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Business Values: Culture, Commitment, Trust and Ethics

This chapter examines the importance of values in business, regulation and law. It begins by recalling the findings of chapter 20 in relation to the catastrophic collapse in the global finance system caused by the collapse in ethical culture that dominated the financial services industry. It appears that regulation has reached its limits in effectively controlling behaviour in the financial services sector, and the issue of culture is critical. It then examines two extremes of business values, first the maximisation of shareholder value, which has dominated modern business, and second, the values that a number of leading commentators have recently noted as being absent from modern business practice, namely commitment and trust. It then notes the desirable relationship between ethics and values.

Economic models of principal–agent assume a simple binary (or similar) relationship. The reality is that businesses exist in structures that have both hierarchical tiers and horizontal 'groups' of 'agents', and that the individuals involved are subject to multiple influences. The collective effect of these influences creates organisational culture—in fact, a series of sub-cultures. It is wholly misleading to frame the motivations for action by individual staff, which occur in many different situations, as if they were all equal agents of a principal, whether shareholders or the company as employer.

I. Selfishness

Economic orthodoxy has interpreted Adam Smith's analysis of economic actors[1] as being based on *self-interest* as being that they are—and should always be—*selfish*. As Gold noted,[2] the development of this idea in the nineteenth century led to extensive preoccupation with mechanisms that align (only) the economic interests of intermediaries with those of their supposed principals (agency theory),[3] and paved the way for a utility-maximising model to become an all-encompassing theory of human behaviour.[4]

[1] A Smith, *Theory of Moral Sentiments* (1759).

[2] N Gold, 'Trustworthiness and Motivations' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014).

[3] FY Edgeworth, *Mathematical Physics: An Essay on the Application of Mathematics to the Moral Sciences* (London, Kegan Paul, 1881) 12.

[4] SB Lewin, 'Economics and Psychology: Lessons for Our Own Day from the Early Twentieth Century' (1996) 34(3) *Journal of Economic Literature* 1293–323; M Mandler, 'A Difficult Choice in Preference Theory: Rationality Implies Completeness or Transitivity But Not Both' in E Millgram (ed), *Varieties of Practical Reasoning* (Cambridge MA, MIT Press, 2001) 373–402.

Sedgwick charts the following history.[5] In 1943, Schumpeter defined the principal goals of entrepreneurial culture as profitability and growth, with innovative strategic practices.[6] The entrepreneur was expected to decline but this did not occur. In 1967 Galbraith argued that the entrepreneur was being replaced by 'the technosphere', namely individuals bringing specialised knowledge, talent or experience to group decision making.[7] Management theory then underwent significant development, bringing the idea that individuals would no longer work for life in one firm or skill but those with expertise would have increased movement within and between economic units.[8] Even by 1992, capitalism was being attacked for 'greed, selfishness, exploitation and a crude disregard for any interests but one's own.'[9]

Collins and Porras' study of high achieving companies found that highly successful companies all had an all-consuming internal vision that was shared by all staff and drove them to excel.[10] Offer's analysis is that since the 1980s public policy has been guided by two doctrines: Selfishness and that the primacy of self-regard is good.[11] The behaviour demonstrated across the financial services industry, and also increasingly by other business leaders, has been essentially selfish, arrogant and greedy.[12] These values have been instilled by inherent weaknesses in business school MBA education, through focusing on profit-maximisation and ignoring ethics.[13] There has been a complete dislocation between the values of society and practice in some industries. Regulatory and liability systems have proved wholly incapable of addressing this problem. Deterrence was defective and ineffective.[14] Self-reporting, even when required, is vulnerable to opportunistic behaviour, cherry-picking.[15] Leniency policies have not addressed cultures.

As Jaffer, Morris, Sawbridge and Vines have recently analysed,[16] a series of serious consequences follow from the situation described above. Shareholders have held other stakeholders to ransom.[17] Risks have been misallocated and service providers have extracted

[5] P Sedgwick, *The Enterprise Culture* (London, SPCK, 1992).

[6] J Schumpeter, *Capitalism, Socialism and Democracy* (New York, Harper & Row, 1943).

[7] JK Galbraith, *The New Industrial State* (London, Hamish Hamiltion, 1967).

[8] eg C Handy, *The Age of Unreason* (London, Business Books, 1989).

[9] Sedgwick (n 5) 126.

[10] J Collins and JI Porras, *Built to Last: Successful Habits of Visionary Companies* 12th edn (London, HarperCollins, 1994, 2005).

[11] A Offer, 'Regard for Others' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014).

[12] P Cammock, 'Vocational Calling and the Search for a New Approach to Business Leadership' in J Buckingham and V Nilakant (eds), *Managing Responsibly. Alternative Approaches to Corporate Management and Governance* (Aldershot, Gower, 2012).

[13] E Krell, 'Why Character is Destiny for Business Schools—And the MBAs they Groom' (2010) 28(2) *Baylor Business School* 4.

[14] J O'Brien, 'Professional Obligation, Ethical Awareness, and Capital Market Regulation' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014) 213.

[15] MW Toffel and JL Short, 'Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing?' *Journal of Law and Economics* (forthcoming); AA Pfaff and W Sanchirico, 'Big Field, Small Potatoes: An Empirical Assessment of EPA's Self-Audit Policy' (2004) 23(3) *Journal of Policy Analysis and Management* 415–32.

[16] S Jaffer, N Morris, E Sawbridge and D Vines, 'How Changes to the Financial Services Industry Eroded Trust' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014).

[17] L Stout, *The Shareholder Value Myth* (San Francisco, Berrett-Koehler Publishers, 2012); C Mayer, *Firm Commitment* (Oxford, Oxford University Press, 2012).

huge rents:[18] Pay was significantly higher than justified by long-term performance.[19] The equity market was overcome by short term maximisation of profits.[20] Remuneration structures involved annual performance fees for asset managers, with large bonuses based on short-term profits. Sandel's conclusion was that an era of market triumphalism came to a devastating end.[21]

Corporations are not static bodies, their cultures and 'DNA' evolve. Organisations are susceptible to *cultural drift*.[22] In fact the IMF (International Monetary Fund) has pointed out in their most recent Global Stability Report that the *tendency* for corporate culture to drift may be more evident with financial firms since 'corporate culture plays an important role in banks because to a much larger extent than other sectors, bank employees often face decisions in situations for which rules are ambiguous or allow for discretion, which may lead to an expectation that bad behavior will go unpunished and good behavior unrewarded.'[23] Mandis, in recording organisational drift in the financial industry, warns of firms incrementally moving away from their intended culture.[24] He also warns that this slow drift often goes unnoticed unless direct and deliberate control is taken to guide that evolution. Mandis points out that the financial industry, both collectively and individually, has over the years surrendered an ethical standard for a legal one, in other words, ethical values for technical compliance. The proliferation of laws, regulations and guidelines has an obfuscatory effect here and can substitute for reputation and ethics.[25]

Despite statements that culture was changed after 2008, there has been glaring evidence that that assertion is incorrect. Kay commented that the American model of lightly regulated capitalism and liberal democracy supposedly controlled large financial institutions when in reality the floors beneath were occupied by a rabble of self-interested individuals determined to evade any controls on their own activities.[26] Manipulation of the foreign exchange markets took place long after the banks had said they had sorted out their cultures and approaches, and had been fined for abusing interbank interest rate benchmarks. Fines were imposed on banks for operating ineffective controls that allowed their traders to manipulate the G10 spot foreign exchange (FX) market between January 2008 and October 2013.[27] The Governor of the Bank of England commented: 'The repeated nature of these

18 R Sandler, *Medium and Long-Term Retail Savings in the UK: A Review* (HM Treasury, 2002).

19 IH Cheng, H Hong and J Scheinkman, 'Yesterday's Heroes: Compensation and Creative Risk Taking' (2009), unpublished working paper, Princeton University, cited in H Davies *The Financial Crisis: Who is to Blame?* (Cambridge UK and Malden MA, Polity Press, 2010).

20 Stout (n 17); Mayer (n 17).

21 MJ Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London, Penguin, 2013).

22 J Shipton, *Integrity in Financial Markets—Challenges from Asia*, Speech to the FCA International Regulators' Seminar, London, 24 November 2014.

23 *Global Financial Stability Report. Risk Taking, Liquidity, and Shadow Banking. Curbing Excess while Promoting Growth, October 2014* (International Monetary Fund, 2014) 129.

24 S Mandis, *What Happened to Goldman Sachs: An Insider's Story of Organizational Drift and its Unintended Consequences* (Boston, Harvard Business Review Press, 2013).

25 J Macey, *The Death of Corporate Reputation: How Integrity has been Destroyed on Wall Street* (London, FT Press, 2013).

26 J Kay, *Obliquity* (London, Profile Books, 2010) 174.

27 Fines totalling £1,114,918,000 were imposed in Novemner 2014 on five banks for failing to control business practices in their G10 spot foreign exchange (FX) trading operations: Citibank NA £225,575,000 ($358 million), HSBC Bank Plc £216,363,000 ($343 million), JPMorgan Chase Bank NA £222,166,000 ($352 million), The Royal

fines demonstrates that financial penalties alone are not sufficient to address the issues raised. Fundamental change is needed to institutionalise culture, to compensation arrangements and to markets.'[28]

A number of studies suggest that group decision making can make members of the group willing to accept stupid ideas or hazardous risks[29] that they would reject if making the same decision alone.[30] Evidence exists from various sectors that serious wrongdoing can emerge in small, tight groups of individuals. Chapter four noted that point in relation to cartels. This appears true of the PIP breast implant fraud.[31] The FCA (Financial Conduct Authority)'s FX investigation found that:

> traders at different banks formed tight knit groups in which information was shared about client activity, including using code names to identify clients without naming them. These groups were described as, for example, 'the players', 'the 3 musketeers', '1 team, 1 dream', 'a co-operative' and 'the A-team'.
>
> Traders shared the information obtained through these groups to help them work out their trading strategies. They then attempted to manipulate fix rates and trigger client 'stop loss' orders (which are designed to limit the losses a client could face if exposed to adverse currency rate movements). This involved traders attempting to manipulate the relevant currency rate in the market, for example, to ensure that the rate at which the bank had agreed to sell a particular currency to its clients was higher than the average rate it had bought that currency for in the market. If successful, the bank would profit.[32]

The sum of these failings has been failure of the financial services sector to understand not just that there has occurred a dislocation between the values of society and the values of that have driven the behaviour of many in the sector, but also that this dislocation has endangered the whole global economic system. The Archbishop of Canterbury said that the banking system should return to 'a broad sense of promoting the wellbeing' of those whom it serves.[33] The action of destroying trust in financial services as a sector crumbles its social licence to operate.[34] Research on individual traders and firms shows that success follows a

Bank of Scotland Plc £217,000,000 ($344 million) and UBS AG £233,814,000 ($371 million): Press release, *FCA Fines Five Banks £1.1 Billion for FX Failings and Announces Industry-wide Remediation Programme* 12 November 2014. See subsequently Press release *FCA Fines Barclays £294,432,000 for Forex Failings* 20 May 2015. Perhaps 20 traders communicated through an internet chat room between 2007 and 2013 sending 'comically self-incriminating messages' such as 'If you ain't cheating, you ain't trying' *The Economist* (London, 23 May 2015) 6.

