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TRANSCRIPT
CORPORATE SOCIAL RESPONSIBILITY: PARADIGM OR PARADOX?
The Cornell Club
New York City
November 6, 1998

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INTRODUCTORY REMARKS: A PRACTITIONER'S VIEW

MR. WEISSMAN: Good morning, everyone, and thank you Mr. Macey.

When I learned I was going to be the opening speaker this morning, I wasn't sure what role I could play. I am not an authority on the topic of corporate social responsibility. I have never written on the topic, I have never spoken before on the topic, I haven't even read extensively on the topic. Given that, I decided what I would do is follow the principle of "going with what you have got." I am not an authority, but I am a practitioner.

I first became the chief executive officer of a public company twenty-nine years ago. Since that time, I have led four public companies in that role and in addition am the director of three other public companies. As a professional manager, over the years I have had to deal with many of the issues that swirl around the topic of this conference this morning. In order to do my job, I have dealt with questions like: How do I think about my responsibility to shareholders? How should I think about employees? If I treat them as partners, am I fooling them and myself? And what about diversity issues? Are they relevant to the success of a business? Do I have any responsibility to my vendors other than to pay them for their goods and services? What kind of relationships do I really want with my customers?

In developing answers to these questions and others like them, I have come to a definite point of view. Today I will share my perspective on some of those issues and describe actions that I have taken as a result, in the hope that in doing so, you will gain some insight as to how at least one practitioner deals with them.

In looking at the program, I note that the discussion that immediately follows my comments will focus on conflicts among stakeholders in the corporation. Since I will be talking about stakeholders, it is appropriate, then, that I start with my definition of the term.

For me, stakeholders comprise four subgroups: customers, shareholders, employees, and vendors. They make my list because each has a high interest in the company, and importantly, each plays a direct and essential role in its operation and success. Excluded from my definition of stakeholders are others, some of whom Mr. Macey mentioned, like the community, government, special interest groups, and any other entity that is not directly involved in the activities of the

enterprise. Although I have excluded it from my stakeholder definition, I do believe that the corporation has a responsibility to society at large. Since the law confers on the modern corporation the status of legal person, the corporation has a responsibility, in my view, like every other citizen, to act in a way that protects the freedom, independence, and property rights of every other person in society.

Within my definition of relevant stakeholders, there is an important distinction. It's the distinction made by the Delaware Court of Chancery that shareholders have unique property rights; rights that other stakeholders do not automatically have as a result of their participation in the enterprise. The law under which my corporation operates obliges me and my fellow managers to preserve and protect those ownership rights.

In spite of the fact that I understand that I have clear fiduciary obligations to the shareholders, you will not hear me repeat the often-spoken management mantra that the sole obligation of management is to maximize shareholder returns. I view that statement both as a cop-out and a gross oversimplification of the proper role of management. I feel strongly about this issue and for that reason, over the past couple of decades, I have raised it dozens of times with groups of company managers and with groups of business school students as well. I usually do it simply by asking the assembled group to raise their hand if they agree with the notion that management's first priority is to make money for its shareholders. Without exception, an overwhelming majority of the audience raise their hands. They are invariably surprised, then, when I tell them that I would not raise my hand since I believe that this view is inadequate and that, in fact, a singular focus on that part of management responsibility can actually get in the way of maximizing shareholder returns.

My first problem with the statement is that it conflicts with my observations of human behavior. I have never met a vendor, a customer, or an employee who could honestly assert that when they get up in the morning their first priority is to maximize the profit for the shareholder in the company that they are associated with. What is apparent is that each stakeholder shares a rationally selfish motivation to maximize success, wealth, security, and satisfaction from their participation in the enterprise. Now, I am not saying that stakeholders do not share a common interest in the enterprise—quite the contrary. Nonshareholder stakeholders can be loyal, energetic, caring, and involved. The important implication for management is that they are not doing it for the shareholders. They are doing it for themselves. Interwoven with their common aspirations for the enterprise are conflicting individual goals.

My second problem with the statement is that it gets backward the way a corporation should work. Corporations leverage capital, labor, and knowledge and create goods and services. Profit is the result of doing those things well. Like many things in life, if you concentrate on the result rather than on the doing, perversely, the result is less likely to happen. Management's job is to create a system that delivers better goods and services, satisfies the individual needs of each group of stakeholders, protects the property rights of shareholders, and maintains a balance among conflicting objectives that optimizes the wealth-creating performance of the enterprise.

Experience has taught me that the answer to the chicken or the egg conundrum is simple. What comes first? The customer comes first. Here is why. Here is why I believe the first priority of the enterprise must be to find real customers with real needs. It should be obvious that without the presence of a real customer with real needs, the corporation consumes wealth rather than creating it. I know that this can sound like a simplistic tautology, but I am constantly amazed by the number of managers who manage to ignore it. It may be the entrepreneur I met some years ago in Indiana who had just opened a skin diving supplies shop because he loved skin-diving (despite the fact that the only water within forty miles was a creek twenty feet wide). Or it might be the manager who is so involved in doing his job that he fails to recognize that the customer has moved on or the need for his product has disappeared. Western Union comes to mind.

The bottom line is that no need means no customer, means no enterprise, means no wealth creation. The shareholder cannot come first.

The second priority must be to build an organization that will effectively respond to customer needs. Additionally, the enterprise must aspire to fill those needs better than anyone else. The world is an ever-changing, competitive place, and no corporation can survive for long if it substitutes "good enough" for the standard of "competitively best." The continuing challenge for management is to create an understanding among all of the stakeholders that achieving these first two priorities is a mandatory prerequisite to fulfilling their own needs; that it is in our common interest to pursue those priorities because our individual stakeholder objectives are only likely to be met if we do so.

We live today in a world where corporations are buffeted by dozens of issues that arise under the rubric of corporate social responsibility, stakeholder rights, philanthropy, political correctness, diversity, environmental issues, ethical investment, and so on. The filter that I use for examining those issues is to ask this question: What effect will

any action have on the viability of the core mission of management to sustainably create wealth through the enterprise?

I have learned over the years that there is no template for managing. One need look no further than to the succession of bestselling business books, often with wildly conflicting management theories, which line the shelves of corporate executives. But there is a realistic opportunity to get it mostly right if you are in intimate contact with each group of stakeholders and can develop an understanding of the needs and perspectives of each.

This view of the world has had a profound effect on actions I have taken and on decisions I have made over the years. To use a recent experience: when I became chairman of the Dun & Bradstreet Corporation in 1994, I knew that the company, then an information services conglomerate, was ill-equipped to make informed trade-off decisions. The governing bodies of the company, both the management and the board, were too far removed from each of the businesses within the company to be able to understand the individual markets or to clearly see customer needs or understand how to fill them. Responding to that, I set into motion a series of radical actions that transformed the corporation.

Today old Dun & Bradstreet is represented by five separate and distinct public companies, each with its own management, its own board, its own shareholders. Each has a tightly focused operating charter and a clearly definable customer set. Today those five companies have higher revenues, more employees, greater profits, and a significantly higher total equity value. By organizing to satisfy customers better, all of the stakeholders won.

In order to get the board and management of IMS Health, the company that I now participate in, intimately familiar with the issues of the business, we reduced the size of the board from sixteen members to a more workable eight. That made the board less of an audience for corporate kabuki dance presentations and more of a working group. We fashioned an ongoing agenda that focused on what one board member, using baseball terminology, called the high hard ones.

Operating managers attend every board meeting and discuss opportunities, problems, and alternate courses of action. Women and minorities have risen to the most senior operating positions within the company, not because of outside diversity goals, but because we realized that our own discomfort was blocking talent and insight that we desperately needed. It was also denying some of our employees the ability to aspire to greater personal success and therefore was lowering their interest in the success of the enterprise.

In order to get goals aligned between employees and shareholders, we modified our compensation and our equity participation pro-

grams in dramatic ways. Unlike old Dun & Bradstreet, where one percent of the workforce participated in stock options, IMS Health now offers stock options to 100 percent of the employees. In addition, nonofficer employees participate in a program that allows them to purchase shares in the company at a discount.

For senior managers, we imposed mandatory stock ownership guidelines. We also lowered cash compensation. Using myself as an example, for instance, making budget today means that I will earn a cash compensation that is fifty-five percent lower than I would have earned in Dun & Bradstreet. In place of cash, we increased the opportunity to earn equity-based gains. Through these actions, we increased a shared stakeholder incentive in growing the wealth of the enterprise.

We moved our headquarters from Westport, Connecticut to Europe because two-thirds of our customers, our revenues, and our employees are outside of the United States. We wanted to signal to our stakeholders that we intended to be more involved with them and to be closer to them. The composition of our senior management team now reflects our commitment to understand our customers and our employees—an American, a Frenchman, a Canadian, an Austrian, an Irishman, and a Japanese.

With vendors, we regularly enter into three- to five-year contracts, and we not only trade cash for goods, we trade goods for goods, so that we can create an interdependence, provide stability for all parties, and foster an atmosphere of partnership. We devote an enormous amount of time talking with customers about their needs and observing them to understand their needs they may not recognize they have. We seek and generally have long-term contracts with our customers, usually in the three- to five-year range. We price our products and our price growth at a less than CPI[1] pattern. For our customers, these steps underscore our continual commitment to value and put pressure on us within the company to deliver on that commitment.

An important point here: none of these actions we have taken have been in response to outside pressure groups; nor are they an effort to be politically correct. They are an affirmation of the model that drives us to find real customers with real needs, to fill those needs better than anyone else can, and to meet the personal objectives of the stakeholders who can make it happen. As we take these actions, let me reiterate: I don't think that we are compromising the interests

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1 The CPI, Consumer Price Index, is an index that the Bureau of Labor Statistics of the Department of Labor computes and issues monthly. The index attempts to track the price level of a group of goods and services that the average consumer purchases. For more information, see *Consumer Price Indexes* (last modified Apr. 13, 1999) <http://stats.bls.gov/cpihome.htm>.

of our shareholders for those of other stakeholders, or that we are suboptimizing the performance of the company.

There is an essential harmony in the way a well-run business runs. It is not an issue of shareholder versus stakeholder or of addressing the needs of one over the other. It is not a zero-sum game. Rather, it is an integrated whole, which has the potential to multiply the returns not only for all of the stakeholders but also for society in general.

By meeting the needs of society, corporations create wealth for society. They leverage the assets that are brought together and deliver that wealth in the form of greater productivity, innovation, and knowledge. I believe that corporations are the most effective tools that society has for achieving that purpose and that corporations should not be diverted or distracted from that singular mission. If society, through the legislative process or through the action of pressure groups, tinkers with the structure of corporations or interferes with their ability to fulfill their mission, they do so at society's peril.

In the course of the discussions that you will have today, I hope that you will keep sight of the fact that tools are generally designed to do one job well. When a tool is enlisted in the task of fulfilling some function other than the one it was designed for, not only is the task done badly or not at all, but also we usually end up damaging that tool.

I think that the corporation is a marvelous tool. Let us understand and preserve its mission and use it well. Thank you very much.

PANEL I
DEFINING THE CONFLICT AMONG STAKEHOLDERS AND BETWEEN STOCKHOLDERS AND STAKEHOLDERS: A MANAGEMENT PERSPECTIVE

A. The Corporation's Role in the Community

MR. CHAKRAVARTY: Good morning ladies and gentlemen. My name is Subrata Chakravarty. I am an assistant managing editor at *Forbes* magazine, and we are here to discuss the conflict, if there is one, between stakeholders and shareholders.

With me here is a very distinguished group of panelists to discuss this issue. Suffice it to say they are all highly educated, although one went to Princeton, and are, in addition, very well-qualified and an extremely balanced group representing all of the various constituencies that one might think of. Peter Clapman, Senior Vice President and Chief Counsel for investments at TIAA-CREF; Lawrence Cunningham, Professor of Law at the Cardozo School of Law, Yeshiva University; Terrence Gallagher, Vice President for Corporate Government at Pfi-

zer; and Timothy Smith, the Executive Director of the Interfaith Center on Corporate Responsibility.

Let me take just a couple of minutes, if I may, just to talk a little bit about how to frame this conversation. I don't think there is any disagreement (1) that the best corporation would be one that is a well-managed, profitable corporation that looks after its people well, and one that is a good corporate citizen, and (2) a profitable corporation is the most likely to be the most desirable to both stockholders and stakeholders. It is because of that you can do all of the things that the stakeholders might wish you to do.

One of the subjects we need to discuss, obviously, is who exactly are the stakeholders. To some extent management is; the workers, obviously; the community, perhaps; the suppliers, perhaps; and perhaps even the unions.

There's very little question that the United States over the last ten to twelve years has become the most competitive nation on Earth, in large part by its willingness to make the painful kinds of decisions like cutting costs, usually by cutting back on people and closing plants. All of these things cause pain, not just to individuals but to entire communities. But there is little question that it needed to be done. These are issues that Asia is just beginning to struggle with and Europe is trying to ignore.

But having said that, a lot of companies play a major role in their communities, not only as taxpayers but also as creators of local beauty—the Pepsico Gardens come to mind in Purchase, New York—and philanthropy. The Rochester Philharmonic wouldn't exist but for Eastman Kodak. The Eastman School of Music wouldn't exist, and the University of Rochester would certainly be a much lesser institution without Kodak stock. You can go on and on as to corporations.

So what is the responsibility of a corporation when, for whatever reason, it moves out of a community? When Gulf is taken over by Chevron and is then moved out of Pittsburgh, does Chevron owe any responsibility to the community in Pittsburgh? When Kodak cuts employment in half in Rochester, or Xerox decides to move closer to New York City because Peter McCullough likes to come to the Harvard Club, do they owe a responsibility to the communities that they leave behind? That is something that needs to be discussed.

On a more serious level, corporations move elsewhere, whether overseas or to nonunion states, in order to cut costs. These are important things that need to be done by the corporations to preserve themselves, but they damage to the communities they leave behind, and the question is one of balance.

Finally, what is the responsibility of the unions? Do they have, really, a stake in the company or are they much more willing to sacri-

fice the company itself for the greater good of the larger union? Again, the one that is the most obvious example is the newspaper union in New York. At the turn of the century, there were about a dozen newspapers in New York City. Today there is essentially one with two others limping, and one might reasonably ask the question, whom have the newspaper unions served by forcing these papers out of business over time?

So with that, I will turn it over to the panel, starting with Professor Cunningham.

B. Shareholder-Primacy: Comparing the American and German Models

MR. CUNNINGHAM: Good morning. Thank you very much, Mr. Chakravarty.

Corporate social responsibility implicates the question for whose benefit the corporation is to be operated. It is customary in the United States to think the law requires that corporations be operated primarily for the benefit of shareholders. It is equally customary in Germany and other continental European countries to think that the law requires that the corporation be operated for the common good, for shareholders, workers, creditors, communities, and so on.

On a general and abstract level, both of these statements or customary ways of thinking are correct, but the truth of these general statements does not altogether hold up at the level of particular application. In particular, the German model, highlighted by the pending merger of Daimler and Chrysler,[2] shows something far less like a stakeholder model than the common German model would suggest, though not quite a shareholder model.

The U.S. model, highlighted by both general standards of director conduct under Delaware law and, more strikingly, by the pending takeover battle being waged by AlliedSignal for AMP in Pennsylvania,[3] is something far less like a shareholder-primacy model and something more like a stakeholder model, though perhaps not quite like the rhetorical German stakeholder model.

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[2] The Daimler-Chrysler merger transaction closed on November 12, 1998. On November 19, 1998 DaimlerChrysler stock began trading on stock exchanges worldwide under symbol DCX. *See The Ticker*, DAILY NEWS (New York), Nov. 12, 1998, at 35.

[3] *See* AMP Inc. v. AlliedSignal Inc., No. CIV.A. 98-4405, 1998 WL 778348 (E.D. Pa. Oct. 8, 1998); *see also* Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133, 1160-62 (1999) (describing the AMP litigation and its implications in detail). After rebutting AlliedSignal's bid, AMP entered into a white knight arrangement with Tyco in November 1998 for a price that exceeded AlliedSignal's bid by approximately 10%. *See* Steven Lipen & Gordon Fairclough, *Tyco Reaches Agreement To Buy AMP in Stock Swap Valued at $11.3 Billion*, WALL ST. J., Nov. 23, 1998, at A3.

Opponents of the shareholder-primacy model in the United States, who advocate a greater role within the corporate government system for nonshareholder groups, sometimes point to the German and other continental European models for support. This model is not commonly seen as putting shareholders first, but rather as putting all constituencies of the corporation on an equal footing.

In terms of formal governance, German corporations generally have two-tiered boards consisting of a management board and a supervisory board in a system called co-determination.[4] The supervisory boards are composed one-half of employee-elected directors and one-half of shareholder-elected directors. That board, in turn, appoints the representative members of the management board, and while the supervisory board cannot make management decisions, it can determine that certain actions to be taken by the management board require its prior approval.[5]

In the Chrysler-Daimler merger, the rhetoric and formal structure of co-determination enabled the Daimler board to maintain that an important factor to it in structuring the deal was that the merged company be a German corporation rather than a U.S. corporation. While German law permitted both boards of Daimler to consider the interests of workers and so-called common interests, it also required that the boards not act contrary to the best interests of the Daimler shareholders. That formulation showed that shareholders do have a special place in German corporate governance, though it is certainly not a shareholder-primacy norm, nor is it a standard or customary formulation of the stakeholder model.

There is also symbolic recognition of the standard stakeholder model in the DaimlerChrysler governance structure and board composition. Of the twenty members on the supervisory board, ten will be appointed by labor and one of those will be appointed by the United Auto Workers Union.[6] But will that formal labor representation really mean much as a practical matter, in terms of whose interests the corporation will serve?

We can't be sure, but the practice within most German corporations is that supervisory boards possess very little real decision-making authority on operations, finance, or other business matters, but instead pretty much just gain access to information and have an occasional voice vote at the table. Indeed, the tendency within Germany has been for managerial boards to dilute the power of the labor-dom-

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4 *See* M.C. OLIVER, THE PRIVATE COMPANY IN GERMANY 11-12 (1986).

5 *See* Thomas J. Schoenbaum & Joachim Lieser, *Reform of the Structure of the American Corporation: The "Two-Tier" Based Model*, 62 KY. L.J. 91, 95-108 (1973).

6 *See* David Phillips, *UAW Wins Daimler Board Seat: Union Will Be Represented on Supervisory Panel Created by Merger with Chrysler*, DETROIT NEWS, May 28, 1998, at A1.

inated supervisory boards. Moreover, this will not be the first time that the UAW has served on a Chrysler board. From the early 1980s until 1991, the UAW has had a seat on the Chrysler board—as part of the multiparty deal worked out with the U.S. Government, which offered loan guarantees to Chrysler in the 1980s. That director, like all other U.S. directors, was duty-bound to act in the best interests of the shareholders and the corporation as a whole—a phrase that sometimes extends director duties to people other than shareholders, including lenders, communities, and workers.

