The Purpose of Corporate Purpose Statements: A Response to "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements" by Paul Davies

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University of Oxford and ECGI

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Abstract

In his critique of the legal aspects of my book Prosperity: Better Business Makes the Greater Good, Paul Davies raises five objections. These are: (a) the inclusion of social or communal elements in mandatory business purpose statements; (b) the assertion that the envisaged adoption of purpose statements is "embarrassingly simple" because shareholders or directors accountable to them will not adopt them; (c) the use of the law to shield directors from adverse reactions from their shareholders; (d) the entity and managerial conception of the company; and (e) regulatory or court approval of corporate purposes. Davies' analysis proceeds by considering two worlds where the Friedman Doctrine prevails and one where it does not, and companies have objectives beyond financial profit. In the former, corporate purpose statements will be ineffective or infeasible and, in the latter, they will be unnecessary or undesirable. In both cases they will not work. Objections (c), (d) and (e) are invalid because they are exactly contrary to what Prosperity is advocating – a strengthening not weakening of board accountability to shareholders; a proprietary not entity view in which the objectives of the firm are aligned with, not divergent from, those of its shareholders; and freedom of choice and plurality of purposes unconstrained by regulatory, court or government intervention. While Davies recognizes these points and the multiplicity of purposes companies can have, he erroneously believes that Prosperity seeks to promote communal or social objectives. It is this which he sees as lying behind legally binding purpose statements and therefore his objections (a) and (b). That is not the case at all. The sole objective behind legally binding purpose statements is to allow companies to make their statements credible. It is enabling not prescriptive or restrictive. It applies equally to private as well as communal or social objectives and it is potentially at least as significant in being value-enhancing for shareholders as it is for other parties, including customers, employees, and communities. Furthermore, Davies himself sets out how companies can make their purpose statements legally binding in an "embarrassingly simple" way without requiring any change to company law. Prosperity suggests that irrespective of the private or public nature of a corporate purpose, the ability to commit to it has immense potential benefit for all those affected by the firm, including its investors. While there is therefore no substance to the concerns and criticisms that Davies raises, there is a substantial issue that he does not address, which goes beyond the remit of Prosperity. This concerns the ability of companies to inflict negative detriments on others. It undermines the functioning of markets and the feasibility of companies to adopt positively beneficial purposes. It is this that may explain the limited extent to which large companies have committed to positive purposes to date, and it may provide a justification for the employment of private law and ordering as well as public law and regulation, and director duties as well as corporate obligations, in restraining corporate conduct.

Keywords: Purpose, director duties, entity theory, accountability, commitment, plurality

JEL Classifications: D21, G3, K2, L2

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The Purpose of Corporate Purpose Statements: A Response to "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements" by Paul Davies[1]

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[1] Paul Davies (2022), "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements", ECGI Working Paper Series in Law, No.666/2022.

Abstract

In his critique of the legal aspects of my book *Prosperity: Better Business Makes the Greater Good,* Paul Davies raises five objections. These are: (a) the inclusion of social or communal elements in mandatory business purpose statements; (b) the assertion that the envisaged adoption of purpose statements is "embarrassingly simple" because shareholders or directors accountable to them will not adopt them; (c) the use of the law to shield directors from adverse reactions from their shareholders; (d) the entity and managerial conception of the company; and (e) regulatory or court approval of corporate purposes.

Davies' analysis proceeds by considering two worlds where the Friedman Doctrine prevails and one where it does not, and companies have objectives beyond financial profit. In the former, corporate purpose statements will be ineffective or infeasible and, in the latter, they will be unnecessary or undesirable. In both cases they will not work.

Objections (c), (d) and (e) are invalid because they are exactly contrary to what *Prosperity* is advocating – a strengthening not weakening of board accountability to shareholders; a proprietary not entity view in which the objectives of the firm are aligned with, not divergent from, those of its shareholders; and freedom of choice and plurality of purposes unconstrained by regulatory, court or government intervention.

While Davies recognizes these points and the multiplicity of purposes companies can have, he erroneously believes that *Prosperity* seeks to promote communal or social objectives. It is this which he sees as lying behind legally binding purpose statements and therefore his objections (a) and (b).

That is not the case at all. The sole objective behind legally binding purpose statements is to allow companies to make their statements credible. It is enabling not prescriptive or restrictive. It applies equally to private as well as communal or social objectives and it is potentially at least as significant in being value-enhancing for shareholders as it is for other parties, including customers, employees, and communities.

