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THE CORPORATE COMMON GOOD: THE RIGHT AND OBLIGATION OF MANAGERS TO DO GOOD TO OTHERS

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I. INTRODUCTION

In *Difficult Moral Questions*,[1] Germain Grisez employs the principles of Catholic social teaching and natural law theory to analyze, in addition to many other ethical questions, the problems faced by business executives. His seminal work goes far beyond the simplistic formulae of "do no harm," "play by the rules of the game," or "don't lie, cheat, or steal" so common in discussions of business ethics. Instead, Grisez offers a highly nuanced evaluation of the pros and cons of the alternatives presented by specific business situations including disloyal superiors, deceptive advertising, sharp negotiation tactics, and fair pricing. Those ethical conundrums that we call "Manager's Dilemmas" can be particularly difficult for those desiring to follow *the way of the Lord Jesus*;[2] it is to them that Professor Grisez so eloquently speaks. His work should be required reading for those thousands of corporate officers who face Manager's Dilemmas and must choose between what their business judgments (heads) tell them is economically best and what their consciences (hearts) tell them is morally right.[3]

Unfortunately, the failure of universities and professional schools to acknowledge the differences between *homo sapiens* and *homo economicus* has left most business people with the impression that the heart is to be felt

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[1] Germain Grisez, *The Way of the Lord Jesus Vol. 3: Difficult Moral Questions* (Franciscan Press 1997) [hereinafter Grisez, *Difficult*].

[2] Referring to the title of Grisez's three volume series, *The Way of the Lord Jesus*.

[3] A good example of a Manager's Dilemma is the case of Stride Rite, a shoe company recognized for its social commitments. Faced with a difficult decision on whether to close a plant in New Bedford, Massachusetts, the Chairman of the Board commented: "Our hearts said, 'Stay' but our heads said, 'Move.'" Joseph Pereira, *Split Personality: Social Responsibility and Need for Low Cost Clash at Stride Rite*, Wall St. J., A1 (May 28, 1993) (quoted in Constance E. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship*, 36 San Diego L. Rev. 897, 938 n. 212 (1999)). Not all chief executive officers see two horns to the dilemma. As one stated, "As CEO I have a duty to do what's best for the shareholders. I can't let my own sense of right and wrong get in the way." R. Edward Freeman & Daniel R. Gilbert, Jr., *Corporate Strategy and the Search for Ethics* 23 (Prentice Hall 1988).

but not followed. The neoclassical free-enterprise economic theory taught in most Economics 101 courses, for example, holds that society is best off if business managers maximize profits.[4] When that view prevails, it is likely that most dilemmas will be resolved in favor of the head, which represents the seemingly remorseless economic logic for the company and its stakeholders. When, however, a Manager[5] takes into account the humane considerations that flow from the manifold consequences of corporate decisions on stakeholders' lives and on the communities affected, his or her heart might indeed be elevated above his or her head.

Grisez rightfully rejects the profit-maximization principle and states instead that a firm is not just a "money making engine" for shareholders, but must be operated for the common good of all stakeholders.[6] Contrary to pure free-market economists and apologists for capitalism, Grisez properly recognizes that the Manager's obligation is to maximize the *common good* of the community represented by the corporation, and that financial return for shareholder investors is just one of the goods for which a corporation is formed.[7] There can be no doubt that Grisez's view is closer to reality, for to conclude otherwise would dismiss virtually every mission statement of every Fortune 100 Company as fatuous. Indeed, a fair observer could not even argue from those pronouncements that a corporation's *primary* purpose

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[4] Milton Friedman states that:

> In a free economy there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.

Milton Friedman, *Capitalism and Freedom* 133 (Univ. of Chicago Press 1962). It should be noted that proper allocation of economic surplus among stakeholders and others is necessary even to economic efficiency only when the other basic assumptions of neoclassical theory are satisfied. The fact that those assumptions (which include free and perfect information and zero transaction costs) are never satisfied in reality clearly demonstrates that purely economics-based resource allocations are hardly the basis on which to make moral determinations. Richard S. Markovits, *Symposium on Second-Best Theory and Law & Economics: An Introduction*, 73 Chi.-Kent. L. Rev. 3 (1998) (stating that "[a]ccording to the General Theory of Second Best, if one or more members of a set of optimal conditions cannot be fulfilled, there is no general reason to believe that fulfilling (or more closely approximating) more of the remaining conditions will bring you closer to the optimum than fulfilling fewer of the remaining conditions"). In this regard, R. H. Coase has lamented that economists have become preoccupied with the "logic of choice" and have divorced theory from its subject matter:

> The consumer is not a human being but a consistent set of preferences. The firm to an economist, as Slater has said, "is effectively defined as a cost curve and a demand curve, and the theory is simply the logic of optimal pricing and input combination." Exchange takes place without any specification of its institutional setting. We have consumers without humanity, firms without organization, and even exchange without markets.

R.H. Coase, *The Firm, the Market, and the Law* 3 (Univ. of Chicago Press 1990).

[5] We use the term *Manager* to refer to a director or officer with executive authority.

[6] Grisez, *Difficult*, *supra* n. 1, at 454.

[7] *Id.* at 457: "[T]he principle that should shape directors' and managers' decisions is *the common good of all who actively participate* in the business by cooperating in its proper activities." (emphasis added).

is to maximize profits. The common phrasing instead, is simply *fair profit* or an *optimal* return to investors within the context of the congeries of other corporate interests.

Therefore, Grisez can legitimately speak of a publicly held corporation's purpose as the pursuit of the common good.[8] By adopting this view, Grisez does not deny the usefulness of the profit-maximization assumption for purposes of economic theory or business planning, nor does he deny that some shareholders may be pure *homines economici* who desire only financial return. Of course, he is not as restrictive as Milton Friedman, the godfather of the free-market system, who argued that a Manager's duty to maximize profits was circumscribed only by the "rules of the game;" that is, the Manager's role as an agent precludes the exercise of his own moral beliefs.[9]

Grisez does not appear to respond directly to Friedman, but there is no doubt based on his analyses that Managers do have moral autonomy to forego profit-maximization in order to *do good* (that is, to act solely to make someone other than a *shareholder* better off). However, this moral autonomy is limited by Grisez's conception of the corporate common good, which is limited to economic interests of the company's immediate stakeholders: "[T]he principle that should shape directors' and managers' decisions is the common good of all who actively participate in the business by cooperating in its proper activities. There are five such groups: investors . . ., managers . . . , nonmanagement employees . . . , . . . regular suppliers of materials and services, . . . and regular purchasers of the business's products.[10] It is here that we part company with Grisez's views, and the rest of our argument will address this narrow but important issue.

Before proceeding, however, we acknowledge Grisez's disclaimer that these questions are *difficult*, and we note his concession that the replies

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[8] *Id.* at 454-55.

[9] Milton Friedman argues:

> [T]he corporate executive is also a person in his own right. As a person, he may have many other responsibilities that he recognizes or assumes—to his family, his conscience, his feelings of charity, his church, his clubs, his city, his country. He may feel impelled by these responsibilities to give part of his income to causes he regards as worthy, to refuse to work for particular corporations, even to leave his job, for example, to join his country's armed forces . . . . But in these respects he is acting as a principal, not an agent; is spending his own money or time or energy, not the money of his employers or the time or energy he has contracted to devote to their purposes. If these are "social responsibilities," they are the social responsibilities of individuals, not of business.

Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times Mag. (Sept. 13, 1970). This issue is also at the crux of the "shareholder primacy" debate. *See e.g.* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 Wash. & Lee L. Rev. 1423 (1993).

[10] Grisez, *Difficult supra* n. 1, at 457.

he offers are neither necessarily correct in all aspects, nor the only possible answers.[11] We hope our criticism of his views will be taken in that same vein—as constructive and tentative—as we seek to apply Catholic social teaching to the messy problems of everyday life.

II. THE RIGHT TO *DO GOOD*

A. The Drug Hypothetical

The context for our analysis is Professor Grisez's wonderful hypothetical on corporate philanthropy, which we paraphrase as follows:

> A pharmaceutical company is considering whether to modify one of its drugs to combat a fatal disease in the Third World and save hundreds of thousands of very poor people from serious disease. The modification would reduce short-term profits because Third World consumers could not pay a price sufficient to cover the development, testing, production, and distribution costs, and Third World governments are unwilling (for political and economic reasons) to purchase the drugs or subsidize their purchase. Although in other similar cases the responsible Managers might justify a long-term profitability rationale stemming from potential future concessions in the affected countries with respect to other products of the corporation and from favorable public relations and goodwill in the U.S. and worldwide, corporate Managers cannot in good faith conclude *in this case* that actual corporate profitability would be enhanced. The corporation already has double digit profit margin monopoly power in its patented drug markets and is subject to intense price competition in its generic products. The corporation's business as presently conducted does no positive harm to anyone, but the modification and subsequent justification would accomplish the moral good of saving human lives.[12]

The beauty of this hypothetical is its presentation of perhaps the extreme test of the *do good* issue because the beneficiaries of the drug are not, nor are they likely to ever be, customers of the corporation or in any other way stakeholders. Thus, the issue is one of pure disinterested philanthropy or *charity* based solely on the special ability of the potential donor to assist those in need.