It is true that Delaware case law routinely and rhetorically emphasizes a shareholder-primacy form. Cases such as *Revlon*[7] and *QVC*[8] come to mind. Yet even in those very cases, the norm is mediated, for the Delaware courts have always permitted directors to consider the impact of their decisions on constituencies other than shareholders.[9]

This standard operating principle in the Delaware courts is consistent with the general principle of U.S. corporate law that allows directors to consider other constituencies so long as the effect on the shareholders is not too great.[10] But the Delaware courts have gone even further, as when the Delaware Supreme Court accepted arguments by Time, Inc.'s director, who resisted an unwanted takeover in part on the ground that doing so was necessary to preserve the journalistic integrity of that company.[11]

Even under the most rigorous form of traditional review of board actions in takeover contests, that to which the so-called *Revlon* duties apply, which at least rhetorically require shareholder wealth maximization, Delaware courts continue to give directors wide berth. Delaware law does not require any particular action of the directors, such as running an auction to maximize shareholder value, nor does it impose on directors any duty to ensure that shareholder value is maximized.

More dramatically, consider the current fight for control between AlliedSignal and AMP. In August 1998, AlliedSignal announced a tender offer, all cash, all shares at a fifty-five percent premium for

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7 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

8 Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994).

9 *See, e.g.*, *Revlon*, 506 A.2d at 182 ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

10 *See, e.g.*, Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 586, 613-14 & nn.142-43 (1997) (cataloging the "permissive 'other-constituency' statutes" of twenty-six states, "which indicate whose interests a board may consider in making decisions[, and b]roadly stated, . . . give boards of directors discretion to consider the interests of non-shareholders when making decisions").

11 *See* Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1143 & n.4, 1145 (Del. 1989).

AMP, which is a company whose profitability had been declining materially of late. AlliedSignal also announced its intention to wage a consent solicitation—what the press has been calling a "mail-in vote"—to gain control of AMP's board by amending the bylaws to increase the size of the board and by proposing to fill the vacancies so created with AlliedSignal nominees.[12] Later in the battle, AlliedSignal also proposed to strip the AMP board's power to modify their poison pill.[13]

AlliedSignal has the overwhelming support of AMP's shareholders. As of mid-September 1998, seventy-two percent of AMP's shareholders had tendered into AlliedSignal's original offer.[14] Shareholder supporters include members of the founding family of that company, the Robert Hixon family, and many of the institutional investors who own a total of about eighty percent of the stock, including TIAA-CREF. Indeed, TIAA-CREF is part of the shareholder group that has sued AMP's board, and it also separately filed a friend-of-the-court brief supporting direct litigation by AlliedSignal against AMP, repeating AlliedSignal's argument.[15]

TIAA-CREF has said that AMP's board has trampled on basic "principles of shareholder democracy."[16] It has done so, despite the overwhelming shareholder support for AlliedSignal, by erecting a series of defensive barriers to AlliedSignal's bid and by taking advantage of Pennsylvania laws that require directors to act not in the best interests of shareholders but in the best interests of the corporation.[17] Pennsylvania law further permits boards to act in what they perceive to be the best interests of nonshareholder constituencies, including employees, lenders, communities, and others.[18]

Among the barriers the board erected were a reduction in the percentage that would trigger AMP's poison pill and a change in the deadhand provision of that pill.[19] The pill had formerly provided that it could only be amended after a change of control by directors who

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12 *See* AMP Inc. v. AlliedSignal Inc., No. CIV.A. 98-4405, 1998 WL 778348, at *1-3 (E.D. Pa. Oct. 8, 1998).

13 *See id.*

14 *See id.* at *2.

15 *See* Amicus Brief for AlliedSignal, AMP Inc. v. AlliedSignal Inc., No. CIV.A. 98-4405, 1998 WL 778348 (E.D. Pa. Oct. 8, 1998) [hereinafter TIAA-CREF Brief].

16 *Id.*

17 *See* 15 PA. CONS. STAT. ANN. § 1715 (West 1995).

18 *See id.*

19 Deadhand provisions stem from the poison pill anti-takeover defense. The AMP court succinctly described the poison pill defense:

> [I]f an acquiring entity acquires more than a specified percentage of a target company's stock, each share of the stock (other than stock held by the acquiror) carries with it a "right" to acquire at half-price newly issued shares of the company's stock. The effect of the right is to place half-price stock in the hands of the target's shareholders, thereby diluting the interest of the

were in office before the change of control. They amended that to provide that after a change of control, the pill simply could not be amended, at least until its expiration date.

AMP also sought and obtained an injunction against AlliedSignal's consent solicitation, both the piece that would strip the board of power to change the pill and also the piece that would amend the bylaws and elect AlliedSignal directors unless and until the Allied directors individually confirm their understanding that Pennsylvania fiduciary duties require them to act solely in the best interests of the company and not in the best interests of the shareholders. A Federal District Court in Pennsylvania upheld AMP's arguments and issued that injunction, prohibiting AlliedSignal from going forward with its consent solicitation unless and until each board member of AlliedSignal makes that certification.[20] That judge, in oral argument, elicited from counsel for AlliedSignal their willingness to do this. "Our proposed slate of directors will be very happy to make that certification," they said, "We will be able to do that within forty-eight hours." In the course of the court's opinion, it repeatedly emphasized that the directors do not have a duty to the shareholders but instead have a duty to the corporation.

I will just take a couple of examples from that opinion:

> [D]irectors may weigh the interests of the shareholders against the interests of other constituencies, [and Pennsylvania law] asserts no specific duty to shareholders above or beyond those owed to those other constituencies.[21]
>
> "[D]irectors . . . may, in considering the best interests of the corporation, consider . . . [t]he effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, [and the list goes on]."[22]
>
> "[D]irectors . . . shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor."[23]

> acquiror and making it economically prohibitive for the acquiror to complete the acquisition of control.

AMP, 1998 WL 778348, at *2. Deadhand provisions, in turn, "seek[ ] to thwart a hostile bid by purporting to vest shareholders with preclusive rights that cannot be redeemed except by 'continuing directors.' Thus the very act that would make it practically possible to redeem the pill–replacing the board–would make it legally impossible." Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 523 (1997).

20 *See AMP*, 1998 WL 778348, at *5.

21 *Id.*

22 *Id.* (quoting 15 PA. CONS. STAT. ANN. § 1715(a) (West 1995)).

23 *Id.* (quoting 15 PA. CONS. STAT. ANN. § 1715(b) (West 1995)).

Under German law, these sorts of statements would be described as protecting the common interests and clearly, under Pennsylvania law, that's just what you have. Even under those Delaware standards that I just mentioned, the shareholder-primacy norm is far more a matter of rhetoric than reality in the United States.

So U.S. practice more nearly resembles German practice than it resembles U.S. rhetoric, and German practice more resembles U.S. practice than it does German rhetoric. Neither abstract standard, taken literally, is sustainable. A sustained and literal application of the generalized shareholder-primacy norm is unachievable, given management control and power. Further, as Mr. Weissman said this morning, management's relationship with all other constituencies also makes a sustained and literal application of the generalized stakeholder law unachievable, given that shareholders do supply the capital that fuels the corporation.[24]

So this mixed-model reality might be inevitable, and it really just optimizes among competing interests subject to competing constraints rather than maximizes any single objective. Accordingly, what should be of greater concern than any competition between shareholders and workers or other nonmanaging constituencies is the competition between all those groups on the one hand and management on the other. In the takeover context, for example, whose interests are really going to be served or protected by the AMP board's actions in defending against AlliedSignal? Certainly the shareholders don't think their interests are being served, and AMP's board has proposed as its own plan to enhance corporate profitability, reducing the workforce by ten percent—about 4200 workers—and also closing ten plants over the next eighteen months.

Apart from takeovers, the most dramatic issue of concern to all constituencies versus management is executive compensation, and here the difference between German corporate governance and American corporate governance is absolutely striking. American executives are paid way more than German executives, both in raw terms and in terms of the ratio of the highest paid executive to the lowest paid executive.

This is one of the big issues that Chrysler and Daimler faced in merging their operations. Which model would be the way forward? Perhaps it is not surprising that the U.S. model is going to be the way forward. The CEO of Daimler in effect said, "We think that the U.S. model on that point is certainly superior"[25] (maybe that's why they are doing this merger), "so long as executive pay is tied to real perform-

[24] *See supra* Introductory Remarks.

[25] For a discussion of the global dynamics of executive compensation and its application to the Daimler-Chrysler merger, see David Cay Johnston, *American-Style Pay Moves*

ance." I thought, I have heard of that before. That is the standard American rhetoric. To the extent German corporate governance is not all that different, as I have suggested, from U.S. corporate governance, I was worried that is what he meant when he mentioned that this merger creates the first German company with a North American culture.

In any event, I think that I would focus as much attention on these kinds of questions as I would on debates or fights between the interests of one constituent group and another.

C. The Crux of the Issue: The Accountability of Management

MR. CLAPMAN: Good morning. I am Peter Clapman from TIAA-CREF. What I will do is add, I think, to a lot of what Mr. Cunningham has said, because he has identified a particular situation, which I think highlights the issues under discussion by this panel.

TIAA-CREF is, I believe, the largest pension system in the world, and we manage approximately $240 billion of assets. We are a long-term shareholder, and not unexpectedly, are going to speak up for the shareholder perspective on these issues. But to start, I would say that often the issues are framed in terms of the stakeholder interest versus the shareholder interest, which I think is probably a false statement of the issue in most cases. What is left out of the equation—and I am glad Mr. Cunningham really brought that into it—is that often the issue is the accountability of management, really not a dispute between stakeholders and shareholders because in running a business, stakeholders don't make the decisions of the company, nor do the shareholders make the decisions of the company. Management makes the decisions of the company, and accountability of management is a keystone of a lot of the issues under discussion.

In fact, I think the stakeholder notion really was born, ironically, in how certain state anti-takeover statutes were devised, which raises a question of the sincerity of whether certain of their principles are for the protection of the stakeholders as opposed to the protection of management in critical situations where there is a dispute of the shareholders. Take the AMP situation, where TIAA-CREF did file an amicus brief,[26] an unusual step, to effectively, I believe, state the shareholder issue in a takeover situation of this sort. What Mr. Cunningham pointed out was that the company has reduced its workforce ten percent, and closed plants. Now where is, therefore, the interest in protecting the employees, as a stakeholder? In other words, you really come down to whether this issue in certain cases—and I would clearly

Abroad: Importance of Stock Options Expands in a Global Economy, N.Y. TIMES, Sept. 3, 1998, at C1.

26 *See* TIAA-CREF Brief, *supra* note 15.

point out that what I am saying now is pretty much confined to where there is a real dispute over takeover and management control—is protection of these other interests; it has a certain air of disingenuity to it. Just take the situation of how you define the competing interests and how you assess whether the interests in protecting the corporation as a whole or particular constituencies within it, how is that to be judged? The AMP board has said what it is doing is protecting the corporation, protecting some of these constituencies. How can anybody make a judgment, find out the factors they are taking into consideration, and conclude that they are doing anything differently than perhaps a new board, one which would have the support of the shareholders looking out in the long run?

Clearly, in the broad mix of American corporations, it is good for business and for shareholders for a company to take fairly into account all of its constituencies. Good customer relationships? That's great. It's great for shareholders, it's great for the business. There is really no dispute there. But when you think of customers, when you think of suppliers, basically, there is no standard that protects them vis-à-vis the corporation, the existing management in the company. If an existing management wants to change suppliers, unless there is a contract that that supplier has with a company, that is just an expected part of the business world. So when management in a takeover context says, "Gee, we really are doing this for suppliers," I think there is an air of disingenuity in the situation. Unless an existing management can say that they are protecting any of these constituencies in a definable way that is rational to the general public, that argument is really effectively being used, not to protect any particular stakeholder, but as a weapon in the anti-takeover context—in the situation where the question is the shareholders'.

Now, what is the appropriate role of a long-term shareholder in these situations? I would say, starting back with the main point, that there is no necessary conflict between good relationships with stakeholders, all of those stakeholders being mentioned here, and the shareholder interest. As I said, the whole question of the stakeholder issue came up as a question of how certain managements would try to protect themselves in the context of a takeover fight. The more "constituents" you can draw into the equation—in presumably ultimately a legal context—the more difficult it is for the court to judge whether the management, in fact, is supporting any particular stakeholder.

How do you decide between, if you define all of these interests as legitimate stakeholders, which stakeholder's interest—a customer, a supplier, employees—is really being protected by the company in any particular situation? Whose interest among those particular stakeholders is more important than others'? And remember one word I

tried to emphasize in the first part of my discussion: Accountability. Basically, management has no accountability to any of these stakeholders. Perhaps they do to their employees, if they are unionized and there are union contracts, but there is no accountability to suppliers and there is no accountability to customers. So basically, the shareholders are what really makes that system work.

The main point, and I will close with a summation of it, is that the real debate between the stakeholders and the shareholders is an interesting debate, and I would start with the premise that in general, there is no real dispute or conflict among stakeholders, including shareholders in that context. The one place that it really makes a difference is when a management is trying to thwart a takeover attempt and uses the stakeholder argument to try to avoid accountability under those circumstances, and I think it is misusing the stakeholder in the final analysis in those situations. Thank you.

D. A Corporate Focus on Shareholders Can Lead to a Focus on the Stakeholders and Communities

MR. GALLAGHER: Good morning. As a representative of a large American company, a public company that operates worldwide, there are a few distinctions I would like to draw in our subject here. First of all, I think we need to talk about the United States, and the company modeled in the United States, which as both of the previous speakers have laid out fairly clearly, is basically the stockholder-primacy model. I would like to quote the most recent issuance of the set of corporate governance principles by the Business Roundtable, one of the leading organizations among large corporations in the United States. They issued their most recent set of principles just last year, and I quote on this subject:

> In the Business Roundtable's view, the paramount duty of management and boards of directors is to the corporation's stockholders; the interests of other stakeholders are relevant as a derivative of the duty to stockholders. The notion that the board must somehow balance the interests of stockholders against the interests of other stakeholders fundamentally misconstrues the role of directors. It is, moreover, an unworkable notion because it would leave the board with no criterion for resolving conflicts between interests of stockholders and of other stakeholders or among different groups of stakeholders.[27]

So that is the pronouncement by a group of the largest corporations in the United States. I think that it is true that the United States model is well set in place, both through that kind of principle and also

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[27] THE BUSINESS ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 3-4 (1997).

through the state laws. It is also true that in the takeover period of the 1980s, a number of states, quite a number of states, adopted the so-called "stakeholders laws" that enabled boards of directors to fend off possible takeovers by citing the interests of stakeholders beyond that of the shareholders, positioning an offer as such.[28] The AMP case probably is a good example of that, and probably an extreme example, as both of the speakers have said.

But taken in the context of a company that is operating and doing its business well and making money for its shareholders, we have a different situation from that which presents itself in the hostile takeover situation. As Mr. Clapman mentioned, in that situation, a company—a United States corporation generally—is aware of, and sensitive to, and takes account of, the interests of the stakeholders beyond the shareholders. In that context, the employees, the suppliers, and the community are beneficiaries of this kind of operation of a large corporation.

Pfizer is a large U.S. corporation, and it does in fact, take into account all of those interests. We have valued suppliers we spend a lot of time courting, a lot of time with, helping out to have their businesses grow as they supply whatever it is we need to operate our business. Our employees are well taken care of, the pay level is high, and as Mr. Weissman was saying, we also grant stock options to every employee in the United States on a periodic basis. Our compensation level is among the highest in the industry. With respect to the community, we have a very extensive philanthropy program that provides donations to various groups. We also have a program that we call *Sharing the Care*,[29] which provides Pfizer pharmaceuticals to those persons who do not have medical insurance but need a Pfizer product, and we do that through the public health centers around the country. The numbers are up in the hundreds of thousands of people who have received Pfizer medication through that kind of a program. So if we are typical, and I believe we are, of large public companies—we have our community programs (primarily in the health and education area because of our business) and the kinds of things Mr. Chakravarty talked about (the symphony orchestras, the universities that are helped by large corporations)—these are all examples of the kind of concern for the stakeholder community in the United States.

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[28] *See, e.g.*, GA. CODE ANN. § 14-2-202(b)(5) (1994); 15 PA. CONS. STAT. ANN. §§ 1715-1716 (West 1995).

[29] Pfizer launched this program in 1993. *See Product Donations: Sharing the Care* (visited Feb. 25, 1999) <http://www.pfizer.com/pfizerinc/philanthropy/whatwedo/programs/html/sharing.html>.

In Europe, we have a different kind of culture. As Alexis de Tocqueville said when he visited the United States,[30] he found an unusual volunteerism in the culture in the United States that he did not find in Europe. This difference has persisted over time. In Europe the culture has been that the government, through its social responsibility, has provided the infrastructure for the community and the support of the community. The support of volunteerism by private corporations has not been the tradition, so we have a different situation there, and the move to try to have the corporations become involved with the stakeholders in society is a fairly recent movement in Europe. My opinion grows out of a concern that those countries which have provided a very basic and extensive social infrastructure have found it to be an expensive proposition as they moved into the new European Community, and its requirements as far as becoming part of the Euro and the use of the European currency, and they have now sought to define a different method of satisfying the needs of that social infrastructure.

I think Mr. Weissman, or maybe it was Mr. Macey, cited Tony Blair. Tony Blair has, in his campaign for his first election as prime minister, cited England as being a stakeholder society—the whole country. His concept would be to broaden extensively the concept of stakeholder and who would be involved with the purpose and the direction of the corporations in the United Kingdom. That is a totally different culture from the United States. To try to meld those two cultures, I believe, is the concern that we have now. That is the tension that's going on.

The OECD,[31] an organization of about twenty-seven governments that was originally founded for economic growth in Europe and other parts of the world, is now looking at establishing a set of corporate governance guidelines that would be used by the various countries that are members of the OECD, and hopefully other countries as well. The debates that have been going on—we have participated in those debates, and Pfizer has a particular role because our chairman is head of the Corporate Governance Taskforce of the Business Roundtable, and as a result of that, we have become involved in those discussions at the OECD—and the tension in those debates is exactly what I described: the tension between the U.S. type of model for corporate responsibility and the European model, as I call it, of corporate responsibility, and how much of a stakeholder interest, in terms of a stakeholder society such as Tony Blair talks about, will be embedded in the corporate governance guidelines. They are in the process of

30 *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Richard D. Heffner ed., Penguin Books 1984) (1835).

