

# CORPORATE DISOBEDIENCE

ELIZABETH POLLMAN<sup>†</sup>

## ABSTRACT

*Corporate law has long taken a dim view of corporate lawbreaking. Corporations can be chartered only for lawful activity. Contemporary case law characterizes the intentional violation of law as a breach of the fiduciary duties of good faith and loyalty. While recognizing that rule breaking raises significant social and moral concerns, this Article demonstrates that corporate law and academic debate have overlooked important aspects of corporate disobedience.*

*This Article provides an overview of corporate disobedience and illuminates the role that it has played in entrepreneurship and legal change. Corporations violate laws in a variety of contexts, including as part of efforts at innovation, in battles of federalism, in taking stances against moralistic laws, in asserting claims for rights, and as part of general business lobbying to shape the law. To the extent that innovation or legal change can benefit society, some of this activity has the potential to provide social value.*

*This central insight and argument leads to additional contributions to corporate law and legal theory. First, examining the full spectrum of corporate disobedience reveals that corporate law's requirement of lawful conduct embeds particular social values into the corporate code. It conveys the principle that corporations should pursue legal change through established and lawful democratic processes. Second, this examination shows that fiduciary duty law is ultimately not an effective*

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<sup>†</sup> Professor of Law, Loyola Law School, Los Angeles. For helpful comments and conversations, I thank Afra Afsharipour, Stephen Bainbridge, Jordan M. Barry, Robert Bartlett, Mihailis Diamantis, Jared Elias, Elisabeth de Fontenay, Jill Fisch, Sean Griffith, Eric Hilt, Robert Jackson, James D. Nelson, Frank Partnoy, Gabriel Rauterberg, Hillary Sale, Steven Davidoff Solomon, Julian Velasco, Andrew Verstein, Yesha Yadav, and Adam Zimmerman. Thanks also to participants at the Law and Entrepreneurship Association Annual Retreat, the Villanova Business Law Colloquium, the National Business Law Scholars Conference, the Junior Business Law Conference at the University of Colorado Law School, the Iowa Corporate Personhood Workshop, the Southern California Business Law Workshop, the Regulation and Markets Workshop at Boston College Law School, the Fiduciary Law Workshop, and faculty workshops at UC Irvine School of Law, UC Davis School of Law, and Vanderbilt Law School.

*or fine-tuned mechanism for policing corporate disobedience. Third, the Article highlights several features of corporate disobedience that might bear on its normative assessment.*

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#### INTRODUCTION

No statistics measure the total number of corporations that disobey the law, but news headlines feature instances of corporate lawbreaking on a daily basis. Corporate fines stemming from claims of

legal violations have reached record levels.<sup>1</sup> Corporate lawbreaking is the subject of widespread public disdain and frequent calls for action against corporations and the individuals acting on their behalf.<sup>2</sup> Corporate law scholars have largely shared this dim view of corporate disobedience.<sup>3</sup>

Corporate law establishes as a fundamental tenet that corporations are chartered only to engage in lawful activity.<sup>4</sup> Historically, the ultra vires doctrine, requiring that a corporation act within the scope of powers set out in its charter, gave teeth to this prohibition on corporate illegal activity.<sup>5</sup> Although the ultra vires doctrine has faded in importance over time, the corporate law requirement of lawful conduct has endured. Even economist Milton Friedman, known for his single-minded focus on shareholder wealth, famously made clear that corporate managers are to pursue profits within legal boundaries.<sup>6</sup> In his words: “[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game.”<sup>7</sup>

Corporate law’s dictates suggest a clear, binary, on–off, lawful or unlawful world that is implicitly reduced to a judgment of good or bad, inside or outside the rules of the game. Yet the world is full of corporate disobedience and lawbreaking that does not easily fit this mold.

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1. Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1485 (2017).

2. See, e.g., Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L. Q. 95, 96, 98 (2004) (describing the frequency of public outcries over corporate scandals and wrongdoing).

3. See *infra* Part I.B.

4. See *infra* Part I.A.

5. See Adam J. Sulkowski & Kent Greenfield, *A Bridle, A Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN’S L. REV. 929, 946 (2005) (“It is important to clarify that illegal activities constituted one variety of ultra vires activity during the doctrine’s glory days in the 1800s and early 1900s and since then have never been rationalized as permissible as a matter of corporate law, even when profitable.”).

6. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 124 (quoting his book, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (U. Chi. Press 1982) (1962)).

7. *Id.*; see also Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 756–57 (2005) (“[M]ost advocates of a duty to profit-maximize concede it should have an exception for illegal conduct.”).

Consider, for example, Uber, the ride-hailing giant that has recently come under significant public scrutiny for a range of disobedient activity.<sup>8</sup> It is currently the world's most valuable startup company.<sup>9</sup> From its early days, Uber aimed to challenge and change the law.<sup>10</sup> Its app connects people who want rides with nearby drivers that are willing to provide this service, and Uber takes a percentage of each fare.<sup>11</sup> Smartphone technology enabled a new model of taxi-like transportation,<sup>12</sup> but in most cities the taxi industry was heavily regulated.<sup>13</sup> This did not deter Uber. It launched operations in cities around the world—often in violation of existing laws or, at best, in legal gray areas.<sup>14</sup> For example, when the company received a cease-and-

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8. In addition to legal issues related to its core ride-hailing business, Uber has recently faced a host of other concerns, including complaints of sexism and sexual harassment at the company, a trade secrets lawsuit by Alphabet's self-driving vehicle company Waymo, and the U.S. Department of Justice's criminal investigation into Uber's use of a program called Greyball that enabled it to evade law enforcement authorities around the world. ADAM LASHINSKY, *WILD RIDE: INSIDE UBER'S QUEST FOR WORLD DOMINATION* 20 (2017) (“[Uber’s] maverick reputation quickly gave way to the perception of a company that considered itself above the law.”); Mike Isaac, *Uber’s C.E.O. Plays With Fire*, N.Y. TIMES (Apr. 23, 2017), <https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html> [<https://perma.cc/6NE4-ZRSB>] (discussing Uber’s various scandals and issues).

9. Zack Friedman, *These 197 Tech Companies Are the World’s Most Valuable Unicorns*, FORBES (May 30, 2017), <https://www.forbes.com/sites/zackfriedman/2017/05/30/tech-unicorns/#51a6edbd1179> [<https://perma.cc/YAJ4-AVEM>]; *The Global Unicorn Club: Current Private Companies Valued at \$1B+*, CBINSIGHTS, <https://www.cbinsights.com/research-unicorn-companies> [<https://perma.cc/Q7NZ-TMZJ>].

10. For an in-depth discussion of companies that “pursue a line of business that has a legal issue at its core,” and for an analytical framework of the business and legal factors that foster this activity, see Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 392 (2017).

11. Aswath Damodaran, *A Disruptive Cab Ride to Riches: The Uber Payoff*, FORBES (June 10, 2014, 2:37 PM), <http://www.forbes.com/sites/aswathdamodaran/2014/06/10/a-disruptive-cab-rideto-riches-the-uber-payoff> [<https://perma.cc/W3QK-5E2C>] (explaining the Uber business model); Richard Koch, *How Uber Used a Simplified Business Model to Disrupt the Taxi Industry*, ENTREPRENEUR (Jan. 3, 2017), <https://www.entrepreneur.com/article/286683> [<https://perma.cc/QP56-HWSP>] (same).

12. See LASHINSKY, *supra* note 8, at 10 (“A mobile-first company, if there had been no iPhone there would have been no Uber.”).

13. See Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 75 (1996) (“[N]early all large and medium-sized communities regulate their local taxicab companies.”); Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 4 (2017) (“For the first time in decades, medallion taxis now face competition from new upstarts not required to hold medallions, because the vehicles dispatched by Uber and other apps operate under a different, less stringent, regulatory framework.”).

14. See, e.g., LASHINSKY, *supra* note 8, at 4 (“Since it received its first cease-and-desist letter from the city of San Francisco in 2010, Uber has been clashing with adversaries from Seattle to New York and Paris to Delhi and beyond . . . .”); Pollman & Barry, *supra* note 10, at 398–400

desist letter early in its operations in San Francisco, it simply ignored the city's demand.<sup>15</sup> And in the years since, Uber and its competitors have grown quickly, leveraging consumer support to challenge restrictive taxi regulations and lobbies that had existed for decades.<sup>16</sup> The way that millions of people travel and commute has changed.<sup>17</sup> An Uber investor referred to the company's work as "a just cause" and "one of the grandest business and moral battles of our generation."<sup>18</sup> Public reaction has reflected a mix of popular approval and vociferous backlash.<sup>19</sup>

Consider another example, far afield from the technology startups of Silicon Valley. Companies that have taken advantage of state legalization of marijuana are operating in clear violation of current federal law.<sup>20</sup> Although they are legal businesses in their home states,

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(discussing Uber's playbook of launching operations despite legal violations and gray areas).

15. LASHINSKY, *supra* note 8, at 14, 90.

16. See Pollman & Barry, *supra* note 10, at 437–39 (discussing how regulatory entrepreneurs have the potential to ameliorate the political process "when there are asymmetries between how a policy's costs and benefits are distributed," such as protectionist regulations that provide rents to an industry and small dispersed costs to consumers). Notably, Uber has faced significant pushback to its operations in some jurisdictions. See, e.g., Amanda Erickson, *Uber Was Just Dealt a Major Blow by the European Union*, WASH. POST. (Dec. 20, 2017), [https://www.washingtonpost.com/news/worldviews/wp/2017/12/20/uber-was-just-dealt-a-major-blow-by-the-european-union/?utm\\_term=.52b28326206b](https://www.washingtonpost.com/news/worldviews/wp/2017/12/20/uber-was-just-dealt-a-major-blow-by-the-european-union/?utm_term=.52b28326206b) [<https://perma.cc/JF65-BKTV>]; Prashant S. Rao & Mike Isaac, *Uber Loses License to Operate in London*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/business/uber-london.html> [<https://perma.cc/7S3B-3BZA>].

17. In 2016, Uber claimed it had forty million monthly active riders. Aaron Yip, *Has Uber's Ridership Been Impacted By Its Scandals?*, FORBES (Apr. 3, 2017, 1:23 PM) (citing Matthew Lynley, *Travis Kalanick Says Uber Has 40 Million Monthly Active Riders*, TECH CRUNCH (Oct. 19, 2016), <https://techcrunch.com/2016/10/19/travis-kalanick-says-uber-has-40-million-monthly-active-riders/> [<https://perma.cc/9Z6M-ZWTZ>]), <https://www.forbes.com/sites/quora/2017/04/03/has-ubers-ridership-been-impacted-by-its-various-scandals/#377d3aba2dee> [<https://perma.cc/92E7-26LD>].

18. Alex Davies, *Travis Kalanick's Great Defender Writes a Hell of a Motivational Letter*, WIRED (Aug. 30, 2017, 2:12 PM) (quoting venture capitalist Shervin Pishevar), <https://www.wired.com/story/uber-shervin-pishevar-kalanick-letter> [<https://perma.cc/R5AP-4HZP>].

19. For example, Philadelphia taxi companies sued Uber in 2014, asserting: "Not since the days of bootlegging has there been a criminal enterprise so brazen and open as to attract hundreds of millions of dollars in investment from investment bankers and to operate in blatant violation of federal and state law as the Uber enterprise." Edvard Pettersson, *Uber Called 'Criminal Enterprise' by Philadelphia Cab Owners*, BLOOMBERG (Dec. 24, 2014, 6:31 PM), <https://www.bloomberg.com/news/articles/2014-12-25/uber-called-criminal-enterprise-by-philadelphia-cab-owners-1-> [<https://perma.cc/EU6C-FJQB>].

20. See, e.g., Erwin Chemerinsky, *Introduction: Marijuana Laws and Federalism*, 58 B.C. L. REV. 857, 859 (2017) ("From the perspective of constitutional law, the inconsistency in marijuana laws between the federal government and many states, among the states, and between the states and Native American tribes raises serious and often unprecedented federalism issues."); Uri

under the Controlled Substances Act it is illegal to distribute or dispense a controlled substance, which is defined to include marijuana.<sup>21</sup> The conflict between state and federal marijuana laws means that companies are engaging in a form of disobedience by operating their business in this industry.<sup>22</sup> Over the course of just a few years, the federal government has taken a variety of positions, from stating that it would not prioritize enforcement of federal law against medical marijuana users and businesses to threatening a federal crackdown.<sup>23</sup> And in the meantime, the industry has grown to multibillion-dollar revenues.<sup>24</sup>

While recognizing the significant social and moral concerns concomitant with rule breaking, this Article illuminates the important role that corporate disobedience has played in entrepreneurship and legal change. Although corporations pose special concerns, the central contribution of this Article echoes, in many ways, observations about the bottom-up dynamic of lawmaking and the role of lawbreaking that have been made in other scholarly literatures, such as constitutional law, property law, and democratic theory.<sup>25</sup> Time and again,

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Berliner, *As More States Legalize Marijuana, Investors and Marketers Line Up*, NPR (Nov. 20, 2016, 6:52 AM), <http://www.npr.org/2016/11/20/502577270/investors-marketers-line-up-to-tap-legal-marijuana-around-u-s> [<https://perma.cc/LQ9T-F9BR>] (“While polls show that about 60 percent of Americans now favor legalization of marijuana, cannabis remains illegal under federal law, a Schedule 1 drug like heroin or LSD under the Controlled Substances Act. . . . None of this seems to have discouraged the growing legion of marijuana entrepreneurs.”); John Hudak & Christine Stenglein, *DEA Guidance Is Clear: Cannabidiol Is Illegal and Always Has Been*, BROOKINGS: FIXGOV (Feb. 6, 2017), <https://www.brookings.edu/blog/fixgov/2017/02/06/cannabidiol-illegal-and-always-has-been/> [<https://perma.cc/45DC-T5Y6>].

21. 21 U.S.C. § 812 Schedule I(C)(10) (2018).

22. This illegality gives rise to a host of related issues such as tax treatment and obtaining legal counsel. See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869, 886–930 (2013) (discussing professional conduct issues for lawyers advising clients on marijuana-related businesses); Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 526 (2014) (discussing tax issues for marijuana-related businesses); Luke Scheuer, *The “Legal” Marijuana Industry’s Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511, 514, 531–36 (2015) (discussing various issues that marijuana-related businesses face).

23. Scheuer, *supra* note 22, at 523–28; Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html> [<https://perma.cc/7Z9R-CWXW>].

24. Chemerinsky, *supra* note 20, at 858 (“[T]he total American cannabis industry generated retail sales of \$53 billion in 2015. Further, over the past two years, the fraction of marijuana sold through legal channels has grown from an estimated \$3 billion to nearly \$6 billion, as more states have voted to allow medical or recreational use.”).

25. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 24–29 (2004) (describing the role of lawbreaking and resisting

corporations have intentionally taken actions that violated laws and have pushed for clarifications and reform.<sup>26</sup> Many observers will take issue with certain examples or find aspects of corporate disobedience deserving of social opprobrium. A study of this activity nonetheless illustrates that corporate disobedience has been an important engine for transforming various areas of law.

Yet, the role that corporate lawbreaking has played in innovation and legal change has been mostly ignored.<sup>27</sup> Instead, the main focus of scholarly inquiry has been the socially harmful nature of corporate lawbreaking and how to efficiently or effectively constrain it.<sup>28</sup> Corporate law scholars have also examined directors' and officers' intentional violations of law in the context of the doctrine of good faith. This debate has largely focused on whether the fiduciary duty of good faith should be understood as an independent duty or as one cabined within the duty of care or loyalty,<sup>29</sup> and the focal point of analysis has

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unconstitutional laws in early American culture); Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 47–48 (1983) (exploring how minorities may break laws in protest as part of their own process of interpreting the Constitution and communicating dissent); Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1933–48 (2005) (examining the role and justification for democratic disobedience); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1101–02 (2007) (arguing that lawbreaking has played an important role in the evolution of property entitlements); cf. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 809 (2015) (highlighting the phenomenon of “extreme law-following” as a means of criticizing laws and motivating reform).

26. This activity may have social and political dimensions, but this Article does not suggest that business corporations should be understood as expressive associations. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1733–38 (2015) (discussing how many corporations cannot be characterized as identifiable groups of natural persons associated for expressive purposes); James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 513 (2015) (arguing that “for-profit businesses should fall outside the scope of the freedom of association”).

27. One notable example to the contrary, examining “whether civil disobedience has any role to play in the business context,” is Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 293 (2010).

28. This literature is voluminous, and includes, for example, BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME, AND ACCOUNTABILITY* (1993); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Joseph F.C. DiMento, Gilbert Geis & Julia M. Gelfand, *Corporate Criminal Liability: A Bibliography*, 28 W. ST. U. L. REV. 1 (2000–2001); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008).

29. Key works include Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559 (2008); Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1 (2006); Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457 (2009); Sean J. Griffith,

been on failures of oversight rather than on intentional or knowing lawbreaking.<sup>30</sup> To the extent that scholars have discussed the latter, it has been from a law and economics perspective of fines as a cost of business or as a critique of such a perspective.<sup>31</sup> This debate ignores the dynamic potential of corporate lawbreaking to catalyze the reevaluation and evolution of laws outside of corporate law and the particular challenges and complexities that this activity poses.

Examining corporate disobedience reveals that there is a wide array of lawbreaking, ranging from truly repugnant activity that has no redeeming social value to innovative entrepreneurship that arguably falls into a legal gray area or transgresses laws made in a different technological or social age. In addition, corporate lawbreaking includes activity ranging from garden-variety compliance failures to what some might refer to, quite provocatively, as corporate civil disobedience—when a corporation takes a stance against a particular law, asserting that it impinges upon a right or a social or moral value held by individuals associated with the corporation.

