Using Experience Smartly to Ensure a Better Future: How the Hard-Earned Lessons of History Should Shape The External and Internal Governance of Corporate Use of Artificial Intelligence

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Artificial intelligence or "AI" has transformative potential. But that reality should not obscure the fact that our society has longstanding experience with the corporate development of novel technologies that pose the simultaneous potential to better human lives and to create massive harm. This article, prepared for the occasion of the 50th anniversary of the Journal of Corporate Law and for the Rome Conference on AI, Ethics, and the Future of Corporate Governance, looks backward at the prior experience with corporate profit-seeking through the development and use of transformative technologies to suggest policy measures that might help ensure that the benefits of AI's development by for-profit business entities to society far exceed its downside.

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I. INTRODUCTION

On the 50th anniversary of this influential journal, it seemed to me appropriate to address an emerging, forward-looking issue in a way that recognizes that the hard-won lessons of corporate experience should be applied, not forgotten, when we tackle what seem to be novel challenges. I also viewed it important to focus on an issue that underscores the important role that corporate law and governance have not just on stockholders, but on all of humanity. By doing so, I signal my hope that the bulk of the next 50 years of corporate law scholarship this journal publishes will risk addressing what matters most—the overall effect of corporate empowerment on humanity. The emerging importance of so-called artificial intelligence, or AI, and its implications for corporate governance seems a subject fitting for this special occasion, and one that underscores these points.

Like anything novel and societally transformative, AI presents two distinct challenges. The more obvious one is that transformative technology unsettles existing practices and demands rethinking how we do things. For those of us with little to no grey hair, it's hard to take on another cycle of learning and adaptation. And sure, we can overstate the extent to which technology like AI is more transformative to life in our nations than electricity, refrigeration, and television. But city streets now—where people walk through busy intersections obliviously looking down at their cellphones, when that would not have been so 30 years ago—confirm that drastic change is happening fast. AI will enmesh our already tech-dependent cultures even more in a non-physical world with the potential to simultaneously connect—but also to divide—us more than ever.

Novel transformations pose yet another distinct challenge: by forgetting that the latest novel technology is not the first novel technology *and* not the first one posing dangers of misuse, we can be beguiled into thinking that fundamentally sound practices employed historically to protect society cannot function to protect us, and that we need overly aggressive new tools to do so. Even more dangerous, however, is the temptation to embrace arguments that society should trust those developing *this particular* new technology, rather than recognize that history teaches that some correspondingly fresh regulation is usually necessary to make sure that new technology is employed safely for humanity.

In this article, I address the latter challenge: which is not letting AI's novelty obscure the need to apply the hard-won lessons of human experience to help us take advantage of the opportunities and minimize the dangers of this new technology. In a constructive spirit, I will highlight some useful practices for both policymakers and corporate leaders, designed to encourage ethical, constructive uses of AI that better human lives and discourage applications that undermine our best values and sow discord. I address myself to two related, but distinct, policy domains: i) the external regulation of corporations that use and sell AI, and ii) the internal governance of those corporations. Let's start with the external.

II. THE ENDURING IMPORTANCE OF EXTERNAL REGULATION IN STRIKING THE REAL BENEFIT TO RISK RATIOS IN THE CORPORATE USE OF AI . . . AND THE DANGERS OF LETTING CORPORATIONS, NOT HUMANS, UNDERMINE THAT REGULATION

AI raises many concerns, which might be thought to warrant new legislative action to better guarantee that AI makes human life better, not worse. By way of example, the EU's recent Artificial Intelligence Act is a comprehensive attempt to regulate the use of AI by

encouraging innovation, improvements in quality and productivity, and benefits to consumers and society, while simultaneously avoiding harm to those affected by AI.[1] I am not technologically sophisticated enough to make any contribution to regulating the generally permissible uses of AI, or its specific uses in particular industries. Rather, I hew to the domain in which I might have some possibly useful experience and insights: addressing how the law in general approaches corporate responsibility for conduct with the potential to create harm, and how those approaches might be challenged by AI's emergence.

For starters, we must remember that society has experience with corporations using novel technologies for profit. Tobacco, asbestos, opioids, leaded gasoline, oil spills, and now PFAS (who even heard of that five years ago) . . . there is no historical shortage of harmful products involving "novel technologies" that have been sold by profit-seeking corporations.