[28] M Carney, Speech 'The Future of Financial Reform', 2014 Monetary Authority of Singapore Lecture, 17 November 2014.

[29] See IL Janis and M Mann, *Decision Making* (New York, Free Press, 1977) 423, where, however, it is also pointed out that there are some studies that an initially dominant risk-averse viewpoint within a group may shift an individual away from risk.

[30] B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge, Cambridge University Press, 1993).

[31] See http://www.bbc.co.uk/news/health-16391522 and *Poly Implant Prothèse (PIP) Silicone Breast Implants: Review of the Actions of the Medicines and Healthcare Products Regulatory Agency (MHRA) and Department of Health* (London, Department of Health, 2012) at https://www.gov.uk/government/publications/pip-silicone-breast-implants-review-of-the-actions-of-the-mhra-and-department-of-health; 'Restoring Confidence in Medical Devices. Reporting on the Success of the PIP Action Plan, European Commission', June 2014, at http://ec.europa.eu/health/medical-devices/regulatory-framework/pip-action-plan/index_en.htm.

[32] Press release (n 27).

[33] J Welby, 'How Do We Fix This Mess?' speech given on Monday 21 April 2013, http://www.archbishopofcanterbury.org/articles.php/5050/how-do-we-fix-this-mess-archbishop-justin-on-restoring-trust-and-confidence-after-the-crash.

[34] Carney (n 28): 'A trusted system can retain its social licence to support the real economy in innovative and efficient ways'.

customer focus, involving asking what innovations, products or services customers need and value, and then satisfying that demand and gaining a justified reputation for doing so. A supplier or self-intermediary that believes that their position and function is more important than their customers is not on solid ground. The problem with the financial services sector was that selfishness became endemic, and a sense of the value of financial services to the wider society was lost. The fact that a whole sector can focus on external values such as ensuring the absolute safety of their customers, is demonstrated by the civil aviation industry, as discussed in chapter 19, in which the quality of humility is notably present.

II. The Business Objectives of Profit and Shareholder Value

The classic theory runs as follows. It is axiomatic that capitalism is a political and economic system in which enterprises compete to make profit. Firms are owned by shareholders, who choose to invest their capital in a firm in exchange for, and with the expectation of, making profit.[35] Since many investors lack detailed information or expertise (asymmetry) to control or monitor the decisions being taken in relation to their money, managing agents take operational decisions on their behalf, as directors and professional managers of a company. Avoidance of conflicts between the interests of owners and managers (agency problem) is minimised or avoided where the interests of both groups are aligned, and managers are incentivised by being paid by results. This is the model of maximising shareholder value.

The model has been modified in some jurisdictions to take account of wider interests than just those of shareholders, namely those of employees and other stakeholders. Thus, under the 'enlightened shareholder value' model of the UK Companies Act,[36] Directors must promote the success of the company for the benefit of its members and in doing so have regard to various factors, for example

— the likely consequences of any decision in the long term;
— the interests of employees;
— the need to foster the company's relationships with; suppliers, customers and others;
— the impact of operations on the community and the environment;
— the desirability of the company maintaining a reputation for high standards of business conduct.

[35] AA Berle and GC Means, *The Modern Corporation and Private Property* (New York, Harcourt, Brace & World, 1923); M Friedman, *Capitalism and Freedom* (Chicago IL, University of Chicago Press, 1962); RE Freeman, *Strategic Management: A Stakeholder Approach* (Boston MA, Pitman/Ballinger, 1984); A Sen, *On Ethics and Economics* (Oxford, Blackwell, 1987); JR Boatright, 'Business Ethics and the Theory of the Firm' (1996) 34(2) *American Business Law Journal* 217; JE Stiglitz, 'Evaluating Economic Change' (2004) 133(3) *Daedalus* 18; T Donaldson and LE Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20(1) *Academy of Management Review* 65; AL Friedman and S Miles, 'Developing Stakeholder Theory' (2002) 39(1) *Journal of Management Studies* 1; TM Jones, W Felps and GA Bigley, 'Ethical Theory and Stakeholder-related Decisions: The Role of Stakeholder Culture' (2007) 32(1) *Academy of Management Review* 137; RK Mitchell, BR Agle and DJ Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22(4) *Academy of Management Review* 853.

[36] Companies Act 2006, s 172.

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Nilakant and Lips-Wiersma record the following changes.[37] Corporate control shifted from owners to non-owning professional managers in the early twentieth century (the managerial revolution) but the dominance of professional managers was challenged around the mid-1980s.[38] Shareholding shifted from a large number of small shareholders to institutional investors.[39] An ideology of neo-liberalism emerged during the mid-1980s, which viewed individual freedom as both the mark and aim of human progress. This coincided with deregulation, technological change and globalisation.[40] The contractarian perspective became the model, viewing an organisation not as a social institution, but as a nexus of contracts.[41] A modified version of utilitarianism, normative economic theory drawing on consequentialism and welfarism emerged, with the argument that all choices must be evaluated by their outcomes, and outcomes must enhance individual utilities or personal well-being.[42]

It is widely agreed that business behaviour became narrowly focused on maximising shareholder value from the 1980s,[43] linked with a widening of citizens' shareholding (and so a dilution of external control by individual shareholders) and a political ideology that influenced individualism[44] and individual liberty.[45] Governance arrangements were changed so as more closely to align managerial incentives with investor interests.[46] Some have criticised that approach as being, contrary to humans' better nature, to be selfish and greedy, to ignore civic responsibilities and to cause society to descend to amorality.[47] Porter and Kramer have criticised an outdated approach to value creation, and he argues that the solution lies in the idea of shared value.[48]

37 V Nilakant and M Lips-Wiersma, 'The Duty of Corporate Management: From the Perspective of Dharma' in J Buckingham and V Nilakant (eds), *Managing Responsibly. Alternative Approaches to Corporate Management and Governance* (Aldershot, Gower, 2012).

38 M Useem, *Investor Capitalism* (New York, Basic Books, 1996).

39 C Brown, 'Rise of the Institutional Equity Funds: Implications for Managerialism' (1998) 32(3) *Journal of Economic Issues* 803.

40 M Chen, 'Post-crisis Trends in Asian Management' (2002) 1 *Asian Business & Management* 39.

41 S Baiman, 'Agency Research in Managerial Accounting: A Survey' (1982) 1 *Journal of Accounting Literature* 154; JL Bradach and R Eccles, 'Price, Authority, and Trust' (1989) 15 *Annual Review of Sociology* 97; L Donaldson, 'The Ethereal Hand: Organizational Economics and Management Theory' (1990) 15(3) *Academy of Management Review* 369; L Donaldson, *American Anti-management Theories of Organization: A Critique of Paradigm Proliferation* (Cambridge, Cambridge University Press, 1995); KM Eisenhardt, 'Agency Theory: An Assessment and Review' (1989) 14(1) *Academy of Management Review* 57; EF Fama and MC Jensen, 'Agency Problems and Residual Claims' (1983) 26 *Journal of Law and Economics* 327; M Jensen and W Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305; F Lafontaine, 'Agency Theory and Franchising: Some Empirical Results' (1992) 23(2) *RAND Journal of Economics* 263; D Levinthal, 'A Survey of Agency Models of Organizations' (1998) 9 *Journal of Economic Behaviour and Organization* 153; J Pfeffer, *New Directions for Organization Theory: Problems and Prospects* (New York, Oxford University Press, 1997).

42 A Sen, *Development as Freedom* (New York, Alfred A Knopf, 1999).

43 W Werner, 'Management, Stock Market and Corporate Reform: Berle and Means Reconsidered' (1977) 77(3) *Columbia Law Review* 388; A Kaufman, L Zacharias and M Karson, *Managers vs Owners: The Struggle for Corporate Control in American Democracy* (Oxford, Oxford University Press, 1995); WW Bratton, 'Berle and Means Reconsidered at the Century's Turn' (2001) 26 *Journal of Corporation Law* 737.

44 FA von Hayek, *The Constitution of Liberty* (London, Routledge & Kegan Paul, 1960).

45 J Rawls, *A Theory of Justice* (Cambridge MA, Harvard University Press, 1971).

46 Useem (n 38).

47 M Ridley, *Origins of Virtue* (London, Penguin Science, 1998).

48 ME Porter and MR Kramer, 'Creating Shared Value' (2011) at https://hbr.org/2011/01/the-big-idea-creating-shared-value.

In any event, a policy of pursuing the maximisation of shareholder value has recently drawn strenuous criticism from leading scholars, and has especially been held to have been a root cause of the global financial crisis. First, Armour and Gordon have argued that the extent to which two key assumptions necessary to support the maximisation of the value of shareholders' claims fail to do so has been underappreciated. The assumptions are, first, that the share price does in fact give the best available estimate of the value of shareholders' claims and, second, that a range of mechanisms—contracts, liability rules, and regulation—act to ensure that any costs a firm's activities impose on other parties are internalised into that firm's profit function. Armour and Gordon argue that the shareholder value norm in fact creates incentives for firms systematically to undermine the efficacy of regulatory internalisation mechanisms, thereby failing to avoid the significant externalities that were thought to be avoided.[49] They suggest that directors and officers should have liability for negligence causing significant loss *to the firm*, and thereby to its shareholders.[50]

Second, Mayer has argued that the structure of Anglo-American companies enables and incentivises short-termism, such that business continuity is systemically disrupted in pursuit of the realisation of instant profit by incentives to create mergers, and asset strip by hedge funds.[51] When these trends are aligned with remuneration of managers on the basis of their short-term results, the resulting focus on making decisions so as to produce short-term profitability undermines investment, continuity and business sustainability, and generates a significant shift in power from long-term investors towards short-term investors and their agents, who seek to make instant profits. Mayer asserts that Vermaelen's defence of shareholder value[52] is misguided. He argues that shareholders are vulnerable to the performance of the corporation to a greater degree than any other party. Directors must uphold the interests of their shareholders, who are weaker. In reality, Mayer observes, managers, shareholders, employees, creditors and society are all in ongoing relations with each other. Although some parties can protect themselves through contracts, the plurality of interests and objectives is not fully recognised in English or United States law—although better embedded in German law.