[11] *Id.* at xviii: "The questions dealt with in this book really are difficult. . . . Undoubtedly, some of my proposed replies contain errors." And *Id.* at xix: "[R]eplies more or less different from the one I propose might be as sound or helpful or even sounder and more helpful."

[12] *See* Grisez, *Difficult*, *supra* n. 1, at 453-54, 457. Grisez's full hypothetical, posed by a director of the corporation, is in his work, including several additional limiting terms to make the dilemma even starker. *Id.* For the reference to the number of people affected, see *id.*

Surprisingly, Professor Grisez concludes that the Managers of the drug company should not undertake the philanthropy with corporate resources despite the dire consequences of the corporation's decision not to help. His analysis of the case reads as follows:[13]

> This question calls for the derivation of a specific moral norm regarding the philanthropic activity of profit-making businesses. The common end of every voluntary association is determined by its participants' mutual understanding and consent. A profit-making business is a voluntary association of the persons who cooperate in the specific activities for which it was organized, in order to achieve various economic benefits. The common good of participants in a business is the principle grounding and limiting the authority of those entrusted with the decision making that shapes their cooperation. So like the people who exercise authority in any other voluntary association, the directors and managers of a business should not elect to use its resources for purposes that, however good in themselves, do not contribute to its common good. Therefore, though the proposed project, considered in itself, would be good, the directors should not vote to proceed with it as a philanthropic act. However, they should try to carry out the project by the voluntary cooperation of participants in the business and other parties able and willing to contribute.[14]

Following his analysis, Grisez sets out a possible reply, which expounds on his reasoning.[15] In his view, management's first responsibilities are to the corporate stakeholders and these responsibilities limit management's freedom to help non-stakeholders.[16] He concludes that the corporation has a primary duty to its shareholders to provide them with a fair return, or if shareholder returns already exceed the market rate, to

[13] For a statement of the purpose and the limitations of this analysis, see *id.* at xviii-xix.
[14] *Id.* at 454.
[15] For an explanation of the different purposes of the *analysis* and the *reply*, see *id.* at xviii-xx.
[16] Grisez is somewhat ambiguous in his definition of *stakeholder*. While he seems to approve definitions that would include "everyone who affects or is affected by a business's actions," he later seems to limit those who should be considered participants in the corporate community to shareholders, employees, and those who are "more or less regular" suppliers and customers. *Id.* at 456. We accept the latter definition here, although we would further limit it by adding a requirement that the putative stakeholder have a significant enough relationship with the corporation to create justifiable reliance on that relationship with the enterprise. Grisez also assumes that the corporation and its stakeholders do not recognize *gratuitous arrangements* for benefiting persons who do not contribute to the corporate welfare, that is, those who are not stakeholders. One might suggest that in this age of *good corporate citizenship* virtually every publicly held company operates on the basis that stakeholders do recognize such gratuitous arrangements because virtually all such companies engage in philanthropy, even if nominally justified as long-term profit-oriented. *Id.* at 456-57.

reduce its prices to its customer stakeholders or increase its payments to its vendor stakeholders:

> You ask whether to support a project to supply a drug that will cure a devastating disease in hundreds of thousands of very poor people, even though this project is likely to lose money, reducing profit over two or three years. My answer is no. *The reduction in profit either will be unfair to investors or not. If it is, that unfairness excludes this use of the company's resources. If not, then the return investors otherwise would receive must be excessive; and in that case, other participants in the business are getting less benefit than they should for their contributions or paying more than they should for the company's products, and the unfairness should be corrected.*[17]

He concludes that mercy cannot be undertaken at the expense of the violation of a duty to another:

> Even if one has charge of a unique capacity to meet a vital need, however, one may not use the capacity to meet the need if that would violate some prior responsibility. Parents of modest means, for example, may not donate part of the money they could use to meet any genuine need of their own children to famine relief that would save the lives of other children.[18]

Grisez's analysis presents an excellent example of how perspective can affect prudential judgment regarding application of Catholic social teaching to a specific situation. His starting point, that management's freedom is limited by its *responsibilities* to stakeholders, assumes that Managers' moral choices are constrained by a purely economic view of that duty and also by the view that the ethical duty to the stakeholders precludes any right or obligation to persons outside the corporate community.[19] While

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[17] Grisez, *Difficult*, *supra* n. 1, at 457 (emphasis added).

[18] *Id.* at 458. *See also id.* at 457 (stating that "[i]f you and the other directors reduce [needy stakeholders'] investment income by doing the proposed philanthropic work, you will not be doing a work of mercy—since mercy is not done at other's expense—but robbing one group of needy people and organizations to benefit some even needier people.").

[19] This would seem to indicate that Grisez's understanding of the corporation is similar to that of the *contractarians*, who view the corporation not as a separate legal person, however fictional, but simply as a nexus of contracts among stakeholders. *See* Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand. L. Rev. 1259, 1273 (1982) ("A corporation . . . is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. . . . [M]anagers should act to maximize wealth of stakeholders pursuant to the terms of the contract of their agency relationship."). Only a contractarian would conclude that management does not have the authority to cause the corporation to act as any other legally cognizable person and take all actions not otherwise illegal. *Cf.* Model Bus. Corp. Act § 3.04 (ABA 1984) (corporation has power to take any action that an individual can take). In fairness, Grisez does assume that the business is organized for a limited specific good. However, his assumption is not valid for virtually any publicly

Grisez's view is obviously not unreasonable, we believe that Catholic social teaching, non-question-begging economic principles of fair return and valuation, and the virtue of prudence impose no such restriction upon the corporation's right to distribute the drug.[20]

B. The Common Good Includes Non-Economic Acts of Solidarity

Grisez's basis for resolving the Manager's Dilemma presented by the hypothetical is for the Manager to act to further the common good of the enterprise. His definition of the relevant *common good* is therefore the key to his moral analysis:

> Like any other voluntary association, a profit-making business is organized for a limited specific good. Because it is an association for ongoing cooperation by which money, work, services, and products are contributed by and distributed among various groups of participants, *its common good is effective economic cooperation and fairness to all participants.*[21]

Grisez, however, does not appear to justify this broad conclusion with adequate support. First, his assumption that a business is organized only for a *specific good* is questionable empirically. Even limiting the issue to the initial incorporation of the business, different stakeholders undoubtedly will have different reasons for joining the community—some to make the most money, others to help mankind through better healthcare, and some just because they enjoy chemistry or sales. Thus, contrary to Grisez, seeking an end of *mere* "effective *economic* cooperation" would very likely violate the basic assumptions of at least some members of the community.[22] Second, the quoted language seems inconsistent with

held corporation for, regardless of its original purpose on the date of incorporation, its sheer size and diversity of stakeholders makes delineation of such a *specific limited* good impossible.

[20] We are using the term *Catholic social teaching* to refer to the teachings of the Roman Catholic Church as to matters of social and economic relationships among people and institutions. The corpus of this teaching can be found in a variety of sources including Scripture, documents promulgated by the Second Vatican Council (most particularly, *Gaudium et Spes* [*Pastoral Constitution of the Church in the Modern World*]), The Catechism of the Catholic Church, the writings of various popes (especially Pope John Paul II) and, of interest to U.S. corporate managers, the United States Conference of Bishops. Each of these writings draws on Scripture, the tradition of the Catholic Church, and works of moral philosophy to elucidate our moral obligations with respect to social and economic matters. While the primary audience for Catholic social teaching is the Roman Catholic faithful, many of the documents are addressed to all men of goodwill and thus are intended to have universal application. We do not include within Catholic social teaching the large body of writings by other individual Christians on moral aspects of socio-economic matters since any fair treatment of those works and issues would be beyond the scope of this work. As to the virtue of prudence, see Josef Pieper, *The Four Cardinal Virtues* (Notre Dame Press 1966).

[21] Grisez, *Difficult*, *supra* n. 1, at 456 (emphasis added).

[22] This phenomenon is frequently observed when management changes or acquisitions occur. Stakeholders sever their relationships with the corporation because it no longer cares about quality or it eliminates a certain product line. While economic considerations may also be present in those decisions, they can frequently result in lower economic returns when the stakeholder enters a different *community*.