This Article aims to shed light on the broad spectrum of corporate disobedience to show the true complexity of this activity and to suggest that, to the extent that innovation or legal change can benefit society, some corporate disobedience could at least have the potential to provide value. This inquiry aims to take account of the world as it is, with the many varied instances in which corporations subvert, transgress, challenge, dissent from, and refuse to comply with the law—all, broadly construed, forms of disobedience. Some of this corporate activity might be praiseworthy, while some might be contemptible. This Article does not aim to evaluate each instance of corporate disobedience, but rather to demonstrate its complexity and its power to advance entrepreneurial efforts and shape the law.

This central insight and argument leads to several additional

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*Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1 (2005); Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456, (2004); Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010); Robert B. Thompson, *The Short, But Interesting Life of Good Faith as an Independent Liability Rule*, 55 N.Y.L. SCH. L. REV. 543 (2010); Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231 (2010).

30. Corporate law scholarship on the duty of good faith and oversight includes Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769 (2007); Andrew C.W. Lund, *Opting Out of Good Faith*, 37 FLA. ST. U. L. REV. 393 (2010); Hillary A. Sale, *Monitoring Caremark's Good Faith*, 32 DEL. J. CORP. L. 719 (2007).

31. See *infra* Part I.B.



contributions in corporate law and legal theory. First, illuminating corporate disobedience reveals that the statutory requirement of lawful conduct serves an expressive function. These statutes can further be interpreted as embedding society's interests into corporate codes and conveying the principle that corporations should pursue legal change through established and lawful democratic processes.<sup>32</sup>

Furthermore, observing the full spectrum of corporate disobedience also sheds new light on corporate law and the literature regarding the fiduciary duty of good faith.<sup>33</sup> Characterizing legal obedience as part of the duty of good faith and then debating whether that duty should exist independently or be cabined within the duty of loyalty has left a larger point unexplored. The requirement of lawful conduct is intended to protect society's interests, not those of the corporation. Because shareholders are the only corporate constituents with the power to assert a breach of fiduciary duty through a derivative suit, fiduciary duty law is ultimately not an effective or fine-tuned mechanism for policing corporate disobedience. Shareholders typically own stock in corporations to make money, not to monitor, evaluate, and enforce legal obedience.<sup>34</sup> Shareholders may not be well situated or motivated to carry out society's interests with regard to corporate disobedience, particularly with respect to corporate conduct that is rooted in innovation, changing social norms, or dissent. This Article demonstrates that current law may even lead to inequitable results in some circumstances when violations of the law are interpreted as automatic breaches of fiduciary duty.

Finally, this Article provides a conceptual framework, highlighting several features of corporate disobedience that might bear on its normative assessment.<sup>35</sup> The question of when breaking the law is justifiable has long been the subject of legal philosophy about civil disobedience and conscientious objection, but scholars have not focused on corporations.<sup>36</sup> Corporations are different from individuals

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32. See *infra* Part III.A.

33. See *infra* Part III.B.

34. See Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market, Failure, and Securities Regulation*, 81 VA. L. REV. 611, 623 (1995) (“[M]ost investors trade to make money.”); Leo E. Strine, Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in the United States*, 71 BUS. LAW. 1081, 1081 (2016) (noting that people invest to create wealth and savings, and that money managers seek returns).

35. See *infra* Part III.C.

36. Classic works discussing the topics of civil disobedience and conscientious objection include RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); JOHN RAWLS, *A THEORY OF*

in important ways.<sup>37</sup> Corporations cannot face the consequences of punishment in the same way as individuals, who can be imprisoned, and corporations are legal entities that do not have moral conscience equivalent to that of an individual. Corporations often represent significant economic power. Corporate disobedience therefore poses rich and novel questions that have real-world as well as theoretical importance. This Article identifies several considerations that may be relevant, including whether the corporation is proactively seeking clarification or change in the law or is instead reacting to enforcement, whether the corporation has openly or clandestinely violated the law, whether the corporation is for-profit or nonprofit, and whether the corporation is public or private.

This Article proceeds as follows. Part I sets out the limited treatment and relatively narrow understanding of corporate lawbreaking embodied in corporate law and literature. Part II describes the wide variety of corporate disobedience, showing that although a great deal of this activity is socially harmful, some corporate disobedience has the potential to produce value or catalyze legal change. This type of activity raises complex, underexamined issues. Part III identifies and explores several implications of this contribution.

## I. THE SINGLE LENS FOCUS OF CORPORATE LAW AND LITERATURE ON VIOLATIONS OF LAW

What does corporate law have to say about corporations engaging in unlawful activity? This Part reviews the relevant corporate code and doctrine and then shows that the standard paradigm of corporate law supposes a binary world of lawful and unlawful activity, authorized and unauthorized actions, and perhaps an implicit judgment of societal good and bad. Further, this Part examines the scholarly literature on corporate lawbreaking, demonstrating that even academic debate has been narrowly focused.

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JUSTICE (2d ed. 1999); MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP (1970); Jürgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State*, 30 BERKELEY J. SOC. 95 (1985); Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21 (1981); HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (Project Gutenberg Literary Archive Foundation 2006) (1849), <https://www.gutenberg.org/files/71/71-h/71-h.htm> [<https://perma.cc/47XB-AJV6>].

37. See *infra* Part III.C.

### A. *Corporate Law's Approach to Corporate Lawbreaking*

It is a fundamental principle of corporate law that corporations are to be engaged only in lawful activity. Put another way, corporate law is broadly enabling within the constraint that corporations act inside the bounds of the law.<sup>38</sup>

This “essential bottom-line requirement” of lawful conduct can be understood in historical context and as a function of the basic fact that it is only through government-granted charters that corporations exist.<sup>39</sup> Historically, corporations were chartered through legislative acts for specifically authorized activity.<sup>40</sup>

The ultra vires doctrine, which limits a corporation’s authority to the purposes and powers enumerated in its charter, served as an important part of corporate law through the nineteenth century.<sup>41</sup> The doctrine was understood to serve the state’s interest in limiting the size and power of corporations and to protect shareholders from managerial overreach that could undermine their investments.<sup>42</sup> Over time, these rationales for the doctrine lost force, and only a vestige of the doctrine remains.<sup>43</sup>

Most notably, with the spread of general incorporation statutes, each state provides individuals with the ability to charter a for-profit corporation without specification as to its activity, subject to the

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38. See Strine, Jr. et al., *supra* note 29, at 633; DEL. CODE ANN. tit. 8, § 101(b) (2016).

39. Strine, Jr. et al., *supra* note 29, at 649. For a discussion of the concession theory of the corporation, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 72–73 (1992); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475, 1484 (1989); John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655–68 (1926).

40. J.W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 14–17 (1970); see also Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1452 (1987) (“That a corporation derived its powers from the sovereign was inherent in the contractual conception of the grant theory. The government granted nothing unless it agreed to the objects of the proposed corporation.”).

41. Greenfield, *supra* note 28, at 1283–84, 1302.

42. *Id.* at 1302; Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 987–91 (2014).

43. Greenfield, *supra* note 28, at 1302; see also Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1663–64 (1988); Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457, 460 (2011) (“[A]s corporate law (and judicial review of corporate actions) moved from questions of corporate power to those of fiduciary duty, the ultra vires doctrine became largely vestigial—and its appendage, the duty of obedience, quietly wilted away.”).

requirement that it be for lawful purpose.<sup>44</sup> For example, section 101(b) of the Delaware General Corporation Law provides: “A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or of the law of this State.”<sup>45</sup> Many corporations broadly state their purpose in their articles or certificate of incorporation as to “engage in any lawful act or activity.”<sup>46</sup>

This statutory requirement of lawful conduct is generally understood to reflect basic public policy concerns.<sup>47</sup> The origins of the “lawful business” language in general incorporation statutes have, however, received scant attention from historians and legal scholars. Interpreting the original meaning of “lawful business” is not straightforward. For example, Connecticut’s 1837 act, one of the earliest general incorporation statutes, allowed for incorporation “for the purpose of engaging in and carrying on any kind of manufacturing or mechanical or mining or quarrying or any other lawful business.”<sup>48</sup> A plausible interpretation of this language is that its drafters intended to indicate a nonexclusive list of industries that could be pursued but not to authorize general incorporation for activities that were limited by other statutes, such as banking, which at the time continued to require a special act for chartering.<sup>49</sup>

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44. For a discussion of the spread of general incorporation statutes in the nineteenth century, see Jessica L. Hennessey & John Joseph Wallis, *Corporations and Organizations in the United States after 1840*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 74, 78–85 (Naomi R. Lamoreaux & William J. Novak eds., 2017). For a discussion of the shift to allowing corporations to be chartered for any lawful purpose, see E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886–1936*, 50 *HARV. L. REV.* 27, 29 (1936); Wiley Rutledge, *Significant Trends in Modern Incorporation Statutes*, 22 *WASH. U. L.Q.* 305, 317–18 (1933).

45. *DEL. CODE ANN.* tit. 8, § 101(b) (2016).

46. That is, for example, what the certificates of incorporation of Uber Technologies, Inc., Google, Inc., Wal-Mart Stores, Inc., and many others provide.

47. See, e.g., Gold, *supra* note 29, at 475 (“Public policy is a leading basis for limiting the board’s discretion to break the law.”).

48. 1837 Connecticut General Incorporation Act, Laws, Ch 63; Revised Statutes (1854), Title III. (on file with author); see also Eric Hilt, *Corporation Law and the Shift Toward Open Access in the Antebellum United States*, in *ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT* 148, 154 (Naomi R. Lamoreaux & John Joseph Wallis eds., 2017) (“[I]n 1837, Connecticut passed a general incorporation act that was the first to not specifically enumerate the industries that could be pursued, or to limit the duration of the existence of the corporations it created.”).

49. In 1852, Connecticut enacted a general incorporation statute for banks. Connecticut Communities and Corporations, Chapt. XXIII, §§ 2–3 (1852). Some current general incorporation statutes have language referring to “any lawful act” in combination with language that carves out industries subject to other statutory requirements. See, e.g., *CAL. CORP. CODE* § 202(b)(1)(A) (West 2015) (“The purpose of the corporation is to engage in any lawful act or activity . . . other

Although the statutory dictate of lawful activity could be interpreted as simply referring to the purposes for which a corporation could be chartered, courts have broadly interpreted it to include the ongoing manner in which business is conducted. The universe of corporate law cases about directors' and officers' knowing violation of the law consistently takes an unfavorable view of lawbreaking and denies business judgment rule protection, the normal standard of deference for directors' decision-making.<sup>50</sup>

In a leading early case, *Roth v. Robertson*,<sup>51</sup> the court sustained recovery from the managing director of an amusement park corporation who used corporate funds to bribe individuals who had threatened to complain about the park violating the state's Sunday closing laws.<sup>52</sup> According to the court, corporate managers who make illegal payments must refund the amounts "wasted for the benefit of stockholders."<sup>53</sup> Even though there was no allegation or proof of personal profit by the director, and the corporation made a large percentage of its revenues from operating on Sundays, the court upheld a jury award against the director for \$800, the amount of the bribes.<sup>54</sup> The court explained that holding otherwise would "be establishing a dangerous precedent, and tacitly countenancing the wasting of corporate funds for purposes of corrupting public morals."<sup>55</sup>

In a more contemporary case, *Miller v. AT&T*,<sup>56</sup> shareholders of AT&T, a New York corporation, brought a derivative suit against the directors after the company failed to collect from the Democratic National Committee a \$1.5 million debt owed for services provided to

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than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code . . .").

50. Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(A) of the American Law Institute's Principles of Corporate Governance*, 66 WASH. L. REV. 413, 448 (1991). See generally Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004) (discussing conceptions of the business judgment rule as an abstention doctrine and as a deferential standard of review).

51. *Roth v. Robertson*, 118 N.Y.S. 351 (Sup. Ct. 1909).

52. *Id.* at 354.

53. *Id.* at 353.

54. *Id.* at 353-54.

55. *Id.* at 353. Another notable early case is *Abrams v. Allen*, 74 N.E.2d 305 (N.Y. 1947), in which a corporate board of directors approved dismantling plants for the purpose of unlawfully intimidating union organizing efforts. As in *Roth*, the *Abrams* court did not apply the business judgment rule and treated the allegations of illegality and loss as sufficient to state a claim for breach of fiduciary duty. *Id.* at 307.

56. *Miller v. AT&T*, 507 F.2d 759 (3d Cir. 1974).

the party's political convention.<sup>57</sup> The plaintiff-shareholders argued that the failure to collect the debt amounted to AT&T making a "contribution" to the political party in violation of a federal prohibition on corporate campaign spending, and the plaintiffs sought injunctive relief to force the corporation to properly collect the debt.<sup>58</sup> The Third Circuit held that the shareholders had stated a claim for breach of fiduciary duty arising from the alleged violation of federal law.<sup>59</sup> The court explained that the business judgment rule "cannot insulate the defendant directors from liability if they did in fact breach [a statutory prohibition], as plaintiffs have charged."<sup>60</sup>

Other cases and commentaries have likewise stated that corporate directors and officers who engage in unlawful conduct on behalf of the corporation violate their fiduciary duties. For example, the Delaware Chancery court has explained, "a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity."<sup>61</sup> In its statement of the duty of care, the American Law Institute's Principles of Corporate Governance include the obligation that directors and officers act within the bounds of the law.<sup>62</sup> Further, the business judgment rule protections do not apply when directors and officers knowingly participate in illegal conduct.<sup>63</sup> Legal compliance is a first-order requirement; profit-seeking follows in the hierarchy of the business corporation's mission.<sup>64</sup>

57. *Id.* at 761.

58. *Id.*

59. *Id.* at 761–62.

60. *Id.* at 762. The court also discussed the net loss rule that requires the plaintiff to assert damage to the corporation in order to state a cause of action for breach of fiduciary duty. *Id.* at 762–63 n.5. Commentators have debated the questionable continued authority of the New York decisions setting out the net loss rule. *See, e.g.,* 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 10:7 (3d ed. 2017) (discussing the net loss rule); Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729, 732–33, 744 (1996) (same); Eisenberg, *supra* note 29, at 37 n.97 (same).

61. *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004); *see also* *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.").

62. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 2.01(b)(1), 4.01(a) (AM. LAW INST. 2008). The commentary recognizes limited exceptions to the general law-compliance obligation under the doctrines of necessity or desuetude. *Id.* § 2.01 cmts. f–g (providing, for example, an exception where "[t]he ordinance has fallen into disuse: it has not been enforced for many years; many retail businesses . . . follow a practice of staying open on Sunday; and community opinion favors the practice").

63. *Id.* § 4.01.

64. *Strine, Jr. et al., supra* note 29, at 651 ("Law compliance thus comes ahead of profit-

While lawful conduct has long been understood as a fundamental tenet of corporate law, judicial opinions have only recently shed light on how exactly it fits into the fiduciary framework. Good faith had long been an “immutable ingredient”<sup>65</sup> of corporate law, but it “remained essentially undefined” until about a decade ago.<sup>66</sup> The groundbreaking case of *In re Walt Disney Co. Derivative Litigation*<sup>67</sup> started to give content to the fiduciary duty of good faith:

Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed. A vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith.<sup>68</sup>

The court specifically pointed to a fiduciary’s intentional violation of law as an example of a failure to act in good faith.<sup>69</sup>

Following the *Disney* case, the Delaware Supreme Court further clarified that the duty of good faith is part of the fiduciary duty of loyalty. In *Stone v. Ritter*,<sup>70</sup> the court explained that the duty of good faith is not an independent fiduciary duty, but rather a “subsidiary element” of the duty of loyalty.<sup>71</sup> Therefore, the implication of *Disney*

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seeking as a matter of the corporation’s mission, and directors owe a duty of loyalty to that hierarchy.”).

65. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1442 (2005).

66. Bainbridge et al., *supra* note 29, at 564.

67. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006).

68. *Id.* at 66.

69. The court stated:

A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, *where the fiduciary acts with the intent to violate applicable positive law*, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.

*Id.* at 67 (emphasis added).

70. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). *Stone* is an oversight case involving “a classic *Caremark* claim.” *Id.* at 364 (explaining that a *Caremark* claim against a director for a corporate loss “is predicated upon ignorance of liability creating activities within the corporation” (quoting *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996))).

71. *Id.* at 364, 369–70 (“The failure to act in good faith may result in liability because the requirement to act in good faith ‘is a subsidiary element[.]’ i.e., a condition, ‘of the fundamental

and *Stone* is that when a fiduciary acts with conscious disregard of a known duty to act, or when a fiduciary intends to violate the law, that is a breach of the duty of good faith and hence a breach of the duty of loyalty.

Subsequent case law has reiterated this logic about lawbreaking and disloyalty. For example, in *Desimone v. Barrows*,<sup>72</sup> the Delaware Chancery Court explained:

[B]y consciously causing the corporation to violate the law, a director would be disloyal to the corporation and could be forced to answer for the harm he has caused. Although directors have wide authority to take lawful action on behalf of the corporation, they have no authority knowingly to cause the corporation to become a rogue, exposing the corporation to penalties from criminal and civil regulators.<sup>73</sup>

Indeed, the Delaware Supreme Court acknowledged in *Stone* that this characterization means that “the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest.”<sup>74</sup> As Professor Andrew Gold has observed: “A common theme is that this case law bars director choices that are, at least potentially, made with the intent of benefitting the corporation or its shareholders.”<sup>75</sup> That is, “[t]hese cases preclude directors from dishonest conduct toward shareholders or from conduct that exceeds a director’s authority—regardless of whether or not the directors honestly believe their decisions will produce desirable outcomes.”<sup>76</sup> There need not be self-interested conduct for a breach of the duty of loyalty; under this interpretation, conduct beyond that authorized by the corporate charter, such as unlawful activity, is disloyal by its nature. Corporate law is binary in this regard—corporations are authorized only for lawful activity, and loyalty must operate within this category.