An errant corporate law theory still permeates too much corporate law scholarship: the idea that stockholders are "residual claimants" and only profit when the corporation has satisfied all legitimate claimants. Experience has shown this to be nonsense.[2] Corporations pay out profits all the time to stockholders, who often make back their entire capital, and more, investing in corporations that never make society whole for the damage their products have caused. Consider climate change: Will the major energy-producing corporations be held responsible for their massive contribution to climate change? Will their stockholders have to give back their gains? Of course not. History suggests that AI will be used irresponsibly if society does not constrain corporate power within a responsible framework promoting competition on the right dimension—creating profits through innovative and safe use of new technology—not through harmful, deceptive uses. When a soccer game is not refereed well, the players do not raise their level of conduct to the best spirit of the game. By the second half, even the cleanest players engage in dodgy tackles and professional fouls just to survive. Being raised Catholic, I was constantly reminded that if there is anything perfect and without sin, it is not human beings, and certainly not humans competing for profit. Bringing out our better angels requires strictly enforced rules of the game that encourage competition based on quality play and prevent dirty tactics from winning out.

Today's market realities exacerbate the risk that corporations will externalize the costs of AI in a societally harmful manner. Cross-border product competition is stronger than ever.[3] So is big capital's power. Stockholders are stronger than ever and come in the form

1. *See generally* Directive 2021/0106, of the European Parliament and of the Council of 13 March 2024 on the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence 2024 O.J. (L 1689).

2. For a full explanation of why I view this to be so, see, e.g., Leo E. Strine, Jr. & Aneil Kovvali, *The Win-Win That Wasn't: Managing to the Stock Market's Negative Effects on American Workers and Other Corporate Stakeholders*, 1 U. CHI. BUS. L. REV. 307 (2022).

3. This important phenomenon is obvious to consumers and is documented in an index that tracks the share of American products versus foreign products sold in the United States. At every period, it shows that international competition in the sale of products is, to put it modestly, robust. Andrew Rechenberg, *Domestic Market Share Index Rises in Q1 2024, Fueled by a Reduced Manufacturing Trade Deficit*, COAL. FOR A PROSPEROUS AM. (July 29, 2024), https://prosperousamerica.org/domestic-market-share-index-rises-in-q1-2024-fueled-by-a-reduced-manufacturing-trade-deficit/ [https://perma.cc/5CEQ-XAEQ] (showing that even in a year when domestic market share rose, foreign products still were predominant, as has been the case for many years).

of large institutional investors, whose incentives are not well-aligned with those of the human investors whose capital they control. Institutional investors hold the capital of human investors who need both sustainable, long-term portfolio growth and access to quality jobs to fund their savings. Human investors suffer as taxpayers, consumers, and community members if corporations cause harm to others and shift the costs to society.[4] But institutional investors' own incentives pressure them to focus upon short-term profits—pressures they transmit to the very corporations developing and seeking to profit from AI. To this point, these muscular institutional investors are globalizing American "manage to the stock market" corporate governance policies, pressuring corporate managers to deliver stockholder returns right now or face replacement.[5]

As corporate and institutional investor power has grown globally, the regulatory structures that constrain that power have not. Corporations have successfully pitted the OECD nations against themselves, in areas like tax, labor rights, and social safety systems, and pressured governments to relax requirements designed to make market economies and business competition work for the many.[6] The rising take at the top by stockholders and top managers, and the declining share for the workers most responsible for corporate profits, illustrates this concern, as has the counterproductive growth of tax havens. The corporations who will most likely deploy AI are often wealthier than many nations and exert power across borders, which suggests that cooperation among the EU, the United States, and the OECD nations to constrain corporate misuse of AI might be essential.

AI poses a particular threat absent a strong, international system of regulation. As abuses of the internet and social media have shown, virtual technologies can penetrate markets anywhere, without impediment by traditional geography.[7] Dangerous AI will be dangerous everywhere on the globe, regardless of which business entity puts it out there or

4. In prior writings, I have discussed these issues in more depth. *See, e.g.*, Leo E. Strine, Jr. & Michael Klain, *Stakeholder Capitalism's Greatest Challenge: Reshaping a Public Consensus to Govern a Global Economy*, 47 SEATTLE U. L. REV. 329 (2024); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy – A Reply to Professor Rock*, 76 BUS. LAW. 397 (2021); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh and Blood Perspective On Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870 (2017). Indeed, during the first decade of this century, I was honored when this journal asked respected commentators to respond to my article touching on many of these issues. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1 (2007).

