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## The Corporate Social Responsibility Movement - The Latest in Maginot Lines to Save Capitalism

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# Articles

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H.J. Glasbeek\*

The Corporate Social Responsibility Movement — The Latest in Maginot Lines to Save Capitalism

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## I. Introduction

The modern corporation had a battle to be accepted as a legitimate institution<sup>1</sup>. In England it was initially seen as a device which might lead to the undermining of individual responsibility<sup>2</sup>, in the United States as subjugating the individual and individualism to the needs of the organization,<sup>3</sup> and in Canada as offending the dignity of labour and

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1. The cause of the difficulty was well-stated by A. Berle, *Economic Power and the Free Society* (New York: The Fund for the Republic, 1958), at 16: "Whenever there is a question of power there is a question of legitimacy. As things stand now, these [corporations] have the slenderest claim of legitimacy, which also means finding a field of responsibility and a field of accountability. Legitimacy, responsibility and accountability are essential to any power system if it is to endure." For early doubts about the corporation's legitimacy, see J.W. Hurst, *The Legitimacy of the Business Corporation* (Charlottesville: University of Virginia Press, 1970) at 30-44; L. Hartz, *Economic Policy and Democratic Thought in Pennsylvania 1776-1860* (Cambridge: Harvard University Press, 1948) at 78-79; Thurmond Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), Chapter VIII; W.W. Cook, *The Corporation Problem: The Public Phases of Corporations, Their Uses, Abuses* (New York: G.P. Putnam's Sons, 1891).

2. After modern corporations had been accorded the privilege of limited liability, *The Law Times*, 21 June, 1856, referred to the legislation as a Rogues' Charter; E. Herman, *Corporate Control, Corporate Power* (London, New York, New Rochelle, Melbourne, Sydney: Cambridge U. P., 1981) at 259 cites William Hazlitt, *Table Talk* — (London: Everyman Edition, 1952), to the following effect: "Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and they are less amenable to disgrace or punishment. They feel neither shame, remorse, gratitude, nor goodwill." (at 264).

3. See John P. Davis, *Corporations; A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State* (New York and London: The Knickerbocker Press, 1905), (reprint edition, William S. Hein, Buffalo, 1986). At page 3 Davis refers to an interview with Henry Watterson, as reported in the *New York Journal of November 29, 1896*: "In 1800 we were a few millions of people and we loved liberty. In 1900 we are nearly a hundred millions of people and we love money. Moreover, individually and collectively, we have a great deal of money. Most of this money is invested in what I call corporations. From a handful of individuals we have become a nation of institutions. The individual counts for less and less, organizations for more and more. It is the idiosyncrasy of the age we live in." Similarly, Charles Francis Adams, "The Place of Corporate Action in Civilization", Chapter (iv) of Shaler's *The United States of America*, Volume II, at 197, is

endangering the political entente.<sup>4</sup> In 1932, Berle and Means<sup>5</sup> showed that most of the wealth in the United States was in the hands of corporations and a large proportion of that corporate wealth was controlled by a relatively small number of dominant corporations.<sup>6</sup> Vigorous public debates ensued, the best known of which was the one carried on between Berle and Dodd.<sup>7</sup> The issue was whether or not corporations should act with a social conscience. By the mid-1950s, Berle, who had argued that corporations should not have such a duty, had acknowledged that corporations had come to accept that corporate power was to be used by corporate directors and officials not only for the benefit of shareholders but also on behalf of the entire community.<sup>8</sup>

While the issue as to whether or not corporations ought to have a social conscience and act upon it has not, as yet, been settled, it is true to say that, in North America, after World War II, corporations had come to enjoy a degree of acceptability and respect that they had not had in the late 19th and early 20th century. Examples abound. Thus it is that, in 1968,<sup>9</sup> The Woods Task Force on Labour Relations<sup>10</sup> argued:

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quoted by Davis, at 4: “[One of the evil effects of corporate organizations] is that we shall have, in place of the independent businessman of today, each gaining his livelihood by his success in a wide range of thought and action, a body of clerklike functionaries, each of whom will do a certain limited kind of work at the command of his superiors.”

4. The Canadian revolutionary Mackenzie included the following provision in his *Draft Constitution*: “s. 56. There shall never be created within this State any incorporated trading companies or incorporated companies with banking powers. Labour is the only means of creating wealth.” See: *The Constitution*, Nov. 15, 1837; D. Creighton, *The Empire of the St. Lawrence*, at 278-80, recorded that, in 1830, Papineau objected to the idea of limited liability and the undue political influence of big corporations, particularly banks.

5. A. Berle and G. Means, *The Modern Corporation and Private Property* (New York: MacMillan, 1932).

6. This was by no means the first finding of the amassment of wealth by the corporate sector. See Richard T. Ely, “The Growth of Corporations,” *Harper’s Magazine*, Volume 75, at 71 (June 1895), who thought that at least one-fourth of the total value of all property in the United States was held by corporations and that this proportion was increasing rapidly. Similarly, Justice Field, at the centennial celebration of the organization of the federal judiciary, New York, February 4, 1890, 134 *U.S.R.*, 742 (as quoted in Davis, *supra*, note 3, at 2) thought that nearly four-fifths of the entire property of the country was held by the corporate sector. What was new in Berle’s and Means’ findings was that they concluded that shareholders were not in control of the dominant corporations; management was. The issues this raises are central to this paper.

7. Berle, “Corporate Powers in Trust” (1931), 44 *Harv. L. Rev.* 1049; “For Whom Corporate Managers Are Trustees” (1932), 45 *Harv. L. Rev.* 1365; Dodd, “For Whom are Corporate Managers Trustees?” (1932), 45 *Harv. L. Rev.* 1145, “Is Effective Enforcement of the Fiduciary Duties of Corporate Trustees Practicable?” (1934), 2 *Uni. Chi. L. Rev.* 194.

8. *The Twentieth-Century Capitalist Revolution* (New York: Harcourt Brace, 1954), and *Economic Power and the Free Society* (New York: The Fund for the Republic, 1958).

9. The date is important, as will become apparent below.

10. Report of the Task Force on Labour Relations, *Canadian Industrial Relations*, (Ottawa: Privy Council Office, 1968).

The principle of freedom under the law, in an environment designed to facilitate individual development and participation, has produced in North America a pluralistic society reflecting a multitude of cultural backgrounds, values, interests and goals. The underlying concepts of the free individual, private property and freedom of contract have produced an essentially capitalistic, although mixed enterprise, economy. Subject to certain qualifications, *the key element within this system is the corporation*, a legal entity which provides a means both for the accumulation of capital and for limiting the risks of enterprise to that capital. [Emphasis added.]

It is clear that the corporation was deemed to have a central and beneficent place in Canadian society, *both economically and politically*. Again, since the advent of the *Charter of Rights and Freedoms*,<sup>11</sup> the Supreme Court of Canada has had no difficulty in finding that corporations have as much right to claim the benefit of political rights and freedoms, such as the right to freedom of religion and the right to privacy,<sup>12</sup> as any warm-blooded human being. Nor is there any longer any real question (either in the United States or in Canada) as to whether or not corporations, as such, can participate in electoral politics by funding parties and/or candidates. The only issue seems to be whether or not financial limitations can be imposed on corporate donors.<sup>13</sup>

Less formally but, I believe, just as importantly, corporations are perceived as vital, live economic and political actors by the general population. For instance, unions speaking about their struggle with employers will frequently refer to the “corporation” as not wanting to do something, or as making unacceptable demands for concessions, and so forth. This is a tell-tale acknowledgement of reality: employers are normally corporations. While this is obviously a legal truism, the fact that workers see beyond their immediate bosses and supervisors when they want to identify their real employer is suggestive of the pervasive presence and legitimacy of the corporate structure. Similarly, when public policies are being discussed, it is common for the protagonists to address the issue of the corporate sector’s desires, wants and opinions in respect of the policies under discussion, thereby suggesting that corporations have wants, desires and opinions. In line with this perception, note that, in recent times, it has become the conventional

11. *Constitution Act, 1982, Part I — Schedule B — Canadian Charter of Rights and Freedoms*.

12. *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295; *Hunter v. Southam*, [1984] 2 S.C.R. 145.

13. See R.G. Atkey, “Corporate Political Activity” (1985), 23 *Uni. West Ont. L.R.* 129; M. Tushnet, “Corporations and Free Speech”, in D. Kairys (ed.) *The Politics of Law, A Progressive Critique* (New York: Pantheon books, 1982). Note that not only can corporations enter into contracts, be subjected to standards leading to civil liability, and be the subject of administrative regulation, but they also have sufficient legal personality to commit crimes. These liabilities bolster their legitimacy when they abide by legal standards.

wisdom of politics in this part of the world that there ought to be an abandonment of state intervention in the economy, leaving it to the private sector<sup>14</sup> (often referred to as the corporate sector) to produce welfare. This notion reflects the views of business as they are made known by umbrella groups, such as the Federation of Independent Business and the National Council on Business Issues, and by chief executive officers of large corporations. The latter frequently speak on public issues, consult with, and are consulted by, politician and public servants. It is the association of these prominent men (and they are nearly all men) with large corporations which give them their standing and which bestows legitimacy upon their expressed views.

In part, no doubt, much of the modern, largely unquestioning acceptance of corporations as legitimate actors is due to the fact that corporations, as such, have come to be seen as central to the economy and thus to the polity. But, while it is true that the economic centrality of corporations has made their participation in both economic and political life seem utterly natural, it does not follow that their contribution to the good of society is seen as being anything but indirect. Indeed, the debate as to whether or not corporations should specifically be required to promote social welfare, as well as engage in the maximization of profits, has continued and, recently, has increased in intensity.<sup>15</sup> More

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14. This hardly needs documentation but, as the point is somewhat important to this paper, note that in February, 1978, Canadian First Ministers asked the Economic Council of Canada to study the problems of government regulation because "[t]he burden of government regulation on the private sector should be reduced and the burden of overlapping federal and provincial jurisdiction should be eliminated." See C.D. Hunt and A.R. Lucas, *Environmental Regulation*, (Calgary: Canadian Institute of Resources Law, 1980), Preface V. This was a study done for the Economic Council of Canada in response to this direction of the First Ministers who, in turn, had been influenced by incessant lobbying by the private sector.

15. The literature is too voluminous to list; most of it is American. See, e.g., P. Drucker, *Concept of the Corporation* (New York: John Day & Co., 1946); A. Hacker "Politics and the Corporation: An Occasional Paper on the Role of the Corporation in a Free Society", (New York: Fund for the Republic, 1958); E. Mason (ed.), *The Corporation in Modern Society* (Cambridge: Harvard U.P., 1960); M. Anshen & G. Bach (eds.), *Management and Corporations 1985*, (New York: McGraw-Hill, 1960); M. Friedman, *Capitalism and Freedom* (Chicago: Uni. of Chi. P., 1962); A. Hacker (ed.) *The Corporation Take-Over* (New York: Harper & Row, 1965); J. Wiener, "The Berle-Dodd Dialogue on the Concept of the Corporation" (1964), 64 Col. L. Rev. 1458; M. Schlusberg "Corporate Legitimacy and Social Responsibility: The Role of Law" (1969), 12 Cal. Management Rev. 65; M. Heald, *The Social Responsibility of Business: Company and Community 1900-1969*, (Cleveland: Press of Western Reserve Union, 1970); R. Lerner, *Management Control and the Large Corporation*, (New York: Dunellen, 1970); D. Bell, "The Corporation and Society in the 1970's" (1971), No. 24, Public Interest, 5; P.S. Sethi, *Up Against the Corporate Wall: Modern Corporations and Social Issues of the Seventies* (Englewood Cliffs, N.J.: Prentice-Hall, 1971); H. Manne and H. Wallich, *The Modern Corporation and Social Responsibility* (Washington: AEI for Public Policy Research, 1972); C. Perrow, *The Radical Attack on Business: A Critical Analysis*, (New York: Harcourt, Brace, Jovanovich, 1972); R. Nader and M. Green, *Corporate Power in*

interestingly, there has been a change in emphasis in argument of those who favour imposing a duty of social responsibility on corporations: in addition to advocating the existence and/or need of this duty, they have gone on to provide detailed blueprints as to how this desideratum should be operationalized. In particular, they have called for changes in the governance and objectives of corporations.<sup>16</sup>

This paper examines the nature of this corporate social responsibility movement. Well-traversed ground will be covered. I will begin with a description of the legal attributes of the corporation and the economic assumptions which underly the validity and justification for the corporate device. Only as much will be done as is necessary to provide a setting in which to raise the following questions:

- (a) Does it make theoretical sense to argue for reform of corporate governance with a view to the promotion of corporate social responsibility?
- (b) Whatever the answer to this question, could such changes in corporate governance ever be efficacious<sup>17</sup>?