### B. *Scholarly Perspectives on Corporate Lawbreaking*

The legal literature on corporate violations of law has not been as uniformly opposed to or clear in disaffirming unlawful activity, but it has been limited in focus. Two central questions have dominated the

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duty of loyalty.” (quoting *Guttman v. Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003)).

72. *Desimone v. Barrows*, 924 A.3d 908 (Del. Ch. 2007).

73. *Id.* at 934.

74. *Stone*, 911 A.2d at 370.

75. Gold, *supra* note 29, at 473.

76. *Id.*



literature: Can corporations use a cost-benefit approach to lawbreaking? How do intentional violations of law fit into the framework of fiduciary duties?

The key lightning rod on the first question emerged in the 1980s with Judge Frank Easterbrook and Professor Daniel Fischel's work applying a law and economics lens. Easterbrook and Fischel provocatively argued: "Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm, because the sanctions set by the legislature and courts are a measure of how much firms should spend to achieve compliance."<sup>77</sup>

Setting aside laws concerning violence or acts characterized as *malum in se*, they argue that the penalty for breaking the law should be understood simply as the "price" of the illegal conduct—fines and other costs discounted by the probability that the legal violation will not be detected and enforced against the corporation.<sup>78</sup> Furthermore, under their view, corporate law itself should not aim to constrain unlawful activity or external costs—that is the purview of external regulations and enforcement officials.<sup>79</sup>

Easterbrook and Fischel go so far as to argue that corporations should break the law in some circumstances:

[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules . . . managers not only may but also should violate the rules when it is profitable to do so.<sup>80</sup>

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77. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982).

78. *Id.*; Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 324 (1996) (arguing that appropriate levels of deterrence will be achieved by setting the penalty for misconduct equal to the social cost of that misconduct, "adjusted for the chance of nondetection").

79. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991). As Easterbrook and Fischel explain:

We do not address optimal ways to deal with pollution, bribery, plant closings, and other decisions that have effects on people who may not participate in the corporate contract. Society must choose whether to conscript the firm's strength (its tendency to maximize wealth) by changing the prices it confronts or by changing its structure so that it is less apt to maximize wealth. The latter choice will yield less of both good ends than the former.

*Id.*

80. Easterbrook & Fischel, *supra* note 77, at 1177 n.57; see also Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1290 (1982) ("[I]f the expected costs

Their work is part of a broader literature that takes an economic approach to civil and criminal liability, analyzing the optimal amount of deterrence, enforcement, and penalties.<sup>81</sup>

A number of scholars have pushed back on this economic view with arguments rooted in moral and social concerns and with a goal of advancing the legitimacy of corporations in society. One of the most vocal critics of Easterbrook and Fischel's "law-as-price theory" has been Professor Cynthia Williams, who identified the growing influence of that viewpoint by the late 1990s.<sup>82</sup> She argues that law should not be seen as voluntary, but rather as the embodiment of morals that must be followed in a democracy.<sup>83</sup> Her argument follows a long and distinguished line of philosophers who have examined the moral obligation to obey the law.<sup>84</sup> Other scholars have similarly criticized the economic perspective for overlooking the normative value of law.<sup>85</sup> In

of fines are less than the costs of installing compliance programs, the proper course to maximize shareholders' wealth is to do nothing and pay the fines.").

81. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT*, 2–45 (Gary S. Becker & William M. Landes eds., 1974) (proposing an economic theory of criminal behavior); Keith N. Hylton, *Optimal Law Enforcement and Victim Precaution*, 27 *RAND J. ECON.* 197, 197–205 (1996) (analyzing, inter alia, state enforcement costs and the costs of victim precaution to derive an optimal punishment policy for the deterrence of criminal activity); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff between the Probability and Magnitude of Fines*, 69 *AM. ECON. REV.* 880, 880–91 (1979) (asserting that the optimal enforcement policy for criminal liability must balance the level of sanctions required to achieve deterrence with the social costs that those sanctions impose).

82. Cynthia A. Williams, *Corporate Compliance With the Laws in the Era of Efficiency*, 76 *N.C. L. REV.* 1265, 1265 (1998).

83. *Id.* at 1385 ("Law, in a democracy, is more than a price tag. It is a command in which we participate, a limit on unacceptable behavior, and an architecture for social, political, and economic interaction."); cf. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *YALE L.J.* 1545, 1554 (1995) ("[T]he modern lawyer's legal realist (and law-and-economics) view of the law may lead the client to respect the law less; to choose to violate the law and chance the consequences."). Another sharp critic of the law and economics approach is Professor Kent Greenfield, who has advocated for reviving the ultra vires doctrine. See Greenfield, *supra* note 28; KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 75–88 (2006).

84. See e.g., FREDERICK SCHAUER, *THE FORCE OF LAW* 55 (2015).

85. See John C. Coffee, Jr., *Litigation and Corporate Governance: An Essay on Steering Between Schylla and Charybdis*, 52 *GEO. WASH. L. REV.* 789, 794 n.11 (1984) (stating that Easterbrook and Fischel's view "at least as applied to most regulatory laws, simply [misstates] the legislative intent, which was not to establish a tariff but to prohibit certain behavior"); Robert Cooter, *Prices and Sanctions*, 84 *COLUM. L. REV.* 1523, 1523 (1984) ("[T]he economic perspective is blind to the distinctly normative aspect of law, viewing a sanction for doing what is forbidden merely as the price of doing what is permitted."); Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 *WM. & MARY L. REV.* 1169, 1201 (2009) ("[T]he growth of economism as an academic mode of thinking about law devalues any conception of law as expressing norms or public purposes.").

scholarly writings on corporate law, Chief Justice Leo Strine of the Delaware Supreme Court, together with distinguished co-authors, has echoed this point:

American corporate law embeds law compliance within the very mission of the corporation. Loyalty to the corporation's obligation as a citizen to attempt in good faith to abide by the law is not incidental to a director's duties, it is fundamental. We find it dismaying that this point is even arguable.<sup>86</sup>

The other major point of dispute in the literature concerning corporate lawbreaking has centered on how best to classify this conduct within the framework of fiduciary duties. In many ways, this is a continuation of the debate about taking a cost-benefit approach to corporate lawbreaking and a translation of that viewpoint into the language of fiduciary duties.

The Delaware Supreme Court's 2006 decisions in *Disney* and *Stone* sparked this inquiry by lodging intentional violations of law within the duty of good faith and as a subset of loyalty. Corporate law scholars Melvin Eisenberg and Stephen Bainbridge criticize this categorization as a poor fit; they argue that the duty of good faith should instead be its own independent duty because managers typically act for profit-maximizing purposes rather than out of self-interest.<sup>87</sup> Similarly, Professor Julian Velasco has noted that "[a]ny 'disloyalty' would be to the law and to society, which is not what the duty of loyalty is about."<sup>88</sup>

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86. Strine, Jr. et al., *supra* note 29, at 653 n.71; *see also* Palmiter, *supra* note 43, at 458 (arguing that explicit recognition of a duty of obedience "would advance the legitimacy of the corporation in society").

87. Bainbridge et al., *supra* note 29, at 592 ("Individuals routinely make cost-benefit analyses before deciding to comply with some *malum prohibitum* law, such as when deciding to violate the speed limit. Is it self-evident that the directors of a corporation should be barred from engaging in similar cost-benefit analyses?"); Eisenberg, *supra* note 29, at 38 (arguing that knowingly causing the corporation to violate the law should be rooted in an independent duty of good faith, not in the duty of loyalty "because typically the manager does not engage in self-interested conduct" and not in the duty of care "because typically the manager rationally believes that the illegal conduct will serve the end of profit maximization").

88. Velasco, *supra* note 29, at 1267 (noting additionally that "it is unfair to say that any violation of the law, however small and regardless of the circumstances, would amount to a breach of the duty of loyalty"). *But see* Strine, Jr. et al., *supra* note 29, at 653 ("To somehow contend that it is loyal to engage in consciously unlawful conduct because the directors believed in good faith that the conduct would be in the best interests of stockholders desiring profits but in bad faith toward society is, well, silly.").

Notably, this legal literature envisions a static, narrow range of corporate lawbreaking. The examples discussed in these works tend to further the viewpoint of the respective authors. For instance, literature advocating a cost-benefit approach typically includes an example involving a quotidian, low-level offense such as a simple traffic violation, whereas scholarly work arguing against this approach might, by contrast, use the example of polluting a river.<sup>89</sup> What is noteworthy, however, is not the difference between these examples, but rather what is missing: examples involving innovation, entrepreneurship, and efforts inside or outside of the political process to catalyze legal change.

## II. THE SPECTRUM OF CORPORATE DISOBEDIENCE

It is widely understood—indeed often decried—that corporations can use their power to change the law. Corporations can take positions against the law. And they can evade and innovate around the law. But despite burgeoning literatures on topics such as innovation and regulation,<sup>90</sup> corporate lobbying and political speech,<sup>91</sup> and corporate

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89. See Bainbridge et al., *supra* note 29, at 592 (discussing routine cost-benefit approaches to compliance, such as deciding whether to abide by a speed limit); Strine, Jr. et al., *supra* note 29, at 652 n.71 (“The question in Lincoln’s case was whether literal compliance with some laws would endanger the endurance of the republic . . . . It was not whether to generate lucre at the cost of illegally polluting a river.”); Williams, *supra* note 82, at 1282 (discussing an example from the ALI Principles of a corporate decision-maker who knowingly engages in tactics against union workers that violate the National Labor Relations Act).

90. See generally, e.g., Eric Biber, Sarah E. Light, J.B. Ruhl & James Salzman, *Regulating Business Innovation as Policy Disruption: From the Model T to Airbnb*, 70 VAND. L. REV. 1561 (2017) (examining how business innovation creates policy disruption and ways in which regulators should respond); Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017) (critiquing the sharing economy and proposing updates to consumer protection law); Stephen R. Miller, *First Principles For Regulating The Sharing Economy*, 54 HARV. J. ON LEGIS. 147 (2016) (proposing principles to guide regulatory responses to the sharing economy); Pollman & Barry, *supra* note 10, at 392 (examining “regulatory entrepreneurs,” defined as “companies [that] pursue a line of business that has a legal issue at its core”); Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the “Sharing Economy,”* 76 OHIO ST. L.J. 901 (2016) (advancing the use of agglomeration economics and public choice theory to form policy responses to the sharing economy); Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401 (2016) (arguing that regulators should use an experimentalist model to regulate risky emerging technologies); Tim Wu, *Strategic Law Avoidance Using the Internet: A Short History*, 90 S. CAL. L. REV. POSTSCRIPT 7 (2017) (discussing the importance of law enforcement in response to regulatory entrepreneurship).

91. See generally, e.g., LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* (2015) (exploring how lobbying has increased the political power of business in the United States); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) (proposing corporate political spending disclosures); Jill E. Fisch, *How Do*

conscience,<sup>92</sup> the frame of reference for disobedience in corporate law has been static. It does not capture the dynamic relationship between law, business, and regulation.<sup>93</sup> This Article aims to enrich this account.

A. *Violations Without Societal Benefit Beyond Corporate Profit: Wrongdoers, Criminals, and Derelicts*

To start first with well-trodden ground, a substantial slice of unlawful conduct by corporations involves criminality or compliance failures that have little or no redeeming societal value. Some of this corporate misconduct reflects widespread and blatantly fraudulent or deceptive conduct carried out over time and with the intent to subvert detection.

The Wells Fargo account scandal provides a recent example.<sup>94</sup> Misconduct at the bank was first uncovered by the *Los Angeles Times*, an investigation by city and federal regulators in Los Angeles followed, and in an eventual settlement, the company paid \$185 million in fines.<sup>95</sup> The investigation brought to light years of fraudulent practices carried out by thousands of employees working in a culture of aggressive sales goals and quotas.<sup>96</sup> The settlement with regulators did not end the impact of the scandal on the company, which sparked a firestorm of

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*Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005) (providing a case study of the political activity of FedEx); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (proposing a national economic welfare rationale for lobbying regulation).

92. For literature on “corporate conscience,” see THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders, & Zoë Robinson eds., 2016); Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777 (2015); Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565; Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015); Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012).

93. See, e.g., Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 930 (describing pig-keeping law “as an arena of conflict, rather than as an unfolding text”); Kyle G. Volk, *The Consequentialist State: Public Law and the Release of Energy in Nineteenth Century America*, 57 AM. J. LEGAL HIST. 232, 235 (2017) (discussing examples of the “cat-and-mouse dynamic . . . [of] regulation spurring entrepreneurial innovation, which in turn prompted regulatory innovation”).

94. See, e.g., Claire A. Hill, *Repugnant Business Models: Preliminary Thoughts on a Research and Policy Agenda*, 74 WASH. & LEE L. REV. 973, 975–76 (2017) (discussing illegal conduct by the Wells Fargo employees).

95. James Rufus Koren, *Wells Fargo to Pay \$185 Million Settlement for ‘Outrageous’ Sales Culture*, L.A. TIMES (Sept. 8, 2016, 3:10 PM), <http://www.latimes.com/business/la-fi-wells-fargo-settlement-20160907-snap-story.html> [<https://perma.cc/S8ML-4U4J>].

96. *Id.*

public outcry, ongoing litigation, and financial impact.<sup>97</sup> Other recent illustrative cases include the Volkswagen emissions scandal and Citibank's deceptive marketing of credit card add-on products.<sup>98</sup>

More mundane compliance failures, while perhaps less morally culpable, also lack social value. For example, Halliburton recently paid \$18.3 million to a thousand workers it had misclassified as exempt from overtime pay under the Fair Labor Standards Act.<sup>99</sup> Compliance failures come in all sizes, of course, and many examples amount to smaller dollar values in fines or settlements or may go undetected.<sup>100</sup> Whether the result of negligent or knowing failure to comply with existing laws and regulations, this rule breaking has no apparent motivation besides perhaps a general profit-making goal.<sup>101</sup>

The examples envisioned by the corporate law literature, such as traffic violations and river pollution, generally fit into this range of corporate activity. Scholars debate whether these activities provide societal benefit when a cost-benefit analysis would result in net profits for the corporation, but they have not identified social value other than profits for the companies engaged in the illegal activity.

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97. Michael Corkery, *Wells Fargo Struggling in Aftermath of Fraud Scandal*, N.Y. TIMES (Jan. 13, 2017), [https://www.nytimes.com/2017/01/13/business/dealbook/wells-fargo-earnings-report.html?\\_r=0](https://www.nytimes.com/2017/01/13/business/dealbook/wells-fargo-earnings-report.html?_r=0) [https://perma.cc/WU9E-WNDE]; Jen Wiczner, *Here's How Much Wells Fargo's Fake Accounts Scandal Is Hurting the Bank*, FORTUNE (Jan. 13, 2017), <http://fortune.com/2017/01/13/wells-fargo-fake-accounts-scandal-closing-branches-earnings> [https://perma.cc/9CDS-CWJU].

98. Danny Hakim, Aaron M. Kessler & Jack Ewing, *As Volkswagen Pushed to Be No. 1, Ambitions Fueled a Scandal*, N.Y. TIMES (Sept. 26, 2015), <https://www.nytimes.com/2015/09/27/business/as-vw-pushed-to-be-no-1-ambitions-fueled-a-scandal.html?action=click&contentCollection=Business%20Day&region=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&moduleDetail=undefined&pgtype=Multimedia> [https://perma.cc/NY7G-VK4H]; *CFPB Orders Citibank to Pay \$700 Million in Consumer Relief for Illegal Credit Card Practices*, CONSUMER FIN. PROT. BUREAU (July 21, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices/> [https://perma.cc/MJR8-FBTQ].

99. *Halliburton Pays Nearly \$18.3 Million in Overtime Owed to More Than 1,000 Employees Nationwide After US Labor Department Investigation*, DEP'T OF LABOR (Sept. 22, 2015), <https://www.dol.gov/newsroom/releases/whd/whd20150922-0> [https://perma.cc/CBQ4-AYET].

100. Cases often settle, sometimes without an admission of wrongdoing by the corporation. BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 61 (2014).

101. For a sampling of the growing body of literature on compliance, see Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999); Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523 (2014).

*B. Disobedience with the Potential for Innovation or Change:  
Innovators, Dissenters, Rebels, and Lobbyists*

In contrast to the above, a wide array of examples exists of corporations violating the law as part of an effort at entrepreneurship, innovation, or legal change. This activity is diverse. For example, it includes the development of new technology that might push the regulatory envelope or raise questions of legal classification. It also includes situations in which a company does not have an innovative business model or product but instead engages in an act of disobedience or defiance as part of an effort to change or clarify the law.<sup>102</sup>

These cases involve not only transgressions of the law or refusals to comply but also the potential that the conduct is in the greater interest of the public. These categories are admittedly porous and debatable.<sup>103</sup> The important observation is that when entrepreneurial activity produces useful technology or innovative services that improve citizens' well-being, productivity, or quality of life, a justification may exist for the disobedience that goes beyond a simple cost-benefit analysis of a corporation's gain.<sup>104</sup> In addition, there is informational value in disobedience that points to areas of law that might be outdated, that conflict with the law of other jurisdictions, or that reflect a political or market failure.<sup>105</sup> Further, the benefits that might flow

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102. See Wu, *supra* note 90, at 17 (“At bottom, law avoidance is complex: it can represent social disorder or unfair opportunism, yet also, paradoxically, play an important role in the democratic process and the evolution of a legal system.”); *id.* at 18 (“[T]here is a narrower category of lawbreaking that raises questions about which there exists true uncertainty in the law and . . . division of public opinion or an underdeveloped debate . . . [A] debate over such questions can be a healthy process, and . . . is not one with a predictable outcome.”).