Collins' analysis of highly successful companies[53] noted that their executive compensation patterns were not systematically different relative to comparison companies in the use of stock (or not), high salaries (or not), bonus incentives (or not), or long-term compensation (or not). The only significant difference was that the executives in the former category received slightly *less* total cash compensation 10 years after the transition than their counterparts at the still-mediocre comparison companies.[54] They concluded that 'It's not how

[49] J Armour and JN Gordon, 'Systemic Harms and the Limits of Shareholder Value' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014). For an absence of voice in corporate environmental responsibility, see C Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2012) 1 *Legal Studies* 141.

[50] J Armour and JN Gordon, 'Systemic Harms and Shareholder Value' (2014) 6(1) *Journal of Legal Analysis* 35. For officers and other controllers liability would arise where there had been lack of candor in risk committee review or for a deficient risk review process, and for directors for lack of care in risk-oversight.

[51] Mayer (n 17).

[52] T Vermaelen, 'Maximizing Shareholder Value: An Ethical Responsibility?' in C Smith and G Lenssen (eds), *Mainstreaming Corporate Responsibility* (Chichester, Wiley, 2009).

[53] J Collins, *Good to Great* (New York, Harper Business, 2001).

[54] ibid, 49.

you compensate your executives, it's which executives you have to compensate in the first place.' 'The purpose of a compensation system should not be to get the right *behaviors* from the wrong people, but to get the right *people* on the bus in the first place, and to keep them there.'[55] Collins and Porras had earlier quoted George Merck II: 'We never try to forget that medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear. The better we have remembered it, the larger they have been.'[56]

Kay adopts the observation that the most profitable businesses are not the most profit-oriented and argues that happiness is not achieved through the pursuit of happiness ('Happiness is not a red Ferrari').[57] Similarly, Mayer points out that shareholder value is an outcome, not an objective.[58] Mayer suggests that the reason why senior executives insisted on paying themselves so much was to sustain their sense of their own importance ('bonuses come to matter as much for the kudos they confer as the cash they generate').[59] He states that a 'corporate culture that extols greed is, in the end, unable to protect itself against its own employees. Nor does the business with such a culture attract public sympathy when things go wrong.'[60]

Analyses of the sources of corporate power reveal competing interests, and hence how to balance and align them.[61] Alternatives to the shareholder primacy theory[62] are director primacy, team production theory (requiring mediation by directors of the competing interests of the various relevant stakeholders)[63] and managerialism.[64] Against this background, the emergence of corporate *social* responsibility, and now a call for corporate *ethical* responsibility, are unsurprising.

In response to the self-interest of maximising individual remuneration or shareholder value it has been pointed out that wealth creation is a collective effort.[65] Individual greed comes at the expense of exploitation of others, and is essentially unethical. It constitutes an affront to the values of all stakeholders and society generally. It also undermines sound business practice. In 1998 Pfeffer stated seven 'high performance practices' that can lead to innovation, productivity and sustained profitability: Employment security, selective hiring, self-managed teams and decentralisation, extensive training, reduction of status differences, sharing of information, and high and contingent compensation.[66] However, in 2007 he found little evidence of the widespread use of these practices in contemporary

55 ibid, 50.
56 Speech to Medical College of Virginia, 1 December 1950, quoted in Collins and Porras (n 10) 49.
57 Kay (n 26). See 'Unilever: In search of the Good Business' *The Economist* (London, 9 August 2014) 69.
58 Mayer (n 17) 167.
59 Kay (n 26) 36.
60 ibid, 37.
61 SJ Padfield, 'Corporate Social Responsibility & Concession Theory' *William & Mary Business Law Review* (forthcoming).
62 LA Bebchuk, 'The Myth That Insulating Boards Serves Long-Term Value' (2013) 113 *Columbia Law Review* 1637.
63 MM Blair and LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247, 280.
64 U Rodrigues, 'A Conflict Primacy Model of the Public Board' (2013) *University of Illinois Law Review* 1051.
65 J Buckingham and V Nilakant (eds), *Managing Responsibly. Alternative Approaches to Corporate Management and Governance* (Farnham, Gower, 2012).
66 J Pfeffer, *The Human Equation* (Boston MA, Harvard Business School, 1998).

organisation.[67] Exclusive focus on shareholder wealth creates organisations typically characterised by a culture of compliance and control.[68] Employees, particularly those with high aspirations, are likely to find the culture constraining, and the culture itself tends to stifle innovative thinking from the lower ranks.[69]

The financial services sector was not unique in creating conflicting pressures. Conflict could arise between performance goals, such as achievement of performance or time targets or cost control, and maintaining safe or ethical operation. This could expose employees to irreconcilable stresses, often under intense time pressure.[70]

Offer places the blame firmly on economics, in having 'arrived at what appears to be a blind alley: The doctrines of efficient markets and the policy norms they endorsed have failed repeatedly and badly.'[71]

III. Commitment and Trust

Even before the financial crisis, academic distrust of corporate culture was growing. Since the global financial crisis it has erupted against individualism, unbalanced self-interest and the maximisation of shareholder value. Scholars have instead asserted the need to balance the interests of all stakeholders in pluralist structures, based on values of sustainable commitment and trust.

Economists have long noted the rationality of trusting others, rather than acting selfishly, where exchange transactions are repeated. Adam Smith also argued that solidarity that appears in trust networks grows from sympathy bred by long-term familiarity, and this forms stronger bonds within households than across kin groups or neighbourhoods.[72] A member of a network will rely on the network's connectedness to assure that a cheater faces shunning by all network members.[73] Tilly studied 'trust networks' which consist of ramified interpersonal connections, consisting mainly of strong ties, within which people set values, consequential, long-term resources and enterprises at risk to the malfeasance, mistakes or failures of others.[74] Examples are fourteenth century Waldensian heretics who faced a threat of denunciation,[75] and sixteenth century English credit networks.[76] Tilly concluded

[67] J Pfeffer, *What Were They Thinking? Unconventional Wisdom about Management* (Boston MA, Harvard Business School, 2007).
[68] J Buckingham and V Nilakant, 'Introduction: Globalizing Corporate Social Responsibility—Challenging Western neo-Liberal Management Theory' in J Buckingham and V Nilakant (eds), *Managing Responsibly. Alternative Approaches to Corporate Management and Governance* (Farnham, Gower, 2012).
[69] CC Manz and HP Simms, *Business Without Bosses* (New York, John Wiley, 1993).
[70] D McCune, C Lewis and D Arendt, 'Safety Culture in Your Safety Management System' in AJ Stolzer, CD Halford and JJ Goglia (eds), *Implementing Safety Management Systems in Aviation* (Farnham, Ashgate, 2011) 143.
[71] Offer (n 11) 155.
[72] Smith (n 1).
[73] A Greif, 'Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies' (1994) 102 *Journal of Political Economy* 912, 936.
[74] C Tilly, *Trust and Rule* (New York, Cambridge University Press, 2005).
[75] ibid, 1–4.
[76] C Muldrew, *The Economy of Obligation* (London, Macmillan, 1998) 148; see C Muldrew, 'Interpreting the Market: The Ethics of Credit and Community Relations in Early Modern England' (1993) 18 *Social History* 163.

that trust consists in placing valued outcomes at risk to others' malfeasance, mistakes or failures. He suggested that trust relationships cluster in distinctive networks, and that it is critical to the future of democracy not just that such small networks are sustained but also that they are sufficiently connected with large public politics. Where this occurs, it supports a governmental shift away from coercion toward combinations of capital and commitment promotes contingent consent.[77]

An analysis of human biology notes that individual human genes have coagulated into cooperative teams, and individual humans have coagulated into societies that are based on cooperation. Socialisation involves large groups with complex inter-relationships, in which divisions of skills and labour support exchange, trade and specialisation. 'Cooperation is a frequent feature of human society; trust is the very foundation of social and economic life.'[78] However, reciprocity only works if people recognise each other, and can rationally trust commitments.[79] Our emotions are guarantees of our commitment. Frank argues that emotions are a way of settling the conflict between short-term expediency and long-term prudence in favour of the latter.[80] 'Trust is as vital a form of social capital as money is a form of actual capital.'[81] Ridley argues for 'a society built on voluntary exchange of goods, information, fortune and power between free individuals in small enough communities for trust to be built. I believe such a society could be more equitable, as well as more prosperous, than one built on bureaucratic statism.'[82]

Collins and Porras' 2005 study of high achieving companies did not find any specific ideological content essential to being a visionary company.[83] They thought that the *authenticity* of the ideology and the extent to which a company attains consistent alignment with the ideology counts more than the *content* of the ideology. However, Collins' 2001 analysis of 'great' companies did conclude that they all involved creating 'a climate where truth is heard', based on open dialogue and debate, and not coercion or authoritarian leadership or bureaucracy. Consensus is *not* specifically sought, but discussion and challenge is encouraged. The great firms also selected people who are self-motivated (and not *de*-motivated) to work passionately within a cultural framework of freedom and responsibility to fulfil their responsibilities.[84] National cultures may vary across a multinational company but the firm's values can still be unified.[85]

Later comparison of the companies in Collins' cohort with others indicated that focusing on 'strategies for success' was significantly less important to long-term value than concentrating on 'cultures for success', in particular on 'conscious capitalism' expressed by concentration on being values driven, higher purpose, stakeholder orientation, conscious

[77] Tilly (n 74) 135.
[78] Ridley (n 47) 57.
[79] ibid, 69.
[80] RH Frank, *Passions within Reason* (New York, Norton, 1988).
[81] Ridley (n 47) 250.
[82] ibid, 263.
[83] Collins and Porras (n 10).
[84] Collins (n 53).
[85] L Hoecklin, *Managing Cultural Differences: Strategies for Competitive Advantage* (Wokingham, Addison-Wesley, 1995) 4 (rather than embracing a standardised way of behaving, the company's French, German and British managers 'had values and behaviours more French, more German and more British than those of their compatriots working for local, domestic companies'.

leadership and conscious culture.[86] Barrett firmly supports the idea that focusing on the needs of employees and the culture of the company is much more important than focusing on strategies for success.[87] Since culture drives performance by unleashing human potential, he argues that organisation should be firmly values-driven.

