encouraging me to write this book. But for their inspiration and consistent support, I would not have written it, and for that, I am forever in their debt.

I am also extremely grateful to have the honor of teaching at North Carolina Central University School of Law. Professor *cummings* and I have taught “Corporate Justice” since 2012 and the students that have participated in our past classes have substantially influenced these materials. Their passion, previous experiences, and classroom contributions challenged us to think more critically about the law. While we were listed as the instructors for the course, we were the true beneficiaries of the course experience. Many times, after class, we spent numerous hours reflecting and debating about the classroom commentary.

I also extend my sincere gratitude to Dean *cummings* and Professors Reggie Momburn, Grace Wigal, and Mary Wright for all of the time they dedicated to helping me improve as both a scholar and a law professor. Anything that I have managed to do well as a member of the academy is largely a function of their dedication and vested interest in my success.

I am also grateful to Professors Atiba Ellis, Kevin Foy, Joseph Grant, Jena Martin, Steven Ramirez, and Cheryl Wade for reading drafts of our book. Their feedback and review was invaluable and substantially enhanced the quality of this book.

I also appreciate the scholarship grant provided by North Carolina Central University School of Law that supported the production of this book. Moreover, I am extremely grateful to the IT and administrative staff at North Carolina Central University School of Law in supporting the facilitation of the “Corporate Justice” course.

Last but not least, I am extremely grateful for the assistance provided by my research assistants Lauren McKoy and Raven Tyndall who worked diligently to help me organize this book.

andré douglas pond cummings

Second edition

A serious debt of gratitude is owed to Maddy Goolsby, our extraordinary research assistant at the University of Arkansas at Little Rock William H. Bowen School of Law who worked diligently on this second edition piloting nearly every page of this edition. She aced Corporate Justice when she took the class from us at Bowen Law and her insights and suggestions on the second edition have been invaluable. I am also appreciative of Widener University Commonwealth Law School for entrusting me with the reins as Dean of the Law School, and I am grateful for the academic and intellectual support provided by Widener Law Commonwealth.

Dean Clark and I have now taught Corporate Justice more than a dozen times out of this book, both team teaching and teaching the class solo. Our student evaluations for this course have been exceptional. We are grateful to every single student who has taken this class from us at North Carolina Central Law School, St. Thomas University Law School, and the University of Arkansas at Little Rock William H. Bowen School of Law. We are grateful to our colleagues that have adopted this book and course and taught it at their law schools. Each of these opportunities and experiences has enhanced our thinking and motivated our changes in updating this second edition. We hope that the lessons learned from Corporate Justice will motivate future lawyers to engage in aggressive and progressive corporate practice, believing that service on corporate boards and activism as shareholders can very literally impact corporate practice and the nation to be fairer, more just, and provide equal opportunity to all citizens.

I am personally grateful to my family that supports me in all of my moves, projects, and efforts, particularly my parents Lynne and Robert (may they rest in peace), my siblings Sharon, Kristin, Cameron, and Kara (may Kent and Susan rest in peace), my extended family, and my own little crew that always stands beside me as I try to make an impact, Lavinia, my partner, and our babies Cole, Malia and Max. Finally, to my comrade and fellow traveler, Todd Clark, the seed that has sparked into Corporate Justice, the book and the course, sprang from your relentless imagining of a better corporate practice and world. Thank you.

First edition

No book or manuscript makes it to publication without a talented team of contributors and supporters. I gratefully acknowledge that team of talented individuals here. First, I am extraordinarily grateful to my co-author and friend Todd J. Clark, who led us into this Corporate Justice journey with passion, innovation, and perseverance. This book would never have seen the light of day without Todd's vision, intellect, and persistence. Second, both Todd and I owe a debt of gratitude to the North Carolina Central University School of Law administration, staff, and students, particularly those four classes of students who signed-up to take a summer certificate course entitled "Corporate Justice." The NCCU Law students that engaged in the following

material with us were sharp, hard-working, smart, and they challenged us consistently on the materials that follow. This coursebook has been shaped and sharpened by the excellent NCCU Law students that have taken our course. Thank you. Further, I have been very impressed with the administration at NCCU Law and the staff, particularly the technical and IT staff, as we have offered this course through distance education technology that mirrors an in-class experience in very real ways. Thank you to the Deans that had the vision to approve this course along with the Social Justice Law-ying summer certificate program, the staff who have assisted and supported our delivery of these materials, and again, the students who have tackled this material with zeal and forward-thinking precision.

