

## Vicarious Charity: Social Responsibility and Catholic Social Teaching

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## ARTICLES

# VICARIOUS CHARITY: SOCIAL RESPONSIBILITY AND CATHOLIC SOCIAL TEACHING

PAULA DALLEY<sup>†</sup>

### INTRODUCTION

“Corporate social responsibility” is now a corporate buzzword. While at one time there was radical disagreement about the power of the corporation to act to benefit non-shareholder constituencies, now, as far as the public face of corporate America goes, corporate social responsibility is standard operating procedure. No corporation proclaims its social irresponsibility or declares its disregard for justice or the general well-being of the planet. Many large corporations embrace their social obligations publicly.<sup>1</sup> The business benefits of corporate social responsibility are increasingly recognized by management professionals.<sup>2</sup> Harvard Business Review has a regular topic on Corporate Social Responsibility.<sup>3</sup> In short, corporate social responsibility (“CSR”) has gone mainstream.<sup>4</sup>

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<sup>1</sup> Cf. Roni Factor et al., *Beliefs About Social Responsibility at Work: Comparisons Between Managers and Non-Managers Over Time and Cross-Nationally*, 22 BUS. ETHICS: EUR. REV. 143, 145–46 (2013) (discussing variation between nationalities).

<sup>2</sup> Devin Thorpe, *Why CSR? The Benefits of Corporate Social Responsibility Will Move You To Act*, FORBES (May 18, 2013, 5:04 PM), <http://www.forbes.com/sites/devinthorpe/2013/05/18/why-csr-the-benefits-of-corporate-social-responsibility-will-move-you-to-act>. See also Daniel McGinn, *Resisting the Lure of Short-termism*, HARV. BUS. REV., Nov. 2016, at 41, 43 (stating that Harvard Business Review’s “100 Best-Performing CEOs in the World” includes a measure of “ESG,” which is environmental, social, and governance performance).

<sup>3</sup> See *Social Responsibility*, HARV. BUS. REV., <https://hbr.org/topic/social-responsibility> (last visited July 8, 2018).

<sup>4</sup> Whether these public commitments to corporate social responsibility actually produce more socially responsible behavior is a different question. The point here is

Despite its ubiquity in corporate public relations materials, CSR still generates legal commentary defending the power of managers to do the right thing at the expense of corporate profits.<sup>5</sup> A subset of CSR commentary argues that the social doctrine of the Catholic Church requires that corporations act to advance social justice. Whether based on Church teaching or not, however, the CSR literature has a fatal weakness: It ignores human agents.

A corporation cannot act on its duties to the public because corporations as such can do nothing: They act through human actors. Even the board of directors has limited opportunities to do social good, because the vast majority of business decisions constituting corporate behavior are made by officers and other agents,<sup>6</sup> not by the board. The CSR literature, however, ignores the legal powers and duties of agents and employees altogether. Additionally, the Catholic social teaching strand of the CSR debate ignores the centrality of the human person to Catholic thought and fails to place moral responsibility on individuals who are free to make moral choices. In sum, both legally and morally, the CSR debate is focused on the wrong people.

The impact that non-director employees can have on both the business of the corporation and the common good of society is substantial. In corporate criminal prosecutions, it is almost invariably those below top management, and certainly below the level of the board, who are blamed for the bad conduct.<sup>7</sup> Such conduct may include making forbidden payments for business

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that, if corporate leaders are willing to publicly avow corporate social responsibility—and its benefits for business—it cannot be either unlawful or contrary to norms of appropriate corporate behavior.

<sup>5</sup> See *infra* Part I.A. While the literature does not distinguish between socially responsible actions that are potentially profitable and those that are expected to reduce profits, it is only the latter set of actions that is interesting.

<sup>6</sup> Megan W. Shaner, *The (Un)enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271, 273 (2014).

<sup>7</sup> See *Pyott v. La. Mun. Police Emps.' Ret. Sys.*, 74 A.3d 612, 614, 618 (Del. 2013) (reversing a decision finding directors approved a marketing plan that violated the False Claims Act); see also Jean Eaglesham & Anupreet Das, *Wall Street Crime: 7 Years, 156 Cases, and Few Convictions; Proceedings Against Individual Bank Employees Are Rare, and Authorities Have Had Difficulty Winning Cases*, WALL ST. J. (May 27, 2016), <https://www.wsj.com/articles/wall-street-crime-7-years-156-cases-and-few-convictions-1464217378> (noting that the United States has brought 156 criminal and civil cases against ten of the largest banks, resulting in charges against forty-seven people, but only one board-level executive).

referrals—also known as taking kickbacks<sup>8</sup>—failing to comply with anti-money-laundering laws,<sup>9</sup> violating anti-trust provisions, mistreating investors, making false statements in issuing securities, or “robo-signing” foreclosure petitions. In an egregious example, Volkswagen would have us believe that the decision to engineer around emissions regulations was taken at a non-executive level.<sup>10</sup>

On the other hand, corporations are less quick to attribute socially beneficial acts to low-level employees. Advertised CSR policies are usually endorsed by the CEO, but if a mid-level manager is responsible for the decision to make a polluting car, she also presumably has the power to decide to make an especially non-polluting car, or to ensure that the corporate fleet comprises only hybrid vehicles.<sup>11</sup> Many decisions that implicate serious social policies are made at an even lower level: purchasing (including selecting suppliers), advertising and marketing (including sponsorships and endorsements), setting wages and prices, and adopting and implementing routine employment policies. The opportunities for mid-level managers to engage in CSR are legion. Unfortunately for CSR advocates, however, agency law, not corporate law, governs officers and other corporate employees,<sup>12</sup> and corporate agents, as opposed to directors, are prohibited by current law from engaging in CSR unless they are authorized to do so, directly or indirectly, by the board: The agent’s duty of loyalty prohibits the agent from engaging in any behavior that the agent believes will not advance the business of the principal—for example, profit-sacrificing CSR.<sup>13</sup>

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<sup>8</sup> See *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 963–64, 971 (Del. Ch. 1996).

<sup>9</sup> See *Stone v. Ritter*, 911 A.2d 362, 365 (Del. 2006).

<sup>10</sup> Jack Ewing, *Engineering a Deception: What Led to Volkswagen’s Diesel Scandal*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/interactive/2017/business/volkswagen-diesel-emissions-timeline.html>.

<sup>11</sup> Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV., 983, 1000 (2011). See also Paul Weitzel & Zachariah J. Rodgers, *Board Shareholder Value and the Inevitable Role of Conscience*, 12 N.Y.U. J.L. & BUS. 35, 88–90 (2015).

<sup>12</sup> See *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010), *aff’d sub nom ASDI Inc. v. Beard Research Inc.*, 11 A.3d 749 (Del. 2010).

<sup>13</sup> Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603, 604–05 (2011).

If corporations cannot engage in CSR because they do not really exist—and have no moral responsibility—and corporate agents are prohibited from engaging in CSR by agency law, who can act to improve corporate behavior? The Church's social doctrine provides an often-overlooked answer to this question: Individuals who are acting as principals, not agents, are responsible for ensuring that their actions are socially responsible. Individuals act as principals when they make decisions about their own property, and it is those decisions that should be the subject of commentary and debate.

This Article begins with a brief introduction to the CSR debate. Part II describes the legal role of various human actors in the corporation, and Part III describes the legal restrictions on those actors' socially responsible, but unauthorized, decisions. Part IV describes in some detail the relevant social teaching of the Catholic Church and explains that it does not apply to corporations or other corporate actors. Part V then describes the appropriate application of Catholic social doctrine to economic actors.

## I. CORPORATE SOCIAL RESPONSIBILITY

### A. *In General*

As noted above, while corporate CSR statements and policies are now standard operating procedures, the obligations of individual managers to make specific choices that prefer, in some way, the interests of others to the financial interests of stockholders are still hotly debated.<sup>14</sup> While some commentators

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<sup>14</sup> Recent articles on the subject include: Anastasia Telesetsky, *Beyond Voluntary Corporate Social Responsibility: Corporate Human Rights Obligations To Prevent Disasters and To Provide Temporary Emergency Relief*, 48 VAND. J. TRANSNAT'L L. 1003, 1016 (2015) (corporations have duties to support positive human rights); Delwin Lau, Note, *Fixing International Labor Law: Corporate Social Responsibility, a Means or an End?*, 24 S. CAL. INTERDISC. L.J. 725, 728–32 (2015) (summarizing debate); Margaret Ryznar & Karen E. Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQ. L. REV. 1667, 1669 (2015); Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 COLUM. L. REV. SIDEBAR 39 (2015) [hereinafter Bainbridge, *Corporate Social Responsibility*] (discussing shareholder primacy); Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1 (2015) (summarizing competing theories); Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353 (2015) (arguing that CSR is good business but that a federal law should

argue that managers may—or must—consider the public good, others argue that managers are obligated to pursue only profitability. This so-called “shareholder wealth maximization norm” claims that managers—including boards of directors—are hired solely to produce profits for shareholders.<sup>15</sup>

There is a legal aspect to this debate: Are managers permitted by law to consider non-shareholder interests? There is also a normative and practical aspect: What should a manager actually do, assuming that she is permitted to consider societal interests to at least some degree? The issue is rarely litigated, but most commentators believe that a board’s decisions relating to social responsibility will almost always be protected by the business judgment rule, which forbids judicial scrutiny.<sup>16</sup> However, unless the owners of the corporation agree otherwise, the managers of a for-profit corporation are obligated to operate a business and not a charity.<sup>17</sup> This still leaves plenty of room for corporate philanthropy, whether through support of expressly charitable causes or through business decisions that are likely to confer significant benefits on outsiders without earning profits for the shareholders.<sup>18</sup> Despite legal latitude to engage in

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also mandate CSR). *See also* Jonathan R. Macey, *Corporate Social Responsibility: A Law & Economics Perspective*, 17 CHAP. L. REV. 331 (2014); Joseph J. Norton, *Reflections on “In the Best Interest of the Corporation” and “Corporate Social Responsibility”: An Essay Honouring the Memory of Professor Alan R. Bromberg*, 68 SMU L. REV. 603 (2015) (summarizing current status of CSR movement); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 5–17 (2012) (describing debate and relevant law).

<sup>15</sup> For a summary of the relevant positions, see *Etsy’s I.P.O. and Public Corporations’ Obligations to Shareholders*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders>. Interestingly, a search for recent law review articles on “shareholder wealth maximization” produced many articles criticizing the doctrine as the prevailing view, but none espousing it.

<sup>16</sup> *See* Murray, *supra* note 14, at 12. A decision is protected by the business judgment rule unless it is uninformed, not in good faith, or involves a conflict of interest. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36, 40–41, n.91 (Del. Ch. 2010). A decision that is uninformed, in bad faith, or made to advance the private interests of the decision maker would not, by any reasonable sense of the term, be a socially responsible one.

<sup>17</sup> *See* *Newmark*, 16 A.3d at 34; *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

<sup>18</sup> Proctor & Gamble’s PuR water project is a useful illustration. Initially, P&G intended to sell its water purification system in developing countries. It spent \$20 million on research and development to make the product available to the very poor at an affordable price. Despite PuR’s superiority, consumers preferred cheaper

socially beneficial acts, there are still plenty of corporations that are operated in socially irresponsible ways that could benefit from stronger public or investor pressure to clean up their acts.<sup>19</sup> Public relations notwithstanding, the shareholder wealth maximization norm may still influence individual corporate leaders,<sup>20</sup> and continues to be taught in elite business schools and law schools.<sup>21</sup>

### B. *Corporate Social Responsibility and the Social Doctrine of the Catholic Church*

Some commentators have supported calls for CSR with precepts from Catholic social doctrine.<sup>22</sup> That doctrine can be used to evaluate—and criticize—business practices,<sup>23</sup> but many

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alternatives, and the project was unprofitable. P&G nevertheless decided to continue the project on a charitable basis—in other words, at a loss to its shareholders. See Denis G. Arnold & Andres Valentin, *Corporate Social Responsibility at the Base of the Pyramid*, 66 J. BUS. RES. 1904, 1908 (2013).

<sup>19</sup> Recent examples include Volkswagen concealing violation of emission controls, Nathan Bomey, *EPA Accuses Volkswagen, Audi of Evading Emission Laws*, USA TODAY (Sept. 18, 2015, 7:38 PM), <https://www.usatoday.com/story/money/cars/2015/09/18/epa-accuses-volkswagen-audi-evading-emission-laws/72400018>; HSBC laundering money for drug cartels and members of al-Qaeda, Alastair Jamieson, *HSBC Allowed Money Laundering That Likely Funded Terror, Drugs*, NBC NEWS (July 17, 2012, 5:52 AM), <https://www.nbcnews.com/business/report-hsbc-allowed-money-laundering-likely-funded-terror-drugs-889170>; GlaxoSmithKline bribing doctors, Matt Robinson, *Glaxo to Pay \$20 Million SEC Fine over Bribery in China*, BLOOMBERG (Sept. 30, 2016, 3:35 PM), <https://www.bloomberg.com/news/articles/2016-09-30/glaxo-to-pay-20-million-sec-fine-over-bribing-chinese-officials>; and Citigroup, JPMorgan Chase, Barclays, and Royal Bank of Scotland manipulating currency markets, Kevin McCoy & Kevin Johnson, *5 Banks Guilty of Rate-rigging, Pay More than \$5B*, USA TODAY (May 20, 2015, 7:35 PM), <https://www.usatoday.com/story/money/2015/05/20/billions-in-bank-fx-settlements/27638443>.

<sup>20</sup> See Joseph L. Bower & Lynn S. Paine, *The Error at the Heart of Corporate Leadership*, 95 HARV. BUS. REV., May–June 2017, 50, 51; Murray, *supra* note 14, at 17–19.

<sup>21</sup> See Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1163 n.136 (2012).

<sup>22</sup> See HUMANISM IN ECONOMICS AND BUSINESS: PERSPECTIVES OF THE CATHOLIC SOCIAL TRADITION (Domènec Melé & Martin Schlag eds., 2015); Michael Miller, *Corporate Social Responsibility and the Role of Business in Society*, in CATHOLIC SOCIAL TEACHING AND THE MARKET ECONOMY 333, 336 (St. Pauls Pub. 2d ed. 2014). For a summary of early debates, see Thomas J. Molony, *Charity, Truth, and Corporate Governance*, 56 LOY. L. REV. 825, 845–64 (2010).