Furthermore, Davies himself sets out how companies can make their purpose statements legally binding in an "embarrassingly simple" way without requiring any change to company law. *Prosperity* suggests that irrespective of the private or public nature of a corporate purpose, the ability to commit to it has immense potential benefit for all those affected by the firm, including its investors.

While there is therefore no substance to the concerns and criticisms that Davies raises, there is a substantial issue that he does not address, which goes beyond the remit of *Prosperity*. This concerns the ability of companies to inflict negative detriments on others. It undermines the functioning of markets and the feasibility of companies to adopt positively beneficial purposes.

It is this that may explain the limited extent to which large companies have committed to positive purposes to date, and it may provide a justification for the employment of private law and ordering as well as public law and regulation, and director duties as well as corporate obligations, in restraining corporate conduct.

Key words: Purpose, director duties, entity theory, accountability, commitment, plurality
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1. Introduction

In his article, "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements",[2] Paul Davies critiques my book, *Prosperity: Better Business Makes the Greater Good.*[3] He examines the legal foundations of my proposals regarding the role that law should play in promoting the notion of corporate purpose I advocate in the book. He finds them wanting in several respects and not practically relevant to the task at hand.

Davies' critique is highly insightful, and I am very grateful to him for paying such close attention to the legal aspects of the book. I am particularly grateful because I agree with and whole heartedly support much of what he says in his article. Though he suggests otherwise, his arguments reinforce and strengthen rather than detract from or weaken the case presented in *Prosperity*. Where Davies' article in some respects falls short is in failing to identify the most substantial issues and problems that the book leaves unresolved.

Davies' article focuses on the determination and adoption of corporate purpose. He argues that only purpose statements which shareholders wish to and can determine will be adopted. Anything else will be infeasible in not being supported by shareholders or unnecessary in being implementable by them in any event.

I whole heartedly agree with this. However, *Prosperity* and Davies' critique of it are like ships passing in the night. While Davies is focused on the front end of determination and adoption of purpose, that is not something of concern to *Prosperity*, which instead concentrates on the back end of commitment to and implementation of purpose. It is not concerned about the front end because it is not seeking to determine and adopt anything other than purposes which are supported by shareholders, namely *profitable* solutions for the problems of people and planet. They can be equally self-regarding as communal or social.

That is not to say that the issue which Davies raises is without importance. It is very much so, but not in the context of *Prosperity* which is not seeking to drive a wedge between corporations and their shareholders. It is most relevant to issues concerned with avoidance of detriment rather than delivery of benefits, which, while not the subject of *Prosperity,* is central to my forthcoming book, *Capitalism and Crises: How to Fix Them*.[4]

I will begin in Section 2 by summarizing Davies' argument and then in Section 3 give my opinion on how his assertions relate to what I say in *Prosperity.* In Section 4, I discuss the role that corporate law should play in promoting corporate activity and what is required to give effect to this. Section 5 describes how *Prosperity*'s proposals can have transformative effects while leaving the existing nature and structure of the firm intact. Section 6 discusses the issues that the book does not address and what is required to take it forward from where it left off. Section 7 concludes.

2. The Purposeless of Mandatory Corporate Purpose Statements

Davies' concerns revolve around five areas. The first concern is what is perceived to be the fundamental objective of legal reform in *Prosperity*, namely that "the adoption of a stated

[2] Paul Davies (2022), "Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements", ECGI Working Paper Series in Law, No.666/2022.
[3] Colin Mayer (2018), *Prosperity: Better Business Makes the Greater Good*, Oxford: Oxford University Press.
[4] Colin Mayer (2024), *Capitalism and Crises: How to Fix Them,* Oxford: Oxford University Press.

purpose….be mandatory for (at least large) companies and that the chosen purpose….be required to contain a social or communal element (as these are defined in *Prosperity*)".[5]

The second concern Davies raises is that "shareholders or directors accountable to shareholders will not adopt purposes of the type envisaged by *Prosperity* without either substantial changes in corporate law beyond the mere adoption of a requirement to state a corporate purpose or a substantial alteration in the goals of investors from those the Friedman doctrine assumes (or some combination of the two)."[6] He attacks the claim I make in *Prosperity* that "corporate law should prioritize purpose. It should require companies to articulate their purposes, incorporate them in their articles of association, and above all demonstrate how they credibly commit to the delivery of purpose."[7]

