Valparaiso University Law Review

Volume 42
Number 4 *Symposium: Unethical Says Who?: A Look at How People and Institutions Help Businesses Fulfill Their Ethical Obligations*

*pp.*1129-1168

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Colin P. Marks

JIMINY CRICKET FOR THE CORPORATION: UNDERSTANDING THE CORPORATE "CONSCIENCE"

Colin P. Marks*

I. INTRODUCTION

In Disney's classic retelling of the fable *Pinocchio*, soon after being granted life by the Blue Fairy, Geppetto's wooden boy is assigned a conscience in the form of the talking insect, Jiminy Cricket.[1] The implication of this assignment is clear; as Pinocchio is not yet a real boy, he does not possess a conscience and must rely on an external voice, such as Jiminy Cricket, to tell him what is right from wrong. Throughout the movie, Pinocchio gets into a number of misadventures including some debacles resulting from ignoring his assigned conscience (including one in which he is half-transformed into an ass).[2]

In this sense, Pinocchio makes an appropriate analogy for the modern American for-profit corporation. Like Pinocchio, the corporation is an artificial entity created by humans. It is then given "life," so to speak, by the states and interacts with the individuals and society around it. And like Pinocchio, corporations have often found themselves embroiled in misadventures, seemingly from acting without a conscience. Other commentators have characterized corporations as soulless,[3] analogizing them to the tin man of the Wizard of Oz[4] (who has no heart) or the Jewish Golem, which can only mindlessly carry-out the instructions slipped into its mouth on a piece of paper.[5] But are corporations truly without any sort of conscience or do they also have a

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1 *See generally* PINOCCHIO (Walt Disney Pictures 1940).

2 *See id.*

3 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 134 (3d ed. 2005).

4 Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1646-47 (2002).

5 LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 44 (2001); RALPH ESTES, TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS 21 (1996).

"Jiminy Cricket"–an external voice that influences them to act in a way that could be deemed "right" or "good?" The question is a difficult one, in part because defining what is "right" is such a subjective task. However, if we view corporate behavior more broadly, to turn the question to what causes corporations to engage in conduct that benefits society, we understand that some external force or forces must direct the corporation. This Article seeks to analyze the external forces that curb or drive corporate behavior as they relate to activities that benefit society in the context of having a "conscience."

Part II of this Article examines the corporation from a historical perspective, tracking its evolution from a small number of specially chartered organizations with a limited, publicly oriented purpose, to the modern, highly regulated profit-making organizations of today. Part III examines whether the modern corporation can have a conscience and what that term means with regard to such an artificial entity. Part IV identifies three driving forces behind what will be termed corporate behavior that is beneficial to society: behavior driven by legal compliance; behavior that also benefits the corporation; and, behavior that is seemingly driven by altruistic (or semi-altruistic) motives. Part V reflects upon how these categories can be used to evaluate corporate behavior.

II. EVOLVING PURPOSE OF THE CORPORATION

Before delving into the task of categorizing the basis of corporate behavior, it is useful to reflect upon how the modern corporation evolved in America. This is more than a mere academic exercise as it is important to understand what role the corporation has played in American history to understand its current status.[6] And, as we will see, this status is essential to understanding what drives corporate behavior.

A. Historical Underpinnings of the Corporation

Though the earliest forms of the corporation can be traced as far back as Roman times,[7] it did not begin to take on its current form in America until the mid-to-late nineteenth century with the emergence of general

[6] *See, e.g.,* Sarah H. Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The Disney Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211, 219 (2006) (reviewing the development of the corporation in America to explain how the law has struggled with holding directors accountable).

[7] 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 1 at 3 (Carol A. Jones ed., 2006); Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 S.M.U. L. REV. 23, 25 (2002).

incorporation statutes.[8] The earliest forms of the corporation in America came by specific charters from the states in the late eighteenth century, which were carried-over from the colonial days when corporations obtained charters directly from the King of England.[9] Corporations were formed with limited purposes and even time limits within which they could operate.[10] The typical corporation would be formed to complete some specific task, such as to build a canal or bridge, and would only be given a charter for a period of five, twenty, or thirty years.[11] The number of corporations was also extremely limited, with only 335 granted in the entire eighteenth century, 181 of which were granted between 1796 and 1800.[12] Most of these were chartered for some specific aspect of the public good, such as building utilities, and very few were for manufacturing purposes.[13]

The early limitations placed upon corporations were in large part a result of the inherent distrust that the public had for the corporation.[14] Corporations at that time were monopolistic by their very nature because they maintained exclusive control over some public asset or business opportunity.[15] There were also concerns over the concentration of wealth that was centered in a corporation.[16] As Justice Brandeis recounted in his dissent in the chain store tax case of *Louis K. Liggett Co. v. Leeu*,[17]

> There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So at first the corporate privilege was

8 FRIEDMAN, *supra* note 3, at 130, 390; Susan P. Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 84-85, 104-06 (1999).

9 Hamill, *supra* note 8, at 88 ("Corporations always have been creatures of statute, requiring a formal recognition normally evidenced by a corporate charter issued by a sovereign person or government.") (citation omitted); *see also* FRIEDMAN, *supra* note 3, at 129-30.

10 FRIEDMAN, *supra* note 3, at 131-32.

11 *Id.*

12 *Id.* at 129; FLETCHER, *supra* note 7, § 2 at 8 ("The cloud of disfavor under which corporations labored in America was not dissipated until near the end of the eighteenth century, and during the last 11 years of that period, the total number of charters granted did not exceed 200.").

13 FRIEDMAN, *supra* note 3, at 130-32, 134 (noting that a "mere handful" of these early corporations were established for manufacturing purposes); ESTES, *supra* note 5, at 22-24.

14 FRIEDMAN, *supra* note 3, at 132.

15 *Id.*

16 Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).

17 288 U.S. 517 (1933).

> granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.[18]

However, while public suspicion of corporations may have remained,[19] economic necessity altered the limited grant of the corporate privilege in the nineteenth century.

One of the most significant changes was the shift of granting corporate status via special charter by the state legislatures to the enactment of general incorporation statutes. At the start of the nineteenth century, corporations were still relatively rare, and the special charter system made sense.[20] However, as the country grew, the practice of issuing special charters became burdensome.[21] As legal historian Lawrence Friedman describes,

> In theory, the special charter system was a good way to control corporations. But the demand for charters, in the end, got to be too heavy. By the 1840s and 1850s, it would have swamped the legislatures, if the process had not become so routine. Even so, state session laws bulged with special charters. Time was wasted in the drudge work of issuing, amending, and extending hundreds of charters. In the rush, there was little time to supervise those charters that perhaps needed supervision.[22]

To combat this problem, states began enacting general incorporation statutes.[23] In 1809, Massachusetts passed a general incorporation act for manufacturing companies, and New York soon followed with its own general incorporation statute in 1811.[24] By the 1850s, over twenty states

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18 *Id.* at 549 (Brandeis, J., dissenting).

19 *Id.*

20 FRIEDMAN, *supra* note 3, at 134.

21 Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 426 (2003) (noting that by the 1820s, demand by business people for corporate charters was growing rapidly).

22 FRIEDMAN, *supra* note 3, at 134.

23 *Id.*; Blair, *supra* note 21, at 425-26.

24 Blair, *supra* note 21, at 425-26; *see also* FRIEDMAN, *supra* note 3, at 134 (noting that New York is generally credited as the first to enact a general incorporation law for business corporations).

had passed general incorporation statutes,[25] and by 1875, general incorporation laws were available in virtually every state.[26]

Though general incorporation laws were available, the special charter system did not entirely disappear, and, indeed, many incorporators still chose the special charter route.[27] Although most every state had a general incorporation statute or law by 1875, only eighteen states had prohibited special charters.[28] The reasons for electing to incorporate by special charter varied from concerns over the prestige of being incorporated under a general incorporation statute to more seedy motives, such as securing favorable arrangements from the state that would not be available to others.[29] Ultimately, concerns over such behavior and a weakening of confidence in public officials led to state constitutional prohibitions on special charters.[30] However, the practice continued in many states early into the twentieth century.[31]

During the nineteenth century, the corporate form as we know it today also began to take shape. The basic characteristics of a corporation—entity status with perpetual life, separation of ownership from management and limited liability—all began to take hold in the minds of American jurists and scholars.[32] The view of the corporation was expressed early in the nineteenth century by Justice Marshall in the seminal case of *Dartmouth College v. Woodward*.[33] In *Dartmouth College*, the Supreme Court was faced with whether the state of New Hampshire could unilaterally alter the charter originally granted to Dartmouth College's trustees by the British Crown in 1769.[34] In 1816, New Hampshire passed an act which attempted to transform Dartmouth College into Dartmouth University.[35] The most significant part of the act altered the mode of governance provided in the college's original charter by increasing the size of the board of trustees from twelve to twenty-one and provided that the new members would be appointed by the

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25 Blair, *supra* note 21, at 426.
26 Hamill, *supra* note 8, at 123.
27 FRIEDMAN, *supra* note 3, at 135.
28 Hamill, *supra* note 8, at 123.
29 *Id.*; FRIEDMAN, *supra* note 3, at 135 (commenting that "[t]here were unscrupulous incorporators, and there were recurrent bribery scandals.").
30 FRIEDMAN, *supra* note 3, at 135; Hamill, *supra* note 8, at 123-27.
31 Hamill, *supra* note 8, at 127-29.
32 FRIEDMAN, *supra* note 3, at 135; HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937 49-50 (1991); Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).
33 17 U.S. 518 (1819).
34 *Id.* at 624-26.
35 *Id.* at 626.

governor.[36] The existing trustees objected and brought suit, claiming that the New Hampshire act violated the Contract Clause of the United States Constitution.[37]

The Supreme Court agreed with the trustees and found that the charter was in fact a contract between Dartmouth College and the state.[38] In the course of his analysis, Justice Marshall set forth what it meant legally to be a corporation, stating:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyance for the purpose of transmitting it from hand to hand. . . . By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it is created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be.[39]

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36 *Id.*; R. Kent Newmyer, *John Marshall as a Transitional Jurist:* Dartmouth College v. Woodward *and the Limits of Omniscient Judging*, 32 CONN. L. REV. 1665, 1666 (2000).

37 *Dartmouth College*, 17 U.S. at 626-27.

38 *Id.* at 627 ("It can require no argument to prove that the circumstances of this case constitute a contract.").

39 *Id.* at 636.