<sup>23</sup> See generally Gerald F. Cavanagh, S.J. et al., *Using Principles of Catholic Social Thought To Evaluate Business Activities*, 10 J. CATH. SOC. THOUGHT 155 (2013); Oliver F. Williams, C.S.C., *Is It Possible To Have a Business Based on Solidarity and Mutual Trust? The Challenge of Catholic Social Teaching to*

commentators have taken the position that it “requires” that corporations operate so as to advance authentic human development. These commentators focus on *the corporation* as the object of the Church’s teaching. In their view, that teaching requires a recognition that the corporation exists for the advancement of the common good.<sup>24</sup> For example, they argue that “Catholic Social Thought requires, at a minimum, that corporate law allow managers to act in a moral manner.”<sup>25</sup> There should be a Catholic vision of the corporation that “emphasizes the *corporation’s* social responsibilities”;<sup>26</sup> “a corporation cannot be content with seeking only the intermediate goods of, for example, efficiency or wealth creation alone.”<sup>27</sup> The law should ensure “corporate awareness of . . . *its* social responsibilities”;<sup>28</sup> “*the corporation* . . . must be dedicated to the flourishing of its employees as human beings.”<sup>29</sup> This strand of commentary also generally ignores the distinction discussed below between directors, on the one hand, and officers and other employees, on the other, by referring vaguely to “managers.”<sup>30</sup>

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*Capitalism and the Promise of Southwest Airlines*, 9 J. CATH. SOC. THOUGHT 59 (2012).

<sup>24</sup> See generally Ronald J. Colombo, *Religious Conceptions of Corporate Purpose*, 74 WASH. & LEE L. REV. 813 (2017); Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 71 (2012) [hereinafter Colombo, *Toward a Nexus of Virtue*]; Leo L. Clarke & Edward C. Lyons, *The Corporate Common Good: The Right and Obligation of Managers To Do Good to Others*, 32 U. DAYTON L. REV. 275, 282–84 (2007); Gerald J. Russello, *Catholic Social Thought and the Large Multinational Corporation*, 46 J. CATH. LEGAL STUD. 107, 114 (2007); MARC GUNTHER, FAITH AND FORTUNE: THE QUIET REVOLUTION TO REFORM AMERICAN BUSINESS 11 (2004).

<sup>25</sup> Molony, *supra* note 22, at 853.

<sup>26</sup> Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. SOC. JUST. 181, 183 (2005) (emphasis added). Professor Stabile suggests that Catholic business people should be “encouraged to bring their faith into their business dealings,” *id.* at 201, apparently as a way to make corporations more socially responsible.

<sup>27</sup> Russello, *supra* note 24, at 125 (emphasis added).

<sup>28</sup> Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 561, 568 (2004) (emphasis added).

<sup>29</sup> *Id.* at 565 n.9.

<sup>30</sup> See, e.g., Molony, *supra* note 22, at 867 (“[m]anagement must direct the corporation”); Clarke & Lyons, *supra* note 24, at 275 (“Manager’s Dilemmas”); Sargent, *supra* note 28, at 572 (“managers’ responsibility”); Joseph S. Spoerl, *The Social Responsibility of Business*, 42 AM. J. JURIS. 277, 277 (1997) (“[M]anagers are agents of shareholders, that is, they are hired by shareholders . . .”). Other commentators gloss over this issue through the use of the passive voice. See Sargent, *supra* note 28, at 570 (“corporations should be managed”).



More recently, commentators have brought Catholic social teaching to bear on specific business practices or specific industry segments.<sup>31</sup> Meanwhile, another strand of commentary applies the Church's social doctrine to justify both the existence of corporations and their pursuit of profits for shareholders.<sup>32</sup> They argue that corporations, as communities organized for a common purpose, can advance the goals of Catholic social teaching by fostering—or at least providing a forum for—“fraternity, sympathy, fellowship, and cooperation,”<sup>33</sup> and by putting into effect the principle of subsidiarity.<sup>34</sup> They also oppose, in general, the view that Church teaching requires managers to reject the shareholder wealth maximization norm.<sup>35</sup>

In sum, the application of Catholic social doctrine to CSR has assumed that the doctrine applies to the corporation as such. But the corporation is incapable of doing anything, good or bad; only humans can act in the world. The Church's teaching is directed at humans, and corporations are not subject to the Church's Magisterium. Moreover, social justice can only be accomplished by the acts of humans, because the Church's definition of social justice requires that acts of justice be carried out with a state of mind that is not only unavailable to a non-human in a direct sense, but also not vicariously available.<sup>36</sup> As explained more fully below, the Church directs that Catholics live

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<sup>31</sup> See, e.g., Cathy A. Driscoll et al., *Nature Is Prior to Us: Applying Catholic Social Thought and Anabaptist-Mennonite Theology to the Ethics of Stakeholder Prioritization for the Natural Environment*, 3 J. RELIGION & BUS. ETHICS 1 (2012); Ronald Paul Hill & Michael L. Capella, *Impoverished Consumers, Catholic Social Teaching, and Distributive Justice*, 67 J. BUS. RES. 32 (2014); Michael J. White, *Homo Laborans: Work in Modern Catholic Social Thought*, 58 VILL. L. REV. 455 (2013); Ericka Costa & Tommaso Ramus, *The Italian Economia Aziendale and Catholic Social Teaching: How To Apply the Common Good Principle at the Managerial Level*, 106 J. BUS. ETHICS 103 (2012); Mara Del Baldo, *Corporate Social Responsibility and Corporate Governance in Italian SMEs: The Experience of Some “Spirited Businesses,”* 16 J. MGMT. & GOVERNANCE 1 (2012).

<sup>32</sup> There are also those who argue that an application of Catholic social teaching to require corporate directors to consider non-shareholder interests violates the shareholder wealth maximization norm and current corporate law and theory. See Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILL. J. L. & INV. MGMT. 3, 10 (2002) [hereinafter Bainbridge, *The Bishops*].

<sup>33</sup> MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION 16 (rev. ed. 1990).

<sup>34</sup> See Bainbridge, *The Bishops*, *supra* note 32, at 25–26.

<sup>35</sup> See Bainbridge, *Corporate Social Responsibility*, *supra* note 14, at 41, 53–54; see also Sargent, *supra* note 28, at 582–83.

<sup>36</sup> See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1929–31 (2d ed. 1997).

with *caritas*, not merely give to “charity.”<sup>37</sup> A corporation cannot feel, or act with, *caritas*, and an agent cannot carry out *caritas* with someone else’s assets. The link between Catholic social teaching and corporate social responsibility is a red herring.

## II. CORPORATE ACTORS

A corporation is, of course, incapable of thinking, doing, or saying anything. It acts solely through humans with distinct legal roles. The directors set general broad-scale policy and monitor the managers, and the managers and other employees carry out corporate business.<sup>38</sup> The shareholders—who may be humans only indirectly—are usually limited to choosing directors and rubber-stamping directorial decisions.<sup>39</sup> However, shareholders have a significant private role when they choose to invest in a business venture at all.

### A. Directors

By law, the voice of the corporation is the board of directors, which decides all corporate questions and is subject only to the state incorporation statute, the foundational documents of the corporation, shareholder voting rights, and its fiduciary duties.<sup>40</sup> It is the board’s role, for example, to decide that the corporation will add a significant new line of business.<sup>41</sup> Because the board is not controlled by the corporation, it is not an agent of the corporation; rather, its powers are conferred by the corporate statute.<sup>42</sup> Nevertheless, the board owes fiduciary duties to “the corporation and its shareholders.”<sup>43</sup> The board acts solely as a body, and each individual director has no legal power to act on behalf of the corporation.<sup>44</sup>

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<sup>37</sup> See *infra* Part IV.

<sup>38</sup> ROBERT CHARLES CLARK, CORPORATE LAW § 3.2.1, at 105–06 (1986).

<sup>39</sup> *Id.* § 3.1.1, at 93–94.

<sup>40</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. c (AM. LAW INST. 2006).

<sup>41</sup> See generally CLARK, *supra* note 38, § 3.2.1, at 105–06.

<sup>42</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (AM. LAW INST. 2006); People *ex rel.* Manice v. Powell, 201 N.Y. 194, 200, 94 N.E. 634, 637 (N.Y. 1911).

<sup>43</sup> See *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 80 (Del. Ch. 2014).

<sup>44</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (AM. LAW INST. 2006).

Under corporate law, the board has broad power not only to adopt business policies but also to state corporate objectives.<sup>45</sup> A corporation's certificate of incorporation may, but rarely does, contain a statement about the corporation's specific business purpose.<sup>46</sup> In the absence of such a provision, corporate objectives are determined by the board.<sup>47</sup> If the board chooses to alter course, it has the power to do so without shareholder consent, unless the change requires a structural change such as a merger or an amendment to the certificate of incorporation.<sup>48</sup> The board of a for-profit corporation cannot adopt a charitable purpose, because that would conflict with its charter.<sup>49</sup> But choosing among potentially profit-making ventures<sup>50</sup> and choosing social and other policies that govern the operation of those ventures is within the board's power.

While the board's powers are extremely broad, the board's actions are theoretically constrained by the board's duties to the corporation and its shareholders. The relevant legal question for CSR is the power of the board of directors, speaking on behalf of the corporation, to undertake or direct actions or policies that benefit others more than, or even at the expense of, the corporation and its shareholders. Corporate law imposes duties of care and loyalty on the board of directors.<sup>51</sup> However, the business judgment rule provides that a board's decisions will not be scrutinized as long as the directors "acted on an informed basis, in good faith and in the honest belief that the action taken

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<sup>45</sup> See DEL. CODE ANN. tit. 8 § 141(a) (West 2016); MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2002).

<sup>46</sup> See MODEL BUS. CORP. ACT § 2.02(b)(2)(i) (AM. BAR ASS'N 2002).

<sup>47</sup> See DEL. CODE ANN. tit. 8 § 141(a) (West 2016); MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2002).

<sup>48</sup> For example, in a celebrated 1989 case, Time Incorporated acquired Warner Communications, Inc., a company arguably larger than Time, and launched itself into the entertainment and cable business without a shareholder vote. See generally *Paramount Commc'ns Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

<sup>49</sup> See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

<sup>50</sup> See *Gimbel v. Signal Cos.*, 316 A.2d 599, 605 (Del. Ch. 1974), *aff'd*, 316 A.2d 619 (Del. 1974).

<sup>51</sup> In Delaware, a failure to act in good faith constitutes a breach of the duty of loyalty. See *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006). The Model Business Corporation Act ("MBCA") does not set forth a specific duty of loyalty, but requires that a director act "(i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation." MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2016).

was in the best interests of the company.”<sup>52</sup> Thus, a board may act to implement socially beneficial policies as long as the board believes, in good faith, that those policies will benefit the company.

The law does not require that the benefits from a particular policy materialize in a certain a time frame,<sup>53</sup> and it does not require that the board perform an extensive cost-benefit analysis for every decision.<sup>54</sup> A board may, for example, cause the corporation to make charitable contributions because they will bring good will and favorable publicity to the company,<sup>55</sup> as long as the contribution is reasonable in relation to the company’s size, and the board can articulate a benefit to the company.<sup>56</sup> A

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<sup>52</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). The MBCA provides that a director will not be liable for any decision unless the decision:

[C]onsisted or was the result of: (i) action not in good faith; or (ii) a decision (A) which the director did not reasonably believe to be in the best interests of the corporation, or (B) as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or (iii) a lack of objectivity due to [a conflict of interest].

MODEL BUS. CORP. ACT § 8.31(a)(2)(i)–(iii) (AM. BAR ASS’N 2016).

<sup>53</sup> *See Paramount*, 571 A.2d at 1154 (“The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate goals.”).

<sup>54</sup> “The members of the board of directors or a board committee, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.” MODEL BUS. CORP. ACT § 8.30(b) (AM. BAR ASS’N 2016). “There is no one way for ‘becoming informed’ [in connection with the board’s decision-making function], and both the method and measure—‘how to’ and ‘how much’—are matters of reasonable judgment for the director to exercise.” *Id.* § 8.30 cmt. 2.

<sup>55</sup> *See Kahn v. Sullivan*, 594 A.2d 48, 61 (Del. 1991) (opining that the business judgment rule would protect decision by the board of Occidental Petroleum to spend \$85.6 million to build and maintain a museum to house the art collection of its founder, Armand Hammer); *Ella M. Kelly & Wyndham Inc. v. Bell*, 266 A.2d 878, 878–79 (Del. 1970) (applying the business judgment rule to board’s decision to pay a tax “voluntarily”); *Theodora Holding Co. v. Henderson*, 257 A.2d 398, 404–05 (Del. Ch. 1969); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953).

<sup>56</sup> Charitable contributions are often used to protect or restore good will. In 2013, the ten largest corporate donors, by dollars given, were as follows: Walmart, Wells Fargo, Chevron, Goldman Sachs, ExxonMobil, JP Morgan Chase, Bank of America, Johnson & Johnson, General Electric, and Target. Sarah Frostenson & Megan O’Neil, *10 Companies That Gave the Most Cash in 2013*, CHRONICLE OF PHILANTHROPY (July 13, 2014), <http://philanthropy.com/article/10-Companies-That-Gave-the/147651>; *see also* Susanne Craig, *Goldman Sachs, Buying Redemption*, N.Y. TIMES: DEALBOOK (Oct. 26, 2013, 2:21 PM), <https://dealbook.nytimes.com/2013/10/26/goldman-sachs-buying-redemption> (discussing Goldman Sachs’ large charitable gifts following the financial crisis).

board may also adopt a policy that benefits the community at the apparent expense of the corporation, as long as the board can point to potential benefits to the corporation.<sup>57</sup> If the board were unable or unwilling to identify a benefit to the corporation, it would arguably not be acting in the good faith belief that the decision was in the best interests of the corporation, and the decision would, theoretically, be a breach of the duty of loyalty and not protected by the business judgment rule.<sup>58</sup> In that case, the members of the board might be liable for losses suffered by the corporation as a result of the board's action.<sup>59</sup>

The "best interests of the corporation" standard imposes only a very limited constraint on the board. The board decides what the "best interests of the corporation" are because those interests depend on corporate objectives.<sup>60</sup> Because the board defines the corporation's business, it can ensure that otherwise unprofitable measures benefit the "business."<sup>61</sup> When the CVS/Caremark board<sup>62</sup> decided that the corporation's stores would forgo \$2 billion in profit from tobacco sales, it renamed its pharmacy

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<sup>57</sup> Some commentary implies that this is not legally accurate. See, e.g., Bainbridge, *Corporate Social Responsibility*, *supra* note 14, at 42, 53. My argument is that, in pursuit of the best interests of the corporation, directors have broad discretion to take actions that in fact benefit outsiders.