Davies instead repeatedly makes assertions to the effect of "(t)he purpose statement requirement envisaged in Chapter 7 [of *Prosperity]* is not "embarrassingly simple" but in fact complicated, perhaps even "embarrassingly" complicated if the goal is its quick implementation. A one-section addition to the Companies Act requiring companies to state a purpose of the required type in their articles of association will not by itself "transform business at a stroke."[8] Instead, it will be argued, it will either be a failure or be rescued by some non-simple changes in corporate law or by a transformation of investors' goals."[9]

Third, Davies is concerned about the suggestion that the law be used "to shield the directors from any adverse reaction from the shareholders to the board's decision. It will be suggested that this strategy, if implemented, would be unlikely to be wholly effective in achieving its goals, would come with considerable costs and, in any case, would be unlikely to obtain legislative endorsement."[10]

He goes on to say that "the assumption underlying the purpose proposal appears to be that a requirement to state a purpose will unshackle the company from the shareholders, because it will in some undefined way override the governance rights of the shareholders."[11] "The main targets of such reforms would be to reduce the impact of at least five powers which shareholders normally possess: (a) to appoint and remove directors; (b) to instruct the board how to act; (c) to convene meetings of the company; (d) to transfer their shares when a tender offer is made to them; and (e) to set profit-related pay. The aim would have to be to go beyond the "zone of isolation" envisaged by Professors Kershaw and Schuster."[12]

Fourth, and related to this, Davies asserts that *Prosperity* "comes close to an entity theory of the company[:] … the dominant conception of the company which the book adopts appears to be a managerialist one; […] managers are somehow above the fray and are there disinterestedly to discharge the responsibility of implementing the purposes the company has adopted – or perhaps even to adopt it in the first place."[13]

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[5] Davies (2022), p. 38.
[6] Id., p.7.
[7] Mayer (2018), p. 23.
[8] Ibid.
[9] Davies (2022), p.7.
[10] Id., p..8.
[11] Id, p.19.
[12] Id. 21 citing David Kershaw and Edmund Schuster (2021), "The Purposive Transformation of Company Law" (2021) *American Journal of Comparative Law*, 69, 478.
[13] Davies (2022), pp. 9-10.

Fifth, Davies objects to the suggestion that there be "regulatory or court approval of the shareholders' choice of corporate purpose, i.e., corporate purpose ceases to be a matter of private ordering. This strategy blurs the boundary between the private and public sectors of the economy."[14]

Davies' analysis progresses in stages by considering two worlds. The first is a "Friedmanite world" where Milton Friedman's assertion about the social responsibility of business being limited to the pursuit of profit prevails. The second is a world where shareholders may have objectives beyond the pursuit of just profits – "a world of ESG investing. Investors might change their views about what constitutes the best way of "making money" (a relatively limited shift) or, more boldly, they might come to share *Prosperity's* views about the importance of communal and social goals for their investment strategies. In this world, investors evaluate the company's achievements along communal and social dimensions as well as along the financial one."[15]

Davies concludes that in the first world "any purpose statements which emerge in this world are not likely to constrain significantly the company's established modes of conducting its profit-making business. Profit-oriented shareholders will not favour purposes which impede their Friedmanite goal, whether those purposes are to be adopted by the shareholders (the normal rule for changes to the company's internal constitution) or by directors accountable to shareholders."[16] Attempts to impose purpose statements will suffer the same fate and demise of the object clauses and *ultra vires* conditions of early UK Companies Acts, the significance of which was steadily eroded by the adoption of progressively less meaningful statements by companies.[17]

In the second world, Davies concludes that "the implications for the reform of corporate law in this second world are very different from those in the first. Far (from) aiming at shielding the board from the shareholders or subjecting their choices to review, (this) strategy suggests that shareholder influence should be given full reign. Shareholders should be free to shape the broad contours of corporate strategy and behaviour and to remove directors who will not listen to shareholders' views on these matters."[18]

He continues: "shareholders who do not like broad purpose requirements and directors accountable to them will not implement them in a meaningful way and those shareholders who do favour them are not dependent on the presence of a purpose requirement."[19] In other words, in the first world, purpose statements and their embedding in corporate law are ineffective and infeasible; in the second world, they are unnecessary or undesirable in impeding shareholder engagement and stewardship. Either way they won't work.