Sandel's critique of the supremacy of the market and of reliance solely on economics as a means of its control concludes that markets crowd out morals, and this leads to corruption and degradation in the moral worth of society's goods.[88] He calls for strenuous reassertion of public goods, such as altruism, generosity, solidarity and civic spirit.[89] He worries about the kind of society that single-minded pursuit of markets has produced.

Drawing on JS Mill,[90] Kay proposed a principle of obliquity: The process of achieving complex objectives indirectly.[91] He also noted Lindblom's principle of 'muddling through': An oblique approach characterised by successive limited comparison.[92] Kay noted that obliquity contradicted the hugely influential theory of rational choice,[93] and instead supported a policy of constant adaptation based on 'trial and error'[94] He also went further by arguing that

> Business exists to serve social purposes and enjoy legitimacy in the short term and survival in the long term only to the extent that such business meets these purposes. Profit cannot then be the 'defining purpose' of a business. [95]

Mayer's analysis of the global financial crisis focused on the notion of the corporation as a mechanism for providing commitment to others, and the evidence that the Anglo-American models of corporations have destroyed essential trust and commitment.[96] Most relationships are based on trust, not contracts, and that to establish trust it is necessary to demonstrate commitment. In this he echoes Michel Albert's conclusion first published in 1991 that rejected the neo-American model of individual achievement and short-term profits in favour of the 'Rhine model' in which the keys to success are collective achievement and public consensus.[97]

Amongst the evidence Mayer cited was the following. First, he argued that the market fails to police itself. The market can reward and discipline corporations through the power of reputation. Thus, when the FSA (Financial Services Authority) discloses that a corporation

[86] R Sisodia, D Wolfe and J Sheth, *Firms of Endearment: How World-class Companies Profit from Passion and Purpose* (Upper Saddle River NJ, Wharton School Publishing, 2007).

[87] R Barrett, *The Values-Driven Organization: Unleashing Human Potential for Performance and Profit* (London, Routledge, 2014) 29.

[88] Sandel (n 21).

[89] ibid, 130.

[90] JS Mill, *Autobiography* (1873) ed (London, Penguin, 1989) 117: 'Those only are happy (I thought) who have their minds fixed on some object other than their own happiness; on the happiness of others, on the improvement of mankind, even on some art or pursuit, followed not as a means, but as itself an ideal end. Aiming thus at something else, they find happiness by the way.'

[91] Kay (n 26).

[92] C Lindblom, 'The Science of "Muddling Through"' (1959) 19(2) *Public Administration Review* 79; see also C Lindblom, 'Still Muddling, Not Yet Through' (1979) 39(6) *Public Administration Review* 517.

[93] P Samuelson, *Foundations of Economic Analysis* (Cambridge MA, Harvard University Press, 1947) 172.

[94] 'If it fails, admit it frankly, and try another.': FD Roosevelt, *Looking Forward* (London, William Heinemann Ltd, 1933) 150.

[95] Kay (n 26) 154.

[96] Mayer (n 17).

[97] M Albert, *Capitalism Against Capitalism* (English edition, London, Whurr Publishers, 1993).

has engaged in some form of misconduct, the decline in its market value is approximately 10 times that of the fine levied.[98] But this disciplining mechanism only works for misconduct that is against the interests of customers or investors, and there is no such effect in relation to some other party.[99] Indeed, there is evidence that the share price of the corporation actually rises in such circumstances.[100] In environmental disasters, the share price losses are no larger than the direct penalties imposed by regulatory authorities, without any further reputational effect;[101] but the victims are third parties—communities, wildlife, the atmosphere. Mayer argued that the market promotes good conduct in a very specific sense: In relation to things that it itself values.[102] His solution is to defer payment until true performance has been revealed.[103]

Second, Mayer argued that regulation promotes immoral conduct. Regulation leads to gaming against rules so as to circumvent or minimise their effects, diverts attention from the moral substance to details of rules, is pro-cyclical, confuses rules with standards, compliance with compassion, and obedience with integrity.[104] He argued that moves to strengthen corporate governance would merely raise the authority of shareholders, and banks would take more risks to please their more powerful shareholders, as had happened in the run-up to the financial crisis.[105]

Mayer then contrasted different models of corporations. He criticised the Anglo-American model on the basis that a combination of diversified shareholding[106] and pursuit of shareholder value had produced mergers or hostile takeovers aimed at short-term realisation of profit by hedge funds.

> The underlying principle of the corporation is perceived to be to promote shareholder interests, but these have come at the expense of other stakeholders who have significant interests in the corporation. Market incentives and reputation intensify the focus on shareholder interests and distort the allocation of resources in an economy to those that yield the greatest benefits for shareholders at the expense of other parties.[107]

Mayer argued that the British financial system

> systematically extinguishes any sense of commitment—of investors to companies, of executives to employees, of employees to firms, of firms to their investors, of firms to communities, or of this generation to any subsequent or past one.[108]

[98] ibid, 46.
[99] ibid, 47.
[100] J Armour, C Mayer and A Polo, 'Regulatory Sanctions and Reputational Damage in Financial Markets' European Corporate Governance Institute, Finance Working Paper Series, No 300 (2011).
[101] J Karpoff, J Lott and E Wehrly, 'The Reputational Penalties for Environmental Violations: Empirical Evidence' (2005) 48 *Journal of Law and Economics* 653.
[102] Mayer (n 17), 49.
[103] ibid, 53.
[104] ibid, ch 4.
[105] Studies reporting that banks that tied executive remuneration closely to their corporate earnings performed worse and took greater risks during the financial crisis than other banks: R Fahlenbrach and R Stulz, 'Bank CEO Incentives and the Credit Crisis' (2010) 99 *Journal of Financial Economics* 11; Cheng, Hong and Scheinkman (n 19).
[106] Mayer (n 17) 85. In contrast to diversification, in 50% of Austrian, Belgian, German and Italian corporations a single investor or group of investors controls more than 50% of the voting shares in corporations. In 50% of Dutch, Spanish and Swedish corporations a single shareholder controls over 30% of the voting shares. In UK they control less than 10% of votes.
[107] ibid, 115.
[108] ibid, 143–44.

Economics does not recognise the fundamental role of commitment in all aspects of our commercial as well as social lives and the way in which institutions contribute to the creation and preservation of commitment.[109]

Based on the claim that family values create stability and commitment to other stakeholders that dispersed shareholders cannot provide, Mayer's prescription to restore companies' ability to make trusted commitments is that corporate governance mechanisms are needed that promote commitment and stronger managerial oversight, and ownership arrangements that encourage both longer-term and more active shareholdings. He suggested that corporations need to exhibit morality, based on three sets of principles. First, companies need values that are credible, consistent and moral. The values will be those of the corporation's customers, investors and employees. Public and private values can be integrated. Second, since self-restraint, reputation and regulation are ineffective, a corporation needs third parties (trust boards) to restrain it from defaulting on its values. Third, the shareholding structure should allow enhanced control to be conferred on shareholders who commit to invest in the corporation for a long period.[110]

The British Standards Institute's code of practice for customer service states the principle that 'good customer service should result in the customer's complete satisfaction with the product or service that they have received'.[111] It continues:

> In order to establish good customer service the organization should show commitment and credibility to its customers and offer an experience that achieves increased customer satisfaction and loyalty. In order to achieve this the organization should demonstrate commitment to providing effective customer service by all employees within the organization, starting with the board, chief executive officer and top management.
>
> Promises should be kept, service should be delivered at times that suit customers and robust and reliable systems should be in place for every aspect of an organization's transactions with its customers.[112]

Ethical trading is intrinsic to business in Germany. Every trader must by law join the local Chamber of Commerce (*Handelskammer*) and is subject to a legal requirement to ensure the decency and morality of the 'honourable merchant' or 'honourable businessman'.[113] The national Association of Industry and Chambers of Commerce expands on the concept thus:

> The 'honourable businessman' is a concept which should not be dealt with in Sunday sermons. The aim is to fill the 'honourable businessman' with life. The DIHK is therefore committed to acting against unfair competition, as well as product and brand piracy, works to prevent and combat corruption and supports commercial mediation and arbitration.[114]

Trust is a moral virtue, which is internally driven.[115] The crucial element that underpins both human contracting and regulation is an ability to trust the people one is dealing with. Contracts and regulatory systems are proxies and supports for uncertainty in trustworthiness.

109 ibid, 144.
110 ibid, 246. See also 'Family Firms: Business in the Blood' *The Economist* (London, 9 August 2014) 55.
111 BS 8477:2014, para 3.1.
112 ibid, paras 3.1.4 and 3.1.5.
113 Chamber of Commerce and Industry Law (IHKG) art 1.1.
114 *DIHK—We are Business* (Deutscher Industrie- und Handelskammertag, 2012) p 11.
115 R Holton, 'Deciding to Trust, Coming to Believe' (1994) 72(1) *Australasian Journal of Philosophy* 63, 66.

Trust gives sufficient confidence to overcome risk and bridge vulnerability.[116] 'Trust is redundant where I have effective guarantees or control of outcomes.'[117] Trust is stronger than mere reliance, the latter being behaviour that is motivated by the pursuit of rewards or the avoidance of punishment.[118] However, it is no longer credible that compliance can be ensured by reliance on formalised structures of accountability and legal duties of accountability. O'Neill argues that '*except in rare and atypical cases* (the infantile case) both placing and refusing trust is a matter of judging either *truth claims* or *commitments to action (promises)*. Trust in others' truth claims is *well placed* if their words are, or turn out to be, true of the world.'[119] Hence, in order to constitute an intelligent response to evidence of trustworthiness, adequate evidence is needed of non-self-regarding motivation and other-regarding commitment,[120] but this need not be complete evidence, let alone proof.[121] She considers that the benchmarks for intelligent accountability are *informed* and *independent* judgement of performance, complemented by *intelligible* communication of those judgements.