5. *E.g.*, Strine, Jr. & Klain, *supra* note 4, at 342–44.

6. For more extended consideration of these issues, see, e.g., *id.* at 329–30 (discussing how economic globalization has allowed corporations to outgrow the traditional economic constraints put on them by national governments); Leo E. Strine, Jr., *Development on a Cracked Foundation: How the Incomplete Nature of New Deal Labor Reform Presaged Its Ultimate Decline*, 57 HARV. J. ON LEGIS. 67, 67–70 (2020) (examining the failures in completing President Roosevelt's full vision for a post-War Global New Deal and other factors that have led to the decline of gainsharing for workers in American corporations); Leo E. Strine, Jr., *Made for this Moment: The Enduring Relevance of Adolf Berle's Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267, 267–68 (2019) (describing why governments regulate corporations); Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior*, 58 U. TORONTO L.J. 241, 254–60 (2008) (describing the competing ideals regulating American corporations throughout history).

7. For an incisive look at how the internet has influenced the lives of people who live in a remote region of the Brazilian Amazon, see Jack Nicas, *The Internet's Final Frontier: Remote Amazon Tribes*, N.Y. TIMES (June

where that entity is chartered. As we have discussed, the market incentives for developing AI fast for first-mover profit advantage have never been stronger. There is no reasonable basis to fear that innovations in AI will not accelerate. Stopping that is not possible, as experience in trying to limit the nations with nuclear and other advanced weapons demonstrates. And the clash between the blocs of nations committed to democracy and authoritarianism is spurring both a figurative and literal arms race to develop new and scary forms of AI.

In applying these realities, policymakers must remember something mundane, but too often slighted: neither AI nor limited liability exist in a state of nature. Both are human creations. The extent to which corporations, and entities like limited liability companies, can use AI must be decided by society, not those business entities. There is a sound way to address the worry that AI will somehow result in "species replacement" by out-of-control technology thinking on its own and without human control: don't relax the existing human constraints on the entities most likely to deploy AI, and go further, and tighten those constraints to ensure that there is no deployment of AI without corresponding human responsibility. From this premise flows a few principles that should guide external regulation.

As to corporate use of AI that causes consumer or other harm in a manner traditionally addressed by tort law, it is vital that there be no exoneration of corporations if they deploy technology they do not understand. If AI causes compensable harm to a victim, ignorance by the corporation as to how the AI works should be the exact opposite of a defense. This does not mean that the corporation and its managers must understand every aspect of how AI they deploy works in each specific situation, but that they understand how it typically operates in the real-world scenarios in which it is intended to operate. Further, corporations should have to demonstrate that their AI has been shown by experience to function in a manner that is not only safe but is safer and more reliable than human decision-making alone. The AI must not give weight to improper factors, and its development and deployment must be shaped and governed by the humans who run the corporation.[8] Until we develop sound methods for ensuring that corporations seeking to escape liability can prove they acted with appropriate respect for safety, I incline toward the view that initially corporations that use AI in a way that causes harm to others should bear strict liability in the first instance. Over time, a better balance might be ultimately struck within a fault-based regime to provide a defense if corporations can show, by reliable evidence, that the AI satisfied the criteria I've laid out and distinguished scholars have advocated.[9] But human beings victimized by AI in seeking loans, walking the street in the vicinity of driver-less cars, or Deepfake libels of their identity cannot be expected to prove that the AI "acted reasonably in the circumstances."

2, 2024), https://www.nytimes.com/2024/06/02/world/americas/starlink-internet-elon-musk-brazil-amazon.html (on file with the *Journal of Corporation Law*).

8. For an excellent consideration of these issues, see Cary Coglianese & Colton R. Crum, *Taking Training Seriously: Human Guidance and Management-Based Regulation of Artificial Intelligence* (Penn L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Rsch. Paper No. 24-08, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729072 [https://perma.cc/9KMQ-G8MY].