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*America*, (New York: Grossman, 1973); D. Linowes, *The Corporate Conscience* (New York: Hawthorn, 1974); James McKie (ed.), *Social Responsibility and the Business Predicament*, (Washington: Brookings institute, 1974); *The Social Responsibilities of Business*, Social Science Research Council, (London, 1975); C. Stone, *Where the Law Ends* (New York: Harper & Row, 1975); R. Nader, M. Green, J. Seligman, *Taming the Giant Corporation* (New York: Norton, 1976); Lindblom, *Politics and Markets* (New York: Basic Books, 1977); C. Walton (ed.), *The Ethics of Corporate Conduct* (Englewood Cliffs, N.J.: Prentice-Hall, 1977); A. Caroll (Ed.), *Managing Corporate Responsibility* (Boston: Little Brown & Co., 1977); Irving Kristol, *Two Cheers for Capitalism* (New York: New American Library, 1978); A. Collier, "The Co-Corp: Big Business Can Re-Form Itself", [1979] *Harvard Bus. Rev.* 121; E. Epstein and D. Votaw (eds.), *Rationality, Legitimacy, Responsibility* (Santa Monica, Ca.: Goodyear Publishing Co., 1980); T. Bradshaw & D. Vogel (eds.), *Corporations and Their Critics: Issues and Answers to the Problems of Corporate Responsibility* (New York: McGraw-Hill, 1981); K. Goodpaster & J. Matthews, "Can a Corporation Have a Conscience?", [1982] *Harvard Bus. Rev.* 132; E. Herman, *Corporate Control, Corporate Power* (Cambridge, London, N.Y.: Cambridge U.P., 1981); M. Novak & J. Cooper (eds.) *The Corporation: A Theological Inquiry* (Washington: AEI for Public Policy Research, 1981); K. Whitnow, "The Moral Crisis in American Capitalism," [1982] *Harv. Bus. Rev.* 76; "Corporate Social Performance in Canada", *Royal Commission on Corporate Concentrations*, (Ottawa: Ministry of Supply and Services, 1978), Study 21; J.E. Smyth, "The Social Implications of Incorporation" in J. Ziegel (ed.), *Studies in Canadian Company Law*, (Toronto: Butt 1967), Chapter 21; J.L. Howard "The Proposals for a New Business Corporations Act for Canada: Concepts and Policies", Special Lectures, 1972, Law Society of Upper Canada, 17; J.L. Howard "Corporate Law in the 80s — An Overview", Special Lectures, 1982, Law Society of Upper Canada, 5; Hadden, Forbes, Simmonds, *Canadian Business Organizations Law*, (Toronto: Butt. 1984), Chapters 2, 5 (part 8); S. Beck "Corporate Power and Public Policy" in I. Bernier & A. Lajoie (eds.), *Consumer Protection, Environmental Law and Corporate Power*, vol. 50 in the series of studies for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: U. of T. Press, 1985).

16. Some of the main proposals for change will be detailed below; see section III of this paper.  
 17. As it is the argument of this paper that corporations in a liberal capitalist society are

(c) If the answer is no to (a), to (b) or to both — as I will argue it obviously ought to be — what really impels the movement promoting corporate social responsibility?

This last question is raised to prepare the way for an argument that the corporate social responsibility movement's agenda is the continued legitimization of capitalist liberal democracy.

## II. *Views of the Corporation*

### 1. *The Legal Approach*

For the purposes of this paper, a skeletal outline of the legal attributes of a corporation is all that is necessary. Indeed, a detailed description would lead to unnecessary obfuscation. The idea of the presentation is to determine how the fundamental legal rules and concepts fit with the notion of corporate social responsibility.

- (a) A corporation is a legal person in its own right, separate from the investors who contribute the capital necessary for its existence. It holds the corporate property in its own name.
- (b) Inasmuch as a corporation incurs debts, the members of the corporation, that is, the shareholders, are responsible to the extent to which they have invested in the corporation. Their private assets are not to be encumbered by corporate debt.
- (c) A corporation has a statement of objectives which its managers are to pursue. This statement is usually very open-ended in its phrasing. Management is left, as a matter of law, to a board of directors which is charged with acting in the interests of the corporation. The directors have to balance the long-term and short-term interests of the corporation.
- (d) The board of directors of the corporation is subject to the direction of the members of the corporation as expressed by them from time to time. There is, thus, a form of shareholder democracy. Members are allocated a number of votes to which their shareholding (i.e. investment) entitles them.

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nothing but vehicles for profit-maximization, that they will continue to be so and that the corporate social responsibility movement refuses to face the implications of this fact, it is not essential for me to tease out *all* the refinements of the theoretical arguments arising out of questions (a) and (b) in the text. This has been done with great thoroughness by Howard "Corporate Law in the 80's — An Overview" in Special Lectures, Law Society of Upper Canada, *Corporate Law in the 80's* (Don Mills: Richard De Boo, 1982); Engel, "An Approach to Corporate Social Responsibility" (1979), 32 *Stan. L. Rev.* 1; Romano, "Metapolitics and Corporate Law Reform" (1984), 36 *Stan. L. Rev.* 923. Engel's article is particularly useful in the way it addresses the question of the efficacy of the various proposals.

- (e) Directors owe a trustee-like obligation to the corporation when corporate assets are in their possession and these form the subject of dealings.
- (f) Directors may not use their position within the corporation to profit personally, or in such a way that it appears that they might. They must exploit potential profit-making opportunities on behalf of the corporation.

This outline suffices for the purposes of this paper in which I am not concerned with the quality of the duties which flow from the legal organization of corporations. This is the stuff of corporate law texts, courses and practices; a side-long glance is all that is needed here.

As a matter of law, directors are not meant to be experts<sup>18</sup>. Their operational framework is the rather ill-defined notion of the best interests of the corporation. It follows that there will always be room for dispute as to whether or not they have acted appropriately. Questions such as whether or not they ought to resist takeover or merger attempts and, if so, what tactics they are entitled to employ, raise this difficulty squarely. What is in the best interests of the corporation in such a situation? Who decides? Does it matter whether some shareholders are at a disadvantage if a majority of the shareholders approve (or disapprove) of a proposed takeover or merger? In such a case, or in any other, should minority shareholders who feel that the action of the directors has hurt their interests and that the directors are in breach of their duty to the corporation, be given a right to sue on behalf of the corporation (the much-discussed and very restricted derivative action) or sue the directors in their own right?<sup>19</sup> When can shareholders found a legal claim that they have been oppressed or unfairly prejudiced by acts or omissions of the corporation and/or of the directors?<sup>20</sup> Can a large corporation be held responsible for the conflicting acts of two of its directors?<sup>21</sup> And so forth.

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18. See, eg., s 134(1) *Business Corporations Act*, S.O. 1982, c. 4. They are to exercise business judgment rather than prudent-like trustee judgment. They are different from trustees because they can be dismissed by the majority of shareholders and because there is a need to be imaginative in risk-taking.

19. See Beck, "The Shareholders' Derivative Action" (1974), 52 Can. B. Rev. 159. For a more recent discussion of majority-minority shareholder conflicts, see Anisman, "Majority-Minority Relations in Canadian Corporation Law: An Overview" (1986), 12 Can. Bus. L. Jo. 473.

20. For a thorough recent discussion, see Rock, Garvic, Glass and Newman, "Fiduciary Duties in the Corporate Setting", paper presented at a seminar "Fiduciary Duties: A Matter of Trust" by the Law Society of Upper Canada, Continuing Legal Education, Nov. 22, 1986.

21. *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 22 D.L.R. (4th) 410 (Ont. C.A.); Austin, "The Corporate Fiduciary: *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce*" (1986), 12 Can. Bus. L. Jo. 96; Crawford, "Bankers'



It is clear that the difficulties and refinements raised by these many issues, so troubling and so dear to corporate lawyers, do not affect the central idea, namely that the corporation and its directors are there to further the interests of the corporation and, thereby, the interests of the shareholders.<sup>22</sup> The nature and scope of the duties of the players *inter se* turn on the definition of how these interests are best served. In general, the best interests of shareholders and of the corporation are assumed to be a positive return on the investments made.<sup>23</sup>

As thus set out, the tenets of the law's approach to the corporation leaves the argument for the imposition of a qualitatively different kind of duty on the corporation and its directors — that is, the duty to be socially responsible — largely devoid of merit. The existing duties of profit-maximization and the promotion of shareholder satisfaction, are, despite the many legal nuances and difficulties adumbrated above, symbiotic and are believed to be capable of being given a concrete, tangible meaning and content. For the corporation and its directors to be asked to balance such duties and interests against interests in respect of which there are no rational criteria, other than some vague notion of social responsibility, would lead, at least from the legal point of view, to serious difficulties for decision-makers. To put unweighted corporate social responsibility in one pan of the scales and difficult-enough to determine duties to the corporation and shareholders in the other, would test the courts, who are to calibrate the scales, severely. Decisions as to the scope of the legal responsibility of the corporation, directors and majority shareholders would become the product of obvious guess-work.<sup>24</sup>

## 2. *The Economists' Approach*

There is a great deal of coincidence between the arguments relying on the

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Fiduciary Duties and Negligence" (1986), 12 Can. Bus. L. Jo. 145; Ziegel, "Bankers' Fiduciary Obligations and Chinese Walls: A further comment on *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce*" (1986), 12 Can. Bus. L. Jo. 211.

22. It is probably this essentially simple truth, of which most corporate law studied and practised is a refinement, which prompted Manning's much quoted appraisal that "corporation law, as a field of intellectual effort is dead . . . We have nothing left but our great corporation statutes — towering skyscrapers of rusted girders, internally welded together and containing nothing but wind". From Bayless Manning, "The Shareholders' Appraisal Remedy: An Essay for Frank Coker" (1962), 72 Yale L.J. 223 at 245.

23. I have used the phrase "a positive return on the investments made" at this stage because, as will be noted, it is argued by the members of the corporate social responsibility movement that absolute profit maximization is not what all corporations seek, nor what should be expected of them.

24. It is in this context that Wedderburn has argued that the American judiciary's attempt to require fairness of directors would merely finish up by judges replacing the business judgment of directors with their own judgement. He is unimpressed by this prospect; see his "The Social Responsibility of Companies" (1965), 15 Melb. U.L.R. 4 at 18 *et seq.*

internal logic of the law which lead to the conclusion that the imposition of corporate social responsibility would result in incoherence and those used by classic economists who hold the same view. What underlies the economic arguments of classical economists such as Hayek<sup>25</sup> and Friedman<sup>26</sup> is a particular vision of the corporation. Thus, Friedman argues that the best way to organize productive activities is to develop an ideal market system (as opposed to a command, planned centralized regime). An ideal market system is one in which all individuals, as individuals, seek to achieve their personal goals by making the best use of their personal abilities and capacities and the inanimate resources which they control. Given a society which is complex enough to warrant a division of labour, this will require that individuals put themselves in a position to exchange that which they can most efficiently produce for things which they need and are produced by others who are also maximizing their abilities, capacities and belongings. If all individuals are free to behave in this self-enhancing way, then, given a perfectly operating market, (that is, one in which there is as much information as is necessary and there are as little transaction costs as possible), an optimal allocation of goods and resources will ensue. Furthermore, the advantage of such a market system is that individuals will make their own sovereign decisions; the more individuals are left to make their own decisions, the less need there is for the external imposition of standards and regulations by the State. In sum, a freely operating market of this kind produces an efficient allocation of resources, enhances individual self-satisfaction and promotes liberty and freedom. Friedman sees the corporation as a facilitator in this scheme. For him, the corporation does not distort the operation of the ideal market provided that the corporation's activities are aimed at more efficiently carrying out the wishes of the individual investors who have created it. Note that this makes the classical economists' assumption that, all things being equal, people will prefer more to less control: if it is accurate, the corporation's drive to maximize profits will coincide with the objective of the individuals who are members (that is, shareholders) of the corporation. In this framework, it would be wrongful to ask a corporation to do something which would fly in the face of its members' wishes, such as looking after the interests of the unemployed, just as it would run counter to our understanding of liberty and freedom to impose positive duties on human individuals to act altruistically towards others.<sup>27</sup>

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25. *Law, Legislation and Liberty* (London: Routledge and Kegan Paul, 1982).