Grisez's other statements asserting that Managers have "moral responsibilities to others … [and] should not regard other peoples' activities essential to the business's success as mere means for making profits."[23] Although he might be referring simply to the non-economic needs of stakeholders in the sense of working hours and conditions, the principle as stated suggests that a business might respect a wide range of needs and desires of stakeholders, including the possibility, through their investments of money or labor, of *doing good* to third-parties.[24]

More fundamentally, as an explication of Catholic social thought, Grisez's definition seems at odds with the approach of Pope John Paul II in his encyclical *Centesimus Annus*:

> [T]he purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and *who form a particular group at the service of the whole of society*. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business.[25]

In contrast to Professor Grisez, we suggest that according to Catholic social principles the corporate common good is not simply based on a concept denoting a full, i.e., *fair*, economic distribution of profits among stakeholders, but reflects the full range of "human and moral factors" that stakeholders may rightfully take into account in pursuing their moral duty to "be at the service of the whole of society."[26] Many stakeholders—whether capital investors, employees, or wholesale customers—may have undoubtedly joined this specific corporate community because of its economic returns but they also may value the goal of benefiting society through the development of pharmaceutical cures. We, therefore, would expand Grisez's definition to encompass not just the economic interests of the stakeholders, but the entire *basket* of interests, desires, and outcomes that combine economic, psychological, and sociological interests.

Our disagreement with Grisez may come down to whether

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[23] *Id.* at 455.

[24] Grisez does not preclude or criticize corporate philanthropy that is profit-motivated. However, one might question whether solely self-interested giving is really *philanthropy*.

[25] Pope John Paul II, *Centesimus Annus* [*Encyclical Letter on the Hundredth Anniversary of* Rerum Novarum] ¶¶ 35, 69, http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html (May 1, 1991) (emphasis added) [hereinafter Pope John Paul II, *Centesimus Annus*].

[26] This is obviously a matter of interpretation. We join Professor Grisez in his recognition that the Church has never attempted to make these types of applications of its teaching to such specific cases and that the meaning of the Church's teaching is ultimately not for us to determine. Grisez, *Difficult*, *supra* n. 1, at xviii.

stakeholders are interested predominantly in economic benefit alone or whether their economic interest may be tempered by broader, humane motives. Certainly, the stakeholders in any large publicly held corporation come from diverse religious, moral, and cultural traditions, each of which espouses strong non-economic values such as family life, the environment, personal freedom, and integrity. To adopt a normative construct that ignores the reality of those non-economic interests that temper the desire to maximize economic gain would render a disservice to stakeholders by denying the essence of their humanity. In Grisez's purely economic firm, stakeholders' actual *basket* of wants would be ignored and an appreciation of humankind's interest in a society focused on human dignity and freedom would thereby be skewed.[27]

In this regard, Grisez's view of the common good seems unduly restrictive when viewed from the perspective of Catholic social teaching:

> In the economic and social realms, too, the dignity and complete vocation of the human person and *the welfare of society as a whole* are to be respected and promoted. For man is the source, the center, and the purpose of all economic and social life.[28]

Again:

> Today more than ever before attention is rightly given to the increase of the production of agricultural and industrial goods and of the rendering of services, for the purpose of making provision for the growth of population and of satisfying the increasing desires of the human race. Therefore, technical progress, an inventive spirit, an eagerness to create and to expand enterprises, the application of methods of production, and the strenuous efforts of all who engage in production—in a word, all the elements making for such development—must be promoted. *The fundamental purpose of this production is not the mere increase of products nor profit or control but rather the*

[27] Grisez's narrower definition of the *common good* also could have the unintended consequence of skewing individual resource allocations. Precluding philanthropy would reduce the incentive for certain individuals to engage in those economic activities that would be more conducive to philanthropic endeavors (such as health care, education, and even financial services) and to over-invest in other activities (weapons, tobacco, alcohol, and pornography). In other words, stakeholders might decide to allocate their resources (capital, labor, purchasing power) strictly by economic return if that is all that matters. For example, a stakeholder might reason: "I might as well work for International Tobacco if I can't work for a company that donates some of its products to needy kids."

[28] Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶¶ 63, 67 (Vatican, 1965) (emphasis added). (available at http://www.catholicculture.org/docs/doc_view.cfm?recnum=3367) [hereinafter Second Vatican Council, *Gaudium et Spes*].

> *service of man, and indeed of the whole man with regard for the full range of his material needs and the demands of his intellectual, moral, spiritual, and religious life; this applies to every man whatsoever and to every group of men, of every race and of every part of the world. Consequently, economic activity is to be carried on according to its own methods and laws within the limits of the moral order, so that God's plan for mankind may be realized.*[29]

C. Considerations of Economic Justice Favor a Right to Do Good

Our disagreement with Grisez's view also arises out of a more specific objection to his argument that philanthropic conduct somehow violates, as a matter of simple economic justice (what he refers to as *fairness*), the Managers' duties to stakeholders.

In sum, his approach to the issue of commutative justice in the context of the corporate community seems overly reductive.[30] We disagree with his view that lost profits or opportunity costs due to the modification and free distribution of the drug, inevitably deprives investors or any other stakeholders of a fair return. He argues generally that those who are responsible for the business would act *at odds with the common good* if their actions could not be fully justified by *anticipated economic benefits*. Grisez in effect concedes that fair return is a concept dependent solely upon economic considerations and excluding other values.

> It is true that what is fair to various participants in the business cannot be precisely calculated and various contingencies cannot be forestalled. But those responsible for the business need not and ought not make decisions they know are at odds with the common good. If the directors of a profit-making business use its resources for a philanthropic project not fully justified *by anticipated*

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[29] *Id.* at ¶¶ 64, 68-69 (emphasis added). While the document recognizes that economic activity is to be carried out according to "its own methods," the Council suggested that shareholder primacy is not the appropriate end-result. This view is not peculiarly Roman Catholic. As J. M. Balkin has noted:

> We may ask whether market behavior is not itself simply a special case of human behavior—whether it too, is only one of a number of different forms of human choice, which in turn depend upon many different forms of human valuation and motivation. Human values and goals may take wealth maximization into account, but they may not be exclusively or even primarily concerned with it. Human action and human decision may rest only in part on the type of reasoning acceptable to Landes' and Posner's reductive vision. Ironically, then, the greatest problem with wealth maximization as a theory of human practical reason may be that it is insufficiently rich.

J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 Colum. L. Rev. 1447, 1475-76 (1987) (reviewing William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 1 (Harvard U. Press 1987)).

[30] *See* Grisez, *Difficult*, *supra* n..1, at xviii-xix.

> *economic benefits* to the business, *they exceed their authority and misappropriate the resources entrusted to them*, just as employees in charge of warehousing and shipping the company's products would if they made an unauthorized gift of drugs to a clinic in a poor country.[31]

More particularly, Grisez explains that the free distribution of the drugs would be impermissible because it would unjustly deprive one or other stakeholder in the company of their deserved benefit:

> [T]he reduction in profit [caused by free distribution of the drug] either will be unfair to investors or not. If it is, that unfairness excludes this use of the company's resources. If not, then the return investors otherwise would receive must be excessive; and in that case, other participants in the business are getting less benefit than they should for their contributions or paying more than they should for the company's products, and the unfairness should be corrected.[32]

Such a view, however, relies on a static, implausible notion of *fair return*—even if analyzed solely from a purely economic point of view. The apparent assumption is that the economics of the firm are roughly zero-sum, that is, any amount of surplus welfare (profit) must result from an injustice committed against someone else—a deprivation to one of these stakeholders of some amount due. That would be true, if at all, only in the case of equilibrium in a perfect market, which is extremely unlikely to be the case anywhere in modern economics, and certainly unlikely in the oligopolistic pharmaceutical industry where patents protect many products, such as the drug at issue here.

In the case of growing businesses with new products, especially those involving new technology, it is not at all unusual for there to be surplus profit that is not attributable to the input of any stakeholder/shareholder in the sense that allocating that surplus to one would be a violation of justice to the other. Common examples would be the nascent automobile, software, and pharmaceutical industries.

The classic case, of course, is *Dodge v. Ford Motor Co.*,[33] in which Ford's success in mass producing automobiles led Henry Ford to reduce dividends and lower prices.[34] In broad strokes, the case involved a challenge by shareholders (the Dodge brothers who were in competition with Ford), Ford testified that the shareholders were making enough money

[31] Grisez, *Difficult*, *supra* n. 1, at 458. *Id.*
[32] Grisez, *Difficult*, *supra* n. 1, at 457 (emphasis added).
[33] 170 N.W. 668 (Mich. 1919).
[34] *Id.* at 670.

and that he planned to devote the corporation's resources to other goals if and when certain profit targets were met.[35] The Court granted the minority shareholders' demand for higher dividends in large part because of Ford's testimony.[36] *Dodge v. Ford*, however, like so many famous cases, did not really say what it often is cited for, namely, that profit for investors is the only end or purpose of a corporation. In fact, Ford's Board of Directors had refused to pay a special dividend requested by minority shareholders and instead opted to use much of the cash surplus for internal expansion and, presumably, to provide a cushion permitting Ford to pay employees more and to lower the price of its cars.[37] (Henry Ford had testified that his ambition was "to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[38]) Notably, neither the plaintiffs nor the Court disagreed with Ford's proposition that although a manufacturing corporation could not engage in humanitarian works as its *principal* business, "*the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation.*"[39]

Thus, *Dodge v. Ford* stands only for the Court's factual conclusion that, in those specific circumstances, Ford Motor was not being run *primarily* for the shareholders' benefit, but for humanitarian reasons and that the refusal to pay a special dividend was therefore arbitrary and not protected by what has come to be called the business judgment rule.[40] We do not disagree with the holding in *Dodge v. Ford*. Indeed, the experience of the last eight decades has only moved the primary/incidental scale toward Ford's position, as is reflected in public corporate pronouncements in annual reports, SEC filings, and on websites.