9. In particular, I commend this incisive and balanced article, Mihailis E. Diamantis, *Reasonable AI: A Negligence Standard*, 77 VAND. L. REV. 573 (2025).

For the same reasons, corporations must bear responsibility to avoid having AI deepen, not overcome, historical patterns of invidious discrimination and inequality, as both the new EU Artificial Intelligence Act and President Biden's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence make clear.[10] Recent guidance from the Department of Labor addressing the responsibilities of government contractors who use AI in hiring further underscores the dangers that improvident use of AI can cause illegal discrimination, but also recognize that used with appropriate care, AI can aid in good hiring practices.[11] To that end, the guidance not only spells out requirements for contractors but identifies promising practices that they can use.[12] And the guidance exemplifies the increasing international expectation that companies using AI do so carefully and with active human oversight.

From the get-go, AI development should not only avoid using invidious factors in a harmful manner but go further and try to take advantage of AI's emotionless nature to build in checks against implicit bias. With deep thinking by those who create these amazing AI systems, the use of AI in concert with human judgment may reduce invidious discrimination and promote more equality. But early deployment of AI in areas like criminal justice and loan applications have shown that without safeguards, AI can reflect and compound historical patterns of discrimination by using illegitimate factors like race to generate unfair outcomes when our societies have finally come to realize that is wrong.

Several dangers must be addressed by corporate law itself. The destructive emergence of tax havens undercutting the tax bases of many OECD nations cannot be ignored when considering AI. I worry that some of these small havens, which have a natural incentive to take fees for giving legal rights away, might seek to attract AI-using business entities in exchange for extending to their investors and managers insulation from proper responsibility. To address this, immunity for injury caused by AI based on any entity shield should be denied and liability should flow up the line until a well-capitalized entity is found that has human investors and a human governing body with the capacity to address that harm in full. This same principle should govern in any situation when a form of entity that does not require human fiduciaries, such as the limited liability companies authorized to act in this manner by many American states, is the direct entity through which AI is used. The law should look through any such entities up through the chain of ownership until the ultimate human investors and managers are found. And if the ultimate entity is not well-capitalized enough to address the harm the AI caused, its individual investors should be on the hook. Just like AI itself, there is nothing natural about an LLC or a tax-haven secret entity that has no human investors who victims or regulators can trace.

Fortunately, for AI to scale, the ultimate entities with the most global impact will likely be well-known, but history has shown that big multinationals will use so-called "asset partitioning" through the formation of (often offshore) subsidiaries to shirk tax and tort liabilities that, as a matter of economic reality and normative justice, the multinational and its stockholders should fairly bear. Being clear that bottom-feeding and rent-seeking of this

10. Directive 2021/0106, *supra* note 1; Exec. Order No. 14,110, 3 C.F.R. § 14110 (2023).

11. *Artificial Intelligence and Equal Employment Opportunity for Federal Contractors*, DEP'T OF LAB. OFF. OF FED. CONT. COMPLIANCE (Apr. 29, 2024), https://www.dol.gov/agencies/ofccp/ai/ai-eeo-guide (on file with the *Journal of Corporation Law)*.

12. *Id.*

kind will not be tolerated as AI expands is critical to creating the correct incentives. The OECD nations should work together to prevent an unproductive race to the bottom among certain nations to become the domiciles of choice for AI-intensive companies by offering them the ability to engage in risky behavior without corresponding responsibility. Hard law is most effective, but when not possible, soft law and incentives in the form of codes of responsibility like the U.N.-supported Principles for Responsible Investment and G20/OECD Principles of Corporate Governance can encourage more corporate responsibility.[13] And the common policy concerns shared by the EU's Artificial Intelligence Act and President Biden's Executive Order on AI suggest a reasoned basis for convergence in international norms and governance regarding AI.

Rent-seeking of another kind is a risk for humanity's ability to channel the use of AI in a positive, not negative, direction. Precisely because huge corporations have other people's money, they have more of it than ordinary human beings do. And if they are allowed to use it—as they are in the United States after *Citizens United*—to influence the political process, that has huge dangers.[14] Corporate treasury funds have flooded into the American political system since *Citizens United* eliminated long-standing constraints on their use. Most of this spending involves corporations seeking to influence elected officials to do their bidding on regulatory issues.[15] Like other industries, the tech sector spends so that it can "persuade" public officials to adopt its view of "socially optimal" regulatory policies, with social optimality being measured by how much the industry is allowed to do whatever it wants with as little accountability to others as possible. If humans are to constrain their creation, humans must set the rules, not corporations. But money has an overweening influence.

