

Corporate Justice

Corporate Justice

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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 most 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 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, 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, although inadequate, discussion regarding issues of corporate justice; however, there is little to no discussion concerning the tools

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)).

and processes by which future lawyers can actually engineer change. In essence, there is some 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 you will walk away enlightened and will have a greater sense of your personal obligation to make a difference as well as the power you 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 the 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; 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 Enron, Lehman Brothers, AIG, and WorldCom so recently 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 you 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 you will come to appreciate the role that you 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.

B. Corporate Justice Is Not Corporate Social Responsibility or 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, 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

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

3. *Corporate Social Responsibility*, ASYOUSOW.ORG, (last visited Nov. 10, 2015), <http://www.asyousow.org/about-us/theory-of-change/corporate-social-responsibility/>.

4. Lord Holme & Richard Watt, *Making Good Business Sense*, THE WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT (last visited May 15, 2016), <http://www.wbcd.org/work-program/business-role/previous-work/corporate-social-responsibility.aspx>.

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 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 only objective. Unlike CSR, Corporate 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,

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>.

7. *Defining Economic Justice and Social Justice*, CENTER FOR ECONOMIC AND SOCIAL JUSTICE CESJ.ORG, (last visited May 14, 2016), <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/>.

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.”

Authors' Note

All cases, law review articles, and newspaper stories that follow have been reproduced with permission (where required) and have been edited by the authors for relevance, scope, and space. In all of the edited material, original footnotes have been omitted and most references eliminated. While quotation marks have been retained in many places to indicate direct quotation from a source other than the author, we have omitted those references as well. In order to view all citations, footnotes and references, a reader must pull-up and review the original article at the place of first publication. The place of original publication appears prominently at the beginning of or in the first footnote of each edited and re-printed piece.