Returning to Grisez's drug hypothetical, no suggestion is made that the company is still not being run primarily for shareholders or stakeholders. Due to demand for the product and its beneficial use, the corporation appears to be able to sell the product at a price that (1) provides for a reasonable return for long-term investors, including support for the stock price and dividend payments; (2) is far above its marginal cost, thereby allowing the corporation to pay suppliers and employees market rate returns above that justified by their productivity; and (3) is far below the marginal benefits received by the firm's customers.

Labeling the problem as one of *excess* returns, as Grisez does, begs the very ethical issue facing Managers. Such economic realities, however,

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[35] *Id.* at 671.
[36] *Id.* at 684.
[37] *Id.* at 671.
[38] Id. at 683.
[39] *Id.* at 684 (emphasis added).
[40] *Id.*

rather than resolving the dilemma simply raise the question: excess by what non-controversial economic standard? Grisez has provided no answer to this question that excludes the permissibility of distribution of the drug.[41] In our view, the corporation violates neither a legal nor a moral principle in *diverting* corporate funds to humanitarian purposes, when the basic long-term returns of investors are satisfied and when these other economic benefits can be reasonably maintained. Cases like *Dodge v. Ford* undermine rather than support Grisez's conclusion that the board's only duty is to benefit stakeholders.

This conclusion regarding the implausibility of Grisez's position is further supported by the fact that his view simply proves too much. Such a moral condition would, for example, eliminate in principle the possibility of any corporate deduction for charitable donations currently permitted under the federal income tax scheme. In order for a corporation's donation to qualify as a deduction under conditions of 26 U.S.C. § 170, such a donation must either proceed from *disinterested generosity* or at a minimum, not constitute a quid pro quo benefit. [42] Grisez's restrictive notion of the principle governing corporate asset distribution only to benefit stakeholders would require that every corporate charitable donation be justified by an offsetting benefit—through goodwill or otherwise—equal to or exceeding the contribution itself. This proposition, however, would contradict the very conditions required for charitable donations to be deductible to corporations

[41] In fact, while the exact economic effect of drug companies' philanthropic conduct is difficult to quantify, it appears that significant donations of free drugs and medical treatment to meet the needs of third-world patients is not unusual. "Pharmaceutical companies are often painted as greedy, uncaring institutions, with their efforts to make their pharmaceuticals available to impoverished countries largely overlooked. In 1987, Merck announced that it would make its drug Mectizan available for no charge to those areas of the world afflicted with "river blindness." More recently, Pfizer has made Diflucan available at no cost to people in developing countries. Since 1999, Bristol-Myers Squibb has committed tens of millions of dollars towards educating and treating people with HIV/AIDS in developing nations. GlaxoSmithKline donates its anti-parasitic drug, albendazole, to people living in tropical regions that are at risk of developing lymphatic filariasis." Stephanie A. Barbosa, *"Implementation of the DOHA Declaration: Its impact on American Pharmaceuticals,"* 36 RUTGERS L.J. 205, 246 (2004).

It is doubtful that definitive proof exists that the good will generated by these donations would completely offset the lost profits that would have been available to distribute to stakeholders if the products had been withheld absent some payment by the donees or donee countries or if it had been offered for sale at full or reduced price to other buyers.

[42] *See e.g. Howard v. Commr.*, 39 T.C. 833 (1963); *U. S. v. Transamerica Corp.*, 392 F.2d 522, 524 (9th Cir. 1968); Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, The Nature of the Corporation, and the Social Construction of Charity*, 44 DePaul L. Rev. 1, 40 (1994) ("Since Hernandez, the courts and the IRS have refused to characterize corporate transfers to charity as deductible contributions where the corporate donor received an obvious benefit. The benefits identified to date include: relief of maintenance costs, goodwill advertising, increased market share, and necessary compliance with state enabling legislation."); *see also* Kenneth J. Yerkes, *Corporate Charitable Contributions: Expanding the Judicial Analysis in a Post-Economic Recovery Act World*, 58 Ind. L.J. 161 (1983).

under the Tax Code.[43]

In further objection to Grisez's zero-sum argument, his analysis seems inconsistent with notions of justice that he recognizes elsewhere in his treatise. For example, his comment that it would be unfair to benefit needier people at the expense of shareholders[44] seems inconsistent with his statements elsewhere that "love requires that surplus be used to meet others' needs,"[45] that owners should share their property with others who have genuine needs;[46] that "communal selfishness" is wrongful;[47] and that individuals (and presumably groups controlling unique resources) have an obligation of solidarity to respond to those whose need is much greater than their own, even if far away.[48] Surely, if one has an obligation to share property, one has the *right* to fulfill that obligation.

Grisez's analysis of the hypothetical does not ignore or merely dismiss these concerns. Rather, he seems to excuse them by focusing on the Managers' problem of dealing with stakeholders who have many different personal attributes, thereby suggesting that Managers can engage in justified non-economic behavior only with unanimous consent of all stakeholders—an obviously impossible task even if *need* could be defined. We suggest that this view of justice is too restrictive because it either assumes away or ignores the risks that stakeholders accept when they become part of a corporation.[49]

Even if the corporation were viewed merely as a nexus of contracts, which typically could be amended only with consent, it would not be reasonable for stakeholders to believe that they had veto power over decisions that might affect them based on their individual attributes. For example, even a shareholder who depended on the current level of dividends to meet his or her living expenses could not complain that it was *unfair* for the corporation to reduce or suspend dividends as long as the board determined that doing so was in the best interest of the corporation for *some* legitimate business purpose or other.

In fact, few, if any, publicly held corporations have mission statements or other expressions of purpose that would limit the corporate purposes to economic objectives benefiting stakeholders alone. Changing perceptions regarding social responsibility give even the poorest investors little reason to claim that their reasonable expectations were violated by a

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[43] For further discussion *see* Douglas A. Kahn and Jeffery H. Kahn, *"GIFTS, GAFTS, AND GEFTS"—The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV., 441, 498-501.
[44] *See supra* n. 1, at 457.
[45] Germain Grisez, *The Way of the Lord Jesus Vol. 2: Living a Christian Life* 369 (Fransican Press 1993) [hereinafter Grisez, *Living*].
[46] *Id.* at 800-01.
[47] *Id.* at 419-20.
[48] *Id.* at 432.
[49] We address this issue from the perspective of legal risks, *infra* pt. II(D).

decision to help those needier than the *average* stakeholder. Therefore, we conclude that Managers can *do good* even if they have no reason to believe that all stakeholders would approve of their decision.

In contrast to Grisez's analysis, which is grounded in a concept of purported fairness to individual stakeholders, we believe that a more appropriate approach is to consider whether the Managers have the right to make the expenditure as a matter of justice in light of the two prevailing views of the corporation. We conclude that they do.

First, the corporation may be viewed as a separate legal entity with its own moral autonomy. This so-called structural perspective of corporations is the historical or traditional view. Originally, corporations were viewed as quasi-public entities, formed not just to make a profit—and certainly not to make the highest profit—but to accomplish their defined purposes.[50] The modern corporate form originated in the early days of the industrial economy's need for mass capital for specific purposes such as trans-ocean shipping, insurance, and railroads.[51] As capitalism developed, corporations were chartered for purely private purposes, but making money was still not the only purpose. As argued above, many stakeholders were undoubtedly motivated as much by the desire to produce a good or service of which they could be proud and from which they received personal satisfaction. Saving a significant number of lives would certainly qualify as a legitimate purpose for such stakeholders. Allowing Managers to accomplish those purposes would not violate any notion of justice owed to stakeholders who did not share those same interests because they could certainly be charged with notice that other stakeholders had non-economic interests.

Alternatively, permitting managerial discretion is also consistent with the perspective that corporations are constituted simply by a network of contracts.[52] One of the residual risks that shareholders assume is that the directors they elect will not be as competent, wise, good, or mercenary as they expect. Other stakeholders assume this same risk with even less control since they do not elect the directors or have shareholder control. Permitting Managers to exercise moral choices does not impermissibly

[50] *See, e.g.*, Dirk A. Zetzsche, "*An Ethical Theory of Corporate Governance History*," Center for Business and Corporate Law Research Paper Series http://ssrn.com/abstract=970909, 27-28 (Feb. 2007): "In the first centuries of corporatism (17^{th} – 18^{th} century), companies were semi-public corporations with territorial monopolies. As such, they were predominantly part of the state administration, and only to a lesser degree for-profit-businesses.