Justice Marshall's opinion essentially became the starting point for the developing law of corporations.[40] Though the decision in *Dartmouth College* did not specifically analyze a business corporation, the result was understood to go beyond simply a small college charter.[41] The Court's ultimate conclusion was that a charter was a valid contract that could not be unilaterally altered by the state in violation of the Contract Clause, just as the state could not unilaterally alter a contract with an individual.[42]

While some predicted that the *Dartmouth College* case signified a sweeping change in the relationship between the state and the corporation, its effect on corporate law turned out to be less significant.[43] As Justice Story had pointed out in his concurrence in *Dartmouth College*, if the state wished to alter the terms of a corporate charter after granting such charter, such authority "must be reserved in the grant."[44] Apparently, the states took this advice to heart, as it soon became a part of multiple state incorporation statutes.[45] Although this effectively overruled *Dartmouth College*, in actuality, the states exercised little control over their corporate creations.[46] This is not surprising because the very nature of general incorporation and the subsequent increased number of corporations militated against the state legislatures' ability to regulate individually each corporation it created.[47] By the close of the

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40 *See* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1450 (1987) (noting that the language and structure of Justice Marshall's opinion were followed throughout the nineteenth century); Arner, *supra* note 7, at 50 (stating that Marshall's opinion, as modified by Justice Story's concurrence, became the "starting point by Joseph Angell and Samuel Ames in their Treatise on the Law of Private Corporations Aggregate") (citation omitted).

41 FRIEDMAN, *supra* note 3, at 136.

42 *Dartmouth College*, 17 U.S. at 643-46.

43 FRIEDMAN, *supra* note 3, at 137.

44 *Dartmouth College*, 17 U.S. at 712 (Story, J. concurring).

> In my judgment it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean[s] [sic] to claim such an authority, *it must be reserved in the grant.*

Id. (emphasis added).

45 FRIEDMAN, *supra* note 3, at 137; Mark, *supra* note 40, at 1454 ("The legislatures immediately began to include clauses reserving to the state the power to amend or repeal the charters that they granted.").

46 Mark, *supra* note 40, at 1454 .

47 *Id.*

nineteenth century, charter-based regulation had failed, and corporate behavior began to be governed by more general regulations.[48]

B. The Development of Corporate Law in the Late Nineteenth and Twentieth Centuries

With the advent of the corporation transforming from a special franchise of the state to a private business organization, state control over each individual corporation diminished.[49] By the close of the nineteenth century, shareholders, rather than the state, became responsible for disciplining corporate managers and directors, but the standard of manager behavior had gradually declined throughout the nineteenth century.[50] As Herbert Hovenkamp recounts, "by 1890 those in control of the corporation were legally answerable for virtually nothing but illegality, clearly ultra vires acts . . . or gross negligence."[51] The environment for investors was also turbulent in the late nineteenth century. As Lawrence Friedman describes, "[t]he investment market was totally unregulated; no SEC [Security Exchange Commission] kept it honest, and the level of morality among promoters was painfully low, to put it mildly. . . . The investing public was unmercifully fleeced."[52] However, this would all soon change.

1. The Curbing of Corporate Behavior

Throughout the late nineteenth century and continuing through to modern day, much of corporate law was developed through a pattern of public outcry followed by legislative action. In some cases, this was precipitated by a single event, while in other cases, a general distrust of corporate power initiated the action. An example of the latter can be found in the development of the antitrust laws.

At the close of the nineteenth century, there was a growing distrust of the amount of power held by corporations.[53] The growth of major corporations after the Civil War increased the long-held fear of monopoly amongst the public, particularly amongst farmers, workers, and small businessmen.[54] In response to these fears, the Sherman Act

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48 *Id.* at 1445; HOVENKAMP, *supra* note 32, at 56.
49 HOVENKAMP, *supra* note 32, at 56.
50 *Id.*
51 *Id.*
52 FRIEDMAN, *supra* note 3, at 391; Duggin & Goldman, *supra* note 6, at 222 (quoting Friedman).
53 FRIEDMAN, *supra* note 3, at 346.
54 FRIEDMAN, *supra* note 3, at 346; HOVENKAMP, *supra* note 32, at 241.

was passed as a means of breaking-up the so-called "trusts" which were viewed as restricting trade and competition.[55] The Sherman Act's early history was shaky, with courts narrowly interpreting the Act.[56] However, under President Theodore Roosevelt, enforcement of the Act received a boost, and subsequent victories in the Supreme Court as well as the establishment of the Federal Trade Commission ("FTC") and passage of the Clayton Act helped to transform the antitrust laws into meaningful regulations.[57] Today, antitrust concerns are not near the level of hysteria that evoked the regulation, but the laws have more of a real effect.[58] As Lawrence Friedman has noted, early in American history individuals such as "John D. Rockefeller could swallow up competitors at will; the modern merger barons must humbly beg permission."[59]

While the antitrust movement was in reaction to a fear of the economic power of the corporation, more often corporate law developed as a reaction to everyday corporate behavior.[60] A classic example is in the development of the food and drug laws. While individual states had their own regulations, Congress was compelled to pass such laws in the wake of Upton Sinclair's 1906 novel *The Jungle*, which described in graphic detail the hellish conditions of meatpacking plants in Chicago.[61] The novel generated such disgust and public outcry that President Theodore Roosevelt hired investigators, who confirmed much of the novel, and the Food and Drug Act swiftly sailed through Congress.[62]

This pattern of curbing unethical corporate behavior continued throughout the twentieth century.[63] For example, around the same time as the Food and Drug Act's passage, Congress passed worker's compensation and safety regulation laws, largely in reaction to safety concerns over the operation of the railroads.[64] Additionally, the

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55 *Id.* As Friedman notes, the use of the word "trust" was a vestige, as holding companies were actually used, rather than trusts, to put monopolies together. *Id.*

56 LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 55 (2002) [hereinafter "FRIEDMAN, 20TH CENTURY"].

57 *Id.* at 55-59; FRIEDMAN, *supra* note 3, at 349.

58 FRIEDMAN, 20TH CENTURY, *supra* note 56, at 392-93.

59 FRIEDMAN, *supra* note 3, at 349.

60 FRIEDMAN, *supra* note 3, at 392 ("The law of corporation, as such, deals less with the economic power of corporations than with their everyday behavior.").

61 FRIEDMAN, 20TH CENTURY, *supra* note 56, at 60-61; *see also* U.S. Food and Drug Administration, *The 1906 Food and Drugs Act and Its Enforcement*, *available at* http://www.fda.gov/oc/historyoffda/section1.html (crediting Sinclair's book as the final precipitating force behind a comprehensive food and drug law).

62 FRIEDMAN, 20TH CENTURY, *supra* note 56, at 60-61.

63 FRIEDMAN, *supra* note 3, at 559-61.

64 FRIEDMAN, 20TH CENTURY, *supra* note 56, at 62.

Securities Act of 1933[65] and the Securities Exchange Act of 1934[66] were enacted to address abuses in the issuance and trading of securities, which were seen as helping to cause the great stock market crash of 1929.[67] More recently, much of the Sarbanes-Oxley Act was passed as a response to the latest spate of corporate scandals that plagued the beginning of the twenty-first century.[68] A general theme that seems to have developed through these regulations is that corporations cannot be trusted to police or regulate themselves, and, therefore, external pressures must be applied.

2. The Relationship between Management and Shareholders

At the close of the nineteenth century, corporate managers and directors were virtually answerable for nothing short of illegal or *ultra vires* acts. However, beginning in the mid-nineteenth century, courts began to recognize a method by which shareholders could sue the corporate directors—the derivative suit. The derivative suit, or stockholder's suit, is an action typically brought by shareholders on behalf of the corporation against "a third party (usu[ally] a corporate officer) because of the corporation's failure to take some action against the third party." [69] Shareholder challenges to *ultra vires* acts were first recognized in the 1830s and 1840s, but the derivative suit did not begin to emerge until the 1850s.[70] Eventually, as *ultra vires* challenges became less relevant,[71] the derivative suits began to focus on the duties owed by the directors of a corporation.

The derivative suit as it relates to the duties owed to the shareholders by corporate directors initially emerged from the law of trusts.[72] The basis of the relationship was that corporate management

65 15 U.S.C.A. §§ 77a-77aa (West 2006).
66 *Id.* at §§ 78a-78mm.
67 Duggin & Goldman, *supra* note 6, at 222; Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) ("A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.").
68 Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 92 (2007).
69 BLACK'S LAW DICTIONARY 475 (8th ed. 2004); Model Business Corporation Act § 7.40(1) (2003) ("'Derivative proceeding' mean[s] a civil suit in the right of a domestic corporation . . . ."); *see also* FRIEDMAN, *supra* note 3, at 393; LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS 514 (4th ed. 2003).
70 HOVENKAMP, *supra* note 32, at 60-61; FRIEDMAN, *supra* note 3, at 393 (noting that the concept received a "push" by the Supreme Court in Dodge v. Woolsey, 59 U.S. 331 (1856)).
71 FRIEDMAN, *supra* note 3, at 396.
72 Duggin & Goldman, *supra* note 6, at 223.

was a trustee, or guardian, of every shareholder and thus was bound by a fiduciary duty to the corporation and its shareholders.[73] As the trustee model evolved, this fiduciary obligation emerged as having two basic components: a duty of loyalty and a duty of care.[74] The duty of loyalty required that the directors place the corporation before their own interests,[75] but the duty of care was more difficult to define as courts struggled with what level of discretion corporate managers should be given in running the company.[76] The ultimate standard that emerged was the business judgment rule.

The business judgment rule essentially frees management to run the corporation as it sees fit.[77] Under the rule, directors cannot be held liable to shareholders for mere errors in judgment, no matter how gross, so long as the decisions were made in good faith and in the ordinary course of business.[78] The effect of the rule is that it prevents courts and shareholders from second-guessing the business decisions of directors.[79] The interplay of the duty of care and the limits of the business judgment rule are well illustrated in the case of *Dodge v. Ford Motor Co.*[80]

In *Dodge*, the plaintiffs, primarily led by brothers John and Horace Dodge, who were minority shareholders in Ford Motor Company, brought suit against the directors.[81] Prior to the suit, Ford had enjoyed many years of success which enabled Ford to pay special dividends totaling $41 million from December, 1911, through October, 1915, as well as a regular dividend of five percent per month on the existing $2 million capital.[82] However, in 1916, Henry Ford, who owned 58% of the Ford Motor Company stock, declared that no more special dividends would be paid and that the earnings would instead be put back into the company.[83] Henry Ford announced his motives in a press release to the city of Detroit, stating,

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73 *Id.*; FRIEDMAN, *supra* note 3, at 393.

74 Duggin & Goldman, *supra* note 6, at 224.

75 *Id.*; Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (describing the duty of loyalty as requiring "the punctilio of an honor the most sensitive.").

76 HOVENKAMP, *supra* note 32, at 62 ("During the second half of the [nineteenth] century a deep division emerged in state courts over the appropriate standard for directors' exercise of their business judgment.").

77 FRIEDMAN, *supra* note 3, at 396.

78 HOVENKAMP, *supra* note 32, at 62; FRIEDMAN, *supra* note 3, at 396.

79 Duggin & Goldman, *supra* note 6, at 225.

80 170 N.W. 668 (Mich. 1919).

81 *Id.* at 669.

82 *Id.* at 670.

83 *Id.* at 671.