26. *Capitalism and Freedom* (Chicago: University or Chicago Press, 1962).

27. Note here that the Friedman assumption that profit-maximizing corporations will be acting in the best interests of individual shareholders is, of course, clouded by the fact that it

### 3. *A Revisionist View of the Corporation*

Those who would like to impose a duty on corporations to be socially responsible argue that the underlying assumptions of the legal and economists' approaches set out above have no empirical basis, nor political justification in modern economic society.

These advocates of the imposition of corporate social responsibility take their cue from the work of Berle and Means.<sup>28</sup> It will be remembered that these scholars found that the promotion of the accumulation of capital by providing for limited responsibility and by easing the rules of registration had worked all too well. They revealed that two-thirds of the United States of America's industrial wealth had been transferred from individual holdings to corporate holdings. Furthermore, they showed that the concentration of wealth was increasing in the United States. In addition, and for the purposes of the corporate social responsibility movement's arguments, most importantly, they found that "production is carried on under the ultimate control of a handful of individuals" in corporations<sup>29</sup>; a huge amount of the property was contributed by a great number of individual, small investors, each of whom had very little interest in controlling all of the capital, leaving it to be controlled by the managers of the corporation. According to Berle and Means, concentration of capital and dispersion of ownership had become a very significant fact of life. The picture they painted was one of ownership of wealth without control, and control exercised by those who were not owners.<sup>30</sup> To the corporate social responsibility movement protagonists the importance of this analysis is that profit-maximization is not the overriding goal of corporate management. This is so because the profits go to shareholders and not to managers who, therefore, are not as interested in producing as much gain as possible and who can, within some rather loosely constructed constraints, pursue their own interests. In his very influential work,<sup>31</sup> John Kenneth Galbraith claimed that managers of large corporations did just that: he argued that they were

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has become manifest that, in many cases, some of the investors are not happy with the way that their corporation behaves. The idea of governance by shareholder majority runs counter to the individualism which the ideal market model requires to be perpetuated. This is the basis for the tensions which underly much of the law so crudely described earlier in the text. For a short discussion of the arguments, pro and con, in respect of the congruence of shareholder and corporate interest in profit-maximization, see Romano, *supra*, note 17 at 953.

28. *Supra*, note 5.

29. Berle and Means, *supra*, note 5.

30. They found that 65 per cent of the major 200 corporations (or 80 per cent of the 200 leading corporations' capital) was controlled by a legal device such as a holding company, a financial institution or management divorced from investors.

31. *The New Industrial State*, (Boston: Houghton Mifflin, 1967).

more interested in stability and empire building (which enured to the managers' benefit and prestige) than they were in profit-maximization as such. The only constraint on management was that they had to ensure enough of a dividend to satisfy contributing shareholders at any one time. As long as there were satisfactory returns, it would be economically foolish for investors to spend much time on scrutinizing the activities of a large, complicated corporation, even in the rare instances in which they had the skills and the resources to do so.

This is where social responsibility proponents pick up the argument. They want to ensure that managerial power be exercised in a way which is more compatible with their goals and purposes, that is, non profit-maximizing purposes. The reasoning is that if management already does not pursue profits single-mindedly and this is either acceptable and/or an inevitable fact of life, management legitimately can be asked to use its discretion less selfishly, that is, in a less management-benefit oriented way. Of course, to make that argument the social responsibility proponents must also have a vision of the corporation as being more than an organization for the accumulation of capital in order to maximize profits, in order to accumulate more capital, leading to more profits, *etc.* They have to have a notion that the corporation is a legal device created for the purpose of furthering larger social policies. This departs dramatically from both the existing legal understanding and the classical economists' approach to corporate organization.

### III. *Proposals for the Restructuring of Corporate Governance*

These proposals range from requirements that there be some reforms which will make the corporation more efficient as a profit-maximizer to requirements that the corporation be so structured as to reflect larger societal needs.

(i) It is the conventional wisdom that, in large corporations, the board of directors (the body legally charged with responsibility for the corporation's acts and welfare) is often the creature of the day-to-day managerial personnel. That is, the directors are either those managers and/or their appointees.<sup>32</sup> In this context, there have been many suggestions that independent directors should be put on the governing board of corporations. Inasmuch as the purpose of such appointments would be to ensure that shareholder preferences will be more respected than they are when an unchecked management and its pet directors are

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32. Mace, "The President and the Board of Directors" (1973), *Harvard Bus. Rev.* 37; Mace, *Directors: Myths and Realities* (Boston, Mass.: Harvard Graduate School of Business, 1971).

in charge,<sup>33</sup> the appointment of independent directors would merely be a way of making the corporate structure conform better to the classical legal and economic visions of the corporation.

(ii) This is also true of a variety of proposals which seek to reinforce the directors' and managers' ability to meet their fiduciary-type obligations. In this category we find proposals for audit committees of boards of directors. They are to be given all the information necessary so that they can aid the directors and managers to avoid conflict of interest situations.<sup>34</sup> Another such proposal is that independent directors should be given the task of determining managerial salaries.<sup>35</sup>

(iii) Within the corporations themselves there has been a discernible movement which aims at ensuring that directors and managerial boards behave in a professional manner. Codes of Conduct have become common<sup>36</sup>. There have been recommendations that schools be created at which directors could acquire appropriate professional standards.<sup>37</sup> Schemes to impose limits on the control that managers exercise over employees personal lives have been established. For instance, there are limits, created by the corporation themselves, on the dissemination and collection of information by restricting access to the personal files of employees. Codes of conduct and, in some of the United States, legislation, provide that whistle-blowers, that is, employees who feel that the corporation is doing something wrongful and want to tell the appropriate authorities about it, should be protected.<sup>38</sup> Some corporations have set up in-house ombudspersons' offices to which employees can bring their grievances, thereby putting restraints on the arbitrary exercise of authority by managers. It is apparent that these kinds of schemes do not require a different understanding of the corporation than either Milton Friedman or the existing legal system have of the nature of the corporation.

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33. See Eisenberg, *The Structure of the Corporation: A Legal Analysis* (Boston: Little Brown & Co., 1976) for the clearest exposition of this proposal and view.

34. See: *Report of the Royal Commission on Corporate Concentration* (Ottawa: Ministry of Supply and Services, 1978), (the Bryce Report), at 306 *et seq.*

35. Steckmet, *Corporate Performance: The Key to Public Trust* (New York: McGraw-Hill, 1982), at 159 *et seq.*

36. Eg., Alexander, "Corporate Political Behaviour" in Bradshaw and Vogel, *supra*, note 15, found that 77 out of 79 corporations responding to a questionnaire said that they had a code of conduct.

37. Earle, "Corporate Governance and the Outside Director — A Modest Proposal" (1979), 36 Wash & Lee L.J. 787.

38. For an evaluation, see Nader, Petkes & Blackwell (eds.) *Whistle Blowing: The Report of the Conference on Professional Responsibility* (New York: Grossman Publishers, 1972); Westin & Salisbury (eds.), *Individual Rights in the Corporation: A Reader on Employee Rights* (New York: Pantheon Books, 1980).

(iv) There have been a complicated set of proposals which seek to create better communication channels between the component parts of a large corporation. The idea is that corporate directors should not have ugly facts hidden from their view so that they can control employees who, under pressure to perform and to deliver, may behave somewhat too aggressively and too anti-socially. Many of these proposals require that special directors be appointed to see that information is available, giving the directors the opportunity to ensure that the corporation is in compliance with legislation which safeguards society, such as anti-trust legislation, consumer and environment protection legislation, *etc.* It is clear that proposals for structures which would deny corporations the facility to behave illegally do not stem from any new notions of the corporation. Both the classical economists and the existing legal structure take it as a given that corporations, like any other economic actors, must stay within the bounds of existing law.

(v) There has been a movement to make the use of proxy campaigns more effective. This has enjoyed some notoriety over recent time. For instance, people who objected to the production and use of chemicals in the pursuit of the war in Vietnam, bought shares in companies like Dow Chemical and sought to have resolutions passed at annual meetings to halt the production of Agent Orange. A recent example involved the infant formula campaign against Nestlé.<sup>39</sup> Such campaigns are very difficult to win<sup>40</sup> but they may have an educational effect on the corporation. These tactics, however, are in line with the traditional economic and legal view of the corporation because the proxy mechanism is one in which investors seek to use their shareholder power to influence management to behave in a particular way, to appoint certain kinds of director, to refute certain kinds of profit-making activities, such as the making of Agent Orange, the rejection of profit-making activities in certain parts of the world, such as South Africa, *etc.*<sup>41</sup> Clearly,

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39. Nestlé aggressively advertised and sold infant formula it produced in Third World countries. Not only could impoverished people, in reality, not afford such a luxury, often they were not well-enough educated to resist the blandishments of “nurses” in white smocks. In addition, the quality of the water needed to make up the mixture often led to disease which could have been avoided by natural breastfeeding. Eventually, Nestlé agreed to stop these practices. For a summary of these events, see “Infant Formula: Hawking Disaster in the Third World” (1987), 8, No. 4 Multi-national Monitor, 20.

40. R. Crête, *The Proxy System in Canadian Corporations — A Critical Analysis* (Montreal: Editions Wilson Lafleur Martel Ltée, 1986) shows the mechanism is rarely used in Canada and, when used, has proved utterly ineffective. See also: R. Dahl, “Governing the Giant Corporation” in R. Nader and M. Green, *supra*, note 15; Investor Research Responsibility Center Inc., *The 1978 Proxy Season: How Institutions Voted on Shareholder Resolutions and Management Proposals* (Sept. 1978).

41. Campaign GM proposed a committee of shareholders to promote corporate responsibility.

if the majority of shareholders can be persuaded that these things ought to happen, no departure from the economic or legal vision of the corporation is required for boards of directors to accede to such proposals.

(vi) Some of the proposals, however, have more than one goal.<sup>42</sup> Thus, frequently arguments for the appointment of independent and/or special interest directors are associated with the idea that these directors should look out for the public interest, rather than just make sure that shareholder (rather than managerial) interests are advanced. Likewise, the suggestions for programmes for the education of directors in a generalist kind of way are made with a view to sensitize boards of directors to the notions of the protection of public interests. One of the more dramatic proposals of this kind is that government-appointed directors and inspectors be inserted into the corporate structure, presumably with general or specific mandates to protect certain social interests. Most arresting has been the suggestion that two-thirds of the directors of major corporate boards should be nationally appointed.<sup>43</sup> These kinds of proposals manifest a view of the corporation which can be differentiated from that evinced by the economists of the classical school and which is reflected in the trappings of contemporary law.

Inasmuch as the proposals on offer merely want to make the corporation work better as a vehicle for shareholder advancement (by providing better information to directors to ensure that the shareholders' interests are pursued and that the law is obeyed), an empirical question is raised by the proposals. It may well be the case that there is no, or little, evidence that the existing forms of corporate governance do not serve shareholders well enough or, more pertinently, if they do not do so because of boards of directors' subservience to managers who pursue their own interests, that independently appointed directors would be better at resisting the blandishments and pressures of managers who

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The committee was to be constituted by representatives of various social and economic interests who were to become members of the corporation which could then be expected to use its position to promote social welfare. For a description, see Schwartz, "The Public-Interest Proxy Context: Reflections on Campaign GM" (1971), 69 Mich. L. Rev. 419. For details of the Agent Orange proxy fight, see *Medical Committee for Human Rights v. SEC* (1970), 432 F. 2d 659; for a description of some of the South African proxy fights, see the Task Force on the Churches and Corporate Responsibility, *Investment in Oppression* (Rev. ed., Toronto: TCCR, 1979).

