

# The American Corporation and Poverty

## The Potential for Corporate Social Responsibility

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*The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation.*

--Justice Louis Brandeis<sup>1</sup>

### Introduction

In the midst of the Great Depression, eminent Harvard law Professor E. Merrick Dodd published his seminal article entitled, *For Whom are Corporate Managers Trustees?*<sup>2</sup> Seizing on a recent transition in the legal conception of the corporate entity,<sup>3</sup> and to a lesser extent developments in property law, Dodd argued that the law of corporate governance could accommodate an institutionalized role for corporate management—an identity beyond fiduciary of the corporation's stockholders.<sup>4</sup> By conceiving of a corporation as a legal person, with interests which may diverge from those of its stockholders, corporate management becomes the fiduciary of the corporate entity, free to pursue the corporation's independent interests. In noting that such a modification in our basic conception of the corporation was possible, Dodd chronicled a change in opinion, of those both inside and outside the corporate entity, on the social responsibility of the corporate body.<sup>5</sup> Speaking on these recent developments Owen Young, then an executive with GE, concluded "one no longer feels the obligation to take from labor for the benefit of capital, nor to take from the public for the benefit of both, but rather to administer wisely and fairly in the interest of all."<sup>6</sup> Almost 80 years later, in the midst of a similar economic crisis, we can see that the transformation in public opinion chronicled by Dodd has failed to yield its predicted, or perhaps, more aptly, potential, results.

Yet, with bad economic news returned daily, there is, once again, palpable outrage directed at America's corporations. Certainly today, the theory of corporate governance depicted in Dodd's article, a vision of broad corporate citizenship, seems like an unrealistic, perhaps fantastical, version of corporate America. And although public attention is currently transfixed on the "misbehaviors" of the American corporation, even in times of economic prosperity a broader vision of corporate social responsibility has not dominated corporate governance. In times of economic prosperity, however, this fact goes largely unnoticed. While the effects of corporate "misbehavior" are broad, touching many aspects of American life, this paper, for purposes of concretely illustrating a larger theory, will focus on the ramifications for those who provide labor to America's largest corporations.

Every day, through the regular course of our daily lives, we confront the faces of America's working poor. These persons suffer quietly, seemingly invisible; many walk past them without noticing. We may occasionally meet them when working late at the office, but otherwise we rarely notice when the wastebaskets have been emptied or the bathrooms cleaned. We see them at the mall and the grocery store,

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<sup>1</sup> *Louis K. Liggett, Co., v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting).

<sup>2</sup> E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932).

<sup>3</sup> Previously, the corporation was perceived as an aggregate of its stockholder owners; Dodd notes a shift in legal conception of the corporation to a "legal person."

<sup>4</sup> Dodd, at 1146-49.

<sup>5</sup> Dodd, at 1148.

<sup>6</sup> Dodd, at 1155.

but we do not know their names. These are the retail sales clerks, janitors, waitresses, garbage-haulers and health aides who every day, almost anonymously, impact our lives. Despite numerous daily encounters, many of us remain oblivious to their plight. We are simply unable to understand how work—to parody a popular political slogan—does not work.

Stories of corporate malfeasance are well known; many, in fact, would argue that they have become commonplace. Details of the Enron scandal and Worldcom's collapse filled newspapers for months. And, as alluded to above, the current economic crisis is largely blamed on rampant corporate wrongdoing. It seems, however, we only pay attention when there is gross criminal misconduct or a global economic crisis. Yet, the phenomenon discussed in the preceding paragraph is not the sexy stuff of headlines. In fact, much of this phenomenon is the result of completely legal behavior; it is perpetuated simply by the day-to-day operations of the corporation. But the existence of a class of working poor, in country with a puritanical morality, suggests a failing in our economic system. Minimum wage, after all, just does not go very far.

To be sure, there is documentation of employee exploitation, violations of health and safety regulations—evidence that at times the law is not a sufficient constraint. But this is a different, although related, problem. Even America's "good" corporations—those in compliance with all applicable laws—are guilty of perpetuating the growing economic inequality in this country. American corporations pay minimum wage when profits would support far more; they structure their business to avoid paying overtime and benefits; they outsource certain aspects of their business to companies that may, or may not, comply with federal and state regulations. These strategies are all employed with an eye towards the maximization of profits, but it is done at the expense of the low-wage worker. The question remains: is it fair to expect more from America's corporations? Or is "profit-maximizing" behavior, as many commentators have concluded, simply the nature of the corporate entity?<sup>7</sup>

In recent years, the corporate social responsibility (CSR) movement has re-emerged as a response to the failure of the current culture of corporate America to reflect a broad vision of the corporation's social purpose.<sup>8</sup> Today's CSR emphasizes internal, self-regulation; that is, a voluntary adjustment in corporate decision-making.<sup>9</sup> But critics of the current movement, noting the dominance of the profit-maximizing culture, argue that CSR amounts to, at best, a public-relations exercise, and, at worst, "provid[es] a 'fig leaf' for corporate license."<sup>10</sup> Such critics have concluded that the current culture is simply the inherent nature of the corporate form; that is, the corporation, as a complex entity, is incapable of socially responsible decision-making.

But this argument fails to acknowledge that the corporation is both a legal and social construct. There is, I would argue, no inherent nature to a "legal fiction;" there is simply a culture. It is a culture—dominated today by an obsessive focus on short-term profits—that both responds to and shapes public opinion. The purpose of this paper, beyond illuminating a connection between America's class of working-poor and the current business culture, is to argue that we as a society cannot expect a different morality, if we view profit-maximization as a morality, without a clear understanding of the role of the corporation as a social institution.

### **The Corporation's Effect on American Poverty**

It is now a seminal work in the study of American poverty, but David Shipler's *The Working Poor: Invisible in America* began, in 1997, as a journey "to find the working people who had been left behind."<sup>11</sup> To call them characters would be incorrect; they are real people, beautifully human—both noble and flawed. Through their words Shipler conveys a sense of quiet desperation; their suffering is palpable, haunting. His

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<sup>7</sup> Kent Greenfield, *The Disaster at Bhopal: Lessons for Corporate Law?*, 42 New Eng. L. Rev. 755 (2008).

<sup>8</sup> See Alan C. Neal, *Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?*, 29 Comp. Lab. L. & Pol'y J. 459.

<sup>9</sup> Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. Pitt. L. Rev. 605, 611 (2001).

<sup>10</sup> Neal, at 463.

<sup>11</sup> David K. Shipler, *THE WORKING POOR: INVISIBLE IN AMERICA* ix (First Vintage 2005).

journey began with a simple motivating premise: "nobody who works hard should be poor in America." But of course he found many low-wage workers were poor—in poverty or standing precariously at the threshold. As he chronicled their lives over the course of several years he found that many remained poor. Shiplier's project exposes several myths about American poverty; the stereotypes surrounding the impoverished all, somehow, now seem incomplete. These persons are caught in a vicious cycle, not entirely blameless but still victims in many respects.