3. Relevance of the "Davies Critique" to the *Prosperity* Assertions

I will begin by addressing the third, fourth and fifth concerns that *Prosperity* seeks to "shield the directors from any adverse reaction from the shareholders to the board's decision", "comes close to an entity theory of the company[,] […] a managerialist one", and there should be

[14] Id. p. 8.
[15] Ibid.
[16] Id. p.7.
[17] S. 8 of the UK Companies Act 1862.
[18] Davies (2022), p.9.
[19] Id, pp. 38-39.

"regulatory or court approval of the shareholders' choice of corporate purpose, i.e., corporate purpose ceases to be a matter of private ordering". All three assertions are precisely contrary to what the book sets out.

The book is not seeking to shield directors from shareholders; on the contrary it is seeking to strengthen accountability. Second, it is not an entity theory of the firm in a managerialist sense. It is one where the objective of the firm is precisely aligned with that of shareholders. Third, it is most certainly not seeking to impose regulatory or court or government approval on corporate purposes. It is seeking exactly the opposite – diversity and freedom of choice.

In fact, Davies acknowledges these points when he states that "the bulk of the book is devoted, correctly in my view, to the development of its positive goal"[20] of producing profitable solutions; the propositions in the book appear to flow from "the company's commitment to its stated purpose, not from a stakeholder framework of accountability";[21] and blurring "the boundary between the private and public sectors of the economy….. appears to run counter to the philosophy behind *Prosperity*."[22]

Davies continues by saying that "it appears that government/court control of the setting and implementation of corporate purposes would run against the philosophy underlying *Prosperity*. This is a book which leaves companies firmly in the private sector of the economy. It is not a book which promotes the pursuit of public purposes through state ownership or control – the traditional, if now somewhat tarnished, formula in the UK for safeguarding the public interest."[23]

The book is indeed about how to promote the interests of shareholders; it is not a stakeholder or managerialist theory; and it seeks to avoid limitations on corporate purpose and instead to promote plurality and multiplicity of purposes.

The problem with Davies' interpretation of *Prosperity* comes early in his article where he says: "In Chapter 7 [of *Prosperity]* purposes, and their coterminous commitments, are categorised into three types: self-regarding (the company is a main beneficiary of the commitment), communal (where the commitment relates to those who deal with the company but the company does not capture all the benefits of its commitment) and social (where benefits are conferred on those not in a contractual or analogous relationship with the company)." That is correct. But then he goes on to assert: "It is the communal and social purposes which are at the centre of the mandatory purpose rule." That is completely incorrect.

In fact, the Chapter makes clear that there are benefits of commitments to all three categories. In relation to the first category it states that: "Self-regarding commitment benefits the provider by giving the recipient sufficient assurance of its irreversibility to encourage them to do things and in particular make investments that otherwise they would be reluctant to undertake. For example, they encourage employees to make firm specific human capital investments in education and training that they cannot readily transfer to another corporation. They induce customers to make purchases from suppliers on whom they are then dependent for after-sales service. They are self-regarding in so far as they are reflected in the benefits, either priced or reciprocal, that the provider derives. In other words, they are consistent with, not divergent

[20] Id. p.4.
[21] Ibid.
[22] Id. p.8.
[23] Id. pp.18-19.

from profit maximization in improving the terms on which the corporation can trade by lowering its cost of employment, purchases, and capital and raising the prices it charges its customers."[24]

In other words, what is being put forward in the book is as applicable to companies who are seeking to profit maximize through conventional forms of private goods and services as it is to those that are seeking to profit from addressing communal and social problems. All of them are required by the definition of corporate purpose to be profitable and therefore shareholder value enhancing, and those that are self-regarding and purely profit maximizing are as valid as those that derive from communal and social problem solving.