I am deeply indebted to the staff, student research assistants and faculty who have worked side-by-side with me in compiling, editing, and drafting this book. To those administrative assistants, student research assistants, and faculty members who have supported my efforts, either by editing, organizing, assisting in drafting, or proofreading, I offer sincere appreciation and respect: Lydia LaMont, Michael Nissim-Sabat, Ruth de Wit, Jennifer Hitchcock, Kim Landis-Savio, Noah Moore, Katrese Reeves, Prosper Batinge, Guadalupe Luna, Justin McKinzie, Celia Garza, and Phebe Poydras. Thank you.

Prior to going to press, Todd and I reached out to our friends in the Corporate Law professoriate and asked them to give a rigorous reading to our manuscript. I am so grateful to the following law professors and legal practitioners that provided incisive commentary and constructive criticism that improved our book immeasurably: Jena Martin, Steven Ramirez, Cheryl Wade, Atiba Ellis, Joseph Grant, and Kevin Foy. Thank you.

To our editorial team at the Carolina Academic Press, we express gratitude, particularly to Jefferson Moors who first saw potential in this project and offered us a book contract, Ryland Bowman who shepherded the project, and Grace Pledger who took us to the finish line with editing suggestions and assistance. Thank you.

Finally, I am personally grateful to my own little family that continues to sacrifice along with me as we created a new book in a never-before-offered subject matter. Thank you to my forever partner Lavinia Mann Cummings and our babies, Cole Kaianuanu, Malia Ao'ilagi, and Maxwell Keavé. I cannot imagine drafting this coursebook without the support, sunshine, and reality check that Luvie, Cole, Malia, and Max have provided. In addition, to the extended Cummings and Mann families, I will always be grateful for the support, love and kindness that we can always count on.

Todd and I hope that all who read and study this book will be inspired and empowered to believe that a better and more just system of corporate law and capitalism can be pursued and achieved.

Introduction

Lawyers play a critical role in designing the social fabric of morality and justice. The following quote from Charles Hamilton Houston, Civil Rights activist, architect of the *Brown v. Board of Education* strategy, and former Dean of Howard Law School, eloquently highlights the ethos of this idea.

[The] Negro lawyer must be trained as a social engineer and group interpreter. Due to the Negro's social and political condition. . . the Negro lawyer must be prepared to anticipate, guide and interpret his group advancement. . . . [Moreover, he must act as] business advisor . . . for the protection of the scattered resources possessed or controlled by the group. . . . He must provide more ways and means for holding within the group the income now flowing through it.¹

In penning these words, Houston was endeavoring to inspire black lawyers to actively engage in the process of social and legal change. Houston famously proclaimed further that lawyers have a choice, to either become social engineers or parasites on society. Houston's efforts during the Civil Rights movement embody the essence of the type of training that is absent from many law school classrooms today. Houston's leadership during the Civil Rights movement consisted of much more than a discussion about the evils of segregation. Instead, his efforts were defined by his concerted activism as exemplified by his promulgation of the plan for overturning *Plessy v. Ferguson*, as well as his inspiration and mentoring of individuals like Thurgood Marshall, James Nabrit, Spottswood Robinson, A. Leon Higginbotham, Constance Baker Motley, Robert Carter and William Hastie, among others, to execute his ideas of social justice.

In an effort to capture the essence of Houston's charge to inspire students to get involved in the Civil Rights movement, beyond the walls of the classroom—it is our hope that this book will motivate students of all races to move beyond a preliminary discussion and investigation of what we call “corporate justice.” More specifically,

1. GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983) (quoting Charles Hamilton Houston, *Personal Observations on the Summary of Studies in Legal Education as Applied to the Howard University School of Law*, (May 28, 1929)).

we endeavor to inspire students to become involved as activists and to promote real change toward equality and social justice in America's corporate boardrooms and on Wall Street.

In some business law textbooks, there is some discussion, although seriously inadequate in our view, regarding issues of corporate justice; however, there is little to no discussion concerning the tools and processes by which future lawyers can actually engineer change. In essence, there is some minor talk, but little practical development of the skills needed or the pedagogical methods necessary to move students from the essence of the discussion of corporate justice to an existence as corporate justice activist.