<sup>58</sup> The case law on this subject is so rare that the legal analysis is largely theoretical. However, one can explain the remarkable case of *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919), on this basis, because Henry Ford was unwilling to articulate the many ways in which his "semi-eleemosynary" operations were benefiting the company. See Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147–48 (2012); cf. Joseph K. Leahy, *A Decade After Disney: A Primer on Good and Bad Faith*, 83 U. CIN. L. REV. 859, 882–83 (2015) (discussing personal, non-financial motive as bad faith).

<sup>59</sup> Because liability in such a case would be premised on a breach of the duty of loyalty, an exculpatory clause such as that permitted by § 102(b)(7) of Delaware General Corporation Law would not protect the directors. In addition, because the claim would be based on a breach of the duty of loyalty, the burden would presumably be on the directors to show that their decision was entirely fair to the corporation. Such cases are sufficiently rare that the applicable legal standards are uncertain.

<sup>60</sup> See Paula J. Dalley, *To Whom It May Concern: Fiduciary Duties and Business Associations*, 26 DEL. J. CORP. L. 515, 546–49 (2001); see also RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (AM. LAW INST. 2006) (power of board).

<sup>61</sup> If such decisions are disclosed, shareholders who are unconvinced about the benefits of those policies can make their own decisions about the company's likely long-term profitability. See GUNTHER, *supra* note 24, at 177.

<sup>62</sup> There are no sources that attribute this decision to the board, but such a step must have been approved, if not initiated, by the board.

division “CVS Health”—a step that emphasized the fact that forgoing tobacco profits was advancing the corporation’s business.<sup>63</sup> Thus, while a board’s open avowal of permanently profit-sacrificing policies would potentially generate liability for the board, a board can, as a practical matter, direct many unprofitable CSR activities as long as it frames its decisions carefully.

### B. Shareholders

Shareholders often represent an additional human participant in the corporation.<sup>64</sup> Shareholders, as such, are not agents of the corporation and have no role in the operation of the business. Even a controlling or sole shareholder operates an incorporated business, not as a shareholder, but in her capacity as president or CEO, if she is wise.<sup>65</sup> The legal function of the shareholders is to elect directors and to approve or veto fundamental changes in the corporation that are initiated by the board.<sup>66</sup> While the shareholders are beneficiaries of the duties owed by the board<sup>67</sup> and other corporate agents, they are not

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<sup>63</sup> See Tom Murphy, *CVS Changes Name, Stops Tobacco Sales Early*, WASH. EXAMINER (Sept. 3, 2014, 2:21 PM), <http://www.washingtonexaminer.com/cvs-changes-name-stops-tobacco-sales-early/article/2161585>; see also Timothy W. Martin & Mike Esterl, *CVS To Stop Selling Cigarettes: Pharmacy Chain Says Tobacco Products Don't Fit with Push as Health-Care Provider*, WALL ST. J. (Feb. 5, 2014, 7:45 PM), <https://www.wsj.com/articles/cvs-to-stop-selling-cigarettes-1391602647>.

<sup>64</sup> Although most shareholders nowadays are institutions, those institutions almost always represent humans, either directly or indirectly. See Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 266 n.145 (2008) [hereinafter Colombo, *Ownership, Limited*]. Institutions themselves act through human agents, who are generally governed by agency law in the same way as corporate agents, although institutional investors may be organized as trusts, partnerships, limited partnerships or other unincorporated entities, and the law governing their managers may be slightly different from corporate and general agency law.

<sup>65</sup> A shareholder may become liable for the obligations of the corporation if she disregards the corporate form by commingling funds, ignoring corporate formalities, and otherwise acting as if she were a sole proprietor. See WILLIAM MEADE FLETCHER, 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.10 (2016) [hereinafter FLETCHER CYCLOPEDIA].

<sup>66</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (AM. LAW INST. 2006).

<sup>67</sup> See *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007).

their principals.<sup>68</sup> When they sue to enforce those duties they must do so derivatively, on behalf of the corporation—the true principal.<sup>69</sup>

The shareholders do have a role in the broader structure of the corporation, however. For one thing, they—or their predecessors—provided the capital needed to establish and run the corporation. Although in many jurisdictions even a majority of the shareholders cannot force the corporation to dissolve,<sup>70</sup> they can withdraw their financial support by seeking to sell their shares and thereby force down the market price of the corporate stock. Eventually, the company's liquidation value would exceed its market value and someone would come along and liquidate it.<sup>71</sup> The shareholders elect directors, and even in a publicly traded corporation that occasionally makes a difference.<sup>72</sup> In public corporations, shareholders vote on shareholder proposals and on executive compensation, and in all corporations shareholders vote on major transactions.<sup>73</sup> Such votes occasionally have practical significance.<sup>74</sup> Boards of public corporations also consult large shareholders informally.<sup>75</sup> Thus, while shareholders—other than controlling shareholders—do not affect management of the corporation, they have a number of decisions to make on their own behalf as owners of shares.<sup>76</sup>

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<sup>68</sup> Commentators often speak of the shareholders as the “principal” of the corporate board and corporate managers, *see, e.g.*, Colombo, *Ownership, Limited*, *supra* note 64, at 265–66, but this is not legally accurate. *See generally* Paula J. Dalley, *Shareholder (and Director) Fiduciary Duties and Shareholder Activism*, 8 HOUS. BUS. & TAX L.J. 301, 310–14 (2008).

<sup>69</sup> *See* FLETCHER CYCLOPEDIA, *supra* note 65, § 5729.

<sup>70</sup> *See, e.g.*, DEL. CODE ANN. tit. 8 § 275 (West 2010) (requiring unanimous shareholder vote); MODEL BUS. CORP. ACT § 14.02 (AM. BAR ASS'N 2002) (requiring board action).

<sup>71</sup> *See* WILLIAM A. KLEIN ET AL., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 202 (11th ed. 2010).

<sup>72</sup> *See id.* at 189.

<sup>73</sup> *See id.* at 124–25.

<sup>74</sup> *See* Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1361 (2013).

<sup>75</sup> *See id.* at 1360–62.

<sup>76</sup> The “nexus-of-contracts” theory holds that the shareholders do not own the corporation, *see* FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991), but there is no question that the shareholders own shares, which constitute property in every legal sense. *See* FLETCHER CYCLOPEDIA, *supra* note 65, § 5096; Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1433 (1993) [hereinafter Bainbridge, *In Defense*].

### C. Officers and Other Employees

While the board has broad powers to determine business policy and practices, it cannot as a practical matter implement its decisions. Rather, it acts by instructing, directing, empowering, and overseeing corporate agents. Corporate officers, unlike directors, are agents of the corporation<sup>77</sup> and are fully subject to the law of agency, as described below.<sup>78</sup> Even employees who lack any authority to act on behalf of the corporation are agents for some purposes and owe a fiduciary duty of loyalty.<sup>79</sup> While no one expects the board to run the company on a daily basis, the law does contemplate that the officers and other employees will be able to trace their authority directly or indirectly to a decision of the board.<sup>80</sup> Thus, a middle manager who approves hiring additional personnel at a particular facility has the power to make that decision because the board authorized someone, probably the president, to take whatever actions were necessary to conduct business, and the president then assigned parts of that job to an underling, and so forth. Corporate officers and other employees do not have the legal power to decide what corporate policy will be, unless the board has delegated that authority to the employee in question.<sup>81</sup> While the board can, in

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<sup>77</sup> See RESTATEMENT (THIRD) OF AGENCY, § 1.01 cmt. c. (AM. LAW INST. 2006).

<sup>78</sup> See *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010), *aff'd sub nom* *ASDI Inc. v. Beard Research Inc.*, 11 A.3d 749 (Del. 2010).

<sup>79</sup> See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c. (AM. LAW INST. 2006). Compare *id.* § 8.01, cmt. c. (discussing whether all employees owe duties), with Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 4 WIS. L. REV. 777, 810–11 n.193 (2011) (listing cases rejecting idea that employee is a true agent owing a duty of loyalty). See generally Deborah A. DeMott, *Relationships of Trust and Confidence in the Workplace*, 100 CORNELL L. REV. 1255 (2015) [hereinafter DeMott, *Relationships of Trust*].

<sup>80</sup> The powers of some officers are set out in state incorporation statutes and in the corporation's charter and bylaws. See RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt. c (AM. LAW INST. 2006).

<sup>81</sup> Cf. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 815–16 (2005) (noting that, where there is a controlling shareholder, she is the “manager,” and “[l]ower level managers should not enjoy discretion to sacrifice the corporation's profits absent some indication of approval by the controlling shareholder of the corporate policy”).



effect, define its own fiduciary duties because it defines the corporate business, corporate agents may not—they are bound by the board’s decision about the best interests of the corporation.<sup>82</sup>

### III. LEGAL RESTRICTIONS ON CORPORATE SOCIAL RESPONSIBILITY

Since the primary actors in corporate enterprises are officers and other employees, it is the law of agency that is most relevant to the socially responsible or irresponsible behavior of “corporations.” The Third Restatement of Agency divides an agent’s duties to the principal into duties of loyalty and duties of performance.<sup>83</sup> Duties of performance include, in addition to the well-known duty of care, various duties requiring obedience to the principal and compliance with any contract between the principal and the agent.<sup>84</sup> The duty of care requires that an agent act with reasonable “care, competence, and diligence” in the performance of the agent’s functions.<sup>85</sup> If an agent chose one course over another because the preferred course was more socially responsible, the agent would breach his duties of performance only if the choice was careless or made incompetently. The motive for the choice would implicate the duty of loyalty, not the duty of care.<sup>86</sup>

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<sup>82</sup> Many such decisions will probably be delegated to the senior officers of the company. In such a case, they would have the same discretion the board would, subject to prior instructions from the board and subject to being overruled by the board. Officers may not be subject to the business judgment rule when making decisions, but at least one court has held that they are obligated to act in good faith in the best interests of the corporation. *See* *Hampshire Grp., Ltd. v. Kuttner, C.A. No. 3607-VCS*, 2010 WL 2379995, at \*11 (Del. Ch. July 12, 2010) (also applying gross negligence standard to officers’ alleged breach of the duty of care). *Cf.* Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 413–15 (2013) (arguing that the business judgment rule should not apply to officers).

<sup>83</sup> RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (AM. LAW INST. 2006).

<sup>84</sup> *See id.* §§ 8.07–8.12.

<sup>85</sup> *See id.* § 8.08.

<sup>86</sup> *Id.* § 8.08 cmt. b. In fact, an agent’s acting to further the interests of someone other than the principal is a classic breach of the duty of loyalty, not the duty of care. *See id.* § 8.01 cmt. b, illus. 2; *see also* *King v. Bankerd*, 492 A.2d 608, 613 (Md. 1985) (“In short, the agent is under a duty to serve his principal with only his principal’s purposes in mind.”). In *King*, which is the basis for the illustration in the Restatement, an attorney-in-fact made a gift of the principal’s property to the principal’s ex-wife. *Id.* at 610. Although the trial court held that the agent “negligently violated the fiduciary relationship,” the appellate court’s discussion—as well as the citation to the case in the Third Restatement—makes clear that the duty violated was loyalty. *Id.* at 611, 613. *But see* Colombo, *Ownership, Limited, supra*

The duty of loyalty is determined by the scope of the agency relationship as created by the parties' manifestations of consent.<sup>87</sup> Thus, the agent is subject to a general duty to act only "in accordance with the principal's manifestation of consent,"<sup>88</sup> and to a duty of loyalty to act "solely for the benefit of the principal" in connection with the agency relationship.<sup>89</sup> The Third Restatement calls this the "general fiduciary principle" that defines the entire relationship between the principal and agent.<sup>90</sup> The agent does not have unfettered discretion to determine what "the principal's benefit" entails.<sup>91</sup> The agent must act based on a reasonable interpretation of the principal's manifestations<sup>92</sup> to the agent.<sup>93</sup> In the words of the Second Restatement, the principal's purposes, "as manifested to the agent, constitute the benefit for which, as the agent should realize, the agency is created."<sup>94</sup> The agent must make "an honest assessment of what the principal would then wish the agent to do,"<sup>95</sup> and that assessment must be based on the agent's understanding of the principal's objectives.<sup>96</sup>

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note 64, at 269 n.159, 282 (arguing that a board's consideration of the common good raises duty of care concerns).

<sup>87</sup> See RESTATEMENT (SECOND) OF AGENCY § 376 cmt. a (AM. LAW INST. 1958).

<sup>88</sup> *Id.* § 383. The Second Restatement includes the qualifier "[e]xcept when he is privileged to protect his own or another's interests . . ." *Id.*

<sup>89</sup> See *id.* § 387.

<sup>90</sup> See RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit . . ."). The Third Restatement adds "loyally" and removes "solely" to clarify that it is acceptable for an agent to receive a benefit, in the form of compensation, from her activities. *Id.* § 8.01 reporter's note a.

<sup>91</sup> Cf. Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*, 117 PENN. ST. L. REV. 1037, 1041–42 (2013) (discussing the need for "substituted judgment" when an agent is acting under a durable power of attorney under the Uniform Power of Attorney Act).

<sup>92</sup> Corporate ethics codes and social responsibility statements, which are adopted by the board, can constitute "manifestations by the principal" for the purposes of guiding agents' behavior. See Robert G. Kennedy, *Virtue and Corporate Culture: The Ethical Formation of Baby Wolverines*, 17 REV. BUS., Winter 1995/1996, at 10, 11.

<sup>93</sup> See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (AM. LAW INST. 2006); RESTATEMENT (SECOND) OF AGENCY § 376 cmt. a (AM. LAW INST. 1958).

<sup>94</sup> See RESTATEMENT (SECOND) OF AGENCY § 39 cmt. a (AM. LAW INST. 1958).

<sup>95</sup> Deborah DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 322 (Andrew S. Gold & Paul B. Miller eds., 2014) [hereinafter DeMott, *The Fiduciary Character of Agency*].

<sup>96</sup> *Id.* at 324.