> My ambition . . . is 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. To do this, we are putting the greatest share of our profits back into the business.[84]

Based on this and other comments by Henry Ford, the plaintiffs sued to enjoin Ford from expanding its operations by building a smelting plant and to compel Ford to issue a special dividend of 75% of the $54 million surplus.[85] After a hearing, the lower court agreed with the plaintiffs, enjoined Ford Motor Company's use of the surplus to expand its operations, and ordered a special dividend to be issued.[86]

On appeal, the Michigan Supreme Court rejected the plaintiffs' claims that Ford Motor Company had illegally expanded beyond the authorized amount of capital provided by statute and also rejected the plaintiffs' claim that the expansion of the corporation's business into a smelting plant was *ultra vires*.[87] However, the court initially seemed sympathetic to the plaintiffs' claims that Ford's expansion and withholding of special dividends was primarily for humanitarian, rather than business reasons.[88] In reviewing Henry Ford's testimony and legal precedence, the court stated:

> His testimony creates the impression, also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company–the policy which has been herein referred to.

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84 *Id.*

85 *Id.* at 672-74.

86 *Id.* 677-78.

87 *Id.* at 679-81. At the time, Michigan had in effect a statute limiting the amount of capital stock for a corporation organizing under Michigan law to $25 million, which was later increased to $50 million. *Id.* at 679-80. The Michigan Supreme Court found that the statute did not limit the amount of capital a corporation could amass after formation. *Id.* at 680.

88 *Id.* at 683 ("It is the contention of plaintiffs that the apparent effect of the plan is intended to be . . . to continue the corporation henceforth as a semi-eleemosynary institution and not as a business institution.").

> . . . .
> There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[89]

Despite this statement, however, the court went on to reverse the lower court's injunction on the expansion of Ford's business operations, holding that the court should not "interfere with the proposed expansion of the business. . . . The judges are not business experts."[90] In upholding the directors' decision to expand, the court noted that this goal did not appear to harm the interests of the shareholders.[91] Though the court reversed the injunction, it did affirm a portion of the trial court's order requiring a distribution of approximately $20 million of the cash surplus, finding that even with some of the money being diverted to the expansion of operations, the surplus was great enough that it was the directors' duty to distribute "a very large sum of money to stockholders" in the form of a dividend.[92] Thus, the *Dodge* case demonstrates both the duty of care owed by corporate directors–through the affirmation of the special dividend–and the application of the business judgment rule–through the reversal of the injunction against expansion.[93]

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89 *Id.* at 683-84.
90 *Id.* at 684.
91 *Id.*
92 *Id.* at 685 (citations omitted).
93 As an interesting side note, some of Ford's motives may not have been as altruistic as articulated. The principle plaintiffs in the case, the Dodge brothers, were originally the manufacturers of the Ford chassis but in 1912, Ford started making its own chassis. RIBSTEIN & LETSOU, *supra* note 69, at 383. It appears Ford was attempting to undercut the prices of his stockholders and competitors as well as deny them dividends which were in effect helping fund the competition. After this case, Ford announced he would sell a $250 automobile and was then able to purchase the Dodge brothers' stock for $25 million (down $10 million from the Dodge brothers' initial asking price). *Id.*

While the business judgment rule was applied in *Dodge* to justify expenditures on business expansion, the rule has been applied in a variety of other areas. As one commentator has noted:

> Pursuant to the Rule, courts generally defer to decisions taken by corporate directors, whether they relate to mergers and acquisitions, paying out of dividends, charitable donations, or executive compensation, as long as: (1) a business decision was made, (2) in good faith, (3) after the director reasonably informed herself, and (4) the director had no financial interest in the decision at issue.[94]

While courts continue to struggle with the exact application of the business judgment rule,[95] the result, in most cases, is that corporate management is, at least legally, not liable for its good faith business decisions. This liberalization of the business judgment rule gave relatively more discretion to the corporate managers than to the shareholders who technically owned the company.[96]

This phenomenon was famously announced by Adolph Berle and Gardiner Means in their 1932 book, *The Modern Corporation and Private Property*.[97] The Berle-Means thesis argued that the sharp division between corporate ownership and control led to management becoming the effective owners of a corporation.[98] The implicit economic problem of the thesis is that corporate managers could act in their own self-interests or for some purpose other than profit maximization and thus not in the interest of the owners of the corporation, *i.e.* the shareholders.[99] Minority shareholders of large corporations could not efficiently monitor the managers; thus, such abuses could go unchecked.[100] This concern helped bring about federal reforms such as the federal proxy

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94 D.A. Jeremy Telman, *The Business Judgment Rule, Disclosure, and Executive Compensation*, 81 TUL. L. REV. 829, 831-32 (2007) (internal citations omitted).

95 *Id.* at 833-39 (noting the confusion over the business judgment rule as either an evidentiary presumption, standard of review, or abstention doctrine); *see also* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 84 (2004).

96 HOVENKAMP, *supra* note 32, at 63.

97 ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119-25 (17th prtg. 1950); FRIEDMAN, 20TH CENTURY, *supra* note 56, at 390.

98 BERELE & MEANS, *supra* note 97, at 119-25; FRIEDMAN, 20TH CENTURY, *supra* note 56, at 390.

99 RIBSTEIN & LETSOU, *supra* note 69, at 254-55; FRIEDMAN, 20TH CENTURY, *supra* note 56, at 390; HOVENKAMP, *supra* note 32, at 306.

100 RIBSTEIN & LETSOU, *supra* note 69, at 255.

regulations.[101] However, while the Berle-Means thesis remains a widely cited work, it is also the subject of criticism.[102] Shareholders are not entirely powerless, as Lawrence Freidman has noted, because they "can vote with their feet, so to speak; and when share prices fall, and stockholders sell, management is in deep, deep trouble."[103] As will be discussed below, this concern for share price and profit is a limiting factor on corporate managers who wish to spend the firm's money on charitable causes.[104]

III. DEFINING "CONSCIENCE" AS IT RELATES TO "GOOD" BEHAVIOR

With a firm grasp of the corporation's historical roots and evolution, we can turn to the task of understanding what it means for a corporation to have a "conscience." Black's Dictionary defines "conscience" as: "[t]he moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; . . . [t]he sense of right and wrong inherent in every person by virtue of his existence as a social entity; good conscience being a synonym of equity."[105] Webster's offers a slightly different definition: "knowledge or feeling of right and wrong; the faculty, power, or principle of a person which decides on the lawfulness or unlawfulness of his actions, with a compulsion to do right; moral judgment that prohibits or opposes the violation of a previously recognized ethical principle."[106] From these definitions we can glean a couple of themes: (1) a conscience involves the ability to make a choice based on a moral sense or feeling; and (2) a conscience involves the ability to determine right from wrong and comport behavior accordingly. These themes pose some interesting hurdles when applying the term to a corporation. First, given that the quality of having a moral sense or feeling is generally human, can it even be applied to a non-human corporation? And, given the subjective nature of right and wrong, what does it mean for a corporation to choose "right?"

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101 *Id.* at 269.

102 William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 737-38, 754-55 (2000); FRIEDMAN, 20TH CENTURY, *supra* note 56, at 390.

103 FRIEDMAN, 20TH CENTURY, *supra* note 56, at 390.

104 *See infra* Part III.

105 BLACK'S LAW DICTIONARY 209 (6th ed. 1991). Interestingly, the more recent eighth edition of Black's Law Dictionary is less nuanced, defining "conscience" more concisely as "[t]he moral sense of right or wrong; esp., a moral sense applied to one's own judgment and actions." BLACK'S LAW DICTIONARY 322 (8th ed. 2004). I have chosen to use the more detailed definition provided in the sixth edition.

106 WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 387 (2d ed. 1979).

A. Can Corporations Make "Conscience" Choices?

Most definitions of a "conscience" involve a uniquely human characteristic to determine right from wrong based on an internal "feeling" or "moral sense." But, corporations are obviously not human. Indeed, from their inception, corporations have been viewed by the public as soulless.[107] It has been feared that a corporation's perpetual life, large size, and limited liability could act to "aggregate the worst urges of whole groups of men," with no sense of morality to temper its powers.[108] Lawrence Mitchell has analogized the corporation to Rabbi Judah Loew's *Golem*, stating that, like the *Golem*, "which came to life to protect the Jewish people once the right words were inserted into its ear, the modern American corporation knows only one thing [profit maximization]. . . . So we have the paradox of having created an artificial creature with all of the rights of natural persons to formulate and pursue ends that give its life meaning, but without the ability to choose and pursue those ends."[109] Or, if we return to the analogy at the beginning of this Article, the corporation is akin to Pinocchio, in that it is an artificial entity, created by man.[110] However, even if a corporation is "soulless," it is made up of and run by human beings.[111] And, though the corporation does not have a "conscience" in the traditional sense,[112] clearly, corporations do make choices that have an impact, positive or negative, on society.

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107 FRIEDMAN, *supra* note 3, at 134.

108 *Id.*

109 MITCHELL, *supra* note 5, at 44.

110 *See id.* at 43 ("[Corporations] are special kinds of people; people created not by God but by law and humans. As such, and in contrast to the Enlightenment vision of autonomous man, they have only the ends given to them by their creators.").

111 FRIEDMAN, *supra* note 3, at 134; Milton Friedman, *The Social Responsibility of Business*, *in* THE ESSENCE OF FRIEDMAN 36-37 (Kurt R. Leube ed., 1987) (noting that corporate responsible behavior must refer to the corporate executives); *see also* MITCHELL, *supra* note 5, at 13, 43-44.

112 *Cf.* Friedman, *supra* note 111, at 36. Milton Friedman, in discussing whether "business" can have responsibilities, urges that they cannot, at least not in the traditional sense, stating:

> What does it mean to say that "business" has responsibilities? Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but "business" as a whole cannot be said to have responsibilities, even in this vague sense.

Id.

1. The Individual in the Corporation

So, are these choices driven purely by the whims and conscience of management? Probably not, as corporate managers can still be held accountable for their actions. Though an individual may wish to act generously with corporate funds, he or she cannot treat corporate monies and possessions as his or her own.[113] For instance, in *Worthington v. Worthington*,[114] Henry R. Worthington, president of a corporation which manufactured and sold hydraulic machinery, agreed to donate equipment to Columbia University's hydraulic laboratory.[115] In a letter agreeing to the donation, Henry Worthington used language that appeared to indicate that he personally was willing to donate the machinery and asked that the donation be identified with his father's name.[116] The corporation sued to recover the value of the equipment from Henry Worthington, claiming the donation was not an authorized expenditure.[117] The court agreed, finding that despite Henry Worthington's being president and a large shareholder, he could not, "by virtue of his office, give away the [corporation's] property."[118] The court clearly took issue with the express individual gratification Henry Worthington received from the donation as articulated by his own words in a letter to Columbia University.[119]

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113 *See, e.g.*, Rice v. Wheeling Dollar Sav. & Trust Co., 130 N.E.2d 442, 449 (Ohio C.P. 1954) (holding that contribution, at insistence of officers and directors, to a charitable corporation in memory of president's mother without notification to all shareholders, was an unsanctioned use of corporate funds). *Cf.* Theodora Holding Corp. v. Henderson, 257 A.2d 398, 403-04 (Del. Ch. 1969) (holding that where president placed his own interest above that of the company's by selling a stock exchange seat previously purchased with corporate funds for personal profit, president was accountable to the company for the profit made). Though the Theodora court found that the business judgment rule did not protect the president for the sale of a stock exchange seat at a personal profit, it held the rule did protect a large gift made to a charitable foundation. *Id.* at 405.