The reason is straightforward. As *Prosperity* states: "commitments relate to those components of obligations that are not enforceable by contract. Some of them are promoted by an alignment of incentives between the recipient and provider and some by more general forms of well-being that the provider might derive. In some cases, they reflect broader principles for which there may not be a direct profit motive. Why are they needed? The significance of commitments derives from the fact that they are opportunity enhancing. In their absence the range of relations that can be sustained is constrained by those that are enforceable by contract or promoted by incentives. Most relations cannot be sustained in this way because they are dependent on the trustworthiness of the individuals and institutions involved and the trust that others have in them."[25]

The importance of this in relation to Davies' critique is that he is assuming something that simply is not the basis of the book or the justification for purpose statements. As Chapter 7 makes clear, the problem that the book is trying to address is how to make purpose statements credible commitments. It begins by describing several purpose statements that companies made prior to them becoming fashionable over the last few years. It suggests that they lack credibility as authentic, meaningful assertions of corporate objectives and that most people will be highly cynical about the significance that should be attached to them.

This has nothing to do with whether a company is seeking to solve a private, communal, or social problem. In all cases, there is credibility gap about the commitments it is making to its customers, employees, suppliers, distributors, communities, societies, environment, and investors. That affects the terms and conditions on which it can negotiate and engage with them. In seeking to solve the commitment problem, Davies is presuming that *Prosperity* is seeking overtly or covertly to impose a requirement on companies to promote communal and social objectives.

That is not the case, but it is this presumption that pervades Davies' entire discussion and is the basis of the first concern described in section 2 of this paper that "the chosen purpose should be required to contain a social or communal element". That is not at all what is intended. The role of law is in lending credibility to firm's commitments whatever they are in terms of promoting private or social benefits. It is enabling not restrictive and that is why so much emphasis is placed in the book on the enabling not prescriptive aspect of corporate law.[26] It is also the reason why the second concern that Davies makes that the solution is "embarrassingly complicated" not "embarrassingly simple" is also without foundation.

[24] Mayer (2018), p.152.
[25] Id. 153.
[26] Id. 157.

4. The Law and Purpose

Davies expresses surprise about the "light treatment of corporate law" in Chapter 7 of *Prosperity*, "surprising for one might think that a fundamental shift in the goals of large companies would require quite a lot in terms of supporting corporate law or corporate governance reform." It is surprising for Davies because of the fundamental shift and heavy lifting that he believes is required to achieve the goals of *Prosperity*, of imposing social goals on companies that are averse to adopting them.

It is, however, not surprising if the objective is precisely what is set out at the beginning of Chapter 7 of lending credibility to the purposes that companies themselves espouse.[27] Far from seeking to thrust unwelcome objectives on companies, what the chapter attempts to identify is ways in which the law might further corporations' own goals. The most interesting part of Davies' article comes right at the end when he turns to this question because the dichotomy between the Friedmanite and non-Friedmanite worlds, which forms the bulk of his article, is of little significance.

In a Friedmanite world corporations should stick to self-regarding objectives and use the power to commit to the extent to which it assists in achieving them. In a non-Friedmanite world, the commitments should relate to the problem-solving objectives which shareholders wish their companies to deliver in profitable ways. The power to commit should feature in both worlds in different forms depending on the specific objectives that are being pursued. Many flowers should bloom, and Davies' two worlds should co-exist to the extent to which shareholder preferences mirror those of the worlds they inhabit. This is very closely related to Oliver Hart and Luigi Zingales' notion of shareholders being concerned about their welfare as well as their wealth.[28]

More relevant is Davies' discussion at the end where he finally engages with the issue that *Prosperity* addresses. He correctly notes that "a more realistic concern with shareholder-chosen social or communal purposes is the uncertain persistence of shareholders' commitment to those goals. What the shareholders decide to adopt, they can take away (albeit only by supermajority vote). The potential loss of commitment by the shareholders to the company's purposes is recognised in relation to charitable (eleemosynary) companies (where the whole purpose of the company is to benefit persons other than its members). Mandatory rules prevent the distribution of charitable company assets to its members, even in a winding up, and establish a regulator to police adherence to the charitable objectives when the company is a going concern. This might be thought to be a heavy-handed solution in relation to companies which also have a commercial purpose."[29]

But now apparently the boot is on the other foot and, dare one say it, there appears to be "an embarrassingly simple solution". "The company could make any alteration of its adopted purposes conditional on the consent of the holder of a "golden" share and then allocate that

[27] The origins of this problem were in Colin Mayer's earlier (2013) book, *Firm Commitment: Why the Corporation is Failing Us and How to Restore Trust in It,* Oxford: Oxford University which identified lack of firm commitment as a source of erosion of trust.