The shift that is required is, therefore, away from reliance on legal (liability or regulatory) or economic (deterrent or rational actor) theories and controls to a system based on ethical behaviour. The construction of mechanisms by which an independent judgement may be made of the expectation of ethical behaviour can apply to contracting parties, regulatory scrutiny, stakeholder expectations and firms' internal arrangements.

What could be the sources of such evidence? Mere personal claims will not suffice. They might include evidence of a deep and consistent adherence to ethical principles;[122] a high proportion of satisfied customers; consistent application of compliance systems and audits; transparency; ethical governance structures; belonging to an external professional structure that has high ethical principles and provides ongoing training, auditing and sanctions; and structures enabling decisions to be debated to test ethical compliance, evaluated against external views, and made transparent. These sources of evidence will be mutually reinforcing, so as to provide density.[123]

Lucas argues that with morals there is an ultimate emphasis on authenticity—individual motives and intentions matter—whereas with the law the ultimate emphasis is on conformity.[124] Studies suggest that the obligation to obey the law may be stronger in a country with a longer tradition of democracy and trust in the legal system.[125]

[116] Gold (n 2) 135.

[117] O O'Neill, 'Trust, Trustworthiness, and Accountability' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014) 178.

[118] A Baier, 'Trust and Antitrust' (1986) 96(2) *Ethics* 231, 234.

[119] O'Neill (n 117).

[120] K Hawley, 'Trust, Distrust and Commitment' (2012) 48(1) *Noûs* 1.

[121] ibid.

[122] H Sants, 'Delivering Intensive Supervision and Credible Deterrence', speech delivered at the Reuters Newsmaker Event, London, 12 March 2009: 'a principles-based approach does not work with people who have no principles'.

[123] CA Heimer, 'Explaining Variation in the Impact of Law: Organizations, Institutions, and Professions' (1996) 15 *Studies in Law, Politics and Society*, 29–59, 37 (the law's shadow is likely to be 'densest' within organisations when it 'largely coincides with the shadow cast by professional bodies').

[124] JR Lucas, 'The Phenomenon of Law' in PMS Hacker and J Raz (eds), *Law, Morality and Society* (Oxford University Press, 1977) 89.

[125] PB Smith et al, 'Cultural Values, Sources of Guidance, and their Relevance to Managerial Behaviour: A 47 Nation Study' (2002) 33 *Journal of Cross-Cultural Psychology* 188–208. It is interesting to note the view that, in comparison with Europe, the USA is a more polyglot and fragmented society: M Thomas, 'In Search of Culture: Holy Grail of Gravy Train' (1985) September *Personnel Management* 24.

IV. Ethics

Hofstede describes culture as a person's 'mental programming'. It begins at childhood, and results in patterns of thinking, feeling and acting. This programming forms the basis of what a person considers to be right and wrong, and to be normal, rational and logical. He believes that such programming is a product of two factors: Social environment and the experiences collected during life.[126] Hofstede has talked of a series of cultural dimensions, and orientations: Individualism–collectivism; uncertainty–avoidance; power–distance; masculinity–femininity; long–short-term.[127] Trompenaars proposes that there are five orientations that shape behaviour when relating to others: (1) The extent to which rules prevail over relationships; (2) the degree to which the group is valued over the individual; (3) the range of feelings that are expressed; (4) the range of involvement that is appropriate; and (5) how status is ascribed.[128] He creates a typology of corporate cultures, which need to be distinguished, for example in reconciling differences between corporate culture and local culture in multinational companies.[129]

Many of the regulatory and scholarly documents that highlight the importance of *culture* in business behaviour refrain from going further and clarify that the ideal that is meant is *ethical* culture. It is no longer acceptable, for example, that a leader's actions should exert aggressive strength whilst maintaining lip service to an ethical high ground.[130] Both the claims and the actions have to be seen to be ethical. The Oxford English Dictionary defines ethics as moral principles that govern a person's behaviour. The cardinal virtues of hope, faith, charity, justice, courage, temperance and prudence,[131] constituted foundations of the development and flourishing of free-market capitalism in the West and also Eastern wisdom traditions.[132] Values that sustain relationships and lives are all about *how*, not *how much*.[133] Pleasure, wealth and happiness do not appear in this list. As the best companies found (chapter 18), success and rewards come as a by-product to those who seek to achieve their (ethical) goals.

[126] G Hofstede et al, *Cultures and Organizations: Software of the Mind—Intercultural Cooperation and Its Importance for Survival* 3rd edn (New York, McGraw Hill, 2010).

[127] G Hofstede, *Culture's Consequences: International Differences in Work-related Values* (1984); M Minkov and G Hofstede, 'The Evolution of Hofstede's doctrine' (2011) 18(1) *Cross Cultural Management: An International Journal* 10.

[128] F Trompenaars, *Riding the Waves of Culture: Understanding Diversity in Global Business* (New York, Irwin, 1993) 156.

[129] C Mills, 'Navigating the Tension between Global and Local: A Communication Perspective' in J Buckingham and V Nilakant (eds), *Managing Responsibly. Alternative Approaches to Corporate Management and Governance* (Farnham, Gower, 2012).

[130] N Macciavelli, *The Prince* (trans (T Parks, London, Penguin Books, 2009).

[131] T Aquinas, *Treatise on the Virtues* ((trans JA Oesterle, Notre Dame IN, University of Notre Dame Press, 1270/1984).

[132] DN McCloskey, *The Bourgeois Virtues: Ethics for an Age of Commerce* (Chicago IL, University of Chicago Press, 2006).

[133] D Seidman, *How: Why HOW we do anything means everything* (Hoboken NJ, John Wiley & Sons, 2007) xviii.

For Aristotle, the character and disposition of the moral agents are as important as the knowledge they are able to assimilate and execute.[134] Aristotle distinguishes between the intellectual and moral virtues.

> [Practical] Wisdom and Understanding and Prudence are intellectual, Liberality and temperance are moral virtues.[135]

> Virtue, then, is of two kinds, intellectual and moral. Intellectual virtue owes both its inception and its growth chiefly to instruction, and for this very reason needs time and experience. Moral goodness, on the other hand, is the result of habit, from which it has got its name, being a slight modification of the word *ethos*. This fact makes it obvious that none of the moral virtues is engendered in us by nature.[136]

Similarly, Justinian's Institutes begin by stating the simple proposition: 'The precepts of the law are these: to live honestly, to injure no one, and to give every man his due.'[137]

Modern empirical evidence tends to support these ideas.[138] Leading modern philosophers MacIntyre and Hauerwas suggest that ethics is only meaningful within the context of a moral community and the moral leadership within that community.[139] Reflecting on the subversion of morality through Nazism and international terrorism, Buchanan called for a systematic comparative evaluation of alternative institutional arrangements and social practices as to their efficacy and efficiency in promoting beliefs that are especially important for the proper functioning of the moral powers (social moral epistemology), and an account of the epistemic virtues of social institutions.[140] In modern life, however, the global community is enormous, composed of a multitude of smaller and overlapping communities, and there is no unified leadership. Steare notes a general decline in religious beliefs and practices, which have historically moderated selfish appetites.[141] Two possible ways forward here are to ensure that communities are sufficiently *small* as to be able to sustain ethical inter-dependence, and to build or reinforce global ethical values, leaders and structures.

Pirie's recent survey of legal anthropology across global cultures through time finds strong emphasis on the relationship between law as a concept and ethics.[142] There are striking examples. In Ladakh, villages saw a dispute as a tear in the fabric of the community, which must be mended with the payment of fines and a ceremonial process of mediation,

[134] See J Alexander, 'Cultivating Character: The Challenge of Business Ethics Education' in J Buckingham and V Nilakant (eds), *Managing Responsibly. Alternative Approaches to Corporate Management and Governance* (Farnham, Gower, 2012).

[135] Aristotle, *Nicomachean Ethics, Book I* (trans JAK Thompson, London, Penguin Books, 1978) 90.

[136] ibid, 91.

[137] *The Institutes of Justinian*, Book I, Title I, para 3.

[138] TM Jones, 'Can Business Ethics be Taught? Empirical Evidence' (1990) 8(2) *Business and Professional Ethics Journal* 73; FH Gautschi and TM Jones, 'Enhancing the Ability of Business Students to Recognize Ethical Issues: An Empirical Assessment of the Effectiveness of a Course in Business Ethics' (1998) 17(2) *Journal of Business Ethics* 205; H Gardner, 'The Ethical Mind' (2007) March *Harvard Business Review South Asia* 33.

[139] A MacIntyre, *After Virtue* (London, Gerald Duckworth & Co, 1981); S Hauerwas, *A Community of Character: Towards a Constructive Christian Social Ethic* (Notre Dame IN, University of Notre Dame Press, 1981).

[140] A Buchanan, 'Philosophy and Public Policy: A Role for Social Moral Epistemology' (2009) 26(3) *Journal of Applied Philosophy* 276, 287.

[141] R Steare, *Ethicability: How to Decide what's Right and Find the Courage to do it* 5th edn (Roger Steare Consulting Limited, 2013) 74.