42. See Schwartz, *supra*, note 41; D. Vogel, *Lobbying The Corporation: Citizen Challenges to Business Authority* (New York: Basic Books, 1978).

43. See Weiss, "Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse" (1981), 28 U.C.L.A. Law Rev. 343.

control the corporation.<sup>44</sup> The merits of these kinds of proposals for changes in corporate structure stand or fall on evidence; there is no question of theoretical incoherence causing political problems. This is not true of proposals which seek to change the agenda of corporations.

As has been seen, the idea behind some of the proposals is that corporate profit-maximization will affect the interests of many people and that they, as people affected, should be allowed to defend themselves. This corresponds to the assumptions of a pluralistic society, that is, one in which the best decisions, the ones most acceptable to the whole of society, will be made after all the issues are vigorously debated and fought about by the various interest groups affected. What needs to be done to make this work is to provide adequate processes allowing for active participation in debate and decision-making. The ultimate decisions made thereafter should be acceptable to society at large. Whatever the merits of this kind of argument in respect of the larger polity, the theory is problematic when it is sought to be applied to corporate governance.

As profit-making activities by corporations leads to externalities, or neighbourhood effects, there is a need to internalize the cost of these external effects to the suppliers and demanders in the exchange chain. This is not mandated by any novel notions of corporate social responsibility but by the precepts of the ideal market which require that the true costs of production are to be included in the price of a product or service; only thus will we get the most beneficial use and allocation of our resources. If corporate governance restructuring by, say, the appointment of special directors, leads to supervisory schemes which ensure that corporations will internalize such costs, the restructuring will be merely a means which helps ensure that competitive capitalism is not undermined by any peculiarities of corporate governance which make it difficult to internalize costs. Proposals offered for these purposes do not impose a duty of social responsibility on the corporation in the sense of requiring altruistic behaviour. But, proposals for specially appointed directors and other such mechanisms are frequently made to internalize costs more effectively *and* to inhibit profit-maximization on behalf of the corporation and shareholders so that other groups — non-shareholders — will benefit. Inasmuch as the latter goal is to be pursued the proposals are quite radical. They hinge on the precept that profit-maximization

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44. Indeed, the literature suggests that shareholders do no better with independent directors. See Romano, *supra*, note 17; Brudney, "The Independent Director — Heavenly City or Potemkin Village" (1982), 95 Harv. L.R. 633; Wedderburn, "Trust, Corporation and the Worker" (1985), Osgoode H.L.J. 203.



must be tempered and made secondary in some instances. The problems raised by this kind of thinking are not hard to discern:

What special interests ought to be recognized as being worthy of protection from harm-causing profit-maximization activity? Even if one could identify which special interests deserve this kind of treatment, how can it be guaranteed that they will be adequately represented by the appointment of special directors? Should the directors be put on the board by some kind of voting or electoral system? Should the interest groups be given something like shareholder participatory or standing rights?<sup>45</sup> Most of the proposals are for some kind of independent or special interest directors: how many of these directors ought there to be? Should they be in a majority on the board, and, more significantly, what mandate should they have? Is each one to represent a specific interest or is he/she just to be a director who is to have a special slant or expertise? *etc.*

The difficulties are compounded by the fact that the corporate restructuring proponents seldom face the very different theoretical bases for their proposals, often not distinguishing between the goals of abiding by law, enhancing the shareholders' interests, internalizing costs and developing social responsibility.<sup>46</sup>

To concretize all of this it is useful to look at one set of proposals which, despite its exceptional sophistication, reveals the shaky fundamentals of the corporate social responsibility movement.

Stone<sup>47</sup> provides a scheme whereby outside directors will be appointed to boards of major corporations as general directors, with a certain degree of tenure. They are to be given a watching brief, evaluating the corporation's behaviour vis-à-vis society. He also suggests that there be a number of special directors on such boards, again with a certain guaranteed tenure. They will be asked to monitor corporate behaviour on behalf of special interests. Finally, he also recommends that there be some special directors who are to keep well-known corporate transgressors in check. In the end, confusion reigns. Take Stone's general directors. They are to oversee and to set aright problems caused by behaviour which both the corporation and the general public would see as unacceptable. At the very least, this means that such directors should ensure that the corporation abide by existing law. Indeed, Stone lists this as a principal mandate of his general directors.<sup>48</sup> But Stone also wants these general

45. The most frequently discussed model of participatory decision-making by non-shareholder groups is that giving workers decision-making rights. European variants are often analysed and scrutinized, e.g., Romano, *supra*, note 15, at 967 *et seq.*

46. See Engel, *supra*, note 17, Romano, *supra*, note 17.

47. C. Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper & Row, 1975).

48. This mandate includes such things as making sure that there will be no gross financial and inventory manipulation, overt illegal racial discrimination or breaches of the criminal law.

directors to make sure that the corporation does not engage in legal conduct which a broad consensus of society would find troublesome. His illustrations include such things as the adulteration of food and beverages, the manufacture of unsafe or shoddy products and engaging in harmful — even if legal — environmental practices. But a determination that something is a shoddy or unsafe product or that conduct constitutes a bad environmental practice is an expression of opinion. For instance, given our economic tenets, it is perfectly reasonable for a producer of a motor car to argue that, although the product could be made safer, it might become unmarketable because of its price or looks. This would mean that people do not want *that much safety* or, in terms of the argument here, that they are willing to accept a certain amount of shoddiness or lack of safety.<sup>49</sup> The underlying assumption, namely, that there is a readily agreed upon consensus on such matters, is just plain silly. This problem becomes even more acute when Stone lists other areas to be subjected to the control of outside directors. His class “B” problems are issues in respect of which it cannot be assumed that there is any coincidence between the way the profit-maximizing corporation and the remainder of the world perceive them. These “B” class issues include such things as legally permitted pollution which can only be avoided by actually incurring losses. Another troubling such issue he refers to is one where the difficulty is that the local community needs the corporation to remain where it is and — to avoid losses (or to increase profits) — the corporation wants to relocate its investment. It is clear that the task of providing special directors with anything like rational criteria in such cases is hopeless as long as one of the dominant goals of the corporate structure remains the maximization of profits.

Apart from the lack of criteria for decision-making which balances special interests against profit-maximization, note that the different special interest groups’ representatives may well have competing views on the handling of any one issue. For instance, there will be conflicts between directors representing employees and those who are there to look after environmental issues. On the other hand, special directors appointed to ensure financial propriety will not likely clash with the members of the board who are charged with profit-maximization: their ultimate interests are congruent. Thus it is likely that some special interests will be less well represented than others, almost by definition. The various proposals for special directors and other such mechanisms do not sort any of these problems out.

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49. Another way of putting it is that one person’s idea of “shoddy” is another person’s idea of “quality”.

The difficulties do not go away when the premise of corporate restructuring is not that special, identifiable interests must be protected. Proponents of nationally appointed directors to the board of corporations do not want them to represent any particular constituency, but rather would charge them with looking after society's common interests, the public welfare at large. The assumption underlying such proposals has to be that the common interests of society can be identified and defined. But, in the absence of even such a relatively weak indicator as a legislative expression of public will<sup>50</sup>, it is highly unlikely that legal profit-maximization will not be generally perceived as being in the public interest. Further, an even more important — and more fragile — assumption underlies this type of proposal: it is that the corporation is an institution whose main function is to serve the common weal directly, rather than a facilitating instrument by which to advance the private interests of a limited number of individuals (that is, shareholders) and thereby only indirectly the good of society. Whatever the ancient roots of the corporate form<sup>51</sup> it requires a good deal of disingenuous revisionism<sup>52</sup> to characterize the modern corporation in this way. As we have seen, neither popular culture, dominant economic wisdom, nor the legal doctrines which give the corporation life (and which might be deemed to be something of an accurate reflection of societal will), support the view that the corporation is anything but a device to further capital accumulation and selfish profit-maximization.

In sum, it is difficult to disagree with the devastating critique that Milton Friedman offered of the notion of corporate social responsibility:

If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve the social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for those posts by strictly private groups? If businessmen are civil servants rather than the employees of their stockholders, then in a democracy they will, sooner or later, be chosen by the public techniques of election and appointment.<sup>53</sup>

50. The purposes of legislation are not always easily discernible. Furthermore, it is difficult to maintain a position that a statute or some other such legal instruments represents a consensus, rather than a political view of some constituencies which momentarily are in the ascendancy. See generally Engel, *supra*, note 17.

51. See *supra*, notes 1-3; C. Stone, *supra*, note 15.

52. For such attempts, see Novak & Cooper (eds.), *The Corporation: A Theological Inquiry*, *supra*, note 15; M. Novak, *Toward a Theology of the Corporation* (Washington D.C., London: American Enterprise Institute for Public Policy Research, 1981).

53. M. Friedman, *Capitalism and Freedom*, *supra*, note 26 at 133-34.

Similarly, Hayek argues that if an enterprise management were obliged to abandon its role as trustee for shareholders, management's power would become uncontrollable and "it could not be long left in the hands of private managers but would inevitably be made the subject of increasing public control".<sup>54</sup> While these very conservative political economists view the prospect of public control of private corporations as anathema because of their ideological starting point, they do point to the soft spot in the corporate social responsibility movement's arguments. They indicate that the notion of the corporation as a facilitator of the individual drive for maximization of profits would be negated as soon as it was sought to have it serve other functions, leading to the oppression of investing individuals' rightful aims and desires. If corporate social responsibility proponents would be willing to say that this does not matter, their argument would be stronger. But, the corporate social responsibility movement wants to have its cake and let shareholders gorge themselves as well. It never abandons the notion that the corporation is a useful device, both for productive activity and for profit-making, which will lead to more capital accumulation and further profit-making. Nonetheless, it wants to put constraints on the profit-making. Thus, Beck has written:

Vague social issues need not be substituted for profit maximization. That is not the issue. The issue is one of *responsible* profit-maximization rather than maximum profits at all costs. . . . [problems] could be remedied within a regime of *responsible* profit-maximization.<sup>55</sup> [Emphasis added]

In any event, the basic supporting argument for the corporate social responsibility movement's proponents to the effect that corporate managers pursue different interests than profit-maximization already is open to serious doubt. There is a good deal of evidence that, in Canada,

54. *Law, Legislation and Liberty*, *supra*, note 25 at 82.

55. "Corporate Power and Public Policy" in Bernier & Lajoie, *Consumer Protection, Environmental Law, and Corporate Power*, vol. 50, Studies for Royal Commission on the Economic Union and Development Prospects for Canada, (Toronto: U. of T. Press, 1985), at 181, 242. Note the oxymoronic quality of the expression "responsible profit-maximization". It well illustrates the incoherence of the corporate social responsibility movement. See also the *American Law Institute, Principles of Corporate Governance: Analysis and Recommendation* (Tent. draft no. 2) (A.L.I.Rev. Draft): "Managers are to be permitted [contrast being obliged to] to qualify profit-maximization by following generally accepted principles of business ethics [as well as to make reasonable philanthropic expenditure]." In the same Draft, at page 28, the corporation is described as: "a social institution . . . whose economic goals must be constrained by social imperatives and needs." Again, the idea is that profit-making is worthwhile, that it can be responsible and that contemporaneously, some *unspecified*, unquantifiable social needs ought to be pursued. It is this kind of vagueness which led Wedderburn, *supra*, note 44, to argue that the idea that fairness could be imposed by judges was a pie-in-the-sky idea and which led him to characterize the corporate social responsibility movement which favoured the kind of proposals set out in the text above as the "fudge school", at 227.

control without ownership is not as common as Berle and Means assumed, an assumption which forms the basis for much of the movement's argumentation<sup>56</sup>. But, even if it is a fact of life, or at least a significant feature of corporate organization, it may not make all that much difference to the way that corporations are managed. That is, although managers are not as controlled by shareholders as classical economic and legal theory would have them be, they do behave in the kind of profit-maximization that shareholders would wish them to do.<sup>57</sup>

All in all, there seems to be very little rational argument compelling the conclusion that the imposition of corporate social responsibility on corporations dovetails with the logic and viability of the corporation as a legal and economic construct. The fact that there is such a vocal and active movement, then, is an arresting phenomenon: if it is so easy to show that logic does not underpin the movement, what motivates intelligent well-meaning people to continue with their struggle for change in the governance of corporations?