There is, of course, a numerical definition of poverty, a quantified measure of human suffering. In 2009, a single person is considered to be living in poverty if she survives on a pre-tax income of less than 10,830 dollars per year.<sup>12</sup> For a family of four the poverty line is currently, in annual income, set at 22,050 dollars.<sup>13</sup> The formula used to determine this measure of basic human need is roundly considered to be inadequate and out of date.<sup>14</sup> Developed in the 1960's, the statistical measure accounts for inflation, but it has never been adapted to the modern economy.<sup>15</sup> Nevertheless, this antiquated tool serves to further illuminate the depth of American poverty. Take, for example, an employee at a fast food restaurant chain. Even if she manages to secure a full-time position and assuming (perhaps unrealistically) that full-time is defined as 40 hours per week, making the federal minimum wage, she will earn a pre-tax income of only 13,100 dollars a year.<sup>16</sup> Disregarding the fact that the federal poverty measure drastically underestimates the cost of living in America, minimum wage does not provide much more than the bare basics. Minimum wage is not a misnomer; luxuries like daycare and health insurance often remain far out of reach.<sup>17</sup> As noted above, the most recent data from the United States Census Bureau indicates that 7.4 million Americans are counted amongst the working poor.<sup>18</sup> But we must stop to consider the collateral consequences of this poverty—the children of America's working poor. Many of the 36.5 million Americans living in poverty are children, the unaccounted for victims of work that does not pay a living wage.<sup>19</sup> It seems a close examination of the quantitative measure of poverty reveals that the problem is more profound than it first appears.

The causes and effects of poverty, however, are not revealed in statistics. That is a more complex inquiry, especially with regard to the economic insecurity of the working poor. There is no single cause of poverty, no one identifiable failure, no one definitive solution. There are, of course, patterns and themes. But even still, it would be impossible to isolate a contributing factor to a multi-faceted problem like poverty and quantify its peculiar effect on this social phenomenon. But as David Shiplier concluded in the early pages of his book, "[w]hile the United States has enjoyed unprecedented affluence, low-wage employees have been testing the American doctrine that hard work cures poverty. Some have found that work works. Others have learned that it doesn't."<sup>20</sup> That is little more than the statistics show. The complex question, however, remains unanswered: why do so many working Americans continue to suffer from the effects of poverty even in times of economic prosperity? An answer to this question is needed because the existence of a class of working poor is fundamentally at odds with the basic values of American society. It is the essence of the American dream—work should work. As noted above, there is no single solution to the plight of the low-wage worker. A solution to such a complex problem must develop through individual contributions from a variety of social institutions; all one can hope to provide to the discourse is a small, incremental improvement. But identifying a cause, or rather a contributing factor, requires moving beyond statistics.

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<sup>12</sup> <http://aspe.hhs.gov/poverty/09poverty.shtml>

<sup>13</sup> Id.

<sup>14</sup> <http://aspe.hhs.gov/poverty/09poverty.shtml>

<sup>15</sup> Id.

<sup>16</sup> The federal minimum wage is currently \$6.55 per hour. See <http://www.dol.gov/>. Although most, if not all, minimum wage workers will be eligible for EITC, many do not know it is available and thus still pay taxes to the federal government.

<sup>17</sup> There are, of course, government assistance programs which help workers obtain these services. The fact that they need government assistance, however, illustrates that they are not being paid a living-wage.

<sup>18</sup> <http://www.bls.gov/cps/cpswp2006.pdf>

<sup>19</sup> Id.

<sup>20</sup> Shiplier, at 4.

In his book, Shipler introduces us to Caroline with a poignant observation, "with indifference, the economic boom at the turn of the century passed her by. The reasons were not obvious, but they were insidious."<sup>21</sup> Caroline had worked steadily all her life, but economic security still eluded her. In the mid-1970's, Caroline was working at a plastics factory making \$6 dollars an hour. Over a quarter century later, she was working at Wal-Mart making \$6.80 an hour; she had gotten nowhere and was falling further and further behind. Shipler estimated, when adjusted for the increased cost of living, Caroline was actually making \$3.70 an hour less than she was in the 1970's;<sup>22</sup> she had made no progress over two decades, where America, in terms of economic prosperity, had gained so much. As noted above, there is no single, identifiable reason for Caroline's position in life; she was the victim of both personal and social failures. Her story is tragic. It is one that is both unique and, in another sense, all too common; many Americans have received too little for their years of hard labor.

Wal-Mart, like all major American corporations, offered their employees health insurance, but Caroline could not afford the monthly premiums. Even if she could have managed to scrape together the money, there remained a \$250 yearly deductible. Thus, Caroline went uninsured. By all accounts she was a model employee, flexible, punctual, hardworking; she never turned down an opportunity for overtime. She could make as much as \$7.50 an hour working the night shift. According to Shipler's estimates, however, this is "nothing close to what her flexibility was worth to a store that stayed open around the clock."<sup>23</sup> But this flexibility, possibly more of a requirement than an asset when working at Wal-Mart, prevented Caroline from getting a second job. She did not have a consistent schedule or a regular day off.

Caroline did not own a car and would walk 20 minutes each day to work. Sometimes she would arrive only to be asked to return for a later shift; she would simply walk home and come back in the evening. She did not seem to find this offensive, although she did have a telephone. And for all of this, her only question, phrased as more of an inquiry than a complaint: "couldn't they have the decency to pay me a bit more?"

Yet, of course, the question remains, could Wal-Mart afford to pay Caroline a higher wage? Such an inquiry might seem ridiculous given the size of the Wal-Mart corporation and its ability to under-cut almost any competitor's prices. But as a low price retailer, this is its market niche; Wal-Mart provides low-cost goods and services. And its continued success suggests that such a retailer is in demand.<sup>24</sup> So the real question becomes, could Wal-Mart pay its employees higher wages without significantly raising its prices? Mark Brown, the manager at the Massachusetts store where Caroline worked, confessed that they could.