The impetus behind this book is to get students to think more critically about the business world around them and to inspire them to get actively involved as agents of change. Through the readings and exercises included in this text, we are confident that students and readers will walk away enlightened and will have a greater sense of personal obligation to make a difference as well as the power individuals possess to effectuate change.

To develop our view of creating engineers of corporate justice, this book will place particular emphasis on how the law, and lawyers in their practice of the law, interact with corporations and other business enterprises. To facilitate this objective, this book will explore the following issues: foundational aspects of corporate governance; how issues of gender and racial diversity affect corporate decision making processes; the causes and effects of the financial market crisis of 2008; regulation, or lack thereof, of credit default swaps and other derivative instruments; director/officer fiduciary duties; the Dodd-Frank Act; *Citizens United*, the prison industrial complex; Corporate Reparations, particularly those pledged in the aftermath of the George Floyd murder and the eventual backlash against corporate repair; and finally, we will explore the impact and effect of social movements on financial reform.

Furthermore, to aid in our discussion about the role of corporations in a just society, we will also look at how corporations are governed, and what responsibilities board members and officers have in their governance. We will ask how it is possible that companies like Wells Fargo, Enron, Lehman Brothers, AIG, Goldman Sachs, and WorldCom functioned in a manner that apparently defrauded investors and the general public. We will seek to understand the stabilizing influence that good corporate governance brings to society, and how it is possible for shareholders and others to benefit from the positive influences that corporations can have on society.

We hope that after reading and studying this book readers will have a better understanding of the role that business plays in American life, and of the ways in which the law is an integral part of business. And more importantly, we hope that students and lawyers will come to appreciate the role that each can have in helping to create a more justice oriented economic structure.

A. What Is Corporate Justice?

Corporate Justice is an elusive term—easily stated, but not easily defined. At its core, Corporate Justice refers to a responsibility, even a moral obligation, which businesses and corporations have to engage fairly, civilly, and responsibly in the world and community that they do business and from which they derive profits. More than that, the concept of Corporate Justice also focuses on the roles that shareholders, policy makers, other stakeholders, and the community at large have in fostering a more just and responsible business community.

Corporate Justice requires that corporations do no harm in their pursuit of profits. Corporate Justice acknowledges the exciting and important role that a successful corporation can play in the lives of the founders, stakeholders and communities with which that business intersects. While recognizing this exciting role, Corporate Justice expects that founders, stakeholders and executives in a business will honor human potential and eschew profits when those profits are derived from unfairness, inequality, danger, and damage.

Corporate Justice recognizes the value, even beauty, of capitalism and free enterprise, as an economic system that when intelligently, effectively, and lightly regulated enables beneficiaries the opportunity to realize their best potential. Human capital is successfully harnessed when an efficient Corporate Justice regime exists. Corporate Justice rejects the Law and Economics and free market fundamentalist approaches to capital markets, recognizing that the weaknesses in Law and Economics and unfettered capital markets is the failure of these approaches to appropriately account for inequality, social injustice, entrenched elitism, and continuing discrimination that pervades global capital markets, perpetrated both by its market makers and market players. Corporate Justice embraces capitalism and free enterprise while simultaneously demanding that corporate law and corporate citizens eliminate inequities, discrimination, and entrenchment of the elite.

Corporate Justice challenges the assumption that a corporation is a fictional person imbued with free speech protections under the First Amendment to the United States Constitution. Corporate Justice advocates for shareholder activism as a valuable method in challenging the socially dysfunctional corporation. Corporate Justice identifies the perverse incentives inherent in the privatization of certain industries including detention and prison regimes and challenges those corporations that pursue these perverse ends. Corporate Justice recognizes that only when human capital is fully exercised, rather than the elite protected, will true capitalism emerge.² To that end, Corporate Justice challenges the Board of Director model where only elite, primarily white male executives, dominate the corporate world in the United States.

2. STEVEN RAMIREZ, *LAWLESS CAPITALISM* (NYU Press 2013).

B. Corporate Justice Is Different from Corporate Social Responsibility and Economic Justice

Corporate Justice is not the same as Corporate Social Responsibility (CSR). In fact, CSR can properly be viewed as a subset of Corporate Justice. While CSR focuses on the corporation and its decision makers, as noted above, Corporate Justice focuses on these individuals as well as the corporation's shareholders, policy makers, other stakeholders, consumers, and the community at large.