[51] "In contrast, modern corporations were founded in order to ensure appropriate financing for businesses that require significant investment in order to succeed in competitive markets. These investments became necessary, as the end of Mercantilism and scientific progress provided for chances to invest in businesses that employed the many new technologies developed in the period of industrialization (railroads, steam machines, etc.)." *Id.* at 28. This history may have influenced Grisez's view of the limited purpose of the corporation

[52] Grisez, *Difficult*, *supra* n. 1, at 458.

exacerbate that residual risk. Stakeholders concerned only about profit-maximization can limit their investments to those companies who purport to eschew corporate philanthropy.[53] In short, the open exercise of moral autonomy by Managers can result in informed and efficient decision-making.[54]

In sum, we believe that Grisez's concerns that the hypothetical expenditure would be unjust to some stakeholders and therefore impermissible are misplaced when considered from the view of economic risk. Stakeholders, in becoming involved with the corporation, incur the risk that management will take action that is not purely profit-maximizing and that is not necessarily economically motivated. Since stakeholders are not guaranteed a cost-benefit analysis based on their personal attributes, how can they be morally entitled to hold management to a purely economic analysis? If management has a moral obligation to forego philanthropy, that obligation must have its source outside the notions of the *rules of the community*.

D. Legal Principles Suggest that Managers Have the Right to "Do Good"

Professor Grisez's analysis and possible reply do not explicitly discuss concepts of corporate law, even though his analysis starts with the proposition that "[t]he common end of every voluntary association is determined by its participants' mutual understanding and consent."[55] Corporate law is the foundation for stakeholders' "mutual understanding and consent" because it provides the default or background rules for their relationships.[56] We contend, therefore, that the legal framework that governs the relationships among stakeholders must be considered in determining whether Managers can *do good* at the economic expense of stakeholders. We do not mean to suggest that an act is morally justifiable just because it can be done without violating the law. Rather, our point is that, contrary to Grisez's analysis, a stakeholder cannot have the understanding that corporate resources may not be devoted to *doing good* if in fact the Managers already have, under existing law, the right to do so without the consent of stakeholders and without even consulting them.

A full discussion of the legal principles regarding corporate philanthropy is outside the scope of this paper.[57] However, a brief

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[53] The conglomerate Berkshire Hathaway, controlled by Warren Buffett, proudly professes to be in this group.

[54] Professor Lawrence Mitchell makes this point forcefully but from a different perspective in Lawrence Mitchell, *Cooperation and Constraint*, 73 Tex. L. Rev. 477 (1995).

[55] Grisez, *Difficult*, *supra* n. 1, at 454.

[56] Stakeholders can, of course, change most of those default rules by specific agreement. However, few publicly held corporations have varied those rules in ways relevant to the present discussion, and Grisez's analysis does not presume any such variations from the norm.

[57] For a more complete discussion and references to other works on the topic, see Leo L. Clarke, Bruce P Frohnen & Edward C. Lyons, *The Practical Soul of Business Ethics: The Corporate Manager's Dilemma and the Social Teaching of the Catholic Church*, 29 Seattle U. L. Rev. 139 (2005).

discussion of the Principles of Corporate Governance of the American Law Institute ("ALI"), increasingly influential in matters of corporate law, demonstrates that under those principles, corporate law would permit the Managers to expend corporate resources to modify and distribute the drug in our hypothetical.[58]

Like Professor Grisez, the ALI Principles reject the principle that a corporation must maximize profits for its shareholders.[59] Moreover, § 2.01(b) supports the conclusion that the corporation need not operate solely to maximize *economic* objectives:

> Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business:
>
> 1. Is obliged, to the same extent as a natural person, to act within the boundaries set by law;
>
> 2. *May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business*; and
>
> 3. May devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes.[60]

The ALI's Comments to § 2.01 also demonstrate that economic benefit is not the sole corporate objective. Comment (f) states:

> In very general terms, Subsection (a) may be thought of as *a broad injunction to enhance economic returns, while Subsection (b) makes clear that certain kinds of conduct must or may be pursued whether or not they enhance such returns (that is, even if the conduct either yields no economic return or entails a net economic loss).*[61]

Comment (h) is even more explicit:

> [O]bservation suggests that corporate decisions are not infrequently made on the basis of ethical considerations

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[58] Principles of Corporate Governance § 2.01 (ALI 2005). The ALI is composed of leading practitioners and academics and is generally regarded as the most prestigious source of legal commentary in the U.S.

[59] Section 2.01(a) of the Principles provides that a corporation "*should have* as its objective the conduct of business activities *with a view to enhancing* corporate profit and shareholder gain." *Id.* at § 2.01(a) (emphasis added to denote the non-mandatory and non-specific nature of the provision). Note that the Principles refer to shareholder gain without mentioning the potential for economic claims of other stakeholders. Yet certainly, if the corporation can ignore the financial claims of the most direct providers of economic benefit, it can ignore the claims of those with more remote and traditionally less cognizable interests.

[60] *Id.* at § 2.01(b) (emphasis added).

[61] *Id.* at § 2.01 cmt. (f) (emphasis added).

> even when doing so would not enhance corporate profit or shareholder gain. Such behavior is not only appropriate, but desirable. *Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account, and it would be unwise social policy to preclude them from doing so.*
>
> *This does not mean that corporate officials can properly take into account any ethical consideration, no matter how idiosyncratic. Because such officials are dealing with other people's money, they will act properly in taking ethical principles into account only where those considerations are reasonably regarded as appropriate to the responsible conduct of business.* In this connection, however, it should be recognized that new principles may emerge over time. A corporate official therefore should be permitted to take into account emerging ethical principles, reasonably regarded as appropriate to the responsible conduct of business, that have significant support although less-than-universal acceptance.[62]

Thus, the ALI's formulation substantially undercuts Grisez's rather uncritical assumption regarding the common good of the corporate community. Under § 2.01(b) of the Principles of Governance, a corporation can decide to *do good* if doing so is (1) supported by an ethical consideration that is sufficiently recognized so as not to be "idiosyncratic;" and (2) "reasonably regarded as appropriate to the responsible conduct of business."[63]

When this formulation is applied, Professor Grisez's conviction about the expenditure not being permissibly for the benefit of a stakeholders in the corporation seem less persuasive.[64] According to the ALI, that lack of economic connection does not matter if the board could justify the expense of modifying the drug on the ground that it is a broadly held ethical view that human lives should be saved even at the cost of utilizing corporate resources. In other words, the ALI's answer to Grisez is that the near-universal outpouring of charity in response to natural disasters demonstrates the existence of an ethical norm that individuals *ought to* use their wealth to address avoidable suffering and death. Certainly, that belief is not so rare as to be *idiosyncratic*, and a Manager could reasonably rely on that ethical

[62] *Id.* at § 2.01 cmt. (h) (emphasis added). Of course, this language might refer more narrowly to the tendency to claim *social responsibility* credit for substituting long term for short-term gains or for simply changing the calculus of determining economic benefit.
[63] *Id.*
[64] Grisez, *Difficult*, *supra* n. 1, at 456-57 and see discussion in text accompanying n. 17 and n. 18.

consideration as one *broadly held* within the meaning of § 2.01(b)(2).[65]

Grisez's objection to the expenditure would have more traction under the second prong of the ALI test, which requires that the expenditure be "appropriate to the responsible conduct of business."[66] Grisez's position that would limit corporate conduct to that which benefit active stakeholders is in part recognized by comment (h) to § 2.01, which explains that Managers do not have total freedom to *do good* because they are "dealing with other people's money."[67] On the other hand, comment (h) also recognizes that corporate officials are *not* less morally obliged than stakeholders to take moral considerations into account. Therefore, *moral considerations* affecting non-stakeholders seem to be appropriate to business considerations.

Yet what conduct counts as "responsible"?[68] Certainly, the ALI must mean more than the responsibility to follow the "rules of the game" (that is, no lying or fraud),[69] otherwise the discretion would be trivial. On the other hand, it is equally clear that Managers cannot dole out resources merely because the corporation has them. The illustrations to § 2.01(b) offer some insight, although they do not directly answer the question posed because they could also be justified as long-term profit oriented. The illustrations to comments (h) and (i) of § 2.01 are also relevant, but they are limited to actions intended to benefit stakeholders other than shareholders.[70] Grisez's drug distribution hypothetical is more difficult than any of these illustrations because the beneficiaries are strangers, not stakeholders.

Does the ALI's failure to include an illustration similar to Grisez's

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[65] Grisez might still object that reducing shareholder returns to modify the drug results violates commutative justice because the common shareholders, as residual risk bearers, are entitled to the money so used. That argument, however, assumes the very point at issue; for § 2.01 provides that the shareholders are entitled to the returns *only* if the modification cannot be justified under the two-part test. In other words, shareholders are entitled only to those returns that result *after* management exercises its discretion under § 2.01.