#### V. *Reprise — The Logic of the Corporate Structure and the Impetus for the Corporate Social Responsibility Movement*

It is essential to both the Milton Friedman model and to the legal system's precepts that the emergence of the corporate form as the main vehicle for the conduct of market activities not be seen as anything but a facilitating device, that is, that corporate activities continue to be characterized as the outcomes of the expressions of the will of the individuals who contributed the property to form the corporation. Only if this is true is it possible to continue to talk about individuals using their resources, abilities and capacities to maximize their opportunities, leading to the optimal allocation of resources and the greatest amount of political freedom. From this perspective, a corporation, no matter what its size, is nothing but a means for the maximization of opportunities by free, sovereign, autonomous human-beings. Managers of the corporate property are just that: managers who have been delegated the task of

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56. See text at notes 95-97.

57. R. Larner, "Ownership and Control in the 200 Largest Non-Financial Corporations" (Sept. 1966), vol. LVI *American Economic Review*, 777; R. Larner, *Management Control and the Large Corporation*, (New York: Dunellen, 1970); E. Herman, *Corporate Control, Corporate Power* (Cambridge, London, New York: Cambridge U.P., 1981); M. Zeitlin, "Corporate Ownership and Control: The Large Corporation and the Capitalist Class" (1974), *American Journal of Sociology*, 1073; Hetherington, "When the Sleeper Wakes: Reflections on Corporate Governance and Shareholder Rights" (1979), 8 *Hofstra L. Rev.* 183 at 194. For a particularly penetrating analysis of why it is that managers have a permanent interest in maximizing profits, see R.W. Connell, *Ruling Class, Ruling Culture* (Cambridge: Cambridge U.P. 1977).

obtaining the best return on the owners' investment. The maintenance of these assumptions is complicated in the real world because the classical free market proponents need to promote the creation and perpetuation of large corporations, rather than small ones.

From an economic point of view, the corporate form gives advantages for sustained market activity of a kind not readily available otherwise. In particular, corporations permit the accumulation of capital, such aggregates being far more flexible and potentially rewarding and productive than the many separate small capitals of which they are made up. This was the historical *raison d'être* and justification for modern company law; the grant of limited liability was to encourage would-be contributors, thereby enhancing the probability of achieving accumulations which would create efficiency. The second major economic advantage bestowed by the adoption of the corporate form is that it is a means of coordinated production, one which obviates the need for entering into new contracts with different people every time new supplies and services are required. A corporate organization permits many related activities to be brought under one umbrella, lessening transaction costs considerably.<sup>58</sup> Manifestly, larger corporations with their greater internal divisions are best suited to achieve this desideratum. Yet, it is precisely the corporations which are most likely to satisfy these goals which have been the target of the corporate social responsibility movement's proponents. For instance, the works of Stone, Nader and Coffee,<sup>59</sup> concern themselves mainly with major or large corporations. What has focussed the attention of would-be reformers on this section of the corporate world?

What has become apparent is that large corporate actors have come to be seen as central to our economic activity. In large part they have contributed heavily to this image of importance, portraying themselves as good citizens in many ways. They promote sports and culture. They say they are proud to be Canadian citizens and that they invest for our welfare, to make us self-sufficient, to provide jobs for Canada, to inspire the young, to forward our research for a greater tomorrow, and so on. The image that they offer us is that they are there to look after us. Because of this they feel that they can claim that they need room to breathe, to innovate and, thus, that they should be left alone by government, to be

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58. Williamson argues that this is possibly the most important reason for having the corporate structure. See "Credible Commitments: Using Hostages to Support Exchange" (1983), 73 *American Economic Review* 519; "Transaction Cost Economics: The Governance of Contractual Relations" (1979), *Jo. L. & Eco.* 233; "Corporate Governance" (1984), 93 *Yale L.J.* 1197.

59. Stone, *supra*, note 15; Nader, Green and Seligman, *supra*, note 15; Coffee, "Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response" (1977), 63 *Va. L. Rev.* 1099.

free from unnecessary intervention. At the same time, they feel that they are not creating too awkward a contradiction when they claim that they are entitled to occasional governmental help; inasmuch as they are helped, they will help make Canada a more competitive and well-off economy. Thus it is that, like real people, they lobby, they support policies, they participate in politics. They have made us understand that what is good for them is good for us. Selflessness and altruism are portrayed as the essence of their being.

This image-creation takes place in many ways. Our formal educational system does it because, by and large, it has no quarrel with this basic ideological message and because it is urged to do so by the corporate sector.<sup>60</sup> It is part of our popular culture;<sup>61</sup> it is encouraged by consumerism and by advocacy advertising.<sup>62</sup> Moreover, the managers and owners of such corporations are treated as leaders in our nation. They lobby as persons in respect of their own (and their corporations') immediate causes. In addition, they are treated as influential pundits on what is good for the economy. They participate in major decision-making bodies' deliberations although they have never stood for election and are in no tangible way accountable for any such activity to their shareholders. Large corporations and their chief managers and owners make a claim which is in effect that, because they represent what is successful in market activity, that is, because they represent what is the essence of what we must unquestionably accept to be a "good", they deserve special loyalty and respect. They have fostered the idea that they acknowledge their responsibility as socially responsible actors and that they act accordingly. This makes it plausible to argue that, if they are perceived to fail in this regard, intervention with corporate governance might be justified.

At the same time as the major corporations are holding themselves out as the soul and moving spirit of modern capitalist society, some corporations are tarnishing that image. Most corporations are very small. It follows that these corporations do not offer the two major advantages which justify the creation of this artificial legal person, the corporation. Firstly, by definition, small corporations are not the aggregate of many

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60. *Eg.*, a Corporate-Higher Education Forum whose board comprises senior officers of leading universities and blue chip corporations has been established to develop means to have university and business interests coincide better than they do. These developments are creating concern. See "University-Business Relationships in Research and Development; A Guide for Universities and Researchers" in CAUT Bulletin, Nov. 1987.

61. This is all too obvious when one watches television.

62. Cloward & Piven, *The New Class War: Reagan's Attack on the Welfare State and the Consequences* (New York: Pantheon Books, 1982), at 9, estimate that "[c]orporations spend one-third of their tax-deductible advertising dollars to influence people as "citizens" rather than just as consumers."

small capitals; the legal device — the corporation — which these small capitalists use does not facilitate the accumulation of capital. Secondly, because of their size, they are relatively incapable of insignificantly reducing transaction costs in the way that large organizations can. In other words, much of the business carried on by the majority of the corporations in this country could just as easily be carried out — from an economic perspective — by partnerships or some other contractual arrangement between the small number of people involved. Such people would not have limited legal liability. And here is the key: these small corporations are formed precisely because they offer the human beings who are members of them the opportunity to avoid some of the usual costs of doing business, such as the costs incurred when the responsibility for harm negligently inflicted by the business is imposed on such individuals or when they have to pay, personally, the penalties incurred when health and safety, or environmental standards are violated by the business in which they engage, *etc.* Indeed, it is part of the popular understanding that the adoption of the corporate form is a convenient means by which to dodge responsibility. Clever, certainly, but not very socially useful. Thus it is that the large corporations' claim that they deserve respect and should be left as unregulated as possible because of their utility to the economy and their established sense of social responsibility is spoilt by the fact that a huge number of organizations — which have the same legal form but which are much smaller in size — are seen to serve no socially useful purpose. This damages the image of corporations in general. In addition, because the law which seeks to develop the protection of shareholder interests has evolved in respect of the smaller, more controlled organization, it is not very well-suited to regulate mega-corporations where this problem is so quantitatively different that it has become qualitatively different.<sup>63</sup> These departures

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63. Here note that the traditional corporate law case books in Canada do not differentiate between *Salomon v. Salomon & Co.*, [1987] A.C. 22, — type corporations and the giant Exxon type. Yet, a quick glance through the table of cases in a standard student text book, such as Beck, Getz, Iacobucci and Johnston *Business Associations Casebook* (Toronto: Richard De Boo, 1987), shows that only a very few of the corporations found in the list of the thousand leading corporations compiled by the *Globe and Mail's Report on Business Magazine* in 1984, 1985 and 1986, appear as litigants in the cases examined. As far as I know, in Canada only the local edition of Hadden, (Hadden, Forbes, Simmons — *Canada Business Organizations Law* (Toronto: Butterworths, 1984)), treats small and large corporations separately. There is an irony in this because it is, of course, precisely these kinds of corporations which correspond best to the classical economist assumption that the corporate form is merely a device which permits individuals who own property to maximize their opportunities and to achieve their desires. Moreover, it is this very type of corporation which has provided the stuff from which corporate law is fashioned. After all, the corporation in *Salomon v. Salomon & Co.*, the case which is the corner-stone of the law relating to the legal personality of corporations, (and in a way, therefore, which lays the basis for the argument that the claims for citizenry and political rights,



from the ideal-type corporation, both in respect of the kind of corporation and in respect of the utility of extant law, has freed would-be reformists to argue for changes in the legal governance of corporations.

In addition, large corporations' positive image-creation efforts are undermined in two significant ways by their own conduct.

First of all they commit crimes. They do so remarkably frequently. Regrettably, as Ellis records, "governments in Canada, federal, provincial and municipal, are not willing to devote resources to collecting systematic information on corporate crime. This means we in Canada have information on only a small fraction of various "tips" of the total corporate crime iceberg."<sup>64</sup> As a consequence, Ellis argues, there is much more corporate crime than most Canadians, governmental agencies and professional scholars acknowledge. The issue has been studied much more extensively in the United States<sup>65</sup>. As early as 1940, Sutherland, in his study of seventy major corporations, found that they frequently broke the law, indeed so often that, if they had been merely mortal beings, their recidivism would have caused them to have been treated as habitual criminals.<sup>66</sup> All studies since that time have come to the same conclusion. The most recent of them, that of Clinard and Yeager,<sup>67</sup> found that 40 percent of the Fortune 500 did not commit crimes of any kind. 60 percent did. While many of the deviations are merely infractions of technical regulations, not unlike the violation of a parking by-law and often do not cause much more damage, many of the infractions cause serious harm and excite moral outrage. In terms of cost, the estimates of the adverse effects of corporate wrongdoing are mindboggling. Thus, in 1974, the U.S. Chamber of Commerce reported that the cost of white-collar crime (which was defined very conservatively by it, as befitted an organization of its kind) was just under \$U.S. 42 billion annually. This was ten times the total amount taken in all thefts reported in the F.B.I.

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which major corporations make, are legitimate) was not a giant corporation; it was neither a complicated multi-member organization, nor one in which management and control were split. While the point cannot be pursued here, it is intriguing that corporate law doctrine has developed in the sphere which most closely models the idealized market situation but in which the market advantages sought by the incorporation device are not attainable.

64. Desmond Ellis, *The Wrong Stuff—An Introduction to the Sociological Study of Deviance* (Toronto: Collier MacMillan, 1987), at 89.

65. As major corporations in Canada are often subsidiaries of major corporations in the United States, the American indicators are useful to analysis of the Canadian situation. In any event, there is no doubt that corporate culture is much the same in our two countries.

66. "White Collar Criminality" (1940), 5 An. Soc. Rev. 1; "Crime and Business" (1941), 217 Annals 112.