114 Henry R. Worthington v. Worthington, 91 N.Y.S. 443 (N.Y. App. Div. 1905).

115 *Id.* at 444-45.

116 *Id.* at 444.

117 *Id.* at 445.

118 *Id.* at 444-45.

119 *Id.* at 445.

> It was a laudable and commendable thing for the defendant to make the gift, not only for the purpose of promulgating knowledge in mechanical engineering, but in perpetuating his father's memory. In doing this, however, he was obligated to use his own property, and not that of another. . . . [T]here is nothing in the record which would justify a finding that any action was taken by *the corporation* which could be construed into its giving the materials and making the expenditure as a gift.

Id. (emphasis added).

What may have played an even larger role in the decision, however, was the failure to have the corporation approve and endorse the action, so that the donation would appear to be one based upon the business judgment of the corporation.[120] Indeed, in other scenarios, even when the benefit to the corporation has been speculative, courts have been reluctant to intervene with the business affairs of a corporation. An example of such reluctance can be seen in the oft-cited case of *Shlensky v. Wrigley*.[121] In *Shlensky*, the plaintiff, a minority shareholder of the Chicago National League Ball Club (which operated the Cub's home baseball park of Wrigley Field), sued the directors for failing to install lights at Wrigley Field so that night games could be played.[122] For those unfamiliar with baseball, Wrigley Field was, at the time of the lawsuit, as it is today, located in a heavily residential neighborhood on the north side of Chicago.[123] At the time of the suit, Wrigley Field was the only major league park not equipped with lights, and so night games could not be played.[124] The plaintiff alleged that the decision not to install lights was costing the corporation revenues that would have resulted from the increase in attendance of night games, and that the decision not to install the lights was not based on financial welfare or interests of the corporation.[125] Instead, the plaintiff claimed the decision was based on the personal position of the president, Philip K. Wrigley, that the installation of lights and night baseball games would have a "deteriorating effect upon the surrounding neighborhood."[126] Despite these allegations, the appellate court refused to reverse the trial court's dismissal of the case, based in part upon the business judgment rule.[127] Instead, the court found that the directors' actions could be consistent with the best interests of the corporation, stating,

> [W]e are not satisfied that the motives assigned to Philip K. Wrigley, and through him to the other directors, are contrary to the best interests of the corporation and the stockholders. For example, it appears to us that the effect on the surrounding neighborhood might well be

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120 *Id.*; *see also In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967-68 (Del. Ch. 1996) (noting that the business judgment rule is process oriented).

121 Shlensky v. Wrigley, 237 N.E.2d 776 (Ill. App. Ct. 1968).

122 *Id.* at 777.

123 RIBSTEIN & LETSOU, *supra* note 69, at 378.

124 *Shlensky*, 237 N.E.2d at 777.

125 *Id.* at 778.

126 *Id.* Wrigley was also allegedly motivated by his view that baseball was a "daytime sport." *Id.*

127 *Id.* at 780.

> considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood. Furthermore, the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep the neighborhood from deteriorating.[128]

As can be seen in the *Shlensky* case, courts can be, and often are, reluctant to interfere with the decisions of the directors, even when the motives appear purely altruistic.[129] Indeed, as will be explored later, many activities that appear altruistic in fact can benefit the corporation as well.[130] Furthermore, many modern state rules, with regard to corporate giving, have removed the need of a court to find a business purpose by essentially sanctioning charitable donations and protecting corporate directors from scrutiny so long as their decisions are made in good faith.[131]

In practice, corporate giving is, essentially, free of any legal restrictions.[132] Although directors can often justify charitable donations

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[128] *Id.* As an aside, lights were eventually installed at Wrigley Field. As Larry Ribstein and Peter Letsou note, rather sarcastically:

> The inexorable tide of progress finally brought lights to Wrigley Field in 1988. The first night game was scheduled for August 8, 1988. . . . Cub greats Billy Williams and Ernie Banks threw out the first pitches. Thunderstorms accompanied by fierce dramatic lightening stopped the game in the fourth inning. Speculation as to the cause of the storm is beyond the scope of this book.

RIBSTEIN & LETSOU, *supra* note 69, at 380.

[129] Greene County Nat. Farm Loan Ass'n v. Fed. Land Bank of Louisville, 57 F. Supp. 783, 789 (W.D. Ky. 1944); A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586-87 (N.J. 1953) (holding that corporate power to make reasonable charitable contributions exists even apart from express statutory provisions).

[130] *See infra* Part IV.B.

[131] *See, e.g.*, DEL. CODE ANN. Tit. 8, § 102(b)(7) (2006) (allowing corporations to eliminate or limit the personal liability of a director to a corporation or stockholder for breach of fiduciary duty except in limited circumstances such as, *inter alia*, acts or omissions not in good faith). Soon after Delaware enacted this statute, other states followed, and now all fifty states have similar provisions. *See also* Duggin & Goldman, *supra* note 6, at 233-34; Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 767-68 (2005) (noting that "[t]wenty-four states (including Delaware) authorize 'donations for the public welfare or for charitable, scientific, or educational purposes.'"); Revised Model Bus. Corp. Act §§ 3.02(13), (15) (2002) (authorizing donations "further[ing] the business and affairs of the corporation," and donations for "charitable, scientific or educational purposes.").

[132] David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 16-17 (1979) ("As a practical matter, the business judgment defense is unlikely to fail in the

and the like under the business judgment rule, legal impediments are not their only concern. At the end of the day, the corporation must make a profit.[133] The individuals who run a corporation may very well wish to act with their own conscience but can, and often are, limited by the mandate that the corporation maximize shareholder wealth.[134] But, is shareholder wealth or profit maximization necessarily a bad thing?[135] The degree to which directors should seek to maximize the profits of the corporation versus engaging in socially responsible behavior is the subject of much debate.

2. Conscience and the Corporate Social Responsibility Debate

The corporate social responsibility ("CSR") debate began as early as the 1930s,[136] but has garnered much attention over the past 20 years.[137] At one far end of the debate is the view that the only responsibility corporate directors have is to make a profit for their shareholders. This view is often represented by the economist Milton Friedman, who wrote 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."[138] The flip side of this argument is that corporations–which owe their very existence, including characteristics such as limited liability, to society–owe a reciprocal duty to non-shareholders and to society.[139]

absence of conflicts of interest, extraordinary amounts of profit foregone, or some other affirmative suggestion of bad faith.") (citation omitted).

133 MITCHELL, *supra* note 5, at 11 (noting that "*profit* is essential to corporate survival") (emphasis in original).

134 *Id.* at 44.

135 *See generally* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (arguing that corporate decision makers cannot, or at the very least should not, attempt to serve the interest of two masters, *i.e.* shareholders and nonshareholders).

136 Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1601 (2006) (crediting Merrick Dodd for the scholarly roots of the CSR discussion in 1932).

137 Lawrence E. Mitchell, *Roles of Corporations and Corporate Officers*, 99 AM. SOC'Y INT'L L. PROC. 265, 265 (2005) (noting that the phrase CSR has only developed as an aspect of public debate since the early 1990s).

138 MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962); *see also* Friedman, *supra* note 111, at 36-38.

139 William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992). Allen describes two characterizations of the corporation. The first is a property model, whereby the corporation is viewed as the property of the shareholders, and his view epitomizes the Friedman view of CSR and the corporation. The

Complicating the CSR debate is that the term itself can mean different things.[140] As Cynthia Williams has noted, "[l]egal academics have struggled to produce useful definitions of CSR, and in that effort may be well advised to look to management literature."[141] This management literature comprises CSR into four types, "(1) the economic responsibility to be profitable; (2) the legal responsibility to abide by the laws of society; (3) the ethical responsibility to do what is right, just, and fair; and (4) the philanthropic responsibility to contribute to various kinds of social, educational, recreational, or cultural purposes."[142] Other definitions are not as broad, however, and some scholars exclude from CSR activities that tend to benefit the corporation, even if it costs the corporation money in the short-term.[143] Ultimately, how CSR is defined and whether it is right or wrong for a company to engage in CSR activities is not within the scope of this Article. What is important, however, is what the CSR debate represents, *i.e.* recognition that corporations have the ability *to choose* to engage, or not engage, in behavior that benefits some entity, group, or individual other than just the corporation.

But, returning to the initial question of whether this means corporations can have a conscience, do corporations engage in this behavior based on an internal "feeling" or "moral sense?" Even though corporate managers can make decisions based on such human qualities, it may not be the case that what one corporate manager chooses to do is based on the same "moral sense" as other decision-makers within the company.[144] And, even if those managers wish to act based on their own internal moral senses or feelings of what is right or wrong, as has been already noted above, other factors, such as making a profit, also influence corporate behavior. The factors that influence corporate behavior will be discussed in more detail below, but with regard to

second view is of the corporation as a social institution, "tinged with a public purpose." *Id.*; *see also* Fisch, *supra* note 136, at 1601-02.

140 Veronica Besmer, *The Legal Character of Private Codes of Conduct: More Than Just a Pseudo-Formal Gloss on Corporate Social Responsibility*, 2 HAST. BUS. L.J. 279, 280 (2006) (noting that CSR means different things to different people).

141 Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1647, n.54 (2006).

142 *Id.* (emphasis omitted) (quoting Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 167 (2005)).

143 Engel, *supra* note 132, at 9; *see* also, Friedman, *supra* note 111, at 40-41.

144 *See* Fisch, *supra* note 136, at 1603 ("The corporation cannot readily adopt the moral perspective of its individual constituents. . . . various corporate stakeholders may have differing moral perspectives"). Fisch further notes that corporate managers' ethical views may not mirror those of society. *Id.*

having a conscience, it appears that a corporation is indeed without an internal conscience in the literal sense. But as has already been discussed, corporations do make social choices and those choices are influenced by external factors stemming, at least in part, from the corporation's status as a social entity (if we borrow from the Black's definition). So, perhaps the corporation does not have an internal conscience, but like Pinocchio, has an external one. However, instead of Jiminy Cricket, the corporation's "conscience" is a complex combination and interaction of social and market forces as well as the individual consciences of its corporate managers.

B. What is "good" Corporate Behavior?

As a conscience involves determining right from wrong, some definition of what is right, or, if we synonymously use the term "good," what is good corporate behavior is in order. After all, one person's saint is another person's sinner.[145] Take, for example, imaginary ABC Corporation, which makes a decision to recognize same sex marriages under its benefits plan. While the decision could certainly be justified as a recruiting tool, many might decry the decision as immoral or wrong while others would celebrate it as progressive and good. Further, questions about the nature of "good" behavior are raised by activities that appear to be altruistic in that they do not benefit the corporation. As the CSR debate demonstrates, whether corporations should even be delving into areas other than activities that profit the corporation is debated. Given that a corporation does not have the ability to tell "right" from "wrong," and as the individuals who run the company and own the company, *i.e.*, management and shareholders, may have pluralistic moral senses giving varying answers to what is "right" and "wrong," how can a corporation comport its behavior accordingly?