With respect to societal or other interests, the Second Restatement expressly states that “[i]n business enterprises, an agent normally has no authority . . . to conduct his principal’s business with a mind to the benefit of others.”<sup>97</sup> Even if the agent works for a charitable organization, “the agent serves others only as a means of forwarding the principal’s objects.”<sup>98</sup> A corporate employee-agent is bound by what the employee believes, based on manifestations by the “corporation,” to be consistent with corporate goals. As noted above, the voice of the corporation is the board of directors or a senior officer to whom the board has delegated its authority to speak on any particular subject. In a large corporation, the CEO—or one of her underlings—is likely to be the real decision maker on most matters, but the CEO is nevertheless under the control of the board of directors to the extent the board chooses to exercise that control.<sup>99</sup>

Agency law does recognize that there are situations in which an agent’s duty to a higher authority trumps the duty of loyalty.<sup>100</sup> Those situations are limited, however, to specific legal mandates, such as disclosure of information subject to a subpoena or to clearly articulated public policy concerns, such as reporting illegal behavior.<sup>101</sup> The exceptions to the duty of loyalty have been kept narrow.<sup>102</sup> The Third Restatement states that, in

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<sup>97</sup> RESTATEMENT (SECOND) OF AGENCY § 39 cmt. a (AM. LAW INST. 1958). The illustration accompanying the text observes that a store manager “may be found” to have authority to make a reasonable donation to a local charity “to which merchants generally contribute,” in order to obtain or retain good will. *Id.* illus. 2. In other words, the act is still in the best interests of the principal.

<sup>98</sup> RESTATEMENT (SECOND) OF AGENCY § 39 cmt. a (AM. LAW INST. 1958).

<sup>99</sup> RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (AM. LAW INST. 2006).

<sup>100</sup> The Third Restatement notes that “an agent may in some circumstances be privileged to engage in conduct that may be adverse to a principal’s interests or that may in some other respect depart from the principal’s wishes.” *Id.* § 8.01 cmt. c. The circumstance noted is the agent’s right to keep secret the fact that the agent is planning to quit. *Id.* This right is a recognition that the agent has a right to make a living after the end of her employment. Without this recognition, anyone with a marketable skill, or who hoped to develop a marketable skill, would be deterred from serving as an agent.

<sup>101</sup> *Id.* § 8.05 cmt. c.

<sup>102</sup> See Fred C. Zacharias, *The Lawyer as Conscientious Objector*, 54 RUTGERS L. REV. 191, 210 (2001) (noting that the author found no case law that directly addressed whether agents may vindicate moral and societal interests in violating their obligations to their principals); *Dicomes v. State*, 782 P.2d 1002, 1009–10 (Wash. 1989) (en banc) (rejecting claim that public policy protected employee who

some instances, “general social interests circumscribe the agent’s duties to the principal,” but it identifies only the whistleblower cases as examples of such an exception to the duty of loyalty.<sup>103</sup> Many courts even refuse to excuse whistleblowing where the reported behavior does not constitute a violation of law.<sup>104</sup>

Unless one of the few narrow exceptions applies, an agent must act according to the principal’s wishes, whether or not the agent agrees with the principal. The agent must comply with the principal’s manifestations, reasonably interpreted, even if the agent believes that doing so is not, in fact, in the principal’s best interests.<sup>105</sup> Thus, there is no room for an agent to act outside the stated purpose of the agency for the benefit of either the common good or the principal’s unacknowledged moral well-being.<sup>106</sup> In agency law, the principal’s right to control the agent and define the purpose of the enterprise is virtually sacrosanct,<sup>107</sup> which reflects the fact that the principal owns the enterprise, and all the resources at the agent’s disposal belong to the principal.

Consider a simple example. Alpha operates a business as a sole proprietor, and Bravo manages one of Alpha’s locations. Bravo elects to purchase recycled bags for the store, although they are slightly more expensive. Bravo has acted loyally to benefit Alpha in this decision only if Bravo reasonably believes, *based on Alpha’s manifestations to him*, that buying—and paying more for—the recycled bags will benefit the business *as Alpha sees it*. Thus, Bravo may purchase the bags if Alpha has

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disclosed confidential information despite employee’s “arguably good faith belief in the righteousness of her conduct . . .”).

<sup>103</sup> RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. c (AM. LAW INST. 2006).

<sup>104</sup> See *generally Dicomes*, 782 P.2d at 1007–09 (collecting and summarizing cases); *Gutierrez v. Sundancer Indian Jewelry, Inc.*, 868 P.2d 1266, 1282 (N.M. Ct. App. 1993), *cert. denied*, 117 N.M. 121 (1994) (Hartz, J., dissenting) (same).

<sup>105</sup> See RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (AM. LAW INST. 2006). In the organizational context, the agent must obey the instructions of his superiors in the organization even if he believes those instructions do not effectively advance the goals of the organization. See DeMott, *The Fiduciary Character of Agency*, *supra* note 95, at 325; see also *id.* at 327 (“[Agent] is not free to disregard what [Agent] knows about [Principal’s] preferences, even if [Agent] believes them to be mistaken.”).

<sup>106</sup> See DeMott, *The Fiduciary Character of Agency*, *supra* note 95, at 329–30 (“[E]ven well-motivated departures from [Principal’s] known preferences are inconsistent with [Agent’s] position as [Principal’s] representative,” even in situations where the agent’s choice does not reduce the economic benefit to the principal).

<sup>107</sup> See *id.* at 321.

indicated that she wants her business to be operated as sustainably as possible, or if Alpha has previously indicated an interest in sustainable products. If Bravo believes that using the recycled bags would benefit the business, but Alpha has previously indicated her dislike of recycled products, Bravo may not buy the bags. Bravo is also not permitted to buy the bags if he subjectively believes there is no *business* reason to do so—in other words, if he does not believe it would benefit *Alpha*. The fact that using the recycled bags has numerous benefits for society is simply irrelevant to Bravo’s duty.<sup>108</sup> The higher-authority exception to the duty of loyalty does not apply because Bravo is not under any superior legal duty to buy recycled bags, and Bravo’s act cannot fall under a whistle-blowing exception because it presumably does not prevent Alpha from violating a statute, regulation, or clearly stated public policy.

A real-world example of this principle recently occurred in Tulsa, Oklahoma, where several city bus drivers were fired for distributing free transit passes to people in need.<sup>109</sup> The drivers were allowed to issue passes “for improved customer service,” but the city charged them with embezzlement for printing and distributing nearly \$38,000 in free rides.<sup>110</sup>

It has been suggested that a principal—at least a corporate principal—knows that her agents will have their own moral and ethical beliefs, that the principal assumes the risk that an agent will act in accordance with generally accepted moral principles (“GAMP”),<sup>111</sup> and that an agent acting in accordance with GAMP does not breach the duty of loyalty.<sup>112</sup> This is incorrect as a matter of law unless the GAMP in question has the force of

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<sup>108</sup> In the unlikely event of a suit, the remedy here would probably be for Bravo to reimburse Alpha for the difference in the cost of the bags. That is, of course, what Bravo should have done in the first place.

<sup>109</sup> The actual facts are unclear. Several drivers are suing the city, alleging they were fired with discriminatory intent and not for distributing free passes. They allege that other drivers also distributed passes and were not disciplined. See Ginnie Graham, *Fired Tulsa Bus Drivers Sue in Federal Court, Alleging Race Discrimination*, TULSA WORLD (Nov. 7, 2015), [http://www.tulsaworld.com/news/rimewatch/fired-tulsa-bus-drivers-sue-in-federal-court-alleging-race/article\\_c4b1597e-7ef2-5cdf-a458-23db128afdf4.html](http://www.tulsaworld.com/news/rimewatch/fired-tulsa-bus-drivers-sue-in-federal-court-alleging-race/article_c4b1597e-7ef2-5cdf-a458-23db128afdf4.html).

<sup>110</sup> The case was dismissed because the drivers lacked criminal intent. See *id.*

<sup>111</sup> See Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 57–61.

<sup>112</sup> There is a certain absurdity in this argument: loyalty is itself a high moral value, and the ninth circle of Hell, according to Dante, is inhabited not by thieves, murderers, heretics, or profiteers, but traitors.

positive law, or the agent reasonably believes that the principal has authorized the agent to apply GAMP in the business context.<sup>113</sup>

It has also been argued that the law should be changed to permit an agent to take actions that do not benefit the principal but are in accordance with socially desirable behavior and GAMP.<sup>114</sup> There are at least two reasons why such a change in the law would be unwise. First, one purpose of the strict duty of loyalty is to encourage a principal to delegate activities to agents and to limit agency costs.<sup>115</sup> A GAMP exception would be sufficiently large and vague that it would increase the risks for principals and force principals to deliver elaborate and yet nonetheless unavoidably incomplete instructions about situations likely to involve moral choices.<sup>116</sup> Second, the GAMP exception would make a difference in two situations—where the principal's moral choice would differ from the agent's, and where the agent must make a moral decision without guidance from the principal. In the former case, the GAMP exception would privilege the agent's view over that of the principal with respect to an aspect of the principal's business, an outcome utterly contrary to every tenet of agency law. In the latter case, current law requires that the agent act based on the agent's reasonable interpretation of the principal's wishes. If the agent legitimately believes that the principal's moral values are coincident with his own, then there is no problem. If the agent believes that the principal's moral values differ from his own, then the agent is actually in the former, conflict-of-value situation and must respect the fact that his principal, not he, owns the enterprise.

It is said to be unrealistic<sup>117</sup> and dangerous<sup>118</sup> to require that an agent check her morals at the door of her workplace. Such "role morality" permits a person to separate herself from the morality of her act and to engage in acts she would never take on

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<sup>113</sup> See DeMott, *Relationships of Trust*, *supra* note 79, at 1266.

<sup>114</sup> See Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 57–65.

<sup>115</sup> See Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1042–44 (2011).

<sup>116</sup> A principal is free, under current law, to express binding moral preferences to the agent but is not required to do so in order to prevent the agent from imposing the agent's moral choices on the principal.

<sup>117</sup> See Bainbridge, *In Defense*, *supra* note 76, at 1439.

<sup>118</sup> See Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 48–49.

her own behalf.<sup>119</sup> To counter that phenomenon, goes the argument, the law should enable and encourage agents to take moral account of their actions.<sup>120</sup> But in the context of an agency relationship that is asking the wrong question. The agent must make moral choices based on her role in the workplace, as elsewhere in the world. But, while an agent is entitled to, and must, act morally in conducting her own business, she is not permitted to pass the costs of her “morality” on to a third person. Morality includes loyalty and respect for another’s property.<sup>121</sup> Bravo may purchase recycled products himself, but he cannot force Alpha to pay for them. That would be no moral choice at all. The difficult moral choice for the agent is not in deciding how to spend other people’s money, but in deciding how to use her own assets, including her skills, and thus even in deciding what job to take.<sup>122</sup> Many, perhaps most, incidents of corporate

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<sup>119</sup> See *id.*; Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 513–22 (1995). It has also been argued that the structure of corporate law, combined with common business practices, makes corporate employees more likely to engage in wrongful behavior. See Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 52–55; Robert J. Rhee, *Corporate Ethics, Agency, and the Theory of the Firm*, 3 J. BUS. & TECH. L. 309, 323–29 (2008); Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1652–55 (2002); see also PIUS XI, ENCYCLICAL LETTER *QUADRAGESIMO ANNO* ¶ 132 (1931) (observing that agents of a corporation can use that form to conceal or justify severe abuses as well as petty injustices).

<sup>120</sup> See Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 57–65; Mitchell, *supra* note 119, at 526–27.

<sup>121</sup> Even if corporate property does not belong to the corporation—because the corporation is only a nexus of contracts—it certainly does not belong to the agent.

<sup>122</sup> Professor Colombo notes that the borrower of a car is not expected to sacrifice a life to protect the car. See Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 55. This observation is inapposite. Even if the borrower of the car were an agent, rather than a mere bailee, the duty of loyalty would not require her to commit homicide to protect the principal’s property. The exceptions to the duty of loyalty would cover such a situation. More to the point, if the owner of a car bails her car to an employee to deliver flowers to a client, the employee may not have the car converted to flex-fuel at the owner’s expense; she may not remove two roses from the bouquet and give them to a sad homeless person; and, if the client is a crime boss, she may not deliver the flowers to someone else that she believes is more deserving. She may, however, refuse to make the delivery and take the consequences.

wrongdoing are attributable to dishonest individual conduct,<sup>123</sup> and requiring workers to abide by, rather than ignore, their fiduciary duties may have a salutary effect on conduct.<sup>124</sup>

#### IV. THE SOCIAL DOCTRINE OF THE CATHOLIC CHURCH

While most CSR commentators ignore the law of agency, the commentators who argue that the social doctrine of the Catholic Church supports or mandates CSR misunderstand and misapply Church doctrine.

##### A. *Teaching and Evangelization*

The Church is made up of all the faithful, living and dead.<sup>125</sup> The Magisterium of the Church—its teaching authority—is therefore directed at, and binding upon,<sup>126</sup> the faithful. The Church identifies its two-fold pastoral activity as, first, helping individuals to discover and love Christ, and, second, encouraging the faithful to live that love in their lives and in the world.<sup>127</sup> The Church’s mission to preach the Gospel entails announcing moral principles and making judgments on human affairs,<sup>128</sup> which is,

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<sup>123</sup> See John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 396–98 (1981).

<sup>124</sup> Petty theft, shirking, disregarding quality controls, and falsely enhancing one’s own performance metrics at the expense of another, for example, are both unethical and breaches of the duty of loyalty.

<sup>125</sup> See CATECHISM OF THE CATHOLIC CHURCH ¶ 1267 (2d ed. 1997). The Code of Canon Law explains that the “Christian faithful” constitute the “people of God” by virtue of their baptism, and they are “called to exercise the mission which God has entrusted to the Church.” CODEX IURIS CANONICI c.204 (Canon Law Society of America trans., 1983) [hereinafter CIC-1983]. For the communion in the Church of those who have died, see SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON THE CHURCH *LUMEN GENTIUM* ¶ 49 (1964) [hereinafter *LUMEN GENTIUM*].

<sup>126</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 1269 (2d ed. 1997); PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 80 (2004) [hereinafter COMPENDIUM].

<sup>127</sup> See COMPENDIUM, *supra* note 126, ¶ 525 (“[T]o discover the truth and to choose the path that they will follow” and “to bear witness with a spirit of service to the Gospel in the field of social activity.”); see also PAUL VI, APOSTOLIC LETTER *OCTOGESIMA ADVENIENS* ¶ 48 (1971), [hereinafter *OCTOGESIMA ADVENIENS*], reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 265, 283–84 (David J. O’Brien & Thomas A. Shannon eds., 1992) [hereinafter CATHOLIC SOCIAL THOUGHT].