[28] See Oliver Hart and Luigi Zingales, (2017), "Companies Should Maximize Shareholder Welfare Not Market Value", *Journal of Law, Finance, and Accounting*, 2, 247–274; Eleonora Broccardo, Oliver Hart and Luigi Zingales (2020), "Exit vs. Voice", European Corporate Governance Institute, Finance Working Paper No. 694/2020; and Oliver Hart and Luigi Zingales (2022), "The New Corporate Governance", ECGI Working Paper, 640/2022

[29] Davies (2022), pp. 36-37.

share to some appropriate guardian, while the ongoing faithfulness of the company to the stated objectives could be ensured by a requirement in the articles for periodic validation by an external party, any alteration in the reporting requirements possibly also being subject to the consent of the holder of the golden share. Private ordering gives the company flexibility as to how it organizes its purpose arrangements. Nevertheless, for small companies there might be value in providing a separate corporate form, such as some form of public benefit corporation, which takes some of the design burden off the incorporators."[30]

Precisely. The reason why Chapter 7 is surprisingly light in its treatment of corporate law is that the problem is embarrassingly simple to solve. It requires no change in corporate law for companies to commit to a purpose. The means to do it are already in place without requiring a change in law to bring it about.

But now I am the one who, I am afraid, must protest a slight naivety in what Davies presumes to be the simplicity with which to achieve the desired objective – a naivety to account for the complexity of the accompanying structures and processes and of the legal procedure to ensure its enforcement.

The reason why *Prosperity* is a book not an article or a chapter of a book is that the adoption of a purpose is more than its determination and commitment to its fulfilment. It involves a coherent and consistent set of accompanying ownership, financial, governance, regulatory, measurement and incentive arrangements – all of which raise serious challenges and changes to existing practices. The current forms of ownership, governance, measurement, performance, finance, and investment are a coherent way of delivering self-regarding objectives. Extending them to incorporate other-regarding problem solving objectives as well requires an equally consistent and coherent set of structures and processes based on company law.

5. The Transformative Role of *Prosperity*

It is natural to seek to classify a study as falling into one of a few familiar categories – shareholder primacy versus stakeholder theory; proprietary versus entity view of the firm; principal-agent versus managerial; capitalist versus socialist etc. Something that seeks to go beyond the conventional view of the firm therefore has a natural tendency to be categorized as stakeholder, entity, managerial, and/or socialist in nature. That is how Davies perceives *Prosperity* and that is precisely what it is not supposed to be. It is firmly in the shareholder, proprietary, principal-agent, capitalist camp.

If that is the case, how could the book in any way be regarded as fulfilling its promise of being transformative in relation to the world we inhabit? Do we not remain locked into all its current defects? The answer is no because it makes credible what currently is correctly regarded as lacking credibility, namely assertions about the goodness, well-meaning and enlightenment of corporations and those who own and run them.

Instead of berating companies such as the members of the Business Roundtable who

[30] Id, p.37. This provides a persuasive critique of the concerns raised about enforcement of corporate purpose statements by John Armour and Luca Enriques (2022), "Green Pills: Making Corporate Climate Commitments Credible", European Corporate Governance Institute, Law Working Paper, No. 657/2022.

apparently have failed to live up to their promises since *Prosperity* was published,[31] let us return to the ones that the book cited in Chapter 7 as being examples that lacked conviction and see what could be expected to change if companies can be held to account for what is otherwise just "cheap talk".

"This was Formica Group's statement about sustainability:

- reduce energy use throughout the life of our products;
- reduce carbon emissions by developing renewable energy sources, waste-to-energy technologies and fuel-efficient freight activities;
- work with suppliers to increase recycled and eco-friendly content in our raw materials, making mandatory the use of fibres from sustainable forests…..

Lockheed Martin is able to attract, develop, and retain a diverse workforce that has the opportunity to showcase and develop their skills and abilities……..We believe that all employees should have a safe and inclusive work environment—one in which everyone is treated fairly, with the highest standards of professionalism, ethical conduct, and full compliance with the law."[32]

What is needed to lend conviction to such statements? First, they should be formally approved by the board and supported by the corporations' shareholders.[33] Second, there should be a process of consulting with the relevant affected parties – employees, environmentalists, nature conservationists etc. about the obligations and requirements associated with them. Third, a set of metrics to evaluate performance against delivery of those objectives should be determined and a system of external reporting against them established.