[142] F Pirie, *The Anthropology of Law* (Oxford, Oxford University Press, 2013).

rather than regarding a dispute as a clash of rights.[143] In the Hindu world the *dharmasutras* of the sixth century BC concern rituals that are necessary to maintain the cosmic and moral order. *Dharma* is a Hindu concept that refers to both appropriate conduct and one's duty.[144] Islamic *shari'a* gives a sense of a divine vision for the world and the individual's duties towards God. Law was divinely ordained, its authority provided by God, a product of a marriage between revelation and reason. Islamic law enjoyed a prestige and authority that was essentially independent of any political or governmental power and authority. Different forms of social order may exist in one society.[145]

Pirie concludes that legal rules and categories specify the way society ought to be; at their most basic, they are a public expression of moral order.[146] 'Law provides a language for expressing what is right and just. It is by encapsulating values that transcend power and politics that it can serve both to legitimate power and to resist or control it.'[147] 'At their most basic, laws create moral standards. They can be read as public statements of the principles upon which their adherents act…'[148] Law is an expression of moral values, as much as an instrument of government, a means of conflict resolution, or a technique of power. 'As well as justice and equity, law tends to invoke an ideal order … something that its rules and categories represent, but can never fully realize.'[149] She notes that Berman emphasised the necessary connections between law and morality, their 'fundamental unity', and laments their separation in the contemporary world. When the lines are broken, he says, a society becomes demoralised; law without religion loses its basis for commitment.[150] The particular form that law takes in our culture is to some degree the product of our beliefs about it and our attitudes toward it.[151] Similarly, Finnis asserts that the task of a legal philosopher is evaluative in a moral sense, not just descriptive.[152] Zizioulas has argued that moral rules are hard to follow if they are separated from religious beliefs.[153]

Sedgwick's theological analysis of enterprise focuses on themes of work and social justice, treating these not as being anti-wealth but fair non-exploitative exchange.[154] He suggests that creation, and hence the creation of wealth, is celebrated, and hence so is innovation. But wealth must be shared amongst the community. It is the *use* of wealth that creates problems. Under a doctrine of stewardship, freedom is understood in relation to membership of, contribution to, and cooperation within, the collective society. This is freedom to create anew and contribute to the active ordering and re-ordering if things.[155]

143 F Pirie, *Peace and Conflict in Ladakh: The Construction of a Fragile Web of Order* (Leiden, Brill, 2007) ch 4.
144 Nilakant and Lips-Wiersma (n 37); PV Kane, *History of Dharmashastra* (Poona, Bhandarkar Oriental Research Institute, 1968); WD O'Flaherty and DJ Derrett (eds), *The Concept of Duty in South Asia* (New Delhi, Vikas, 1978).
145 SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719–46.
146 Pirie (n 142) 110.
147 ibid, 13.
148 ibid, 175.
149 ibid, 226.
150 H Berman, *The Interaction of Law and Religion* (London, SCM Press, 1974) 21.
151 G Lamond, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35–57, 37.
152 J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon, 1980) 3.
153 JD Zizioulas, 'Preserving God's Creation' in M Palmer and E Breuilly (eds), *Christianity and Ecology* (London, Cassel, 1992).
154 Sedgwick (n 5) ch 6.
155 K Barth, *Church Dogmatics* (Edinburgh, T & T Clark, 1965).

In Christian religious foundations a strong association has been noted between the experience of work as a calling and the sense that the work is meaningful.[156] Bunderson, Thompson and Cammock note that the protestant conception of a vocation or 'calling' contains two discrete strands: The first involves the discovery of one's unique 'gifts and talents', and the second the recognition of invitations to deploy those gifts and talents in the service of others.[157]

Philosophers have suggested that a moral issue is present where a person's actions, when freely performed, may harm or benefit others.[158] It follows that the action must have *consequences* for others and must involve the decision maker exercising *choice*. However, that analysis does not ideally fit a view of accidents where the role of an individual actor is viewed as occurring within a wider systemic context, and where that context is of more fundamental significance in relation to causation and prevention of accidents, as discussed in chapter 19 particularly in relation to aviation. The wider view chimes with the well-recognised legal problem of identifying the actor to whom liability should—and should not—be attributed as having legally 'caused' harm, when many possible causes could scientifically be identified.

Rest's overview of research on the performance of moral acts included the following conclusions.[159] First, moral judgement changes with time and formal education. Age/education accounts for 30–50 per cent of the variance in results. Second, for most people, it is not specific moral experiences that foster development (eg education) but rather becoming more aware of the social world in general and one's place in it. The people who develop moral judgement are those who love to learn, who seek new challenges, who enjoy intellectually stimulating environments, who are reflective, who make plans and set goals, who take risks, who see themselves in the larger social contexts of history and institutions and broad cultural trends, who take responsibility for themselves and their environs. The people who develop are advantaged by receiving encouragement to continue their education and their development, who are in stimulating and challenging environments, and who operate in social milieus that support their work, endeavour to interest them, and reward their accomplishments. Third, moral education programmes designed to stimulate moral judgement do produce modest but significant gains. This is particularly so for programmes emphasising peer discussion of controversial moral dilemmas. Education programmes designed to foster general personality development are also effective. But discipline-oriented, information-laden courses on traditional academic topics seem not to be so effective. Fourth, similarities across cultures are more striking than dissimilarities.

Various scholars have expanded Rest's analysis. Particularly useful is Jones' notion of *moral intensity*.[160] He first adopts previous views that an *ethical decision* is defined as a

156 AM Grant, 'Employees without a Cause: The Motivational Effects of Prosocial Impact in Public Service' (2008) 11(1) *International Public Management Journal* 48; DT Hall and DE Chandler, 'Psychological Success: When the Career is a Calling' (2005) 26(2) *Journal of Organizational Behaviour* 155; KS Cameron, *Positive Leadership: Strategies for Extraordinary Performance* (San Francisco CA, Berrett-Koehler, 2008); P Cammock, *The Spirit of Leadership: Exploring the Personal Foundations of Extraordinary Leadership* (Christchurch, Leadership Press, 2009).

157 S Bunderson and JA Thompson, 'The Call of the Wild: Zookeepers, Callings, and the Double-edged Sword of Deeply Meaningful Work' (2009) 54(1) *Administrative Science Quarterly* 32; Cammock (n 12).

158 MG Velasquez and C Rostankowski, *Ethics: Theory and Practice* (Englewood Cliffs NJ, Prentice-Hall, 1985).

159 JR Rest, *Moral Development: Advances in Research and Theory* (New York, Praeger, 1986).

160 TM Jones, 'Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model' (1991) 16(2) *Academy of Management Review* 366.

decision that is both legal and morally acceptable to the community.[161] He then suggests that ethical decision making is issue contingent; that is, characteristics of the moral issue itself, collectively called *moral intensity*, are important determinants of ethical decision making and behaviour. Jones identifies six such characteristics: Magnitude of consequences, social consensus, probability of effect, temporal immediacy, proximity and concentration of effect.[162] He argues that the intensity of these features will tend to make moral issues more frequently recognised, although he accepts that some cognitive processes will affect moral decision making and behaviour in general, without regard to the moral intensity of the issue itself.[163]

Ethical principles have to be applied in practice, and it is here that problems arise. In practical terms, it includes *not* selling a mortgage to someone who will never be able to repay it, *not* selling an insurance policy for which the customer has no realistic need, *not* promoting a product through inaccurate or misleading fashion, *not* selling or continuing to sell a dangerous product, *not* on-selling bonds that have no value, *not* having an undisclosed or major conflict of interest, *not* paying oneself or others more than they deserve.

These examples can all be described in terms of a lack of fairness. Treating customers fairly has for some years been a legal requirement under EU law on financial services,[164] and general consumer trading.[165] The FSA ran a programme from 2003 specifically on 'Treating Customers Fairly' but, as noted in chapter 20, it was not applied by banks, one reason for this being that it was mis-framed in translation, another being that it was deliberately antithetical to the banks' culture of selling and simply misapplied through 'creative compliance'. So there is nothing new about a requirement of fairness, and it would be widely held to be true as a general principle, but the *context* leads to people not observing it in practice. As was found in relation to compliance with sometimes extensive and complex regulatory regimes by SMEs (small and medium sized enterprises), owner-managers might think they are in compliance but it needs an external person in a position of trust to point out that they are wrong and should make changes.[166]

The examples given above can also be attributed to a moral stance that is selfish and not *other-regarding*. It has been called a pro-social attitude, defined as altruism, or the concern for the outcomes of another or others.[167] In some, it may be deeply held, in others it may be driven by care about being esteemed by others (selfish but other-regarding),[168] but will not be driven by fear of sanctions.

Ethical conduct is a cornerstone of many professions and membership of professional associations. The Hippocratic Oath (I will take care that they suffer no hurt or damage; ... Further, I will comport myself and use my knowledge in a godly manner) is instilled in

[161] Following HC Kelman and VL Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven CT, Yale University Press, 1989).
[162] Jones (n 160) 372.
[163] ibid, 389.
[164] See ch 20; *Treating Customers Fairly After the Point of Sale*, DP7 (FCA, 2001).
[165] Dir 2005/29/EC on unfair commercial practices.
[166] See ch 18.
[167] DA Collard, *Altruism and Economy: A Study in Non-Selfish Economics* (Oxford, Martin Robertson, 1978); E Fehr and U Fischbacher, 'The Nature of Human Altruism' (2003) 425(6960) *Nature* 785–91.
[168] G Brennan and P Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (Oxford, Oxford University Press, 2004); A Offer, 'Between the Gift and the Market: The Economy of Regard' (1997) 50(3) *The Economic History Review* 450–76.

medical students at an early stage and underpinned by subsequent training. The Institution of Engineering and Technology promotes and encourages ethical behaviour through its Knowledge Network and commitment to shared Rules of Conduct, thereby seeking 'to raise the level of public trust and confidence in the positive contribution to society made by science, engineering and technology'.[169] The Rules of Conduct 'aim to support members to take an ethical stance when balancing the often conflicting interests and demands of employers, society and the environment.'[170] The Institution requires both Bachelor and Incorporated Engineer qualifications to include that candidates are able to demonstrate 'understanding of the need for a high level of professional and ethical conduct in engineering.'[171] This will require familiarity with the Code of Conduct, ethical theory and awareness of ethical dilemmas through case studies.[172]

V. Mechanisms for Supporting Ethical Behaviour

The objective is to enable business to behave on the basis of commitment. It should provide evidence of a deep and consistent adherence to ethical principles, so as to be able to identify which individuals, businesses and systems can and cannot be trusted, and appropriate action taken. The mechanisms set out at the end of the previous section will now be discussed in greater detail.

The ideal is that ethical principles should be held and applied by both the individuals in the group and expressed in the actions of the organisation to which they belong. However, it is not possible to tell others what to believe. The issue is how we can access sufficient evidence on which to decide whether or not to trust an organisation and its personnel.

A Gallup study found that organisations with highly engaged employees have 3.9 times the earnings per share growth rate compared with organisations with low engagement in the same industry.[173] Data from 5,000 German establishments demonstrated that firms that adopt trust-based work contracts tend to be between 11 to 14 per cent more likely to improve products.[174] The same positive relationship was found in relation to flexible working time arrangements. The psychology research (chapter one) tells us that the two key points are that values that are applied must conform to individuals' internal value system, and that the norms must be made and applied in fairly and consistently.