<sup>128</sup> JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* ¶ 5 (1991) [hereinafter *CENTESIMUS ANNUS*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 127, 439, 443; CIC-1983, *supra* note 125, c.747, § 2.



in essence, its social doctrine. The basis for the Church's teaching on social issues is its evangelization mission, proclaiming the "truth of Christ's love in society."<sup>129</sup> As Pope Francis has made clear, the "New Evangelization" proclaimed by Pope John Paul II<sup>130</sup> connects causally to the Church's social teaching.<sup>131</sup>

The Church's "social" teaching is not solely about social and economic justice; rather, it is Catholic teaching, and only a commitment to the truth of the Gospel makes Catholic social justice possible.<sup>132</sup> The Church's social doctrine, like all its teaching, seeks to "help[] man on the path of salvation."<sup>133</sup> It is only in light of this goal that the Church concerns itself with other things;<sup>134</sup> this is its "primary and sole purpose."<sup>135</sup> Catholic social doctrine therefore includes spiritual goals that are inseparable from its concern for justice and temporal conditions. The social and economic development that the Church promotes is "integral human development," which considers the whole person, including her relationship with God.<sup>136</sup> Catholic social

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<sup>129</sup> BENEDICT XVI, ENCYCLICAL LETTER *CARITAS IN VERITATE* ¶ 5 (2009) [hereinafter *CARITAS IN VERITATE*].

<sup>130</sup> There are numerous texts on the New Evangelization. A new emphasis was officially declared in BENEDICT XVI, APOSTOLIC LETTER *PORTA FIDEI* ¶ 4, (2011). A complete lengthy papal exhortation appears in *EVANGELII GAUDIUM*, *infra* note 131, while the U.S. bishops have also published on the subject. See generally UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Disciples Called To Witness: The New Evangelization* 3 (2012).

<sup>131</sup> See FRANCIS, APOSTOLIC EXHORTATION *EVANGELII GAUDIUM* ¶ 17 (2013) [hereinafter *EVANGELII GAUDIUM*]; see also *id.* ¶¶ 15, 24, 49; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *The New Evangelization and Social Justice*, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/new-evangelization-social-justice.cfm> (last visited Feb. 23, 2018); COMPENDIUM, *supra* note 126, ¶ 7.

<sup>132</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶¶ 2–6; see also *EVANGELII GAUDIUM*, *supra* note 131, ¶ 199 (noting that the Church's "authentic option for the poor" differs from every other ideology because it is based on love).

<sup>133</sup> *CENTESIMUS ANNUS*, *supra* note 128, ¶ 54.

<sup>134</sup> See *id.*

<sup>135</sup> COMPENDIUM, *supra* note 126, ¶ 69.

<sup>136</sup> See SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *GAUDIUM ET SPES* ¶ 10 (1965) [hereinafter *GAUDIUM ET SPES*]; *CARITAS IN VERITATE*, *supra* note 129, ¶ 79; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 41.

doctrine is not merely concerned with making life better for humans; it is about making humans themselves more fully human in recognizing their ultimate destiny.<sup>137</sup>

Because of this core value of the entire—spiritual—human person, the Church teaches that those working for social justice must work not merely for the common good, but out of love.<sup>138</sup> In the words of Pope Benedict: “Charity is at the heart of the Church’s social doctrine. Every responsibility and every commitment spelt out by that doctrine is derived from charity which, according to the teaching of Jesus, is the synthesis of the entire Law.”<sup>139</sup> The “charity” [*caritas*]<sup>140</sup> that is at the heart of the Church’s social doctrine is “love received and given”<sup>141</sup>—received from God and given to God and man. Love of one’s neighbor without *caritas*—that is, without a link to the love of God—is merely “morality,” not Christianity,<sup>142</sup> and any attempt to build up the world without God leads to “desertification.”<sup>143</sup> And *caritas* is not only linked to love of God,<sup>144</sup> it *comes from* love of God.<sup>145</sup> Consequently, the Church calls those who are to

<sup>137</sup> See *GAUDIUM ET SPES*, *supra* note 136, ¶ 41; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 54.

<sup>138</sup> See *EVANGELII GAUDIUM*, *supra* note 131, ¶ 165 (“God’s saving love . . . precedes any moral and religious obligation on our part.”). Those acting for the common good for some reason other than love of God and neighbor are perhaps people “of good faith” who can assist the faithful in some aspects of their work, see *CARITAS IN VERITATE*, *supra* note 129, ¶ 57, but they are not living in accordance with Catholic social teaching. See JOHN XXIII, ENCYCLICAL LETTER *PACEM IN TERRIS* ¶¶ 158–60 (1963) [hereinafter *PACEM IN TERRIS*], *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 131, 157.

<sup>139</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 2; see also *EVANGELII GAUDIUM*, *supra* note 131, ¶ 37 (stating that the first value of moral teaching is “faith working through love”) (quoting *Galatians* 5:6 (New American)).

<sup>140</sup> In the English-language version of *CARITAS IN VERITATE*, the word used is “charity.” In the Latin version it is “*caritas*”; in the German version it is “*Liebe*.” I will use the term *caritas* to refer to this concept throughout this Article.

<sup>141</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 5.

<sup>142</sup> See BENEDICT XVI, ENCYCLICAL LETTER *DEUS CARITAS EST* ¶ 14 (2005) [hereinafter *DEUS CARITAS EST*].

<sup>143</sup> *EVANGELII GAUDIUM*, *supra* note 131, ¶ 86.

<sup>144</sup> See *OCTOGESIMA ADVENIENS*, *supra* note 127, ¶ 17.

<sup>145</sup> See CATECHISM OF THE CATHOLIC CHURCH ¶ 1822 (2d ed. 1997); *LUMEN GENTIUM*, *supra* note 125, ¶ 42; *EVANGELII GAUDIUM*, *supra* note 131, ¶ 183; *CARITAS IN VERITATE*, *supra* note 129, ¶ 78; *DEUS CARITAS EST*, *supra* note 142, ¶¶ 1, 17, 18, 20; JOHN XXIII, ENCYCLICAL LETTER *MATER ET MAGISTRA* ¶ 257 (1961) [hereinafter *MATER ET MAGISTRA*], *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 84, 125; SYNOD OF BISHOPS, *Justice in the World* (1971) [hereinafter *JUSTICE IN THE WORLD*], *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 288, 293–94.

effectuate its social doctrine to undergo a personal conversion to “transcendent love,”<sup>146</sup> which will in turn lead them to take responsibility for injustice.<sup>147</sup> Development and socioeconomic progress require that the truth of Christ’s love be itself loved and demonstrated.<sup>148</sup> Society cannot be made more human until *caritas* prevails in human relationships;<sup>149</sup> justice alone cannot bring about the “union of minds and hearts” which is the basis for real stability.<sup>150</sup> In other words, Catholic social doctrine calls the faithful to advance the integral human development of all peoples, *because the faithful love God*.

### B. *Specific Precepts of the Catholic Social Doctrine*

The Church’s social doctrine provides criteria for judging the morality and justice of political, social, and economic institutions and systems, as well as general guidance about the nature of a just society.<sup>151</sup> Although the three aspects of human life—political, social, and economic—cannot be separated for practical purposes, this Article considers only the precepts of Church doctrine relating to the economy and, more specifically, business.

While the Church has not endorsed a specific economic system or set of policies, its social doctrine is quite clear about the economic conditions that advance integral human development: an attitude of solidarity between all people,<sup>152</sup> worker participation in enterprise,<sup>153</sup> just wages,<sup>154</sup> full

<sup>146</sup> *OCTOGESIMA ADVENIENS*, *supra* note 127, ¶ 45 (“Otherwise, . . . the most revolutionary ideologies lead only to a change in masters.”); *see also id.* ¶ 48 (issuing a “call to action” preceded by a “personal conversion”).

<sup>147</sup> *See EVANGELII GAUDIUM*, *supra* note 131, ¶ 127; *OCTOGESIMA ADVENIENS*, *supra* note 127, ¶ 48.

<sup>148</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 5; *see also JUSTICE IN THE WORLD*, *supra* note 145, at 310; JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 40 (1987) [hereinafter *SOLLICITUDO REI SOCIALIS*], *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 395, 424.

<sup>149</sup> *See* JOHN PAUL II, ENCYCLICAL LETTER *DIVES IN MISERICORDIA* ¶ 14 (1980) [hereinafter *DIVES IN MISERICORDIA*] (referring to “merciful love”).

<sup>150</sup> *QUADRAGESIMO ANNO*, *supra* note 119, ¶ 137.

<sup>151</sup> *See* Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 AVE MARIA L. REV. 1, 5–6 (2006).

<sup>152</sup> *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 1941 (2d ed. 1997).

<sup>153</sup> *See PACEM IN TERRIS*, *supra* note 138, ¶¶ 18, 20; *MATER ET MAGISTRA*, *supra* note 145, ¶ 82.

<sup>154</sup> *See MATER ET MAGISTRA*, *supra* note 145, ¶ 71.

employment,<sup>155</sup> and a more equitable distribution of goods among men, among other things.<sup>156</sup> More generally, economic life should be inspired by Christian principles.<sup>157</sup> The economy in all its facets should respect the dignity of the whole person because the economy is human activity.<sup>158</sup> Of course, the economy is not an independent actor; it is made up of individual decisions and decision makers, and so the concrete prescriptions of the Church's social doctrine relating to the economy are directed at how humans behave in their various economic roles: owner and worker.<sup>159</sup> The Church's social doctrine also addresses the role of businesses in general and corporations specifically.

### 1. Ownership of Property

Many of a person's economic roles involve decisions about the use of her property, and Catholic social doctrine is quite specific about the obligations of the faithful in that regard. First of all, the Church emphasizes the doctrine of the universal destination of goods: God gave creation to man in common, and, although we have adopted a system of private property for a variety of primarily consequentialist reasons, those property rights are limited by duties reflecting the claims of the common good.<sup>160</sup> This limitation has a number of consequences. First, and obviously, it is wrong to use one's property to seek to increase one's wealth by unjust or unlawful means.<sup>161</sup> Second, one must give one's property to those in need.<sup>162</sup> *Caritas* may require that

<sup>155</sup> See JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *CHRISTIFIDELES LAICI* ¶ 43 (1988) [hereinafter *CHRISTIFIDELES LAICI*].

<sup>156</sup> *LUMEN GENTIUM*, *supra* note 125, ¶ 36; see also CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2403–06 (2d ed. 1997).

<sup>157</sup> *QUADRAGESIMO ANNO*, *supra* note 119, ¶ 136.

<sup>158</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶¶ 45, 65.

<sup>159</sup> See *id.* ¶¶ 37, 65, 66; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 36; see also *QUADRAGESIMO ANNO*, *supra* note 119, ¶ 141 (“[T]he apostles of the industrial and commercial world should themselves be employers and merchants.”).

<sup>160</sup> See *GAUDIUM ET SPES*, *supra* note 136, ¶ 69; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 43; JOHN PAUL II, ENCYCLICAL LETTER *LABOREM EXERCENS* ¶ 14 (1981) [hereinafter *LABOREM EXERCENS*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 352, 378; *PACEM IN TERRIS*, *supra* note 138, ¶ 22; *MATER ET MAGISTRA*, *supra* note 145, ¶¶ 19–20; *QUADRAGESIMO ANNO*, *supra* note 119, ¶¶ 44–52; LEO XIII, ENCYCLICAL LETTER *RERUM NOVARUM* ¶¶ 4–14, 19 (1891) [hereinafter *RERUM NOVARUM*], reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 14, 14.

<sup>161</sup> See *CENTESIMUS ANNUS*, *supra* note 128, ¶ 43; *QUADRAGESIMO ANNO*, *supra* note 119, ¶ 134.

<sup>162</sup> See *RERUM NOVARUM*, *supra* note 160, ¶ 22.

one give not only from one's superfluous income, but out of one's own needs as well.<sup>163</sup> Pope Paul VI exhorted each person to examine his conscience: "Is he prepared to support out of his own pocket works and undertakings organized in favor of the most destitute? Is he ready to pay higher taxes so that the public authorities can intensify their efforts in favor of development?"<sup>164</sup> The obligation must be satisfied from one's own resources.<sup>165</sup>

Third, one should not be too attached to material wealth and property. One should have "interior freedom" with regard to one's goods and abilities.<sup>166</sup> Observation of the "right order" of values will lead the faithful to lives "permeated with the spirit of the beatitudes, notably with a spirit of poverty."<sup>167</sup> Owners should use their goods with moderation, "reserving the better part for guests, for the sick and the poor."<sup>168</sup> Individuals must beware the dangers of consumerism, which can prevent a person from truly "being."<sup>169</sup> Consumer choices also have a moral dimension and should be made accordingly.<sup>170</sup> "[E]very economic decision has a moral consequence,"<sup>171</sup> and created goods themselves can be used to advance general progress.<sup>172</sup>

Fourth, decisions about savings and investment, and the productive use of property in general, must consider the common good.<sup>173</sup> A reasonable return on investment is just, but property

<sup>163</sup> See *CENTESIMUS ANNUS*, *supra* note 128, ¶ 36; *GAUDIUM ET SPES*, *supra* note 136, ¶ 69. Loving one's neighbor calls for sacrifice and perhaps suffering, which unites the actor with Christ and serves to build up the body of Christ on earth. See PAUL VI, ENCYCLICAL LETTER *POPULORUM PROGRESSIO* ¶ 79 (1967) [hereinafter *POPULORUM PROGRESSIO*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 127, at 240, 253.

<sup>164</sup> *POPULORUM PROGRESSIO*, *supra* note 163, ¶ 47; see also *OCTOGESIMA ADVENIENS*, *supra* note 127, ¶ 23 ("[T]he more fortunate should renounce some of their rights so as to place their goods more generously at the service of others.").

<sup>165</sup> See *PACEM IN TERRIS*, *supra* note 138, ¶ 35; *MATER ET MAGISTRA*, *supra* note 145, ¶ 121. Canon Law emphasizes this, and notes that clergy should be paid enough so that they can give from their personal income. CIC-1983, *supra* note 125, c.222, § 2. Canon Law requires that the faithful support the Church, with time and talent if not with cash.

<sup>166</sup> *OCTOGESIMA ADVENIENS*, *supra* note 127, ¶ 45.

<sup>167</sup> *GAUDIUM ET SPES*, *supra* note 136, ¶ 72.

<sup>168</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2405 (2d ed. 1997).

<sup>169</sup> *SOLLICITUDO REI SOCIALIS*, *supra* note 148, ¶ 28.

<sup>170</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶ 66; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 36.

<sup>171</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 37 (emphasis omitted).

<sup>172</sup> See *LUMEN GENTIUM*, *supra* note 125, ¶ 36.