Fourth, the corporations should set out how their internal governance, culture, values, incentive, and remuneration procedures of everyone in the organization are aligned with the statements. Fifth, the current and capital costs involved in fulfilling the obligations, and the provisions needed to ensure that failures to deliver can be rectified, should be estimated and projected forward.

Sixth, the corporations should set out a compelling business case for the commitments and demonstrate how they are profitable and value enhancing once account is taken of the risks and costs to which the corporations and their investors would otherwise be exposed. Finally, the corporations should determine the party who will be responsible for holding their boards to account for delivery of its commitments, exactly along the lines of what Davies sets out at the end of his article and I mention in the previous section of this article.

This then establishes the commitments as binding obligations for which the corporations are liable. It is transformational for corporations, their employees, the environment, their investors, and the world we inhabit.[34] Anything less is cheap talk and irrelevant. And all this

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[31] Lucian Bebchuk and Roberto Tallarita (2020), "The Illusory Promise of Stakeholder Capitalism", *Cornell Law Review,* 106, 91-177.

[32] Mayer (2018), pp 159-160.

[33] Some observers have suggested giving shareholders a "Say on Purpose", i.e., a right to express their opinion on the adoption or implementation of a corporate purpose analogous to that on climate policy or executive pay. See Alex Edmans and Tom Gosling (2020), "How to Give Shareholders a Say on Corporate Social Responsibility", *Wall Street Journal*, 6 December.

[34] See John Armour and Luca Enriques (2022), "Green Pills: Making Corporate Climate Commitments Credible", European Corporate Governance Institute, Law Working Paper, No. 657/2022 for supporting arguments as to why providing companies with the means to commit is so important in the context of the environment.

comes in the context of boards that remain solely accountable to their shareholders for fulfilling their obligations.[35]

Will it happen and why has it not happened? This brings us to another set of issues that go beyond those covered by *Prosperity* and come closer to the ones that should concern Davies in his paper.

6. Beyond Prosperity

At one stage in his article, Davies further confuses matters in referring to the British Academy Programme on the Future of the Corporation[36] by failing to note a substantial distinction that exists between the programme and *Prosperity.* He describes the British Academy programme as "adding little to the company law implications"[37] of *Prosperity* and mistakenly characterizes it as "technically inept" in failing to recognize the distinction between director duties and obligations of companies.

This is because Davies seems to be unaware of the significant differences in the corporate purposes that underlie the book and the programme, and the potential implications of these for director duties and corporate obligations. The reason why *Prosperity* is solely concerned with enabling not prescriptive legislation is that it deliberately framed corporate purposes as being about producing profitable solutions. It does not seek to constrain corporate conduct in any way because it is simply seeking to promote positively profitable outcomes.

In contrast the British Academy introduces a second element to corporate purposes alongside "producing profitable solutions to the problems of people and planet" and that is "not profiting from producing problems for either". While businesses and investors predictably like to focus on the positive former objective, policymakers, regulators, and society are at least as, if not more, concerned about avoidance of the negative latter one.

Since *Prosperity* did not incorporate this in corporate purpose, it was able to and did park this in the conventional location of regulation and avoid any suggestion of corporate law as being restrictive. It therefore drew a sharp distinction between corporate law as promoting positive purposes and regulation in addressing negative detriments in a conventional form.

The British Academy project, on the other hand, at least had to acknowledge that there was a potential issue that its definition raised which went beyond the enabling function of corporate law to include its potential prescriptive and restrictive role. It was not something that it attempted to expand, and it has only subsequently given attention to related issues of corporate

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[35] While the firm in this context remains solely accountable to its shareholders and therefore is proprietary in nature, the resolution of the time consistency problem through commitment introduces a possible division between the interests of different generations of shareholders. In that respect it is an entity that, while not distinct from its shareholders, has objectives that may be at variance with a particular group of shareholders.

[36] Davies incorrectly refers to it as a programme "run by Colin Mayer under the auspices of the British Academy" as against a programme run by the British Academy for which I acted as its academic lead.

[37] British Academy (2019), "Principles for Purposeful Business", the British Academy Future of the Corporation Programme, https://www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/; and
British Academy (2021), "Policy and Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme", https://www.thebritishacademy.ac.uk/publications/policy-and-practice-for-purposeful-business/

legal responsibility.[38]

This raises questions about the distinction between director duties and corporate obligations that do not arise in *Prosperity*, where the duties of directors are as conventionally defined in relation to promoting the success of the company for the benefit of its members. It introduces the possibility of private law and ordering as well as public law and regulation, and director duties as well as corporate obligations, enforcing avoidance of detriment.