67. *Corporate Crime*, (New York: The Free Press, 1980).

index, and 250 times the amount taken in all bank robberies in the U.S. in that year.<sup>68</sup>

More telling, perhaps, than the incidents of criminality of large corporations is the actual nature of the deviant conduct engaged in. For instance, major corporations have been parties to spectacular price fixing schemes and anti-competitive practices. The heavy equipment electrical conspiracy involving General Electric,<sup>69</sup> the predatory pricing practices of Hoffman-La Roche in Canada (which revealed the many other anti-competitive practices of this corporation in all parts of the world),<sup>70</sup> the folding carton conspiracy<sup>71</sup>, are just a few of the many recent examples. In America, attention was focussed on the use of bribes by top corporations such as Exxon, Lockheed and MacDonnell-Douglas.<sup>72</sup> Deceptive advertising is so rife that we have come to talk about permissible puffery as opposed to unacceptable straight-forward lying. Some social commentators are arguing that the result of such continuous telling of half-truths has made the population quite cynical and less truthful than it used to be.<sup>73</sup> The number of manufacturing enterprises which have knowingly put shoddy and dangerous products on the market, leading to serious injuries and deaths are very well-known. They include Ford's production of the Pinto<sup>74</sup>, the car which exploded on touch, the thalidomide tragedy and the Dalkon shield saga.<sup>75</sup> In all of these better known cases it turned out that the producers knew, or could easily have known, of the defects and frequently hid their knowledge from the unwary public. The discharge of dangerous toxic materials, such

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68. A Handbook on White-Collar Crime (1974); see also Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice*, (New York: John Wiley & Sons 1979) at 106; Clinard and Yeager, *supra*, note 67; Taskforce Report of the President's Commission on Law Enforcement and Administration of Justice, *Crime and its Impact — An Assessment* (1967); Conklin, "Illegal But Not Criminal": *Business Crime in America*, (Englewood Cliffs, N.J.: Prentice-Hall, 1977); Box, *Power, Crime and Mystification* (London: Tavistock Publications, 1983).

69. For a discussion of the main elements of this crime, see G. Geis, "The Heavy Electrical Equipment Anti-Trust Cases of 1961", in Clinard & Quinney (eds.), *Criminal Behaviour Systems*, (New York: Holt, Reinhart & Winston, 1967).

70. *R. v. Hoffman-La Roche Limited (No. 2)* (1980), 56 C.C.C. (2d) 563 (Ont. H. Ct.). For a discussion of some of Hoffman-La Roche's dubious practices, see J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London, Boston, Melbourne & Henley: Routledge & Kegan Paul, 1984).

71. See: Clinard & Yeager, *supra*, note 64.

72. For the story of these bribery cases, see B. Fisse and J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany: State University of New York Press, 1983), Chapters 13, 14.

73. D. Boorstin, *The Image* (Pelican, 1962), at 216-17.

74. For a short description, see Fisse & Braithwaite, *supra*, note 72, Chapter 5.

75. See Mintz, *At Any Cost* (New York: Pantheon, 1985).

as mercury into the English-Wabigon River Basin<sup>76</sup>, the burial of toxic waste at places like Love Canal, are among the better known practices involving the infliction of environmental and personal harm by major corporations which knew, or could have known, of the harm that they were likely to create.

Again, more and more the public is becoming aware of major corporations having used processes and toxic substances in the workplace with knowledge, or easily obtainable knowledge, of the harm that they were likely to cause to workers. The asbestos industry is well-known for its outrageous conduct in this regard<sup>77</sup>; so also are the operations of plastic producers who exposed workers to vinyl chloride<sup>78</sup> or manufacturers who callously exposed their workers to cyanide.<sup>79</sup> We have heard, all too often, of corporations who know full well that the production of certain substances and release thereof on the market is not an acceptable practice in a civilized society, yet continue to make these substances to put them on foreign markets where people either do not know of the danger or have much less stringent regulation<sup>80</sup>. In this context, it is to be noted that major corporations are often involved in practices which, while not actually illegal, are, to their knowledge, of dubious acceptability. The earlier mentioned marketing of the infant formula milk in countries where this presents a danger because it requires mixing the product with contaminated water is a sad example. The lack of respect for the lives of people in jurisdictions where there is less control over corporate activities than there is in this part of the world has also brought a great deal of shame to the defenders of western capitalistic activities. Again, examples are all too plentiful: Bhopal is but one; asbestos manufacturers actually let young children play in the mountains of their poisonous material in South Africa, knowing full well that no such contact would be permitted in the country of origin of the corporation<sup>81</sup>.

The image this kind of activity offers is not that which is sought to be purveyed by the corporate sector. Moreover, the task of selling the idea that large corporations are the guardians and promoters of the common

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76. For a telling of this tale, see Troyer, *No Safe Place* (Toronto, Vancouver: Clarke, Irwin & Co., 1977).

77. Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon Books, 1985).

78. Brody, "Vinyl Chloride Party Knew of Dangers to Workers", *New York Times*, 11 May 1974.

79. For a discussion of this incident, see Glasbeek, "The Importance of *Golub*: why the criminal law should be used in respect of certain occupational health and safety violations" (1986), Vol. IX, #5, *At the Centre*, at 19.

80. J. Braithwaite, *supra*, note 70.

81. See Brodeur, *supra*, note 77.

good is made harder because, very often, the corporations which have engaged in the ugly kinds of practices listed above are not very seriously punished for these transgressions. For instance, for its part in the heavy electrical equipment fraud, General Electric was fined \$437,000. That amounted to the equivalent of the imposition of a fine of \$12.30 on a person earning \$15,000 annually.<sup>82</sup> In the folding carton industry conspiracy, in which each of twenty-three conspirators were initially fined \$50,000 (some fines were later reduced), the fines amounted to the imposition of fines ranging from the equivalent of 24 cents to \$1.80 for a person making \$15,000 per year.<sup>83</sup> Similarly, very small fines were imposed on the First National Bank of Boston and Shawmut for laundering satchels of \$20 bills (allegedly brought in by underworld figures) in clear violation of the law, the amount laundered being \$1.3 billion.<sup>84</sup> Hoffman-La Roche was fined \$50,000 for its wilful infringement of the predatory pricing provisions of the *Combines Investigation Act*,<sup>85</sup> Lockheed Aircraft Corporation which, in the period 1970-75, had paid out between \$30 and \$38 million in questionable payments (bribes) to such governments as those of Japan, Germany, The Netherlands, Italy, Indonesia, Iran, Saudi Arabia, and to such eminent persons as Prime Minister Tanaka of Japan and Prince Bernhard of The Netherlands, to win sales, agreed to pay a fine of \$647,000. The McDonnell-Douglas Corporation was also involved in paying bribes in order to obtain contracts, although the amounts were of a lesser order. The eventual fines paid by that corporation amounted to \$55,000 in addition to an agreement to pay \$1.2 million in settlement of a civil suit brought against it by the U.S. government which had incurred expenses as result of the frauds practised by the corporation.<sup>86</sup> In a similar way, Stanbury has recorded that fines imposed under the *Combines Investigation Act*, for what the courts claimed to be very serious offences, were derisory. Typically they were the equivalent of imposing penalties of \$131 on a person earning \$15,000 per year.<sup>87</sup>

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82. See Geis "Criminal Penalties for Corporate Offenders" (1972), 8 *Criminal Law Bulletin*, 377.

83. Clinard & Yeager, *supra*, note 64, Box *supra*, note 65.

84. *The New York Times*, 9 June, 1985.

85. *Supra*, note 70.

86. See Fisse & Braithwaite, *supra*, note 72.

87. See Stanbury, "Penalties and Remedies Under the *Combines Investigation Act* 1899-1976" (1976), 14 *O.H.L.J.* 571. Stanbury argued, at page 571, that "with very few exceptions, the penalties in combines cases have been grossly inadequate for the purpose either of deterring the repetition of the offence or deterring others who may contemplate similar illegal restraints of trade. In fact, a careful review of the fines in such cases would almost certainly result in a conclusion that 'crime pays'."

Even when the conviction is the rare one of criminal conspiracy under the aegis of the morally more significant *Criminal Code*, the fines on corporations tend to be light. Thus in *R. v. McNamara et al* (no.2)<sup>88</sup> corporations, which had been convicted of seven counts, were fined a total of \$6,000,050. The amount of which the government of Canada had been defrauded by the corporations so punished was said to be \$4,279,000. But, that amount was calculated by reference only to the seven counts in the final indictment. There was evidence before the court that conduct of a similar kind had been engaged in by these corporations in forty other situations, covering a period of an additional 14 years. In occupational health and safety and environmental situations, also, the penalties have been startlingly light<sup>89</sup>.

When corporate conduct leads to a successful prosecution, punishment is usually imposed upon the corporation, not upon those managers who made the decisions which led to the offence and never on major shareholders or controlling owners as such.<sup>90</sup> This furthers the impression that the legal device, the corporation, created to further the economic aims of accumulation of capital and the diminution of transaction costs, is actually a convenient way of avoiding responsibility for wanton and unacceptable conduct, a view which is bolstered by the use made of the corporate form by small business to avoid the incidence of many social and legal obligations.

While Sutherland made his observations in the 1940s,<sup>91</sup> attention on

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88. (1981), 56 C.C.C. (2d) 516 (Ont. C.A.)

89. Take for example the enforcement of the occupational health and safety legislation in Ontario. Corporations are frequently fined a few hundred or a few thousand dollars for violations which lead to the death of workers; see e.g., *R. v. Ontario Gypsum Co. Ltd.* (1982), C.C.H. Empt. Safety and Health Guide, para. 95, 191, where the corporation was fined \$1,500 and a supervisor \$500 for such a violation. The uproar which has arisen over recent times has led to an upward trend; in *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287, a fine of \$12,000 was imposed for a violation which led to the death of a worker. Moreover, agencies under pressure as public attention has been brought to bear on the lightness of the fines for such serious consequences of avoidance of the law, have loudly trumpeted their intent to enforce regulations more stringently and to impose much heavier fines. Of course, as experience has shown us, merely to increase maxima does not lead either to more stringent enforcement or to more severe penalties.

90. Occasionally, individuals are prosecuted for their offences as was the case in the MacNamara decision, *supra*, note 88, but there, the penalties were still disproportionately light. Mr. MacNamara and Mr. Cooper, two of the chief wrongdoers were sentenced to serious jail sentences but were given very early parole, leading to the expression of righteous indignation by editorial writers. See "Privileged Parole", *Globe & Mail*, 28 April, 1982. For a full discussion as to why it is that the corporations are sought to be made responsible rather than the managers and/or the shareholders, see H. Glasbeek, "Why Corporate Deviance Is Not Treated as a Crime — The Need to Make 'Profits' a Dirty Word" (1984), 22 O.H.L.J. 393.

91. "White Collar Criminality" (1940), 5 An. Soc. Rev. 1; "Crime and Business" (1941), 217 Annals 112; "Is 'White Collar Crime' Crime?" (1945), 10 An. Soc. Rev. 132; *White Collar Crime*, (New York: Dryden, 1949).

the kind of wayward corporate behaviour set out above seems to have intensified in the last ten to fifteen years. It may be, of course, that there has been an increase in deviant corporate behaviour, but this is problematic. A number of more compelling reasons for the augmented notoriety of wrongful corporate behaviour suggest themselves.

During the activist 1960s, when the North American economy was doing so well, the growth of public interest activity, especially in relation to consumer protection, was quite remarkable. It made sense that, in this climate of unparalleled abundance, manifesting conspicuous consumption, deficiencies relating to consumerism would become the focus of attention. This movement had the greatest impetus where capitalism and consumerism were truly a way of life, that is, in the United States. But it was followed very quickly by similar developments in Canada. Legislative consumer reform, improved environmental and occupational health and safety statutes became the vogue.<sup>92</sup> Thus it was that, at the same time as corporations could claim with some justification that they were the engine of growth and, therefore, what was good for them was good for all of society, they were, because of these very claims, the focus of legislative amelioration of the neighbourhood effects of private economic activities. Ralph Nader, in his famous battles with General Motors, was one of the more important activists in identifying the corporate sector as being a centre of harm-causing activities. Awareness increased in the United States during the Vietnam War, where such famous companies as General Motors, General Dynamics and Chrysler were seen to making large profits from a very controversial war. Even more provoking was the fact that companies like Dow Chemical were making profits out of such horrible activities as napalm bombing.