<sup>173</sup> See *CENTESIMUS ANNUS*, *supra* note 128, ¶ 36; CATECHISM OF THE CATHOLIC CHURCH ¶ 2405 (2d ed. 1997).

must be used “in accordance with faith and right reason.”<sup>174</sup> Because of the importance of meaningful work to the development of the complete person,<sup>175</sup> Catholic social doctrine encourages investment in activities that create employment opportunities satisfying the requirements of solidarity.<sup>176</sup> Investment has other potential moral implications of course. For example, Pope Benedict XVI specifically recognized the existence—and danger—of social choice investment funds; the faithful must consider whether financial opportunities respect “the inviolable dignity of the human person and the transcendent value of natural moral norms.”<sup>177</sup> Persons with assets engaged in business are similarly bound. Business owners must “respect concretely the human dignity” of their workers and strive to operate their businesses so as to promote the family.<sup>178</sup>

In general, the faithful should avoid using their property in ways that increase inappropriate inequalities in wealth.<sup>179</sup> One must recognize that one’s possessions are not entirely one’s own—they are “common in the sense that they should be able to benefit not only him but also others.”<sup>180</sup> In short, the general obligation to act with *caritas* applies to a person’s use of her property as to all her actions.<sup>181</sup>

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<sup>174</sup> *QUADRAGESIMO ANNO*, *supra* note 119, ¶ 136.

<sup>175</sup> *See infra* notes 184–193 and accompanying text.

<sup>176</sup> *See CENTESIMUS ANNUS*, *supra* note 128, ¶ 36; *see also QUADRAGESIMO ANNO*, *supra* note 119, ¶ 51 (recommending such investment as a use for superfluous income).

<sup>177</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 45. The Pope notes that “ethical” financing might mean anything, including “decisions and choices contrary to justice and authentic human welfare,” and that one needs a “sound criterion of discernment.” *Id.*

<sup>178</sup> *COMPENDIUM*, *supra* note 126, ¶¶ 344–45.

<sup>179</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 32.

<sup>180</sup> *GAUDIUM ET SPES*, *supra* note 136, ¶ 69.

<sup>181</sup> *Cf. SOLLICITUDO REI SOCIALIS*, *supra* note 148, ¶ 47 (exhorting everyone to “implement . . . by the use of their resources . . . the measures inspired by solidarity and love of preference for the poor”).

## 2. Work

Catholic social doctrine also focuses substantial attention on work and workers.<sup>182</sup> Work must be more than simply a means to live.<sup>183</sup> It has an essential spiritual component: It contributes to the spiritual good of the laborer and contributes to the work of Christ.<sup>184</sup> Every person has a duty to work,<sup>185</sup> but work is defined broadly as any human activity.<sup>186</sup> Work is essential to the worker for a number of reasons. Ideally, one fulfills one's calling through work;<sup>187</sup> in any event, one is obeying God's commandment by working.<sup>188</sup> One also develops oneself as a person through work.<sup>189</sup> Through work, one contributes to the good of others; not only one's co-workers and the enterprise in which one works, but also one's family and society in general.<sup>190</sup> A worker shares in God's work of creation<sup>191</sup> and, also, because work invariably involves some kind of toil, in Christ's suffering on the cross.<sup>192</sup> Work provides, moreover, an opportunity to live with *caritas*.<sup>193</sup>

## 3. Business

In addition to work and ownership of property, which are themselves business activities,<sup>194</sup> Catholic social doctrine has specific observations and prescriptions related to businesses.<sup>195</sup> Businesses should produce "useful goods and services,"<sup>196</sup> create

<sup>182</sup> See *LABOREM EXERCENS*, *supra* note 160, ¶ 3 ("[H]uman work is a key, probably the essential key, to the whole social question.") (emphasis in original).

<sup>183</sup> See *GAUDIUM ET SPES*, *supra* note 136, ¶ 36; *QUADRAGESIMO ANNO*, *supra* note 119, ¶ 135.

<sup>184</sup> See *MATER ET MAGISTRA*, *supra* note 145, ¶ 259; *LABOREM EXERCENS*, *supra* note 160, ¶¶ 24–27.

<sup>185</sup> See *GAUDIUM ET SPES*, *supra* note 136, ¶ 67.

<sup>186</sup> See *LABOREM EXERCENS*, *supra* note 160, ¶ 1. The Pope goes on to explain that work is "transitive"—through work, one directs oneself toward an external object. *Id.* ¶ 4.

<sup>187</sup> *Id.* ¶ 6.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.* ¶¶ 24–26.

<sup>190</sup> See *id.* ¶ 16.

<sup>191</sup> See *id.* ¶ 25.

<sup>192</sup> See *id.* ¶ 27.

<sup>193</sup> See *CENTESIMUS ANNUS*, *supra* note 128, ¶ 41; *GAUDIUM ET SPES*, *supra* note 136, ¶ 67.

<sup>194</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶ 41.

<sup>195</sup> As discussed below, the use of "business" or "a business" as the grammatical subject of a sentence can present difficulties, especially when referring to morality or intentionality.

<sup>196</sup> *COMPENDIUM*, *supra* note 126, ¶ 338.

wealth for their owners and contracting parties,<sup>197</sup> produce high-quality goods and services, and promote the well-being of their employees.<sup>198</sup> On the other hand, businesses should avoid corruption, the irresponsible destruction of natural resources, and the exploitation of workers, especially in developing nations.<sup>199</sup> Businesses by their nature serve a social function by “creating opportunities for meeting, cooperating and the enhancement of the abilities of the people involved,”<sup>200</sup> and profit is not to be pursued without regard to its social and human costs. The “demands of the common good . . . must also be borne in mind when assessing the rate of return due as compensation to the company’s management, and as interest or dividends to investors.”<sup>201</sup>

However, Catholic social doctrine is about more than improving the social value of business. It includes exhortations consistent with the Church’s evangelical mission. The lay faithful are to be apostles in their roles as employers and merchants,<sup>202</sup> and a business must not neglect “the authentic values that bring about the concrete development of the person and society,”<sup>203</sup> presumably including the spiritual values described above. While these observations purport to relate to businesses, they are in fact about the behavior of humans. Those actors are variously “business owners and management,”<sup>204</sup> “employers,”<sup>205</sup> “those responsible for business enterprises”<sup>206</sup> and “[a]ll those involved in a business venture.”<sup>207</sup> Vaguer terms, such as “individuals and private enterprise,” are often used as

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<sup>197</sup> *See id.*

<sup>198</sup> *See CENTESIMUS ANNUS, supra* note 128, ¶ 36.

<sup>199</sup> *See id.* ¶ 43.

<sup>200</sup> COMPENDIUM, *supra* note 126, ¶ 338; *see also CENTESIMUS ANNUS, supra* note 128, ¶ 43 (describing business as a “society of persons” where integral human development “promotes the greater productivity and efficiency of work itself”).

<sup>201</sup> *MATER ET MAGISTRA, supra* note 145, ¶ 81 (emphasis omitted).

<sup>202</sup> *OCTOGESIMA ADVENIENS, supra* note 127, ¶ 48.

<sup>203</sup> COMPENDIUM, *supra* note 126, ¶ 338 (emphasis omitted).

<sup>204</sup> *Id.* ¶ 344.

<sup>205</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 1941 (2d ed. 1997); CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION *LIBERTATIS CONSCIENTIA* ¶ 83 (1986) [hereinafter *LIBERTATIS CONSCIENTIA*].

<sup>206</sup> CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2430, 2432 (2d ed. 1997).

<sup>207</sup> COMPENDIUM, *supra* note 126, ¶ 339.



well,<sup>208</sup> but, when economic and financial institutions create injustice, “it is not the instrument that must be called to account, but individuals, their moral conscience and their personal and social responsibility.”<sup>209</sup>

C. *Catholic Social Doctrine and Corporations: Vicarious Charity*

Because Catholic social doctrine calls for the faithful to bring *caritas* to the world, it cannot apply to corporations. Clearly an institution cannot actually act with *caritas*, which has an emotional component. Nor can humans somehow act so that *caritas* is imputed to the corporation. It is impossible for a faithful member of the Church to carry out the Church’s mission or advance Catholic social justice, which requires a commitment to the Gospel, on someone else’s behalf—that is, as an agent—unless the principal shares the agent’s spiritual motivation. The concept of representation or substitution has an important place in Catholic theology,<sup>210</sup> but a relationship with God must arise from a free response and acceptance in which a person “commits his whole self freely to God.”<sup>211</sup> A person must act without external pressure; “no man has the capacity to force internal compliance on another.”<sup>212</sup> It follows that a person must feel *caritas* personally; the *caritas* of one person cannot be imputed to another.<sup>213</sup>

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<sup>208</sup> See, e.g., *LIBERTATIS CONSCIENTIA*, *supra* note 205, ¶ 85; see also CATECHISM OF THE CATHOLIC CHURCH ¶ 2433 (2d ed. 1997) (“[S]ociety should, according to circumstances, help citizens find work and employment.”).

<sup>209</sup> *CARITAS IN VERITATE*, *supra* note 129, ¶ 36; see also *OCTOGESIMA ADVENIENS*, *supra* note 127, ¶ 48.

<sup>210</sup> Most fundamentally, Jesus took upon himself the sins of the world and therefore, to oversimplify grossly, redeemed us vicariously. CATECHISM OF THE CATHOLIC CHURCH ¶ 1992 (2d ed. 1997). Moreover, Christians can participate in the redemption of others through prayer. See Jacques Servais, S.J., Postscript, in HANS URS VON BALTHASAR & ADRIENNE VON SPEYR, *TO THE HEART OF THE MYSTERY OF REDEMPTION* 129–30 (2010). One’s own works “enable us to collaborate in the salvation of others” by building up the Church. CATECHISM OF THE CATHOLIC CHURCH ¶ 2003 (2d ed. 1997).

<sup>211</sup> PAUL VI, DOGMATIC CONSTITUTION ON DIVINE REVELATION *DEI VERBUM* ¶ 5 (1965).

<sup>212</sup> *PACEM IN TERRIS*, *supra* note 138, ¶ 48; see also *DEUS CARITAS EST*, *supra* note 142, ¶ 16.

<sup>213</sup> Cf. Charles J. Chaput, O.F.M. Cap., “*We Have No King But Caesar:*” *Some Thoughts on Catholic Faith and Public Life*, 58 *VILL. L. REV.* 371, 377 (2013) (“The obligation to seek and serve the truth belongs to each of us personally . . . . We can’t ignore or delegate away these personal duties to anyone else or any government agency.”).

Unlike *caritas* itself, an agent's good works can be imputed to the principal, as when a person directs another to distribute alms on her behalf. However, neither the love nor the works can be imputed when an actor is using another person's goods without that person's consent, because that by definition is not an act of *caritas* at all.<sup>214</sup> For one thing, the obligation of *caritas* requires sacrifice of self; sacrificing another would not have any spiritual value for either the actor or the unwitting donor, and it would not serve as a very convincing witness of the Gospel. Additionally, causing another person to suffer, even for the common good, would violate other fundamental moral principles, including respect for the rights of others<sup>215</sup> and, in some cases, fidelity to one's obligations.<sup>216</sup> Thus, vicarious *caritas*<sup>217</sup> could exist only when one person used his *own* property or other gifts out of love for God and neighbor and offered that love and sacrifice for the benefit of another's soul. But that is not CSR.

#### V. PERSONAL SOCIAL RESPONSIBILITY

If Catholic social doctrine has little to say to corporations and corporate, or other, agents, how can it relate at all to the world of business? The answer is that it relates to individuals in their business activities, but only to the extent that they are acting on their own behalf, as principals, and not as agents.<sup>218</sup> This is true because only individuals are capable of the *caritas* that enables true social justice,<sup>219</sup> as the Church sees it. In the

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<sup>214</sup> One may not engage in charity with another person's goods. See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. II-II, Q. 32, art. 8 (2d ed. 1920) (1266–1273) (“[H]e that is under another's power must not give alms of anything in respect of which he is subject to that other.”). If the principal directs the agent to give alms, the *caritas*—and presumably the property—is the principal's; it is not imputed from the agent.

<sup>215</sup> See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2407–08 (2d ed. 1997). This would be treating another as a means, rather than as an end in herself. See *id.* ¶ 2407.

<sup>216</sup> See *id.* ¶¶ 2410–11.

<sup>217</sup> This author has not been able to identify any such doctrine in an authoritative source. Cf. *id.* ¶ 2010 (“Moved by the Holy Spirit . . . we can then merit for ourselves and for others the graces needed for our sanctification, for the increase of grace and charity, and for the attainment of eternal life.”) (emphasis added).

<sup>218</sup> This focus is consistent with Catholic moral teaching, which focuses on the actor and the effect of sin on the actor, not on the harm caused by the sin. See M. Cathleen Kaveny, *Appropriation of Evil: Cooperation's Mirror Image*, 61 THEOLOGICAL STUD. 280, 303 (2000).

<sup>219</sup> See *supra* Part IV.C; see also BENEDICT XVI, *MESSAGE FOR LENT* (2013).

world of business, corporations are not the only principals; owners of property are also principals when they are dealing with their own property. Thus, Catholic social doctrine applies to business owners, investors, and consumers, who are also the vast majority of the human beings in the United States.

In 2016, almost 150 million Americans were employed;<sup>220</sup> only about 2.6 million of those can be categorized as senior management.<sup>221</sup> While almost 25 million people work in “management, business, and financial operations,”<sup>222</sup> almost 27 million are in “service” occupations such as “health care” support or “food preparation,” 33.5 million are in sales, office, and administrative positions, almost 14 million are in “natural resources, construction, and maintenance,” and almost 18 million are in production and transportation occupations.<sup>223</sup> At the risk of overgeneralizing, over 93 million employees are likely to have little significant decision-making authority at work.<sup>224</sup>

Significant numbers of Americans own their own businesses, however. In 2013, there were 24.3 million “nonemployer” establishments.<sup>225</sup> In 2016, thirteen percent of households owned

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<sup>220</sup> U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY tbl.11 (2016), <https://www.bls.gov/cps/cpsa2016.pdf> (last visited Jan. 23, 2018).

<sup>221</sup> These are “chief executives” and “general operations managers.” *Id.*

<sup>222</sup> This category includes food service managers, education administrators, claims adjusters, event planners, and accountants. *Id.*

<sup>223</sup> U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, QUARTERLY CENSUS OF EMPLOYMENT AND WAGES (2016), [https://data.bls.gov/cew/apps/table\\_maker/v4/table\\_maker.htm#type=12&year=2016&size=0,1,2,3,4,5,6,7,8,9&agg=23&supp=1](https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=12&year=2016&size=0,1,2,3,4,5,6,7,8,9&agg=23&supp=1) (last visited July 8, 2018).