If we rely on such concepts as defining a conscience, there is no way to reconcile a conscience and the corporation. However, if we look at the end result of pressures to produce "good" behavior, we can see a theme of behavior that benefits some entity, person, or group other than just the corporation. Thus, corporations may not know right from wrong, but corporations do act upon pressures to help or benefit some aspect of society, be it global, national, statewide, municipality, or even a smaller demographic or group. So, again, if we turn to the view that a corporation is a social entity, based on its status as such, it can and does

145 Friedman, *supra* note 111, at 40 (noting, with regard to arguments for corporate managers to act socially responsibly, that "one man's good is another's evil").

comport its behavior to act, perhaps not based on what is right or wrong, but upon pressures to act to benefit some aspect of society other than itself (though not mutually exclusive of benefiting itself). This returns us to the conclusion that corporations act, not based upon an internal conscience, but based upon an external conscience made up of many interacting factors.

IV. A CATEGORICAL APPROACH TO WHAT DRIVES THE CORPORATE CONSCIENCE

To briefly review, we have traced the evolution of the corporation in the late eighteenth century from a relative few, specially chartered associations generally organized to complete projects for the public good, to the modern profit making behemoths of modern America. Along the way, corporations have been subjected to regulation, often in response to public outcry against perceived abuses of power. This corporate evolution has also resulted in a general separation of ownership and control, though that is not to say that corporate mangers act completely free from external pressures such as to make a profit. With regard to the corporate "conscience," while corporations do not have one in the traditional sense of the word, the corporation is run by corporate managers who can act based upon their own sense of morals, but that alone does not account for corporate behavior that benefits society as a whole. But corporations do tend to act based upon the decisions of management as they interact with other factors. I have broken these factors into three main categories: (1) acts that benefit society which are due to legal compliance; (2) acts that benefit society which also benefit the corporation; and (3) acts that benefit society based on altruistic (or semi-altruistic for those that do not believe in pure altruism) motives.[146] I will discuss each in turn below.

A. Compliance with the Law

The first category involves actions that have a positive effect on society that are compelled by law. Historically, we have seen corporations grow from a relative few with special charters that were

[146] Professor Cynthia Williams uses a similar categorical approach to explain why corporations engage in social responsibility initiatives. Williams, *supra* note 141, at 1644. Professor Williams divides her explanation into four possible reasons: 1) law compliance; 2) market driven; 3) politically motivated; and, 4) intrinsic motivations. *Id.* at 1644-46. Though my second category could easily be broken down into market-driven and politically motivated to similarly mirror Professor Williams' approach, for the purpose of identifying what motivates the corporate conscience, I believe these are actually part of the larger category of actions beneficial to the corporation as well as society.

monitored by the state, to the numerous generally chartered organizations of today. Along the way, corporate abuses, or at least perceived abuses of power, have led to reactions by the government in the form of laws meant to curb corporate behavior.[147] Modern corporations are faced with a number of laws and regulations affecting their behavior, from environmental laws to securities regulations to employment laws. While this may not seem to involve a decision of the conscience, in fact, compliance with the law is very much a choice. If we accept that the law is generally a society-imposed form of morality–of what is right and wrong–then compliance represents a choice of the conscience.[148] Though we like to think of individuals as acting in compliance with the law out of a sense of morality, punishment and deterrence certainly play a part, and, just as individuals break the law for a variety of reasons, so do corporations.

One reason corporations break the law is simple: profit.[149] The lure of profits may cause a corporation to engage in a cost-benefit analysis, weighing what is a small fine for what may seem like rather innocuous behavior against maximizing profits.[150] And to a degree, it might be said that if society imposes too small a fine, the prohibited behavior is not generally deemed that bad in the first place.[151] In addition to the level of punishment, the risk of getting caught plays a factor in a corporation's willingness to violate the law. As Daniel Ostas notes, some regulations "are not effectively enforced either because violators find it possible to

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147 *See supra* part II.B.1.

148 Engel, *supra* note 132, at 37 ("If the legislature has purported to attach civil or criminal liability to (or to retain such liability for) a particular piece of behavior, then there is, under our assumptions, a public consensus that such behavior should be reduced."); Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities With Regard to Law*, 41 AM. BUS. L.J. 559, 565 (2004) (citations omitted) (noting that under a "Public Interest Theory" of regulation, "[r]egulators regulate in the public interest and regulations reflect the aspirations of a democratic society.").

149 ESTES, *supra* note 5, at 104 (quoting former SEC chief of enforcement Stanley Sporkin that, "[i]n many instances where people are not lining their own pockets you can only explain corporate crime in terms of 'produce or perish.'").

150 Ostas, *supra* note 148, at 573-74.

151 Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177, n.57 (1982) ("[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules . . . managers not only may but also should violate the rules when it is profitable to do so."). *But see* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1266-70 (1997-1998) (criticizing an "efficient breach" approach to regulatory law).

conceal their acts or because society provides insufficient resources to prosecute violations."[152]

An example of such conduct can be seen in the employment of illegal immigrants. Under the Immigration Reform and Control Act of 1986, fines may be imposed under Title 18 of the United States Code for employers knowingly employing at least ten illegal immigrants; employers in violation of the Code may also be imprisoned for up to five years.[153] Despite these penalties being in place since 1986, enforcement has been steadily declining since then.[154] As one commentator has pointed out, "[i]n the ten-year period from 1992 to 2002, the number of investigations of employers of illegal aliens declined seventy percent, from 7053 to 2061, on-site job arrests of illegal aliens declined from 8027 to 451, and the fines imposed on employers declined from 1063 to thirteen–a staggering ninety-nine percent decrease."[155] With such scarce enforcement, it is easy to see how a corporation could choose to employ illegal immigrants at lower wages and to take the seemingly low risk of getting caught rather than decreasing its bottom line by having to pay higher wages to legal workers.[156]

But even when the societal stakes should be high, corporations can fail to meet legal standards based on a concern for profits. For instance, in the wake of a March 2005 explosion in a BP refinery in Texas City, Texas, BP conducted a self-audit of its process safety culture at all of its U.S. refineries.[157] While the study was not intended to measure legal

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[152] Ostas, *supra* note 148, at 567. David Engel breaks corporate non-compliance with regulatory laws down into three reasons:

> (1) the corporate acts may not be detected; (2) the transaction costs of establishing liability may exceed the amount nominally due successful private plaintiffs or the potential benefit perceived by the public prosecutor; or (3) the nominal liability may bankrupt the corporation, in which case the rule of limited liability will protect the shareholders.

Engel, *supra* note 132, at 39.

[153] 8 U.S.C. § 1324(a)(3)(A) (2000).

[154] Hugh Alexander Fuller, *Immigration,Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After* Hoffman Plastic Compounds, Inc. v. NLRB, 58 BAYLOR L. REV. 985, 1003 (2006) (citing Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 51, 52); Bob Herbert, *Who's Getting the New Jobs*, N.Y. TIMES, July 23, 2004, at A23; Louis Uchitelle, *I.N.S. Is Looking the Other Way As Illegal Immigrants Fill Jobs*, N.Y. TIMES, March 9, 2000, at C1.

[155] *See* Fuller, *supra* note 154, at 1003.

[156] *See id.* (noting that "penalties will not deter illegal immigration if they are never imposed.").

[157] THE REPORT OF THE BP REFINERIES SAFETY REVIEW PANEL 17 (January 2007) (on file with author). [In the interest of full academic disclosure, the author, in his previous employment, briefly worked on portions of the independent safety review that was the

compliance or to assess the causes of the Texas City explosion,[158] the results of some of the surveys of employees give interesting insights into the perception of where BP's primary concerns were with regard to safety processes, which can certainly implicate legal requirements. For instance, in response to a question regarding whether process safety was compromised by short-term financial goals, thirty percent of the Texas City refinery operators and forty-five percent of a Toledo, Ohio refinery's operators said it was compromised.[159] Similarly, thirty-three percent of Texas City operators and forty-two percent of Toledo operators agreed that process safety was secondary to achieving production goals.[160] While these numbers are by no means a majority of the employees, it represents a significant portion of people with an inside view "from the trenches" so to speak,[161] and demonstrates how the financial bottom line could affect a corporation's cultural attitude toward compliance.

The above discussion has focused on decisions to comply or not comply with the law. However, corporations can also flirt with non-compliance by acting in the gray areas of the law. "Loopholes" in the law may allow corporations to comply with the letter, if not the spirit, of a law, or vague language in a law may leave a regulation open to a variety of interpretations which a corporation might abuse.[162] This has led to what some have termed "[c]reative compliance" with the law, *i.e.*, the ability to legally achieve the same ends as criminal action by manipulating and exploiting the legal system.[163] This area presents an interesting cross-road for the corporate conscience, as it does not deal

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basis of this report, but took no part in the formulation, dissemination, or review of the survey questions cited.]

[158] *Id.* at 14.

[159] *Id.* at 64.

[160] *Id.* at 65. Similar numbers were also reported for maintenance/craft technicians. *Id.* at 64-65. The surveys covered three other refineries in Whiting, Indiana, Cherry Point, Oregon, and Carson, California. *Id.* The results for these refineries were much more favorable to BP's commitment to process safety. *Id.* However, contractors tended to have a much less favorable view of BP's commitment to process safety, with 39-60 percent agreeing that production goals took precedence over process safety. *Id.*

[161] Management uniformly answered the question more favorably to BP's commitment to process safety. *Id.* However, the report's ultimate conclusion was that "BP has not adequately established process safety as a core value across its five U.S. refineries." *Id.* at 65.

[162] Ostas, *supra* note 148, at 567. Ostas notes a fundamental difference between compliance with the law and cooperation with the law, stating that "compliance embodies a less expansive duty than does cooperation. At its heart, the distinction highlights the difference between the letter and the spirit of the law. One complies with the letter of the law; one cooperates with the law's spirit." *Id.* at 566.