Furthermore, the negative aspects of detriments caused by corporate activities are potentially an explanation for why few, especially large, companies appear willing to commit to positive corporate purposes. Davies suggests that "none of the purpose statements put out by French companies is robust enough to carry by itself the weight of translating the *Prosperity's* proposals "from a visionary ideal to a practical reality"[39] and that evidence on the adoption of public benefit corporations in the US indicates "shareholder scepticism about robust forms of purpose adoption".[40]

Even if these statements were true (and evidence from France at least suggests it may no longer be),[41] in the absence of a level playing field, it may be impossible for large companies to make positive commitments when competing in markets with firms that are willing to profit through inflicting negative detriments on others. Smaller firms operating in more innovative or locally less competitive markets may be less disadvantaged by such considerations and gain more from committing to purposes that confer benefits on others.

It is in this broader context of deterring detriments that Leo Strine, Jaap Winter and I also raised the question, in another publication to which Davies refers in his article, of whether the public benefit corporation "should be the universal standard for societally important corporations".[42]

These are fundamental issues that are developed at length in my forthcoming book *Capitalism and Crises: How to Fix Them,*[43] where the role of law features much more prominently than in either *Prosperity* or the British Academy programme in seeking to address avoidance of detriments as well as promotion of positive benefits. I will not attempt to elaborate on this here but merely restate that Davies has misdirected his concerns and criticisms against a publication that did not seek to accomplish the task he assigns to it.

7. Conclusions

It is extremely helpful and important to see how a piece of writing looks through the eyes of someone who presumes a completely different world from the one intended by the author. The tremendously valuable contribution of Davies's careful and thoughtful review of the legal aspects of *Prosperity* has been to make me do exactly that and I am very grateful to him for going to such length's in setting out his reflections so clearly.

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[38] British Academy (2022), "Implications of the British Academy Future of the Corporation Findings for Corporate Legal Responsibility", Discussion Paper for the Standing International Forum of Commercial Courts (SIFoCC).
[39] Davies (2022), p.14.
[40] Ibid.
[41] https://societeamission.com.
[42] Colin Mayer, Leo Strine and Jaap Winter (2020), "50 Years Later, Milton Friedman's Shareholder Doctrine is Dead", *Fortune Magazine,* 13 September.
[43] Colin Mayer (2024), *Capitalism and Crises: How to Fix Them,* Oxford: Oxford University Press.

The complexity, impossibility, and undesirability that Davies sees in *Prosperity*'s mission presumes an objective it did not have of forcing the unwanted on the unwilling. The fatal mistake that the architects of the original object clauses of XIX century corporate law made was to attempt to do exactly that – to restrain companies to their stated purposes. *Prosperity* is at the other end of the spectrum in terms of seeking to promote the enabling aspects of corporate purposes and commitments to them.

The reason why *Prosperity* emphasized this was that, in the absence of such means of commitment, we would observe precisely what has happened since the publication of the book and that is the appearance of a plethora of purposes that amount to little more than cheap talk. Anticipating this, *Prosperity* sought to identify ways in which a company could demonstrate an authentic and credible commitment to a purpose that was a meaningful challenge for the business. The law is one component that can be helpful in this regard by allowing firms to demonstrate a commitment to their purposes.

However, it is only one part of a broader systemic reset that is required to effect the necessary changes. *Prosperity* did not attempt to address the restraints on negative detriments that are required beyond conventional regulatory instruments. *Capitalism and Crises: How to Fix Them* does that and it will offer Davies a chance of a second bite at the cherry.

But I want to conclude with a more substantial message and concern. Like it or not, there is a problem with the way in which our capitalist system is currently formulated and functioning. It is simply not working. The matters that Davies raises and to which I have attempted to respond are of profound importance for the world we inhabit and its future. They are of necessity difficult and complex, and they are at the forefront of all our understanding of them.

To most people these are arcane and inaccessible issues, and it is all too easy for them to descend into navel gazing discourse which does not address the substantive task at hand. We are in the privileged position of having at least some appreciation of them and, I believe, it is our duty to stand above the fray and work together in resolving them constructively, productively, and rapidly for the sake of all of us.

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