This growing unease about the downside effect of large corporations' activities did not diminish with time. As the awareness of environmental harm done by corporations (acid rain, Three Mile Island, Love Canal) occupational harm (asbestos, mercury, lead), bad products, (thalidomide, Pinto) grew, the economy began to falter. Inflation and unemployment came to dominate public consciousness; high interest rates made consumerism more a dream than a reality. Corporations which had joyfully claimed full responsibility for the previous state of abundance sought to avoid being blamed for these disturbing new trends. They blamed foreigners (OPEC) for the decline of business, as well as unions

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92. See, Belobaba, "The Development of Consumer Protection Regulation: 1945-1984" in *Consumer Protection, Environmental Law and Corporate Power*, *supra*, note 55; the same volume also contains an essay by P. Emond on the legislative development in the environmental sector, "Environmental Law and Policy: A Retrospective Examination of the Canadian Experience", at 89.

because they impeded productive and competitive practices. But, most of all, they blamed government. The allegation was (is) that its increasing intervention in the market had distorted it to such an extent that it was becoming uncompetitive and unproductive. This argument had many aspects (printing too many dollars, creating disincentives for foreign investors, spending too much on welfare) but, in the context of this paper, the most important one was the rather successful corporate sector's attack on the state-imposed (that is, non-market created) standards of behaviour relating to the environment, occupational health and safety and product manufacturing.

While the corporate sector appears to have been quite successful in its efforts to create a widely held perception of government ineptitude, wastefulness and authoritarianism,<sup>93</sup> it does not follow that the corporations have shedded the image of being dangerous inflictors of harm on society.

From about 1980 onwards attention has been drawn to the staggering incidents of insider trading, especially in the U.S.A., the most notorious incident involving I. Boesky. By April 1986, 46 such charges had been laid in the state of New York alone.<sup>94</sup> Given all this, the public's trust in corporate management is very low and declining. By 1978, a poll found that, over a nine year period, the number of people who expressed a great deal of confidence in the heads of large corporations in the U.S.A. dropped from 55 per cent to 15 per cent.<sup>95</sup> More recently, a New York Times/CBS News Poll revealed that only 32 per cent of the American public think most corporate executives are honest, while 55 per cent think most are not.<sup>96</sup> The corporate sector has become alarmed by this public mistrust. While it thinks it is largely misplaced, it emphasises the need for the corporate sector to reform itself, lest external forces do it for it. Thus, at a conference called to discuss the television media's finding that business had a bad image, the Business Roundtable (an umbrella group which represents the largest 200 U.S. corporations) released a survey done for it which showed that high school students who were

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93. I presume that this is what is meant by the conventional wisdom that there is a contemporary lack of appetite for government intervention and a popular demand for returning the economy to the total control of the private sector.

94. *New York Times*, 27 April, 1986.

95. A poll conducted by Harris, cited in Silk & Vogel, *Ethics and Profits*, (New York: Simon & Schuster, 1976).

96. *New York Times*, 9 June, 1985. The same poll found that 54% of the public thought white collar crime went on too often, 85% thought that the criminals got away with such crimes and 65% said that those punished got off too lightly. This underscores the importance of the events stressed in the text to public perception.

asked whether business executives would be very or somewhat likely to take certain actions gave the following responses:

. . . 85% said business people would seek profit from “insider trading” in the company’s stock; 74% said business people would spread lies and rumours which could damage competitors; 74% said business people would falsify the company’s earnings and financial statements; 68% said business people would secretly dump toxic chemicals or waste rather than render them harmless in order to save money; 62% said business people would resort to blackmail; 63% said business people would sabotage a competitor’s facilities or products in order to eliminate competition; 52% said business people would engage in illegal drug dealing to turn quick profits; 37 % said business people would produce defective, potentially harmful products and knowingly sell them on the market; 17% said business people would plan the injury, or even murder, of an employee who “knows too much”; 13% said business people would plan the injury, or even murder of a competitor.<sup>97</sup>

As *Variety* reported, the research led to heated exchanges as to how television and business could get together to improve this image.

In short, despite the corporate sector’s best efforts, the corporate social responsibility movement has a fertile political field in which to plant its seed.

## VI. *Corporate Power*

Most of the manifestations of wrongful corporate behaviour are the results of a clear violation of existing legal standards and/or failure to internalize costs to the appropriate productive enterprise. In theory, this could be taken care of by the existing legal system without requiring any changes in corporate governance. After all, individuals could bring private actions; the state’s regulatory agency could set more clearly defined standards and streamline its enforcement processes; the criminal law could be used to repress the more immoral and serious deviants. Inasmuch as all of this is theoretically possible, it would have been more logical to expect an argument that the existing legal mechanisms ought to be refined and used so as to contain wrongful corporate behaviour, rather than to seek to change the structure of something which makes economic and legal sense. We have now come to the crux of the matter: the corporate social responsibility movement is posited on the notion that the existing legal mechanisms simply cannot be made to work to control

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97. As reported in *Variety*, June 10, 1987. The high school students may have got their impressions from the television portrayal of the corporate sector (from “Dallas”, “Dynasty”, etc.), and the picture is thus not representative of more mature judgments. But it is the perception which counts in this battle for primacy and autonomy. Otherwise why would the corporate sector worry about such uninformed opinions?



large corporations. This conclusion rests, in large part,<sup>98</sup> on the fact that our normal legal mechanisms will be ineffective because of the importance of the private sector to governments, in particular, the importance of a small number of corporate actors to the government. It is the fact that an economy, such as Canada's, is dominated by a relatively small number of corporations which is the substratum of all the arguments advocating the creation of an invigorated regime of corporate social responsibility.

There are hundreds of thousands of corporations and businesses in Canada.<sup>99</sup> From the point of view of the ideal market theorists, the more the better: competition is sharpened and political freedom is enhanced. Moreover, each of the many market actors is pursuing her/his/its individual objectives. The ensuing fragmentation guarantees that competing interest groups will be on more or less equal terms and that none of them will be able to achieve a decisive economic or political advantage in the competition for economic markets and/or political influence.<sup>100</sup> But, of course, this is not how Canada's economy works. The fact is that a few dominant corporations control the economy. Here I do not want to enter into the controversy as to whether or not there is too much corporate concentration in Canada. That there is a great deal of concentration cannot be denied. The well-known *Bryce Report*<sup>101</sup> concluded that the evidence before it suggested concentration in Canada was higher than in any other industrial country but, in the end, found this to be an acceptable state of affairs.<sup>102</sup> There is a controversy because the comparison of levels of concentration is a problematic exercise. For instance, one has to allow for the different number of businesses in the

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98. I say "in large part" because in small part it rests on the fact that some members of the corporate social responsibility movement would like the corporations to be more altruistic citizens, in the same way that they believe all citizens ought to be more altruistic, that is, they are assuming a corporatist model of society, one in which unity, rather than competition and conflict, is the norm.

99. Hadden, Forbes, Simmonds, *Canadian Business Organizations Law*, *supra*, note 63, rely on a report of the Small Business Secretariat of the Department of Industry, Trade and Commerce, *New Statistics on Small Businesses in Canada* (Ottawa, 1979), to show that, when 225,000 unincorporated enterprises with sales revenue of less than \$10,000 were omitted, there were still some 650,000 active enterprises in Canada in 1976.

100. R. Mileband, *The State in Capitalist Society*, (London: Quartet Books, 1977), has argued, most convincingly, that this notion that the operation of a free market leads to a level political and economic playing field is precisely what is wrong with pluralist democratic theories.

101. Canada, *Report of the Royal Commission on Corporate Concentration*, R. Bryce, Chairman (*Bryce Report*), (Ottawa: Minister of Supply and Services, 1978).

102. At page 42. The Commission believed that, for Canada to be efficient in world markets, concentration, rather than cut throat competition, was to be promoted. Whatever the merits of this argument, it requires a departure from the notion of efficiency based on the ideal market model of the Friedman type, the one on which all the arguments which support the legitimacy of the corporate structure rely.

countries being compared, as well as the different ways of characterizing the control of assets.<sup>103</sup> What is significant here is that a few major corporations control the major sectors of our economy. Thus, in agriculture, 0.06% of the number of corporations have 8.17% of the total assets, 13.84% of the equity, 4.74% of the sales and 10.37% of the profits in the agricultural industries; in mining, 5.12% of the corporations control 91.74% of the assets, 91.25% of the equity, have 91.28% of the sales and make 98.70% of the profits; in manufacturing, 1.92% of the corporations have 79.29% of the assets, 83.58% of the equity, make 72.89% of the sales and 76.79% of the profits; in construction, 0.12% of the corporations have 22.57% of the assets, 24.13% of the equity, make 14.03% of the sales and 20.12% of the profits; in utilities, 0.89% of the corporations have 94.09% of the assets, 94.30% of the equity, make 78.81% of the sales and 88.17% of the profits; in wholesale trade, 0.54% of the corporations have 51.09% of the assets, 60.77% of the equity, make 43.54% of the sales and 39.38% of the profits; in retail, 0.11% of the corporations have 41.05% of the assets, 53.43% of the equity, make 33.59% of the sales and 52.46% of the profits; in services 0.13% of the corporations have 3.64% of the assets, 34.89% of the equity, make 23.58% of the sales and 43.38% of the profits.<sup>104</sup>

In an economy ideologically and practically committed to the production of economic welfare by placing reliance on the private ordering system, the behaviour of private economic actors is crucial. As Beck<sup>105</sup> has written:

In a private enterprise market system, such critical matters as the distribution of income, what is produced, the allocation of resources to different lines of production, the allocation of the labour force to different occupations and work places, plant locations, investment levels, the technologies used in production, the quality of goods and services, and the innovation of new products are all matters that are in large part decided by business men. Yet they are also matters of great economic and social significance. They are, in a real sense, public policy decisions and, to the extent that they are made or shaped by business leaders, such leaders exercise a public policy function.

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103. Hadden, et. al., *supra*, note 63, at 53-57.

104. Compiled from Statistics Canada, *C.A.L.U.R.A. Report for 1984*, Part I — Corporations. The same report also reveals the following information. The leading 500 non-financial actors have 54.0% of sale, 67.7% of assets, 70.4% of profits. There are 1,905 large non-financial corporations with assets of \$25 million dollars or more. They account for 73.3% of assets, 55.5% of sales, 72.6% of profits. Calculating another way, the Report looks at enterprises. An enterprise is a group of corporations under a controlling interest. The 100 leading enterprises in Canada comprise some 1,300 corporations. They account for 38.9% of sales, 52.1% of assets, 54.4% of equity, 53.4% of profits, 41.7% of taxable income.

105. "Corporate Power and Public Policy", *supra*, note 55 at 182.

In a fragmented economy, private decision-makers pursuing their many different goals, would not, of course, exercise undue influence. Where there are a few large economic units who dominate various segments, however, they have the potential to wield enormous public power. Beck, again:

If it is largely left to private enterprise to make the critical public policy decisions . . . government policy must ensure the success of private enterprise. To fail to do so is to risk detrimental effects on the economy and thus on the citizenry whose welfare is the chief function of government to advance . . . . Government must, to a significant degree, be acquiescent to the needs and demands of business for to do so is to do no more than to provide good government.<sup>106</sup>

Yet, it is not obvious how even dominant economic units will influence government. After all, their interests are not always the same and, in any event, what mechanisms do they have to let the state understand what their wishes are? That is, inasmuch as there is fragmentation, pluralism will persist and the autonomy of elected government be preserved. But, the idea that large corporations are just yet another interest group in a pluralist society competing for attention and influence with similarly placed groups is a distortion of the Canadian reality. Consider:

- (i) Managerial, as opposed to shareholder, control of dominant firms is not as well established in Canada as the Berle and Means analysis suggests is the case in the U.S.A. Francis<sup>107</sup> has shown that Canada's 32 wealthiest families, along with five conglomerates, control about one-third of the country's non-financial assets. The revenues of their various enterprises, in 1985, were nearly \$123 billion. This outstripped the federal government's income in that year: it was only \$80 billion. Similarly, it has been calculated that 9 families control 50 per cent of the equity on the Toronto Stock Exchange.<sup>108</sup> Moreover, a 1984 Toronto Stock Exchange study showed that, of the 283 public companies which make up the composite index, close to 80 per cent of these listed companies are controlled by a single family and/or group. Only 21 per cent were widely held, that is, the shareholders were so dispersed as to give managers real control.<sup>109</sup> In Canada, therefore, it is difficult to speak of ownership without control. In this context, it is easier to see how the business interests of a few dominant Canadian corporations and of their

106. *Id.*, at 184.