When asked how starting his employees at \$8 dollars per hour instead of \$6.25 (and retaining the higher hourly wage paid for working the night shift) would affect the economics of the store, Brown thought for a moment and concluded, "I don't think it would change at all."<sup>25</sup> According to its own management, Wal-Mart could pay higher wages without reducing its profits; Brown noted, "We'd have to cut corners on other things like, you know, we may not be able to put all the pretty balloons up all over the store. The non-necessities we'd have to cut back on."<sup>26</sup> Several days after Shipler interviewed Mark Brown, Wal-Mart announced 5.8 billion dollars net income for 1999; that figure is up 23% over the previous year's income.<sup>27</sup> And Wal-Mart's wealth continues to accumulate; in 2005, the corporation reported approximately \$11.2 billion in profits.<sup>28</sup>

Although Wal-Mart is an often maligned example of the modern American corporation, it is certainly not unique. Caroline's life story is again illustrative. Searching for higher wages, Caroline left Wal-Mart and signed on with a temp-agency. After about a month, the agency placed her at a factory owned by Proctor & Gamble; she would be earning \$10 an hour, the highest wage she had ever received. For many low-wage employees this job would have been a blessing; it paid a decent wage, enough to provide the

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<sup>21</sup> Shipler, at 51.

<sup>22</sup> Id. at 50-5.

<sup>23</sup> Shipler, at 51.

<sup>24</sup> To suggest that Wal-Mart should increase prices in order to increase its wages would, in some sense, require Wal-Mart to change its business model. Wal-Mart is a low-price retailer and there is demand for this type of service. This project argues that there is room

<sup>25</sup> Shipler, at 65.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> [http://www.tni.org/detail\\_page.phtml?act\\_id=15966&password=9999&publish=Y&username=guest@tni.org](http://www.tni.org/detail_page.phtml?act_id=15966&password=9999&publish=Y&username=guest@tni.org)

potential for economic comfort. For Caroline, however, there was a problem—her daughter Amber. By this point, Amber was now fourteen, sweet and joyous but she had a learning disability and was epileptic. The child needed a fair amount of supervision and could not be alone for more than a few hours. When taking the occasional evening-shift at Wal-Mart, Caroline was usually able to find someone to stay with Amber. Caroline often rented space in her home to struggling families, they were likely to be at home in the evening. But now she had no boarders, no one to stay with Amber and the P&G factory worked on rotating shifts. So Caroline did the only thing she could, she left Amber alone. This continued until Amber's school threatened to call social services. Caroline, adept at using government aid, starting enlisting resources, but Amber was too old for welfare's child-care support and too young for Social Security's aid. Amber's school, which had a number of social services contacts, also began investigating. All they needed to find was a temporary solution; in a month Caroline would be taking on new tenants who would be able to help with Amber in the evening. This situation, of course, is nothing remarkable; it likely occurs somewhere everyday. What Shipler found remarkable, however, was the failure—even of those in social services—to "pursue the obvious solution;"<sup>29</sup> Caroline simply needed to work day shift, at least for a month, and then her problem would have been solved. But nobody considered pursuing this option with the employer. Shipler notes, "this solemn regard for the employer as untouchable, off limits, beyond the realm of persuasion unless in violation of the law, seems to permeate the culture of American anti-poverty efforts...."<sup>30</sup> When Shipler asked that question—the one no one thought to ask—he received the answer everyone else had expected. Caroline was a temporary employee and the factory felt no responsibility towards her; the company knew she was replaceable.

Statistics may be indicative; in 2005, the pay ratio between the CEO and the average employee working in the same company was 262 to 1.<sup>31</sup> In contrast, in 1979, the pay ratio was 24 to 1. But it becomes obvious, once we move beyond statistics, that the American corporation, as an institution, contributes to the plight of the working poor. While the policies and practices of corporate America are not the sole, or even direct, cause of poverty, they place low-wage workers in a precarious position, teetering on the edge of impoverishment. These workers are in a constant state of economic insecurity. And many of them, as Cynthia Estlund notes, work for America's large "Fortune-500 type" firms.<sup>32</sup> In some sense, we can see this by simply looking at the salary these corporations pay to their employees. What is not always clear, however, is that corporations could do better. Caroline's story demonstrates this; Wal-Mart could have paid its employees higher wages; Proctor & Gamble could have provided her with a solution to her temporary problem. That is, the policies and practices which contribute to the problem of American poverty are not a necessary evil of a profitable business. But the market dictates the wages paid; that same market, and the availability of low-wage labor, dictates that Caroline was replaceable. This is something that Americans have come to accept; these are the policies and practices we have come to expect.

### **Corporate Citizenship: Contrary to the Inherent Nature of the Corporate Entity?**

After two decades of historic economic growth, there remains an invisible class in America—those operating at the bottom of our nation's labor market. In 2006, the United States Census Bureau counted 7.4 million Americans among the working poor.<sup>33</sup> Many of these workers are employed, directly or indirectly, by America's largest corporations.<sup>34</sup> But as these corporations continue to accumulate vast amounts of wealth, it has become clear that the obvious prosperity has not "trickled-down." Over the last two decades of the 20th century, a time of historic and prolific corporate expansion, the income of the poorest 20 percent of Americans rose less than 1% (in terms of real dollars); the income of the richest 20 percent, by contrast, has

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<sup>29</sup> Shipler, at 71.

<sup>30</sup> Id.

<sup>31</sup> Estlund, at 672.

<sup>32</sup> Estlund, at 673.

<sup>33</sup> <http://www.bls.gov/cps/cpswp2006.pdf> (A worker is classified among the working poor after having spent 27 weeks or more in the labor market, working or looking for work, but whose income still fell below the official poverty level.)

<sup>34</sup> Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 Lewis & Clark L. Rev. 671, 673 (2008).

increased by 49 percent.<sup>35</sup> The problem, however, is more than simple economic inequality. While American corporations report astounding levels of profit, many of their employees, direct and indirect, do not receive a living wage.

Caroline's story, a brief sojourn into the invisible world of the working poor, while demonstrating the pain poverty, also provides a picture of American corporate culture. What we see, if we accept Caroline's story as illustrative, is a business culture dedicated to the maximization of short-term profits, a dedication which persists despite enormous social costs. These costs, while harmful to a variety of social constituencies, often have, as shown above, a debilitating effect on the low-wage worker. From a social justice perspective, this is problematic, as employees are viewed as having a valid and weighty claim to the benefits of corporate profit and production. After all, corporate wealth is created through labor—it is amassed on the backs, and through the sweat, of its employees. The continued existence of this public policy problem seems to challenge our basic sense of fairness. Although disagreeing about the details of policy and implementation many Americans, relying on Shipler's basic assumption "that nobody who works hard should be poor," would agree with the basic premise that a corporation's employees are entitled to an equitable portion of the profits they help produce. A living wage, where company profits would support it, is equitable.