31 OECD stands for Organization for Economic Cooperation and Development.

drafting those and they hope to have a set of guidelines drafted by mid-1999. These guidelines will be the next sort of pronouncement by a major group on how to balance these two cultures.

Once we get into the regular operation of the corporation, both here in the United States and to some extent in Europe through the subsidiaries of transnational corporations such as Pfizer, you get basically a U.S. model in the sense that the community does matter, the employees do matter. The whole concept of a stakeholder society in this context is, I think, now in place in the United States, and it will be growing in the other parts of the world through the transnational corporations. To what extent we would be forced into a greater legislative-type responsibility for society as a whole is unclear at this time and that is something that, in my opinion, would be a mistake on the part of the OECD or the governments that are part of the OECD. If they should legislate this type of requirement, I think they would set limits on what corporations would do or not do in this area, and without the legislation, I believe that we have an opportunity to expand our involvement with the community, our involvement with our shareholders, our stakeholders, the employees, the suppliers, and anyone else who has an interest in the corporation. That, in my opinion, is a better way to go in terms of balancing the responsibilities.

E. Corporations' New Motivation To Invest in Socially Responsible Community Programs

MR. SMITH: Good morning. I am Tim Smith and as you heard, I work with the Interfaith Center on Corporate Responsibility. That is an association of 275 religious investors through pension funds, foundations, health, Roman Catholic health, hospital chains, that kind of thing, and we have approximately $90 billion in their various portfolios.

In our work we are also working with other concerned investors, groups like New York City's pension funds, for example, or some of the mutual funds in this room, the Dreyfus Third Century Fund or Pax World Fund with foundations, universities, trade unions—I see Jack Schenkman here, former head of the Amalgamated Clothing and Textile Workers Union—and all of these are voices of investors who are very concerned about the corporate governance issues we are discussing on this panel. But we also need to look at what some of them describe as the "social bottom line." They look at what the social responsibilities of companies in which they invest are. According to a recent study by the Social Investment Forum,[32] if you count up the

[32] *See Report on Responsible Investing Trends in the United States* (Nov. 5, 1997) <http://www.socialinvest.org/areas/research/trends/1997-Trends.htm>.

universities, foundations, religious groups, trade unions, pension funds, and so on that vote proxies on social issues, that file resolutions, that perhaps screen out tobacco stock, for example—many of you may know that Harvard and Johns Hopkins don't own tobacco stock and won't because they feel it is a violation of their mission as a university—if you count all of these up, you come up with about a trillion dollars. Still a small part of the market, but nonetheless one that cannot be ignored or discounted.

In our work, the work on corporate social responsibility, we are raising a whole range of issues, from the environment to diversity. We are looking for and looking at issues like sweatshops overseas and questions of the responsibilities of the tobacco industry. We are encouraging good corporate citizenship, pressing for leadership by the business community on issues as I have just described, and in the late 1990s, we are heartened to see that these calls for corporate social responsibility are coming not simply from investors, not simply from environmental groups or human rights groups, but also from the business community itself. These are not words that are simply heard from companies like Ben and Jerry's and Stonyfield Farms, who are those kinds of feel-good or do-good companies that one hopes will make a profit but also define themselves as being socially responsible companies. You would hear these same words from the CEO of General Motors, from Shell Oil, Pfizer, IBM, British Petroleum, Liz Claiborne, and many, many other companies.

The specifics, of course, of what defines corporate social responsibility may differ, but the basic theme we are talking about this morning it is whether it is a paradox to talk about corporate social responsibility. I believe many business leaders now argue that they have a broader compact with society, they have a responsibility to be in a kind of a social contract with the broader society. So Milton Friedman's maxim that the goal of business is profits for shareholders,[33] and at least as it was interpreted over the years—that it was the sole goal and all good things flowed from it—is something that I am not hearing from the top executives, the CEO's of major corporations, any longer.

You hear more. Of course you still will hear that profitability is key to the long-term success of the company, for shareholders. But you also will often hear companies like General Motors talk about how work on environment and leadership on the environment is good for the bottom line. And you will hear other companies talk about how being a socially responsible corporate citizen is not simply a do-good action but it is also good for the shareholders and the bottom line. So

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33 *See* Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32.

I believe that corporate social responsibility commitments are being heard more and more from American corporations.

Let me turn to a couple of examples we and other groups have raised with companies so we are not just talking about this in amorphous generalizations. Through the process of quiet dialogue with companies or vigorous debates through the shareholder process, many social responsibility issues are brought to the boardrooms of American companies. We are actively involved, for example, in pressing corporations on environmental issues. Many times this is, again, a quiet conversation with management as they explain to concerned shareholders what they are doing to take steps forward into the next century in a very, very active, progressive way on the environment. But sometimes you will see shareholder resolutions on proxy statements asking for example, companies to endorse a set of environmental principles called the CERES principles,[34] which we believe is a remarkable set of environmental accountability standards.

These are not simply a set of "green" principles that the company salutes and says, "we are committed to all good things in the environment." The company also pledges to do an annual standardized environmental report, so that the company will track its progress on things like toxic emissions and other environmental issues. It also will report to the shareholders, report to the stakeholders, of course, setting up standards for itself. Further, through the CERES principles, the companies are also committed to work more in a cooperative way with environmental groups rather than seeing them as the enemy, always pushing them to make environmental changes.

That's also been the experience in the environmental community as they sit down now with General Motors or other companies, learn more about the business problems those companies face, and work together with them for environmental improvement. So we see companies like GM, ITT, Bank of America, and Sun Oil as leaders endorsing these principles. While we have encouraged the companies to endorse the CERES principles, there are many other sets of environmental standards out there that we see, from the Chemical Manufacturers Association to the petroleum industry, and we are heartened by the fact that we are seeing companies make that kind of public commitment and covenant with others in the industry to move forward.

A second issue you will see shareholders raising a great deal with companies is the whole question of diversity. Of course, virtually every company we talk to or you would discuss issues with says they are committed to nondiscrimination in employment. We are talking about

34 CERES stands for the Coalition for Environmentally Responsible Economies. For a general discussion of the CERES principles, see Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 498-502 (1997).

equal employment opportunity, shattering the glass ceiling, and diversifying boards of directors. So we need to look beyond the statement, "we are an equal opportunity employer, we don't discriminate," and look at what leadership means for a company on the diversity issue.

I think it might be interesting to look at some of the steps that Texaco is taking to illustrate this broader question.[35] First of all, Texaco, as part of their rigorous present process, is reviewing all levels of its company to ensure it is moving towards true diversity. That is the general theme. It is attempting to break open the glass ceiling; the glass ceiling that is so prevalent and was described in the glass ceiling economics report that came out in the last administration.[36]

Texaco is diversifying and has been diversifying its board. Texaco publishes an annual report on diversity, including the hard numbers—where their EEO numbers stand—and what changes have occurred in the last three years.[37] Texaco tracks these numbers for itself and lets the shareholders and others review those numbers. They are working to diversify their vendors and those who are managing Texaco stations, so Texaco is actually tracking who is providing the goods and services to them and also who is out there selling the gasoline at the pump. They are even looking at who manages the Texaco pension fund, and if my statistics are accurate, I believe that over ten percent of the vendors, of those who manage Texaco's pension fund, are woman or minority managers. Believe me, among the religious investors that would be a goal I would love to see some of our members living up to. Moreover, I think that Texaco is stressing that this is not simply a do-good program, and although some might be skeptical and say it is simply being done to get rid of the past problems and terrible PR they have suffered, you hear management say again and again that leveraging diversity and the talents of all of their people is essential for a profitable future for the company.

Now, I don't mention this as an advertisement for Texaco, but I mention this as sort of a breakdown of what it means to be a leader in equal employment opportunity. It doesn't simply mean we won't discriminate. Also, as I mentioned earlier when I talked about boards of directors, for us it means that boards of directors of companies need to be inclusive, they need to be diverse. They need to, at least in some

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35 Texaco and certain of its key executives became embroiled in a racial-discrimination lawsuit in 1996. Texaco settled the case "for $176 million and [an agreement to] creat[e] a program to promote more minorities." Adam Bryant, *2 in Texaco Case Found Not Guilty*, N.Y. TIMES, May 13, 1998, at A1.

36 *See* U.S. DEP'T OF LABOR, PIPELINES OF PROGRESS: AN UPDATE ON THE GLASS CEILING INITIATIVE (1992). This publication is available from the Department of Labor Office of Federal Contract Compliance Programs in Boston, Massachusetts, (617) 565-2059.

37 *See First Annual Report of the Equality and Fairness Task Force for Year Ending June 30, 1998* (visited Mar. 9, 1999) <http://www.texaco.com/compinfo/contactus_main.htm>.

degree, mirror who the shareholders and the stakeholders are in the company. In short, the age of the all-white-male board has passed. We see many, many institutional investors, including CalPERS and TIAA-CREF, supporting diversity on boards not simply as a social issue. In fact, and Mr. Gallagher can speak for himself, but as I understand it, TIAA-CREF's guidelines see this support as good corporate governance. It is in the governance guidelines of the company. Diversity is seen as a value in governance that is a value for shareholders.

A third example that's very much in the news these days is the question of sweatshops. In the past several years we have all seen media stories, all the way from Kathy Lee Gifford being charged with using child labor in Honduras[38] to Doonesbury cartoons on Nike satirizing their operations in Asia.[39] These media exposés and challenges have raised issues such as child labor, and shoes and apparel made by workers in Indonesia or El Salvador at virtual poverty level wages. They talked about factories with forced overtime without pay. They talked about factories who actively work to crush any union organizing and many, many other examples.

Interestingly enough, it was only seven years ago that Levi Strauss came out with a code of conduct that dealt with these kinds of issues.[40] That was only seven years ago. This week some of you have read in the press that a group called the Apparel Industry Partnership,[41] spon-

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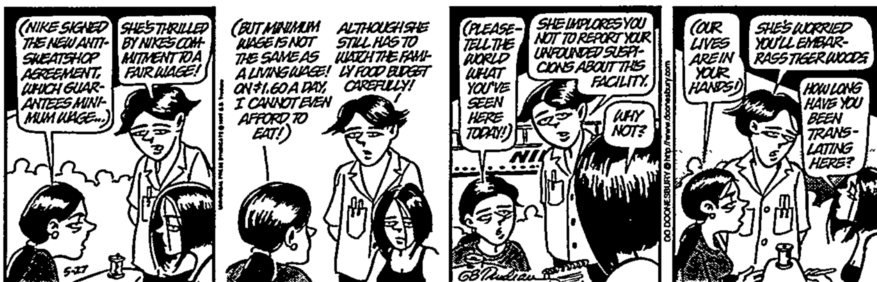
38 *See* Kevin Sweeney, *We Can Build Up to a Living Wage*, L.A. TIMES, Nov. 16, 1998, at A17.

39 In 1997, *Doonesbury* ran a series of cartoon strips about the circumstances of Nike's factories in Vietnam. The following strip, at the heart of the series, ran on May 27, 1997.

Doonesbury BY GARRY TRUDEAU



DOONESBURY © 1997 G. B. Trudeau. Reprinted with permission of UNIVERSAL PRESS SYNDICATE. All rights reserved.

40 *See* Editorial, *Citizen Shell*, N.Y. TIMES, Mar. 31, 1997, at A14 ("In 1991, Levi Strauss wrote the first corporate code of conduct. It commits contractors to good labor practices and pledges that Levi Strauss will assess a nation's human rights record before doing business there."); *see also* Steven Lee Myers, *Clothing Makers Taking Steps To Limit Child Labor Abroad*, N.Y. TIMES, Oct. 21, 1996, at A10 (discussing the efforts of Levi Strauss and others to require fair labor practices in their overseas plants).

41 *See* Sweeney, *supra* note 38.

sored by the White House, and which includes a number of shoe and apparel companies working with human rights groups and groups like the Interfaith Center on Corporate Responsibility, has come out with a new agreement for companies.

Here is what I think one of the big changes is. Six or ten years ago, if you asked a clothing company to be responsible for what a vendor in South Korea did, what a vendor in Honduras did, they would say: "We can be responsible for our own company, our own plants and employees, but we can't be responsible for the company that is simply selling us the product." Interestingly enough, at least in the apparel industry and certainly in the shoe industry, now we see all of these companies saying:

> No, no, Nike doesn't own factories in Indonesia. Its running shoes are made in a factory where 23,000 young women work making their product. It is not a Nike factory, but that's what that factory exists to do, is to make the Nike product, and we are responsible, Nike is responsible for how people are treated in that plant.

I think that is a sea change, that's an attitude change that they are accountable for those providing the goods and services for them.

So this week, you will see an announcement, some of you may have read that in *The Times*, that includes a commitment to third-party monitoring, both to internal monitoring by Price Waterhouse or whoever you wish to assign and also to have independent external monitoring.[42] I think it's a big change in the apparel industry.

You will see support for just a small first step. I think Mr. Schenkman and I both agree that (1) there is an acknowledgment that there needs to be a study of wage levels around the world and (2) the Department of Labor needs studies so we can see, for example, if in Honduras employees are being paid wages that even they can't feed their families with. We know from our experience that within most of the plants in places like Indonesia, El Salvador, or Honduras, somebody is being paid a poverty wage to make the shirt I am wearing or the shoes I am wearing. So while companies have not committed to change the wage levels yet, at least they are acknowledging this needs to be studied and compared to their wage levels.

The agreement supports a third-party complaint system. It states very clearly there shall be no child labor, there shall be safe working conditions, and there shall be freedom of labor to organize. All of these relate to vendors. So you will hear religious investors raising questions with the Nikes, with the Liz Claibornes in this country, and you will hear other socially concerned investors making sure that if

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[42] *See* George White, *White House Task Force Issues Sweatshop Plan*, L.A. TIMES, Nov. 4, 1998, at C3.

they invest in companies they are not following sweatshop conditions. You will also see tremendous leadership by companies who feel the time has come to move forward on these issues.

In conclusion, we could talk about many, many other issues—the Community Reinvestment Act,[43] the policies of the tobacco industry, and any of the two dozen corporate responsibility issues on which we work—but my obvious point in raising these examples is that shareholders are a vibrant and effective voice supporting companies who take leadership in corporate social responsibility and pressing those companies who don't quite get it yet to join us as socially responsible corporate citizens.

I would just say as a little announcement that *60 Minutes* is going to be, this fall, doing a segment on this whole issue of corporate social responsibility and religious investors, and we don't know the date yet, but we encourage you to watch it.[44]

Thank you very much.

F. Questions and Comments

MR. CHAKRAVARTY: We have a few moments for questions. Let me kick it off with a question for Mr. Gallagher.

We talked a great deal about shareholders. In an interview I did about a dozen years ago with the chairman of Monsanto, asking him about shareholder interests, he said:

> I believe very much in shareholder interests, if you can define for me who the shareholder is. Is it the ARM that is in the stock for thirty days or less? Is it the institution that is typically in the stock for a year or thereabouts or the long-term shareholders? Each of them has different interests. If you will, tell me whose interests I need to protect, I would be happy to do that.[45]

MR. GALLAGHER: Well, I think that interview reflects a period of time in the so-called takeover era where there was a distinction between the arbitrageur who entered a stock that was in play, was in there for a very short period of time, and was looking just to maximize its investment over a period of weeks or months.

In the present context, I think we have got groups of shareholders who are, in fact, long-term shareholders. In the case of Pfizer, we are about sixty-five percent owned by various types of institutions. Although the ranking among those institutions as to who is our largest shareholder, who is the second, third, fourth, and so forth will change

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[43] Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (codified at 12 U.S.C. §§ 2901-2907 (1994)).

[44] *See 60 Minutes: Sister Business* (CBS television broadcast, Nov. 15, 1998).

[45] For an article related to this interview, see Subrata N. Chakravarty, *Taking Risks Is What They Pay You for*, FORBES, Feb. 10, 1986, at 43.

from quarter to quarter, generally the larger institutions—including TIAA-CREF, CalPERS, New York State Retirement Fund, and a whole group of others—are with us over a very long period of time, and we view them as long-term shareholders. Our individual shareholder group is also very long-term. So we don't have very much in the way of short-term shareholders. Every once in a while, as the Pfizer stock price moves in a certain direction, you will get the momentum investors who will come in because they see a potential rise of five or ten points in the stock, and they will move in and move out. But generally, our shareholding group is a long-term group, and I think that is probably true of Monsanto or any large corporation now. The hostile takeover era has changed, it has not gone away, but it has changed in character.

AUDIENCE MEMBER: I am the treasurer of the MIT Enterprise Forum of New York.

Has there been any thought given to global minimum wages and labor standards to avoid a race to the bottom?

MR. SMITH: I think there has been a great deal of thought about it. Our position has simply been that the most important thing for people working in Honduras or Indonesia is that they are paid a just and sustainable wage for that community.

The issue isn't how do other countries' wages compare to the American worker's wage. It will still be more profitable for Nike, "unfortunately" I am sure others would say, to be doing business there than it would be in the United States. However, our goal is to make sure their employees are treated fairly, and that therefore the standard in Honduras is going to be different than the standard in El Salvador and Guatemala.

AUDIENCE MEMBER: I am a corporate attorney.

Mr. Smith, I think there was a very good talk and some excellent examples of what companies have done in the areas of social responsibility. You said at the end of your talk that shareholders have been a vibrant and effective voice in bringing about changes. My question is, do you think that there should be legislative standards for companies in this area and, if so, what kind of standards would you prescribe and how would you enforce them?

MR. SMITH: I think if I answer that question yes, everything else I have said would be discounted. I can't imagine too many people in the business community, in this room, who would celebrate the idea of getting legislation coming down the pike binding them to principles. Even if some of us would think that legislation would be a great outcome, I think most importantly for right now is that we see companies like General Motors and Shell Oil coming out with clear codes of conduct to deal with corporate social responsibility. Rather than hav-

ing it forced on them by government, they set their own standards, and they are judging themselves, and of course, other groups—shareholders and human rights groups—can judge their performance as well there.

We have published a set of books called *Principles for Global Corporate Responsibility.*[46] We are very proud of these books. They have benchmarks by which a company and we can judge behavior. But we are not saying to a company, when we give them these principles, that they should endorse our principles. We are saying, here is our thinking, we would like to enrich your thinking when you create your global principles.

I do know that Dr. Leon Sullivan, who created the *Sullivan Principles in South Africa,*[47] is discussing right now a set of global principles he will ask companies to endorse, and I would expect that sometime later this year there may be such an announcement with a number of leadership companies adopting such principles. But again, this isn't the government telling companies what to do. It is an association of companies, sometimes prodded by others, coming together to announce what their own commitments are. I think that probably works best, frankly.