Nations that do not allow corporate political spending should not weaken their more sensible approach. For nations like ours, it is long past the time to restore responsible limits. The United States should require any corporate political spending to be under a plan approved by a super-majority of stockholders, ban corporate giving to partisan committees, and require boards of directors to determine that the recipients of any corporation donations have views consistent with the corporation's stated ethical values.[16] Many American companies now tout their commitment to net-zero while lobbying and using their political

13. *See* PRINCIPLES FOR RESPONSIBLE INV., A BLUEPRINT FOR RESPONSIBLE INVESTMENT (2017), https://www.unpri.org/download?ac=5330 [https://perma.cc/R92R-WHZ9]; OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015), http://dx.doi.org/10.1787/9789264236882-en [https://perma.cc/9HCW-CL8W] (discussing incentives to encourage corporate responsibility).

14. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

15. *E.g.,* Leo E. Strine, Jr., *Corporate Power Ratchet: The Court's Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 441, 441–42 (2016) (discussing why corporate political spending mostly involves spending to influence regulatory policy in a way that will favor their companies).

16. Admittedly, this issue can be seen as a white whale for me. *See, e.g.*, Leo E. Strine, Jr. & Dorothy S. Lund, *Corporate Political Spending is Bad Business*, HARV. BUS. REV. (Jan.-Feb. 2022), https://hbr.org/2022/01/corporate-political-spending-is-bad-business [https://perma.cc/9LNJ-K7GQ]; Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007 (2020); Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451; Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91

spending to thwart action to address climate change.[17] Similar discordance between stated commitments to ethics and back-door undermining of effective regulation has occurred in the tech and AI space, whose managers are subject to the same investor pressure to put profit first as company leaders in other industries.[18] This makes sensible external regulation difficult in the United States and other nations where corporate political muscle is wielded.

If important markets like the United States do not act because our legislative processes are distorted by corporate money, or tax havens facilitate escape, that failure will undermine the utility of the EU's Artificial Intelligence Act, encourage regulatory arbitrage, and an eventual global regulatory bottom line that is less than "socially optimal."[19] To be more optimistic, the united action of the many nations of the EU in enacting that Act provides a positive model creating incentives for nations like my own to converge upward and making it more probable that the corporations having the most global impact will have to hew to sensible constraints on their ability to use AI in dangerous ways.

III. LOOKING INWARD: HOW MIGHT INTERNAL CORPORATE GOVERNANCE ADAPT TO GET THE BEST, AND TAKE THE WORST, OUT OF AI

Now, let's look inward at corporate governance itself. What does historical experience about the behavior of corporate leaders teach us that might help us take advantage of the possibilities, and minimize the dangers, of AI?

In recent decades, corporate governance rules have fetishized independence over industry expertise. In the United States, this has resulted in boards where typically the only non-independent director is the CEO.[20] Independence is essential for a strong contingent of any public company board, but pushing for complete independence complicates the ability to include directors whose primary occupations are as active participants in a relevant industry, with an up-to-date feel for current market trends and technologies. With growing time commitments and public controversy for independent directors, public companies

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NOTRE DAME L. REV. 877 (2016); Strine, Jr., *supra* note 15 at 423; Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory And* Citizens United, 100 CORNELL L. REV. 335 (2015).

17. *E.g.*, CTR. FOR POL. ACCOUNTABILITY, HOLLOW POLICIES: WHEN CORPORATIONS' POLITICAL SPENDING AND EMISSIONS GOALS/POLICIES CONFLICT 13–26 (Feb. 23, 2022), https://www.politicalaccountability.net/wp-content/uploads/2022/03/Hollow-Policies.pdf [https://perma.cc/4DLC-42JJ].