107. *Controlling Interests: Who Owns Canada?*, (Toronto: MacMillan of Canada, 1986).

108. Beck, *supra*, note 55 at 197. Note that the banks are not included in that figure.

109. "The Regulation of Take-Over Bids in Canada: Premium Private Agreement Transactions" in *Report of the Security Industry Committee on Take-Over Bids* (1983). In the United States 85.2% of the companies are widely held.

owners may both coincide and be easily transmitted to policy-makers.

- (ii) Clement has shown that there is an extensive system of interlocking directorships connecting the major corporations in Canada. Of the 113 dominant corporations he found 1848 interlocked positions.<sup>110</sup> Again, this makes it easier for business leaders to develop congruent views if they wish to do so in order to influence the state and to put up a reasonably united front when they want to do so.
- (iii) Not only are major corporations and their chief executives closely interlinked, they also have very close direct links with the state. A recent study by Fox and Ornstein<sup>111</sup> revealed the overlapping memberships of public and private organizations. By overlapping memberships they mean ties created by individuals who move from one organization to another in the course of their careers, or who have held concurrent membership in more than one organization. The organizations considered were private and public sector organizations, that is, businesses and state institutions. They found that more than 3,300 such ties connected the 148 state organizations and 302 private organizations surveyed. This study also showed that a great number of politicians and bureaucrats became members of the corporate élite or had been recruited from those segments. For instance, 17.9 per cent of federal cabinet ministers had held, or came to hold, corporate organizational positions. About 20 per cent of the federal cabinet, members of the senate, judges in the two senior courts, and university and hospital boards, have held at least one corporate position, either before or after their membership in the state institution.
- (iv) Newspapers and other media are private corporations whose managerial and major shareholding groups frequently have very important interests in other dominant corporate groupings. Thus, Clement showed that the 15 dominant media firms were run by 105 major owners, directors and managers. Of these, 51 were also members of the ruling élite (as defined by Clement) of the country at large, that is, they were also directors or executives of one of more of the boards of the nation's 113 dominant firms. This, of course, has a tremendous effect on the potential ability of large business interests to make their views known to governments and to persuade them. Beck has shown that when issues have really

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110. *The Canadian Corporate Elite* (Toronto: McClelland and Stewart Limited, 1975) at 155.

111. "The Canadian State and Corporate Elites in the Post-War Period" (1986), 23 *Canadian Review of Sociology and Anthropology* 48.

mattered to large business, such as the government's policies in respect of the National Energy Programme, The Foreign Investment Review Act, the creation of Petro-Canada and its purchases of private oil companies, the purchase by the Ontario government of interests in Suncor, the findings and treatment of a Royal Commission of Inquiry into the Newspaper Industries, the debates concerning Canada's general competitive policies and an attempt at a radical reformation of taxation law, major business interests were able to have their views almost totally reflected by the news media. Inevitably, those interests held sway with the government of the day.<sup>112</sup>

- (v) As well as using all these links to lobby government directly and have their views heard<sup>113</sup>, there are a great number of trade and industry associations in which the divergent interests of firms in the same economic sectors are brought together. Inevitably they tend to be controlled by the larger corporations. These powerful lobbying groups — aided by the personal connections of their members with government — are able to gain a great deal of access to government. Recently, the Business Council on National Issues (modelled on the U.S. Business Roundtable),<sup>114</sup> comprised by the chief executive officer of truly major corporations has given coherence and direction to the politics of business.<sup>115</sup>

There is little doubt, then, that a government which perceives itself as being reliant upon the private sector to provide economic and social welfare, is in a position to be influenced, constrained and even intimidated by a closely connected and single-minded business élite. That single-mindedness will exist in respect of particular issues<sup>116</sup> or in respect

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112. Beck, *supra*, note 55 at 183-193 and sources cited there.

113. Hugh G. Thorburn, "Pressure Groups", vol. Pat-Z, *The Canadian Encyclopaedia*, at 1472 notes that over 50% of 703 Canadian firms studied in 1978 had been in contact with the federal political élite and bureaucrats; 42% had made individual representations to federal government department, boards and commissions; 55% of large firms (that is, firms with over 500 employees) had made individual representations to government, whereas 28% of small firms had done so.

114. Text at note 97, *supra*.

115. This is a paraphrase of the thought conveyed by Useem in his *The Inner Circle: Large Corporations and the Rise of Business Political Activity in the U.S. and U.K.* (New York: Oxford U.P. 1984). Other powerful lobby groups in Canada include the Canadian Tax Foundation, commercial banks, Canadian Federation of Agriculture, Canadian Medical Association, Chamber of Commerce, Canadian Manufacturers' Association, the Institute of Associate Executives (a lobby of lobbyists), etc. Note also that non-business groups have such lobby groups but that they are much smaller and much less influential, in part because the organizational ties of the Fox/Ornstein variety hardly exist. A prominent example would be the public interest advocacy centre, Energy Probe.

116. Such as, say, the N.E.P. or the *Foreign Investment Review Act*.

of the general direction of the economy, for instance, in respect of issues such as deregulation, subsidies for certain kinds of economic undertakings, attracting foreign investment, undermining the welfare system with its costs to business, containing trade unions' demands, etc. Eventually, what the dominant economic units, intimate to government is that, if the appropriate economic and political climate is not created by it, they will lose "confidence". That is, the threat of deinvestment looms large.<sup>117</sup>

This being so, we now have an explanation as to why it is that the corporate sector can impose, so frequently, the costs of its profit-making activities on society with relative impunity. Standard-setters are restrained, lest they impose too high a burden on that segment of the economy whose withdrawal would bode ill for the economic welfare of society and, therefore, for the government of the day. Again, the relative pusillanimity of enforcement strategies and the derisory nature of the penalties imposed can now be understood. Moreover, it becomes absolutely clear why the corporate social responsibility movement, at the end of the day, basically defines corporate social responsibility as a requirement that corporations abide by existing standards: to impose altruistic goals on this autonomous private sector is out of the question, given the underpinnings of the Canadian capitalist liberal democracy set out above.

I am now in a better position to answer the question I posed: why does the corporate social responsibility movement offer the proposals it does?

In a democracy, elected government is to set the standards and norms for economic and social behaviour. In our democracy, the profit-maximization by individual economic actors is accepted by government to be the motor of our economy. In an economy with many independent, unrelated economic actors, this should leave government free to set standards and norms. The problem is that the Canadian economy is not of that kind. Democratic control has to be subjugated to large private interests which can determine the level of economic activity and general welfare. The corporate social responsibility movement does not want to accept the logical implications which flow from this analysis. After all, logic would dictate that, at a minimum, dominance of the economy, and thus of the State, by a few corporations should be eliminated. Amongst

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117. This is recognized by the more thoughtful supporters of market systems as political economic regimes. *Eg.*, C. Lindblom, *Politics and Markets* (New York: Basic Books, 1977) writes at 88: "[M]arket systems help support liberal democracy" but because "major decisions are made in the market rather than in government, the tasks of government are complicated and the powers of government in some ways crippled." The more major decisions are made by a decreasing number of market actors, the greater the fetters on government.

the corporate social responsibility movement proponents, only Nader and Green have proffered a suggestion to this effect — they ask for the break-up of some oligopolies.<sup>118</sup> Others<sup>119</sup> have made but the vaguest of references to this possibility. Yet, in the ideal, to recapture democratic control over the state, a curtailment of existing economic power is imperative. The power of the non-élite members of society to participate in politics and in economics should be increased dramatically. The corporate social responsibility movement does not advocate that. The proposals made for new kinds of corporate governance are clearly aimed at changing the consciousness of the ruling class cadres, rather than at attacking the institutions and mechanisms which permit the ruling classes to perpetuate their power. To elaborate: the various constituencies (workers, consumers, even government) are to have representatives on boards of directors to help generate a form of commitment from corporate management to develop and to support socially responsible corporate behaviour. These representatives, however, are to continue to act in a setting where they are to participate in the promotion of profit-earning, albeit only *responsible profit-earning*. Some of the difficulties for representatives who are to be put in this position have already been outlined. Note further that, inasmuch as governments are to appoint directors or to have their own representatives on corporate boards, it is to be remembered that the genesis of the concern is the unchecked wayward behaviour of corporations, unchecked because government is already beholden to the corporate élite and does not try to inhibit its excesses with any zest. How likely is it that government-appointed directors will be inclined to follow a new independent path? In a similar vein, note that another recommended idea<sup>120</sup> is that think-tanks be set up which include working class, consumer, health and safety activists, environmentalists and other such sectoral interest representataives. The idea is that this will stiffen government's back by providing a counter-weight to business interests at the lobbying tables. Again, it is hard to see how governments which have been penetrated by dominant business interests and which are ideologically committed to the perpetuation of the existing relationships, could set up effective mechanisms of this kind.

In short, the problem is one of too little democracy. Democratic control over the allocation of resources and individual freedoms is entrusted, in theory, to a state which is electorally responsible to the citizenry made up of juristically equal citizens. It turns out that the state's

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118. *Taming the Corporate Giant*, *supra*, note 15.

119. *Eg.*, Beck, *supra*, note 55.

120. *Id.*

sovereignty is diminished because governments must, in the first place, respond to the needs of dominant economic actors. The problem becomes one of too little democracy, too little citizenry control over essential conditions because large private economic interests crowd them out of the political decision-making processes. This becomes obvious and, therefore, potentially dangerous to those who exercise power, because the large private economic actors who are in a position to ride roughshod over the majority's interests, frequently violating shared moral precepts and existing legal norms, all too often take advantage of their position.

Yet the corporate social responsibility movement response is a set of proposals for *attenuated* democracy. Nothing is done, *directly*, for enhancing ruled class participating in government decision-making. Nothing is to be done, *directly*, to make the ruling class' instruments — corporations commanding the economic heights — less important to the state. Rather, they will be asked to take special interest-group representation into account to some undefined extent. The proposals are really mechanisms for technocratic input — contrast participatory-democratic — input. Each representative voice is to be but one amongst many. The model of representation is one which mirrors that of conventional liberalism in that it assumes that the representors are not there as class representatives. Consumers, workers, environmentalists, etc., are all perceived to have differing, perhaps conflicting, interests. This assumption of sectorialness is interesting because the other working assumption is that the corporate élite has an undifferentiated class interest: profit-making. This will lead to the eventual failure of the corporate social responsibility proposals. In the end, if we, as a society, continue to place reliance on the profit-making activities of dominant members of the corporate sector for our welfare and we remain wedded to the political ideology which goes with that economic approach, exhortations made to the corporate sector to subjugate its pursuit of profit *to some extent* will not work. The dominant corporations' ability to command respect from the state depends on the power which stems from their control over investment; the ability of the state to demand respect and more caring treatment from these corporations is limited by its inability to back-up its demands with force as long as the use of private property owners to make profits remains the central means of producing economic welfare. Moreover, the corporate sector's ability to penetrate state institutions will in no way be impaired. The creation of new corporate governance structures will suggest that something has been done about some troubling issues, while the underlying problem — the disempowerment of the electorate — will not have been addressed in any significant way. For a while the corporate image will be improved as we



will have shown that we are asking the corporate sector to moderate its behaviour. But, as nothing fundamental will have changed, the dominant corporations will not be impeded for long. They will walk around the various versions of the Maginot line which the corporate social responsibility movement offers.

The corporate responsibility movement has diagnosed the problem accurately. It is dominant capital and its corollary: the denial of democracy, a denial which is ever-increasingly manifested by the harm-inflicting behaviour of large economic actors. The reforms they offer do not address the causes of the problem, merely the manifestations. It will not do. Our aspiration to be a real democracy is on the line.

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