<sup>224</sup> U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY *supra* note 220. Nor are workers likely to have close contact with the owners of the business. Although there are relatively few large workplaces, 87.2 million people worked in workplaces with more than 20 employees. *Id.* at tbl.12. While meaningful participation in work is a goal of the Church’s social doctrine, a significant proportion of the lay faithful in the United States probably do not have it. On the other hand, the *Wall Street Journal* reports that more than three-quarters of surveyed employees say they have no desire to move up in their organizations because they are happy and fulfilled in their current job. Sue Shellenbarger, *Would You Refuse a Promotion To Stay in a Job You Love?*, WALL ST. J. (July 16, 2013, 11:05 PM), <https://www.wsj.com/articles/SB10001424127887324348504578609762637492762>.

<sup>225</sup> U.S. CENSUS BUREAU, GEOGRAPHIC AREA SERIES: NONEMPLOYER STATISTICS BY LEGAL FORM OF ORGANIZATION FOR THE U.S. AND STATES (2015), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=NE S\\_2015\\_00A1&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=NE S_2015_00A1&prodType=table) (last visited Jan. 23, 2018). These are people working alone, such as independent contractors. U.S. CENSUS BUREAU, NONEMPLOYER

all or part of a business,<sup>226</sup> as of 2010, the last year for which data was reported, ninety-four percent had an active role in the business they owned.<sup>227</sup> Far more invest in businesses run by others: By various accounts, about half of American households invest in the stock market, directly or through mutual funds, retirement plans, and similar vehicles.<sup>228</sup> It is in these roles—as workers and owners—that individuals can freely act to advance social justice, and it is to individuals in these roles that the Church speaks.

#### A. *Issues in the Workplace*

It is difficult to imagine more than a day or two passing in the life of the average worker without an opportunity for the practice of personal *caritas*,<sup>229</sup> and even ordinary workers will occasionally, perhaps often, be presented with thorny moral issues and will be called upon to make decisions that implicate Catholic moral and social teaching more directly. Workers in fact have asked questions such as:

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STATISTICS, <https://www.census.gov/econ/overview/mu0500.html> (last visited Dec. 2, 2017).

<sup>226</sup> *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL., Sept. 2017, at 21 box 6, 28 box 9.

<sup>227</sup> *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98 FED. RES. BULL., June 2012, at 47 tbl.9, 51–52.

<sup>228</sup> *Id.* at 24; see also Jeffrey M. Jones, *U.S. Stock Ownership Down Among All But Older, Higher-Income*, GALLUP NEWS (May 24, 2017), <http://news.gallup.com/poll/211052/stock-ownership-down-among-older-higher-income.aspx>.

<sup>229</sup> Pope Francis's encyclical, *EVANGELII GAUDIUM*, *supra* note 131, suggests that the faithful must overcome suspicion of others and abandon their defensive attitudes. ¶ 88. They should learn to suffer in Christ when they are unjustly attacked or met with ingratitude, *id.* ¶ 91, and tolerate the nuisances in life, *id.* ¶ 92. A person with *caritas* prays for someone who makes her angry, *id.* ¶ 101, and serves as a peacemaker in her community, *id.* ¶ 239. The faithful must respect migrants and those of other faiths, *id.* ¶ 253, must stand firm in faith when faced with setbacks and frustrations, *id.* ¶ 277–80, and must not try to appear better than others, *id.* ¶ 271. In fact, Chapter V of *EVANGELII GAUDIUM* is a set of vivid instructions for the laity. The Pope clearly expects that they will be carried out in the workplace, producing “nurses with soul, teachers with soul, politicians with soul.” *Id.* ¶ 273.

- May a mechanic or clerical employee continue working for a business that cheats people?<sup>230</sup>
- May a customer service worker or desk clerk implement evasive or devious policies?<sup>231</sup>
- May employees allow an employer's defects or wrongdoing to hurt others?<sup>232</sup>
- May salespeople push products on which extra commission is paid?<sup>233</sup>
- May an employer hire undocumented workers in violation of the law?<sup>234</sup>

Such questions suggest that employees understand the implications of the duty of loyalty better than many legal scholars do.<sup>235</sup>

Questions such as those listed above implicate the moral doctrine of "cooperation with evil." Put very simply, participating in an objectionable act is always forbidden if the cooperator shares the wrongful intent of the primary actor; this is "formal cooperation."<sup>236</sup> When a person's act contributes to the wrongful act of another, and the cooperator foresees that her action will help the wrongdoer but does not intend that the wrong occur, the cooperator's act is "material cooperation."<sup>237</sup> In cases of material cooperation, the permissibility of the act is determined on a case-by-case basis. Thus, in some circumstances an employee may be able to do her job even if she knows that the enterprise in which she works will commit some wrongful act, as long as she does not intend that act.<sup>238</sup> Material cooperation "can be immoral, however, because it can lead to sharing bad intentions, lead others into sin, impair one's witness to relevant moral truth, and/or be unfair to those injured by the wrongdoing to which it contributes."<sup>239</sup> Relevant factors include how badly the employee needs the job, whether the employee's resignation is likely to

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<sup>230</sup> See GERMAIN GRISEZ, 3 THE WAY OF THE LORD JESUS: DIFFICULT MORAL QUESTIONS 543, 544 (1997). Professor Grisez has also been asked questions about the morality of tax evasion and theft of employer resources.

<sup>231</sup> *Id.* at 548, 551.

<sup>232</sup> *Id.* at 555.

<sup>233</sup> *Id.* at 576.

<sup>234</sup> *Id.* at 735.

<sup>235</sup> Cf. Colombo, *Toward a Nexus of Virtue*, *supra* note 24, at 38–39 (arguing that low-level employees do not face moral issues).

<sup>236</sup> See GRISEZ, *supra* note 230, at 872–74.

<sup>237</sup> See *id.*

<sup>238</sup> See *id.* at 876–86.

<sup>239</sup> See *id.* at 546–47.

hinder or advance the evil behavior, and whether the employee has the opportunity to ameliorate the effects of the bad behavior by staying employed.<sup>240</sup>

Employers, or their attorneys, can, and probably do, provide instruction on the duty of loyalty as part of their regular employee training, but they probably do not provide guidance for employees who face personal moral dilemmas because of the demands of their employers. Oddly, the Church does not provide much formal guidance on this subject either.<sup>241</sup> While legal scholarship is unlikely to be more available to low-level employees than moral theology, lawyers and legal commentators could help employers establish policies that recognize and encourage loyal, moral behavior on the part of employees. Such policies might reduce the likelihood that employees will engage in harmful, disloyal, and immoral acts. Moreover, a greater recognition of individual moral responsibility in general might improve the business's culture of behavior.<sup>242</sup>

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<sup>240</sup> See, e.g., *id.* at 543–48. Material cooperation:

[I]s licit when the action is good or indifferent in itself; and when one has a reason for doing it that is both just and proportioned to the gravity of the other's sin and to the closeness of the assistance which is [thereby] given to the carrying out of that sin.

*Id.* at 876 (quoting St. Alphonsus Ligouri) (alteration in original).

<sup>241</sup> In contrast, the Church has many resources available to help the faithful live according to Church teaching in their family lives and as citizens. The U.S.C.C.B. has a section of its website dedicated to “Marriage and Family” that includes dozens of Bishops’ Letters, Church documents, FAQs, and other documents. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Marriage and Family*, <http://www.usccb.org/issues-and-action/marriage-and-family/index.cfm> (last visited Jan. 23, 2018). The Bishops also have a portal on Faithful Citizenship, which focuses on “Forming Consciences for Faithful Citizenship” and includes a bulletin insert and parish guide, as well as links to other documents. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Forming Consciences for Faithful Citizenship*, <http://www.usccb.org/issues-and-action/faithful-citizenship/index.cfm> (last visited Jan. 23, 2018). The “Human Life and Dignity” Portal includes links to Vatican statements on social justice, as well as other statements of principles, but has little designed to educate the laity about how to implement the social doctrine of the Church in their own lives. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Human Life and Dignity*, <http://www.usccb.org/issues-and-action/human-life-and-dignity/> (last visited Jan. 23, 2018).

<sup>242</sup> See Scott Berinato, *To Stop Bad Behavior, Display a Virtuous Quote*, HARV. BUS. REV., Jan.–Feb. 2016, at 34–35 (describing study in which subjects were less likely to ask colleagues to engage in unethical behavior if those colleagues had a quote about integrity in their email signatures).

More importantly, there are many aspects of the Church's social teaching that are applicable to ordinary work. The requirements of *caritas* are personal, which is to say, they apply in person-to-person interactions. An employee cannot spend her employer's resources on socially desirable but more expensive supplies, but she can support her co-workers in difficulty, she can treat customers—including immigrants and "undesirables"—with courtesy and kindness, and she can mediate workplace disputes and step away from petty jealousies. She can, moreover, provide opportunities for her co-workers and subordinates to have greater participation in their workplaces and to have more meaningful work experiences.<sup>243</sup> These are small steps to advancing authentic human dignity, and thus are real ways that real people can advance social justice.<sup>244</sup>

Many proponents of corporate social responsibility might question the relevance of this kind of daily ethics to CSR. There are three answers to that question. First, the Church's social doctrine does not demand reform as an end in itself. The Church is in the business of promoting *caritas*, not social programs.<sup>245</sup> Second, a large-scale conversion to *caritas* would go a long way to accomplishing social justice.<sup>246</sup> Third, it has been argued that individuals working for corporations are less likely to make moral decisions,<sup>247</sup> and that mid-level and low-level employees are particularly likely to engage in illegal or undesirable behavior.<sup>248</sup> If those arguments are true, then focusing on

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<sup>243</sup> See H.B. ACTON, *THE MORALS OF MARKETS AND RELATED ESSAYS* 23, 49 (David Gordon & Jeremy Shearmur, eds. 1993) ("[T]his does not mean that even the Christian virtues must be absent from the business world altogether. Between the members of a firm or between its employees there is plenty of scope for humility and charity, and perhaps even for self-sacrifice as well.")

<sup>244</sup> See BENEDICT XVI, *ENCYCLICAL LETTER SPE SALVI* ¶ 48 (2007) [hereinafter *SPE SALVI*] ("As Christians we should . . . ask: what can I do in order that others may be saved . . . ?").

<sup>245</sup> See *EVANGELII GAUDIUM*, *supra* note 131, ¶ 199. Pope Francis made this point in one of his first public statements as Pope. See FRANCIS, *HOMILY MISSA PRO ECCLESIA* (2013) ("We can walk as much as we want, we can build many things, but if we do not profess Jesus Christ, things go wrong. We may become a charitable NGO, but not the Church, the Bride of the Lord.")

<sup>246</sup> See CONGREGATION FOR THE DOCTRINE OF THE FAITH, *INSTRUCTION ON CERTAIN ASPECTS OF THE "THEOLOGY OF LIBERATION"* ¶¶ 3, 15 (1984).

<sup>247</sup> Coffee, Jr., *supra* note 123, 389–90, 392–93, 395–96, 398.

<sup>248</sup> *Id.* at 397.

ordinary workers might have more of an effect on the social behavior of corporations than additional exhortations directed toward top management.<sup>249</sup>

### B. *Ownership of Property*

As noted above, Catholic social doctrine calls for the payment of just wages, promotion of global human development, protection of the environment, and respect for human life, among other things—in other words, social responsibility. While a corporate employee is not permitted, consistent with her duty of loyalty, to undertake those initiatives *sua sponte* at work—that is, with her employer’s property—she is permitted, and even required, to consider those goals in her use of her *own* property.

#### 1. Use of Property as a Consumer

It is probably safe to say that every American over the age of twelve has made a decision as a consumer.<sup>250</sup> Those decisions involve a moral act,<sup>251</sup> not only in the choices of how much to spend and what to spend it on,<sup>252</sup> but also in the choice of from whom to purchase.<sup>253</sup> From the perspective of the Church’s social

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<sup>249</sup> There are numerous resources calling, or recalling, top managers to bear witness in their lives. *See, e.g.*, HELEN J. ALFORD, O.P., & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* (2001); PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *VOCATION OF THE BUSINESS LEADER: A REFLECTION* (2012); BUSINESS, RELIGION, & SPIRITUALITY: A NEW SYNTHESIS (Oliver F. Williams ed. 2003); LAURA L. NASH, *BELIEVERS IN BUSINESS* (1994). There are also a variety of organizations devoted to supporting Christian managers. *See, e.g.*, *Fellowship of Companies for Christ International*, <http://www.fcci.org/> (last visited Jan. 23, 2018); *International Christian Chamber of Commerce*, <http://iccc.net/> (last visited Jan. 23, 2018); *Ask Wise Counsel*, <http://www.askwisecounsel.com/> (last visited Jan. 23, 2018); C12 GROUP, <http://www.c12group.com/> (last visited Jan. 23, 2018) (for Christian CEOs and owners). *But see* Abellin, *Oklahoma Publisher Prays with, Fires 25 Workers*, ABC NEWS (June 8, 2012), <http://abcnews.go.com/Business/oklahoma-company-fires-25-employees-amid-outsourcing-rumors/story?id=16520756>.

<sup>250</sup> Average after-tax income per household in the United States in 2016 was about \$64,000, and average annual expenditures were over \$57,000. U.S. BUREAU OF LABOR STATISTICS, *CONSUMER EXPENDITURE SURVEY* (2016), tbl.1300, <https://www.bls.gov/cex/2016/combined/age.pdf> (last visited Dec. 2, 2017).

<sup>251</sup> *See CARITAS IN VERITATE*, *supra* note 129, ¶ 66; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 36.

<sup>252</sup> *Cf. SPE SALVI*, *supra* note 244, ¶ 39 (“[W]e need witnesses . . . if we are to prefer goodness to comfort, even in the little choices we face each day.”).

<sup>253</sup> *See* Gerald J. Beyer, *Workers’ Rights and Socially Responsible Investment in the Catholic Tradition: A Case Study*, 10 J. CATH. SOC. THOUGHT 117, 142 n.103



doctrine—as opposed to Christian teaching generally—the relevant issue in both spending and saving is the practices of the businesses involved.<sup>254</sup> For example, one can purchase only fair trade coffee or prefer brand-name Tylenol, manufactured by a company that purports to operate according to a socially responsible “credo,”<sup>255</sup> to generic acetaminophen. The point of making such consumer decisions is not to change the behavior of sellers or manufacturers,<sup>256</sup> but rather to operate one’s own business—that is, purchasing—in accordance with one’s moral views and Church teaching.