18. *E.g.*, *Big Tech's Scramble to Stop Child Safety Laws*, TECH TRANSPARENCY PROJECT (May 3, 2023), https://www.techtransparencyproject.org/articles/big-techs-scramble-to-stop-child-safety-laws [https://perma.cc/GN3D-7KD2]; Zach Williams, *Big Tech's Data Privacy War Moves to New York to Weaken Bills***,** BLOOMBERG L. (Oct. 11, 2023), https://news.bloomberglaw.com/privacy-and-data-security/big-techs-data-privacy-war-moves-to-new-york-to-weaken-bills [https://perma.cc/9AY2-V4U2].

19. *See generally* Directive 2021/0106, *supra* note 1.

20. *See* SPENCER STUART, 2023 U.S. SPENCER STUART BOARD INDEX 8, 26 (2023), https://www.spencerstuart.com/-/media/2023/september/usbi/2023_us_spencer_stuart_board_index.pdf [https://perma.cc/F4NU-74AZ] (showing that 65% of boards of S&P 500 have only the Chief Executive Officer as a non-independent director) [hereinafter SPENCER STUART, 2023 BOARD INDEX]; SPENCER STUART, BOARD INDEX 1987 PROXY REPORT 19–23 (1987) (showing that there was an increasing trend toward more board independence but that by 1987, 98% of included U.S. public companies still had boards with more than one non-independent director and a supermajority of boards had three or more non-independent directors).

have also become more begrudging about permitting their top managers to serve on other company boards, meaning boards now include fewer active executives.

These realities compound another danger, which is that directors are typically older than even top management and not as steeped in new technologies as young people.[21] The time-tested habits of a successful lifetime in the business sector can crowd out brain space for the new without an active commitment to constant learning and adaptation. And independent directors already face the enduring temptation to view themselves as bit players in a theatrical production scripted by the CEO. Making sure that the independent directors are encouraged to and, in fact, do bring to bear their business judgment like they did when they were doing their "day jobs" is key to good corporate governance and a vital role for good management. After all, an authentically strong CEO should welcome, nay, demand, vibrant board involvement, and feedback, not stifle it because of his own insecurity.

Bringing out the best in independent directors requires recognizing that successful people rarely like to admit that they don't know as much as they should, and fostering an environment where the board asks demanding questions about key issues and has them answered in a patient, clear, and non-jargonistic manner. Boards must avoid the pitfall of newer directors assuming that more experienced directors know the answers if something complex, but poorly explained, is being discussed, and of the more experienced not wanting to expose their own confusion or ignorance by asking for clarification.

A famous example of what can happen when no one demands that an issue of some complexity be explained clearly is what happened at Enron. To satisfy regulatory capital requirements needed to continue to increase the volume of risky derivative trades Enron could engage in using its own stock as collateral, Enron created special purpose entities funded almost entirely with Enron stock or its equivalent to supposedly move liabilities for trades off its balance sheet and to transfer the risk of the trades to the special purpose entities, not Enron.[22] So the hedge worked like this: if Enron's stock price plummeted, Enron was protected because a special purpose entity funded with Enron stock would make Enron whole.[23] If this sounds obviously stupid, not sound, and not a hedge, that is because it was. But Enron's board, most of whose members were respectable people, apparently had no idea about these practices. Had the board demanded management to discuss how the company was protecting itself from the risk that its stock price would fall and explain specifically how the hedge would work in the event the company needed it for protection, the board would have realized that the supposedly risk-reducing hedges were not *bona fide* hedges at all.

AI exacerbates these dangers. AI is being used in fast-developing business practices, and it is likely largely independent directors who are no longer active managers at companies will not be personally familiar with these emergent uses. Plus, AI is exceedingly complex, putting stressors on generalist boards and their reticence to demand explanations from management. Here are a few practical suggestions to address these concerns.

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21. SPENCER STUART, 2023 BOARD INDEX, *supra* note 20, at 8 (showing the average age of independent directors is 63 years old and the average age of CEOs is 58 years old.).

22. C. William Thomas, *The Rise and Fall of Enron*, J. OF ACCT. (Mar. 31, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html [https://perma.cc/VM9T].

23. *Id.*

First, the board, top management, and their advisors must always keep this fundamental question in mind and understand the answer: how does this company make money? This is the most important question a director must understand to be effective and, as my beloved President Biden is wont to say, I meant it literally and not figuratively. How does the company make money from selling a product or service? What is the chain of production that results in those sales? To be effective, directors must know the answer to this core question and use it to evaluate whether the company has a sound business strategy, whether that strategy is respectful of the stakeholders affected by its implementation, and what the challenges are to its success.