A broad vision of the corporation's social purpose, a vision of the corporation as a moral agent, is not a modern reform. Professor Dodd's famous article, according to his estimation, chronicled a period of American history where public opinion had made "substantial strides in a direction of the view of a business corporation as an economic institution which has a social service as well as a profit-making function."<sup>36</sup> The modern CSR movement has been alive, in some variant, since the early 1970's. In that era, the corporate social responsibility movement concentrated on efforts to reform the law of corporate governance.<sup>37</sup> Today's version of CSR, however, is centered on internal, self-regulation; it advocates "behavior by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interests."<sup>38</sup> Discussing the modern role of the multi-national corporation, the European Commission noted, "[t]here is today a growing perception among enterprises that sustainable business success and shareholder value cannot be achieved solely through maximizing short-term profits, but instead through market-oriented yet responsible behavior."<sup>39</sup> But, of course, CSR has its critics on both the right and the left. On the right, there is a fundamental disagreement about socio-economic policy and the corporation's proper role as a social institution. This side of the debate will be taken up later in this paper. On the left, critics suggest that voluntary regulation will, and cannot, result in substantive changes to corporate decision-making. To expect internal self-regulation from the corporation, these critics seem to suggest, is to expect reform that is incompatible with the inherent nature of the corporate entity.

Kent Greenfield, a well-known corporate law scholar, recently employed a famous parable to describe the nature of the corporate entity. In this brief essay, he compares the hypothetical corporation to the fabled scorpion who, contrary to professed intention, stung the frog providing him passage across the river killing them both. When the dying frog asked why he had done it, the scorpion simply replied, "I am a scorpion...and that is my nature."<sup>40</sup> Building on this analogy, describing the inherent nature of the corporate entity, he writes, "without constraints, [the corporation] can be too single-minded in the pursuit of profit. As an artificial entity, it has no conscience of its own. And with the separation between the company and its investors, the consciences of those investors are not easily brought to bear."<sup>41</sup> The consequence, he suggests, is that, "the company has every incentive to externalize costs to those whose interests are not included in the firm's financial calculus—and the firm can do this by polluting the environment, selling shoddy products to one-time purchasers, raiding its employees' pension funds, or producing its goods in sweatshops."<sup>42</sup> Many would agree that Greenfield has accurately depicted the current culture of the modern American corporation.

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<sup>35</sup> Id.

<sup>36</sup> Dodd at 1148.

<sup>37</sup> Branson at 611-14.

<sup>38</sup> Neal at 465.

<sup>39</sup> Neal at 460.

<sup>40</sup> Greenfield at 755 (citing <http://www.gardenplum.com/girls/gratree/frogandscorpion.html>).

<sup>41</sup> Greenfield at 959

<sup>42</sup> Id.

But to argue, as commentators have, that this is the inherent nature of the corporation suggests that the law or process of corporate decision-making, in some respect, predetermines the profit-maximizing culture of today's corporate America. As noted above, such an analysis ignores the fact that corporate America is a social institution, shaped by the society in which it operates. Greenfield, for his part, hints at the influence of the social conception of the corporation; "it is worth emphasizing that corporate managers and executives making decisions are not doing anything illegal or even immoral. They are doing what we ask them to do, which is to look after the interests of the bottom line."<sup>43</sup> This is the cause of the current culture of corporate America; "we ask them to be single minded in their role and leave to others the worries about the externalities their companies cause."<sup>44</sup>

### **The Development of the Current Culture of Corporate America**

The above discussion—if we accept that corporate America is, in part, a social construct—presents a curious contradiction. On one hand, the corporation is a social institution, a product of social expectations, responsive to public opinion. On the other hand, the current culture of corporate America places certain burden on society that, as in the case of the working poor, many Americans appear to find problematic. But this leaves us wondering how to explain this anomalous disconnect? It could simply be that Americans are unaware of the social effects of the profit-maximizing culture; the connection between poverty and the corporation is somewhat indirect. This, however, does not seem to be a phenomenon of ignorance; it is not something that, in our most thoughtful moments as citizens we do not recognize. But this disconnect—the inability to articulate the animating social purpose of the corporate form—has left corporate America without a clear moral directive.

American history demonstrates a consistent and pervasive discomfort with reconciling the corporation as both a business entity and as a social institution. The modern corporation enjoys unprecedented wealth and power. With this power comes the ability to broadly affect the world, to do harm and to advance the social good. To be sure, the corporation is "the world's most successful business form;"<sup>45</sup> it has expanded the American (and global economy) and created immense financial wealth. Furthermore, a country's economic wealth is also linked to its social progress. It is not an exaggeration to say that America industrialized and eventually modernized through incorporation. But despite the corporation's potential to aid social progress, until the mid-19th century the business corporation (as opposed to charitable or educational corporations) was a highly regulated business form; there were no general incorporation statutes. Expansion of the corporate form, as Justice Louis Brandeis concluded, was resisted out of fear;<sup>46</sup> "fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjugation of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain."<sup>47</sup> And we can see that progress has had a social cost, a cost that, in many ways, is externalized to the whole of society.

Much of the controversy surrounding the American corporation, with regard to both law and public policy, is centered on how to retain the benefits of private enterprise, while at the same time controlling the social costs associated with the corporate structure. The effect of corporate law on the perpetuation of the current profit-maximizing culture will be discussed more fully in a subsequent section of this paper. I think we will find, as with the larger social discourse, the law of corporate governance is irresolute. But this "ambivalence," the inability to articulate a coherent conception of the corporation as a social institution, has a profound effect outside of law and public policy. Without a defined animating social purpose, corporate America is left without moral orientation. That is, there is no articulated understanding of the role of the corporation as a moral agent.

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<sup>43</sup> Greenfield at 759

<sup>44</sup> Id.

<sup>45</sup> Kent Greenfield, *The Proposition: Saving the World With Corporate Law*, 57 Emory L. J. 948, 948 (2008).

<sup>46</sup> *Lee*, 288 U.S. at 548.

<sup>47</sup> Id.

On the right side of the political spectrum there is, what might easily be termed, the Friedman morality. While it might seem curious to impute a moral theory to an economist, Friedman's declaration that "the social responsibility of business is to increase its profits" was, most certainly, a moral directive to America's corporate managers.<sup>48</sup> Responding to, what he perceived to be, the dominant belief amongst corporate officers that "business should be concerned with promoting desirable social ends," Friedman boldly railed against the concept of corporate social responsibility.<sup>49</sup> Seizing on the analogy of corporate managers as agents of the company's stockholders, Friedman asserted that social responsibility must require a manager to act "in some way" contrary to interest of his employers; in so acting, Friedman concluded, he would be spending someone else's money.<sup>50</sup> From this perspective, corporate social responsibility becomes an illegitimate tax on corporate dividends.<sup>51</sup> Friedman feared an oligarchy of corporate managers; he saw in the CSR movement a threat to democracy itself. As one jurist has summarized, in adopting the broad vision of the corporation as a social institution, corporate officers "risked undermining the most obvious utility of the corporate form—its capacity to increase social wealth."<sup>52</sup> And, of course, increased social wealth would indirectly benefit the whole of society. This is the theory of "trickle-down" economics. According to Friedman, the only legitimate restrictions on the free market are those that pass the rigors of the political system.<sup>53</sup> Thus, corporate managers must "vigorously pursue profits for stockholders tempered only by the requirement to comply with laws and generally accepted business norms."<sup>54</sup>