103. Cf. Peñalver & Katyal, *supra* note 25, at 1128 (“The many discussions of intentional lawbreaking within legal philosophy reflect three broad approaches: one rooted in the dignity of individual conscience, one oriented toward the correction of imperfections in the majoritarian political process, and one celebrating a pluralistic conception of legal interpretation.”).

104. See, e.g., Ross Levine & Yona Rubinstein, *Smart and Illicit: Who Becomes An Entrepreneur and Do They Earn More?*, 132 Q.J. ECON. 963, 963 (2017). Levine and Rubinstein note:

Economists since Adam Smith have emphasized that entrepreneurs spur improvements in living standards. For example, Schumpeter argues that entrepreneurs drive economic growth by undertaking risky ventures that create and introduce new goods, services, and production processes that displace old businesses. [Various scholars] stress that the human capital of entrepreneurs plays a unique role in shaping the productivity of firms and the growth rate of entire economies.

*Id.*

105. See EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 172 (2010) (noting

from corporate disobedience aimed at clarifying or changing the law may accrue to others where the company pushes for broad legal change rather than an individual regulatory exemption or waiver.<sup>106</sup>

To examine the contours of corporate disobedience, this section reviews a range of examples, both historical and contemporary.<sup>107</sup> This account is not offered in the spirit of justification or advocacy but rather aims to broaden the debate.

1. *Innovation and Entrepreneurship.* Throughout history, companies at the cutting edge of technology have provided a rich set of examples of corporate disobedience. In some instances, corporate disobedience stems from legal uncertainty as new technology develops; it can be unclear whether a new product or service is definitively illegal or whether it can be characterized as outside the reach of existing law.<sup>108</sup> Companies may also be willing to break the law while establishing their technology, with the hope that they will be able to change the law before regulators enforce it against them.<sup>109</sup>

Uber is the most salient example of corporate disobedience in the early twenty-first century.<sup>110</sup> The ride-hailing startup has been

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in the intellectual property context that “[c]ases of particularly widespread free riding offer valuable information concerning the degree to which entitlements may be outdated or the result of some kind of political or market failure that might, on its own merits, justify legal reform or redistribution”); *see also* Wu, *supra* note 90, at 17 (“The laws on the books represent a judgment at a certain time and place, by one generation, that reflects both prevailing norms and technological reality of that time, yet may have little to do with what following generations think about an issue.”).

106. *See, e.g.*, Michael R. Dennis, Katherine Rowan, Richard Feinberg, Richard Widdows & Richard Crable, *Corporate Civil Disobedience in the Consumer Interest*, 6 *ADVANCING THE CONSUMER INTEREST* 16, 18 (1994) (discussing corporate defiance in the consumer interest and noting that “the defiance is in the greater interest of the public” and “the benefits will be enhanced if the defiance is successful in implementing legal change so that other companies are allowed to follow suit”).

107. This Article uses the term “spectrum” to reflect this diversity of examples but does not mean to suggest that the types of activity can be plotted precisely on a scale.

108. For a discussion of lawbreaking as part of a process of legal interpretation and dissent, *see* Cover, *supra* note 25, at 46–48; Peñalver & Katyal, *supra* note 25, at 1130–31.

109. *See* Pollman & Barry, *supra* note 10, at 399 (“Sometimes regulatory entrepreneurs proactively engage regulators, but often they simply push forward with the business while hoping that regulators and enforcement agencies will not come knocking.”).

110. *See id.* at 398–400 (discussing Uber as a “regulatory entrepreneur” that operated in legal gray areas and strategically engaged in legal disobedience as part of its efforts to change its regulatory environment); Biber et al., *supra* note 90, at 1569 (“[B]esides causing industry upheaval, Uber, Airbnb, and other applications of the platform economy often are also arguably illegal, if not patently illegal, in many jurisdictions. They are routinely skirting and flouting existing federal, state, and local laws.”).



enmeshed in a series of scandals involving questionable or even illegal activity, ranging from using a tool the company developed called Greyball to evade law enforcement officials, to testing self-driving vehicles on public roads without obtaining the required permits.<sup>111</sup> Many of Uber's legal woes fall into the category of unlawful conduct with little or no redeeming societal value beyond corporate profit, as described in the section above. However, at the center of Uber's controversial story is a business that uses technology to transform transportation—a company that is willing to disobey existing laws in order to upend the taxi industry, change how people get around towns and cities, and perhaps one day even replace car ownership.<sup>112</sup>

The Uber co-founders developed the core concept for the company's business in 2008: a smartphone app that connects drivers and riders and takes a cut of the ride's cost.<sup>113</sup> In the eyes of the co-founders, the app had the potential "to take on an entrenched taxi industry that they felt was more interested in blocking competition than in serving customers."<sup>114</sup> By 2010, the company launched the service in San Francisco and shortly thereafter received a cease-and-desist letter from the San Francisco Metro Transit Authority and California Public Utilities Commission.<sup>115</sup> The company's response: simply changing its name from UberCab to Uber and otherwise ignoring the regulators' letter.<sup>116</sup>

The company continued to operate and expand to cities across the United States and around the world. It developed a playbook for local

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111. Davey Alba, *A Short History of the Many, Many Ways Uber Screwed Up*, WIRED (June 21, 2017, 2:42 PM), <https://www.wired.com/story/timeline-uber-crises> [<https://perma.cc/Z5CC-25Y8>]; Alan Ohnsman, *Uber's Defiance of California on Self-Driving Car Rules Sparks Legal Showdown*, FORBES (Dec. 16, 2016, 7:29 PM), <https://www.forbes.com/sites/alanohnsman/2016/12/16/uber-doubles-down-on-decision-to-defy-california-on-self-driving-car-rules/#30fa7f26e7a> [<https://perma.cc/ZM2W-6BHH>]; see also Douglas MacMillan & Newley Purnell, *Smoke, Then Fire: Uber Knowingly Leased Unsafe Cars to Drivers*, WALL ST. J. (Aug. 3, 2017), <https://www.wsj.com/articles/smoke-then-fire-uber-knowingly-leased-unsafe-cars-to-drivers-1501786430> [<https://perma.cc/Z8UL-TEKT>].

112. See LASHINSKY, *supra* note 8, at 22, 104–05.

113. *Id.* at 80–81.

114. BRAD STONE, *THE UPSTARTS: HOW UBER, AIRBNB, AND THE KILLER COMPANIES OF THE NEW SILICON VALLEY ARE CHANGING THE WORLD* 49 (describing, based on interviews, the Uber co-founders' views from the early days of the company); see also Rafi Mohammed, *Regulation Is Hurting Cabs and Helping Uber*, HARV. BUS. REV. (July 9, 2014), <https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber> [<https://perma.cc/U7Y4-FUHW>] ("Much of [Uber's] spectacular growth has been fueled by outdated regulation.").

115. LASHINSKY, *supra* note 8, at 90.

116. *Id.* at 86, 90.

launches that started with assessing regulations but not necessarily complying with them. One of the Uber employees who oversaw these early city launches explained: “I would go through every single clause of the regs and try and piece together where we could have a problem.”<sup>117</sup> Putting this strategy in context, technology journalist Adam Lashinsky observed: “A normal company would have arranged meetings with regulators to signal their intentions; Uber approached each launch like a guerilla attack, with no need to warn the enemy first.”<sup>118</sup> The company was aware that many regulators viewed its operations as illegal, yet it characterized itself as a technology company to which taxi laws did not apply.<sup>119</sup> Uber repeatedly paid fines and settlements as a cost of doing business, but it did not waver from its playbook.<sup>120</sup> As of early 2014, Uber was engaged in seventeen active regulatory fights across the country, and the number continued to mushroom for years after.<sup>121</sup>

Uber combined this regulatory disobedience with lobbying, public relations, and grassroots support from drivers and riders, which it leveraged to obtain legal changes in many jurisdictions.<sup>122</sup> It did not always succeed, and it pulled out of some locations, at least temporarily.<sup>123</sup> But, in many instances, its strategy of legal disobedience combined with a strong offensive approach to gaining popularity

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117. *Id.* at 97.

118. *Id.*

119. *See id.* at 106.

120. For example, when the company faced a law in Paris making its “UberPop” service illegal, the company refused to shut down and instead paid drivers’ fines. Liz Alderman, *Uber’s French Resistance*, N.Y. TIMES MAG. (June 3, 2015), <https://www.nytimes.com/2015/06/07/magazine/ubers-french-resistance.html> [<https://perma.cc/49WD-2P8E>].

121. LASHINSKY, *supra* note 8, at 108.

122. *Id.* at 107–08; *see* Pollman & Barry, *supra* note 10, at 388.

123. Douglas MacMillan & Rachel Emma Silverman, *Uber, Lyft Shut Down in Austin Over Fingerprint Vote*, WALL ST. J. (May 9, 2016, 8:20 PM), <https://www.wsj.com/articles/texas-capital-city-votes-to-keep-fingerprinting-for-uber-lyft-drivers-1462796972> [<https://perma.cc/SKV9-GS7H>]; David Meyer, *Uber Pulls Out of Hungary Thanks to New Regulations*, FORTUNE (July 13, 2016), <http://fortune.com/2016/07/13/uber-hungary-ban> [<https://perma.cc/MZ9P-D85U>]; *New Regulations Prompt Uber to Exit Denmark*, FORTUNE (Mar. 28, 2017), <http://fortune.com/2017/03/28/new-regulations-prompt-uber-to-exit-denmark> [<https://perma.cc/H5GC-DHAZ>]; Andrea Peterson, *In Kansas, Uber’s Campaign Didn’t Just Backfire—It Knocked Out the Legislature’s E-Mail System*, WASH. POST (Apr. 7, 2015), [https://www.washingtonpost.com/news/the-switch/wp/2015/04/07/in-kansas-ubers-campaign-didnt-just-backfire-it-knocked-out-the-legislatures-e-mail-system/?utm\\_term=.0ce9db632709](https://www.washingtonpost.com/news/the-switch/wp/2015/04/07/in-kansas-ubers-campaign-didnt-just-backfire-it-knocked-out-the-legislatures-e-mail-system/?utm_term=.0ce9db632709) [<https://perma.cc/43J8-LUAG>]; Mark Scott, *Uber’s No-Holds-Barred Expansion Strategy Fizzles in Germany*, N.Y. TIMES (Jan. 3, 2016), <https://www.nytimes.com/2016/01/04/technology/ubers-no-holds-barred-expansion-strategy-fizzles-in-germany.html> [<https://perma.cc/VB92-X878>].

worked to its advantage and catalyzed change—not just for its own benefit, but for its competitors’ as well.<sup>124</sup> Even if Uber’s success ultimately comes to an end, the ride-sharing model that Uber helped to develop will likely live on, and competitors or successors will benefit from the regulatory environment Uber helped shape.<sup>125</sup>

Myriad other examples exist of innovative companies stretching, disregarding, or even intentionally disobeying laws or legal orders in their quests to develop new technology.<sup>126</sup> This willingness to upend the established order may in fact be part of innovation culture and a personality trait of many entrepreneurs.<sup>127</sup> According to recent research, people who become entrepreneurs are more likely than others to have received high scores on aptitude tests and to have engaged in more disruptive, illicit activities in their youth.<sup>128</sup>

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124. See, e.g., LASHINSKY, *supra* note 8, at 108 (“These battles played out almost everywhere Uber—and Lyft often behind it—went.”); Daniel Roberts, *Uber’s Competitors in NYC Are Growing Like Crazy*, YAHOO! FINANCE (Mar. 10, 2017), <https://finance.yahoo.com/news/ubers-competitors-in-nyc-are-growing-like-crazy-144556302.html> [<https://perma.cc/Y8PC-VJJM>] (“Lyft, Juno, and Gett are all climbing just at a time when Uber is vulnerable, beset by a series of separate scandals . . .”); Serena Saitto, *Inside Big Taxi’s Dirty War with Uber*, BLOOMBERG (Mar. 11, 2015, 5:00 AM), <http://www.bloomberg.com/news/articles/2015-03-11/inside-big-taxi-s-dirty-war-with-uber> [<https://perma.cc/TX6R-CXU4>] (“[U]ber’s strategy has been to launch services regardless of the rules and then leverage its popularity to force regulators to adapt. So far, that approach has succeeded in about 30 markets in North America . . .”).

125. See Jack Stewart, *As Uber Crumbles, Lyft Builds Its Future*, WIRED (June 14, 2017, 5:06 PM) <https://www.wired.com/story/uber-lyft-crisis> [<https://perma.cc/B2Q9-LLYN>] (discussing how Lyft could “reap the rewards” from Uber’s “rough 2017”); Ben Thompson, *Intel, MobilEye, and Smiling Curves*, STRATECHERY (Mar. 14, 2017), <https://stratichery.com/2017/intel-mobileyeye-and-smiling-curves> [<https://perma.cc/5NLM-JYW8>] (“Uber is the biggest player in ride-sharing, at least in most Western countries, although Lyft is lurking should Uber implode; Didi is dominant in China, while Southeast Asia has a number of smaller competitors.”). *But see* Susie Cagle, *How a Start-Up That Wouldn’t Break the Rules Was Forced to Fail*, PAC. STANDARD (Jan. 27, 2015), <https://psmag.com/economics/night-school-failed-because-it-followed-law> [<https://perma.cc/5L5N-QDLB>] (noting that some would-be competitors of ride-hailing companies have failed after trying to work with local regulators).

126. Elizabeth Pollman, *The Rise of Regulatory Affairs in Innovative Startups*, in THE HANDBOOK ON LAW AND ENTREPRENEURSHIP IN THE UNITED STATES (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2880818](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880818) [<https://perma.cc/9K35-3ULR>].

127. The term “corporate disobedience” has also been used to describe the “stealth innovation” of employees purposely “bending or even breaking select internal rules” within large corporations that have extensive policies and control systems. Thomas Wedell-Wedellsborg, *The Case for Corporate Disobedience*, HARV. BUS. REV. (June 2, 2014), <https://hbr.org/2014/06/the-case-for-corporate-disobedience> [<https://perma.cc/M86W-WS9N>].

128. Levine & Rubinstein, *supra* note 104, at 963. Entrepreneurs may rationalize their behavior and business strategies through a process psychologists call moral disengagement, for example, thinking certain regulations are unnecessary and thus that it is not bad to violate them. Noam Scheiber, *The Shkreli Syndrome: Youthful Trouble, Tech Success, Then a Fall*, N.Y. TIMES (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/business/entrepreneur-young-trouble>

It is not only startups that bump up against laws and regulations. Industry giant Google, now organized under the holding company Alphabet, has fought numerous legal battles, sometimes succeeding in claims that its technology does not in fact violate the law and at other times losing and eventually being forced to pay fines and change its approach. From privacy violations incurred by collecting street views around the globe to copyright issues over its “moonshot” project of scanning all the world’s books,<sup>129</sup> Google and its affiliates have often tested legal boundaries. It may be unfair to characterize any of Google’s activity as outright intentional disobedience. Yet, the company has notably displayed a nuanced understanding that its overall business inevitably involves legal violations and that it must proceed nonetheless with this approach. Google’s general counsel explained:

We do the best we can to make sure we’re complying with all the present and future rules out there, and we’ve usually gotten it right. Our rule of thumb has been if our products are creating value for people and society, courts will usually come out on the side of delivering that kind of benefit. That’s not to say that there aren’t surprises along the way. For example, we’ve launched in a country only to discover that there’s a 20-year-old law on the books that creates an unforeseen issue—and then we have to adjust our implementation.<sup>130</sup>

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.html?ref=dealbook&=undefined&auth=login-email&\_r=1 [https://perma.cc/FYF8-MGZ8] (quoting psychologist Laurence Steinberg).

129. See, e.g., Robinson Meyer, *After 10 Years, Google Books Is Legal*, ATLANTIC (Oct. 20, 2015), <https://www.theatlantic.com/technology/archive/2015/10/fair-use-transformative-leva-google-books/411058> [https://perma.cc/AUW5-PJYP] (explaining the decade-long legal battle over Google Books in which the Second Circuit ultimately ruled that it was fair use for the company to scan millions of copyrighted books and make portions available online without copyright holders’ permission); Mark Scott, *Google Fined Record \$2.7 Billion on E.U. Antitrust Ruling*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html> [https://perma.cc/BY3W-675U] (discussing the European Commission’s antitrust ruling and fine against Google); David Streitfeld, *Google Concedes That Drive-By Prying Violated Privacy*, N.Y. TIMES (Mar. 12, 2013), <http://www.nytimes.com/2013/03/13/technology/google-pays-fine-over-street-view-privacy-breach.html?pagewanted=all> [https://perma.cc/U38U-9EJG] (noting that Google “acknowledged to state officials that it had violated people’s privacy during its Street View mapping project when it casually scooped up passwords, e-mails and other personal information from unsuspecting computer users,” and that it settled a case brought by thirty-eight states); Jeffrey Toobin, *Google’s Moon Shot: The Quest for the Universal Library*, NEW YORKER (Feb. 5, 2007), <http://www.newyorker.com/magazine/2007/02/05/googles-moon-shot> [https://perma.cc/4XW7-T2AW] (discussing Google Books).

130. Sharon Driscoll, *Lawyering at the Edge of Innovation: A Conversation with Kent Walker, Google’s General Counsel and Senior Vice President*, STAN. LAW., Fall 2016, at 27.