AI's emergence makes this focus essential. The question might be reframed this way: how does this company use AI to make money? If we are a bank, are we using it to determine to whom will we lend or issue a credit card? How does the AI's algorithm do that? What protections have been used to ensure that invidious criteria—such as race, gender, or geographic residency—are not driving the decisions? If we are selling consumer products, how are we using AI to price and market our products? Are we using AI to collect personal information from consumers? Is that information necessary for the transactions that consumers engage in with us? Or are we gathering more than necessary and selling that information for profit? How might improper access to that information happen? What harm could come to our customers if that occurs, and what are we doing to prevent that? As AI evolves, many new industry-specific trends and nuances will develop. Effective management of the company's business strategy and of its compliance with laws and ethical norms protecting stakeholders like workers, consumers, and society will depend on corporate leaders understanding how their use of AI affects others.

The only way corporate boards can do this is by touching and feeling the AI material to their company's business plan. To stick with the example of a bank board, if the corporation's loan screening unit is using AI as a core part of the loan marketing and approval process, the directors should be shown how it works and understand its role in that critical process and the checks and balances—human and non-human—that have been employed. Viewing the system from the perspective of the loan officers *and* from the perspective of the bank's consumers will demystify much of the complexity and facilitate the board's ability as generalists to frame solid questions and implement good policies to make sure that AI's advantages are maximized and its downsides minimized.

Second, the board's own committee structure must reflect the company's industry space. It has long been an unsound practice for companies to heap all their compliance into the board's audit committee.[24] The job of the audit committee in addressing financial compliance is challenging and crowds out other risks. Audit committees give priority to financial expertise when many companies' greatest business risks and greatest risks of harming others are non-financial. AI's emergence makes it even more essential that boards create an industry-specific committee with first-order responsibility for monitoring legal compliance and stakeholder protection issues arising from the company's central methods for making money. Such an industry-specific committee is not just essential; it is efficient. The

24. For a more extended discussion of this important topic, see Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1915–18 (2021).

creation of a strong industry-specific committee best positions the entire board to understand the business deeply, keep abreast of dynamic changes, and understand the rewards and risks of the many choices that AI will present. And by taking core business risk out of the audit committee's remit, the industry-specific committee can be comprised of directors with the most relevant expertise, which will often not be the purely financial, accounting expertise demanded of audit committee members, however much we love CFOs, accountants, and investment bankers. And, of course, that is a lot.

Third, the board's consideration of how the company uses AI to make money should also make it face a mirror test about itself. Are we willing and able to learn what we need to know about this emerging technology to monitor its profitable, legal, and ethical use? Are there gaps in experience and expertise on our board to fill? And to do so while keeping the board at a manageable size, do some of us need to move on? Put bluntly, the acceleration of change due to new technologies underscores the inescapable need for an effective system of board self-evaluation ensuring that there is turnover to provide for fresh thinking, that all members of the board work hard, commit to constant learning, and that the board has the range of skills required to be effective. And yes, this means that independent directors must be willing to put the company's best interests ahead of their own interests in perpetual service.

Fourth, boards and top managers should not just make sure they monitor the company's use of AI; they should use AI to improve their own thinking. Although human judgment should ultimately drive corporate decision-making and policy, human beings are themselves subject to cognitive bias, blind spots, fatigue, and other factors separating us from the divine. As AI improves, corporate leaders can test their inclinations and preliminary decisions by using AI smartly, not in ways involving blind deference or allowing them to escape from responsibility, but as a way to better ensure that decisions result from reasoned consideration of relevant factors and not from extraneous or illegitimate ones. AI has the potential to help corporations become more law-abiding and ethical. For example, AI is now being developed to help risk management systems to identify potential indicators that there are compliance and safety vulnerabilities that require attention.[25] Consider the American opioid epidemic: might smart use of AI have detected the mismatch between the growth in opioid sales and underlying incidences of actual medical problems for which opioids might be properly prescribed? Used wisely and proactively, AI can improve human decision-making and behavior in a way that makes corporate behavior more consistent with society's best interests. And by using AI as an aid in their work, corporate leaders will better understand how AI works in general and its strengths and weaknesses.