At a structural level, Mayer's form of corporate governance and ownership—the 'trust firm'—combines responsibility with power and denies power without responsibility. It therefore defines the notion of a moral corporation and imbues the corporation with a degree of morality which exceeds that of the individual.[175] But ethical governance structures

[169] *Rules of Conduct* (The Institution of Engineering and Technology, 2012).

[170] ibid.

[171] *IET Learning Outcomes Handbook incorporating UK-SPEC for Bachelors and MEng Degree Programmes* (The Institution of Engineering and Technology, 2009).

[172] ibid, 28.

[173] *Employee Engagement: What's Your Engagement Ratio* (Gallup Consulting).

[174] ON Godart, H Görg and A Hanley, 'Trust-based Work-time and Product Improvements: Evidence from Firm Level Data' Kiel Institute for the World Economy Working Paper No 1914, 2014.

[175] Mayer (n 17) 8.

would not stop at board level. A range of publications are now appearing on how to grow an ethical culture within a business.[176]

Public statements made by an organisation of their official position on how ethics apply to their activities are clearly relevant, especially if the statement is that the organisation will always seek to act ethically.[177] Statements of corporate goals should be enfused with statements that the enterprise espouses ethical values.[178] It can assist to view corporate goals in wide social terms, such as ideals of advancement of medical science and of service to humanity, as this celebrated statement by Merck:

> We never try to forget that medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear. The better we have remembered it, the larger they have been.[179]

The review of the policies of public authorities in Part C above found that the objectives and activities of agencies have widened from focusing solely on economic market aspects to encompassing responsibility for maintaining market balance and for delivering fair outcomes. In a parallel approach within firms, successful businesses have focused not on profit but on adopting the ethical standpoint of fairly delivering high quality outcomes for customers. Similarly, philosophical investigation of corporate accountability finds that corporate decisions can be immoral, illegal or just bad because no one feels personal responsibility for the ultimate outcome.[180] Encouraging individuals—in private or public employment—to feel responsible for outcomes appears to be sound policy. Ariely noted in relation to the game of golf, where there is no referee and people have to decide for themselves what is acceptable, the further people are from the action, the greater it is to indulge in mild dishonesty.[181] As discussed above, Barrett's recent conclusion of the evidence is that focusing on values to drive an organisation, expressed through addressing the needs of employees and the culture of the company, is paramount to long-term success.[182]

A review of codes of ethics in finance found they are built on seven core principles or values: Integrity, objectivity, competence, fairness, confidentiality, professionalism and diligence.[183] Statements of corporate goals and ethics have both external and internal value. But they may be mere window dressing and not applied in practice. Whilst much attention has been devoted to 'the tone from the top', values need to be applied throughout an

[176] See particularly P Montagnon, *Ethics, Risk and Governance* (Institute of Business Ethics, 2014); F Coffey, *The Role and Effectiveness of Ethics and Compliance Practitioners* (Institute of Business Ethics, 2014); L Tansey Martens, *Globalising a Business Ethics Programme* (Institute of Business Ethics, 2012).

[177] A study in 1982 found that only 18 of 80 companies had clearly articulated sets of qualitative (non-financial) beliefs: T Deal and A Kennedy, *Corporate Cultures: The Rites and Rituals of Corporate Life* (Reading, MASS, Addison-Wesley, 1982).

[178] T Levitt, 'Marketing Myopia' (1960) 38(4) *Harvard Business Review* 45.

[179] Collins and Porras (n 10) 47. The authors cite a number of company credos and ideologies, such as that of Johnson & Johnson: ibid, 59–71.

[180] M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge, Cambridge University Press, 1998).

[181] D Ariely, *The (Honest) Truth about Dishonesty. How We Lie to Everyone—Especially Ourselves* (New York, HarperCollins, 2012) ch 3.

[182] Barrett (n 87) 29.

[183] JA Ragatz and RF Duska, 'Financial Codes of Ethics' in J Boatright (ed), *Finance Ethics: Critical Issues in Theory and Practice* (Hoboken, John Wiley, 2010) 297.

organisation in multiple discrete sub-groups.[184] Employees should feel they are trusted by their managers: The converse will provoke misconduct.[185] Negative experiences are much more salient, memorable and influential than positive ones.[186] Feelings of shame may lead to distancing, resistance and a dismissive, antagonistic stance.[187]

Applying fair values fairly and consistently can include the following aspects. Dealings between all staff, supervisors, stakeholders and the public should be honest and open. Information should be freely shared, in a no blame culture, on a constant feedback basis, with the objective of constant learning. When things go wrong, one should apologise, share all relevant information and make redress when harm is caused to others. Praise should be given not just for good works and success but for honesty and openness. Difficult issues could be raised in an ethics hotline, or discussed with ethics committees (not just at board levels and involving external stakeholders) and with internal 'ethics ambassadors'.[188] Surveys can reveal how the employees perceive the company on fairness and openness issues.[189]

Evidence from earlier chapters is that many people believe that they are doing the right thing until it is pointed out to them by someone they respect, that this is not the case, and they could improve certain activities. This is particularly true of small businesses, who do not have the resource to devote to detailed compliance knowledge or systemic activities. The nature of the communication is best undertaken in an educational, supportive fashion, rather than an aggressive, authoritarian fashion. Hence, useful techniques can be education, low key visits from officials, but also auditors, notified bodies and trade associations. The enlistment of groups and trade associations as lines of communication between officials and multiple dispersed firms in UK Primary Authority scheme is an example of this. Ethics training programmes alone appear to be minimally effective.[190]

Opportunities for reflection, introspection, seeking advice and open discussion are preferable to authoritarian decision making.[191] Working with devil's advocates, Cassandras and multiple advocacy[192] can counter a tendency for conformity in groups that have strong

[184] S Killingsworth, 'Modeling the Message: Communicating Compliance through Organizational Values and Culture' (2012) 25 *Georgetown Journal of Legal Ethics* 961.

[185] *Compliance and Ethics Leadership Roundtable, 2007*. Corporate Executive Board research; M Griffin and T Davis, *Corporate Executive Board Research Alert, Sourcing Competitive Advantage from Organizational Integrity: the Hidden Cost of Misconduct*, at https://www.celc.executiveboard.com/public/CELC_ResearchAlert.html; Ethics Resource Center, *National Business Ethics Survey*, 2 (2007), http://www.ethics.org/resource/2007-national-business-ethics-survey.

[186] RF Baumeister et al, 'Bad is Stronger than Good' (2001) 5 *Review of General Psychology* 323.

[187] V Braithwaite, 'Is Reintegrative Shaming Relevant to Tax evasion and Avoidance?' in H Elffers, P Verboon and W Huisman (eds), *Managing and Maintaining Compliance* (The Hague, Boom Legal Publishers, 2006).

[188] R Steinholtz, 'Ethics Ambassadors: Getting Under the Skin of the Business' (2014) *Business Compliance* 16–28.

[189] LK Treviño et al, 'Managing Ethics and Legal Compliance: What Works and What Hurts' (1999) 41 *California Management Review* 131.

[190] EP Waples, AL Antes, ST Murphy, S Connelly and MD Mumford, 'A Meta-Analytic Investigation of Business Ethics Instruction' (2009) 87(1) *Journal of Business Ethics* 133–61, 146.

[191] J Elkington and S Fennel, 'Partners for Sustainability' in J Bendell (ed), *Terms for Endearment: Business, NGOs and Sustainable Development*. (Sheffield, Greenleaf Books, 2010) 150–62; CL Hartman and ER Stafford, 'Green Alliances: Building New Business with Environmental Groups' (1997) 30(2) *Long Range Planning* 184; JW Selsky and B Parker, 'Cross-Sector Partnerships to Address Social Issues: Challenges to Theory and Practice' (2005) 31(6) *Journal of Management* 1; Alexander (n 134).

[192] AL George, *Presidential Decisionmaking in Foreign Policy: The Effective Use of Information and Advice* (Boulder CO, Westview Press, 1980) 191–208; J Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' (2006) 16(4) *Communication Theory* 11.

internal cohesion.[193] This chimes with recent political theory on widening of democratic involvement in governance and deliberation.[194]

The introduction of checklists in clinical practice, such as the World Health Organisation Surgical Safety Checklist, has been shown to improve communication,[195] preparedness,[196] teamwork[197] and attitudes to safety.[198] Such introduction in five different medical specialties at each of two hospitals under a randomised trial basis resulted in decreases in post-operative complication rates, patients' length of stay and mortality.[199]

Employment policies can seek to identify non-psychopaths,[200] since they are trust-responsive.[201] Indications on the views of staff and customers can be obtained through blind surveys, complaint mechanisms and external ombudsmen. Metrics can demonstrate satisfaction, such as employee turnover, illness records, performance levels and the proportion of satisfied customers.

Auditing, checking and internal due diligence have been found to identify problems. The medical device sector has learned the importance of unannounced inspections.[202]

The City Values project proposed that all workers in the City of London should undergo initial and continuing professional training in ethics, and be asked to sign a voluntary pledge.[203] Some have even suggested that all bankers should swear a Bankers' Oath.[204] Belonging to an external professional organisation that has high ethical principles and

[193] IL Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* 2nd edn (Boston, Wadsworth, 1982).

[194] J Dryzek, *Deliverative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, Oxford University Press, 2000); HS Richardson, *Democratic Autonomy. Public Reasoning about the Ends of Policy* (Oxford, Oxford University Press, 2002).

[195] AHK Fudickar, J Wiltfang and B Bein, 'The Effect of the WHO Surgical Safety Checklist on Complication Rate and Communication' (2012) 109 *Deutsches Arzteblatt International* 6; RJ Kearns, V Uppal, J Bonner J, et al 'The Introduction of a Surgical Safety Checklist in a Tertiary Referral Obstetric Centre' (2011) 20 *BMJ Quality and Safety* 818, L Nilsson, O Lindberget, A Gupta et al, 'Implementing a Pre-operative Checklist to Increase Patient Safety: A 1-year Follow-up of Personnel Attitudes' (2010) 54 *Acta Anaesthesiologica Scandinavica* 76; RSK Takala, SL Pauniaho, A Kotkansalo et al, 'A Pilot Study of the Implementation of WHO Surgical Checklist in Finland: Improvements in Activities and Communication' (2011) 55 *Acta Anaesthesiologica Scandinavica* 1206.