[66] Principles of Corporate Governance, *supra* n. 58, at § 2.01 cmt. (h).

[67] *Id.*

[68] *See id.* (referring to the "responsible conduct of business").

[69] Principles of Corporate Governance § 2.01 cmt. (h) includes two illustrations. Illustration 11 states that a corporation may honor a contract unenforceable against it under the Statute of Frauds even though the corporation is about to be dissolved. *Id.* Illustration 12 states that the corporation can also refuse to honor the contract and assert the statute as profit-maximizing behavior. *Id.* The comment also refers to Illustrations 13, 14, 19, and 20, which illustrate the application of § 2.01(b)(2). That subsection permits a corporation to devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

[70] The illustrations to § 2.01(b)(3) also deal with such cases. Illustration 19, which deals with a management's refusal to sell or close a money-losing plant in order to preserve jobs, may have been intended to set the outer perimeters of the humanitarian exception to profit-maximization. *Id.* at § 2.01(b)(3). That illustration, however, is distinguishable from the present hypothetical because it involved an indefinite commitment and resulted in a loss of over 25% of the corporation's annual income. (The illustration does state that the action cannot be justified under § 2.01(b)(2) because the corporation is not *obligated* to make the expenditure. But nowhere else in § 2.01 or in the comment is there any indication that a moral *obligation* is a prerequisite to making an expenditure).

case reflect a consensus that the diversion of resources to non-stakeholders would be inappropriate or irresponsible? We think not, especially when the issue is saving so many lives. As comment (i) to § 2.01 states, "[s]ocial policy . . . favors humane behavior by major social institutions."[71] The pharmaceutical company is uniquely situated to provide humanitarian relief because it already has the expertise and is apparently a major, if not sole, potential provider. The stated social policy would be frustrated if a publicly held corporation in the business of making drugs and alleviating human suffering does not have a *prima facie* moral right to act humanely to prevent the death of tens of thousands of people. This is especially so if the drug is patented so that not even the government could accomplish what the Managers propose.[72]

E. Principles of Catholic Social Teaching Favor "Doing Good"

Grisez's analysis can also be questioned in light of the principle of Catholic social teaching that economic activity is justified only to the extent it serves humanity.[73] The relevant principle in Catholic social teaching is whether the corporation, as the most efficient provider of the remedy, is *permitted* to undertake the philanthropy, or whether permissibility is negated, superseded, or tempered by the company's relationships with its stakeholders/shareholders, or by its lack of relationship with the recipients of the modified drug. Catholic social teaching's notions of the universal destination of private property, solidarity, and subsidiarity all suggest an affirmative answer to the first question even given the lack of relationship between the corporation and the beneficiaries.

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[71] *Id.* at § 2.01 cmt. (i).

[72] A different analysis might apply if the hypothetical did not include stipulations that the corporation's viability is not threatened by the proposed expenditure. Incidentally, we note that Professor Grisez's reference to "double-digit" returns on "book value" does not establish that the corporation can afford the expenditure without raising questions regarding the just return due to shareholders. Certainly, a 10% return on an equity investment in a business that depends heavily on research and development would be on the low side. However, "double-digit" also includes returns in the 30% and higher range, which would be extremely high over the long run. In addition, we note that Grisez's analysis appears to be based on an unrealistic conception of fair valuation and just return. Mention of the conception of "book value" in the initial description of the problem illustrates this oversimplification. Grisez, *Difficult*, *supra* n. 1, at 453: "The business has been consistently profitable, and annual profits has exceeded twenty-five percent of book value . . . . "

In general, "book value" constitutes a worst-case scenario valuation consisting of stockholders equity interest after all corporate liabilities have been discounted. Thus, "book value" in no full sense factors in the true value of a company including its future earning potential and other likely contingencies related to its future performance. The Financial Accounting Standards Board (FASB) has, for example, proposed standards for evaluating fair value, a concept generally defined as the price at which an asset might be exchanged in a current transaction between unrelated, knowledgeable parties. Factors affecting fair valuation and just return include, in addition to rudimentary book value: relative scarcity, perceived utility, potential risk/return characteristics, replacement costs or costs of close substitutes, and production/distribution costs including the cost of capital. Principal among corporate valuation methods is not "book value" but rather a discounted cash flow method, under which the price of the stock is valued as a function of the discounted profits (dividends, earnings, or cash flows) the stock will bring to the stockholder in the foreseeable future, including its final value upon disposition. *See e.g.* Stephen Ross et al., *Corporate Finance* 115-30 (Irwin 1990).

[73] *See* general introductory discussion in text accompanying notes 27-29.

1. The Universal Destination of Property

According to Catholic social teaching, each member of the community involved in the corporation must justify his or her actions not solely by their economic return to the member, but also with a view toward the common good of all humanity.[74] Of course, individual stakeholders can participate in the corporate community to obtain the economic return necessary to satisfy the genuine needs of themselves and their families. However, the stakeholder cannot isolate himself or herself from the common good of the society of which he or she is a part. To the extent that the stakeholder controls resources that can be used, not only for genuine needs of his or her family, but also for the broader common good, the obligation exists to consider devoting those resources to furthering that broader interest. Indeed, although Catholic social teaching recognizes private property as a positive good, it also maintains that the owner holds the property as a steward and that all property has a *universal destination* for the benefit of all.[75] Therefore, the Second Vatican Council taught that "men are obliged to come to the relief of the poor and to do so not merely out of their superfluous goods."[76]

The fact that stakeholders have invested some of their property in a corporate community carries with it, as far as we can tell, no blanket immunity for that property from its universal destination.[77] Indeed, because the firm is necessary for the manufacture of complex goods such as the drug at issue,[78] the conclusion becomes virtually inescapable that the property of the corporation—the know-how and other resources necessary to production of the drugs—has the universal destination of meeting the fundamental need of the infected individuals in Africa. As the persons responsible for allocating those community resources, the Managers have every right to consider a role for the corporation in achieving this particularly necessary common good of society.

2. Solidarity

Grisez's focus on the lack of a relationship between the corporation and the potential beneficiaries also fails to give sufficient weight to the principle of solidarity. Solidarity is the bond among human beings that is derived from, and recognized because of, "our common origin and by the

[74] Pope John Paul II, *Centesimus Annus*, *supra* n. 25, at ¶¶ 13, 27-28.
[75] *See e.g.* Pope Leo XIII, *Rerum Novarum* [*Encyclical Letter on Capital and Labor*], http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html (May 15, 1891).
[76] *Gaudium et Spes*, *supra* n. 28, at ¶¶ 69, 73.
[77] Professor Grisez does not mention this concept in his discussion of this hypothetical, though he recognizes its validity and application in other portions of his treatise. Grisez, *Living*, *supra* n. 45, at 800 et seq. Moreover, Grisez recognizes that charity is not an option and that satisfaction of universal destination or property is a serious obligation. *Id.* at 802.
[78] Pope John Paul II, *Centesimus Annus*, *supra* n. 25, at ¶¶ 29, 32.

equality in rational nature of all men, whatever nation they belong to."[79] Solidarity is found across socio-economic lines, and should be manifest in many forms, such as "solidarity of the poor among themselves, between rich and poor, of workers among themselves, between employers and employees in a business, solidarity among nations and peoples."[80]

Grisez does not mention solidarity by name in his analysis of this question, but deals with it indirectly by addressing the objection that the need of the potential beneficiaries justifies the diversion of the corporate assets.[81] Grisez's response is that mercy cannot justify depriving stakeholders of their rightful returns that would permit them to satisfy genuine needs because "mercy is not done at others' expense."[82] Instead, he focuses on the priority of the Managers' responsibilities, asserting that the genuine needs of stakeholders must be fulfilled before resources can be devoted to meeting even more dire needs of lower priority or less deserving claimants.[83]

Contrary to Grisez's argument, however, Catholic social teaching does not support a conclusion that all genuine needs of *prior claimants* are to be satisfied before solidarity requires the satisfaction of genuine needs of others, at least when the latters' needs are more dire. In a world of scarce and limited resources, not all needs—even all *genuine* needs—can be met.

Grisez himself elsewhere recognizes this distinction. In analyzing the question of whether charitable giving must involve an immediate personal relationship,[84] Grisez writes, "[w]hen the needs of people far away are much greater than those close at hand, responding to the latter rather than the former can be a grave violation of one's strict duty to make right use of one's resources."[85] That argument, we believe, applies with special force to the present hypothetical.