CSR has gained great popularity in recent years and much has been written and said about a corporation's responsibility to engage in socially responsible behavior. CSR is often defined as a company operating in a manner that respects and accounts for its social and environmental impact on the citizens and communities in which it engages its business. A corporation engaging in CSR will be committed to enacting policies that integrate responsible practices into its daily operations, and with great transparency, monitoring these policies and reporting on the progress made toward its socially responsible goals.³ The publication *Making Good Business Sense* defines CSR as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."⁴

Today, CSR includes a broad commitment by businesses to improve the lives of its employees and to improve the conditions of the communities in which they do business. These objectives are most often met by companies adopting fair policies and developing cultures that include governance and ethics, employee hiring, opportunity and training, responsible supply chain and purchasing policies, and responsible energy and environmental impacts.⁵ Of course, CSR is not without its critics.⁶

Corporate Justice encompasses much more than CSR. While Corporate Justice embraces the ethos and goals of CSR, it requires much more than good citizenship by a corporation. Corporate Justice seeks to hold corporate leaders, shareholders, politicians, consumers, and the community at large responsible for ensuring that financial markets operate in a manner that promotes the financial well-being of more than a corporation's own shareholders or the corporation's own decision makers. While Corporate Justice does not reject the idea of generating profit, it does mandate that profit maximization cannot be a corporation's sole objective. Unlike CSR, Corporate

3. *Corporate Social Responsibility*, AsYouSow.ORG, (last visited July 14, 2024), <http://www.asyousow.org/about-us/theory-of-change/>.

4. Richard Holme & Phil Watts, *Corporate Social Responsibility: Making Good Business Sense*, THE WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT (last visited July 13, 2024), https://www.globalhand.org/system/assets/aadd8f32f6ecef3fe3b080b8d462d509da3f3e57/original/CSR_Good_Business_WBCSD_2000.pdf.

5. *Corporate Social Responsibility*, *supra* note 3.

6. Aneen Karnani, *The Case Against Corporate Social Responsibility*, WALL ST. J. (Aug. 23, 2010), available at <http://online.wsj.com/article/SB10001424052748703338004575230112664504890.html>.

Justice recognizes that a corporation's obligation to promote this responsibility is a responsibility that is shared by groups in and outside of the corporation.

Similarly, Corporate Justice is not the same as Economic Justice. Economic Justice can properly be viewed as a subset of or corollary to Corporate Justice. Economic Justice encompasses the moral principles which guide the design of economic institutions. These institutions all differently determine how each person earns a living, enters into contracts, exchanges goods and services with others and otherwise produces an independent material foundation for his or her economic sustenance. The ultimate purpose of economic justice is to free each person to engage creatively in the unlimited work beyond economics — that of the mind and the spirit.⁷

C. Shareholder Activism

One of the ways in which Corporate Justice seeks to proactively engage corporate law, particularly in challenging the dysfunctional corporate citizen, is through shareholder activism. Examples of shareholder activism abound and will be covered in great detail in later sections of this book. Because shareholders of a corporation are imbued with certain rights, a solitary, committed shareholder can wield great power when she recognizes that a corporation is potentially injuring society. As you study the material in this book, and think deeply about the arguments and cases presented herein, consider the statements above made by Charles Hamilton Houston in connection with social engineering and the financial condition of people of color in the United States and across the world. A lawyer can play a significant role in seeking and pursuing justice locally, nationally and globally. As you read about shareholder power and corporate leadership, contemplate on the avenues that are available to forward-thinking, socially conscious practitioners of the law, to seek and to perpetuate economic equality and social justice. We believe that a solitary, committed attorney, who is also a corporate leader or shareholder can become a dynamic social engineer. In the prescient words of Margaret Mead, “[N]ever doubt that a small group of thoughtful, committed citizens can change the world; indeed, it’s the only thing that ever has.”

7. *Defining Economic Justice and Social Justice*, CENTER FOR ECONOMIC AND SOCIAL JUSTICE CESJ.ORG (last visited July 14, 2024), <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/>.

Authors' Note

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