Despite Friedman's concession to the legitimacy of restricting the free market through political means, regulation remains a four-letter word amongst his followers; regulation places an increased cost on the corporation, and causes a corresponding reduction in profits. But this, of course, is where the public policy debate begins. Regulation has become the liberal answer to the cost-benefit analysis that is at the heart of the political debate over the American corporation.<sup>55</sup> While the CSR movement has emerged and re-emerged, in various forms, advocating governance reforms, in many liberal circles regulation remains the only solution to the inevitable failures of the capitalist system. But this is not because liberals have acquiesced to Friedman's claim that internal regulation is illegitimate, rather it is a capitulation to what is widely viewed as the inherent nature of the corporate entity. It is at this point we begin to see an overlap between the theory of corporate governance and the debate surrounding public policy. But somewhere in the course of this continuing debate, Americans have come to believe that they cannot expect more from a scorpion.

In the early 20th century, following several decades of gradual reform,<sup>56</sup> America was confronted with the existence of the modern corporation. Unlike their predecessors, corporations were now "public"—financed through relatively small capital infusions from a large, diverse, and dispersed group of investors. And while this method of financing permitted the corporate entity to quickly collect a large amount of liquid, low-cost capital, this trend had serious implications for corporate governance. In 1915, a future Supreme Court Justice Louis Brandeis opined, "a wide distribution of stock dissipates altogether the responsibility of stockholders, particularly of those with 5 shares, 10 shares, 15 shares, or 50 shares. They recognize that they have no influence in a corporation of hundreds of millions of dollars capital."<sup>57</sup> That is, the separation of ownership and control leads to the phenomenon, amongst the stockholders, which economists refer to as

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<sup>48</sup> Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Profits*, N.Y. TIMES, Sept. 13, 1970, at 33.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*, at 33, 122.

<sup>51</sup> *Id.*, at 122.

<sup>52</sup> Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior*, 58 U. Toronto L.J. 241, 257 (2008).

<sup>53</sup> Friedman, at 122.

<sup>54</sup> Strine, at 257.

<sup>55</sup> *Id.* at

<sup>56</sup> Such reforms include the introduction of general incorporation laws and the free transferability of shares. *See* Bruner, at 1389.

<sup>57</sup> Louis D. Brandeis, *On Industrial Relations*, in *The Curse of Bigness: Miscellaneous Papers of Louis D. Brandeis*, 70, 77 (Osmond K. Fraenkel ed., 1965).



rational apathy.<sup>58</sup> Shareholders now, instead of being the voice of reasoned judgment, were likened to the absentee landlord.<sup>59</sup> As Brandeis concluded, the separation of ownership and control had "removed many of the checks which formally operated to curb the misuse of wealth and power."<sup>60</sup>

The corporation, and to some extent our capitalist system itself, came under attack in the wake of the Great Depression.<sup>61</sup> With the advent of the separation of ownership and control, it was unclear exactly what position corporate managers occupied within the corporate structure. But it seemed clear, as Professor Dodd would note in his famous article, that this separation had left a void of moral authority in the modern corporation. Dodd argued, noting the phenomenon of rational apathy, that to view corporate officers as simply agents of the shareholders would mean in practice "that there are no human beings in a position where they can lawfully accept for incorporated businesses those social responsibilities which the public is coming to expect."<sup>62</sup> Surveying the political landscape of his day, Dodd concluded that it was not necessary to "give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders."<sup>63</sup>

Professor Dodd's article was received with mixed reviews. Professor Adolf A. Berle, another prominent voice in the discourse of the era, criticized Dodd's vision as theoretically sound but dangerous in practice.<sup>64</sup> He argued that allowing corporate officers to justify their business decisions with regard to the interests of numerous corporate and societal constituencies would, ultimately, leave management unrestrained and unaccountable.<sup>65</sup> Berle, by this point in his career,<sup>66</sup> had come to believe that internal, self-regulation was insufficient to constrain corporate power.<sup>67</sup> While, as a matter of internal-regulation, he always maintained, "all powers granted to a corporation or to the management...are necessarily and at all times exercisable only for the ratable benefit of all the shareholders,"<sup>68</sup> Berle had become a principal player in the Roosevelt administration, a member of the famed "Brains Trust."<sup>69</sup> Berle was the author of Roosevelt's famed Commonwealth Club campaign speech, a cautious, yet direct, call for government intervention in the American market.<sup>70</sup> According to Berle, the Great Depression was the result of factors intrinsic to a capitalist system—government oversight was necessary.<sup>71</sup>

It is at this point in American history that regulation became "the liberal answer to capitalist market failure."<sup>72</sup> While the socio-economic debate in this country remains unsettled, it is centered primarily on the

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<sup>58</sup> Rational apathy is defined as voter indifference based on a reasoned assessment that his or her vote will not materially influence the outcome of the election.

<sup>59</sup> Dodd, at 1153.

<sup>60</sup> *Lee*, 288 U.S. at 565.

<sup>61</sup> Strine, at 246 (Referencing communism and fascism Strine writes, "too many of us in the United States today are ignorant of the reality that these more extreme remedies for market failure were appealing to many Americans in the 1930s").

<sup>62</sup> Dodd, at 1162.

<sup>63</sup> Dodd at 1148.

<sup>64</sup> Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. Pa. L. Rev. 1861, 1893 (2003).

<sup>65</sup> Joseph L. Weiner, *The Berle-Dodd Dialogue on the Concept of the Corporation*, 64 Colum. L. Rev. 1458, 1461 (1964).

<sup>66</sup> Berle, writing continuously during the first half of the 20th century, changed, moderated, and retracted many of his early opinions throughout the course of his career. At some points, his scholarship seems to have schizophrenic quality, but this is simply a product of sweeping economic and social changes occurring over the course of his career.

<sup>67</sup> Tsuk, at 1892.

<sup>68</sup> Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049 (1931).

<sup>69</sup> William W. Bratton and Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. Corp. L. 99 (2008).

<sup>70</sup> Davis W. Houck, *FDR's Commonwealth Club Address: Redefining Individualism, Adjudicating Greatness*, Rhetoric & Public Affairs Journal Vol. 7, No. 3 259-282 (2004).

[http://muse.jhu.edu/journals/rhetoric\\_and\\_public\\_affairs/v007/7.3houck.pdf](http://muse.jhu.edu/journals/rhetoric_and_public_affairs/v007/7.3houck.pdf)

<sup>71</sup> Bratton and Wachter, at 138.