[163] Doreen McBarnet, *After Enron Will "Whiter Than White Collar Crime" Still Wash?*, 46 BRIT. J. CRIMINOLOGY 1091, 1092 (2006).

with out-and-out illegality, but rather with a decision to not only comply with the letter of the law but to also cooperate with the spirit of the law.[164]

The accounting scandal that precipitated Enron's collapse provides an excellent example of "creative compliance." One of the keys to Enron's ability to state such high profits was its use of mark-to-market accounting. Under normal accounting methods, revenue recognition occurs after a service has been provided (or mostly provided) and payment has been received.[165] Under the mark-to-market accounting method, however, Enron was able to recognize revenue even before a service was provided, allowing Enron "to report expected benefits from future transactions into current period income."[166] Enron coupled the mark-to-market accounting with an aggressive interpretation of what constituted trades, adopting a "merchant model" of revenues.[167] Under the "merchant model," an entity, such as a retailer, could account for the entire selling price of products in their possession because they are deemed to take the risk of selling the goods in their possession.[168] Enron used this model to account for the entire selling price of its energy trades, rather than just accounting for the trading or brokerage fees as was customary.[169] Despite the potential for abuse in such accounting practices, Enron had actually obtained approval from the SEC to use the mark-to-market accounting method in January of 1992.[170] The result, however, was that Enron reported "enormously inflated performance, high share values, otherwise unsustainable credit ratings and huge recompense for executives in both performance related pay and share options."[171]

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164 Ostas, *supra* note 148, at 566. Another interesting twist on this concept involves the corporation's ability to influence the law. Fisch, *supra* note 136, at 1604-05. Through political influence, corporations have the ability to change laws with which they do not want to comply. *Id.* at 1610.

165 Bala G. Dharan & William R. Bufkins, *Red Flags in Enron's Reporting of Revenues and Key Financial Measures*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 102 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

166 *Id.* at 101-02.

167 *Id.*

168 *Id.* at 103.

169 *Id.* The accounting for just the brokerage fee of the trade is known as the "agent model" because an "'agent' is someone who provides a service to the customer (such as facilitating the purchase of an airline ticket), but does not really take up the risks of possession and the risks of collection." *Id.*

170 *Id.* at 104.

171 McBarnet, *supra* note 163, at 1095; Dharan & Bufkins, *supra* note 165, at 103 (estimating that revenues were increased as much as fifty times through use of these accounting

As can be seen from the examples above, the mere fact that actions are compelled by the law does not mean that they are devoid of a choice. Profit weighs a clear role in the decisions of some corporations to engage in, or refrain from, illegal activities. Though some may argue that a cost-benefit analysis is appropriate with regard to legal compliance, it would be difficult to fault a corporation for choosing compliance. Even Milton Friedman has caveated that the responsibility of businessmen to make as much money as possible is to be done "while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[172] And even when a corporation is practicing "creative compliance," as in the Enron example above, the spirit of the law may be broken by doing what is not arguably illegal, but still in violation of the underlying rules of society embodied in ethical custom.

B. Acts that Benefit both Society and the Corporation

This category includes behavior that has a positive effect on society but that also benefits the corporation. At the most basic level, most charitable donations tend to fall in this category.[173] Corporations are eligible for a tax deduction on the donations, reaping the benefits of good public relations with a relatively small output of money when compared to the company's net profits. However, though a large donation of the corporation's profits would likely not be worth the tax deduction or the benefits from positive public relations, few corporations give more than a very small percentage of their profits to charity,[174] despite the Federal Tax Code allowing for a deduction for up to ten percent.[175]

Some corporate giving also contains an ulterior motive beyond the obvious benefits to the corporation and goodwill obtained. Again, Enron provides a good example of the motives behind charitable donations.

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methods). Of course, Enron involved much more than mere creative compliance to maximize shareholder profits, as there was also a large degree of self-dealing.

[172] Friedman, *supra* note 111, at 37.

[173] Rikki Abzug & Natalie J. Webb, *Rational and Extra-Rational Motivations for Corporate Giving: Complementing Economic Theory with Organization Science*, 41 N.Y.L. SCH. L. REV. 1035, 1039 (1997) (noting that "economists tend to believe that nearly all donations benefit the corporation in some way.") (citation omitted).

[174] SPECIAL REPORT: PHILANTHROPY 2005, *Smarter Corporate Giving,* BUSINESS WEEK, November 28, 2005, at 72 (noting that giving in 2004 by corporations equaled 1.2 percent of total corporate profits, which was the average for the previous forty years). Corporate giving in the United States in 2006 reportedly only accounted for 4.3 percent of the total contributions made to charities in 2006, while 75.6 percent came from individuals. *Report: Most U.S. giving done by individuals*, CINCINNATI BUS. COUR., June 25, 2007.

[175] I.R.C. § 170(b)(2) (2006).

Despite its other questionable dealings, Enron was known for its charity, annually disbursing one percent of its pretax earnings to worthy causes, which totaled $12 million in 2001.[176] Enron's giving was so extensive that, after its fall, many of the beneficiaries of its generosity, including the United Way, YMCA, and local Houston arts and theater programs, felt its absence.[177] While Enron's charity benefited the community, there was also a benefit to Enron; the most obvious benefit being the goodwill and positive public relations Enron enjoyed as a good "corporate citizen." Also, as noted above, such donations would provide a tax deduction, but there may have also been a more sinister motive behind Enron's largesse. Following Enron's fall, many questioned whether Enron was giving money, both to charitable organizations as well as political contributions, to avoid closer scrutiny of its operations.[178] Viewed cynically, Enron's generosity was intended to influence people with the power to help or hurt the company.[179] As accounting professor Ralph Estes surmised, "[m]ost of the rationale is that somehow it will pay off on the bottom line . . . It's calculated to pay a dividend, and these actions can keep the wolves from the door."[180] In other words, the benefit gained by charitable activities, whether it be through a reduction in the costs of defending the corporation's actions before the government, an avoidance of governmental regulations, or a reduction in property damage at the hands of activists, makes-up for or exceeds the costs to the corporation.[181]

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[176] Allan Turner, *Enron's Fall Shakes Up Nonprofit Community*, HOUS. CHRON., Dec. 7, 2001, at A1.

[177] *Id.* (collecting accounts of Enron's corporate giving as well as the efforts of its individual employees).

[178] Alan Clendenning, *Critics Question Enron's Charitable Donations: Company and Lay Contributed to Wide Range of Causes*, ST. LOUIS POST-DISPATCH, Jan. 27, 2002, at A4.

[179] *Id.*

[180] *Id.* (quoting Dr. Ralph Estes, accounting professor emeritus at American University).

[181] NEIL H. JACOBY, CORPORATE POWER AND SOCIAL RESPONSIBILITY: A BLUEPRINT FOR THE FUTURE 194-97 (1973).

> Rational enterprise managers judge the yield of outlays for social purposes by their long-run effect upon profits. They measure the return on the "investment" in each social program. Each social outlay is tested by a cost/benefit analysis. Among the benefits may be a reduction in the costs of defending the firm's actions before the legislative or executive agencies of government, an avoidance of onerous governmental regulations, or a reduction in property damage at the hands of activists. Social pressures generate costs, the amount of which can be minimized by appropriate corporate outlays.

Id. at 196.

Other than charitable donations, corporations have developed a number of other ways to help society while adding to the company's bottom line and/or reputation. For instance, one modern trend is the integration of marketing campaigns for products with prominent charities or social causes.[182] A small sampling of such ventures was recounted in November of 2006 in The New York Times:

> Saks Fifth Avenue is selling a leather jacket from Kenneth Cole this holiday season for $795, and a percentage of the sales price will be donated to Help USA, a group that fights homelessness.
>
> Bath & Body Works is selling an Elton John scented candle for $16.50, with 10 percent of each sale, or $2, going to the Elton John AIDS Foundation.
>
> Gap, Apple Computer and Motorola are offering limited-edition red-colored products to benefit the AIDS charity (Product) RED. Gap gives 50 percent of the profits from sales; Apple gives $10 for each iPod Nano; and Motorola $17 for each phone.[183]

The RED campaign is an excellent example of this trend and of corporate behavior that has a positive effect on society while benefiting the corporation. The Red campaign is the brain child of musician Bono and California politician Bobby Shriver.[184] The concept is simple: manufacturers make product lines tied to the Red campaign, for instance a red Motokrzr phone, and give a portion of the profits to the Global

[182] Craig and Marc Kielburger, *Cause-tied Marketing Not Perfect*, TORONTO STAR, July 16, 2007, at World and Comment (noting that cause-related marketing is an "increasingly effective way to reach savvy consumers."); John Hall Scripps, *Firm, Non-profits Both Benefit From Cause Marketing*, FORT WAYNE J. GAZETTE, July 13, 2007, at 3E; Michael Barbaro, *Candles, Jeans, Lipsticks: Products With Ulterior Motives*, N.Y. TIMES, Nov. 13, 2006, at F33 ("[R]etailers across the country are putting philanthropy at the center of their product lines, whether it is clothes, books or shoes."). Michael E. Porter and Mark R. Kramer have described corporations' attempts at creating value for both society and themselves as a "shared value[,]" stating: "The essential test that should guide [corporate social responsibility] is not whether a cause is worthy but whether it presents an opportunity to create shared value—that is, a meaningful benefit for society that is also valuable to the business." Michael E. Porter & Mark R. Kramer, *The Link Between Competitive Advantage and Corporate Social Resposnibility*, HARV. BUS. REV., HBR Spotlight, Dec. 2006, at 8.

[183] Barbaro, *supra* note 182, at F33.

[184] Louise Story, *Want to Help Treat AIDS in Africa? Buy a Cellphone*, N.Y. TIMES, Oct. 4, 2006, at C8.

Fund to Fight AIDS.[185] The idea is that, rather than a one-time charitable donation, because the companies are making a profit from the sale of the RED products, the donations will be sustained.[186] Participants include Gap, Armani Exchange, Motorola, Converse, Apple, and American Express.[187] There have, however, been some concerns raised over the transparency of the donations in the RED campaign,[188] and while the concept seems sound, time will tell whether abuses destroy the public benefit to such campaigns.

The move by many corporations to go "green" (adopt environmentally friendly practices) often offers another example of actions that benefit society and the corporation. Corporations that offer "green" products or services hope to cash-in on an environmentally conscious consumer base.[189] Additionally, as with the RED campaign, corporations get the public relations benefit of claiming they are helping the environment.[190] But, the "green" movement goes beyond appealing to the consumer's desire to help the environment. Many corporations see a benefit in energy savings themselves.[191] For instance, a standard feature in new Wal-Marts is to have a series of skylights in the roof to reduce energy costs for lighting.[192] Such "green" construction is seen as a way many companies can reduce the environmental impacts of

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185 *Id.*

186 *Id.*

187 *Id.*; Barbaro, *supra* note 182, at F33.

188 Scripps, *supra* note 182, at 3E (noting concerns over transparency in accounting and how the proceeds of products are funneled to the Global Fund). *Cf.* Kielburger, *supra* note 182, at 2 (noting that the campaign has spent over four times as much in advertising than it has raised).

189 Paul Davidson, *Getting Gold Out of Green: Companies Learn Eco-friendliness Helps Bottom Line*, USA TODAY, April 19, 2007, at 7A.

190 This has led to some concerns that corporations are "'greenwashing,' or using environmentalism to polish their corporate images." *Id.* Consumers concerned over the climate-friendliness of companies can obtain a global scorecard which ranks companies based, among other things, on "what they have done to reduce their impact on the climate, [and] their stances on global-warming legislation." MSNBC News Services, *Companies Get Ranked on Global Warming: Canon, Nike Among the Best; Apple, eBay, Levi Strauss Among Worst*, June 19, 2007, *available at* https://www.msnbc.msn.com/id/19315109/ (describing it as a "pocket-sized scorecard produced by a new nonprofit, Climate Counts, and based on 22 criteria developed with help from experts.").