AUDIENCE MEMBER: I work with Tim Smith at the Interfaith Center on Corporate Responsibility, directing the environmental issues that he mentioned.

Tim, I was going to follow up on your last comment and say that I think shareholders and the organized institutional investors have been very effective in raising the standards of corporate disclosure and corporate commitments from one company to the next. In other words, investors will work out a deal with one company and then go to competitors and say, "this is a minimum now." In this manner, the shareholder action on that issue with one company serves to raise the whole standard in the industry on disclosure and dealing with that particular issue—having the company enter the public debate and having an issue discussed in the annual report, quarterly reports, and responses to shareholders. So we find that is a very effective means with the large group of shareholders we work with. One small action between one set of shareholders in one company can have a large ripple effect when it comes to raising environmental issues or sweatshop issues and others.

MR. CHAKRAVARTY: One more question, please.

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46 INTERFAITH CTR. ON CORPORATE RESPONSIBILITY ET AL., PRINCIPLES FOR GLOBAL CORPORATE RESPONSIBILITY (1998).

47 REV. LEON H. SULLIVAN, THE (SULLIVAN) STATEMENT OF PRINCIPLES (4th amplification 1984).

AUDIENCE MEMBER: Thank you. My interest in life is family-owned businesses, and I have a question for you, Mr. Chakravarty. As someone who spends a lot of time in a family-owned business, do you find the debate on these subjects is somehow different for companies that are not owned in the public?

MR. CHAKRAVARTY: I guess it is a good thing that I am resiguing as of today.

Well, obviously, there is a certain degree of difference in that the pressures are not quite the same as in a publicly owned company. Our responsibility as writers, as managers, is to make sure that the family is happy, and the family's responsibility, because their intellectual capital walks out the door every night, is to make sure we are happy. That is a more symbiotic relationship, perhaps, than in a public corporation. It also helps that we are a very small firm, as firms go. I mean, the entire editorial staff of *Forbes* is under a hundred people, including fact checkers, library staff, and everyone else, and the total corporate staff is about 300. There are things you can do in a corporation of 300 people (e.g., you make special exemptions) that you cannot do in a corporation of 300,000.

So, in that sense, the combination of not having to answer to anyone outside the building and not being as susceptible to pressures is also governed by the pressure that our revenues come from advertisers. Mr. Gerstner[48] seems to have realized this pressure quite effectively vis-à-vis *Fortune*. He is running out of magazines to boycott. But by and large, running a family-owned type of business is a much more self-directed kind of thing.

Well, we are out of time. And I thank you all for your participation, especially our panel. Please give them a hand.

PANEL II
HUMAN CAPITAL INVESTMENT AND SOCIETAL INTEREST

A. Social Responsibility as Corporate Philanthropy

MR. BALOTTI: Good morning. I am Frank Balotti. I am the moderator of this panel dealing with human capital and social responsibility. As with the previous panel, I will not take the time to introduce with any specificity all of the members of the panel because their biographies are part of the materials, and I encourage you to read those biographies and familiarize yourselves with the panel as we go forward because I think it is important for each of you to know where they are

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48 Louis V. Gerstner, Jr. is the Chairman and Chief Executive Officer of IBM Corporation. IBM stopped running ads in *Fortune* after "a not altogether flattering cover story on [Gerstner]" in 1997. *See* David Shaw, *Magazines Feel Increased Pressure from Advertisers*, L.A. TIMES, Mar. 31, 1998, at A21.

coming from as far as educational and working backgrounds. I will, however, introduce them to you. To my far left is Margaret Blair, Henry Butler, and Jill Fisch, and to my immediate left is Mike Miller.

What we are going to talk about, as I said, is human capital and social responsibility. I am going to introduce that topic with a little discussion about the social responsibility end of this just by way of introduction—and I hope not to steal any of the thunder of the panelists—and then we will get right into the meat of the topic after my few words on this.

Social responsibility, as we are going to treat it on this panel, equates with corporate philanthropy. We are going to limit our discussion to corporate giving—charitable giving by corporations.

As you all know, corporate philanthropy—corporate giving—is part of our national policy. The Internal Revenue Code provides for a deduction for corporations that make charitable gifts. It is the same, as far as I know, with the states that have income taxes; the state laws, to one degree or another, authorize corporate giving in the corporation laws of the various states.

Despite all of this, there is an awful lot of interest lately in corporate philanthropy, and I guess one could legitimately raise the question why, what difference does it make? What are we talking about? Are we talking about $50, $100, or something larger? If you look at the ten-percent limit, as far as deductibility in the Internal Revenue Code, as providing the upper limit of what we might expect to be given away by corporations—that's ten percent of pretax profits—there is roughly, and this is a very rough number, $60 billion available to be given away to charities by corporate managers. Actually, the contributions are more in the range of $8 to $9 billion, still a healthy number. Someone once said, "A billion here, a billion there, soon you are talking about real money."

But this is money that is donated, from the shareholders' point of view, given away by the managers without shareholder approval and, in fact, without the knowledge of the shareholders. Right now generally accepted accounting principles do not require disclosure of any of this information in footnotes or otherwise. The securities laws do not require disclosure to stockholders of the amount that's given away by managers and the donors. This is all money that under classic theory would be available to be spent on projects that return in excess of the cost of capital and hence increase the wealth of the shareholders in a company. Alternatively, it is money that is available to be distributed to shareholders in the form of share buybacks or dividends. That is money that is not there. These facts have spurned a lot of concern, and I think that a lot of it comes from some press reports that many of you might have seen, and there was a press report of a difficult case.

To my mind, you can divide corporate giving roughly into two categories: cause-related giving, which is nothing more than advertisement, and business building. American Express had a program to give a penny or some such number to the Statue of Liberty Fund for every dollar we charged on the cards. That, to my mind, would probably be deductible as an ordinary and necessary business expense anyway; it's part of the advertising that the company is doing to build the product. It is not what I think of as a hard case.

There was a report several years ago in the *New York Times* of what I think is a hard case.[49] The president of a New York Stock Exchange company and his wife were pro-life advocates. She established a pro-life charity called the Nurturing Network. Both were directors of the Nurturing Network, and she was the president. Three other corporate directors and five other spouses were on the charitable board. Both the company and the foundation made gifts. The amounts were not disclosed. There was no publicity to benefit the corporation, as there could not be, because for every pro-life advocate there is one with a contrary view, and the company could not take the risk of disclosing to all of its various constituencies that it was making these contributions. In fact, I think this is a classic case where a shareholder could argue that the corporation received nothing in exchange for these undisclosed, unpublicized corporate gifts. It worries shareholders, and they react.

Another newspaper article I wanted to call to your attention was one last fall in the *Wall Street Journal*—and it was about a half-page ad, which isn't cheap in the *Wall Street Journal*—announcing a contest to determine which corporation could give away the most of its shareholders' money. It was not phrased in that way, of course, but it was phrased in the sense of we are going to have a contest to determine which is the most philanthropic corporation in America.

Look at that from a shareholder's point of view. My first characterization of it is the shareholder's point of view. You mean they are having a contest to see which corporation can give away the most of my money? And that prompted me to think, well, who really cares? That was answered about two or three weeks later when there was an article in the *Wall Street Journal* that announced that Microsoft had been crowned king of the corporate givers, and the article went on to say that IBM was stunned.[50] That struck me as a little odd because I did not know how a corporation could be stunned. I assume Lou Gerstner was stunned, and that meant that the people who care about

49 *See* Michael deCourcy Hinds, *Abortion Foes' Centers Guiding Lives After Births*, N.Y. TIMES, May 13, 1990, § 1, at 1.

50 *See* Monica Langley, *High-Tech Companies Battle Over the Value of Donated Software*, WALL ST. J., Sept. 9, 1997, at A1.

this contest, to a shareholder's mind, are people like Bill Gates and Lou Gerstner; they want to be crowned king of the corporate givers. So a shareholder would think that this money is being given away for the benefit of having the CEO crowned king of the corporate givers.

With all of that having been said, let's turn to some of our panelists to get their thoughts on this, and you will notice that I did not talk about human capital at all. I want to tnrn to Margaret Blair to have her comment on human capital and what it has to do with this area, and maybe give us a comment or two on whether or not there is any kind of a corporate model or a corporate theory that would permit the kind of behavior that I have just described. In describing this, I have tried to be a little controversial about it, and it is not necessarily what I believe. Don't anybody walk away with that impression.

B. Challenging Milton Friedman: Human Capital Taking Precedent over Profit Maximization

MS. BLAIR: I took the title of this panel a little more seriously, so that's what I really want to talk about. I tried to think about the links between human capital and corporate social responsibility, and it's a natural for me. I have been thinking about some of these issues for a number of years, and I think that a panel on human capital in a conference on corporate social responsibility represents progress of sorts, so I am happy to be here.

Just a few years ago, if you heard the phrase "corporate social responsibility" it probably would have evoked one of two sorts of responses either in academic or policy circles. The phrase was typically associated with a leftist agenda and a group of leftist advocates, including prominent people like Ralph Nader, Mark Green, Leon Sullivan, the Reverend Jesse Jackson, and others. The view that was propounded by these people was that corporations were large, rich, powerful, and they had been granted all sorts of special powers and rights under the law. There were few, if any, countervailing social and economic forces to restrain them.

That perspective certainly was not an uncommon perspective at certain times in the history of this country. The people who were concerned about that argued that since corporations are creatures of the law and they have status as legal citizens, they had an obligation to be good citizens. They should clean up their pollutants, hire more minorities, make their products and workplaces absolutely safe for all users, eschew involvement with foreigu dictators, let their employees do volunteer work on corporate time, and make large contributions to charitable causes of one sort or another. We can go on and on with the various sorts of things that people have argued, and these arguments stated that this was their duty as citizens, without necessarily a

direct relationship to the bottom line for these companies. The assumption was they are profitable, and therefore, they should do these things.

The alternative view, of course, was epitomized by Milton Friedman's famous essay published in 1970 which he titled *The Social Responsibility of Businesses To Increase Its Profits*.[51] The title says it all. Contemporary versions of the Milton Friedman point of view have usually been argued in terms of what economists call a principal-agent model. The idea here is that we are supposed to understand that shareholders are the principals because they supposedly own the corporation. Correspondingly, we should understand that the corporate officers, directors, and managers are agents of the shareholders.

If your understanding of corporation law is that it's a set of rules that is designed to solve the inevitable principal-agent problems that arise between shareholders and managers, then you would view as deviant or problematic any aspect of the law or public policy that permits or encourages corporate officers and directors to do anything other than to attempt to maximize share value.

What I wanted to talk about today is a framework for thinking about corporate law that really challenges the Milton Friedman view, but that does so by appealing to not just some sort of vague notion of corporate social responsibility or corporate citizenship, but to an alternative economic model. The model I want to offer is contractarian in the spirit of the principal-agent model, but it addresses what I really believe is the single economic problem that the law addresses, and it is not a principal-agent problem.

The reason why my arguments belong on a panel about human capital is that the alternative I am going to talk about comes out of an effort to grapple with the role that human capital plays in corporations, as well as the investments and the contracting problems that are raised by these kinds of issues. The financial markets are telling us that the corporate sector as a whole, even taking into account some of the decline we have seen since the middle of the summer, is worth somewhere around two-and-a-half to three times the value of the property, plant, and equipment—at least the book value of property, plant, and equipment—that is owned by the corporations. Where do you think that additional value is coming from? There are some patents, some copyrights. Some companies have some valuable mailing lists and some have got brand names and reputational capital. But all of this taken together does not really add up to nearly enough—and people have attempted to do this—to account for all of the remaining value. Where is that value coming from?

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51 Friedman, *supra* note 33.

Let me give you an example of what I am talking about. When IBM acquired Lotus a few years ago it paid Lotus shareholders something like—and I did not go back and get the exact numbers, but I think I have the right order of magnitude on this—$4.3 billion to acquire Lotus and take it in as part of IBM.[52] The accountants at IBM had to justify that price somehow. But when you add up all of hard assets and the identifiable tangible assets in Lotus, you still only get something like $1.2 billion in assets. That left another $3.1 billion that had to be accounted for.

IBM went out and they hired some consultants, and they went into Lotus and they went up one side and down the other, all over Lotus, and tried to figure out what is here that might be valuable. They came back with a 400-page report that basically invented a new accounting term and asserted that Lotus had something like $1.8 billion in "technology in progress."

What do you think "technology in progress" is? Well, I don't know either. But I would be willing to bet that most of it gets on the elevator every evening and goes out the front door, gets in its car or on the subway and goes home. This is the nature of the assets that account for a substantial and growing proportion of the value in the corporate sector in the nineties and going into the twenty-first century. If that is correct—and the more I learn about it, the more that I am convinced that it is correct—it seems to me that we cannot continue to discuss corporate law and corporate governance and corporate social responsibility in terms of a model that assumes that the shareholders are the owners.

Under the law, the shareholders do not legally even own the hard assets of the corporation, although in principle, they could use an alternative organizational form and then they could own the hard assets. But they don't. The hard assets are owned by the legal entity that we call the corporation, and they are not owned by the shareholders. But beyond that there is no way the shareholders could end up owning the human capital that is such a central input into the wealth-creating process in most corporations. It's just not possible.

When I talk about these issues with legal scholars and with practicing lawyers who have been steeped in the jurisprudence of law and economics, and particularly in the principal-agent approach, I usually get a reflexive, almost sputtering kind of response: "But if the shareholders are not the owners of the corporations, who does own them?" A more serious and difficult version of this question is: if directors and officers are not accountable to shareholders, who will they be account-

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52 *See* Laurie Hays & Steven Lipin, *Lotus Gives in and Accepts IBM Offer of $3.52 Billion, a Sweetened $64 a Share*, WALL ST. J., June 12, 1995, at A3.

able to? What will keep them from building empires, from feathering their own nests, from giving large donations to their pet charities and otherwise wasting the corporate resources?

These very questions demonstrate how dominant the principal-agent mindset has been. So I think we need a new paradigm that really helps us understand what is going on and what the corporations look like. This is why it resonates with what was said in the first panel. The rhetoric differs from the practice, from the practical aspect of what's going on.

In a paper that I have coming out in the *Virginia Law Review* this spring with Professor Lynn Stout at the Georgetown University Law Center,[53] she and I present an alternative framework, the beginnings of one anyway. We think a far better way to understand corporation law is that it is a solution not to a principal-agent problem, but to a team-production problem. In economics, team production refers to situations in which an ongoing wealth-generating activity requires inputs from a number of different parties. These inputs are difficult to measure and monitor. They are enterprise specific, and they are nonseparable.

Enterprise specific means once the investments are made, the investments basically cannot be recovered except out of the proceeds of the enterprise. This might be because they are irrevocably committed, and they have little value in any other enterprise. They are specific to this operation. Nonseparable means you cannot attribute one portion of the profits to any one output. It is a joint output. These two attributes mean it is going to be extremely difficult, if not impossible, to write contracts that encourage the team members to make optimal inputs into the process and that will then protect each of the team members from the opportunistic behavior of the other team members. It is not going to be possible to write contracts over the output. It is also not going to be possible to write contracts on the input, because as we already said, those are difficult to monitor.

Human capital is a classic example of this kind of thing. Team production problems are not well studied, but there is a solution to the problems in contracting—at least it's been presented in a recent paper in the *Quarterly Journal of Economics* by two University of Chicago economists.[54] They propose that one of the solutions that can help solve the problem is that all of the participants on the team give up their property rights over key inputs and over the outputs to a passive third party. And the reason that this works is because, in effect, it

[53] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

[54] *See* Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387 (1998).

means that none of the team members own the enterprise or its key assets. Therefore, they can credibly commit to all of the other team members that they are not going to rip them off. They are, in effect, yielding control to someone else.

This is exactly what happens when you form the corporation. The corporation itself becomes the repository of the property rights. You put a board of directors in control of it, and you have got to give them discretion. That's the point. They cannot necessarily be completely and totally and utterly accountable to only one team member or set of team members. This approach emphasizes not only the importance of noncontractual-bargaining-type solutions, organizational solutions, and formal allocations of authority, but also solutions that emphasize trust, fiduciary norms, norms of social responsibility, and other noneconomic means of promoting cooperative behavior and mutual investment.

So, in other words, to jump to my conclusion, corporations must be socially responsible not because the corporation itself is a citizen, but because it is a mechanism for governing the relationships among a large group of individuals, who are collectively and individually trying to expand their wealth, but who collectively and individually must be motivated to make some very specific at-risk investments. The governance process that has been devised to solve this problem is that all of the participants in the enterprises give up property rights, give up control rights, to an internal hierarchy headed by a board of directors with fiduciary obligations to the legal entity, the corporation. For it to work best, it is most successful when all of the team members perceive the officers and managers in charge of the company to be fair, trustworthy, and socially responsible.

C. The Law and Economics Reaction: Separating Ownership and Control with the Contractual Theory of the Corporation

MR. BALOTTI: Now I am going to turn to Henry Butler, who has a Ph.D. in economics as well as a law degree, and I will get him to comment, and I am sure he will completely agree with the model Margaret has presented. [Laughter.]

MR. BUTLER: Thank you very much. It is a pleasure to be here. My role is to be the knee-jerk law and economics reaction to Ms. Blair's statements, and I guess my knee-jerk reaction to this is, what's the big deal here?

One of the big points she makes for us is it is very difficult in a company like IBM or Lotus to identify the source of the value. It seems to me they found out a way to create that value, even though the accountants have not found a way to measure it. So do we need to

change corporation law? I don't see any reason for that on the basis of that observation. I don't see any reason for a new theory of corporate governance on the basis of that. So that is my knee-jerk reaction. Now I will return to my formal remarks.

The concern about the social responsibility of corporations has a long tradition in American law and politics, and I am sure a lot of you are very familiar with this. One of my favorite quotes is from Andrew Jackson, who said, "Corporations have neither souls to be damned or asses to be kicked."[55]

A lot of people feel that way about corporations. In fact, Ms. Blair's discussion of the sixties style of corporate social responsibility viewed corporations in that way. But a more powerful and more influential tradition in corporation law has been the Berle and Means tradition of the separation of ownership and control,[56] which was developed and had enormous influence from the thirties until even now. I approach a lot of these issues from that tradition. That is, I am very skeptical of the incentives that managers face, of the constraints that managers have on their behavior. I am concerned about their ability to take corporate assets and use them for their own use. I think that it is a particularly dangerous mix, then, when you combine the Berle and Means perspective with the calls for social responsibility, because that just gives managers, to some extent, free rein on controlling corporations or the shareholders or whoever we determine to be the owners of those assets. So I have got some trouble with that, and the perspective that I bring to this goes beyond identifying the principal-agent problem. Rather, what is the solution to the principal-agent problem? The Berle and Means solution was a very corporate-democracy-oriented model of giving the shareholders more power—to make it into a real democracy, to have them be informed voters and let the voters work, and also to have more legal constraints on what management can and cannot do.