Other technology companies have sometimes taken approaches that are openly aimed at meeting the letter, but not the spirit, of the law. For example, when France's parliament acted out of concern for small local bookstores by passing a law that banned retailers from offering free shipping or discounts over 5 percent on books, Amazon responded by charging one cent for shipping.<sup>131</sup>

Another technology giant, Apple, found itself in a difficult position when asked by the FBI to "unlock" an iPhone used by a terrorist; Apple chose to resist.<sup>132</sup> The request came amidst an ongoing and heated public debate about how to balance the privacy afforded by encryption with law enforcement's need for access.<sup>133</sup> When talks between the FBI and Apple reached an impasse, a magistrate judge issued an order compelling Apple to provide technical assistance to allow the FBI to bypass or disable the iPhone security functions.<sup>134</sup> Apple CEO Tim Cook responded with a strongly worded open letter to the company's customers, stating: "We oppose this order, which has

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131. See Alison Griswold, *France Banned Free Shipping. So Amazon Made It Cost One Cent.*, SLATE: MONEYBOX (July 11, 2014), [http://www.slate.com/blogs/moneybox/2014/07/11/france\\_banned\\_free\\_shipping\\_so\\_amazon\\_made\\_it\\_cost\\_one\\_cent.html](http://www.slate.com/blogs/moneybox/2014/07/11/france_banned_free_shipping_so_amazon_made_it_cost_one_cent.html) [https://perma.cc/PG5M-5RGR]; Sam Schechner, *Amazon Shelves French Book Discounts*, WALL ST. J. (July 10, 2014, 11:32 AM), <https://www.wsj.com/articles/amazon-shelves-french-book-discounts-1405006355> [https://perma.cc/GQL3-YQ5R].

132. Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. TIMES (Feb. 17, 2016), <https://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html> [https://perma.cc/F8PV-VDAM]; see also Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance at 4–5, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203*, No. ED 15-0451M, 2016 WL 618401 (C.D. Cal. Feb. 16, 2016) (requesting that the court vacate an order that directed Apple to assist in the search of a seized iPhone); Kim Zetter, *Apple's FBI Battle Is Complicated. Here's What's Really Going On*, WIRED (Feb. 18, 2016, 1:15 PM), <https://www.wired.com/2016/02/apples-fbi-battle-is-complicated-heres-whats-really-going-on> [https://perma.cc/CE3M-SS3E] ("But this isn't about unlocking a phone; rather, it's about ordering Apple to create a new software tool to eliminate specific security protections the company built into its phone software to protect customer data . . . it's an after-market backdoor to be used selectively on phones the government is investigating.").

133. Zetter, *supra* note 132. In a similar case in New York, the court ruled in Apple's favor on statutory grounds. See *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court*, 149 F. Supp. 3d 341, 344 (E.D.N.Y. 2016) (holding that Apple was under no obligation to assist with the search warrant, based on the fact that Congress has considered and decided not to adopt legislation that would support the Government's interpretation of 28 U.S.C. § 1651(a)(2012)).

134. Lichtblau & Benner, *supra* note 132; Kim Zetter, *Magistrate Orders Apple to Help FBI Hack San Bernardino Shooter's Phone*, WIRED (Feb. 16, 2016), <https://www.wired.com/2016/02/magistrate-orders-apple-to-help-fbi-hack-phone-of-san-bernardino-shooter> [https://perma.cc/QSF4-NGML].

implications far beyond the legal case at hand. This moment calls for public discussion, and we want our customers and people around the country to understand what is at stake.”<sup>135</sup> Cook explained the deeper tensions and complexity in the privacy and security debate, noting that “[c]ompromising the security of our personal information can ultimately put our personal safety at risk” and that “[Apple has] even put that data out of our own reach, because we believe the contents of your iPhone are none of our business.”<sup>136</sup>

Apple then formally filed an opposition to the magistrate’s order and asked the court to withdraw its demand.<sup>137</sup> This move represented a strong stance against compliance with the government’s request and the judge’s order. Other major technology companies, including Microsoft, Google, and Facebook, filed a brief in support of Apple’s defiance.<sup>138</sup> In addition to pushing Apple for its technical assistance, the FBI called on Congress to pass legislation clarifying the authority of law enforcement to access private data.<sup>139</sup> Meanwhile, the FBI was

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135. Tim Cook, *A Message to Our Customers*, APPLE (Feb. 16, 2016), <https://www.apple.com/customer-letter> [<https://perma.cc/RZE7-KXPR>].

136. *Id.* For a discussion of whether a corporation has a constitutional right to privacy and whether it can assert such a right on behalf of corporate participants or users against the government, see generally Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27 (2014).

137. Katie Benner, Eric Lichtblau & Nick Wingfield, *Apple Goes to Court, and F.B.I. Presses Congress to Settle iPhone Privacy Fight*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/26/technology/apple-unlock-iphone-fbi-san-bernardino-brief.html> [<https://perma.cc/7QFJ-N7X6>]. Apple claimed that the order overstepped the All Writs Act and the company’s First and Fifth Amendment rights. See generally Clark D. Cunningham, *Apple and the American Revolution: Remembering Why We Have the Fourth Amendment*, 126 YALE L.J. FORUM 216 (2016) (discussing the Apple case); Steven R. Morrison, *Breaking iPhones Under CALEA and the All Writs Act: Why the Government Was (Mostly) Right*, 38 CARDOZO L. REV. 2039 (2017) (same).

138. Brief of Amici Curiae Amazon.com, Box, Cisco Systems, Dropbox, Evernote, Facebook, Google, Microsoft, Mozilla, Nest, Pinterest, Slack, Snapchat, Whatsapp, and Yahoo in Support of Apple, Inc. at 1–4, *In re Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, Cal. License Plate 35KGD203, No. ED 15-0451M, 2016 WL 618401 (C.D. Cal. Feb. 16, 2016); Benner et al., *supra* note 137. Amicus curiae briefs from various Apple supporters flowed in and argued, in sum:

[A] court order that favored the government would: run counter to [the Communications Assistance for Law Enforcement Act] and the [All Writs Act]; violate Apple’s First Amendment rights; violate Apple’s due process rights; undermine freedom of speech in the digital age; create a public safety threat; damage the American economy; undermine Apple’s business strategy and corporate identity; encourage cell phone theft; undermine consumers’ trust in tech companies and their products; undermine free press; and enable rogue countries to invent vulnerability-creating backdoors.

Morrison, *supra* note 137, at 2042.

139. Benner et al., *supra* note 137.

also working to find a way to bypass the iPhone's protection without Apple's help.<sup>140</sup> Ultimately, an anonymous hacker helped the FBI access the iPhone data, thereby ending the legal standoff before the California court issued a final ruling.<sup>141</sup> Understanding that a similar situation could arise again in the future, Apple released a statement that it would "continue to increase the security of [its] products" and push the government to disclose the third-party tool used to exploit the iPhone's security vulnerability.<sup>142</sup>

2. *Battles of Federalism.* In addition to the context of entrepreneurship and innovation, corporate disobedience also arises in situations of conflicting laws from different jurisdictions or levels of government. In fact, the very first Supreme Court case on the constitutional rights of corporations involved state and federal tensions brought to the fore by a corporation defying a legal mandate.

The Bank of the United States, championed by Alexander Hamilton and created by Congress, refused to pay a tax that populist state lawmakers levied on a bank branch in Savannah, Georgia.<sup>143</sup> The bank headquarters in Philadelphia instructed the Savannah branch to refuse to comply with the law, hoping to "bring the question before the Supreme Court of the United States."<sup>144</sup> A Georgia tax collector, "with force and arms," entered the Savannah branch and took two boxes of silver coins.<sup>145</sup> The case made its way to the Supreme Court, as the bank hoped, but the Court ruled on a preliminary issue regarding diversity jurisdiction and sent the issue of whether states could impose taxes on federal entities back to the lower court.<sup>146</sup> Shortly after this decision, Congress famously failed to renew the bank's charter.<sup>147</sup> It was not until a decade later, in 1819, that the bank's disobedience was vindicated on

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140. Alina Selyukh, *The FBI Has Successfully Unlocked the iPhone Without Apple's Help*, NPR (Mar. 28, 2016, 6:20 PM), <http://www.npr.org/sections/thetwo-way/2016/03/28/472192080/the-fbi-has-successfully-unlocked-the-iphone-without-apples-help> [https://perma.cc/HB4U-GTLV].

141. *Id.*

142. *Id.*

143. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 63 (1809); ADAM WINKLER, *WE THE CORPORATIONS* 40–41 (2018).

144. WINKLER, *supra* note 143, at 41.

145. *Id.*

146. *Bank of the U.S.*, 9 U.S. at 87–88, 92.

147. Victor Morawetz, *The Power of Congress to Enact Incorporation Laws and to Regulate Corporations*, 26 HARV. L. REV. 667, 668 (1913) ("The charter of the bank expired in 1811 and for political reasons Congress refused to renew it . . .").

the merits. In the landmark decision of *McCulloch v. Maryland*,<sup>148</sup> the Supreme Court struck down a state tax directed at the re-chartered Bank of the United States.<sup>149</sup>

As illustrated by *Bank of the United States v. Deveaux*, corporate disobedience commonly arises when there is a mismatch between local or state law and federal law. This results in corporations being in violation of law, at least in one jurisdiction or at one level of government, for some period of time while the laws are in the process of changing or being clarified.<sup>150</sup> Examples of this point are plentiful in recent years.

For instance, in 2016, the San Francisco Board of Supervisors passed one of the most stringent restrictions on short-term rentals in the country, making it illegal for Airbnb and similar short-term rental platforms to collect fees from facilitating rentals that had not properly registered with the city.<sup>151</sup> Before this city ordinance, Airbnb had established its popular platform for short-term rentals by engaging in regulatory disputes across numerous jurisdictions.<sup>152</sup> Thus, unsurprisingly, Airbnb did not simply accept the law as it was and conform to its dictates; instead, the company sued the city and challenged the new law in court. Airbnb claimed that the local ordinance violated the First Amendment, the Communications Decency Act, and the Stored Communications Act.<sup>153</sup> A federal court

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148. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

149. *Id.* at 436 (“[T]he states have no power, by taxation or otherwise, to . . . impede . . . the operations of the constitutional laws enacted by congress . . . . We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.”).

150. Conflicting laws or legal requests may even span international jurisdictions. *See, e.g.*, Danny Hakim & Jack Ewing, *VW Refuses to Give American States Documents in Emissions Inquiries*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/business/vw-refuses-to-give-us-states-documents-in-emissions-inquiries.html> [<https://perma.cc/38EH-3S4Y>] (discussing Volkswagen’s claim that it could not respond to U.S. investigators’ requests without violating German privacy laws).

151. Emily Green, *SF Major Blow to Airbnb with Tough Short-Term Rental Law*, SF GATE (Nov. 15, 2016, 10:26 PM), <http://www.sfgate.com/news/article/SF-deals-major-blow-to-Airbnb-with-tough-10617319.php> [<https://perma.cc/7DW5-6XSX>]; Dan Levine & Heather Somerville, *Judge Rejects Airbnb Bid to Halt San Francisco Ordinance*, REUTERS (Nov. 8, 2016), <http://www.reuters.com/article/airbnb-sanfrancisco-ruling-idUSL1N1D923N> [<https://perma.cc/SDV3-WAPP>].

152. *See* LEIGH GALLAGHER, *THE AIRBNB STORY* 125–29, 133–37 (2017); *see also* Pollman & Barry, *supra* note 10, at 401, 405–06, 412–13 (discussing Airbnb’s regulatory strategy and outlook).

153. *An Update for Our Community in San Francisco*, AIRBNBCITIZEN (June 27, 2016), <https://san-francisco.airbnbciizen.com/an-update-for-our-community-in-san-francisco> [<https://>



denied Airbnb's motion for a preliminary injunction, indicating it was not persuaded on the merits.<sup>154</sup> Subsequently, Airbnb settled with San Francisco, agreeing to a compromise solution of having a streamlined registration process on the Airbnb site.<sup>155</sup> The company's temporary recalcitrance evolved into collaboration. New startups inspired by Airbnb are emerging and navigating the regulatory environment.<sup>156</sup>

In another example of federalism-related disobedience, marijuana companies have flourished as more states have legalized medical and recreational use. As discussed above, although these businesses may be engaged in legal activity in their home states, they are currently violating federal law.<sup>157</sup> Under the Controlled Substances Act, it is illegal to distribute or dispense marijuana, which falls within the definition of a controlled substance.<sup>158</sup> The conflict between state and federal marijuana laws means that companies are engaging in a form of disobedience by operating their business in this industry.

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perma.cc/7S7G-CEY6]; *see also* Hye-Jin Kim, *Supes Crack Down on Airbnb, Scofflaw Hosts*, S.F. PUB. PRESS (June 14, 2015, 3:27 PM), <http://sfpublicpress.org/news/2016-06/supes-crack-down-on-unregistered-home-sharing> [https://perma.cc/Q49W-KDHY] (explaining that, when San Francisco passed the ordinance in the summer of 2016, only a fraction of the address listings on Airbnb's site were legally registered with the Office for Short-Term Rental).

154. *Airbnb, Inc. v. City and Cty. of S.F.*, 217 F. Supp. 3d 1066, 1080 (N.D. Cal. 2016). Airbnb has engaged in similar battles in other jurisdictions. *See, e.g.*, Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), [https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?\\_r=2&referer=https://perma.cc/W6J3-S7ZY](https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=2&referer=https://perma.cc/W6J3-S7ZY)] (discussing a lawsuit Airbnb filed seeking to enjoin enforcement of a New York law on the grounds that it violated the company's constitutional rights and was inconsistent with the Communications Decency Act). *But see* Joshua Brustein, *Airbnb to Drop New York City Lawsuit Over Short-Term Rentals*, BLOOMBERG (Dec. 2, 2016), <https://www.bloomberg.com/news/articles/2016-12-03/airbnb-to-drop-new-york-city-lawsuit-over-short-term-rentals> [https://perma.cc/B84N-8LYJ] (discussing Airbnb's decision to drop the lawsuit after reaching an agreement with regulators).

155. Katie Benner, *Airbnb Settles Lawsuit With Its Hometown, San Francisco*, N.Y. TIMES (May 1, 2017), [https://www.nytimes.com/2017/05/01/technology/airbnb-san-francisco-settle-registration-lawsuit.html?\\_r=0](https://www.nytimes.com/2017/05/01/technology/airbnb-san-francisco-settle-registration-lawsuit.html?_r=0) [https://perma.cc/FTU9-5M6D].

156. Cory Weinberg, *Airbnb Fuels Boutique Rental Startups, but Regulatory Risks Loom*, INFORMATION (Jan. 10, 2018), <https://www.theinformation.com/articles/airbnb-fuels-boutique-rental-startups-but-regulatory-risks-loom> [https://perma.cc/TNC9-RMW3].

157. *See, e.g.*, Chemerinsky, *supra* note 20, at 857 ("Nearly half of the states allow medical use of marijuana . . . However, marijuana remains a Schedule 1 controlled substance under the federal Controlled Substances Act, along with opioids, like heroin, and hallucinogenics, like LSD."); *see also* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009) (discussing competing visions of the state as "servant, insider, and ally" as well as "dissenter, rival, and challenger").

158. 21 U.S.C. § 812 Schedule I(C)(10) (2018).

Nonetheless, the industry has experienced rapid growth, all in the shadow of threats from the federal government.<sup>159</sup>

3. *Moral Stances and Claims for Rights.* Another set of examples of corporate disobedience involves companies that violate or refuse to comply with laws that are moralistic in nature. Conversely, some companies engage in disobedience as a result of their own claimed moral stances against laws or civil liberties. These cases are of a distinctly different flavor.

The response of nineteenth-century liquor businesses to the temperance movement and Sunday laws provides a colorful illustration.<sup>160</sup> During the 1840s and '50s, in movements spanning cities and towns across the country, temperance and Sabbath reformers sought to impose moral order through regulations that prohibited the sale of alcohol and restricted work and play on Sunday, the day of worship for Christians.<sup>161</sup> Reformers justified these restrictions with claims of majority support for moral and religious norms but were met with dissent from a diverse group of anti-prohibitionists including Jewish, Catholic, and Seventh Day Baptist communities, immigrants, labor advocates, and liquor businesses whose owners made their living selling alcohol.<sup>162</sup> Historian Kyle Volk has traced the resistance efforts of these anti-prohibitionists, including the disobedience of “[n]umerous shop-keepers and tavern-owners [that] registered their discontent by blatantly staying open.”<sup>163</sup>

Ad hoc and informal responses evolved into more organized opposition to alcohol prohibition.<sup>164</sup> Liquor dealers, brewers,

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159. See Chemerinsky, *supra* note 20, at 858 (noting that revenues from marijuana sold through “legal” channels has grown to nearly \$6 billion); Scheuer, *supra* note 22, at 513–20 (discussing the legal issues that the marijuana industry faces); see also *DOJ Bullies Delaware into Suspending Medical Marijuana Dispensary Program*, MARIJUANA POLY PROJECT, <https://blog.mpp.org/medical-marijuana/doj-bullies-delaware-into-suspending-medical-marijuana-dispensary-program> [https://perma.cc/B4KN-EFFC] (noting that U.S. attorneys in Delaware and Washington threatened federal enforcement against state-sponsored medical marijuana dispensaries).

160. Because general incorporation statutes were just beginning to spread across the states during this period, the corporate form was not readily available to business organizers at this time, and this example includes businesses that operated for profit but may have been sole proprietorships or partnerships rather than corporations.

161. KYLE G. VOLK, *MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY* 3, 37–38 (2014).

162. *Id.*

163. *Id.* at 38.