<sup>72</sup> See Strine, at 246.

merits of regulation. Of course, the Friedman Doctrine is still influential and has contributed to the current culture of corporate America. But today, few on the left look beyond regulation for a solution to the controversy surrounding the American corporation; few stop to question the conclusion that profit-maximization is the inherent nature of the corporate entity. But while some amount of regulation is certainly necessary, I would argue that sole reliance on regulation has had an unintended effect on corporate decision-making. It is as Kent Greenfield said, "we ask them to be single minded in their role and leave to others the worries about the externalities their companies cause."<sup>73</sup> We have, I suspect unintentionally, created a culture that relieves managers of any responsibility for making socially responsible decisions.

### **The Law of Corporate Governance and the Lack of a Moral Directive**

The current culture of corporate America has developed, in part, as a reaction to theories of socio-economics and public policy. From the right, corporate managers are told that profit-maximization is, in and of itself, socially responsible. The left has accepted the current profit-maximizing culture opting to interfere where such behavior intrudes on the social good. Corporate managers are thus not required to weigh the broad social effects in the decision-making calculus—regulation now dictates what is socially responsible. As alluded to above, the discourse surrounding the law of corporate governance, like the larger public policy debate, is concerned with retaining the benefits of capitalism while limiting the social costs associated with the corporate structure. Over the past several decades, the law of corporate governance, the law that regulates internal decision-making, has largely been ignored as a mainstream method of reform. There, of course, may be a good policy reasons for this decision. It may be, given the complexity of the modern corporation and its broad ability to impact society, that the law of corporate governance cannot accommodate the elaborate decision-making process.<sup>74</sup> But some scholars have asserted that in order to change corporate decision-making it is necessary to effect a change in corporate law.<sup>75</sup> This is simply not the case. While corporate law, as with larger social discourse, has not effectively articulated a clear conception of the corporation as a social institution, it is not determinative of the current business culture. There is room within the current structure of corporate law to accommodate a broad vision of the corporation as a social entity; there is room for a culture of corporate citizenship.

The principle of shareholder primacy, most often associated with Professor Berle's statement that "all powers granted to a corporation or to the management... are necessarily and at all times exercisable only for the ratable benefit of all the shareholder,"<sup>76</sup> is often referenced as precluding a broad vision of the corporation as a social institution.<sup>77</sup> As David Millon noted, "the shareholder primacy conception reduced the corporation to the purely private financial interests of its owners, the shareholders."<sup>78</sup> Today, in keeping with this interpretation of shareholder primacy, corporate law generally assumes that shareholder interests are primarily economic.<sup>79</sup> It is through this assumption that shareholder primacy is equated with profit-

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<sup>73</sup> Greenfield, at 759.

<sup>74</sup> Concerns of enforcement are part of the rationale behind the deferential business judgment rule. *AC Acquisition Corp., v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986) (noting that the business judgment rule is "simply a recognition of the allocation of responsibility made by section 114(a) of the General Incorporation Law and of the limited institutional competence of the courts to assess business decisions"). See also *Austin v. Chamber of Commerce*, 494 U.S. 652, 686 (1990) ("A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives").

<sup>75</sup> See D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 Emory L. J. 985 (2008).

<sup>76</sup> Berle, at 1049.

<sup>77</sup> David Millon, *Theories of the Corporation*, 1990 Duke. L. J. 201, 224 (1990).

<sup>78</sup> Id.

<sup>79</sup> See *Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406 (Minn. 1971) (applying Delaware law); *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691 (Del. 1971). ("[T]he desire to solicit proxies for a slate of directors in opposition to management is a purpose reasonably related to the stockholder's interest as a stockholder;...[A]ny further or secondary purpose is seeking the list is irrelevant.") (internal citations omitted).

maximization. Shareholder primacy remains the dominant descriptive theory amongst corporate law academics. One scholar has even concluded, "Shareholder wealth maximization is not only the law, but also is a basic feature of the corporate ideology."<sup>80</sup> In this statement we can see how the dominant theory of corporate law perpetuates the culture of profit-maximization.

The classic judicial statement of shareholder primacy is the seminal case of *Dodge v. Ford*.<sup>81</sup> Although the parties may suggest that there were motives, not reflected in the record, for Ford's posture in the case, *Dodge v. Ford* is often cited as precluding consideration of non-shareholder constituencies in corporate decision-making. At trial, when explaining the corporation's refusal to grant a reoccurring dividend, Ford blatantly conceded, "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 their lives and their homes. To do this we are putting the greatest share of our profits back into the business."<sup>82</sup> From this statement the Court determined that Ford was motivated by a duty he felt that he owed to the general public.<sup>83</sup> The Court then went on to say:

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.<sup>84</sup>

This conclusion appears to provide, in the vain of the Friedman morality, a simple normative directive to corporate officers. More recently, the Delaware Chancery Court has stated, "the board's power derives from the shareholders, who are the ultimate holders of power under Delaware law."<sup>85</sup>

Beyond the moral directive of shareholder primacy, shareholders are afforded both voting rights and fiduciary protections that, in theory, make corporate managers accountable to company investors. Shareholders retain the power to elect the board<sup>86</sup> and can "amend or repeal" the corporation's governing bylaws.<sup>87</sup> Perhaps most directly supporting a conception of corporate managers as trustees of the shareholders are the fiduciary protections afforded to investors. These protections provide stockholders with means to assert their interests in the corporate entity.<sup>88</sup>

As noted above, the modern view of shareholder primacy doctrine is that it reduced the corporation to a purely financial institution.<sup>89</sup> But this cannot be the simple result of the shareholder primacy doctrine; Berle, who is often aligned with modern version of this theory, advocated it as means of constraining the corporate entity.<sup>90</sup> The question for Berle was not whether the corporate entity had social responsibilities, but what means would best hold it accountable for those responsibilities.<sup>91</sup> But rather, perpetuating the

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<sup>80</sup> Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. L. Rev. 547 (2003).

<sup>81</sup> *Dodge v. Ford*, 170 N.W. 668, (Mich. 1919).

<sup>82</sup> *Id.* at 683.

<sup>83</sup> *Id.* at 684.

<sup>84</sup> *Id.* at 684.

<sup>85</sup> *UniSuper, Ltd. v. News Corp.*, 2005 Del. Ch. LEXIS 205, at \*25 (unpublished opinions are binding on Delaware courts).

<sup>86</sup> DE. CODE ANN. Title 8, §211(b); Bruner at 1400 ("Delaware courts quite clearly conceptualize board power as resting upon a shareholder-granted mandated, rejecting the notion that boards possess sui generis powers").

<sup>87</sup> DE. CODE ANN. Title 8, §109(a).

<sup>88</sup> The most relevant protection, for our purposes, is the fiduciary duty of due care. The duty of due care requires that managers, "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise in similar circumstances in like position." *Francis v. New Jersey Bank*, 432 A.2d 814 (1981).