My take on this is a little bit different. I present the knee-jerk law and economics reaction to this, which is that the alternative conception of the corporation is the contractual theory of the corporation in which the corporation is founded on mutually beneficial exchange between not only the shareholders, but also all of the other inputs into the productive process of creating the corporation. The gist of the contractual theory of the corporation is that corporate management has the incentive to design incentive contracts—I like that,

[55] There is some dispute about who actually first uttered this quote. For authority that President Jackson said something similar, see A.M. SCHLESINGER, JR., THE AGE OF JACKSON 335 (1945).

[56] *See* ADOLPH A. BERLE, JR., & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 3 (1932).

"double incentives"—to act as if they had the shareholders' best interests at heart. The glue that holds this together, at least in my view, is the market for corporate control, the threat that if they don't do what is in the shareholders' best interest, then they will lose their jobs.

Within that, there are a lot of other market constraints other than the market for corporate control. In general, there is the market for capital. The capital markets are very competitive. That is one thing I really have to mention here with respect to the points Ms. Blair is making. Pick up any business magazine on a regular basis and there are articles in there about companies struggling to hold on to their employees. The employees may have made large, firm-specific investments, but they also have developed a lot of capital—human capital that is worth more to other companies—and so there is constant bidding going on for these individuals in the marketplace. That puts competitive pressure on firms to treat their employees properly. Competitive product markets are a very important constraint on managers, forcing them to act in the shareholders' best interest to try to maximize the value of the firm, in the sense of maximizing the value in the residual claims that are left over after everyone else has been paid. You have to have competitive product markets and competitive service markets as well, since we are in a services society.

Corporate law, within this model, is simply a standard form contract that could have been written by the parties on their own. Instead, it is pulled off the shelf by the investors when they are initially forming their corporation as a way to pull the corporation together, and to provide a legal governance framework. But it is a very general set of rules. It doesn't get into specific contracts about how you are supposed to compensate your employees. Corporate law has never done that.

Some of the policy implications Ms. Blair has derived from her model seem to get into areas where corporate law has not gone before, and I think that is a mistake. As Mr. Weissman mentioned today, we have certain tools in our arsenal that we use to handle certain problems. Some tools are designed to deal with some things, and some are designed to deal with others. If you try to take a tool like corporate law, which provides a broad governance mechanism, and use that to deal with specific issues like firm-specific investments in human capital, I think you are getting outside of the scope of what corporate law has been designed to deal with historically. I think probably there are going to be some adverse consequences associated with that change in corporate law, particularly, in my concern, about the ability of the managers to use that as an excuse to divert resources away from the people who have a contractual claim on them.

My view of corporation law is that it provides kind of a backstop for when things really get bad, when the managers really get out of line. The main thing that forces the managers to behave are these market constraints I talked about earlier. If those market constraints for some reason are not constraining the managers, we have corporate law that kicks in—fiduciary duties of care and loyalty, other provisions to try to get managers to behave.

Within this context, I guess I should talk a little bit about philanthropy. It is clear in modern corporate law that corporations could give away a lot more money than they currently are giving away. It is also clear that under the tax code they could give away a lot more than they are. To some extent, the legal constraints are not what is binding the managers. There are market forces out there that are keeping them from giving away as much money as they legally could give away. To some extent, if we are dealing with policy arguments about giving managers more authority to give away money, I am not sure that it makes much difference because they are effectively bound to a tighter control over resources by the market than they are by the legal rules.

Any increase in the legally permissible discretion of managers, then, is unlikely to change behavior, and this observation holds regardless of one's characterization of the corporation—whether it is the knee-jerk law and economics nexus-of-contracts approach, or whether it is a bundle of assets, or a bundle of specific investments, or all of the other language we can use to talk about it. The fact of the matter is that the market incentives of managers are more constraining on them than are legal incentives under the current regimes that we are observing.

Ms. Blair has kind of latched on to the entity theory of the corporation to argue that the entities have responsibilities to groups other than the corporation shareholders. While I disagree with her recharacterization of the entity theory and the changes in the corporate law that follow from her logic on this, my overall reaction to this again is a very resounding "So what?" And the "so what" is because the market is so dominating here in forcing the managers to behave within constraints that are probably closer to what the shareholders want than the constraints she would like to allow the managers to move toward.

The fact is, the managers do have a great deal of discretion about their corporate giving, and almost all of it passes muster under the business judgment rule.[57] An alternative question we could be raising is, instead of giving managers more discretion, should we be taking

[57] For a discussion of the business judgment rule, see, for example, DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE 1-5 (1993).

discretion away from managers? My concern, if we did that, is that we will move into an area we probably don't want to tread in corporation law.

There are a lot of good reasons for having the business judgment rule. You don't want to be second-guessing the managers when they are making business decisions. My view on most corporate philanthropy is that it basically should fit under investments by the corporation that it thinks are going to increase the value of the firm. You invest in developing the goodwill of the business. That is a business decision. If it turns out that you made this investment in the Statue of Liberty program and the investors did not get all excited about that or the market did not react positively about that, we don't want to come along and second-guess the decision.

So I think the business judgment rule is an appropriate way to deal with this. I should mention in that regard, though, it is difficult to imagine a corporate manager who is so inept that he could not come up with a business justification for just about any type of charitable activity. I don't think those legal constraints are siguificant, and I am not sure we are moving in the right direction if we try to constrain managers even a little bit more.

I have a couple more points. One, Ms. Blair, in some of her work, has argued that managerial control of the discretion of corporate giving is part of the management compensation package. I actually don't have any argument with that characterization of what's going on. That is, that managers benefit or they get their jollies from giving away the corporation's money to groups that they want. But I do question whether it is a cost-effective way to compensate managers. You may be better off just giving the money directly to the managers as opposed to them simply giving that to organizations and being a conduit for that.

I want to address the question of whose money is being given away. That is an issue that is challenged by Ms. Blair in a number of her developments of these team models. If the contribution is expected to be a market-value-increasing contribution, then nothing has been given away, in my view. That is, you just simply have made a net positive value investment in the business and the resources of the business. On the other hand, if the contribution is not expected to increase the firm value in terms of goodwill or any other positive feelings that might be associated, and, in fact, it might cause a reduction in the firm value, then it is clearly the shareholders' wealth that has been distributed. How do I know that? The shareholders are the residual claimants of the bundle of cash flows. I don't want to say they are the owners of the firm, but they have a claim on the residual cash flows of the business. Where does that contribution come from?

Straight out of that residual. It is on the margin in a very real sense. So the shareholders own the residual claim. I am not claiming they own all of the assets of the business. I am not claiming that they own the employees or their human capital, but they do own that residual claim.

I have one last comment to make and then I will leave you alone. Every problem that Ms. Blair has identified that is related to firm-specific investment by employees is a profit opportunity for a businessperson. It's an entrepreneurial opportunity. We live in a world of incredibly competitive labor markets, where it is very difficult for companies to attract employees and keep employees. They need to make general investments in employees. They need to make specific investments in employees to keep them on the job. Companies that are better at doing this, attracting the brain power to their businesses, are the ones that are more likely to succeed not only in the product markets and the service markets, but also in the capital markets.

So the problems she has identified here are the ones that I don't view as necessarily the type of thing we need to come up with a legal solution for. The people who have the incentives to come up with that solution can make money by coming up with that solution, and that is a heck of a lot better to me than a bunch of legislators, judges, or legal commentators telling businesses how to run their businesses.

MR. BALOTTI: Thank you. We now have a total and complete understanding of the economic models by which one may justify or not justify management discretion in making gifts to charities. I don't mean to be fair at all in my summary of the two positions, but it seems to me that Ms. Blair's position is that the shareholders don't own anything, so what difference does it make, and we'll give wide discretion to the managers and let them decide these items. As Mr. Butler pointed out, it's part of their compensation package to have the jollies from giving away the money that does not belong to the shareholders anyway.

Mr. Butler's view, of course, is a little different. The shareholders mean something. They mean something because they are part of the contract. I would like to be assured that when the Romans invented corporations about 2200 years ago, they had a contract theory in mind, and that when the Church reinvented corporations in England to avoid inheritance taxes, it had a contract theory in mind. But I doubt all of that, and he thinks that the business judgment rule and market forces will be the effective constraint on corporate giving, ignoring completely the board of directors of Occidental Petroleum that gave away $90 million for the Armand Hammer Museum.[58] That

[58] *See* James Cook, *Smoke, Mirrors and Armand Hammer*, FORBES, Nov. 18, 1996, at 67.

amount represented something like thirty percent of the net income for the year.

MR. BUTLER: Are we allowed to respond to your statements?

MR. BALOTTI: Not at all. [Laughter.]

MR. BUTLER: You just ignored everything I said. [Laughter.]

MR. BALOTTI: Of course I did. I said I did not mean to be fair. With that in mind, we will turn to some thoughts on corporate giving. We will turn to Ms. Fisch first for her thoughts on corporate philanthropy as viewed by an academic.

D. Corporate Philanthropy Is as American as Apple Pie

MS. FISCH: It is a pleasure to be on this panel and to have the opportunity to talk about these issues with such distinguished experts. It's kind of interesting, Mr. Balotti's initial observation about the increasing attention that corporate philanthropy is getting right now. Just as an example of that, Representative Paul Gillmor (R-Ohio) introduced two bills in Congress a little over a year ago addressing corporate philanthropy.

The first of the bills, House Bill 944,[59] would require public companies—companies that are subject to the reporting requirements of the federal securities laws—to disclose, as part of their regular reporting, the charities to which they made contributions and the amounts of those contributions. The other bill, House Bill 945,[60] is modeled after the program used by Berkshire Hathaway and is more of a shareholder-democracy approach, to borrow Mr. Butler's language. Under this statute, public companies would be required to let their shareholders decide to which charities the corporations would make donations and the amount of those donations. Both of these bills have some room for the SEC to exempt certain kinds of transactions—donations of goods, and so forth—and to allow the corporations to make some donations in addition to what is specified by the shareholders.

Both of these bills were referred by the House Committee on Commerce to the Securities and Exchange Commission, and the Securities and Exchange Commission is in the process of analyzing the bills and conducting some sort of ongoing study on whether either of these approaches is advisable. But it's just an example of the increased attention people are giving lately to corporate philanthropy, and at first blush, this attention seems a little bit surprising.

Why is it surprising? For one thing, we have a general feeling in this country that philanthropy is good. It's great for people to donate to charity. It's great for corporations to donate to charity. It's great

59 H.R. 944, 105th Cong. (1997).
60 H.R. 945, 105th Cong. (1997).

for charities to have more money and do socially valuable things. Why scrutinize it, why analyze it, why do anything that might upset this wonderful phenomenon?

Number two, with respect to corporate philanthropy, it's not very much money. Compared to the dollars at stake—the dollars that shareholders, for example, could lose depending upon the outcome of a takeover battle—corporate philanthropy is trivial. Mr. Balotti's statistics—and it is very hard to gather statistics on how much corporate philanthropy exists, because there are a number of issues of how you quantify it, accounting problems, and so forth—but Mr. Balotti's figures give you a ballpark idea. Typically, corporations donate between one and two percent of their taxable income to charity on a yearly basis. That's not very much money, and, you know, the total dollar amount—we are talking about $7 to $9 billion a year—represents a very small percentage of overall corporate earnings and a very small percentage of the total amount of money that corporations legally could donate to charity, as Mr. Butler points out. It may be a drop in the bucket, something that does not merit much of our attention, arguably.

By the same token, the percentage of charitable giving that is done by corporations is a very small percentage of overall charitable spending. Individuals donate far more money to charities than corporations. Corporate giving is somewhere on the order of, ballpark, maybe five percent of the overall amount of money that is donated to charity, depending upon how you count foundation giving and so forth. So it does not seem to be a significant issue from a dollars and cents perspective, and therefore, why should we really be studying it? Finally, the opportunity to engage in corporate philanthropy is just so appealing from the corporation's perspective. Corporate philanthropy makes corporations look good, and corporations love to look good.

In contrast to this perception of the corporation, and my favorite quote about the corporation, is Brandeis's description of corporations as Frankenstein's monster.[61] The corporations instead get to take out these ads showing how they are giving computers to school children, and Bill Gates, instead of having to worry about his legal battles, can be the king of the corporate givers. Corporations publish these glossy brochures in which Exxon shows how it has given money to all of these different environmental organizations. You know, this is won-

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61 *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 566-67 (1933) (Brandeis, J., dissenting) ("[C]oincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth; and that the resulting disparity in incomes is a major cause of the existing depression. Such is the Frankenstein monster by which States have created their corporation laws." (footnotes omitted)).

derful from a PR perspective. It is wonderful in terms of the corporations looking like they are socially responsible, so why would anybody question this?

If we translate this down to the individual level—the individual corporate executives—regardless of whether they get their jollies from giving away other people's money, they also feel like they are being responsible. They feel this is a way of giving back to the community, and they perhaps find their jobs, their role in society, much more defensible. I think we see, as a natural offshoot, corporations spending increasing time and paying increasing attention to the recipients of their benevolence, setting up separate foundations, setting up within the corporations charitable giving departments, hiring people who are going to figure out where the corporate dollars can do the most good and so forth. This is something I think really matters to people.

Of course, you know, just from a law and economics bottom line, a dollars and cents approach, corporate philanthropy in some cases may make good economic sense for the corporation. After all, if a computer company—I won't pick on IBM, it's been done enough—has a warehouse full of computers that are somewhat obsolete because they are too slow, then think of the difference between writing off that inventory as a loss because the computers can't be sold and giving the computers away to school children in a district that does not have any computers, getting the publicity, getting the charitable deduction. Which would you rather do? Which makes more sense from the corporation's perspective?

So corporate philanthropy is as American as apple pie. It makes a lot of economic sense. Why challenge it at all? And, in fact, the traditional legal attitude toward corporate philanthropy reflects everything I have said. It reflects the idea that corporate philanthropy is generally good, it is desirable, we want to do everything to encourage it, and we certainly don't want to challenge it. For example, Mr. Balotti distinguished between corporate philanthropy that is deductible as a business expense under § 162[62] and corporate giving that is classified as a charitable contribution under § 170.[63] There are a number of ways in which the tax law gives more favorable treatment to charitable giving than to ordinary business expenses. Given that distinction in the tax law, it leads us to believe that there really is something to the idea of corporate philanthropy that extends beyond increasing the corporate pie, serving the long-term interests of the corporation in terms of profit maximization.

62 *See* I.R.C. § 162(b) (1994).
63 *See id.* § 170.

When we talk about corporate philanthropy, I think we have to be clear that we intend to include a category of giving that we can't justify in terms of the corporation's bottom line. If all we mean by corporate philanthropy is we are doing things that are intangible but are good for the community and are going to improve the corporation's goodwill, if all we mean by corporate philanthropy is cause-related marketing, an alternative to advertising expenses or something like that, I don't think we really need to worry about corporate philanthropy. I think that the idea that we trust this to managers' discretion, or we trust this to the business judgment rule, makes a lot of sense. But the tax code seems to envision a category of things we couldn't justify as business expenses but nonetheless we want to encourage, and the same is true for corporate law.

Virtually every state has a statute on the books that authorizes corporations to make charitable donations,[64] but it turns out that under many statutes, the managers have greater discretion with respect to corporate philanthropy than they do for business-related expenses.[65] There are some statutes, including the New York,[66] New Jersey,[67] and California[68] statutes, that authorize management to donate money to charity irrespective of whether it benefits the corporation. So we don't even have the normal business-judgment-rule constraint in operation in cases involving corporate philanthropy. If that is true, if there really is this separate category apart from spending that benefits the corporation, then we have to think a little about why.

We have heard discussion about the idea that the corporation as an entity has social obligations, that the corporation has some sort of moral responsibility to give back and so forth. Those ideas have been around and have been debated for a long time, and I am not sure we can resolve that debate here today. But to the extent that we buy those arguments, to the extent we think a corporation has a social obligation, then we have to ask ourselves, why is corporate giving voluntary? Does it make sense for one corporation to feel this obligation, to give two percent of its taxable income to charity, while its competitor says that we don't feel we have any particular obligation, and we are not going to do this. Is that really the approach we want to take if we think this is an obligation, if it is a requirement, or if we think this

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64 *See, e.g.*, MASS. GEN. LAWS ch. 156B, § 9(k) (1996); OHIO REV. CODE ANN. § 1701.13(D) (Anderson 1997); TEX. BUS. CORP. ACT ANN. art. 2.02(A)(14) (West Supp. 1999).

65 *See* Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 602-05, 664-65 (1997).

66 *See* N.Y. BUS. CORP. LAW § 202(a)(12) (McKinney 1986).

67 *See* N.J. STAT. ANN. § 14A:3-4(1) (West Supp. 1998).

68 *See* CAL. CORP. CODE § 207(e) (West 1990).

is some sort of quid pro quo for the benefits that corporations receive?

Similarly, we might defend corporate philanthropy as part of executive compensation, part of management's pay, but if we do that, we certainly don't acknowledge that in the way we account for corporate philanthropy. Disclosure of executive compensation is an issue that's gotten a lot of attention recently. But this is a way almost of undercutting those disclosure requirements in providing some under-the-table compensation. So it doesn't really seem that this is plausibly what's going on either, what the explanation is.

There are a couple of concerns about corporate philanthropy that I think sometimes don't receive enough attention. One, it is clear that corporate philanthropy has the potential to change the nature of charity in this country. To the extent that big corporations are encouraged to donate big dollars to charity, we are delegating decisions for social spending to those corporate decision makers, to corporate executives, and we might be concerned about this.

We might have some concern about whether we think the corporate executives, the people we have chosen for their ability to run a business, are the same people who should be deciding our social values, who should be deciding where this money goes. We might be concerned about corporate giving causing charities to become more mainstream. We might be concerned that corporate giving doesn't reflect the values of the voters, or the values of individuals raising questions about accountability and so forth.