Finally, as to internal governance, boards must recognize that the tone and incentives that they and management set at the top will determine whether employees believe the company genuinely wants to make money the right way. Unless the top dogs do not just recognize that the duty of the company to obey the law and treat its stakeholders ethically

25. *See, e.g.*, *Artificial Intelligence in Risk Management*, KPMG, https://kpmg.com/ae/en/home/insights/2021/09/artificial-intelligence-in-risk-management.html [https://perma.cc/UMD2-C2J7] ("AI and ML tools, with their advanced prediction techniques and capabilities to utilize large volumes of data, are increasingly being used in Risk Management for quicker and more efficient credit, investment and business related decision making.").

comes before pure profit, but support and encourage employees in doing so, then the company is likely to lapse into bad behavior. A culture should exist where the only risk taken is that an innovative—but proven safe—AI product or valuable service might not obtain success—that is, the natural risk of fair market competition. Risk should not be taken with the well-being of employees, customers, or society. And compensation incentives must recognize that if employees' ability to feed their families depends on pumping up sales alone, and not also on doing things the right way, high-minded rhetoric from the C-Suite about compliance and ethics will be viewed as phony branding. On this score, employees have played an important role already in the tech space, in voicing concerns about the unethical, harmful uses to which company products were being deployed. Employees are, of course, not always right about these matters. But experience suggests that opening more space for employees to express good faith qualms about the ways emerging technology like AI are being used is a helpful safeguard. Employees know a lot about how tech affects them and the company's customers. Boards should make clear they want to listen and shape a culture that encourages speaking up in good faith. One way to do this that fits with the American corporate governance system would be to convert compensation committees into full-blown workforce committees that address the full range of workforce issues and that act as instruments to enhance worker voices, and as critical, management's willingness to listen.[26]

IV. A FINAL THOUGHT ABOUT WHAT WE ALREADY KNOW AND SHOULD NOT FORGET

As this esteemed journal looks back and forward, another reality inspires a general closing thought. The impact of billions of us engaging in economic activity means that we now have the collective ability to do irremediable harm very fast. Many people still go to London expecting fog and fail to realize that London was foggy because millions of people were using coal and other dirty fuels. When environmental regulation was adopted, the fog went away because it was not fog; it was pollution. When millions become billions, the impact of bad practices is even more immediate and widespread. To wit, a huge percentage of the carbon and methane usage that has warmed our climate is from just the last two generations.

The pace and scale of human business conduct affecting humanity and the planet have grown enormously. We cannot afford the time to relearn the lessons of history. Instead, we must redouble our efforts to apply them with speed, in a world in which corporate power extends globally, and the regulatory systems that constrain that power are balkanized and pitted against each other.

26. For a fuller discussion of this idea and its benefits, see Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1384 (2022); Leo E. Strine, Jr. & Kirby M. Smith, *Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism*, 76 BUS. LAW. 31, 51 (2020–2021).

In trying to best address AI ethically, let us also admit the following: there is no urgent problem that AI's development and employment in a rapid, careless way will fix. AI presents no answer to climate change. AI presents no answer to poverty. AI presents no answer to the possibility of hot wars and no solution to the divisions that cause civil strife.

With appropriate care and deployment, however, AI can improve our ability to better address these problems over time and to make decisions that are more accurate and even other regarding. But unless that care is taken, unless those who seek profit through AI recognize their duties to others, and unless those who cause harm are held accountable; AI has the potential to make humanity and a planet already facing serious threats even worse off.

To make our descendants glad that AI was created, policymakers, business leaders, and corporate law scholars must work together to better ensure that it helps solve human problems, fosters more equitable and just societies, and makes human lives more fulfilling. That requires respecting the benefits of innovation in technology and the remarkable accomplishments of those who bring it about. But, it also requires a reciprocal recognition by scientists, business innovators, and corporate law scholars that there are sound, factual, and historically proven reasons why society constrains the exercise of corporate power and channels it to be consistent with humanity's best interests. Precisely because AI has transformational potential at a time when transformative technologies can scale faster and cause irreversible impact faster than ever, society needs correspondingly smart and fast thinking to make sure AI is developed and implemented only in a safe, responsible, and ethical way.