The principle of solidarity strongly supports corporate philanthropy in this case. A corporation has a moral right to help a known person or group when the need is great and the corporation is in a proximate position to meet that need. In this regard, Grisez's notion of "prior responsibility"[86] seems at odds with the Gospel command "you shall love . . . your neighbor as yourself"[87] and the Golden Rule "do unto others as you would have them do unto you."[88] As we disagree with Grisez's argument that a parent *cannot*

[79] *Catechism of the Catholic Church* ¶¶ 471, 1939 (2d ed., U.S. Catholic Conference 1997) (citing Pius XII, *Summi Pontificatus* (October 20, 1939)).
[80] *Id.* at ¶¶ 471, 1941.
[81] Grisez, *Difficult*, *supra* n. 1, at 458.
[82] *Id.* at 457-58.
[83] *Id.*
[84] *Id.* at 428 (Question 95).
[85] *Id.* at 432.
[86] Referring to Grisez, *Difficult*, *supra* n. 1, at 458.
[87] *Luke* 10:27.
[88] *Matthew* 7:12.

donate to famine relief if it means depriving her own child of a *genuine need*,[89] such as piano lessons (development of talents) or a book of Shakespeare's plays (satisfying the need of education); So, we conclude that corporate Managers need not forego life-saving philanthropy just because it might reduce shareholder returns.[90] As a matter of solidarity, Managers have the right to make difficult decisions as to whether and when corporate resources can be devoted to satisfy needs of non-stakeholders, even when genuine needs of some stakeholders may go unsatisfied as a result.

3. Subsidiarity

The principle of subsidiarity states that a community of a higher order should not assume the responsibilities belonging to a community of a lower order, thereby depriving it of its authority.[91] Rather, the larger community should support the smaller entity in case of need. Stated otherwise, subsidiarity may be considered the Catholic social teaching equivalent of a principle of proportional efficiency. Applied in the context of Grisez's hypothetical, it suggests that Managers should be empowered to undertake the philanthropy if the corporation is in fact the most reasonable provider of that remedy.

Grisez's suggestion that individual members of the corporate community should voluntarily band together to solve the problem[92] is not only unrealistic practically—because the individuals do not have the right to the patent—but also because their *ad hoc* efforts would be inefficient. As a larger organization should not undertake activities that can be handled by a smaller unit of society, Catholic social teaching recognizes that large economic institutions sometimes are precisely the appropriate actor to address the needs of the marginalized.

Subsidiarity can also serve as a limiting principle on the right of Managers to engage in philanthropy. The Managers have the right here because the corporation is the most efficient source of the required aid. Managers of another drug manufacturer might not have the right to engage in the extensive philanthropy required to develop a drug *from scratch*. Nor

[89] "Genuine needs are marked out by the basic human goods, which are intelligible reasons for action, considered as the object of a will toward integral human fulfillment. So, *genuine needs* refers not only to the basic necessities but to the less obvious yet real needs for religious, moral, and cultural goods." Grisez, *Difficult*, *supra* n. 1, at 436. Developing the distinction between basic needs versus genuine needs, Grisez states, "Sometimes . . . subsistence needs do not deserve priority. For example, meeting in moderate ways the religious, moral, and cultural needs of one's own children takes priority over feeding someone else's, even if the latter are starving; parents are not free to be merciful at their children's expense." *Id.* at 438. While we generally agree that there may be no moral *obligation* to deprive one's children of genuine needs, we believe a parent may under the proper circumstances permissibly *choose* to alleviate a dire basic need in another even at the cost of a child's genuine, but not basic, need.
[90] The needs mentioned are genuine in that they would be used in living a good moral life even though they are not necessities. Grisez, *Living*, *supra* n. 45, at 801.
[91] *Compendium of the Catechism of the Catholic Church* ¶¶ 404, 116 (USCCB Publg. 2006).
[92] Grisez, *Difficult*, *supra* n. 1, at 458-59.

would the Managers of a computer manufacturer likely have a right to contribute large sums to fund the development of a new drug. In most such situations, we would agree with Grisez, that those Managers should leave it to individual stakeholders to determine how their property should be allocated among the many unmet needs of society.

In sum, Grisez's prudential judgment on this hypothetical is not unassailable from the perspective of Catholic social teaching. We conclude that an individual who stood in the shoes of the corporation would have a moral right to provide the modified drugs and save those lives, even if it meant depriving his family of some goods. Since the essence of the corporation from the moral point of view is nothing more than a community of its stakeholders, the community has the right to respond more or less as a reasonable individual would. Stakeholders cannot prevent the community from exercising moral rights simply by appointing fiduciaries to manage their money for them. Therefore, the fiduciaries are free to make decisions that would be morally permissible for the community of stakeholders.

III. THE OBLIGATION TO *DO GOOD*

A. Does an Obligation to "Do Good" Exist?

Since Grisez concluded that the corporation does not have the right to expend funds to modify the drug,[93] he would necessarily determine that the corporation and its Managers are under no obligation to save lives by incurring the expense of modifying the drug. This does not mean that Grisez believes that Managers are free of any moral obligation. He recognizes, for example, that Managers "can be morally required to act for outsiders' interests insofar as that is conducive to the business's own survival and flourishing."[94]

We agree with Professor Grisez that Managers have an obligation to promote the common good. We would disagree, however, with the suggestion that his analysis can be interpreted to support a conclusion that the obligation is necessarily limited to the common good *of the specific corporate community.* Rather, we believe that—absent any other complications of the hypothetical—the commands of social justice *require* the corporation to modify its drug. The Managers and the corporation, just like all citizens, have an obligation of solidarity to their neighbors, the fulfillment of which enhances the common good of society.

In his analysis or possible reply, Grisez does not refer to the moral responsibility of the corporation itself. This silence cannot be construed as an argument that the corporation does not have moral responsibility or that stakeholders do not retain moral responsibility over the use of resources they invest in corporations. Whether a corporation is viewed as a separate

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93 Grisez, *Difficult*, *supra* n. 1, at 457.
94 Grisez, *Living*, *supra* n. 45, at 455.

juridical person[95] or as a nexus of contracts through which individuals accomplish their own purposes,[96] stakeholders cannot evade personal moral responsibility for their investment any more than the Pharisees could evade their obligations to their parents by declaring their property subject to Corban.[97] Indeed, as mentioned above, Grisez expressly warns that the failure to honor solidarity as a serious obligation is a grave moral wrong.[98] Nor does Grisez view solidarity narrowly. For example, he warns that one may not buy an expensive car if a cheaper one will meet one's basic genuine need for transportation.[99] He makes it clear that this obligation applies equally to each community, which would include a corporation.[100]

B. A Limiting Principle

If we are correct that Grisez would recognize an obligation to *do good* as a general principle, then we must explain why he did not find such an obligation in his hypothetical case. We believe the explanation may be found in the difficulties of developing a principle for limiting that obligation. That is, Grisez must have felt a need to limit the *do good* obligation so that corporations and their stakeholders are not unduly burdened by the perceived need to help all those who would benefit from corporate beneficence. This problem, though thorny, is no different from the problem always presented by the demands of charity: To what extent is an individual, family, or community obligated to forego its own flourishing to assist those in greater need?[101]

Grisez addresses this problem in general terms elsewhere in his treatise when he discusses whether a Christian's obligation of charity, or his right to retain property, can vary with his social condition and status or "station in life."[102] Grisez rightfully concludes that statements made by Pope Leo XIII in *Rerum Novarum* and by St. Thomas Aquinas cannot be interpreted to permit a Christian to retain property which could be used to meet the genuine needs of the poor simply because of one's social status.[103] However, Grisez does find a limiting principle in the individual's personal

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[95] *See e.g.* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 Stan. L. Rev. 1471, 1475 (1989).
[96] Grisez, *Difficult*, *supra* n. 1, at 458.
[97] *See Mark* 7:11.
[98] *See supra* n. 74.
[99] Grisez, *Living*, *supra* n. 45, at 804.
[100] *Id.* at 805.
[101] Note that this sentence was limited to *flourishing* whereas Grisez's above statement, *supra* n. 85, refers to "survival and flourishing." We do not suggest here that any person, whether natural or corporate, has an *obligation* to sacrifice its own survival for another. Here, therefore, we are continuing with the hypothetical's assumption that the corporation can modify the drug without unduly compromising long term profitability.
[102] Grisez, *Living*, *supra* n. 45, at 805-06.
[103] *Id.* at 805: "Vatican II points out that some of the Fathers and Doctors of the Church teach that 'one is obliged to come to the relief of the poor, and to do so not merely out of one's superfluous goods."

vocation or the community's mission.[104] Undoubtedly, it was this limiting principle that supported his analysis of the drug hypothetical. The corporate community's mission was the economic benefit of its members, and the retention of property was justified by that purpose, despite the legitimate needs of the African poor.

Once again, we reach a different prudential judgment. We suggest that the community's mission is not a limiting principle, but rather can itself include the relationship between the need and the particular ability of the community to satisfy that need; so long as the corporation remains viable and provides a just return to its stakeholders.[105] Thus, we agree with Grisez that Managers have an *a priori* obligation rooted in commutative justice to honor their commitments to stakeholders, including the payment of a fair return to shareholders. The question then becomes how to differentiate between the needs of stakeholders and the surplus that must be used to *do good*. Grisez recognizes that this is a "matter of more and less," both in quantity and degree.[106] Each person, whether acting as an individual or a Manager, must make a prudential judgment when he controls resources that are surplus and therefore subject to the obligation to *do good*. Such decisions are very familiar to Managers in other contexts. For example, Managers must frequently decide whether the corporation has sufficient surplus to grow either internally, or by acquisition of another business. Although decisions to grow are frequently made on the basis of prestige or their effect on executives' own compensation, in the present context the decision would be made on the basis of the needs of those less fortunate.