[196] AB Böhmer, P Kindermann, U Schwanke U et al, 'Long-term Effects of a Perioperative Safety Checklist from the Viewpoint of Personnel' (2013) 57 *Acta Anaesthesiologica Scandinavica* 150.

[197] AB Böhmer, F Wappler, T Tinschmann et al, 'The Implementation of a Perioperative Checklist Increases Patients' Perioperative Safety and Staff Satisfaction' (2012) 56 *Acta Anaesthesiologica Scandinavica* 332; P Helmiö, K Blomgren, A Takala et al, 'Towards Better Patient Safety: WHO Surgical Safety Checklist in Otorhinolaryngology' (2011) 36 *Clinical Otolaryngology* 242.

[198] AB Haynes, TG Weiser, WR Berry et al 'Changes in Safety Attitude and Relationship to Decreased Postoperative Morbidity and Mortality following Implementation of a Checklist-based Surgical Safety Intervention' (2011) 20 *BMJ Quality and Safety* 102.

[199] A Steinar Haugen, E Søfteland, SK Almeland, N Sevadalis, B Vonen, GE Eide, MW Nortvedt and S Harthug, 'Effect of the World Health Organization Checklist on Patient Outcomes: A Stepped Wedge Cluster Randomized Controlled Trial' (2015) 261(5) *Annals of Surgery* 821–28.

[200] Gold (n 2).

[201] M Bacharach, G Guerra and DJ Zizzo, 'The Self-Fulfilling Property of Trust: An Experimental Study' (2007) 63(4) *Theory and Decision* 349.

[202] *Restoring Confidence in Medical Devices. Reporting on the Success of the PIP Action Plan, European Commission* (European Commission, 2014).

[203] *Investing in Integrity. The Lord Mayor's Conference on Trust and Values* (City Values Forum, 2012) http://tomorrowscompany.com/governing-values.

[204] DT Llewellyn, R Steare and J Trevellick, *Virtuous Banking: Placing Ethos and Purpose at the Heart of Finance* (London, ResPublica, 2014).

provides ongoing training, auditing and sanctions can be an indicator or reliability through training and peer support.[205] However, as with all aspects discussed here, reliance on professional organisations alone may be unreliable.[206] Reliance on external support is likely to be critical. In 2014 the Archbishop of Canterbury invited financial workers to spend a gap year in a new quasi-monastic community at Lambeth.[207]

External actions can demonstrate internal values, such as Merck's giving away Mectizan to cure 'river blindness'. Individuals and firms that demonstrate that they deserve trust should be rewarded. Commercial reward should follow reputations. Regulatory rewards should also be made. Rewards might be in terms of public awards,[208] honours or esteem,[209] or might be grant of an earned lower regime of regulatory scrutiny. Communication of ethical issues should enable market-based reputational sanctions to operate more readily.[210] Ethical criteria might be applied in insurance, similar to current credit being given for factors such as external technical accreditation. Actors' reputations could be adjusted in response to their cooperative or uncooperative behaviour.[211]

In relation to remuneration, it should be obvious that bonuses tied to performance are not well-suited to inducing honest and trustworthy behaviour.[212] Paying executives on the basis of performance has attracted strong criticism as a practice.[213] In fact, whilst experience from the Enron and WorldCom crises underlined the risks which flawed incentives can pose to market efficiency (and was not adequately learnt),[214] and various theoretical arguments on how particular schemes *might* induce particular behaviour,[215] there is

[205] J Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford, Oxford University Press, 2006); CJ Cowton, 'Accounting and the Ethics Challenge: Re-membering the Professional Body' (2009) 39(3) *Accounting and Business Research* 177–89; J Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge, Cambridge University Press, 2011); O'Neill (n 117) 186; O'Brien (n 14).

[206] O O'Neill, 'Accountability, Trust and Professional Practice' in N Ray (ed), *Architecture and its Ethical Dilemmas* (London, Taylor & Francis, 2005); A Alexandra and S Miller, *Integrity Systems for Occupations* (Aldershot, Ashgate Publishing, 2010).

[207] *Archbishop Appoints Prior to Oversee Radical New Community at Lambeth Palace* (Archbishop of Canterbury, 2014) at http://www.archbishopofcanterbury.org/articles.php/5440/archbishop-appoints-prior-to-oversee-radical-new-community-at-lambeth-palace-video.

[208] Trust marks.

[209] G Brennan and A Hamlin, *Democratic Devices and Desires* (Cambridge, Cambridge University Press, 2000).

[210] J Armour, C Mayer, and A Polo, 'Regulatory Sanctions and Reputational Damage in Financial Markets', Oxford Legal Studies Research Paper No 62/2010 (2012). *Australian Securities and Investments Commission v Rich* 44 ACSR 431 (2003). *Australian Securities and Investments Commission v Healey* 278 ALR 618 (2011). *Australian Securities and Investments Commission v Healey (No2)* FCA 1003 (2012).

[211] JT Scholz, 'Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness' (1991) 85 *American Political Science Review* 115–36.

[212] T Noe and HP Young, 'The Limits to Compensation in the Financial Services Sector' in N Morris and D Vines (eds), *Capital Failure; Rebuilding Trust in Financial Services* (Oxford, Oxford University Press, 2014).

[213] M Dorff, *Indispensable and Other Myths: Why the CEO Pay Experiment Failed and How to Fix It* (Oakland CA, University of California Press, 2014).

[214] JC Coffee Jr, 'Understanding Enron: It's the Gatekeepers, Stupid' (2002) 57 *The Business Lawyer* 1403–20; Coffee, Jr (n 205).

[215] See eg S Bhagat, BJ Bolton and R Romano, 'Getting Incentives Right: Is Deferred Bank Executive Compensation Sufficient?' European Corporate Governance Institute (ECGI)—Law Working Paper No 241/2014 Yale Law and Economics Research Paper No 489 (arguing to retain equity-based incentive pay, to reform bank capital structure to reduce the probability of a tail event, and mandatory issuance of contingent convertible capital–debt that converts to equity under specified adverse states of the world).

very little empirical evidence on how different bonus schemes affect traders' propensity to trade and which bonus schemes improve traders' performance. Recent studies suggest that bonuses may be detrimental for performance, at least when threshold and linear compensation schemes are compared.[216] However, those involved in markets appear not to favour regulation of remuneration.[217]

From 2015, GSK Plc revised its remuneration scheme for all sales employees, dropping individual sales targets and changing remuneration from being based on targets to evaluation on technical knowledge, the quality of the service they deliver to support improved patient care and the overall performance of GSK's business.[218] The CEO said that in providing doctors with information about medicines 'this must be done clearly, transparently and without any perception of conflict of interest'.[219]

VI. Conclusions

Economic orthodoxy has been allowed to run away with the idea that human society and especially a politico-economic capitalist system is based on selfishness. That is not what the founding god Adam Smith actually said: He referred to the fact that self-interest in economic utility-maximising relationships would have major self-regulating effects. In fact, he also noted the importance of inter-personal social concern and altruism, but such virtues have been largely overlooked, both in Smith's writing and in the obsessive focus of economic thought on self-interest. Economic theorists in the twentieth century have asserted that companies will self-regulate because the economic interests of principals and agents (shareholders and managers) are aligned. Maximisation of shareholder value has been a mantra in business for some decades now. Yet these theories have been shown to be seriously flawed.

The global financial crisis from 2008 has vividly demonstrated that corporate values based on selfish maximisation of profit, whether for individual employees or businesses or shareholders, carries huge risks for society. In the 2000s scandals such as BCCI, Enron, Worldcom or Nick Leeson,[220] were dismissed as idiosyncratic rogues that were not representative of the majority of traders. The collective and systemic activities of the financial services sector in threatening the viability of global economic stability have, however, revealed that the uncontrolled capitalist system has serious flaws. This is not an ideological issue of communism or socialism against capitalism. It is that capitalism needs to put its house in order. Uncontrolled selfishness and individual freedom cause harm to others and to the self.

216 E Pikulina, L Renneboog, J Ter Horst and P Tobler, 'Bonus Schemes and Trading Activity' *TILEC Discussion Paper No 2013-007.*

217 J-M Hitz and S Müller-Bloch, 'Market Reactions to the Regulation of Executive Compensation' at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434580 (reporting weak evidence of an average negative reaction to proposed legislation in Germany, and negative stock price reactions on firms most exposed).

218 Press release, 17 December 2013, available at http://www.gsk.com/en-gb/media/press-releases/2013/gsk-announces-changes-to-its-global-sales-and-marketing-practices-to-further-ensure-patient-interests-come-first/.

219 Sir Andrew Whitty, ibid.

220 *How Leeson Broke the Bank* (BBC News Online, 22 June 1999).

Regulatory systems can do a great deal, but are not enough. One needs to revert to some basic premises. Values, commitment and trust have always been essential to markets, and need to be reinvented in modern globalised markets. The problems in the financial services sector should not be seen in isolation. Various other sectors pose risks. Some sectors have demonstrated outstandingly impressive reliability. Debates about culture in financial services too often fail to connect with the fact that *ethical* values are required. The history of ethics in business, professional and general human life is not new and has a very long history. Sound roots can be found at least in Ancient Greek philosophers and revered eighteenth century philosophers. The ideas are neither new nor complex. Ethics means identifying conflicts of interest and acting in a way that shows consideration for others, especially customers and those for whom one is responsible. It is those simple propositions that have been forgotten and need to be reinforced in modern business structures.

Three types of changes are essential. First, the objectives and structures of business organisations need to be re-examined. The idea that many businesses exist for the long term and need to be based on sound social values is intrinsic to the German trust structures advocated by Mayer. Second, business arrangements need to avoid incentives that promote unethical behaviour, such as remunerating employees or shareholders on a short term basis as opposed to a long term basis based on sound success in providing useful value to society. Third, structures can be put in place to support ethical conduct. Many of these ideas are based on the avoidance of the risks identified by cognitive and behavioural psychology, such as promoting System 2 thinking, avoiding herd behaviour, reassessment of risks and so on. Thus, psychology—and not economics—can provide a rational theory of ethical business. The development of ethical business is only a small step from the approach developed under the mantra of corporate social responsibility. There is some evidence that ethical businesses succeed in producing outstanding commercial performance as well as—and because of—integrating with the social behaviours desired by the wider society in which they operate.