164. *Id.* at 168.

hotelkeepers, and others in the alcohol industry formed grassroots political associations that mobilized democratic engagement.<sup>165</sup> Organizers typically invited all interested participants to meetings and rallies; according to Professor Volk, “these gatherings . . . pulled thousands upon thousands of Americans into public life.”<sup>166</sup> Brewers and dealers, big and small, came together to lobby for their cause, put pressure on politicians, run tickets of their own candidates in elections, sway public opinion, and eventually challenge the constitutionality of prohibition laws in courts.<sup>167</sup> Anti-prohibitionists argued that a tyrannical majority of fanatical reformers and state legislatures were violating the personal liberty of Americans and had wrongly eradicated a form of property—alcohol—and “turn[ed] once law-abiding businessmen into criminals.”<sup>168</sup>

In New York, one of the hottest battlegrounds, associations of liquor dealers raised large amounts of money for a legal defense fund, and dealers “committed themselves to civil disobedience—to selling in the face of the law.”<sup>169</sup> One association circulated detailed instructions to its liquor dealer members, explaining how to respond to potential enforcement attempts in order to preserve legal causes of action and to ensure that public officers were treated respectfully and without violence.<sup>170</sup> These acts of disobedience were done openly and reported nationally in newspapers.<sup>171</sup>

The two most notable cases of the era, which both reached the New York Court of Appeals, involved liquor dealers who sold alcohol in the face of prohibition, accepted arrest peacefully, and relied upon the legal defense fund.<sup>172</sup> The Court of Appeals ultimately declared New York’s liquor prohibition unconstitutional on the basis that it

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165. *Id.* at 168–77.

166. *Id.* at 174.

167. *Id.* at 185–86.

168. *Id.* at 178–79.

169. *Id.* at 186; *see also* Kyle G. Volk, *What if the Fourth of July Were Dry?*, OUP BLOG (July 4, 2014), <https://blog.oup.com/2014/07/alcohol-free-fourth-of-july> [<https://perma.cc/KHP5-2DDA>] (characterizing liquor businesses as engaging in “civil disobedience” by defiantly selling alcohol with the hope of being arrested in order to test the prohibition’s constitutionality in court, thus countering prohibitionists “with tactics intended to protect civil liberties and minority rights in America’s democracy”).

170. VOLK, *supra* note 161, at 186.

171. *Id.* at 187.

172. *Id.* at 187 (discussing *People v. Toynbee*, 20 Barb. 168 (N.Y. Gen. Term 1855) and *Wynehamer v. People*, 13 N.Y. 378 (1856)).

denied due process in property.<sup>173</sup> Another major victory came when the Indiana Supreme Court overturned the state's prohibition law, stating that the legislature had "invaded the constitutional right of the citizen."<sup>174</sup> Liquor dealer associations remained in force throughout the nineteenth century, and although not always successful, their tactics served as a model for various businesses that challenged Sunday laws and more generally helped to transform understandings of minority rights.<sup>175</sup>

On the other side of the coin, some corporate disobedience involves corporations claiming their own moral stances against laws. Several seminal cases establishing corporate constitutional and statutory rights fit this description.

One recent example involves Hobby Lobby Stores, Inc., a closely held corporation that operates a nationwide chain of craft stores.<sup>176</sup> The Hobby Lobby shareholders, the Green family of Oklahoma, are Christians who decided to sue the government in their individual capacity and on behalf of the corporation rather than comply with the Affordable Care Act's ("ACA") requirement that employee health-insurance plans cover contraception.<sup>177</sup> Hobby Lobby's opposition to

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173. *Id.*

174. *Beebe v. State*, 6 Ind. 501, 519 (1855); *see also* VOLK, *supra* note 161, at 188 (discussing *Beebe*). For another excellent discussion of court battles involving prohibition restrictions, see WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 177–89 (1996).

175. *See* VOLK, *supra* note 161, at 190–201, 204–05 ("Liquor dealers and drinkers . . . and the era's other everyday moral minorities . . . transformed minority rights from the comparatively narrow concern of propertied aristocrats, slaveholders, and intellectuals into the rallying cry of growing groups of socioeconomically diverse Americans."). Volk further explained the impact that businesses had on liquor laws:

Ultimately, it was [the liquor businesses'] decision to resist that pushed courts to occasionally invalidate laws and brought legislatures to repeal laws and replace them with new measures. But the challengers I found just as often lost in court and in the court of public opinion. When this occurred, their efforts often had the unintended effect of strengthening state power as judiciaries and the public validated particular exercises of police power.

Kyle G. Volk, *The Consequential State: Public Law and the Release of Energy in Nineteenth-Century America*, 57 AM. J. LEGAL HIST. 232, 236 (2017).

176. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–65 (2014).

177. *See id.* at 2766 ("The Greens, Hobby Lobby, and Mardel sued [the Department of Health and Human Services] and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause."). The blockbuster case *Citizens United v. FEC*, 558 U.S. 310 (2010), also involved a corporation (nonprofit) that proactively sought declaratory and injunctive relief against the Federal Election Commission; the corporation asserted that the Bipartisan Campaign Reform Act was unconstitutional as applied to its speech, a political film. *Id.* at 318–22 (2010).

the ACA ultimately resulted in the Supreme Court's ruling that the ACA violated the Religious Freedom and Restoration Act as applied to the company.<sup>178</sup> The Hobby Lobby plaintiffs claimed that complying with the ACA would substantially burden their sincerely held religious beliefs. Signaling their claimed moral stance against the law, their counsel stated: "It is with a heavy heart that anyone needs to go to court to sue their own government."<sup>179</sup> Twenty-seven other companies filed similar lawsuits against the Department of Health and Human Services over the health care law.<sup>180</sup> If Hobby Lobby and the Greens had not succeeded in their controversial case, the corporation would have faced fines of approximately \$1.3 million per day or \$475 million per year for compliance failure.<sup>181</sup>

Many examples exist involving nonprofit corporations. Perhaps most famously, during the civil rights era the NAACP litigated the scope of its members' rights after being challenged for violating a state statute.<sup>182</sup>

In 1956, the Alabama attorney general sued the NAACP, a nonprofit membership corporation formed in New York, for violating a law requiring out-of-state corporations to register before doing business in the state.<sup>183</sup> The state circuit court issued an order restraining the NAACP from engaging in further activities in Alabama.<sup>184</sup> The NAACP moved to dissolve the restraining order, arguing that it was exempt from the registration requirement and that

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178. *Hobby Lobby*, 134 S. Ct. at 2759, 2785.

179. La'tasha Givens, *Hobby Lobby Sues Government Over Contraceptive Coverage*, KFOR (Sept. 12, 2012), <http://kfor.com/2012/09/12/hobby-lobby-sues-government-over-contraceptive> [https://perma.cc/KPG3-T6AP].

180. *Id.* For a criticism of *Hobby Lobby* as "more reminiscent of market libertarianism than of religious freedom," see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453 (2015).

181. *Hobby Lobby*, 134 S. Ct. at 2759. Another recent case involved a small corporation, wholly owned by a baker and his wife, that refused to create a cake for a same-sex wedding on the basis of the baker's religious beliefs. The Colorado Civil Rights Commission upheld an administrative law judge's decision that the refusal violated the state's anti-discrimination law and ordered the corporation to take remedial measures and ensure compliance. The Supreme Court ultimately invalidated the Commission's order on the ground that the proceedings lacked religious neutrality. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). For an example of a business unsuccessfully claiming constitutional rights, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (challenging the public accommodations provisions of the Civil Rights Act of 1964 through a declaratory judgment action).

182. See *NAACP v. Alabama*, 357 U.S. 449, 451–53 (1958).

183. *Id.* at 451–52.

184. *Id.* at 452–53.

the Fourteenth Amendment right to freedom of speech and assembly protected its activity.<sup>185</sup> Before the hearing on this motion, the court granted the state's request for a large number of the nonprofit's records and papers, including a membership list.<sup>186</sup> The NAACP refused to comply, and the court found it in civil contempt and levied a \$10,000 fine.<sup>187</sup> Disclosing the NAACP's membership list would have potentially subjected its members to persecution and personal harm.<sup>188</sup> On appeal, the U.S. Supreme Court found in favor of the NAACP, striking down the judgment of civil contempt and concluding that its members' rights of association had been violated.<sup>189</sup> In commentary several years later, the *New York Times* put into context the state court proceedings that the NAACP had faced: "The history of this case shows nothing less than a cynical perversion of the legal process by state judges sworn to uphold law and the Constitution."<sup>190</sup>

The "sanctuary" movement of current times echoes the past and presents new issues of potential disobedience in the context of immigration law and policy. Nonprofit and municipal corporations, including universities, churches, and cities, have declared themselves sanctuaries and "openly refuse to cooperate with federal requests to hold undocumented immigrants until they can be deported."<sup>191</sup> If the government were to cut off funds to corporations that provide sanctuary and refuse cooperation, it "would invite court fights that could take many months, or even years, to settle."<sup>192</sup> Some legal scholars have pointed to the possibility of business corporations joining the sanctuary movement and claiming religious beliefs that morally compel them to shelter immigrant employees and their families.<sup>193</sup>

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185. *Id.* at 453.

186. *Id.*

187. *Id.*

188. *See id.* ("The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected . . .").

189. *Id.* at 466.

190. *N.A.A.C.P. v. Alabama*, *N.Y. TIMES* (June 6, 1964), <http://www.nytimes.com/1964/06/06/naacp-v-alabama.html> [<https://perma.cc/VPF6-7BA2>].

191. Clyde Haberman, *Trump and the Battle Over Sanctuary in America*, *N.Y. TIMES* (Mar. 5, 2017), [https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html?\\_r=0](https://www.nytimes.com/2017/03/05/us/sanctuary-cities-movement-1980s-political-asylum.html?_r=0) [<https://perma.cc/LD3M-DK5W>].

192. *Id.*

193. *See* Elizabeth Brown & Inara Scott, *Sanctuary Corporations: Should Liberal Corporations Get Religion?*, 20 *U. PA. J. CONST. L.* 1101, 1104 (2018).

4. *General Business Lobbying.* There is another common context in which corporate disobedience arises as part of an effort to change or clarify the law—general business operations and lobbying. Companies that violate the law while trying to change it are not necessarily engaged in technological innovation. Some companies are simply too impatient to pause their business activity while engaging in efforts to change existing laws.

Kellogg Company, for example, flaunted regulations that it pushed to change for marketing purposes. In 1984, Kellogg put on the packaging of its All-Bran cereal a statement of the National Cancer Institute’s finding of a correlation between high-fiber diets and lower risks of certain types of cancer.<sup>194</sup> At the time, advertising or labeling a food product with health claims that linked the food to the prevention, treatment, or cure of a specific disease brought the product within the drug regulation purview of the Food and Drug Administration (“FDA”).<sup>195</sup> Given that Kellogg had not put its All-Bran cereal through the more burdensome process governing products classified as drugs, Kellogg’s decision to add this label to its All-Bran risked having the product pulled from the market.<sup>196</sup> For several years, Kellogg continued to make health claims for various products such as All-Bran and Nutrific cereals while petitioning the FDA to change its regulations.<sup>197</sup>

In 1992, after several reversals of its position, the FDA ceded to Kellogg’s request and allowed for scientifically substantiated health claims on food labels.<sup>198</sup> While some have expressed concerns about the potential for consumers to be misled, other commentators have pointed out that Kellogg served the consumer interest by pushing to share information about food products at the point of purchase on the supermarket shelves, where consumers make their buying decisions.<sup>199</sup>

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From a cereal manufacturer defying labeling rules to the contemporary issue of “legal” marijuana businesses, corporations

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194. Dennis et al., *supra* note 106, at 17.

195. *Id.* at 16.

196. *Id.* at 16–17.

197. *Id.* at 17.

198. *Id.*

199. *Id.*

operate in violation of the law for a variety of reasons and in circumstances that might evoke scrutiny on different bases. In some instances, corporations defy legal mandates but engage in litigation that clarifies the law, or ultimately collaborate with regulators at a later time. Sometimes corporations are engaged in lobbying efforts with agencies or legislatures that could change the law that they are subverting or transgressing. Some of the above examples might strike some readers as disobedient, while others might say the corporation simply pursued legal recourse within its right.<sup>200</sup> These cases raise deep questions about what it means for a corporation to intend to violate the law and whether ultimate vindication or cooperation transforms or justifies otherwise disobedient activity. Corporate law and literature has assumed that the question of whether a corporation intends to violate the law or is engaged in lawful conduct is clear. But in many instances it is not.

Furthermore, although specific examples may spark legitimate concern and debate about countervailing social costs and the questionable ability of corporations to assert moral claims, on the whole, some of this activity has the potential to provide value. Corporate disobedience has been an important engine for transforming various areas of law. The next Part begins to uncover some of the implications.

### III. IMPLICATIONS FOR CORPORATE LAW AND BEYOND

Understanding the full spectrum of corporate disobedience not only reveals the role that some of this activity can play in innovation and legal change, it also sheds new light on corporate law's role in constraining unlawful activity. This Part examines those insights and implications. It begins by reexamining the statutory requirement of lawful conduct and then turns to showing how fiduciary duties are an ineffective tool for serving society's interests regarding corporate disobedience. The final subsection explores several features of corporate disobedience that might bear on its assessment.

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200. Cf. Bulman-Pozen & Pozen, *supra* note 25, at 841 (“[C]ivil disobedience does not lose its status as such solely because the behavior is ultimately deemed lawful. The critical question is whether, at the time the act is taken . . . , those responsible for the act genuinely and reasonably believe it accords with all positive law.”).



A. *The Corporate Statute Is Expressive and Embeds Society's Interests*

Statutory dictates stating that corporations can be chartered only for lawful business serve an expressive function.<sup>201</sup> Such provisions assert the authority of the state in granting the privilege of operating through the corporate form and set a limit on the privileges that flow from corporate status. Corporate statutes allow people to conduct their activity through a separate entity but do not immunize actors from the basic obligation to obey the law. And, although statutes refer specifically to the purposes for which a state will allow chartering, courts and scholars have broadly interpreted the statutes to impose a general requirement of lawful conduct in corporate operations.<sup>202</sup>

A new insight on this topic also follows from observing the full spectrum of corporate disobedience. The statutory dictate serves not only this expressive function, but it also, quite notably, embeds society's interests into corporate law and conveys the principle that corporations should pursue legal change through established and lawful democratic processes. Put differently, the corporate statute can be read as favoring an approach that pushes corporations to use officially sanctioned channels for challenging and dissenting from the law.

For example, to the extent that the “essential bottom-line requirement”<sup>203</sup> of lawful conduct goes beyond chartered purposes to cover all corporate activity, it conceivably also implies a preference that corporations challenge a law proactively through established means, such as in an action for declaratory judgment or through the legislative process.<sup>204</sup> The statute implies that if there is a question as to whether certain conduct is lawful, corporations should ask permission first; the statute does not authorize violating the law and then waiting

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201. See, e.g., DEL. CODE ANN. tit. 8, § 101(b) (2016). For a discussion of law's essential role to communicate moral principles and joint commitments, see Seana Valentine Shiffrin, Tanner Lecture on Human Values at UC Berkeley: Speaking Amongst Ourselves: Democracy and Law (Apr. 29, 2017), <http://tannerlectures.berkeley.edu/2016-2017-lecture-series> [<https://perma.cc/DCR2-NPLY>].

202. See *supra* Part I.A.

203. Strine, Jr. et al., *supra* note 29, at 649.

204. *Id.* 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, cmt. g (AM. LAW INST. 1994) suggests a similar view, stating: “The norm of obedience to law also is usually deemed counterbalanced where, under appropriate conditions, a rule is violated openly for the purpose of testing its validity or interpretation.”

to see if the corporation will be held accountable or breaking the law while concurrently lobbying for change.<sup>205</sup>

In addition, although some commentators prefer focusing on a cost-benefit approach to lawbreaking rather than the statutory dictate,<sup>206</sup> their argument is not significantly strengthened by an understanding of the spectrum of corporate disobedience presented in this Article. Some corporate lawbreaking may have redeeming virtues, such as creating positive externalities for others or helping to reshape laws, which can grow stale or fall out of step with modern times. Corporations can sometimes serve a useful role in finding entrepreneurial opportunities.<sup>207</sup> However, the fact that the benefits of lawbreaking may indeed transcend one corporation's gain arguably only underscores how difficult it would be for a corporation to engage in an accurate cost-benefit analysis that captures all the societal interests embedded in the statutory requirement of lawful conduct.<sup>208</sup>

### *B. Fiduciary Duties Are a Poor Fit for Constraining Corporate Disobedience*

The observations regarding corporate disobedience not only put the statutory dictate incorporating society's interests in a new light, they also illuminate that fiduciary duties are an ineffective tool for constraining this activity. Furthermore, policing corporate

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205. Corporations may in some instances face obstacles to obtaining declaratory relief or challenging a regulator's decision through appropriate legal channels because of procedural requirements such as standing and ripeness. *See, e.g.,* *Adult Video Ass'n v. U.S. Dep't of Justice*, 71 F.3d 563, 565 (6th Cir. 1995) (ruling that a trade association lacked standing to pursue its claim for a declaratory judgment that a particular film was not obscene because the association had not alleged a sufficient injury or threat of injury).

206. *See supra* Part I.B.

207. *See, e.g.,* Pollman & Barry, *supra* note 10, at 437–42 (discussing potential benefits of regulatory entrepreneurship); D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1540–49 (2013) (discussing definitions of entrepreneurial opportunities and the source of such opportunities). For a classic work that describes entrepreneurial action as the disruptive force that sustains economic growth in a capitalist system, even as it threatens to undermine institutions, see generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942).