<sup>89</sup> Millon, at 224.

<sup>90</sup> Bratton and Wachter, at 102.

<sup>91</sup> *Id.*

conception of the corporation as a purely financial institution is the assumption that, in the modern corporation, shareholder interests are solely economic. Thus, shareholder directed decision-making was not always equated with profit-maximization; it would be incorrect then, to suggest that simply because corporate managers act as agents for company shareholders that a corporation is solely a private, financial entity. As Professor Dodd noted in his famous article that, at one time the "law took the position that business [was] a public profession rather than a purely private matter."<sup>92</sup>

The belief, often encompassed within the shareholder primacy doctrine, that the sole purpose of the corporate entity is to produce financial wealth, is inconsistent with several aspects of corporate governance. While corporate boards have been delegated sweeping authority to direct the "business and affairs" of the corporations,<sup>93</sup> there is no state statute that mandates the board act solely to maximize shareholder wealth.<sup>94</sup> Moreover, Delaware corporations are expressly permitted to "make donations for the public welfare or for charitable, scientific, or educational purposes."<sup>95</sup> Finally, corporate law dictates that corporate managers owe fiduciary duties not only to the shareholders, but to the corporate entity itself.<sup>96</sup> This could be viewed as an implicit recognition that these interests may, at some point, diverge. Such an explanation would also clarify Delaware case law which explicitly permits, in the context of a hostile takeover, the board to consider the interests of non-shareholder constituencies ("i.e. creditors, customers, employees, and perhaps even the community generally").<sup>97</sup>

To suggest that the corporation's interest could, in theory, diverge from those of its shareholders, would be of little consequence if stockholders were able to hold managers strictly accountable to the shareholder primacy doctrine.<sup>98</sup> The accommodating business judgment rule, partially a recognition of the fiduciary duties owed to the corporation, gives corporate managers wide discretion in balancing competing interests. Quite simply, the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good-faith, and in the honest belief that the action taken was in the best interest of the company."<sup>99</sup> This deferential rule allows corporate managers to sacrifice short-term profit-maximization in the name of long-term corporate planning. As Professor Bruner concluded:

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<sup>92</sup> Dodd, at 1148.

<sup>93</sup> DE. CODE ANN. Title 8, §141(a); Bruner, at 1395.

<sup>94</sup> Bruner, at 1400.

<sup>95</sup> DE. CODE ANN. Title 8, §122(9). Some scholars have argued that the fiduciary duties to the corporate entity should create duties to non-shareholder constituencies. Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 Wash. U. L. Q. 403 (2001). However, shareholders are the only corporate constituency that enjoys standing to sue to enforce these obligations; that is, in a solvent corporation. David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 Va. L. Rev. 1001, 1013 (2000). Creditors can receive standing when a corporation has entered insolvency. NACEPF v. Gheewalla, 930 A.2d 92 (Del. 2007). But, as David Million notes, this does not undermine shareholder primacy because once liabilities exceed assets, the shareholders have no remaining interest in the corporation. Millon at 1012-13.

Notably, however, "[s]hareholders are under no duty to bring suit in cases where they have no interest." Millon at 1012-13.

<sup>96</sup> Malone v. Brincat, 722 A.2d 5 (Del. 1998).

<sup>97</sup> Unocal Corp., v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

<sup>98</sup> The remainder of this section is dedicated to discussing the business judgment rule as a means of holding corporate managers accountable. But, the voting rights retained by corporate shareholders are also an equally ineffective tooling for maintaining accountability. In the modern public corporation, the dislocation of equity investors (and the phenomenon of rational apathy), substantially reduces the effective influence of voting rights. As Stephen Bainbridge notes, the structure of corporate decision-making leaves shareholders in a reactive position. Even still, the phenomenon of rational apathy greatly reduces incentives to monitor and police the board's decision-making—their few incentives to react. See Bruner, at 1387. And even where there is interest or incentive, "shareholders dissatisfied with firm governance [have] no low-cost option other than to sell their stock." Thus, the practical limitations of the corporate structure reduce the shareholders' ability to effectively enforce their rights. Id.

<sup>99</sup> Gantler v. Stephens, 965 A.2d 695, 705-06 (Del. 2009)(citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (overruled on other grounds)) (internal citations omitted).

The business judgment rule functions every day to insulate countless decisions from second-guessing of any sort, permitting corporate decision-makers to deviate from the path of shareholder wealth maximization without fear of judicial intervention or negative consequences-so long as they can come up with some form of rationalization phrased in terms of "long-term" shareholder interest.<sup>100</sup>

This conclusion is confirmed in the case of *Shlensky v. Wrigley*.<sup>101</sup> Although this case is not a completely accurate application of the modern business judgment rule, the judicial posture is illustrative. Even when confronted with direct evidence that Phillip Wrigley's decision to maintain a completely day-time schedule was hurting corporate profits, the Court was reluctant to scrutinize the decision of corporate management:

Plaintiff in the instant case argues that the directors are acting for reasons unrelated to the financial interest and welfare of the Cubs. However, we 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 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. By these thoughts we do not mean to say that we have decided that the decision of the directors was a correct one. That is beyond our jurisdiction and ability.<sup>102</sup>

Are the cases irreconcilable? Perhaps. But we must consider that Wrigley, unlike Ford, did not suggest that he was unconcerned with shareholder return. Rather, he articulated a reasoned judgment, a balancing of competing interests. This was enough to satisfy the *Wrigley* Court.

Like the larger social discourse, the law of corporate governance does not provide a clear moral directive to corporate managers. As Professor Bruner concluded, "corporate law, for lack of a single animating vision of the social good, has refrained from articulating a clear hierarch of beneficiaries of corporate production." While the law of corporate governance does not dictate socially responsible decision-making, it does not mandate total allegiance to the theory of shareholder primacy. The strong language of certain judicial opinions has led, in some instances, to an overly simplistic understanding of corporate law; this, in turn, has helped perpetuate the current culture of corporate America. History, however, demonstrates that there was once a broader vision of the corporation as a social institution; and there remains room, within the law, for a revival of this conception. Corporate managers, who due to the structure of the modern corporation effectively control decision-making, owe duties to both the shareholders and the corporate entity. In the exercise of these duties corporate managers are expressly permitted to balance the short-term and long-term interests of the corporation.<sup>103</sup> This allows enough leeway for corporations to pursue profits within a framework of corporate citizenship. It is this leeway that allowed Merck to develop and then donate the drug to cure a devastating disease known as river blindness.<sup>104</sup> It is in the name of increased productivity and

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<sup>100</sup> Bruner, at 1394.

<sup>101</sup> *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. 1968).

<sup>102</sup> *Id.* at 780.