We might also be concerned about the political overtones of corporate giving. We spend a lot of time these days worrying about the influence of corporate money in campaign finance, in politics and so forth, and it strikes me that this is particularly true when you look at some of the corporate giving brochures that companies prepare. I don't know why it is that some of the companies that do the most to publicize their giving are companies that have issues with the environment, litigation issues, or antitrust issues, but it seems like there is an awful lot of correlation, so that the corporations that I hear the most about being socially responsible and environmentally friendly are oil companies for which I might otherwise be a little skeptical about their actions and whether they are being socially responsible. Is this a backdoor way of getting political influence, of persuading legislators to avoid imposing mandatory restrictions on corporations' pollution policies or worker policies, things like that? Do we want to consider those as part of the debate when we ask ourselves, is this really part of the corporation's obligation to be socially responsible?

E. The Softer Side of Corporate Philanthropy: The Importance of Investing in Human Capital

MR. BALOTTI: Thank you, Ms. Fisch. With all these theoretical observations completed, let's turn to the real world. To educate us in the real world, we have Mike next to me. One of his many responsibilities at Toys "R" Us is being Director and the President of the Children's Benefit Fund, which makes donations of about $5 million a year to various children's causes.

MR. MILLER: Thank you. I am here, and I will steal—or borrow, I should say—a phrase from Sears to present the softer side of corporate philanthropy. I have heard my panelists and others literally tear apart corporate philanthropy as an ego trip, another way of compensation, as feathering somebody's own nest. I will tell you, none of that have I seen personally or witnessed personally in our corporate giving, so I really take exception to some of the statements that are being made.

As I was preparing for this presentation, I was reminded of what Muriel Humphrey said to her husband as he was getting ready to make a speech. She said, "Remember, Hubert, to be immortal, you don't have to be eternal." Without investment in human capital, and the recognition of social issues, today's corporations cannot fully integrate themselves or their associates into the communities in which they function, grow, and prosper. You can interpret the article about Cornell in the *New York Times* of October 24 of this year[69] as recognizing the importance of developing human capital. Cornell's human capital is its student body and its educators. The intent of Cornell's change and sizable dollar investment is to integrate the students so that they can become partners in the work under way. Obviously, Cornell has recognized the need for change and has committed educationally and financially to see that change occur.

A recent survey conducted jointly by Korn/Ferry International and The Economist Intelligence Unit[70] revealed that a major transformation is occurring in corporations. "Tomorrow's organization will move significantly away from command and control bureaucracies where all actions need to be cleared upwards."[71] Further, "tomorrow's leaders will be responsible for developing a culture that attracts the kind of talent best suited to achieving corporate goals. The leader of tomorrow will have international and multicultural experi-

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69 *See* Karen W. Arenson, *Cornell Announces Plans To Put Greater Focus on Undergraduates*, N.Y. TIMES, Oct. 24, 1998, at B1.

70 *See* ECONOMIST INTELLIGENCE UNIT & KORN/FERRY INT'L, DEVELOPING LEADERSHIP FOR THE 21ST CENTURY.

71 *Id.*

ence essential to running a global business."[72] What does that have to do with our discussion today? Everything. Corporations have a responsibility for developing the whole person and giving back to the community from which they derive their profits. In addition, and just as important, corporations should educate their officers, managers, and associates to become active members of the community. Obviously corporations can and should not lose sight of the responsibility to the shareholders, namely profit and return on investment.

Considering a report issued in by Cone & Roper, the following facts were highlighted, which do translate, coincidentally, to the bottom line. When price and quality are equal, 76% of consumers say they would most likely switch to a brand associated with good cause. Fifty-nine percent of consumers believe that business should address problems in their own backyards.

Receptivity to cause-related marketing is greatest among those most likely to make key purchasing decisions: women, parents of young children, and influentials. Cause-related marketing can have an extremely positive impact on a corporate image. That translates to the bottom line. More than half, 58%, of Americans say they have a more favorable opinion of companies that support causes. When asked to name one company they believe most socially responsible, 26% of Americans were able to name a company. Most frequently mentioned were food and beverage companies: McDonald's, Anheuser-Busch, Ben & Jerry's, Coca-Cola and Pepsi as well as WalMart and Ford. Alas no Toys "R" Us/Children's Benefit Fund but I hope to remedy that situation over time. More than 76% of consumers reported they would be likely to switch from one retail store to another store associated with a good cause, given comparable prices and product.

We are meeting here today in one of the greatest cities in the world—New York. New York has a multitude of issues confronting it, one of the most important being education. Yet how many of New York's corporate leaders have encouraged their associates, either with time or with dollars, to help with the education of a population that will soon become their associates? One educator I met recently—actually, it was about six months ago—said individuals in corporate America can determine when it is Yale on one hand or jail on the other. Really, he meant to say Cornell or jail, but it didn't rhyme. [Extended applause]. This is corporate responsibility personified, and it represents investment in human capital and social interests.

There is concern that being caught up in social causes will detract from the corporation's main purpose—the maximization of profits,

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72 *Id.*

you have heard that, and the shareholders' stake. Nonsense. Look at some of the most giving corporations in the country and you will see, while they recognize their responsibility to stakeholders, they have not lost sight of their corporate responsibility to their investors, their shareholders, and the financial community.

What can we do to further corporate responsibility? We can make sure our corporations become involved in the community by finding a program that fits with our corporate culture. We cater to children. Therefore, we sponsor programs that benefit children's health and welfare. We got so involved that we set up a separate 501(c)(3) corporation[73] with its own board, its own officers, its own financials to deal with the fund-raising and the distribution of funding. We educate our boards, our officers, our managers, and associates on the benefits of giving. Publicize your corporate involvement and it will make your associates and your customers think of you in a more positive way. That too will translate into a bottom line.

I can certainly speak about the giving programs that we have set up. We set up the Children's Benefit Fund, a separate 501(c)(3) corporation that will probably benefit about 240 different organizations this year. We also have what we call a children's hospital playroom, the Toys "R" Us playroom. We have forty-seven playrooms in hospitals throughout the United States. We have also set up for our employees what we call the Geoffrey Fund. It's a program that literally is to benefit our employees solely in the event of a disaster. Hurricanes that have happened—we are there to help out through our charitable giving through the Geoffrey Fund. Also, we have direct marketing causes that tie in with the Children's Miracle Network to tie in with the sale of plush toys.

You have heard a brief description of our corporate programs. What do we consider the real and perceived benefits? It is a payback to our customers, community, and our associates; a pride that our associates have in helping others, in making them more productive. Our customers can see that we care about the community in which we function and in which we do business, and we do receive occasionally some favorable publicity.

In conclusion, I will leave you with the quotation from H.G. Wells, "Human history becomes more and more a race between education and catastrophe."[74] In my opinion, by giving you education, hopefully education will avoid catastrophe.

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73 *See* I.R.C. § 501(c)(3) (1994).

74 H.G. WELLS, THE OUTLINE OF HISTORY 1100 (3d ed. 1920).

F. Questions and Comments

MR. BALOTTI: We have a couple more minutes. Mr. Butler?

MR. BUTLER: I will just point out that there is a group in Washington called the Capital Research Center that rates corporate philanthropy according to their contributions to groups that advocate different public policy positions, and I encourage you to try to locate this group and see what they are up to. Toys "R" Us is not on the top ten worst or the top ten best; you are somewhere in the murky middle on that. But there is a real concern in corporate giving that you see in what they call corporate misgiving: where the discretion of managers somewhere along the line has gone awry in giving money to interests that are clearly against the interests of the business.

I don't want to spend any more time on that. What I do want to share with you is that I do spend quite a bit of my time raising money from corporations for a program I think will save the civil justice system, and our general approach in going to corporations is to go to the general counsel's office. We view it as the kiss of death when we get pushed to the corporate giving office or corporation's foundation. We need to talk to the people who understand the business reason for doing this in order to get that support.

A few years ago I was visiting with the general counsel of a major corporation who was very generously supporting the program that I was involved with for many years. He said he was going to continue his support, but instead of it continuing to come from his budget with his discretionary funds in the general counsel's office, the contribution was going to be coming from the corporation's foundation. This was because there is this group out there that is rating their behavior, and they were getting a bad rating, and so they were going to shift where the funds come from.

What is the point of that? The point is that it is easier to find out what the foundations are doing than it is to find out what the corporations are doing with their own funds before it goes to the foundation. If you are interested in disclosure, want to see disclosure regulations, either you are going to have to touch all of the bases to figure out where the money is going to come from—a lot like restrictions on campaign spending to some extent—and that raises the question of how much do we want business to disclose about their expenditures. We do not require them to disclose information about most of the expenditures they make on other profit maximizing moves.

Do we want to get into this business of looking at all of the things that they do? I think that this probably would be a mistake.

MR. BALOTTI: Questions?

AUDIENCE MEMBER: Hi. This question is for Ms. Fisch. I am the Bureau Chief for Civil Rights at the Office of the Attorney General of New York.

You touched on briefly an issue that I have another twist to, and that is corporate giving with regard to litigation issues and government. Before being the Bureau Chief of Civil Rights, I was in the environmental bureau of the same office, and I have participated in the settlement of the Love Canal Litigation, and as you know, $120 million was the amount of the settlement, but $5 million went to set up an environmental research facility in upstate New York in the community that was originally subjected to the problem.[75]

I wondered what you thought about that and whether you thought that raised the same kinds of ethical issues that you touched on briefly during your speech. I personally think that that is a very pragmatic and meaningful way for us to settle our cases, to include these types of elements to settlements, and this also branches out to other areas of law, other than environmental. In civil rights we see the same thing. I wondered what you thought about that—using corporate giving as a means to resolve litigation.

MS. FISCH: It is a good question. I think that you are absolutely right. The idea of socially responsible programs being part of the solution to litigation and part of the solution to corporate wrongdoing is an excellent idea. I think that the problem comes when it is masked by the aura of corporate philanthropy so that a corporation can wind up being held less accountable for its wrongdoing, spending less money, making some sort of an effort which is sort of a token gesture of goodwill that is actually viewed more favorably by the public, which perhaps does not have the full information of what is going on than if the corporation were to spend a greater amount of money in making reparations, paying damages, and so forth. So my concern is not whether these programs are problematic; it is the way they are characterized in visibility and so forth.

AUDIENCE MEMBER: I will not tell you who I work for, but I will tell you a little bit about them. We are the leading technology company in the world. We are the largest software company in the world even after absorbing Lotus. We have increased shareholder value seven times in the last five years. We had no plant closings throughout the corporation, even in the worst of times. We are leaders in diversity and work-life balance. We had business conduct guidelines before it was the popular thing to do. We are leaders in protecting the environment. We are leaders in computing in schools, and we

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75 *See* Dan Herbeck, *After Nearly Two Decades Curtin Concludes Litigation*, BUFFALO NEWS, May 23, 1998, at B11 (describing the settlement for the 20-year long Love Canal Litigation).

have a harassment-free environment. That was the background for my question.

I am concerned about one very important issue, and it has a lot to do with what we are talking about today. I was at a town meeting on diversity at IBM recently, and the theme over and over again was that diversity is no longer the right thing to do societally, but it is the right business thing to do. That is why companies like IBM are leaders.

What concerns me about that is what if it becomes not the right business thing to do, that customers start deciding that buying from companies led exclusively by white males is what they want to do. Do we give up on diversity?

I wanted your thoughts on that, as to this apparent swing. The Waltons, for example, made decisions about harassment-free environment, hiring the disabled, hiring minority managers, and promoting people before it was apparently the right business thing to do, but it was the right thing to do for good societal reasons. I would appreciate perhaps Mr. Butler or others commenting on that.

MR. BALOTTI: Mr. Butler?

MR. BUTLER: The business world is a very complicated and challenging workplace. A lot of companies can experiment with lots of different ways to be successful. You have a formula, which seems to be working pretty well, and I will applaud you for it. I think that is one of the great things about our market system. You can find different ways to make your employees happy, to keep employees productive, to develop a valuable brand name, and there is no cookie-cutter approach out there.

In terms of what should be leading the way or whatever, I think the societal corporate leadership is probably a better way to get long-term change than having government impositioned changes anyway. I don't know if that will change and where we will go with that.

MR. BALOTTI: Let's translate that thought to philanthropy. Some of us up here have had some fun poking questions at the idea of corporate giving, but I think we all recognize that it would be a disaster for the charities in our country were there to be a dramatic swing away from corporate giving, and it is a very good thing for our society.

The only question that I think is a legitimate question from a societal point of view is, like everything else in society, there are abuses, and how do we weed out those abuses and prevent them or hold people responsible? Should they be responsible? I don't know the answer to that. The things that IBM and other corporations do in this area we can't stop, and we should not stop.

MS. BLAIR: I think I actually agree with a lot more with Mr. Butler has been saying than he thinks I do. One of the things in particular is that the market forces are really powerful, and very often the con-

straints they impose are much stronger than the constraints that the law imposes, and often that is a good thing.

The question you raise I think is an intriguing one, which is what do we do about it if the market pressures are pushing in a direction that really is morally, socially problematic in some sort of way, and I do think there are places where that happens, and that's where, I think, there is still a role, a much stronger role—and this is where Mr. Butler and I probably do part company—that has not been explored in recent years. It has been sort of swept under the rug as we emphasize the role of markets. But I'm talking about the role for leadership, for social norms, for moral standards, for personal conscience, and, in fact, what the law has created with the business judgment rule is room for corporate executives in which they can maneuver in order to exercise their judgment and their conscience on these things. They can abuse it too, and that is the flip side of that. But nonetheless, I think the law has created room for that discretion. I would not want to take that away.

AUDIENCE MEMBER: I am working with the Aspen Institute on the Initiative on Social Innovation in Business. My question is primarily to the academics on this panel and anyone else in the room who wants to answer it.

What we are interested in learning more about is how business schools, law schools, and executive education programs can build corporate social responsibility into their curricula to help emerging and, in the case of executive education programs, current leaders to understand the complexities, not the general issues—yes, we all know these are important things to be doing—but the complexities around these issues.

MR. BALOTTI: If nobody else will answer, I would say you probably want to retain one of these people up here.

MS. FISCH: I think to the extent we have been identifying a relationship between corporate profitability and market forces and social responsibility, I think that identifying that relationship for our students is very important. I think the effort to get corporate decision makers more focused on the long-term—not necessarily that that is taking away from the bottom line—but the idea that good community ties, good publicity, good consumer relations, strong and contented workforce will ultimately result in a more profitable corporation, I think can be built into our educational system early on.

I guess I just had sort of a follow-up on the earlier point. I think that the idea of corporations taking a leadership role that bucks or goes against market-driven forces is very difficult, and it is very unusual. I think, in fact, that one of the problems that I have observed in

corporate philanthropy is the reluctance of the corporations to do that.

I am not sure if that is a market failure that requires some sort of a regulatory response or if that's an educational problem or what. For example, when AIDS became a major problem, there were a number of corporations who adopted as part of their charitable giving policies a restriction. They would not give money to charities that focused on a single disease. Of course, that on its face looks relatively neutral, but it was a nice way of avoiding the controversy as to whether it was a good idea, whether it was bucking the trend in market forces and so forth, to give to AIDS research.

I think corporations really influencing social change are more the exception, unfortunately, than the rule.

MR. BALOTTI: Any other comments up here?

AUDIENCE MEMBER: Maybe you could repeat my question. We present charity always as a positive, which I think it almost always is, but is there any sense of extortion going on from some organizations? I mean, maybe that is more of a practical question, because one has to give.

Ms. Fisch says that it is always the ones who are having environmental problems, who are donating, and you can see that from the other side. You could say, "Yeah, of course, they are donating because there is extortion by environmental groups to get money from them." Of course, that is sort of a dark picture, and it can't describe all charitable giving.

MR. BUTLER: Some of that, it is clear, you see this take place a lot in the Community Reinvestment Act with bank mergers. The organization ACORN[76]—what do they stand for?

AUDIENCE MEMBER: Extortion or—no.

MR. BUTLER: They are a group that gets bought off in the NationsBank-Bank of America merger.[77] NationsBank has paid them a lot of money over the years, and so has Bank of America, and so have a lot of other banks. They turn around and sue them in the next merger that comes back. So you are not buying them; you are actually renting them.

AUDIENCE MEMBER: That is ridiculous. Come on. That is sloppy research.

MR. MACEY: There is quite a lot of discussion on this topic. There will be time left in the afternoon. Let's reconvene after lunch.

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76 ACORN is a public interest group that stands for the Association of Community Organizations for Reform Now.

77 *See BankAmerica Merger Is Complete, Creating Behemoth U.S. Bank*, WALL ST. J., Oct. 1, 1998, at B13.

PANEL III
INTERNATIONAL PERSPECTIVES: EUROPE AND JAPAN[78]

PANEL IV
INTEREST GROUPS AND POLITICAL PRESSURE

MR. MACEY: So without further ado, we'll begin with our first panelist, Martha Dinerstein, from the U.S. Trust Company.

A. Performance, Quality, and Integrity: The Key to Building Shareholder Value Is Building Long-Term Relationships

MS. DINERSTEIN: Since my remarks are obviously going to reflect where I work and what I do, I thought I'd just give you a brief snapshot of that. U.S. Trust is primarily an investment management company, and our principal clients are high net worth individuals. We're headquartered in New York City, but we also have twenty offices in eight states and an employee base of about 1700. We are a publicly traded company on Nasdaq.

I am not in charge of investor relations, nor am I in charge of corporate contributions, but I am actively involved in both. I am responsible for maintaining and enhancing U.S. Trust's reputation, for communicating to all of our constituencies, and for developing marketing programs which build our business.

We believe that corporate social responsibility has many facets. The ones talked about most often in terms of what we hear about, and really talked about most often today, are those involving corporate contributions. But there are certainly other ways to define corporate responsibility. I'd like to briefly mention two, at the end of my remarks, dealing with businesses conducting themselves in an ethical manner and building value for shareholders by having the courage to make long-term business decisions.

Let me start, though, with what might be called U.S. Trust's formal corporate responsibility effort. One of the services that we offer our clients is private banking. As a bank, we're a regulated industry. We are subject to some interest group and some political pressures. Specifically, we're subject to something called the Community Reinvestment Act ("CRA").[79] CRA requires us to provide low-interest credit facilities to support housing and economic development in low income and minority neighborhoods. To meet our CRA obligations, we also need to allocate a substantial portion of our charitable giving to programs which qualify for CRA credit. Outside of those obliga-

78 The transcript of Panel III of the Symposium is not reproduced here. The transcript is on file with the *Cornell Law Review*.

79 Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1147 (codified as amended at 12 U.S.C. §§ 2901-2907 (1994)).

tions, we've established formal guidelines and evaluation criteria to help us decide which organizations and projects to fund from among the multitude of organizations which would love our support. One of my favorite criteria is a focus on giving seed money to fund worthwhile new initiatives to sort of get them on firm ground; a microenterprise approach to charitable giving, if you will.