191 *Id.*; Daniel Franklin, *A change in climate; The greening of corporate* responsibility, *in Just good business: A special report on corporate social responsibility*, THE ECONOMIST, Jan. 19, 2008, at 14 ("Beyond the lofty talk, reducing a company's output of greenhouse gasses and encouraging 'responsible' use of resources can also mean cutting waste and saving money."); Jim Downing, *Go Green to Save Some Green; Wal-Mart Seeks Ways to Cut Electricity Usage*, FORT WAYNE J. GAZETTE, April 30, 2007, at 4C.

192 Downing, *supra* note 191, at 4C.

operations.[193] Other companies are reducing their impact and saving money through other means, such as Marriott Hotel's use of compact fluorescent light bulbs to save 65% on hotel lighting costs.[194] Beyond the benefits to the corporation in energy savings and to public relations, some states have also created incentives for environmentally friendly corporations.[195] For instance, Wisconsin has enacted "Green Tier" legislation, which is designed to promote "superior environmental performance" by businesses.[196] The Wisconsin legislation creates a two-tier market-based incentive program for environmentally responsible businesses.[197] Also, on the federal level, the U.S. has given tax credits in the past to renewable-energy producers, though the failure to renew the credit in some years has made the credit unpredictable.[198] Still, there is a general consensus among many that a federal level of control is inevitable, be it through incentives or strict controls.[199] Even such federal controls have the potential to create big business, however, in the form of carbon credits, *i.e.,* credits that can be bought on the open market that are awarded to businesses for the tons of carbon dioxide that are *not* emitted.[200] Such legislation would provide another potential money making angle for corporations that choose to go "green."[201]

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[193] Brian D. Anderson, *Legal and Business Issues of Green Building*, 79 WIS. LAW. 10, 11 (2006); Rick Rothacker, *Environmentally Friendly Projects: Buildings growing Wachovia, BofA part of push to cut the ecological impact of doing business*, CHARLOTTE OBSERVER, May 2, 2007, at 1D.

[194] Davidson, *supra* note 189, at 7A.

[195] *See, e.g.*, WIS. STAT. § 299.83 (2007) (setting out Green Tier legislation intended to create incentives for businesses with superior environmental performance). Similarly, Oregon has established a Green Permits program which offers reduced inspection frequency, among other benefits, as an incentive to encourage firms to adopt an environmental management system. OR. DEP'T OF ENVTL. QUALITY, THE OREGON GREEN PERMITS PROGRAM GUIDE 4-1 (2000).

[196] WIS. STAT. § 299.83; Linda H. Bochert & Mary Woolsey Schlaefer, *Achieving Environmental Excellence: Green Tier Legislation*, 78 WIS. LAW. 8, 9 (2005).

[197] Bochert & Schlafer, *supra* note 196, at 9.

[198] *Sunlit Uplands: Wind and Solar Power are Flourishing,Tthanks to Subsidies*, THE ECONOMIST, June 2, 2007, *in Cleaning up: A Special Report on Business and Climate Change*, at 16-19.

[199] *Everybody's Green Now: How America's Big Companies Got Environmentalism*, THE ECONOMIST, June 2, 2007, *in Cleaning up: A Special Report on Business and Climate Change*, at 6.

[200] *Trading Thin Air: The Carbon Market is Working, but not Bringing Forth as Much Innovation as had Been Hoped*, THE ECONOMIST, June 2, 2007, *in Cleaning up: A Special Report on Business and Climate Change*, at 8.

[201] Of course, any compulsory legislation would belong in the first category. I have included "green" legislation in the second category only to the degree that it is incentive based as opposed to compulsory.

In all of the situations described above, however, the question must be asked: if there is a benefit to the corporation, why is this even a choice? After all, it would seem that if choosing to pair with the RED campaign or to switch all of your business's light bulbs over to compact fluorescent light bulbs will save or make your business money, then why isn't everyone doing this? What sort of choice is being made? Again, turning a profit, even if just in the short-term, can be an obstacle. Many corporate managers feel pressure to make short-term earnings. According to a survey conducted by authors Dominic Dodd and Ken Favaro for their book, *The Three Tensions*, "nearly two-thirds (63 percent) of the managers in our survey said that the capital markets are biased toward short-term earnings."[202] Thus, if a venture requires a large up-front outlay of capital, such as some energy-saving steps, or if the return is speculative, it is understandable how some corporate managers might delay or decline to enter into such ventures.[203]

C. Altruistic (or Semi-Altruistic) Acts

The third and final category involves corporate behavior that benefits society and is initiated by altruistic motives. Of course, the very term "altruistic" can be controversial. The term "altruism" means an "unselfish concern for the welfare of others."[204] However, it could be argued that no action, be it by a corporation or an individual, is completely unselfish.[205] However, it is not the purpose of this Article to enter into such a philosophical debate, and so, for the purposes of this Article, I will use the term more loosely to cover behavior that is motivated by something other than a solid and foreseeable benefit to the corporation.

Even given this broad definition, it can be hard to categorize corporate behavior as "altruistic." As has already been noted, corporate managers are influenced and pressured to maximize profit. Some privately held corporations, however, have made altruistic behavior a part of their corporate culture. This is often initiated by specific persons

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202 DOMINIC DODD & KEN FAVARO, THE THREE TENSIONS 71 (2007).

203 *Id.* at 72 (noting that, of those surveyed, 27 percent often, and 54 percent sometimes, cut spending on R&D, marketing, or IT to safeguard short-term earnings and 13 percent often, and 64 percent sometimes, delayed a project, even if it would be profitable for the same reason).

204 WEBSTER'S UNIVERSAL COLLEGE DICTIONARY (1997).

205 Indeed, a recent study suggests that undertaking unselfish acts releases chemicals in the brain that activate some of the same pleasure centers in your brain as food and sex. *To your brain, altruism's as good as sex: Even paying taxes can trigger pleasure centers, study says*, REUTERS, June 14, 2007, *available at* http://www.msnbc.msn.com/id/19235071/.

within the organizations that have taken stands based on their own beliefs as to how a corporation should behave. These specific persons, in effect, act as individual "Jiminy Crickets" for the corporation. For instance, an example many a hungry fast-food fan is aware of is that Chik-fil-A is not open on Sundays.[206] The reason: Chik-fil-A's founder and chairman, S. Truett Cathy, is a devout Christian.[207] His beliefs have led him never to have his businesses open on Sundays, "a time in the quick service industry that normally generates 20 percent of revenue."[208] While the company also admits that it is a useful incentive in hiring and retaining employees,[209] it is clear that the real motivation is S. Truett Cathy's desire to worship and glorify his God. As Mr. Cathy expressed in response to a question about what he would like his greatest legacy to the organization to be:

> I think the greatest contribution would be the fact that we're closed on Sunday. We've done that for 60 years. And there are times when you mention Chick-fil-A, yeah, that's the place that's closed on Sundays. And it gives us opportunity to explain well sure, you can't go eat at Chick-fil-A because they're closed on Sunday to respect the Lord's Day. 'Honor the Lord's Day and keep it holy.' It's a special day that the Lord has given Man. We need that day off, it's to honor God. We just need a day off to think about the little things that are important. And that's the bottom line.[210]

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206 *See* Chik-fil-A, corporate website, http://www.chik-fil-a.com/Closed.asp (last visited March 23, 2008).

207 Miles Davis & Leyland M. Lucas, *Principle before Profits: An Interview with S. Truett Cathy*, NEW ENGLAND J. OF ENTREPRENEURSHIP, April 1, 2007, at 27; Thuy-Doan Le, *A Day of Rest: Religious Choice May Sacrifice Sales but Build Customer Loyalty*, THE SACRAMENTO BEE, April 15, 2006, at D1.

208 Davis & Leyland, *supra* note 207, at 27; Ben Werner, *Chik-fil-A Founder Shares his Philosophy*, THE COLUMBIA (SC) STATE, April 18, 2007.

209 Le, *supra* note 207.

210 Davis & Leyland, *supra* note 207, at 31. Interestingly, when asked about corporate social responsibility and whether the responsibility of a corporate manager is to the stockholders or shareholders, Mr. Cathy responded:

> You should be honest to your stockholders. Look at it the way they practice in the Navy where the captain's always the last one to depart from the ship. If you got a sinking ship, it is the captain who leaves last. I felt that in business it's the same way, you got to be responsible to the stockholders–unlike a business owner I heard about. He took his money and left the company in bad shape. He shouldn't have walked off, leaving his business in trouble. He did all he could to leave the scene. You should take care of the stockholders, those who

Thus, though there may be some incidental benefits to the decision to close on Sundays, the real motivation behind the decision is not a profit or benefit seeking motive, but rather a religiously based decision.

Ben & Jerry's ice cream offers another example of a corporation that has engaged in behavior for reasons other than profit.[211] Ben & Jerry's was started by Ben Cohen and Jerry Greenfield in Burlington, Vermont, in 1978.[212] From its inception, Ben & Jerry's used milk from local dairy farmers that was grown hormone-free and partnered early-on with non-profit organizations to offer job training to disadvantaged people.[213] In addition, Ben & Jerry's set up a compensation plan through which all staff earned at least twenty percent of the salary of the highest paid employee and committed 7.5 percent of its pre-tax profits to philanthropic causes.[214] Even though Ben & Jerry's was bought by food giant Unilever in 2000, the deal included a promise by Unilever to keep in place Ben & Jerry's corporate philanthropic philosophy as well as to commit a percentage of profits to charity.[215] And since the takeover, Ben & Jerry's still boasts that the company's annual reports continue to "evaluate achievement on social and environmental goals, including assessments by an external auditor."[216]

That is not to say that only privately held corporations can fall into this category. For instance, Robert Galvin, a former senior officer with Motorola, described an instance where his company forfeited profits

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> invest their life savings in it and trust in the company. They shouldn't be disappointed by the person they're trusting in, with mistake and no protection really, but that's the stock market. But it gets back to biblical principles. Treat others like you like to be treated, be honest and be truthful. These are the basic things that are expected of an individual.

Id. at 30.

211 EMILY ROSS & ANGUS HOLLAND, 100 GREAT BUSINESSES AND THE MINDS BEHIND THEM 353 (Sourcebooks, Inc. 2006) (2004) (noting that Ben & Jerry's is the first company to make a profit while acting like a non-profit organization).

212 *Id.*

213 *Id.* at 353-55.

214 *Id.* at 355. Ben & Jerry's also "set up all manner of revenue streams into nonprofit activities . . . [and] offered staff extended maternity and paternity leave and allowances for de facto and gay couples." *Id.*

215 *Id.* at 355-56. According to Ben & Jerry's website, it donates "over $1.1 million" a year to charity and donated $1.6 million in 2006. *See* http://www.benjerry.com/foundation/ (last visited March 23, 2008); *see also Company Profile for Ben & Jerry's*, March 30, 2007, *available at* http://www.benjerry.com/our_company/press_center/press/.