<sup>103</sup> See *Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. 1968).

<sup>104</sup> Daniel Diermeir, Introduction: From Corporate Social Responsibility to Values-Based Management, *in* Global Corporate Citizenship 1-23, 11 (Anuradha Dayal-Gulati & Mark W. Finn eds., Northwestern University Press 2007). While not directly related to the plight of the working poor, this illustration demonstrates the latitude that corporate managers are given to pursue the long-term interests of the corporation. Merck argued that this form of charity allowed the company to better attract scientists.

reduced turn-over that Costco pays its employees a higher-wage than Wal-Mart.<sup>105</sup> It is this discretion that allows Starbucks to provide health-care benefits for each one of its employees.<sup>106</sup>

### **A Culture of Corporate Citizenship: The Influence of Public Opinion**

Despite decades of debate, America has never been able to develop a coherent conception of the corporation as both a business entity and social institution. The political and legal debate, a continuing attempt to balance the good with the bad, is ongoing. But in failing to clearly articulate the social role of the corporate entity, we have failed to provide corporate managers, those effectively responsible for directing corporate decision-making, with a moral orientation in line with social expectations. For those who subscribe to the Friedman doctrine, there is little work to be done. If this was a satisfactory social morality, however, the corporation, and its attendant culture of profit-maximization, would enjoy favorable public opinion. On the opposite side, if we had achieved the proper balance of social consequences through regulation, Caroline's story would not offend our basic sense of social justice. We have come to accept the current culture of corporate America as the inherent nature of the corporate entity; regulation is simply an attempt to ameliorate the negative social effects of this culture—there has been very little attempt to change this culture. We, as a society, must begin to conceive of our corporations as not merely financial institutions, but also as citizens.

Critics will suggest that as a legal fiction the corporate entity is incapable of developing a complex morality; that is, that the current focus of the corporate social responsibility movement, internal self-regulation, cannot provide substantive change. This may in fact be true. It might be too much to expect the modern corporation, a large, multi-tiered organization, to articulate a moral theory; we cannot expect a corporation to cater to non-existent demand. As Friedman noted, corporate managers are not in a position to independently, or effectively, determine the social good.<sup>107</sup> But this argument is undercut when we view the current business culture as a social construct. The culture of profit-maximization is the product of certain social values and assumptions; it is not the inherent nature of the corporate entity. If the current culture of profit-maximization is a response to social expectations, by changing those expectations we can presumably effect a change in the culture of corporate America.

Since the New Deal, American public policy has used regulation to constrain the corporation and minimize the externalities imposed on the whole of society. Caroline's story, as well as the stories of the 7.4 million Americans counted amongst the working poor, demonstrates that regulation is not sufficient. These regulations, laws dictating a minimum-wage or minimum standards for safe working conditions, might have been considered the floor of acceptable corporate behavior, a complement to a socially-responsible governance structure. But as we have failed to define the role of the corporation as a social institution, we have failed to define what socially responsible behavior actually entails. These laws are the only normative guidance from those who, in contrast to Friedman, believe that corporations have a responsibility beyond producing financial wealth. To redefine the American corporation as a fellow citizen, will redefine the corporation's role as a moral actor.

To expect better from America's corporations will not effect immediate change; the current culture did not develop overnight and it will take time to re-socialize corporate managers. But while the law currently dictates the moral standard for America's corporations, the same cannot be said about any other citizen. If we apply Peter Singer's drowning baby hypothetical, tailored for our own purposes here, this point become clear.<sup>108</sup> There may be no legal duty to rescue the drowning child, but very few people would find

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<sup>105</sup> Julia Contreras and Orly Lobel, *Wal-Martization and the Fair-Share Health Care Acts*, 19 St. Thomas L. Rev. 105, 116-117 (2006).

<sup>106</sup> Diermeir, at 11. Diermeir also notes that Starbucks pay more for employees health-care benefits than it does to purchase the coffee it serves.

<sup>107</sup> Strine, at 257.

<sup>108</sup> Peter Singer, *Famine, Affluence, and Morality*, *Philosophy and Public Affairs Journal* Vol. 1, No. 1 229-243 (1972).

that decision, where one was physically capable of providing aid, morally acceptable. Citizens should express outrage when corporate behavior falls below acceptable moral standards, not simply when there is gross criminal conduct or a global economic crisis. We expect more from our citizens, we should expect more from our corporations.

An ethic of corporate citizenship is a market-oriented approach to defining the corporation as a social institution. Just as public opinion, fueled by certain assumptions about the inherent nature of the corporate entity, perpetuates the current culture of corporate America, a conception of corporate citizenship will redefine what it means to be a "good" corporation. And, it is no surprise, that corporations as for-profit business are particularly susceptible to market pressure in the form of public opinion. One commentator, looking at the issue of global working conditions, concluded, "under pressure from NGO's, the media, and public opinion, [multi-national corporations] have played a central role in creating and implementing labor standards globally."<sup>109</sup> The international outrage, and attendant public relations crisis, over the working conditions in several of Nike's overseas factories is both relevant and illustrative. Nike was accused, and heavily criticized, for subcontracting to employers in Southeast Asia that, "permitted dangerous working conditions in Vietnam, imposed forced overtime in China, and drafted fourteen-year old laborers in Indonesia."<sup>110</sup> Of course, none of this behavior was illegal in these countries and Nike originally took the position that it was not responsible for legislating labor standards in the countries where it did business.<sup>111</sup> But in response to tremendous public pressure, Nike eventually revised its position and imposed minimum age and minimum wage for all employees direct and indirect.<sup>112</sup>

To argue simply for change in our conception of the American corporation may, in many ways, seem incomplete. This paper has not provided a concrete plan for change; there is no actionable solution. But, recognizing certain assumptions and misconceptions that intrude on the public discourse is a fundamental beginning. The discussion is incomplete if we simply assume that profit-maximization is the inherent nature of the corporate entity. Of course, to create an ethic of corporate citizenship will require that we redefine how we view our corporations. It will require a fundamental change in the public conversation. If truly expect more from our corporations, however, we must demand it. Recognizing our part in the perpetuation of the current profit-maximizing culture is the first step.

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<sup>109</sup> Julie Boris ET AL., *Labor Standards in Thailand: The Players and Their Impacts*, in *Global Corporate Citizenship* 27-39, 32 (Anuradha Dayal-Gulati & Mark W. Finn eds., Northwestern University Press 2007).

<sup>110</sup> Jared Cluff ET AL., *Preventing Labor-Standards "Explosions" in Thailand and Vietnam*, in *Global Corporate Citizenship* 57-74, 61 (Anuradha Dayal-Gulati & Mark W. Finn eds., Northwestern University Press 2007).

<sup>111</sup> Id.

<sup>112</sup> Id.