We don't let ourselves off the hook just by writing checks. We believe strongly in the power of volunteerism, a uniquely American phenomenon, I think, which is one of this country's greatest strengths. We encourage employees at all levels to volunteer their time to their communities and to the not-for-profit causes in which they believe. As one moves up our corporate ladder, we do a lot more than encourage. In fact, records are kept as to senior officers' board affiliations. Of course, we do this because we believe in the causes that we're supporting, but we also do it because we think it's good business. While we make a significant difference to the organizations and charities that we help, frankly, we have found a lot of clients that way. We've made a lot of contacts that way. And we've learned practices that have helped us manage our business better.

In a similar vein, some types of charitable contributions are considered as part of our marketing mix. We have a variety of ways that we can spend marketing dollars. They include advertising, hiring additional sales staff, hosting events, and charitable contributions. We think that the ones that we choose to support as part of our marketing budget give us an opportunity to do good plus build our business. For instance, I was personally surprised to find out that a lot of golf outings actually support very worthwhile organizations, and a lot of charities rely on funding that comes from black-tie dinners. Cultural institutions really provide remarkably beautiful venues for us to do some client entertaining. So that would be some of the ways that we could spend those dollars.

Now to turn just briefly to the two other aspects of corporate responsibility that I'd like to focus on—ethical behavior and smart business management—which increase shareholder value. Three words appear like a mantra in all of our communications. They are performance, quality, and integrity. The success of our business is dependent on building long-term relationships with our clients. We're out of business if we don't do that. So that really starts with treating clients with the highest degree of integrity. Because of the kind of business that we're in, for us that means it starts with keeping their financial affairs in strictest confidentiality. And it moves on to, I suppose at the end of the line, having the integrity to recommend against using certain types of services, even if U.S. Trust provides them. If we don't think it's in our client's best interests, we recommend against using

them. And that's one of the reasons that we have clients for generations.

This emphasis on ethical behavior extends to our employees as well. We expect it of them, and we extend it to them. Keeping in mind our time constraints, I'll give you just one example. Three years ago, despite objections from a community activist group, which eventually were rejected, we sold certain businesses to another bank to be able to focus our energy and resources on our core business: the investment management business for high net worth individuals. We instructed our investment bankers to tell all potential purchasers to structure their bids with the understanding that we were very concerned about the welfare of our employees. We moved heaven and earth to have meetings with all of our employees immediately after the news was disseminated publicly, to be able to explain to them how this was going to affect their lives. While, to be frank, we did end up with some very unhappy employees, all of us took comfort in knowing that we really had done everything humanly possible to keep their interests uppermost in our minds and to treat them in a humane and ethical way.

I guess we feel our highest act of corporate responsibility is to build value for our shareholders. Since the restructuring that I mentioned, we've been successful in doing that because we made a difficult, but smart and courageous decision to sell healthy, profitable businesses because we thought we could do better long-term and increase shareholder value more by greater business focus.

Finally, one of the most beneficial things that we've ever done was to put programs in place to encourage stock ownership at all levels. We see examples daily of employees acting like owners, and I don't mean with their noses buried in the *Wall Street Journal*'s stock table.

So, to repeat, our view of corporate responsibility is multifaceted. Building shareholder value is our ultimate goal, but we honestly do not know how to do that without an economically viable community in which to do business, without building long-term relationships with our clients, and without a committed and motivated work force.

Thank you.

MR. TARANTO: Hi. I'd like to introduce myself. I'm James Taranto. I'm the moderator. I apologize to everyone for being late. I'm an editor at the *Wall Street Journal*. We had to put out a newspaper and then I ran into some traffic, so I'm terribly sorry. I guess I'll give my little opening comment, which perhaps will amuse you.

The subject of the panel is interest groups and political pressure. It reminds me of one of the more colorful characters in this week's elections. I refer, of course, to governor-elect Jessie "The Body" Ventura, of Minnesota. He's a former professional wrestler and one of his

campaign ads showed a child holding an action figure of "The Body" wrestling Evil Special Interest Man. Evil Special Interest Man couldn't make it today. No doubt he's in the hospital recovering from his injuries.

But we have four distinguished panelists, one of whom you've already heard from, who I gather will critique or defend special interests as they relate to corporate governance. The second panelist is Alice Tepper Marlin. She's the President of the Council on Economic Priorities Accreditation Agency and President of the Council on Economic Priorities. I guess those are two separate organizations. I suppose she'll explain. She's the author and editor of numerous publications, including *Rating America's Corporate Conscience, the Price of Power, and Paper Profits.* A nice alliterative title. And she's also the Editor in Chief of the Council's monthly Research Report series.

I give you Alice Tepper Marlin.

B. Social Accountability as Measured by the Treatment of Laborers

Ms. MARLIN: It's a pleasure to join you all here today. I actually won't talk about what I was advertised to talk about, so I hope our moderator will excuse us. I'll be talking today about a program called "Social Accountability 8000" ("SA 8000").[80]

In today's business environment, the speed of transportation and communication has risen dramatically and the costs have fallen substantially. Literacy rates around the world have dramatically improved. Capital investment is so easily mobile that production anywhere in the world is practical and often seen as necessary to stay competitive. Globalization has resulted in lower production costs and new job opportunities in many locations. But, as assembly manufacturing jobs move to the developing world in response to market conditions, millions of children and impoverished adults manufacture garments and toys, weave rugs, and cut gems and flowers, usually for export.

The International Labor Organization estimates that today at least 120 million children worldwide are working at jobs that are often dangerous, and frequently pay so poorly that desperate people work hours that are exhausting, simply to earn enough to meet the basic survival essentials. Accident rates zoom for overtired workers, and in some factories here in our own country and in Europe conditions are little better, especially for immigrant populations who don't speak a

80 The Council on Economic Priorities Accreditation Agency released the Social Accountability 8000 Standard in October 1997. Its goal is the promotion of ethical practices for sourcing and producting goods and services. For more information on this program, see Macau Productivity & Tech. Transfer Ctr., *What Is Social Accountability (SA) Standard?* (visited Mar. 12, 1999) <http://www.cpttm.org.mo/Quality/QInfo/sa_8000_e.htm>.

country's native language or hold citizenship. Public awareness has grown steadily. Corporate reputations are now at stake wherever consumers watch TV, log on to the Internet, or have made "fax" a verb.

Yet corporate managers find it extremely difficult to ensure responsibility when dealing with a network of hundreds or even thousands of suppliers spanning the globe. Suppliers, squeezed by fiercely competitive pricing, may need technical and/or financial assistance to adjust. Internal codes of conduct, pioneered by Levi Strauss, have emerged as a preliminary response to this dilemma. Liz Claiborne, Toys "R" Us, Mattel, and Reebok are among companies that have adopted first-rate codes of conduct and monitoring systems to seek compliance.

But there are several major flaws to that approach. Internal codes are inherently expensive and inefficient to develop and monitor due to duplication of effort. Codes lack consistency. They are often weak on auditability. They tend to be unclear about how to interface with laws and customs that vary widely by region and country. Workers may fear retribution for revealing problems to their employer's customers in the absence of some form of guarantee that their anonymity will be protected.

The Council on Economic Priorities, a twenty-nine-year-old charitable trust, with which the Accreditation Agency is affiliated, has surveyed 360 U.S. companies in upwards of forty industries.[81] Seventy-one disclosed that they have a code of conduct with sourcing guidelines. But our analysis of these codes graphically illustrates the great differences and lack of consistency among codes. Few covered the core elements comprehensively and fewer still used binding language or reference benchmarks. With respect to the category of basic rights, not one issue was addressed in every code. Only two-thirds of the codes we analyzed addressed discrimination. Fewer provided for workplace health and safety, and only one-in-five addressed freedom of association or called for training programs for the workers affected. A mere seventeen percent required one day off in seven. Fewer than one in three even mentioned that they monitor the implementation of the guidelines, and only a handful disclosed any information to support this claim.

So we developed a universal code called Social Accountability 8000. SA 8000 was designed to overcome all five of these obstacles. It adapts the same successful model that companies have used to ensure quality control, ISO 9000.[82] SA 8000 applies these same techniques to

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[81] For more information on the Council on Economic Priorities ("CEP") and its survey, visit its Internet cite at <http://www.cepnyc.org>.

[82] *See* PERRY L. JOHNSON, ISO 9000: MEETING THE NEW INTERNATIONAL STANDARDS (1993) (detailing the ISO 9000 quality system standard and registration process). For

ensure safe and decent workplace conditions, and its associated accreditation system provides for specialized training of auditors. Like ISO 9000, its system for corrective and preventive actions encourages continuous improvement. SA 8000 is a voluntary, verifiable standard that can be effectively monitored both internally and by independent, expert third parties in consultation with nonprofit organizations and trade unions. SA 8000 is consensus based and was developed by a diverse international advisory board, informed by a series of pilot audits in various countries.

These representatives are drawn equally from the corporate community, on the one hand, and from the nongovernmental organizations and trade union sector, on the other. It's an international body; at least half of the members are from countries abroad.

The standard is based on Conventions of the International Labor Organization,[83] the U.N. Declaration on Human Rights,[84] and the U.N. Convention on the Rights of the Child.[85] These are all conventions that were developed and signed by most countries from every region of the world. The standard itself covers nine essential areas. The provisions are as follows: child labor, forced labor, basic health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, compensation, and management systems to ensure and document the delivery of and compliance with the performance recommendations.

The CEP accreditation agency, in turn, like all qualified accreditation agencies recognized by the International Accreditation Forum, complies with ISO Guide Sixty-One and the International Accreditation Forum Guidelines.[86] Three large international certification bodies, SGS, DNV, and BVQI—a Swiss firm, a Norwegian firm, and a French firm—have already been accredited or licensed to audit against SA 8000 and to accord the facilities that comply the right the use of the SA 8000 mark. A factory certification is good for three years, with surveillance audits every six months. At every audit any nonconformances with the standard are written up as "corrective action requests" and call for a root-cause analysis, a corrective action

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more information on ISO 9000, see Macau Productivity & Tech. Transfer Ctr., *Revision of ISO 9000 for Year 2000* (visited Mar. 12, 1999) <http://www.cpttm.org.mo/Quality/QInfo/iso_y2k_e.htm>.

83 For a list of these conventions, visit the International Labor Organization website at <http://www.ilo.org>.

84 *See* G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

85 *See* G.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49, at 165, U.N. Doc. A/44/736 (1989), *reprinted in* 28 I.L.M. 1948 (1989).

86 For a description of both ISO Guide 61 and the International Accreditation Forum Guidelines, see Naomi Roht-Arriaza, *Developing Countries, Regional Organizations, and the ISO 14001 Environmental Management Standard*, 9 GEO. INT'L ENVTL. L. REV. 583, 598-99 & n.88 (1997).

plan from management, and implementation of a plan for prevention of recurrence of the noncompliance.

The first factory to be certified and accorded the right to display the SA 8000 certification mark was an Avon Products Cosmetics factory in New York State. Avon Products, Toys "R" Us, and Otto-Versand—each a company with revenues between $5 and $20 billion—and more than 5000 direct primary suppliers, have established policies and begun to inform their suppliers that demonstrated conformance to SA 8000 will be expected. So have Italy's Legacoop, the largest supermarket chain in Italy, France's Promodes, a $30 billion company that operates hypermarkets, supermarkets, and minimarkets throughout Europe, and the Dutch retailer, We Europe.

The participating retailers may offer initial technical assistance and price adjustments to those smaller suppliers in developing countries and the United States, which lack the managerial or technical resources to start up but are dedicated to complying with the standard. These large retailers will soon require evidence that suppliers have applied for certification to SA 8000, so suppliers certified to SA 8000 will enjoy a clear competitive advantage. CEPAA will also track the costs and benefits of utilizing the system. We expect to find significant bottom line benefits, analogous to those resulting in the use of the ISO 9000 quality control system, improvements in quality, productivity increases, better working morale, and reductions in employee turnover rates. We'll also be eager to learn what real benefits are accruing directly to workers, such as increased compensation, opportunities for free association, and children placed in and completing schools.

Thank you.

C. Corporations Getting Philanthropic Through the Arts

MR. TARANTO: Thank you, Alice.

Our next speaker will be Luisa Kreisberg, the founder of the Kreisberg Group, which is involved in audience and market research for cultural services and products, cultural policy formation, and implementation of community-governmental relations with regard to cultural issues. She's worked with major corporations, including American Express, Sara Lee Corporation, and others in formulating cultural policies as an integral part of business.

Luisa?

MS. KREISBERG: Thank you.

I'm going to wing it. I have a written speech and I don't want to read it. I think we've had two very thoughtful and very far-reaching presentations. I want to get very specific and address some of the is-

sues that I think will remain very weighty, as we complete the twentieth century and move into the new century and life in cyberspace.

First of all, just a little bit of background. I've come out of journalism—not the *Wall Street Journal*—the *New York Times*.

MR. TARANTO: We won't hold it against you. [Laughter.]

MS. KREISBERG: Okay. I spent a decade as a reporter and an editor. I come from the Museum of Modern Art, where I was director of public information and handled the big Picasso exhibition and the sale of the air rights—which is a-i-r, not h-e-i-r rights—to build a great condo tower on the side streets of the city after which I formed the Kreisberg Group, which for many people sounds like a chamber music ensemble. We are a small agency—fifteen people who operate directly across the street from Lincoln Center—but we work all over the world.

In the last fourteen years we've been responsible for the marketing, communications, and advocacy for a whole sector of society. That sector is called culture. But that's a nonprofit sector and a profit sector. What's happened in the years I've spent working in cultural advocacy is a blurring of the edges between those sectors which is occurring more than ever in the '90s and will increase in the new century. The nonprofit is viewed as increasingly profit making. What was a tax infrastructure—an infrastructure created out of tax laws—is now being recreated to acknowledge not only the tax laws, but the realities of the marketplace. My case studies include American Express, the World Monuments Fund, Sara Lee Corporation, the Disney Corporation, 42nd Street, and now, just this last week, the Intel Corporation and the Whitney Museum.

World Monuments Fund is a watchdog group. It identifies, as you have identified and seen identified in the natural environment, the most endangered species in the built environment. It is premised on the notion that those landmarks of our lives that were man-made, created by human beings, also are critical to our survival. To have a point of reference like the Taj Mahal, the Empire State Building, or Angkor Wat in Cambodia is to have a human compass. The World Monuments Fund has called attention to the dangers that are facing these built places that keep us connected to our own humanity.

The American Express Company bought into that project, to the tune of $5 million, and it has now become a marketing vehicle. American Express is identifying, in a very enlightened way, with the issue of the built environment, while it also uses the built environment for its own market.

The very issue of whether we endanger the site more through tourism is an unresolved issue. Some of these sites are actually falling apart because they've had too many people crawling all over them. In

Lascaux, they've closed the caves and created a replica of the caves. Because the caves are so endangered by human beings, you must now go visit a replica. The fine line is being straddled here between tourism, the travel industry, and an ethos that says that these monuments, these places created by human beings, historically have a resonance and a power that we need to acknowledge and protect.

Sara Lee Corporation collected art—impressionism. The founder of the company began the collections. It was taken over then by John Bryan, as CEO, and by the corporation, and used as a kind of public relations tool. The collection traveled widely. It was loaned, and it was seen in Europe in its entirety. On the occasion of the millennium, a gift of a $100 million art collection is to be given to the public sector. The collection is to be given to twenty-five American museums, including museums in Mississippi and South Carolina, as well as museums in Washington, New York, and Los Angeles, and fifteen international museums, including museums in the Vatican, Russia, Holland, et cetera. According to some stockholders suits—one suit was filed to prevent this action from being taken—the feeling was that the collection was an asset of the corporation, and it should be sold. It's worth $100 million.

Reader's Digest is selling its collection. It's already de-accessioned. Very important works of art that will never again be available to museums. The cost to Sara Lee is not that great, given our tax laws, but the gesture, which is to believe that the public also has some entitlement to the profits of corporate America is very enlightened indeed.

We've been involved with 42nd Street redevelopment from the day of the first announcement of the design competition. Until the Disney Corporation said—at great benefit from the government, and with great subsidy from all sorts of taxpayers—it would renovate and restore the New Amsterdam Theater on 42nd Street, the real estate interests of this city were not buying into the reclaiming of 42nd Street as a mass entertainment district. There are, within the mass entertainment district, two nonprofit structures, one of which will contain a new building devoted to rehearsal spaces and the development of new product. In my period of time in working on 42nd Street, I watched Julie Taymor move from the Lenox Art Center in upstate Massachusetts to Lincoln Center with Juan Darien and the Riverside Church—all nonprofit—to 42nd Street with the Lion King. And Julie Taymor learned everything she learned from the nonprofit world. She travelled in Bali and in Java, learned about puppetry and brought it to the nonprofit theater. Disney was smart and co-oped it, built it right in. And they have a great, great success.

Lastly, Intel has formed a partnership with the Whitney Museum for $6 million to develop the Interactive Virtual Museum—a museum that will be something you experience when you walk through the door through a laptop.

In Helsinki, Finland right now a museum has been built where you check out when you come in—free of charge—a laptop. You then go to the restaurant, the cafe in the museum, and you access what you are going to see in the museum from that laptop. Instead of Acoustiguide, you now get your laptop.

There is a revolution going on as I speak, and it's blurring all the lines, blurring the edges between what used to be clearly a tax-sheltered structure called nonprofit and the techniques and tools that are used by marketers in the corporate world and in the business world.

That leads me to my last question: Is it social responsibility? That's why you now have books being published on corporate social responsibility that are asking whether these structures are valid at the end of the twentieth century. I have two daughters-in-law with Harvard and Columbia divinity degrees, who served on business school committees to talk about ethics. They found out that the divinity school reps didn't really want to talk about the business school view of ethics and the business school didn't want to talk about the divinity school view. There is the big divide. That sums it up.

I leave you with questions.

D. Legal Solutions Are Not the Answer

MR. TARANTO: Thank you, Luisa.

Finally we have Jon Macey, the J. DuPratt White Professor of Law and Director of the John M. Olin Program in Law and Economics at Cornell Law School. And also, I might add, a *Wall Street Journal* contributor.

Mr. Macey?

MR. MACEY: I want to talk about the relationship between other constituencies, stakeholders, and the actual problems that these other constituencies and stakeholders have. I also want to talk about politics.

First, let's assume that, as most people believe, we have serious problems with environmental issues. We have serious problems with issues related to inner cities and other communities. We have serious problems of the Luigi Zingales-Margaret Blair variety of human capital and workers, something I will come back to in much more detail, and serious problems with respect to relationships between corporations and vendors, and corporations and customers. The simple question that I want to pose is: Assuming that all of these serious problems exist, is there any relationship between these problems and a legal

solution that would expand the fiduciary duties of corporate directors beyond their traditional constituency—the shareholders?