216 *50 for History*, HR MAGAZINE, Dec. 1, 2005, at 10.

based upon principles of integrity and respect for other people.[217] His anecdote recalls an instance around 1950 when Motorola had the opportunity to enter into a microwave contract with a South American government.[218] The contract would have meant a significant, but not enormous, increase in the company's profit margin.[219] However, it came to the company's attention that the South American government was trying to play footloose with where the money was going, and it was suspected that the contract would ultimately result in cash being funneled to some of that country's generals.[220] Motorola refused to enter into the contract and, furthermore, according to Galvin, would never solicit that government again, despite the profit that could be made.[221]

But, does this anecdote really represent an instance of altruistic behavior? Galvin admits that, though the company did not take that contract, it "made so much more money honorably over the next twenty years while [the] anecdote was still fresh in people's minds,"[222] indicating that the reputation boost and subsequent positive effect it had on the company's bottom line was worth any short-term profit they could have made by entering into a contract with a corrupt government. So does this sort of conduct really belong in the previous category? Perhaps not; according to Galvin, Motorola's decision, or perhaps more accurately, the decision of its officers, was not based on what was profitable or legal but on what the company held as a core value of right and wrong.[223]

Another company that has recently made headlines with its seemingly progressive corporate culture is American Apparel, Inc. which specializes in selling T-shirts.[224] American Apparel's claim to fame is that all of its merchandise is manufactured in Los Angeles, California,

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[217] Robert W. Galvin, *Corporate Social Responsibility is Not a Challenge*, *in* IS THE GOOD CORPORATION DEAD? SOCIAL RESPONSIBILITY IN A GLOBAL ECONOMY 254 (John W. Houck & Oliver F. Williams eds., 1996).

[218] *Id.*

[219] *Id.* at 255.

[220] *Id.* at 254-55. This occurred prior to enactment of the Federal Corrupt Practices Act ("FCPA"). *Id.* at 258; 15 U.S.C. §§ 78dd-1, 78dd-2 (2006).

[221] Galvin, *supra* note 217, at 255.

[222] *Id.*

[223] *Id.* at 258. Galvin notes that although the conduct in question in the anecdote would now be illegal, he believes that the legality was irrelevant because, as he puts it, "I know right from wrong and practice what is right, regardless of the law." *Id.*

[224] American Apparel, http://americanapparel.net/ (last visited Apr. 4, 2008) (American Apparel, Inc. trades on the American Stock Exchange (AMEX) as APP).

rather than overseas.[225] American Apparel's founder, Dov Charney, has made it his company's goal to prove that T-shirts can be made profitably in the U.S.A. while still paying a decent wage and maintaining good working conditions.[226] Indeed, American Apparel has not just settled for manufacturing in the U.S., but also has offered benefits beyond a "decent" wage. Along with workers averaging $12.50 an hour,[227] American Apparel offers a number of perks such as health insurance, paid vacations, free English classes (the workers are predominantly Hispanic), subsidized bus passes, lunches, legal assistance as well as yoga, massage, and counseling.[228] American Apparel has planned to begin a stock plan under which the average employee would receive 540 shares in the company.[229] This is all part of Charney's vision to present a "sweatshop free" product which has reaped rewards for the company.[230] American Apparel reported $80 million in sales in 2003[231] and that number grew to $300 million in 2006.[232]

The sweatshop-free vision is more than just an altruistic tag-line, however; it is also the heart of American Apparel's business model. By keeping manufacturing in the U.S., Charney claims he is better able to respond to market demands as well as ensure quality control.[233] The generous pay and benefits also helps attract workers. As Charney himself has noted, "It's not a marketing ploy, necessarily, it's about taking care of people that are taking care of the company. And it's also a capitalistic ploy, because they can say: 'Well, you know, someone works at another factory, they make $2 less or $5 less an hour,' and they're 'Oh,

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225 SUZANNE BERGER, HOW WE COMPETE: WHAT COMPANIES AROUND THE WORLD ARE DOING TO MAKE IT IN TODAY'S GLOBAL ECONOMY 201-02 (2006); Rob Walker, *Conscience Undercover*, N.Y. TIMES, Aug. 1, 2004, at Section 6, p. 18; CBS Sunday Morning (CBS television broadcast Feb. 4, 2007) (Interview by John Blackstone with Dov Charney, creator of American Apparel company).

226 BERGER, *supra* note 225, at 203.

227 *Id.* at 202; Walker, *supra* note 225 (quoting a $13 per hour wage).

228 BERGER, *supra* note 225, at 202-03; Linda Baker, *Made in the U.S. of A.?*, SALON, Feb. 11, 2004.

229 CBS Sunday Morning (CBS television broadcast Feb. 4, 2007) (Interview by John Blackstone with Dov Charney, creator of American Apparel company).

230 BERGER, *supra* note 225, at 203. *American Apparel Registers Record-Breaking Sales*, BUS. WIRE, Dec. 10, 2002.

231 Jenny Strasburg, *Made in the U.S.A.*, SAN FRANCISCO CHRON., July 4, 2004, at Business J1.

232 CBS Sunday Morning: *To aT*, (CBS television broadcast Feb. 4, 2007) (Interview by John Blackstone with Dov Charney, creator of American Apparel company).

233 *Id.*; *see also* BERGER, *supra* note 225, at 203; Marisa Katz, *Millionaire in a T-shirt*, Israel Business Arena, Nov. 16, 2004 (noting that Charney briefly outsourced in the beginning to Mexico but that the quality control created issues that off-set the savings in cheaper labor).

at American Apparel, you have medical insurance.'"[234] The sweatshop free tagline has also been a marketing point itself, which may be a large part of the company's success.[235] Thus, as with the Motorola example above, the corporate behavior may have its genesis in an altruistic or semi-altruistic motive. Ultimately, it is the concept's profitability that makes it sustainable. As Charney himself has noted, "If you've got a company where everybody wins, that company will be around for awhile."[236]

D. Blurring the Lines

As the Motorola anecdote and American Apparel business model demonstrate, it is often difficult to identify the main motivating factor behind corporate behavior that is beneficial to society. Though the Federal Corrupt Practices Act was not yet in place, Motorola may have felt it was treading into a gray legal area, or at least one that could eventually cause it legal headaches. Additionally, as Galvin noted, the corporation saw a long-term benefit based on refraining to do business. American Apparel is motivated to provide a sweatshop free product, but that same tagline has helped sell the shirts and thus made the product profitable. Identifying what motivates such corporate behavior is difficult without more information from the companies themselves,[237] and even then, we may be suspect of their explanations, which may be nothing more than a public relations spin. On the other hand, corporate managers may be doing the opposite, attempting to offer legitimate beneficial results for the corporation to justify their own desire to engage in altruistic behavior.[238]

In reflecting upon the above factors, it is important to note that they are just that, factors. They very well may not be mutually exclusive, but

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234 CBS Sunday Morning (CBS television broadcast Feb. 4, 2007) (Interview by John Blackstone with Dov Charney, creator of American Apparel company).

235 *Id.*; BERGER, *supra* note 225, at 202-03; Strasburg, *supra* note 231; Shannon McMahon, *Made in Downtown L.A.; American Apparel's progressive practices winning over customers*, SAN DIEGO UNION-TRIBUNE, Dec. 18, 2004, at Business, C-1 ("American Apparel's socially conscious vibe is still what first strikes a chord with consumers.").

236 McMahon, *supra* note 235 (quoting Dov Charney).

237 As Professor Williams notes in discussing her own categorical approach to CSR initiatives, "[d]istinguishing between these explanations is difficult without access to information about companies' internal decision-making processes, which will require more in-depth interviews and case studies; there are undoubtedly multiple explanations for this relatively new phenomenon." Williams, *supra* note 141, at 1647.

238 Abzug & Webb, *supra* note 173, at 1041 (noting that, with regard to giving, because managers cannot separate their individual interests from occupational decision-making, managers "may maximize their own utility").

rather, interact in a complex way to produce socially beneficial corporate behaviors. And while examples have been used to try and identify behaviors based upon driving factors, it is certainly open for debate whether, and to what degree, a corporate behavior is based upon one of the mentioned categories.

V. JUDGING THE CORPORATE CONSCIENCE

It is tempting, when looking at the above categories, to use them as a checklist for good corporate behavior. For instance, if a corporation is generally abiding by the laws and occasionally donating money to charity, then it could be concluded that the corporation is acting as an acceptable corporate citizen, even if it does not engage in altruistic acts. Just as individual citizen John Doe, who generally abides by the law (though we would probably tend to forgive the errant minor violation such as a traffic ticket) and who occasionally gives money to a local charity, but enjoys the tax write-off, could be deemed a good citizen. However, I believe such an approach over-simplifies the analysis. Continuing with the John Doe example, Doe, a single unattached man, could also be having an affair with his best friend's fiancé. Many would consider this rather morally reprehensible, though completely legal. Corporations can also engage in behavior that, though legal, can be seen as immoral and affect our view of their corporate citizenship. Returning to the example of the corporation that chooses to recognize same sex partnerships, whether the corporation is considered to have made a right or wrong choice is a highly individualized question.

This is not to say that the factors are useless in evaluating corporate behavior. Quite the contrary, someone may well look at a situation and make his or her own determination of what the motivating factor should be behind socially beneficial actions. Law and economics proponents may well argue that no corporate act should be based on the altruistic category, while proponents of CSR will likely promote decision-making based in that same category (though perhaps not exclusively). But whatever the moral base of the individual judging corporate behavior, understanding what motivates corporate behavior is important in understanding how to change or curb corporate behavior.

VI. CONCLUSION

The corporation has evolved extensively from its roots in America as a specially chartered association organized to accomplish some public good, to the modern profit-making entities of today. Along the way, abuses of corporate power, whether real or perceived, have resulted in regulations aimed at curbing corporate behavior. Furthermore, the separation of ownership from control in the corporation, articulated in the Berle-Means thesis, has led to debates over the roles and duties of corporate managers. This has helped to shape the debate over whether, and to what degree, corporate managers should cause the corporation to engage in socially beneficial behaviors.

Though these individuals who run the corporation have a conscience (arguably as human beings), the corporation itself does not have one in the traditional sense of the word. The corporation is an artificial entity, soulless and devoid of the ability to reflect upon its actions. However, like the wooden boy, Pinocchio, corporate behavior is directed by its own Jiminy Cricket, *i.e.* external factors. These external factors of legal compliance, corporate benefit and even altruism (even if it is manifested through a controlling corporate manager), often act in conjunction to produce corporate behaviors that ultimately benefit some aspect of society. While more empirical research is needed to understand to what degree each of these factors affects corporate behaviors, through understanding these factors, we may begin to understand why corporations act as they do and how corporate behaviors may be curbed in the future.