There are severe practical constraints on consumers trying to make moral choices when purchasing goods. The first is the lack of a meaningful choice of items. Recycled products and fair trade coffee are more expensive than their unsustainable counterparts, and many Americans cannot afford to make those choices.<sup>257</sup> It might be difficult to find *any* ready-made clothing untouched by unfair or unsafe labor practices, no matter how much one is willing to spend. The second problem is a lack of information.<sup>258</sup> Most purchasing decisions must be made in the absence of reliable information about the producers of the goods or services being purchased. We cannot trace the food we buy to the domestic producer who has given us salmonella, much less determine what labor practices are being used by the vendor’s sub-sub-contractor in Asia. And manufacturing is only one step—where and how was the cotton grown and spun or the acrylic fiber produced?<sup>259</sup> However, the literature on corporate

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(2013); and Kaveny, *supra* note 218, at 286 (discussing moral responsibility for purchasing decisions).

<sup>254</sup> Cf. CATECHISM OF THE CATHOLIC CHURCH ¶ 2504 (2d. ed 1997) (“Those who hold goods for use and consumption should use them with moderation, reserving the better part for guests, for the sick and the poor.”).

<sup>255</sup> See *Our Credo*, JOHNSON & JOHNSON, <http://www.jnj.com/about-jnj/jnj-credo> (last visited Jan. 23, 2018).

<sup>256</sup> Cf. Elhauge, *supra* note 81, at 750–51 (arguing that consumer activists are acting for social and moral reasons but are unlikely to change corporate behavior).

<sup>257</sup> The fact that one cannot afford recycled products on one’s meager salary does not, of course, justify using someone else’s money to pay for them. Cf. Benjamin Harrison (attributed): “I pity the man who wants a coat so cheap that the man or woman who produces the cloth will starve in the process.”

<sup>258</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶ 66; Elhauge, *supra* note 81, at 750.

<sup>259</sup> Various disclosure systems relating to labor conditions and environmental practices have been proposed. See, e.g., David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure*

social responsibility presumes that one can identify corporations that are not engaging in socially responsible practices. If that is so, consumers who spend their own money in ways that are contrary to relevant moral principles are engaging in socially irresponsible private behavior.

## 2. Use of Property as a Business Owner or Investor

With money that has not been spent, one may start one's own business or invest in someone else's.<sup>260</sup> One purpose of investing is to provide for one's future needs or to provide for future legitimate needs of others. One might also invest in order to accumulate the funds necessary to start a socially responsible business. Investing simply to accumulate wealth for oneself or one's heirs and devisees would not be consistent with Catholic social doctrine, wherever the money were invested. In addition, an inordinate desire for financial security can lead one to withhold resources that might be used to alleviate real suffering.<sup>261</sup> Catholic social teaching and the universal destination of goods suggest that rates of return should be only one investment consideration among many.<sup>262</sup> For one thing, a rate of return may entail a level of risk that is incompatible with legitimate reasons for investing.<sup>263</sup> More importantly, an investor is, in a sense, the owner of a business,<sup>264</sup> and if she is

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*Regulation*, 43 OSGOODE HALL L.J. 353, 353 (2005); John Parkinson, *Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame*, 3 J. CORP. L. STUD. 3, 3, 5 (2003); Donald C. Langevoort, *Commentary: Stakeholder Values, Disclosure and Materiality*, 48 CATH. U. L. REV. 93, 95–96 (1998).

<sup>260</sup> This discussion assumes investments in corporate debt or equity, but other financial investments, including bank savings accounts and certificates of deposits, and even government securities, ultimately finance someone's business.

<sup>261</sup> See GRISEZ, *supra* note 230, at 494–95; see also *EVANGELII GAUDIUM*, *supra* note 131, ¶ 80.

<sup>262</sup> UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL* ¶ 195 (1986), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 127, at 572, 660–61.

<sup>263</sup> See GRISEZ, *supra* note 230, at 504.

<sup>264</sup> I am not suggesting that investors own the businesses in which they invest in any legal sense; I mean only that they own their investment “business.” Also, from the perspective of the individual, an investment is a use of her property to participate in the economic benefits of a business, and thus makes her a participant in the business through her ownership of property. Many investors also participate as employees in the companies in which they invest. See *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, 98

conducting that business with *caritas*, she will consider many other things besides her return on investment.

Among other things, the Church teaches that the owner of a business<sup>265</sup> must try to provide meaningful employment, pay a just wage, provide a work environment and benefits package that support the worker's health and safety, provide an opportunity for her employees to participate in decision making in the business, provide adequate time for her employees to worship and spend with family, and otherwise promote the authentic development of her employees and possibly others by, perhaps, encouraging education or, for those so inclined, spiritual formation.<sup>266</sup> She must, at a minimum, treat each of her employees and everyone else with respect, and, ideally, view each employee with *caritas*.

The socially responsible business owner must charge a fair price for her goods or services and ensure that those goods and services are of high quality and are themselves things that promote authentic human development. Consider the response of Professor Grisez when asked by the owner of an "upscale restaurant" whether he could consider an applicant's appearance when hiring wait staff:

You describe your restaurant as an expensive one patronized by the affluent, who, very likely, spend a good deal there on luxurious foods and fine wines. In operating your business, you must promote and thereby intend that sort of consumption. Can you honestly judge that all of it, or at least enough of it to make your business profitable, is morally justifiable? If not, you intend what is unjustifiable, and you need to repent and change the character of your business so that it will provide a truly needed, and so legitimate, service.<sup>267</sup>

If one is suffused with *caritas*, all aspects of one's business are considered from the perspective of human development. What message does one's advertising send?<sup>268</sup> From whom does one purchase one's supplies? Does one's supplier pay a just wage and

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FED. RES. BULL., June 2012, at 34 (reporting that 35.5% of households owning stock hold the stock of an employer).

<sup>265</sup> Business owners are a particular focus of the Church's social doctrine. See COMPENDIUM, *supra* note 126, ¶¶ 344, 345.

<sup>266</sup> *Id.* ¶ 301.

<sup>267</sup> GRIZEZ, *supra* note 230, at 494–95.

<sup>268</sup> See generally ALFORD & NAUGHTON, *supra* note 249, at 178–92; Spoerl, *supra* note 30, at 284–85.

respect the rights of his employees? Are one's own and one's suppliers' business operations environmentally sustainable? Social responsibility requires that a business owner seek all these things.

An investor provides funds so that someone else can operate a business. An investor, like a business owner, must invest with *caritas*.<sup>269</sup> Ideally, she would invest in businesses owned by other individuals with *caritas*, but those opportunities are likely to be scarce. In the absence of that option, the faithful investor should seek to invest in businesses whose practices are consistent with Catholic social doctrine. A socially responsible investor does not have the option to use her property to promote injustice or oppression, and she should avoid cooperation with such acts if possible.<sup>270</sup> This is true not because the investor is morally responsible for the acts of the managers of the business, but because she is morally responsible for her own choices in using her assets. An employee may be able to do her job even if she knows that the enterprise in which she works will commit a wrongful act, as long as she does not intend that act.<sup>271</sup> A shareholder, on the other hand, who invests in order to share the profits of a business, necessarily intends the acts of the business that are taken to increase profits, and is therefore formally cooperating with any wrongful acts of the business.<sup>272</sup> Investors who are concerned with social justice cannot invest in businesses that adhere to the shareholder wealth maximization norm.

The investor might also choose to use her investments to encourage the businesses in which she invests to improve their policies. The investment policy of the U.S. Conference of Catholic Bishops ("U.S.C.C.B.") includes "active corporate participation" to "support policies in accord with its values and oppose those in

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<sup>269</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶ 65; *CENTESIMUS ANNUS*, *supra* note 128, ¶ 36; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL*, *supra* note 262, ¶ 354.

<sup>270</sup> See Beyer, *supra* note 253, at 142–43 (discussing cooperation and toleration of evil in connection with investment decisions).

<sup>271</sup> See *supra* notes 238–242 and accompanying text.

<sup>272</sup> See *GRISEZ*, *supra* note 230, at 504–05. Investment in a mutual fund is more likely to involve material, rather than formal, cooperation because the investor likely intends that the portfolio produce a reasonable rate of return without intending the particular activities of the companies in the portfolio. See *id.* at 505–06. Such material cooperation may be wrong also, depending on the circumstances. See *id.* at 506.

conflict with them.”<sup>273</sup> The same goes for any investor, although an individual will have fewer opportunities to engage management in seeking corporate change. Moreover, there are limits, under current law, to what shareholders are permitted to do.<sup>274</sup> The kinds of policies that a socially responsible investor is likely to want to change will usually be within the discretion and control of the board.<sup>275</sup> Abandoning sweatshops, adopting sustainable agricultural practices, and “promot[ing] generous wage and benefit policies and adequate worker safety guidelines”<sup>276</sup> are all decisions within the business judgment of the board and are not subject to shareholder control. If the investor cannot convince the board to adopt policies consistent with Catholic social teaching, the investor should invest elsewhere.<sup>277</sup>

In recent years, more options for “socially responsible investment” have become available, but the Church warns that not all “social choice” funds are designed to encourage authentic human development.<sup>278</sup> Some Catholic institutions, including the U.S.C.C.B., have developed investment policies that are expressly designed to comport with Catholic social doctrine;<sup>279</sup> the complexity of their investment guidelines illustrates the difficulty of their task.<sup>280</sup> Disclosure of CSR policies can help

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<sup>273</sup> UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *SOCIALLY RESPONSIBLE INVESTMENT GUIDELINES* ¶ 3.2 (2003) [hereinafter *INVESTMENT GUIDELINES*]. The U.S.C.C.B. also notes that “mixed investments” in firms that do both good and bad may be “tolerated” as long as the U.S.C.C.B. engages in shareholder advocacy “with a reasonable hope of success for corporate change.” *Id.*

<sup>274</sup> See Jay B. Kesten, *Towards a Moral Agency Theory of the Shareholder Bylaw Power*, 85 *TEMPLE L. REV.* 485, 490 (2013); Colombo, *Ownership, Limited*, *supra* note 64, at 278–80.

<sup>275</sup> Colombo, *Ownership, Limited*, *supra* note 64, at 278–79.

<sup>276</sup> *INVESTMENT GUIDELINES*, *supra* note 273, ¶ 4.1.

<sup>277</sup> See Beyer, *supra* note 253, at 143–44.

<sup>278</sup> See *CARITAS IN VERITATE*, *supra* note 129, ¶ 45; see also GRISEZ, *supra* note 230, at 506; Mary Ellen Foley McGuire, *Catholic Social Teaching Meets Wall Street: Do Good While Doing Well*, *AMERICA MAG.* (Nov. 19, 2007), <https://www.americamagazine.org/issue/634/article/catholic-social-teaching-meets-wall-street>.

<sup>279</sup> See Beyer, *supra* note 253, at 141.

<sup>280</sup> *But see* Robert Milburn, *Impact Investing Done Right*, *BARRON'S* (Nov. 28, 2015), <http://www.barrons.com/articles/impact-investing-done-right-1448684226>. Milburn notes, however, that even professional investors sometimes find themselves investing in businesses that do not share their social goals. *Id.*

guide socially responsible investors.<sup>281</sup> Such information is increasingly available: A recent review found that ninety-four of the Fortune 100 companies have CSR links on their websites,<sup>282</sup> and CEOs are sometimes explicit about their rejection of the shareholder wealth maximization norm.<sup>283</sup> A high-profile example occurred at a 2014 Apple shareholders' meeting. When a "conservative think tank and investor" called for Apple to stop putting money in unprofitable green energy projects, Tim Cook replied, "If you want me to do things only for ROI [return on investment] reasons, you should get out of this stock."<sup>284</sup>

It is unclear whether socially responsible investing actually has any effect on the behavior of businesses,<sup>285</sup> but that is not really the point. The point is that the investor who cares about social justice must avoid participation in harmful activities. Commentators who argue that there is a moral duty to protect the common good must address their rhetoric to those who are able to act morally. Moral outcomes can only be achieved by moral actors. Moreover, if every Catholic dollar<sup>286</sup> were withdrawn from socially irresponsible investments and redirected to businesses affirmatively engaged in socially beneficial activities, there would undoubtedly be a positive impact to those businesses,<sup>287</sup> even if the irresponsible businesses were not induced to change their behavior. And to the extent managers and commentators continue to espouse the shareholder wealth maximization norm, evidence that actual investors do not

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<sup>281</sup> See Gabrielle Palmer, Note, *Stockholder Inspection Rights and an "Incredible" Basis: Seeking Disclosure Related to Corporate Social Responsibility*, 92 DENV. U. L. REV. ONLINE 125, 134–35 (2015).

<sup>282</sup> The exceptions were: Berkshire Hathaway; Costco; Energy Transfer Equity; Enterprise Products Partners, an energy company; World Fuel Services; and INTL FCStone, an investment company.

<sup>283</sup> See GUNTHER, *supra* note 24, at 177 (quoting CFO of Herman Miller defending treatment of laid-off employees: "We think it's the right thing to do. If you don't like that, you can go invest somewhere else.").

<sup>284</sup> Loulla-Mae Eleftheriou-Smith, *Apple's Tim Cook: Business Isn't Just About Making Profit*, INDEPENDENT (Mar. 2, 2014, 5:41 PM), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/apples-tim-cook-business-isn-t-just-about-making-a-profit-9163931.html>.

<sup>285</sup> See Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1435–39 (2008) (arguing that socially responsible investing is not effective at changing corporate practices).

<sup>286</sup> See Milburn, *supra* note 280 (noting that by some estimates \$6.57 trillion is engaged in "impact investing").

<sup>287</sup> See *id.*

invest that way might cause them to reconsider their views. Most importantly, investor social responsibility involves individuals in decisions about the appropriate use of their own property, not someone else's.

#### CONCLUDING REFLECTIONS

At the end of the day, social responsibility assumes a moral obligation to act in the best interests of the community. It is not consistent with law or morality to encourage agents to use their principal's assets to advance goals their principals do not share. It is consistent with both law and morality, however, to encourage principals—owners of their own property—to use their own assets to advance their own moral goals. In fact, the social teaching of the Catholic Church requires it. Encouraging disloyalty is unlikely to lead to better behavior by anyone in the long term, while enhancing individual moral responsibility may reduce the incidence of business wrongdoing—which is, of necessity, always carried out by individuals. More fundamentally, there is a certain dissonance in calls for “corporate” responsibility, an oxymoron, that do not include calls for individual responsibility. Every decision that an individual makes, whether at work, at the mall, or at the stockbroker's, is a moral act. Sacrificing profits in the public interest begins at home.