208. *See* THOMAS O. MCGARITY, *FREEDOM TO HARM* 9 (2013) (arguing that the “ever-changing outcome” of the “social bargain” between the business community and society is already reflected in “the web of legislation, regulations, and common law rules that govern the marketplace”); Ryan, *supra* note 50, at 491 (“[W]hile a corporate manager might be able to identify opportunities for profitable deviance, there is no guarantee that overall social utility will be enhanced by the proscribed conduct.”); *see also* Coffee, *supra* note 85, at 794 n.11 (1984) (arguing that “the legislature cannot know how high to set penalty levels in order to make the expected penalty cost exceed the expected benefit”).

disobedience through fiduciary duties may even lead to inequitable results in some circumstances.

To start, the structure of corporate law creates an obligation with an imperfect accountability mechanism: the fundamental corporate law tenet requiring lawful conduct is intended to serve the public interest, but fiduciary duties are enforceable only by shareholders.<sup>209</sup> In a famous article published in the *Harvard Law Review* in 1931, Adolf Berle, one of the foundational thinkers of modern corporate law, argued that fiduciary duties would help to police the broad powers that corporate managers enjoy under corporate law.<sup>210</sup> According to Berle, “through the very nature of the corporate entity, responsibility goes with power,” and accountability comes from requiring power to be “at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.”<sup>211</sup> Thus, “corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply . . . to the trustee’s exercise of wide powers [as] a fiduciary.”<sup>212</sup> Notably, even Berle separated the “technical rules” regarding proper exercise of corporate power from the equitable rules embodied in fiduciary duty doctrine. They are of a different type and aimed at different goals.

Courts have valiantly, but imperfectly, fit together these pieces by ascribing to shareholders an interest in having corporate fiduciaries obey the law. The Delaware Supreme Court explained it needed a “doctrinal vehicle” to proscribe culpable conduct;<sup>213</sup> however, it had few tools at its disposal and once it contemplated the issue from within

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209. The standard view of fiduciary duty litigation is that it serves “as a gap-filler to protect the interests of stockholders.” Lawrence A. Hamermesh & Leo E. Strine, Jr., *Fiduciary Principles And Delaware Corporation Law: Searching For The Optimal Balance By Understanding That The World Is Not*, OXFORD HANDBOOK OF FIDUCIARY LAW (forthcoming) (manuscript at 9), <https://ssrn.com/abstract=3044477> [<https://perma.cc/AJ5A-JPDK>]; see also Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose II: An Encouragement for Future Consideration from Professors Johnson and Millon*, 74 WASH. & LEE L. REV. 1165, 1173 (2017) (footnotes omitted) (“[T]he Delaware General Corporation Law gives only stockholders rights, such as the right to elect directors, vote on major transactions, and enforce fiduciary duties.”).

210. A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049–50 (1931).

211. *Id.*

212. *Id.* at 1049.

213. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006).

the context of shareholder derivative litigation, it ineluctably became a matter of categorizing a fiduciary duty.<sup>214</sup>

Scholars and jurists have attempted similar justifications. For example, Professors Claire Hill and Brett McDonnell argue that conduct involving illegality raises an issue concerning the fiduciary duty of good faith, and is treated with less legal deference, because it may be contrary to shareholders' interests as citizens.<sup>215</sup> Similarly, Chief Justice Strine, together with co-authors, has explained that good faith defines "the state of mind that must motivate a loyal fiduciary," which is typically described as a belief that one's actions "are in the best interests of the corporation and its stockholders."<sup>216</sup> In this view, good faith is best understood as intertwined with or subsumed under the duty of loyalty because "a director cannot act loyally if she uses her corporate powers in bad faith to pursue improper ends."<sup>217</sup> Further, "[w]hen directors knowingly cause the corporation to . . . engage in unlawful acts . . . they are disloyal to the corporation's essential nature. By causing the corporation to become a lawless rogue, they make the corporation untrue to itself and to the promise underlying its own societally authorized birth."<sup>218</sup>

Other scholars have commented on the awkward fit of this analytical approach and have advocated for understanding the duty of good faith as an independent duty or have championed a separate duty of obedience. Professor Melvin Eisenberg argues for a separate, gap-filling duty of good faith because "corporate managers have an obligation not to knowingly cause the corporation to violate the law . . . [that] cannot be rationalized under either the duty of care or the duty of loyalty."<sup>219</sup> In his view:

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214. The other corporate law mechanism that has been used in the past is the ultra vires doctrine. Despite calls to reinvigorate the doctrine, it remains rarely used and is largely perceived as a historic relic. See Greenfield, *supra* note 28, at 1280–81 (acknowledging perceptions that the ultra vires doctrine is "dead" and calling for a revival of the doctrine).

215. Hill & McDonnell, *supra* note 30, at 1784–85 (2007) ("Shareholders are also citizens, and insofar as laws advance the general social welfare, citizens care about that. A diversified shareholder with small stakes in any one corporation may well find that the public interest predominates over the corporate interest.").

216. Strine, Jr. et al., *supra* note 29, at 633.

217. *Id.* at 643; see also *id.* at 652 ("It is only by creating the artificial idea that a director may be loyal to the corporation by causing it to pursue profit through unlawful activity that there is any need to use good faith as a gap-filler.").

218. *Id.* at 650.

219. Eisenberg, *supra* note 29, at 11.

Why, and to whom, is a director or officer being disloyal if he causes the corporation to take an action that violates the law, when he is not self-interested in the action and the action is rationally calculated to increase corporate profit and shareholder gain? Trying to squeeze such conduct in the duty of loyalty is like trying to squeeze the foot of Cinderella's stepsister into Cinderella's glass slipper—an enterprise equally painful and fruitless.<sup>220</sup>

Likewise, Professor Alan Palmiter argues that corporate law should revive a “duty of obedience” to recognize that “the duties of care and loyalty are incomplete” and that “[c]orporate actions that violate legal norms, even when those actions are diligent and selfless, are inconsistent with fundamental expectations of corporate conduct.”<sup>221</sup> Each of these arguments recognizes that the statutory requirement of lawful conduct is unlike the fiduciary duties of care and loyalty, which directly serve the shareholders' interests. Yet, both scholars still strive to preserve fiduciary duty as a means of achieving the goal of lawful conduct.

An important point that these criticisms do not highlight is that the fiduciary duty of good faith does not inquire into the potential social harm or value of specific acts of corporate disobedience. The duty requires fidelity to the law without evaluation of situations in which this may be of more or less importance to the public interest. To the extent that social harm is the relevant concern, the argument for cabining the duty of good faith, and its obligation to obey the law, within the duty of loyalty should be particularly controversial in situations in which corporate disobedience is rooted in innovation or changing social norms.

Furthermore, to the extent that existing case law suggests that a knowing violation of law is an automatic breach of the duty of loyalty,<sup>222</sup> it may lead to unfair results in some circumstances. Such a

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220. *Id.* at 38; *see also* Bainbridge et al., *supra* note 29, at 594, 604 (highlighting other issues raised by the good faith doctrine such as whether a de minimis exception should be recognized and how to craft appropriate remedies when there are no ill-gotten gains for the fiduciary to disgorge).

221. Palmiter, *supra* note 43, at 458; *id.* at 460 (“The duty of obedience served mostly as a natural corollary to the ultra vires doctrine. Just as the corporation was prevented from acting beyond its powers, corporate actors were obligated not to perpetrate such actions—and could be held liable if they did.”).

222. Bainbridge et al., *supra* note 29, at 604 (“As for the concept of good faith, the extent to which it exposes directors to new sources of liability remains unresolved. Because categorizing conduct as bad faith seemingly results in per se liability, unconstrained by questions of causation, which is nonexculpable under section 102(b)(7), this uncertainty is quite troubling.”).

policy of automatic breach could usefully give directors and officers a basis to refuse to engage in disobedience and it could deter some misconduct, but it is also concerning to the extent that it functionally provides shareholders with an insurance policy. Shareholders would gain from corporate disobedience when the law goes unenforced or is changed in the corporation's favor and leads to corporate profit, and yet shareholders could sue directors and officers for breach of fiduciary duty when it turns out that breaking the law did not pay off for the corporation.<sup>223</sup>

A recent case in the Delaware Court of Chancery provides an example. In *Kandell v. Niv*,<sup>224</sup> the court excused demand and allowed a derivative complaint to proceed where the plaintiff-shareholder alleged that the directors pursued a business model premised on violating a federal regulation.<sup>225</sup> The corporation, a foreign-exchange broker, publicly disclosed its business practice of limiting clients' trading losses, which the plaintiff recognized "increase[ed] profits" but contravened a rule promulgated by the Commodity Futures Trading Commission and eventually led to large corporate losses when a "flash crash" unexpectedly occurred.<sup>226</sup> To be sure, the state does not "charter lawbreakers," as the court explained,<sup>227</sup> but it nonetheless seems odd to countenance an internal settling up in favor of the corporation and its shareholders when the directors' attempts to benefit them fail.<sup>228</sup>

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223. One scholar has raised this concern in the context of the "legalized" marijuana industry. See Scheuer, *supra* note 22, at 543 (arguing for an exception for the marijuana industry that would make violation of the Controlled Substances Act not a violation of the law for purposes of state corporate law: "It would seem ridiculous to allow an equity holder to sue their manager for violating the law when the equity holder invested for that very purpose.").

224. *Kandell v. Niv*, C.A. No. 11812-VCG, 2017 WL 4334149 (Del. Ch. Sept. 29, 2017).

225. *Id.* at \*5, \*18 ("I pause to emphasize that this case presents a highly unusual set of facts: a Delaware corporation with a business model allegedly reliant on a clear violation of a federal regulation; a situation of which I can reasonably infer the Board was aware.").

226. *Id.* at \*1.

227. *Id.* at \*16.

228. See Palmiter, *supra* note 43, at 476 ("Just as individuals . . . have (or should have) the freedom to make cost-benefit choices on whether to comply with legal norms, the corporation should also have some latitude. Thus, while noncompliance might result in penalties against the corporation . . . such an outcome should not necessarily demand an internal corporate settling up."); Ryan, *supra* note 50, at 424 (noting the potential windfall for plaintiffs' attorneys); Stephen Bainbridge, *Does an Intentional Violation of Law = Bad Faith?*, PROFESSOR BAINBRIDGE (June 8, 2006), <http://www.professorbainbridge.com/professorbainbridgecom/2006/06/does-an-intentional-violation-of-law-bad-faith.html> [https://perma.cc/7X5G-D2HC] ("Allowing shareholders to sue over a decision made with the intent of maximizing corporate profits is nothing less than double-dipping, even if the decision proves misguided.").

Moreover, it is worth observing just how poor a fit fiduciary duties are for policing corporate disobedience. Corporate directors and officers owe fiduciary duties to “the corporation and its shareholders”<sup>229</sup>—not to the government or society writ large. In the development of corporate law, legislative drafters and courts have unsurprisingly supported basic principles of public policy and commonly accepted notions of general welfare by limiting corporations to lawful conduct. But this does not mean that fiduciary duties are an effective mechanism for achieving those goals; rather, the fiduciary duty of good faith was simply the corporate governance tool that was readily available.<sup>230</sup> As examples in Part II illustrate, corporate disobedience may violate the law, but that does not necessarily mean it hurts the corporation’s shareholders or even its stakeholders, and it is possible that in some instances the disobedient activity could provide some other social benefit.

And, quite predictably, shareholders are imperfect enforcers of society’s interests through the fiduciary duty of good faith.<sup>231</sup> As Chief Justice Strine has explained: “Under America’s leading corporation law, only one constituency can sue to enforce the legal duties owed by directors and managers . . . . These powers translate into purpose because those who run corporations owe their continued employment . . . to the only constituency the corporate law establishes—

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229. See, e.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988) (holding that under well-established Delaware law, “directors owe fiduciary duties of care and loyalty to the corporation and its shareholders” (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986))); see also *Gantler v. Stephens*, 965 A.2d 695, 709 (2009) (“[T]he fiduciary duties of officers are the same as those of directors.”).

230. Another potential tool, “the corporate death penalty,” is the rarely used power of the state attorney general to revoke a corporate charter or to enjoin a corporation from the transaction of unauthorized business. See DEL. CODE ANN. tit. 8, § 124(3) (2016) (providing that a corporate “lack of capacity or power may be asserted: . . . (3) In a proceeding by the Attorney General to dissolve the corporation, or to enjoin the corporation from the transaction of unauthorized business”); Greenfield, *supra* note 28, at 1359–60 (“It will not be in the state’s interest to use this remedy very often.”).

231. Scholars have similarly observed that corporate compliance regimes originate from the government rather than from an internal corporate constituency such as shareholders. See Griffith, *supra* note 101, at 2078–79 (“The impetus for compliance does not come from a traditional corporate constituency . . . [but] from the government . . . . The contemporary compliance function subverts the notion that corporate governance arrangements both are and ought to be the product of a bargain between shareholders and managers.”); Hechler Baer, *supra* note 101, at 954–55 (challenging “the notion that corporate compliance regulation is an example of [collaborative] New Governance” and showing “[t]o the contrary, it is at best an illusory delegation of responsibility whereby the government commands firms *ex ante* to implement ‘effective’ compliance programs”).

stockholders.”<sup>232</sup> Despite widespread corporate illegality, there are few modern cases in which shareholders have successfully held directors liable for breaking the law.<sup>233</sup> In addition to the fact that violating the law may benefit rather than harm the corporation and its shareholders, it may be difficult for shareholders to monitor corporate disobedience.<sup>234</sup> A suit for breach of fiduciary duty entails the usual obstacles of shareholder derivative litigation, such as showing demand futility and potentially facing a motion to dismiss from a special litigation committee.<sup>235</sup> The difficulty of proving an intentional violation of law might also discourage plaintiffs’ attorneys from bringing cases on behalf of shareholders. In many instances, intent and the illegality of the corporation’s actions might be contestable.

One final observation regarding fiduciary duties: The rarity of shareholder enforcement of the requirement of lawful conduct raises concerns, yet it has the interesting effect of leaving play in the joints for the kinds of corporate disobedience this Article examines. This opens the door for corporate misconduct that causes social harm, but it also presents entrepreneurial opportunities, gives businesses latitude to assert rights in opposition to law, and provides flexibility for society to

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232. Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. OF ECON. POL’Y 176, 178–79 (2017); *id.* at 178 (“As with the constitution of a human polity, the core insight into who is to be served as an end can be found within the terms of authorizing corporate statute itself and who it empowers and who it does not.”); *see also* Strine, Jr., *supra* note 209, at 1177 (“The boards of these corporations did not view themselves as having any national loyalties or loyalties to other constituencies, they viewed themselves as elected officials in the republic of equity capital.”).

233. Beveridge, *supra* note 60, at 732 (“[T]here is no such thing as a corporation . . . in compliance with law; rather, there are only corporations (and businesses) out of compliance with law to varying degrees. Despite that fact, there are no modern cases holding directors liable to shareholders for breaking the law.”); *see also* GREENFIELD, *supra* note 83, at 75 (“[T]here is not a single, modern case that holds directors liable to shareholders just because the directors or the corporation broke the law.”); John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1174 (1977) (noting “[t]he absence of a modern case holding defendants strictly liable for intentional illegality”); Palmiter, *supra* note 43, at 460 (“More significantly, no Delaware court (the font of modern corporate law) has ever invoked a ‘duty of obedience’ in the for-profit corporation.”).

234. *See* DAVID A. WESTBROOK, BETWEEN CITIZEN AND STATE: AN INTRODUCTION TO THE CORPORATION 63 (2007) (“As passive and distant owners of the corporation, shareholders have little ability to monitor how their business is being conducted . . . . [They] have little opportunity to learn of mismanagement . . . .”).

235. *See* RALPH C. FERRARA, SHAREHOLDER DERIVATIVE LITIGATION: BESIEGING THE BOARD §§ 4.01, 5.01, 7.01 (2017); *see also* WESTBROOK, *supra* note 234, at 88 (“Doctrines that initially appear to provide stout protection of shareholder interests are usually something less.”).



absorb transformative cycles of creative destruction.<sup>236</sup> The upshot is that internal corporate governance cannot be counted on to control corporate disobedience, and other areas of law and other enforcers are left to respond.

### C. Considerations for Evaluating Corporate Disobedience

Because corporate law itself does not serve as an effective constraint on corporate lawbreaking, regulators, legislators, enforcement officials, and jurists are regularly called upon to make decisions about corporations engaging in forms of disobedience. This final section thus aims to highlight several features of corporate disobedience that might bear on its normative assessment. Existing literature on the cost-benefit approach to lawbreaking distinguishes between criminal and civil law, and fiduciary duty doctrine distinguishes between intentional and unintentional violations of law.<sup>237</sup> Bringing together the full range of corporate disobedience helps reveal and frame additional relevant considerations for future debate.<sup>238</sup>

1. *Proactive vs. reactive.* The first consideration is whether a corporation is proactively seeking clarification or change in the law, or is instead simply responding to enforcement action. As discussed in Part III.A, corporate law itself requires lawful conduct, which implicitly expresses a preference that corporations use established and lawful democratic processes to challenge the law. Even if a corporation were to express disdain for the law or state a refusal to comply, if it were to first proactively seek clarification through a declaratory judgment, advisory opinion, or other guidance without incurring a legal violation, such an action would be consistent with its state-granted corporate charter.

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236. See Walter Isaacson, *How Uber and Airbnb Became Poster Children for the Disruption Economy*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/books/review/wild-ride-adam-lashinsky-uber-airbnb.html> [<https://perma.cc/Y85Q-DKLW>] (“[S]ocieties must find ways to absorb these economic transformations, because it is futile to resist them. Peer-to-peer technology [is] disruptive . . . . But it has an inexorable tendency to . . . reinforce[e] the most basic rule of entrepreneurship . . . to make something that people really want.”).