I think that the answer to that question is no. That is to say that these other constituency statutes and these broad grants of social responsibility along the European model do not give rights to these other constituencies, they simply take rights away from shareholders. It is not at all obvious to me how—taking the environment as an example—we can say, "Gee, I think there's a very big problem with the environment. Therefore, I'm going to take away managers' and directors' fiduciary obligation to shareholders and make that fiduciary obligation broader." I think it takes someone with a great deal of faith or naiveté, or both, to think that this expansion or change in legal orientation will actually benefit the environment.

Let me turn to the issue of human capital. The problem with addressing an audience about human capital is that the term is so vague. When you talk about "human capital" everybody agrees that it's a very important problem but nobody really understands what we mean. So I want to give three real world, true stories about corporate human capital problems that I hope will illustrate the nature of the problem.

The first one relates to an actual company that I was involved with a couple of years ago. Simultaneously within this company, which was the subject of a hostile tender offer, two events occurred. The first event was a 50% change in the nature of the shareholding population, a huge amount of turnover in the shares. Investors were buying the stock. Also, simultaneously, a 50% turnover in the company's sales force, selling a certain kind of high-tech product, occurred.

Now, what I want to suggest to you from a corporate governance perspective is that the turnover in shares makes no difference. Shareholders are totally fungible. It doesn't make any difference. These are financial assets. Nothing about the asset side of the balance sheet or the liability side of the balance sheet of this company changes when the share turnover occurs. However, of course, as anybody can readily imagine, the 50% turnover in a very highly skilled sales force, selling a highly technical specialized product, wreaked havoc on this firm. So that's one example of human capital really mattering; not just mattering in an abstract way, but making a difference to the firm's bottom line.

Second, to stress the international flavor of this conference, imagine that you are periodically going to a restaurant in the United States. Imagine that this is the case—it's very likely to be the situation in the U.S. restaurant or other small business—that the people working for you and waiting on you will change, maybe not day-to-day, but week-to-week or month-to-month. By contrast, if you go to a similar estab-

lishment in Europe, the likelihood is that this labor force is much, much more stable. This turnover has meaningful consequences with respect to the willingness of these firms to make investments in training these employees, which is one aspect of this human capital puzzle we've been talking about.

The third example is a manifestation of the second point. If you talk to people who design software programs in the United States, they say that there is no way to market a software program in the United States, whether it is word processing or spreadsheet or any other kind of retail-based software program, unless the users of that program can be taught to operate the program within twenty minutes, without the use of a manual. Now, the good news is that this is an enormous challenge to software program designers. But why do we have this bizarre constraint on the nature of software design in the United States? The answer is quite clear: It's because that's about how long, in U.S. labor markets, we can expect to keep employees.

What I am telling you is sort of the bleak side of what everybody celebrates about the United States. What everybody celebrates about the United States, of course, is this enormous flexibility in our labor markets. And they are great, and I don't think we should give that up for anything. On the other hand, we have to realize that this flexibility takes a toll with respect to the examples of human capital development that I've given you just now.

What do we do in the system? What is the nature of the problems? I would suggest to you very strongly, as I said with my environmental example, that this problem is extremely acute—and I certainly agree with Mr. Zingales about that and with Margaret Blair—but expanding the nature of corporate social responsibility to include workers, vendors, or customers is not going to solve this problem at all. This is a contracting problem that exists between firms and their employees, and shareholders want to solve this problem every bit as much or more than anybody else. The problems are, I would suggest to you, problems in terms of shortcomings in the ability of firms to enter into enforceable labor contracts with their workers that would make both the workers and the firms better off. For example, U.S. ERISA[87] pension restrictions prohibit firms from providing vesting rules for pension plans that give employees incentives to hang around after the firm has made these sort of very highly specific investments in human capital development. Similarly, while U.S. flexibility in labor markets is a great thing, that flexibility, in my view, should be coupled with the ability of firms to contract with employees to provide for enforceable contracts that would work simultaneously to provide

87 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461).

longevity for employment, but also to require the employees stick around, something that is not possible to do under U.S. contract law.

So the idea is: Yes, these are meaningful problems, the problem of human capital and the problem of retention of human capital. These problems have to be solved by businesses in the United States if the United States is going to remain competitive. I think that many of you may have been introduced to this topic of human capital today, but I can tell you it's going to become more and more and more important to U.S. competitiveness in the future.

So where does this leave us with respect to other constituency statutes? There's no mystery if one looks at the legislative process within the states, about where these proposals in the United States we've heard so much about today are coming from in terms of making corporations more socially responsible. Individual firms, faced with the prospect of hostile takeovers, go to their legislatures and engage in special pleading.[88] It began in Connecticut, when Aetna became subject of a hostile takeover several years ago,[89] and it spread like wild fire throughout the states. Burlington Industry is threatened with a hostile takeover, they go to their legislature in North Carolina and they say, "we need protection; we need greater degrees of freedom to help our interests, as incumbent management, against takeover." Similarly, in Indiana you have the Belzberg family making a run in Arvin Industries.[90] Indiana responds with favorable legislation that's couched in these broad, meaningful social terms but has very narrow special interest focus. Similarly with respect to Ohio and the threats to Goodyear Tire & Rubber,[91] Boeing Industries and Washington,[92] Wisconsin with Heilman Brewing.[93] The list goes on and on.

In other words, the analysis that has been done of the history of these legislative initiatives is quite transparent. We see these statutes which appear to be very high-minded and responsible, actually simply to be extremely narrow responses to special pleadings of a very well-known variety.

Thank you.

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88 *See, e.g.*, Michael W. Miller, *Safe at Home: How Indiana Shielded a Firm and Changed the Takeover Business*, WALL ST. J., July 1, 1987, at 1 (discussing the passing of a bill that "in effect, outlawed most hostile takeovers in the Hoosier State").

89 *See* Roberta Romano, *State Takeover Laws: Constitutional but Dumb*, WALL ST. J., May 14, 1987, at 28.

90 *See* Miller, *supra* note 88 (discussing the Balzberg "assault on Arvin").

91 *See Ohio Takeover Law Caused Stock-Price Fall, SEC Says*, WALL ST. J., May 19, 1987, at 16.

92 *See* Eileen White, *Washington State Legislative Leaders Meet with Boeing*, WALL ST. J., July 30, 1987, at 12.

93 *See* Robert Johnson, *Heileman Seeks Law To Thwart Bond Takeover Bid*, WALL ST. J., Sept. 14, 1987, at 14.

E. Questions and Comments

MR. TARANTO: Thank you, Mr. Macey. I think we have a little over half an hour for questions. And I'll exercise my moderator's prerogative and ask a question of Ms. Marlin.

It seems to me that when you're talking about factories in developing countries, there's going to be a trade-off between the quality of workplace conditions and the number of jobs because improving workplace conditions, improving wages, and so forth is in most cases going to increase costs and reduce the cost advantage of locating in these countries. My question is: In setting up your standards, what account did you make of these trade-offs and what sorts of compromises did you make in terms of setting forth what the standards should be for workplace conditions?

MS. MARLIN: The standard decisions were made by that diverse board of advisers, half from the corporate community—U.S. and abroad—half from NGOs and trade unions—it wasn't a staff decision—and based on widely shared international conventions. We didn't draw it from thin air. But we were very concerned about the trade-offs that you're talking about.

We were, however, at the same time quite well-informed about the productivity differences between developing world personnel and developed world personnel, and were convinced that given better opportunities for education, nutrition, reasonable work hours, reasonable amounts of rest, and safe working conditions, there would not be an adverse bottom line effect.

First, for instance, Mr. Macey's talking about the cost of high turnover. When you get significant increases in productivity, loyalty, interest in the job, competence in the job, and reductions in turnover, that often will more than offset the increase in compensation.

Secondly, for a lot of the goods that are produced in developing countries, the labor costs in many industrial sectors are actually quite a small percentage of the cost that people pay.

The third is that the primary motivation for this is consumer choice. And consumers are asking for more than price competition, but are responding to surveys and are indicating in their buying choices that if given a choice between a product made with child labor in a sweatshop and a product that they have some assurance was not made with child labor and not in a sweatshop, they will choose to take the product that is made under reasonable working conditions and not by children. And that they will pay a premium to have the ability to have that choice and will choose the more expensive product, in very large numbers, like 75 to 80%, consistent in both the United States and in a number of European countries.

And the fourth is that there is a strong risk-reduction motivator here. It really is fear of the Kathy Lee Gifford and Nike syndrome,[94] which many of the companies involved in this think is a significant risk, because few of them that are producing in developing countries have much level of assurance that they don't have factories where the same problems occur.

MR. TARANTO: All right. Let's open it up to the audience. You, sir, in the back.

AUDIENCE MEMBER: I have one point to make and a question to ask, both from the perspective of a mostly German-trained lawyer who now practices in this country.

It seems to have become pretty clear in the course of this discussion that the discussion around corporate charity and corporate giving, to the extent that it's voluntary, is really around a nonissue since the stockholder feels that it's necessary to hire a group of executives and provide them with perks, potentially, to have them spend his money on these various good causes. And there really isn't any reason why they shouldn't do that.

I think that the real problems actually kick in when coercive governmental measures enter the picture. I guess that's what we see in the case of these stakeholder societies in some of the European countries that have been presented here.

My question would be: Isn't it almost necessarily the case that when we embark on this road to impose these various mandates on corporations to do good, that those choices that corporations make will be made eventually by publicly elected officials? And is that not going to lead to a more statute-ridden, interventionist corporate state? I guess that would be a question to the entire panel.

MR. MACEY: I'll take a first crack at it. I don't disagree with much of the implications of your question, Martin, other than your characterization of yourself as a mostly German trained lawyer. Having received an LL.M. degree from Cornell, we would have to add a well-trained U.S. lawyer and mostly German trained.

With respect to the first part of your question, which is why do we need to worry about this? It's just a way of having hidden extra compensation to management in the United States. And my view of that is that I agree with you that the government coercion point is a more serious concern. However, if we are operating under a regime in which management is supposed to disclose its compensation, and we have a regime in which these charitable contributions are characterized, at least by you—and I share your characterization—as compensa-

94 *See supra* notes 38-39.

tion, shouldn't they also be disclosed? And I think that there are lots of specific examples.

There are stories of the number one and two officers, who happen to be spouses, at a particular company who are giving away tens of millions of dollars of the corporation's money to charities that have nothing to do with the corporation's business. What some people find socially unattractive is that it happened to be to a right-to-life organization, for example. It doesn't come out for years, and shareholders, if they knew about it, might object.

My short answer is this: if the nature of the contributions is transparent, then I don't care, it's more of a disclosure issue for me. And I'm against any coercion, as to the second part of your question.

MR. TARANTO: Anyone else?

MS. MARLIN: I think Mr. Macey has addressed the central question. SA 8000, just to clarify, is a completely voluntary program. It doesn't involve government in any way. Our feeling about it is that consumers are entitled to choice. If they decide they'd like to choose one product over another, in part because of the way workers are treated, they have as much right to make that kind of consumer choice as to what color, what quality of sewing, or what quality of material the suits we're wearing today are made of.

MS. KREISBERG: I have a different view, and that is, you know, the statistics are interesting now. At a time when corporate profits were at an all-time high, corporate giving—certainly to culture—dropped. In terms of percentages it's lower, not higher. I use "culture" as a broad term, because that includes the sector called education. I'm not just talking about art museums. I'm talking about a whole vast network of institutions that comprise this thing called "culture." I also believe CEOs make the decision about what is socially responsible, and that's very eccentric, very much a particular decision of an individual. And then I also have this old lefty in me. There's a kind of hegemony, it's called capitalism, and it's pretty ruthless. Whenever it's profitable to be socially responsible or accountable, it's fine. When it's no longer profitable we become pretty cruel.

Listening to all of this and having been married to a lawyer for forty years, I hear some of the legal infrastructure emerging as well. I'm wondering about an ethos that has something to do with the public good. Do we do anything for the public good anymore, except collect garbage?

MR. MACEY: Let me just respond to that by saying I would just like a little clarification on this hegemony point. The corporate capitalist—whatever multilateral conspiracy or however you want to characterize it—may lack the diversity that we would like, but it is much more diverse than government.

If we were to replace—

Ms. KREISBERG: No question.

MR. MACEY: —corporate giving with, you know, the same dollars being given by government, we'd see far less diversity. That would make some people, obviously, a whole lot better off. It also would make some people a whole lot worse off—a lot less diverse.

It's always "as compared to what?" We don't live in a nirvana world. Given that those are the choices, the corporate model in the U.S. or the situation in Europe—where I don't think people actually pointed out during the last session, as I wish they would have—compared to the U.S. situation, there is no corporate philanthropy in Europe.

Ms. KREISBERG: Government has historically been the philanthropist. However, they are looking at the American model and emulating it pretty widely these days, and our model isn't necessarily working so well anymore. Our nonprofit sector is reeling under the pressures of markets that shift very radically and corporate giving and discretionary money, which has gone into the safety net issues.

MR. MACEY: But what I'm saying is, that you're quite right saying that Europe is looking towards America. The reason they're doing it is not because it is an ideal system, it's just better than what they have. It may be deeply flawed, exactly as you're suggesting. And my question to you is: If you don't like this system here, what should we replace it with? What's your alternative model?

Ms. KREISBERG: I didn't say we're going to replace it. I have no interest in replacing it. I'd like to humanize it a bit.

Ms. MARLIN: I'd like to suggest that, I think the reason Europe is shifting is lack of government funds, not a preference of how they're allocated. Government giving in many European countries is considerably more responsive to grass roots and developing countries' demands and considerably more pluralistic than American government support of citizen activism, considerably more pluralistic in my observation.

MR. TARANTO: The lady in the corner over here.

AUDIENCE MEMBER: Hi. I think I want to comment on some of the comments that I've heard, not just in this panel, but earlier. I think that one of the things that has to be clarified, in the whole discussion of stakeholders issues, is it's not a them-and-us kind of a setup at all. It's that the stakeholders wear different hats at different times: Customers are employees and employees are shareholders. And there isn't this divisiveness that I think we kind of hear in this type of a conference. And so, it's the whole idea of whether it should be regulated or voluntary guidelines I think we really keep coming back to. It

is a system that's working, that's market driven. It's driven by these constituencies, who are us. They're not these separate entities.

And so when we have a demand, like Ms. Marlin is talking about, that we want to have products that are made in a certain way—by people who have healthy working conditions—that becomes a reality because we are the customer. We are also the shareholder, and we vote with our feet. Each of those stakeholder groups do vote with their feet. And so, I mean, that's what's so great about this system.

And I just thought that comment was something I'd been trying to make all day.

MR. TARANTO: Anyone to respond? Okay, more questions?

AUDIENCE MEMBER: I think it is always fun to hear people beat government up. The implication is that government is—

MR. MACEY: I agree, it is always fun.

AUDIENCE MEMBER: —What will you replace government with? Something else? The answer is, probably, anything works better than certain parts of government, and yet we are stuck with government as we are stuck with human beings. My point here is: I think that the notion of community and what kinds of community corporations want is really the question that the stakeholders, stockholders, shareholders dispute is all about. When you have people coming in from Connecticut to be CEOs of corporations in New York and not investing in New York, that is the question that people aren't discussing.

I think what you are talking about often is absentee corporate management, where the corporation hasn't figured out what community it is a part of and how to become an integral and an active part of the community. So when we talk of corporate social responsibility, we're saying that, I think a lot of corporations are still confused about what "community" means. Now, I don't think we have really taken any steps with the media, itself, or with other communities that are part of that sort of spider's web that Ms. Taylor designed, where corporations realize that these are the stakeholders and these are the constituents we need to serve. So we all get caught up on corporate giving, corporate philanthropy—are we creating largess and finally beating up on government?

I gness my question, after all of this diatribe, is essentially: Have we even figured out in terms of corporate law, corporate practice, shareholder practice, what communities are all about? What is a corporate community?

MR. TARANTO: Who wants to take that one?

MS. DINERSTEIN: You.

MR. TARANTO: I haven't figured it out.

MR. MACEY: I haven't figured it out either, but I do know two things. One, that community is really, really good. And however we

define it, we want to foster it and nurture it. And the second thing is, with respect to this—I was taken by your example of the guy coming in from Connecticut, presumably from Greenwich to New York, and does he really care about the community? The real model is the guy who lives in whatever fancy suburb of Amsterdam that Mr. Boot lives in, driving into downtown Amsterdam and controlling workers in Ithaca, New York. Like my local supermarket, which is owned by a Dutch company, and in Malaysia and in India. That is much more the reality.

And, you know, the ideas that think it only makes this problem more difficult, this conceptual problem you're describing, more difficult. And certainly by telling the guy in Connecticut, that he has to live in—I don't know—

AUDIENCE MEMBER: Bedford Stuyvesant.

MR. MACEY: —Queens, right Bedford Stuyvesant, or telling Arnoud's neighbor that he has to move into downtown Amsterdam—I don't think is going to move us a centimeter towards any resolution of this problem.

MR. TARANTO: Anyone else? More questions? Sir?

AUDIENCE MEMBER: This morning I raised the question of a global minimum wage or global minimum working standards. I was very pleased to learn something I hadn't known about SA 8000, on the model of ISO 9000, which seems to address that. I think in terms of talking about this whole thing at the global level, what we do need is some kind of level of world government to set some standardized rules, taking into allowance the different standards of living in different parts of the world. But that's a first step.

MR. TARANTO: No response? Okay. All right. Any more questions?

MS. KREISBERG: I just want to say one thing. I think that the single most important cultural event of the year happened a few weeks ago, or I guess maybe more than a week ago, when John Glenn went into that capsule.[95] The fact is that you talk about the word "community," and his view of the planet when he was flying around in space was a description of our community. So I don't know, we're getting into very big concepts that have a great mythology attached to them. It will be the assigument of the best of our corporate leaders and the best of government leaders—as well as the best of every other kind of leader—to try to figure it out because I think it is pretty muddled when it comes to the idea of community.

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95 *See* John Noble Wilford, *Glenn Reports Back to Earth, "It's Been a Great Ride So Far,"* N.Y. TIMES, Oct. 31, 1998, at A12.

MR. MACEY: I certainly agree. If we could only get a few more politicians in those space capsules. [Laughter.]

MS. KREISBERG: He'd make a great politician.

MR. TARANTO: Any more questions? Okay.

MR. MACEY: We can also continue in an informal way. I noticed there are refreshments set up in the back. It's been a long day.

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