The identification of surplus does not, however, resolve the issue in the same sense as an individual's conclusion that he has surplus property. In that event, his or her only remaining decision is the purpose in justice or mercy to which the resources should be employed;[107] but in the corporate context there is an intermediate issue involving who should make the decision—the Managers or the individual stakeholders. Grisez's analysis of the drug hypothetical suggests a strong conviction that subsidiarity requires that the decision be left to the stakeholders, and as indicated above, we would agree in most situations. Where the surplus resources are simply profits, their fungible nature suggests that stakeholders can distribute them at least as efficiently as the corporation. Individual stakeholders understand their own preferences best and are in at least as good a position as Managers to comprehend the needs of potential beneficiaries.

The answer might well be different, however, when the surplus is

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[104] *Id.* at 806.

[105] A full discussion of the doctrine of *just price* or *just return* is beyond the scope of this paper. *See* Grisez, *Difficult*, *supra* n. 1, at 614-20.

[106] Grisez, *Living*, *supra* n. 45, at 369.

[107] For an excellent discussion of how that question might be answered, see Grisez, *Difficult*, *supra* n. 1, at 428-34.

not financial, but consists of specific products, equipment, know-how, and other resources that are most efficiently employed and/or distributed by the corporation. Managers are in a better position to appreciate the uses of those resources and also, in light of their dealings with the corporation's customers, to ascertain the potential uses and benefits that may satisfy the genuine needs of potential donees. In such circumstances, the considerations of subsidiarity discussed in the preceding paragraph would not apply. Instead, the common good will be most enhanced by corporate philanthropy and the corporation would be obliged to act accordingly.

C. Catholic Social Teaching in a Post-Christian World

One final objection must be considered. In our discussion of the right to *do good*, we did not discuss whether Managers could ethically employ their religious-based ethical views in determining whether to *do good*. That omission was based on the fact that the ALI Principles of Corporate Governance permit Managers to employ any non-idiosyncratic ethical principle. Since Christianity can arguably be considered a widely held ethical system, even in our current culture, we concluded that even non-Christian Managers could employ Christian ethics to affect the interests of non-Christian stakeholders.

That analysis does not apply, however, equally to the issue of a managerial obligation to *do good* because no legal principle recognizes that *obligation*. Nevertheless, we believe that Managers still have such an obligation to the extent that such religious obligations overlap with the demands of absolute ethical moral norms forming part of "natural ethics."[108] First, it would be a material cooperation with evil for a Christian Manager to retain his employment and fail to execute that obligation.[109] Therefore, as long as the Manager is so employed, he is so obligated. Second, the Church teaches that its pronouncements on social and economic matters, coinciding with the tenets of natural ethics, "belong to the Church's doctrinal patrimony and, as such, involve the exercise of her teaching authority."[110] Therefore, such principles apply to all persons, not just Catholics. All

[108] "Those who, on the basis of respect for individual conscience, would view the moral duty of Christians to act according to their conscience as something that disqualifies them from political life, denying the legitimacy of their political involvement following from their convictions about the common good, would be guilty of a form of intolerant *secularism*. Such a position would seek to deny not only any engagement of Christianity in public or political life, but even the possibility of natural ethics itself." Vatican Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life, No. 6.

[109] *See id.* at 459 et seq.

[110] Pope John Paul II, *Centesimus Annus*, *supra* n. 25, at ¶¶ 3, 5. These principles of social teaching do not, however, include specific "analysis of events of recent history" which does not fall within the Magisterium's specific domain. *Id.* Thus, the Church does not purport to be stating hard and fast rules applicable to each and every situation. Instead, its social teaching sets forth principles of general guidance to assist in making prudential judgments regarding specific ethical situations.

persons, natural or legal, have the obligation.[111]

Finally, as Grisez eloquently explains, persons should forego rights as a matter of justice for the sake of mercy in favor of those in dire need.[112] Thus, justice requires stakeholders to forego rights to corporate resources they might otherwise claim, in order to help those with genuine needs of basic sustenance that the corporation is particularly well-situated to satisfy. If that proposition is accepted, then the Manager is not in violation of a legitimate right of the stakeholder to the corporate resources.

IV. CONCLUSION

We have attempted to illustrate in broad strokes a model of managerial freedom—and even an obligation—to engage in philanthropic conduct that differs in significant respects from that suggested by Germain Grisez. Grisez's narrow conception of the nature of the corporation as essentially ordered to the economic benefit of its stakeholders unnecessarily restricts the actions that can follow from that nature. While he denies that profit maximization is an appropriate standard for economic activity, it is difficult to avoid the conclusion that he eventually falls back into what might be termed an *enlightened* profit maximization ideal, that is, a view that a corporation must indeed maximize profits, not just for shareholders as the traditional concept of maximization has been implemented, but rather for all *stakeholders*. In keeping with this "metaphysical" description of its nature, Grisez believes that only actions consistent with that natural "end" are permissible, and accordingly any actions that would reduce the profit that otherwise could be distributed to those stakeholders would be impermissible.[113]

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[111] Cf., e.g., McGowan v. State of Md., 366 U.S. 420, 442 (U.S. 1961): ". . . [T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. (citation omitted) The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue."

[112] Grisez, *Living*, *supra* n. 45, at 370.

[113] In Grisez's philosophical writings, he rejects the movement from *is* to *ought* in practical matters as a philosophical error. Applying this to his elaboration of *natural law* theory, he proposes that it is improper to regard knowledge of moral norms as merely a process of reading or deducing norms from a static preexistent metaphysical conception of human nature. "[S]cholastic natural-law theory must be rejected. It moves by a logically illicit step—from human nature as a given reality, to what ought and ought not to be chosen." Germain Grisez, *The Way of the Lord Jesus Vol. 1: Christian Moral Principles* 104 (Franciscan Herald Press 1983). For Grisez, a full grasp of human nature itself obtains only subsequent to, and based upon, reflection on practical reason's constitutive grasp of human intelligible goods. Reasoning analogously, about the proper conduct of a corporation, Grisez appears to adopt precisely the standpoint he rejects in natural law theory, i.e., he attempts to develop a corporate ethic based on a preconception about the nature of a corporation, attempting to deduce from that speculative conception its ethical obligations. The preceding argument suggests, in keeping with Grisez's own approach in natural law theory, that a more appropriate analysis of the ethical norms of a corporation can be derived from analysis of the actual exercise of corporate activity, one that reveals a richer conception of the corporate common good than mere economic good.

As the preceding discussions have attempted to illustrate, however, such a conception of a corporation conflicts with the inference about its nature that a rational actor could draw from the actual behavioral conduct of modern public corporations, their public statements, and representations to shareholders. Further, his account conflicts with fundamental statements of corporate law and seemingly, with Catholic social teaching. Based on these alternative theoretical and behavioral sources, it is difficult to accept Grisez's *enlightened* neo-classical model of a corporation. Such an interpretation strikes us as a type of metaphysical speculation that finds no confirmation either in modern practice or theory. Serious grounds exist for questioning the weight of Grisez's view as either a descriptive or normative theory of corporate ethics.

Alternatively, significant support from those same sources can support a different view of the nature of corporations. In our *expanded* view, a corporation, as a *corporate legal person*, is generally allowed an analogous moral and economic freedom, similar to that enjoyed by an *individual person*—limited by only one condition. Since the voluntary association of individuals into a corporation does, as we agree with Grisez, specifically involve an expectation of *fair* profit, that condition does limit Managers' freedom. Managers must coordinate their efforts to seek a reasonably fair rate of return to all their stakeholders.[114] Contrary to Grisez's view, however, this limitation does not require Managers to distribute *all* profit to stakeholders.

Grisez's view notwithstanding, it may be entirely possible, in a variety of corporate and economic circumstances, for a corporation to generate enough profit to remunerate equitably all stakeholders under reasonable and acceptable economic standards of fair return, yet still have resources left over to benefit needy third-party non-stakeholders. In fact, if this were not the case, at least some of the charitable conduct and contributions of almost every public corporation would be put into question. Subject to the weak condition that Managers seek first to provide a fair return to their stakeholders, and not a maximized return, no reason exists to deny corporate Managers the right, and even in certain cases the moral obligation, to employ corporate resources in philanthropic conduct, or more simply, *to love one's neighbor*.

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[114] We leave for another day an analysis of whether a corporation with a particular ability to meet a specific need might have an obligation to satisfy that need even at the cost of denying stakeholders a *fair* return.