237. See *supra* Part I.

238. See JOHN RAWLS, A THEORY OF JUSTICE 319–20 (2d ed. 1999) (“Precise principles that straightaway decide actual cases are clearly out of the question.”).

Corporations are legal persons under the law and have the right to sue and be sued.<sup>239</sup> They may, for example, file suit for a declaratory judgment to receive a ruling on whether a planned course of action would be lawful.<sup>240</sup> In addition, corporations may lawfully pursue legislative change at the local, state, or federal level.<sup>241</sup> Of course, political spending and the lobbying process, particularly with regard to corporations, raise a host of concerns such as rent-seeking and regulatory capture, and are subject to regulation.<sup>242</sup> The point here is simply to contrast situations in which corporations pursue legal change within the bounds of the law with situations in which corporations are caught acting in violation of the law. For some companies, lawfully pursuing legal change is too slow for their desires or needs, and other companies may plainly be lawbreakers that are only hoping to evade the law rather than to clarify or change it; either of these scenarios may indicate that the activity is socially harmful.<sup>243</sup>

2. *Open vs. secret.* Another consideration is whether the corporation is openly or clandestinely violating a law. Corporations by their nature may be incapable of engaging in true civil disobedience,

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239. 19 AM. JUR. 2D *Corporations* § 1850 (2017) (“The power of a corporation to sue is a necessary incident to its creation, existence, protection, and to the enforcement of its legitimate rights and the redress of wrongs suffered by it . . . . The right of a corporation to sue is both constitutionally and statutorily mandated.”).

240. One example is Hobby Lobby’s suit for a declaratory judgment regarding the applicability of the Affordable Care Act’s contraception requirement. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764–65 (2014). This does not suggest that Hobby Lobby’s arguments on the merits of its claims were correct, but the means by which it pursued clarification or legal change is illustrative.

241. See Williams, *supra* note 82, at 1338 (“In a democracy, if the corporation disagrees with the legislature, there are ways to seek to change that determination short of economic vigilantism.”).

242. See generally PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss, eds. 2013) (discussing regulatory capture); Hasen, *supra* note 91, at 191 (discussing lobbying regulations and rent-seeking); Pollman & Barry, *supra* note 10, at 442–47 (discussing concerns about regulatory entrepreneurship); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (identifying and theorizing regulatory capture).

243. Corporations are not generally considered to lack the political power to challenge undesirable legislation, and in fact the more common concern is that corporations wield too much political influence. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1447–49 (2016) (discussing the “popular sentiment that ‘the system is rigged’ to work for wealthy and corporate interests” (quoting Elizabeth Warren, Speech to the Democratic National Convention (Sept. 5, 2012), [http://www.huffingtonpost.com/2012/09/05/elizabeth-warren-speech-text\\_n\\_1850597.html](http://www.huffingtonpost.com/2012/09/05/elizabeth-warren-speech-text_n_1850597.html) [https://perma.cc/QM97-SMXX])). See generally Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527 (2015) (discussing the powerlessness doctrine and group power).

but the concept nonetheless reflects that an open violation can hold special meaning in our society. Notwithstanding a great variety of definitions, a key element of nearly all characterizations of civil disobedience is the openness of the violation—whether it is meant to make a public statement.<sup>244</sup>

For corporations, some open or easily discoverable violations of the law may be nothing more than egregious lawbreaking serving no purpose other than strategic advantage,<sup>245</sup> but sometimes the distinction between open and covert action is probative of whether the activity aims for innovation or change. Examples of open violations include businesses that are taking advantage of state legalizations of marijuana while it remains illegal under federal law—and the nineteenth century anti-prohibitionist liquor dealers, brewers, and hotelkeepers that openly violated the law and organized in associations to preserve their legal claims and push for change.<sup>246</sup>

Open violations have informational value. For example, when multiple actors openly violate the same law, or when a company engaged in an open violation receives significant public support, it suggests that the law at issue may deserve reexamination because it has fallen out of step with the times in terms of technology or social practice. The law or regulation may be prohibitively expensive or

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244. See RAWLS, *supra* note 238, at 320 (defining civil disobedience “as a public, nonviolent, conscientious yet political act contrary in the law or policies of the government”); Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 661 (1961) (“Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government.”); Bulman-Pozen & Pozen, *supra* note 25, at 810–11 (“On most accounts, civil disobedience consists of an open violation of law and a willingness to submit to punishment.”); Markovits, *supra* note 25, at 1898 n.2 (discussing civil disobedience as “disobedience guided by political principles and addressed to the public generally”); cf. THOREAU, *supra* note 36 (“If the injustice . . . is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law.”). Philosophers have discussed justifications for acts of private conscience under other terms, such as conscientious evasion or refusal. See RAWLS, *supra* note 238, at 323–26; Ostas, *supra* note 27, at 294.

245. For example, in *Kandell v. Niv*, discussed *supra* notes 225–28, the brokerage corporation’s advertised policy to limit client foreign-exchange losses clearly violated a federal prohibition and attracted an enforcement action from the CFTC. *Kandell v. Niv*, C.A. No. 11812-VCG, 2017 WL 4334149, at \*4 (Del. Ch. Sept. 29, 2017). The company was not pursuing a change to this law or claiming moral opposition; it was seemingly operating with the hope of avoiding detection or enforcement, despite the brazenness of the violation.

246. See *supra* Part II.B. By contrast, Uber’s covert use of “Greyball,” a software tool it developed to evade sting operations by law enforcement, belied the company’s claims that it was a technology company to which taxi and employee regulations did not apply. See Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), [https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html?\\_r=1](https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html?_r=1) [<https://perma.cc/FS3M-6XJR>] (discussing Uber’s use of Greyball).

complex for businesses to comply with and the actual costs may not have been fully understood by lawmakers at the time it was enacted. Regulators and lawmakers might glean a variety of other useful information from openly communicated corporate disobedience.<sup>247</sup> Operating in the light instead of hiding in the shadows, especially while acting in concert with political and social movements, suggests a potential willingness to accept consequences and test the possibility of legal change.

To be sure, corporations cannot, however, submit to punishment in the same way that individuals can and thus an open violation does not justify or transform the conduct into legal activity or civil disobedience.<sup>248</sup> Corporations cannot be imprisoned. As the British Lord Chancellor Edward Thurlow famously remarked in the eighteenth century, corporations have no “conscience, . . . no soul to be damned, and no body to be kicked.”<sup>249</sup> What corporations can do is face prosecution for the actions of their agents and accept resulting penalties, including fines, revocation of business licenses, and even forced dissolution.<sup>250</sup> The individuals involved in wrongdoing on behalf of the corporation may or may not feel the impact of any such consequences.<sup>251</sup> Thus, corporate consequences are not necessarily meaningless to those involved, but they are of a different scope and nature. This difference suggests that direct parallels that scholars and commentators have drawn to civil disobedience are largely inapt, and there are significant limits to according value to the openness of violations.<sup>252</sup> In addition, to the extent that open violations are

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247. See Beveridge, *supra* note 60, at 777 (“The United States is a nation with a superabundance of laws: laws that have been forgotten, laws that are rarely or selectively enforced, laws that no one understands, and laws that are regarded by everyone as more of a nuisance than a moral command.”).

248. See THOREAU, *supra* note 36 (“Under a government which imprisons any unjustly, the true place for a just man is also a prison.”); see also RAWLS, *supra* note 238, at 366–67 (“[F]idelity to law is expressed . . . by the willingness to accept the legal consequences of one’s conduct.”).

249. John C. Coffee, “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

250. GARRETT, *supra* note 100, at 4.

251. See, e.g., Theodore L. Banks & Christian E. Liipfert, *General Principles Behind A Compliance Program: The Case for Compliance* § 1.03, in CORPORATE LEGAL COMPLIANCE HANDBOOK (Theodore L. Banks & Frederick Z. Banks eds., 2d ed. Supp. II 2018) (discussing the duties and potential liability of directors, officers, and employees); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 824–33 (2014) (examining the treatment of individuals who commit crime within the corporate domain).

252. See generally Ostas, *supra* note 27, at 312 (“Businesspeople do not abandon their conscience simply because they are in a business setting. If the choice to intentionally violate a

numerous or become commonplace, concerns may arise about social costs, attitudes toward compliance, and erosion of the rule of law.<sup>253</sup>

3. *For-profit vs. nonprofit.* For some observers, the for-profit nature of business corporations may be the most significant consideration in evaluating disobedience. The concern is two-fold about motives and the lack of conscience.

Many scholars have espoused the view that self-interest in profit-making nullifies other justifications for illegal activity. For example, Professor Daniel Markovits has argued that because political disobedience can be democracy enhancing, legal violations that occur as part of political disobedience can be justifiable.<sup>254</sup> However, he defines such activity as part of political protest, “not guided by greed or self-dealing but by principle.”<sup>255</sup> Similarly, Professor Cynthia Williams distinguishes the motivation for civil disobedience from “a calculation of private economic benefits to a particular corporation, the purpose of which is self-interested profit-making.”<sup>256</sup> And moral and political philosopher John Rawls noted, “it goes without saying that civil disobedience cannot be grounded solely on group or self-interest.”<sup>257</sup> According to these views, the profit motive is inconsistent with a righteous approach, whether justified by reference to democracy, justice, or some other value.

Along similar lines, for-profit corporations do not have a conscience and thus are not constrained by a moral sense, nor are they

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business regulation is truly a matter of moral principle rather than convenience, like all forms of civil disobedience, it is to be applauded, not condemned.”). Controversial author and fellow at the American Enterprise Institute, Charles Murray, has gone so far as to advocate for citizens, including businesses, to engage in “civil disobedience” by “ignor[ing] large portions of the laws and regulations with which we are burdened.” CHARLES MURRAY, *BY THE PEOPLE: REBUILDING LIBERTY WITHOUT PERMISSION* 129 (2015). He also suggests a private fund to provide legal assistance for those engaged in such disobedience and to raise public awareness and pressure politicians and regulators to change policies. *Id.* at 144–45. For a critique of Murray’s work, see Thomas O. McGarity, *Corporate Crime Is Not ‘Civil Disobedience,’* ACS BLOG (May 22, 2015), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=9F2FD56D-C8EA-BC01-A131802EBC3EBE4B> [<https://perma.cc/H3NS-AS76>] (“Murray’s idea is a gross perversion of the concept of civil disobedience as the nonviolent violation of a law that the violator deems to be unjust and the willingness to suffer the legal consequences to demonstrate the law’s injustice.”).

253. See PEÑALVER & KATYAL, *supra* note 105, at 146 (discussing concerns that property disobedience creates “uneven and potentially unfair effects” on third parties); WALZER, *supra* note 36, at 17 n.18 (discussing concerns that disobedience undermines the legal system).

254. Markovits, *supra* note 25, at 1902.

255. *Id.* at 1898.

256. Williams, *supra* note 82, at 1341–42.

257. RAWLS, *supra* note 238, at 321.

the equivalent of the human actors with conscience that organize, manage, work for, or own a share in them.<sup>258</sup> This problematizes assertions that business corporations are legitimate actors for claiming moral stances against the law.<sup>259</sup>

For example, Professor Jill Fisch explains that a corporation “lacks an authoritative source of moral reasoning, leaving it little alternative but to rely on legal rules as limits on actions.”<sup>260</sup> The corporation is a separate legal entity that “cannot readily adopt the moral perspective of its individual constituents.”<sup>261</sup> Shareholders “do not have the legal authority to make operational decisions”; fiduciary duties constrain officers and directors from “impos[ing] their personal moral views on the corporation”; and, at any rate, “there is little reason to believe their ethical views mirror those of society.”<sup>262</sup> Moreover, “various corporate stakeholders may have differing moral perspectives.”<sup>263</sup> Professor James Nelson has similarly highlighted that “the norms that accompany various corporate roles either encourage or demand a detached form of affiliation,” such that individuals do not typically form moral connections with business corporations.<sup>264</sup>

Even those who do not see the profit motive as disqualifying for asserting moral claims or mitigating culpability might still believe that it deserves some conceptual weight and that nonprofit corporations should get more benefit of the doubt. Corporate disobedience engaged in for profit may warrant particularly searching scrutiny of whether the activity produces harmful externalities or serves the values of a democratic society and the public interest.

4. *Public vs. private.* Although the line between public and private corporations has become increasingly blurred in recent years,<sup>265</sup> this

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258. See, e.g., Kent Greenfield, *Corporate Ethics in a Devilish System*, 3 J. BUS. & TECH. L. 427, 427 (2008) (“[A]s artificial entities, corporations are not subject to the constraints of conscience and social norm that limit the behavior of natural persons.”).

259. For a discussion of limits based on organizational and associational standing, see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 143–47 (2014).

260. Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1594 (2006).

261. *Id.* at 1603.

262. *Id.*

263. *Id.*

264. Nelson, *supra* note 92, at 1609.

265. See generally Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445 (2017) (discussing the public-private divide);

distinction is potentially relevant in evaluating corporate disobedience for a few reasons. Publicness may indicate that a corporation's activity is particularly unlikely to represent the social or political goals or other ideals of its shareholders or any identifiable persons associating for any purpose besides personal profit.<sup>266</sup> Thus, public corporations' claims of morality or conscience may be particularly deserving of skepticism and scrutiny. These corporations are not associational in terms of fitting a paradigm of a voluntary association or community in which individuals feel a sense of connection.<sup>267</sup> This is not to say that private corporations do represent such associational or expressive associations, rather only that public corporations most certainly do not.

Public corporations represent significant economic power and are typically subject to more oversight because of additional regulations and disclosures. They may be more likely to face consequences for illegal activity and incur consequences of larger magnitude. This might, in some instances, indicate a stronger likelihood that disobedience would provide social benefit, as corporations may not otherwise be willing to take on the risks of disobedient activity—particularly if it is done in the open.<sup>268</sup> Finally, the general public can play a useful role as an additional regulatory force, pushing back on socially harmful or repugnant activity, and whether this occurs and the type of response can convey relevant information about the nature of the disobedience. To the extent that corporations operate in a public sphere, the possibility exists that employees, the media, politicians, and everyday people can meaningfully weigh in and have an incentive to do so.<sup>269</sup>

In sum, as government officials and regulators around the world respond to corporate disobedience in dynamic contexts, several characteristics may be useful in helping to guide preliminary thinking

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Donald C. Langevoort & Robert B. Thompson, "Publicness" in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337 (2013) (same).

266. See Blair & Pollman, *supra* note 26, at 1733 (discussing how public corporations "cannot be regarded as representing any particular natural person or group of natural persons" and have "organizational dynamics that cannot easily be tied to identifiable groups of people").

267. Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 672–73 (2016).

268. Recall the Google general counsel's statement, discussed above, that the company's rule of thumb has been that if its products create value for people and society, then courts will usually come out on its side. See Driscoll, *supra* note 130.

269. The public sphere is arguably broader than the definition provided by securities laws. See Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 137–38 (2011) (arguing that defining "public corporations as those that are traded in markets" is "impoverished" and that "the government and the media have increasing influence over public corporations and their governance").

about the nature of disobedience, its potential value, and how or when it may merit response. These characteristics include whether a corporation is proactively seeking clarification or change in the law or is simply responding to enforcement action, whether its conduct is carried out in the open or in secret, whether the corporation is for-profit or nonprofit, and whether it is public or private. These characteristics are not exclusive, nor do they specify a particular result or relieve any actor of liability. They instead reflect the beginning of a conceptual framework that could help guide more nuanced evaluation and understanding of the wide range of unlawful corporate activity.

### CONCLUSION

Corporate disobedience paradoxically undermines the integrity of the legal system while at the same time plays an important role in shaping it. This Article seeks to bring attention to the broad spectrum of corporate disobedience, including instances in which corporations challenge, break, or subvert the law in connection with innovation and entrepreneurship, battles of federalism, moral stances, and general business lobbying.

Observing this range of disobedient activity helps illuminate several aspects of corporate law that have long been the subject of debate. Despite the apparent possibility of constraining corporate lawbreaking through corporate law itself, the historic and existing mechanisms that have attempted this feat have largely failed. The above discussion highlights that while society's interest in obedience to the law is embedded in corporate statutes, the right to enforce this dictate is held by shareholders who may not be well situated to monitor this activity and have a conflicting interest in maximizing the profitability and financial performance of the corporations in which they are invested.

There is no easy way within corporate law to remedy this structural weakness because all corporate participants that are associated with the internal governance of the corporation by definition have a stake in the corporation and are not well positioned to represent the public interest at large. Exhortations that shareholders are also citizens—and that corporations should observe social and moral norms of legal obedience—do little to make such aims a reality. Furthermore, fiduciary duty doctrine itself has not dealt with concerns about the fairness and logical coherence of construing intentional violations of law as automatic breaches of the fiduciary duty of loyalty



without exception. Shareholders who stand to profit from corporate lawbreaking can also call on corporate directors and officers to pay when disobedience turns out not to benefit the corporation.

Moreover, the relationship between business and law is dynamic, not static. The underlying laws at issue are external to corporate law. As the stories of Part II illustrate, there will always be companies that push the regulatory envelope or even operate in violation of law. From the Bank of the United States in Alexander Hamilton's time to today's "legalized" marijuana businesses, the complex framework of laws in our federalist system gives rise to opportunities for strategic advantage, claims of moral conscience, and unresolved tensions in the law. These various acts of corporate disobedience can cause great social harm and can spur valuable clarifications and changes to the law and other social good. Understanding the dynamism of the corporate disobedience spectrum provides rich areas for future work on how to respond to corporate challenges to the status quo that involve disobedience and whether there are more and less legitimate ways of changing and innovating around the law.